LIABILITY FOR NEGLIGENT STATEMENTS: ROUND TWO

Thoughts provoked by M.L.C. Assurance Co. v. Evatt (1968) 42 A.L.J.R. 316

Delivering his judgment in the Court of Appeal in 1965[1] Turner J. cited the dictum made over a hundred years before by Sir Henry Maine:

> the movement of the progressive societies has hitherto been a movement from status to contract

and went on to add the following comment of his own.

> it was left to Lord Atkin in *Donoghue* v. *Stevenson*[2] to notice the commencement of a tendency in the opposite direction, in which, in the absence of any duty ex contractu, the relationship of Atkinian neighbours alone was deemed to give rise to a duty to take care, the beach of which supported an action in tort for negligence. Perhaps the establishment of the Welfare State will set the tide firmly in the directions opposite to that perceived by Sir Henry Maine when he made his observations upon the evolution of society, and in the modern political scene status may be on the threshold of a new significance, of which we have as yet seen only the beginnings.[3]

These remarks were made in reference to the epochal decision of the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[4] in 1963 where it was finally settled that there can be liability for negligent statements causing financial loss apart from cases where there is a contractual or fiduciary obligation to be careful, and whether or not this had really been the case before then,[5] the controversy is now centred upon the circumstances in which liability will be so held to arise. The Law Lords were unanimous, however, that as a minimum requirement there had to exist a "special relationship" between the plaintiff and the defendant upon whose negligent statement the plaintiff relied to his detriment before a duty to be careful arose, but although both duty of care and negligence as an independent action are tortious concepts, the nature of the "special relationship" and the duty of care itself were, as seen by the judges who decided the case, heavily overlaid with connotations of contract. Not until the end of 1968 when the case of *M.L.C. Assurance Co.* v. *Evatt*[6] came before the High Court of Australia was attention specifically directed towards this question. In throwing light on the fundamental nature of the duty of care, the High

1. *Smith* v. *Auckland Hospital Board* [1965] N.Z.L.R. 191.
2. [1932] A.C. 562; [1932] All E.R. Rep. 1.
3. [1965] N.Z.L.R. 191, 204.
4. [1964] A.C. 465; [1963] 2 All E.R. 575.
5. The effect of *Hedley Byrne* v. *Heller* is discussed more fully infra at pp. 299-301.
6. (1968) 42 A.L.J.R. 316; [1969] A.L.R. 3.

Court of Australia has elucidated some other issues, unresolved in the former case, which are of great practical significance, and whilst the ambit of this action has not been restricted in any way[7] the essence of the obligation incurred in the duty to be careful is shown to be tortious rather than contractual. If then, the development of the common law in this aspect of negligence deviated in *Hedley Byrne* v. *Heller* in the direction of contract, the High Court of Australia has set it firmly back on the course which Turner J. saw as having been set for it.

The re-emphasis of the duty to be careful as a duty imposed by law, rather than one arising from a unilateral undertaking, is possibly the most important aspect of the decision in *M.L.C.* v. *Evatt* because it goes right to the elements of the action. Although these elements will inevitably at times merge, for the purposes of this analysis they can be separately marked out and be examined as they are customarily classified.

(1) By a process of induced fission the duty to be careful in giving information and advice has now separated itself from the general area of the law commonly called professional negligence. Whereas the parent case *Hedley Byrne* v. *Heller* lends itself to the creation of a specific duty stemming directly from the profession or calling of the representor, the High Court of Australia has decided that of itself it no longer gives rise to a special relationship but can profitably be relegated to the status of one of those factors which may determine the more basic questions of reasonable reliance and causation.

(2) Upon the basis of *Hedley Byrne* v. *Heller* liability has hitherto been accepted as being conditional upon the absence of a disclaimer. Furthermore, the absence of a disclaimer and the special relationship appear as two separate questions which together give rise to the duty. The High Court, however, has recognised the conceptual inconsistency of a tortious duty removable by disclaimer and has de-categorised it, constituting it as a component of the special relationship itself so that it may not always be decisive of liability. Instead it will make its contribution as a consideration weighing more upon the state of the facts.

(3) A relaxation is now possible in the minimum degree of proximity required for the imposition of the duty. This issue, concerning the scope of the duty, has two branches.

(a) Knowledge of the precise transaction for which the advice or information is relied upon, required by *Candler* v. *Crane, Christmas & Co.*[8], has been expanded by Barwick C.J. into an actual realisation by the giver of the information or advice that it is to be relied upon in connexion with "some matter of business or serious consequence" or a set of circumstances such that he ought to have realised it.

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7. It appears to have been broadened.
8. [1951] 2 K.B. 164; [1951] 1 All E.R. 426.

(b) Knowledge of the precise person who is going to act upon the statement gives way to a requirement that it be accepted by or on behalf of "an identifiable person or identifiable class of persons".

(4) There is now no necessary distinction between information or advice given in response to an enquiry and that which is volunteered.[9]

The pronouncements of the High Court in *M.L.C.* v. *Evatt* cover a wide range of issues varying in their significance. Although not all of the matters subjected to comment necessarily arose out of the facts for proper determination, the exhaustive judgments are for all that no less authoritative. Rather they should be assessed as a deliberate reservation to later courts of the freedom to decide the issues when they arise, a necessary step lest the case ever be interpreted as having decided *sub silentio* against possibilities lying outside the minimum area covered by *Hedley Byrne* v. *Heller*.

Having stated so much, the writer enters his own reservation. The following analysis of *M.L.C.* v. *Evatt* and of what might be expected to be its consequences does not pretend to deal definitively with every issue arising out of it. Instead certain of the salient features of the case are discussed as fully as the limited space allows and in so far as one is permitted to prophesy upon the basis of a decision still under appeal,[10] some predictions are entertained as to what the case might hold for those who stand to be affected by it. Expressed as a series of questions, therefore, the topics to be discussed are as follows:

(1) Is a special skill a condition precent to liability?
(2) Assumed Responsibility or Imposed Duty?
(3) The Disclaimer.
(4) The Scope of the Duty—to whom is it owed?
(5) Conclusion.

1. IS A SPECIAL SKILL A CONDITION PRECEDENT TO LIABILITY?

Contrasted with those which arose for consideration in *Hedley Byrne* v. *Heller*[11] the facts in *Evatt's* case are straightforward. The respondent, a policy-holder in the M.L.C. Assurance Co., approached an officer of that company and enquired as to the financial stability of the now notorious H. G. Palmer Ltd. which was, like the M.L.C.

9. (1968) 42 A.L.J.R. at 322; [1969] A.L.R. at 13 per Barwick C.J. Dr. A. Szakats has suggested in a recent article ("The Accountability of Accountants"—*The Accountants' Journal*, October, 1969, at 107) that the question of whether or not a statement is prompted by an enquiry determines the conceptual nature of the duty. The present writer concedes that a preceding enquiry may be an important factor in assessing the reasonableness and foreseeability of the reliance upon the ensuing statement but finds it difficult, with respect, to imagine how it can possibly relate to the nature of the duty which the law finally holds the representor to owe.
10. At the time of writing an application for leave to appeal had been heard by the Privy Council.
11. [1964] A.C. 465; [1963] 2 All E.R. 575.

Assurance Co., a subsidiary of M.L.C. Ltd. and sought advice as to the security of his existing investments in H. G. Palmer Ltd. and of any which he might make in the future. Upon assurances that H. G. Palmer Ltd. was sound and thriving, and worthy of further investment, the respondent not only retained his shares in the company but added to them with the consequence that when H. G. Palmer Ltd. was forced into liquidation he sustained the financial loss in respect of which he was suing.

