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 — Appellants (Defendants)

- and -

CLIVE RALEIGH EVATT — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

LINKLATERS & PAINES,
Barrington House,
59/67 Gresham Street,
London, E.C.2.
Solicitors for the
Appellants.

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

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- and -

CLIVE RALEIGH EVATT — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

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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 — Appellants (Defendants)

- and -

CLIVE RALEIGH EVATT — Respondent (Plaintiff)

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RECORD OF PROCEEDINGS

No. 1

DECLARATION OF CLIVE RALEIGH EVATT dated 20th November 1967

In the Supreme Court of New South Wales

No.1

Declaration of Clive Raleigh Evatt

20th November 1967.

No. 9725 of 1967.

BETWEEN: CLIVE RALEIGH EVATT
Plaintiff

AND: THE MUTUAL LIFE & CITIZENS' ASSURANCE COMPANY LIMITED
First named Defendant

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AND: THE M.L.C. LIMITED
Second named Defendant

The 20th day of November, 1967 A.D.

CLIVE RALEIGH EVATT by Keith Hinchcliffe his attorney sues the MUTUAL LIFE AND CITIZENS' ASSURANCE COMPANY LIMITED a company duly incorporated and liable to be sued in and by its said corporate name and style for that at all material times the plaintiff was a policy holder in the defendant company and the plaintiff was seeking from the defendant company information and advice concerning the financial

SYDNEY TO WIT

30

In the Supreme Court of New South Wales

No.1

Declaration of Clive Raleigh Evatt

20th November 1967 (continued)

stability of a certain company to wit H.G. Palmer (Consolidated) Limited and as to the safety of investments therein and the defendant company as the plaintiff well knew was associated with H.G. Palmer (Consolidated) Limited by reason of the fact that both companies were subsidiaries of The M.L.C. Limited and by virtue of this association the defendant company as the plaintiff well knew had special facilities for obtaining full complete and up-to-date information concerning the financial affairs of H.G. Palmer (Consolidated) Limited and was in a position to give the plaintiff reliable and up-to-date advice concerning the financial stability of the said company and the defendant company by itself its servants and agents 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 the said H.G. Palmer (Consolidated) Limited and whether to invest further therein WHEREUPON the defendant company by itself its servants and agents negligently informed and advised the plaintiff that the said company H.G. Palmer (Consolidated) Limited was and would continue financially stable and that investments therein existing were and would continue safe and that it would be safe further to invest therein WHEREBY the plaintiff relying on the said information and advice did not realise on certain existing investments in the said Company H.G. Palmer (Consolidated) Limited and invested further sums therein and the plaintiff thereby lost the value of the aforesaid investments together with interest thereon and was otherwise greatly damnified.

2. AND for a second count CLIVE RALEIGH EVATT by Keith Hinchcliffe his attorney sues THE M.L.C. LIMITED a duly incorporated company and as such liable to be sued in its corporate name for that at all material times the defendant owned over ninety per cent of the ordinary shares in H.G. Palmer (Consolidated) Limited (herein called "Palmer") and certain directors of the defendant were also directors of Palmer and the plaintiff having substantial sums of money invested on interest bearing unsecured loans to Palmer and well knowing 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 the financial affairs of Palmer and was in a position to give the plaintiff reliable and up-to-date advice concerning the financial stability of Palmer, sought from the defendant information and advice concerning the financial stability of Palmer and as to the safety of unsecured loans thereto and the defendant company by itself its servants and agents elected to supply the plaintiff with the said information and advice knowing that the plaintiff intended to act thereon in making a decision whether to retain his existing unsecured loans to Palmer and whether to make further unsecured loans to that company WHEREUPON the defendant by itself its servants and agents negligently informed and advised the plaintiff that Palmer was and would continue financially stable and that existing unsecured loans thereto were and would continue to be safe and that it would be safe to make further unsecured loans to Palmer WHEREBY the plaintiff relying upon the said information and advice refrained from realising his existing investments in Palmer and made further unsecured loans to that company so that when Palmer became insolvent the plaintiff lost the value of all his investments therein and lost the interest which he would otherwise have received therefrom and suffered other damage.

