IN THE COURT OF APPEAL OF NEW ZEALAND

CA.14/90	BETWEEN	SOUTH PACIFIC MANUFACTURING COMPANY LIMITED
		First Appellant
	AND	KIM LULEZIM POGONI
		Second Appellant
	AND	NEW ZEALAND SECURITY CONSULTANTS & INVESTIGATIONS LIMITED
		First Respondent
	AND	TREVOR MORLEY
		Second Respondent
	AND	PETER THOREAU
		Third Respondent
CA.172/90	BETWEEN	TERRENCE MORTENSEN
		Appellant
	AND	S.A. LAING and R.J.A. LAING
		Respondents

Coram: Cooke P
Richardson J
Casey J
Hardie Boys J
Sir Gordon Bisson

Hearing: 27, 28 February 1991

Counsel: W. Akel and Helen Wild for South Pacific Manufacturing Co and K.L. Pogoni
S.J. Brown and Rebecca L. Kitteridge for New Zealand Security Consultants and Investigations Ltd, T. Morley and P. Thoreau
P.D. Green and S.J. Brown for T. Mortensen
C.S. Withnall QC for S.A. Laing and R.J.A. Laing

Judgment: 29 November 1991

JUDGMENT OF SIR GORDON BISSON

These two appeals have been heard together. They both raise the question whether a professional fire investigator engaged by the insurer is liable in damages for economic loss suffered by the insured if the investigator fails to take reasonable care in his investigation and in consequence his report is defective and causes loss to the insured.

Both appeals are from judgments given on applications to strike out the cause of action in negligence. In the proceeding brought by South Pacific Manufacturing Co Ltd and Mr Pogoni Heron J struck out that cause of action, concluding his judgment with these words,

> For what may be a combination of reasons based at one end on overall policy considerations, and because the plaintiffs do not come within the test of proximity or neighbourhood by virtue of the application of ***Anns v. Merton Borough*** or ***Peabody*** I think in law there was no duty of care owed by these three defendants to the plaintiffs and accordingly there is no cause of action disclosed in paragraphs 19-36 of the Statement of Claim and it should be struck out.

In the proceeding brought by Shona Ann Laing and Ronald James Andrew Laing Master Hansen refused to strike out the cause of action in negligence. He concluded:

> Once I am satisfied that sufficient neighbourhood or proximity arguably exists to create a prima facie duty of care, I am of the view that, except in the clearest of cases, negativing policy considerations should be properly balanced at trial. I am satisfied that a prima facie duty of care exists here. The evidence of policy considerations is untested and not so clear cut as to say the alleged duty of care could not possibly be established at trial.

As the facts and claims are by no means the same or similar it is necessary to look at each case separately.

Dealing first with the South Pacific appeal. The proceedings arise out of a fire which destroyed the premises leased by Elite Apparel Limited ('the insured") on 2 February 1984. After the fire the insured was placed into receivership by the debentureholders. The plant, machinery and stock in trade of the insured were insured by the fourth respondent ("the insurer"). Almost immediately after the fire the insurer instructed the first respondent to investigate the cause of the fire and in turn the two principals of that company Mr Morley, the second respondent, and Mr Thoreau, the third respondent, conducted the investigation and reported to the insurer. On 11 July 1984 the insurer declined the insurance claim which the insured had made. The insurer alleges that there was clear evidence that the fire had been deliberately lit. The inference was that the second appellant or someone at his instigation had lit the fire. Mr Pogoni was a director and principal shareholder in the insured. As a result of the insurer declining liability, proceedings were commenced in the High Court at Wellington under A No.295/84 by the insured against the insurer claiming indemnity for losses of $607,500 being the amount of the insurance cover. The insurer filed a statement of defence in those proceedings alleging arson, misstatements and breaches of the policy. A discovery issue was dealt with by this Court in ***General Accident Fire & Life Assurance v. Elite Apparel Ltd*** [1987] 1 NZLR 129. When

those proceedings finally came on for hearing on 23 March 1987 the insurer settled the claim at $550,000 all in.

