CASE NOTES

R LOWE LIPPMAN FIGDOR & FRANCK v. AGC (ADVANCES) LTD.[1]

A recent appeal decision of a Full Court of the Supreme Court of Victoria on auditors' liability brings both cheer and concern — to different quarters.

The decision is *R Lowe Lippman Figdor & Franck v. AGC (Advances) Ltd* ('*LLFF* case'). The facts are straightforward. A firm of auditors was alleged to have negligently audited the accounts of a company. A copy of these audited accounts were forwarded to a financier which was the principal creditor of the company. The auditors were aware that a copy of the accounts would be given to the financier 'for review purposes'. The company subsequently failed and the financier sued the auditors for negligent misstatement.

At first instance,[2] Vincent J. applied *Norris v. Sibberas*[3] and held that the auditors owed a duty of care to the financier. His Honour found that the duty was breached and awarded damages against the auditors.

On appeal, the Full Court, comprising Brooking, Gobbo and Tadgell JJ., allowed the appeal and held that the auditors did not owe a duty of care to the financier. The leading judgment was given by Brooking J., with whom Gobbo J. agreed. Tadgell J. gave a short judgment which, in essence, is consistent with the thrust of the leading judgment.

The decision of the Full Court is important as it reveals the approach of the Victorian Supreme Court on the vexing issue of the liability of auditors — and, by extension, other professional advisors — towards third parties under the law of negligent misstatement in tort. This is the issue dealt with at length by the landmark House of Lords decision of *Caparo Industries p.l.c. v. Dickman*[4] (*'Caparo'*) — an issue which has aroused substantial controversy.[5] It is a particularly relevant issue given that, currently in Australia, several prominent firms of

[1] [1992] 2 V.R. 671.

[2] *AGC (Advances) Ltd v. R Lowe Lippmann Figdor & Franck* (1990) 4 Australian Corporations and Securities Reports 337.

[3] [1990] V.R. 161.

[4] [1990] 2 A.C. 605; [1990] 2 W.L.R. 358. The decision at first instance is reported in (1988) 4 Butterworths Company Cases 144 and the decision of the Court of Appeal is reported in [1989] Q.B. 653; [1989] 1 All E.R. 798.

[5] See, for example, Baxt, R., 'The Liability of Auditors — The Pendulum Swings Back' (1990) 8 *Company and Securities Law Journal* 249; Gary, G. & Shelluch, P., 'The Auditor's Liability to the Company, Shareholders, and Third Parties' (1991) 9 *Company & Securities Law Journal* 59; Kinross, J.S.P., 'Post *Caparo* — Paradise Lost?' (1991) 6 *Commercial Law Quarterly* 26; Richardson, J.H., '*Caparo* — Sanity Regained' *(1991) 6 Commercial Law Quarterly* 22; Morris, G.S., 'The Liability of Professional Advisers: *Caparo* and After'(1991) 1 *Journal of Business Law* (January 1991) 36; Davies, M., 'The Liability of Auditors to Third Parties in Negligence' (1991) 14 *University of New South Wales Law Journal* 171; and Lim, Y.C., Seah, C.L. & Ong C.C., and Tabalujan, B.S., 'Auditors Liability to Third Parties: An Investor's Perspective, An Auditor's Perspective & A Lawyer's Perspective' (1993) 1 *Asia Business Law Review* 48. On the topic of auditors' liability generally, see Godsell, D., *Auditors' Legal Duties and Liabilities in Australia* (1990).

auditors are facing major lawsuits brought by third parties who claim to have suffered loss as a result of negligent misstatement.

