admitted to be based on community standards. Law is normative, policy is not; the difference lies in the effect, not in the substance. An appeal to law is an appeal to norms already established; and appeal to policy is a norm-creating process and provided the courts are allowed this norm-creating function the vital requirement is clarity, certainty and predictability in its exercise.

The potential effect of *Dutton's Case* is enormous. One can imagine its being used to found liability against designers of bridges, cars and buildings, and against inspectors of all types exercising statutory or contractual powers. But even if its scope is not extended, it will remain a leading case in the law of torts.

P. F. CANE, B.A., LL.B. (Sydney), Solicitor.

THE LIABILITY IN TORT FOR NEGLIGENT MISSTATEMENT: A TOOTHLESS LION?

The decision of the N.S.W. Court of Appeal (Asprey, J. A., Mason, J. A., and Taylor, A. J. A.) in *Presser* v. *Caldwell Estates Pty. Ltd., Southern Estates (Wollongong) Pty. Ltd., (Third Party)*[1] is another chapter in the chequered story of the application of *Hedley Byrne and Co. Ltd.* v. *Heller and Partners Ltd.*,[2] since that case was decided by the House of Lords in 1964.

The facts of the *Presser* case were these: In 1960 the firm of Caldwell Estates began to develop a fifty-acre lot owned by it at Balgownie, near Wollongong. The development required a certain amount of re-contouring and construction of roads, drains, kerbs and gutters. This work was basically under the control of a licensed surveyor, but Southern Estates, a real estate agent acting for Caldwell, had a certain amount of responsibility for it. Southern's duties included the obtaining of the Council's approval for the sub-division, the procurement of finance for the development, securing provision by the Water Board and sewerage, paying accounts, and deciding upon the number of allotments to be included for sale in each particular section, for which Southern was paid a $20 "management fee" in respect of each block sold, in addition to its ordinary commission.

In August, 1965, the plaintiff, Mr. Presser, commenced negotiations with Southern for the purchase of lot 46, Margaret Street. During the course of the negotiations, the plaintiff's wife telephoned one Abbott, a salesman employed by Southern, and asked him whether lot 46 had been filled.[3] Abbott did not know, but said that he would ask J. L. Robinson, a director of Southern. There was a conflict of evidence as to whether Abbott actually put this question to Robinson in so many words, but the trial judge found that the end result was that Abbott conveyed to the plaintiff's wife the answer, purportedly given by Robinson, that there was no filling on lot 46. The trial judge further found that, because of the information acquired from Abbott as to the absence of filling, the plaintiff elected to proceed with the purchase, for the purpose of erecting a dwelling on lot 46, and signed the contract on 7th October, 1965.

After the plaintiff's house was built, cracks started to appear in it. It transpired that lot 46 had been filled. Consequently, late in 1968 Presser sued

[1] (1971) 2 N.S.W.L.R. 471.
[2] (1964) A.C. 465.
[3] Meaning that soil had been artificially brought onto the lot to raise its level or to make it more level.

Caldwell in the District Court at Wollongong for damages in three alternative counts. Southern was sued by the plaintiff in three similar counts, and Caldwell joined Southern as a third party. At the trial, the first count, laid in fraud, was not proceeded with, and the trial judge ruled that the third, which alleged a representation by way of collateral contract, was unable to be supported. But he found for the plaintiff on the second count, laid in innocent but negligent misrepresentation, awarding him $3385 damages against Caldwell, who in turn recovered some $1700 as against Southern, being approximately half of Caldwell's liability to Presser.[3a] Against this judgment Caldwell now appealed.

A final relevant fact is that when the trial judge decided the matter, he had available to him the decision of the High Court in *The Mutual Life and Citizens Assurance Co. Ltd.* v. *Evatt*.[4] When the appeal was heard, the Court of Appeal had the guidance of the Privy Council's judgment in *M.L.C.* v. *Evatt*,[5] from which they had to take their law.[6]

The Court was then faced with the possibility of having to answer the following questions:

(i) Was the relationship between the plaintiff and the defendants of the "special kind" spoken of in *Hedley Byrne* v. *Heller* so as to raise a duty of care?

(ii) If such a duty existed, were the defendants negligent?

The Court in fact was not bound to express any opinion on the second question, because it answered the first in the negative, but Asprey, J. A. thought *obiter* that there was no negligence.[6a]

THE HEDLEY BYRNE AND EVATT CASES

It will be useful at this stage to indicate the degree of qualification placed on the decision in *Hedley Byrne* v. *Heller* by the Privy Council's decision in *M.L.C.* v. *Evatt*. The former case broadly laid down this principle: that where the defendant gives information to the plaintiff he will be under a duty to exercise reasonable care in giving it, if:

(i) there is a "special relationship" between the plaintiff and the defendant. that is, that the defendant has expressly or impliedly held himself out as possessing some special knowledge or expertise in relation to the information sought, and as being prepared to exercise that skill, and

(ii) the defendant knows that the plaintiff intends to act on the information, and

(iii) it is reasonable for the plaintiff to rely on the information given by the defendant.

Lord Reid went so far as to say: "A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer it without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully. or to have accepted a relationship

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[3a] The judgment itself is unreported but its salient points are to be found in *Presser* (1971) 2 N.S.W.L.R. 471 *per* Asprey, J. A. at 475-478.

[4] (1968) 42 A.L.J.R. 316.

[5] (1970) 44 A.L.J.R. 478, (1971) 1 All E.R. 150.

[6] See *Piening* v. *Wanless*, (1966) 117 C.L.R. 498 at 502, 509, 510.

