COMMENTS
COMMENTAIRES

EVIDENCE—CIVIL CASES—COMMUNICATIONS MADE BY SPOUSES TO MEDIATOR—ADMISSIBILITY—PRIVILEGE—JUDICIAL DISCRETION TO EXCLUDE RELEVANT EVIDENCE—PUBLIC POLICY.—In *Cronkwright* v. *Cronkwright*[1] in the course of hearing a contested petition for divorce, the trial judge upheld the objection of counsel for the respondent to the admission of the evidence of an Anglican clergyman who had been active in pursuit of the reconciliation of the parties. The clergyman was called to testify as to the contents of discussions he had held with the spouse. The trial judge ruled that there was no privilege attaching to such evidence but excluded the evidence in exercise of a judicial discretion to disallow admissible evidence.

Applying *Regina* v. *Wray*[2] the trial judge held that he had a discretion not to receive admissible evidence because of "the particular circumstances in the case or for reasons of public policy".

This case followed another case by the same trial judge, *Robson* v. *Robson*[3] in which an officer of the John Howard Society, who had had discussions with the spouses was compelled to testify in an application for custody under The Infants Act.[4] His Lordship considered section 21 of the Divorce Act[5] inapplicable because the officer was not a person nominated by the court to assist the parties to reconcile. Although he negated the existence of any common law privilege, he would have admitted the evidence in any event because the parties had testified about the conversation and therefore presumably had waived any privilege.

---

[1] (1971), 14 D.L.R. (3d) 168.

[2] [1970] 2 O.R. 3, [1970] 3 C.C.C. 122, rev., [1970] 4 C.C.C. 1, (1970), 11 D.L.R. (3d) 673.

[3] [1969] 2 O.R. 857, (1970), 7 D.L.R. (3d) 289.

[4] R.S.O. 1960, c. 187, now R.S.O., 1970, c. 222.

[5] R.S.C., 1970, c. D-8, s. 21: "(1) A person nominated by a court under this Act to endeavour to assist the parties to a marriage with a view to their possible reconciliation is not competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as the nominee of the court for that purpose. (2) Evidence of anything said or of any admission or communication made in the course of an endeavour to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings."

These cases raise two important questions with relation to the law of evidence.

(i) Are communications made by spouses to a mediator or conciliator of a marital dispute privileged?

(ii) Does the court, in a civil case, have a discretion to exclude admissible evidence on the grounds of public policy or otherwise?

In deciding the first question, the *Cronkwright* v. *Cronkwright*[6] case refers to two Canadian cases, *Dembie* v. *Dembie*[7] and *G.* v. *G.*[8] in which this privilege was recognized. Such a privilege was also recognized in the unreported decision of the Supreme Court of Ontario in *Vickers* v. *Vickers*[9] in which the evidence of a family solicitor who attempted to mediate a matrimonial dispute was rejected.

These cases do not purport to create a new privilege but appear to be a logical extension of the privilege attaching to communications had in furtherance of settlement. The courts in England have had no hesitation in so extending the privilege. Thus in *McTaggart* v. *McTaggart,*[10] the Court of Appeal, although holding that the privilege had been waived, recognized that a probation officer who had interviewed the spouses, was not free to divulge the evidence unless the parties consented or waived the privilege.

In *Mole* v. *Mole*[11] it was held that the privilege attached when one of the parties obtained the assistance of a probation officer who communicated with the other spouse in an attempt to effect a reconciliation. The court stressed the fact that the same would apply to a doctor, clergyman or other marriage guidance counsellor who was approached by the parties with a view to reconciling marital differences. The rationale of the privilege was stated to be a tacit understanding that negotiations were to be without prejudice. *Theodoropoulas* v. *Theodoropoulas*[12] and *Henley* v. *Henley*[13] are to the same effect.

In *McTaggart* v. *McTaggart,*[14] Denning L.J. says:

> It seems to me that negotiations which take place in the presence of the probation officer with a view to reconciliation are made on the understanding, by all concerned that they are to be without prejudice to the rights of the parties. The rule as to "without prejudice" communications applies with especial force to negotiations for reconciliation.

---

[6] *Supra,* footnote 1.
[7] (1964-65), 7 Crim. L.Q. 305.
[8] [1964] 1 O.R. 361.
[9] Unreported decision of Stewart J., November 20th, 1963.
[10] [1949] P. 94, [1948] 2 All E.R. 754.
[11] [1951] P. 21, [1950] 2 All E.R. 328.
[12] [1964] P. 311, [1963] 2 All E.R. 772.
[13] [1955] 1 All E.R. 590.
[14] *Supra,* footnote 10, at p. 755 (All E.R.).

In *Brysh* v. *Davidson*[15] Tavender D.C.J. approved of the English cases but held that they had no application to a Department of Public Welfare employee who interviewed a putative father and was called as a witness in affiliation proceedings. The basis for the decision appears to be that the proposed witness was not a mediator or a conciliator.

It is submitted that a privilege which attaches to negotiations for settlement of commercial disputes must apply no less to negotiations with respect to settlement of matrimonial disputes. The heavy emphasis placed on reconciliation by Parliament in the Divorce Act[16] demonstrates that it is public policy to encourage such negotiations whether through a court appointed conciliator or a private one. While the operation of this privilege may, on occasion, exclude important evidence, the same may be said with respect to the operation of any other privilege.[17]

If the court concludes that no privilege exists in circumstances in which it considers appropriate that the evidence be excluded, can it do so in exercise of judicial discretion? A discretion to exclude otherwise admissible evidence is clearly recognized in criminal cases in which it was early recognized that some evidence of slight probative value and highly prejudicial might operate unfairly to the accused.[18]*Cronkwright* v. *Cronkwright*[19] citing *Regina* v. *Wray*[20] relied on this line of cases. The Court of Appeal of Ontario, in the *Regina* v. *Wray* case upheld the ruling of the trial judge to exclude evidence elicited as a result of the taking of a statement from the accused which in itself was ruled inadmissible. The Supreme Court of Canada (Cartwright C.J.C. Hall and Spence JJ. dissenting) allowed the appeal. It was held that the discretion applicable in criminal cases is restricted to situations where the basis for admissibility of the evidence is tenuous and the evidence is of slight or trivial probative value as compared with its highly prejudicial effect.

It is doubtful that this rule, whose rationale appears to be to prevent unfairness and prejudice to the accused, has any application in civil cases.[21]

A judicial discretion to exclude admissible evidence as distinguished from a finding that evidence is not relevant has been recognized in civil jury trials in connection with the displaying of limbs,

---

[15] (1964), 42 D.L.R. (2d) 673.
[16] *Supra*, footnote 5.
[17] *Attorney-General* v. *Clough*, [1963] 1 All E.R. 420, per Lord Parker C.J., at p. 425.
[18] *Noor Mohamed* v. *The King*, [1949] A.C. 182.
[19] *Supra*, footnote 1.
[20] *Supra*, footnote 2.
[21] *Director of Public Prosecutions* v. *Christie*, [1914-15] All E.R. Reprint 63, at p. 69, [1914] A.C. 545, at p. 559.

photographs and the like to the jury. It has been held by the Supreme Court of Canada that in such a case the trial judge has a personal discretion in the particular circumstances of each case to exclude such evidence.[22] In the *Draper* v. *Jacklyn et al.*[23] case the trial judge admitted photographs of an accident victim's face which were relevant to illustrate testimony of a medical witness as to the condition of a scar and which also showed two "Kirschner" pins used to hold fracture bones in place. The Court of Appeal for Ontario ordered a new trial, holding that sight of the photographs was likely to have shocked the jury and inflamed them. The Supreme Court of Canada restored the judgment at trial. The discretion to exclude such evidence has been exercised in a number of cases.[24]

Apart from these limited circumstances, there appears to be no recognition in Canada of a general judicial discretion to exclude relevant evidence. Such a discretion is to be carefully distinguished from a decision as to the relevance of evidence which might appear in many cases to have the same result. In England, however, there are dicta in cases dealing with claims of privilege by newspaper reporters to the effect that the court has a discretion to restrict cross examination so as to exclude relevant evidence where public policy demands it. Thus, in *Attorney-General* v. *Mulholland*,[25] in an appeal by a journalist from an order committing him for contempt for refusing to disclose his sources of information when cross examined in the course of an enquiry into alleged offences under the Official Secrets Act, the Court of Appeal upheld the order of committal, but Donovan L.J. referred to the need for some residual discretion not only in cases where a journalist asserts a privilege but in situations,

> . . . arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.

