LIABILITY OF ONTARIO LAND SURVEYORS - HOW FAR DOES IT GO?

By David L. McKenzie

What are the legal limits of a surveyor's liability for a survey he prepares for his client? The view of some surveyors, perhaps most, is that his liability should extend only to his client, with whom he has contractual obligation to prepare the survey accurately, and not to a third party, who may happen to rely on his survey sometime in the future, if the survey is then found to be in error. This view may well be correct in law today, but as this article will illustrate, such a view may be open to doubt.

Case Cited

The traditional position of the law, having to do with actions based in negligence, was embodied in the English case of **Le Lievre and Dennes v Gould** (1893) 1 Q.C. 491. In this case the mortgages of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor (the defendant) that specified stages in the progress of certain buildings had been reached. There was at no time any contractual relationship between the surveyor and the mortgagees.

Because of the gross negligence of the surveyor the certificates, contained untrue statements as to the progress of the buildings, but there was no finding of fraud on his part. Lord Esher, M.R. giving the decision of the Court, restated the law as set down by the House of Lords in **Derry v Peek,** 14 A.C. 339, that, "in the absence of contract, an action for negligence cannot be maintained when there is no fraud," and "negligence, however great, does not of itself constitute fraud."

Only if a duty lies upon a defendant not to be negligent, could negligent misrepresentation give rise to a cause of action. The Court felt that such a duty could only arise through a contractual relationship based on consideration, and it followed that in the absence of a contract, the law of torts furnished no remedy in any circumstances for non-fraudulent misrepresentations, and that there was no more duty that could be demanded from professional people like surveyors than from just anyone expressing a casual opinion.

Remained Till 1951

This statement of the law with respect to third party liability, absent contract, remained unshakened until 1951, when the validity of **Le Lievre and Dennes v Gould** was directly challenged by the case of **Candler v Crane, Christmas & Co.** 2 K. B. 164.

Here, the plaintiff was interested in investing some money in a limited company, but wished to consult the accounts of the company first. The accountants of the company were instructed to get the accounts prepared since the plaintiff wished to inspect them. On their completion, the chief accountant discussed them with the plaintiff, and he accordingly invested his money in the company. However, the accounts had been carelessly prepared and gave a wholly misleading picture of the state of the company, and as a result, the plaintiff lost the whole of his investment. Action was taken against the chief accountant as well as the company.

The majority of the Lords dismissed the action on the ground that the defendants owned no duty of care to the plaintiff, following **Derry v Peek** and **Le Lievre v Gould.** The position remained that a false statement, carelessly, as contrasted with fraudulently, made by one person to another, though acted on by that other to his detriment, was not actionable **in the absence of any contractual or fiduciary relationship between the parties.**

Dissenting Decision

However, signs of changes to come in this area of the law appeared from the dissenting decision of Denning, L.J. Lord Denning, refused to be guided by decisions of the past which he distinguished on their facts and confined them to their time and place in history. According to Lord Denning, accountants, exercising a calling which requires knowledge and skill, owed a duty to use care in the work, which resulted in their accounts and reports, and also in the rendering of their accounts and reports. They owed that duty (as do surveyors, valuers and analysts) not only to their clients, but to **any third person to whom they showed their accounts and reports or to whom they knew that their clients were going to show them,** when, to the knowledge of the accountants that person would consider their accounts and reports with a view to the investment of money or taking other action to his gain or detriment.

Duty of Care

Having established a duty of care owed by persons, who, due to their special knowledge or training know facts or are believed to know certain facts because of their special knowledge or training know facts or are believed to know certain facts because of their special position, in relation to those who are in an unequal position due to their lack of specialized knowledge or training, Lord Denning set the above-mentioned limits around those to whom these so-called "professional" people owe a duty. He then went further and held that the **duty only extends in respect to those transactions for which the accountants knew that their accounts were required.** He did not believe that the duty could be extended still further so as to include "strangers" of whom they have heard nothing and to whom their client without their knowledge may choose to show their accounts. To Lord Denning, "it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business." He declined to comment on whether a professional would be liable if he negligently prepared his accounts or surveys for the guidance of a specific class of persons in a specific class of transactions.

Bad Law

It was not until 1964 and the case of **Hedley Byrne v Heller** (1964) A. C. 465, that both the **Candler** case and the **Le Lievre** case were overruled and held to be bad law.

In this monumental case, the plaintiff Hedley Byrne & Co. were advertising agents, who sought financial information from their bankers, as to the financial stability of a company with which bankers in turn made inquiries with Heller & Partners, the defendants, who were the bankers of the company with whom the

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orders had been placed. Their reply was favourable but they cautioned that their advice was "without responsibility" on their part. In reliance on these references Hedley Byrne & Co. placed orders which resulted in a substantial financial loss. As a result, they brought an action against Heller & Partners for damages for negligence.

