LIABILITY FOR NEGLIGENT MISSTATEMENTS: CONTINUING UNCERTAINTY

J. A. SMILLIE*

Developments since 1971 have confirmed that the decision of the Privy Council in *Mutual Life & Citizens' Assurance Co. Ltd.* v. *Evatt*[1] has not clarified and settled the scope of liability in tort for negligent statements causing economic loss. In this paper it is intended to consider only the scope and application of the basic tests of duty laid down in *M.L.C.* v. *Evatt*.[2]

1. *M.L.C.* v. *Evatt*

In *M.L.C.* v. *Evatt* Lord Diplock, delivering the advice of the majority of the Judicial Committee, indicated that a duty to take care in making a statement will normally arise only where:

(a) the subject matter of the statement calls for the exercise of some special qualification, skill or competence not possessed by the ordinary reasonable man, *and*

(b) the adviser lets it be known that he claims to possess the necessary qualification, skill or competence either

(i) by carrying on the business or profession of giving advice of the kind given, *or*

(ii) by letting it be known in some other way that he "claims to possess skill and competence in the subject matter of the particular inquiry comparable to those who do carry on the business or profession of advising on that subject matter and is prepared to exercise a comparable skill and competence in giving the advice".[3]

However Lord Diplock emphasised that this basic test of duty is not to be applied automatically in a rigid, inflexible manner. In particular, he suggested that satisfaction of the normal requirements

* LL.M. (Otago), J.S.D. (Yale). Senior Lecturer in Law, University of Otago.

1 [1971] A.C. 793.

2 Ibid. This paper will not discuss other uncertain aspects of liability for negligent statements which have been the subject of recent developments. E.g. (i) those cases in which liability for negligent statements has been imposed upon public officials by application of the ordinary "neighbour" test in *Donoghue* v. *Stevenson*: see Craig, "Negligent Misstatements, Negligent Acts and Economic Loss" (1976) 92 L.Q.R. 213, and the recent decisions in *Rutherford* v. *Attorney-General* [1976] 1 N.Z.L.R. 403 and *Hope* v. *Manukau City Council*, unreported judgment of Chilwell J., Supreme Court, Auckland, 2 August 1976, No. A.1553/73; and (ii) the question of the relationship between tortious and contractual liability for negligent statements: see Symmons, "The Problem of the Applicability of Tort Liability to Negligent Mis-statements in Contractual Situations: A Critique on the Nunes Diamonds and Sealand Cases" (1975) 21 McGill L. J. 79, and the decision of the English Court of Appeal in *Esso Petroleum Co. Ltd.* v. *Mardon* [1976] 2 W.L.R. 583.

3 [1971] A.C. 793, 806.

for a duty may not be necessary in some situations "such as, perhaps, where the adviser has a financial interest in the transaction upon which he gives his advice . . . . "[4]

According to the majority of the Privy Council, where a duty of care is owed the adviser must "conform to that standard of skill and competence and diligence which is generally shown by persons who carry on the business . . . ."[5] of giving advice of the kind given.

It was immediately obvious that application of the test of duty formulated by the majority in *Evatt* would give rise to a number of difficult problems. When is a person to be regarded as "carrying on the business or profession" of giving advice of a particular kind? Must the adviser hold himself out as an expert in respect of the specific matter to which his advice relates in the sense that giving advice of this particular kind is central to his business or profession? Is it sufficient if persons in the same business or profession as the adviser not infrequently provide information or advice of that general kind in the ordinary course of their normal business activities? Or is it sufficient if the individual defendant himself regards provision of this kind of information or advice as part of his normal business activity? What *kind* and *degree* of special skill and competence must the adviser claim to possess? Must the subject matter of the advice be of a kind which necessarily requires the exercise of special expertise and judgment in interpreting, evaluating or analysing factual data, formulating opinions or drawing conclusions? Or is it sufficient that the adviser claims to be competent to acquire and pass on raw factual information? In what circumstances will the fact that the adviser has a financial interest in the transaction under discussion provide the basis for imposing a duty of care on the adviser? Does the existence of a financial interest justify imposing liability in circumstances which would not otherwise attract a duty of care? If this is so, what kind of financial interest is necessary?

Lords Reid and Morris dissented in *Evatt*. They felt that it was both unnecessary and undesirable to limit the scope of the duty in the manner proposed by the majority. They considered that a legal duty to take such care as is reasonable in the circumstances of the case should normally arise where advice is "given on a business occasion or in the course of the [adviser's] business activities".[6] The minority concluded:[7]

> In our judgment when an inquirer consults a business man in the course of his business and makes it plain to him that he is seeking considered advice and intends to act on it in a particular way, any reasonable business man would realise that, if he chooses to give advice without any warning or qualification, he is putting himself under a moral obligation to take some care. It appears to us to be well within the principles established by the *Hedley Byrne* case to regard his action in giving such advice as creating a special relationship between him and the inquirer and to translate his moral obligation into a legal obligation to take such care as is reasonable in the whole circumstances.

4 Ibid., 809.

5 Ibid., 804.

6 Ibid., 811. Lords Reids and Morris conceded that unusual cases might arise where a duty should be imposed in respect of advice given outside a professional or business context.

7 Ibid., 812.

Subsequent decisions reflect the fundamental conflict between the two views expressed in *Evatt,* and the difficulties inherent in applying the test of duty formulated by the majority of the Privy Council.