He elaborates:

> For these reasons, I think that it would be wrong to hold that a judge is tied hand and foot in such a case as the present and must always order an answer or punish a refusal to give the answer once it is shown that the question is technically admissible. Indeed, I understood the learned Attorney-General to concur in this view, namely, that the judge

[22] *Draper* v. *Jacklyn et al.* (1970), 9 D.L.R. (3d) 264.

[23] *Ibid.*

[24] *Udy* v. *Stewart* (1886), 10 O.R. 591; *Hansen* v. *Saskatchewan Power Corporation* (1962), 31 D.L.R. (2d) 189 (Sask. C.A.); *Gray et al.* v. *LaFleche et al.*, [1950] 1 D.L.R. 337, [1950] 1 W.W.R. 193, (1950-51), 57 Man. R 396; *Sornberger et al.* v. *C.P.R.* (1897), 24 O.A.R. 263; *Laughlin* v. *Harvey* (1897), 24 O.A.R. 438; *Richardson* v. *Nugent* (1918), 40 D.L.R. 700, 45 N.B.R. 331.

[25] [1963] 1 All E.R. 767, per Donovan L.J., at pp. 772-773.

> should always keep an ultimate discretion. This would apply not only in the case of journalists, but in other cases where information is given and received under the seal of confidence, for example, information given by a patient to his doctor and arising out of that relationship. In the present case, where the ultimate matter at stake is the safety of the community, I agree that no such consideration as I have mentioned, calling for the exercise of a discretion in favour of the appellants, arises, and that, accordingly, their appeals fail and must be dismissed.

In *Attorney-General* v. *Clough*[26] in somewhat similar circumstances, Lord Parker C.J., while committing the journalist for contempt and refusing to recognize any privilege went on to say:

> As I have said, it seems to me that certain classes of communication have been recognised as privileged. In the rest of a vast area, it seems to me that it must be for the court to ascertain what public policy demands. If, in the circumstances of any particular case, it became clear that public policy demanded a recognition of some claim to privilege, then, as I conceive, it would be the duty of this court to give due effect to public policy and recognise the claim.

This wide ranging discretion does not appear to have been claimed by Canadian courts. Reference is made to it in *McConachy* v. *Times Publishers Ltd. et al.*[27] Davey J.A. (the only judge to deal with the point) found it unnecessary to decide the question of a judicial discretion to restrict cross examination as to a newspaper's sources of information.

The rationale of the English cases and in particular the *Attorney-General* v. *Clough,*[28] appears to be that existing privileges against disclosure may be inadequate and that it is necessary on occasion to have "a judge-made privilege" with respect to certain types of communication for which public policy demands protection. Where privilege exists, its foundation is to encourage communication by removing the fear of subsequent disclosure. The same rationale would not appear to apply to "judge-made privileges". How is one to know that the privilege will attach? The circumstances under which the judicial discretion will be exercised cannot be forecast with any precision. It is therefore submitted that the English cases ought not to be followed.

Insofar as such a discretion is justifiable as an intrument in dealing with the problems depicted by the English cases, the same object can be achieved by recognition of the fact that a judge is not compelled to commit for contempt even when there is a refusal. To introduce a wide ranging judicial discretion to exclude relevant evidence appears to be an expensive price to pay to accomplish this limited object. The price is the introduction of a great deal of uncertainty into the rules of evidence.

---

[26] *Supra,* footnote 17, at p. 425.
[27] (1965), 49 D.L.R. (2d) 349, at p. 352.
[28] *Supra,* footnote 17.

It is submitted that there is no reason for importing into the law of evidence a discretion to exclude evidence in dealing with the type of situation depicted by *Cronkwright* v. *Cronkwright*.[29] The English cases and some Canadian cases reviewed above demonstrate that this is so. It is submitted that inadequacies in the existing law relating to privileged communications should be dealt with by either legislation or "judge-made law" extending the privilege rather than by a discretion exercised *ad hoc* as suggested by Lord Parker in *Attorney-General* v. *Clough*.[30] Apart from the uncertainty it creates there are other difficulties with the latter approach. If a privilege exists, it is the privilege of the parties and may be waived if both parties desire the evidence to be admitted.[31] A judicial discretion on the other hand, based on public policy, is not subservient to the wishes of the parties but to that of the public. Thus an instrument designed to overcome the inadequacies of privilege may result in the exclusion of evidence which both parties want.

JOHN SOPINKA*

* * *

TRUSTS INTER VIVOS—DUTY TO CONVERT UNDER-PRODUCTIVE PROPERTY—THE EVEN-HAND RULE.—Where under-productive property is settled by deed on trust for persons in succession, does the trustee owe a duty to the life tenant to convert the property into securities producing a higher rate of return? An answer to this question can, of course, be found in any of the standard English works on the law of trusts. Unless an intention to the contrary can be gathered from the terms of the trust instrument there is no such duty.[1] The same rule applies to specific bequests of property on trust for persons in succession[2] and even to residuary devises of real estate on such trusts.[3] It is only with respect to residuary bequests of personalty that equity has imposed upon the trustees a duty to convert under-productive, wasting or reversionary property into authorized investments.[4] The distinction between

[29] *Supra*, footnote 1.
[30] *Supra*, footnote 17.
[31] *Pais* v. *Pais*, [1970] 3 All E.R. 491.

* John Sopinka, of the Ontario Bar, Toronto.

[1] See, *e.g.*, Snell's Principles of Equity (26th ed., 1966), p. 236; Underhill's Law of Trusts and Trustees (11th ed., 1959), p. 291; Hanbury's Modern Equity (9th ed., 1969), pp. 328-329; Halsbury's Laws of England (3rd ed., 1962), Vol. 38, p. 880. See also, S. J. Bailey, (1942-43), 7 Conv. (N.S.) 128, at pp. 128-129; *Re Van Straubenzee*, [1901] 2 Ch. 779.

[2] *Pickering* v. *Pickering* (1839), 4 My. and Cr. 289, at p. 298; *Re Van Straubenzee, ibid.*, at p. 782.

[3] *Re Searle*, [1900] 2 Ch. 829; *Re Darnley*, [1907] 1 Ch. 159; *Re Oliver*, [1908] 2 Ch. 74.

[4] *Howe* v. *Lord Dartmouth* (1802), 7 Ves. 137; *Re Lennox*, [1949] S.C.R. 446, and many other cases.

residuary bequests of personalty on the one hand and other testamentary settlements and settlements *inter vivos* on the other is, presumably, based on the principle that equity should not impose a duty to convert where the property has been specifically selected and appropriated to the trust by the settlor.[5]

These principles are well established and until recently there was every reason to believe that they qualified the equally well established principle that trustees are under a duty to hold an even hand between the persons interested under the trust. Where the trustees were expressly authorized to retain or convert under-productive or wasting property the position was no different. Thus in *Gray* v. *Siggers*,[6] short leaseholds were settled on the testator's widow for life with remainders over. The trustees, one of whom was the widow, were given power to retain or convert all or any part of the property as, in their absolute discretion, they might think fit. It was argued for the remaindermen that the leaseholds should be sold and that the life tenant should receive the annual income from the proceeds. Notwithstanding the possibility that the leaseholds might expire in the widow's lifetime, the court refused to interfere.[7] The approach has been similar in cases where the trustees have been given a duty to convert with a power to postpone at their discretion. In one such case, Middleton J.A. said:[8]

> [The delay of the trustees] is in my view entirely without blame for the testator gave all his property to his widow and the Trust Company to be held and disposed of by them as directed by his will, and he authorizes his trustees "to sell and dispose of all or any part of his real estate . . . as they see fit", leaving the re-investment of the same entirely to their judgment and discretion. I think this gives to the executors an uncontrollable discretion which they may exercise, not only in such manner but at such time as in their judgment they deem proper, and in the absence of any suggestion that the power has not been exercised honestly and in good faith, the executor cannot be said to have been guilty of any breach of trust.

In none of these situations was it suggested that the even-hand rule might either impose upon trustees a duty to convert under-productive or wasting property or limit the effect of an express power to retain. The one exception was the special case of a will which settled residuary personalty and which contained neither an express power to retain the property in its original state nor any other implication that the life tenant was intended to enjoy the property in specie. In cases other than that just mentioned the even-

[5] Underhill, *op. cit.*, footnote 1, p. 291.

