PROFESSIONAL NEGLIGENCE

The Balancing Act - The Duty vs the Liability

HILARY PHILLIPS
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The topic 'Professional Negligence'is so all-encompassing that I was impelled to attempt to narrow the issues in an effort to ensure that this paper could be delivered within the time-frame required and hopefully would still hold the attention of the audience.

Claims for professional negligence against lawyers, accountants and other professionals have seriously increased in recent years. Insurers are of the view that most negligence claims result from "single mistakes" and oversights rather than errors in fundamental points of law. Pressure of work, missed deadlines; poor communications, inadequate written procedures and a misunderstanding of the client's expectations are the major problem areas. (Mr. Trickett of Sedgwick Professional Indemnity Liability Insurance). His advice is that firms must ensure that all staff are aware of the potential for mistakes, and if they do occur one should inform the underwriters as quickly as possible. To all professionals here today, these words must sound extraordinarily familiar, in that we preach these principles every day. But the issues which confront the professional today have become slightly more complicated, and one is impelled to be cognizant always of the extent of the duty which exists in every particular case when one is acting in the course of his profession.

I shall attempt to trace the development of the professional's responsibility in order to show how policy and changes in the common law have placed an onerous burden on professionals.

Attorney's Duties

The duty to the client had always been considered to be confined and determined by the contractual relationship and the parties were bound by their express obligations specifically set out in a written retainer. The leading text ***Corderey's on the Law relating to Solicitors***, sets out, several implied duties and obligations, some of which I shall set out hereunder succinctly.

(i) To be skilful and careful

(ii) To protect the clients' interest

(iii) To render efficient and effective conduct of litigation

(iv) To render efficient and effective conduct of real estate transactions and investment matters

(v) The duty in relation to Wills and Estates

(vi) Safe custody of Certificates of Titles and Deeds

(vii) The duty of confidentiality

(viii) Vicarious liability for acts of agents

Auditor's Duties

It is the duty of an Auditor to verify not merely the arithmetical accuracy of the balance sheet, but its substantial accuracy ***Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co. Ltd [1958] 1 All E.R. 11 at 23,*** and to see that it includes the particulars required by the articles and by statute, and contains a correct representation of the state of affairs of the company's affairs. An auditor's duty might be said to fall under three (3) heads:

(1) Statutory

(2) Contractual

(3) Non-contractual

(1) **Statutory**

The Jamaican Companies Act sets out some of the duties of Auditors. Specifically, section 156 and the Tenth Schedule set out what is required for inclusion in an Auditors' Report. It should be noted that sub-section 5 of S.156 makes failure to comply with the Section (and by extension of the Tenth Schedule) a criminal offences, although the sanction of one hundred dollars is in itself laughable. It should be noted also that Auditors will have certain duties set out in the Articles of Association of various Companies.

(2) **Contractual**

Apart from his statutory duty, which cannot be removed by a company's Articles or by agreement, the exact duties of an auditor are regulated by the contract under which he is employed, ***Re City Equitable Fire Insurance Co. Ltd [1925] Ch. 407 C.A.***

(3) **Non-Contractual, i.e. Common Law Principles**

As mentioned earlier an auditor (being a professional in the business of giving advice), may incur liability for negligent mis-statements giving rise to loss.

Thus on the basis of the expressed and implied obligations set out above, the duty of care owed the client by his legal advisor/accountant is wide, onerous and far reaching, yet this duty was presumed to be based on the contractual relationship of attorney and client, and accountant/client. The expectations and responsibilities were circumscribed by that relationship only, and this persisted until 1936, when the classic case of ***Donoghue v Stevenson [1932] All E.R. 1***, exploded that myth and raised questions of the responsibility owed by persons to third parties in tort, that is, outside of a contractual relationship. This issue, though remained unsettled for several years and was not fully settled, as we shall see, until 1978 in the decision of ***Midland Bank Trust Co. Ltd v Hert, Stubbs & Kemp,*** which was later endorsed in several decisions in the House of Lords and clarified in the Privy Council decision of ***Tai Hing Cotton Mill Ltd v Liu Chong Bank Ltd and Others [1985] 1 All E.R. 947.***

The facts of ***Donoghue v Stevenson,*** are well known to attorneys but are stated herein with brevity, for ease of reference:

> **"the appellant and a friend visited a cafe where the friend ordered for her a bottle of ginger beer. The proprietor of the cafe opened the ginger beer bottle, which was opaque and pored some of the contents of the bottle into a tumbler from which the appellant proceeded to drink. Her friend then poured the remaining contents of the bottle into the tumbler and with it a decomposing snail came from the bottle. As a result of having drank some of the impure ginger beer, the appellant suffered from shock and gastric illness. In an action brought by her for negligence against the manufacturer of the ginger beer, it was held by a three to two majority in the House of Lords that on proof of those facts the appellant would be entitled to recover damages."**

As you can see, the facts of this case do not relate to the professional adviser and his client, but to a product manufactured, but the Court decided that a person may be liable to another for negligent commission of an act which caused injury to the second person, notwithstanding the absence of a contract between the two. Thus it established the existence of a duty in the law of tort between two or more non-contracting parties. In expanding on this duty, Lord Atkin at page 11 stated in the now famous passage:

> **"The rule that you are to love your neighbour becomes law. You must not injure your neighbour, and the lawyers question: who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question".**

This case therefore laid down the fundamental principle relating to negligence in the law of tort. However, on its facts, it covered instances in which physical injury occurred as a result of defective product manufacture, thus when 15 years later a case arose pertaining to economic loss in respect of professional advice offered a potential investor in a company, the principles enunciated in the ***Donoghue v Stevenson*** case came under review and were applied very differently with startling results. In ***Candler v Crane Christmas & Co., [1951] 1 All E.R. 426,*** the facts are substantially different, in that

> **A managing director of a company instructed a firm of accountants and auditors to prepare the company's balance sheet. A clerk employed to the accounting firm prepared the draft accounts knowing that they were wanted for the purpose of inducing**

P to invest money in the company. These accounts were later shown to P in the presence of the said clerk, and relying on the same, P invested £2,000 shares in the company. The accounts were later certified in the same form as those shown to P. They were later found to have been prepared negligently, though not fraudulently, and did not give a true statement of the financial affairs of the company which went into liquidation, and there being no assets, P lost his investment in its entirety. P sued the defendants for damages for negligence, and breach of their duty to give P accurate information, but even in the light of the earlier breakthrough decision in Donoghue v Stevenson, the Court ruled inter alia by majority:

(i) in the absence of a contractual and fiduciary relationship between the parties, the defendants owed no duty to P to exercise care in preparing the accounts and giving their certificate, and the pleadings therefore could not maintain against them an action for negligence.

Lord Denning gave a brilliant and powerful dissenting judgement in this case, on which I shall focus as the majority decision was later overruled, but large portions of Lord Denning's judgement are now quoted with acceptance and endorsement, in later judgements in the House of Lords as I shall hereinafter set out.

The issues raised in this case were as follows:

(i) for P, although there was no contract between P, and the auditors, the relationship between them was so close and direct that the auditors did owe a duty of care to him within the principles stated in ***Donoghue v Stevenson.***

(ii) for the auditors, the submission was that the duty owed by them to the company was purely a contractual duty and therefore they were

not liable in negligence to a person to whom they were under no contractual duty.

The issue was therefore did the accountants owe a duty of care to P?

Lord Justice Asquith, in this case, decided that the decision in ***Donoghue v Stevenson*** could only have regard to negligence which caused physical and personal damage and stated that the classic passage of Lord Atkin could only have referred to the distinction between liability in tort for careless (but non-fraudulent) mis-statements and liability in tort for some other forms of carelessness, and that his formula defining **"who is my neighbour"**, must be read subject to his acceptance of this overriding distinction. Further he was not prepared to accept that the judgement in ***Donoghue v Stevenson*** created a duty in those circumstances outside of the contractual and/or fiduciary relationship.

To the contrary, Lord Denning's dissenting speech so clearly re-stated the ruling in ***Donoghue v Stevenson*** and how it ought to be applied that it bears reiteration here in its fullness for clarity:

> **"First, what persons are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts and other things, and to make reports on which other people - other then their clients - rely in the ordinary course of business. Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports. Herein lies the difference between these professionals men and other persons who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus.**

and then he says at page 435:

> "to what transactions does the duty of care extend? It extends, I think, only to those transactions from which the accountants know their accounts were required. For instance, in the present case, it extends to the original investment of £2,000.00, which P made in reliance on the accounts, because the defendants knew that the accounts were required for his guidance in making that investment ... This distinction is that the duty only extends to the very transaction in mind, at the time, is implicit in the decided cases.

This then was how the law was developing, the questions were who owed the duty, to whom, and in relation to what transaction. The duty was not bound by the contractual relationships only, but with reference to the connection of the parties and the particular transaction.

In the latter part of his speech, Lord Denning made some discerning comments about the development of the duty owed by professionals and why and how he thought they should develop. He drew a distinction between the lawyers and the accountants and I think it is worthwhile quoting this passage in its entirety:

> "One final word. I think the law would fail to serve the best interests of the community if it should hold that accountants and auditors owe a duty to no one but their client. Its influence would be most marked in cases where the client is a company or firm controlled by one man. It would encourage accountants to accept the information which the one man gives them without verifying, and to prepare and present the accounts rather as a lawyer prepares and presents a case, putting the best appearance on the accounts they can without expressing their personal opinion of them. This is, to my way of thinking, an entirely wrong approach. There is great difference between the lawyer and the accountant. The lawyer is never called on to express his personal belief in the truth of his client's case, whereas the accountant, who certifies the

accounts of his clients, is always called on to express his personal opinion whether the accounts exhibit a true and correct view of his client's affairs, and he is required to do this, not so much for the satisfaction of his own client, but more for the guidance of shareholders, investors revenue authorities and others who may have to rely on the accounts in serious matters of business. If we should decide this case in favour of the defendants, there will be no reason why accountants should ever verify the work of the one man in a one-man company, because there will be no one to complain about it. The one man who gives them wrong information will not complain if they do not verify it. He wants their backing for the misleading information he gives them, and he can only get if they accept his word without verification. It is just what he wants so as to gain his own ends. And the persons who are misled cannot complain because the accountants owe no duty to them. If such be the law, I think it is to be regretted, for it means that the accountants' certificate, which should be a safeguard, becomes a snare for those who rely on it. I do not myself think that it is the law. In my opinion, accountants owe a duty of care not only to their own clients, but also to all those whom they know will rely on their accounts in the transactions for which those accounts are prepared. I would, therefore, be in favour of allowing the appeal and entering judgement for the plaintiff for damages in the sum of £2,000".