Two important matters were not included in the pleadings, one being an allegation that the appellant made a practice of giving its policy holders (or anyone else) information and advice of the type actually tendered and the other being an allegation that the appellant generally held itself out as able to give the particular information or as being skilled in the giving of advice on the subject matter of the respondent's enquiry. This being the case, then, the special relationship, which was held by the majority of the High Court[12] to have existed between the respondent and the appellant, turned on the proof of a relationship between the appellant and H. G. Palmer Ltd.[13]

Although not possessing a special skill, the appellant's relationship with H. G. Palmer Ltd. placed them in a position of advantage with respect to the type of information and advice given and it was therefore reasonable for the respondent to have relied on it. Thus the appellant was held to owe the respondent a duty of care.[14]

Before going on to analyse the decision in detail and gauge its full impact, it is necessary to record precisely what the court set out to do. In his leading judgment, the Chief Justice, Sir Garfield Barwick, marked out the terms of the court's enquiry in very clear language when he said:

> The matter so far as this Court is concerned is free from any binding authority. The court's task therefore is to declare the common law in this respect for Australia.[15]

To what extent, then, does the common law of Australia allow an action to lie for negligent statements causing financial loss? The High Court's decision follows on directly from that of the House of Lords in *Hedley Byrne* v. *Heller* in so far as it was agreed on all sides that a duty of care arose only where there was a special relationship, but past this point there are a number of possible divergences. Whereas in *Hedley Byrne* v. *Heller* the defendants were within the recognised calling of bankers and commonly gave references of the type the subject of litigation in that case, the appellant in *M.L.C.* v. *Evatt* could not be brought under either category. It was natural, therefore, for the appellant to contend that an action would lie only if the person giving the information or advice held himself out as professionally expert in that connection. Such was the principal ground of the demurrer.

12. Barwick C.J., Menzies & Kitto J.J., Taylor & Owen J.J. dissenting.
13. (1966) 42 A.L.J.R. at 340; [1969] A.L.R. at 44; per Menzies J.
14. This is a short statement of the result on the facts and is not intended to be taken as the ratio decidendi.
15. (1968) 42 A.L.J.R. at 318; [1969] A.L.R. at 6.

After outlining in wide terms the kinds of matters that would be taken into account in order to establish a special relationship Barwick C.J. specifically adverted to the question of the need for special skill.

> . . . the elements of the special relationship to which I have referred do not require either the actual possession of skill or judgment on the part of the speaker or any profession by him to possess the same. His willingness to proffer the information or advice in the relationship which I have described is sufficient.[16]

The learned Chief Justice was unwilling to specifically categorise the relationships which might give rise to a duty of care but felt it encumbent upon him nevertheless to enumerate the essential characteristics of the special relationship. Shortly stated these were:

(a) Surrounding circumstances of such a character that the speaker (giving advice or information) realises or ought to realise that he is being trusted to give information to which the recipient believes he has access, or advice upon a matter in respect of which he is believed by the recipient to possess capacity or opportunity for judgment. In each case the subject matter must be of a serious or business nature.[17]

(b) The giver of the advice or information must realise or ought to realise that it is intended to be acted upon.[18]

(c) It must be reasonable in the circumstances for the recipient of the advice or information to seek, accept, and to rely upon it.[19]

The Chief Justice was of the view that the impact of the membership of a profession or the possession of a special skill was felt when it came to determining both causation, i.e. whether the recipient acted on his own impulse or was prompted by the advice to act to his loss, and the reasonableness of his reliance on the advice or information if he did in fact rely on it.[20] It is submitted that such an approach is to be preferred to the view which accords professional status or skill presumptive legal significance. A situation might conceivably arise where the inequality of the parties' knowledge on a certain subject is extreme, yet a special circumstance might be present so as to render reliance unreasonable. Moreover, as social attitudes change, the standard of care expected of a reasonable man and what is held to be reasonably foreseeable itself are bound to be elastic. By giving certain considerations a more factual significance, the courts will be able to maintain some flexibility without having either to make doctrinal alterations in the law or to resort to fictions in order to avoid them.

16. Ibid., 323 and 14 resp.
17. "It seems to me that it is this element of trust which the one has of the other which is at the heart of the relevant relationship"—(1968) 42 A.L.J.R. at 322; [1969] A.L.R. at 12.
18. Ibid. at 322, 12 resp.
19. Ibid. The passage in which these statements appear was adopted by McCarthy J. in *Dimond Mnfg Co.* v. *Hamilton* [1969] N.Z.L.R. 609, 627.
20. (1968) 42 A.L.J.R. at 322, 323; [1969] A.L.R. at 12, 13.

Kitto J.'s remarks are not as explicit on the question of a special skill, but both the tenor of his judgment and, indeed, his decision itself are inconsistent with anything but concurrence with the Chief Justice on this point. That the transaction involved and the information sought were of a serious business nature, that it was reasonable in all the circumstances for the respondent to have acted as he did, and that the appellant knew his information and advice were to be relied on, were matters sufficient to establish a special relationship.[21]

The summation of Menzies J.'s opinion on the issue is found in this short statement:

> If, as has now been established, there is a duty to advise carfully outside contractual or fiduciary relationships, the allegations here would, if proved, give rise to such a duty unless some stopping point can be found such as a limitation that such a duty arises only when advice is given by a person being in business to advise or holding himself out generally as having some special skill to advise. I do not think that such limitations exist.[22]

The implications held by this part of the decision for persons in a wide variety of capacities are clear.

The persons who stand to be affected by the case are not only those who ply recognised trades which have only lately taken to describing themselves as professions, like real estate agents, stock-brokers, valuers, and professional company secretaries, but anyone whose occupation or place in an organisation puts him in a special position to possess or obtain information either to pass on or use as the basis for advice. As for company directors, it is now irrelevant whether or not the law comes to recognise them as having a calling of their own which might impose common standards. The really interesting question relating to company directors, that of the liability which attaches to negligently prepared reports made primarily for the benefit of shareholders but relied upon by investors is not solved by the case. More will be said on that subject further on.

As far as stock-brokers are concerned, the uncertainties of the market are still such that it will continue to be difficult to bring brokers within the normal ambit of professional negligence in giving advice *simpliciter*, for the difficulty of reading the market will always place a serious limit upon how far it is possible to be below the mark, but if a broker holds himself out as having or simply has exclusive information, the key allegations of reasonable reliance and causation can more easily be maintained.

The possibility that any one holding a position of responsibility in a company may be liable for information to which his position gives him access points to what might have been the result, for example, if the secretary in *Dimond Manufacturing Co.* v. *Hamilton*[23] who showed

21. Ibid., 328 and 23 resp.
22. Ibid., 340 and 44 resp.
23. [1969] N.Z.L.R. 609.

the balance sheet to the prospective purchaser had not been an accountant at all or merely the same accountant who prepared it. In as much as the showing of the balance sheet was not only a representation of its contents but an implied representation of their truth as well,[24] any person holding a position of responsibility might have effectively made that representation.

(a) *The Dissenting Judgments*

Broadly speaking, the common grounds for dissent of Owen and Taylor JJ. were that construed in the light of its antecedent authorities the case of *Hedley Byrne & Co.* v. *Heller & Partners*[25] did not establish that a person (or corporation) not being possessed of a special skill or profession could be liable for giving negligent information and advice and that upon the analogy of *Low* v. *Bouverie*[26] and the banking cases relied on in *Hedley Byrne*, the defendant insurance company, whose general business it was not to give information and advice to policy holders concerning its fellow subsidiaries, could not be held to owe any more than a general duty of honesty.[27] Taylor J.'s reasoning proceeded from the premise that there was a difference between information *simpliciter* and opinioned advice and to this extent differed from that of Owen J. He also employed the additional authorities of *Banbury* v. *Bank of Montreal*[28] and *Woods* v. *Martin's Bank*.[29]

Having thus delineated the main areas of dispute it is now proposed to establish firstly whether on the assumption that they were so bound, the majority judges were justified in their conclusions upon the face of the speeches of the House of Lords in *Hedley Byrne & Co.* v. *Heller & Partners*, and secondly, whether the tenor of the antecedent authorities prevented them, as Owen and Taylor JJ. thought they did, from holding for the respondent.

(b) *Hedley Byrne & Co.* v. *Heller & Partners Ltd.*

Limited to the literal effect of his speech, Lord Reid clearly lends support to the majority judges in *M.L.C.* v. *Evatt*. After finding authority in Lord Haldane's speech in *Nocton* v. *Lord Ashburton*[30] for the proposition that other "special" relationships might produce a duty of care outside fiduciary relationships and contracts, he goes on to add:

24. Ibid., 636 per Turner J.
25. [1964] A.C. 465; [1963] 2 All E.R. 575.
26. [1891] 3 Ch.D. 82.
27. (1968) 42 A.L.J.R. at 334; (1969) A.L.R. 33-34.
28. [1918] A.C. 626.
29. [1959] 1 Q.B. 55; [1958] 3 All E.R. 166.
30. [1914] A.C. 932: Lord Haldane's terminology may well have been misconstrued in later cases. The modern view is that there are three categories of relationship which give rise to a duty to take care in utterances; contractural, fiduciary, and special. When considered alongside the actual decision in *Robinson* v. *National Bank of Scotland* Lord Haldane's re-emphasis of what he had said earlier in *Nocton* v. *Lord Ashburton* strongly suggests that he envisaged only two categories, these being the contractual and the special, with the fiduciary relationship being merely an example of the latter.