[6a] (1971) 2 N.S.W.L.R. at 485-486.

with the inquirer which requires him to exercise such care as the circumstances require".[7]

It is illustrative of the restricted view taken in *Evatt's Case* that Lord Diplock said of the above quotation: "This passage should in their Lordships' view be understood as restricted to advisers who carry on the business or profession of giving advice of the kind sought and to advice given by them in the course of that business."[8]

Thus, even though the M.L.C. admittedly was in a very good position to give the specialised knowledge sought by Mr. Evatt, and though the M.L.C. knew Mr. Evatt intended to act on the advice, that is, it was reasonable for him to do so, and though the advice was given without any disclaimer of liability, Mr. Evatt nevertheless lost, because the M.L.C. were not, and had not held themselves out as being, in the business of giving financial advice, nor did they hold themselves out to Mr. Evatt as intending to take special care in the seeking of the specialised information to which they admittedly had access.

THE DECISION IN PRESSER'S CASE

Asprey, J. A., found the defendants not liable for the following reasons. He summarised Lord Diplock's judgment in *Evatt's Case*, and extracted from it a number of situations in which a duty of care could be clearly seen either to arise or not. According to Lord Diplock, one of the situations where a duty does arise is the carrying on by the defendant of a business or profession which involves the making of statements of a kind which calls for special skill and competence. The carrying on itself of the business is then the way in which the defendant has let it be known to the plaintiff that he possesses this special skill and is prepared to use it responsibly for the benefit of anyone who should choose to avail himself of it.

Asprey, J. A. also noted that where a statement is based on facts not fully disclosed to the plaintiff, the defendant must exercise his skill and competence in the selection of the facts, and must satisfy himself as to the reliability of the sources of those facts. Asprey, J. A. went on: "The plaintiff does not allege that Southern carried on a business of supplying information as to the geological structure of the land, or that it held itself out as doing so, or that it claimed to possess any qualification, skill or competence greater than that generally possessed by real estate agents."[9] This as such is scarcely debatable. But he then continued: "There is no evidence to suggest that it is part of the ordinary course of the business of a real estate agent in N.S.W. to be able to supply information to prospective purchasers of land placed in his hands for sale as to the structure of the land beneath its surface even when he has knowledge that some parts of a large area of land have been contoured."[10] This seems, with respect, to be somewhat less than obvious. Surely the question, whether land is filled or not, in these circumstances, is not only geological, but administrative as well. It would be purely geological if the land were virgin, or unaltered within living memory. But where work on a large estate had been done as recently as five years before the enquiry, it would surely be reasonable to expect a real estate agent to have records of what was done, meaning that the information would not be "geological" at all. Irrespective of these particular circumstances, it would in general be reasonable to expect a real estate agent to know whether a piece of land,

[7] (1964) A.C. 465 at 486.
[8] 44 A.L.J.R. 478 at 483.
[9] (1971) 2 N.S.W.L.R. 471 at 480.
[10] (1971) 2 N.S.W.L.R. 471 at 480.

on which a prospective buyer intends to erect a house, is fit for that purpose. If a real estate agent is in the business of selling land, it seems that this information would be one of the first pieces of information he should possess. On the facts of the instant case, given Southern's involvement with the development, it seems very likely that they should possess expert information on this subject.

The Court found, however, that "Southern's records contained no material which would have enabled it to make any different answer to that which Abbott gave".[11]

Asprey, J. A. thus concluded that the question was "whether Southern was under an obligation to make any independent enquiries".[12] Undoubtedly, if it is not part of a real estate agent's business to give such information, Southern was under no such obligation, even though they had promised to do so, on the authority of the passage quoted earlier from *Evatt's Case*,[13] where Lord Diplock restricts the breadth of Lord Reid's statement in *Hedley Byrne*. But if one accepts that it is part of a real estate agent's business to give such information, an undertaking to seek an answer from a source impliedly held out as being reliable (namely Mr. Robinson), given without disclaimer of liability, and in a situation in which it would be reasonable to infer that both parties were aware of the gravity of the transaction and the reliance which was to be placed on the answer, would surely raise a duty of care even on the restricted view of *Hedley Byrne* as propounded in *Evatt's Case*. There would be few people more likely than Mr. Robinson to have expert knowledge of the state of the land in question, and that the advice sought was expert would be clearly what a reasonable plaintiff would be likely to infer from an undertaking to enquire of Mr. Robinson. Thus it would seem that the second and third requirements listed in the synopsis of *Hedley Byrne* above were also made out: the reasonableness of the plaintiff's reliance on the advice, by the argument just put; and the knowledge by the advisor that the recipient of the advice intended to act on it, which was found as a fact by the trial judge.

Asprey, J. A. dealt with Caldwell's "personal negligence" (as opposed to their vicarious liability for Southern) in much the same way, i.e., on the basis that a vendor in Caldwell's position could not reasonably be expected to possess such knowledge. His Honour said: "The fact of ownership of land, re-contoured in part by contractors to the owner for sale in subdivision, does not amount to a claim by the owner to a prospective buyer that he possesses some qualification not possessed by the ordinary landowner to speak as to the geological structure of the subsoil of the land".[14] This conclusion, as well, seems to be open to doubt, for the reasons given above.

