CHAOS OR A NEW DIRECTION FOR ECONOMIC LOSS?

Ross v. *Caunters* [1]

It is a surprising fact that the law relating to the infliction of economic loss has not given rise to a single reported case in Malaysia or Singapore. That is to say that there has been no case concerning any of the so-called economic torts, recovery of economic loss caused by a negligent misstatement, or recovery of economic loss caused by a negligent act.[2] This state of affairs is hardly likely to continue for long in societies in which economic interests are of increasing importance, and the public is becoming more litigious, especially when the law relating to recovery of economic loss is receiving considerable attention in other Commonwealth jurisdictions.[3] A case which may well prove to be a turning point in this area, at least with regard to English law, and which will undoubtedly receive some attention when plaintiffs seeking recovery of economic loss make their belated appearance in Malaysia and Singapore, is the recent decision of Sir Robert Megarry V.C. in *Ross* v. *Caunters* (*a firm*).

A testator instructed the defendants, a firm of solicitors, to draw up a will in which he wished to leave a share of his residuary estate to his sister-in-law, the plaintiff. When they sent the will to the testator for execution, the defendants omitted to inform him that attestation of the will by the spouse of a beneficiary would invalidate the will, which was attested by the plaintiff's husband, a fact which was not noticed by the defendants when the will was returned to them. Subsequently the testator died, the will was found to be void, and the plaintiff accordingly sued the defendants for the money she would have received under the will had it been valid, and was awarded damages equivalent to the lost legacy.

The defendants contended that they owed no duty of care to the plaintiff, though they admitted that they had been negligent.

They relied first on the proposition that, liability for negligent misstatement apart, a solicitor can only be sued in contract, not in tort, citing *Groom* v. *Crocker*.[4] This proposition was dealt with speedily. *Groom* v. *Crocker* had already been doubted in previous cases,[5] and his Lordship held that since in his view a solicitor has no immunity in tort with regard to his client, there could be no such immunity with regard to third parties. His Lordship felt free to apply the usual Atkinian principle, which has been held to apply in all cases where policy considerations do not warrant its exclusion.[6] The de-

1 [1979] 3 All E.R. 580.

2 The principles of negligent misstatement formulated in *Hedley Byrne* v. *Heller* [1964] A.C. 465 have however been accepted in Malaysia, see *Bank Bumiputra Malaysia* v. *Yeoh Ho Huat* [1979] 1 M.L.J. 30; this is apparent from *obiter dicta* of Ajaib Singh J., but the case was decided in the tort of deceit.

3 See *Rivtow Marine Ltd.* v. *Washington Iron Works* (1973) 40 D.L.R. (3d) 530; *aCaltex Oil (Australia) Pty. Ltd.* v. *Dredge Willemstadt* (1976) 136 C.L.R. 529.

4 [1938] 2 All E.R. 394.

5 Notably *Esso Petroleum Co. Ltd.* v. *Mardon* [1975] 1 All E.R. 203 and *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp* [1978] 3 All E.R. 571.

6 See *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] A.C. 1004; *Anns* v. *Merton* London Borough Council [1978] A.C. 728.

fendants' contemplation of the plaintiff was, in his Lordship's words, "actual, nominate and direct" and was indeed contemplation by contract. Clearly the foreseeability test was satisfied. While admitting that liability for negligent misstatement is an exception to the general principle laid down in *Donoghue* v. *Stevenson,* his Lordship could not discern any element of negligent misstatement in the facts of the case, so that the question of reliance was not relevant.

