



# Haig v. Bamford

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Commentary

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## *Haig v. Bamford*

By R. D. BROWN, F.C.A.\*

I wish never to hear this objection [against a novel extension of the liability of negligence] again. This action is for a tort: torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief. . .<sup>1</sup>

The Supreme Court of Canada's decision in the case of *Gordon T. Haig v. Ralph L. Bamford, et al.*<sup>2</sup> has served to extend the potential liability for damages arising out of negligence to third parties who do not have a contractual relationship with the person committing the error. As such, the decision is of particular concern to accountants, lawyers, and other professionals who will now have to consider a much broader class of persons who may be able to claim for damages in respect of negligence.

In *Haig v. Bamford*, the Supreme Court unanimously accepted the view that a duty of care is owed, at least by a person exercising particular skills (as in a profession), not only to those who employ him, but to a broader and less distinct class whom it is known will receive and rely on his report. This judgment is noteworthy, not only for its adoption of the reasoning of the House of Lords in the landmark case of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*<sup>3</sup> which had already been tacitly accepted in previous decisions of the Supreme Court,<sup>4</sup> but also for the way in which the *Hedley Byrne* doctrine of liability for innocent misrepresentation to third parties who are not bound by contractual or fiduciary relationships was dealt with and extended in a particular factual situation.

Scholler was a businessman engaged in woodworking in Moose Jaw, Saskatchewan. In 1964, he incorporated Scholler Furniture & Fixtures Ltd. and embarked on a major expansion with the assistance of the Saskatchewan

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<sup>1</sup> *Chapman v. Pickersgill*, Michaelmas Term, 3 Geo. III 1762, 2 Wils. K.B. 145 at 146; 95 E.R. 734 per Pratt C.J. Cited by Lord Denning in his minority opinion in *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164 at 178; [1951] 1 All. E.R. 426 at 432, and further quoted by Spence J. in his dissenting judgment in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Company*, [1972] S.C.R. 769 at 801; 26 D.L.R. (3d) 699 at 716.

<sup>2</sup> Decision handed down April 1, 1976. Not reported as yet.

<sup>3</sup> [1964] A.C. 465; [1963] 2 All E.R. 575 (H.L.).

<sup>4</sup> See, for example, *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Company*, *supra*, note 1 at 775 and 802 (S.C.R.); 726 and 716 (D.L.R.); *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957 at 967 and 970; [1972] 3 W.W.R. 433 at 440 and 442; 22 D.L.R. (3d) 470 at 476 and 479; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189 at 1213; [1973] 6 W.W.R. 692 at 709; 40 D.L.R. (3d) 530 at 546. See also *Windsor Motors Ltd. v. Powell River* (1969), 68 W.W.R. 173; 4 D.L.R. (3d) 155 (B.C.C.A.).

Economic Development Corporation (SEDCO). Scholler, who was evidently a better woodworker than financier, obtained a promise of additional credit from SEDCO, contingent upon the production of satisfactory audited financial statements of the company and the infusion of \$20,000 of new equity capital.

It was at this time that the defendant accountants, R. L. Bamford & Co., were engaged by Scholler to prepare the required financial statements as of March 31, 1965, the first year end of the company. The accountants knew at the time of their engagement that Scholler was seeking a new investor for the business; indeed, that appeared to be the primary reason for their engagement. The trial judge made the crucial finding of fact that the accountants were aware, prior to the completion of the financial statements, that the statements would be used by Scholler to show to SEDCO, the company's bank and to some (at that time, unidentified) potential investors in the company. It was, in fact, an official of SEDCO who located a Mr. Haig, who had an interest in investing in the business. The audited financial statements were shown to him, indicating a net profit for the company's first year of operations of about \$21,000 and a satisfactory relationship of gross profit to sales. Haig then made an investment of slightly over \$20,000 in the company, as well as guaranteeing its bank loan.

