SOLICITOR'S NEGLIGENCE: THE APPEAL OF DEYONG

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I. INTRODUCTION

The *DeYong* case[1] has gone to the Alberta Court of Appeal. At first instance the case raised the spectre of concurrent liability in contract and tort for solicitors. Judicial guidance on this point, however, remains for the future; the question of concurrent liability was not addressed by the Court of Appeal.

In a strong judgment, the decision of the trial judge was reversed and Weeks, the solicitor, exonerated from any blame. Along with reversing two findings of fact, the Court of Appeal made instructive points about the use of expert evidence and reliance upon documents provided by one's client. Both appear to be variations on the theme that the duty of a solicitor is not that of an insurer.[2] These points merit brief comment.

II. FACTS

The action concerned an unsecured loan to finance a speculative investment. On the strength of a telex purporting to indicate that an independent party was willing to perform his role in this affair, D and R, advanced funds to M. The telex was delivered to W, the solicitor, by the party seeking the loan. W had been retained by D. Although a telex was obtained with D's knowledge and acquiescence, neither he nor W knew it was a fabrication. When the money was advanced and not recovered, D and his silent partner, R, sued W, the solicitor, for failing to protect their interests.

The trial judge found, *inter alia*, that W was personally to have confirmed the arrangement and, in failing to do so, was negligent in the performance of his contract of retainer.[3] On the facts found by the trial judge, W was held liable to R in tort and to D in both contract and tort.

Whether a solicitor's liability to his client is based upon contract or tort, this result did not find favour with the Court of Appeal.[4] They arrived at their conclusion by overturning two findings of fact and two of law. On the matters of fact the Court found:

1. The evidence did not support finding an instruction requiring W to contact the independent party (Chrysler Corp.) *personally and directly*.[5]

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1. *DeYong* v. *Weeks* (1984) 55 A.R. 305. Leave to appeal to the S.C.C. denied January 21, 1985, (1985) A.W.L.D. 15 February 1985, No. 233.
2. *DeYong* [1984] 55 A.R. 305 at 314. See also *Bjorninen* v. *Mercredi* [1983] 4 W.W.R. 633 at 640; (1983) 21 Man. R. (2d) 229 at 233 per Hewak J. and see also *Doiron* v. *La Caisse Populaire D'Inkerman Ltee* (1985) 32 C.C.L.T. 73 (N.B.C.A.). At p. 102 LaForest J.A. referred to *Brumer* v. *Gunn* [1983] 1 W.W.R. 424 (Manitoba Q.B.) and said: "[t]he solicitor is not an insurer against loss to his client". Interestingly, a unanimous court found the client contributorily negligent and reduced the award accordingly.
3. *DeYong* at first instance (1983) 43 A.R. 342 at 364.
4. Per Belzil J.A. (Lieberman and Harradence JJ.A. concurring).
5. *Supra* n. 1 at 311.

2. Contacting the independent party would have made no appreciable difference. The evidence did not support a causal connection between W's conduct and the loss.[6]

III. LAW

From these facts and the course of evidence at trial, two important questions of law emerged. The first deals with the scope of solicitors duties; in particular whether there was a duty to verify a written acknowledgement that figured prominently in the deal. The second, an evidentiary point, deals with establishing a standard of conduct in particular circumstances. Before proceeding to the actual decision it will be useful first to consider the theoretical setting of solicitors duties.

The foundation of a solicitors liability to his client is arguably based upon contract. But whether tort or contract founds the obligations, certain similarities in the cause of action can be observed.

In contract, the terms of an agreement are ordinarily questions of fact. Implied terms in a class of private agreements such as solicitor's retainers, however, resemble the public duties of tort. Like the *existence* of a duty in a negligence action, both are questions of law and arise from decided cases and statute.[7] Thus whether a solicitors obligations to his client are founded upon tort or contract, the origin of at least some of the duties arise from the same source; common law and statute. The similarities in nature and origin, however, do not warrant indifference to the cause of action.[8]

This class of solicitors obligations comes chiefly from the vintage English Court of Appeal Decision in *Groom* v. *Crocker*.[9] Scott L.J.

6. *Supra* n. 1 at 317.