This article examines the decision of the Full Court in the *LLFF* case and discusses the approach taken by the Court on the issue of ascertaining a duty of care. I begin by mentioning the salient facts of the case. Then follows an analysis of the leading judgment of Brooking J. Particular attention is focused on what appears to be a requirement that, to establish proximity and hence a duty of care, the maker of a statement ('advisor') must make the statement with the intention of inducing the ultimate recipient ('advisee') to rely and act upon the statement. The analysis suggests that the use of this requirement — which, for ease of reference, I have termed the 'inducement criterion' — is questionable.[6]

THE FACTS

The appellants ('LLFF') were auditors of Lyvetta Weaving Mills Pty Ltd ('Lyvetta') for several years, culminating in the 1981 financial year. By this time, Lyvetta had falsified its accounts and maintained two sets of stock sheets. This enabled it to overstate its stock in its 1981 accounts by $228,000. In turn, this converted what ought to have been a significant loss of over $200,000 into a profit of $23,000.

LLFF knew of the stock sheets which reflected the correct financial position. But they nevertheless gave an unqualified auditors' report for the 1981 financial year. At the trial, apparently LLFF virtually conceded that they were negligent in issuing the unqualified auditors' report.[7] The appeal, therefore, revolved around the issue of the existence of a duty of care.

The respondent, AGC, was Lyvetta's financier. AGC first became a creditor of Lyvetta in March 1981. In August 1981, AGC requested from Lyvetta a copy of its 1981 audited accounts to enable AGC to review the credit facility. Not having received the accounts, AGC repeated the request to Lyvetta in September 1981.

Sometime in September or October 1981 — the precise date was not ascertained even at the trial — AGC telephoned LLFF direct requesting a copy of the 1981 audited accounts of Lyvetta. During that telephone conversation, AGC mentioned that the accounts were required 'for review purposes'.

In November 1981, after having received the audited accounts from LLFF, Lyvetta forwarded a copy of the accounts to AGC. Lyvetta also sought a permanent increase of the credit facility to $900,000. After reviewing the accounts, in February 1982 AGC agreed to increase the credit facility to $900,000.

Shortly thereafter, Lyvetta experienced financial difficulties. In July 1982, Lyvetta was placed in receivership by AGC. Lyvetta was subsequently found to owe AGC about $868,000 and to have realisable assets estimated at $385,000.

[6] The reasoning of the Full Court was considered but not followed by Rolfe J. of the Supreme Court of New South Wales in the recent case of *Columbia Coffee & Tea Pty Ltd & Anor v. Churchill & Ors t/a Nelson Parkhill; Saunders v. Donyoke Pty Ltd & Ors* (1992) 10 Australian Company Law Cases 1,659 ('*Columbia Coffee & Tea*').

[7] [1992] V.R. 671, 677. The reported judgment made no reference as to whether deceit was pleaded by AGC.

ANALYSIS

In its judgment, the Full Court found that LLFF had not made any statement to AGC; it follows, therefore, that there could be no negligent misstatement.[8] It was pointed out that LLFF had not said anything to AGC regarding the accounts nor, indeed, was it shown that LLFF had forwarded a copy of the accounts to AGC. It was conceded that LLFF knew that AGC wanted the audited accounts for review purposes and that they had this knowledge when they completed and signed the audit report. Brooking J. was even prepared to accept that LLFF 'knew or believed that AGC would probably rely on the report' in deciding on Lyvetta's credit facility; however, His Honour rejected the view that this knowledge or belief could be equated with LLFF 'having an intention to induce AGC to act in reliance' upon the report.[9]

In reaching this conclusion, Brooking J. referred to the joint judgment of Gibbs C.J., Mason, Wilson and Dawson JJ. in *San Sebastian Pty Ltd v. The Minister*[10] ('San Sebastian'), where their Honours stated:

> [To establish a duty of care] it is necessary not only that A intends that B or members of a class of persons [to] act or refrain from acting in a particular way, but also that A makes the statement with the intention ofinducing B or members of that class, in reliance on the statement to act or refrain from acting in the particular way, in circumstances where A should realize that economic loss may be suffered if the statement is not true.[11]

To be fair, Brooking J. did, however, qualify his remarks regarding the inducement criterion:

> It cannot be said that in cases of negligent misstatement a duty of care will exist only where the defendant made the statement with this intention [that it be acted upon by the plaintiff or by a class of persons which will include the plaintiff]. But in some cases the duty of care will not arise unless the statement was made with the intention mentioned. . . . This is not because, as regards negligent misstatements, the tort of negligence has the intention mentioned as an essential ingredient in common with the tort of deceit. It is because in a case like the present, there being no other combination of circumstances present sufficient to impose a duty of care, that duty will not arise unless the defendant made the statement with the intention mentioned.[12]

Notwithstanding the guarded qualification, the judgment of Brooking J. relies heavily upon the distinction mentioned in *San Sebastian*: to establish a duty of care, it is not sufficient that the advisor intends that the advisee acts in a particular way, but that the advisor makes the statement with the *intention of inducing* the advisee, in reliance on the statement, to act in a particular way. On a separate issue, Brooking J. also mentioned that no submission was made as to why the audit was performed.[13] Under s 158 and the Eighth Schedule of the *Companies Act* 1961, Lyvetta would not be required to lodge statutory audited accounts if it were an exempt proprietary company.[14] However, His Honour noted that, from the evidence available, no finding could be made as to whether Lyvetta was an exempt proprietary company or not. Consequently, it is unclear as to whether the audited accounts were prepared to comply with statutory obligation or for some other purpose.

8 *Ibid.*
9 *Ibid.* 682.
10 (1986) 162 C.L.R. 341.
11 *Ibid.* 358-9.
12 [1992] V.R. 671, 679.
13 *Ibid.* 678.
14 *Ibid.*

This point is significant because it has been argued elsewhere that, under Australian law, statutory audited accounts have a wider role than their British equivalents and this may create relationships of proximity between auditors and additional third parties such as creditors.[15] It was unfortunate that no submissions on this point were made at the hearing and that no evidence was led as to the purpose of the audited accounts. The Court was deprived of the opportunity of considering this interesting argument — one which may be a basis for rejecting the application of *Caparo* in Australia. More importantly, it also deprived AGC of a possible ground upon which it could argue that there was proximity between it and LLFF and that, consequently, LLFF owed it a duty of care.

In these circumstances, the decision of the Full Court fell back squarely upon the issue as to whether LLFF had made a statement to AGC with an intention to induce AGC to relyupon the statement. The reasoning underlying this inducement criterion and its use in the *LLFF* case raise its own difficulties. These are considered below.

MEANING

First, it is not clear what the inducement criterion actually means. One possibility is that it may refer to the role which reliance plays when making a finding as to the existence of a duty of care. In *San Sebastian*, reliance is said to 'play a prominent part in the ascertainment of a relationship of proximity between the plaintiff and the defendant, and therefore in the ascertainment of a duty of care'.[16] If so, it seems that the inducement criterion seeks to emphasise that not only must the advisor intend that the advisee act a certain way, but that the advisee act a certain way as a result of being induced to rely upon the advice.

But the issue is this: is there really a difference between an advisor engaging in conduct, such as making a statement, intending that the advisee would act in a certain way, and the advisor making a statement intending to induce the advisee to rely upon the statement and act in a certain way? Is not the latter implied in the former? Put in another way, does not the conduct of making the statement with the intention that the advisee act in a certain way amount to inducing the advisee? If so, then it seems little turns on the distinction between intending *per se* and intending to induce.

On the other hand, if there is a real distinction between intending per se and intending to induce, it would appear that the latter has become a condition which is nigh impossible to fulfill in most cases. In the *LLFF* case, Brooking J. took the view that even if the advisor knew the advisee would rely on the statement, this would not be sufficient to establish a duty of care. Thus, although his Honour was prepared to accept that LLFF knew or believed that AGC would probably rely on the report in deciding what to do as regards Lyvetta's credit facility, this knowl-

[15] Gary, G. & Shelluch, P., 'The Auditor's Liability to theCompany, Shareholders, and Third Parties' (1991) 9 *Company & Securities Law Journal* 59, 61-2; see also Baxt, R., 'The Liability of Auditors — The Pendulum Swings Back' (1990) 8 *Company & Securities Law Journal* 249.