However, within a few months the company was again troubled by a shortage of working capital and investigation disclosed that not only was the company then in serious financial difficulties, but the earlier balance sheet of March 31, 1965 had been in error: a \$28,000 pre-payment received by the company on contracts which had not even been started had been taken directly into revenue in the March 31 statements. As a result, the sales, profits, and net assets of the company had all been materially overstated. In fact, the company had been in a loss position for its initial year to March 31, rather than the profit one disclosed in the statements. The business shortly thereafter wandered into financial extinction, leaving Haig with a total loss on his investment and an intriguing claim against the accountants.

When the issue came to trial originally in Saskatchewan,<sup>5</sup> the trial judge had little difficulty in finding the defendant accountants negligent in their preparation of the March 31, 1965 balance sheet. The evidence indicated that the accountant's work on the audit of the company had been delegated to a relatively junior employee. In addition, there seemed to have been a divergence between the work which this employee thought that he was to carry out, and the work referred to in the opinion subsequently given by the accountants as to what the firm had actually done. However, the trial judge went further and reached the crucial finding that the accountants owed a duty of care to Haig, and were therefore liable to him for the damages which flowed out of the accountants' negligence.

On appeal to the Saskatchewan Court of Appeal,<sup>6</sup> the trial judge's decision was reversed, with the majority of the court holding that the

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<sup>5</sup> [1972] 6 W.W.R. 557; 32 D.L.R. (3d) 66 (Sask.).

<sup>6</sup> [1974] 6 W.W.R. 236; 53 D.L.R. (3d) 85 (Sask. C.A.).

accountants were not liable to Haig, since at the time that the misleading financial statements were prepared, Haig had not yet appeared on the scene as a potential investor. Accordingly, the connection between the defendant accountants and Haig was too tenuous to create a duty of care or to support a claim for damages flowing from negligence.

The appeal to the Supreme Court was therefore on a split decision, with MacPherson J., the trial judge, and Woods J. A. of the Saskatchewan Court of Appeal holding that it was sufficient to find damages that the accountants knew that the statements were intended to be distributed to a class of potential readers of whom Haig was a member, while Hall and McGuire J.J.A. held that there must be a more direct relationship between the accountants and the plaintiff in order to create liability.

The Supreme Court of Canada evidently considered the issues raised in the appeal to have widespread implications and a full panel of nine judges sat on the case. Rather remarkably, in view of an apparent earlier split in the court on the application of the *Hedley Byrne* doctrine,<sup>7</sup> the court this time was unanimous in its decision in favour of the plaintiff Haig. Dickson J. wrote a lengthy and closely reasoned judgment, which will be of considerable and continuing importance in respect of third party actions for negligence.

Dickson J. stated near the outset of his decision that "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 McPherson 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."

With respect, the real issue was perhaps the determination of the precise relationship which had to exist between the defendant accountants and the plaintiff, in order to establish a duty of care. The judgments of Hall and McGuire J.J.A. below did not solely rest on whether the accountants knew of the identity of the proposed investor; to use the words of Hall J.A. as to his understanding of the issue: "[I]t seems that in those cases where the defendants have been held liable for negligent misrepresentation there existed some element of control over the use of the statement which provided an opportunity to correct if the error had been discovered."<sup>8</sup>

The essential point which appeared to Hall J.A., therefore, was rather that there was no close relationship between the accountant and the plaintiff, and indeed the plaintiff had not even appeared on the scene when the accountants' report had been issued. Hall J.A. felt that the mere fact that the document might have been expected to be used by Scholler to show to some future prospective investor was not sufficient in itself to create a special

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<sup>7</sup> *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Company*, *supra*, note 1.

<sup>8</sup> *Supra*, note 6 at 254-55 (W.W.R.); 102 (D.L.R.).

relationship between the accountants and Haig and hence a duty of care to Haig.