7. See W.L. Prosser *The Law of Torts* (4th ed. 1971) 205; R.F.V. Heuston and R.S. Chambers *Salmond and Heuston on the Law of Torts* (18th ed. 1981) 183. It may now be slightly misleading to put things this way where common law negligence is concerned. The authors of this latter source cite *Arenson* v. *Casson, Beckman, Rutley & Co.* [1977] A.C. 1004 at 1011 and *Anns* v. *Merton London Borough Council* [1978] A.C. 728 at 751-752 per Lord Wilberforce and suggest that in negligence actions the emphasis has shifted from looking at cases to find a duty, to negativing a prima facie duty on public policy considerations. On the general question of implied terms in contract see: G.H. Treitel *The Law of Contract* (6th ed. 1983) 158; *Cheshire and Fifoot Law of Contract* (10th ed. 1981) 115; S.M. Waddams *The Law of Contract* (2nd ed. 1984) 366. Here the starting point is usually *The Moorcock* [1886-90] All E.R. Rep. 530 at 534 and 535 per Bowen L.J. It appears simpler to exclude implied terms in contract than to limit a duty in the tort of negligence.

8. This conclusion is inconsistent with the former Master of the Rolls' *obiter* remarks about professionals in *Esso Petroleum Co. Ltd.* [1976] 2 All E.R. 5. Referring to "decisions of high authority" he says (at p. 15): "[t]hose decisions show that, in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract and is therefore actionable in tort."

   While the law of England now appears to endorse such a conclusion it is respectfully submitted that Lord Dennings' remarks were made in advance of developments which would support them. In Canada, it is submitted these remarks are not the law; as the writer has endeavoured to point out in an earlier comment, (1984) 22 *Alta. L. Rev.* 294; authorities dealing with concurrent liability of professionals are divided and there has been no clear pronouncement by the S.C.C. It is further submitted that the former Master of Rolls softens the effects of his conclusion in the extra-judicial remarks cited following.

9. [1938] 2 All E.R. 394; [1939] 1 K.B. 194. See also *Nocton* v. *Lord Ashburton* [1914] A.C. 932 at 956. *Lanphier* v. *Phiphos 91838* 8 C&P 475 per Tindal C.J., and *Cordery's Law Relating to Solicitors* (6th ed. 1968) 187.

stressed that the relation between solicitor and client was contractual and neatly summarized the implied duties, saying:[10]

> The retainer, when given, puts into operation the normal terms of the contractual relationship, including in particular *the duty of the solicitor to protect the client's interest*, and carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria. [Emphasis added.]

While Scott L.J. emphasizes that these duties are "normal terms of the contractual relation" and do not give rise to a cause of action in tort, they bear, nevertheless, a close resemblance to the sort of duties one might expect to find in the tort of negligence.[11]

At the heart of these duties is the obligation to "protect the client's interest". Though some examples of the way this might be achieved are offered, the obligation is unfortunately broad. Whether contract or tort founds the duty, an obligation to "protect the client's interests" could mean virtually anything.

From this case, in Canada, arise the remarks of Riley J. in *Millican* v. *Tiffin Holdings Limited*:[12]

> Lawyers are bound to exercise a reasonable degree of care, skill and knowledge in all legal business they undertake. . . .
>
> The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor.
>
> It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily, competent lawyer would not have made or shown it.
>
> It is extremely difficult to define the exact limits by which the skill and diligence which a lawyer undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking. It is a question of degree, and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed: See Scrutton, L.J. in *Fletcher and Son* v. *Jubb, Booth and Helliwell* [1920] 1 KB 275, 281, 89 LJKB 236, following Tindal, C.J. in *Godefroy* v. *Dalton* (1830) 6 Bing 460, 8 LJOSCP 79, 130 E.R. 1357. See also *Parker* v. *Rolls* (1854) 14 CB 691, 139 E.R. 284. . . .

He continues by summarizing the duties as follows:

> The obligations of the lawyer are, I think, the following:
>
> 1. To be skillful and careful;
> 2. To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary;
> 3. *To protect the interests of his client;*
> 4. To carry out his instructions by all proper means;
> 5. To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him;
> 6. To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria. [Emphasis added.]

10. [1938] 2 All E.R. 394 at 413; 108 L.J.K.B. 296.

11. This similarity may be responsible for the current trend of speaking about solicitors negligence as though it were a tort. In most cases the implied terms of the retainer are in issue. It is submitted that the difference is more than purely semantic.