> I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him.[31]

Lord Devlin expresses himself to be of the same view and in order to avoid imposing restrictive terms on later courts he specifically declines to limit the ambit of the special relationship to situations only where the defendant has a qualification or a special skill or holds himself out as having such.[32] Lord Pearce's attitude may best be gleaned from the following short extract from his judgment:

> To import such a duty (i.e. that imposed on a special relationship) the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the enquiry and the importance and influence attached to the answer.[33]

There is nothing in this statement which is inconsistent with what was said by Lord Reid and Lord Devlin. For an application of it see *W. B. Anderson & Sons* v. *Rhodes Ltd.*[34] where the negligence of the defendant company's book-keeper in not informing its salesman of the bad state of a credit customer's account with them led to the salesman's giving an assurance to the plaintiff that the customer's credit standing was good. The occupation of the defendant was that of fruit and vegetable wholesalers in the Liverpool market so in no way could they have been said to either be carrying on or holding themselves out as professional advisers, yet Cairns J. held that a special relationship existed because the representation was made in a business context and because the gravity of the enquiry was sufficiently apparent to the defendant. The defendant's duty in this case arose out of its special position of advantage *vis-à-vis* their customer and in this respect it is not materially distinguishable from *M.L.C.* v. *Evatt.*

In the writer's opinion, therefore, there was ample scope in the speeches in *Hedley Byrne* v. *Heller* for the conclusion reached by the majority in *M.L.C.* v. *Evatt.* It must be conceded, however, that the tenor of the other two judges' opinion is to the contrary, although even here there are possibilities that may have been overlooked.[35] The passage most frequently cited from Lord Morris's speech (Lord Hodson adopted it literally[36]) is the following:

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31. [1964] A.C. at 486; [1963] 2 All E.R. at 583.
32. Ibid., 531 and 612 resp.
33. Ibid., 539 and 617 resp.
34. [1967] 2 All E.R. 850, 862.
35. See esp. *Jones* v. *Still* [1965] N.Z.L.R. 1071 where the narrower headnote in the official Law Reports was preferred to that of the All England Reports, and (1968) 42 A.L.J.R. at 331 per Taylor J., [1969] A.L.R. at 29.
36. [1964] A.C. at 514; [1963] 2 All E.R. at 601.

> My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore, if, in a sphere in which a person is so placed that persons could reasonably rely on his judgment or his skill, *or his ability to make a careful enquiry*, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.[37]

The first section of this passage may legitimately be construed against the background of Lord Morris's earlier remarks on the duty of care imposed in the performance of gratuitous services[38] long established by such cases as *Shiells* v. *Blackburne*[39] and *Wilkinson* v. *Coverdale*.[40] But the latter portion of the passage is the important one for, when applied to the giving of information alone, an ability to make a careful enquiry is meaningful only where the person giving the information has superior access to that information.[41]

Then there are the comments of Lord Devlin upon the two levels at which a special relationship may arise, i.e. "either generally, where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction".[42] The dealings between Evatt and his insurers stand as a clear example of the "ad hoc" relationship Lord Devlin had in mind but, limited by the facts of the case before him and the myriad possibilities he was opening up, could not specifically envisage.

(c) *Duty and Standard*

As was stated previously, the two main limbs of the dissenting judgments were, firstly, that what Evatt received was pure information and that upon the authority of *Low* v. *Bouverie*[43] information, when given by a person not having any special skill or calling, should not be subject to a duty of care any more than that given by a trustee to an interested stranger.

The second link of the reasoning was a thesis strongly linked to *Low* v. *Bouverie* and built upon a line of banking cases from *Robinson* v. *National Bank of Scotland*[44] onwards. This thesis, culminating in

37. Ibid., 503 and 495 resp. (emphasis added).
38. See *Coggs* v. *Bernard* (1703) 1 Com. 133; 92 E.R. 107 and discussion of the case by Lord Devlin—[1964] A.C. at 527; [1963] 2 All E.R. at 609.
39. (1789) 1 Hy. Bl. 158; 126 E.R. 94.
40. (1793) 1 Esp. 74.
41. Note however Taylor J.'s interpretation of these words—(1968) 42 A.L.J.R. at 331, [1969] A.L.R. at 29.
42. [1964] A.C. at 529; [1963] 2 All E.R. at 611.
43. [1891] 3 Ch. 82.
44. 1916 S.C. (H.L.) 154.

the judgments of Lord Morris and Lord Hodson in *Hedley Byrne* v. *Heller* is an endorsement of the view of bankers' informal obligations taken by Pearson L.J. in the court below.[45]

> Is (the banker) then expected, in business hours in the bank's time, to expend time and trouble in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-worded and well-balanced report? That seems wholly unreasonable.[46]

The passage itself echoes the words of Cozens-Hardy M.R. in *Parsons* v. *Barclay & Co. Ltd.*[47] which also met with the approval of Taylor and Owen JJ.

As to *Low* v. *Bouverie*, the analysis of that case and its pedigree undertaken by Barwick C.J.[48] shows sufficiently the extent to which the doctrine expressed there was so infected by an erroneous view of *Derry* v. *Peek* that it can no longer be relied upon as good authority except in so far as it decides that a trustee cannot be compelled to give information to an interested stranger.

Upon the second question, namely that there should be a duty lying upon bankers to be careful in giving references, it appears to the writer that in the cases cited above and held out by Owen and Taylor JJ. as authority to the contrary there is a very fundamental ground for objection. The effort and care which must be undertaken by a person upon whom a duty of care lies falls to be considered as to its extent only when the duty to take care has been established. But apparently this is insufficient for we also find it said:

> If he is not expected to do any of those things, and if he is permitted to give an impromptu answer in the words that immediately come to his mind on the basis of facts which he happens to remember or is able to ascertain from a quick glance at the file, or one of the files, the duty of care seems to add little, if anything, to the duty of honesty.[49]

There is a short answer to this. Nowhere in the law of tort is there exacted an absolute standard of care. (As a general rule a man is not held to owe the utmost care to a person to whom he owes a duty for a duty of care may mean in the circumstances a duty to take such care and go to such lengths as are reasonable, balanced by the extent of the risk.) It may indeed be unreasonable, as Pearson L.J. thought, to compel bankers to take the measures he mentions but that is an issue which arises only when it is determined whether or not there has been a breach. Pearson L.J. has confused the two issues, using the standard of care, which is a question to be decided upon the facts of

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45. [1962] 1 Q.B. 396; [1961] 3 All E.R. 891.
46. [1962] 1 Q.B. at 414-5; [1961] 3 All E.R. at 902.
47. (1910) 26 T.L.R. 628, 629; [1908-10] All E.R. Rep. 429, 432.
48. (1968) 42 A.L.J.R. at 323-4; [1969] A.L.R. at 15, 16, 17.
49. [1962] 1 Q.B. 396, 414-5; [1961] 3 All E.R. 891, 902.

each case, to settle that there can be no duty at all.[50] But having accepted that a duty may lie, it would still always be open to courts to hold that it would be unreasonable to compel bankers to take the trouble which Lords Morris and Hodson, Pearson L.J., Taylor and Owen JJ. believe they should not be compelled to take in answer to mere enquiries. That, however, does not prevent the law from demanding that having in fact taken certain steps in response to a request, or having taken such trouble as the law in the circumstances finds reasonable, bankers should exercise due care and skill in formulating an unambiguous statement of fact or advice on the basis of such information as is either ready at hand or has been collated. Upon this footing the intermediate duty postulated by Mr. Honore[51] as lying between a duty of care and a duty to abstain from deceit is unnecessary as a practical possibility and conceptually superfluous.[52]

2. ASSUMED RESPONSIBILITY OR IMPOSED DUTY?

It was suggested above[53] that the speeches in *Hedley Byrne* v. *Heller* are evidence of a tendency to look upon the duty of care in making statements as containing a strong element of contract, not in the sense that it is in any way affected by the doctrine of consideration, but in the sense that the duty of care arises by consensus out of an undertaking of responsibility. It is not clear whether the House of Lords would have found a duty of care in the respondents had there been no disclaimer, but what is certain is that at the very least the disclaimer precluded any possibility of a duty of care,[54] thus in *Hedley Byrne* v. *Heller* the conception which the lords had of the duty of care was inextricably bound up with the presence of the disclaimer and the way in which the enquiry itself was framed. In *M.L.C.* v. *Evatt*, however, there was no disclaimer and the two approaches must be examined subject to this difference. The disclaimer aside, the language employed by the House of Lords is strongly redolent of consensus.

