Judgment 30, 1970

IN THE PRIVY COUNCIL

No. 36 of 1969

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA



BETWEEN:

A THE MUTUAL LIFE & CITIZENS' ASSURANCE COMPANY LIMITED and THE M.L.C LIMITED

Appellants (Defendants)

- and -

B CLIVE RALEIGH EVATT

Respondent (Plaintiff)

CASE FOR THE APPELLANTS

The question raised by this appeal is whether the facts stated in any count of the Plaintiff's declaration are sufficient to disclose a C cause of action known to the common law. The Plaintiff alleges that acting upon gratuitous information and advice given to him at his request by one of the Defendants, or by both of them, concerning the financial stability of a Company called H.G. Palmer (Consolidated) Limited he allowed money which he had lent to that Company to D remain with it and advanced further moneys to that Company with the result that he suffered financial loss. He claims that the Defendants were negligent in giving that information and advice. The Plaintiff does not allege that there was any relevant contractual relationship or any fiduciary relationship between him and either

Defendant nor has he alleged that either Defendant gave him dishonest information or advice.

The Appellants propose to make their submissions in relation to the alleged cause of action contained in the first count of the declaration in the Plaintiff's action against both Appellants (No. 9725 of 1967) and to add shortly some further submissions with respect to the second and third counts in the same action.

HISTORY

First Action (No. 4670 of 1966)

In 1966 the Respondent sued the Mutual Life and Citizens' Assurance Company Limited (an appellant) in the Supreme Court of New South Wales for damages. His declaration contained one count. It alleged (in brief) that the Defendant was negligent in giving gratuitous information and advice to the Plaintiff concerning the financial stability of H. G. Palmer (Consolidated) Limited upon which the Plaintiff relied and acted thereby suffering financial loss. The Defendant filed a demurrer alleging that the declaration disclosed no cause of action known to the law. Argument on the demurrer was heard by the Court of Appeal Division of the Supreme Court (Wallace P., Walsh and Asprey JJ.A.) on June 5th, 6th and 7th, 1967. During the hearing of demurrer the declaration was by consent amended. The count and the amendment are set out in the judgment of Asprey J.A.. The demurrer was dismissed with costs, (Asprey J.A. dissenting) see 86 W.N., N.S.W., Pt. 2, p.183. The Defendant was granted special leave to appeal by the High Court of Australia on the 18th August, 1967.

p.30 l.13 p.31 l.37

pp.12-45

pp.12-45

Second Action (No. 9725 of 1967)

In 1967, before the appeal in the first action came on for hearing in the High Court, the Respondent instituted a second action in the Supreme Court for damages against the same Defendant and The
A M.L.C. Limited as second Defendant (also an appellant). His declaration contained three counts, one against the first Defendant, another against the second Defendant and a third against both Defendants jointly. pp. 1-4

The Defendants filed demurrers to each count and in addition
B pleaded the provisions of Section 10 of the Usury Bills of Lading and Written Memoranda Act, 1902 (New South Wales), which are the same as the provisions of Section 8 of the Statute of Frauds Amendment Act, 1828 (United Kingdom) (Lord Tenderden's Act). To these pleas the Plaintiff demurred.

C Argument on the demurrers was heard by the Court of Appeal (New South Wales) on December 18th, 1967, constituted as formerly. The demurrers to the declarations were dismissed with costs (Asprey J.A. dissenting) and the demurrers to the pleas were allowed with costs - 87 W.N. (N.S.W.) Pt. 2, p.165. pp. 7-12

D On 12th March, 1968 the High Court gave special leave to appeal from those orders. pp. 46-47

Before the hearing of the appeals it was agreed between the Plaintiff and the Defendants that if the appeal in the second action should be allowed, the appeal in the first action should also be
E allowed, and that if the appeal in the second action should be dismissed the Plaintiff would discontinue the first action. Conse-

quently the record before the High Court of Australia comprised only the pleadings in the second action and the reasons for judgment on the demurrers thereto, which reasons themselves referred to the reasons for judgment on the demurrer in the first action.

The appeal was heard by the High Court on the 1st, 2nd, 3rd and 4th April, 1968. On 11th November, 1968 judgment was delivered. The appeal relating to the Defendant's demurrers was, by majority, dismissed (Barwick C.J. Kitto and Menzies JJ; Taylor and Owen JJ. dissenting) and the appeal relating to the Plaintiff's demurrers was dismissed, (Barwick C.J. and Menzies J. so deciding; Kitto, Taylor and Owen JJ. giving no decision).

On 15th July, 1969, upon certain undertakings as to costs, namely that in the event of the appeal being allowed the Appellants would not ask for costs and would not seek an order disturbing any orders for costs made against them in the Supreme Court of New South Wales or in the High Court of Australia, by an Order in Council special leave to appeal from the orders and judgment of the High Court was granted in so far as that Court had held that the Appellants' demurrers to the Plaintiff's declaration in the second action had been properly overruled. The Appellants in their petition to the Judicial Committee for special leave did not seek leave to appeal against the order allowing the Plaintiff's demurrer to their pleas. The first action has now been discontinued by the Plaintiff.