It must be noted, of course, that when Abbott gave the reply to the plaintiff's wife, he advised her to check with the council; the plaintiff's wife did so, but the council was unable to answer her enquiry. His Honour, having found that there was no "special relationship", did not discuss whether this would have been an effective disclaimer of liability in the event that a duty of care had *prima facie* been shown. An initial question is whether the rules relating to remedies in the contractual area of innocent misrepresentation have any application to negligent misrepresentation under the *Hedley Byrne* principle. It is well settled in the contractual field that knowledge that the representation is untrue bars relief;[15] this would surely be so in tort. If the

[11] (1971) 2 N.S.W.L.R. 471 at 482 *per* Asprey, J. A.
[12] (1971) 2 N.S.W.L.R. 471 at 481.
[13] (1970) 44 A.L.J.R. 478 at 484.
[14] (1971) 2 N.S.W.L.R. 471 at 486.
[15] *Smith* v. *Chadwick* (1882) 20 Ch. D. 27.

plaintiff has an opportunity to check the representation's accuracy, but fails to do so, he is not necessarily defeated.[16] There is some authority for the proposition that if the plaintiff tests the accuracy of the proposition, but fails to discover the truth, he can obtain no relief.[17] On the basis of these rules it would seem that the plaintiff would not be disentitled to relief: the Council told the plaintiff's wife bluntly that they did not know, thus in truth she had no opportunity to check the accuracy of the representation.

It may, on the other hand, be that the test as to whether a purported disclaimer is effective in a *Hedley Byrne* situation is simply whether on the ordinary construction of the words used, a reasonable man would understand that liability was being excluded. Whilst it is arguable that a statement advising the plaintiff to check with the Council is capable of being so construed, it would be strange if a defendant could escape liability by such an oblique and casual disclaimer.

Another suggestion[18] is that the question of testing the accuracy of a negligent misrepresentation being sued for in tort must be decided in the same way as a question of the possibility of intermediate examination excluding liability under *Donoghue* v. *Stevenson*,[19] but there seems to have been no judicial comment on this.

Mason, J. A., and Taylor, A. J. A., who delivered a joint judgment, thought that the "reference to the Council demonstrates that Mr. Abbott was not asserting that the purchaser should place complete reliance on the answer."[20] Their Honours viewed the facts somewhat differently from the view taken by Asprey, J. A., and came to the conclusion, requiring a rather different sort of discussion, that there was no liability. Contrary to Asprey, J. A., they thought that it may have been within the professional competence of a real estate agent to give advice of the kind sought, but that the "question here is designed rather to obtain gratuitous information in the form of knowledge of a simple fact, which could be provided by any person familiar with the particular circumstances of the development, circumstances which, if known, provided the answer without the need for any skill or competence in their interpretation."[21] Their Honours by this seem to suggest that the information sought was of a type incapable of being the subject matter of any skill or expertise, and *ipso facto* being incapable of falling within the rule in *Hedley Byrne*. This seems to add further refinement to what is required for relief under the *Hedley Byrne* principle, namely that what is sought must be something more than raw data; there must be some correlation, explanation, or interpretation requiring skill or expertise, as well. This is arguable, on the basis of the cases: in *Hedley Byrne* the question was: "was Easipower a good risk?"; in *Smith* v. *Auckland Hospital Board*:[22] "was the aortography dangerous?"; in *W. B. Anderson* v. *Rhodes (Liverpool)*:[23] "were Taylors good payers?"; and in *Evatt's Case* itself: "were H. G. Palmer in a sound financial position?"—all seem to have requested opinions as opposed to raw facts. This seems to the writer, however, to be taking an unjustifiably literalistic view, and to ignore the substance of the transaction. What the plaintiff in *Presser's Case* really wanted to know was "whether the land was fit to build a house on?", and it would seem most unjust if the plaintiff, by virtue of having been specific

[16] *Redgrave* v. *Hurd* (1881) 20 Ch. D. 1.
[17] *Clarke* v. *Mackintosh* (1862) 4 Giff. 134.
[18] G. H. Treitel, *The Law of Contract*, 3rd ed. at 282.
[19] (1932) A.C. 562.
[20] (1971) 2 N.S.W.L.R. 471 at 492.
[21] (1971) 2 N.S.W.L.R. 471 at 492.
[22] (1965) N.Z.L.R. 191.
[23] (1967) 2 All E.R. 850.

as to the cause of his disquiet, had disentitled himself to relief. What their Honours say as to the necessity of something more than mere data is probably true as such, but here both parties knew that the enquiry related to the suitability of the land for the purposes of erecting a house; it would be nearly impossible in the circumstances to suggest that either Abbott or Robinson thought the enquiry academic, or directed to purposes other than the suitability of the land for the purposes of building a house. On the view taken by their Honours it would follow that had the plaintiff in *Smith* v. *Auckland Hospital Board* said "what percentage of people suffer damage for an aortography?" he could not have recovered. Surely this is not so.

Their Honours reinforced their contention that in the circumstances no reliance ought to have been placed by the plaintiff on the answer, by continuing: "Mr. Abbott likewise responded to the inquiry as one which did not call for the formation of a professional judgment. He said that he would ask Mr. Robinson, a director of the company, who would presumably have knowledge of the fact. The final answer given by Mr. Abbott, 'I have asked Mr. Robinson. There is no filling on your land. You can check with the Council' indicates that he did no more than he promised, that is, he spoke to Mr. Robinson, that his answer was based solely on that conversation and that he at no stage assumed any wider responsibility to inquire into and form a judgment [on] the subject matter of the question."[24]

It seems at least debatable that the answer given indicated that no particular skill was being exercised and that the plaintiff was not intended to place any reliance on the answer. Indeed, the quoting of Mr. Robinson, whom it would be reasonable to infer, as a director of the company, had professional skill or expertise in the matter, would seem to reinforce the impression obviously gained by the plaintiff that this was a skilled and careful answer. It is in addition at least arguable that the words "You can check with the Council" sounded in the context of the answer like an expression of confidence in the answer, rather than a warning that no reliance should be placed on it.