Professor Stevens, writing in the *Modern Law Review*,[55] suggested that the potential impact of *Hedley Byrne* v. *Heller* on both tort and contract shows the remarkable nature of a "new" principle:

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50. The confusion stems principally from careless use of the word duty. The distinction between the bare notion of the duty of care and its breach is well illustrated in Professor Fleming's *Introduction to the Law of Torts* at 44. When used in a wider sense the word duty is coloured by what is involved in its breach. It "encompasses not only the question whether the situation called for the exercise of reasonable care, but also what was required precisely to satisfy the requisite standard". Here, unfortunately, Professor Fleming employs the term "reasonable care" which is inconsistent with his own analysis.
51. (1965) 8 J.S.P.T.L. (N.S.) 284 at 290-1.
52. See the searching analysis to which Mr. Honore's formulation has been subjected by the editors of Winfield (8th ed. 1967) at 244. See also Mr. E. Aspey's comments in (1969) 5 V.U.W.L.R. 247, 256.
53. Supra p. 293.
54. See the comments in retrospect of Lord Pearce in *Rondel* v. *Worsley* [1969] A.C. 191, 263; [1967] 3 All E.R. 993, 1021-1022.
55. (1964) 27 M.L.R. 121, 161.

> It should finally put an end to the Winfield theory that "at the present day, tort and contract are distinguishable in that the duties in the former case are primarily fixed by law, while in the latter they are fixed by the parties themselves. Moreover, in tort, the duty is towards persons generally, in contract it is towards a specific person or specific persons".

It must be conceded to Professor Stevens that the speeches in *Hedley Byrne* v. *Heller* justify this view for the use of such terms as "equivalent to contract" and "assumption of responsibility" are not capable of any other construction, and as Professor Stevens states at page 161:

> The emphasis on the skill and judgment of the defendant, and the power of the defendant to disclaim also seem out of keeping with the heavy emphasis by the majority on a development of the tort of negligence.

When the case of *M.L.C.* v. *Evatt* went to the High Court for determination this conceptual inconsistency must have been in the forefront of the minds of the court, for in two of the judgments delivered in this case there are clear statements of a philosophy directly opposed to that pronounced by the House of Lords and which may constitute the beginnings of doctrinal conflict.

It would be difficult not to construe the leading judgment of Sir Garfield Barwick C.J. as an indicative and emphatic pronouncement of Australian judicial policy, the whole tenor of his judgment as well as its terms being deliberately aimed at placing the law of negligence in its social, as well as historical context. The premise from which his reasoning flows is that liability for negligent statements is but one facet of the law of negligence and is therefore part of the law of torts and that the question of proximity aside, the law of negligent statements is conceptually indistinguishable from that relating to physical acts.

> It seems to me that the concept of a duty to be careful in the utterance of words is as appropriate in the regulation of human affairs in a society as in a duty of care in the case of physical acts or omissions. In each case, of course, the duty would spring out of some relationship and the cause of action depend on loss and damage causally related to the breach of duty. And in each case, in my opinion, the duty would be imposed by law and not arise out of any consensual or unilateral assumption of the duty.[56]

Elsewhere in the judgment the Chief Justice makes the observation that the relationships and the specific duties to which they give rise have become progressively less categorised as the law has developed. Legislation such as the provision in the Companies Act enacted to nullify the effect of *Derry* v. *Peek*[72] has aided this process. At the end of the nineteenth century the legislature was obviously undeterred by the proximity problem which has always been regarded as the prime

56. (1968) 42 A.L.J.R. 316, 320; [1969] A.L.R. 3, 10.
57. (1889) 14 App. Cas. 337.

reason for the slow development of the law of negligent statements when the clear need was seen for certain controls to be placed upon the issue of prospectuses. Indeed it is ironic that in the last few years the law of negligently manufactured articles has become embarrassed by the same open ended liability as was feared in the event of liability being sanctioned for utterances. The law received a nasty scare with the drug thalidomide and will have to face much the same problem when the "jumbo-jet" airliners begin to crowd the air-traffic routes.

Taylor J. who does not dissent on this question purports to "agree" with Lord Morris that the duty of care, rather than being one which arises from an implication of assumed responsibility, arises instead from "the operation" of the law upon a particular form of relationship.[58] Justifiable as a fair interpretation of Lord Morris or not, the expression must be taken at the very least to represent Taylor J.'s own view.

With Owen J. undeclared on this question, we find that both Menzies and Taylor JJ. lean heavily on *Hedley* v. *Heller* and are content to leave the duty of care in the conceptual framework inherited from the House of Lords. Both adhere to the principle that liability depends on the express or implied intentions of the parties.

Although on a count of heads there is no majority in favour of either view it would be regrettable if later courts were to take the same view of the matter as was adopted by J. A. Glasbeek in the most recent commentary on the case and opt for the *status quo*.[59] Mr. Glasbeek has suggested that Menzies and Kitto JJ. have halted the attempt by the Chief Justice to put an end to the anomaly which "permits recovery where no contract ensues, but none where a contract is induced". Barwick C.J. may well have had no specific intention in this direction and instead may have been trying merely to place the duty of care on a surer philosophical foundation. But whatever may have been the intention, commitment to the imposed-duty doctrine clearly has the effect of removing the anomaly, and it is therefore something of a paradox that by applying the Winfield analysis there results a situation similar to that obtaining under the old assumsit-based action on a warranty in the days before legal duties became polarised into the now familiar categories of contract and tort. It is much simpler to impose a duty on a person by operation of law, than to hold that he has voluntarily assumed a responsibility, unsupported by consideration, which is denied in an ensuing contract.

Notwithstanding its preoccupation with consensualism, *Hedley Byrne* v. *Heller* is without doubt one of the revolutionary decisions of the decade but it is as well to see it in perspective. In its endeavour to correct the unfortunate results of some old cases, the House of Lords was primarily concerned with the past and therefore ought not be charged with having been conscious of the mission of forging new

58. (1968) 42 A.L.J.R. at 331; [1969] A.L.R. at 29.
59. "Another Non-Statement on the Law of Statements?" (1969) Vol. I Australian Current Law Review 2, 6.

pathways. Given the limited objectives of that decision we may now feel less constrained to be fettered by it in giving the new duty of care its final and, presumably, desired form. In dealing with *M.L.C.* v. *Evatt* then, it may fairly be predicted that later courts will be true to habit and will not be over-concerned with whether or not the Chief Justice's formula is in the strict sense a majority-supported statement of principle. On the point of detail upon which the case turned, the leading majority judgment was given by Barwick C.J. and on that account it is likely to receive lengthy citation. One cannot, therefore, share Mr. Glasbeek's pessimism. The fear expressed in the Australian House of Representatives that the High Court's ruling could "throw the nation into uncertainty and jeopardise normal contacts"[60] is certainly one extreme view that has been taken. That the decision is a "non-statement" may well be another.

If the total effect of the High Court's analysis of this area of negligence is to be taken as tortious and on that account a departure from the terms of the House of Lords speeches, the result which immediately follows is that the legal effect of the disclaimer, of crucial importance under the semi-contract doctrine, becomes considerably diminished. When taken to its logical conclusion the disclaimer assumes a minor position as one of the many variables which may, according to the circumstances of each case, give rise to the special relationship upon which liability is imposed. Furthermore, as the Chief Justice points out,[61] if liability is imposed, it is questionable whether a disclaimer may always except the person giving the advice from the duty of care.

