

## HEDLEY BYRNE & CO. LTD. v. HELLER & PARTNERS, LTD.\*

My purpose in this article is to examine the effect of the House of Lords' decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners, Ltd.*<sup>1</sup> The case concerned liability in tort to a person who suffered pecuniary loss through relying on a misleading statement, made carelessly but honestly. Though the defendants were held not liable to the plaintiffs on the facts of the case, the judgments contain dicta of far-reaching importance on the scope of liability for negligence.

It is useful at the outset to distinguish between two ways in which reliance upon misleading statements may cause harm to a plaintiff. The first is where the plaintiff himself acts upon the statement and thereby suffers some harm. Most of the cases in the books have been of this type, and most of the discussion of liability for careless statements has been concerned with harm caused in this way.<sup>2</sup> The second way in which a plaintiff may be damnified through reliance on misleading statements is where some third person causes him harm through relying on the defendant's statement. An example would be where a newspaper publishes a false statement that the plaintiff has ceased to carry on business with the result that some of his customers stop dealing with him.<sup>3</sup>

A moment's reflection shows that the tort of negligence can have only limited application in both these situations. As Lord Haldane once remarked, "liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act."<sup>4</sup> If it is the plaintiff himself who has relied to his detriment on a misleading statement, we find in the law of contract, estoppel and deceit a well-developed body of rules which takes little or no account of negligence and which is quite inconsistent with a

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<sup>1</sup> [1964] A.C. 465.

<sup>2</sup> See FLEMING, *THE LAW OF TORTS*, (2nd ed., Sydney, 1961) 594-611; Paton, *Liability in Tort for Negligent Statements*, (1947) 25 CAN BAR REV. 123; Fullagar, *Liability for Representations at Common Law*, (1951-1952) 25 AUST. L.J. 278; Seavey, *Candler v. Crane, Christmas & Co.: Negligent Misrepresentation by Accountants*, (1952) 67 L.Q. REV. 466.

<sup>3</sup> *Ratcliffe v. Evans*, [1892] 2 Q.B. 524.

<sup>4</sup> *Nocton v. Ashburton*, [1914] A.C. 932, at 948.

general duty to be careful in speech. If it is some third person who acts upon the statement, causing harm to the plaintiff, here again we find principles of liability, in defamation and injurious falsehood, which are inconsistent with any such general duty. One cannot, for example, circumvent the defence of privilege in defamation or the requirement of malice in injurious falsehood by casting one's claim in negligence and arguing that the defendant ought to have known that the statement in question was false.<sup>5</sup>

The damage suffered through reliance on careless statements is usually pecuniary, not physical, and as Lord Pearce remarked in *Hedley Byrne*,<sup>6</sup> "economic protection has lagged behind protection in physical matters."<sup>7</sup> We shall see later that there are general limitations on liability in negligence for pecuniary loss, not peculiar to liability for careless statements.<sup>8</sup>

In cases where the plaintiff has acted on a misleading statement, it was thought at one time that the decision of the House of Lords in *Derry v. Peek*<sup>9</sup> had established, in the words of Lord Bramwell, that "to found an action for damages there must be contract and breach, or fraud."<sup>10</sup> This was the view of *Derry v. Peek* adopted by the Court of Appeal in *Le Lievre v. Gould*.<sup>11</sup> In *Gould's Case* the owner of land undertook to convey it to a builder, in consideration of a perpetual yearly rent, upon the builder's erecting two houses of a certain value on the land. The builder needed to borrow money in order to build the houses, and the owner of the land agreed to procure a loan for him, payable in instalments. A schedule of advances was prepared and the defendant, a surveyor, was instructed by the owner to issue progress certificates. Later, the owner arranged for the plaintiff to advance the money to the builder by instalments on the security of a mortgage of the builder's interest in the land, and a mortgage deed was executed. The plaintiff paid instalments to the builder on the faith of the defendant's certificates and lost money through the defendant's negligence in overvaluing the work done.

It was held by the Court of Appeal that the defendant owed no duty of care to the plaintiff in issuing the certificates. Bowen L.J.

<sup>5</sup> These points are well brought out by Morison, *Liability in Negligence for False Statements*, (1951) 67 L.Q. Rev. 212-229.

<sup>6</sup> [1964] A.C. 465.

<sup>7</sup> *Ibid.*, at 536.

<sup>8</sup> *Infra*, at 493 *et. seq.*

<sup>9</sup> (1889) 14 App. Cas. 337.

<sup>10</sup> *Ibid.*, at 347.

<sup>11</sup> [1893] 1 Q.B. 491. This was also the view of Romer J. in *Scholes v. Brook*, (1891) 63 L.T. 857.

said that the law of England "does not consider that what a man writes on paper is like a gun or other dangerous instrument."<sup>12</sup>

This view of the effect of *Derry v. Peek*<sup>13</sup> had to be qualified after the decision of the House of Lords in *Nocton v. Lord Ashburton*<sup>14</sup> in 1914, where it was held that *Derry v. Peek* and the stringent requirements of deceit did not prevent the courts from recognising in special circumstances obligations besides that of honesty. The defendant, in *Nocton's Case*, was a solicitor who advised the plaintiff, one of his clients, to surrender part of the security for a debt, thereby causing him loss. The pleadings did not allege any retainer or contract between the parties, largely because the case had been fought in the courts below on the issue of fraud, and by the time the case reached the House of Lords amendment of the pleadings was ruled out by the statutes of limitation. This meant that if, as the House held, fraud had not been made out, a judgment in favour of the plaintiff had to be rested on some obligation which arose independently of contract. It was held by the House that the allegations in the pleadings were wide enough to found a claim for dereliction of duty by a person occupying a fiduciary relation, such as existed between a solicitor and his client.

Three members of the House in *Nocton's Case* went so far as to say that *Derry v. Peek* was concerned only with deceit and had no bearing on liability for negligence,<sup>15</sup> except to the extent that it implied that there was no duty to be careful on the facts of the case. These dicta and the expansion of negligence liability set off by *Donoghue v. Stevenson*<sup>16</sup> encouraged some to believe that the question of liability for careless statements was still open.<sup>17</sup> But when the question was raised before the Court of Appeal in *Candler v. Crane, Christmas & Co.*,<sup>18</sup> in 1951, the majority of the Court, Asquith L.J. and Cohen L.J., held that they were still bound by *Le Lievre v. Gould*<sup>19</sup> and that it had not been impliedly over-ruled by *Donoghue*

<sup>12</sup> *Ibid.*, at 502. It is true that Bowen L.J. limited the immunity to cases where there is no duty to be careful (at 501), but his judgment shows that what he had in mind in making this qualification was the duty resting on an occupier not to mislead visitors about the safety of the premises and other duties to avoid physical harm (at 503).

<sup>13</sup> (1889) 14 App. Cas. 337.

<sup>14</sup> [1914] A.C. 932.

<sup>15</sup> *Ibid.*, at 963 (Lord Dunedin), at 970 (Lord Shaw of Dunfermline), at 978 (Lord Parmoor).

<sup>16</sup> [1932] A.C. 562.

<sup>17</sup> For example, WINFIELD, LAW OF TORTS, (4th ed., London, 1948) 386.

<sup>18</sup> [1951] 2 K.B. 164.

<sup>19</sup> [1893] 1 Q.B. 491.

*v. Stevenson*. The Plaintiff, in *Candler's Case*, asked to see the balance sheet of a company before deciding whether to invest in it. The defendants, a firm of accountants, who had already been instructed by the company to prepare accounts, were asked to expedite the accounts for this purpose. The defendant's clerk, who did the work, showed the draft accounts to the plaintiff personally and allowed him to take a copy. The accounts were carelessly prepared and seriously misrepresented the company's assets, with the result that the plaintiff lost the money he invested in the company on the faith of the accounts.<sup>20</sup> There being no contractual or fiduciary relation between the parties, Asquith L.J. and Cohen L.J. held that the plaintiff had no remedy.

Denning L.J. dissented, and since his judgment met with approval in *Hedley Byrne*, his reasoning assumes great importance. He held that *Nocton's Case* and *Donoghue v. Stevenson* entitled the Court to examine the law as to negligent statements afresh and to disregard the reasoning of *Le Lievre v. Gould*.<sup>21</sup> He recognised that the duty to be careful in word was subject to limitations not found in other fields of negligence. Invoking ancient dicta on "the duty of every artificer to exercise his art rightly and truly as he ought,"<sup>22</sup> he held that a duty of care was owed by "those persons such as accountants, surveyors, valuers and analysts, whose profession it is to examine books, accounts, and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business."<sup>23</sup> This excluded company promoters issuing a prospectus and trustees answering inquiries about trust funds, and was therefore consistent, in his view, with *Derry v. Peek*<sup>24</sup> and *Low v. Bouverie*.<sup>25</sup>

<sup>20</sup> The plaintiff employed his own accountant, but the mistakes in the defendants' accounts were not such as the plaintiff's accountant could be expected to discover: see [1951] 2 K.B. 164, at 167.

<sup>21</sup> [1951] 2 K.B. 164, 176-178. Denning L.J. thought that the actual decision in *Le Lievre v. Gould* was right, since the mortgagees had stipulated in the mortgage for valuations by his own surveyor, with the result, in Denning L.J.'s view, that the plaintiff's reliance on the defendant's certificates was not foreseeable (at 181). But this is a strained view of the facts of *Gould's Case* (see the judgment of Asquith L.J. in *Candler's Case*, *ibid.*, at 193-194) since the defendant's certificates could have no other purpose than to induce someone to advance money to the builder on the security of the work done. The defendant did not know of the stipulation in the mortgage for independent valuations and it was not in fact contemplated that they would be made.

<sup>22</sup> FITZHERBERT, *NATURA BREVIVM*, (1534), 94D.

<sup>23</sup> [1951] 2 K.B. 164, at 179.

<sup>24</sup> (1889) 14 App. Cas. 337.

<sup>25</sup> [1891] 3 Ch. 82.

This duty was owed, he said, not only to their employer, but also “to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them.”<sup>26</sup> The test of proximity in these cases was, he thought: “Did the accountants know that the accounts were required for submission to the plaintiff and use by him?”<sup>27</sup> The duty extended “only to those transactions for which the accountants knew their accounts were required.”<sup>28</sup> This last limitation meant that the plaintiff in *Candler’s Case*, even on the view of Denning L.J., was entitled to recover only his original investment, which was known to the defendants, and not the additional money which he put into the company later.

