UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

DECLARATION OF HOWARD L. VICKERY
IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO MOTIONS TO DISMISS OF
PRICEWATERHOUSECOOPERS ACCOUNTANTS N.V.,
PRICEWATERHOUSECOOPERS LLP, AND
PRICEWATERHOUSECOOPERS INTERNATIONAL LIMITED

Exhibit 18

3 of 3 DOCUMENTS

[*466] Gordon T. Haig (Plaintiff) Appellant and Ralph L. Bamford, Nairn Hagan, Alfred R. Wickens and John Gibson (Defendants) Respondents

INDEXED AS: HAIG v. BAMFORD et al.

SUPREME COURT OF CANADA

[1977] 1 S.C.R. 466; 1976 S.C.R. LEXIS 190

Heard: November 13, 14, 1975

Judgment: April 1, 1976

PANEL: [**1] Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson. Beetz and de Grandpre JJ.

PRIOR-HISTORY: ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

CATCHWORDS:
Negligence -- Chartered accountants -- Preparation of defective financial statement -- Statement relied on by investor to his loss -- Identity of investor not known to accountants -- Right of recovery.

HEADNOTE:
One Scholler carried on a woodworking business as sole proprietor. Early in 1964, following a fire, the Saskatchewan Economic Development Corporation (Sedco) agreed to advance Scholler $ 34,000 for the purpose of establishing a plant to undertake millwork and the manufacture of furniture, conditional upon incorporation of the sole proprietorship. A company was incorporated and some months later it became apparent that there was a serious shortage of working capital. Scholler approached Sedco for a further loan of $ 20,000 which was approved, contingent upon (i) production of a satisfactory audited financial statement of the company for the period from the date of incorporation, February 10, 1964, to March 31, 1965, and (ii) the infusion of $ 20,000 of equity capital.

Instructions were issued to a firm of chartered accountants, of which the respondents [**2] were partners, to prepare the required financial statement and Scholler began a search for an outside investor. He made it known to the accountants that he was seeking an investor. The statement, when completed, showed that the operations of the company were profitable; the potential was promising, and a $ 20,000 loan from Sedco and $ 20,000 of equity money would provide necessary working capital. Influenced by these considerations, the appellant purchased in mid-August, 1965, shares in the capital stock of the company for $ 20,075 and guaranteed the bank loan to the extent of $ 20,000.

Notwithstanding the addition of $ 40,000 in capital, the company was again troubled within a short time by a serious cash shortage. An investigation disclosed that a [*467] $ 28,000 prepayment received by the company in March 1965 on two contracts, upon which work had not started, had been treated as if the work had been completed and the moneys earned. The $ 28,000 had been credited to revenue by the company's bookkeeper rather than shown as a

liability. The accountants had failed to spot the error.

Instead of making a profit in the period, as shown by the statement, the company had suffered a [**3] loss; instead of buying into a thriving business, as the financial statement would have suggested, the appellant bought into a distressed enterprise which never showed a profit. During the six months from March 31, 1965, to August 31, 1965, a net loss of $ 21,460.10 was sustained. By early December, the company had reached the limit of its bank line of credit. To meet the payroll the appellant made a further investment of $ 2,500, matched by a like amount from Sedco. A meeting of creditors, held late in the month, decided against further support and at year-end, the company ceased business. The appellant lost the $ 20,075 paid for shares, the loan of $ 2,500, and $ 6,500 under the bank guarantee. He sued the accountants, the company and Scholler to recover $ 20,075 and $ 2,500 but later discontinued against Scholler and the company.

The trial judge allowed recovery. An appeal by the accountants was allowed by a majority of the Court of Appeal, and an appeal by the investor to this Court followed.

Held: The appeal should be allowed and the trial judgment reinstated, subject only to disallowance of the claim of $ 2,500.

Per Laskin C.J. and Ritchie, Spence, Pigeon, Dickson and Beetz [**4] JJ.: The respondents owed the appellant a duty to use reasonable care in the preparation of the accounts. Also, in representing to have done an audit when they were aware that an audit had not been done, the respondents were guilty of a serious dereliction of duty.