3. AND for a third count the plaintiff sues THE MUTUAL LIFE AND CITIZENS' ASSURANCE COMPANY LIMITED and THE M.L.C. LIMITED both duly incorporated companies and as such liable to be sued in their corporate names for that at all material times the second defendant owned over ninety per cent of the ordinary shares in H.G. Palmer (Consolidated) Limited (herein called "Palmer") and all the ordinary shares in the first defendant, and the first and the second defendants had the same directors and some of those persons were also directors of Palmer, and the first defendant owned some of the ordinary shares in Palmer, and the plaintiff having substantial sums of money invested on interest bearing unsecured loans to Palmer and well knowing that the defendants 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 up-to-date advice concerning the financial stability of Palmer, sought from the defendants information and advice concerning

In the Supreme Court of New South Wales

No.1

Declaration of Clive Raleigh Evatt

20th November 1967 (continued)

the financial stability of Palmer and as to the safety of unsecured loans thereto and the defendants by themselves their servants and agents elected to supply the plaintiff with the said information and advice knowing that the plaintiff intended to act thereon in making a decision whether to retain his existing unsecured loans to Palmer and whether to make further unsecured loans to it WHEREUPON the defendants by themselves their servants and agents negligently informed and advised the plaintiff that Palmer was and would continue financially stable and that existing unsecured loans thereto were and would continue to be safe and that it would be safe to make further unsecured loans to Palmer WHEREBY the plaintiff relying upon the said information and advice refrained from realising his existing investments in Palmer and made further unsecured loans to that company so that when Palmer become insolvent the plaintiff lost the value of all his investments therein and lost the interest which he would otherwise have received therefrom and suffered other damage and the plaintiff sues the defendants jointly and severally pursuant to the Statute in such case made and provided and claims the sum of ONE HUNDRED AND TEN THOUSAND DOLLARS ($110,000.00).

K. Hinchcliffe

155-159 Castlereagh Street
Sydney.

No. 2

EXTRACTS FROM PLEAS AND DEMURRERS OF THE MUTUAL LIFE & CITIZENS' ASSURANCE COMPANY LIMITED AND THE M.L.C. LIMITED dated 23rd November 1967

In the Supreme Court of New South Wales

No. 2

Extracts from Pleas and Demurrers of The Mutual Life & Citizens' Assurance Company Limited and The M.L.C. Limited

23rd November 1967

23rd November 1967

No. 9725 of 1967.

BETWEEN: CLIVE RALEIGH EVATT

Plaintiff

AND: THE MUTUAL LIFE & CITIZENS' ASSURANCE COMPANY LIMITED

First named Defendant

AND: THE M.L.C. LIMITED

Second named Defendant

The 23rd day of November in the year of Our Lord One thousand nine hundred and sixty-seven.

9. THE defendant The Mutual Life & Citizens' Assurance Company Limited says that the first count of the declaration is bad in substance.

It is intended to argue on the hearing of this demurrer the following matters of law:-

(a) The facts alleged in the first count of the declaration do not disclose any cause of action known to the law.

10. THE defendant The M.L.C. Limited says that the second count of the declaration is bad in substance.

It is intended to argue on the hearing of this demurrer the following matters of law:-

(a) The facts alleged in the second count of the declaration do not disclose any cause of action known to the law.

11. THE defendants say that the third count of the declaration is bad in substance.

It is intended to argue on the hearing of this

In the Supreme Court of New South Wales

No. 2

Extracts from Pleas and Demurrers of The Mutual Life & Citizens' Assurance Company Limited and The M.L.C. Limited

23rd November 1967 (continued)

demurrer the following matters of law:-

(a) The facts alleged in the third count of the declaration do not disclose any cause of action known to the law.

E.A. O'Halloran

Attorney for the Defendants

187-191 Macquarie Street, SYDNEY.

No. 3

Extract from Replication, Joinder in Demurrer and Demurrers of Clive Raleigh Evatt

5th December 1967

No. 3

EXTRACT FROM REPLICATION, JOINDER IN DEMURRER AND DEMURRERS OF CLIVE RALEIGH EVATT dated 5th December 1967

5th December, 1967

No. 9725 of 1967.

BETWEEN: CLIVE RALEIGH EVATT
Plaintiff

AND: THE MUTUAL LIFE & CITIZENS' ASSURANCE COMPANY LIMITED
First named Defendant

AND: THE M.L.C. LIMITED
Second named Defendant

The 5th day of December 1967 A.D.