These earlier cases provide the main background to the decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners, Ltd.*<sup>29</sup> The plaintiffs were advertising agents who were instructed by a company, Easipower, Ltd., to place orders for advertising time on television and advertising space in newspapers on behalf of the company. Under these contracts, the plaintiffs became personally liable for the sums due. Having some doubts about the financial standing of Easipower, they asked their bankers, the National Provincial, for a report on the company. The city office of the National Provincial telephoned the defendants, who were Easipower’s bankers, and said they wanted to know in confidence and without responsibility on the defendants’ part the financial standing of the company and whether the company would be good for an advertising contract for £8,000 to £9,000. Some months later, the defendants answered another query from the National Provincial about the company in a letter headed with a disclaimer of responsibility. The defendants’ replies to these queries, including the disclaimers, were passed on to the plaintiffs by the National Provincial, though the identity of the defendants was not disclosed. It is not necessary here to go into the actual terms of the defendants’ replies, but they were encouraging in tone and the plaintiffs lost over £17,000 when Easipower went into liquidation a few months later.

At trial, the plaintiffs abandoned charges of fraud, but argued that the defendants’ replies were calculated to convey an impression of the company’s standing not justified by facts known to the defendants and that they were negligent in not making clear that the

<sup>26</sup> [1951] 2 K.B. 164, at 180-181.

<sup>27</sup> *Ibid.*, at 181.

<sup>28</sup> *Ibid.*, at 182.

<sup>29</sup> [1964] A.C. 465.

references were intended to be very guarded ones. McNair J. held that Mr. Heller was in fact negligent in this respect, but gave judgment for the defendants on the ground that, in the absence of a contractual or fiduciary relation, they owed no duty of care to the plaintiffs. The Court of Appeal upheld his judgment on the same ground,<sup>30</sup> and went on to say that it would not be reasonable, apart from authority, to impose on a banker answering such queries a duty to do more than act honestly.<sup>31</sup> The Court of Appeal purported to follow *Le Lievre v. Gould*<sup>32</sup> and *Candler v. Crane, Christmas & Co.*<sup>33</sup> The plaintiffs tried to found a duty on the special relation between the defendants and Easipower constituted by the fact that the defendants were financing the company, but the Court of Appeal held that the only relationship which could give rise to a duty within the principle of *Nocton's Case* was one between the defendant and the plaintiff.<sup>34</sup>

The narrow issue in the plaintiffs' appeal to the House of Lords was whether a banker, who has disclaimed responsibility, can be liable in negligence to a person, not his customer, who relies upon a careless reference. But counsel for the defendants sought to uphold the Court of Appeal's judgment on the broad ground that, outside contractual and fiduciary relations, there is no duty in making statements other than to avoid physical harm to others.<sup>35</sup> Though, in the event, the appeal failed and the defendants were held not liable, the bulk of the judgments, occupying some sixty pages of the Law Reports,

<sup>30</sup> [1962] 1 Q.B. 396. Having held that the defendants owed no duty of care to the plaintiffs, the Court of Appeal did not go into the question whether McNair J's. finding of negligence was correct. The defendants disputed the finding, both in the Court of Appeal and House of Lords.

<sup>31</sup> "Apart from authority, I am not satisfied that it would be reasonable to impose upon a banker the obligation suggested, if that obligation really adds anything to the duty of giving an honest answer. It is conceded . . . that the banker is not expected to make outside inquiries to supplement the information which he already has. Is he then expected, in business hours in the bank's time, to expend time and trouble in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced and well-worded report? That seems wholly unreasonable. Then, if he is not expected to do any of those things, and if he is permitted to give an impromptu answer in the words that immediately come to his mind on the basis of the facts which he happens to remember or is able to ascertain from a quick glance at the file or one of the files, the duty of care seems to add little, if anything, to the duty of honesty." [1962] 1 Q.B. 396, at 414-415 (*per* Pearson L.J.).

<sup>32</sup> [1893] 1 Q.B. 491.

<sup>33</sup> [1951] 2 K.B. 164.

<sup>34</sup> [1962] 1 Q.B. 396, at 414.

<sup>35</sup> [1964] A.C. 465, at 474.

was devoted to reviewing and rejecting this broad principle advanced by the defendants,<sup>36</sup> and the importance of the decision lies in the views expressed on this. While all members of the House agreed with Denning L.J. in *Candler's Case* that the question of liability for careless statements was still open, despite *Derry v. Peek*, there are some important differences in the views put forward on the scope of liability.

I do not propose to examine too critically the analysis in *Hedley Byrne* of earlier cases such as *Derry v. Peek* and *Nocton v. Ashburton*. Under a strict doctrine of precedent, the common law can often grow only through the strained interpretation of earlier cases. In great cases like *Pasley v. Freeman*,<sup>37</sup> *Lumley v. Gye*<sup>38</sup> and *Donoghue v. Stevenson*,<sup>39</sup> recognised as turning points in the law, it was the dissenting minority which was truer to the earlier authorities. I think it was Holmes who said that ignorance is the best of law reformers. If we are ready to allow the judges to develop the law, we must not look too closely at the logical processes of justification. Though it may seem quite disingenuous for the judges in *Nocton's Case* and *Hedley Byrne* to contend that *Derry v. Peek* was concerned only with the requirements of deceit and not with liability for negligence,<sup>40</sup> I am concerned here with the desirability and feasibility of the principles put forward rather than with the justification of those principles upon the earlier authorities.

It is however worth noting that in *Nocton's Case*, which was cited as the main justification of the views put forward in *Hedley Byrne*, the plaintiff was claiming the restoration of property got from him by the defendant. Though there are dicta in some of the judgments which suggest that the plaintiff was entitled to recover common law

<sup>36</sup> It is interesting to notice how the form and generality of the judgments were determined by the nature of the argument put forward by the defendants' counsel. In this respect *Hedley Byrne* resembles *Fletcher v. Rylands*, (1866) L.R. 1 Ex. 265, where Manisty Q.C., for the plaintiff, rested his case on a broad contention. The subsequent history of the rule in *Rylands v. Fletcher*, limiting its scope, is not without significance for students of *Hedley Byrne*.

<sup>37</sup> (1789) 3 T.R. 51, 100 E.R. 450.

<sup>38</sup> (1853) 2 El. & Bl. 216, 118 E.R. 749.

<sup>39</sup> [1932] A.C. 562. Lord Atkin's strained interpretation of some of the earlier cases, such as *Earl v. Lubbock*, [1905] 1 K.B. 253, caused difficulty later when the courts were working out the effect of *Donoghue v. Stevenson*. See SALMOND ON TORTS, (13th ed. R. F. V. Heuston, 1961) 559.

<sup>40</sup> *Nocton v. Ashburton*, [1914] A.C. 932, at 963, 970, 978; *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, at 484 (Lord Reid), 500 (Lord Morris), 508 (Lord Hodson), 519 (Lord Devlin), 535-536 (Lord Pearce).

damages for negligence, Lords Haldane, Dunedin and Shaw founded their conclusion that he was entitled to succeed on the exclusive jurisdiction of a court of equity in cases of fiduciary relations.<sup>41</sup> Lord Haldane expressly said that the proper mode of giving relief, if the quantum of compensation had been in issue, would have been to order the defendant to restore the security and that this would not necessarily be equivalent to common law damages for fraud or negligence.<sup>42</sup>

Students of the judicial process will note with interest that the judgments in *Derry v. Peek* were not examined at all in *Hedley Byrne*. The Law Lords were content to refer to passages in *Nocton's Case* as shewing conclusively that *Derry v. Peek* did not establish any general principal of the law of negligence, though it was conceded, rather oddly, that the case must be taken to have established by implication that there was no duty to be careful on the facts of the case.<sup>43</sup>

In *Robinson v. National Bank of Scotland*,<sup>44</sup> two years after *Nocton's Case*, Lord Haldane again uttered a warning against exaggerating the effect of *Derry v. Peek*. Whereas in *Nocton's Case* he had invoked the fiduciary relationship between the parties and the exclusive jurisdiction of equity to justify liability, in *Robinson's Case* he went further and said that there could be other special relationships giving rise to a duty of care.<sup>45</sup> Though he gave no examples of such special relationships and though this was said in the course of a judgment holding that a banker was not liable for carelessness in giving a reference, the passage was fastened on by the Law Lords in *Hedley Byrne*<sup>46</sup> as authority for the view that the duty of care was not confined to fiduciary relationships.

<sup>41</sup> [1914] A.C. 932, at 952-957, 963-965, 971-972. See also Sealy, *Some Principles of Fiduciary Obligation*, (1963) CAMB. L.J. 119, who argues (at 137-140) that the remedy based on fiduciary relationship is purely equitable and is confined to cases where one person has control of property which, in the eyes of equity, belongs to another.

<sup>42</sup> *Ibid.*, at 958.

<sup>43</sup> [1964] A.C. 465, at 500-501 (*per Lord Morris*), 519 (*per Lord Devlin*).

<sup>44</sup> [1916] Sess. Cas. (H.L.) 154.

<sup>45</sup> *Ibid.*, at 157: "I think, as I said in *Nocton's case*, that an exaggerated view was taken by a good many people of the scope of the decision in *Derry v. Peek*. The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the Courts may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the Courts are in any way hampered in recognizing that the duty of care may be established when such cases really occur."

<sup>46</sup> [1964] A.C. 465, at 486 (Lord Reid), 502 (Lord Morris), 523 (Lord Devlin), 536 (Lord Pearce).



Lord Reid, though he recognised that the law must treat negligent words differently from negligent acts, said that a duty arose in all those relationships "where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him."<sup>47</sup> He thought that there must be something more than the mere misstatement, and that the "most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility."<sup>48</sup>

Though the plaintiffs in *Hedley Byrne* did not know the identity of the banker from whom the references came and the defendants on their side did not know the identity of the person on whose behalf the inquiries were made, Lord Reid said that he would treat the case as one where the statement is made directly to the person who suffers loss through acting on it.<sup>49</sup> This seems, at first sight, to be a sensible approach. If an inquiry is made on behalf of X, it is difficult to believe that liability for carelessness in answering it can turn on whether the identity of X is known to the defendant, so long as he knows the nature of the transaction which X has in mind. The only difficulty with Lord Reid's view, on the actual facts of *Hedley Byrne*, is that the defendants would not have answered a query coming directly from the customer of another bank. But this objection is probably peculiar to bankers.

Lord Reid's principle would seem to imply that liability does not extend beyond cases of direct dealing, if we include in this, as he did himself, cases where the inquiry is made by an agent. It is hardly apt to speak of a person assuming a responsibility where there is no direct dealing. If this is a fair interpretation of his judgment,<sup>50</sup> it goes little beyond the law as previously understood, since there will usually be a contract or fiduciary relationship between the parties. Though Lord Reid said<sup>51</sup> that *Candler v. Crane, Christmas & Co.*<sup>52</sup>

<sup>47</sup> *Ibid.*, at 486.

<sup>48</sup> *Ibid.*, at 483.

<sup>49</sup> *Ibid.*, at 482. Lord Morris also said (at 494) that nothing turned on whether the defendants knew the identity of the person on whose behalf the enquiries were made.