The appellant placed justifiable reliance upon a financial statement which the accountants stated presented fairly the financial position of the company as at March 31, 1965. The accountants prepared such statements for reward in the course of their professional duties. The statements were for benefit and guidance in a business transaction, the nature of which was known to the accountants. The accountants were aware that the company intended to supply the statements to members of a [*468] very limited class. The appellant was a member of the class. The fact that the accountants did not know his name was not of importance. There was no good reason for distinguishing between the case in which a defendant accountant delivers information directly to the plaintiff at the request of his employer (*Candler v. Crane, Christmas & Co., [1951] 1 All E.R. 426,* and *Glanzer v. Shepard (1922), 233 N.Y. 236)* and the case in which the [**5] information is handed to the employer who, to the knowledge of the accountant, passes it to members of a limited class (whose identity is unknown to the accountant) in furtherance of a transaction the nature of which is known to the accountant.

The appellant could not recover from the respondents the sum of $ 2,500 which he advanced to the company in December 1965, because by that time he was fully cognizant of the true state of affairs. It could not be said that the sum was advanced in reliance upon false statements.

Per Martland, Judson and de Grandpre JJ.: On the finding that the respondents knew, prior to the completion of the financial statement, that it would be used by Sedco, by the bank with which the company was doing business and by a potential investor in equity capital, the respondents owed a duty of care, in the preparation of that financial statement, to that potential investor (the appellant), even though they were not aware of his actual identity.

CASES-CITED:

[Hedley Byrne & Co. v. Heller & Partners, [1963] 2 All E.R. 575, Dutton v. Bognor Regis United Building Co. Ltd., [1972] 1 All E.R. 462; Mutual Life & Citizens Assurance Co. Ltd. v. Evatt, [1971] 1 All E.R. 150; Ultramares [**6] Corp. v. Touche (1931), 255 N.Y. 170; Rusch Factors, Inc. v. Levin (1968), 284 F. Supp. 85; Rhode Island Hospital Trust National Bank v. Swartz (1972), 455 F. 2d 847; Wellbridge Holdings Ltd. v. Metropolitan Corp. of Greater Winnipeg, [1971] S.C.R. 957; Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189; J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co., [1972] S.C.R. 769, referred to.]

INTRODUCTION:
APPEAL from a judgment of the Court of Appeal for Saskatchewan n1, allowing an appeal from a judgment of MacPherson J. Appeal allowed.

n1 [1974] 6 W.W.R. 236, *53 D.L.R. (3d) 85.*

----------End Footnotes----------

COUNSEL: R. W. Thompson, for the plaintiff, appellant
E. R. Gritsfeld, Q.C., for the defendants, respondents

JUDGMENT-1:
[*469] The judgment of Laskin C.J. and Ritchie, Spence, Pigeon, Dickson and Beetz JJ. was delivered by

DICKSON J.--This appeal concerns the liability of an accountant to parties other than his employer for negligent statements. The Court is asked to decide whether there was in the relationship of the parties [**7] to the appeal such kind or degree of proximity as to give rise to a duty of care owed by the respondents to the appellant. The damages involved are not large but the question raised is of importance to the accounting profession and to the investing public.

I

In October 1961, Siegfried Scholler and his brother entered into partnership under the firm name of Scholler Brothers Millwork in the City of Moose Jaw. The firm made cabinets and other furniture and also undertook contracts for interior woodwork. The partnership was dissolved in December 1962, and from then until February 1964, Siegfried Scholler carried on the business as sole proprietor. In early 1964, following a fire, Saskatchewan Economic Development Corporation (Sedco) agreed to advance Scholler $ 34,000 for the purpose of establishing a plant to undertake millwork and the manufacture of furniture in Moose Jaw, conditional upon incorporation of the sole proprietorship. Scholler Furniture & Fixtures Ltd. (the company) was incorporated and the sole proprietorship came to an end. Scholler was an excellent workman but poor financial planner. He evinced a compulsive urge to expand the business of the company with the result [**8] that by January 1965, a serious shortage of working capital became apparent. Scholler approached Sedco for a further loan of $ 20,000 which was approved, contingent upon (i) production of a satisfactory audited financial statement of the company for the period from date of incorporation, February 10, 1964, to March 31, 1965, and (ii) the infusion of $ 20,000 of equity capital. [*470]

Instructions were issued to the firm of R. L. Bamford & Co. (the accountants), of whom the respondents (defendants) were partners, to prepare the required financial statement and Scholler began a search for an outside investor. He made it known to the accountants that he was seeking an investor. The trial judge, MacPherson J., made a crucial finding, not disturbed by the Court of Appeal for Saskatchewan, that the accountants knew, prior to completion of the financial statement, dated June 18, 1965, at the root of the present litigation, that the statement would be used by Sedco, by the bank with whom the company was doing business, and by a potential investor in equity capital.

