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Dodds & Dodds v. Millman (1964) 45 D.L.R. (2d) 472

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DODDS & DODDS v. MILLMAN (1964) 45 D.L.R. (2d) 472—TORT—EXECUTED CONTRACT FOR SALE OF REALTY—AVAILABILITY OF REMEDY FOR NEGLIGENT MISREPRESENTATION BY REAL ESTATE SALESMAN.—Early in 1963, the House of Lords in principle settled the problem of whether or not to grant a remedy in damages for negligent misrepresentation by granting such relief in the case of *Hedley, Byrne & Co. v. Heller*.[1] In the case of *Dodds v. Millman*[2] the Supreme Court of British Columbia decided to follow the lead of the English courts and make this form of relief available in the province. It is probable that other Canadian jurisdictions will also take this position. In effect this amounts to the creation of an entirely new tort remedy, and constitutes a bold departure from the position previously taken by the courts.

Mr. and Mrs. Dodds, having purchased a North Vancouver apartment building, suffered financial loss as the result of a grossly inadequate "operating statement" used by the real estate salesman in promoting the sale. They framed their action in three different ways,

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51 (1963), 43 D.L.R. (2d) 401.
52 *Statutes of Canada*, 1960, c. 39.
53 (1956), 3 D.L.R. (2d) 727.

1 [1963] 2 All E.R. 575.
2 (1964), 45 D.L.R. (2d) 472.

suing the vendor for recission of the contract, and in deceit, and claiming damages against the real estate agent for negligent misrepresentation in the operating statement. This operating statement contained a projection of future revenues and expenses in the operation of the apartment building, but omitted to mention repairs, decorating, managerial fees and janitorial expenses. The plaintiffs, in suing the real estate agent for negligent misrepresentation, relied on a duty of care arising from the business relationship of the parties in terms of the principle of *Hedley, Byrne & Co. v. Heller.*

The claim for recission of the contract failed, since the court found as a fact that there was an executed contract for the sale of land. Once such contracts are executed, any right to recission for damages caused by negligent misrepresentations is lost.[3] The court further found that the plaintiffs had affirmed the contract. This finding was not necessary to the decision, but would have cut off the right to recission had the contract involved a sale of something other than land. In contracts for the sale of land, execution alone is sufficient to terminate a right to rescind; in other contracts both execution and affirmation are required.

The claim for deceit or fraudulent misrepresentation failed since the court found that the element of fraud was not present.[4] The court found that the real estate agent was "guilty of gross carelessness", but that "he may have been misled by his informers".[5]

The court then found that the vendor was not liable for damages for negligent misrepresentation because of an exculpatory clause contained in the interim receipt:

> It is understood and agreed that there are no other representations, warranties, promises or agreements other than those contained in the agreement.[6]

The court did not, however, permit the realty company and its salesman to shelter under this exculpatory clause in the sales contract, holding that they were not privy to the contract and could not, therefore, escape liability by virtue of its provisions.[7] The court found that the real estate salesman and his employer had been guilty of negligent misrepresentation, and ordered them to pay $8,500.00 damages to the plaintiff.

In order to appreciate the importance and consequences of the B.C. Supreme Court's decision, the principles upon which its conclusion was based must be considered. The plaintiff's success in establishing a claim in tort on the one hand, and the unavailability of a remedy in contract on the other, indicate the differing policies of the law. The law of contract does not allow a remedy for negligent misrepresentation, fearing too wide and unforseeable an extension of liability. Consequently, the scope of contractual remedies is circum-

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3 *Seddon v. N.E. Salt Co. Ltd.*, [1905] 1 Ch. 326.
4 *Wilde v. Gibson* (1848), 1 H.L.C. 605 at 632.
5 *Supra*, footnote 2 at 477.
6 *Ibid.*

scribed by well defined ideas like privity. The law of tort, on the other hand, has remained more flexible, displaying a willingness to extend remedies where it could be shown that a duty of care existed. These tendencies collided in *Dodds v. Millman*. The consequence was a widening of liability in tort, and an indication that the doctrine of privity of contract is now being seriously challenged by the law of negligence.