[16] *San Sebastian Properties Ltd v. The Minister* (1986) 162 C.L.R. 341, 355. For a more detailed treatment of reliance, see McHugh, M.H., 'Neighbourhood, Proximity and Reliance' in Finn, P.D. (ed), *Essays on Torts* (1989) 5-42.

edge or belief 'cannot be equated with an intention to induce AGC to act in reliance on the report'.[17]

This raises the question: in what circumstances would the inducement criterion be fulfilled? Brooking J. did not elaborate. However, the answer appears to be — only in the most blatant of cases, perhaps in cases verging on the tort of deceit. As one commentator, referring to the inducement criterion in *San Sebastian*, has noted:

> In auditing the accounts of the audit client, the auditor may foresee that parties other than the audit client may rely on the audited statement, and he or she may even positively know that third parties will rely on those statement, but it will seldom, if ever, be the case that the auditor will audit the accounts intending to induce third parties to rely on them.[18]

Indeed, in such circumstances, one wonders whether there is much difference between the tort of negligent misstatement and the tort of deceit. Foreseeability and proximity — two key concepts in negligence — appear to have been overshadowed by intention, a concept which is more relevant to deceit. Is the distinction between the two torts being blurred?

PAST AUTHORITIES

Secondly, it is doubtful whether the weight of authority would support the use of the inducement criterion in the ascertainment of proximity. The seminal case on negligent misstatement, *Hedley Byrne Co Ltd v. Heller & Partners Ltd*[19] ('*Hedley Byrne*'), did not refer to any factor resembling the inducement criterion when ascertaining a duty of care. Indeed, as will be shown below, it is arguable that *Hedley Byrne* uses a much simpler test to determine proximity. Even subsequent English cases, which followed Australian High Court precedent in adopting a narrower approach towards finding proximity,[20] did not appear to make any reference to such a factor.

In *Hedley Byrne*, the central issue was whether a duty of care was owed by the defendant bankers to the plaintiff in respect of a credit reference given by the defendant concerning one of its clients. Although the reasoning of the Law Lords is somewhat diverse, it is nevertheless interesting to note that Lord Reid took the view that a duty of care (and, implicitly, proximity) exists where:

> . . . it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. . . A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep

[17] [1992] V.R. 671, 682.

[18] Davies, M., 'The Liability of Auditors to Third Parties in Negligence', (1991) 14 *University of New South Wales Law Journal* 171, 184.

[19] [1964] A.C. 465; [1963] 2 All E.R. 575.

[20] There is a discernible trend in the decisions of the English courts since the mid-1980s which narrows the circumstances in which a duty of care is found in negligent misstatement cases: for example, *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd* [1985] A.C. 210 and *Yuen Kun Yeu v. Attorney General of Hong Kong* [1988] A.C. 175, culminating in *Caparo* [1990] 2 A.C. 605. In doing so, the English courts, in effect, followed the approach of Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424 who took an early lead in advocating this narrower approach in the Australian High Court. For an analysis of this trend, see Lord Oliver of Aylmerton, 'Judicial Legislation: Retreat from *Anns*', the Third Sultan Azlan Shah Law Lecture, organised by the Faculty of Law, University of Malaya and the British Council Malaysia, delivered on 12 September 1988, reprinted in [1988] 1 *The Supreme Court Journal* 249.

> silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.[21]

Thus, Lord Reid focused on two elements in determining proximity. First, the reference to the advisee 'seeking' the advice suggests that the advisee's intended use of the advice is critical.[22] Of course, such intended use cannot be unlimited in scope; it must be a reasonable use in all the circumstances. Secondly, Lord Reid emphasises the need for the advisor to know of the advisee's purpose.