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If the judgment of the High Court stands then the Respondent

as Plaintiff in the action upon proof of the facts alleged in the counts could not be non-suited, and the Appellants as Defendants would not be entitled to a verdict by direction. The question therefore is whether, assuming only the facts alleged will be proved, a good
A cause of action will be before the jury. As Mr. Justice Kitto said in this case: "We are here concerned with a declaration under the common law system of pleading still in force in New South Sales. The pleader was not at liberty to content himself with an allegation that the Defendant owed the Plaintiff a duty of care. His task was
B to allege facts from which, if proved at the trial, the law will deduce the duty." P.81 ll.41-48

THE DECLARATION - FIRST COUNT

The facts expressly alleged in the first count against The Mutual Life & Citizens' Assurance Company Limited are:-

C (a) The Plaintiff was a policy-holder in the Defendant Company (called "the company");

(b) The Plaintiff was seeking from the company information and advice concerning the financial stability of H. G. Palmer (Consolidated) Limited (called "Palmer") as to the safety
D of investments in that company;

(c) The company and Palmer were subsidiary companies of the Defendant The M.L.C. Limited;

(d) By virtue of that association the company, as the Plaintiff well knew, had "special facilities for obtaining
E full complete and up-to-date information concerning the financial affairs" of Palmer;

(e) The company was "in a position" to give the Plaintiff reliable and up-to-date advice concerning the financial stability of Palmer;

(f) The company "accepted the responsibility of supplying" the Plaintiff with the said information and advice with the knowledge that the Plaintiff intended to act thereon in making a decision whether to retain investments already existing in Palmer and whether to invest further therein;

(g) The Plaintiff acted upon such information and advice and retained his investments in Palmer and invested further funds in that company; and

(h) The company negligently gave that information and advice to the Plaintiff whereby the Plaintiff lost the value and advantage of his investments.

In the High Court counsel for the Respondent was asked to state what facts were intended to be conveyed by certain phrases in three of the allegations, namely, in (d), that the Company had "special facilities for obtaining full, complete and up-to-date information concerning the financial affairs" of Palmer, in (e), that the Company was "in a position" to give information concerning Palmer's financial stability; and in (f), that the Company "accepted the responsibility of supplying" information and advice.

Counsel informed the Court that :

p.103 ll.23-27 by the allegation in (d) it was intended to allege that the Company was in a better position than the Respondent to

obtain such information;

by the allegation in (e) it was intended to allege that the Company "had in their employ officers who were capable of forming a reliable judgment upon information obtained concerning Palmer's financial affairs"; p.126 ll.47-50

and by the allegation in (f) it was intended to allege that the Defendants "supplied the information and advice without disclaimer of responsibility". p.51,l.40 -p.52,l.10

It is submitted that the facts as pleaded and explained are insufficient to enable a Court to hold that a cause of action had been pleaded, namely, that the Appellant was under a duty of care towards the Respondent and was in breach of that duty. The ultimate questions to be answered are, adapting the words of Kitto J., whether the facts pleaded supported conclusions of law that :

(1) it was reasonable for the Plaintiff to understand and accept the statement made by the Defendant as intended to relieve the Plaintiff, so far as an exercise by the Defendant of reasonable care and skill in enquiry (as to facts) or judgment (as to opinions) would do it, from having to bear any loss that a decision to act in reliance upon the statement may bring about; and p.78, ll.1-9

(2) the Defendant was engaged in a communication on a business level, intending to stand behind what he said or wrote with the same accountability for the consequences of any lack of care or skill in checking

p. 78, ll. 19-25

facts or forming judgments as if he were being paid.

It is submitted that the facts pleaded fall far short of enabling the Court to say the Plaintiff and the Defendants were in a relationship of such a character. The facts alleged are not sufficient to enable the Court to determine whether or not it was reasonable for the Plaintiff so to accept the statement of the Defendant or that the occasion was recognised by the Defendant as such a business occasion. It is not sufficient to allege that the Plaintiff regarded it as such, for that does not mean that the Defendant regarded itself as giving information or advising as a matter of business or that it should have recognised the occasion as a business occasion importing in the circumstances responsibility in law for lack of care.

To enable a Court to answer these ultimate questions it is essential that it should have before it at least some of the following facts, and perhaps all of them, in order to determine as a matter of law in this case, whether a duty of care did exist in giving information and advice :-

A. (i) that the Company was in the business of giving, or held itself out as competent to give, information or advice with respect to investments either to the public or to its policy holders concerning investments generally, or with respect to the financial stability of Palmer;

(ii) that the Plaintiff sought information and advice from the Company because of the Company's knowledge, ability or skill in the field of inquiry or because it professed to have such knowledge ability or skill;

A. (iii) that the Company, except in so far as the words "was in a position" imply, had special ability or skill in assessing information concerning the financial affairs of Palmer or in giving advice as to the safety of investments in that

A Company;

B. (i) that the Company at the time when it gave the information and advice (i) had a right of access to "full complete and up-to-date information" concerning the financial affairs of Palmer and undertook to exercise that right or (ii) was in

B fact in possession of such information;

(ii) that the Company knew that the Plaintiff believed that by reason of its association with Palmer it had special facilities for obtaining full complete and up-to-date information as to Palmer's financial affairs;

C C. that the Company knew that it was being trusted by the Plaintiff to be accurate in giving the information and careful in giving the advice sought;

D. that it was reasonable for the Plaintiff to act upon the information and advice so given;

D E. that the information given was incorrect or that the advice given was unsound;

F. specific acts or omissions of the Company constituting its breach of any duty of care to the Plaintiff.

The Appellants submit that in the absence of allegations

E A(i), (ii) and (iii) above no cause of action is disclosed by the declaration.