Perhaps it is this "final word" which has later brought about the clarification of the duty and the distinction in its applicability against the different categories of professionals.

Subsequent to these propositions posed by Lord Denning, within twelve (12) years the issue of negligent mis-statements by professionals, resulting in damages representing purely economic loss forged a new development of the law in the next landmark case of ***Hedley Byrne & Co v Heller & Partners [1963] 1 All E.R. 575.*** The facts

are as follows:

> **A bank inquired by telephone of the respondent merchant bankers concerning the financial position of a customer for whom the respondents were bankers. The bank said that they wanted to know in confidence and without responsibility on the part of the respondents, the respectability and standing of E Ltd, and whether E Ltd, would be good for an advertising contract of £8,000 to £9,000. The bank further inquired some months later as to the trustworthiness of E Ltd in the way of business, to the extent of £100,000 per annum. The respondent replied to the effect that E Ltd was respectably constituted and considered good for its normal business engagements. This was communicated to the appellants. In reliance on the respondent merchant bank's reply to the appellants, (an advertising agency), placed orders for advertising time and space on E Ltd's behalf assuming personal responsibility for payment to the television stations and newspapers concerned. As a result of E Ltd's subsequent liquidation, the appellants lost over £17,000 on the advertising contracts. The appellants sued the respondent merchant bank claiming that the information given by the latter, upon which the former relied, was given negligently and proved untrue, resulting in the loss to the appellants.**
>
> **The court held that but for the disclaimer of responsibility given by the merchant bank, the latter did owe a duty of care to the appellants and would be liable in negligence for the breach thereof.**

This principle as it relates to the liability as a consequence of negligent mis-statements, is more specifically elucidated in the dicta of Lord Reid at page 583D, which is still an accurate account and clear pronouncement of the law and is thus stated:

> **"A reasonable man, knowing that he was being trusted or that his skill and judgement were being relied on, would, I think have three courses open to him. He would keep**

silent or decline to give the information or advice sought; or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry, which a careful answer would require; or he could simply answer without any such qualification. If he chooses to adopt the last course, he must, I think, be held to have accepted some responsibility for his answer being given carefully or to have accepted a relationship with the inquirer which requires him to exercise such care as circumstances require".

This case overruling ***Candler v Crane Christmas & Co,*** reinforced the judgement of Denning L.J., that a liability in tort can arise, otherwise than in a contractual or fiduciary relationship, and in circumstances where economic loss is the only damage sustained. It is clear though that in order to be liable for statements which prove to be clearly false, the defendant must have assumed some responsibility for the advice, opinion or information, which was tendered to the plaintiff, and the circumstances must be such that the plaintiff could reasonably rely on the defendant's skill or judgement. The duty of care in tort will then exist, once the defendant is or holds himself out to be carrying on the business or profession which involves the giving of that advice or information. However, in the ***Mutual Life and Citizens Assurance Co. Ltd v Evatt [1971] 1 All E.R. 150,*** it was established that where a company's business does not include giving a particular type of advice and where it does not claim to possess the necessary skill and competence to give such advice, and to exercise the necessary diligence to give reliable advice of that type, its duty towards the plaintiff was merely to give him an honest answer to his inquiry.

To complete the trilogy of the cases which form the basis and foundation of the scope of liability in the law of tort, one must mention ***Home Office v Dorset Yacht Co. Ltd [1970] 2 All E.R. 294,*** where Lord Reid, once again sought to endorse the principles set out above, and found that officials of a Government institution, the custodians of deliquent youths who in a bid to escape by boat, caused damage to the plaintiff's yacht were liable to the yacht owners in tort for that damage.

Subsequent to this trilogy of cases, the question which arose in ***Candler v Crane,*** to wit whether the duty owed only arose in certain contractual relationships between contracting parties was now posed differently, that is, whether the contractual relationship could also give rise to a duty of care in tort.

In ***Midland Bank Trust Co Ltd, and Another v Hett, Stubbs & Kemp (a firm) [1978] 3 All E.R. 571,*** the issue was decided in a clear and lucid judgement of Oliver J, (as he then was).

> **In that case, W owned a farm which he leased his to his son G, to whom he also gave an option to purchase the same. W and G requested that A, a partner in a firm of solicitors to draw up the option, which was done. Some time later G requested advice as to the date when the option could be exercised but did not inquire into the registration of the same. It was not registered. W conveyed the farm to his wife. Later in the same year, G attempted to exercise the option and could not do so as for the first time he discovered that the option had not been registered. An action against the wife for specific performance failed. In a later action against the solicitors for breach of contract for failing to register the option, the issue arose as to whether an action existed in tort, for due to the length of time which had passed since the cause of action would have arisen in breach of contract, the defendants pleaded and relied on in the**

Statute of Limitations.

