'SPECIAL SKILL' IN NEGLIGENT MISSTATEMENT†

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[*In* Mutual Life and Citizens' Assurance Co. Ltd v. Evatt, *the Privy Council decided that 'special skill' on the part of the defendant was a requirement for the existence of a duty of care in making statements. This decision effectively confined liability for negligent misstatements to those who were, or who professed to be, in the business of giving information or advice. In two recent decisions, the Full Court of the Supreme Court of Western Australia and the Full Court of the Supreme Court of Victoria have taken opposing views of the effect of* Evatt*'s case. This article compares those two decisions and considers whether* Evatt *should continue to be followed in Australia on grounds of principle or precedent. It recommends that the Victorian decision be preferred to the Western Australian decision, and that* Evatt *should no longer be followed. It also considers the possibility that the whole question of 'special skill' has become irrelevant because of the availability of an action under s. 52 of the Trade Practices Act 1974 (Cth) and/or an action under State Fair Trading Acts.*]

1. *Introduction*

In practice, liability for negligent misstatements chiefly affects those who are in the business of giving information or advice. The risk of liability is only of pressing concern to those professionals, such as lawyers and accountants, whose day-to-day work consists of making statements which might cause financial loss to their clients. However, throughout the 35 years in which liability of this kind has existed,[1] debate has continued about whether liability should be *confined* to such defendants.

The controversy about which defendants should owe a duty of care in making statements has centred on the issue of 'special skill'. If 'special skill' on the part of the defendant is a requirement for the existence of a duty of care, then a duty is owed only by those who are, or who profess to be, experts in the field in which they are giving information or advice. If 'special skill' is not a requirement, then a duty may be owed by defendants who are not expert if, in all the circumstances of the case, it is deemed appropriate.

In Australia, the debate about 'special skill' has largely been a debate about the effect of *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt*.[2] In that case, the Privy Council held that 'special skill' was a requirement for the existence of a duty of care in making statements.[3] *Evatt's* case was strongly criticised by the High Court of Australia in *L. Shaddock & Associates Pty Ltd v. Council of the*

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1 Liability for negligent misstatements was first introduced in 1964 by *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465.

2 [1971] A.C. 793.

3 The majority of the Privy Council also suggested that a duty might arise in the absence of special skill where the adviser has a financial interest in the transaction upon which he or she gives advice: [1971] A.C. 793, 809. See also, *Presser v. Caldwell Estates Pty Ltd* [1971] 2 N.S.W.L.R. 471, 493, *per* Mason J.A.; *San Sebastian Pty Ltd v. Minister Administering the Environmental*

City of Parramatta (No. 1),[4] but the question of its effect in Australia has been revived by two recent decisions of State Supreme Courts. In *Mohr v. Cleaver*,[5] the Full Court of the Supreme Court of Western Australia followed *Evatt's* case; in *Norris v. Sibberas*,[6] the Full Court of the Supreme Court of Victoria appeared to express the view that it should not be followed. Thus, debate has been renewed about whether 'special skill' on the part of the defendant is a separate requirement for the existence of a duty of care.

In this article, I shall attempt to show that, on grounds of principle and precedent, *Evatt* should not be followed in Australia. To some extent, this involves refighting old battles,[7] but, until the conflict between *Mohr v. Cleaver* and *Norris v. Sibberas* has been resolved by the High Court of Australia, the war has not yet been won. However, I close with a suggestion that, in practice, the war itself may be unnecessary.

2. *Precedent*

In *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt*,[8] the plaintiff sought investment advice from an insurance company. His reason for doing so was that the company in which he intended to invest was a co-subsidiary of the company from which he sought advice. The insurance company negligently advised that its co-subsidiary was a sound investment, which it was not. Acting on that advice, the plaintiff invested, and lost, his money. He brought an action against the insurance company, claiming that its negligent advice had caused his loss. In the High Court of Australia,[9] it was held that the relationship between the plaintiff and the defendant insurance company was such that the latter owed the former a duty to take care in the giving of advice. The majority of the Court held that it was not important that the defendant was not in the business of giving investment advice. Barwick C.J. said:

> [I]n my opinion, 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, in my opinion, sufficient.[10]

According to this view, the presence or absence of 'special skill' on the part of the defendant is relevant to the central question of reasonable reliance, but is not

Planning and Assessment Act 1979 (1986) 162 C.L.R. 340, 358, *per* Gibbs C.J., Mason, Wilson and Dawson JJ. However, in each of *Presser*, *San Sebastian* and *Evatt* itself, it was held that the defendant's financial interest in the transaction in question was not sufficient in itself to give rise to a duty of care.