<sup>50</sup> Direct dealing is also implied by Lord Reid's speaking of a person "seeking information or advice." As to whether there must be a request for information in order for liability to exist, see *infra* at 486.

<sup>51</sup> [1964] A.C. 465, at 487.

<sup>52</sup> [1951] 2 K.B. 164.

was a case where the defendants must be taken to have assumed a responsibility and where the plaintiff should on that account have succeeded, it would seem that this was only because the accountants dealt directly with the plaintiff in showing him the accounts. Though he rejected the ratio of *Le Lievre v. Gould*,<sup>53</sup> he thought that the actual decision against liability was probably correct.<sup>54</sup> In *Gould's Case* there was, as we have seen,<sup>55</sup> no direct dealing between the plaintiff and the defendant.

Lord Devlin, too, thought that there could be liability only where the defendant had assumed a responsibility, and that it was not imposed by law.<sup>56</sup> He thought the problem created by the facts of the case was a by-product of the doctrine of consideration, and that the problem would not exist if it were possible to construct a contract without consideration.<sup>57</sup> He cited *Coggs v. Bernard*,<sup>58</sup> *Skelton v. London & North Western Ry. Co.*,<sup>59</sup> *Banbury v. Bank of Montreal*<sup>60</sup> and *Wilkinson v. Coverdale*<sup>61</sup> as showing that, though a promise without consideration is unenforceable, a duty of care attaches to the actual performance of a gratuitous undertaking. He could see no reason why this principle should not be extended to a case where the service undertaken is the giving of information or advice, though he recognised that this step has not yet been taken.<sup>62</sup> The result was, he thought, that a duty of care would arise where "there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract,"<sup>63</sup> a relationship which he thought aptly described by the phrase "equivalent to contract," used by Lord Shaw in *Nocton v. Ashburton*.<sup>64</sup> "It is a responsibility that is voluntarily accepted or undertaken either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction . . . . Responsibility can attach only to the single act, *i.e.* the giving of the reference, and only if the doing of that act implied a voluntary under-

<sup>53</sup> [1893] 1 Q.B. 491.

<sup>54</sup> [1964] A.C. 465, at 488.

<sup>55</sup> *Supra*, at 468-469.

<sup>56</sup> [1964] A.C. 465, at 529.

<sup>57</sup> *Ibid.*, at 525.

<sup>58</sup> (1703) 2 Ld. Raym. 909, 92 E.R. 107.

<sup>59</sup> (1867) L.R. 2 C.P. 631.

<sup>60</sup> [1918] A.C. 626.

<sup>61</sup> (1793) 1 Esp. 74, 170 E.R. 284.

<sup>62</sup> [1964] A.C. 465, at 528.

<sup>63</sup> *Ibid.*, at 529.

<sup>64</sup> [1914] A.C. 932, at 972.

<sup>65</sup> [1964] A.C. 465, at 529.

taking to assume responsibility.”<sup>65</sup> Lord Devlin acknowledged that his principle was limited in scope and that later cases might require some wider principle of liability, independent of any notion of contract. Though he paid respect to what was said by the other Law Lords in *Hedley Byrne* and by Denning L.J. in *Candler’s Case*, he preferred to leave these wider questions open till he saw what shape future cases took.<sup>66</sup>

Lord Devlin’s suggested principle is not easy for a common lawyer to comprehend. Consideration is essential to contractual obligation in the common law, and the operation of identifying contracts without consideration is bound to be uncertain.<sup>67</sup> Lord Devlin said that it may sometimes be necessary to distinguish between social and professional relationships, and that it may often be material “to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form.”<sup>68</sup> But he was not prepared to limit liability, as Lord Morris, Lord Hodson and Lord Pearce were, to people professing special skills. If the acceptance of responsibility was there, he did not think that the defendant could escape liability “simply because he belonged to no profession or calling, had no qualifications or special skill and did not hold himself out as having any.”<sup>69</sup>

Despite differences in terminology, Lord Devlin’s principle is clearly close to Lord Reid’s. Once again, the notion of assuming a responsibility would seem to limit liability to cases of direct dealing between the parties. I defer till later the question whether it is sensible to try to make liability in this field turn on an assumption of responsibility by the defendant.

<sup>66</sup> *Ibid.*, at 530-531.

<sup>67</sup> Lord Shaw, in using the expression “equivalent to contract” in *Nocton’s Case*, was referring with approval to the proposition put forward by Sir Roundell Palmer in *Peek v. Gurney*, (1871-2) L.R. 13 Eq. 79, at 97: “Equity will interfere only in the following cases: first, wherever a contract is to be rescinded; secondly, where fraud, in the proper sense of the word, is to be redressed; thirdly, where a representation has been made which binds the conscience of the party and estops and obliges him to make it good. In the last case the representation in equity is equivalent to a contract and very nearly coincides with a warranty at law; and in order that a person may avail himself of relief founded on it he must shew that there was such a proximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other.”

Though Sir Roundell Palmer was clearly referring to fiduciary relationships in equity, Lord Shaw cited the passage as supporting liability for negligence at common law: [1914] A.C. 932, at 969-972.

<sup>68</sup> [1964] A.C. 465, at 529.

<sup>69</sup> *Ibid.*, at 531.

Though Lord Devlin thought that all members of the House were agreed that responsibility must be assumed and was not imposed by the law,<sup>70</sup> the other three Law Lords seem in fact to have adopted wider principles of liability.

Though Lord Morris said at one point that one person could be liable to another if he assumed a responsibility to tender him deliberate advice,<sup>71</sup> he went on later to say that there could be liability without any direct dealings between the parties.<sup>72</sup> After reviewing the cases he said that "it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore, if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or skill or on his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise."<sup>73</sup> Lord Hodson expressly adopted this statement of principle.<sup>74</sup>

The fifth member of the House, Lord Pearce, thought that *Shiells v. Blackburne*,<sup>75</sup> *Gladwell v. Steggall*<sup>76</sup> and *Wilkinson v. Coverdale*<sup>77</sup> had established that "if persons holding themselves out in a calling or situation or profession take on a task within that calling or situation or profession they have a duty of skill and care."<sup>78</sup> He thought that there was no distinction in such a case between negligence in act and in word, or between physical and economic loss. He then went on to express his approval of the principles laid down by Denning L.J. in *Candler v. Crane, Christmas & Co.*,<sup>79</sup> which we considered earlier.<sup>80</sup> Though the defendants in *Candler's Case* dealt directly with the plaintiff in showing him the accounts, Denning L.J. said that a duty

<sup>70</sup> *Ibid.*, at 529.

<sup>71</sup> *Ibid.*, at 494.

<sup>72</sup> *Ibid.*, at 496.

<sup>73</sup> *Ibid.*, at 502-503.

<sup>74</sup> *Ibid.*, at 514.

<sup>75</sup> 1 H. Bl. 158, 126 E.R. 94.

<sup>76</sup> 5 Bing. (N.C.) 733, 132 E.R. 1283.

<sup>77</sup> (1793) 1 Esp. 74, 170 E.R. 284.

<sup>78</sup> [1964] A.C. 465, at 538.

<sup>79</sup> [1951] 2 K.B. 164.

<sup>80</sup> *Supra*, at 469-470.

would be owed to any person to whom the defendants know that the report is going to be shown in order to induce him to act on it in some particular transaction.

Before I consider what the effect of *Hedley Byrne* is likely to be, I must first explain why, despite the principles just described, the defendants were held not liable.

One member of the House, Lord Hodson, agreed with the view expressed in the Court of Appeal<sup>81</sup> that it would not be reasonable to expect more of a banker giving a reference than that he should answer honestly. Lord Hodson therefore held that the defendants owed no duty of care to the plaintiffs, quite apart from the disclaimer of responsibility.<sup>82</sup> Indeed, he thought that this had already been decided by the House of Lords in *Robinson v. National Bank of Scotland*,<sup>83</sup> where no importance had been attached to the presence of a disclaimer in holding a banker not liable for a misleading reference. Lord Morris, too, was inclined to the same opinion,<sup>84</sup> though in the end he joined Lord Reid, Lord Devlin and Lord Pearce in holding that it was not necessary to decide the point since the defendants' liability was in any event excluded by the disclaimers of responsibility.<sup>85</sup> Lord Reid and Lord Devlin both held that an assumption of responsibility, such as was necessary in their view to found liability, could not be inferred in the face of an express disclaimer.<sup>86</sup> Lord Reid, Lord Devlin and Lord Pearce differed from Lord Hodson in thinking that *Robinson's Case* had not concluded the question of a banker's liability where there has been no disclaimer,<sup>87</sup> and they left the question open.

<sup>81</sup> *Supra*, at 472.

<sup>82</sup> [1964] A.C. 465, at 512-513.

<sup>83</sup> [1916] Sess. Cas. (H.L.) 154.

<sup>84</sup> [1964] A.C. 465, at 503-504.

<sup>85</sup> *Ibid.*, at 491-493, 504, 533, 539-540.

<sup>86</sup> *Ibid.*, at 492, 533.

<sup>87</sup> It is difficult to accept this interpretation of *Robinson's Case*. Lord Haldane ([1916] Sess. Cas. (H.L.) 154, at 157), though declaring, in the passage quoted earlier (*supra*, at 474) that a duty to be careful may arise in special relationships, held that there was no such special relationship "when a mere inquiry is made by one banker of another." None of the Law Lords made any reference to the disclaimer in holding that the bank was not liable for negligence. Nor is there any substance in Lord Devlin's suggestion in *Hedley Byrne*, ([1964] A.C. 465, at 532-533) that the reference in *Robinson's Case* was not furnished for the use of the pursuer. Though the bank did not know the identity of the pursuer, it was held that he fell within the class of those intended to be influenced by the reference: see the judgment of Earl Loreburn ([1916] Sess. Cas. (H.L.) 154, at 155), concurred in by the other members of the House.

The narrow point at issue in *Hedley Byrne* is not of great practical importance, since banks will no doubt continue their practice of disclaiming responsibility in answering inquiries. The arguments put forward by the Court of Appeal and Lord Hodson<sup>88</sup> against imposing a duty to do more than answer honestly are not wholly convincing. While it may be unreasonable, as they said, to expect a banker to expend time and trouble in searching records and studying documents in order to discover the true state of affairs, one may yet reasonably demand that he should take some care in expressing what he happens to know. The negligence of the defendants in *Hedley Byrne* was alleged to consist in misrepresenting the facts they actually knew, not in failing to make investigations about Easipower.