2. The Plaintiff says that the three counts in the Declaration are good in substance.

K. Hinchcliffe

Attorney for the Plaintiff
155-159 Castlereagh Street,
Sydney.

No. 4

REASONS FOR JUDGMENT OF THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES dated 18th December 1967

In the Supreme Court of New South Wales, Court of Appeal

No. 4

Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales

18th December 1967

No. 9725 of 1967.

CORAM: WALLACE, P.
WALSH, J.A.
ASPREY, J.A.

Monday, 18th December, 1967.

EVATT v. MUTUAL LIFE & CITIZENS' ASSURANCE COMPANY LIMITED AND THE M.L.C. LIMITED

JUDGMENT

Wallace, P.

WALLACE, P.: We have earlier given a decision on the demurrer which was raised in action No. 4670 of 1966 in which the plaintiff was the same as in the second action, to which I will presently refer, and the only defendant was the first-named defendant in such other action, namely Mutual Life & Citizens' Assurance Company Limited. The High Court has, we understand, granted leave to appeal from our decision on the demurrer judgment which we gave in June last but has stood over the further hearing thereof in view of the proceedings which were imminent in a second action. That fresh action has been instituted; it is No. 9725 of 1967 and the Declaration in it was filed on the 20th November 1967. It is an action in which the same plaintiff as in the earlier case is the plaintiff and there are now two defendants, namely the Mutual Life & Citizens' Assurance Company Limited as the first-named and the M.L.C. Limited as the second defendant.

In the new action there are three counts: the first is against the Mutual Life & Citizens' Assurance Company Limited, which appears to be identical with the count in the earlier action; the second count is against the M.L.C. Limited and it makes somewhat different allegations but they are not materially different further for present purposes; the third count is a count against both defendants. Broadly, all three counts are based on the Hedley Byrne case.

In the Supreme Court of New South Wales, Court of Appeal

No. 4

Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales

18th December 1967

Wallace, P. (continued)

Three pleas have been lodged attracting the attention of this Court, namely the 6th, 7th and 8th Pleas, each of which in effect relies upon s.10 of the Usury, Bills of Lading and Written Memoranda Act (1902), which of course was taken from s.6 of Lord Tenterden's Act passed in 1828. The defendants have demurred to each of the three counts of the Declaration and the plaintiff has demurred to each of the said 6th, 7th and 8th pleas. In other words we have before us demurrers to the counts in the second action and demurrers to three pleas in the second action.

Mr. Kerrigan, who appears for both defendants, has made a typewritten summary of his submissions on the three counts and they very usefully summarise most, if not all, of the arguments put before us earlier in the year on the first action. He recognises that we will, almost as of course having regard to the events, not differ from what we said in June last. He did refer to an additional matter in relation to the third count, that is the count against the defendants jointly, in that he stated he wishes to reserve the right to apply for it to be struck out on the ground that there is no allegation of a common wrongful act or statement by the two defendants and that, on the contrary, the first and second counts relate to separate causes of action. He has claimed that in such circumstances a count of joint enterprise is not maintainable, notwithstanding the provisions of s.2 (1) (a) of the Law Reform Miscellaneous Provisions Act of 1946.

I find it sufficient to say that the judgments in Speirs v. Caledonian Collieries in 57 S.R. p.483, particularly at p.511, answer the submission. That passage was referred to recently by this Court, I think in particular by my Brother Asprey in Castellan v. Electric Power Transmission Pty. Limited & Broken Hill Proprietary Company Limited (unreported) which was delivered on the 20th September 1967. I therefore feel that the defendants' demurrers to the plaintiff's counts should be overruled.

Turning to the s.10 point, that is to say the plaintiff's demurrers to the 6th, 7th and 8th pleas, these pleas follow precisely the relevant portion of the wording of s.10, and of course they are

claimed to apply to an action based on principles enunciated by their Lordships in Hedley Byrne's case. We were referred at some length to an analysis of what the House of Lords said in Banbury v. The Bank of Montreal in 1918 A.C. at p.626 and also to the judgment of Cairns J. in W.B. Anderson & Sons v. Rhodes, 1967 2 A.E.R., 851.