4 (1981) 150 C.L.R. 225.

5 [1986] W.A.R. 67.

6 (1990) V.R. 161.

7 *Evatt's* case has long been the subject of academic criticism. See, among many others: Phegan, C. S., 'Hedley Byrne v. Heller in the Privy Council — The Continuing Story' (1971) 45 *Australian Law Journal* 20; Lindgren, K. E., 'Professional Negligence in Words and the Privy Council' (1972) 46 *Australian Law Journal* 176; Stevens, L. L., 'Two steps forward and three steps back! Liability for Negligent Words' (1972) 5 *New Zealand University Law Review* 39. However, compare Weir, T., 'The Developer and the Clerk' (1982) 2 *Oxford Journal of Legal Studies* 440.

8 [1971] A.C. 793.

9 (1968) 122 C.L.R. 556.

10 *Ibid.* 574.

a separate requirement in itself. Thus, if the defendant is, or professes to be, an expert in the field in which he or she is giving information or advice, and the plaintiff is not, then there are strong grounds for saying that it would be reasonable for the plaintiff to rely on the defendant's expertise rather than trusting in his or her own judgment. Conversely, if the defendant is not an expert, it will not usually be reasonable for the plaintiff to rely on his or her information or advice. In this way, the presence or absence of 'special skill' does not *determine* the existence of a duty of care, but is an important factor among many others to be taken into account.

The defendant in *Evatt's* case appealed to the Privy Council. By a majority of three to two,[11] the Privy Council allowed the appeal, holding that the defendant insurance company did not owe the plaintiff a duty of care because it did not have, nor had it professed to have, special skill in the giving of investment advice.

The majority of the Privy Council relied on the judgments in *Hedley Byrne v. Heller*[12] for their decision that special skill was a requirement for the existence of a duty of care. The minority, Lords Reid and Morris, might have been expected to have a better understanding of the decision in *Hedley Byrne* as they, unlike two of the three judges in the majority, had actually given judgment in that case. Lords Reid and Morris preferred the view expressed by Barwick C.J. in the High Court of Australia, namely that special skill was not, in itself, a requirement for the existence of a duty of care. However, they protested in vain when they said, 'We are unable to construe the passages from our speeches cited in the judgment of the majority in the way in which they are there construed.'[13] The majority decision that special skill was a requirement for the existence of a duty of care meant that, in effect, liability was confined to those who were in the business of giving information or advice.

This narrow view was never popular. It was roundly criticized by academics,[14] and the Court of Appeal in England declined to follow it in *Howard Marine and Dredging Co. Ltd v. A. Ogden & Sons (Excavations) Ltd.*[15] It seemed that its death-knell had been sounded in Australia with the decision of the High Court in *L. Shaddock & Associates Pty Ltd v. Council of the City of Parramatta (No. 1).*[16]

In *Shaddock's* case, each of the five judges stated that he preferred the view expressed by Barwick C.J. in the High Court in *Evatt*, and the minority in the Privy Council, to that of the majority of the Privy Council. Two of the judges, Mason and Aickin JJ., did so as part of the *ratio* of their decision. Mason J., with whom Aickin J. agreed, said:

[11] Until relatively recently, the practice of the Privy Council was to deliver one unanimous joint judgment, on the basis that its function was to advise Her Majesty, and conflicting advice would not assist her. This practice was formally discontinued in 1966 by the Judicial Committee (Dissenting Judgments) Order 1966. The first Privy Council case to contain a dissenting judgment was *National and Grindlays Bank Ltd v. Dharamshi Vallabhji* [1967] 1 A.C. 207. *Evatt's* case is one of very few other examples.

[12] [1964] A.C. 465.

[13] [1971] A.C. 793, 813.

[14] *Supra* n. 7.

[15] [1978] 1 Q.B. 574, 591, *per* Lord Denning M.R.

[16] (1981) 150 C.L.R. 225.

> I prefer the wider view to that expressed by the majority of the Privy Council in the M.L.C. Case. I consider that this Court should now adopt Barwick C.J.'s statement of the conditions which give rise to a duty of care in the provision of advice or information.[17]

Two of the judges, Gibbs C.J. and Stephen J., expressed criticisms of the judgment of the majority of the Privy Council in *Evatt*,[18] but held that it was unnecessary to choose between the majority and the minority views.[19] Gibbs C.J. and Stephen J. took the view that, on the facts of the case at hand, the defendant, a shire council, did have 'special skill' in the giving of information about road-widening plans. Thus, on the facts of the case, the defendant owed a duty of care under either of the views expressed in *Evatt*. As a result, the criticisms of the majority view expressed by Gibbs C.J. and Stephen J. were *obiter*.