2. *Day* v. *Ost*[8]

The first New Zealand case after *Evatt* was *Day* v. *Ost.* There Cooke J. held that an architect responsible for supervising construction of a building was liable to a subcontractor for negligently assuring him that the balance of the total contract price was more than sufficient to cover the remaining work, and he could be sure of being paid if he completed his contract. Clearly Cooke J. was prepared to take a liberal view of the test of duty laid down by the majority in *Evatt.* He relied upon three aspects of the case to support his finding that a duty was owed in terms of the *Evatt* test.

First Cooke J. emphasised that at the time the negligent assurance was given, "the defendant was acting in his professional capacity as architect of the building project on which he wished the plaintiff to complete work".[9] Although it is not normal practice for an architect to discuss with *sub*contractors the amount of the contract price left to cover the remaining work, the architect is responsible for providing the main contractor and the owner with this information, and it would therefore be possible to regard the architect as "carrying on the business or profession" of giving advice of this kind. Secondly, Cooke J. emphasised that the defendant had initiated the interview at which the negligent assurances were made. Finally, the learned judge observed: "it is a reasonable inference that the defendant's fees depended at least to some extent on completion of the buildings; and a duty of care will more readily be inferred when the adviser has a financial interest: see *Evatt's* case at p. 809 . . . ."[10] This imputation to the defendant of a financial interest in the plaintiff acting upon the advice provides rather a tenuous basis for imposing a duty of care. Although it is normal practice for part of a supervising architect's fee to be withheld until completion of the project, the defendant neither appeared nor was represented at the trial of this action, and there was no evidence that the practice was followed in this case.

3. *Bernadine Fisheries Ltd.* v. *Allan; Davies (Third Party)*[11]

In *Bernadine Fisheries Ltd.* v. *Allan,* Casey J. took an even wider view of the scope of the duty of care owed in respect of statements causing economic loss. The plaintiff company brought an action against the defendant for $7,000 being the balance owing to it under a contract for the sale and purchase of the fishing vessel *Bernadine.* The defendant Allan joined Davies, an accountant, as Third Party, claiming indemnity to the full amount of the plaintiff's claim on the ground that Davies was liable to him in tort for negligent misstatement.

Casey J. found that Marshall, the Governing Director and major shareholder of the plaintiff company had, on behalf of the company, entered into a binding oral contract with the defendant for the sale

8 [1973] 2 N.Z.L.R. 385.
9 Ibid., 388.
10 Id.
11 Unreported: Supreme Court, Christchurch, 15 April 1975, No. A.132/70.

and purchase of the *Bernadine* for $10,000. Allan had arranged to finance the purchase by borrowing $3,000 from P. & W. Henderson Ltd. and $7,000 from a Mr Gregory-Hunt. Marshall appreciated that it might be quite some time before the securities for the loans were completed and the purchase money paid in full. However, he agreed to allow Allan to take immediate possession of the *Bernadine* provided Allan arranged insurance cover over the vessel before she was taken from her moorings at Waitangi Bay in the Chatham Islands.

The Third Party, Davies, was a chartered accountant who acted for both P. & W. Henderson Ltd. and Mr Gregory-Hunt. Davies had expressly undertaken to P. & W. Henderson Ltd. that he would arrange insurance cover for the *Bernadine*. When Gregory-Hunt arrived at Waitangi Bay to take delivery of the boat on behalf of Allan, a crew member of the boat informed him of Marshall's instruction that the *Bernadine* was not to be moved until insurance cover had been arranged. Gregory-Hunt telephoned Davies and then proceeded to move the boat to a new mooring. Casey J. found that Davies either told Gregory-Hunt that insurance cover had been effected, or led him to believe that this was the case. Gregory-Hunt passed this information on to Allan who, in reliance upon it, took no further action himself to arrange insurance cover on the vessel. Allan proceeded to use the boat for fishing until it was wrecked in a storm a month later.

In fact the *Bernadine* was not insured—the insurance company had notified Davies that interim cover would not be given until the proposal form was completed—and Casey J. found that Davies was negligent in assuring Gregory-Hunt that insurance had been arranged.

Casey J. had no doubt that if a duty of care in tort was owed by Davies in respect of the statement made to Gregory-Hunt, Allan was within the category of persons to whom that duty was owed: ". . . Mr Davies knew or ought to have known from the circumstances that any information he gave Gregory-Hunt about insurance would be given in turn to Allan who could be expected to rely upon it." The crucial question was whether the circumstances were such as to satisfy the test of duty laid down by Lord Diplock in *M.L.C.* v. *Evatt*.

Obviously a chartered accountant can be regarded as "carrying on the business" of arranging insurance cover and notifying interested parties only if a very wide meaning is given to that phrase. It is also obvious that the task of arranging insurance cover on a vessel such as the *Bernadine* was not one which, of its nature, *called for* or required special qualification, skill or competence in any but the broadest possible sense. Performance of the task undertaken by Davies and communication of the result did not require interpretation or evaluation of information, formulation of an opinion, or the exercise of judgment. Casey J. agreed that the matter "could have been attended to by anybody of average business experience or knowledge of the island's fishing industry". Having reached this point, the learned judge posed the question:

> Does the fact that insurance could have been effected by anyone else connected with the transaction mean that there was no duty of care on Mr Davies? Certainly the majority decision in *Evatt*'s case requires more than a relationship where the adviser simply knows he is being trusted and is in a better position to be informed upon the matter than the recipient. The giving of the information or advice must call for some special skill and competence in relation to its subject matter not possessed by the ordinary man.