Thus, it seems debatable on the facts that no duty of care was raised by virtue of the professional competence of the real estate agent, or by the reliability of his source of information.

THE "FINANCIAL INTEREST" ARGUMENT

The plaintiff, however, relied not only on the well-settled facets of the *Hedley Byrne* decision, discussed above, but on a *dictum* of Lord Diplock in *Evatt's Case*, in which he reserved his opinion as to the possibility of a duty of care arising where the advisor has a financial interest in the transaction in respect of which he gives his advice.[25] The plaintiff in *Presser's Case* relied on the case there quoted by Lord Diplock by way of example, *W. B. Anderson* v. *Rhodes (Liverpool) Ltd.*[26] In that case the seven plaintiffs and the defendant were all wholesalers of (among other things) potatoes. The four plaintiffs who recovered had asked the defendant for an opinion as to the credit-worthiness of a company called Taylors Pty. Ltd. The defendant, Rhodes, had had dealings with Taylors, who at the time owed Rhodes some £2500, an excessive amount according to the customs of this particular trade. The defendant nevertheless assured the plaintiffs that Taylors were "all right", which the Court found to mean that Taylors were credit-worthy. Although the plaintiffs did not pay the defendant for the information, the defendant was at the time acting as a commission agent for Taylors to purchase further quan-

[24] (1971) 2 N.S.W.L.R. 471 at 492.
[25] (1970) 44 A.L.J.R. 478 at 484.
[26] (1967) 2 All E.R. 850.

tities of potatoes, and thus had a financial interest in any transaction between Taylors and the plaintiffs. Relying on the assurance given, the plaintiffs sold potatoes to Taylors, who were unable to pay. Cairns J. found that a duty of care was owed, and that the defendants had been negligent. His Honour also found that the plaintiffs would not have sold to Taylors in the absence of the assurance.

Asprey, J. A., after an analysis of the above case, decided that the "financial interest" was not necessary to the plaintiffs' case. The defendant had had dealings with Taylors, of which fact the plaintiffs were aware, so that the defendant was by inference laying claim to a special knowledge of Taylors' financial position, and thus placing itself in the position "of a person whose business it was to give (credit references concerning its customers)."[27] Thus for his Honour the "important distinguishing feature" (between the *W. B. Anderson Case* and *Presser's Case*) was that in the former "the defendant had made it known to the plaintiffs that it was personally qualified by reason of its own transactions to express an opinion as to the credit-worthiness of the company. That qualification would not necessarily be possessed by a commission agent in the ordinary course of business . . ."[28] Accordingly, in *Presser's Case* "that type of financial interest could not operate to imply any claim on the part of Southern to any qualification, skill, or competence beyond that usually expected to be possessed by real estate agents, and, as I have pointed out, an expert knowledge of the geological structure of soil is not something reasonably incidental to the functions which a real estate agent in N.S.W. is employed to undertake."[29]

Asprey, J. A., did "not know what Lord Diplock may have envisaged in the passage in the *M.L.C. Case*[30] in which he makes a guarded reference to 'other situations' in which the advisor has a financial interest in the transaction upon which he gives his advice",[31] but his Honour continued "it seems to me that where A is retained by B for reward payable on the completion of the business for which A is retained, and A deals with C in relation to that business, it would be a far-reaching result if, when interrogated by C touching C's own interest on some matter which ought to be recognised by the ordinary reasonable person to be outside A's expertise, A were to be placed in the position of refusing to answer, or being bound to institute all such enquiries as ought reasonably to be made to ensure a reliable answer."[32]

This seems a rather out-of-hand rejection of Lord Diplock's dictum and his opinion of the *W. B. Anderson Case*. To start with, the above hypothetical situation does not really match the situation in *Presser's Case*. For instance, here A is not merely dealing with C (to use his Honour's characters for a moment) "in relation" to the "business", but surely the dealing is the whole of the business, and does not merely bear a "relation" to it. And is not the "matter" of interest to A as well, and not solely to C? It seems to be taking a very odd view of the duty to be honest in business transactions to assert that it is totally irrelevant to A whether C gets a good or bad block of land. The matter of expertise has been discussed above.[33] It seems to the writer that the situation here may be precisely the sort of thing Lord Diplock meant.

The basic difference really in regard to the *W. B. Anderson Case* is that in Asprey, J. A.'s view the *ratio* is that the defendant impliedly held himself out as possessing special skill and knowledge, whereas Lord Diplock refers

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[27] (1971) 2 N.S.W.L.R. 471 at 483.
[28] (1971) 2 N.S.W.L.R. 471 at 483.
[29] (1971) 2 N.S.W.L.R. 471 at 484.
[30] (1970) 44 A.L.J.R. 478 at 484.
[31] (1971) 2 N.S.W.L.R. 471 at 484.
[32] (1971) 2 N.S.W.L.R. 471 at 484.
[33] *Supra passim.*