The defendants' second proposition was that liability for negligent misstatement is the only exception to the rule that pure economic loss is irrecoverable. In the absence of a negligent misstatement economic loss must, to be recoverable, arise from injury to the plaintiff or damage to his property.[7] Despite a formidable clutch of authorities cited by the defendants for this proposition, his Lordship was able to avoid the difficult question of the correct interpretation of these cases, by turning instead to *Ministry of Housing and Local Government* v. *Sharp*.[8] In that case the plaintiff Ministry was able to recover pure economic loss from a local authority whose clerk had negligently failed to mention in a certificate, given in response to a local land charges search made by an intending purchaser, that the Ministry had a charge on the land in question, the purchaser having taken the land free of the charge and the plaintiffs having thereby lost the value of the charge. The Court of Appeal held unanimously that the plaintiffs could recover, but the *rationes decidendi* of Lord Denning M.R. and Salmon L.J. were different, while the *ratio* of the third member of the Court, Cross L.J., was unclear. Lord Denning M.R. would have decided the case by an extension of the *Hedley Byrne* v. *Heller* principle, whereas Salmon L.J. would have decided it on simple *Donoghue* v. *Stevenson* principles. Faced with this divergence of view his Lordship expressed a preference for the approach of Salmon L.J., but felt that whatever the correct *ratio,* the case covered the facts before him. In each case *D* was guilty of a negligent omission in his dealings with *X, X* acted on the negligent omission, and, by acting in this way, caused financial loss to P: in addition *D* contemplated, or ought to have contemplated, that his negligent omissions would injure P, an identified or identifiable person, and there was no possibility of unlimited liability.

In connection with this second contention the defendants puts forward the interesting suggestion that the plaintiff had not suffered any economic loss, but had merely failed to set something extra, "a mere *spes.*" To his Lordship, however, failure to receive an assured benefit was a loss and there was nothing in the point.

The defendants' third contention was that policy reasons dictated the exclusion of a duty of care in this type of case. The gravamen of these arguments was that a duty owed to third parties would dilute the duty owed to the client. In this case there was no conflict of interest, but a rule was necessary which would cover cases of conflict as well as cases where there was no conflict. His Lordship felt however that the two duties were different in nature; here the duty to

[7] See especially *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.* [1972] 3 All E.R. 557; *Weller* v. *Foot and Mouth Disease Research Institute* [1965] 3 All E.R. 560.

[8] [1970] 1 All E.R. 1009.

the third party was merely to use proper care in carrying out the client's instructions, a duty which in this case marched with the duty to the client, and if anything strengthened it.

The decision in *Ross* v. *Caunters* reflects developments in the area of economic loss in the United States, Canada and Australia.[9] It is now clear that, whatever doubts there may have been before, pure economic loss arising from a negligent act is recoverable in English law, notwithstanding the strong line of authority culminating in *Spartan Steel & Alloys Ltd.* v. *Martin & Co*.[10] This line of authority will now have to be reconsidered in the light of *Ministry of Housing* v. *Sharp* and *Ross* v. *Caunters,* not to mention Edmund Davies L.J.'s dissenting judgment in *Spartan Steel.*

However numerous difficulties remain, to which his Lordship in *Ross* v. *Caunters* did not attempt to address himself, but which will now have to be resolved by the Court of Appeal and the House of Lords.

In the first place the precise relationship between the *Donoghue* v. *Stevenson* principle and the *Hedley Byrne* principle is in considerable confusion. Whatever the extent of recovery for pure economic loss in the case of a negligent act, it seems now that defendants will be anxious to bring the facts of their case within the *Hedley Byrne* principle in order to take advantage of the limitations on liability which are involved in that principle; previously however it seemed that the *Hedley Byrne* principle was a liberal relaxation, for negligent misstatements, of a strict rule about recovery of pure economic loss. Further confusion is now likely to arise because the logic of the distinction between an act and a statement is paper thin, having been weakened by decisions of the Court of Appeal in *Dutton v. Bognor Regis U.D.C.*[11] and *Ministry of Housing* v. *Sharp,* and the House of Lords in *Anns* v. *Merton London Borough Council*,[12] and exposed by academic writers.[13] There is no justification for treating the two types of economic loss differently. Policy and common sense may require that liability for negligently inflicted economic loss be kept within manageable bounds, but not that liability depend upon whether an act or a statement was the instrumentality by which the loss was caused.