The manager of Sedco, a Mr. Wiltshire, helped Scholler in his search for a potential investor, and, with the consent of Scholler, [**9] showed a copy of the financial statement to his friend, the plaintiff Haig, who had been looking for a "likely opportunity." Haig discussed the statement with his bank manager and with a chartered accountant. The bottom line of the statement showed that the operations of the company were profitable; the potential was promising; a $ 20,000 loan from Sedco and $ 20,000 of equity money would provide necessary working capital. Influenced by these considerations Haig, an experienced business man, purhased in mid-August, 1965, shares in the capital stock of the company for $ 20,075 and guaranteed the bank loan to the extent of $ 20,000. He became president; Scholler became vice-president and operating head. All looked well: there was ample work for the company as the Saskatchewan liquor

laws had recently been altered to permit mixed drinking and the formerly all-male beer parlours were being upgraded. But something was wrong. Notwithstanding the addition of $ 40,000 in capital, which enabled trade creditors to be paid, within a very short time the company was again troubled by serious cash shortage. The accountants were consulted and investigation soon disclosed the source of the trouble: [**10] a $ 28,000 prepayment received by the company in March 1965, on two contracts from the Robert Simpson Regina Limited, upon which work had not started, had been treated as if the work had been completed and the moneys earned. The $ 28,000 had been credited to [*471] revenue by the company's bookkeeper rather than shown as a liability. The accountants had failed to spot the error. On Haig's instructions a new financial statement, dated September 29, 1965, was prepared by the accountants for the period February 10, 1964, to March 31, 1965, in which the $ 28,000 prepayment was removed from revenue and shown under liabilities as "deferred revenue-- progress advance." In the result, the position as certified by the accountants and the true position of the accounts were as follows:

	Position as Certified by Accountants (June 18, 1965 Statement)	True Position (Sept. 29, 1965 Statement)
Sales	$ 186,603.64	$ 158,603.64
Gross Profit	80,896.50	52,896.50
Net Profit Before Tax	26,590.31	(1,994.52)
Net Profit After Tax	20,717.04	nil
Surplus	21,321.04	600.00

Instead of making a profit in the period, as shown by the June statement, the company had suffered [**11] a loss: instead of buying into a thriving business, as the financial statement of June 18, 1965, would have suggested, Haig bought into a distressed enterprise which never showed a profit. During the six months from March 31, 1965, to August 31, 1965, a net loss of $ 21,460.10 was sustained. By early December, the company had reached the limit of its bank line of credit. To meet the payroll Haig made a further investment of $ 2,500, matched by a like amount from Sedco. A meeting of creditors, held late in the month, decided against further support and at year-end, the company ceased business. Haig lost the $ 20,075 paid for shares, the loan of $ 2,500, and $ 6,500 under the bank guarantee. He sued the accountants, the company and Scholler to recover $ 20,075 and $ 2,500 but later discontinued against Scholler and the company. [*472]

II

The trial judge found negligence on the part of the accountants. I think the evidence amply supports that finding. From the expert testimony, it appears that the engagement of a chartered accountant can be on either an "audit" basis or a "non-audit" basis. If the engagement is for an audit, the accountant does what he considers necessary by way [**12] of auditing procedures, tests and verification of internal controls, accounts, and records to permit him to give an opinion on the financial statements. In an engagement of the non-audit type, the accountant merely helps the client in the preparation of the financial statement on terms which permit him to accept the client's records and dispense with the checks and verifications expected in an audit. The product of an audit is a financial statement accompanied by an auditor's report expressing an opinion on the financial statement. At the end of a non-audit engagement, a financial statement is issued to which is appended a comment in which the auditor expressly disclaims responsibility.