Further, that in the absence of allegations B(i) and (ii) above no cause of action is disclosed even though the absence of allegations A(i), (ii) and (iii) be not fatal.

Further, that in the absence of allegations C, D, E and F above the declaration is demurrable. A

DECISION OF THE HIGH COURT

From the facts expressly alleged, Barwick C.J. found

p. 73, ll. 4-11 implicit the following facts:- (1) that the Company had at its hand the requisite information; (2) that the Company knew that the

p. 73, ll. 11-14 Plaintiff intended to act upon the information and advice it would B

p. 51 ll. 24-35 receive; and (3) that the information and advice given by the Company to the Plaintiff was incorrect and that its incorrectness was due to want of care.

From the facts expressly alleged his Honour drew the following inferences of fact :- C

(a) that the Company knew it was being trusted by the Plaintiff - an inference reached "not without some

p. 73, ll. 28-37 lingering doubt but on the whole with sufficient firmness".

(b) that it was reasonable for the Plaintiff to take the D course he took - an inference reached "again with

p. 74, ll. 10-28 some periods of hesitancy".

His Honour held that the declaration was "silent as to the facts by the proof of which it is intended to establish that the Appellant was in breach of its duty of care". Nevertheless E he took the view that, on demurrer, he should treat the word

"negligently" as covering the matters which earlier he had said were "implicit" in the declaration, by which presumably he meant (3) above. His Honour observed that the mere use of the word "negligently" was expected to do the complete work of "denominating the extent of the duty and of specifying the manner of its breach". p. 74, ll. 30-40

In the result, his Honour came to the conclusion that the declaration "with bare sufficiency" alleged a cause of action. That is to say it alleged facts, which he considered to be sufficient to create a relationship into which the law imported a duty to take care and giving rise to an action for breach of that duty. In the Chief Justice's analysis, such a cause of action existed even though the Defendant did not have special information or special skill or experience in giving advice about the subject matter of the enquiry or profess to have such competency - in his view it was sufficient that it had the opportunity of getting the information and in fact did give information and advice. Moreover, he went further, and expressed the view that the relationship need not stem from an inquiry reasonably made, it could arise from information and advice proffered on a serious occasion in relation to a business matter. p. 75, l. 2 — p. 66, l. 44 - p. 67, l. 26

The description of a "special relationship" given by the Chief Justice is wider than that in Hedley Byrne v. Heller & Partners Ltd. (1964) A.C. 465: it is wider, so we submit, than that adopted by the two Justices who held with him that the

appeal should be dismissed. By it all that is required, in his view, is that the Defendant should be aware that he is giving information

p. 62, ll. 9-13 and advice to an identified or identifiable person or class of persons; that the circumstances are such that he is aware or should be aware

p. 63, ll. 24-37 that he is being trusted to give information which he possesses or to which he is believed to have access and to give advice in respect of which he is believed to possess a capacity or opportunity for

ibid. judgment; that the subject matter is of a serious or business

p. 64, ll. 5-10 nature; that he is aware that the information and advice will be acted upon with business or serious consequence, and that in all the circumstances it is reasonable for the Plaintiff to accept and

p. 64, ll. 11-27 rely upon the information and advice.

In his Honour's view possession of special information and special competence are irrelevant; it is sufficient if the Plaintiff believes that the Defendant can get the information and has the opportunity for judgment. Such a Defendant having no actual knowledge and having no competence in the field of enquiry, conditions which would make him cautious in answering, is, according to the Chief Justice, answerable not for lack of diligence in marshalling his information (for ex hypothesi he has none) nor for carelessness in forming an opinion (for ex hypothesi he has no skill in that) but for answering honestly though ignorantly and mistakenly.

His Honour did not consider it appropriate in considering the question to approach it by a discussion of the reasons given in the several speeches in Hedley Byrne, although those reasons had

a considerable influence in the formation of his own views. p.56, ll.22-38
It is apparent however that his Honour adopted a wider concept of a "special relationship" than the majority of their Lordships had stated in describing the elements of a "special relationship" importing a duty of care in giving information and advice on a business matter. In order to find that the facts alleged were sufficient to fit the wide concept of the "special relationship" which he had described, the Chief Justice had still to discover implications and, with some doubt and hesitancy, to draw inferences of fact.

When the facts alleged point only with a wavering finger to a cause of action it is submitted a demurrer should be allowed. Causes of action should be precisely and firmly stated by alleging the essential facts of the cause of action, expressly or implicitly. When the sufficiency of a declaration is tested on demurrer inferences of fact cannot be drawn. Vacher & Sons Ltd. v. London Society of Compositors 1913 A.C. 107 per Lord Atkinson at 125; Burton v. Karbowsky 14 S.R. (N.S.W.) 272 at 278; Lubrano v. Gollin & Co. 19 S.R. (N.S.W.) 214 per Ferguson J. at 225 and on appeal 27 C.L.R. 113, per Isaacs J. at 118. The distinction explained by Isaacs J. was adopted by Kitto J. in Rose v. Hyric 108 C.L.R. 353 at 358.