This brings us to the central problem of economic loss, which concerns the proper limits to be imposed. It seems to be generally agreed amongst judges and academics that the *Donoghue* v. *Stevenson* principle is too wide as a suitable criterion for the recovery of pure economic loss. This view is perhaps open to some doubt; after all economic loss resulting from personal injury or damage to property can be extremely great, as in air and sea disasters, but society has evolved methods of distributing the huge losses involved. One might inquire, what is the difference between putting a dangerous article into circulation and putting a dangerous statement into circulation?

9 See footnote 3, and also Craig, (1976) 92 L.Q.R. 213.
10 [1972] 3 All E.R. 557.
11 [1972] 1 Q.B. 373.
12 [1978] A.C. 728.
13 See especially Craig. (1976) 92 L.Q.R. 213.

Both can cause great damage to a large number of people, but is this a good reason to deny or artificially restrict liability? Warnings against "liability in an indeterminate amount for an indeterminate time to an indeterminate class"[14] have been voiced many times before, usually by those whose views have subsequently been rejected.[15] The "floodgates" argument has never proved to be right in practice.

Assuming the above view does not represent legal policy as conceived by the judges — and the probability is that it does not — an intermediate position is required which would restrict liability for economic loss resulting from negligent acts in a similar way to the *Hedley Byrne* principle. A number of formulae have already been discussed, but by far the best candidate is that of Gibbs and Mason JJ. in *Caltex Oil (Australia) Pty.* v. *Dredge Willemstadt*[16] (a case in which no less than four theories were advanced by the five judges of the High Court of Australia) who would restrict liability to cases where the defendant knew or ought to have known that the plaintiff individually, and not merely as a member of an indeterminate or unascertained class, would be likely to suffer financial loss as a result of the negligence. Both *Ministry of Housing* v. *Sharp* and *Ross* v. *Counters* are consistent with such a test, although both were apparently decided on foreseeability principles, and the test itself was favourably regarded in *Ross* v. *Caunters.* It is not free from difficulty. It is open to the objection that a deserving plaintiff should not fail merely because there happen to be other similarly unfortunate persons — surely either all or none should recover — and in addition there may be difficulty in deciding just what the word "class" means in this context, and how small or large the class must be. Whatever test ultimately gains acceptance it is to be hoped that it will also be applicable to negligent misstatement cases in order to remove the anomaly which still exists after *Ross* v. *Caunters.*

It is worth noting that in *Ross* v. *Caunters* it was held that failure to receive a benefit is economic loss for these purposes. Although the point could perhaps have been argued more strongly and is perhaps open to more doubt than his Lordship indicated, it is probably right. In this connection it might have been fruitful to compare the plaintiff's position with that of a person who loses his cause of action because his lawyer fails to commence his action within the limitation period. In such a case one has to decide whether on the balance of probabilities the plaintiff would have succeeded, and it is submitted that the same principle should apply to any loss of a *"spes".*

Finally, whatever the doubts remaining after *Ross* v. *Caunters,* it is a disastrous result for the legal profession, and for that matter any other profession. The spectre of contract seems now to be well and truly exorcised from the law of negligence, and it seems that lawyers, in non-contentious business at least, will have to look further than their clients in applying themselves to everyday problems. It may be that the policy arguments involved here will call for closer

[14] *Per* Cardozo C.J. in *Ultramares Corporation* v. *Touche* (1931) 174 N.E. 441.
[15] See Lord Buckmaster's dissenting judgment in *Donoghue* v. *Stevenson,* Widgery J.'s judgment in *Weller's* case, *supra.*, and Lord Denning M.R.'s judgment in *S.C.M. (U.K.) Ltd.* v. *Whittal.*
[16] (1976) 136 C.L.R. 529.

consideration some day, but it will probably be in relation to the standard of care that the arguments for the lawyers will find a sympathetic audience.

As Sir Robert Megarry V.C. returns to his more accustomed role as a chancery judge, he can take comfort in the thought that although he found himself, in his own words, "cast adrift on the limitless seas of the common law," he has at least forced us to look much more earnestly for some dry land.

A.J. HARDING