Professor Stevens in his article raised the question of whether there is any need to herd the *Hedley Byrne* duty clearly into either tort or contract. The foregoing remarks and the decision in *M.L.C.* v. *Evatt* itself should go a long way to answering his question. It does not, however, go all the way to resolving every issue raised by Professor Stevens' impeachment of Winfield's definition of tortious liability.[62]

It is true that the well known torts may not have had their origin in any all-embracing general principle of tortious liability but that is[63] not to say that judges and commentators have not observed in them over the years a growing likeness and either for this reason or by obeying the dictates of an inarticulate social policy have not accelerated their aggregation. Merely because the law is always evolving, albeit at a different pace from time to time, the possibility is not excluded that when Winfield formulated his definition, the divers forms of action, commonly called torts, strongly displayed the basic characteristic upon which the definition is founded.

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60. Quoted by Glasbeek, ibid., 2.
61. Ibid., 321 and 11-12 resp.
62. "Tortious liability arises from the breach of a duty primarily fixed by the law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages"—*Winfield on Tort* (5th ed. 1950) p. 2.
63. See *Furniss* v. *Fitchett* [1958] N.Z.L.R. 396, 401 per Barrowclough C.J.

The definition of tortious liability may ultimately be a circular controversy, but to accept Winfield's definition with its emphasis on an imposed duty as being valid at one moment and to criticise it merely because the House of Lords creates a type of duty which does not rigorously follow the lines of distinction set by it is to redefine the word "tort" and not to disprove Winfield's definition.[64] But even accepting Winfield's definition on this ground, it has also been argued[65] that in reality the duty is imposed by the law in both tort and contract, for in the case of contract, it is said, the law imposes a general duty to keep agreements which are made in the proper form.[66]

Far from undermining the doctrine propounded by Winfield, Mr. Poulton has in fact pointed to where the distinction exactly lies. The operative word in the case of duty imposed by the law in contract is "general" because the nature and extent of the specific duties arising out of a contract are totally determined by the parties. Nor do the limits of illegality and capacity imposed by law upon a contract constitute an exception for they go solely to the question of validity. In tortious negligence, however, the nature and the extent of the specific duty is imposed by law as that which ought to be done by a reasonable man with regard to his neighbours who foreseeably stand to be affected by his behaviour. That is something objectively determined, whereas the real effect of the specific duty in contract is undertaken subjectively.

The key to the question posed by Professor Stevens lies in the doctrinal implications of the disclaimer[67] and it is these which make the analogy of *Donoghue* v. *Stevenson* a very useful one. With respect to Lord Reid who in *Hedley Byrne* v. *Heller* thought that *Donoghue* v. *Stevenson* had no bearing on that case, Lord Atkins' principle is just as apt to the consideration of negligent statements as it is to the consideration of negligent acts for it contains the principle of morality which underlies all tortious liability, namely that citizens should not behave so carelessly that they imperil their neighbours' life, limb, reputation, or property.

The word negligence itself provides a clue to the inconsistency in the contractual view of the duty. Hitherto, and without exception, it has always been applied to behaviour which, in the context of an established duty of care, is unreasonable. In contracting, however, there has always been a duty to be honest (although not an excessively onerous one for *uberrima fides* is the exception rather than the rule) but never a duty to be reasonable once the valid contract is made. Every day the courts are upholding contracts which are patently unreasonable but these contracts are enforced nevertheless. The

64. Winfield is followed by Charlesworth (4th ed. 1962) S. 1005.
65. See the article by W. D. C. Poulton (1966) 82 L.Q.R. 346, 351.
66. Idem.
67. Professor Stevens was alive to the problem but did not follow his doubts through to their proper conclusion. "The most categorically clear aspect to the principle which was being developed was the absolute power of the disclaimer . . . this very clarity could well have made that part of the decision the least satisfying one." (1964) 27 M.L.R. 121, 140.

specific duties in a contract may be either more than generous or tantamount to robbery but the courts manifest a great reluctance to interfere with the contracting parties' right to determine their own obligations.

When another aspect of the contracting process is scrutinised it becomes apparent that in the proposition aired in *Hedley Byrne* to the effect that in giving advice a person in a special relationship assumes legal responsibility, there is a gross fiction. If the accountant, for example, in *Candler* v. *Crane Christmas*[68] had been asked at the time whether he was undertaking legal liability in the event of his accounts having been carelessly compiled he would assuredly have uttered a horrified "no". In a proper contract the same question would invariably meet an unqualified "yes", for the person so asked would recognise that unless he were to undertake the legal consequences of his default the other party would not contract with him.

Thus if negligence is always looked upon as a failure to act in accordance with an imposed standard, then it must be acceded to it that there is an objective element in that word which cannot be removed from it without redefining it out of all usefulness.

3. THE DISCLAIMER

If it is accepted that the duty of care in all types of negligence is the same in essence, i.e., imposed by law, the application of the disclaimer leads to insupportable results. To take the duty owed by a manufacturer as an example. Where an article has been negligently manufactured the law will not countenance as a lessening or avoidance of liability a label which states "makers accept no responsibility for any defect in this article or any want of care in its manufacture which leads to injury". There is a deterrent element in the law's policy in this regard. But that aside, the only effect a label purporting to disclaim liability could have would be either to render the user in some way *volens* (a plea which is almost valueless today)[69] or perhaps contributory to his own injury, with the second possibility being a real one only where a label points out an inherently dangerous feature and the user ignores it or pays it less than due regard. No one can deny that goods are made to be used, but in the case of an article which has no known dangerous propensities and has all the appearances of being sound a pure disclaimer of responsibility for its negligent manufacture would be so inconsistent with its appearance and distribution, itself a representation of soundness, that no court would ever accede to the suggestion that the user was unreasonable in using it.

Similarly with a piece of negligently framed advice. If a man were to say, "that is the only course you ought to follow. I should stake my reputation on it but I take no responsibility for any carelessness I may have employed in giving my opinion" provided the occasion were serious enough and provided, normally, the giver of the advice

68. [1951] 2 K.B. 164; [1951] 1 All E.R. 426.
69. cf. *Morrison* v. *Union Steam Ship Co. of N.Z. Ltd.* [1962] N.Z.L.R. 990.

were sufficiently placed with advantage in respect of the subject matter of the advice, the inconsistency would be difficult to ignore. In one breath the man has stated, virtually, that all care has been taken and that his advice is sound. In the other he purports to cover himself in the event of his having been careless, the possibility of which the first statement is calculated to exclude. If the advice were given with enough gravity and sincerity a man would not, in such circumstances, be anything but reasonable in acting on it and invariably, the giver of the information or advice will actually know that it is to be relied on. Should not the law, then, impose a duty to be careful in such circumstances?

If the duty of care in negligence is recognised to be a tortious concept, when such a duty of care is imposed by law, it can be of no avail to attempt unilaterally either to throw that duty off or to disclaim liability in advance of its dereliction. If this is recognised to be the essence of the tort of negligence, a "disclaimer" can still be accorded a less than crucial recognition without being at odds with the nature of the duty, for it will be open to give a disclaimer even a potent effect among the many other ingredients of a situation which go to make up the special relationship upon which the law may then impose the duty.

The recent American case, *Texas Tunnelling Co.* v. *Chattanooga City*[70] provides a graphic illustration of what a disclaimer in certain circumstances may amount to. In that case, the defendants knew that their summary would be furnished to and relied upon by bidders and sub-contractors in spite of the disclaimer which was attached to it. The disclaimer was worded in explicit terms:

> This information is furnished for the convenience of bidders and is not a part of contract. The information is not guaranteed and any bid submitted must be based upon the bidder's own investigations and determinations.

The summary omitted the results of test-bores made at certain crucial points, but all the samples, survey data, and plans were, and were known by the plaintiffs to be, available for inspection at the City Engineer's office. Apart from other defects which the court found in the way of a special relationship, the decision shows that it was thought that the plaintiffs had either disregarded the warning and, working upon their own assumption, had not really acted in reliance upon the survey summary at all, or had been unreasonable in relying on it, notwithstanding that evidence established that it was normal for tunnellers to bid for contracts upon the faith of summarised surveys and did not normally make their own investigations before submitting their tenders. One might have thought that normal trade practice would be something to take into account when determining whether or not it is reasonable to rely on such a document in spite of the warning, especially if it was invariably reliable, but the court seems to have been

70. 329 F. 2d 402 (1964).

primarily concerned with setting its own standards. It goes without saying that the normal trade practice amongst tunnelling contractors in Tennessee will never be the same.