The fifth judge was Murphy J. His view is of pivotal importance, as it determines whether or not a majority of the Court decided, as *ratio*, that the majority view in *Evatt* should no longer be followed in Australia.[20] In the crucial passage of his judgment, Murphy J. said:

> The liability is not confined to those who have special skill or competence. This reflects the approach of this court in the *M.L.C.* case and departs from that of the Privy Council in the same case which restricted liability to those who possessed or professed special skill or competence on the subject of the mis-statement. For the purpose of this appeal, it is enough to hold that liability extends to those whose profession or business it is to give advice or information, whether gratuitously or not . . . [T]his Court is not bound by the Privy Council decision in the *M.L.C.* case and there is no justification for adhering to the error expressed by the Privy Council in that case.[21]

It is difficult to see how this passage could possibly be taken to be *obiter*, but for the ambiguous sentence, 'For the purpose of this appeal, it is enough to hold that liability extends to those whose profession or business it is to give advice or information, whether gratuitously or not.'

What does this sentence mean? What effect does it have on the strong words that surround it? In my opinion, the sentence does not mean that Murphy J. should be counted with Gibbs C.J. and Stephen J. as a judge whose views on *Evatt* were *obiter*. It does not mean that Murphy J. found it unnecessary to decide between the two views expressed in *Evatt* because, on the facts of the case, the defendant would be liable under either view. In the sentence in question, Murphy J. says, quite rightly, that a finding that the defendant was in the business of giving information would be enough to dispose of the appeal. However, he does not say that he confines his decision to such a finding. The sentence means merely that the appeal could be decided without departing from the majority view in *Evatt*. It does not mean that, in Murphy J.'s view, it *should* be. Indeed, it is quite clear from the rest of the passage quoted above that Murphy J. was of the view that *Evatt* should no longer be followed in Australia.

Thus, Murphy J. should be counted with Mason and Aickin JJ. as a judge who held, as *ratio*, that the views of Barwick C.J. and the minority of the Privy

[17] *Ibid.* 251.
[18] *Ibid.* 234, *per* Gibbs C.J.; *Ibid.* 240, *per* Stephen J.
[19] *Ibid.*
[20] It is ironic that it is Murphy J.'s judgment that must be scrutinized in this way, in the light of his views on the doctrine of precedent, particularly in Constitutional matters; see Goldring, J., 'Murphy and the Australian Constitution', in Scutt, J. (ed.), *Lionel Murphy: a radical judge* (1987) 60-85.
[21] *Ibid.* 256.

Council in *Evatt* should be preferred to those of the majority of the Privy Council. No judge is confined to the narrowest possible view that will decide the appeal at hand. If this were so, all of Lord Atkin's views on duty of care in *Donoghue v. Stevenson*[22] would have been *obiter*, as a more narrowly expressed opinion would have been sufficient to find for the plaintiff in that case.

Further, this view of *Shaddock* seems to have been taken by a majority of the High Court of Australia in *San Sebastian Pty Ltd v. Minister Administering the Environmental Planning and Assessment Act 1979*.[23] In that case, Gibbs C.J., Mason, Wilson and Dawson JJ. said:

> In *Shaddock*, Mason and Aickin JJ. applied Barwick C.J.'s statement of the principle of liability and Murphy J. seems to have adopted a similar approach. Gibbs C.J. found it unnecessary to decide whether the view of the majority or minority in the Privy Council in *Evatt* was correct and Stephen J. seems to have been prepared to accept the majority view for the purpose of deciding the case.[24]

Although this statement is itself *obiter*, it clearly groups Murphy J.'s judgment with those of Mason and Aickin JJ. rather than with those of Gibbs C.J. and Stephen J. Further, it is surely significant that both Gibbs C.J., whose views in *Shaddock* were *obiter*, and Mason J., whose views in *Shaddock* formed part of the *ratio* of his decision, took the view that Murphy J.'s views were part of the *ratio* of his decision.

Until recently, it was thought that *Shaddock* had laid the ghost of *Evatt* to rest. It is in the light of the judgments in *Shaddock* that one must consider the State Supreme Court decisions in *Mohr v. Cleaver* and *Norris v. Sibberas*.