to it as an example of a case where the defendant has a financial interest in the transaction upon which he gives his advice. Asprey, J. A.'s analysis is a perfectly sound one. So just what did Lord Diplock mean in his rather brief reference? In the writer's view he may have meant one of two things. Firstly, he may have been referring to the test suggested by Lord Pearce in *Hedley Byrne* and quoted by Cairns J., namely, whether the representation concerned a "business transaction whose nature made clear the gravity of the enquiry and the importance and influence attached to the answers".[34] Perhaps in Lord Diplock's view the financial interest was an important part of the entire set of circumstances showing the transaction to be a "business transaction", the financial interest showing its gravity. In his Lordship's view the financial interest perhaps was just sufficient to add that element of seriousness required to set up the duty of care. This seems to the writer an alternative, equally valid, analysis to that of Asprey, J. A. Secondly, Lord Diplock may have agreed with Asprey, J. A.'s analysis, and be merely saying that were the elements of an "implied skill" absent, the financial interest may have nevertheless been sufficient to raise a duty of care. After all, the defendants in the *W. B. Anderson Case* were not in the business of giving credit references, and therefore would possess only *prima facie* ordinary skill in such matters; Asprey, J. A. would supplement this ordinary skill by the defendants "implied skill" so as to constitute a duty of care; perhaps Lord Diplock would supplement the ordinary skill by the financial interest to add the necessary element of gravity and thus set up the duty of care. After all, it is arguable that the defendant's mere dealing with Taylors only told them how much Taylors owed the defendants themselves, and nothing as to Taylors' financial position generally, and thus the defendants *in fact* possessed no more than ordinary skill in the matter, insufficient to set up a duty in the absence of the financial interest.

Whichever of these analyses is nearest to the truth it seems to the writer that, with respect, the plaintiff's argument on these lines deserved a little more attention than it ultimately received.

PHYSICAL AND ECONOMIC HARM: HOW NECESSARY IS HEDLEY BYRNE?

Before going further, it is worthwhile noting an interesting point about the struggle in *Presser's Case* to set up a duty of care, and it is this: the damage in the instant case was not purely economic, but physical with consequent economic harm, i.e., cracks appeared in the house. The distinction between physical and economic harm has long been recognised in the area of tort,[35] and *semble* is still recognised.[36]

In *S.C.M.* v. *Whittall*,[37] for instance, the defendants' negligence caused an electric power loss in the plaintiffs' factory, resulting in damage to moulds when typewriter casings congealed in them, as well as causing economic loss by stopping production. Lord Denning, M. R. commented on the sagacity of the course pursued by counsel for the plaintiff in claiming only for the physical, and not for the purely economic, damage. Lord Denning himself denied the distinction between physical and economic harm, but thought that the plaintiff could not have recovered here on the ground that the economic damage was not sufficiently "direct". The remainder of the Court of Appeal, however,

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[34] (1967) 2 All E.R. 850 at 862.
[35] *Coggs* v. *Bernard* (1703) 2 Ld. Raym. 909.
[36] See Court of Appeal in *S.C.M.* v. *Whittall* (1971) 1 Q.B. 337 and more recently by the N.S.W. Court of Appeal in *French Knit Sales* v. *N. Gold and Sons* (1972) 2 N.S.W.L.R. 132.
[37] (1971) 1 Q.B. 337.

thought that the old rule distinguishing physical and financial harm still exists.[38] These comments were *obiter*, of course.

Fleming[39] cites *Shiells* v. *Blackburne*[40] and *Wilson* v. *Coverdale*[41] as "old, yet sound, decisions which held defendants liable (for the consequences of negligent words causing physical damage) despite their acting voluntarily and without reward". This, of course, is not a universal opinion; Lindgren,[42] for instance, interprets *Shiells* v. *Blackburne* as a case like *De La Bere* v. *Pearson*,[43] i.e., as being a contract supported by very artificial consideration, in the former case being supposed benefit conferred by the plaintiff on the defendant in allowing him to enter the leather at the Custom House.

But to take a simple hypothetical case, there would be no question of the application of the Hedley Byrne doctrine where, say, a garage failed to repair a motor car and negligently asserted that they had done so, thereby causing physical damage to the plaintiff; such a case would be instantly disposed of under *Donoghue* v. *Stevenson*.[44] No post-*Hedley Byrne* case, however, seems to have as much as contemplated this sort of approach. In *Smith* v. *Auckland Hospital Board*[45] the plaintiff lost his leg after consenting to an operation in reliance on a carelessly given assurance by a doctor that the operation involved no great element of risk. The damage was quite obviously physical, yet the case proceeded on the basis that the *Hedley Byrne* doctrine was the only possible avenue to the plaintiff's success. Lindgren[46] suggests that the distinction between negligent acts and words is that "words cause nothing unless acted upon, that is, the *direct* cause of the hearer's loss is his own action". This does not seem very enlightening; one might say that in the above hypothetical example the "direct" cause of the plaintiff's injury was his acting on the assurance that the car was fit to drive. Another possible answer is that the use of the *Hedley Byrne* principle can only be avoided where there is "additional" negligence other than the negligent words, and the damage springs at least partly from this, as for instance in *Clay* v. *A. J. Crump and Sons*,[47] where there was neligence not only in asserting a wall to be in a safe condition, but in leaving the wall in a dangerous condition. Once again, to take our hypothetical example, a failure alone to repair the car would not be negligence causing damage, without the redelivery and assurance of safety. It would seem to be often quite hard in this sort of situation to separate negligent words and negligent acts.

This area of the law is an awkward one. It may be argued that the *dicta* in *Hedley Byrne* and *Evatt's Case* are to be taken as settling the law in favour of the absence of a distinction between physical and financial harm; or either of the two distinctions suggested above may be the correct reason why none of the litigants relying on the *Hedley Byrne* principle have adopted this suggested alternative approach. It seems to the writer, however, that the matter is not beyond discussion, and that this alternative approach in cases involving physical harm resulting from negligent words could fruitfully be made.[48]

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[38] See, for instance, *Weller* v. *Foot and Mouth Disease Research Institute* (1966) 1 Q.B. 569 and *Burgess* v. *Florence Nightingale Hospital for Gentlewomen* (1955) 1 Q.B. 349.