The accountant had performed non-audit accounting services for the partnership, Scholler Brothers Millwork, in 1963, and at that time the financial statement was accompanied by a letter, the final paragraph of which disclaimed in these words:

"The attached financial statements have been prepared from the books and records and information furnished, without audit, and we are not able to express an opinion as to the financial position of the business."

In the present proceedings the accountants sought [**13] to maintain that their engagement in 1965 was of a non-audit nature and that they were performing for the company a mere accounting function in preparing a financial statement from the client's financial records. This submission fails for two reasons: first, Sedco required audited financial statements as a condition of the further loan to the company and the evidence is clear that the statements were prepared in satisfaction of that condition, as the accountants had been advised by Sedco and the company; secondly, the auditors' report [*473] follows the format generally recognized as appropriate for audited financial statements, in these terms:

"We have examined the records of Scholler Furniture & Fixtures Ltd. for the period from incorporation, February 10, 1964 to March 31, 1965 and have prepared therefrom the attached Balance Sheet as at the latter date and Statement of Profit and Loss for the period. Our examination included a general review of the accounting procedures and such tests of the accounting records and other supporting evidence as we considered necessary in the circumstances.

The accounts receivable are as shown by the records and we have not confirmed them by direct [**14] communication with the recorded debtors.

The inventories of materials and work-in-process were not taken by us or under our supervision and have been accepted as certified to us by Mr. Siegfried Scholler.

Subject to the foregoing reservations we report that, in our opinion, the attached Balance Sheet and related Statement of Profit and Loss present fairly the financial position of Scholler Furniture & Fixtures Ltd. as at March 31, 1965 and the results of operations for the period ended on that date in accordance with generally accepted accounting principles and as shown by the books of the Company."

The report would lead the reader to believe that an audit had been done but the evidence shows that no audit was done. The report is qualified in three respects but not with respect to liabilities. Gary Lloyd Davidge, then an articled student in the accountant's office, and now a chartered accountant, prepared the impugned financial statements. He testified that he had been instructed by his firm not to do an audit; he believed he was acting as accountant and not auditor; he was not furnished with an audit program. He did not peruse invoices or purchase orders; he did not inquire as [**15] to prepayments or as to the state of contracts; he did not analyze the figures as to sales or work in progress; nor did he inquire as to internal controls to determine to what extent the controls could be relied upon to assure the accuracy of the revenue accounts. He left the employ of the accountants before the statement was delivered to the client, in the belief that it would be accompanied by a complete disclaimer, as had accompanied the 1963 [*474] financial statements of Scholler Brothers Millwork. Notwithstanding all of this, the auditors rendered the quoted opinion in which they said that their examination had included a general review of the accounting records and other supporting evidence as they considered necessary in the circumstances. That was not true. They also expressed the opinion, subject to the three reservations earlier referred to, that the balance sheet and related statement of profit and loss fairly presented the financial position of the company as at March 31, 1965. The work done by or on behalf of the accountants did not warrant any such affirmation. In representing to have done an audit when they were aware that an audit had not been done, in my view the [**16] accountants were guilty of a serious dereliction of duty. This was more than honest blunder or error in judgment.

III

I come then to the question whether Haig, who received the defective financial statements, and relied on them to his loss, as a right of recovery from the accountants. Mr. Justice MacPherson at trial allowed recovery. He held that the

accountants knew or ought to have known that the statements would be used by a potential investor in the company; although Haig was not, in the judge's words, "in the picture," when the statement was prepared, he must be included in the category of persons who could be foreseen by the accountants as relying on the statement and therefore the accountants owed a duty to Haig. The judge applied a test of foreseeability.

