Lord Denning has indicated that using the stated case procedure to gain time or delay the day of a final award being rendered against a party would be improper. Obviously, this would mean that the party seeking the case stated does not do so bona fide. He is acting without proper motive. He also stated that in all cases where the arbitrator or umpire is of opinion that the application is not raised bona fide, but for some ulterior motive he should, of course, refuse it. (Arbitration (Commercial) Law and Practice by Dorter & Widmer, 1979.)

Barwick, C.J., in *Buckley v Bennell Design and Construction Pty. Ltd.* (1978), said:

> *"Courts of first instance need, in my opinion, to be chary of dividing a case so as to attempt first to have determined by an appellate court what is presented as a preliminary point of law and thereafter to determine what I might call the merits or substance of the case. Too often, the suggested preliminary question either does not really arise, or requires the determination of facts to make it of relevance, or, if the question does arise, its resolution fails to be definitive of the rights of the parties. There are, of course, cases which can be disposed of, as it were, on demurrer. But, in my experience, they are very much the exception, rather than the rule. Better, in my opinion, that the court of first instance should decide the whole case at the outset. Its decision may prove acceptable to the parties, even if not satisfying to the academic interests of counsel."*

Commonly it is found that the party who is stronger on "the merits" than the law seeks to avoid the stating of a case or the making of a "speaking award" *(Gold Coast City Council v Canterbury Pipe Lines (Aust.) Pty. Ltd.* (1968).

PROFESSIONAL LIABILITY / OTHER PROFESSIONS

L.E. James

The most significant trend developing in recent years in the field of professional liability has been the tendency of the Courts to hold the professional adviser or consultant responsible not merely for physical injury to his client or damage to his client's property but also for the purely financial consequences of professional work to the person who might be affected by it. This tendency is more obvious in relation to professions other than the legal profession, since the legal profession was always one where such liability as there was affected financial consequences almost exclusively.

The modern law of professional negligence has its conceptual origin in the rule Donoghue v Stevenson (1932) A.C. 562, where it is said that one must take reasonable care to avoid injuring one's neighbours by one's actions. This has been extended by the decision in Hedley Byrne v. Heller & Partners (1964) A.C. 465 into the principle that one must take reasonable care not to cause financial loss to one's neighbour by one's words.

At least for most people, the risks inherent in the rule in Hedley Byrne v Heller & Partners can be avoided by mere silence. However for the professional, there is the added complication of an obligation, once engaged in a general capacity, to take positive steps to avoid anticipated loss or injury by timely measures and thus the professional who does not act when in a difficult situation is being condemned, but when he does act, he does so at his peril. It is no wonder that there is a great need for professional indemnity insurance.

These developments, as in the case of almost all such changes in the law, are the project not only of logical reasoning and argument from precedent on the part of the Judges who site in our Courts but also of changing community view points and of fashionable perspectives current in our society. In the past, it was the generally accepted view that if a person engaged in some venture and suffered a loss, he should bear that loss as part of the hazards of the enterprise and should hope to set it off against profits on other ventures, but at present there is a growing view that where the individual suffers some loss or fails to obtain some advantage which he is hoped to materialise, he is entitled to look to redress for some other portion of society. If he has no hope of getting money out of the Government, such a person's thoughts naturally turn towards the other persons who are associated in any way with the venture, so that if professional people were in any way connected with the loss, it is an obvious association of ideas which prompts the thought that they should make good the loss out of their, the professional's, own pockets.

The idea that a professional man has a duty to do what he can to ensure the success of his client's venture is easily transmuted into the notion that a professional man has a duty to insure his client against any loss which might arise out of the failure of the venture.

One can only perceive these general developments by considering examples in relation to the particular profession.

Architects

One of the many duties of an Architect is to make an assessment from time to time of the value of the work completed under the Building Contract and to issue a certificate which shows what the proprietor should pay the builder at that stage of the progress of the work. Naturally, the Architect is under a good deal of pressure both from the builder, to certify as much as possible, and from the proprietor, to certify as little as possible. Prior to the case of Sutcliffe v. Thackrah (1974) A.C. 727, it was always thought that the Architect was not liable to be sued by either party in respect of the Certificate.

When the case of Sutcliffe v. Thackrah came before the House of Lords it was held that the Architect was liable to a proprietor who had paid out to a builder in reliance upon the Certificate issued by the Architect and was then unable to complete the building for the unpaid contract sum when the builder became insolvent. This liability was founded in negligence, which exposed the Architect to liability for damages if he failed to take reasonable care.

This principle would appear to expose the Architect on a like basis to an action against him by the builder, if under similar circumstances an Architect should certify for too little an amount and the builder should be unable to recover from the proprietor because of the latter's insolvency. It is clear that a duty of care may be owed by architectural engineers to the main contractor in certain circumstances, as to which see Oldschool v. Gleeson (Contractors) 4 Build. L.R. 1053 also noted in June 1980 Current Law item 27 (e), although that case related to design responsibility rather than financial aspects. The Architect may thus be in an invidious position if both builder and proprietor are of belligerent disposition, prone to litigation and of doubtful solvency.