As *Hedley Byrne*<sup>9</sup> seems to be the root of the main arguments in the case, it is useful at the outset to review this 1963 decision of the House of Lords. In *Hedley Byrne*, one bank had responded negligently to a request from another bank for credit information on a particular business, with the evident knowledge that the information requested would be passed on to a specific but unnamed customer of the enquiring bank interested in supplying services on credit to the business in question. The customer of the second bank acted on the information received, and lost substantially as a result. The judgment of the House of Lords in the case is unusually erudite and lengthy, even by U.K. standards: all five Law Lords wrote separate but basically concurring opinions in which it was concluded that the respondents did owe a duty of care to the appellants.

In a later decision of the Privy Council, *Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt*,<sup>10</sup> Lord Diplock summed up the implications of the *Hedley Byrne* decision as follows:

Prior to *Hedley Byrne* it was accepted law in England that in the absence of contract the maker of statement of fact or an opinion owed to a person whom he could reasonably foresee would rely on it in a matter affecting his economic interest, a duty to be honest in making the statement. But he did not owe any duty to be careful, unless the relationship between him and the person who acted upon it to his economic detriment fell within the category of relationships which the law classified as fiduciary. *Hedley Byrne* decided that the class of relationships between the maker of the statement and the person who acted on it to his economic detriment which attracted the duty to be careful was not so limited, but could extend to relationships which though not fiduciary in character possessed other [special] characteristics.<sup>11</sup>

The Lords, in reaching their decision in *Hedley Byrne*, noted with approval<sup>12</sup> the comments of Lord Denning in his dissenting judgment in *Candler v. Crane, Christmas & Co.*<sup>13</sup> where he had formulated the following proposition:

[T]hose persons such as accountants, surveyors, valuers, and analysts, whose profession and occupation it is to examine books, accounts, and other things and to make reports on which other people — other than their clients — rely on in the ordinary course of business [had a duty of care in specified circumstances, to those others. Such people] 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, that 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

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<sup>9</sup> *Supra*, note 3.

<sup>10</sup> [1971] A.C. 793; [1971] 1 All E.R. 150 (P.C.).

<sup>11</sup> *Id.* at 154 (A.C.); 802 (All E.R.).

<sup>12</sup> This dissenting judgment of Lord Denning was referred to with approval in *Hedley Byrne*, *supra*, note 3, in the speeches of Lord Hodson at 509 (A.C.); 597 (All E.R.); Lord Devlin at 530 (A.C.); 611 (All E.R.); and Lord Pearce at 538-39 (A.C.); 617 (All E.R.).

<sup>13</sup> *Supra*, note 1.

knowledge may choose to show their accounts. Once the accountants have handed the accounts to their employer, they are not, as a rule, responsible for what he does with them without their knowledge or consent . . . [T]he test of proximity [in cited cases] is: Did the accountants know that the accounts were required for submission to the plaintiff and use by him?<sup>14</sup>

The intricately reasoned decision in the House of Lords in *Hedley Byrne* refers back to a wealth of older English cases to show that there may be a cause of action for damages for innocent misrepresentation apart from any contractual or fiduciary relationship between the parties and that the claim in *Hedley Byrne* for such damages was not entirely a novel claim, but rather a logical and appropriate extension of the common law, as developed in these earlier decisions. Interestingly enough, the actual decision in *Hedley Byrne* was in favour of the respondent, since after their exhaustive survey of the law of negligence, the Lords went on to hold that in the instant case, a disclaimer as to liability in respect of the opinions proffered, made by the respondent at the time that the advice was conveyed, was sufficient in itself to absolve him of the responsibility to which his negligence would otherwise have subjected him.