It is submitted that of the "implications" found by the Chief Justice the first and third are not correct and the second unnecessary as it is expressly stated. p.2, ll.14-20

It is also submitted his Honour was in error in regarding it to be permissible to draw inferences of fact on demurrer.

And further that neither the implications found in and nor the matters comprehended by the word "negligently" are supportable.

Kitto J. drew attention to the distinction between an action for loss caused by negligent acts and one based on negligent words. He cited the ultimate generalisation of Lord Reid in Hedley Byrne and considered Lord Morris had used words (which Lord Hodson specifically accepted) not very different - (1964) A.C. at 503: and considered that the view of Lord Devlin was not materially different - (1964) A.C. at 503 and that Lord Pearce expressed the same view. A B

p.77, l.11 -p.78, l.32
p.78, l.47 -p.79, l.7
p.79, ll.8-24
p.80, ll.5-6

His Honour held that if it were reasonable for the Plaintiff to suppose that the Defendant intended to accept the full responsibility ordinarily appropriate to a business transaction, then a duty of care arose in the Defendant. C

p.80, ll.34-46

The Appellants submit that the reasonableness of the state of mind of the Plaintiff is not the decisive matter in determining whether a duty of care is imported by law: if his state of mind is, however, unreasonable that may be decisive against such a duty being imported. The state of mind of the Defendant is material. D

His Honour stated the rule of pleading in New South Wales and in applying it found that sufficient facts were alleged to raise a duty of care in the Defendant.

p.81, ll.41-50
p.82, l.32 -p.83, l.47

The implication which his Honour found in the allegation that the Company itself gave the information and advice was not E

made by Barwick C.J. or Menzies J..

His Honour considered that Derry v. Peek (1889) 14 App. Cas. 337 is out of line with the current of authority and, except for its ruling on deceit, ought not to be regarded as laying down any other principle. His Honour also considered that Low v. Bouverie (1891) 3 Ch. 82 since Nocton v. Ashburton (1914) A.C. 932 was no safe guide in a case like the present. p.82,l.2 -p.83,l.14 p.85, ll.15-26

We submit his Honour was not correct in either of these considerations.

His Honour thought that the present case was radically different from Parsons v. Barclay & Co. Ltd. (1910) 103 L.T. 196 and Robinson v. National Bank of Scotland Ltd. (1916) S.C. (H.L.) 154. It is submitted that the difference between the present case and those cases is not radical nor indeed real. p.85,l.26 p.88,l.30

Menzies J. also regarded the declaration as an unsatisfactory pleading which would need amendment before trial. In Hedley Byrne's case, his Honour found a principle that a duty of care will arise "when, in relation to a matter of business concern, one person makes known to another that he is relying upon the other's advice on a matter within the special competence of that other and advice is then given without disclaimer of responsibility". We submit that the principle is too broadly stated, but even if it is not, "special competence" neither is alleged nor is it implicit in the present declaration. His Honour seemed to be of the opinion that if a p.122, ll.40-43 p.124, ll.31-33 p.124, ll.44-49

"special relationship" giving rise to a duty of care can exist outside contractual or fiduciary relationships, there is no "stopping point". This we submit is not a correct approach. It is not a question of finding a stopping place for a duty once arising but a question of finding a situation in which a duty to take care has arisen. We submit that Lord Reid's reference to a "stopping point" was made in a different context. Merely because A invokes B's opinion on a serious occasion relating to the investments of A's money a duty of care does not arise. Nor does it arise if B chooses to answer. Such a duty could arise for example if B has special competence or if he holds himself out as having such competence or if he expressly undertakes to be responsible for careful advice. The allegation in the present case, namely that the Defendant was only "in a position of special advantage to get and give accurate information about the financial stability of Palmers" is not an allegation of "special competence" which his Honour conceded was necessary for the Defendant to have.

Taylor J. made an analysis of Hedley Byrne. He considered that where advice is linked with the giving of information the possession of skill and judgment by the Defendant may be critical. He contrasted Lord Reid's view - namely, that "trust" in and "reliance" upon the Defendant by the Plaintiff was enough, provided that the Defendant knew, or ought to have known, that he was being trusted and thus the giving of an answer to the enquiry in such circum-

p.88,l.37 -p.89,l.24

stances indicated that the Defendant "accepted some responsibility" or accepted a "relationship" which required him to exercise care - with a more restricted view which Lord Morris stated, - namely, that the Defendant must be possessed of a special skill or be in a
A sphere (of activity) which justified the Plaintiff in placing reliance p.90, l.16 -p.91,l.9
on his judgment or skill or ability to make careful enquiry and must know that the Plaintiff would place reliance on his answer. He pointed out that Lord Morris' description of the circumstances which gave rise to a duty of care had the approval of Lord Hodson. p.91, ll.10-16
B His Honour also pointed out that Lord Devlin's opinion was that where a general relationship, - for example solicitor and client, importing a duty, is not alleged, the allegation of the relationship ad hoc must be examined and evaluated on its own facts, the question being whether but for the absence of consideration the parties were
C in a contractual relationship; and that Lord Pearce had emphasised p.91, ll.29-36
that there must be a representation which concerned a business or p.91, ll.37-44
professional transaction.