In view of his Honour's earlier observations as to the nature of the service performed by Davies, one would imagine that application of the *Evatt* test could result only in judgment for the Third Party. However, Casey J. continued:

> There is no difficulty when applying this test to the more specialised aspects of an accountant's practice such as the preparation of balance sheets, or reports on credit or profitability. But by no means all of a professional's services involve the higher mysteries of his craft, and I can see no reason for limiting the application of his skill and competence to these aspects only, and requiring him merely to act honestly on the rest. So long as the information or advice is given in the course of and as part of his professional undertaking, there arises a duty to exercise that degree of skill and competence generally possessed by persons engaged in the calling or profession of doing acts of that kind. Cooke J. seems to have reached this conclusion in *Day* v. *Ost* . . . .

Applying this broad test to the facts of the case before him, Casey J. concluded:

> . . . [W]hen Mr Davies undertook to arrange this insurance, it was well understood to be one of his functions as an accountant. He thereby held himself out to possess the necessary skill and competence to do it, and was under a duty to Allan to exercise the appropriate standard of care, on giving advice or information relating thereto. In this case, it included the obligation, in reply to his serious inquiry, to tell Gregory-Hunt on 27 February quite unambiguously that the vessel was not insured.

So at least in the case of a person practising one of the traditional professions, Casey J. was prepared to take a very wide view as to when, in terms of *Evatt,* such a person is "carrying on the profession" of giving advice of a particular kind, and also as to the kind and degree of skill and competence which the subject matter of the advice must require. He considered that whenever a professional man undertakes to give information or advice in the course of, and as a part of, his normal professional activities, he owes a duty to exercise professional competence in giving that advice even if the nature of the particular service to be performed and advice given does not call for the exercise of skill and competence greater than or different in kind from that possessed by the ordinary man of reasonable intelligence and diligence. Clearly Casey J. was influenced by the fact that many professional men "act as 'men of affairs' for their clients and perform many tasks which the client might do quite capably, but which can be more conveniently and competently done by the professional because his experience has given him an expertise and knowledge which the ordinary man may or may not possess". Casey J. obviously felt that it is unrealistic to expect ordinary laymen to differentiate between those kinds of services and advice which, of their very nature, demand special skill and competence of a kind which the members of the particular profession hold themselves out as possessing, and those kinds of advice which, although provided by members of the profession as a service, do not necessarily call for or require special skill or competence not possessed by the ordinary reasonable man. The layman cannot be expected to put professional advice into one or other of these categories and place reliance only upon the former.

It is submitted that Casey J. reached a fair result on the facts of the case before him, and that his statement of principle is perfectly sensible. The obvious question arising out of *Bernadine Fisheries* was whether Casey J.'s wide approach would be applied to businessmen who are not enaged in the practice of the traditional professions.

3. *Capital Motors Ltd.* v. *Beecham*[12]

In *Capital Motors Ltd.* v. *Beecham* Cooke J. was prepared to give an affirmative answer to this question.[13] The plaintiff Beecham had inspected and test-driven a used car offered for sale by the defendant, a licensed motor vehicle dealer. The plaintiff indicated that he would buy the car provided it had not had more than two previous owners. The defendant's salesman undertook to check the number of previous owners. A day or two later the salesman telephoned the plaintiff and confirmed that the car had only two previous owners. The plaintiff purchased the car in reliance upon this assurance. In fact that car had five previous owners. The salesman was found to have been negligent: the certificate of registration in respect of the car had not been available to him and instead of checking with the Motor Vehicles Registration Branch of the Post Office, he had only made a casual inquiry of a group of his fellow employees. In an action for negligent misrepresentation the plaintiff recovered damages of $100, being the difference between the price paid for the vehicle and its market value as a car with five previous owners, one of which was a rental car company.

First Cooke J. rejected the defendant's argument that there can be no liability in tort in respect of a statement made in the course of pre-contractual negotiations which lead to the completion of a contract between the parties.

The learned judge then proceeded to inquire whether the requirements of *M.L.C.* v. *Evatt* were satisfied so as to impose a duty of care on the salesman. Clearly it was arguable that an essential element of the *Evatt* test was lacking in that the defendant did not, merely by carrying on the business of a used car salesman, hold himself out as having any special skill or competence in relation to the subject-matter of the statement which is not possessed by the ordinary reasonable man. The statement consisted merely of an assertion of raw fact which did not require explanation or interpretation. It was also accepted that the statement did not even transfer raw information to which the salesman had access but the plaintiff did not: the plaintiff could easily have obtained the information himself simply by inquiring at the Motor Vehicles Registration Branch.

Cooke J. relied upon two features of the case to support his conclusion that a duty of care arose. First, the salesman, who was remunerated by commission on completed sales, had a direct financial interest in making a sale to the plaintiff. Secondly, by undertaking to obtain and provide the information sought in the course of, and as part of, his normal business operation, the salesman held himself out as being "particularly competent" to acquire and supply that information. Cooke J. observed:[14]

> Although the plaintiff, a retired insurance company manager, could have obtained the information for himself without much trouble, it was information of a kind which a salesman employed by a motor vehicle dealer may reasonably be expected to be particularly competent to supply: such a dealer has

12 [1975] 1 N.Z.L.R. 577.

13 Although *Capital Motors* was decided prior to the hearing in *Bernadine Fisheries*, the judgment had not yet been reported and it appears that the decision was not drawn to the attention of Casey J.

14 [1975] 1 N.Z.L.R. 577, 580.

> bought the car, is likely to know something of its history, should have seen the registration certificate, and is no doubt used to dealing with the Motor Vehicles Registration Branch. The salesman here first said he thought it may have been a two-owner car, but he undertook to confirm this. So it was a matter, not of a casual and indefinite answer to an enquiry, but of an undertaking to make sure—as far, no doubt, as reasonably possible.