As that settlement was not sufficient to enable the insured to pay the first appellant its unsecured debt of not less than $259,212-00 that company and Mr Pogoni, the second appellant, commenced a proceeding in the High Court at Wellington in which they pleaded a cause of action in negligence against the first, second and third respondents and the second appellant pleaded a cause of action in defamation against the first, second, third and fourth respondents. The first appellant also pleaded causes of action in breach of contract, breach of fiduciary obligation and negligence against the fifth and sixth respondents, they being respectively the receiver of the insured company and the receiver's firm of chartered accountants. Those causes of action relate to the proceeding brought by the receiver against the insurer, which was settled as already mentioned.

The cause of action in negligence against the first, second and third respondents which was struck out by Heron J can be summarised by setting out the following clauses from the statement of claim. It is to be assumed for the purposes of both appeals that the allegations are factually correct.

> 19. ON or about 3 February 1984 the Fourth Defendant instructed the first defendant to investigate and report to it on the origins and causes of the said fire.

20. IN or about the month of February 1984 the second and third defendants investigated the origin and cause of the said fire including inspecting the premises at 188 Broadway Avenue, Palmerston North on or about 3 February 1984.

21. ON a date unknown to the plaintiffs but believed to be towards the end of February 1984 the first defendant forwarded to the fourth defendant a report titled "Elite Apparel Limited, 188 Broadway Avenue, Palmerston North, Report on Investigation 3/2/84 to 21/2/84" and other reports.

22. THE first and/or second and/or third defendants were aware that the fourth defendant was the insurer of Elite Apparel Limited and that the information contained in the said reports would influence any decision by the fourth defendant as to whether or not to indemnify Elite Apparel Limited pursuant to the contract of insurance.

23. ...

24. THE first and/or second and/or third defendants were also aware, or should have been aware, that any refusal by the fourth defendant to indemnify Elite Apparel Limited would have serious financial consequences for its directors and shareholders and creditors, including the plaintiffs.

25. THE first and/or second and/or third defendants owed a duty of care to the plaintiffs or either of them to carry out their investigation and prepare the said report as to the origin and causes of the said fire with all due skill and care and in a proper professional and scientific manner having regard to the established principles of a professional arson investigation.

26. (This clause sets out 37 respects in which acts or omissions are alleged to be in breach of the alleged duty of care.)

27. AS a result of the first and/or second and/or third defendant's breach and/or breaches of duty the fourth defendant was misinformed and wrongly advised as to the probable cause and origin of the fire and accordingly refused to indemnify Elite Apparel Limited pursuant to the policy of insurance.

The causes of action in defamation pleaded by the second appellant alleged that the report of the investigators accused him of arson and fraud.

Dealing now with the Laings' case, the first defendant moved in the High Court at Dunedin for a review of the decision of Master Hansen. This motion was removed into this Court by consent. Mr Mortensen also moved in this Court for leave to appeal out of time.

According to the statement of claim the Laings carried on in partnership a retail business in womens' fashion clothing. This stock-in-trade, plant and machinery were insured against damage by fire with the A.M.P. Fire & General Insurance Company (New Zealand) Ltd ("the insurer"). On 21 June 1982 a fire caused damage or loss amounting to $76,776-19 in respect of stock-in-trade, $5,424-70 in respect of plant and machinery and caused loss of profits (also covered by the insurer) amounting to $25,000-00. The statement of claim founded in negligence alleges against the appellant as first defendant that:

> 6. On or about the 23rd day of June 1982 A.M.P. appointed the First Defendant to enquire into the cause of the said fire and to report to it thereon.
>
> 7. At all material times the first defendant knew or ought to have known that if he should advise A.M.P. that the fire had been deliberately lit by the plaintiffs or either of them then A.M.P. would -
>
> (a) refuse to meet any claim under the said policy; and

(b) make or cause to be made a complaint to the Police which would or could lead to the plaintiffs or either of them being prosecuted for the crime of arson

and the plaintiff would thereby suffer loss.