### The Effect of *Hedley Byrne* in the Law of Torts.

There are several reasons why it is difficult to forecast what the effect of *Hedley Byrne* is likely to be. In view of the fact that the defendants were held not liable, it is, in the first place, clearly open to a strong judge to characterise much of what was said in *Hedley Byrne* as obiter dicta. Much depends on whether the courts welcome the opportunity provided by the dicta in *Hedley Byrne* to depart from earlier authorities. It is not without significance that it has been held by two judges of first instance since *Hedley Byrne* that claims by clients against a solicitor and an architect for professional negligence are still to be regarded as causes of action in contract and not in tort.<sup>89</sup> While it is true that these two cases were concerned with ancillary matters such as the measure of damages<sup>90</sup> and the accrual of a cause of action for the purpose of limitation of actions,<sup>91</sup> they serve as a warning against exaggerating the effect that *Hedley Byrne* is likely to have on well-settled rules.

Forecasting the effect of the decision is also made difficult by the vagueness of the principles laid down and by the differences, already noted, in the principles enunciated by the various Law Lords. I have already remarked on the uncertainty of Lord Devlin's "equivalent to contract" formula.<sup>92</sup> There also seems to be a large element

<sup>88</sup> *Supra*, at 472, 479.

<sup>89</sup> *Clark v. Kirby-Smith*, [1964] 2 All E.R. 835 (Plowman J.); *Bagot v. Stevens Scanlan & Co.*, [1964] 2 Lloyd's List L.R. 353 (Diplock L.J., sitting as an addition Judge of the Queen's Bench Division).

<sup>90</sup> *Clark v. Kirby-Smith*, [1964] 2 All E.R. 835. Plowman J. referred to a line of cases "going back for nearly 150 years" as showing that the client's cause of action is in contract and not in tort, and he refused to accept the argument that *Hedley Byrne* had altered this rule.

<sup>91</sup> *Bagot v. Stevens Scanlan & Co.*, [1964] 2 Lloyd's List L.R. 353.

<sup>92</sup> *Supra*, at 477.

of fiction in founding liability, as Lord Reid and Lord Devlin did, on an assumption of responsibility by the defendant. Though people often undertake to do things for others, they rarely in fact undertake to be responsible for harm if something goes wrong. Lord Devlin seems to recognize this in conceding that the assumption of responsibility will usually be implied.<sup>93</sup> If this is so, what we really want to know is what will lead the courts to imply such an assumption.

If we examine the cases cited in *Hedley Byrne* as showing that an action will lie for the negligent performance of a gratuitous undertaking, we find that in the claims for purely pecuniary loss there was an actual undertaking by the defendant to do something for the plaintiff.<sup>94</sup> In the early history of liability for negligence in the exercise of a calling an *assumpsit* or undertaking had to be proved: without a prior undertaking no amount of negligence would make a defendant liable.<sup>95</sup> Though this requirement has long been abandoned in claims for physical harm, such as by a patient against a surgeon, there is some reason to believe that it is still necessary in claims for pecuniary loss. The importance of an undertaking is illustrated by two nineteenth century decisions of the House of Lords, on appeal from Scotland. In *Donaldson v. Haldane*<sup>96</sup> an attorney, who was the ordinary attorney for a borrower, also acted gratuitously for the lender in arranging a loan. Through the negligence of the attorney, the security turned out to be insufficient. It was held that the attorney was liable to the lender. In the second case, *Robertson v. Fleming*,<sup>97</sup> the defendant was employed by X to draw up an assignment of leaseholds to the plaintiff, who had agreed to guarantee a loan to X. The assignment turned out to be void as against creditors, so that the plaintiff lost his security. In holding that the defendant was not liable to the plaintiff, the House of Lords stressed that there was no intercourse between the parties and that the defendant did not undertake to act for both X and the plaintiff.

<sup>93</sup> [1964] A.C. 465, at 529.

<sup>94</sup> *Wilkinson v. Coverdale*, (1793) 1 Esp. 74, 170 E.R. 284; *Shiells v. Blackburne*, (1789) 1 H. Bl 158, at 162, 126 E.R. 94, at 96; *Banbury v. Bank of Montreal*, [1918] A.C. 626, 657; *Dartnall v. Howard*, (1825) 4 B. & C. 345, 107 E.R. 1088; *De la Bere v. Pearson Ltd.*, [1908] 1 K.B. 280.

<sup>95</sup> FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW*, (London, 1949) 156-157. FIFOOT points out that an *assumpsit* continued to be alleged, after the recognition of a general remedy for breach of a promise, to support an action for negligent conduct as an independent wrong, particularly in claims for professional negligence.

<sup>96</sup> (1840) 7 Cl. & F. 762, 7 E.R. 1258.

<sup>97</sup> (1861) 4 Macq. 167.

In *Whitehead v. Greetham*<sup>98</sup> it was held by the Court of Exchequer Chamber, in an action of assumpsit against the defendant for investing the plaintiff's money insecurely, that a verdict in favour of the plaintiff could not be set aside because the declaration did not allege that the defendant was to be paid for his services. The Court followed the reasoning of *Coggs v. Bernard*<sup>99</sup> in holding that the delivery of the money to the defendant was a sufficient consideration. As the judgment of Holt C.J. in *Coggs v. Bernard*<sup>1</sup> shows, "consideration" here means the justification for imposing liability for careless performance, not that which makes an executory promise enforceable. We should avoid the mistake of assuming that a gratuitous promise is destitute of legal effect in liability for negligence because it is unenforceable as a promise in the law of contract. In *Kitchen v. Royal Air Forces Association*,<sup>2</sup> where an action for negligence was brought against a firm of solicitors acting for the widow of an airman, it seems to have been assumed by the Court of Appeal that the defendants could not escape liability by showing that they were acting gratuitously for the plaintiff. It is difficult to imagine that the law could be otherwise. The cases holding that actions against solicitors, brokers and architects are to be classified as contractual for ancillary purposes, such as costs, limitation of actions, measure of damages etc., are not necessarily inconsistent with the rule suggested.<sup>3</sup> If a distinction has to be drawn between one class of action and another for the purpose, say, of limitation of actions, there is clearly much to be

<sup>98</sup> (1825) 2 Bing. 464, 130 E.R. 385.

<sup>99</sup> (1703) 2 Ld. Raym. 909, 92 E.R. 107.

<sup>1</sup> *Ibid.*, at 919: ". . . it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to careful management. Indeed if the agreement had been executory, to carry these brandies from one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing." See also Lord Kenyon in *Wilkinson v. Coverdale*, (1793) 1 Esp. 75, at 76, and Lord Finlay L.C. in *Banbury v. Bank of Montreal*, [1918] A.C. 626, at 657 ("The consideration really is the confidence reposed in the person who undertakes the duty.") Though Lord Finlay L.C. and Lord Shaw were in a minority in *Banbury's Case*, the difference of opinion was not on this point but on the scope of the manager's authority to advise on investments.

<sup>2</sup> [1958] 2 All E.R. 241.

<sup>3</sup> The cases are listed in a recent article by P. M. North, *The Basis of a Solicitor's Professional Liability*, (1964) 114 L.J. (N.S.), 835.



said for treating all claims against solicitors alike, irrespective of whether the defendant was to be paid for his services.<sup>4</sup> The judges have sometimes recognized that a classification for one purpose may not be good for another.<sup>5</sup>

It is not clear how far, if at all, the Law Lords in *Hedley Byrne* intended to go beyond these cases where an undertaking was held to impose a duty to be careful. Though Lord Reid and Lord Devlin purported to found liability on an assumption of responsibility rather than on an undertaking to do something for another, the principles they propounded would seem to confine liability to cases of direct dealing where the defendant undertook, or is reasonably supposed by the plaintiff to have undertaken, to do something for the plaintiff.

Though the principles formulated by the other three Law Lords do not confine liability to cases of direct dealing, their treatment of the cases suggests that this limitation can fairly be implied. Though they thought that the plaintiff should have succeeded in *Candler's Case*, where there was direct dealing between the parties, the opinion was expressed that, while the grounds on which *Le Lievre v. Gould* was decided were wrong, the actual decision against liability was probably correct on the facts.<sup>6</sup> In *Gould's Case* there was no direct dealing between the plaintiff and the defendant. Approval was also expressed of the decision of Salmon J. in *Woods v. Martins Bank Ltd.*,<sup>7</sup> where the bank was held liable for negligent advice on investment given by one of its managers to a potential customer. Here, as in *Candler's Case*, there was direct dealing between the parties.

Two decisions of the New York Court of Appeals, which were referred to in *Hedley Byrne* by some of the Law Lords, again illustrate,

<sup>4</sup> In England, in order to induce litigants to take advantage of the cheaper facilities of the County Courts, a successful plaintiff in the High Court may be penalised in the matter of costs if he recovers less than a prescribed sum. Until recently the minimum sum varied according as the action was "founded on tort" or "founded on contract." Most of the cases on the tort/contract classification of actions against professional men have been concerned with this matter of costs. It would clearly be rather ridiculous, for this purpose, to make anything turn on whether the defendant was acting gratuitously or for reward. Similar reasoning applies to limitation of actions, and other ancillary matters, such as measure of damages and service of writs out of the jurisdiction.

<sup>5</sup> *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399, at 403 (*per Greer L.J.*).

<sup>6</sup> [1964] A.C. 465, 507-508 (Lord Hodson), 535 (Lord Pearce).

<sup>7</sup> [1959] 1 Q.B. 55. Lord Hodson, in *Hedley Byrne*, [1964] A.C. 465, at 510-511, though approving of the decision of Salmon J., found it difficult to accept Salmon J.'s finding that there was a fiduciary relationship between the plaintiff and the bank, within the principle of *Nocton's Case*.

in their results if not in their reasoning, the importance of direct dealing. In the earlier case, *Glanzer v. Shepard*,<sup>8</sup> it was held, in a judgment written by Cardozo J., that a public weigher, employed by the seller of beans, was liable in negligence to a purchaser to whom he gave a certificate overstating their weight. In the later decision, *Ultramares Corporation v. Touche*,<sup>9</sup> the same Court, again through Cardozo J., held that the auditors of a company, who supplied the company with thirty-two copies of a report overstating the company's assets, were not liable in negligence to a person who advanced money to the company on the faith of it. The Court distinguished *Glanzer v. Shepard* on the ground that the weight slip there and the plaintiff's reliance on it were the very aim and end of the transaction, whereas in the *Ultramares Case* the auditors' service was for the benefit of the company and only incidentally and collaterally for the benefit of those to whom the company might show the report.<sup>10</sup> With respect, this explanation would seem to ignore the realities of business affairs, for, as Denning L.J. pointed out in *Candler's Case*,<sup>11</sup> the main purpose of certified accounts is often to influence third parties. A better explanation of the *Ultramares Case* is that there was no direct dealing between the parties. Lord Reid, in *Hedley Byrne*, distinguished the two New York cases on this ground.<sup>12</sup>

Lord Morris, one of the three Law Lords who expounded principles going beyond cases of direct dealing, was clearly influenced by the desire to formulate a principle which would vindicate the decision of Chitty J. in *Cann v. Willson*.<sup>13</sup> As we have seen, Lord Morris said that a duty of care will arise if a person allows his information or advice to be passed on to another person.<sup>14</sup> In *Cann v. Willson*, the defendants were valuers who were instructed to value certain land by solicitors acting for the owner. They were told to send the valuation to the solicitors, who were also acting for certain trustees proposing to advance money to the owner on the security of the land. The defendants were told the purpose of the valuation and their responsibility in the matter was impressed upon them by the solicitors. The owner defaulted in repaying the loan and the defendants' valuation turned out to be greatly exaggerated. Three different grounds for

<sup>8</sup> (1922) 233 N.Y. 236.