Cooke J.'s wide view of when, in terms of *Evatt,* a person claims by reason of his business or profession to possess the required degree of skill and competence in relation to the subject matter of a statement corresponds closely with that of Casey J. in *Bernadine Fisheries.* However the decision in *Capital Motors* goes further than *Bernadine Fisheries* in two respects. Whereas Casey J. was prepared to find that the accountant in *Bernadine Fisheries* held himself out as possessing special skill *and* competence in respect of the matter, in *Capital Motors* Cooke J. construed these terms disjunctively[15] and held that the salesman's implied claim to be "particularly competent" to supply the information was sufficient to satisfy the *Evatt* requirement. Secondly, Cooke J. was prepared to apply this wide approach to advisers who were not members of the traditional professions.

4. *Esso Petroleum Co. Ltd.* v. *Mardon*[16]

In broad terms, the approaches taken by the English High Court and Court of Appeal in *Esso Petroleum Co. Ltd.* v. *Mardon* support the liberal interpretation of *Evatt* adopted by Cooke and Casey JJ. in the New Zealand cases.

Mardon entered into a disastrous contract to lease a newly constructed petrol service station from Esso for a three year term in reliance upon a negligent estimate by representatives of Esso that the "throughput" of the station would reach 200,000 gallons in the third year of operation. Mardon claimed damages on the ground that the statement amounted to a warranty under a collateral contract, and alternatively under the *Hedley Byrne* principle.

The High Court Judge, Lawson J., held that the statement was not in the nature of a promise or guarantee sufficient to amount to a contractual warranty, but he found Esso liable in tort for negligent misstatement. Although Lawson J. seemed to assume that Esso could not be regarded as "carrying on the business" of giving advice of the kind given in the sense required by *Evatt,* he considered that the test of duty laid down by the majority of the Privy Council (by whose decision, of course, the judge was not bound) was unduly restrictive and expressed a preference for the dissenting opinion of Lords Morris and Reid.[17] However, the learned judge decided that even by application of the majority view in *Evatt* a duty of care was owed by Esso on the facts before him because Esso had a financial interest in the plaintiff acting on the advice by entering into a tenancy agreement from which Esso would derive considerable financial benefit.

15 This interpretation finds some support in the majority opinion in *Evatt*: see [1971] A.C. 802 1. B, 807 1. C. See also *Plummer-Allinson* v. *Spencer L. Ayrey Ltd.* [1976] 2 N.Z.L.R. 254, 262, 263, 264 and the text accompanying nn. 24, 25 infra.

16 [1975] Q.B. 819 (D.C.); [1976] 2 W.L.R. 583 (C.A.).

17 [1975] Q.B. 819, 830.

The Court of Appeal affirmed Lawson's J.'s conclusion that Esso owed Mardon a duty of care in tort.[18] Shaw L.J. expressed complete agreement with the reasons and conclusions of Lawson J. on this point.[19] Ormrod L.J. categorically rejected the argument, based on *Evatt* "that the duty of care is limited to persons who carry on or hold themselves out as carrying on the business or profession of giving advice . . . . " and prefered to follow the reasoning of the minority in *Evatt*.[20]

Lord Denning M.R. concluded:[21]

> It seems to me that *Hedley Byrne & Co. Ltd.* v. *Heller & Partners, Ltd.* [1964] A.C. 465, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another—be it advice, information or opinion —with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages.

Lord Denning's statement of principle would seem to extend the duty, at least where the representor will derive a direct financial benefit from the representee acting on the statement, to persons who claim to possess or to have better access to raw information which is not possessed by the representee.

5. *Plummer-Allinson* v. *Spencer L. Avery Ltd. and Another; New Zealand Insurance Co. Ltd. (Third Party)*[22]

In *Plummer-Allinson* Chilwell J. reverted to a restrictive literal interpretation of the majority opinion in *Evatt*. This approach led the judge to deny the existence of a duty of care in circumstances which were similar in all material respects to *Bernadine Fisheries* and *Capital Motors Ltd.* v. *Beecham*.

The plaintiff operated a ladies' hairdressing salon in Hamilton. One night there was a fire in premises adjoining the plaintiff's salon, and the salon was damaged by water and heat. The next morning the plaintiff telephoned her insurance company (the second defendant) and asked that someone be sent to inspect the damage. When the company's claims clerk arrived the plaintiff drew his attention to packets of hair waving solution which were stacked alongside a concrete wall dividing the salon from the adjoining premises. The wall had obviously been affected by heat and the plaintiff was concerned that the heat may have also affected the solution in the packets. The clerk said he did not think there would be any damage to the contents of the packets. Nevertheless, the plaintiff gave the clerk a packet of the solution and made it plain to him that it was to be sent to the first defendant, the manufacturer and supplier of the product, for testing. However the clerk merely wrote to the manufacturer describing

18 [1976] 2 W.L.R. 583. The Court of Appeal also found that the representation amounted to a contractual warranty, and the defendant was held liable in contract as well as in tort.
19 Ibid., 606.
20 Ibid., 601.
21 Ibid., 595.
22 [1976] 2 N.Z.L.R. 254.

the circumstances and inquiring "whether or not heat does in fact damage the solution". The manufacturer replied that the product would be useable "if the outside of the packaging does not show any damage or signs of heat". Although some of the packets bore obvious signs of heat damage the claims clerk telephoned the plaintiff and assured her that he had been in touch with the manufacturer and "it was O.K. for her to use the remaining packets". In fact the product had been damaged by heat and application produced unsatisfactory results. This resulted in a steady decline in the plaintiff's business turnover. Chilwell J. found that the claims clerk had been negligent in advising the plaintiff, and he accepted the plaintiff's evidence that as a direct result of her reliance on the clerk's assurance the business had, over a three year period, suffered a loss of profit amounting to $4,544.59 after tax.