The Court held that the defendants were not liable in contract, as there was no general retainer, and when the solicitors were consulted about the exercise of the option, they were not under a duty to consider at the same time its registration or enforceability. The more interesting aspect of the decision in this case however, is that the Court found that the solicitors were liable in tort:

> **"because under the general law the relation of solicitor and client gave rise to a duty on a solicitor to exercise that care and skill on which he knew that his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do. Furthermore, there was no rule of law, which confined a solicitor's duty to his client under his retainer to a contractual duty alone, nor was there any rule of law, which precluded a claim in tort for breach of a duty to use reasonable care and skill if there was a parallel contractual duty of care".**

This was a significant development with regard to the duty owed by professionals for several reasons, the most important of which was that the professional could no longer rely on the specific express obligations set out in the retainer and the implied obligations in law with regard to contracts even though understood, recognized and accepted, but was now facing the responsibility of owing a duty in tort presumed but not specifically stated and which was perhaps wider, than that stated, in a contractual relationship.

Some time later the Privy Council case of ***Tai Hing Cotton Mill Ltd v Liu Chong***

Hing Bank Ltd & Others [1985]-2 All E.R. 947, however clarified this situation and restricted the duty in tort, to no wider than the obligations expressly and implicitly imposed in a contract.

In that case, a textile manufacturer carrying on a business in Hong Kong, was a customer of three Banks who had the authority to pay cheques drawn by the Managing Director of the company. The bank agreed to send periodic statements which were considered confirmed if no statement to the contrary was made by the company. An employee of the company forged about 300 cheques which were all duly encashed by the banks and without any statement from the company in respect of the inaccuracy of the statements which had been issued by the banks.

At first instance the Judge dismissed the claims by the company on the basis that the company was estopped by the implied representation, of its conduct by silence that the statements were accurate, and since two of the banks had relied on these representations. The Plaintiff succeeded against the third bank. The company appealed and the 3rd bank cross-appealed. The Court of Appeal dismissed the company's appeal and allowed the third bank's cross-appeal, holding that the company was estopped by its own negligence from challenging the correctness of any of the bank statements. The company appealed to the Privy Council and it was held that in the absence of express agreement to the contrary, the duty owed the bank by the customer was two-fold:

(i) a duty to refrain from drawing a cheque in a manner which facilitated forgery;

(ii) a duty to inform the bank of any such forgery as soon as it is known by the customer.

The customer was not under a duty to take reasonable precautions in the management of his business with the bank to prevent cheques being forged, nor was he under a duty to check the statements of the bank periodically for accuracy. For this latter obligation to be a part of the duty owed the bank by the customer, it must be expressly stated. If the contract with the bank did not include it, then there could be no breach of duty owed. The incidence of such risk was in the business of banking, not that of the customer, and was a service provided by the Bank. The important ratio decidendi is however stated thus:

> **"Furthermore, the obligations owed by banker and customer to one another in tort did not provide the respondent banks with any greater protection than that which they had a contract for, since the parties mutual obligations in tort could not be any greater than those to be found expressly or by necessary implication in the contract."**

Indeed, in the ***Tai Hing v Liu Chong*** case, there is the oft cited passage in the judgement of Lord Scarman, when dealing with the issue of tort, wherein he exhorts persons who are in contractual relationships to pursue their remedies, by way of breach of contract and not to search for breaches of duty in tort.

Then came the lengthy and controversial decision of Vice Chancellor Sir Robert Megarry in ***Ross v Caunters (a firm) [1979] 3 All E.R. 580*** where for the first time, a solicitor was found liable to a third party, a beneficiary, with whom he had no contract, for damages in tort representing, purely economic loss.

The facts of this case are as follows:

The Testator instructed solicitors to prepare a Will in which his sister-in-law was a beneficiary. He requested that the Will be sent to the sister-in-law's house, which it was, and was executed there. The solicitors did not warn the testator that the spouse of a beneficiary ought not to witness the execution of the will and the husband of the beneficiary did so. The Will was returned to the solicitors who took no special notice of the signatures of the attesting witnesses. The testator died and the gift to the sister-in-law failed. Nine months later the solicitors informed her of this fact and she sued claiming that the solicitors were negligent:

(i) In failing to warn the testator of the consequences of her husband witnessing the Will;

(ii) in failing to observe that he had;

(iii) in failing to draw the testator's attention to this fact and to get the testator to re-execute a new will in the circumstances

The solicitors, though admittedly negligent, denied liability on the basis that:

(i) they were liable in contract, and not in tort, and could not be liable in tort to a third party;

(ii) by way of policy, a solicitor ought not to be liable to anyone except his client;

(iii) in any event, the plaintiff had no cause of action in negligence and that the loss suffered was purely financial.

The Court held that the solicitors were liable because:

(i) if a solicitor was contracted by a client to carry out certain instructions which conferred a benefit to a third party, he thereby owes a duty of care

to the identified person, and

(ii) this duty was not inconsistent to the duty owed by the solicitor to the client in contract and in tort.