As for the advisor's purpose[23] — whether or not the advisor made the statement with the intention of inducing the advisee to rely upon it — little, if anything, was said. Lord Reid did, however, outline the three choices available to an advisor who knows of the advisee's purpose: the advisor could decline to give the advice; he could give it subject to a qualification or disclaimer; or he could give it without qualification. No reference to the advisor's intention was made at all.

In all this, there appears to be no reference to anything which resembles the inducement criterion mentioned in *San Sebastian.* Indeed, Lord Reid seemed to suggest that, as long as the advisee's purpose in relying on the advice is reasonable, the advisor's knowledge of that purpose is sufficient to establish a duty of care if the advice was given without qualification. In other words, if there is a checklist for reliance and proximity, it appears to comprise:

- the advisee's purpose of relying on the advice being reasonable;
- the advisor knowing the advisee's purpose; and
- the advisor giving the advice without qualification.

In the *LLFF* case, however, Brooking J. supported his conclusion by raising the following example: an auditor who intended simply to fulfill his statutory duties, may owe a duty of care and be liable to all sorts of persons if,

> on the day before the audit report was signed, the company informed him of its intention to broadcast the audited accounts by distributing them to all those with whom it had or hoped to have business dealings.[24]

The simple answer to this example, however, is for the advisor to use an appropriately worded disclaimer against third parties. It is clear that appropriately worded disclaimers can be effective to limit or exclude liability.[25] Indeed, this is the very point being made by Lord Reid in *Hedley Byrne*, as discussed above, when he listed the three alternative courses of action available to the auditor in such a situation.

In a much later case, *Smith v. Eric S Bush,*[26] Lord Jauncey acknowledged that the mere fact that a mortgagee's valuer knows that his valuation will be shown to

21 [1964] A.C. 465, 486.

22 This is the view of Lord Oliver when he summarised his understanding of *Hedley Byrne* in *Caparo* [1990] 2 A.C. 605, 638.

23 In *San Sebastian* (1986) 162 C.L.R. 341, 372 Brennan J. used the phrase 'intention or purpose of inducing reliance', suggesting that intention and purpose may be used interchangeably.

24 [1992] 2 V.R. 671, 682.

25 In *Hedley Byrne*, a disclaimer saved the advisor from liability; but in *Smith v. Eric S Bush* [1990] 1 A.C. 831 a disclaimer was struck down since it was held to be unreasonable pursuant to the Unfair Contract Terms Act 1977 (UK).

26 [1990] 1 A.C. 831.

an intending mortgagor of itself may not impose upon him a duty of care to the mortgagor.[27] Rather, the valuer must know that the mortgagor is likely to rely on the valuation. Once that likelihood of reliance is made known to the valuer, this may be sufficient to impose liability. If, it is argued that intention to induce is necessary, then implicit in Lord Jauncey's statement is the proposition that, if the advisor knew that the advice would be passed on to the advisee and it is likely that the advisee would rely on the advice, then the giving of the advice with such knowledge amounts to giving the advice with an intention to induce the advisee to rely and act upon the advice. Surely, such was the situation with AGC in the *LLFF* case.

Similarly, after reviewing earlier authorities, Lord Bridge in *Caparo* stated that:

> The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances, the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it.[28]

The past authorities, therefore, even taking into account the recent narrower approach towards proximity, do not appear to support the use of the inducement criterion in finding proximity and a duty of care.

SAN SEBASTIAN

Thirdly, based on a reading of *San Sebastian* itself, the authority of the inducement criterion must be questioned. Clearly, the criterion is an *obiter dictum*.[29] Moreover, the reasoning in *San Sebastian* regarding proximity — particularly its interpretation of a number of American cases — has been criticised.[30] It is somewhat surprising, therefore, that the Full Court in the *LLFF* case seemed to place such heavy emphasis upon it without further discussion.