Depending upon its contents, a disclaimer may have either of two possible effects:

(a) It may render the plaintiff's reliance unreasonable.

(b) It may go towards proving that the plaintiff's loss was either not in any way or only partially caused by the representation.

Furthermore, as the *Texas Tunnelling* case shows, there may be other ingredients of the situation outside the disclaimer which will operate to give the disclaimer its force, but a bald disclaimer of liability without more, if sufficiently inconsistent with the apparent authority of the representation, should not in logic have its desired effect.

The emphasis is given here to the tortious character of the duty but it will still always be possible to expressly contract out of the responsibility which the law would otherwise impose. If an enquiry is made and information is given on the condition that no responsibility attaches to it and the enquirer expressly consents to those terms it may be possible to infer a contract to forego rights in tort. *Hedley Byrne* v. *Heller* itself might have been approached in this way. The appellants' bankers asked the respondents "in confidence" and "without responsibility" as to the credit standing of Easipower Ltd. and received a reference with a disclaimer which if anything met the limitation which they themselves placed upon what they demanded of the respondents. All that required to be done to constitute the whole transaction as a contract was to treat the enquiring bank as the appellants' agents.

It should be borne in mind, however, that the courts generally view with disfavour exclusion clauses and contracts to forego rights which accrue by operation of law and although the term *contra proferentem* is one which properly belongs in contract it is very likely that the attitude which underlies that rule will greatly affect the view taken of disclaimers of tortious liability. It is probable, therefore, that contracts will be inferred only where on the facts there is a clear and express intention on the part of the enquirer to give up that which he would otherwise have. Not many situations will measure up to the standard.

4. THE SCOPE OF THE DUTY

The right of action recognised by the law of England in a duty of care in making statements is still in its infancy and has not yet reached the point where the ultimate scope of the duty of care may be confidently predicted. All that we may be sure of at the present time is that if the utterer of the statement is aware of the specific transaction in which his statement is to be relied on, or at least of the specific person who is going to rely upon it, a duty of care will be imposed and an action will lie if damage results.

In the United States a remedy similar to that granted in *Hedley Byrne* v. *Heller*[71] was created in the New York case of *Glanzer* v. *Shepard*[72] in 1922, and by 1931 the question with which English law is yet to be confronted was settled by Cardozo C.J. in the famous case of *Ultramares Corporation* v. *Touche, Niven & Co.*[73] But even in so far as it affects English law the controversy is an old one and involves the same considerations as were once employed in denying a duty of care altogether, namely the liability of a person whose representations are embodied in a document which is circulated to or seen by a great many more parties than those in the direct contemplation of the person when he formulated it. The feeling of English authority up to now has been against liability to all who might foreseeably rely on the representations so made but the following extract from the judgment of Barwick C.J. foreshadows a reassessment of the whole problem:

> The information or advice will be sought or accepted by a person on his own behalf or on behalf of another identified or identifiable person or on behalf of an identified or identifiable class of persons. The person giving the information or advice must do so willingly and knowingly in the sense that he is aware of the circumstances which create the relevant relationship.[74]

The controversy is at its most acute and receives most discussion in the context of negligently framed balance sheets, certificates and reports issued by company auditors. Should auditors be liable for losses incurred by several investors or lenders whom the auditors at the time when the document is drafted know or ought to know are intended to rely upon it? Of all the cases in which the matter has been discussed, *Candler* v. *Crane, Christmas & Co.*[75] still provides the best treatment of it. Denning L.J. (as he then was) left himself open to decide the question at the appropriate time but he leant towards allowing liability on a somewhat wider plane. Whilst expressing his own disquiet at the possibility of open-ended liability to "any person in the land who chooses to rely on the accounts in matters of business"[76] and whilst further echoing Cardozo C.J.'s horror of "liability in an indeterminate amount for an indeterminate time to an indeterminate class"[77] Denning L.J. does go on to say:

> Whether [the auditor] would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be . . .

That Denning L.J.'s brethren denied altogether the existence of a duty of care in that case is now too well known to recount, but the

71. [1964] A.C. 465; [1963] 2 All E.R. 575.
72. 135 N.E. 275 (1922).
73. 174 N.E. 441 (1931).
74. (1968) 42 A.L.J.R. at 321; [1969] A.L.R. at 11.
75. [1951] 2 K.B. 164; [1951] 1 All E.R. 426.
76. Ibid., 183 and 435 resp.
77. 174 N.E. at 448 (1931).

precise extent to which his own judgment has been resuscitated cannot yet be ascertained. At the very least the subsequent decision in *Hedley Byrne* v. *Heller* has settled that upon the same facts as in *Candler's* case the decision would now go the other way, but what of the situation obtaining in *Ultramares Corpn* v. *Touche*?[78]

On the understanding that their balance sheet was to be used to attract finance, the defendant firm of accountants issued thirty-two certified copies to their client company with the intention that these should be distributed. The defendants did not have specific knowledge that the plaintiffs were included among the parties to whom the accounts would be given but had clear knowledge of the kinds of person with whom business was to be transacted upon the basis of the accounts, and the time range within which this was to be done, namely "banks, creditors, stockholders, purchasers or sellers, according to the needs of the occasion, as the basis of financial dealings". In view of the fact that the accountants made particular provision for several investors the question of foreseeability is put beyond issue. The only thing they could not have foreseen was the amount to be invested, but both *Hedley Byrne* v. *Heller* and *M.L.C.* v. *Evatt* show that as long as the defendant knows that a serious transaction hinges on the representation or, more particularly, a substantial sum of money is involved, that is sufficient. In short, the exact amount of damage has not been thought to affect the initial question of a duty of care.

The negligence action has developed further since *Glanzer* v. *Shepard*. Since it is beyond dispute that in the *Ultramares* case it was more than reasonably foreseeable that several investors would rely upon the documents. any limitation which the law might impose must of necessity be founded not in logic but in policy. The law will have to face up to this issue some day and it is therefore hardly a matter for surprise that the Chief Justice of Australia should have taken the opportunity in *M.L.C.* v. *Evatt* to pave the way for a possible future application of Denning L.J.'s compromise formula for liability to a specific class. But should the passage cited from the judgment of Barwick C.J. be thought to throw all constraint to the winds and to offer scope for truly unlimited liability, attention is drawn to the caution entered by the Chief Justice in a preceding paragraph:

> . . . the basic concept of a duty of care arising by operation of law out of some relationship of one person to another remains constant . . . But I think it is quite clear that the relationship of proximity, adequate for compensation of physical acts or omissions, would be inappropriate in the case of utterance by way of information or advice which causes loss or damage. The necessary relationship in that connection must needs be more specific.[79]

78. Ibid.
79. (1968) 42 A.L.J.R. at 320; [1969] A.L.R. at 9.

With these indicators to go by, the question which falls to be answered at this point is what is meant by "an identified or identifiable class of persons"?[80]

The use of the term "class of persons" implies a certain degree of anonymity within that class. If it were otherwise there would be no need to employ the word "class". If the actual identity of all those within the class were known to the defendant when he made the statement relied upon it would merely be a case of liability lying in respect of several duties of care. If there is to be anonymity and indeterminacy within the class, it is difficult to imagine in relation to what the class is to be identifiable. It may be that the Chief Justice had in mind a line drawn at some point of time, namely when the force of the representation has expended itself among those whom it was intended to reach at the time it was made. To use the *Ultramares* situation as an example: those whom the company intended to approach at the time when the accountants issued the thirty-two copies of the balance sheet might, on this basis, be thought to fall within an identifiable class, and anyone into whose hands the accounts fell at some later date would fall outside it. That does not mean, however, that foreseeability has been subtly displaced as the governing criterion of liability by knowledge or intention. Reliance by the plaintiff still needs only to be reasonably foreseeable but the plaintiff himself must be in the actual contemplation of the representor either as an identity or as a member of a class of persons.

It is not proposed here to undertake a comprehensive review of the whole area of controversy; for an up-to-date account of the authorities the reader is recommended to two recent articles by Professor E. J. Bradley[81] and Mr. E. Aspey[82] which both give an exhaustive analysis to the whole question of public accountants' liability in negligence. But what is emphasised here is that the case of *Ultramares Corpn* v. *Touche, Niven & Co.*,[83] commonly supposed to set the limits of the duty of care, when assessed in relation to the position it has acquired in American law, is seen to fulfil a somewhat different role, for it has now grown into a body of authority which denies the existence of any duty of care at all outside contract as broadly defined.

