Judgment 30, 1970

IN THE PRIVY COUNCIL No. 36 of 1969

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

THE MUTUAL LIFE & CITIZENS ASSURANCE COMPANY LIMITED and THE M.L.C. LIMITED (Defendants) Appellants

- and -

CLIVE RALEIGH EVATT (Plaintiff) Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal by special leave from the judgment of the High Court of Australia dismissing by majority appeals by the present appellants from a judgment of the Court of Appeal of New South Wales. The Court of Appeal by majority had overruled demurrers by the defendants appellants to the plaintiff respondent's declaration in a common law action in the Supreme Court of New South Wales.

2. The only question in the present appeal is whether the counts in the plaintiff's declaration disclose good causes of action at common law against the defendants appellants.

3. The Plaintiff's declaration seeks to plead causes of action in tort for negligence causing purely financial loss independently of any fraud, fiduciary relationship, or contract. It pleads facts which are alleged to give rise to an "ad hoc" special relationship, founding a duty of care in the imparting of information and advice within the p. 1-4

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principles established by the decision of the House of Lords in Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd. (1964) A.C. 465 (herein called "Hedley Byrne").

4. The Judges of the Court of Appeal (Wallace P., Walsh J.S. (as he then was) and Asprey J.A.) and four of the five Judges in the High Court of Australia (Barwick C.J., Kitto, Taylor and Menzies J.J.) held that the principles enunciated by the House of Lords in Hedley Byrne formed part of the common law of Australia. On the other hand, Owen J., one of the two dissenting Judges in the High Court, said that he was not "prepared to accept (the speeches in Hedley Byrne) to their full extent as stating the common law of this country".

p.131 line 44

5. In these circumstances it is submitted that the Board will follow and apply the reasoning in Hedley Byrne to its full extent as stating the common law not only of England but also of Australia.

6. Hedley Byrne clearly decided that an action could lie in tort for negligently imparting information or advice causing purely financial loss independently of contract, fraud, and fiduciary relationship. This general proposition was not denied by either of the dissenting Judges in the High Court, and was not challenged by the appellants in their petition for special leave.

7. In the Australian Courts and in their petition for special leave, the appellants submitted that "special relationships", giving rise to liability if gratuitous advice is negligently given so as to cause financial loss, can only arise in cases where the defendant :-

(a) Carries on business as an adviser, or holds himself out as being willing to advise, or

(b) Possesses or holds himself out as possessing "special skill".

8. The appellants seek to establish the following propositions :-

(a) That the two categories referred to in paragraph 7 are exhaustive and cover the entire field of liability in negligence for imparting gratuitous information and advice causing purely financial loss.

(b) In particular, there is no third category of special relationships where one party has special access to information not available to the other

(c) The plaintiff's declaration does not allege facts which bring it within the area of liability so defined.

9. The minority Judges in the High Court (Taylor and Owen J.J.) substantially accepted these propositions. The other six Australian Judges in the High Court and Court of Appeal rejected the first two propositions and did not deal with the third as they upheld the declaration on a wider view of the principles established by Hedley Byrne. Although Asprey J.A. partially dissented in the Court of Appeal, he did so on a point not argued by the appellants in that Court which was later unanimously rejected by the High Court, and which was not advanced by the appellants to the Board in their petition for special leave. Except on that point, he substantially agreed with the other Judges of the Court of Appeal in rejecting the appellants' submissions.

10. The respondent seeks to support the rejection of the first two propositions by the majority Judges in the High Court, and by the Court of Appeal, and in addition challenges the appellants' third proposition, and submits that even on the narrow view of Hedley Byrne contended for by the appellants, the present declaration can be supported.

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11. It is submitted that the suggested limitations the appellants seek to place on the decision in Hedley Byrne, are not to be found in or deduced from the speeches in that case and do not exist. It is submitted that the House of Lords did more than just create a number of closed categories of special relationships. It enunciated broad general principles for determining the existence of gratuitous special relationships giving rise to a duty of care in the imparting of information and advice. The categories of special relationships accepted by the appellants illustrate but do not exhaust these general principles.