12. At first instance (1964) 50 W.W.R. (NS) 673; 49 D.L.R. (2d) 216; reversed (1965) 53 W.W.R. (NS) 505; reversed (affirming the trial decision) [1967] S.C.R. 183.

This has been cited with approval elsewhere (for example *Aetna Roofing (1975) Ltd.* v. *Conradi* [13] and *Schloss* v. *Koehler.*)[14] The first part of it (including remarks about liability arising out of contract) has been approved by the Court of Appeal on more than one occasion.[15]

The danger with these sorts of definitions arises when the *emphasis* is misplaced. It is a simple step to overlook the retainer and whatever limits it might have, focus on the duties and treat the matter like a negligence action. To do so ignores an important question: does the negligence complained of give rise to a breach of contract?

A further problem lies in the scope of phrases such as "the duty of the solicitor to protect the client's interest". It is not much of a definition at all. As Riley J. points out, it is extremely difficult to know where the boundaries lie.

The result may make solicitors duties overbearing. If the emphasis is on "negligence", rather than arguing limits to an agreement and focusing on the facts arising from the circumstances of a particular retainer, the defendant must rely upon public policy to limit the duties.[16] This is a far higher hurdle to clear than limiting duties in contract and the broad words used to describe them, make it equally difficult to get around. In effect the solicitor becomes almost an insurer of his client's affairs.

Thus the theoretical aspect of this area of the law reveals two problems. First, whether the emphasis should be on the implied duties; making the action more like tort, or, on the scope of the retainer; which brings the action back to its proper setting, contract. Second, there is the problem connected with the language of solicitors negligence and the scope of words used to speak to solicitors obligations.

Fortunately, the Court of Appeal has given some guidance on these questions by examining the duties within the retainer rather than the cause of action itself. Whether their conclusions will rise above the facts of the case remains to be seen. But it is cause for some optimism in an area of the law otherwise marked by bleak developments.

The Trial Judge appears to have found as an implied term of the retainer, or a general duty of care owed by W to D, to confirm personally the collateral arrangement which was the object of the loan.[17] Despite finding no *specific instructions* he held this to be a "general duty" and as such an implied term of the retainer.[18] The Court of Appeal disagreed. They began with the proposition that *the duty of a solicitor is not that of an insurer.*[19] Citing *Millican* v. *Tiffin Holdings Limited* [20] they said:[21]

> I have found no authority, none is cited by the Trial Judge and none was cited before us which would impose a duty upon a solicitor in the absence of specific instructions or

13. (1984) 52 A.R. 369 per McBain J.
14. [1979] 4 Alta. L.R. (2d) 85 per Bowen J.
15. See *DeYong*, *supra* n. 1 at 314 and see *Spence* v. *Bell* [1982] 39 A.R. 239 at 251.
16. See *supra* n. 7.
17. *Supra* n. 1 at 309.
18. Or in the alternative, that the breach of this "general duty" might give rise to a cause of action in tort.
19. *Supra* n. 2.
20. *Supra* n. 12.
21. *Supra* n. 1 at 310.

> special circumstances alerting him to do so to verify the authenticity of documents delivered to him by his client or by someone else on his client's instructions, be it even by the party with whom his client proposes to deal. The solicitor is entitled to assume, again in the absence of specific instructions or unusual circumstances, that the client has satisfied himself of the integrity of the party with whom the client proposes to deal.

There were neither specific instructions nor special or unusual circumstances. In the absence of these, the client was ". . . not entitled to assume that [W] would verify the contract in the normal performance of this professional duty".[22]

Thus, we find two specific limits to the implied terms of the retainer:

1. In the absence of specific circumstances or specific instructions there is no duty upon a solicitor "to verify the *authenticity of documents* delivered to him by his client or by someone else on his client's instructions, be it even the party with whom his client proposes to deal".[23]
2. "The solicitor is entitled to assume, again in the absence of specific instructions or unusual circumstances, that the client has satisfied himself of the *integrity* of the party with whom the client proposes to deal."[24] [Emphasis added.]

Unfortunately, it is not clear how far this will go because the facts were complicated and unusual. It will not found a rule that extraneous matters need not be checked[25] but it appears that if a risk is not evident or if there are no facts that would put one "on suspicion" there is not liable to be a duty.[26]

Eliminating a "general duty" to verify collateral facts in the absence of unusual circumstances offers some solace to the practitioner. So also does the weight placed by the Court of Appeal on the agreement rather than just emphasizing the duties.[27] Although it would be fanciful to find a conclusion on the question of emphasis in this aspect of the decision, the result may be a welcome sign.