On the other hand, it must not be forgotten that the Plaintiff still has the onus of proving that the architect has fallen below the standard of reasonable care, presumably that of the ordinary architect on the Clapham omnibus. For instance, the Court held that the Plaintiff had failed to satisfy this burden in the case of B.L. Holdings v. Robert J. Wood & Partners (1979) 123SJ570, in which an architect was held not liable because a doubt had arisen over planning permission granted to a particular project. In assessing the area of the project for planning permission purposes the relevant Authority had excluded the car park and the caretaker's flat. An intending purchaser raised a query as to whether the planning permission might subsequently be held invalid because of this and refused to go on with the purchase. The proprietor of the project could hardly proceed against the Authority for having approved his project and therefore simply turned around and sued the architect. The Trial Judge considered that the architect was negligent, since the Judge's interpretation of the relevant regulations was different from that of the Authority. However, the Court of Appeal held that the architect was not negligent, since he was entitled to assume that the Authority knew its own business and the interpretation adopted by the Authority had been generally in use for some years.

Auditors

One of the difficulties about the new concept of the responsiblity of a professional person to those he advises is the extent to which he is responsible to make good disappointed expectation to profit as compared with his responsibility to reimburse for losses actually incurred as a result of his negligent advice. A case which illustrates this difficulty in relation to Auditors is Scott Group v. McFarlane (1978) 1NZLR 553.

In that case, a firm of Auditors certified the consolidated accounts of a group of companies as true and correct. In fact, the value of certain assets had been taken into account twice, featuring both independently and also as part of a larger figure. This was so obviously careless that the Auditors did not attempt to deny negligence in the subsequent proceedings.

Unknown to the Auditors, a takeover bid was being contemplated by a business enterprise which became a Plaintiff in the subsequent action. It relied upon the Auditors' account of the consolidated group of companies in accessing the figure which it was prepared to pay on the takeover. When the error was discovered, it was realised by the Plaintiff that the takeover, although profitable, was not so very profitable as had been supposed. Accordingly, an action was taken against the Auditors for the shortfall in the anticipated profit, which failed in the New Zealand Court of Appeal.

The three Judges who heard the case in the New Zealand Court of Appeal ruled against the claim by a majority of 2 to 1, but it is instructive to compare their different views. Richmond P. held that although the Auditors had been negligent, they owed no duty of care to the Plaintiff, as they had no knowledge of the Plaintiff at the time when the accounts were being prepared and no knowledge of the particular transaction contemplated by the Plaintiff. It was not sufficient, the Judge held, to show that it was reasonably foreseeable on the part of the Auditors that there might be somebody who was contemplating a takeover bid, since he concluded that in order to show liability for negligent advice, the Defendant must be aware that a particular person or class of person does intend to rely on that advice in a business sense.

Another Judge who supported the dismissal of the claim, Cooke J., did so upon quite different grounds. He held that a duty of care certainly existed, since the Auditors ought to have realised that their word may well be relied upon by a particular class of person contemplating a particular class of transaction. However, the claim was in tort, not in contract, and the Plaintiff in tort, he said, must show a loss. In this case, the Plaintiff had not suffered a loss but had merely failed to make as great a profit as he had hoped.

The dissenting member of the Court, Woodhouse J., agreed with Cooke J. that a duty of care existed. He also considered that a loss had been established, although he did not believe one could simply take the value of the duplicated assets and regard that as being the loss. On the contrary, he believed that the Plaintiff was limited to the difference between what had been paid for the group of companies and a fair market value, leading him to arrive at a reduced but still substantial figure.

This case illustrates quite clearly the way in which the law is in a state of flux at the present time and the extent to which opinions may vary on the exact limits of liability in any particular set of circumstances.

Valuers

One often sees clauses in contracts of sale which provide for a price to be agreed upon but if not, to be determined by a valuer. This was the situation which came before the House of Lords in the case of Arenson v. Arenson (1977) A.C. 405. In that case the Vendor sued the valuer for negligence on the grounds that the property he sold was really worth more than the price

assessed by the valuer. The House of Lords decided that the claim was sound in law, holding that the relationship between the valuer and the parties to the sale was such that he was liable to either of them if he injured them financially by his negligence in assessing the price. Hence, not only would he be liable to the Vendor if he assessed the price too low but likewise he would be liable to the Purchaser if he assessed the price too high, provided that it could be established the valuer had not displayed reasonable care.

Arbitrators

In the case of Cutcliffe v. Thackrah, the House of Lords adverted to the rule that Judges were not liable in damages for negligence in the performance of their judicial duties and noted that there was a firmly established extension of this rule for Arbitrators. Lord Reid at page 735 of the report describes the rule as firmly established and one that could not now be questioned by the House of Lords. However, such is the pace at which the development of the law is proceeding at present that this rule was indeed questioned in the Arenson case, although it survived the questioning so far as the majority of the Law Lords were concerned.

One of the Law Lords, Lord Kilbrandon, did indeed proclaim his view that Arbitrators were liable to be sued at the hands of a vengeful litigant, although of course he rejected with horror any possibility of such an idea being extended to Judges. Strangely enough, he came to the conclusion about the liability of Arbitrators generally upon the basis of the principles flowing from the decision of Sutcliffe v. Thackrah, even though the Law Lords in the latter case were all quite clear in their views that such a conclusion was wrong.

Of course, it is not unusual in the history of the Law that a principle but dimly perceived by the Judges in the original case will be gradually worked out by subsequent Judges to lead to results quite outside the scope of the original decision.

Visions of the future

In this paper, only a few professions have been selected for consideration, leaving a whole range of professions from Accountants to Zoologists unregarded. Nevertheless it does seem clear that present trends are to expose professional people to a much greater likelihood of litigation than was the case in the past and to arrange a person who at one time would not even have been considered as possible future claimants whether this is a good or bad thing depends upon one's point of view. No doubt one of the consequences, perhaps unintended, of these developments is that the other professions will have a greater need for the legal profession!