For myself I think, with much respect, that if the matter were at large the analysis made to us by Mr. Kerrigan would be indeed forceful but I think we should follow entirely the dicta of their Lordsxhips in The Bank of Montreal case, albeit on one view the dicta relating therein to s.6 of Lord Tenterden's Act were not strictly necessary in the case of three of the judgments of their Lordships. Nevertheless the dicta seems to me to be practically all one way, and, putting it very compendiously, I think the principle which they have enunciated is that s.6 did not apply to cases of negligence and breach of duty but it is confined to actions for fraudulent misrepresentation, and this present action is not such. I do not think it is necessary to elaborate the matter further and I am content to say that relying upon the dicta of their Lordships I am of opinion that the plaintiff's demurrers to those three pleas should be upheld and that judgment should be given for the plaintiff thereon.

In the result I am of opinion that the defendants' demurrers to the plaintiff's three counts fails and that judgment thereon should be given for the plaintiff and that the plaintiff's demurrers to the defendants' pleas should be upheld and that judgment on demurrers should be given thereon in favour of the plaintiff, in both cases with costs.

Walsh, J.A.

WALSH, J.A.: I agree. In relation to demurrers to the three counts in the plaintiff's Declaration in the second action, No. 9725 of 1967, I think it is clear that the demurrers must fail unless the Court were to reconsider the decision already given in the demurrer earlier heard in the action 4670 of 1966. I do not think we should do that but should follow that decision, and if we do I think it is inevitable that these demurrers must fail.

In relation to the point mentioned by Mr. Kerrigan, that it may be that the third count is defective because there is no allegation of a common

In the Supreme Court of New South Wales, Court of Appeal

No. 4

Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales

18th December 1967

Walsh, J.A. (continued)

wrongful act, as I understood it Mr. Kerrigan did not really seek that we should uphold the demurrer to the third count for that reason. Rather he merely foreshadowed that perhaps at some future time an application will be made in relation to that count to strike it out. We cannot now deal with possible applications which may be made in the future, so that Mr. Kerrigan's reference to that point has no bearing on the decision we should now give on the demurrers to the three counts in the Declaration.

As to the demurrers to the pleas filed by the defendants, apart from authority I think it would be a debatable question whether the actions here brought by the plaintiff are actions which fall within the description contained in s.10 of the Usury, Bills of Lading and Written Memoranda Act, of the actions which it is there provided are not to be brought unless the representation or assurance mentioned in the section is made in writing signed by the party to be charged therewith. I think there would be much to be said in favour of the view that the actions here brought are actions to charge a person upon or by reason of a representation or assurance of the kind that is mentioned in the section.

I think it is clear that the observations in Banbury v. The Bank of Montreal stand squarely in the way of that view. If we accept those observations as stating the law as to the construction of s.10 I think it is inevitable the pleas must be held to be bad.

Although we are not in strictness bound by the observations made by their Lordships in that case I think we should accept and apply them to the present case, without ourselves making an independent examination of the whole question and that, therefore, there should be judgment for the plaintiff on these demurrers. I agree with the proposal that has been made by the learned President.

Asprey, J.A.

ASPREY, J.A.: As regards the defendants' demurrer to the plaintiff's declaration, the first count appears to me to be in substantially the same form as the plaintiff's count in action No. 4670 of 1966, with the addition of the amendment sought by the plaintiff during the hearing of the demurrer to that declaration and which I set forth in the judgment delivered by me on the 28th June 1967, and to which I gave the number 2A (see 86 W.N. (Part 2) at p.193). The second and third counts in the Declaration in the present action do not appear in Action No. 4670 of 1966 but have been introduced because the plaintiff has now sued the M.L.C. Limited as well as the first-named defendant, which was the sole defendant in the earlier action.

All three counts contain what, in the judgment delivered by me on the 28th June 1967 in the earlier action, I considered to be the invalidating element of prediction. When this Court gave judgment on the demurrer in action 4670 of 1966 I was unfortunately unable to agree with the majority of the Court and, had the matter just rested there, I should have regarded myself as bound on the hearing of this demurrer by the decision of the majority in any future case. But I understand that the High Court of Australia has granted leave to appeal against the decision and the matter is awaiting argument. I gather that the same course will be pursued in relation to the present demurrer in which, whilst written submissions in short form have been handed to us, there has been no further argument. The appeals in both cases will most certainly be heard together by the High Court of Australia.