(iii) there was a sufficient degree of proximity between the solicitor and the identified third party and the instructions specifically conferred a benefit on the third party;

(iv) there was no reason by policy which stated that the solicitor ought not to be held to be liable in negligence to a third party, not being the client, as this was a limited duty owed, as opposed to the wider duty owed by the solicitor to the client to do all that the solicitor could properly do and far from conflicting with or diluting the duty to the client it strengthened it.

Further, the fact that the claim was purely for financial loss, and not for injury to person or property, did not preclude her claim.

V.C. Megarry, at page 587-b, endorsed the earlier decision in ***Midland Bank Trust Co Ltd v Hert, Stubbs & Kemp,*** and stated that:

" a solicitor's liability to his client for negligence is not confined to liability in contract, to the exclusion of liability in tort. The client may base his claim in tort, irrespective of contract".

I found one case in this jurisdiction ***(unreported) C.L. Mc-127 of 1977, Donald McDonald v Williams & Williams (a firm of Attorneys)*** in which Orr, J gave judgement for the plaintiff and in so doing stated that he was applying the principles of Ross v Caunters. The facts differed substantially. The plaintiff was merely the client of the defendants, through the subrogation clause in an insurance policy and the

plaintiff/insured claimed negligence against the attorneys for entering a consent judgement without his authority or knowledge, although with the authority of the insurance company which subsequently was liquidated.

At the end of the last decade, and right through this year, a series of cases were decided, three of which made their way to the House of Lords which once again endeavoured to define, clarify and delineate the duty owed by the professionals to persons who were not their clients. The focus seems to be on the accountants and the lawyers, but recent clarification of this area of the law began with valuation surveyors in the cases of:

Smith v Eric S Bush (a firm),

and

Harris v Wyre Forest District, [1989] 2 All E.R. 514

In these cases the Court grappled with the appropriate test for establishing whether a duty of care exists in relation to third parties who are not in a contractual relationship with the professionals, but who have relied on their work. Thus the abovementioned cases on negligent mis-statement which were decided by the House of Lords in 1989.

In both cases the question arose whether a surveyor instructed by a mortgagee to value a house owed the prospective purchaser a duty in tort to carry out that valuation with reasonable skill and care and whether a disclaimer of liability by or on behalf of the surveyor for negligence was effective.

In the first case, the surveyor of the society inspected and valued the house and the valuation report indicating that no repairs were required, was paid for by the respective

purchaser. No independent valuation was obtained. Due to defects in the chimneys, they collapsed and fell through the roof causing considerable damage. The report contained a disclaimer to the effect that there was no warranty as to its accuracy and was supplied without any acceptance of responsibility. The purchaser sued the surveyors.

The Judge held that the Defendants were liable. The Court of Appeal affirmed the decision, holding that the disclaimer was not fair and reasonable under the Unfair Contract Terms Act of 1977.

In the second case, the valuation was given by the local authority which was under a statutory duty to provide the same before advancing any money. This was done. The purchaser signed an application form, which contained statements to the effect that the valuation was confidential, was intended solely for the information of the local authority and no responsibility was accepted for the value and/or the condition of the property, the inspection and the report. The purchaser relied on the valuation, borrowed on the basis of the same and assumed that the house had the value stated therein and was not in need of repairs. The house was later found to be subject to settlement, virtually unsaleable and could only be repaired, if at all for an amount in excess of the purchase price.

The purchaser brought an action against the local authority and its surveyor. The Judge upheld these claims. The Court of Appeal reversed the decision on the ground that the notice had effectively excluded liability.

The House of Lords held that the valuer in these circumstances owed a duty of care to both the mortgagee, and the mortgagor to exercise reasonable skill and care knowing that the mortgagee and the mortgagor would certainly rely on the valuation and that the latter had paid for the same. It made no difference whether the valuer was

employed by the mortgagee, or acted on his own account and was employed by an independent firm of valuers, since he was discharging the duties of a professional man on whose skill and judgement he knew the purchaser was relying. The fact that the local authority was under a statutory duty to provide the valuation report did not prevent the valuer being under a contractual and tortious duty to the purchaser, but this was limited to the purchaser alone, and not to subsequent purchasers.

It is interesting to note that the House of Lords also held, however in keeping with the ***Hedley Byrne case,*** that the valuer could disclaim liability to exercise reasonable skill and care by an express exclusion clause. Such a disclaimer however fell to be interpreted under the U.K. Contracts Unfair Terms Act 1977, and had to satisfy that Act that the disclaimer was reasonable and effective. The Court held that having regard to the increased cost of homes, and the high interest rates, it would not be reasonable for mortgagees and valuers to impose on purchasers the risk of loss due to carelessness on their part. It would be interesting to see how the Courts here would deal with the express disclaimer in light of the fact that we do not have a similar statute in Jamaica.

In the ***Capara Industries plc v Dickman and Others [1990] 1 All E.R. 568,*** a leading case for negligent mis-statement in respect of the accountants principally, although applicable to all professionals, the House of Lords ruled that the duty was not imposed.

