NOTES

TORTS: RECOVERY FOR NEGLIGENT MISSTATEMENT IN PREPARING AN ESTIMATE: DUTY PREDICATED UPON KNOWLEDGE OF PROFESSION AT THE TIME: *Hodgins v. Hydro-Electric Commission (Supreme Court of Canada, Oct. 7, 1975).*

It is perhaps surprising that after a decade of uncertainty the Supreme Court of Canada has ignored an opportunity to interpret the *Hedley Byrne* [1] principle and apply it to Canadian jurisprudence. But in *Hodgins v. Hydro-Electric Commission,* [2] both majority and dissent take without comment the position that the respondent owed a duty of care to the appellant who sought his advice when the respondent knew that the appellant would rely on this information. The issue which occupied the three courts in their deliberations was rather the standard of care which would be expected of someone in the respondent's position; each court arrived at differing interpretations on the facts.

In 1967, Robert Hodgins decided to add an indoor swimming pool to his home. Initially he had intended to use forced air to heat the room but at the urging of Winch, his electrical contractor, he investigated the feasibility of electric heating. An estimate of heating costs for the room only was provided by Mr. Runions, a sales technician employed by the Hydro-Electric Commission of Nepean, the exclusive provider of electricity in the area. It was found at trial that neither Hodgins nor Winch were familiar at the time with the techniques employed in heat-loss calculations; both were found to have relied on Runions. Basing his decision on this estimate of lower heating costs, Hodgins installed radiant heaters (electric heaters); thereafter, his bills exceeded the estimate by 100 per cent.

The evidence at trial showed that Runions adhered to the conventional methods for calculating the heat-loss estimate; he took into account neither the presence of the pool nor the temperature to which the water would be heated. In 1967, Runions' profession did not have an official method for estimating the amount of electricity needed to heat a room containing a swimming pool. Runions based his calculations on the premise that the room would contain a concrete slab floor. Various experts in the electrical heating field testified that if asked to estimate heating costs for such a room in 1967 they would have proceeded as Runions. However, the conventional calculations were based on the assumption that baseboard heaters were to be employed. Since these could not be used within fifteen feet of water radiant heaters were installed which resulted in an increased consumption of electrical energy.

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

[2] (Sup. Ct., Oct. 7, 1975).

In an action for negligent misstatement the trial judge, Mr. Justice Macdonald, awarded Hodgins damages for *inter alia* the excess costs for heating.[3] It was determined that Runions owed a duty to Hodgins to qualify his estimate, warning the appellant of Runions' or the profession's lack of expertise in this type of calculation.

The Ontario Court of Appeal, although agreeing that Runions owed a duty of care in providing the estimate, reversed the trial decision.[4] Compliance with the conventional methods was conclusive of no negligence.

On appeal to the Supreme Court of Canada,[5] counsel for the appellant argued that Runions failed to respond to the inquiry addressed to him. In effect, "Runions answered an entirely different question from that posed by the inquirer, and the answer was more than 100% in error".[6] Furthermore, in holding himself out to the public as someone capable of estimating heating costs for swimming pools, the facts revealed that Runions patently misrepresented his professional ability.

The respondent's argument focused on the appellant's first contention, centering almost entirely on one question: What was Runions asked to do? The respondent argued that he was asked to provide an estimate for the heating of the room alone. Granted, it was a room containing a swimming pool, but that fact need not have concerned Runions since the pool was to be heated on a separate circuit. The respondent submitted that Runions discharged his duty by providing a heat-loss estimate for a room assumed to have a concrete slab floor. This was what the appellant asked of him; there was no negligence.

The majority judgment[7] arrives at an unsatisfactory and unclear finding of fact on the respondent's contention. Mr. Justice Ritchie, on behalf of the majority, reiterates the respondent's submission and concludes: "I think it can be taken that the estimate requested was an estimate relating exclusively to the room as the swimming pool was to be heated by a separate circuit."[8] This is undeniably true; however, we are uncertain from the majority judgment whether the estimate was for the room alone ignoring the existence of thousands of gallons of heated water (hypothetically a room with a concrete slab floor), or an estimate for a room containing a swimming pool. Undoubtedly, Runions' reply was perfectly accurate if he proceeded on the assumption that the room had a concrete slab floor. But the fundamental question still remains: What was asked of Runions?