[39] *Law of Torts*, 4th Ed. p. 164.

[40] (1789) 1 H. Bl. 158.

[41] (1793) 1 Esp. 74.

[42] K. E. Lindgren, "*Professional Negligence in Words and the Privy Council*" (1972) 46 A.L.J. 176 at 177.

[43] (1908) 1 K.B. 280.

[44] (1932) A.C. 562.

[45] (1965) N.Z.L.R. 191.

[46] Lindgren, *supra* n. 42 at 187.

[47] (1964) 1 Q.B. 533.

[48] A detailed (although pre-*Hedley Byrne*) discussion of this aspect is to be found in W. L. Morison, *Liability in Negligence for False Statements* (1951) 67 L.Q.R. 212 at 217-21. See also A. L. Goodhart, *Liability for Negligent Misstatements* (1962) 78 L.Q.R. 107.

CONTRACTUAL ASPECTS OF PRESSER'S CASE

Two important questions arise out of this case. They are:

(1) To what extent does the *Hedley Byrne* doctrine apply when the parties involved stand in contractual, or pre-contractual, relations?

(2) Is it desirable to create, in view of the now exclusive categorisation in the contractual field of misrepresentation as either fraudulent or innocent, a third category, that of negligent misrepresentation, with an appropriate remedy?

(1) *Application of the Hedley Byrne doctrine as between contracting parties.*

The question of whether this doctrine applies as between contracting parties is really only part of the larger question of the existence of a duty of care, i.e., taking into account all the circumstances, including the existence of a contract, does a duty of care arise? Nevertheless, the question is approached by most writers as a separate one, so that those who answer it in the negative submit that the existence of a contract is a circumstance which will always negative the existence of a duty of care. Professor Goodhart, for instance, in an article published shortly after *Hedley Byrne* had been decided in the English Court of Appeal,[49] would have emphatically answered in the negative: "No-one can question that, as the law stands at present, no damages can be recovered from a party to a contract because he makes a negligent but innocent misrepresentation . . . It would be strangely illogical, therefore, if the law of tort were to enable a party to a contract to sue a third person for damages on the ground that the third party's negligent misrepresentation had induced him to enter into the contract".[50] Presumably this reasoning would extend to the case where the contracting party himself is the representor.

Those who would answer this question in the negative since the decision of *Hedley Byrne* by the House of Lords may base their arguments on the tenor of Lord Devlin's speech in that case. His Lordship developed his argument for the existence of a duty of care by reference to the unjust distinctions which arise in situations where advice has been negligently given, depending on the existence of consideration or not. His Lordship referred to *De La Bere* v. *Pearson*[51] where the plaintiff succeeded by framing her action in contract, the Court deciding that the advantage gained by the defendant by virtue of his being at liberty to publish the plaintiff's letter if he so desired constituted consideration for the contract. This consideration was really quite artificial, and, had the arrangement not been for publication, consideration might well have been found lacking, and the plaintiff would then have failed. It was this sort of capricious result which Lord Devlin found abhorrent, that is, that success or failure depended in *De La Bere* v. *Pearson* not at all on the substance of the claim, but on a circumstance fairly irrelevant to the real essence of the action. Thus his Lordship concluded that there ought to be a duty of care in situations which "are 'equivalent to contract', that is, where there is an assumption of responsibility is circumstances in which, but for the absence of consideration, there would be a contract".[52] It is arguable that this approach implies that this duty of care is a sort of a substitute for consideration, and, by inference, that where there is consideration, the duty will not exist. Elsewhere, his Lordship says:[53] "(If) the doctor negligently advises (a patient) that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy. Unless of course the patient was a private patient and the doctor accepted half a guinea for his trouble; then the patient can recover all".

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[49] Goodhart, *ibid.*
[50] *Id.* at 112.
[51] (1908) 1 K.B. 280.
[52] (1964) A.C. 465 at 529.
[53] (1964) A.C. 465 at 517.

This is a rather blunt statement; as any plaintiff will find out, the mere existence of a contract will not assure him success in his claim. What if his action fails for a reason other than a lack of consideration? Can he then fall back on the *Hedley Byrne* principle, or is his Lordship suggesting that if the existence of a contract is shown, the plaintiff cannot rely on this duty of care even if he fails in contract? This last explanation is not inconsistent with what his Lordship says, and, if it is the correct explanation, would be authority for the proposition that *Hedley Byrne* does not apply where there is a contract on foot.

Another obvious suggestion is that *Hedley Byrne* ought not to apply where there is a contract because if a party wishes to rely on a statement he can include it as an express term of the contract. This is true in theory, but not of much use in practice; the other party almost always refuses to do such a thing, particularly where a "standard form" contract is employed. Professor Allan[54] has pointed out that the *Hedley Byrne* doctrine, the doctrine of collateral contract, the distinction between terms and representations, between warranties and conditions, and parol evidence rule are all untidy excrescences on the law of contract either producing unjust results or designed to avoid those results. Professor Allan's proposals for reform would do away with all these miscellaneous doctrines, and have every statement made in the course of negotiations leading to the formation of a contract capable of having contractual force; whether a particular statement does have such a force to be simply a question of fact, that is, one would just ask "did it induce entry into the contract?", or "did the other party rely on it?", so that every statement would either be part of the contract and actionable as a term, or else incapable of being the basis of any sort of action, thus excluding any possible use of the *Hedley Byrne* doctrine. As to the present law, Allan concedes the question to be in doubt, although he leans toward the exclusion of *Hedley Byrne* from the contractual field.