In that case, shareholders in the company, relying on the audited accounts, bought more shares and proceeded to a successful take-over bid of the company. Subsequently the accounts were proved to be inaccurate and misleading as they showed a pre-tax profit of £1.2M, when in fact there had been a loss of over £400,000.

The shareholders sued the auditors on the basis that they owed a duty of care to them as shareholders and potential investors in the company as they relied on the accounts and would not have purchased more shares and undertaken the bid take-over if the accounts had been accurate.

The Judge, on a preliminary point as to whether this duty as alleged was owed to the shareholders, ruled that it was not. The Court of Appeal allowed the appeal in part stating that the auditors owed a duty to the shareholders, as shareholders, but not as potential investors.

The House of Lords held, and thus set out the basic threshold for future decisions in the area, that there were 3 criteria for the imposition of the duty of care, to wit

(1) foreseeability of damage;

(2) proximity of relationship, and

(3) the reasonableness or otherwise of imposing a duty.

But most importantly for the guidance of auditors, it was held that:

"The auditor of a public company's accounts owed no duty to a member of the public at large who relied on the accounts to buy shares in the company because the court would not deduce a relationship of proximity between the auditor and a member of the public when to do so would give rise to unlimited liability on the part of the auditor. Furthermore, an auditor owed no duty of care to an individual shareholder in the company who wished to buy more shares in the company, since an individual shareholder in the company who wished to buy more shares was in no better position than a member of the public at large and the auditor's statutory duty to prepare accounts was owed to the body of the shareholders as a whole, for the purpose for which accounts were prepared and audited being to enable the shareholders as a body to exercise informed control of the company and not to enable individual shareholders

to buy shares with a view to profit. It followed that the auditors did not owe a duty of care to the respondents either as shareholders or as potential investors in the company. The appeal would therefore be allowed and the cross-appeal dismissed".

Lord Oliver of Aylmerton, at page 588 of the judgement of the House, discussed the difficulties of deciding whether the circumstances gave rise to that relationship of proximity or 'the special relationship' as it has come to be known, in which the duty of care arises, or on which action depends. He stated that it is not possible to categorise the special features which must be found to exist before the duty of care will arise in any given case. But later on in the judgement he confirmed the approval of the House of Lords of the expressed text of proximity in the dissenting judgement of Lord Denning in the ***Candler v Crane case***, and stated that the following could be deduced from the **Hedley Byrne case**, and can be relied on for ascertaining whether the necessary relationship between the maker of the statement or giver of advice and the recipient of the advice who relies on the same is held to exist, viz:

(i) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given;

(ii) the adviser knows, either actually or inferentially that the advice will be communicated to the advisee, either specifically or as a member of an ascertainable class in order that it should be used by the advisee for that purpose.

(iii) it is known either actually or inferentially that the advice so communicated is likely to be acted on by the advisee for that purpose without independent inquiry, and

(iv) it is so acted on by the advisee to his detriment.

These conditions are not conclusive or exclusive but can be used effectively. Thus the Court found that there could be no proximity of relationship with the auditors or any special relationship between them and the shareholders as potential investors. The statutory duties of the company's auditors were not intended to protect the interests of investors in the market, and since the duty of the auditor to the shareholder was simply to inform of the status of the company as a whole to enable the shareholders to exercise 'informed control' and not in order to invest with a view to profit, no duty of care would be owed in this situation either.

The ruling in the ***Caparo case,*** was reviewed and distinguished in ***Morgan Crucible Co, plc v Hill Samuel Bank Ltd & Others [1991] All E.R. 148.***

> **In that case, the issue was whether the pleadings ought to be amended to include a ground that the defendants owed a duty to of care to a company which intended to make a take-over bid of another company. The initial bid was made in reliance of accounts prepared by the auditors. This offer was rejected. Further statements were made by the target company to its advisers in order to defend the take-over bid and circulars were later dispatched to the plaintiff company relating to the earlier financial statements submitted. The circular dispatched by the target company included a letter from the accountants stating that the profit forecast of the target company had complied with stated accounting policies and a letter from the bank expressing an opinion that the forecast had been made with due and careful inquiry. The plaintiff**

company, as a consequence increased its bid, which was later accepted. The plaintiff later claimed that the profit forecast was grossly overstated and worthless and that the accounts had been negligently prepared and had they been accurate, the plaintiff would never have made a bid and certainly never increased the amount of the offer. The plaintiff issued a writ against the bank, the accountants and the chairman of the directors of the target company alleging that it was foreseeable that the plaintiff would rely on the representations contained in the pre-bid financial statements and profit forecast.

At first instance the Judge refused the amendment to include the allegation of the duty of care owed by the defendants, but the Court of Appeal of Slade, Mustell & Nicholls L. JJ, held that since there had been an identifiable bidder, and the defendants were aware of this bidder, they ought to take care to ensure that they were not negligent in issuing any statements to the company which could be misleading as they were aware, that the company might rely on them.

Since in this case, the defendants intended the plaintiffs to rely on the profit forecast and the financial statements and the plaintiff did rely on them, then it was certainly arguable that there was a relationship of proximity between each of the defendants and the plaintiff to give rise to the duty of care. Thus the facts distinguished the case of **Caparo** and presumed that the duty of care did exist on the particular facts disclosed.