12. The respondent in particular relies upon the general statement of principle which Lord Reid enunciated in Hedley Byrne at p.486 where after referring to the views of Lord Haldane in Nocton's case and Robinson's case, he said:-

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

13. Statements of principle of considerable width are also to be found in the speeches of Lord Morris at pp.502-503, of Lord Hodson at p.514, of Lord Devlin at p.529-530, p.531 and of Lord Pearce at p.539. Cf. per Barwick C.J. and per Menzies J. No member of the House of Lords expressly limited the principles in the manner contended for by the appellants. Indeed this is implicit in the dissenting judgments in the High Court because both Judges read down the general statements of principle by reference to cases decided before Hedley Byrne

p.63 line 33 et seq
p.127 line 2 et seq

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which were not expressly overruled by the House of Lords in that case. See per Taylor J. and per Owen J.

p.97 line 15 - p.107 line 12, p.134 line 12 - p.135 line 11, p.135 line 12 - p.141 line 31

14. Even if the House of Lords in Hedley Byrne had done no more than hold that special relationships could exist in the situations contended for by the appellants it would still have been open to a Court to deduce from such categories a general principle which would support the finding of a special relationship outside those original categories. It is submitted that the general principle deducible from such categories is that formulated by Lord Reid in Hedley Byrne and quoted in paragraph 12, and that formulated by Barwick C.J. in the present case. Indeed the general principles formulated by each member of the House of Lords in Hedley Byrne would be deducible from such categories.

p.65 line 14 - p.66 line 27

15. Moreover it is submitted that the categories of negligence in this field, as in the field of liability for physical damage, are never closed. Cf. Donoghue v. Stevenson (1932) A.C. at 619 per Lord Macmillan. See per Lord Hodson in Hedley Byrne at p.505 and per Lord Devlin at p.531.

16. Next it is proposed to examine more closely the two categories contended for by the appellants to determine their true content and rationale. In the first place, what does the expression "special skill" mean in this context? Are the categories of special skill limited to persons who follow recognised professions and callings, or is the concept a wider one?

17. In Candler's case Denning L.J. (as he then was) at (1951) 2 K.B. at 179-180 described the class of persons who in his view owed a duty of care independently of contract. At one stage in the passage cited it seems that Denning L.J. is confining the category to "professional men", but later he speaks of "persons who engage in a calling which required

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special knowledge and skill". In Hedley Byrne the House of Lords approved this judgment, but none of their Lordships confined the concept of special relationships to that formulated by Denning L.J. On the contrary each member of the House in Hedley Byrne formulated principles which are wider than those formulated by Denning L.J. in Candler's case.

18. The House of Lords approved Cann v. Wilson (1888) 39 Ch.D 39, and explained Le Lievre v. Gould (1893) 1 Q.B.491. Members of the House also approved Shiels v. Blackburne 1 H.B.L. 158, where it was considered that "a clerk in the Customs House" was a person who professed special skill (Lord Morris at p.495, Lord Hodson at p.510, Lord Devlin at p.526-7, and Lord Pearce at p.537-538), and Glanzer v. Shepherd (1922) 233 N.Y. 236 when a public weigher was held to owe a duty of care outside contract (Lord Reid at p.488, Lord Pearce at p.537). So far all the cases have concerned persons who followed a particular occupation, profession or calling, and the duty was held to arise in relation to acts or transactions carried out in the course of that calling.

19. The appellants no doubt would seek to classify the cases of Woods v. Martins Bank Ltd. (1959) 1 Q.B. 55 (approved by Lord Hodson at p.510, 514, Lord Devlin at p.530, and Lord Pearce at p.539) and Hedley Byrne itself as holding out cases. It is submitted however that they can equally be regarded as "skill" cases and if that is correct, they show that the type of skill which is capable of giving rise to a special relationship is far wider than that contended for by the appellants.

20. It is submitted that on principle and authority general business and financial skill (falling outside the scope of the accountancy profession and occupations such as that of a stock broker) constitutes "a special skill" for the purposes of the principles established by Hedley Byrne. This submission is supported

by the subsequent decision in W.B.Anderson & Sons Ltd. v. Rhodes (Liverpool) Ltd. (1967) 2 All E.R. 850.

21. Furthermore it is submitted that in principle the reason why the possession of "special skill" by a defendant imposes a duty of care in the imparting of information and advice, is that in such cases the test formulated in Hedley Byrne, by Lord Reid at p.486 (quoted in paragraph 12) is readily satisfied.

22. It is conceded by the appellants in their petition for special leave that a person who holds himself out as an adviser in business matters may come under a legal duty of care in the imparting of information and advice. What is the difference in principle between such a person and one similarly placed who does not hold himself out as an adviser, but who is prepared when approached to give information or advice? When does a person who gives advice when approached for the first time and continues to advise when approached thereafter, commence to hold himself out as an adviser? Is a duty of care owed to the fifth person advised, but not to the previous four? It is submitted that there is no difference in principle between the position of the first, fifth or eighth person advised, and that a special relationship can arise in each case.