The next point decided by the Court of Appeal had to do with evidence of a particular standard in the circumstances. Expert evidence is said to be admissible to assist the Court in understanding technical (factual) problems or establishing the existence of a standard of conduct in particular situations. Their evidence is not admissible on points of law. The existence of a *duty* or the extent[28] of terms of the retainer are matters of law

22. *Id.* at 311.

23. *Id.* at 310.

24. *Id.* See also *Imperial Bank of Canada* v. *Hamilton*, [1901] 31 S.C.R. 344.

25. *Id.* at 317.

26. This conclusion probably doesn't apply where standard practice is concerned. Although it fits neatly with a line of standard practice cases beginning with *Winrob* v. *Street* (1959) 19 D.L.R. (2d) 172, it (and *Winrob*) conflicts with *Polischuk* v. *Hagarty* (1983) 149 D.L.R. (3d) 65, 42 O.R. (2d) 417 (Ont. HC) affirmed (1985) 14 D.L.R. (4th) 446, (1984) 49 O.R. (2d) 71 (Ontario CA), and *Edward Wong Finance Co. Ltd.* v. *Johnson, Stokes & Master* [1984] 2 W.L.R. 1, [1984] A.C. 296 (P.C.). *Winrob* speaks in terms of "provident precautions against a *known* risk". *Poloschuk* and *Wong* appear to turn upon a risk *inherent* in common procedure that is only in a strained sense "known". Perhaps the sort of reasoning found in the *DeYong* case will prevail elsewhere and exert a moderating influence.

27. See for example, *supra* n. 1 at 314.

28. I.e. meaning.

for which expert evidence may not be adduced.[29] The existence of a *standard of conduct* is a matter of fact for which expert evidence is admissible. There is often an extremely fine line dividing the two.

A solicitor is expected to perform at least to the standard of an "ordinarily competent" member of his profession.[30] But even in routine matters the standard is often difficult to discern. To cite Riley J. once again:[31]

> It is extremely difficult to define the exact limits by which the skill and diligence which a lawyer undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking. It is a question of degree, and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed.

The problem is exacerbated whenever the circumstances of the retainer are unusual or uncommon; the novelty itself diminishes the likelihood of there being a clear standard of conduct. When the situation is in any way unique, given the scope of solicitor's duties the expert evidence tends to go to the *existence* of a duty to do this or that rather than indicating how the duties should be discharged. As novelty increases so does the tendency of expert evidence to go to a question of law. The effect is either that the expert finds himself in place of the judge, or the experts' standard is substituted for that of the ordinarily competent solicitor. Both are unacceptable.

At trial two experts were given a set of hypothetical facts intended to mirror those in the case at bar and asked whether the lawyers obligation were fulfilled. Both experts were leading senior solicitors of unquestioned competence. The second, in essence, was asked what he would have done in the circumstances. The Court of Appeal held this latter evidence to be inadmissible, saying:[32]

> An expert may be called to express an opinion on the standard of competence and skill to be expected of a solicitor not to say what his own practice would have been.

In support of this proposition Phipson[33] is cited along with an old English case.[34]

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29. See for example Prosser *supra* n. 7, *DeYong* (1984) 55 A.R. 305 at 316, citing Oliver J. in *Midland Bank Trust Co.* v. *Hett, Stubbs and Kemp* [1979] Ch. 384, [1978] 3 All E.R. 571 at 582. R.N. Mahoney "Lawyers — Negligence — Standard of Care" 63 Can. Bar Rev. 221 at 234 suggests Laskin C.J.C. (as he then was) viewed the matter differently in *Reibl* v. *Hughes* [1980] 2 S.C.R. 880, (1981) 114 D.L.R. (3d) 1.