The majority in the Court of Appeal for Saskatchewan (Hall J.A. with McGuire J.A. concurring) came to a different conclusion. The majority of the Court were satisfied that the accountants had been informed by Scholler that the statement would be used to induce persons to invest equity capital in the company. Mr. Justice Hall noted that at that time there was no specific person or group in mind as a prospective investor or [**17] investors; Haig was not known to the accountants and [*475] they were not aware that he had been shown a copy of the statement or that he had been approached to invest in the company. The learned justice of appeal observed that the financial statement had been given to Haig without the knowledge of Scholler or the company. With respect, I think this observation is in error as Wiltshire testified that before giving a copy of the statement to Haig he had received Scholler's permission. The point is, however, of no great consequence for if the accountants, at the request of the company, prepared financial statements for distribution to, inter alia, potential investors, and furnished the company with copies for that purpose, I fail to understand why the company or anyone on its behalf would be expected to seek permission of the accountants before releasing a copy. The learned justice of appeal concluded that the accountants owed Haig the duty to be honest but that they were not liable to him for negligence and, since the misrepresentation contained in the financial statement was the result of an "honest blunder", the appeal should be allowed with costs. The dissenting judge, Mr. Justice [**18] Woods, was of opinion that the accountants knew that the statement was intended for a special purpose, a purpose that would affect the economic interests of those from whom Scholler would attempt to secure funds and that Haig fell within this category. The outcome of this appeal rests, it would seem, on whether, to create a duty of care, it is sufficient that the accountants knew that the information was intended to be disseminated among a specific group or class, as Mr. Justice MacPherson and Mr. Justice Woods would have it, or whether the accountants also needed to be apprised of the plaintiff's identity, as Mr. Justice Hall and Mr. Justice McGuire would have it.

IV

The increasing growth and changing role of corporations in modern society has been attended by a new perception of the societal role of the profession of accounting. The day when the accountant served only the owner-manager of a company and was answerable to him alone has passed. The complexities of modern industry combined with the effects of specialization, the impact [*476] of taxation, urbanization, the separation of ownership from management, the rise of professional corporate managers, and a host of other factors, [**19] have led to marked changes in the role and responsibilities of the accountant, and in the reliance which the public must place upon his work. The financial statements of the corporations upon which he reports can affect the economic interests of the general public as well as of shareholders and potential shareholders.

With the added prestige and value of his services has come, as the leaders of the profession have recognized, a concomitant and commensurately increased responsibility to the public. It seems unrealistic to be oblivious to these developments. It does not necessarily follow that the doors must be thrown open and recovery permitted whenever someone's economic interest suffers as the result of a negligent act on the part of an accountant. Compensation to the injured party is a relevant consideration but it may not be the only relevant consideration. Fear of unlimited liability for the accountant, "liability in an indeterminate amount for an indeterminate time to an indeterminate class," was considered a relevant factor by Mr. Justice Cardozo in Ultramares Corp. v. Touche n2. From the authorities, it appears that several possible tests could be applied to invoke a duty [**20] of care on the part of accountants vis-a-vis third parties: (i) foreseeability of the use of the financial statement and the auditor's report thereon by the plaintiff and reliance thereon; (ii) actual knowledge of the limited class that will use and rely on the statement; (iii) actual knowledge of the specific plaintiff who will use and rely on the statement. It is unnecessary for the purposes of the present case to decide whether test (i), the test of foreseeability, is or is not, a proper test to apply in determining the full extent of the duty owed by accountants to third parties. The choice in the present case, it seems to me, is between test (ii) and test (iii), actual knowledge of the limited class or actual knowledge of the specific plaintiff. I have concluded on the

authorities that test (iii) is too narrow and that test (ii), actual knowledge of the [*477] limited class, is the proper test to apply in this case.

----------Footnotes----------

n2 (1931), *255 N.Y. 170.*

----------End Footnotes----------

The English authorities: I do not think [**21] one can do better than begin with Lord Denning's dissent in Candler v. Crane, Christmas & Co. n3, which later found favour in Hedley Byrne & Co. v. Heller & Partners n4. After identifying accountants as among those under a duty to use care, Lord Denning, in answer to the question "To whom do these professional persons owe this duty?" said (p. 434):

"... They owe the duty, of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them. I do not think, however, the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts."

and

"The test of proximity in these cases is: Did the accountants know that the accounts were required for submission to the plaintiff for use by him?"

One can find some support in these words for the position taken by the majority in the Saskatchewan Court of Appeal but their effect is tempered by what appears later in the judgment, p. 435:

"It will [**22] be noticed that I have confined the duty to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question. That is sufficient for the decision of this case. I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business, for that would expose him in the words of Cardozo, C.J., in Ultramares Corp. v. Touche [supra] to

"... liability in an indeterminate amount for an indeterminate time to an indeterminate class." [*478]

Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be, just as the analyst and lift inspector would be liable in the instances I have given earlier."