23. It is submitted therefore that in point of principle there is no fundemental or even significant distinction between a person who holds himself out as an adviser and one who gives advice when formally approached for it in a serious business context. Subsequent willingness to advise when approached is equivalent to willingness to advise in advance which is present in a holding out case. In both cases the defendant is willing to give serious business or professional advice without disclaimer and it is submitted that it is this feature which is fundamental to the existence of a special relationship.

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24. If this is correct, then the appellant's argument that a special relationship cannot arise except where the defendant professes special skill or holds himself out as an adviser must be rejected.

25. In any event it is submitted that the plaintiff's declaration satisfies the narrowest test of the existence of a special relationship put forward by the appellants. The first count of the declaration alleges that the first defendant "was in a position to give the plaintiff reliable and up-to-date advice concerning the financial stability of" H.G. Palmer Consolidated Limited.

p.2 line 12-Line 14

26. During argument in the High Court, Counsel for the plaintiff stated that these words meant that the defendant "had in its employ officers who were capable of forming a reliable judgment upon information obtained concerning Palmer's financial affairs" (noted by Owen J.) It is submitted that the words of the count bear this meaning. Therefore the count alleges that the first defendant was possessed of business and financial skill which enabled it to advise the plaintiff in connection with the financial stability of H.G. Palmer (Consolidated) Ltd.

p.128 line 47-line 50

27. It is submitted that this allegation is sufficient on demurrer to bring the first count within the narrowest formulation of special relationships contended for by the appellants and accepted by the minority Judges in the High Court. If this is so, the remaining two counts must also be good.

28. The appellants submitted in their petition that superior access to "inside" information is not sufficient without more to support a special relationship. The appellants further submitted that the present declaration did no more than allege that the defendants had superior access to inside information. The respondent challenges both these propositions. It is submitted that superior access to information of a business or professional

nature, a fortiori to "inside" information is sufficient in a proper case to support a special relationship.

29. Hedley Byrne itself can fairly be regarded as an inside information case.

30. Many of the "skill" cases can be regarded as cases where the defendant had superior access to information of a business or professional nature. Sometimes the information is primary, e.g. the information contained in the Company's books of account in Candler's case. In others the information is what may be called secondary and consists of inferences, deductions and opinions based on primary information, e.g., an opinion as to the value of a property, or the value of a share in the capital of a company. In some of these cases "inside" information is involved, for example Candler's case and Banbury v. Bank of Montreal (1918) A.C.628. In others this is not the case, but the Defendant because of his professed skill has or ought to have, superior ability to obtain (superior access to) secondary information such as the value of a property for example Cann v. Willson 39 Ch. D. 39, and Le Lievre v. Gould (1893) 1 Q.B. 491.

31. The cases of the shipbroker and customs clerk referred to in Shiels v. Blackburne 1 H. Bl 158 can also be regarded as information cases rather than skill cases in the strict sense. The persons mentioned, by virtue of their past experience in customs work were presumably thought to have information as to the correct manner of entering goods which was not readily accessible to a layman, or at least they should have known how to obtain such information. In such cases the so-called skill is nothing more than the possession of information or the means of obtaining it. A solicitor asked for legal advice may not know the answer immediately, but he should know how to obtain it either by doing the research himself, or by taking Counsel's opinion.

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32. Similarly the case of Heskell v. Continental Express Ltd. (1950) 1 All E.R.1033 referred to by Lord Devlin in Hedley Byrne at p.532 is another case of superior access to information where no real question of skill was involved. The defendant shipbrokers were in a better position than the plaintiff to know that the goods had not been shipped.

33. Cases decided since Hedley Byrne further support this view. In W.B.Anderson & Sons Ltd. v. Rhodes (Liverpool) Ltd. (1967) 2 All E.R. 850 the defendant had much better means than the plaintiffs of finding out the state of the account between the defendant and Taylors (Corn and Produce) Limited, and thereby forming a reliable business opinion as to the solvency and credit worthiness of the latter. The only "skill" required was keeping one's accounting records up-to-date, and general business experience. The plaintiffs presumably were the equal of the defendant in the latter respect. It was held that a special relationship existed. Similarly in Ministry of Housing v. Sharp (1969) 3 W.L.R. 1020 the local land charges registrar and his employees had superior access to inside information. It is submitted that the skill involved in searching the register is minimal. Again it was held that a special relationship existed between the registrar and his searcher and persons likely to be affected by an inaccurate official search. The decision of Fisher J. has since been affirmed by the Court of Appeal (The Times 29.1.70) The New Zealand decision in Karori Properties Ltd. v. Jalicich & Ors. (1969) N.Z.L.R. 698 can also be readily explained on this basis. The brick company knew better than the architects, the properties and strength of their bricks.