In these special circumstances I think I should adhere to the views which I have earlier expressed (see 86 W.N. (Part 2) at pp.194 etc.). Accordingly I uphold the defendants' demurrer to the 1st, 2nd and 3rd counts of the declaration and adopt as my reasons on this occasion those I delivered on the 28th June 1967.

As regards the plaintiff's demurrer to the 6th, 7th and 8th pleas, s.10 of the Usury, Bills of Lading and Written Memoranda Act 1902 is in the same terms as s.6 of the English Statute of Frauds Amendment Act 1928, Lord Tenterden's Act. The history of that section is related in Banbury v. The Bank of Montreal (1918 A.C. at 626) and in that case their Lordships were unanimous in holding that the section may only be pleaded successfully in an action for fraud (see also W.B. Anderson & Sons Limited v. Rhodes (Liverpool) Limited, (1967) 2 A.E.R. 850), a case in which the Hedley Byrne case was applied and Cairnes J. held that the section did not apply to an action for negligence and only applied to an action of fraud (see especially pp. 862-865).

I think that having regard to the language used by a number of their Lordships I should follow this view of Banbury v. The Bank of Montreal. The allegations relied upon in the three counts in the present action are not alleged to be fraudulent. Accordingly I am of the opinion that the defendants' demurrer should be overruled.

As regards the point raised by Mr. Kerrigan in relation to the third count of the declaration in the present action, as the matter was not pressed I do not propose to express any opinion thereon.

In the Supreme Court of New South Wales, Court of Appeal

No. 4

Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales

18th December 1967

Wallace, P.

WALLACE, P.: The order of the Court will be: By majority the defendants' demurrers to the plaintiff's 1st, 2nd and 3rd counts are overruled and judgment in demurrer is given thereon for the plaintiff with costs. As regards the plaintiff's demurrers to the defendants' 6th, 7th and 8th pleas, the Court upholds such demurrers and gives judgment thereon in favour of the plaintiff with costs.

As regards the action 4670 of 1966, the Court upholds the plaintiff's demurrer to the new 3rd plea with costs and gives judgment thereon for the plaintiff.

No. 5

Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales in action No. 4670 of 1966

28th June 1967

No. 5

REASONS FOR JUDGMENT OF THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES dated 28th June 1967

No. 4670 of 1966.

CORAM: WALLACE, P.
WALSH, J.A.
ASPREY, J.A.

Wednesday, 28th June, 1967.

EVATT v. MUTUAL LIFE AND CITIZENS' ASSURANCE COMPANY LIMITED

JUDGMENT

Wallace, P.

WALLACE, P.: This is a demurrer to a plaintiff's declaration in which the defendant claims that the facts alleged in the declaration disclose no cause of action known to the law.

The declaration was, by consent, amended during the hearing of argument and the amended declaration (the additions inserted by the amendment being shown by me in square brackets) reads as follows:-

"CLIVE RALEIGH EVATT by Keith Hinchcliffe his attorney sues the MUTUAL LIFE AND CITIZENS' ASSURANCE COMPANY LTD a company duly incorporated and liable to be sued in and by its said corporate name and style for that at all material times the plaintiff was a policy holder in the defendant company and the plaintiff was seeking from the defendant company information and advice concerning the financial stability of a certain company to wit H.G. Palmer (Con-

solidated) Limited and as to the safety of investments therein /and the Defendant Company as the Plaintiff well knew was associated with H.G. Palmer (Consolidated) Limited by reason of the fact that both Companies were subsidiaries of The M.L.C. Limited and by virtue of this association the Defendant Company as the plaintiff well knew had special facilities for obtaining full complete and up-to-date information concerning the financial affairs of H.G. Palmer (Consolidated) Limited and was in a position to give the plaintiff reliable and up-to-date advice concerning the financial stability of the said Company/ and the defendant company by itself its servants and agents 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 the said H.G. Palmer (Consolidated) Limited and whether to invest further therein WHEREUPON the defendant company by itself its servants and agents negligently informed and advised the plaintiff that the said Company H.G. Palmer (Consolidated) Limited was and would continue financially stable and that investments therein existing were and would continue safe and that it would be safe further to invest therein WHEREBY the plaintiff relying on the said information and advice did not realise on certain existing investments in the said company H.G. Palmer (Consolidated) Limited and invested further sums therein and the plaintiff thereby lost the value of the aforesaid investments together with interest thereon and was otherwise greatly damnified.