His Honour placed almost exclusive reliance upon the analysis of *Evatt's* case made by Asprey J.A. in *Presser* v. *Caldwell Estates Pty. Ltd.*[23] In *Presser,* Asprey J.A. reduced the opinion of the majority in *Evatt* to a series of propositions which Chilwell J. adopted and applied with only minor variations. The propositions directly applicable to the present facts were:[24]

> . . . . in general:
>
> (a) the statement upon which a plaintiff bases his action for damages for negligence must be one which the defendant has made in the ordinary course of his business or profession; and
>
> (b) the subject matter of such statement must be one which is of a kind in respect of which his business or profession is carried on; and
>
> (c) the subject matter of such statement must be one which calls for the exercise of some special qualification, skill or competence which is not possessed by the ordinary reasonable man but to which the defendant is known by the plaintiff to lay claim by reason of the defendant engaging in that business or profession.

Applying this test to the facts before him, Chilwell J. found that the first two requirements were met: the statement was made by the clerk in the ordinary course of his business, and the normal conduct of his business commonly involved making statements of that kind. However the learned judge found that the third requirement was not satisfied because:[25]

> . . . [N]o special qualification or skill or competence was required merely to pass on the information obtained from Christchurch. Any normally intelligent diligent insurance company employee handling an insurance claim such as the one in hand could pass on the information. That he did it so negligently that he misinformed the plaintiffs is not the issue: it did not require a special qualification or skill or competence on the part of . . . [the clerk] to pass on the correct information.

This conclusion is in direct conflict with *Capital Motors Ltd.* v. *Beecham,* and can be reconciled with *Bernadine Fisheries* only if persons practising the traditional professions are to be treated differently to businessmen. In neither previous case did the nature of the task the defendant undertook to perform or the subject matter of the advice he gave necessarily require the exercise of some special skill

23 [1971] 2 N.S.W.L.R. 471 (C.A.).
24 [1976] 2 N.Z.L.R. 254, 262.
25 Ibid., 263-264.

or competence not possessed by the ordinary man of reasonable intelligence and diligence. In all three cases the defendants had undertaken to perform, as part of their normal business operation, a purely routine mechanical task, and to pass on the raw factual information thus obtained. In no case did formulation of the statement require the defendant to use special skill or judgment in selecting or evaluating the factual information to be supplied, or in drawing an expert opinion or conclusion based on raw factual data. Whereas in *Bernadine Fisheries* and *Capital Motors* the courts were prepared to find that the defendants had laid claim to a sufficient degree of special skill or competence to satisfy the *Evatt* test simply by undertaking as part of their normal business practice to perform a routine service and transfer the raw information thus acquired, in *Plummer-Allinson* Chilwell J. appeared to hold that no duty can arise under the *Evatt* test in respect of statements which merely pass on raw factual information and require no evaluation, assessment, interpretation or exercise of judgment.[26]

Chilwell J. also rejected the plaintiff's alternative argument, based on Lord Diplock's qualification in *Evatt,* that a claim to special skill or competence is not required in order to give rise to a duty "where the defendant has a financial interest in the transaction on which he gives his advice". Clearly the insurance company had a direct financial interest in escaping liability for the product under its contract of insurance with the plaintiff.

Once again Chilwell J. adopted the reasoning of Asprey J.A. in *Presser* v. *Caldwell Estates Pty. Ltd.*[27] In *Presser* the New South Wales Court of Appeal held that the financial interest which a commission agent (in that case a real estate agent) has in a potential purchaser completing a purchase in reliance upon the agent's assurance as to the state of the property is not the kind of financial interest which the Privy Council had in mind as being sufficient to attract a duty of care in negligence. Asprey J.A. restricted the potential effect of Lord Diplock's qualification in *Evatt* by explaining the decision in *W. B. Anderson & Sons Ltd.* v. *Rhodes (Liverpool) Ltd.*[28] (the case referred to by Lord Diplock by way of illustration) in very narrow terms. In *Anderson's* case the plaintiffs and the defendant were wholesalers of fruit and vegetables. The defendant had previously sold potatoes on credit to Taylors Pty. Ltd. and at the relevant time Taylors owed the defendants about £2,500 although the defendant, due to the negligence of its book-keepers, was unaware of the extent of the debt. The defendant began to purchase potatoes for Taylors on a commission basis. Before selling to the defendant as agent for Taylors, the plaintiffs asked the defendant whether Taylors were creditworthy and the defendant replied that they were. In reliance upon the defendant's assurances the plaintiffs sold the potatoes to Taylors, who were unable to pay. Cairns J. held that the defendant owed a duty of care to the plaintiffs and was liable in negligence for the plaintiffs' losses.

26 *Plummer-Allinson* can be reconciled with *Day* v. *Ost,* supra, n. 8 on this point: there the architect was required to calculate the amount already paid to contractors and subtract this sum from the total contract price.

27 Supra, n. 23.

28 [1967] 2 All E.R. 850.