34. It is also submitted that each of the speeches in Hedley Byrne supports the respondent's proposition that superior access to information of a business or professional nature, a fortiori to "inside" information, is sufficient in a proper case to support a special relationship. The relevant passages

from the speeches in Hedley Byrne are collected in the judgment of Owen J. RECORD p.132 line 32-p.134 line 41

35. The minority Judges in the High Court were of the view that the Court of Appeal decision in Low v. Bouverie (1891) 3 Ch.82 had not been overruled expressly or impliedly by the House of Lords in Hedley Byrne. They relied upon the reference to Low v. Bouverie in the speech of Lord Hodson at p.513-514 which they took as indicating His Lordship's view that the case would be decided the same way today. They also relied upon the fact that Lord Morris referred to the case without any expression of disapproval at p.502, and it had "received the express approval of the House of Lords in Nocton v. Lord Ashburton". From the proposition that the case of Low v.Bouverie would be decided the same way today the minority Judges drew the conclusion that the possession of inside information or the means of access to it, without the possession of special skill, is not sufficient to found a special relationship. p.98 lines 17-20 p.138 lines 1-19

36. It is submitted that in Nocton v. Lord Ashburton (1914) A.C.932 the House of Lords only approved the decision in Low v. Bouverie insofar as it held that trustees were under no automatic duty to answer enquiries by strangers as to the trust fund and the interests of the beneficiaries therein.

37. It is also submitted that the reference to part of the judgment of Bowen L.J. in Low v. Bouverie contained in the speech of Lord Morris in Hedley Byrne at p.502 in no way implies any approval of the decision, or any view that the case would be decided the same way today.

38. In Hedley Byrne the House of Lords clearly disapproved the whole of the reasoning of the Court of Appeal in Low v. Bouverie on the common law duty question. See also per Lord Reid at p.484 per Lord Morris at p.500,503, per Lord Devlin at p.517, 532 and per Lord

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Pearce at p.539. In these circumstances the absence of any reference to the case in three of the speeches, and the passing reference to it in the speech of Lord Morris in no way supports the reasoning of Taylor and Owen J.J. in the High Court. The respondent respectfully adopts the analyses of Low v. Bouverie contained in the judgments of Barwick C.J. and of Kitto J. and submits that they demonstrate that no wide proposition can be based on that decision.

p.70 line 15- p.74 line 11

p.87 Lines 15-25

39. Furthermore there is a body of authority which supports the view that an "ad hoc" special relationship is capable of arising in cases where the defendant does not profess skill, hold himself out as an adviser, or have superior access to information of a business or professional nature. See Wilkinson v. Coverdale 1 Esp.75 approved in Hedley Byrne by Lord Morris (p.495), Lord Hodson (p.510), Lord Devlin (p.526-7) and Lord Pearce (p.537-8), Dartnall v. Howard 4 B. & C. 345 approved and explained by Lord Devlin (p.527), Lord Devlin's view that De la Bere v. Pearson (1908) 1 K.B. 280 can best be regarded as a gratuitous special relationship case (p.528), his own formulation of the circumstances in which an ad hoc special relationship may arise (p.531), and the views of Lord Finlay and Lord Shaw in Banbury v. Bank of Montreal (1918) A.C. 626 at 654, 657-8 and at 694. This authority can also be relied upon to support the present declaration.

40. But in any event the respondent submits that the Counts in the Declaration do more than merely allege that the defendants had superior access to inside information. The relevant allegations in the third count are that the defendants :

p.3 lines 43-49

> "had by virtue of their shareholdings in Palmer and otherwise special facilities for obtaining full complete and up-to-date information concerning the financial affairs of Palmer and were in a position to give the Plaintiff reliable and

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up-to-date advice concerning the financial stability of Palmer..."

Six Australian Judges out of the eight who heard this case in the Court of Appeal and High Court have held that these allegations are capable of supporting a special relationship between the parties within the passages from the speeches in Hedley Byrne cited and quoted by Owen J. See per Barwick C.J. per Kitto J., per Menzies J., per Wallace P., per Walsh J.A. p.132 line 23- p.134 line 41

41. The appellants in their petition for special leave submitted that one of the important questions of law which could arise in this case if leave were granted, concerned the extent of the duty of care arising from a particular special relationship (Petition p.30). In particular it was submitted that a question would arise as to whether a defendant coming under a duty of care, not having the necessary information at hand, but having means of ascertaining it, is under any duty carefully to use its means of ascertaining the information and to check its accuracy (Petition p.29-30). Taylor J. considered the nature and extent of the duty of care which could arise in cases where a special relationship existed. He said :- p.74 lines 33-39; p.84 line 18-p.85 line 46; p.126 lines 31-49; p.26 lines 20-24; p.30 lines 31-40; p.43 lines 19-27; p.104 lines 2-12

> "Further it seems to me the duty of care which will arise in the circumstances previously mentioned will be discharged if the person of whom the advice is sought forms his opinion without negligence on the material before him for, as I understand Hedley Byrne's case, he is not under a duty to make extraneous enquiries concerning the subject matter upon which his advice has been sought though of course it would be otherwise if he had specifically undertaken to do this".