[6] (1880), 15 Ch. D. 74. See also, *In re Nicholson*, [1909] 2 Ch. 111; *Re Courtier* (1887), 34 Ch. D. 136; *Re Sheldon* (1888), 39 Ch. D. 50.

[7] "I cannot look at the question whether the leaseholds are for long or short terms, because, whether long or short, the widow was to have the property in specie if the trustees thought fit to retain it": *ibid.*, at p.77.

[8] *Re Rutherford*, [1933] O.R. 707, at pp. 725-726.

hand rule's main application as between successive beneficiaries was to act as a brake on any purported exercise by the trustees of a power to convert and to re-invest.[9] The court would not enforce the exercise of the power against the wishes of the trustees but it would prevent them from exercising the power in order to favour unduly one beneficiary against another.

The principles which have been stated may, of course, be over-ridden if a beneficiary can establish that the trustees were guilty of an abuse of discretion in deciding not to sell. An allegation of this kind may be hard to substantiate if the trustees rely on their undoubted right to refuse to give reasons for their decision.[10] If it can be substantiated there is no doubt that the court has power to intervene even, in appropriate circumstances, to the extent of removing the trustees.[11]

Consider the following cases: (a) the trustees' refusal to convert is actuated by bad faith; (b) the trustees erroneously believe that they have no power to convert; (c) the trustees erroneously believe that, under the terms of the trust instrument, they are authorized to favour the life tenant over the remainderman or *vice versa*. In the first two cases the main difficulties which would have to be overcome by a beneficiary who seeks the court's intervention would normally be evidential. In the third case, there might also be a very real difficulty in establishing that the trustees' belief was erroneous in law. If specific under-productive property is settled on persons in succession and the trustees are given a power to retain the property, there seems to be a clear implication that to that extent the even-hand rule has been waived and that the fact that the remaindermen may be favoured to the prejudice of the life tenant does not in itself impose upon the trustees any duty to convert. If this were not so, the cases which have been referred to at the beginning of this comment would be inexplicable and the rule which applies to residuary bequests of personalty would extend to all settlements whether *inter vivos* or testamentary. Indeed it is implicit in those cases, that the absence of an express power to retain does not affect the matter. As long as the settlement does not arise by virtue of a residuary bequest of personalty, equity imposes no duty to convert.

The principles which have been outlined have governed the practice of lawyers drafting trust documents and trustees administering estates in England and in other parts of the Common-

[9] As *e.g.*, in *Raby* v. *Ridehalgh* (1855), 7 De G. M. and G. 104; *Stuart* v. *Stuart* (1841), 3 Beav. 430; *Re Armstrong* (1924), 55 O.L.R. 639.

[10] *Re Beloved Wilkes's Charity* (1851), 3 Mac. and G. 440; *Re Londonderry's Settlement*, [1965] Ch. 918.

[11] For general comments on the inherent power of the court to remove a trustee see *Letterstedt* v. *Broers* (1884), 9 App. Cas. 371; *Re Wrightson*, [1908] 1 Ch. 789.

wealth for a considerable time. For that reason, and quite apart from the fact that it is not everyday that a trust company is removed from a trust, the implications of the reasoning in the judgments delivered by Keith J. at first instance and Arnup J.A. in the Court of Appeal of Ontario in *Re Smith*[12] are more than a little disturbing.

In March 1966 the settlor transferred shares of Imperial Oil Limited to the trust company on trust to pay the income to his mother for life with remainder to the survivor of his mother and himself. The trustee was expressly authorized in its sole discretion (a) to "Retain the Trust Fund in its present form, whether producing income or not" and (b) to "convert into money and bonds, stocks, shares . . . from time to time in its hands and from time to time invest the proceeds thereof" in various classes of investments described in the trust instrument. From March 1966 until August 1969 the trustee paid the annual income from the shares to the life tenant. This income was considerably below that obtainable from other securities in which the trustees were authorized to invest. In August 1969, the life tenant's solicitors requested the trustee to diversify the portfolio in order to produce a greater return for the life tenant. The trust company acknowledged the letter and sought the advice of the settlor through his solicitors. The latter then wrote to the life tenant's solicitors to the effect that they would be consulting the settlor and would report back in the near future. The life tenant's solicitors received no further communication for some nine months and ultimately applied to the court. The court was asked to determine (a) whether the trustee was "in breach of its duty to maintain an even-hand between the life-tenant and the remainderman by refusing to exercise its power to invest in securities which would produce a reasonable return" to the life tenant, (b) whether the trustee was "in breach of its duty to exercise prudence and reasonable care in the investment of the trust assets by failing to diversify the investments of the trust" and (c) whether the trustee had "properly exercised its discretion with respect to the investment of the trust assets". An application was also made for an order removing the trustee.

At first instance Keith J. answered questions (a) and (c)[13] in the affirmative and granted an order removing the trustee. The learned judge rejected the trust company's argument that the terms of the trust instrument required it to retain the shares of Imperial Oil Limited and found that the trustee had not maintained an even hand as between the beneficiaries. The report then continues:[14]

---

[12] [1971] 1 O.R. 584 (Keith J.); [1971] 2 O.R. 541 (C.A.).

[13] Question (b) was answered in the negative. No reason for this answer appears in the report.

[14] The learned judge cited as authorities the cases in footnotes 9, *supra*,

> Unless there is some provision in the trust agreement which prevents the trustee from doing so, it seems to me inescapable that the trustee is in breach of his well-recognized duty to maintain such an investment.

The order for removing the trustee was made on the ground that the deference which had been shown to the views of the settlor made it impossible to restore confidence in the original trustee with respect to the future administration of the trust.

In a judgment delivered orally by Arnup J.A. the Court of Appeal agreed in substance[15] with the decision and the reasoning of the judge at first instance.

On the facts as found by the learned trial judge the decision that the trustee had failed to exercise its discretion and had thereby been guilty of a breach of trust is in no way in conflict with the principles which were stated earlier in this comment. What is disturbing both in the judgment of Keith J. and that of the Court of Appeal is the treatment of the even-hand rule. It seems to be implicit in both judgments that the fact that the life tenant was receiving a comparatively low rate of return on the investments was sufficient to impose, at least *prima facie*, a duty to convert and reinvest.[16] Moreover the fact that the trust instrument expressly authorized the retention of the entire fund "whether producing income or not" was obviously not regarded as conferring power upon the trustee to hold the scales unevenly to the prejudice of the life tenant.[17] The finding of the Court of Appeal was that the trust company was "in breach of its duty to maintain an even-hand between the life tenant and remainderman by refusing to exercise its power to invest in securities which would produce a reasonable return for the life tenant having regard to her financial circumstances". Although the finding is not altogether free from ambiguity it does appear to represent more than a decision that the trustee had failed to exercise its discretion; it appears rather as a finding that a conversion and re-investment should have been made. The even-hand rule was thus treated as governing the way in which the discretion whether to convert or retain ought to have been exercised.

If this is a correct interpretation of the reasoning of the learned

---

a passage from Lewin on Trusts (16th ed., 1964), p. 356, which summarizes the effect of those cases and passages from Underhill's Law of Trusts and Trustees, *op. cit.*, footnote 1, art. 45(1), p. 273, and Halsbury, *op. cit.*, footnote 1, p. 972, para. 1683, which contain general statements of the even-hand rule.

[15] The court found that it was unnecessary to answer questions (b) and (c) *supra* and varied the judgment at first instance accordingly.

[16] [1971] 1 O.R. 584, at pp. 588-589 (Keith J.); [1971] 2 O.R. 541, at p. 542 (C.A.).

[17] Neither the judgment at first instance nor that of the Court of Appeal places any significance on the inclusion of these words.

judges the case must have some impact on the practice of drafting and administering trusts, as least in Ontario. The English decisions and the propositions stated in the English texts can no longer be regarded as safe and secure guides to trustees empowered to retain under-productive property.