If one can assume that Mr. Justice Ritchie proceeded on the basis that the estimate was for a room with a concrete floor, his finding that Runions

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[3] Hodgins v. Hydro-Electric Comm'n, [1972] 3 Ont. 332, 28 D.L.R.3d 174 (Cty. Ct.).

[4] Hodgins v. Hydro-Electric Comm'n, (Ont., May 3, 1973).

[5] *Supra* note 2.

[6] Appellant's factum at 8-9.

[7] The majority decision was delivered by Ritchie, J., for Martland, Judson, Pigeon, Beetz & de Grandpré, JJ.; Laskin, C.J.C., delivered a concurring judgment and Spence, J., dissented.

[8] *Supra* note 2, at 4 (Ritchie, J.).

was not negligent is quite logical and, indeed, inescapable. But Mr. Justice Spence's dissent differs on this important finding of fact.

Mr. Justice Spence poses the appellant's inquiry in this manner: "It is, therefore, most apparent that what Mr. Winch, for and on behalf of the appellant, was asking from Mr. Runions, the servant of the respondent, was the cost of heating a room *in which there was to be a swimming pool* filled with water." [9] Proceeding on the assumption that the estimate was for a room containing a swimming pool, the case is more difficult to resolve.

The duty of care expected of the adviser was rather ambiguously defined by Lord Reid in *Hedley Byrne* as a duty "to exercise such care as the circumstances require" [10] in making such reply. Lord Hodson affords a more pragmatic standard, defining it as a "duty to avoid inflicting pecuniary loss". [11] It is undeniable that the duty of which their Lordships conceived was derived from the *Donoghue v. Stevenson* [12] "neighbour" principle. But in offering skilled advice the duty would be limited—to avoid the infliction of injury (physical or economic) on those whom you know or ought to know will rely on your words. And the duty would only arise if the circumstances showed that the adviser assumed the responsibility; as Lord Devlin explains it, in those circumstances that, but for the lack of consideration, would prove a contract. [13]

Within these liberal parameters, the majority and dissent in the Supreme Court of Canada decision in *Hodgins* arrive at differing results which reflect the dichotomy in Canadian case law.

The standard of care as enunciated in the case of *Mutual Life & Citizens' Assurance Co. v. Evatt* [14] is adopted by the majorities at both the Court of Appeal and Supreme Court levels in *Hodgins*. The plaintiff in that case was a shareholder in the defendant company and was interested in investing his money in H. G. Palmer Ltd. which was, as was the defendant, a subsidiary of M.L.C. Ltd. Since the defendant company was in such a close relationship with H. G. Palmer Ltd., the plaintiff expected that the defendant would have knowledge on which to base a considered opinion of Palmer's financial stability. The defendant proceeded to counsel the plaintiff without inquiring into Palmer's position or prospects and thereby provided an inaccurate statement. Because of the defendant's negligent report, the plaintiff invested and consequently suffered a loss when H. G. Palmer Ltd. failed. The Privy Council held that there had been no representation to the plaintiff by the defendant company that it possessed the requisite skill and knowledge to prepare a statement concerning Palmer's financial status. It was not in the defendant's normal course of business to supply such advice and therefore it could not be held responsible for its statements. The court went on

[9] *Id.* at 4 (Spence, J.) (emphasis added).
[10] *Supra* note 1, at 486, [1963] 2 All E.R. at 583.
[11] *Id.* at 509, [1963] 2 All E.R. at 598.
[12] [1932] A.C. 562, [1932] All E.R. Rep. 1.
[13] *Supra* note 1, at 529, [1963] 2 All E.R. at 610.
[14] [1971] A.C. 793, [1971] 1 All E.R. 150 (P.C. 1970).

to state that a representation by the adviser would normally occur by his engaging in a trade or profession in which it was usual that skilled advice was offered, *i.e.*, advice which was not possessed by the general public. If such was the representation, then the only standard of care would be that of conforming "to an ascertainable standard of skill and competence in relation to the subject matter of the advice". [15]

Thus, the majority in *Hodgins* was satisfied when it was found that Runions applied the conventional and approved method in his calculations. According to Mr. Scott, an expert witness, the procedure adopted by Runions was unexceptionable:

> His Honour: If you had been doing this heat-loss estimate in 67, you would have done it the very same way it was done by Mr. Runyans (sic)?
> A. In 1967, yes sir.
> His Honour: Would you have felt that you should have any additional information than he had?
> A. Well sir, I would suspect that they had many requests coming across their desk every day for estimates, and I don't think they would likely . . . . I don't see how they would have any way of knowing. [16]

It appears from the evidence that given the volume of work, Runions should not have been expected to prepare more than an ordinary estimate based on what he thought was sufficient information.