In the case at bar, the accounts were prepared for the guidance of a "specific class of persons", potential investors, in a "specific class of transactions", the investment of $ 20,000 of equity capital. The number of potential investors would, of necessity, be limited because the company, as a private [**23] company, was prohibited by s. 3(o) (iii) of The Companies Act of Saskatchewan (R.S.S. 1965, c. 131) from extending any invitation to the public to subscribe for shares or debentures of the company.

----------Footnotes----------

n3 *[1951] 1 All E.R. 426* (C.A.).

n4 *[1963] 2 All E.R. 575* (H.L.).

----------End Footnotes----------

One comes then to the Hedley Byrne case. The argument was raised in that case that the relationship between the parties was not sufficiently close to give rise to any duty. Lord Reid dealt with that argument in these words (p. 580):

"... It is said that the respondents did not know the precise purpose of the inquiries and did not even know whether National Provincial Bank, Ltd. wanted the information for its own use or for the use of a customer: they knew nothing of the appellants. I would reject that argument. They knew that the inquiry was in connection with an advertising contract, and it was at least probable that the information was wanted by the advertising contractors. It seems to me quite immaterial that they did [**24] not know who these contractors were: there is no suggestion of any speciality which could have influenced them in deciding whether to give information or in what form to give it. I shall therefore treat this as if it were a case where a negligent misrepresentation is made directly to the person seeking information, opinion or advice, and I shall not attempt to decide what kind of degree of proximity is necessary before there can be a duty owed by the defendant to the plaintiff."

In the present case the accountants knew that the financial statements were being prepared for the very purpose of influencing, in addition to the bank and Sedco, a limited number of potential investors. The names of the potential investors were not material to the accountants. What was important was the nature of the transaction or transactions for which the statements were intended, [*479] for that is what delineated the limits of potential liability. The speech of Lord Morris in Hedley Byrne included this observation, p. 588:

"It is, I think, a reasonable and proper inference that the bank must have known that the National Provincial were making their inquiry because some customer of theirs was or might [**25] be entering into some advertising contract in respect of which Easipower, Ltd., might become under a liability to such customer to the extent of the figures mentioned. The inquiries were from one bank to another. The name of the customer (Hedleys) was not mentioned by the inquiring bank (National Provincial) to the answering bank (the bank): nor did the inquiring bank (National Provincial) give to the customer (Hedleys) the name of the answering bank (the bank). These circumstances do not seem to me to be material. The bank must have known that the inquiry was being made by someone who was contemplating doing business with Easipower Ltd. and that their answer or the substance of it would in fact be passed on to such person."

Lord Devlin stood on narrow ground, content with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care and such relationship may be either general, such as that of solicitor and client and of banker and customer, or particular, created ad hoc, in which case it becomes necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility. This reference to "assumption [**26] of responsibility" is crucial in cases involving economic loss, according to C. Harvey, "Economic Losses & Negligence" (1972), *50 Can. Bar Rev. 580.* Harvey devises a test for imposing a duty of care in cases of economic loss which he phrases as follows (p. 600):

"a person should be bound by a legal duty of care to avoid causing economic loss to another in circumstances where a reasonable man in the position of the defendant would foresee that kind of loss and would assume responsibility for it."

This "assumption of responsibility" test is an interesting one, although it is no more objective than a foreseeability test. It would allow the Court to narrow the scope of liability from that resulting from a foreseeability test, but it would still require a policy determination as to what should be the [*480] scope of liability. As Lord Pearce stated in Hedley Byrne (p. 615):

"How wide the sphere of the duty of care in negligence is to be laid depends ultimately on the courts' assessment of the demands of society for protection from the carelessness of others."

Lord Pearce in Hedley Byrne adopted Lord Denning's dissent in Candler's case, to which I have already referred, noting

that [**27] the result produced was somewhat similar to the American Restatement of the Law of Torts.