> [The] decision mushroomed into a flat rule of no liability for negligent misrepresentation to those not in privity of contract where economic loss is caused.[84]

This is not to say that *Hedley Byrne* v. *Heller* would have been decided differently in an American jurisdiction which follows *Ultramares* because there is a slightly different view taken there of the concept of privity. Cardozo C.J. observed that "the assault on the citadel of privity is proceeding apace"[85] but his treatment of *Glanzer*

80. Ibid.; 321, and 11 resp.
81. [1966] J.B.L. 190 "Liability for Negligent Audit".
82. [1969] 5 V.U.W.L.R. 247.
83. 174 N.E. 441 (1931).
84. Bradley op. cit. at 191.
85. 174 N.E. at 445 (1931).

v. *Shepard*[86] shows that rather than recognising liabilities outside privity, American courts had in fact stretched the notion of privity so that a greater range of liabilities could come within it. In *Glanzer* v. *Shepard* a bean-seller requested the defendants, who were public weighers, to make a return of the weight and furnish it to the buyers, which the defendants did. The buyer bought a quantity of beans upon the faith of the certificate which recited that it was made for his use. The certificate being erroneous, the weigher was held liable to the buyer. Cardozo C.J. was himself a member of the court in that case and his subsequent analysis of it is illuminating for it evinces a doctrine very much akin to Lord Devlin's "equivalent to contract" theory:

> The bond was so close as to approach that of privity, if not completely one with it. Not so the case at hand [referring to *Ultramares* v. *Touche*] . . . In a word, the service rendered by the defendant in *Glanzer* v. *Shepard* was primarily for the information of a third person, in effect, if not in name, a party to the contract, and only incidentally for that of the formal promisee.[87]

The contractual tenor of Cardozo C.J.'s view of *Glanzer* v. *Shepard* is further evidenced by the statement that "public accountants are public only in the sense that their services are offered to anyone who chooses to employ them. This is far from saying that those who do not employ them are in the same position as those who do.[88]

In *Glanzer* v. *Shepard* the weigher, the seller, and the buyer together constituted a neat little threesome, all in each other's direct contemplation, which would, without too much stretching of the rules of contract as they stood in American law at that time, have been a sufficient basis for inferring a contract for the benefit of a third party enforceable by him. The action, however, was brought in tort and it was the contractual element which enabled Cardozo C.J. to keep the bounds of negligence more confined than those of deceit in respect of which he held that an action could lie.

Proceeding, however, upon the basis of *M.L.C.* v. *Evatt*, if the general duty of care is seen to belong in the realm of tort it would be an appropriate time, now that it is recognised that a duty of care may arise outside contract, to establish the scope of the duty of care on a fresh basis notwithstanding that the *Ultramares* principle was endorsed as recently as 1964 by the U.S. Court of Appeal (6th Circuit) in *Texas Tunnelling Co.* v. *City of Chattanooga*.[89] In that case a material finding was omitted from the summarised report of a survey engineer engaged by the city to test-bore the ground where a sewer tunnel was to be constructed. There was evidence that the defendant engineering surveyor knew that its reports would be made available to parties bidding for the tunnelling sub-contract and relied on them in formulating their cost estimates. Reversing the District Court, the Court of

86. Ibid., 448.
87. 135 N.E. 275 (1922).
88. 174 N.E. 446 (1931).
89. 329 F. 2d 402 (1964).

Appeal held, following *Ultramares*, that no new advance in the law was to be made as advocated by the lower court.[90] The fundamental policy conflict which is the recurrent theme of every attempt to settle the misrepresentation remedy upon a proper conceptual foundation in tort emerged in a starkly familiar passage in the district court's judgment:

> Without passing upon matters not before the court, it may be observed in this connection that there have been significant changes in the American society during the thirty years that have elapsed since the decisions in the *Ultramares* case. The continued growth and expansion of industry, the growth of population, the urbanisation of society, the growing complexity of business relations and the growing specialisation of business functions all require more and more reliance in business transactions upon the representations of specialists.[91]

In the Court of Appeals the passage was not referred to in any way at all but it may yet point the way to the establishment of a principle such as that to be found in the judgment of Barwick C.J.

Had the Court of Appeal applied the *Evatt* formula it might well have reached the same outcome by virtue of the powerful and manifold force of the disclaimer which, on the facts, could have been the basis for a finding of all or any of unreasonable reliance, non-causation, and contributory negligence, but the salient feature of the case is that the recognition of a duty of care would hardly have resulted in indiscriminate liability. Only one tenderer could win the sub-contract so it was of little import who the ultimately successful sub-contractor was. Here was a case where the foreseeable class might have been infinite in its content but where the specific transaction was defined, identified and quantifiable before the class resolved itself into a specifically identifiable plaintiff. No situation could be imagined where the "indeterminate liability" thesis of Cardozo C.J. would be less in point. It constitutes an area where the "identifiable class" formula of Denning L.J. and Barwick C.J. might readily be applied.

It may be argued at this stage that the concept of a class is itself inappropriate since liability was in issue as to one person only but it is emphasised that what is always involved is a duty of care at the time of the making of a representation, not the eventual liability resulting from it. Hence in the *Texas Tunnelling*[92] case a duty of care would need to have been owed to all those who might come within the

90. 204 F. Supp. 821 (D.C. 1962).

91. Cited by Bradley, op. cit. at 191. A more recent case, *Rusch Factors Inc.* v. *Levin* 284 F. Supp. 85 (D.R.I. 1968) shows that the assault on the citadel of *Ultramares* may now be under way. The latter case is criticised as "an unwarranted inroad upon the principle (enunciated by Cardozo J. in *Palsgraf* v. *Long Island R.R.* 162 N.E. 99 (1928)) that 'the risk reasonably to be perceived defines the duty to be obeyed' ". The Rhode Island court, however, stopped short of "overruling" *Ultramares* and having distinguished it on rather doubtful grounds applied *Glanzer* v. *Shepard* instead. See also (1969) 57 Cal. L.R. 281.

92. 204 F. Supp. 821 (D.C. 1962).

identifiable or foreseen class of tenderers. All of those who submitted tenders would conceivably have relied on the information but only one, the winner of the sub-contract, suffered loss. Needless to say, these difficulties need not arise if the three ingredients of actionable negligence are adhered to. A duty must arise before there is damage and for this reason the two should be separated in the analysis.

If the limits on the scope of the duty are set at those who are known or intended to be induced by the representation, this would bring the scope of the duty of care closely into line with the duty of honesty in the orthodox action of deceit.

In *Ultramares* v. *Touche, Niven & Co.* the relative scope of liability in the two forms of action was specifically in point and it was held that although a negligence action would not succeed deceit would lie where a class of persons was intentionally induced to act upon the copies of the documents. If the facts in that case indicate the limits of the duty in deceit, then it would appear that the law on this point is the same in both the United States and England with the leading English case being *Peek* v. *Gurney*.[93]

It is commonly supposed that a person owes a duty of honesty to the[94] world at large and to that extent a co-extensive liability for negligent statements might at first blush appear a horrendous possibility.

But *Peek* v. *Gurney* shows that even the duty of honesty has limits and that they are capable of being defined in a practical way. The line is drawn at those the defendant actually intends or knows will be induced to act, namely members of the public invited by a prospectus to become shareholders, but not purchasers on the market who buy at a considerable premium from people to whom the original issue was made. If it can be shown that the authors of the prospectus did in fact directly contemplate that the prospectus would promote market purchases as well as subscriptions then those purchasers too would be owed a duty of honesty: *Andrews* v. *Mockford*.[95] The rule requiring a direct relationship created by actual intention has been criticised by *Gower*,[96] and it would appear to be a substantial criticism in so far as intention is taken to mean primary purpose. In any event there is a large intrusion of fact into the rule in *Peek* v. *Gurney* which depends largely upon an acceptance of the proposition that directors who issue prospectuses for the purpose of attracting subscribers do not in fact know that the prospectus will be relied upon by people buying from the initial subscribers. Today as a matter of commercial reality that proposition would be difficult to sustain. Indeed one can go as far as saying that very few prospectuses are issued without that double purpose. In such circumstances a common law remedy for fraudulent

93. (1873) L.R. 6 H.L. 377.
94. "It was not until 1789 that *Pasley* v. *Freeman* 3 Term. Rep. 51 recognised and laid down a duty of honesty to the world at large—thus creating a remedy designed to protect the economic as opposed to the physical interests of the community"—[1964] A.C. at 534; [1963] 2 All E.R. at 614.
95. [1896] 1 Q.B. 372, C.A.
96. *Modern Company Law* (2nd ed. 1957), 297.

prospectuses is a matter of some importance because section 53 of the Companies Act 1955 does not include market purchasers in its ambit.