In *Presser,* Asprey J.A. treated *Anderson* as a case where "although the defendant may not have carried on a business which involved giving credit references concerning its customers, by making known in the context of these particular negotiations that it had had its own transactions both as principal and agent with the company [Taylors], it was by inference laying claim to have knowledge of the company's habits in complying with the market's custom and practice in payment of accounts and thus it placed itself in the position of a person whose business it was to give references of that kind . . . ."[29] However the mere fact "that a commission agent is being paid by his own client for his work according to the usual practice of business cannot amount to a claim to a third party that he has any special skill or particular ability to answer questions as to the internal financial structure or abilities of his principal".[30]

So Asprey J.A. refused to accept that Lord Diplock in *Evatt* intended his reference to "other situations" such as where the defendant has a financial interest to be treated as possible *exceptions* to the basic requirement of a claim to special skill and competence. Asprey J.A. treated the existence of a financial interest as being relevant only where it provides the basis for an inference that the defendant, atlhough not in the business of giving advice of the kind given, has nevertheless claimed that he is, by reason of his financial interest, specially qualified to provide the advice. By this view, it is difficult to envisage any situation other than the case where the representation relates to the creditworthiness of a person to whom the defendant has extended credit where the existence of a financial interest could give rise to a duty of care.

Applying Asprey J.A.'s approach to the case before him, Chilwell J. concluded:[31]

> . . . [T]he fact that the second defendant was financially interested in escaping liability under its policy of fire insurance is not the type of financial interest from which an implication of special qualification, skill or competence on the part of . . . [the claims clerk] is to be made. He was merely applying the degree of qualification, skill or competence usually expected of a claims clerk albeit that he acted negligently.

Chilwell J. found "with regret" that the test of duty laid down by the Privy Council in *M.L.C.* v. *Evatt* was not satisfied on the facts before him, and the plaintiff's claim was dismissed.

Chilwell J.'s view as to the relevance of a financial interest runs directly contrary to the approaches taken by Cooke J. in *Day* v. *Ost* and *Capital Motors Ltd.* v. *Beecham,* and Lawson J. and Shaw L.J. in *Esso Petroleum Co. Ltd.* v. *Mardon.* The financial interest of the salesman in *Capital Motors* and the *assumed* financial interest of the architect in *Day* v. *Ost* was simply that of a commission agent. In *Esso* the defendant's financial interest consisted of the benefit which the company would derive under the terms of the tenancy agreement which the plaintiff was induced to enter. In none of those cases did the existence of the financial interest itself justify an inference that the defendant claimed to possess some special qualification, skill or competence not possessed by a normal person in his position.

29 [1971] 2 N.S.W.L.R. 471, 483.
30 Id.
31 [1976] 2 N.Z.L.R. 254, 265.

Chilwell J. did not refer to *Capital Motors Ltd.* v. *Beecham* and, with respect, his attempts to deal with *Day* v. *Ost* and *Esso Petroleum* are not convincing. He thought that in *Esso* there was sufficient to impose a duty on the defendant quite apart from the company's financial interest in the transaction. However this requires a wider view of when a person is "carrying on the business" of giving advice of the kind given than Lawson J. and the Court of Appeal thought justified in terms of *Evatt*. As far as one can judge from his rather cryptic reference to the case, Chilwell J. did not agree with the decision in *Day* v. *Ost*. He said merely:[32]

> In *Day* v. *Ost* . . . if the defendant had not been a qualified architect but a person employed to keep the accounts and to issue certificates, it seems to me that he would have been personally qualified by reason of his own involvement in the financial transactions of his client to be liable for the negligent misstatement that there was plenty of money available to pay the plaintiff.

However, in the most recent case in which the point has been raised, Mahon J. appears to have inclined towards the approach taken in *Presser* and *Plummer-Allinson*. In *Coleman* v. *Myers*[33] Mahon J. doubted whether a financial interest could, by itself, elevate an ordinary relationship of buyer and seller into a special relationship which attracts a duty of care in negligence.

6. *Summary and Conclusion*

The post-*Evatt* cases on negligent misstatement show clear and irreconcilable differences in approach to interpretation and application of the crucial elements of the majority opinion in *M.L.C.* v. *Evatt*.

(a) Will the fact that the adviser has a financial interest in the recipient acting in reliance upon the statement justify a court imposing a duty of care in circumstances which would not otherwise give rise to a duty?

On this point there is a clear conflict between *Presser* v. *Caldwell Estates,* the *Plummer-Allinson* case and *Coleman* v. *Myers* on the one hand, and *Day* v. *Ost, Capital Motors* v. *Beecham* and Lawson J. and Shaw L.J. in *Esso Petroleum*. It therefore becomes essential to determine which is the correct interpretation of Lord Diplock's reference to financial interest in *M.L.C.* v. *Evatt*. It can certainly be argued that the narrow interpretation adopted in *Presser* and *Plummer-Allinson* is more in accord with the spirit of the majority opinion in *Evatt*. As one writer put it: "To adopt a wider view of 'financial interest' would be to undermine the strength of the majority principle in *M.L.C.* v. *Evatt* and allow the recovery of damages in cases where possession of the financial interest was quite unrelated to the knowledge or ability possessed by the defendant."[34]

However, it is submitted that this narrow interpretation does not give effect to the plain meaning of the words used by Lord Diplock. Lord Diplock referred to the situation where "the adviser has a financial interest in the transaction upon which he gives his advice" as an example of "other situations" where the "missing characteristic of the

32 Ibid., 264-265.
33 As yet unreported: Supreme Court, Auckland, 13 May 1976, No. A.744/74. Noted (1976) 2 N.Z. Recent Law (N.S.) 154.
34 McKenzie, "Whatever Happened to Hedley Byrne" [1974] N.Z.L.J. 543, 546.

relationship which [the majority] consider to be essential to give rise to a duty of care in a situation of the kind in which Mr Evatt and the company found themselves is not necessarily essential . . . ."[35] This can only mean that the fact that the adviser has a financial interest may be sufficient *in itself* to attract a duty of care even although he made no claim to special qualification, skill or competence in relation to the subject matter of the statement; i.e. he neither carried on the business of giving advice of the kind given or held himself out in any other way as possessing special skill and competence comparable to a person in the business of giving that kind of advice. It is submitted that the majority in *Evatt* viewed the existence of a financial interest as a possible exception to the basic requirement of a claim to special skill and competence, and that Cooke J.'s wide interpretation of Lord Diplock's reference to financial interest is the correct one.