The *Hedley Byrne* decision was previously considered by the Supreme Court in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection*.<sup>15</sup> The facts in this case were that a jeweller had suffered a substantial loss through theft and sought to recover damages from a company providing burglar alarm services to its premises. The claim was made not so much under the contract between the jeweller and the protection company, which specifically provided that the protection company was not an insurer and that its liability under the contract was strictly limited, but rather in respect of various assurances which had been given by employees of the protection company to the plaintiff concerning the reliability of the system. In this case, the Supreme Court, held, by a decision of three to two, (Martland, Judson, and Pigeon, JJ. for the majority, and Spence and Laskin JJ. dissenting) that the *Hedley Byrne* decision, while recognized, had no application. The critical point according to the majority was rather that where the relationship between parties is governed by a contract, there can be no tort liability for negligent misrepresentation unless the negligence can be considered as an "independent tort" outside of the contract.

However, the minority would have held that the representations made by the defendant employees were negligent and that the plaintiff was entitled to succeed. Indeed, Spence J., concurred with by Laskin C.J., was almost caustic in his minority judgment, and quoted<sup>16</sup> quite pointedly from the dissenting judgment of Lord Denning in *Candler v. Crane, Christmas & Co.* to the following effect: "You will find that in each of them [a string of U.K. cases in which the law of damages for innocent misrepresentation was further developed], the judges were divided in opinion. On the one side there were the timorous souls who were careful of allowing a new cause of action. On

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<sup>14</sup> *Id.* at 179 and 180-81 (A.C.); 433 and 434 (All E.R.); quoted, in part, in *Hedley Byrne*, *supra*, note 3 at 538-39 (A.C.); 617 (All E.R.), and elsewhere, and in the Supreme Court's decision in *Haig v. Bamford*, *supra*, note 2.

<sup>15</sup> *Supra*, note 1.

<sup>16</sup> *Id.* at 801 (S.C.R.); 716 (D.L.R.).

the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.<sup>17</sup> The decision in the *Nunes* case is complicated by some slight confusion with respect to the implications of the evidence, including a disagreement as to whether the alleged negligence had in fact been the cause of damage to the plaintiff.

Another case considered earlier by the Supreme Court on the same type of issue was *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*.<sup>18</sup> A land developer who acted in reliance on a re-zoning by-law subsequently declared invalid laid an action against the municipality. The court here had no difficulty in finding that the *Hedley Byrne* principle did not extend to the case of a legislative body. They also held that it could not be said that there was a "special relationship" between the appellant and the respondent, the municipality. Both the *Welbridge* and *Nunes* decisions are therefore rather special cases, although in *Nunes*, the Supreme Court seemed strangely reluctant to go the last mile that it has willingly jumped in *Haig*.

The courts in the United Kingdom have also had a bit of difficulty with the full implications of *Hedley Byrne*. The Privy Council, in *Mutual Life v. Evatt*,<sup>19</sup> was rather careful to define the limits on the *Hedley Byrne* reasoning. The basic facts of this New South Wales case were that the respondent claimed damages for negligent advice given gratuitously by an insurance company when he enquired about the financial stability of another company which was related to the insurance corporation. In this case, the majority of the Privy Council held that there was an essential characteristic missing in the relationship which was necessary to create a duty of care: the fact that the insurance company had evidently not represented itself as having particular skills and competence which the person advised did not possess distinguished the case from *Hedley Byrne*. Lord Diplock, speaking for the majority of the Council, said that in order to have a special relationship which implied a duty of care, it was necessary, first, that the maker of the statement had made it in the ordinary course of his business or profession and, secondly, that the subject matter of the statement called for the exercise of some qualification, skill, or competence not possessed by the ordinary reasonable man.<sup>20</sup> Lord Reid and Lord Morris, in the minority, would have held that there was no such necessity of establishing a particular special skill when advice was sought and furnished in a "business" situation.

All of the cases cited above contain references to a vast array of previous decisions in the U.K., Canada, and the United States.<sup>21</sup> Reference

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<sup>17</sup> *Supra*, note 1 at 178 (K.B.); 432 (All E.R.).

<sup>18</sup> *Supra*, note 4.

<sup>19</sup> *Supra*, note 10.

<sup>20</sup> *Id.* at 154 (A.C.); 802 (All E.R.).