30. See for example *Aaroe* v. *Seymore* (1956) 6 D.L.R. (2d) 100; *Brenner* v. *Gregory* (1972) 30 D.L.R. (3d) 672; *Page* v. *Dyck* (1980) 12 C.C.L.T. 43. To these cases, R.N. Mahoney, *supra* n. 29, adds two surgeon cases out of the Supreme Court of Canada. They are *Eady* v. *Tenderenda* 51 D.L.R. (3d) 79 and *Ostrowski et al* v. *Lotto* (1972) 31 D.L.R. (3d) 715, affirming (1970) 15 D.L.R. (3d) 402. Mahoney observes that they support the standard of the "normal prudent practitioner of the same experience and standing" in professional negligence actions. He goes on, however, to argue that where common practice is involved, two solicitors cases: *Polischuk* v. *Hagarty* and *Edward Wong Finance Co. Ltd.* v. *Johnson, Stokes & Master*, *supra* n. 26, may have raised the standard considerably. See also *Elcano Acceptance Ltd.* v. *Richmond* (1985) 31 C.C.L.T. 201, where a specialist-generalist distinction was recognized by Smith J.

31. *Millican* v. *Tiffin Holdings Limited* (at first instance) *supra* n. 12; Cited with approval *DeYong*, *supra* n. 1 at 314.

32. *Supra* n. 1 at 315.

33. *Phipson on Evidence* (13th ed. 1982) 562.

34. *Berthon* v. *Loughman* 2 Stark 258.

The Court went further than this, however, doubting the value of expert evidence in cases involving solicitor's negligence.[35] It is submitted that this doubt applies to any circumstances where the task is other than routine. When there are anything other than purely "run of the mill" circumstances in a solicitor's negligence action, it appears that expert testimony will rarely be admissible now. The very facts which make a situation unusual precludes uniform conduct. The expert could only say what he would have done. On principle and as shown in *DeYong*, this is irrelevant. Moreover, to ask the expert whether the obligations were discharged casts him in the role of the judge. This is similarly unacceptable. To allow expert evidence in these situations might substitute the expert's standard for that of the ordinarily competent solicitor. Since the standard would then become exceedingly high, the effect would be the same as simply emphasizing the already broad duties; the lawyer becomes an insurer of his client's affairs. The strict evidentary point fits neatly with the theme of the appeal decision.

IV. CONCLUSION

There is much to be welcomed in this most recent judgment of the Court of Appeal. What remains to be resolved, however, is the theoretical question plaguing solicitors' liability: whether liability is founded in tort or contract. The Court of Appeal left this question open.[36]

The tendency is to treat solicitors' negligence as though it were a tort. J.M. Kaye in a thorough article on solicitor's liability says:[37]

> It is to be hoped that one day the matter will be considered by the House, and that that tribunal will go into the question not with an eye to narrow questions of expediency, such as the desirability of allowing a plaintiff to choose his own limitation period, but rather with a view to tackling the broader question of general importance which has been thrown into prominence by *Hett* and *Forster* v. *Outred & Co.*: namely, *what is the justification for imposing a public duty on a professional man, in addition to the private duty arising from contract or retainer?* [Emphasis added.]

35. *Supra* n. 1 at 316. See also *Elcano Acceptance Ltd.* v. *Richmond, supra* n. 30 at 214.

36. See *supra* n. 1 at 317 and 320 for example. The question has been raised but not decided in a number of recent cases: *Ruzicka* v. *Costigan* (1984) 54 A.R. 386 (Alta. C.A.) leave to appeal to the S.C.C. denied [1984] A.W.L.D. Nov. 30. (Limitation of Actions); *Silliman Construction (Alta) Ltd.* v. *Johnson, Ming & Co.* (1984) 31 Alta. L.R. (2d) 284 (Alta. C.A.) (Third party procedure); *Ferris* v. *Rusnak* (1983) 50 A.R. 297 per McDonald J.; *Beiser* v. *A Law Firm* [1984] 4 W.W.R. 551 per Lander J. (damages: liability was not in issue). Some have come down on the side of tort: *Stronghold Investments Ltd.* v. *Renkema* [1984] 4 C.C.L.I. 116 per Hinds J. (counsel agreed that the Plaintiff was entitled to sue in contract or tort at 119). The anomalous "breach of fiduciary duty" has appeared as well: *Luckiw Holdings (1980) Ltd.* v. *Murphy* (unreported) 21 December 1985, J.D. of Red Deer, Q.B. 82100-10498 per McDonald J.; *Cavallin* v. *King* (1984) 51 B.C.L.R. 149 per Wallace J.; along with the "duty to warn": *Loubardeaus* v. *W* (1984) 33 Sask. R. 26 (E & O Bulletin #60). In a case that may be indicative of the future attitude of the Supreme Court of Canada, LaForest J.A. (as he then was) in *Doiron* v. *D'Inkerman Ltee.*, *supra* n. 2, found that the doctrine of contributory negligence applied in an action by a client against his lawyer. It may become a landmark decision since the New Brunswick Court of Appeal held that the doctrine applied regardless of whether the cause of action was tortious or contractual.