Two other cases decided in England might be mentioned briefly, in one of which the ambit of the duty of care was extended and in the other, restricted. In Dutton v. Bognor Regis United Building Co. Ltd. n5, it was held that the relationship between a building inspector, who had negligently approved the foundations of a house, and the plaintiff, subsequent purchaser of the house, was sufficiently proximate to form the basis of a duty of care. In Mutual Life & Citizens Assurance Co. Ltd. v. Evatt n6, a majority of the Privy Council denied recovery to Evatt for negligent advice given to him gratuitously by an insurance company, of which he was a policy holder, for the reason that he did not allege that at or prior to the time of his inquiry the company carried on the business of supplying information or advice on investments or that it claimed to possess any special skill or competence. These considerations are not, of course, present in the case at bar. Here the accountants held themselves out as possessing special qualifications, skill, and competence which, for reward, they were prepared to place [**28] at the disposal of the public.

----------Footnotes----------

n5 *[1972] 1 All E.R. 462.*

n6 *[1971] 1 All E.R. 150.*

----------End Footnotes----------

The American authorities: Judgment in the two leading cases was written by Mr. Justice Cardozo. In Glanzer v. Shepard n7 the defendants, public weighers, at the request of a seller of beans, made [*481] a return of the weight and furnished the plaintiff buyer with a copy. The buyer paid the seller on the faith of the certificate which turned out to be erroneous. The buyers were entitled to recover from the weighers. The certificate was held to be the very "end and aim" of the transaction and not something issued in the expectation that the seller would use it thereafter in the operations of his business as occasion might require.

----------Footnotes----------

n7 (1922), *233 N.Y. 236.*

----------End Footnotes----------

The question whether third parties were protected [**29] from the negligence of accountants came before the New York Courts in Ultramares Corp. v. Touche, supra. The breach made in the wall of privity by Glanzer's case was narrowed in Ultramares. In that case, a company showed a balance sheet prepared by the defendants to a factor who advanced money to the company. The factor was unknown to the defendants, and Cardozo J. held that the defendants owed the factor no duty of care. Although the Ultramares decision has been followed widely in the United States, it has also been criticized. (See Prosser, Law of Torts, 4th ed., pp. 706 to 709; Hawkins, "Professional Negligence Liability of Public Accountants" (1959), *12 Vand. Law Rev. 797;* Note, "Accountants' Liability for False and Misleading Statements" (1967), *67 Colum. L. Rev. 1437.)* Ultramares has also been distinguished in a case similar to the one at bar, Rusch Factors, Inc. v. Levin n8. In Rusch, the Court held that the plaintiff investor, who had relied on the financial statement prepared by the defendant, was actually foreseen by the defendant. Pettine J. distinguished Ultramares in these words (p. 91):

"... There, the plaintiff was a member of an undefined, unlimited class of remote [**30] lenders and potential equity holders not actually foreseen but only foreseeable."

The Rusch case was followed by the U.S. Court of Appeals (4th Circuit) in Rhode Island Hospital Trust National Bank v. Swartz n9. That case mentions that Rusch has been followed in Iowa and Minnesota.

----------Footnotes----------

n8 (1968), *284 F. Supp. 85* (Dist. Ct., R.I.).

n9 (1972), *455 F. 2d 847.*

----------End Footnotes----------

[*482]

The case before us is closer to Glanzer than to Ultramares. The very end and aim of the financial statements prepared by the accountants in the present case was to secure additional financing for the company from Sedco and an equity investor; the statements were required primarily for these third parties and only incidentally for use by the company. In the Ultramares case, Touche would know that the statements were primarily for company use although they might be read in the ordinary course of business by shareholders, investors, banks and countless others.

Prosser, Law of Torts, 4th ed., notes at p. 707 that a duty of reasonable [**31] care has been found where a representation is made to a third person with knowledge that he intends to communicate it to the specific individual plaintiff for the purpose of inducing him to act, and that most of the courts have drawn the line there. The following question is posed, however, (p. 708):

"But what if the defendant is informed that his representation is to be passed on to some more limited group, as a basis for action on the part of some one or more of them?"

and the answer is in these words, (p. 709):

"... where the group affected is a sufficiently small one, and particularly, as in the case of the successful bidder, only one person can be expected to suffer loss, the guess may be hazarded that the recovery will be allowed. Certificates of expert examination are intended to be exhibited, not hidden under a bushel; and a rule which denies recovery because the defendant who has provided one for such a purpose does not know the plaintiff's name, or the particulars of the transaction, has a very artificial aspect."