Taylor J. was unable to accept Lord Devlin's conclusion that there was a common view in the speeches of his colleagues,
D namely that responsibility would attach because the giving of advice implied "a voluntary undertaking to assume responsibility". This Mr. Justice Taylor thought was not a correct view of the other opinions. He did not accept Lord Devlin's analysis of "special p.92, ll.19-22
relationship". It is submitted that his Honour's conclusions from p.92, ll.22-37
E the Hedley Byrne case are correct. His Honour drew attention p.94,l.40
to the approval given in Hedley Byrne to the dissenting judgment p.95,l.14

of Denning L.J. in Candler v. Crane Christmas and Co. (1951) 2 K.B. 164, a judgment which did not include non-skilled persons among those on whom lay a duty of care in giving information and advice. He

p.95, ll.16-48 emphasised that Low v. Bouverie (1891) 3 Ch. 82 had not been over-

p.96, ll.10-42 ruled, but on the contrary that decision had been approved in Nocton v. Ashburton (1914) A.C. 932 - a case where the Defendant supplied incorrect information though accurate information was not unavailable to him. His Honour drew attention to different views taken of the duty of a bank in advising on investments - namely that where the bank did not hold itself out as an investment adviser the

p.97, ll.14-29 duty in giving advice to a customer was that of honesty; but where it did so hold itself out the duty was that of care. This was the fact which distinguished Woods v. Martins Bank (1959) 1 Q.B. 55 from Banbury v. Bank of Montreal (1918) A.C. 626 and Robinson v. National Bank of Scotland (1916) S.C. (H.L.) 46.

p.101,l.26 -p.102,l.12 His Honour stated when, in his view, a duty of care will arise in giving gratuitous information and advice. This view we respectfully submit is correct. It is consistent with authorities reviewed in Hedley Byrne's case and consistent with the opinions of the majority of their Lordships in that case.

Mr. Justice Taylor as a separate point stressed that the declaration did not allege that the Defendant was in possession of "up-to-date information" at the time when the opinions were expressed. Nor did the declaration allege that the Defendant had access to such information. An allegation merely that it had "special facilities" to obtain it he considered was not enough to impose a duty to get

the information unless it had specifically undertaken to do this. This is a view which we submit is correct. He emphasised that the Plaintiff did not allege that it was part of the Defendant's business to give advice on investments to its policy holders or that it held itself out as ready to give such advice to its policy holders generally or to the Plaintiff in particular. Further that facts were not alleged the existence of which would in his view be necessary to satisfy the "narrower" view of a special relationship, namely, that it was not alleged that the company or the officer or officers of the company were possessed of any special skill or ability or that they knew that the Plaintiff proposed to rely on their skill and judgment.

p.103, ll.9-16

p.103, ll.33-41

p.103, ll.41-44

His Honour then referred to the "bare allegation" of negligence and pointed out that it is essential that it should appear from the count that the negligence relied upon constituted a breach of duty owed to the Plaintiff. Since it did not specify the act of negligence it was consistent with an allegation of an omission to use the Defendant's "special facilities" to obtain information which nothing in the count suggested to be its duty. We respectfully adopt his Honour's view.

p.104, ll.5-23

Mr. Justice Taylor, it is submitted was correct in his approach to the declaration under demurrer; he refused to draw inferences. We also submit that his analysis and criticism of the opinions given in Hedley Byrne is correct, and that there are material differences in the several descriptions of a special relationship given in them. The majority of the opinions held that

special skill and ability in the field of inquiry was the basis for imposing the duty of care. We submit with respect that Lord Reid's view is too widely expressed as also is Lord Devlin's view as each of these views may be understood as saying that skill and experience are irrelevant.

Owen J. pointed out that neither a contractual nor a fiduciary relationship between the parties was pleaded, that fraud was not alleged, nor was it alleged that either Defendant carried on a business as an investment adviser or held itself out as possessing special skill in advising on investments.

p.129, ll.1-14

He considered that the broad propositions in Hedley Byrne relating to special relationships should be read in the light of a number of authorities that Hedley Byrne had left undisturbed - authorities which established that the relationship between the parties was not such as to give rise to a duty of care but only a duty of honesty. His survey of the authorities led him to the conclusion that if the action in Derry v. Peek (1889) 14 App. Cas. 337 had been framed in negligence and not in fraud it would have failed, because the only duty found to exist in that case was one of honesty. This he considered was the view of Lord Haldane and Lord Atkinson, in Nocton v. Ashburton (1914) A.C. at 947 and 957 respectively. He pointed out that Bowen L.J.'s view of Derry v. Peek, given in Low v. Bouverie (1891) 3 Ch. 82 at 105, had the approval of Lord Shaw in Nocton v. Ashburton (at 971), a view which Lord Reid referred to without dissent in Hedley Byrne (at 454) and his Honour referred to the acceptance of such a view by Lord Morris (at 500), by Lord Hodson (at 508) and by

p.132, l.42 - p.133, l.12

p.133, ll.26-34

p.133, l.35 - p.136, l.7

p.134, l.8 - p.135, l.10

Lord Pearce (at 534).