Earlier this year, the reported decision of ***Galoo Ltd v Bright Grahame Murray, [1995] 1 All E.R. 16*** applied both decisions in the ***Caparo and Morgan Crucible cases***, which at this stage therefore, define and clarify the law with regard to the duty owed by accountants to persons wishing to loan funds to, purchase shares in, or take over other companies.

There were three plaintiffs: the third plaintiff purchased 51% shares in the second plaintiff, which owned all the shares in the first plaintiff. The third plaintiff's complaint was that it arrived at a share price for the second plaintiff on the basis of the net profits set out in the audited accounts of both the first and second plaintiffs delivered to it for that specific purpose.

After acquisition, the third plaintiff made further loans to the first and second plaintiffs, and purchased more shares in the second plaintiff. Subsequently the third plaintiff discovered substantial inaccuracies in the first and second plaintiff's accounts, and the third plaintiff claimed that the auditors had been negligent and in breach of the duties owed in contract and/or tort to the plaintiffs which had resulted in loss and damage.

The claims for loss in respect of the first and second plaintiffs related to the fact that if the accounts had been accurately prepared, the companies would not have accepted further loans but would have ceased trading and not suffered further losses. The third plaintiff claimed that it would not have originally invested, nor later made loans to, or further invested in the first and second plaintiff companies. The first instance judge struck out the claims of the first and second plaintiffs on the grounds of:

(1) acceptance of a loan did not amount to the loss causing damage

(2) trading losses would not be considered as damages flowing from the auditor's negligence.

The Judge also struck out the claims of the third plaintiff for loans made to the other plaintiffs and for the further purchase of shares in the second plaintiff as not being sufficient to create the degree of proximity required to establish a duty of care. The issue of the third plaintiff's claim in tort, in relation to the reliance of the third plaintiff on accounts of the auditors in the original purchase of shares in the second plaintiff was permitted to go to trial. The plaintiffs appealed and the auditors cross-appealed. The appeals and cross-appeals were dismissed.

The Court of Appeal, Glidewell, Evans and Waite L.JJ, ruled as follows:

(1) The mere acceptance of a loan could not be described as a loss giving rise to damages. The loss may occur because of the use to which the funds were put but this could not of itself give rise to a claim against the auditors in negligence.

(2) A plaintiff could claim damages for breach of contract where the breach was the effective or dominant cause of the loss and did not merely provide the opportunity to sustain the loss. This ought to be decided by applying common sense. In this case the negligence of the auditors may have supplied the opportunity for the continuing trading loss, but could not be said to have caused the loss.

(3) The fact that it is foreseeable that potential bidders or lenders would rely on audited financial statements, is not sufficient to impose a duty of care on the auditors to the bidder or lender. It is only when the potential bidder or lender is identified and the auditor is made aware of that fact and intends the bidder or lender to rely on the statements and they do, that the auditor could be under a duty of care and liable if they are negligent. In this case the auditors knew that their accounts would be relied on by the third plaintiff in calculating the purchase price of the shares in that they had been required to submit the accounts for that specific purpose. Thus it would be arguable that a duty was owed in those circumstances. A fortiori since the auditors did not know of the alleged intended use of the accounts

by the third plaintiff in respect of the subsequent loans and/or the further acquisition of shares thereafter, no duty could then be imposed and the claim would be struck out.

In the leading most recent case dealing with the extent of the duty owed by the solicitor, the House of Lords in ***White and Another v Jones & Others [1995] 1 All E.R. 691,*** though doubting the ruling of Sir Robert Megarry in ***Ross v Caunters,*** decided more by policy and in an effort to close an obvious lacuna in the law that the attorney does and must owe a duty of care to a beneficiary under a Will.

In this case the testator had quarrelled with the plaintiffs, his two daughters, and then executed a will cutting them out of the estate. Three months later having reconciled with the daughters, he sent instructions to his attorneys to include gifts of £9,000 to each daughter. The solicitors failed to effect those instructions, the testator died and the daughters sued.

The first instance judge said the solicitors owed no duty and dismissed the action. The Court of Appeal allowed the Appeal and awarded damages of £9,000 to each plaintiff. The solicitors appealed to the House of Lords, relying on the argument which succeeded in the *Caunters case*, over 40 years ago but which was clearly no longer the law.

The House of Lords in confirming the ruling of the Court of Appeal by a majority with Lords Keith of Kinkel, and Lord Mustell dissenting, held that by accepting instructions to draw up a will, the assumption of responsibility by the solicitor would extend to the intended beneficiary who was reasonably deprived of his intended legacy as a result of the solicitor's negligence. For, as no other contractual or fiduciary relationship exists, and the estate would have no claim against the solicitor, injustice would result if the intended beneficiary had no remedy against the solicitor. Further the principle

of assumption of responsibility should be such that it could encompass the intended beneficiary in that 'special relationship', the consequences of which being that he would owe a duty of care to all those who should benefit under the Will pursuant to the testator's instructions.

In the instant case, the solicitors clearly owed a duty of care to the beneficiaries and since the beneficiaries had been deprived of the intended legacies due to their negligence, the solicitors were liable and the appeal was refused.