<sup>9</sup> (1931) 255 N.Y. 170; 174 N.E. 441.

<sup>10</sup> 174 N.E. 441, at 446.

<sup>11</sup> [1951] 2 K.B. 164, at 184.

<sup>12</sup> [1964] A.C. 465, at 487-488.

<sup>13</sup> (1888) 39 Ch. D. 39.

<sup>14</sup> [1964] A.C. 465, at 502-503.

holding the defendants liable for the trustees' loss were discussed in the judgment,<sup>15</sup> but Chitty J. expressed his preference for resting liability on negligence.<sup>16</sup> He held that the defendants, by sending their valuation directly to the agents of the trustees for the purpose of inducing them to act on it, had incurred a duty towards the trustees to take care in the preparation of their report.<sup>17</sup>

Lords Reid, Morris and Pearce,<sup>18</sup> in discussing *Cann v. Willson*, all said that the Court of Appeal in *Le Lievre v. Gould* was wrong in regarding *Cann v. Willson* as inconsistent with *Derry v. Peek*, and there can be little doubt that the decision of Chitty J. is now good law. But the decision does not carry liability beyond cases of direct dealing, if, like Lord Reid, we include cases where the parties deal through agents, as in *Hedley Byrne* itself. Lord Devlin did not discuss *Cann v. Willson*, but it is reasonably plain that he would have treated it as within the scope of his "equivalent to contract" principle. It may be, therefore, that when Lord Morris spoke of a duty arising where the defendant allows information to be passed on to the plaintiff, he had in mind only cases like *Cann v. Willson* and *Hedley Byrne* where the defendants deal directly with the plaintiff's agent.

Of the five members of the House, only Lord Pearce<sup>19</sup> clearly adopted the principle laid down by Denning L.J. in his dissenting judgment in *Candler's Case*, which I referred to earlier.<sup>20</sup> This goes further than even Lord Morris and Lord Hodson were prepared to go, since Denning L.J. thought that liability would extend to any person to whom the defendant knows a report is to be shown in order to induce him to act on it. But *Candler* was in fact a direct dealing case, and it may be that Denning L.J.'s qualification that liability exists only when the report has been prepared "for the guidance of the very person in the very transaction in question,"<sup>21</sup> will produce much the same results as a direct dealing limitation. He cited the *Ultramares Case*<sup>22</sup> and clearly thought that liability would not exist merely because it is foreseeable that people will rely on some report.

<sup>15</sup> *Viz.*, contract, fraud and negligence.

<sup>16</sup> (1888) 39 Ch. D. 39, at 44.

<sup>17</sup> *Ibid.*, at 42-43. It must be admitted that Chitty J. likened the defendant's certificate to the hair-wash in *George v. Skivington*, (1869) L.R. 5 Ex. 1, which would imply liability to any person who relies on a certificate. But this view is quite untenable, even after *Hedley Byrne*.

<sup>18</sup> [1964] A.C. 465, at 489 (Lord Reid), 499 (Lord Morris), 535 (Lord Pearce).

<sup>19</sup> *Ibid.*, at 538-539.

<sup>20</sup> *Supra*, at 470-471.

<sup>21</sup> [1951] 2 K.B. 164, at 183.

<sup>22</sup> (1931) 255 N.Y. 170, 174 N.E. 441. *Supra*, at 484.

If some limit, short of foreseeable reliance, is to be placed on liability for negligent information or advice, there is much to be said for confining liability to cases of direct dealing, where the plaintiff reasonably believes that the defendant has undertaken to do something for him. In such cases the plaintiff is induced by the defendant to place reliance on him and to forego measures for his protection that he would otherwise take.<sup>23</sup> This is well illustrated by *Wilkinson v. Coverdale*<sup>24</sup> where the vendor of property undertook to get a fire policy renewed for the purchaser. Lord Kenyon accepted the proposition that a voluntary undertaking, without consideration, would make the vendor liable for negligence in carrying out his undertaking, resulting in the purchaser being unable to recover under the policy.<sup>25</sup>

There are dicta in Lord Reid's judgment in *Hedley Byrne* which suggest that the information or advice must be given in response to an inquiry in order for there to be liability.<sup>26</sup> But it is difficult to believe that the absence of any antecedent inquiry will affect liability if the defendant in fact undertakes to do something for the plaintiff. There was no antecedent inquiry from the plaintiff in *Candler's Case* or in *Cann v. Willson*, and yet the House in *Hedley Byrne* thought that the claims should have succeeded.

As regards the incidence of the duty, Denning L.J. in *Candler's Case*, confined it to those whose profession it is "to examine books, accounts, and other things and to make reports on which other

<sup>23</sup> The importance of induced reliance as a factor in negligence liability is discussed *infra*, at 499-500.

<sup>24</sup> (1793), 1 Esp. 74, 170 E.R. 284.

<sup>25</sup> English and Australian courts would probably not follow the recent Tennessee decision in *Texas Tunnelling Co. v. City of Chattanooga*, (1962) 204 F. Supp. 821 (noted (1963-64) 62 MICH. L. REV. 145). The defendants were employed as consulting engineers to design a sewage system for a city and to prepare a report of geological conditions. The report was to be sent, as the defendants knew, to contractors submitting tenders for doing the work. One of the defendants' draftsmen carelessly omitted certain geological information from the report, with the result that it took the plaintiff, a sub-contractor of the successful tenderer, much longer to do certain work than was estimated on the basis of the defendants' report. The defendants were held liable for the plaintiff's loss. The court said: "A person who makes a material and negligent misrepresentation in the course of a business transaction is liable for injuries suffered because of justifiable reliance on the misrepresentation by any member of that class of persons whose reliance was reasonably foreseeable." English and Australian courts would probably still follow *Priestley v. Stone*, (1888) 4 Times L.R. 730, where it was held by the Court of Appeal that a builder could not recover from a surveyor who prepared misleading bills of quantities for an architect. *Priestley v. Stone* was not referred to in *Hedley Byrne*.

<sup>26</sup> [1964] A.C. 465, at 486.

people . . . rely in the ordinary course of business."<sup>27</sup> Lord Pearce, in *Hedley Byrne*, expressly adopted this principle,<sup>28</sup> and Lord Morris and Lord Hodson did substantially the same in limiting liability to people "possessed of a special skill."<sup>29</sup> Lord Reid, too, stressed the importance of the question whether the information or advice is given professionally or in a business connexion.<sup>30</sup> Lord Devlin, on the other hand, was not prepared to restrict liability by definition to such cases: he thought there might be exceptional situations where a person belonging to no profession or calling could be regarded as having assumed a responsibility.<sup>31</sup> But one can be reasonably sure that casual social inquiries will not lead to liability. Lord Pearce referred with approval<sup>32</sup> to *Fish v. Kelly*,<sup>33</sup> where a solicitor was held not liable in negligence for an erroneous reply about the effect of a document which he gave to the servant of one of his clients. And Lord Hodson rested his conclusion that the defendants in *Hedley Byrne* owed no duty to the plaintiffs, quite apart from the disclaimer, partly on the ground that it had been held in *Low v. Bouverie*<sup>34</sup> that a lay trustee answering inquiries from a stranger about the incumbrances on a trust interest was not liable for mere negligence in his replies. A banker giving a reference could not, he thought, be in a worse position than a trustee.<sup>35</sup> Seemingly, this immunity would not extend to a "professional" trustee, such as a trust corporation.

It would also seem that a defendant must have notice of the transactions which the plaintiff has in mind. This requirement was satisfied in *Hedley Byrne* because the defendants were told by the National Provincial that the inquiry concerned advertising contracts and certain figures were mentioned. In *Candler's Case* the plaintiff, some time after his original investment of £2,000, put a further £200

<sup>27</sup> [1951] 2 K.B. 164, at 179.

<sup>28</sup> [1964] A.C. 465, at 538.

<sup>29</sup> *Ibid.*, at 502, 514. Lord Morris (at 495), Lord Hodson (at 510), and Lord Pearce (at 537) cited a passage from *Shiells v. Blackburne*, (1789) 1 H. Bl. 158, at 163, where Lord Loughborough distinguished cases where the defendant's "situation or profession is such as to imply skill." In *Shiells v. Blackburne* the defendant undertook to enter a parcel for the plaintiff at the Customs House for exportation. Since it was not his profession to do this, Lord Loughborough held that he could not be liable for doing it wrongly (with the result that the parcel was seized) without fraud or gross negligence, which was not proved.

<sup>30</sup> *Ibid.*, at 483.

<sup>31</sup> *Ibid.*, at 531.

<sup>32</sup> [1964] A.C. 465, at 539.

<sup>33</sup> (1864) 17 C.B.N.S. 194.

<sup>34</sup> [1891] 3 Ch. 82.

<sup>35</sup> [1964] A.C. 465, at 514.

into the company. Denning L.J. thought that the defendants could not be liable for the loss of this additional sum, since in preparing their accounts and showing them to the plaintiff they knew only of the £2,000.<sup>86</sup> This limitation is consistent with liability being based on an undertaking, since a person generally undertakes to do something for another for some particular purpose.

In liability for deceit and in contractual remedies for innocent misrepresentation, a distinction is drawn between statements of fact and statements of law. Misrepresentations of law give rise to no remedy, at least at common law.<sup>87</sup> A further distinction is drawn between statements of fact and statements of opinion, and it is generally said that a false statement of opinion affords no ground for relief.<sup>88</sup> The relevance of these distinctions was not discussed in *Hedley Byrne*, but it is reasonably plain that they can have no application to liability in tort for negligence. The judgments speak of liability for giving "advice" and no objection was taken to the fact that the information provided by the defendants was an expression of opinion. It would be odd indeed if a solicitor sued for giving faulty advice could escape liability on the ground that his advice took the form of statements of law.