It is of course, possible that one should confine the decision to its own facts and ignore any implications which the reasoning of the learned judges might appear to have for trustees who recognize the existence of their discretions and make a *bona fide* attempt to exercise them. It is very doubtful whether any trustee could afford to do this and until clarification is obtained much more attention will have to be given to the insertion of clauses which will effectively exclude the even-hand principle.[18] Such attention will be required notwithstanding the fact that the principle is obviously grounded in sound policy. In this area, the over-riding policy is still freedom of disposition and it is submitted that neither justice to dependants nor justice to the beneficiaries of a person's bounty will be served adequately by tinkering with principles which have long governed the interpretation of wills and settlements *inter vivos*. To a large extent the content of those principles is a matter of indifference. What is important is that the principles, whatever their content, should be clearly stated and consistently applied. Despite the judgments which were delivered in *Re Smith,* settlors will still desire in some cases to authorize their trustees to benefit one beneficiary at the expense of another. In situations of the kind discussed in this comment the reasoning in those judgments has complicated unnecessarily the task of the lawyers engaged in drafting settlements and, more important, has created doubts as to the obligations of trustees administering settlements constituted prior to the decision.

MAURICE C. CULLITY*

* * *

LANDLORD AND TENANT—REMEDIES AVAILABLE TO LANDLORD WHEN TENANT WRONGFULLY REPUDIATES LEASE—PROPERTY LAW OR CONTRACT LAW—THE DEMISE OF *Goldhar* v. *Universal Sections & Mouldings Ltd.*—Premises are leased to a tenant for a term of years. Before the term expires, the tenant, without justification, repudiates the lease and gives up possession. The landlord accepts the termination of the lease and sues for damages

[18] For an example of such a clause see p. G-7 of A More Intelligent Lawyer's Guide to Drafting Ordinary Wills (1970) (contributed by Mrs. Bertha Wilson Q.C.).

* Maurice C. Cullity, of Osgoode Hall Law School, York University, Toronto.

for losing the benefit of the lease for the unexpired portion of the term. Will he succeed?

Since the Ontario Court of Appeal decided *Goldhar* v. *Universal Sections & Mouldings Ltd.*[1] in 1963, the answer has been no. Its statement of the law, subsequently applied by appellate courts in Alberta,[2] British Columbia[3] and Nova Scotia,[4] remained the last word on the subject until it was overruled last year by the Supreme Court of Canada in *Highway Properties Ltd.* v. *Kelly, Douglas & Co. Ltd.*[5]

In *Goldhar*, the landlord leased a portion of a building to the tenant[6] in 1956. The rental was $833.00 per month, and the lease expired in October, 1962. The tenant advised the landlord that it proposed to move out in May, 1959, because of constant flooding of the demised premises. The trial judge[7] found the reason given by the tenant for the move to be unsupported by the facts; the real reason was that the tenant needed larger space which it had already acquired elsewhere.[8]

The tenant left in May, 1959. The premises remained vacant until the middle of July, 1959. From that date until mid-November, 1959, the landlord permitted a portion of the space to be occupied by Maple Leaf Plastics Limited, a company owned by her husband and brother-in-law. On November 17th, 1959, after several unsuccessful efforts to find a tenant willing to pay a higher rental, the landlord leased the premises to that company for the balance of the original unexpired term for $500.00 per month.

The trial judge, Gale J. (now C.J.O.), found as facts that the landlord's efforts to mitigate her damages after the tenant had vacated were reasonable and proper,[9] and that the lease to Maple Leaf Plastics Limited of November 17th, 1959, was made in good faith at the best figure then obtainable.[10] He rejected the tenant's argument that it had offered a surrender of the lease in delivering up the premises, which surrender the landlord had accepted when she re-let the premises to Maple Leaf Plastics Limited. Instead,

---

[1] [1963] 1 O.R. 189, 36 D.L.R. (2d) 450.

[2] *Bel-Boys Buildings Ltd. et al.* v. *Clark et al.* (1967), 62 D.L.R. (2d) 233, 59 W.W.R. 641.

[3] *Highway Properties Ltd.* v. *Kelly, Douglas & Co. Ltd.* (1968), 1 D.L.R. (3d) 626, 66 W.W.R. 705.

[4] *South End Development Ltd.* v. *E. D. Eddy Co.* (1970), 16 D.L.R. (3d) 89.

[5] (1971), 17 D L.R. (3d) 710, [1971] S.C.R. 562.

[6] Actually, the parties were tenant and sub-tenant, respectively. For the purpose of clarity, it is easier to refer to them as landlord and tenant.

[7] [1962] O.R. 744, 34 D.L.R. (2d) 82.

[8] *Supra,* footnote 7, at pp. 779 (O.R.), 87 (D.L.R.).

[9] *Ibid.,* at pp. 782 (O.R.), 90 (D.L.R.).

[10] *Ibid.,* at pp. 783 (O.R.), 91 (D.L.R.).

he adopted the landlord's position that:[11]

> . . . this is not an action for rent following a surrender — and the statement of claim bears this out — but rather a simple action for damages for breach of contract based upon the [tenant's] repudiation of the contract and the measure of damages is calculated upon the rental reserved in the lease.

Accordingly, he gave judgment[12] for the landlord for the rent unpaid until mid-July, 1959 (when Maple Leaf Plastics Limited was first let into possession), and for the difference between the rent stipulated in the tenant's lease ($833.00 per month) and the rent actually received by the landlord ($500.00 per month) from November 17th, 1959 until October, 1962.

The tenant appealed. It did not contest the trial judge's findings that it was not justified in vacating the premises and that the $500.00 monthly rental paid by Maple Leaf Plastics Limited for the remainder of the term was a fair market value.[13] Rather, the basis of the appeal was that Gale J. had wrongly applied principles of the law of contract instead of those of the law of property; and that, applying the latter, the original lease had been surrendered by operation of law when the tenant granted a new lease to Maple Leaf Plastics Limited, with the result that the landlord's right to recover damages accruing after that date was gone.

The Court of Appeal agreed that there was a fundamental difference between leases and other classes of contract:[14]

> While the modern lease contains numerous contractual provisions it operates primarily to convey a possessory title. As a consequence the effect given by the law to promises by way of covenants in a lease has always received different treatment from that given to similar promises in an ordinary bilateral contract. In the latter where the covenants may be considered to be mutually dependent a substantial breach by one party will excuse the other party from further performance and permit recovery in damages for the breach. In leases, however, the covenants are assumed to be independent. . . . *Under concepts of property law a lease is primarily a conveyance to which the covenants are incidental.* . . . Any determination of the lease contract must, as a result, involve surrender, and acceptance of surrender, of the estate vested in the lessee.

The court found that there had been a surrender of the lease by operation of law, which the landlord was estopped from denying. The surrender arose without reference to, and even in spite of, the landlord's intention. In the words of McGillivray J.A., who deliv-

---

[11] *Ibid.*, at pp. 785 (O.R.), 93 (D.R.L.).
[12] *Ibid.*, at pp. 793 (O.R.), 101 (D.L.R.).
[13] *Supra*, footnote 1, at pp. 191 (O.R.), 452 (D.L.R.).
[14] *Ibid.*, at pp. 192-193 (O.R.), 453-454 (D.L.R.), italics mine.

ered the judgment of the court:[15]

> The estoppel by operation of law, as distinct from the acts of the parties, may in some circumstances arise independently of their intention and will occur where there has been acceptance of a new interest by the lessee or by acceptance of possession by the landlord.

However, having adverted to the irrelevance of intention, McGillivray J.A., referred to authorities which permitted the landlord to recover the deficiency arising after a subsequent re-letting where his intention to re-let on behalf of the tenant had been clearly communicated:[16]

> In another series of cases, however, the Courts have sought to avoid the rigour of the law as above enunciated and have, when the intention of the landlord has been made plain and notice has been given to the lessee, held in effect that the landlord in re-letting did so as agent of the first lessee and, as such, was entitled to recover from him any deficiency resulting from the subsequent leasing. In 23 Hals., 3rd ed., p. 686, the author states:
>
> > "If, however, after the tenant has quitted the premises, the landlord re-lets them to another tenant who goes into occupation, a surrender is effected from the time of the re-letting, unless the landlord gives notice to the tenant that the re-letting is on his account."