8. That in the circumstances the first defendant owed a duty to the plaintiffs to take reasonable care in investigating the cause of the said fire and reporting to A.M.P. thereon.

9. ...

10. That the first defendant advised A.M.P. that as a result of his enquiries he believed that the fire was caused by the deliberate act of the plaintiff, Shona Ann Laing, and further advised the Alexandra Police of his said belief.

11. As a result of the first defendant's said advice A.M.P. refused to meet the claim made by the plaintiffs under the said policy and the plaintiffs have thereby lost the sums referred to in paragraphs 4 and 5 hereof.

12. As a further result of the first defendant's said advice the plaintiff, Shona Ann Laing, was prosecuted for the crime of arson in the High Court of New Zealand at Dunedin on the 14th, 15th and 16th days of February 1983.

13. At the conclusion of the trial the plaintiff Shona Ann Laing was convicted and sentenced to perform 200 hours of community work. The plaintiff duly performed her sentence.

14. In a judgment dated the 7th day of March 1985 the Court of Appeal of New Zealand quashed the plaintiff's conviction on the grounds of new evidence as to the way in which the fire was started. The Court of Appeal ordered a new trial but the Solicitor General entered a stay of proceedings.

15. That the first defendant's conclusions as to the cause of the fire were wrong in fact and were the result of negligence in carrying out his investigations and in breach of his duty of care to the plaintiffs in all or any of the following respects:

(a) Failure to interview the fire brigade personnel who first entered

the premises in the course of the fire, or any of the fire brigade personnel attending;

(b) Failure to ascertain that an electric heater had been moved by fire brigade personnel whilst extinguishing the fire;

(c) Inaccurately assuming the position of the said heater at the time of the fire;

(d) Failing to observe a coil of electric cable near the seat of the fire and to take into account the possibility of electro-magnetic induction in the coil causing the fire;

(e) Failing to accurately locate the seat of the fire;

(f) Failing to observe the absence of burn marks at the point alleged by the first defendant to be the seat of the fire;

(g) Failing to interview the plaintiffs or either of them;

(h) Failing to enquire as to the identity of witnesses and/or to interview them;

(i) Failing generally to carry out the investigation in a proper careful and thorough manner.

16. As a result of the first defendant's negligence, the plaintiffs have suffered the losses referred to in paragraphs 4 and 5 hereof, have had to sell all their assets to satisfy creditors, incurred legal costs in respect of the said prosecution and suffered loss of reputation, injury to their feelings and dignity, loss of liberty and enormous anguish and distress.

It should be mentioned that the Laings' proceeding in the High Court was consolidated with their proceeding against the insurer claiming indemnity under the insurance policy for their losses arising from the fire in the amounts

already mentioned. It was also alleged that by the insurer's failure to indemnify them they had suffered inconvenience, loss of income, anguish and distress. General damages of $125,000 were claimed. In its statement of defence the insurer pleaded that the Laings were not entitled to indemnity under the policy upon the following grounds:

1. The fire was the result of the wilful acts of the first named plaintiff, S.A. Laing;

2. The plaintiffs were in breach of the declaration contained in the proposal for insurance executed by the plaintiffs on 4 September 1981 namely that the plaintiffs would exercise reasonable care for the safety of the insured property.

This proceeding has not yet been to trial, nor has it been settled as was the liquidator's claim for indemnity against the insurer in the other appeal before this Court.

As can be seen from paras. 12, 13 and 14 of the statement of claim the allegations against the appellant go beyond loss or damage caused by the fire itself in respect of which $107,100-89 is claimed. The claim founded on the appellant's negligence also seeks $250,000-00 as general damages and $30,000-00 for legal and related costs in respect of the prosecution of Mrs Laing and her successful appeal against conviction. It is to be noted that there are no alternative grounds for those claims in either defamation or malicious prosecution but the damages sought under the cause of action in negligence include loss of reputation and loss of liberty.