### **The Effect of *Hedley Byrne* in the Law of Contract.**

A remarkable feature of *Hedley Byrne* is the absence of any discussion of the effect of the decision where the plaintiff has been induced to enter into a contract with the defendant. It is noteworthy that Harman L.J. in the Court of Appeal thought it a fatal objection to the plaintiffs' claim, once they abandoned allegations of fraud, that innocent misrepresentation does not sound in damages in the law of contract.<sup>89</sup>

<sup>86</sup> [1951] 2 K.B. 164, at 183. It was on this ground that Denning L.J. disposed of the problem, posed by Asquith L.J. (at 194), of the marine hydrographer who carelessly omits a reef from a map. Denning L.J. said that he would not be liable for the loss of a ship on the reef because he "publishes his work simply for the purpose of giving information, and not with any particular transaction in mind at all." But what is the information given for, if not to make navigation safe? If a harbour authority issues a map of the harbour omitting a sunken wreck, the harbour authority would be liable for damage caused to a ship using the harbour: *Workington Dock & Harbour Board v. S. S. Towerfield (Owners)*, [1951] A.C. 112. The real explanation of the hydrographer's immunity is the absence of any sufficiently close relationship between him and the person who relies on his maps.

<sup>87</sup> TREITEL, *LAW OF CONTRACT*, (London, 1962) 213-216.

<sup>88</sup> TREITEL, *op. cit. supra* at 216-217.

<sup>89</sup> [1962] 1 Q.B. 396, at 415-416.

Lord Reid and Lord Devlin did not consider at all whether the principles they propounded could apply when the plaintiff is induced by a negligently false statement to enter into a contract with the defendant, though there is nothing in those principles which would obviously exclude such a case. Lord Morris, after citing Lord Moulton's well known dictum in *Heilbut, Symons & Co. v. Buckleton*<sup>40</sup> on the importance of maintaining in its full integrity the principle that "a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made,"<sup>41</sup> expressed the opinion that Lord Moulton's principle is "in no way impeached by recognition of the fact that if a duty exists there is a remedy for breach of it."<sup>42</sup> This was Lord Morris' only reference to the topic. Lord Pearce, with equal brevity, expressed substantially the same opinion.<sup>43</sup>

Lord Hodson's views on the question are more obscure. After referring to the point made by Harman L.J. in the Court of Appeal, he said that "it may in certain cases appear to be strange that whereas innocent misrepresentation does not sound in damages yet in the special cases under consideration an injured party may sue in tort *a third person* whose negligent misrepresentation has induced him to enter into the contract."<sup>44</sup> He then went on to say that "innocent misrepresentation is not the cause of action but evidence of the negligence which is the cause of action."<sup>45</sup> These passages might be taken to imply that an action for negligence will not lie against the other party to the contract, though it is not clear upon what principle one could discriminate between representations by a contracting party and misrepresentations by a third party.<sup>46</sup>

Even if Lord Hodson is to be interpreted as having been against any enlargement of contractual remedies, it is clear that the judgments of the other members of the House are consistent with an extension of the principles of *Hedley Byrne* to the field of contract.

Though one's first reaction is to doubt whether a "fundamental

<sup>40</sup> [1913] A.C. 30.

<sup>41</sup> *Ibid.*, at 51.

<sup>42</sup> [1964] A.C. 465, at 502.

<sup>43</sup> *Ibid.*, at 539.

<sup>44</sup> *Ibid.*, at 511. Italics supplied.

<sup>45</sup> *Ibid.*, following a dictum of Lord Wrenbury in *Banbury v. Bank of Montreal*, [1918] A.C. 625, at 713.

<sup>46</sup> It may be that Lord Hodson was thinking only of the situation where A induces B to contract with C, and that he did not mean to imply that there could not be liability for negligence where A induces B to enter into a contract with A himself.

proposition"<sup>47</sup> of the law of contract can be overturned by a side wind from the law of tort, it is in fact difficult to see how the principles formulated in *Hedley Byrne* can logically be excluded from contractual relations. The "fundamental proposition" in question is largely an accident of the former division between common law and equity. A person induced to enter into a contract by an innocent (*i.e.* non-fraudulent) misrepresentation ordinarily has the equitable right to rescind the contract.<sup>48</sup> This remedy is an expression of the understandable sentiment that a person should, where possible, restore what he has got from another person by misleading him, even though innocently. Few people would question the common justice of this sentiment. The equitable right to rescind for innocent misrepresentation supplies a deficiency in the common law when the representation is not a term of the contract. Its limitations as a remedy,<sup>49</sup> sometimes making it less valuable than the right to damages at common law, result from the distinctive character of equitable remedies and not from any general conviction that damages are inappropriate. The common law refused a remedy and equity did the best it could. It is no matter for congratulation that these crabbed distinctions are still recognized nearly a century after the Judicature Act. The argument for allowing an action for damages against a misrepresenter who induces the plaintiff to enter into a contract with him is stronger than where the defendant is a third party, since in the first case the defendant has got a benefit from his misrepresentation.<sup>50</sup>

Let us suppose that the seller of a car tells a prospective purchaser that it is a 1948 model. Subsequently, a written contract of sale is concluded, which contains no reference to the year of manufacture. The car is in fact a 1939 model, identical in design, and the purchaser later discovers this. In view of the written contract, it is doubtful whether the seller's statement is a term of the contract, and therefore, assuming no fraud, the buyer is left to his remedies for innocent misrepresentation.<sup>51</sup> If we accept the generally held view that the right to rescind for innocent misrepresentation does not extend to a contract for the sale of goods after property has passed or the goods have been accepted,<sup>52</sup> the buyer's only remedy will be

47 As Harman L.J. described it in the Court of Appeal: [1962] 1 Q.B. 396, at 415.

48 TREITEL, *LAW OF CONTRACT*, (London, 1962) 235-253.

49 TREITEL, *op. cit. supra* at 240-253.

50 It was suggested earlier that this factor weighed with the House of Lords in *Nocton's Case: supra*, at 473-474.

51 The problem is suggested by *Oscar Chess, Ltd. v. Williams*, [1957] 1 All E.R. 325.

52 TREITEL, *op. cit. supra* note 49, at 251-253.



in tort for breach of the seller's duty to be careful in describing the age of the car.

As we saw earlier,<sup>53</sup> the majority of the judges in *Hedley Byrne* followed Denning L.J. in *Candler's Case* in holding that there would be no liability for careless information or advice unless it is given by a person possessed of a special skill. If we apply this limitation to the field of contract, there would be no liability in the problem just considered unless the seller is a dealer in cars. Few people would quarrel with a differentiation here between dealers and others. It already exists in some of the terms implied under the Sale of Goods Act.<sup>54</sup> Indeed, the cases show that the courts are more ready to classify a statement as a term of the contract, rather than a mere representation, if it is made by a dealer.<sup>55</sup>

By a strange coincidence, the Law Reform Committee in England, in its 10th Report,<sup>56</sup> has recently recommended that a party to a contract, who induces the other party to enter into it by an untrue representation, should be liable in damages for any loss suffered by the other unless he proves that he believed the representation to be true and had reasonable grounds for his belief. This recommendation, if adopted, would go further than *Hedley Byrne* since nothing would turn on whether the representation is made in the way of business by a person with special skill. Putting the burden of proof on the representor would also tend to make liability stricter in practice. I am inclined to think that this recommendation would tilt the scale too much in favour of the representee. If the seller of the car, in my problem,<sup>57</sup> is a private person and the buyer is a dealer in cars, the risk of the car turning out to be a 1939 model should, I suggest, fall on the dealer, unless the year of manufacture is made a term of the contract.

*Hedley Byrne*, in providing a new, non-contractual basis for holding people liable for misleading others, offers a more satisfactory explanation of a number of cases that have in the past been fitted only with difficulty into the law of contract. In *De la Bere v. Pearson*,<sup>58</sup> for example, the defendants offered in their newspaper to give advice on investment to their readers. In response to the plaintiff's request for the name of a good stockbroker, they recommended an

<sup>53</sup> *Supra*, at 486-487.

<sup>54</sup> Section 14.

<sup>55</sup> TREITEL, *op. cit. supra*, 209.

<sup>56</sup> Cmd. 1782/1962.

<sup>57</sup> *Supra*, at 490.

<sup>58</sup> [1908] 1 K.B. 280.

“outside” broker who was an undischarged bankrupt and who embezzled the plaintiff’s money. The plaintiff sued in contract, and the Court of Appeal exercised much ingenuity in finding some consideration for the defendants’ undertaking to give advice. As Lord Devlin said in *Hedley Byrne*, the decision is better regarded as an instance of liability for negligence.<sup>59</sup> He agreed with Pollock’s view that “the cause of action is better regarded as arising from default in the performance of a voluntary undertaking independent of contract.”<sup>60</sup>

Another decision better explained as resting on negligence rather than contract is *McRae v. Commonwealth Disposals Commission*,<sup>61</sup> where the defendants purported to sell to the plaintiffs a wreck lying on a certain reef. The plaintiffs fitted out an expedition to salvage the ship before they discovered that the wreck did not exist and never had existed. The High Court of Australia held that the defendants had impliedly undertaken that there was a tanker on the reef and were therefore liable in damages for breach of contract. Though justice was done on the facts of the case, the objection to this explanation is that it implies that the plaintiffs would have been entitled to damages for loss of profit even if the true state of affairs had been discovered immediately after the contract was made, before they incurred any expense in fitting out an expedition. This is most improbable, and it would be better to found liability on the negligence of the defendants in misleading the plaintiffs. This was in fact one of the grounds on which the plaintiffs claimed damages. Having held that the contract was not void for mistake, the High Court did not have to consider the claim for negligence, though Dixon J. and Fullagar J. said that *Candler’s Case*, then just decided, would have been a formidable obstacle to recovery.<sup>62</sup> This obstacle has now disappeared. An interesting feature of the decision on mistake is that the Court said that even if the correct view is that a contract is ordinarily void where the parties are mistaken as to the existence of the subject matter, nevertheless “a party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party.”<sup>63</sup> This qualification would seem to introduce liability for

<sup>59</sup> [1964] A.C. 465, at 528.

<sup>60</sup> POLLOCK, *CONTRACTS*, (13th ed. London) 140.

<sup>61</sup> (1950-51) 84 Commonwealth L.R. 377.

<sup>62</sup> *Ibid.*, at 410.

<sup>63</sup> *Ibid.*, at 408. Compare the rule that a party cannot rely on the doctrine of frustration if he has been at fault in respect of the event in question: TREITEL, *LAW OF CONTRACT* (London, 1962), 564-566.

negligence by the back door, in the guise of contractual liability.