In the *Goldhar* case, the Court of Appeal found that the landlord had not given notice to the tenant that she proposed to re-let *on the latter s behalf*. It therefore felt obliged to apply "the rigour of the law" and hold the landlord estopped from asserting that there was no surrender when she re-let the premises on November 17th, 1959.[17] In the result, the tenant's appeal was allowed and the landlord's claim for damages arising subsequent to the re-letting to Maple Leaf Plastics Limited was dismissed.[18]

So long as *Goldhar* remained good law, a landlord faced with a defaulting tenant in similar circumstances had three options:

1. he could leave the premises vacant for the balance of the term and sue to recover the rent for that period;
2. he could elect to terminate the lease, reserving his right

---

[15] *Ibid.*, at pp. 194 (O.R.), 455 (D.L.R.). Compare, for example, the language of Baron Parke in *Lyon* v. *Reed* (1844), 13 M. & W. 285, quoted at pp. 197 (O.R.), 458 (D.L.R.).

[16] *Ibid.*, at pp. 198 (O.R.), 459 (D.L.R.).

[17] *Ibid.*, at pp. 199 (O.R.), 460 (D.L.R.).

[18] The Court of Appeal also varied the trial judgment by allowing the tenant's claim for rent for the period from mid-July until November 17th, 1959. This claim had been disallowed by the trial judge. The Court of Appeal held that the occupation by Maple Leaf Plastics Limited during that period was a bare licensee, and that the landlord clearly did not intend to resume possession during that period: *Ibid.*, at pp. 200 (O.R.), 461 (D.L.R.).

to sue for rent unpaid or for damages incurred up to the date of termination, but not thereafter; or

3. he could notify the tenant that he proposed to re-let the premises on the tenant's account and claim for any loss suffered, including the deficiency (if any) in the rental for the balance of the original term.

From a landlord's point of view, these three alternatives were scarcely calculated to inspire confidence in the law. The impracticality of the first option is obvious; the second option compelled a landlord to forego a potentially substantial claim; and the third option (at first blush the best of the three) turned out to be fraught with hidden dangers. In a later case, the landlord, purporting to exercise the legal fiction of re-letting on his tenant's behalf,[19] found himself unable to re-let except for a period that extended beyond the unexpired portion of the original tenant's term. His claim for damages following the re-letting was rejected because the court found that he could not be said to be acting as the tenant's agent in leasing the premises for a period in excess of the original term, and that, as a matter of law, he had accepted a surrender of the original tenancy when he purported to do so.[20]

Although rejected in *Goldhar*, there still remained (at least in theory) a fourth alternative: the landlord could elect to terminate the lease and claim damages against the defaulting tenant for the loss of the benefit of the lease over the balance of the unexpired term. The legal validity of this alternative arose again for decision in the *Highway Properties* case. In that case, the landlord owned property on which a shopping centre was to be erected. The proposed centre was to contain eleven stores, including a supermarket which was to be the principal tenant. The success of the centre, and of its constituent stores, depended in large measure on the number of customers which the supermarket and the combined operations of all the other tenants would attract.

Kelly, Douglas & Co. Ltd., which operated several supermarkets in British Columbia, leased the premises designated for use as a supermarket. Its lease contained a clause which specifically obligated it to carry on such business on the premises continuously during the full term of a fifteen-year tenancy. The lease provided for a minimum annual rental, plus an additional rental based on annual gross sales.

The shopping centre did not prosper. Unable to carry on its business continuously for the full term of the tenancy, the super-

---

[19] A fiction subsequently characterized by Mr. Justice Laskin as "a unilateral assertion of unauthorized agency", *supra,* footnote 5, at pp. 718 (D.L.R.), 572 (S.C.R.).

[20] *Korsman* v. *Bergl,* [1967] 1 O.R. 576, 61 D.L.R. (2d) 558 (C.A.).

market closed its doors some seventeen months after the tenant went into possession. As might have been expected, the withdrawal of the supermarket had a disastrous effect on the centre as a whole: other stores failed, tenants moved out and the centre took on the appearance of a ghost town.

When the landlord sued, the tenant, in its statement of defence and counterclaim, expressly repudiated the lease, which then had about twelve more years to run. The landlord thereupon advised the tenant that it proposed to take possession of the premises but would hold the tenant responsible for any damages suffered as a result of its breach and wrongful repudiation of the lease. Possession was re-taken by the landlord, which attempted, without success, to re-let the premises. Ultimately, the supermarket space was divided into three separate stores, for which tenants were eventually obtained.

In its statement of claim (as amended at the trial), the landlord sought damages for wrongful repudiation of the lease, principally for prospective loss resulting from the tenant's failure to carry on the supermarket business in the centre for the full term. The tenant (which likewise amended its statement of defence at trial) took the position that the re-entry by the landlord constituted an acceptance of a surrender of the lease, and that the landlord's relief was confined in law to rent accrued due and damages occasioned before the date of such surrender.

Both the trial judge[21] and the majority of the British Columbia Court of Appeal[22] rejected the landlord's claim for damages arising after its re-entry. Applying *Goldhar*, they held that the lease had been surrendered by operation of law as a result of the tenant's repudiation and the landlord's taking of possession, with the result that the landlord could not recover for damages arising after the date of the surrender. In doing so, they accepted the principle that the law of property, rather than the law of contract, governed the rights and duties of the parties in the circumstances. Davey C.J.B.C., who dissented in the Court of Appeal, expressed his frustration with this concept by commenting that ". . . the law would indeed be impotent if it could not award a landlord damages for loss caused by a tenant's wrong simply because a contract is combined with a grant of an estate in land".[23]

Twice rebuffed by the adverse application of the *Goldhar* case, the landlord appealed further. The Supreme Court of Canada, in a unanimous decision, allowed the appeal, approved the basis of the landlord's claim for damages and overruled *Goldhar*. Mr. Justice Laskin, who delivered the judgment of the court, re-

[21] (1967), 60 W.W.R. 193.
[22] *Supra*, footnote 3.
[23] *Ibid.*, at p. 632 (D.L.R.).

jected the proposition that the landlord's termination of the lease precluded his right to recover for damages arising thereafter:[24]

> Although it is correct to say that repudiation by the tenant gives the landlord at that time a choice between holding the tenant to the lease or terminating it, yet at the same time a right of action for damages then arises; and the election to insist on the lease or to refuse further performance (and thus bring it to an end) goes simply to the measure and range of damages. I see no logic in a conclusion that, by electing to terminate, the landlord has limited the damages that he may then claim to the same scale that would result if he had elected to keep the lease alive.

He saw no justification for applying one law to the repudiation of leases and another to the repudiation of commercial contracts generally:[25]

> It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land. Finally, there is merit here as in other situations in avoiding multiplicity of actions that may otherwise be a concomitant of insistence that a landlord engage in instalment litigation against a repudiating tenant.

On consent of counsel, the case was remitted to the trial judge to assess damages on the basis of the the evidence which had been adduced before him. While refraining from defining in advance the specific items of damage to be assessed, the court did indicate[26] that two elements to be considered would be the present value of the unpaid future rent for the unexpired period of the lease (less the actual rental value of the premises for that period) and the loss, so far as provable, resulting from the repudiation by the tenant of the covenant to carry on business.

In thus repudiating the purported distinction between damages for breach of leases and damages for breach of other contracts, the *Highway Properties* case echoed the sentiments expressed in an American legal commentary[27] that:

> Long after the realities of feudal tenure have vanished and a new system based upon a theory of contractual obligation has in general taken its place, the old theory of obligations springing from the relation of lord and tenant survives. The courts here have neglected the caution of Mr. Justice Holmes, "that continuity with the past is only a necessity and not a duty". If one turns from a decision upon the conditions implied upon a contract for the sale of goods in installments,

---

[24] *Supra,* footnote 5, at pp. 721 (D.L.R.), 576 (S.C.R.).
[25] *Ibid.*
[26] *Ibid.,* at pp. 716 (D.L.R.), 570 (S.C.R.).
[27] (1924-25), 23 Mich. L. Rev. 211, at pp 221-222, quoted, somewhat apologetically, in *Goldhar, supra,* footnote 1, at pp. 200 (O.R.), 461 (D.L.R.).

to one upon the obligation of the parties to a lease, one changes from the terms and ideas of the twentieth century to those of the sixteenth. The notion of "privity of estate" and its attendant rights and duties appears as quaint and startling as a modern infantryman with a crossbow.

The Supreme Court of Canada has now armed the modern combatant in landlord-and-tenant litigation with modern weapons. It is unlikely that even the most pacific observer of the jurisprudential battleground will fail to applaud this particular rearmament.