The approach taken in the American Restatement of Torts (2d) SS 552 is to permit recovery for loss suffered by the person or one of the persons for whose benefit [**32] or guidance the professional person intends to supply the information or knows that the recipient intends to supply it. A duty of care arises if the defendant accountant knows that a third party will receive his statements. This knowledge is not with regard to the specific individual, but to a limited class of which he forms a part. An explanatory note in the Restatement shows this: [*483]

"A is negotiating with a bank for a credit of $ 50,000. The bank requires an audit by certified public accountants. A employs B & Company, a firm of accountants, to make the audit, telling them he is going to negotiate a bank loan. A does not get his loan from the first bank but does negotiate a loan with another bank, which relies upon B & Company's certified statements. The audit carelessly overstates the financial resources of A, and in consequence the second bank suffers pecuniary loss. B & Company is subject to liability to the second bank."

(See also (1969), *53 Minn. Law Rev. 1357.)*

The Canadian authorities: The Hedley Byrne case has been considered by this Court in Wellbridge Holdings Ltd. v. Metropolitan Corp. of Greater Winnipeg n10. Recovery for economic loss caused by negligence [**33] has been allowed in Rivtow Marine Ltd. v. Washington Iron Works n11, where Mr. Justice Ritchie said, p. 1213:

"... I am of opinion that the case of Hedley Byrne represents the considered opinion of five members of the House of Lords to the effect that a negligent misrepresentation may give rise to an action for damages for economic loss occasioned thereby without any physical injury to person or property and apart from any contract or fiduciary

relationship...."

(See also J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co. n12)

----------Footnotes----------

n10 *[1971] S.C.R. 957.*

n11 *[1974] S.C.R. 1189.*

n12 *[1972] S.C.R. 769.*

----------End Footnotes----------

In summary, Haig placed justifiable reliance upon a financial statement which the accountants stated presented fairly the financial position of the company as at March 31, 1965. The accountants prepared such statements for reward in the course of their professional duties. The statements were for benefit and guidance in a business transaction, the nature of which was known to the [**34] accountants. The accountants were aware that the company intended to supply the statements to members of a very limited class. Haig was a member of the class. It is true the accountants did not know his name but, as I have indicated earlier, I do not think that is of importance. I can see no good reason for [*484] distinguishing between the case in which a defendant accountant delivers information directly to the plaintiff at the request of his employer, (Candler's case and Glanzer's case) and the case in which the information is handed to the employer who, to the knowledge of the accountant, passes it to members of a limited class (whose identity is unknown to the accountant) in furtherance of a transaction the nature of which is known to the accountant. I would accordingly hold that the accountants owed Haig a duty to use reasonable care in the preparation of the accounts.

I am of the view, however, that Haig cannot recover from the accountants the sum of $ 2,500 which he advanced to the company in December 1965, because by that time he was fully cognizant of the true state of affairs. It cannot be said that the sum was advanced in reliance upon false statements. Haig had the [**35] choice of advancing additional money in the hope of saving his original investment. He chose to make a further advance, but the choice was his and not one for which the accountants are liable.

I would allow the appeal, set aside the judgment of the Court of Appeal for Saskatchewan and reinstate the judgment of MacPherson J., subject only to disallowance of the claim of $ 2,500, the whole with costs in this Court and in the Courts below.

The judgment of Martland, Judson and de Grandpre JJ. was delivered by

MARTLAND J.--I agree with the conclusion reached by my brother Dickson that, based upon the finding of the learned trial judge, which was not disturbed by the Court of Appeal, that the respondents knew, prior to the completion of the financial statement, that it would be used by Sedco, by the bank with which the company was doing business and by a potential investor in equity capital, the respondents owed a duty of care, in the preparation of that financial statement, to that potential investor (the appellant), even though they were not aware of his actual identity.

I would dispose of the appeal in the manner proposed by my brother Dickson. [*485]

Appeal allowed with costs.

SOLICITORS: Solicitors [**36] for the plaintiff, appellant: Halvorson, Scheibel, Thompson & Rath, Regina
Solicitors for the defendants, respondents: Embury, Molisky, Gritzfeld & Embury, Regina