3. Mohr v. Cleaver

Like *Evatt's* case, *Mohr v. Cleaver*[25] concerned investment advice given by someone who was not, and did not profess to be, an investment adviser. The defendant was an accountant, who had acted as tax agent for the plaintiffs for several years. The plaintiffs were asked by the directors of a company to loan money to that company, and they agreed to do so. However, in the course of a telephone conversation with the defendant before the money was paid over, one of the plaintiffs asked the defendant about the advisability of advancing money to the company. The defendant told the plaintiffs that he thought the future prospects of the company were 'extremely good'.

The plaintiffs loaned the money to the company, which collapsed soon after. The plaintiffs sought to recover their lost money from the defendant,[26] alleging that his negligent advice had caused their loss. At first instance, it was held that the defendant owed the plaintiffs no duty of care because *inter alia* he was not, nor had he professed to be, an expert in giving investment advice. This decision

22 [1932] A.C. 562.
23 (1986) 162 C.L.R. 340.
24 *Ibid.* 356.
25 [1986] W.A.R. 67.
26 The plaintiff also sued the directors of the company, one of whom was the son of the defendant, in deceit and negligent misstatement. At first instance, the directors were held not liable, as their belief in the viability of the company was reasonably held. The plaintiff's appeal against this decision was abandoned.

was affirmed by the Full Court on appeal. In holding that the defendant owed no duty of care, the Full Court followed the decision of the majority of the Privy Council in *Evatt*. Burt C.J. quoted from the headnote of *Evatt*, describing the majority decision, before continuing:

> That statement of law has been criticised by academic writers, it appears not to have been accepted by the Court of Appeal in England and reservations concerning it have been expressed by Justices of the High Court: see *L. Shaddock & Associates Pty Ltd v. Parramatta City Council*. . . particularly *per* Mason J. . . . But the authority of the statement of the law as expressed by the majority in *Evatt's* case in its application to a case of this kind has not been overthrown by any decision of the High Court and it remains binding on this Court.[27]

With respect, this is an unduly conservative reading of the judgments in *Shaddock*. There can be no doubt that the views of Mason and Aickin JJ. in that case formed part of the *ratio* of their decision. It is only possible to say, as Burt C.J. does, that *Shaddock* did not 'overthrow' the majority decision in *Evatt* if one says that the views expressed by Murphy J. in *Shaddock* were *obiter*. As noted above, it is difficult to read Murphy J.'s strongly expressed views on *Evatt* as being anything other than part of the *ratio* for his decision, and this seems to have been the view accepted by the High Court of Australia in *San Sebastian Pty Ltd v. Minister Administering the Environmental Planning and Assessment Act 1979*.[28] However, the decision of the Full Court in *Mohr* is unequivocal, and it is this that has reopened the debate in Australia.

4. Norris v. Sibberas

In *Norris v. Sibberas*,[29] the defendant was a real estate agent who acted for the vendor of a motel and milk bar business in Bonnie Doon in Victoria. The plaintiffs were prospective purchasers of that business. In the course of negotiations, the defendant made a number of statements to the plaintiffs about the future prospects of the business. She also told them that she had owned motels herself, and that she had 'a lot of experience in the motel business'.[30]

The plaintiffs purchased the motel, which struggled to make money. They incurred considerable losses, and they brought an action against the defendant, claiming that their losses were caused by her negligent misstatements during the negotiations for sale of the business. At first instance, the trial judge held the defendant liable, and awarded damages, interest and costs in the sum of $111,313.85. The defendant appealed.

The Full Court of the Supreme Court of Victoria allowed the appeal, holding that the defendant had not breached any duty owed to the plaintiffs.[31] All statements made by her were, in effect, true.[32]

The question of whether the defendant owed a duty of care was attended with some confusion. Counsel for the defendant appeared both to concede that the

27 [1986] W.A.R. 67, 71.
28 (1986) 162 C.L.R. 340, 356.
29 (1990) V.R. 161.
30 *Ibid.* 163/0. *per* Marks J.
31 *Ibid.* 175. *per* Marks J., with whom Murphy and Beach JJ. agreed.
32 *Ibid.* 175-177.

defendant owed a duty, and to submit that no duty was owed.[33] The Full Court resolved this confusion by distinguishing between statements in three different areas of expertise, namely, 'the market, motel management and financial viability in the individual case of the plaintiffs'.[34] With respect to the first two areas of expertise, Marks J. (with whom Murphy and Beach JJ. agreed) said:

> [I]t was conceded, and I think rightly, that as regards motel management and the demand or market with respect to which Mrs Norris purported to have 'special skill' or expertise she did owe a duty to take reasonable care as to the accuracy of what she said.[35]

With respect to the third area of expertise, the financial viability of this particular project, Marks J. said:

> There was, to use the language of prevailing legal principle, no sufficient proximity between the plaintiffs and Mrs Norris concerning matters of financial viability . . . because it was indeed expressly excluded from the area of any expertise which Mrs Norris purported to have or in respect of which the plaintiffs were to look to her for information, advice or prediction.[36]

Thus, the Full Court held that the defendant owed a duty with respect to statements within her professed area of expertise, but did not owe a duty with respect to statements outside that area. However, it is important to note that the Full Court did not hold that the defendant *could* not owe a duty with respect to matters outside her field of expertise. It held that she did not owe a duty on the facts of the case, because the plaintiffs had consulted an accountant for detailed advice about the viability of the particular motel business in question.[37] Because the plaintiffs did not, in fact, rely on the defendant with respect to the financial viability of this particular business, the question of any duty owed by her in this matter did not arise. This is clear from the following passage of the judgment of Marks J.:

> The evidence, in my view, required the conclusion that Mrs Norris owed a duty of care in respect only of those matters on which her expertise was invoked and trusted. Those matters did not include the area of financial viability in respect of which the plaintiffs did not seek advice from or reliance on *[sic]* Mrs Norris.[38]

Thus, the result of *Norris v. Sibberas* does not turn on the adoption of one or other of the views in *Evatt*. The *ratio* of the decision is uncontroversial: the defendant owed a duty with respect to matters in which she professed to be expert, but she did not breach that duty. Further, she owed no duty with respect to matters on which the plaintiffs did not rely on her for advice. It has never been disputed that if a defendant does profess to be an expert, he or she owes a duty of care. Equally, it has never been disputed that if the plaintiff does not in fact rely on the defendant's advice, the defendant cannot possibly be liable.

33 *Ibid.* 173-174. The court did not consider the possibility that the defendant owed a duty solely because of her financial interest in the transaction: see *supra* n. 3. However, in *Presser v. Caldwell Estates Pty Ltd* [1971] 2 N.S.W.L.R. 471, 493, Mason J.A. said that a real estate agent's interest in receiving commission on a sale was insufficient in itself to give rise to a duty of care under the principles in the cases cited at note 3, *supra*.

34 *Ibid.* 174.

35 *Ibid.*

36 *Ibid.*

37 The plaintiffs also sued the accountants in negligent misstatement. It was held at first instance that the accountants were not liable, as all statements made by them had been made after the plaintiffs had signed the contract for purchase of the business. The plaintiffs did not appeal from this decision.

38 (1990) V.R. 161, 174.

However, the Full Court did not confine itself to these uncontroversial matters. It appears to have expressed the view, *obiter*, that a defendant can owe a duty with respect to matters in which he or she is not expert, even though the defendant in this case did not. In the course of summarizing the current state of the law in this area, Marks J. said:

> The duty is not limited to persons whose business or profession includes giving the sort of advice or information sought but extends to persons who on a serious occasion give considered advice or information concerning a business or professional transaction: *per* Gibbs C.J. *Shaddock* p. 234.[39]

In order to take this view, Marks J. must have accepted that the majority view in *Evatt* is no longer binding in Australia. This appears to be the effect of the following passage:

> The law governing negligent misstatements has undergone substantial development since *Hedley Byrne & Co. v. Heller & Partners Ltd* [1964] A.C. 465. In particular, there has been a distinct erosion of the majority view which might be thought to have circumscribed the relationships and circumstances capable of giving rise to a relevant duty of care. The Court of Appeal and our High Court have indicated preference for what was said by the minority on this aspect. In *L. Shaddock & Associates Pty Ltd v. The Council of the City of Parramatta* (1981) 150 C.L.R. 225, the minority view was not formally adopted but the majority of the Court appear to have expressed agreement with it.[40]

Unfortunately, in this passage, the report omits to mention *Evatt*. However, it is clear that it is *Evatt's* case to which it refers, and not, as the text would seem to suggest, *Hedley Byrne v. Heller*. The reference to majority and minority views makes no sense with respect to *Hedley Byrne*, which was a unanimous decision. Further, it was the minority view in *Evatt* for which the English Court of Appeal and the majority of the High Court in *Shaddock* expressed a preference, not any supposed minority view in *Hedley Byrne*.