And the plaintiff claims the sum of One hundred and ten thousand dollars ($110,000.00)."

The allegation that the plaintiff was a policy holder in the defendant company was acknowledged to be immaterial.

The cause of action alleged is founded on the reasoning of the House of Lords in the recent decision of Hedley Byrne & Co. Ltd. v Heller & Partners Ltd. 1964 A.C. 465.

This is a decision which has attracted much comment in academic circles (an example being the critical analysis of Mr. Gordon Q.C. of the Bar of British Columbia appearing in the Australian Law Journal at pp.39 and 79) and has arisen for consideration in recent judgments in England and elsewhere though not in the High Court of Australia.

In the Supreme Court of New South Wales, Court of Appeal

No. 5

Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales in action No. 4670 of 1966

28th June 1967

Wallace, P. (continued)

I referred to some of these in Dominion Freeholders Ltd. v Bird 84 W.N. (Pt 2) 190.

I should say at once, that contrary to a submission made to us, I am of the opinion that this Court should deem itself bound by the dicta enunciated by their Lordships in the Hedley Byrne Case even though they may be considered unnecessary for the actual decision (which was based on a disclaimer of responsibility) and therefore obiter dicta - see per Danckwerts L.J. in Rodel v W. 1966 3 All E.R. 657 at p. 672. As Gresson J. said in Smith v Auckland Hospital Board 1965 N.Z.L.R.191 at 219 -

> "with considered pronouncements at this level of authority the distinction between ratio and dictum surely tends to lose some of its significance."

Moreover the unlikelihood of the Privy Council differing from the considered pronouncements of the House of Lords is also relevant (cf. Corbett v Social Security Commission 1962 N.Z.L.R. 878).

Once this Court decides that it should apply the stated principles in the Hedley Byrne case it is not for us to say whether we do so with or without enthusiasm or to take a hand either in supporting or refuting the comment thereon which seems to be fashionable in legal circles. Not all such comment is unfavourable - e.g. see per Salmon L.J. in Rondel v. W. (supra) at p. 678.

An innocent misrepresentation was of course well known to be capable of creating liability in contract or where a fiduciary relationship existed between a plaintiff and defendant but the important development which the Hedley Byrne Case made was in clarifying the law of tort in relation to liability where a special relationship existed between the plaintiff and defendant and where other important tests are satisfied with the result that although in general an innocent but negligent misrepresentation gives rise to no cause of action in tort, special circumstances can exist which do create liability therefore, even though the misrepresentation, given by way of advice or information, is given gratuitously. The delineation of these special circumstances or tests for liability constituted

the problem solved in the elaborate judgments of their Lordships. Principles were stated which bear a close resemblance to the American law as stated in paragraph 552 of volume 3 of the Restatement of the Law of Torts and to which reference was made by several of their Lordships. Denning L.J., whose dissenting judgment in Candler v Crane Christmas & Co. 1951 2 K.B. 164 was upheld twelve years later in Hedley Byrne, also referred to the American law but at the same time confined his decision to the case where the defendant gives his report or advice to the enquirer. He said at p. 183:-

> "I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business for that would be to expose him to liability in an indeterminate amount for an indeterminate time to an indeterminate class"

- and he quoted these last words from the judgment of Cardazo C.J. in Ultramares Corporation v Touche (1931) 255 N.Y. Rep. 170.

We do not have to consider in this case whether liability for an innocent misrepresentation can extend to an indeterminate class for here the plaintiff alleges that he addressed a direct enquiry to the defendant.

All the speeches in the Hedley Byrne Case are directed to showing the circumstances in which a duty of care will be implied by law in relevant circumstances in cases other than where the duty arises from contract or a fiduciary relationship. Thus at p. 502 Lord Morris said -

> "The guidance which Lord Haldane gave in Nocton v Lord Ashburton was repeated by him in his speech in Robinson v National Bank of Scotland Ltd. He clearly pointed out that Derry v Peek did not affect (1) the whole doctrine as to fiduciary relationship (2) the duty of care arising from implied as well as express contracts, and (3) the duty of care arising from other special relationships which the courts may find to exist in particular cases."

