

Canadian Institute for the Administration of Justice

October 31, 1986

M.J. Ashby Comments on J.M. Giles' Paper

Mr. Chairman, Ladies and Gentlemen I would first of all like to compliment Mr. Giles for presenting to us a rational and well thought out paper and one which obviously caused him to expend a considerable amount of effort.

Before commenting on the paper's conclusions I should tell you that, as Chairperson of our national institute's Professional Liability Insurance Committee, I am constantly witnessing first hand the terrible consequences of lawsuits against accountants for professional negligence. I should note that the same consequences would occur were the suit against a doctor, lawyer, architect or any other professional person.

First of all, hindsight is employed and it is always 20:20. Next, the accountant's reputation is on the line - his or her name as well as the firm's appears in the press. Irrespective of the outcome of the litigation, the professional's esteem is diminished. Thirdly, the out of pocket costs are horrific. Next, for the defendant the case is non-productive as the time spent on it is not recoverable and other clients may be neglected. Lastly and probably most importantly, the resulting tension is unbearable and can cause disastrous effects on a marriage and a business partnership to say nothing of the defendant's own health - both physical and mental. All in all it is a no win situation for the professional accountant.

Having said this however, I think that it is only reasonable in a civilized society that a professional be held responsible for his or her actions - the question is to what degree? Unfortunately there is far too great a tendency for people who have been careless and made imprudent investments and therefore suffered losses (often due to their own greed and unwillingness to take responsibility for their own actions) to attempt to recover the loss from someone else. Far too often the threat of litigation is used solely to gain access to insurance funds. The results can be utterly disastrous. In the Cambridge

Credit Corporation vs Hutcheson case recently decided by the Supreme Court of New South Wales, an accounting firm which had a judgment rendered against it of \$145,000,000 (Australian). Not only were the partners responsible for the work affected, partners hundreds of miles away in different cities saw a lifetime of accumulated assets disappear - not only partnership investments but homes, automobiles and retirement funds. All these - subject, of course, to the decision's being upheld on appeal - went down the drain causing indescribable hardship not only to the partners of the firm but to spouses and children born and unborn. Somewhere, I think, a reasonable line has to be drawn.

We should also bear in mind that we live in an atmosphere where business is becoming more and more international and being a partner in a Big Eight accounting firm I have to rely on people throughout the world.

It is axiomatic that professional accountants will simply cease signing audit reports if every time they do so a lifetime of work is at risk - including retirement funds. To compound the exposure, professional indemnity insurance is becoming increasingly difficult to obtain, premiums are escalating and deductibles are going up - all obviously as a result of the increasingly litigious atmosphere. Our national institute committee sponsors a plan for small and medium-sized Chartered Accountants in public practice in Canada. For almost a year now we have been unable to provide more than \$1,000,000 coverage to anyone. Many automobile drivers carry more than \$1,000,000 public liability coverage.

Nevertheless when all is said and done I completely agree with Mr. Giles' conclusion that there should be no denial of liability to those who are genuinely entitled to some redress. I also agree accountants should be protected against trifling errors. Lord Benson, a past President of the Institute of Chartered Accountants in England and Wales, stated in a recent article that accountants should not be harrassed by immaterial matters.

Let me briefly comment on each of the five possible ways of restricting accountants' liability cited by Mr. Giles:

1. Restrict the parties to whom the accountant owes a duty of care. Such a restriction would be fine for the public accountant but unjust to someone who genuinely relied on financial statements audited by the accountant and which had material errors or omissions which the auditor should have detected following the procedures set out in the accounting profession's literature.
2. The courts should limit claims against accountants to cases of direct and substantial reliance and to scrutinize such claims carefully. I totally agree as this would prevent successful litigation (or even the threat of litigation) by litigants who have never relied on the defective financial statements.
3. The measure of damage rule should be strictly applied. Again I concur as it seems unjust, for example, for the plaintiffs to be able to obtain in damages anything more than the difference between what they paid for the investment less what it was actually worth at the time they bought it. Too often, as Mr. Giles points out, courts have returned the entire investment.
4. Use of disclaimers by accountants. Frankly I do not believe that these work very often. Furthermore, auditors are hired to add credibility to financial information and a disclaimer provides no comfort and, in my view, demeans the accountancy profession.
5. Lastly legislative intervention to limit the liability of accountants to third parties. In Canada I think that such a course of action is impractical. First of all, it would be rigourously opposed by consumer groups. Secondly, it would take years to get the concurrence of all the jurisdictions in Canada (I doubt even if we started now it would be accomplished in my lifetime).

Lastly where would a national accountancy firm stand if, say, Nova Scotia had such legislation and British Columbia did not? Having thrown cold water on such a proposal I should point out that I understand that the Institute of Chartered Accountants in Australia is having some degree of success in having such legislation introduced in that country.

Thank you very much for giving me the opportunity to comment on Mr. Giles' thoughtful paper.