<sup>21</sup> Reference was made in *Hedley Byrne*, *supra*, note 3 at 531 and 539 (A.C.); 612 and 617 (All E.R.), in *Mutual Life*, *supra*, note 10 at 802 (A.C.); 154 (All E.R.); and in *Haig v. Bamford*, *supra*, note 2, to the fact that the present law in the United States as set out in the American Restatement of the Law of Torts appears to have anticipated the development of the English common law and would yield a result approximating that in *Hedley Byrne*.

was, of course, made to the famous case of *Ultramares Corp. v. Touche*.<sup>22</sup> In this decision of the United States Supreme Court, the defendants were a firm of accountants sued by a creditor of their client, basically for negligence in respect of financial statements which they prepared. The defendant accountants had delivered thirty copies of financial statements and opinions which they had prepared to their corporate client, but had no specific knowledge of the use to which the client would put such statements. Cardozo C.J. stated:

To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it to himself. A different question develops when we ask whether they owed a duty to these to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.<sup>23</sup>

In rejecting the claim of the appellant, Cardozo C.J. distinguished the earlier U.S. Supreme Court decision in *Glanzer v. Shepard*,<sup>24</sup> where a claim for damages based on the negligence of a weigh master was upheld, when there was a much closer relationship between the defendant and the third party. In this earlier case, a weigh master employed by one party had delivered copies of weighing records directly to a third party and was held to be liable to the third party in respect of his negligence.

It was on the basis of this background of case law that the Supreme Court considered the issues raised in *Haig*. Dickson J., in giving the unanimous reasons for judgment of the court, dealt first of all with the issues raised in the proceedings below. He referred to the argument in the decision of the Saskatchewan Court of Appeal concerning the fact that the financial statements had not been given to Haig directly by the accountants, but indirectly through SEDCO and Scholler. This point was, to Dickson J., a matter of no great consequence; for if the accountants had prepared financial statements at the request of the company, knowing that they were intended for distribution to, *inter alia*, potential investors, it was difficult to understand why the company or anyone else on its behalf would be expected to seek their permission before releasing a copy.

Speaking mainly with respect to potential liability for accountants, Dickson J. stated that it appeared that there were several alternative tests that could be applied to determine whether a duty of care was owed by independent accountants to third parties: first, could the accountant foresee the use of (and reliance on) financial statement by third parties; secondly, did the accountant have actual knowledge of a limited class of parties that would use and rely on the financial statements; and thirdly, did the accountant have actual knowledge of the specific person who would use and rely on the statements? Dickson J. held that it was necessary to consider the first

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<sup>22</sup> (1931), 255 N.Y. 170; 174 N.E. 441; 74 A.L.R. 1139 (U.S. Sup. Ct.).

<sup>23</sup> *Id.* at 179 (N.Y.); 444 (N.E.); 1145 (A.L.R.).

<sup>24</sup> (1922), 233 N.Y. 236; 135 N.E. 275; 23 A.L.R. 1425 (U.S. Sup. Ct.).



test above;<sup>25</sup> the choice in the present case was between the second and third alternative tests representing "actual knowledge of the limited class," or the "actual knowledge of the specific plaintiff." Basically, the rest of the judgment is a simple explanation of why the actual knowledge of the identity of a specific plaintiff is not required and hence why the second alternative is the appropriate test to establish a relationship sufficient to give rise to a duty of care and a potential liability for negligence.

Dickson J. laid great stress on the fact that the accountants had prepared the financial statements for reward in the course of their professional duties and knew that they were intended for use in a possible business transaction, and the broad nature of which was known to the accountants. He also pointed out the changing responsibilities of auditors and accountants in today's society. They now served not merely the owner-managers of private companies, but instead a much broader group of persons who relied on their work and reports.

The accountants in *Haig* were, therefore, aware that the company intended to supply the statements to members of this "very limited class" and while they did not know Haig's name at that time, this was not of importance. Dickson J. stated specifically that, "I can see 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 [as in *Candler* and *Glanzer*] and the case in which information is handed to the employer who, to the knowledge of the accountant, passes it to the 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."