Mr. Justice Spence in his dissent elaborated on this question of conformance or custom, citing *Anderson v. Chasney*, [17] and *The T. J. Hooper.* [18] In the former case a sponge was left in a child after an operation and some hours later it lodged in the base of his throat causing his death by suffocation. The doctor argued that he had believed all the sponges had been removed and that his method of operation was in accordance with that practised by most other hospitals. Evidence was produced revealing that a few hospitals had a method of counting sponges or attaching strings to the sponges to ensure that none were left in the body. However, this practice had not been adopted by more than a few hospitals; the defendant's operating techniques could not be faulted in comparison with those of the majority of doctors. The court found negligence notwithstanding the expert testimony in the defendant's favour. Mr. Justice Coyne of the Manitoba Court of Appeal dismissed this testimony holding that if custom or common practice became the standard of care by which a professional should be judged then experts would usurp the jury function. It would, of course, be suitable to permit expert evidence on matters no layman could understand. But when the acts or conduct of a professional would be capable of being understood by the reasonable man, the reasonable care standard would supercede the standard of custom; if a practice was found lacking in the estimation of judge or jury the conforming defendant could be found negligent.

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[15] *Id.* at 803, [1971] 1 All E.R. at 156.
[16] Case on Appeal, filed in Sup. Ct., July, 1974, at 145.
[17] [1949] 2 W.W.R. 337, [1949] 4 D.L.R. 71 (Man.).
[18] 60 F.2d 737 (N.Y. Cir. Ct. 1932).

The T. J. Hooper involved the loss of cargo on board a tug which capsized during gale winds. The tugs would have received adequate warning and probably would have put into shore had they carried radios, but there was no such custom of installing radios for the purpose of monitoring the weather. The defendants could not be blamed for diverging from the norm. However, Judge Hand discussed the easy availability and minor costs of the radios and the factor of safety afforded the tug boat crews, concluding that there was no excuse for the failure of the owners to provide the equipment:

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices . . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. [19]

The principle of law developed in *Anderson* and *The T. J. Hooper* has been applied in Canada and other common law jurisdictions, but to this date only in relation to cases of negligent *acts* of professionals. [20] But this should not prevent its application to negligent misstatements. The rationale for the rule is to prevent a professional from setting up a common practice as a defence when the reasonable man would perceive such a practice to be inadequate. Chief Justice Laskin accepts this proposition in *Hodgins*: "I do not think that it is invariably enough to defeat the action that the defendant has used the skill or knowledge then known to him or to others in his field of endeavour." [21] But, as will be discussed *infra*, the Chief Justice proceeds to refine this doctrine.

The dissent judgment is partly based on this same principle of law. Mr. Justice Spence finds that, in 1967, the practice of heating estimators was inadequate because of its failure to include as a factor the effect of heated water on the consumption of electricity. "Surely, in the present case, even 'an ordinary man' would understand that one could not approach the estimate of the cost of heating a room which surrounded a swimming pool containing thousands of gallons of water without knowing the temperature at which the water was to be maintained." [22] Although other heating technicians would calculate the heat-loss estimate in 1967 in the conventional manner, Runions would still be found negligent. The custom was inadequate in much the same manner as was the custom in *The T. J. Hooper* in failing to provide radios, or in *Anderson* in neglecting to attach strings to sponges or to count them.

Mr. Justice Spence's judgment stands or falls on a conclusion that even the "man on the street" would have recognized the potential heat loss bebetween room and water. Neither Mr. Justice Ritchie nor Chief Justice

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[19] *Id.* at 740.