In Lord Keith of Kinkel's opinion, this case was an attempt to circumvent the rule of privity of contract. There was no contract with the beneficiaries, and if the intended effect of the contract between the testator and the solicitor was that an immediate benefit was to be conferred on the plaintiffs, and was not so conferred due to the negligence of the solicitors, the plaintiffs would still have had no cause of action due to the abovementioned principle. Thus he declined to accept that any damages were due by way of breach of contract.

With regard to the claim in tort, Lord Keith said there was no relationship between the daughters and the solicitors which could create any proximity to give rise to a duty of care nor did the solicitor do or say anything upon which the daughters acted to their detriment. No damage was done, he said by the solicitor to any existing or financial or other interest of the plaintiffs. He refused to extend the principles of ***Hedley Byrne*** to the instant case.

It appears as though the majority decision may have been guided in order to arrive at their decision in the case by the " impulse to do practical justice". Much is said of the fact that if the assumption of responsibility did not by implication extend the duty

to the intended beneficiary, then there would be no remedy for the negligent acts by the solicitor. Lord Goff said the profession cannot complain if such a liability is imposed on its members "for if one of them has been negligent in such a way as to defeat his clients testamentary disposition, he would be very lucky if the law was such that he was not found to be liable in damages in the ordinary way". In truth he said the doctrine of consideration and the doctrine of privity of contract prevent the intended beneficiary from being able to claim by way of a contractual approach. Further, the claim was only for pure economic loss and for a loss of expectation and the claim also arises for an omission of action all of which should in ordinary circumstances, give rise to a claim in contract. But an attorney who undertakes to perform a service to a client must do so with reasonable care and skill and failure to do so will result in an action in contract and tort. Yet it is still difficult to accept that a duty of care was owed to an intended beneficiary in those circumstances. In most cases the intended beneficiary is not even aware of the assumption of responsibility by the attorney to the client in contract and/or tort and does not even know about the gift. Thus the Court was impelled to turn to what was described in the judgement as the "tortious solution." In doing so, Lord Goff in effect made available to the intended beneficiary, as a matter of law, a remedy under the ***Hedley Byrne*** principle, even though that principle was accepted as applicable in cases of pure economic loss, with regard to negligent mis-statements only, and this case did not involve a negligent mis-statement.

Lord Browne-Wilkinson at page 717, accepted whis novel approach with the comment that "it is clear that the law in this case has not ossified ... there might be

other sets of circumstances in which it would be appropriate to find a special relationship giving rise to a duty of care. He stated that Lord Bridge (in Caparo's case) quoting from Brennan J, in ***Scotland Shire Council v Heyman [1985] 60 ALR 1 at 43-44,*** recognized that:

> **"the law will develop novel categories of negligence incrementally and by analogy with established categories. "In my judgement, this is a case where such development should take place since there is a close analogy with existing categories of special relationships giving rise to a duty of care to prevent economic loss".**

It will be interesting to see whether our Courts will follow this path and find that the duty of care exists in these circumstances even where there is no contractual or fiduciary relationship but merely by the extension of the principles of ***Hedley Byrne,*** and declare that a special relationship exists.

In closing, it would be remiss of me not to mention the several ways in which both our professions can work in a mutually beneficial relationship in order to protect the client's interest. Indeed, in many ways, it could be considered negligent if one professional in the conduct of certain matters has not consulted with and obtained the advice and input of the other.

<u>In non-contentious business</u>

For the preparation of Prospectuses and rights issues, both the legal framework and the accounting information must be flawless to avoid liability. Our professions collaborate in:

(i) estate management

(ii) settlements

(iii) family trusts

(iv) tax liability

(v) valuation of assets, and businesses as a going concern,

(vi) receiverships and liquidations, and

(vii) generally with regard to the duties and responsibilities of directors/companies under the Companies Act and their relevant statutes.

In contentious business

It is very important for the attorneys to obtain the evidence needed in Court with the assistance of the accountants in support of:

(i) damages claimed for loss of profits,

(ii) Petitions for Winding up of Companies

(iii) the assets/liability ratio,

(iv) full comprehension of the worth of a company.

In my humble submission, it behoves us to work together to provide the fullest representation wherever possible. Indeed, internationally it is my understanding that claims against accountants are being settled in some instances in the sum of approximately $186.5M for negligence in preparation of accounts, which claims are being pursued by the attorneys by way of contingency. This modus operandi is thereby 'feeding the Litigation" which could perhaps be unavailable to the litigant without this up-front assistance, and the claims are settled on the basis, that this sum is less expensive than the cost of the adverse publicity coupled with the expense of protracted litigation.

Since the law as stated, permits the professionals to exclude liability under the ***Hedley v Byrne*** principle, by means of restriction and limitation of the responsibility, perhaps with the advent of multi-disciplinary partnerships in Jamaica, the client could obtain the fullest and best representation possible, with all parties exercising that high standard of skill and care as required, but with that added security of protection to preclude the persistent litigant from the pursuit of claims which are baseless and entirely without merit.

HILARY PHILLIPS

4TH OCTOBER, 1995