In *Hedley, Byrne & Co. v. Heller* it was decided that categories existed wherein the court could impose liability in damages for negligent misstatement. This liability would arise in special relationships where a client relied upon a professional or business person's judgment. These special relationships created a duty of care upon the representor toward the person he knows will rely upon his statements unless the representor disclaims liability.[8] This view resulted after a long struggle to broaden the basis of tort liability against ideas of privity originating in the case of *Winterbottom v. Wright*.[9] In 1914 Lord Haldane's view that special relationships, in addition to fraud or dishonesty, might give rise to a duty of care was an early sign of change.[10] A major change came with *Donoghue v. Stevenson*[11] which sidestepped the doctrine of privity, extending liability to negligence causing physical loss. However, no remedy was granted for negligence causing economic or financial harm. The last important decision in which damages were denied for negligent misstatement appeared in *Candler v. Crane Christmas & Co.*[12] in 1951, Denning L.J. strongly dissenting. Denning L.J. followed the older authority of *Cann v. Wilson*[13] in which Chitty L.J. had awarded damages against a property valuator for negligent misrepresentation despite a lack of privity. The issue was how far to extend liability for careless statements. Denning L.J.'s views were fully applied[14] and liability was extended by *Hedley, Byrne & Co. v. Heller*. This completed the work of *Donoghue v. Stevenson* by virtually eliminating the concept of privity from the law of tort.

In *Dodds v. Millman* a duty of care could arise if Lord Pearce's qualifications were met:

> . . . the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer.[15]

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7 The court here followed the reasoning in *Midland Silicones Ltd. v. Scruttons Ltd.*, [1961] 1 Q.B. 106 (C.A.).

8 Lord Denning in *Candler v. Crane Christmas & Co.*, [1951] 1 All E.R. 426; 2 K.B. at 179-181.

9 (1842), 10 M. & W. 109; 152 E.R. 402.

10 *Nocton v. Lord Ashburton*, [1914] A.C. 932 at 948 and 955.

11 [1932] A.C. 562.

12 *Supra*, footnote 8.

13 (1888), 39 Ch. D. 39.

14 *The Gold Spirits Have Conquered: Hedley Byrne & Co. v. Heller*, 3 *Osgoode Hall L.J.* 89.

15 *Supra*, footnote 1 at 617.

The real estate salesman and buyer are surely in such a relationship, as is the vendor, for the duty is not limited by privity[16] or the nature of the loss sustained.[17] The House of Lords in *Hedley Byrne* recognized that the duty of care can arise in a wide variety of situations.[18] *Dodds v. Millman* in applying the *Hedley, Byrne & Co. v. Heller* decision apparently adopted this wide view of liability.

Once it is established that a duty of care may arise, the plaintiffs must next prove that a representation was made to them upon which they relied. In order to establish liability, it is necessary to prove that the representor intended that his representation be relied upon. Here it must be shown that in the business situation the buyer relied upon the misrepresentation of the salesman in the ordinary course of a business transaction, that is, it was warranted or justified reliance.[19] If the intended reliance is not clear to the defendant, this may not matter as long as the plaintiffs were justified in relying upon the representation.[20] At the outset MacLean J. was careful to clarify the nature of the misrepresentation. In regard to the operating statement he said:

> It was accepted by them [the plaintiffs] not as a representation of an existing fact, but I am satisfied that it was accepted by them as a statement of the existing honest opinion of the person who made it to them, namely, the real estate agent.[21]

This evidently contradicts statements of law by both Anson and Fleming which maintain that only a representation of existing or past fact and not mere opinion is necessary in order to bring an action and to find a defendant liable.[22] On the other hand a statement of American law enunciated by Prosser says that opinions in regard to realty transactions form a special case and may be treated as statements of fact provided that the opinion comes from one with special knowledge (for example, an experienced real estate agent).[23] This is a possible rationale. However it may be that a justifiable reliance alone is decisive and that the nature of the representations perhaps no longer matters.[24]

In regard to reliance Denning L.J. had said:

> . . . [the duty of care] extends, I think, only to those transactions for which the accountants knew their accounts were required. . . . This distinction, that the duty only extends to the very transaction in mind at the time, is implicit in the decided cases.[25]

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16 *Supra,* footnote 1, Lord Reid at 580, 581; Lord Morris at 588.
17 *Supra,* footnote 1, Lord Hodson at 598.
18 *Supra,* footnote 1 at 509, 523, 528; See also Anson, *Principles of the English Law of Contract,* 1964, 22nd ed., p. 227 ff.
19 Prosser, *Handbook of the Law of Torts,* 1964, 3rd ed., p. 731 ff.
20 *Id.* at 737-8.
21 *Supra,* footnote 2 at 474.
22 Fleming, *The Law of Torts,* 1961, 2nd ed., pp. 597-8.
23 *Supra,* footnote 19 at 737-8.
24 *Id.* at 743.
25 *Supra,* footnote 8 at 435.