This is the interesting extension in the *Haig* decision. Indeed, it goes some fair distance beyond *Hedley Byrne* or for that matter the dissenting, but subsequently approved, view in *Candler*, since Dickson J. held that even though the accountants could not have known of the existence and circumstances of Haig when they did their work, they nevertheless owed him a duty of care.

Accountants in particular may derive one small note of comfort from the Supreme Court decision. There had been some question in the minds of accountants as to whether due judicial recognition would be given to the different responsibility undertaken by an accountant when he undertakes an audit of financial statements and gives an opinion thereon, and in those circumstances where he undertakes a non-audit engagement, merely undertaking to prepare financial statements from the records of business without any audit of the books. However, Dickson J. had no difficulty in distinguishing between the two classes of engagement. He stated that "the product of an audit is a financial statement accompanied by an auditors' 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."

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<sup>25</sup> Although it is presumably beyond the boundary of where a duty of care lies.

However, it might be noted that accountants have now further complicated matters in the years since the *Haig* case arose, by creating three different classes of reports: there is now a set of financial statements accompanied by an auditors' report, involving a full audit examination; there are financial statements accompanied by accountants' comments, which reflect the fact that the accountant has not performed an audit in respect of the statements but nevertheless has carried out certain minimal amounts of work in their preparation; and finally, there are statements which are accompanied by a note to the reader, in respect of which the accountant has performed essentially no verification work whatsoever. The subtleties of this new system of distinguishing different responsibilities of the accountant may possibly at some future date receive further consideration in the courts.

In the case at issue, the auditors had in fact issued an opinion, in the usual form, with respect to financial statements. The opinion was qualified with respect to three important matters relating to the financial statements, in that it stated that the auditor had not fully satisfied himself as to accounts receivable, inventories, or work in progress, and the opinion on the fairness of the statements was given "subject to" these reservations. However, the report was not qualified with respect to the matter of undisclosed liabilities for sums received in respect of which no work had been done, and it was in this area that the financial statements turned out to be seriously misleading.

The unanimous judgment of the Supreme Court in *Haig v. Bamford* therefore represents a further important development in the law relating to damages for negligence and error. Prior to *Hedley Byrne*, it had been accepted by many that liability in cases involving other than contractual or fiduciary relationships could only exist to third parties where fraud was involved; mere negligence could not create such liability. However, after the *Hedley Byrne* decision, it now seems that in certain circumstances there will be a duty of care to be exercised, at least by persons dealing in areas in which they have a particular expertise and reputation, to a defined class of third parties, who are known to rely on the expert judgments in question.

At the heart of the issue, as the matter was concluded in *Haig*, is not the mere extension of third party liability in particular circumstances, but rather the definition of the precise class of persons to whom such a duty of care may be owed. It is one thing, in a relatively simple situation, to identify a small and discreet group of individuals who are or can be identified as relying directly on the judgments of professionals with whom they have no direct contractual or fiduciary relationship. It is another question altogether, in more complex cases, to contemplate the dimensions of the liability for negligence which may arise where it is known that the opinions and certificates of an accountant or other professional are to be widely disseminated and are to form part of the background information on which a broad class of persons may place some reliance in the conduct of their affairs.

The logic of the doctrines adopted by the Supreme Court in *Haig v. Bamford* undoubtedly makes some sense when related to the particular facts of that case. The defendant accountants had warning, before they commenced their work, that the financial statements would be used for the purpose of interesting potential investors in the corporation. Even though *Haig* had not

yet come upon the scene when the defendant accountants completed their work, it could be argued that Haig was one of a limited "class" of persons whom the accountants knew might rely on the financial statements. In the facts of the case, it is obvious that there would only be a very small number of individuals who would have any interest in investing in a Saskatchewan woodworking business and it was also reasonably obvious that the communication of such financial statements to potential investors would only be through Scholler or possibly SEDCO. In other words, the dissemination of the financial statements would likely be through limited means, over a limited time period, to a relatively small number of persons who would then either decide to invest or not to invest, based on all of the information at hand.