It is clear from the above that the Full Court of the Supreme Court of Victoria intended to express the opinion that the majority view from *Evatt* no longer forms part of the law in Australia. It is equally clear that this view is *obiter*, as it was not necessary for the decision in *Norris*. In contrast, the opposing view expressed by the Full Court of the Supreme Court of Western Australia in *Mohr v. Cleaver* formed part of the *ratio* of the decision in that case. Thus, as there are conflicting State Full Court decisions of different status, the question of the precedential status of the majority view in *Evatt* remains unresolved.[41]

5. *Principle*

Under the general law of negligence, absence of expertise usually constitutes negligence, rather than excusing it. If a person undertakes an activity in which he or she is not an expert, and fails to live up to the standard of an expert, that failure constitutes negligence. To choose a simple example, the inexperience of a learner driver does not usually excuse a failure to live up to the standard of the reasonable experienced driver. As Lord Denning M.R. put it in *Nettleship v. Weston*:

[39] *Ibid.* 172.
[40] *Ibid.* 171.
[41] Except, of course, in Western Australia, where *Mohr v. Cleaver* must be followed.

> The learner driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care . . .[42]

However, this principle applies only where the plaintiff is unaware of the inexperience of the defendant (until it is too late). The learner driver does not owe the same duty to his or her instructor as he or she does to other road users. The instructor knows of the learner driver's inexperience, and cannot reasonably expect the learner to live up to the standard of the expert. As Mason, Wilson, Deane and Dawson JJ. put it in *Cook v. Cook*:

> It would be contrary to common sense and the concept of what is reasonable in the circumstances (considerations which are basic to the common law of negligence) to measure the content of the duty of . . . a pupil by the standard to be expected of the ordinary experienced, skilled and careful driver . . .[43]

Thus, the plaintiff's knowledge of the expertise of the defendant is one of the factors to be taken into account in determining the nature of the duty owed.

Under these basic principles of the law of negligence, should a defendant be required to live up to the standard of reasonable care in making statements if he or she has no 'special skill' in the subject-matter of those statements? There is no denying that the relationship between a plaintiff and a non-expert defendant is different from the relationship between a plaintiff and a defendant who is, or who professes to be, an expert. However, it does not follow from this that a non-expert defendant should never owe a duty to take reasonable care. The general principles described above suggest that the duty owed by the non-expert defendant may be modified according to the circumstances of the case, not that no duty should be owed at all.

In *Cook v. Cook*,[44] the learner driver was held to owe some kind of a duty to her instructor. Mason, Wilson, Deane and Dawson JJ. said:

> [T]he appellant's known incompetence and inexperience as a driver was a controlling element of the relationship of proximity between the parties. That special element of the relationship took it out of the ordinary relationship between a driver and passenger . . . The standard of the duty of care which arose from that distinct relationship of proximity was that which could reasonably be expected of an unqualified and inexperienced driver . . .[45]

These principles apply as much to cases of negligent misstatement as they do to cases of negligent driving. In *San Sebastian Pty Ltd v. Minister Administering the Environmental Planning and Assessment Act 1979*,[46] Gibbs C.J., Mason, Wilson and Dawson JJ. said:

> [T]he correct view is that, just as liability for negligent misstatement is but an instance of liability for negligent acts and omissions generally, so the treatment of the duty of care in the context of misstatements is but an instance of the application of the principles governing the duty of care in negligence generally.[47]

According to these general principles, the duty owed by a defendant may be modified, but not negated, by his or her absence of expertise. It follows that, in a negligent misstatement case, the absence of 'special skill' on the defendant's part should not *preclude* the existence of a duty of care, but may modify it.

42 [1971] 2 Q.B. 691, 699.
43 (1986) 162 C.L.R. 376, 383.
44 (1986) 162 C.L.R. 376.
45 *Ibid.* 388.
46 (1986) 162 C.L.R. 340.
47 *Ibid.* 354.

The nature of the duty owed by a defendant without 'special skill' should depend on the nature of the relationship between plaintiff and defendant. In particular, it should depend on the question of whether it was reasonable, in all the circumstances, for the plaintiff to have relied on the information or advice given by the defendant. This seems to follow from the views of Gibbs C.J., Mason, Wilson and Dawson JJ. in the *San Sebastian* case, when they said:

> When . . . economic loss results from negligent misstatement, the element of reliance plays a prominent part in the ascertainment of a relationship of proximity between the plaintiff and the defendant, and therefore in the ascertainment of a duty of care.[48]

According to this view, the proper question is not, for example, 'Was Mutual Life in the business of giving investment advice?' but, 'Was it reasonable, in all the circumstances, for Evatt to rely on investment advice given by Mutual Life?'