Low v. Bouverie, Owen J. observed, had been approved by Lord Haldane in Nocton v. Ashburton (at 950) and no reference to it in Hedley Byrne threw any doubt on its correctness, see for example, Lord Morris at 502 and Lord Hodson at 513/514. He pointed out that in Parsons v. Barclay & Co, Ltd. (1910) 103 L.T. 196, a banker was held to be under no duty when answering an enquiry as to a customer's financial standing other than that of giving an honest answer - and that passages from that case had been cited with approval in Hedley Byrne by Lord Morris (at 503/504) and Lord Hodson (at 512). In his Honour's view, Robinson v. National Bank of Scotland (1916) S.C. (H.L.) 154, especially the statement at 157 by Lord Haldane, himself a critic of the misunderstanding of Derry v. Peek, laid down no different law.

p.136, ll.1-19

p.136,l.20 -p.138,l.17

The only duty imposed by law in respect of the facts pleaded in the count he considered to be one of honesty and not one of care. No higher duty, his Honour thought, was imposed on the Defendant on the facts pleaded herein, than was found to arise in the decisions to which he had referred and which he described as authorities of great weight.

p.135,l.18 -p.139,l.12

THE DECLARATION - SECOND AND THIRD COUNTS

The second count of the declaration (against The M.L.C. Limited) alleges as facts additional to those alleged in the first count :-

(a) that the Defendant owned over ninety per cent of the

ordinary shares in Palmer;

(b) that certain of its directors were also directors of Palmer;

(c) that the Plaintiff well knew that the Defendant had by virtue of its shareholding in Palmer and otherwise special facilities for obtaining full complete and up-to-date information concerning Palmer's financial affairs and was in a position to give the Plaintiff reliable and up-to-date advice concerning the financial stability of Palmer.

It omits the allegation that the Plaintiff was a policy holder in the Assurance Company. It substitutes the words "unsecured loans" for "investments" in the first count. It substitutes the words "elected to supply" in place of the words "accepted the responsibility of supplying" in the first count.

The only substantial allegation which differentiates the second from the first count is that the second Defendant was in a position to reason of its shareholding in and representation on the board of Palmer to obtain information and give advice. The count falls under the same criticisms and betrays the same shortcomings in failing to disclose a cause of action as the first count.

The third count (against both Defendants) contains the material allegations of the first and second counts and adds a further allegation that the Assurance Company held some shares in Palmer. It is submitted that it falls in all material points

under the same criticisms as the first count and discloses no cause of action jointly against the two Defendants.

SUBMISSIONS

1. In the law of negligence relating to acts causing damage to person or property there is a distinction long established with respect to the existence of a duty of care between the case of a person who has or holds himself out as having special competence on the one hand and the case of a person who has no special competence on the other hand.

In the former case, the person has a duty to exercise a fair reasonable and competent degree of skill, Lanphier v. Phipos (1838) 8 C. & P. 479; 173 E.R. 581. The person in the latter case we submit, has no such duty.

It is submitted that where the action is one for negligent words, the same distinction does and should exist.

Among the cases before Derry v. Peek (1889) 14 A.C. 337 the following are instances of the distinction (in respect of gratuitous services) :

Shiells v. Blackburn (1789) 1 Hy. Bl. 158;
126 E.R. 94.

Dartnell v. Howard (1825) 3 B. & C. 345;
107 E.R. 1088.

In respect of gratuitous information the following is an instance; Taylor v. Ashton (1843) 11 M. & W. 401; 152 E.R. 860. In that case the jury denied fraud in the reports of directors of a bank but found that the directors had been

guilty of "gross and unpardonable negligence" in publishing reports on which the Plaintiff had acted and had made a bad investment. Parke B. emphatically rejected the proposition that that was sufficient to give the Plaintiff a right of action. His Lordship said: "From this proposition we entirely dissent; because we are of opinion that independently of any contract between the parties no one can be made responsible for a representation of this kind unless it be fraudulently made." (at 416; at 866).

Even a professional man, a solicitor, making a statement with respect to the legal result of a deed which he had drawn, to a person who was not his client, was held not liable to him in damages which he suffered as a result of acting upon it; Fish v Kelly (1864) 17 C.B. (N.S.) 194; 144 E.R. 78. Kelly had given Fish in response to an inquiry wrong information as to his rights under a deed governing the conditions of his employment which he had drawn up for his employer. The submission, which is not irrelevant to this case, was made that "having undertaken to answer the plaintiff's inquiry, though acting gratuitously, the defendant was bound to see that the information he gave was correct, the more especially as he had the means of so doing in his own hands at the time." (at 202; at 81). The Court (Earle C.J., Williams, Willes and Byles JJ.) rejected the submission.

It is submitted that the above authorities have not been in any way questioned by later decisions.