MARVIN A. CATZMAN*

* * *

NEGLIGENT MISSTATEMENTS IN THE PRIVY COUNCIL—AREA OF LIABILITY CLEARLY DELIMITED.—The decision in *Hedly Byrne* v. *Heller*[1] made the academic world buzz with excitement. A great number of words were written describing the judgments in the case and speculating as to their likely future effect.[2] Some doubted whether the House of Lords should have been so bold[3] and others commended the court for its innovative approach.[4] I myself became convinced that, whatever the intention of their Lordships had been, the shackles of past misconceptions had prevented the House of Lords from couching their view in language which would unequivocally fix liability on a person who carelessly advised or informed another who could reasonably rely on such advice or information.[5]

---

* Marvin A. Catzman, of the Ontario Bar, Toronto.

[1] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575.

[2] The following is by no means an exhaustive list: Dworkin (1962), 25 Mod.L.Rev. 246 (a note on the Court of Appeal result); Stevens, *Hedley Byrne* v. *Heller*—Judicial Creativity and Doctrinal Possibility (1964), 27 Mod.L.Rev. 121; D. L. Mathieson (1965), 28 Mod.L.Rev. 595 (a note on *Smith* v. *Auckland Hospital Board*, [1965] N.Z.L.R. 191); Weir, [1963] Camb.L.J. 216 (a note on *Hedley Byrne*); Jolowicz, [1965] Camb.L.J. 27 (a note on *Bagot* v. *Scanlan Stevens & Co.*, [1964] 3 W.L.R. 1162); Dias, [1965] Camb.L.J. 191 (a note on *Weller & Co. and Another* v. *Foot and Mouth Disease Research Institute*, [1966] IQ.B. 569); D. M. Gordon, *Hedley Byrne* v. *Heller* in the House of Lords (1964-65), 38 A.J.L. 39, 79, also (1965), 2 U.B.C.L.Rev. 113; James, Innocent Misrepresentation: An Unanswered Challenge, [1963] J.Bus.L. 336; North, Liability for Professional Negligence: Some Comparisons, [1963] J.Bus.L. 131; North, Valuers: A Study in Professional Liability (1965), 29 The Conv. 186; 275; Goodhart, Liability for Innocent but Negligent Misrepresentations (1964), 74 Yale L.J. 286; Honoré, *Hedley Byrne & Co.* v. *Heller & Partners Ltd.* (1965), 8 J.S.P.T. 284; Coote, The Effect of *Hedley Byrne* (1967) 2 N.Z.U.L.Rev. 261; Glasbeek, Limited Liability for Negligent Misstatement, in Linden (Ed.) Studies in Canadian Tort Law (1968), p. 115, as well as all standard contract texts.

[3] *E.g.* Gordon, *op. cit., ibid.*

[4] *E.g.* Stevens, *op. cit., ibid.*

[5] *Op. cit., ibid.*

The fact that so many views could be stoutly defended provided stimulus to academics but did very little to resolve the law with respect to statements. Fortunately a recent case arising in Australia found its way into the Privy Council where an authoritative pronouncement was made about the state of the law of statements. The case was *M.L.C.* v. *Evatt*.[6]

The fact situation could not have been better devised to test the scope of *Hedley Byrne*. Mr. Evatt was a well-known barrister. He had invested money in a firm known as H. G. Palmer (Consolidated) Ltd., by way of debentures. He was considering whether to invest more money in the same company and sought advice on this from his insurer, Mutual Life and Citizens' Assurance Co. Ltd. The reason he went to the Assurance Company for such advice was that both H. G. Palmer and the Assurance Company were subsidiaries of another company, M.L.C. Ltd. Indeed, the three companies had some directors in common.

The advice that Evatt received caused him not only to retain his existing investment but also to lend further monies to H. G. Palmer. This company eventually failed and Evatt brought an action against the Assurance Company and M.L.C. Ltd. His argument was that the Assurance Company was, by its servants, in a better position than Evatt to obtain information about H. G. Palmer's financial position and that the company knew that Mr. Evatt intended to rely on the advice. It followed that if the company had acted carelessly it ought to be held to have been in breach of its duty of care. The defendants demurred[7] on the basis that the facts alleged did not constitute any cause of action known to the common law. Thus the stage was set for the Australian hierarchy of courts to examine the nature of liability for financial loss resulting from carelessly made statements.

The New South Wales Supreme Court (Court of Appeal) twice decided that the facts alleged did not disclose a cause of action.[8] The High Court, however, held to the contrary by the barest possible majority—three to two.[9] Leave to appeal to the Privy Council was granted.

1. *The Privy Council decision.*[10]

By a majority of three to two the Privy Council decided that

[6] *Mutual Life and Citizens' Assurance Co. Ltd. and Another* v. *Evatt* (1968), 42 A.L.J.R. 316 (H.C.), (1970) 44 A.L.J.R. 478 (P.C.).

[7] The New South Wales pleading rules still made a demurrer a special plea.

[8] (1967), 86 W.N. (Pt. 2) (N.S.W.) 183, 87 W.N. (Pt. 2) (N.S.W.) 165. It required two hearings because the pleadings were altered.

[9] (1968), 42 A.L.J.R. 316. The majority was considered by Barwick C.J., Menzies and Kitto JJ.: the minority by Taylor and Owen JJ. For a discussion of the reasons for decision see Glasbeek, Another Non-Statement on the Law of Statements? (1969), 1 Aust. Curr. L. Rev. 2.

[10] (1970), 44 A.L.J.R. 478.

the demurrer should succeed. That is, it decided that the pleadings did not disclose a cause of action known to the common law. Although the cases in which a "duty of care" will exist are stated very clearly by the majority in the Privy Council, the closeness of the "judicial score" makes it a pity that the reasoning of the majority is not more compelling. After all, taking the history of the *Evatt* litigation as a whole, a quick addition shows that seven learned lawyers decided that there could be a duty of care on the basis of the pleadings and that six learned lawyers decided that there was no such duty of care. The minority have carried the day. This is not the only case in which this has happened, but every time that it does occur it serves as a reminder that the common law system is not democratic. Hence, if the minority decision is to be binding law on the basis that the wisest (rather than the most) men have propounded it, it would be advantageous if the supporting reasoning was candid and logical.

2. *The reasoning of the Privy Council.*

The majority was constituted by Lord Hodson, Lord Guest and Lord Diplock. The last-named delivered the opinion.

Lord Diplock pointed out that prior to *Hedley Byrne* v. *Heller* it was unquestioned law that, in the absence of a contract or of a fiduciary relationship, a representor only owed a duty to be honest in respect of economic loss suffered by a representee who foreseeably relied on the representation. The question was, therefore: what difference to the law had been occasioned by the decision in *Hedley Byrne* where it had been just as unequivocally stated that in some situations, as well as in contractual or fiduciary ones, there would be a duty to take reasonable care?

In answering this question the opinion of the majority noted that one of the oldest principles known to the common law was that those who follow a calling which requires skill and competence must exercise reasonable skill and competence. When therefore a person engages in a business in which he, as a normal part of that business, gives advice on the basis of information with which an inquirer furnishes him or which he has to garner himself, that person must meet the standard of care that a man in his business can reasonably be expected to achieve. From this it follows, so goes the opinion, that a person who gives gratuitous advice, but who does not normally do so as part of his business, cannot be expected to meet the same standard as one who does ordinarily give such advice, and therefore cannot owe a duty to conduct himself in accordance with such a standard. Therefore, the argument continues, as

> . . . there is in their Lordships' view no half-way house between that [the standard of care owed by a person who habitually gives advice]

> and the common law duty which each man owes his neighbour irrespective of his skill—the duty of honesty,[11]

all that can be asked of the unskilled representor is that he be honest.

Much reliance was placed on the decision in *Low* v. *Bouverie*[12] to bolster the view that the only duty owed was a duty to be honest, as opposed to a duty to be careful. In that case, it will be remembered, the inquirer was a potential lender of money. The inquiry was in respect of the state of encumbrance of a life interest created for a beneficiary under a trust. The trustee, in his reply, omitted to advise the inquirer of six mortgages of which he (the trustee) ought to have known. He ought to have known about them because these mortgages were recited in the deed which had been used to appoint him as trustee. It was held that, there being no doubt about the trustee's honesty, he owed the inquirer no further duty. It is manifest, therefore, why the majority found support for its decision in the holding of *Low* v. *Bouverie*. But, as the minority opinion of the Privy Council in *Evatt* pointed out, it was by no means unchallengeable support. The minority noted that in *Low* v. *Bouverie* there was language indicating that the trustee's representations had not been adamant statements that there were no other encumbrances. Therefore, the minority argued, the result in that case might be explicable on the basis that the trustee's representations had the equivalent of a "without responsibility" clause attached.