If this is so, it becomes necessary to consider what kind of financial interest is required to bring a case within this exception to the basic test of duty. In *M.L.C.* v. *Evatt* the defendant company could be regarded as having a very small and indirect financial interest in the plaintiff acting on the advice by retaining and increasing his investment in the defendant's subsidiary company. However the Privy Council considered that the question of financial interest was not relevant in that case.[36] It may well be appropriate to limit the scope of this exception to situations where the adviser will derive a direct and reasonably substantial financial benefit from the plaintiff acting on the advice given.[37]

(b) What is the nature and degree of special qualification, skill or competence which the adviser must claim to possess in order to satisfy the basic test of duty laid down in *Evatt*?

Where the statement consists only of bare facts which require no evaluation, analysis, exercise of judgment or formulation of opinion, the post-*Evatt* cases are in direct conflict.[38] In *Bernadine Fisheries* and *Capital Motors* v. *Beecham* the courts found that a claim to special skill or competence sufficient to satisfy the *Evatt* requirement can be made in respect of the routine functions of acquiring and passing on raw factual information, even where any person of reasonable intelligence and diligence in the position of the recipient could have acquired the information himself. The defendant was regarded as laying claim to the required degree of competence by agreeing to provide the information in the course of his normal business or professional activities. But in *Presser* v. *Caldwell Estates* and the *Plummer-Allinson* case the courts interpreted *Evatt* as excluding liability for statements of this kind. In their view such statements can never be the subject of a claim to special skill or competence of the nature and degree contemplated by the Privy Council in *Evatt*.

The restrictive approach adopted in *Presser* and *Plummer-Allinson* may be justified on a literal interpretation of the majority opinion in

35 [1971] A.C. 793, 809.
36 Ibid., 805, 1. E-F.
37 As in *Capital Motors Ltd.* v. *Beecham* (commission on sale) and *Esso Petroleum Co. Ltd.* v. *Mardon* (rent payments and profit from increased sales of petrol).
38 Even prior to *Evatt* it was uncertain whether *Hedley Byrne* justified imposing a duty on an adviser who made no claim to special "skill": compare *Jones* v. *Still* [1965] N.Z.L.R. 1071 and *Barrett* v. *J. R. West Ltd.* [1970] N.Z.L.R. 789.

Evatt. However, it is suggested that the wider approach taken in *Bernadine Fisheries* and *Capital Motors* is to be preferred. Where the defendant, in the ordinary course of his business or professional activities, makes a statement which he knows the recipient will rely upon in respect of a serious business matter, he should be liable for negligence even where the statement consists merely of bare facts which do not require any interpretation, evaluation or explanation.

It is arguable that the wide approach in *Bernadine Fisheries* and *Capital Motors* is consistent with the spirit and underlying rationale of the majority view in *Evatt*. It is suggested that the concern of the majority in *Evatt* was to ensure that liability for negligent statements is limited to persons who, because they are in the business of giving advice, are in a position to either insure against liability or accept the risk of liability as a normal business risk, and in either case can pass on the cost through pricing of their services. The majority was also concerned to ensure that the conduct of those persons upon whom a duty is imposed should be judged by reference to a readily ascertainable standard of care. The decisions in *Bernadine Fisheries* and *Capital Motors* v. *Beecham* are perfectly consistent with those objectives.

Nor should courts feel deterred from following *Bernadine Fisheries* and *Capital Motors* by the terms of the majority opinion in *Evatt*. After all, those decisions are based merely upon a liberal interpretation of the terms "skill" and "competence". In fact, it can be argued that the requirement of a claim to special skill or competence should properly be restricted to the particular kind of situation which arose in *Evatt*. The Privy Council emphasised that in "other situations"—of which the existence of a financial interest was merely one example—a claim to special skill or competence may not be necessary to found a duty, and concluded:[39]

> On this, as on any other metes and bounds of the doctrine of *Hedley Byrne* their Lordships are expressing no opinion. The categories of negligence are not closed and their Lordships' opinion in the instant appeal, like all judicial reasoning, must be understood secundum subjectam materiam.

One writer[40] has argued from this that the application of the basic test in *Evatt* should be restricted to the situation where a non-professional adviser or a person who is obviously not possessed of any special skill makes a statement which clearly requires the exercise of special skill in analysing and evaluating information and making a skilled judgment. But that test should not be applied in the different situation where a person in the ordinary course of his business acquires and passes on raw information, a task which does not require any special skill. This argument derives some support from the Privy Council's apparent approval of the test of duty laid down in the American Restatement of the Law of Torts.[41] Lord Diplock interpreted the Restatement proposition as imposing a duty on "a person who makes it a part of his business or profession to supply for the

39 [1971] A.C. 793, 809.