Once one leaves the relatively simple facts in *Haig v. Bamford*, the ultimate dimensions of the doctrine established in this decision become considerably more uncertain. The most obvious instance of potential third party liability lies in the opinion given by accountants on financial statements. However, in many situations, an accountant may be aware that there is a possibility that the financial statements may be used by the business to obtain loans and new capital investment from such persons as may subsequently prove to have an interest in taking such action. Indeed, it might be argued that in virtually every case where accountants prepare financial statements there must be at least a vague appreciation that the statements in question might be used by management, at a subsequent date, to obtain credit or sell shares, and in many instances it will also be known that there exists a group of lenders and investors who are more likely than others to be approached in such an event.

The heart of the difficulty in determining the application of *Haig* lies, therefore, in the identification of the class of third persons who may have a claim for possible damages arising out of negligence and error. The following may be examples of the questions which have not yet been fully answered in respect of this aspect of the *Haig* decision. Is the possible liability to third parties created only in situations where it is known that the report of the professional will be used in respect of a definite transaction (for example, sale of a reasonably definite amount of equity capital to a reasonably small group of persons) or could it extend to a wider range of situations (for example, an accountant's report is required because the company needs new funding, but as yet there is no clear indication of how, or from whom, such funds will be sought)? Does the liability for possible negligence exist in situations where the "particular group" of potential third parties (such as investors) is in fact a broad one (as potential investors in a new issue of securities of a large company)? Finally, is it essential, in order to create such a liability for negligence to third parties, that the individual in question have at least a theoretical opportunity of correcting any error which he subsequently discovered in his opinion?

The practical implication of the *Haig* decision may well expand the scope of liability for accountants substantially and for other members of professions and expert advisers as well. Even before the *Haig* case, there were signs that the litigation plague that has spread across the United States with respect to actions against accountants, doctors and now lawyers, was

showing tentative signs of instigating an upsurge of actions in Canada. The *Haig* decision will certainly lend encouragement to this trend.

For those who are concerned about the implications of the *Haig* decision, there would appear to be relatively little practical advice that can be given. It is a wise dog that knows its own master and in future it would appear that there may be wisdom in accountants and other members of professions and experts taking more fully into account the possible users of their opinions and work, and considering carefully the damages to such third parties that might flow out of any error or omission which they might commit. In other words, the expert can no longer look merely to his client when considering where claims for damages may arise, but must consider the interests of a broader class, including those who may not have the same degree of sophistication or knowledge as their client.

A further possible protective action would be for the professional or businessman concerned with "Haig-type" liability to attempt to make clear, consistent with the facts of the situation, that his report or opinion is intended only for the benefit of his client and is not designed to be relied upon by third parties. Alternatively, consideration could be given to inserting a disclaimer of responsibility along the lines of that which ultimately saved the respondent in *Hedley Byrne*. However, these solutions are not likely to be practical in many cases, particularly with respect to opinions given by accountants on financial statements which by their nature are intended for the information of a broad class of persons. The final useful advice, of course, would be to ensure that negligence insurance, with its ever increasing premium rate, is kept on a fully paid up basis.

The decision in *Haig v. Bamford* is a logical development of recent trends in judicial interpretation in Canada and reflects similar developments in the United Kingdom and the United States. However, like most new developments it carries with it a host of questions as to the dimensions of the shift in the interpretation of the law which it represents. The *Haig* decision undoubtedly will encourage further exploration of the limits of the liability to third parties for negligence and error and will impose both a heavier duty of care and a more onerous financial liability on persons carrying on a profession and whose reports are relied upon by persons other than those with whom they have a direct contractual or fiduciary relationship.