This leads to the next question: if *Low* v. *Bouverie* does not incontrovertibly establish the majority's proposition that there is no half-way house between a duty to exercise professional skill or experience or both and a duty merely to be honest, do principles of logic do so? The answer must be "No".

The majority in *Evatt* subscribes to the view that a person who advises another because it is normal to do so in the course of his business, owes a duty of care to the advisee for gratuitous advice so given. Such a person is potentially liable because he holds himself out as an expert. But, of course, that does not mean that if the advice is wrong that liability will follow; it merely means that the adviser must have used skill and expertise in the way that a reasonable adviser in his position would have done. Much ink has been spilled describing and decrying the mysticism of the reasonable man concept as a standard-setter and it is not proposed to smudge the picture further in this comment. Suffice it to say that there seems nothing incongruous about fixing a man who is in a position of knowledge (or who can be reasonably thought, by a *bona fide* inquirer, to be in a position of knowledge) with a duty

---

[11] *Ibid.*, at p. 481.
[12] [1891] 3 Ch. 82.

to be as careful about giving advice in respect of that knowledge as a reasonable man in that situation could be expected to be. It should not matter whether the advice was given as part and parcel of the everyday business practice of the adviser. Although difficult, the exercise is surely no more abstract than setting the standard of care to be borne by the ordinary, average, reasonable expert. The minority in *Evatt* put this argument most convincingly:[13]

> It must be borne in mind that there is here no question of warranty. If the adviser were to be held liable because his advice was bad then it would be relevant to inquire into his capacity to give the advice. But here and in cases coming within the principles laid down, in *Hedley Byrne* the only duty in question is a duty to take reasonable care before giving the advice. We can see no ground for the distinction that a specially skilled man must exercise care but a less skilled man need not do so. We are unable to accept the argument that a duty to take care is the same as a duty to conform to a particular standard of skill. One must assume a reasonable man who has that degree of knowledge and skill which facts known to the inquirer (including statements made by the adviser) entitled him to expect of the adviser, and then inquire whether such a reasonable man could have given the advice which was in fact given if he had exercised reasonable care.

That the members of the majority could not see the simple logic of this argument is not to be attributed to their lack of capacity to grasp the tenets of legal reasoning. Rather it is evidence of their strong desire to limit liability for misstatements. This desire can be gleaned from two further facets of their opinion.

Firstly, as already noted, the majority showed that it was not oblivious to the fact that a man might be fixed with a duty to be reasonably careful even though he was not normally engaged in business in which advice was customarily given. This is indicated by the fact that it accepted that a person who claimed "to possess skill and competence in the subject matter of the particular inquiry comparable to those who do carry on the business or profession of advising on that subject matter and is prepared to exercise a comparable skill and competence in giving the advice"[14] should be required to make good his claim. In the instant case it was felt that the Assurance Company (through its directors) had not made such a claim.[15] The pleadings merely alleged that the advisers were in a position to get information and that, in the company which employed them, there were skilled people who could assess that information and interpret it. The majority saw this as a negation of a holding out by the defendant that it had both the skill *and* the willingness to exercise it. After all, went the argument, there was nothing in the transaction between representors and representee

---

[13] See the dissenting opinion at p. 485, *supra*, footnote 10.
[14] *Ibid.*, at p. 482.
[15] *Ibid.*, at p. 483.

which suggested to the latter that the former would instruct their specialists to evaluate the information they would obtain.[16] That is, the majority really wanted evidence of some explicit assumption of responsibility. The minority interpreted the fact situation as one where the advisers had, by not expressly disclaiming responsibility, assumed it. At the very least, this differing interpretation of the fact situation suggests a preference for one result rather than another.

The second aspect of the majority opinion which reveals that their Lordships were eager to restrict the ambit of the duty to take care in cases of representations would be amusing if it did not reveal how artificial judicial reasoning can get when judges frankly do not like the result that common sense and legal logic apparently dictate.

Counsel for Evatt had relied heavily on two passages in *Hedley Byrne* which, if followed, would have defeated the demurrer. The cited passages were from the speeches of Lord Reid and Lord Morris of Borth-y-Gest respectively. Both passages seemed to say that where a person is so placed that a reasonable man might expect his advice to be reliable if carefully given, any advice offered in a serious context must be carefully given. The majority, quite properly, pointed out that any judicial argument must not be used in isolation, but must be put in its proper framework of reference — otherwise the meaning of those who constructed the argument might well be misrepresented. And when the majority put the two passages into the allegedly appropriate contexts, it came to the view that both Lord Reid and Lord Morris of Borth-y-Gest, despite the language they had used, really intended that the existence of a duty of care should be restricted to people who carried on the business of giving advice or normally undertook to give advice of a certain kind.[17]

There would be nothing remarkable about this method of analysing previous judicial pronouncements if it were not for the fact that the two judges who wrote the analysed passages actually formed the minority in the *Evatt* case! Probably somewhat aggrieved, Lord Reid and Lord Morris of Borth-y-Gest replied:[18]

> We are unable to construe the passage from our speeches cited in the judgment of the majority in the way in which they are there construed.

Even though theoretically defensible, the fact that courts are not to look to parliamentary debates when searching for the intention of parliament in drafting certain sections of a statute is bad enough; but that judges, who can actually tell their fellow members of a bench what they meant by certain statements, can pointedly be ignored, is astounding.

[16] *Ibid.*, at pp. 483-484.
[17] *Ibid.*, at pp. 482-483.
[18] *Ibid.*, at p. 486.

3. *The majority's view of when a duty to take care will exist.*

(a) When the adviser carries on a business or profession which involves the giving of advice of a kind which calls for special skill and competence.

(b) When the adviser does not carry on such a business or profession, "but has, at or before the time at which his advice is sought, let it be known that he claims to possess skill and competence in the subject matter of the particular inquiry comparable to those who do carry on the business or profession of advising on that subject matter and is prepared to exercise a comparable skill and competence in giving the advice".[19]

4. *A brief appraisal.*

Once again it is clear that a duty of care in respect of statements causing financial loss is not to be given the scope of, say, the duty of care in respect of the manufacture of goods causing physical harm. Indeed, if anything, the Privy Council would limit the number of cases in which a duty of care will be established even more than the more pessimistic of the academics[20] thought likely, in as much as the non-expert who gives advice, to be held liable, must not only not disclaim responsibility but actually indicate a willingness to assume it. Undoubtedly, the principal motivation of the judiciary has been to dam the potential floodgates. It is clear that if economic loss is equated to physical or property injury, then careless advice would lead to recovery by many people of vast amounts of money if there were no other barrier to recovery. That is, the fear that a careless cartographer would be liable for all the economic consequences of the foundering of a large passenger liner on an uncharted obstruction would have been realized. Hence the unsurprising restriction of liability to cases where the advice is given by experts or people holding themselves out as experts. This approach has some merit as a matter of pragmatism. Professor Atiyah summed this up very well. He argued that not to recognize the distinctive nature of economic loss would lead to difficulties:

> When an insurance company pays on a policy, is this a "loss"? When a taxpayer is injured and suffers economic loss, and so pays less tax, is that a "loss" to the Revenue?[21]

But the distinction between financial loss caused through physical injury and financial loss caused directly was properly castigated as too artificial in *Hedley Byrne* itself. Lord Devlin's language did not leave any room for doubts. Having used an example to show the kind of result the distinction might bring about, his Lordship stated:[22]

[19] *Ibid.*, at p. 482.
[20] See Glasbeek, *op. cit.*, footnotes 2 and 9.
[21] (1969), 10 J.S.P.T. 232, at p. 233 (a book review).
[22] *Supra*, footnote 1, at pp. 517 (A.C.), 603 (All E.R.).

> I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle. It just happens to be the line which those who have been driven from the extreme assertion that negligent statements in the absence of contractual or fiduciary duty give no cause of action have in the course of their retreat so far reached.