40 McLauchlan, "Negligent Misstatement — The Case of the Careless Clerk" [1976] N.Z.L.J. 323, 326.

41 American Law Institute, *Restatement of the Law of Torts* (1938) Vol. 3, p. 122, para. 552. The *Restatement* provision was also referred to with approval by Lords Devlin and Pearce in *Hedley Byrne* [1964] A.C. 465, 531, 539.

guidance of others in their business transactions information of the kind contained in the statement and the statement . . . [is] made by him in the course of that business or profession".[42] This test does not limit the duty to cases where the nature of the advice necessarily requires the exercise of special skill in evaluating information and formulating opinions or conclusions. The American Restatement proposition goes on to provide that a person who owes a duty by application of this test is liable if "he fails to exercise that *care* and *competence* in *obtaining* and *communicating* the information which its recipient is justified in expecting".[43] The commentary to the Restatement expressly provides that: "The rule . . . applies *not only* to information given as to the existence of facts but *also* to an opinion given upon facts equally well known to both the supplier and the recipient".[44] It seems, therefore, that the American Restatement test would impose liability upon the defendants in *Capital Motors* and *Presser* for their negligence in ascertaining the true facts, and also upon the defendants in *Bernadine Fisheries* and *Plummer-Allinson* for their negligence in communicating basic facts within their knowledge.[45]

(c) When is a defendant to be treated as "carrying on the business or profession" of giving advice of the kind given so as to lay claim to the required skill or competence?

Consistent with their approach to question (b) above, the courts in *Capital Motors* and *Bernadine Fisheries*[46] considered it sufficient to satisfy this requirement if persons engaged in the defendant's business or profession not infrequently have cause to supply that general kind of information in the normal course of their business activities.[47]

But in *Esso Petroleum Co. Ltd.* v. *Mardon* and *Presser* v. *Caldwell Estates*[48] the courts seemed to take a narrower approach, apparently requiring provision of the kind of advice given to be central to, or an essential part of, the performance by the defendant of his professional or business duties.[49]

A wide approach to this requirement is appropriate where ascertaining and communicating the information sought does not call for special expertise and capacity for judgment. In cases like *Bernadine Fisheries* and *Capital Motors* the fact that the defendant provided the information in the ordinary course of his business activities can be found to amount to a claim that he possessed and was willing to exercise

42 [1971] A.C. 793, 802.
43 Supra, n. 41. (Emphasis added).
44 Ibid., p. 123, comment 6. (Emphasis added).
45 The American courts appear to have adopted this approach: see Prosser, *The Law of Torts* (4th ed. 1971) p. 704, notes 12 and 13.
46 In *Bernadine Fisheries* Casey J. could be interpreted as taking an even wider view, at least in respect of persons practising the traditional professions: i.e. in the case of a professional person, it is sufficient if *he himself* regarded provision of the information or advice as a normal part of his professional function, even if such a service is not commonly provided by other members of his profession.
47 Possibly Chilwell J. in *Plummer-Allinson* could also be regarded as favouring a wide view of this requirement in view of his explanation of *Esso Petroleum Co. Ltd.* v. *Mardon* as a case where the defendant owed a duty by application of the basic test in *Evatt*.
48 Real estate agent held not to be "carrying on the business" of providing information as to whether land fill had been used in respect of a particular property.
49 Mahon J. could also be regarded as taking a restrictive view of this requirement in *Coleman* v. *Myers* supra, n. 33.

the same degree of competence and diligence in relation to the statement that would be shown by a reasonably competent person in his business. The defendant can then be required to meet that reasonably clear standard of care and competence. But application of this wide approach to statements which obviously and necessarily call for special skill in analysing information and forming an expert opinion or conclusion would create difficulties.

For example, if it were established that public accountants not infrequently provide advice as to the financial stability and investment potential of companies for which they do not act in a professional capacity (a subject which, according to *Evatt,* necessarily calls for special qualification, skill and competence), application of the wide approach would result in a duty being imposed. The question of the standard of care required of the accountant would then arise. Is he to be judged by the standard of the reasonably knowledgeable and competent accountant giving advice of this kind, or is he required to meet the higher standard of the stockbroker or professional investment adviser? The majority of *Evatt* seemed to contemplate a particular ascertainable standard of skill and competence in respect of any particular kind of advice, and strong arguments could be advanced in favour of the view that *Evatt* would require the accountant to meet the higher standard of the professional investment adviser. This approach may well place an unduly onerous burden on the professional who gives advice on matters which are not central to his training and expertise. On the other hand, the recipient may act quite reasonably in placing reliance on advice of this kind, and it is surely unfair to deny him a remedy even where the adviser acts in a completely irresponsible manner.

The dissenting minority in *Evatt* showed a clear appreciation of this problem. They said:[50]

> We can see no ground for the distinction that a specially skilled man must exercise care but a less skilled man need not do so. We are unable to accept the argument that a duty to take care is the same as a duty to conform to a particular standard of skill. One must assume a reasonable man who has that degree of knowledge and skill which facts known to the inquirer (including statements made by the adviser) entitled him to expect of the adviser, and then inquire whether such a reasonable man could have given the advice which was in fact given if he had exercised reasonable care.

This is the approach taken in the American Restatement. The Restatement test would impose a duty on any person "who in the course of his business or profession supplies information for the guidance of others in their business transactions . . . ."[51] But where such an adviser "makes no pretence to special competence but agrees . . . to furnish information which lies outside the field of his business or profession . . . ." he is required only to exercise that degree of care and competence which the nature of his business entitles the recipient to expect.[52] The only way in which a New Zealand court could give practical effect to this more flexible approach is by interpreting *Evatt* as contemplating a variable standard of care within a broad class of persons who are regarded as "carrying on the business" of giving advice of the kind in question.

50 [1971] A.C. 793, 812.
51 Supra, n. 41. Cf. Lord Diplock's expression of the *Restatement* test: see text accompanying n. 42 supra.
52 Ibid., p. 125, comment d.