The majority of the House of Lords held, that for the first time in law, a negligent, though honest, misrepresentation, spoken or written, may give rise to a cause of action for damage for financial loss caused thereby, **apart from any contract or fiduciary relationship,** since the law will imply a duty of care when a party seeking information from a party possessed of a **special** skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment. However, since here there was an express disclaimer of responsibility, no such duty could be implied and the action was dismissed.

Clearly Stated

The law could not be more clearly stated, but the cases since 1964 have been struggling to determine the limitation which should be placed around this so-called Hedley Byrne principle.

One such case is the **Ministry of Housing v Sharp** (1970) 2 Q. B. 233, where both the local registry office and one of its clerks who had made a careless search of title, were found liable to subsequent purchasers of certain properties, who had relied on the faulty search, and who suffered financial damage therefrom. Lord Denning in finding the clerk liable, held that, "he was under a duty at common law to use due care. That was a duty which he owed to any person-incumbrancer or purchaser- whom he knew, or ought to have known, might be injured if he made a mistake. The case comes four square within the principles which are stated in **Candler v Crane, Christmas & Co.,** and which are approved by the House of Lords in **Hedley Byrne & Co. Ltd. v Heller & Partners Ltd."** As to how far that duty could be extended, Lord Denning went on to say, "in my opinion the duty to use due care in a statement arises, not from any voluntary assumption of responsibility, but from the fact that the person making it knows, or ought to know, that others, being his neighbours in this regard, would act on the faith of the statement being accurate. That is enough to bring the duty into being. It is owed. of course, to the person to whom the certificate is issued and whom he knows is going to act on it."

Extent of Liability

Another is the very recent case of **Dutton v Bognor Regis United Building Co. Ltd. and another,** (1972) 1 E. R. 462. Again, it was Lord Denning who lead the way; and summed up how the extent of liability would be determined.

> "It seems to me that it is a **question of policy** which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.
> In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth. Nowadays we direct ourselves to considerations of policy. In short, we look at the relationship of the parties; and then say, as a matter of policy, on whom the loss should fall."

Facts of Case

The facts of this case may be stated as follows. According to the English **Public Health Act,** municipalities were empowered to make by-laws regulating the construction of buildings in their particular areas. More specifically, the by-laws regulate the construction of foundations on which buildings could be built, and provided for surveyors and inspectors to see whether the by-laws have been complied with.

H., a builder, planned to build some houses in Bognor Regis, and received the necessary approvals from the Bognor Regis United District Council. H. started to build his houses, but on one of his plots of land, he discovered a rubbish heap, which had been previously made to look like the surrounding lands. Because of this, he made some changes in the foundations, which foundations were approved by the Council's inspector, who failed to detect the rubbish heap. The Council's surveyor also inspected the foundations, and approved them as being satisfactory.

The house was finished in 1959 and sold to C., who resold it to D., the plaintiff in 1960. As a direct result of the unsatisfactory foundations, due to the type of soil the house was built upon, the house soon had many defects. A surveyor hired by the plaintiff's solicitors discovered the rubbish heap in 1964, and this action was commenced against the Council and its inspectors.

Court Findings

The Court found that the Council, through their building inspectors, owed a duty of care to the plaintiff to ensure that the inspection of the foundations of the house was properly carried out and that the foundations were adequate for the following reasons, quoted at length from the judgment:

The Position of the Professional Adviser

Counsel for the Council then submitted another reason for saying that the inspector owed no duty to a purchaser. He said that an inspector is in the same position as any professional man who, by virtue of his training and experience, is qualified to give advice to others on how they should act. He said that such a professional man owed no duty to one who did not employ him but only took the benefit of his work; and that an inspector was in a like position. Nowadays, since **Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.,** it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him but also to another who he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty. The essence of this proportion, however, is the **reliance.** In **Hedley Byrne v Heller** it was stressed by Lord Reid, by Lord Morris of Borth-Gest, and by Lord Hodson. The professional man must know that the other is **relying** on his skill and the other must in fact rely on it.

Reliance

Counsel for the Council made a strong point here about reliance. He said that, even if the inspector was under a duty of care, he owed that duty only to those who knew would rely on this advice — and who did rely on it — and not to those who did not. He said that Mrs. Dutton did not rely on the inspector and he owed her, therefore, no duty.

It is at this point that I must draw a distinction, between the several categories of professional men. I can well see that in the case of a professional man who gives advice on financial or property matters (such as a banker or surveyor) — his duty is only to those who rely on him and suffer financial loss in consequence. But, in the case of a professional man who gives advice on the safety of buildings, or machines, or material,

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his duty is to all those who may suffer injury in case his advice is bad. The reason is, not because those injured relied on him, but because he knew, or ought to have known, that such persons might be injured if he did his work badly.