Yet another line of contract cases which would be better explained as resting on liability for negligence are those where the courts have in recent years discovered collateral contracts so as to be able to give effect to undertakings which threatened to fail through want of privity or consideration.<sup>64</sup> Indeed, one of these cases, *Andrews v. Hopkinson*,<sup>65</sup> has already shown that negligence may be an alternative ground of liability. The defendant in that case was a dealer in second-hand cars who assured the plaintiff, a prospective purchaser, that a certain car was a "good little bus" and that he would stake his life on it. The plaintiff then "bought" the car on hire purchase through a finance company. A few days later, the steering failed because of a defective draglink and the plaintiff was seriously injured. McNair J. held that the defendant was liable both for breach of warranty and for negligence. Since there was no contract of sale between the parties, the car having been sold to the finance company, McNair J. had to construct some other contract between the plaintiff and the defendant in order to enforce the warranty. He did this by holding that the plaintiff provided consideration for the warranty in causing the finance company to buy the car from the defendant. He also held that the defendant was liable in tort for negligence since the defect was easily discoverable by a competent mechanic. The contractual explanation is strained and the second ground of judgment is more acceptable.<sup>66</sup>

### Physical Harm and Pecuniary Loss.

I remarked at the beginning of this paper that purely economic interests have not as yet received much protection in the law of negligence. Though some judges have expressly recognized the importance of the distinction between liability for physical harm and liability for

<sup>64</sup> *Shanklin Pier v. Detel Products, Ltd.*, [1951] 2 K.B. 854; *Brown v. Sheen & Richmond Car Sales*, [1950] 1 All E.R. 1102; *Andrews v. Hopkinson*, [1957] 1 Q.B. 229.

<sup>65</sup> [1957] 1 Q.B. 229.

<sup>66</sup> Space does not permit of any discussion of the implications of *Hedley Byrne* for the doctrines of consideration and privity of contract. Suppose, for example, A undertakes gratuitously to get a policy of insurance assigned for the benefit of B, and B, relying on A, forgoes from taking any steps himself. *Wilkinson v. Coverdale*, (1793) 1 Esp. 75, approved in *Hedley Byrne*, shows that A is liable if he sets out to get the policy assigned, but does it negligently. But what if A negligently forgets to do anything about the assignment? Cf. *Smith v. Lascelles*, (1788) 2 T.R. 187; *Callender v. Oelrichs*, (1838) 5 Bing. N.C. 58. For a suggested principle, see Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, (1950-1951) 64 HARV. L. REV. 913.

pecuniary loss,<sup>67</sup> the relevance of the distinction is to be inferred more from what the courts have done than from articulated principles. There has been a tendency to deny liability in claims for pecuniary loss on the ground that the damage is too remote or was not in fact foreseeable.<sup>68</sup> Indeed, some judges have disputed the validity of any general distinction between physical harm and financial loss.<sup>69</sup>

If we have regard to what the courts do, however, there can be no doubt about the importance of the distinction. This is so whether the plaintiff's pecuniary loss follows upon physical harm to someone else or is suffered directly. As regards loss suffered in the first way, the general rule without doubt is that a person has no remedy for the pecuniary loss he suffers as the result of physical injuries negligently inflicted by the defendant on another person.<sup>70</sup> A wife has no remedy for the loss she suffers through injuries done to her husband,<sup>71</sup> a partner has no remedy for the loss resulting from injuries inflicted on his fellow partner.<sup>72</sup> Similarly, an insurer has no claim, except by subrogation, against a person who damages the property insured.<sup>73</sup> It has been held that a tug owner has no remedy against a person who deprived him of the profits of a lucrative towing contract by negligently sinking the ship he is towing.<sup>74</sup> As Devlin J. said in one of these cases, "the law must necessarily limit the scope within which it can allow recovery."<sup>75</sup> Though it has sometimes been said that the loss in question was unforeseeable, it is quite clear that the denial of liability

<sup>67</sup> *Old Gate Estates Ltd. v. Toplis*, [1939] 3 All E.R. 209, at 217 (Wrottesley J.); *Revesz v. The Commonwealth*, (1951) 51 State R (N.S.W.) 63, at 70 (Maxwell J), 72 (Owen J); *Sinclair v. Clearly*, (1946) Queensland S.R. 74, at 78 (Macrossan C.J.); *Humphrey v. Bowers*, (1929) 45 Times L.R. 297, at 298-9 (Rowlatt J); *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164, at 189 (Asquith L.J.); *Clayton v. Woodman & Son Ltd.*, [1961] 3 All E.R. 249, at 256 (Salmon J.).

<sup>68</sup> For example, *Cattle v. Stockton Waterworks Co.*, (1875) L.R. 10 Q.B. 454; *Société Anonyme de Remorquage à Hélice v. Bennetts*, [1911] 1 K.B. 243.

<sup>69</sup> *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164, at 179 (Denning L.J.).

<sup>70</sup> *The Commonwealth v. Quince*, (1943-1944) 68 Commonwealth L.R. 227, at 240-241; *Best v. Samuel Fox & Co. Ltd.*, [1952] A.C. 716, at 731; *Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd.*, [1955] A.C. 457, at 484; *Anglo-Algerian S. S. Co. v. Houlder Line*, [1908] 1 K.B. 659; *The Notting Hill*, (1884) 9 P.D. 105; *Burgess v. Florence Nightingale Hospital for Gentlewomen*, [1955] 1 Q.B. 349; *Société Anonyme etc. v. Bennetts*, [1911] 1 K.B. 243; *Simpson v. Thomson*, (1877) 3 App. Cas. 279, at 289.

<sup>71</sup> *Best v. Samuel Fox & Co. Ltd.*, [1952] A.C. 716.

<sup>72</sup> *Burgess v. Florence Nightingale Hospital for Gentlewomen*, [1955] 1 Q.B. 349.

<sup>73</sup> *Simpson v. Thomson*, (1877) 3 App. Cas. 279.

<sup>74</sup> *Société Anonyme etc. v. Bennetts* [1911] 1 K.B. 243.

<sup>75</sup> *Burgess v. Florence Nightingale Hospital for Gentlewomen*, [1955] 1 Q.B. 349, 355.

is based on general considerations of policy. If I burn down a factory by negligence, it is clearly foreseeable that the workmen employed there will suffer pecuniary loss and yet it has never been suggested that I am liable for the loss of wages. The only exceptions to the rule we are considering are the old actions for loss of services and consortium, which derive from notions of proprietary right in servants, wives and children, and the statutory remedy under the Fatal Accidents Act.

Where the pecuniary loss is suffered directly, we again find stringent limitations on liability. The commonest way of causing loss is by misleading the plaintiff with faulty information or advice. The limited scope of liability for negligence in such a case has been considered already. But it is wrong to suppose that these limitations are peculiar to negligence which takes the form of information or advice. Loss can be caused by negligence which takes other forms. A solicitor who negligently fails to get a will executed properly undoubtedly causes financial loss to the disappointed beneficiaries, but there is no question of misrepresentation. If he escapes liability to the beneficiaries, it is not because of some limitation peculiar to representations, but because of some more general bias against protecting interests of this sort.

The need to preserve some sort of balance between the fault and the burden of liability has clearly influenced the courts in restricting liability for pecuniary loss. There is a speculative element in commerce and investment, which makes one disinclined to allow investors and business men to shift their losses too easily on to the shoulders of others. I suspect that if the defendants' accounts in *Candler's Case* had grossly *undervalued* the assets of the company, so that the plaintiff paid less than the real value for the shares he got, he would have felt no urgent obligation to supplement the deficiency. The windfall would have been regarded as a legitimate reward of speculative investment. Whatever the reasons for the restrictions on liability, broadly similar restrictions are found in other legal systems.<sup>76</sup>

I have referred to this distinction between physical harm and pecuniary loss, because, although its importance was recognized by Lord Pearce in *Hedley Byrne*,<sup>77</sup> Lord Hodson and Lord Devlin, doubted its validity.<sup>78</sup> Lord Devlin said he could find neither logic nor commonsense in it. "If irrespective of contract, a doctor negligently

<sup>76</sup> RYAN, INTRODUCTION TO THE CIVIL LAW, (Sydney, 1962) 110-112; LAWSON, NEGLIGENCE IN THE CIVIL LAW, (Oxford, 1950) 29-36.

<sup>77</sup> [1964] A.C. 465, at 536.

<sup>78</sup> *Ibid.*, at 509, 516-517.

advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him 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. I am bound to say, my lords, that I think this to be nonsense."<sup>79</sup>

It will be noticed that the illustration chosen by Lord Devlin to ridicule the distinction is one where the defendant has undertaken to do something for the plaintiff. As we saw earlier,<sup>80</sup> there is considerable authority for the view that a defendant may be liable for pecuniary loss if he undertook to do something for the plaintiff, even though without consideration in the contractual sense. Though the undertaking is not enforceable as a promise, it is not without effect in the law of negligence. Indeed, one might describe the relationship, as Lord Devlin did himself, as "equivalent to contract." But this does not entail that the distinction between pecuniary loss and physical has no general validity in the ordinary negligence situation, where there is no such relationship between the plaintiff and the defendant. The restrictions on liability described above are too well settled to be swept away by general reasoning such as Lord Devlin's.

It is curious that though Lord Hodson and Lord Devlin doubted the validity of the distinction, they agreed with the other members of the House that liability for careless information or advice is subject to special limitations, and that it is not legitimate to try to solve the question of liability by reference to the principle of *Donoghue v. Stevenson*.<sup>81</sup>

<sup>79</sup> *Ibid.*, at 517. This passage shows little sympathy for the doctrine of consideration. The doctor makes his living from accepting "half a guinea for his trouble" and some may think that this may properly affect the scope of his liability. Lord Devlin did not refer to *Pimm v. Roper*, (1862) 2 F. & F. 783, where Bramewell B. held that a railway doctor, who told a passenger that the injuries he had suffered in a collision were only slight, was not liable for the loss suffered by the passenger in accepting too low a figure in settlement of his claim.

<sup>80</sup> *Supra*, at 481-486.

<sup>81</sup> "In my opinion, the appellants in their argument tried to press *Donoghue v. Stevenson* too hard . . . they take the specific proposition laid down by *Donoghue v. Stevenson* and try to apply it literally to a certificate for a banker's reference. That will not do, for a general conception cannot be applied to pieces of paper in the same way as to articles of commerce or to writers in the same way as to manufacturers": [1964] A.C. 465, at 525 (Lord Devlin).

Lord Hodson and Lord Devlin seem to have attached exaggerated importance to the decision of the House of Lords in *Morrison S.S. Co. Ltd. v. Greystoke Castle*.<sup>82</sup> In the *Morrison Case* the owners of the cargo on a ship damaged in a collision were obliged, under the terms of the bills of lading, to make general average contributions to the port of refuge expenses incurred by the ship. Having paid these contributions, the cargo owners sought to recover a proportion of this expenditure from the owners of the other ship, which was partly to blame for the collision. It was held by a majority of the House<sup>83</sup> that the cargo owners were entitled to succeed.