[20] *Accord*, Cavanagh v. Ulster Weaving Co., [1960] A.C. 145, [1959] 2 All E.R. 745 (1959); Kauffmann v. T.T.C., [1960] Sup. Ct. 251, 22 D.L.R.2d 97; King v. Stolberg, 65 W.W.R. (n.s.) 705, 70 D.L.R.2d 473 (B.C. Sup. Ct. 1968) (dictum).

[21] *Supra* note 2, at 1 (Laskin, C.J.C.).

[22] *Id.* at 12 (Spence, J.).

Laskin have noted this finding in their reasons but perhaps this could be considered an error of judgment on their Lordships parts. The dissent judgment is remarkable for its grasp of the facts and for the first reported application of the "negligent custom" doctrine to a *Hedley Byrne* situation.

But there is an alternate basis on which a dissent could have proceeded, illustrated by the reasoning of Mr. Justice Macdonald at trial, and Chief Justice Laskin in the Supreme Court of Canada. (This alternative is hinted at in the dissent, but it is submitted that the reasoning of Mr. Justice Spence results in a less precise rule of law). Assuming that Runions was asked to calculate heat loss for a room containing a heated pool, the critical formulation is as follows: Does the *Hedley Byrne* principle impose on Runions a duty to qualify his estimate?

As stated previously, Mr. Justice Ritchie accepts the standard as enunciated by the majority in *Mutual Life & Citizens' Assurance Ltd.* It is the minority ratio in that case, however, which crystallizes the positions which the trial judge and Chief Justice Laskin adopt in tackling the problem presented by *Hodgins.* Both Lord Reid and Lord Morris objected to the consequences which would flow from the majority ratio:

> If the adviser is invited in a business context to advise on a certain matter and he chooses to accept that invitation and to give without warning or qualification what appears to be considered advice, is he to be allowed to turn around later and say that he was under no duty to take care because in fact he had no sufficient skill or competence to give the advice? [23]

They go on to state that the professional has a duty beyond that to conform to the average skill, although in many cases to prepare a statement with the skill which is customary to the profession will be enough. In some circumstances, however, the standard of reasonable care will impose a further duty on the adviser: the test is to ask whether a reasonable man with the skill and knowledge of the adviser would have given such advice to the inquirer knowing that he would rely on it.

Mr. Justice Macdonald emphasized the fact that Runions knew that there was to be a pool in the room and yet calculated the estimate for a room with a concrete floor. By doing so he failed to answer Hodgins' question. Runions delivered an estimate to Hodgins which was of limited use, and did not warn the appellant of its limitations. The duty established in *Hedley Byrne* was to take such care as the circumstances required and Mr. Justice Macdonald held that Runions failed. All Runions was required to do was to qualify his statement in some way, to warn Hodgins that neither he nor his employers had yet developed a system to apply to rooms containing swimming pools and that the estimate was made on the basis of the room having a concrete floor. Runions was aware that there were studies being made on that very subject and that therefore there existed some controversy. This implied that the conventional method might not be appropriate.

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[23] *Supra* note 14, at 812, [1971] 1 All E.R. at 163.

When Hodgins or Winch made the request of the Hydro-Electric Commission it was on the understanding that the respondent possessed the requisite skill and knowledge to provide an accurate heat-loss estimate. The respondent represented itself to the public as a professional organization in the business of providing estimates for heating both residential and commercial premises. But this was a misrepresentation—it did not have the knowledge to calculate for rooms containing swimming pools. Therefore it had a duty to warn such customers as Hodgins of a potential defect in its product; it was not enough to comply with the standards of skill and knowledge which the profession maintained since those standards were insufficient in a field of which the profession had no knowledge.

Chief Justice Laskin describes the standard as follows: "In my opinion, the care or skill that must be shown by the defendant must depend, as it does here, on what is the information or advice sought from him and which he has unqualifiedly represented that he can give." [24] Runions "unqualifiedly represented" that he could answer Winch's question, and the appellant was not aware of any limitations. Therefore, he was negligent. (However, Chief Justice Laskin dismisses the appellant's claim, presumably because Runions was asked to make a calculation on a room assumed to have a concrete floor. Because the estimate was accurate, the qualification was unnecessary).