However, according to general principles, the *extent* of the duty owed should reflect the degree of skill the plaintiff knows the defendant to possess. For example, if one goes to a jeweller to have one's ears pierced, one should not expect the hygiene standards of the reasonable doctor.[49] Similarly, if one goes to a real estate agent for financial advice, one should not expect the quality of the advice to meet the standard of the reasonable accountant. If Mrs Norris *had* given detailed advice about the financial viability of the motel at Bonnie Doon, it may well have been reasonable for the plaintiffs to rely on it in the circumstances. In those circumstances, there would be no justification in principle for saying that she owed no duty. Equally, there would be no justification for saying that she should owe the same duty that an accountant would owe in giving advice about the same matters. The plaintiffs knew she was not an accountant and could not reasonably have expected the skill and care of an accountant.

Although it may be consistent with general principle to say that defendants without 'special skill' may owe a duty of care in making statements, are there any special reasons for saying that a distinction should be made between experts and non-experts? At first sight, it may seem that to confine the existence of a duty of care to those with 'special skill' is to introduce some much-needed certainty into an area of the law which has become increasingly vague. 'Special skill' appears to be a 'bright line' test, free from the fuzziness of that notorious concept, proximity. If the defendant is an expert, he or she may owe a duty; if not, he or she does not. What could be simpler?

This certainty is spurious. When is an expert an expert? How expert does one have to be before one has 'special skill' for the purposes of the test? For example, if a lawyer is an expert in family law, but has never studied or practised commercial law, does he or she have 'special skill' in commercial law?[50] Should such a lawyer owe a duty of care if he or she chooses to give advice on commercial law matters? Does he or she have 'special skill' as a lawyer, in some general sense? Similarly, does a tax accountant have 'special skill' in *all* kinds of

48 *Ibid.* 355.

49 *Philips v. William Whitely Ltd* [1938] 1 All E.R. 566.

50 See *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt* [1971] A.C. 793, 812, *per* Lords Reid and Morris.

financial matters? Apparently not, as the defendant tax accountant in *Mohr v. Cleaver* was held to have no 'special skill' in investment matters. Yet surely some accountants have 'special skill' in investment matters? How can one know which accountants and lawyers have 'special skill' and which do not? Or must one simply say they all have 'special skill' in all subjects by reason of their professional qualifications?

If a family lawyer *does* owe a duty in giving advice on commercial law matters, and a tax accountant a duty in giving advice on auditing, why should an insurance company owe no duty in giving investment advice? Surely the crucial factor is not the precise area of expertise of the defendant, but the fact that he or she has chosen to give advice to someone who is likely to rely on it. Most clients are likely to rely on the advice they get from their solicitor, whether or not he or she passed Commercial Law 100 at Law School. Similarly, most people would expect investment advice given by a reputable insurance company to be reliable, particularly if there is reason to suppose that that company has access to information about the potential investment.

Back in 1970, Lords Reid and Morris said:

> [W]hen 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.[51]

This is no less true twenty years later. There seems to be no reason in principle or precedent why the majority decision in *Evatt* should be followed in Australia. Indeed, until *Mohr v. Cleaver*, there was no longer any reason to suppose that it would be.

6. *Conclusion*

At bottom, the question of which defendants owe a duty of care in making statements is, like all other duty questions, a question of which potential defendants are obliged to buy liability insurance.[52] Even if liability is extended to defendants with no 'special skill', it is still likely that most of them will carry insurance against liability.[53] In most cases, there will be no liability unless the advice was given in the course of business,[54] and, as Lord Griffiths observed in *Smith v. Eric S. Bush*:

> Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of a loss . . .[55]

51 *Ibid.*

52 Davies, M., 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9 Legal Studies 67.

53 However, it may be the case that professional indemnity policies cover the insured only in respect of liability for statements within the scope of his or her professional work and not outside it. Of course, the question of the extent of cover depends on the words used in the policy.

54 See *Mutual Life and Citizens' Assurance Co. Ltd v. Evatt* [1971] A.C. 793, 811-2, *per* Lords Reid and Morris.

55 [1989] 2 W.L.R. 790, 810.