Proximity

Counsel for the Council submitted that in any case the duty ought to be limited to those immediately concerned and not to purchaser after purchaser down the line. There is a good deal in this, but I think the reason is because a sufficient purchaser often has the house surveyed. This intermediate inspector, or opportunity of inspection, may break the proximity. It would certainly do so when it ought to disclose the damage. But the foundations of a house are in a class by themselves. Once covered up, they will not be seen again until the damage appears. The inspector must know this or, at any rate, he ought to know it. I should have thought that the inspector ought to have had subsequent purchasers in mind when he was inspecting the foundations — he ought to have realized that, if he was negligent, they might suffer damage.

Limitation of Action

Counsel for the Council also said that, if this action were allowed, it would expose the Council to endless claims. The period of limitation would only start to run when the damage was done, i.e. when the cracks appeared in the house. This would mean that they might be liable many years hence. I do not think that is right. The damage was done when the foundations were badly constructed. The period of limitation (six years) then began to run. The council would be protected by a six year limitation, but the builder might not be. If he covered up his own bad work, he would be guilty of concealed fraud, and the period of limitation would not begin to run until the fraud was discovered.

First Canadian Case

As you are aware, so far, this article has dealt entirely with English law. Our courts have followed the English position in the past, particularly with respect to negligence cases. A prime example of this is given by the case of **Dodds and Dodds v Millman** (1964) 45 D. L. R. (2nd) 472 which was the first Canadian case to adopt the Hedley Byrne decision as good law in British Columbia.

In this case the plaintiff, an inexperienced purchaser, relied on statements made by the vendor's real estate agent in purchasing an apartment building. These statements, which were contained in an operating statement of projected revenue and expenses prepared by the agent, gave an entirely false impression of the capability of the building to produce a profit and, were therefore grossly negligent.

Mr. Justice Maclean of the British Columbia Supreme Court in giving his decision in favour of the plaintiff stated, "I respectfully adopt the principles enunciated in the **Hedley Byrne** case, and find that, even though no contractual relationship was such as to impose upon the agent a duty to exercise care in compiling the operating statement."

Another Example

The **Hedley Byrne** principle was referred to in Ontario in the case of **Myers v Thompson and London Life Insurance Co.** (1967), 63 D. L. R. (2nd) 476 (Ont.), a decision by Judge Carroll, which was later affirmed without written reasons by the Ontario Court of Appeals.

Here a very experienced and skilled life insurance agent gratuitously undertook to effect a conversion of a life insurance policy upon a client's life according to instructions received by him from the client's solicitor for the purpose of minimizing the estate duties leviable upon the death of the insured. He negligently failed to act in accordance with the instructions received by him from the client's solicitor or to inform the insured or his solicitor of that failure. As a result, he was found liable to the estate for the amount of the extra duties levied.

Most Recent Case

The most recent Ontario case on point is **Babcock v Servacar Ltd.** (1970) 1 O. R. 125. In this case, Judge Matheson held a car clinic liable for carelessly diagnosing the plaintiff's car. Because of the diagnosis, the plaintiff purchased the car but almost immediately incurred expensive repairs. There was no warranty express or implied nor any guarantee clause in this contract between the parties, but liability was established on the basis of the **Hedley Byrne** principle; that is, that the diagnosis statement was relied upon by the plaintiff to his financial disadvantage and that the defendant corporation should have known it would be relied on.

Third Party Action

The present position of the law appears to be that a Canadian court might well entertain a cause of action brought by a third party against a surveyor, where such third party relied to his detriment on a survey, where **all** of the following criteria are found to be present:

(1) where there has been an honest misrepresentation; **negligence.**

(2) where the surveyor, as a professional, is deemed to possess a special skill; a special duty of care will be implied by the law, upon him for those who rely on his skill and judgement; — **duty of care.**

(3) where reliance is placed thereon by such third party to his detriment and financial loss is caused thereby; **damage.**

(4) where the surveyor is found to have known or ought to have known that reliance would be placed on his skill and judgment by the third party.

Surveyor's Liability

It is this last criteria which may well limit the extent of the surveyor's liability. He could reasonably say that his survey is only drawn for use in one particular transaction, and that it would be impossible for him to know who might make use of his survey at some future date. However, there are two arguments which could be brought against such a position.

First, as you will recall, Lord Denning in the **Candler** case refused to decide whether a professional would be held liable if he negligently prepared his surveys for the guidance of a specific class of persons (subsequent purchasers) or a specific class of transactions, (the sale and purchase of lands.)

Secondly, as the English cases have pointed out, the courts are no longer concerned with questions of proximity and the like. The real question is one of **policy.** As Lord Denning said in the **Bognor Regis** case, "in short, we look at the relationship of the parties, and then say, as a matter of policy, on whom the loss should fall." Such a position is not openly admitted to as the basis for judicial findings in tort actions in Canada, but the trend towards the English position is quite apparent.

In conclusion then, it is evident that a strong argument could be raised against a surveyor by a third person, who relied on the surveyor's survey, to his financial detriment, where the surveyor knew or ought to have known that such person would or might rely on his survey. Whether such an argument would be accepted by an Ontario court is purely speculative but I submit that there is some authority upon which the court could base a decision against the surveyor, both on legal and policy grounds.

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