I will now go to passages from the various

In the Supreme Court of New South Wales, Court of Appeal

No. 5

Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales in action No. 4670 of 1966

28th June 1967

Wallace, P. (continued)

speeches which appear to me of particular importance in the determination of the demurrer.

At p. 486, Lord Reid, after quoting Lord Haldane's explanation given in Robinson v National Bank of Scotland Ltd. (1961 S.C.(HL) 154 at 157) of the effect of Derry v Peek 14 App Cas 337 said :-

> "This passage makes it clear that Lord Haldane did not think that a duty to take care must be limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognised by the Court of Chancery as being of a fiduciary character. He 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 inquirer was relying on him."

I regard this dictum as being of paramount importance. His Lordship then added:-

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

Later, Lord Reid said that the ratio in Le Lievre v Gould was wrong and that Camm v Wilson ought not to have been overruled. These cases are so well known that it would be mere prolixity on my

part to elaborate on them.

It may be noted that in the second of the two quoted passages His Lordship used the phrase "skill and judgment" and he immediately referred to the case of Candler v Crane Christmas & Co. (supra) which dealt with the liability of a skilled professional man and said that it was wrongly decided.

The particular passage from Lord Morris' speech, which is of special importance for present purposes, appears at pp.502-3 and which consists of two successive sentences:-

(a) "My Lords, I consider that it follows and 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 upon 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."

(b) "Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon 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 upon it, then a duty of care will arise."

It will be seen that in sentence (a) His Lordship refers to "special skill". In sentence (b) however His Lordship goes further and indicates that the ingredients which will cause a duty to arise are (1) a sphere in which a person is placed whereby others could reasonably rely on the judgment or the ability of that person to make careful inquiry and (2) the information or advice is given to another who, as that person knows will in fact place reliance upon the information or advice.

It is therefore apparent that not only does the enunciated principle in sentence (b) go farther - and intentionally so - than sentence (a), but it is in effect as wide as the principle stated by Lord Reid in the above quoted passages.

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Lord Morris' enunciation stated in sentence (b) was expressly adopted by Lord Hodson at p.514 in the last sentence of His Lordship's speech.

Lord Devlin, after an elaborate review of many earlier cases went even further - perhaps further than any other of their Lordships. He stressed both the element of "undertaking the responsibility" and the general conception of "proximity" (Donoghue v Stevenson 1932 A.C. 562). At p.530 His Lordship said -

> "Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.
>
> I regard this proposition as an application of the general conception of proximity".

His Lordship had earlier stressed that financial loss was not excluded from the field of liability which along well established lines is attracted by damage to the person or to property - a theme common to all the judgments and which is one of the features of the case.

His Lordship also stressed (a) the absence of consideration is not irrelevant when determining that a special relationship exists deriving from "an assumption of responsibility" and (b) there must be kept in mind in such a determining process the difference between information or advice tendered on a social occasion or out of good nature and an occasion of a more serious nature and when the defendant "is getting his reward in some indirect manner" (p. 529). (With this phrase may be compared the phrase "mutual business advantage" used by Lord Morris at p. 503).

But it was at p. 531 that Lord Devlin expressed his views in the widest terms. After referring to the proposition in the American Restatement of the Law of Torts Vol.III para.522 (which refers to a person who "in the course of his business or profession supplies information for the guidance of others") His Lordship said:-

> "Since the essence of the matter in the present

case and in others of the same type is the acceptance of responsibility, I should like to guard against the imposition of restrictive terms notwithstanding that the essential condition is fulfilled. If a defendant says to a plaintiff: 'Let me do this for you; do not waste your money in employing a professional, I will do it for nothing and you can rely on me', I do not think he 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. The relevance of these factors is to show the unlikelihood of a defendant in such circumstances assuming a legal responsibility, and as such they may often be decisive. But they are not theoretically conclusive and so cannot be the subject of definition. It would be unfortunate if they were."

(My underlining)

The width of this enunciation is obvious although doubtless His Lordship did not intend that acceptance by the defendant of responsibility, though the essence of the matter, is the sole major consideration.