The decision does at first sight seem to conflict with the general rule described earlier, according to which one person cannot recover the pecuniary loss he suffers through physical harm done to another. But the conflict is apparent rather than real. The cargo owners' general average contribution reduced *pro tanto* the damages which the owners of the carrying ship could recover for the damage done to it. The effect of allowing the cargo owners a right of action against the other ship was not to add to the ordinary burden of collision damages falling on the defendants.<sup>84</sup> This is a far cry from recognizing a general right of recovery for pecuniary loss, such as would enable workmen to recover loss of wages in my example of a factory being burnt down. Though there are dicta in the judgment of Lord Roche which question the general validity of the distinction between physical harm and pecuniary loss,<sup>85</sup> the other two members of the majority

<sup>82</sup> [1947] A.C. 265.

<sup>83</sup> Lord Roche, Lord Porter and Lord Uthwatt; Viscount Simon and Lord Simonds dissenting.

<sup>84</sup> In *Aktieselskabet v. The Sucaseco*, (1935) 294 U.S. 394, the United States Supreme Court allowed cargo owners to recover in similar circumstances. Similarly, in *Cue v. Breeland*, (1901) 78 Miss. 864, the plaintiff, who had contracted with a township to keep a bridge in repair, recovered from the defendant who negligently damaged the bridge. Both decisions, like the *Morrison Case*, give effect to rights of subrogation.

<sup>85</sup> ". . . if two lorries A and B are meeting one another on the road, I cannot bring myself to doubt that the driver of lorry A owes a duty both to the owner of lorry B and to the owner of the goods then carried in lorry B . . . if lorry A is negligently driven and damages lorry B so severely that whilst no damage is done to the goods in it the goods have to be unloaded for the repair of the lorry and then reloaded and carried forward in some other way and the consequent expense is by reason of his contract or otherwise the expense of the goods owner, then in my judgment the goods owner has a direct cause of action to recover such expense": [1947] A.C. 265, at 280. Cf. *The Notting Hill*, (1884) 9 P.D. 105, where it was held that a cargo owner in B's ship, damaged by the negligence of A, could not recover from A the pecuniary loss caused by the consequent delay in the arrival of the cargo. It was held that the damage was too remote.

based the defendants' liability largely on the peculiar community of interest between ship and cargo owners which is found in the law of the sea.<sup>86</sup>

My conclusion therefore is that *Hedley Byrne* does not affect the general validity of the distinction between claims for physical harm and claims for pecuniary loss. The decision merely extends, by dicta at least, an existing principle of liability for the negligent performance of an undertaking to the situation where the service takes the form of information or advice.

### Liability for Physical Harm.

In arguing for the importance of the nature of the harm suffered, I do not wish to imply that there are not special problems in dealing with claims for physical harm caused through relying on misleading information.

There are, it is true, many cases in the reports where no notice has been taken of the element of misrepresentation in a case and the claim has been dealt with on ordinary principles of negligence.<sup>87</sup> Two Australian cases illustrate this. In *Mountney v. Smith*,<sup>88</sup> a barmaid employed by the defendant misled a customer as to the whereabouts of the lavatory in such a way that he fell down an unguarded lift well in the dark. The High Court, in holding the defendant liable as occupier of the premises for breach of duty to an invitee, did not advert to the factor of misrepresentation in the case. In *Barnes v. The Commonwealth*,<sup>89</sup> the declaration, to which the defendant demurred, alleged that a public officer administering the old age pension scheme negligently sent a letter to the plaintiff, who was the wife of an old age pensioner, falsely stating that he had been admitted to a mental asylum, thereby causing the plaintiff shock and illness. The Supreme Court of New South Wales ruled that the declaration disclosed a cause of action, again without any importance being attached to the element of misrepresentation.

It is also true, as it has often been pointed out,<sup>90</sup> that a high proportion of negligence cases could be regarded as involving liability

<sup>86</sup> [1947] A.C. 265, at 297, 311.

<sup>87</sup> *Kubach v. Hollands*, [1937] 3 All E.R. 907; *Sharp v. Avery*, [1938] 4 All E.R. 85; *Watson v. Buckley*, [1940] 1 All E.R. 174; *Andrews v. Hopkinson*, [1957] 1 Q.B. 229; *Cunnington v. G. N. Ry.* (1883) 49 L.T. 392; *The Pass of Ballater*, [1942] P. 112.

<sup>88</sup> (1904) 1 Commonwealth L.R. 146.

<sup>89</sup> (1937) 37 State R. (N.S.W.) 511.



for negligent misrepresentations. The manufacturer, repairer and occupier impliedly represent that something is safe for use.

But it would be rash to conclude from this that there are in fact no special limitations on liability for physical harm caused by negligent misrepresentations. If the customer's inquiry about the whereabouts of the lavatory, in *Mountney v. Smith*, had been answered by a fellow customer, in the absence of the barmaid, it is reasonably plain that he would not have been liable for misleading directions, even though it can be shown that he knew the proper route better than the barmaid.

If we reflect on the reasons for this, we realise that it was the relationship of occupier and visitor, in *Mountney v. Smith*, which imposed on the barmaid a duty to be careful in expressing herself, and it is the absence of any special relationship between the two customers in my own example which makes us reluctant to hold one liable to the other for expressing himself carelessly.

The factors which give rise to a duty of care in speech to avoid physical injury to others are probably the same as those which give rise to liability for omissions. In both cases we have to find something to justify an exceptional liability. As regards omissions, there is of course no general duty to take active steps to avoid injury to others. If I came across a boulder in a dangerous position in the roadway, I am under no obligation to remove it or to give warning to other motorists, no matter how easy it would be to do so. This is not the place to investigate the scope of liability for omissions, but the cases show that there are certain factors which tend to give rise to liability. The more important of these factors are (1) that the defendant derives a benefit, directly or indirectly, from the plaintiff; (2) the occupation or possession of property by the defendant; (3) that the defendant induced the plaintiff to rely for his safety on some step to be taken by the defendant.<sup>91</sup> An occupier of premises is under a positive duty to take care that the premises are not dangerous to others, and the importance of the factor of benefit is shown by the different duties owed to invitees and licensees.

The effect of inducing the plaintiff to rely on the defendant for his safety is illustrated by *Mercer v. S.E. & Chatham Ry. Co.*<sup>92</sup> The defendant railway company made a practice of keeping the wicket gate at a level crossing locked when trains were passing, though it

<sup>90</sup> FLEMING, LAW OF TORTS, (2nd ed. Sydney, 1961) 175-176.

<sup>91</sup> *Ibid.*, 148-157.

<sup>92</sup> [1922] 2 K.B. 549.

was under no original obligation to do so. The plaintiff, who knew of this practice, started to cross the line on finding the gate unlocked and was run down by a train. The company was held liable for negligence on the ground that the plaintiff had been induced to expect no danger if he found the gate unlocked. Lush J. spoke of the defendants' duty as being "self-imposed."

In *Mercer's Case*, the unlocked gate constituted a representation to the plaintiff that it was safe to cross the line. A passenger in a car is not ordinarily under any duty to warn the driver of dangers or obstacles, but it is not difficult to imagine situations where, say, in backing a vehicle, the passenger induces the driver to rely on him for the safety of some manoeuvre and where some mishap occurs through faulty information from the passenger, such as an injunction to swing left instead of right. The reasoning of *Mercer's Case* suggests that the passenger, in such a situation, might be held liable.

Professor Morison pointed out some years ago<sup>98</sup> that a claim for physical harm seems to stand a better chance of success if the element of misrepresentation in it is not remarked upon. Three recent cases on the liability of architects bear witness to this. In *Clayton v. Woodman & Sons Ltd.*,<sup>94</sup> a building specification provided for joining an existing tower to a new wall by cutting a chase in the wall of the tower. The plaintiff, an experienced bricklayer, concerned about the safety of the tower and the difficulty of incorporating the new wall, suggested to the architect acting under the contract that it would be better to take down the tower and build a new wall. The architect declined to vary the specification and said that the work must proceed. When the chase was cut, the tower collapsed and the plaintiff was injured. McNair J. treated the plaintiff's claim against the architects for negligence as involving the scope of liability for careless statements, and he gave two grounds for holding the defendants liable. The first was that the architect went beyond a mere representation in ordering the plaintiff to abide by the specification; the second was that *Candler's Case* did not exclude claims for physical harm, as opposed to pecuniary loss. The Court of Appeal reversed his judgment on the ground that the architect was not in fact negligent, and so it was not necessary to review the grounds of McNair J.'s judgment.<sup>95</sup> But some

<sup>98</sup> In *Liability in Negligence for False Statements*, (1951) 67 L.Q. REV. 212, at 220.

<sup>94</sup> [1962] 2 Q.B. 533.

<sup>95</sup> [1962] 2 All E.R. 33. One of the difficulties, as Pearson L.J. pointed out, is that a duty to have regard for a workman's safety may conflict with the architect's duty to his client.

doubts were expressed as to whether the architect owed any duty of care to the plaintiff in deciding to adhere to the specification.

In *Clay v. A. J. Crump & Sons Ltd.*<sup>96</sup> and *Voli v. Inglewood Shire Council*,<sup>97</sup> on the other hand, claims against architects were dealt with by the English Court of Appeal and the High Court of Australia as ordinary actions for negligence, not involving any distinct problem of careless advice, though in both cases the negligence alleged took this form. It is not necessary to go into the facts of these cases, but merely to note that the architects were in both cases held liable.

It is better to keep the language of misrepresentation out of claims for physical harm, even if we accept that liability is limited. The weakness of the approach in *Clayton v. Woodman & Sons Ltd.* is that it suggests that different principles may apply according as the person misled is or is not the person injured. But if an architect is negligent in telling a bricklayer to cut a chase in a tower, it can hardly make any difference whether the person injured when the tower collapses is the bricklayer himself (*i.e.* the misrepresentee) or some other workman nearby who knows nothing of what has passed between the architect and the bricklayer.

### Conclusions.

It may be that *Hedley Byrne*, like *The Wagon Mound*,<sup>98</sup> will turn out to have little effect on the practical operation of the law of negligence, despite its appearance of dissent from earlier cases. Some may think that the judgments illustrate the practical wisdom of denying authority to judicial statements of law which are in fact not acted upon by those who propound them. Understandably, it has been debated whether the decision has affected the immunity of the Bar for professional negligence, which has generally been founded on the absence of any contractual right to sue for fees.<sup>99</sup> It is perhaps fortunate for the Law Lords in *Hedley Byrne* that liability for carelessness in speech is not likely to extend to the oracles of the law themselves.

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<sup>96</sup> [1963] 3 All E.R. 687.

<sup>97</sup> [1963] Argus L.R. 657.

<sup>98</sup> [1961] A.C. 388. Compare *Hughes v. Lord Advocate*, [1963] A.C. 837; *Smith v. Leech, Brain & Co. Ltd.*, [1962] 2 Q.B. 405; *Chapman v. Hearse*, (1961) 106 Commonwealth L.R. 112.

<sup>99</sup> *Lingard, Negligence and the Bar*, (1964) 114 L.J. 202.

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