An investigator who seeks, obtains and supplies information as to the cause of a fire is not dealing with information which relates only to the insurer who engages him. Such information relates very much to the insured as well. Such an investigator is accordingly a private investigator who must be licensed under the Private Investigators and Security Guards Act 1974. Although not pleaded it is understood that the investigators engaged in both cases acted as private investigators licensed under the Act.

The investigator has a contract with the insurer to report as required by the contract on certain matters. This may involve an in-depth enquiry or simply an answer to a certain question or questions. In any event it would be implied that in making his enquiry and reporting on it and in answering questions he would take reasonable care not to mislead the insurer. In other words he must be careful to give the right answers. The question is whether he is under the same duty to the insured, with whom he has no contractual relationship. Is there at common law a duty of care to the insured?

It was submitted that this Court should not follow ***Anns v. Merton London Borough Council*** [1978] AC 728 and the subsequent cases which applied that decision and contended that for the appellants to succeed they must show that the imposition of a duty of care in this instance is the next logical incremental step in a line of relevant authority

citing ***Murphy v. Brentwood District council*** [1990] 2 All ER 908. It was submitted that if the "traditional" views of establishing a duty of care are applied they favour the investigators in both appeals but it was not said what should be regarded as "traditional" in the field of negligence. Mr Green did, however, start by referring to ***Donoghue v. Stevenson*** [1932] AC 562 and cited a passage from the speech of Lord Atkin which in his view was designed to circumscribe the occasions on which relief may be demanded. His citation included the words:

> But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person insured by them to demand relief.

But it was with that limitation in mind that Lord Atkin went on to state how the rules of law govern the situation in particular cases and said, at p.580:

> The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

As Lord Reid said in ***Home Office v. Dorset Yacht Co Ltd*** [1970] 2 All ER 294 at 297:

> In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. ***Donoghue v. Stevenson*** may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.

And in ***Caparo Industries Plc v. Dickman and Others*** [1990] 1 All ER 568 Lord Oliver said at p.584:

> ... the duty of care in tort depends not solely on the existence of the essential ingredient of the foreseeability of damage to the plaintiff but on its coincidence with a further ingredient to which has been attached the label 'proximity' and which was described by Lord Atkin in the course of his speech in ***Donoghue v. Stevenson*** [1932] AC 562 at 581; [1932] All ER Rep 1 at 12 as -
>
> > 'such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.'

Lord Atkin was referring to loss caused by physical damage. Since then the duty of care has been extended to economic loss not resulting from physical damage. Lord Oliver in ***Caparo*** saw the need for such a duty to be kept within the bounds of common sense and practicality. He said at p.585:

> Those limits have been found by the requirement of what has been called a 'relationship of proximity' between plaintiff

> and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be 'just and reasonable'.

It is 'the relationship of proximity' and foreseeability of harm which is the starting point as recognised by this Court in ***Brown v. Heathcote County Council*** [1986] 1 NZLR 76 (see Cooke P at p.79) and in ***First City Corporation Ltd v. Downsview Nominees Ltd*** [1990] 3 NZLR 265 (see Richardson J at p.275). There then must be considered whether the imposition of liability for harm would be just and reasonable and whether there are policy considerations or other factors which militate against the recognition of a cause of action in negligence. I see no occasion, having carefully considered ***Caparo*** and ***Murphy***, and with the greatest respect, to change the way in which this Court has developed its approach to deciding claims in new fields of alleged negligence.

The immediacy and foreseeability of the harmful consequences to an insured from an investigator's report to the insurer which negligently attributes blame for a fire to the insured clearly demonstrates the proximity of the relationship of the investigator with the insured. At first sight I would have no difficulty in finding the investigators in both appeals being under a duty of care to the insured in making their reports, a duty to report correctly and not to make errors which by exercising reasonable care they could have avoided making. I reach this conclusion applying the approach of this Court in the