Later he said :- p.106 lines 12-23

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"...it is consistent with the allegation (in the declaration) that the negligence alleged on the part of the defendant was constituted by its act of venturing an opinion without first availing itself of its alleged 'special facilities...' and since there is... nothing to suggest that the defendant came under a duty to make such extraneous enquiries, this is an additional ground upon which the demurrer should be upheld".

42. In the first place the respondent submits that a count is not demurrable if it alleges facts from which a duty to take reasonable care flows. Provided a pleading satisfies this test, the precise nature, content and extent of the duty of care which arises involves mixed questions of fact and law which must and can only be resolved at the trial of the action. The duty is a duty to take that degree of care which is reasonable in the circumstances, and the circumstances can only be elucidated by evidence. (Cf. Paris v. Stepney Borough Council (1951) A.C. 367.) In the present case if a duty exists the standard of care will depend upon the nature and circumstances of the communications between the parties, the size of the plaintiff's existing investments, the size of the additional investment proposed (by way of loan), and possibly many other factors. These matters need not, and indeed cannot be included in a pleading.

p.104 lines 2-12

43. Moreover, Taylor J. finds that the defendant could not come under a duty to make "extraneous enquiries" without having "specifically undertaken to do so", and that no breach of duty would be committed if an opinion was given based on "the material before" the person asked for advice. What is meant by "the material before" an employee of a public company? What is the information which should be regarded as being at his "hand"? Is it limited to the material in his head, or open on the desk when the request for advice is made to him, or does it extend to the

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contents of a file in a filing cabinet in his office, or does it extend further to the contents of a file in the office of one of his colleagues or subordinates? This analysis demonstrates in our submission that questions of fact and degree are necessarily involved. Moreover Taylor J. holds that a person in a special relationship may come under a duty to make "extraneous enquiries" if he had "specifically" undertaken to do so. Surely however he would also be under such a duty if he impliedly undertook to do so, or if a tribunal of fact considered that in all the circumstances if was reasonable for him to make such enquiries.

p.104 lines 2-12

44. It is submitted that the analysis of the standard of care contained in the majority judgments in the High Court is in accord with principle and is to be preferred to that of Taylor J. See per Barwick C.J., per Kitto J., and per Menzies J.

p.67 line 41- p.68 line 23

45. The appellants further submitted in their petition (p.34) that it was not reasonable for the respondent to act on such information and advice as he may have obtained from the appellants because "the respondent's enquiry of the (appellants) as to the financial stability of H.G.Palmer was like an enquiry made of a person as to his own financial standing." The respondent submits that this proposition ignores or glosses over the separate legal identity of the three companies involved. The appellants rely upon the separate legal identity of H.G.Palmer (Consolidated) Limited to show that the advice to the respondent was given without consideration and that they, particularly the holding company, are not legally responsible for the debts of H.G.Palmer. It is submitted that in these circumstances the appellants cannot be heard to say that the legal situation is the same as it would have been if the respondent had dealt direct with H.G. Palmer.

p.88 lines 1-30
p.126 lines 22-49

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46. The respondent therefore submits that the appeal should be dismissed for the following (amongst other)

REASONS

1. The principles laid down in Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd.(1964) A.C. 465 should be applied and followed.

2. Neither the possession of special skill, nor holding oneself out as an adviser are necessary conditions for the creation of a special relationship.

3. Superior access to business or professional information, especially "inside information" is sufficient for the creation of a special relationship in a proper case.

4. In any event, the declaration alleges that the defendants possessed the skill necessary to enable them to advise the plaintiff.

5. The declaration discloses good causes of action at common law.

6. The majority of the High Court of Australia, and of the Court of Appeal of New South Wales were correct in overruling the defendants' demurrers to the plaintiff's declaration.

K.R. HANDLEY

No.36 of 1969

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

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

- v -

CLIVE RALEIGH EVATT

CASE FOR THE RESPONDENT

COWARD, CHANCE & CO.,
St.Swithin's House,
Walbrook,
London, E.C.4.