One other factor determines the result at which Mr. Justice Spence arrives. Runions knew there was to be a swimming pool in the room and yet he based his calculations on the use of baseboard heaters which could not be operated within fifteen feet of water. Radiant heaters were installed by Hodgins and resulted in an increase in consumption of electricity. Mr. Justice Spence comments: "[E]ven without reference to any lack of science in calculating heat loss from the room to the water, his estimate was erroneous on his admitted knowledge at the time." [25]

This factor escapes the attention of Mr. Justice Ritchie when he finds that Runions conformed to the general degree of skill of his profession. It would be too exacting to demand that Runions exceed his colleagues in appreciating the effect of water on heating costs. But would it be unrealistic to expect Runions should know the type of equipment Hodgins would install? The costs would increase if radiant heaters were used instead of baseboard heaters, and, as found on the facts, only radiant heaters were proper. Even without reference to the profession's ignorance of heat loss in 1967, Runions was negligent in preparing his estimate and ought to have been held responsible for the proportion of heating costs above the estimate attributable to the use of the less efficient radiant heaters.

Conclusion

Hodgins prepared the stage for a discussion of the varying standards of

[24] *Supra* note 2, at 1 (Laskin, C.J.C.).
[25] *Id.* at 9 (Spence, J.).

care, and unfortunately, the least satisfying standard is adopted by the majority. The standard of reasonable care is not met by a reference to custom or common skill and knowledge. Each fact situation requires a different standard which only at times will be answered by custom. In the instant case, the custom of the profession was inadequate and Runions was not able to fill the gap using his own skill. Mr. Justice Spence holds that Runions should have grasped the significance of the effect of water and that any man could have prepared the estimate using his native intelligence. This perhaps exaggerates the capabilities of the ordinary by-stander. However, there was the minimum duty on Runions to warn the appellant of the lack of science in the field in which the appellant's inquiry fell.

One other remaining problem in the analysis of *Hodgins* is the failure to discuss the *Hedley Byrne* principle.[26] At trial, the judge quoted the headnote from that case and without further elaboration imposes a duty on Runions;[27] the Court of Appeal in like manner discovered the existence of the duty.[28] In the majority judgment in the Supreme Court of Canada, Runions was found to have "adopted the last course indicated by Lord Reid".[29] Perhaps the fact situation was so straightforward that the judges who delivered the opinions of their respective courts did not find it necessary to prove the existence of the "special relationship" between the appellant and respondent, nor the circumstances which pointed to the respondent's assumption of responsibility for his words.

This case involved the Court in an exploration of various standards of care; it is submitted that Chief Justice Laskin's judgment contained the most acceptable measure of that standard. Each case must involve a discussion of what was asked of the professional, and what he represented himself as being capable of providing. Only on this foundation can the standard of care be formulated and the question of negligence resolved. Resort to custom and common practice is a convenient manner in which to judge the defendant's conduct but it is not always conclusive, especially where those customs are questionable. The principles presented in the dissenting judgment are valuable contributions to the law of negligent misstatement but perhaps their application to this fact situation is overly optimistic. The calculation of a heat-loss estimate is not a matter with which a layman would be comfortable and it is debatable whether an ordinary man would find Runions negligent because he failed to recognize the potential for heat loss between the room and the water.

Hodgins v. Hydro-Electric Commission will provide the Canadian courts

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[26] But for a Supreme Court consideration of *Hedley Byrne*, see Welbridge Holdings Ltd. v. Winnipeg, [1971] Sup. Ct. 957 (1970), *aff'g* 72 W.W.R. (n.s.) 705 (Man. 1970). The case of Haig v. Bamford, [1974] 6 W.W.R. 236 (Sask.), is currently on appeal to the Supreme Court and may also provide a judgment by the Court involving an explanation of *Hedley Byrne*.

[27] *Supra* note 3, at 334, 28 D.L.R.3d at 176.

[28] *Supra* note 4.

[29] *Supra* note 2, at 5 (Ritchie, J.).

with a choice: whether to accept Mr. Justice Ritchie's dogmatic standard of custom or the more flexible and perhaps more realistic test enunciated by Chief Justice Laskin. And Mr. Justice Spence's statements will open up a new avenue which a court might consider when the appropriate fact situation arises. The *Hodgins* case is not a controversial decision except in its interpretation of the facts, but it should provide some guidance for the lower courts. Perhaps it should be best remembered for what it did not do.

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