two cases I have cited, and regard the step into the new factual situation presented in these appeals no giant leap but a natural step to take in all the circumstances which have to be taken into account. It may be described as an incremental step being a small amount by which a variable quantity increases. The duty of care in making a report is, of course, owed by the investigator to the insurer under the contract of employment. That this duty of care should also apply to a third party, the insured, is not a new concept. For an analogy I refer to ***Ministry of Housing and Local Government v. Sharp and Another*** [1970] 2 QB 223. In that case a Local Authority clerk negligently omitted from an official certificate reference to a compensation notice registered in favour of the Minister of Housing and Local Government. The certificate was conclusive by statute in favour of the purchasers whose solicitors had sought the certificate under the Land Charges Act 1925 so the Ministry sought to recover its loss by claiming damages for negligence against the clerk and his employer. Lord Denning MR had no doubt that the clerk was under a duty at common law to use due care to any person whom he knew, or ought to have known, might be injured if he made a mistake. He said, at p.268:

> I do not think it matters that the search was made at the request of the purchaser and the certificate issued to him. It would be absurd if a duty of care were owed to a purchaser but not to an encumbrancer.

On a similar approach it can be suggested that it would be absurd if an investigator owed a duty of care to the

insurer but not to the insured. The recognition of this duty of care would serve the social objective referred to by Richardson J in ***Downsview Nominees (supra)*** of promoting professional competence and would be in conformity with the right given under the Private Investigators and Security Guards Act 1974 by s.53 to a person having a personal interest in the subject-matter, to file a disciplinary complaint based on negligence. There is not only the close proximity of relationship between investigator and insured, but it could also be just and reasonable (see ***Williams v. Attorney-General*** [1990] 1 NZLR 646, 671) to impose a duty of care in favour of the insured on the investigator when making his report to the insurer having regard to the duty of good faith and fair dealing owed by the insurer to the insured. There is not, however, a sufficient degree of proximity between the investigator and possible creditors or the directors and shareholders of an insured company. It would not be fair and reasonable to extend the duty of care beyond that to the insured as it would open the door to a wide field of possible claimants possibly giving rise to the objection of the floodgates principle. For this reason the South Pacific appeal must fail.

In respect of the Mortensen appeal, although the starting point of proximity of the relationship between him and the Laings is met so as to raise a prima facie duty of care there are compelling reasons for not holding that the insured has a right of action in negligence to recover the damages as claimed in this case. There are other more

appropriate remedies open for the insured to pursue. This was not the case in ***Ministry of Housing and Local Government v. Sharp and Another (supra)*** as there was no contractual relationship between the Minister and the purchasers of the property or their solicitors. The Laings can proceed against the insurer in contract for losses covered by the terms of their policy of insurance and insofar as their claim to damages sought relief for loss of reputation and loss of liberty it is open for them to seek relief in proceedings alleging defamation and malicious prosecution. There is no occasion in these circumstances to hold that there should also be a cause of action in negligence against the investigator. In fact there are compelling reasons why there should not be in these circumstances. (See ***Simaan General Contracting Co v. Pilkington Glass Ltd (No. 2)*** [1988] 1 QB 758 and ***Bell-Booth Group Ltd v. Attorney-General*** [1989] 3 NZLR 148). I do not rule out the possibility that an action in negligence may lie against a private investigator by a third party to the investigation for economic loss where no contract exists between the third party and the investigator's employer, but some caution would be needed in case the disciplinary consequences of such a liability in negligence resulted in an overkill presenting its own disadvantages as was mentioned by Lord Keith of Kinkell in ***Rowling and Another v. Takaro Properties Ltd*** [1988] 1 All ER 163, 173.

For these reasons I would allow the Mortensen appeal with the consequences as stated by the President in his judgment.

Gordon E. Binnie

Solicitors:

Simpson Grierson Butler White, Auckland for South Pacific Manufacturing Co Ltd and K.L. Pogoni
Morrison Morpeth, Wellington, for New Zealand Security Consultants & Investigators Ltd, T. Morley and T. Mortensen
Izard Weston & Co, Wellington for P. Thoreau
Bodkins, Alexandra, for S.A. Laing and R.J.A. Laing