2. In Derry v. Peek (1889) 14 A.C. 337, the question whether

the directors were under a duty to exercise care was not a question for determination (see Viscount Haldane in Nocton v. Ashburton (1914) A.C. 932 at 947 and Lord Reid in Hedley Byrne's Case at 484 and Lord Devlin in the same case at 518), nevertheless Derry v. Peek clearly accepts as law that, on the facts of that case, the only duty owed by the directors to those to whom the prospectus was addressed was a duty of honesty. Lord Haldane in Nocton v. Ashburton said (1914) A.C. 932 at 947 that their Lordships in Derry v. Peek "must indeed be taken to have thought that the facts proved as to the relationship of the parties ... were not enough to establish any special duty arising out of that relationship other than the general duty of honesty"; and he added (at 956): "What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care therefore gave rise to no cause of action".

Bowen L.J. said in Low v. Bouverie (1891) 3 Ch. 82 at 105: "Derry v. Peek decides ... that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful - not to give information except after careful enquiry. In Derry v. Peek, the House of Lords considered that the cir-

cumstances raised no such duty. It is hardly necessary to point out that, if the duty is assumed to exist, there must be a remedy for its non-performance, and that therefore the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty, such as the law recognizes, to be careful." This statement by Bowen L.J. was approved by Lord Shaw in Nocton's Case (at 971). And in Hedley Byrne's Case Lord Reid said of Derry v. Peek that "It must be implied that on the facts of that case there was no such duty". (at 484).

It is submitted that there is no reason why the defendant on the facts alleged in the declaration should owe to the person who makes the inquiry any wider duty than that which was held to be owed by the directors in Derry v. Peek.

3. Cann v. Wilson (1888) 39 Ch. D. 39 (overruled by Le Lievre v. Gould (1893) 1 Q.B. 491, but restored by Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd. (1964) A.C. 465) is not opposed to our submission because in that case the defendant being a valuer had special competence. Low v. Bouverie (1891) 3 Ch. 82 supports our submission. In that case the defendant had special knowledge of the facts and had the means of checking their completeness and accuracy, but he had no special competence; there was a request for information as to those facts by the Plaintiff, who, as the defendant knew, intended to do business with the defendant's cestui que trust and the inquiry was made on a "business occasion" yet it was held that the Defendant was under no duty except to give honest answers to the best of his

knowledge and belief. To hold that the allegations of fact in the oounts in the Respondent's declaration disclose good causes of action would be inconsistent with the decision in Low v. Bouverie. The decision in that case has been accepted by Lord Haldane in Nocton v. Ashburton (1914) A.C. 932 (at 950) and was cited without criticism in Hedley Byrne's Case (supra) by Lord Morris (at 502) and by Lord Hodson (at 513/514).

4. In all cases which we have been able to discover in which a duty of care has been found to exist in giving information or advice, where there was no contractual or fiduciary relationship, the defendant had, or professed to have, some special competence. Such a defendant when answering an inquiry for information or advice made on a "business occasion" is by law under a duty to exercise care. Such a defendant may protect himself from liability by disclaiming responsibility as was done in Hedley Byrne. It is submitted that Lord Morris (at 502) and Lord Hodson (at 514) in Hedley Byrne's Case did not intend that special competence should not be a necessary feature of a special relationship giving rise to a duty of care in advising. Lord Pearce (at 538) recognised the possession of special competence as the basis of liability. The dissenting judgment of Denning L.J. in Candler v. Crane Christmas & Co. (1951) 2 K.B. 164, approved in Hedley Byrne, dealt only with the obligations of persons in possession of special competence, and the approval given by the House of Lords in Hedley Byrne to that judgment should

not be interpreted as laying down any different view.

5. It is submitted that the common basis in the judgments of a majority in Hedley Bryne's case lays down nothing inconsistent with the submission made above. In that case the defendant had special competence for it was a bank and the inquiry related to a customer's credit-worthiness. In discussing the cases giving rise to a duty of care in giving information and advice no decision was approved in which a Defendant who did not have special competence was held liable nor was any case disapproved in which a Defendant who had no special competence was held not liable.

A majority of their Lordships seem to have agreed that such a special relationship importing a duty of care arises whenever it is apparent that the request is made on a "business occasion" to a person who has or holds himself out as having special skill and ability in the field with which the inquiry is concerned. The Appellants submit that the facts alleged by the Plaintiff here neither expressly nor by implication give rise to any "special relationship" of the kind said to import a duty of care in Hedley Bryne's case.

6. In the case of a person who is not alleged to have, or to have held himself out as having, special competence no duty of care is imported by answering an inquiry. The fact of answering the inquiry is immaterial to the existence of a special relationship which must be established irrespective whether an answer is given or not. The form of the answer may be such as to exclude

responsibility in circumstances where the person giving the answer might otherwise be liable, but merely by answering without disclaimer on a "business occasion" a person who has no special competence does not become subject to a duty of care which had not arisen before he answered.

7. Where of a Defendant it is alleged that he has only means of obtaining information he is under no duty to obtain the information. There is a difference between knowledge and means of knowledge - Brownlie v. Campbell (1880) 5 A.C. 925 (at 952) per Lord Blackburn. It is submitted that a duty to take care in giving information and advice cannot arise where it is alleged only that the Defendant has the means of obtaining information, and it is not alleged that he undertook to obtain it. Such was the situation in Fish v. Kelly and Low v. Bouverie (supra).

8. It is submitted that the omission of an allegation of special competence is fatal to the declaration but if that is not accepted, it is submitted further that the omission of an allegation that the Defendant (i) was in possession of information or (ii) not being in possession of information undertook to obtain it, is fatal.