Scott v. *Dixon*,[97] a case cited with approval in *Peek* v. *Gurney*, is probably more analogous to *Ultramares* than *Peek* v. *Gurney* itself. There the directors of a bank fraudulently stated in a report to shareholders that a dividend was about to be paid out of profits which were sufficient to sustain the payment of a dividend and that the shares were a safe investment for their money. Copies of the report were made available at the bank to anyone who cared to take a copy, for the purpose of ascertaining the state of the business with a view to purchasing shares. The statements in the prospectus were knowingly false and purchasers of the shares incurred losses through being made contributories upon the failure of the bank. The defendant, a director of the bank, was held liable to the plaintiff who came by a copy of the report through his sharebrokers.

The judgments in *Scott* v. *Dixon* are couched in somewhat more general terms than the rule which is supposed to have emanated from *Peek* v. *Gurney* but it is probable that the House of Lords did not intend to place any restriction on what it adopted from the earlier case. In *Peek* v. *Gurney* the facts were rather special. Upon receiving a prospectus inviting him to subscribe the plaintiff declined the offer but some months later when the shares were riding high on the exchange he took it upon himself to buy some shares from a shareholder. He then complained that he bought the shares upon the faith of the prospectus. Perhaps feeling that it could not hold that the count in the declaration was untrue, the House of Lords held that the force of the prospectus had spent itself by the time the plaintiff purchased his shares and that the representation was not made directly to him. This, surely, is just another way of saying that the representations did not cause the plaintiff's loss or, put more simply still, that it was not through reliance upon the prospectus that he purchased the shares. The decision can be justified on that ground alone.

Having established the probable limits to the duty of honesty in deceit it may now be asked whether there is any good reason why the duty of care should be differently construed, in other words, notwithstanding certain other obvious differences between the two forms of action, is there a material distinction which compels a different analysis of the scope of the duty.

A distinction made upon the basis of the state of the defendant's mind is certainly not a material consideration. Both neglect and dishonesty are a declension from an approved standard of conduct and where, in respect of either of the two, a person is called upon to make good the loss he has occasioned another, there is no thought of punishing the maker of the fraudulent statement as opposed to the negligent for that would imply punishing the neglectful person too, since both are required to do no more and no less than to make good the damage caused. As has been emphasised above, tort remedies are granted instead for the purpose of compensating and shifting the burden of the

97. (1860) 29 L.J. (Ex.) 62, n.

loss inflicted upon one person by another whose *culpa* (which term encompasses both dishonesty and neglect) causes injury. Where loss adjustment is the underlying social policy of the remedy, the only confines which can be placed upon liability, since the duties of care and honesty themselves constitute a control device, are those which are set by policy itself.

An analysis of the cases in deceit shows that the test applied there is in large measure the same as the "identifiable class" test for negligence as foreshadowed by Barwick C.J. in *M.L.C.* v. *Evatt* but rejected by Cardozo C.J. in *Ultramares Corpn* v. *Touche, Niven & Co.* However, it is suggested that the impasse created by *Ultramares* might be conveniently avoided by the use of a formula hinted at by Turner J. in *Dimond Manufacturing Co.* v. *Hamilton*:[98]

> I . . . am prepared to hold that in the absence of circumstances bringing possible purchasers of shares into his reasonable contemplation as persons who will read and rely upon the balance sheet, a public accountant preparing a balance sheet of a company is under no duty of care as to its correctness to such persons.

Granted that it was held on the facts that possible purchasers were not in the accountants' reasonable contemplation, it is more than likely that persons in the position of the plaintiff in *Ultramares* v. *Touche, Niven & Co.* would now come within the classification since reasonable contemplation is a far cry from the specific identification which Cardozo C.J. thought was the first requirement of an action in negligence.

It may be felt that having taken the principle so far it would be arbitrary to set a limit where it is suggested that it has in fact been set. That may be so, but if it points to anything at all it points ultimately to the inadequacy of the law of torts to deal with the immense and complex task of social loss adjustment which is now seen to be its main role. How general the criteria are to be upon which a class is to be identifiable may depend largely upon the extent to which insurance is used by persons whose careless statements stand to be actionable and how far the courts are prepared to recognise insurance as being the means of compensating the plaintiff specifically according to the amount of his individual loss and yet spreading the burden of the loss generally among the greatest number. Liability insurance is clearly the answer and as applied to professional people, who will remain the prime targets for suits in respect of careless statements, it is hardly a revolutionary concept.

5. CONCLUSION

Although they are quite consistent with the direction in which the law is already moving, the tendencies noted in preceding paragraphs and the suggestions mooted combine to show why, even as a matter of

98. [1969] N.Z.L.R. 609, 636.

policy, the conceptual unity of the duty of care should be kept intact. Perhaps, when all is said and done, it is the only reason for keeping it so, in which case Professor Stevens' question needs no further consideration except to draw attention to what has been said before. The important result of the High Court's decision is that by keeping the duty of care in making statements within the bounds of the unified conception of tortious liability, the law will have the flexibility to adapt to social attitudes and needs, and to impose upon persons the standards of conduct expected of them by the community at any given time. That is not to say, however, that the development will be entirely without cost. In consigning the disclaimer and the occupation of the defendant to the comparatively subordinate role now acquired by them, the High Court has stripped the concept of the special relationship of much of its significance and to that extent may have brought more uncertainty into an area of conduct where obligations were sufficiently amorphous as they stood. But, as Professor Stevens observed,[99] the days of the nineteenth century and its rugged individualism have long departed. So too, thankfully, have the days departed when the passing of that era was noticed with regret. The division of labour, the devolution of responsibility, and the pressing necessity for the modern citizen to be totally preoccupied within the confines of his own calling, have all combined to make the individual both dependent upon and indispensable to his fellows, even though socially and morally he may be in the process of becoming less consciously involved. The conscious commitment, however, which a man feels towards his fellows has little bearing upon the duties which the complexity of his existence demands that he accept, for the diversification of human roles must eventually be recognised by the law in the broadening scope of the duties which it imposes. Yet outside the realms of any category or competency at all, a man may come into the possession of knowledge which may be useful to his neighbour, and given the reliance which such knowledge will inevitably meet, the danger of its manipulation must result in a more generalised conception of a duty to be careful.

By placing the general duty in tort the High Court of Australia has shown a deeper appreciation of social trends than the House of Lords with its preoccupation with contract and implicit emphasis on individually determined obligations. The High Court in *M.L.C.* v. *Evatt* did not have to tread upon the same unbroken ground as the House of Lords but it might, with the benefit of hindsight, prove to have placed the law of negligence on a straighter path.

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* This article was presented as the writer's legal writing requirement for the degree of LL.B. Honours at Victoria University of Wellington.

99. (1964) 27 M.L.R. 121.

"MOUNT WESTRAY"

From Gray Dawes Westray Group Newsletter November, 1969

Older members of the Gray Dawes Westray Group may remember that in 1936 Jim Westray, a Grandson of the original J. B. Westray, was killed following a plane crash, in the MacPherson Ranges near Brisbane. This incident hit the headlines of the World Press at the time because the Stinson Monoplane aircraft was missing for 9 days before it was eventually searched for and found by Bernard O'Reilly. Jim Westray and two others survived the crash and he, although badly burned, was in the best shape and therefore went for help. The country is extremely rugged and he died after falling down a cliff. At the time the Australian people erected a Memorial Stone to Jim Westray which is situated beside the New England Highway on the New South Wales/South Queensland border. Last year the Queensland Placenames Board proposed that a previously un-named Peak in the MacPherson Ranges be named Mount Westray. This Mountain is part of the Lamington Plateau between two forks of Christmas Creek. The Mountain looks out over the Tweed Valley.

(Note: J. B. Westray & Co. (N.Z.) Limited, Insurance Brokers, is the New Zealand Company in the group.)