This forthright statement supports the view I hold. It is undesirable, in terms of the encouragement of business generally, to have recovery for economic loss available to all and sundry who are affected in some way by a careless statement or representation. But it would be foolish to restrict the scope of liability by doing harm to fundamental principles.

It is the law which decides whether the relationship between two people is such that a duty of care toward the other ought to be imposed on one of them. It would be strange, therefore, to suggest that a duty will be imposed on such a person if he causes physical harm, or physical harm plus financial loss, but not if he causes "merely" financial loss. It would be strange because there is no logical argument which compels such a distinction. There may be, however, a policy argument to this effect. But policy arguments have an unaccommodating habit of losing their significance. For instance, it was argued in *Winterbottom* v. *Wright* that if the plaintiff recovered "the most absurd and outrageous consequences, to which I can see no limit, would ensue".[23] Ninety years later those consequences were no longer thought outrageous,[24] and to-day they are believed to be most acceptable. But to get to this position lawyers had to deliberately do violence to the expressed reasoning in previous decisions,[25] for the expressed reasons were tailor-made to fit in with a policy which no longer commended itself.

Thus, if policy is to dictate the limits of liability, let it be clear that it does so. Then, if new social developments make the policy unattractive, it can be dropped without remorse. That is, if the courts wish to diminish liability for economic loss, let them not achieve this result by pretending that the law does regard, and will always regard, economic loss as a strange head of damage which will prevent general principles governing the imposition of a duty of care by the law from applying. After all, the same results as the ones so far reached can be obtained by using the ordinary notions with respect to the duty of care question and by then imposing a

[23] (1842), 10 M. & W. 109; 152 E.R. 402, per Lord Abinger C.B.

[24] See *Donoghue* v. *Stevenson,* [1932] A.C. 562.

[25] After all, the House of Lords split three to two in *Donoghue* v. *Stevenson, ibid.,* and the way Lord Atkin dealt with the authorities is not as convincing as Lord Buckmaster's effort.

very low standard of care where the defendant has no special skill or has not claimed to have any. Concededly, this will not do away with the spreading effect, which Professor Atiyah wishes to avoid, when a defendant is said to be in breach of his duty of care. Of course, it could be argued that, as a matter of policy, such a defendant ought not to escape liability for the more remote damage arising out of his careless utterance.[26] But this argument does not face the issue clearly. It must be admitted that to leave the matter of liability purely to the judgment of a particular court as to the desirability of recovery or otherwise is unsatisfactory. Luckily, in the area of negligent misstatements causing financial loss, there is, in fact, no need for such a haphazard approach. The question of "duty of care" need not be twisted, nor need the "standard of care" be left to be manipulated. The area of recovery is likely to remain narrow because one of the basic tenets of tort liability commands such a result. The Privy Council, in setting out when a "duty of care" will exist, did not make any reference to the supposed distinction between financial and other kinds of damage but restricted itself to an enunciation of the situation in which potential liability exists. It could have (but unfortunately did not) advance a very good reason in support of its pronouncement.

First, let me reiterate that the logic of equating economic loss with other kinds of damage is incontrovertible. But the infliction of purely financial damage through faulty advice is different to the causing of injury by most other means. This is so because, in the final analysis, the advisee has a choice as to whether or not he is going to rely on the advice. It is trite law that a manufacturer will not be liable in respect of his defective product if the consumer had a reasonable chance of intermediate inspection. This is so because, when the consumer has had such an opportunity, it would be illogical not to rebut the presumption that he is not exercising any choice of his own and relying completely on the manufacturer's

---

[26] To take up Professor Atiyah's point about the Revenue's loss: if physical injury was incurred, it was once thought that the defendant ought not to make good the loss in so much as it represented money that would normally have been owed to the Taxation Department. See *British Transport Commission* v. *Gourley*, [1956] A.C. 185. That is, the Revenue was to lose, and the defendant to benefit. The decision was much criticized, the best attack being mounted by Bale. *British Transport Commission* v. *Gourley* Reconsidered (1966), 44 Can. Bar Rev. 66. Australian cases tried to skirt the result as much as it was possible without offending the principle that the House of Lords ought not to be ignored lightly. See, for instance, cases such as *Robert* v. *Collier's Bulk Liquid Transport Pty. Ltd.*, [1959] V.R. 280; *McLaurin* v. *Commissioner of Taxation* (1961), 34 A.L.J.R. 463. More significantly, in *Ontario* v. *Jennings* (1966), 57 D.L.R. (2d) 644, it was held that the defendant should not benefit at the Revenue Department's expense. The policy reasons advanced for this result would apply with equal logic to potential Revenue losses as a result of the infliction of "purely" financial damage.

skill and competence. That is, there will have been an intervening act breaking the chain of causation.

This is not the place to air views on the concept of causation; it is sufficient if the more obvious aspects of that difficult notion are applied to the subject of statements.

When gratuitous advice is given, the advisee is always in a position to evaluate that advice. But sometimes this possibility is only theoretical, rather than real. This will be so where the advisee is a layman and the adviser an expert in respect of the subject matter of the advice. Where the expert gives advice in a business context it seems proper to hold that the advisee's opportunity to evaluate the advice for himself is negligible and, therefore, that reliance on the advice proffered will give rise to liability if it was carelessly given. There will have been, for practical purposes, no intervening act breaking the chain of causation. Obviously the same argument applies to the situation where the maker of the statement holds himself out to be willing to act as an expert when an inquiry is made of him. This, of course, explains the majority decision of the Privy Council in as much as it held that there could be no cause of action in Mr. Evatt's particular case because the directors had not *positively* held themselves out as willing to act as experts.

Naturally, a chance to evaluate the advice given will not break the causation chain if there is a contract between the parties. If a man has given consideration for the advice received, he is entitled to get carefully prepared advice regardless of his own expertise in the area. That, of course, is the classical difference between contract and tort. In the former, the advisee has bought the right to rely on the statement made to him or, to translate it rather crudely into tortious misstatement jargon, the representor has consented (for a price) to assume the risk for faultily given advice. As already noted, in torts it is the law which says that a certain relationship exists between the parties which might give rise to liability;[27] hence, in the absence of consensus between the parties, it is necessary to show that the advice was given in a context where the adviser deliberately accepted responsibility or, as a reasonable man, ought to have known that there would be total reliance on his advice. The latter situation can only be established by showing that the advisee's *real* opportunity to evaluate the advice was non-existent.

This conceptualization explains the holding of the majority in *Evatt* v. *M.L.C.* It also explains the majority's cautious comment

[27] This point was made very strongly by Barwick C.J. in the High Court stage of the *Evatt* case. His Honour felt that a disclaimer of responsibility was only evidence of the relationship between the parties, but not determinative of it, in a tortious situation. He then went on to hold that recovery for negligent misstatement arose out of tort, not contract. Unfortunately, the other members of the majority (Menzies and Kitto JJ.) did not accept this view of disclaimer clauses. *Supra,* footnote 9.

that, in addition to "the expert" or "the holding-out as an expert" situations, there might also be a duty to take care in respect of statements if the adviser has a financial interest in the transaction about which he is giving advice.[28] It is submitted that there was no need to be so guarded about this view. In such situations it is not difficult to spell out an assumption of risk by the adviser, regardless of whether the advisee has a chance to evaluate the advice. Indeed, as has been shown elsewhere,[29] all the cases which supposedly follow *Hedley Byrne* are of this nature.

5. *A caution.*

It is quite likely that in England, at least, the Privy Council decisions will be held in low regard. After all, Lord Reid and Lord Morris of Borth-y-Gest might form part of the majority of some future House of Lords bench. In a similar vein, the Court of Appeal has recently given quite a wide reading to the *Hedley Byrne* doctrine.[30] If this results in a change so that the question of a duty of care is no longer to be determined on the basis of supposed differences between financial and other kinds of damage, much will have been gained. But serious damage will be done if, in the eagerness to replace previous woolly thinking, the courts fail to appreciate that the distinction between tort (with its attendant causation tenets) and contract is vital in this area of the law.

H. J. GLASBEEK*

---

[28] *Supra*, footnote 10, at p. 484.

[29] Glasbeek, *op. cit.*, footnote 2, at pp. 132-133.

[30] *Ministry of Housing and Local Government* v. *Sharp*, [1970] 2 Q.B. 223, [1970] 2 W.L.R. 802.

* H. J. Glasbeek, Senior Lecturer in Law, University of Melbourne, Australia.