Asprey, J. A. in *Presser's Case* thought *obiter* that the doctrine had no contractual application, in reliance on a *dictum* of McNair, J. in *Oleoficio Zucchi S. P. A.* v. *Northern Sales Ltd.*,[55] where his Honour said: "(A)s at present advised, I consider the submission advanced by the buyers, that the ruling in (*Hedley Byrne*) applies as between contracting parties, is without foundation".[56] His Honour unfortunately advanced no reasons for this opinion.

There is, of course, a body of opinion to the contrary. Asprey, J. A. in *Presser's Case* quoted Millner[57] as saying: "(It) is consonant with the tenor of the judgment in the *Hedley Byrne Case* (*supra*) that persons negotiating a contract would ordinarily be among those who stand in a special relationship to each other in regard to the statements which pass between them relative to the contemplated transaction" so that "(A) careless misstatement would, in the absence of a disclaimer of liability . . . entitle the party acting thereon to his prejudice to claim damages in an action for negligence". Simos[58] is of the opinion that "(there) seems to be no reason in principle why an innocent party who has been induced to enter into a contract by reason of an innocent but negligent misrepresentation should not also have a right to sue the representor in tort for damages for negligence even if he later affirms the contract".

It seems to the writer that this last opinion is a fair statement of what the law should be. Both extreme views (i.e., that existence of a contract excludes *Hedley Byrne*, and the opposing view that all contracting parties would normally stand in a special relationship) seem to lose sight of the essence of the

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[54] Allan, D. E., *The Scope of the Contract*, (1967) 41 A.L.J. 274.
[55] (1965) 2 Lloyds' Rep. 496.
[56] (1965) 2 Lloyds' Rep. 496 at 519.
[57] Millner, *Modern Law of Negligence* (1967) at 140-141.
[58] T. Simos, "Misrepresentation and the Law of Contract," in *Recent Developments in the Law of Contract*, Sydney University Committee for Postgraduate Studies in the Department of Law (1972) at 95.

Hedley Byrne doctrine. After all, as was pointed out at the start of this section, the existence of a contract is only a factual element to be taken into account in determining the existence or otherwise of a duty of care, and not a separate issue totally unconnected with the duty of care question.[59] To assert, as does Millner, that the existence of a contract is of itself sufficient to set up the duty is to lose sight of the requiremens of gravity, seriousness, special skill, and justified reliance on the representation which pervade the *Hedley Byrne* doctrine. While in *Presser's Case* one may debate Asprey, J. A.'s judgment on the "skill and competence" issue on the facts, it is unarguable that to preserve some semblance of order in the *Hedley Byrne* principle at least a certain amount of skill or capability on the part of the representor must be shown, otherwise the requirement that it be reasonable for the plaintiff to rely on the answer is not fulfilled: on Millner's view the plaintiff may ask the most inept person with whom he is in contractual relations a question bearing on the contract, and if he chooses to rely on the answer it becomes actionable. This surely cannot be the law.

On the other hand, to assert boldly that the doctrine is without application at all where the parties are in contractual relations is to assert that one single circumstance, namely the existence of a contract, can negative the existence of a duty of care, even in the presence of a number of other elements sufficient in themselves to set up a duty of care. Should this be the law, it would be just as capricious as it was before Lord Devlin delivered his judgment, except that a different set of plaintiffs would win. It is surely more logical to read his Lordship as using arguments from a particular area of the law to support the existence of a duty to be careful in speech in certain circumstances than to seige on the phrase "equivalent to contract" and to find in it a lot more than may originally have been intended. It certainly does not seem to be a necessary conclusion to draw from Lord Devlin's speech that he intended that the *Hedley Byrne* doctrine should be without application in the contractual sphere.

It seems to the writer that firstly, where a duty of care can be set up on the principles laid down in *Hedley Byrne* and *Evatt's Case* before the existence of a contract is even considered, the existence of such a contract should not *per se* destroy that duty (although a particular type of contract might, such as one where the parties had been aware of the possibility of, and had the opportunity of, reducing the statement in question to an express term). Secondly, where there is a "missing element" in the duty, the existence of a contract may well supply it, either by way of pointing to the gravity of the transaction and the consequences of acting on the representation, or by showing its "business nature", or perhaps, if Lord Diplock is to be taken at face value in *Evatt's Case*, by simply supplying a financial interest.

Thus it seems to the writer that, in certain circumstances, the *Hedley Byrne* doctrine ought to find application in the contractual sphere.

It is interesting to note that, since *Presser's Case*, a case involving this question has been decided by Hardie, J., in the N.S.W. Supreme Court. In *Dillingham Constructions Pty. Ltd.* v. *Downs*[60] three associated companies entered into a contract with the N.S.W. Government for the deepening of Newcastle Harbour. The work was delayed because the effect of the blasting was partially dissipated through abandoned coal workings under the harbour, of whose existence the Government was at all material times aware, but about which the companies did not find out until some time later. In an action against the Government alleging negligent misrepresentation inducing entry

[59] The High Court has recently given a *dictum* to this effect: see *Morrison-Knudsen International Co. Ltd.* v. *Commonwealth* (1972) 46 A.L.J.R. 265.