37. J.M. Kaye "The Liability of Solicitors in Tort" (1984) 100 *L.Q.R.* 680 at 716; References are to: *Midland Bank Trust Co. Ltd. and another* v. *Hett, Stubbs & Kemp (a firm)* [1979] Ch. 384, [1978] 3 All E.R. 571, and *Forster* v. *Outred & Co. (a firm)* [1982] 1 W.L.R. 86.

As suggested above, there are already elements of public duty in the contract of retainer. These are the well established implied terms. But Mr. Kaye's point is well taken. These duties, while they may resemble the public duty of tort, must neither be emphasized nor enlarged. To do so ignores their proper contractual setting, makes private duties public and, in effect, makes solicitors' negligence a tort. In this manner common law negligence expands.

On a practical level, Kaye's rhetorical question has been answered elsewhere. Lord Denning has said (extrajudically):[38]

> I have tried to show you how much the law of negligence has been extended; especially in regard to the negligence of professional men. This extension would have been intolerable for all concerned — had it not been for insurance. . . . In most of the cases that come before the Courts today, the parties appear at first sight to be ordinary persons or industrial companies or public authorities. But their true identity is obscured by masks. If you lift up the mask, you will usually find the legal aid funds or an insurance company or the taxpayer — all of whom are assumed to have limitless funds. In theory the Courts do not look behind the masks. But in practice they do. That is the reason why the law of negligence has been extended so as to embrace nearly all activities in which people engage.

Moreover the expansion of common law negligence might not be the end of the matter. Some have suggested that the Courts have gone further and are entertaining a principle of loss distribution. The question then becomes: as between two parties, who can afford to bear the loss? With increasing frequency the answer appears to be the lawyer. R.N. Mahoney[39] refers to a passage in *Edward Wong Finance Co. Ltd.* v. *Johnson, Stokes & Master*[40] where the Privy Counsel appears to discard fault as the principal of liability and says:

> The Decision reached seems a thinly veiled preference for the choice that the profession as a whole is the body best able to "bear the loss" rather than a determination of carelessness in traditional terms.

He regards the consequence as ". . . 'loss spreading' careening out of control." In another article, D. Dooley[41] refers to the Ontario Court of Appeal Decision in *Polischuk* v. *Hagarty* and says:

> In a ruling which should be applauded by lawyers and the public alike, the Court ruled that it is the lawyer, not the client, who bears the risk of an undertaking not being honoured in a real estate transaction even when the evidence is that the lawyer is without fault. Negligence is not the issue. Rather, the Court must choose who will bear the loss as between two innocent parties.

If these observations are accurate there is an uneasy relation between "loss distribution" and the welcome notion that solicitors are not insurers of their client's affairs. And as Lord Denning further says:[42]

> To award compensation without fault would make society bankrupt. No one could pay the premium to get cover. I sometimes wonder whether the time has not come — may indeed already be with us — when the Courts should cry Halt! Enough has been done for the sufferer. Now remember the man has to foot the bill — even though he be only one of many.

38. Lord Denning M.R. (as he then was) *The Discipline of Law* (London 1979) 280.
39. (1985) 63 *Can. Bar Rev.* 221 at 241.
40. *Edward Wong Finance Co. Ltd.* v. *Johnson, Stokes & Master* [1984] 2 W.L.R. 1; [1984] A.C. 296 (PC).
41. D. Dooley, "The Liability of Solicitors for Accepting Undertakings — *Polischuk* v. *Hagarty*" (1985) 6 *The Advocates Quarterly* 123 at 123.
42. *The Discipline of Law*, *supra* n. 38.

While one may not wish to regard the expansion of common law negligence as a *fait accompli*, the tendency to speak of solicitors negligence in reference to a tort appears to have become both popular and convenient. Loss distribution may also be gaining a foothold. It will be the average client who bears the brunt of this in higher fees. Perhaps the decision of the Court of Appeal in *DeYong* represents at least a slowing of this expansion and will exert a moderating influence in this area of the law.