It is unlikely that there will be many defendants without 'special skill' and without insurance simply because, as in all other areas of negligence, if the defendant is uninsured, it is not worth the plaintiff's time and money taking proceedings against him or her. Those 'prudent, professional men' who already have insurance may have to pay more for it if *Evatt* is not followed,[56] but they will simply pass on any extra cost to their own clients by way of increased charges for their services.

At present, the question of who owes a duty of care in making statements remains unresolved in Australia in the light of the conflict between *Mohr v. Cleaver* and *Norris v. Sibberas*.[57] It is to be hoped that that conflict will be resolved soon by the High Court of Australia. For the reasons given above, the view expressed by the Full Court of the Supreme Court of Victoria in *Norris* should be preferred.

By way of postscript, it may be argued that the conflict between *Mohr* and *Norris* is irrelevant in practice.[58] If the High Court were to restrict the avenues of redress in negligent misstatement by reaffirming the majority view in *Evatt*, plaintiffs could easily turn elsewhere. Misleading advice by a non-expert may not give rise to liability at common law if *Evatt* is reaffirmed, but it may quite possibly give rise to liability under the Trade Practices Act 1974 (Cth) s. 52, if the defendant were a corporation, and if the advice were given 'in trade or commerce'.[59] A corporate defendant which is guilty of 'misleading and deceptive conduct' under s. 52 may be required to compensate a plaintiff who has suffered loss by virtue of s. 82(1) of the same Act. Thus, a plaintiff who has suffered loss after relying on misleading advice may turn to the Act if redress at common law is unavailable.

The major restriction on the use of the Trade Practices Act 1974 as an alternative to an action in negligent misstatement is the fact that the operation of the Act is confined to corporations. No such restriction applies in those States which have enacted Fair Trading Acts, which incorporate the Trade Practices Act provisions at State level, without the restriction to corporations.[60] Each of these

56 Despite recent statements that professional liability insurance is becoming unaffordable (see, *inter alia*, the N.S.W. Attorney-General's Department Issues Paper, *Limitation of Professional Liability for Financial Loss* (1989) and Davies, M., *supra* n. 52, at 80-83), the insurance industry appears to be of the opinion that the crisis of 1984-1986 is past, and that the availability of professional liability insurance has improved in recent years: see Mills, M., 'Duty of Care — Recent Developments as a Control Mechanism of Negligence' (The Insurance Institute of Australia 1989).

57 The question of *to whom* a duty is owed in making statements was considered recently by the House of Lords in *Caparo Industries PLC v. Dickman* [1990] 2 W.L.R. 358. It remains to be seen whether the High Court of Australia will take a similar approach to the House of Lords on this issue.

58 This argument was drawn to my attention by a question raised at the seminar mentioned at the beginning of this article. I am indebted to the questioner who must, unfortunately, remain anonymous, as I remember his question, but not him. Whoever you are, I apologize. See also, Clarke, P. H., 'The Hegemony of Misleading or Deceptive Conduct in Contract, Tort and Restitution' (1989) 5 *Australian Bar Review* 109, 129-130.

59 The restriction imposed by the requirement that the advice be given 'in trade or commerce' is very slight, because, as was pointed out in *Re Ku-ring-gai Cooperative Building Society (No. 12) Ltd* (1978) 36 F.L.R. 134, 167, *per* Deane, J., 'the terms are clearly of the widest import'. For other examples of the very broad interpretation placed on these words, see Miller, R. V., *Annotated Trade Practices Act* (10th ed. 1989), 136.

60 Fair Trading Act 1987 (N.S.W.) s. 42; Fair Trading Act 1987 (Vic.) s. 11; Fair Trading Act 1987 (S.A.) s. 46; *Fair Trading Act* 1987 (W.A.) s. 10.

States has a provision equivalent to s. 52 of the Commonwealth Act, but applying to 'persons' rather than to 'corporations'. It is ironic that Western Australia, the State which has taken the most restrictive view of liability in negligent misstatement, is also one of the States which provides a remedy for those who have suffered loss by reason of 'misleading and deceptive conduct' on the part of any person, natural or corporate.[61] It may well be that this combination of affairs will render irrelevant the issue of liability in negligent misstatement. By taking one step back, Western Australia may have shown the way for plaintiffs to take fifty steps forward.[62]

[61] Fair Trading Act 1987 (W.A.) ss 10(1), 79.

[62] 'If one step, why not fifty?' — see Lord Buckmaster's plaintive dissent in *Donoghue v. Stevenson* [1932] A.C. 562, 577.