[60] (1972) 2 N.S.W.L.R. 49.

into the contract, Hardie, J. observed firstly that as the parties were in a fairly equal bargaining position, the pre-contract relation in this case would not normally qualify as a "special relationship" within the meaning of the *Hedley Byrne* doctrine, but nevertheless, secondly, that the mere fact that the parties were in a pre-contract relationship would not of itself preclude the application of the doctrine. This appears to be a fairly sensible and logical application of the *Hedley Byrne* principle. (The comments were *obiter*, as no duty was in fact found to exist in that case, but detailed analysis is beyond the scope of this discussion).

OUGHT THERE TO BE A REMEDY FOR NEGLIGENT MISREPRESENTATION WHICH INDUCES ENTRY INTO A CONTRACT?

It is beyond question that the English legislature has considered it desirable that such a remedy exist. The *Misrepresentation Bill* was presented to the House of Commons without comment on the part of its sponsor, Sir Eric Fletcher.[61] The only debate occasioned by the Bill at all was an unsuccessful amendment in the House of Lords seeking to alter the monetary value of a contract below which exclusion clauses relating to innocent misrepresentation are deprived of effect.[62] The growth over the years of the rather unsatisfactory and artificial device of collateral contract, and Lord Dennings' efforts in *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors) Ltd.*,[63] also indicate the recognition of the need for a remedy here.

It seems reasonable to infer from the Parliamentary progress of the *Misrepresentation Bill* that the desriability of such a remedy was so obvious as to be beyond discussion, although the method by which the *Misrepresentation Act* (1967) gives this remedy has subsequently been the subject of some criticism;[64] the method employs a fiction of fraud which has the effect of shifting the onus of proof onto the representor to show that he had reasonable grounds for belief in the truth of the statement, and did in fact believe in its truth.[65]

Allen[66] agrees that there should be a remedy for innocent misrepresentation,, but thinks that the English attempts "appear to tinker with and to patch up a thoroughly unsatisfactory area of the law without coming to grips with the real problems". Professor Allen's suggestions for reform in this area are outlined earlier.[67] The varying views as to the applicability of the *Hedley Byrne* doctrine have also been reviewed. In fact, the desirability of the remedy seems to be beyond doubt, but the ideal form that it should take remains a subject of contention. Professor Allen seems to think it at best untidy, and at worst totally undesirable that tortious remedies should obtrude into the field of contract law. Other writers[68] see no reason why the operation of the *Hedley Byrne* doctrine should be excluded simply because there is a contract on foot; this view is shared by the writer of a recent short note on *Dillingham Constructions* v. *Downs*.[69]

Neither view of what the law should be is totally satisfying in practice. Allen's view would require sweeping legislation which would revolutionise the

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[61] *U.K. Parliamentary Debates, House of Commons*, 1965-66, Series 5, vol. 721, at 1235.
[62] *Ibid.*, 1966-67, Series 5, Vol. 741, at 1360.
[63] (1965) 2 All E.R. 65.
[64] See, for example, G. H. Treitel, *op. cit.* p. 290.
[65] *Misrepresentation Act* (U.K.) (1967) s. 2(1).
[66] Allen, D. E. *supra* n. 54 at 287.
[67] *Supra* n. 54.
[68] Millner, *op. cit.*; Simos, *op. cit.*—*supra* note (58).
[69] *Current Topics* (1972) 46 A.L.J. 606.

law of contract. It is in the final analysis, probably the more satisfactory of the two solutions. The other is a piecemeal approach which will lead to a good deal of uncertainty: take for instance the reformatory attempts of Lord Denning in *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors) Ltd.*[70] In that case his Lordship advanced the proposition that any representation which is made negligently raises a presumption that it is a term of the contract. His Lordship, purporting to rely on a statement of Holt, C.J. repeated in *Heilbut Symonds and Co.* v. *Buckleton*,[71] that "an affirmation at the time of sale is a warranty, provided it appear on evidence to be so intended", gave a remedy to a buyer of a car to whom misrepresentations concerning the car had been made. This innovation, however, does not seem likely to be followed in Australia. Thus the "judicial innovation" process is likely to disadvantage plaintiffs by its uncertainty. On the other hand, in the absence of reforming legislation, to deny plaintiffs a potentially wide avenue of relief, in the form of the *Hedley Byrne* doctrine, is surely unjust.

To sum up: *Presser's Case* is an excellent example of the uncertainty of the law in this area. The fears of some early critics of *Hedley Byrne*[72] have scarcely been justified: a statistical analysis of the percentage of plaintiffs who have actually recovered under this principle would surely tell a gloomy tale, and go far towards supporting the charge that the *Hedley Byrne* principle is a toothless tiger, particularly as qualified in this country by *Evatt's Case.* Nevertheless, to deny a plaintiff who happens to be in contractual relations with the defendant any access at all to the principle, seems quite unjust, in view of the current difficulties surrounding the remedies in this area.

CONCLUSION

It has not been the writer's intention to quibble with the actual decision in *Presser* v. *Caldwell Estates*, as the issue of negligence has not been discussed. It is submitted, however, that the question of the existence of a duty of care could have been examined in a more thorough fashion, and that the conclusion reached on the application of the rule laid down in *Hedley Byrne* v. *Heller* was reached in a manner which left something to be desired. The writer hopes that these conclusions will not unhesitatingly be taken to represent the law in N.S.W.

G. W. BALDWIN, B.A. — Fourth Year student.

[70] (1965) 2 All E.R. 65.
[71] (1913) A.C. 30.
[72] See, for example, D. M. Gordon, *Hedley Byrne* v. *Heller in the House of Lords* (1964) 38 A.L.J. 39.