Furthermore, there does not appear to be any references in *San Sebastian* regarding the origin of the criterion. Its judicial pedigree, therefore, is suspect. One possible origin of the criterion is the dissenting judgment of Denning L.J. in *Candler v. Crane Christmas & Co*[31] where his Lordship stated:

> But excluding such cases as those, there are some cases — of which the present is one — where the accountant knew all the time, even before they present their accounts, that their employer requires the accounts to show to a third person *so as to induce* him to act on them: and then they themselves or their employers, present the accounts to him for the purpose. In such cases I am of the opinion that the accountants owe a duty of care to the third person.[32] (Italics added.)

It should be noted, however, that here Denning L.J. was not establishing inducement as a criterion for finding proximity. His Lordship, in effect, stated that where there is such intention to induce, proximity and hence duty of care

27 *Ibid.* 872.
28 [1990] 2 A.C. 605, 620-1.
29 (1986) 162 C.L.R. 341, 358.
30 See Davies, M., 'The Liability of Auditors to Third Parties in Negligence' (1991) 14 *University of New South Wales Law Journal* 171, 182.
31 [1951] 2 K.B. 164.
32 [1951] 2 K.B. 164, 181.

would be established. In other words, the inducement criterion may be a sufficient, as opposed to necessary, element for proximity.[33]

To be fair, as mentioned earlier, Brooking J. in the *LLFF* case did qualify his remarks regarding the inducement criterion by stating that it is not a necessary element for finding proximity. However, his Honour's approach arguably is such that, for all practical purposes, the inducement criterion becomes a necessary element. In the *LLFF* case, it was not the case that AGC was an unidentified recipient of the audited accounts. In fact, as the auditors of Lyvetta, it would not be possible for LLFF not to realise that AGC was the principal creditor of Lyvetta. Moreover, AGC made direct contact with LLFF during the telephone conversation in September/October 1981. AGC specifically told LLFF that the accounts were required for the purpose of reviewing the Lyvetta credit facility. Given such explicit direct contact, it seems paradoxical that no proximity was found.

Granted, there have been other cases where, despite an explicit direct contact between an advisor and an advisee, a duty of care was not established. *James McNaughton Paper Group Ltd v. Hicks Anderson & Co*[34] is one such case. However, the Court of Appeal in that case did not rest its conclusion on the absence of the inducement criterion. The Court held that there was no duty of care on the basis of other factors, such as the fact that the accounts were in draft form and that the advisee was expected to have undertaken independent steps to review the financial position of the company which it was going to acquire.[35] Again, no comment was made regarding the necessity of the inducement criterion.

It is also noteworthy that in another Victorian Full Court decision, *Norris v. Sibberas*,[36] no reference was made to the San Sebastian inducement criterion[37] although the court had every opportunity to do so. Indeed, in his judgment Marks J., with whom Murphy and Beach JJ. agreed, whilst referring to *San Sebastian*, made no reference to the inducement criterion, preferring to state his understanding of that case in the following words:

> A consequence of *San Sebastian* is that the relationship of proximity between the parties ... determines the existence or otherwise of a duty of care in the area of negligent misstatement torts. In turn, the required degree of proximity is to be determined by reference to the 'reliance' which the representee to the knowledge of the representor places on what is said (that is, the statement, information, advice, prediction or whatever be the type of communication).[38]

It is remarkable that, although Vincent J. at first instance[39] referred to and

33 Even the sufficiency of the inducement criterion for proximity is also debatable: see Brennan J. in *San Sebastian* (1986) 162 C.L.R. 341, 372.

34 [1991] 2 A.C. 113.

35 *McNaughton* is considered in Percival, M., 'After Caparo — Liability in Business Transactions Revisited' (1991) 54 *Modern Law Review* 739, Logie, J.G., 'Liability in Negligence of Company Accountants and Auditors' (1991) *The Scots Law Times* 169 and Tabalujan, B.S., '*Caparo* Revisited: Proximity, Purpose and Knowledge and the Auditor's Duty of Care to Third Parties' [1992] 2 *Malayan Law Journal* xc.