9. On any view of the facts pleaded we submit that it would be unreasonable for the Plaintiff in this case to have relied upon the information and advice given. He alleged that he knew the first Appellant was a subsidiary of the second Defendant and also that Palmer was a

subsidiary of the second Defendant. The Plaintiff therefore knew that each Defendant must have been interested in retaining and obtaining loan capital for Palmer. In such circumstances neither Defendant was in a position to advise the Plaintiff as to the financial condition and future prospects of Palmer, and it was not reasonable for the Plaintiff to rely upon such information and advice - see Banbury v. Bank of Montreal (1918) A.C. 626 (at 704/705) per Lord Parker of Waddington and (at 716) per Lord Wrenbury. It being unreasonable in fact it could never be reasonable in law.

10. The word "negligently" in the phrase "negligently informed and advised" does not precisely state the breach of duty. It is capable of meaning (a) negligently failed to obtain the information or (b) negligently evaluated the information, or (c) negligently (in the sense of carelessly or unskilfully) gave the advice. It is not alleged which of these three possible breaches of duty is relied upon, and this, we submit, is also fatal to the declaration.

11. Each count combines in one allegation of negligence the giving of information and advice with respect to the current financial stability of Palmer and the future financial stability of Palmer. If by reason of a "special relationship" a duty of care was imported with respect to the financial diagnosis of Palmer, it does not follow that a duty of care was also imported with respect to the financial prognosis of Palmer. Information as to the financial future of a company carrying

on a commercial enterprise is not possible in a factual sense, all that can be offered is a prediction, especially where there is no limited period of time involved. In its nature any advice or opinion that Palmer would "continue financially stable" can only be a prediction and, it is submitted, honest prediction is all that could be expected or required by law. There is no allegation of any dishonesty in the prediction. There is no authority for a proposition that an honest forecast of the continuing prosperity of a business undertaking, shown subsequently, as events may prove, to be mistaken, provides a cause of action. This was the view taken by Asprey J.A. dissenting in the Court of Appeal (1966-67) 86 W.N. (Pt. 2) (N.S.W.) 201-204. Barwick C. J. in the High Court adverted to this point but with disfavour.

p.41 l.46 -p.45 l.11
p.66, ll.23-43

It is submitted that to rely upon such a prediction would be unreasonable and not within the principle of reasonable inquiry and reasonable reliance mentioned in Hedley Byrne's case. It is further submitted that since the breach of duty is alleged as a composite breach, the whole count is bad upon demurrer.

The Appellants therefore submit that the appeal should be allowed; the orders of the Court of Appeal of the Supreme Court of New South Wales and of the High Court of Australia should be discharged except as to the orders allowing the Plaintiff's demurrers to the Defendant's pleas and the orders for costs; that the Defendant's

demurrers be allowed on the ground that the declaration discloses no cause of action and (if the Plaintiff so desires) liberty be granted to amend within one calendar month. The Appellants, in accordance with their undertaking, do not ask for costs.

REASONS

1. Because none of the counts in the Respondent's declaration discloses a good cause of action.

2. Because the decision in Hedley Byrne v. Heller & Partners (1964) A.C. 465 does not justify a decision that any count in the Respondent's declaration discloses a good cause of action.

3. Because to hold that the allegations in the counts in the Respondent's declaration disclose good causes of action would be inconsistent with the decision in Low v. Bouverie (1891) 3 Ch. 82 and other cases not disapproved.

4. Because the absence of any allegation in the counts that the Appellants were possessed of special competence is, in the absence of a contractual or fiduciary relationship, fatal to the validity of the counts.

5. Because in all cases in which a duty of care has been found to exist, where there was no contractual or fiduciary relationship, the Defendant had, or professed to have, special competence. To introduce a duty of care into

matters of business conversation where the Defendant does not possess such special competence would place an unnecessary restriction on commercial interchange of information and opinion. Some text book writers have suggested that the doctrine in Hedley Byrne calls for some limitation, among them Salmond on Torts (15th ed. - 1969) 267 and Winfield on Torts (8th ed. - 1967) 242.

6. Because there is no allegation in the counts that the Appellants had information, as distinct from the means of obtaining it, nor is there any allegation that the Appellants undertook to obtain it, and under those circumstances there is no duty cast by law upon the Appellants to obtain the information.

7. Because the declaration is unsatisfactory in all its counts, in that none of them alleges facts giving rise to a duty of care or precisely alleges any breach of any duty of care.

8. Because none of the counts discloses a good cause of action according to the common law of England and there should be no difference between the common law of Australia and that of England in this respect.

9. Because the High Court of Australia should have

made the order which the Court of Appeal in New South Wales should have made, namely, allowed the demurrers and, if requested, granted liberty to amend.

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T. SIMOS

Counsel for the Appellants

No. 36 of 1969

IN THE PRIVY COUNCIL

ON APPEAL FROM THE
HIGH COURT OF AUSTRALIA

BETWEEN:

THE MUTUAL LIFE & CITIZENS' ASSURANCE COMPANY LIMITED and THE M.L.C. LIMITED

Appellants

- and -

CLIVE RALEIGH EVATT

Respondent

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# CASE FOR THE APPELLANTS

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