The fact of reliance was essential and MacLean J. proceeded directly to find it:

> In his inexperience, Mr. Dodds questioned none of the statements . . . and I am satisfied that the plaintiff relied upon the agent's statements as honest expressions of the agent's *bona fide* opinion as to the future operating costs of the building.[26]

Next it was vital to show the court that the representation relied upon was in fact a misrepresentation or a negligent statement. In deciding this point it is necessary to employ a proper standard of care. Where business or professional people are concerned the standard is that of normal business with resort to the custom of trade, if necessary, to see whether the defendant's behaviour and judgment met the standard of the whole profession.[27] The onus of proving a failure to meet this standard falls upon the plaintiff.[28] Evidence was adduced by experienced people who dealt in real estate. This was the proper procedure to indicate the inaccuracy of facts in the operating statement[29] and to prove that a misrepresentation had occurred. Positive negligence was also found since the salesman's omissions of cost items were such as "any agent of even average experience would know should be included".[30]

It is perhaps impossible to foretell the impact that the *Dodds v. Millman* decision will have in Canada. As yet no pertinent decisions have appeared. Other than an *obiter dictum* by Whittaker J. in *Boyd v. Ackley*,[31] this is the first Canadian case to follow *Hedley, Byrne & Co. v. Heller*. In December 1963 the Supreme Court of Canada permitted an action in deceit to be based on the "concealment" of material facts affecting the value of a house sold.[32] This case was in many ways similar to *Dodds v. Millman*, the main difference being the way in which the actions were framed. The significant difference lies, probably, in the willingness of the Supreme Court to construe gross negligence as equivalent to fraud. Since *Dodds v. Millman* it is likely that other Canadian jurisdictions will follow the lead taken by the B.C. Supreme Court in allowing damages for negligent misrepresentation. Anson has suggested that fraud now need only be pleaded in executed realty contracts,[33] probably in deference to the rule in *Seddon v. N.E. Salt Co. Ltd.*. But since *Dodds v. Millman* it may be more logical to suggest that fraud now need never be pleaded in Canada.[34]

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26 *Supra*, footnote 2 at 474.
27 *Supra*, footnote 14 at 103.
28 *Ibid.*
29 *Supra*, footnote 2 at 475-7. The inaccuracy of the operating statement was shown. Expenses were in fact twice the total given and maximum rentals had been inflated. Most important, a real estate appraiser valued the property at $35,000, or $8,500 less than the plaintiffs paid. The difference or "out of pocket" loss was taken as the measure of damages.
30 *Ibid.*
31 (1962), 32 D.L.R. (2d) 77 at 80.
32 *Hepting v. Schaaf*, (1964), 43 D.L.R. (2d) 168 at 170.
33 Anson, *op. cit.* pp. 227 and 218.
34 Prosser, *op. cit.* p. 727 suggests that innocent misrepresentation must be sued for in deceit but at p. 721 he admits that suing in negligence or in deceit is probably only a matter of form.

If *Dodds v. Millman* is generally accepted, Canada will be in roughly the same position as England with regard to negligent misrepresentation. This is a progressive step, easing the burden of proof for the plaintiff where fraudulent intent cannot be established, yet negligence is clear.

The U.S. authorities seem to be the best gauge of how far the limits of liability for negligent misrepresentation can be extended. The generally accepted American view seems to be that stated by Cardozo C.J. in *Ultramares Corp. v. Touche*[35] where liability is limited to specific persons known to the defendant when he made his misrepresentation. This seems wider than "special relationships". A wider liability to third parties has been justified on the grounds that professional and business people can adjust fees in order to insure themselves against liability for negligent misstatement.[36] U.S. courts have allowed recovery of damages in special circumstances even where no reliance existed, the action being based solely on the relation between the parties.[37] The American Restatement contains the widest general statement of liability. There the liability of public officials is limited only to the class to which information is made available and to any transactions meant to be affected by the information.[38]

In England the far reaching nature of the *Hedley, Byrne & Co. v. Heller* principle has been criticized; it is said that liability for negligent misstatements can be generalized as simply damages for "reasonable" reliance which caused loss. This displaces the distinction between contractual and tort remedies since liability is not based upon foreseeability. The remedy can apply to all phases of contracting:[39]

> If so, then there must be a tort action whenever in the preliminaries one party either generally by unreasonable behaviour or specifically by making a statement which he ought to have known was false causes loss to the other whether that loss takes place owing to the failure validly to contract or by means of the eventuating contract itself.[40]

Furthermore, negligent interference with or promotion of contractual relations could become a tort if a contract remained unfulfilled.[41] These possibilities may never be fully realized but they presage developments as advanced as those in the U.S. and, perhaps, more significant and varied in their possible effects.

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35 225 N.Y. 170; 174 N.E. 441 (1931).
36 *Recent Cases: Negligent Misrepresentation,* 65 Harv. L. Rev. 355 at 356 (1948).
37 *Ibid.*
38 *Recent Cases: Negligent Misrepresentation,* 77 Harv. L. Rev. 773 at 775 (1964).
39 Weir, J. A., *Liability For Syntax,* (1963), Camb. L.J., 216 at 218-19.
40 *Id.* at 220.
41 *Ibid.*