36 [1990] V.R. 147.

37 In *Norris v. Sibberas* [1990] V.R. 161, 171 there was a reference to the judgment of Lord Denning M.R. in *Esso Petroleum Co. Ltd. v. Mardon* [1976] Q.B. 801, 820 which contained the phrase 'intending to induce'. Again, it is submitted that this should be read as meaning that an intention to induce may be a sufficient, as opposed to necessary, element for proximity in certain situations. See the argument above in relation to *Candler v Crane Christmas & Co.* [1951] 2 K.B. 164.

38 [1990] V.R. 161, 174.

39 (1990) 4 Australian Corporations and Securities Reports 337, 340-1.

applied *Norris v. Sibberas* which, it is submitted, is more consistent with the approach in *Hedley Byrne*, the Full Court in the *LLFF* case made no reference at all to *Norris v. Sibberas*.

CONCLUSION

The conclusion of the matter seems to be this. In the *LLFF* case, the Full Court, led by Brooking J., appeared to have relied upon a dictum in *San Sebastian* and adopted avery narrow approach to finding a duty of care. This approach is even narrower than that used by the House of Lords in *Caparo* — which itself has been the subject of controversy — and certainly much more narrow than the approach used in *Hedley Byrne*.[40]

If the approach of Brooking J. signals the way in which the Supreme Court of Victoria in future will apply the proximity test to similar cases before it,[41] there may be cause for cheer among Victorian auditors and other professional advisors. Under this approach, the liability of auditors and other professional advisors to third parties now seem negligible. Granted that their potential for liability under the misleading and deceptive conduct provisions of ss 52-53 Trade Practices Act 1974 (Cth) ss 995 and 1005 Corporations Law continue to exist. Yet, the Victorian approach does provide some relief to auditors and other professional advisors.

Indeed, those advisors who are currently beleaguered with negligence suits in other Australian jurisdictions may be tempted to seek a transfer of their cases to the Victorian court. In contrast, other jurisdictions, such as the Supreme Court of New South Wales, appear to take a wider approach to the question of auditors' duty of care to third parties, as evidenced in the recent case of *Columbia Coffee & Tea*.[42]

On the other hand, the *LLFF* case may also be cause for concern. If one would, for a moment, step back and look at the equities of the factual situation in the case, disregarding all the complexities and technicalities of the law surrounding liability for negligent misstatement, one cannot help but feel that justice was not done. With respect, neither the ruling nor the rule appears satisfactory.

If the reasoning in the *LLFF* case is subsequently followed by other cases, this will amount to a significant shift from the original principles of negligent misstatement enunciated in *Hedley Byrne*. Foreseeability and proximity now appear to be subordinated and made conditional upon intention — an intention which is difficult to establish, at that.

In these circumstances, one wonders whether any third party advisee could

40 On the view that *Caparo* is more narrow than *Hedley Byrne*, see Davies, M., 'The Liability of Auditors to Third Parties in Negligence' (1991) 14 *University of New South Wales Law Journal* 171 and Tabalujan, B.S., '*Caparo* Revisited: Proximity, Purpose and Knowledge and the Auditor's Duty of Care to Third Parties' [1992] 2 *Malayan Law Journal* xc.

41 This decision will be binding upon all lower courts in Victoria unless it is later overturned. Apparently, AGC considered appealing to the High Court following the Full Court decision; but the case was subsequently settled out of court: telephone conversation in December 1992 with Mr. Peter Rashleigh, partner of Phillips Fox, Melbourne, solicitors for LLFF.

42 (1992) 10 Australian Company Law Cases 1,659, *supra* n.6 for full citation.

ever hope to establish the proximity required for a duty of care. If so, this decision is Victorian not only in terms of its jurisdiction, but perhaps also in terms of its age.

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