Lord Pearce made the following important statement at p. 538:-

"The basis ... is 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. In terms of proximity one might say that they are in particularly close proximity to those who as they know are relying on their skill and care although the proximity is not contractual".

(My underlining)

Again, at p.539 His Lordship said -

"If an innocent misrepresentation is made between parties in a fiduciary relationship it may, on that ground, give a right to claim damages for negligence. There is also, in my

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opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded."

A concluding passage of His Lordship's speech is also of importance. It also appears at p.539:-

"Was there such a special relationship in the present case as to impose on the defendants a duty of care to the plaintiffs as the undisclosed principals for whom the National Provincial Bank was making the inquiry? The answer to that question depends on the circumstances of the transaction. If, for instance, they disclosed a casual social approach to the inquiry, no such special relationship or duty of care would be assumed (see Fish v Kelly). To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer. It is conceded that Salmon J. rightly found a duty of care in Woods v Martins Bank Ltd. but the facts in that case were wholly different from these in the present case. A most important circumstance is the form of the inquiry and of the answer."

At this stage His Lordship referred to the bank's disclaimer of responsibility when giving the information which had been sought, and, in common with all their Lordships, decided the appeal in favour of the defendant bank on that ground. His Lordship held (p. 540) that the disclaimer had prevented the "special relationship" from arising.

The above, I think, is a sufficient analysis of the speeches in the Hedley Byrne Case for present purposes. No useful purpose would be served by a consideration of and reference to earlier cases, as they were considered by their Lordships who either distinguished or overruled them or adopted and incorporated them into the various speeches. Nor, I think, (and with much respect to that great Judge) do the views of Fullager J. in his learned paper on "Liability for Representations at Common Law" delivered to the

Law convention in 1951 and appearing at pp 278 et seq of 25 A.L.J. assist as it was written when the majority decision in Candler v Crane Christmas & Co. had just been published and was good law. It is however interesting to note that at p. 288 His Honour said of the "proximity" concept, that if "such an argument is ever put forward, it will certainly, I think, merit serious consideration".

It may be permissible to add that the paper of Fullagar J. is in some respects not inconsistent with the summary of the Hedley Byrne judgments submitted to us by Mr. Reynolds (for the demurring defendant) which was:-

> "If X possesses or professes to possess special skill and, acting or practising within his professional sphere makes a statement which he knows will be relied upon, he owes a duty of care not only to the person to whom the statement is made but to others whom he knows or ought to know will rely on it."

As I have earlier implied, the latter part (i.e. the reference to "others") of this summary is wider than is necessary for a decision in the present demurrer. The earlier, and main part of Mr. Reynolds' summary strictly accords with the headnote appearing in 1964 A.C. at p.466 and which Mr. Reynolds claims is accurate. I think the headnote is perfectly accurate as far as it goes, but it does not, in a respect important for present purposes, cover all that was said, as the passages which I have quoted above from the respective speeches demonstrate. In this regard it is sufficient to refer to the passages which I have quoted from Lord Reid's speech, the "situation" mentioned by Lord Pearce, the "sphere" referred to by Lord Morris and Lord Hodson and the "business transaction" of Lord Pearce. In short - and this to me is of the essence in the determination of this demurrer - I am unable to read the majority of the views expressed on the circumstances which will give rise to this duty of care as being confined to cases where the defendant possesses special "skill" as a professional man and is acting within his "professional" sphere and I cannot detect any reason why it should - though (and except in the case of barristers) this would in practice commonly

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be the position. I cannot reconcile such a confined view with the general tenor of the judgments and some of the passages and conclusions therein, perhaps particularly the quoted dictum of Lord Reid and the phrase "if in a sphere in which a person is so placed that others could reasonably rely on his judgment .... or his ability to make careful enquiry" appearing at pp 503 and 514. This, of course, was an essential portion of the answer to the enquiry to which all their Lordships turned and which is expressed early in the speech of Lord Reid. His Lordship said (at p.483):-

> "So it seems to me that there is good sense behind our present law that in general an innocent but negligent misrepresentation gives no cause of action. There must be something more than the mere misstatement. I therefore turn to the authorities to see what more is required."

In my opinion, and to the best of my consideration, the answer given by the majority, if not all, of their Lordships can be summarised for present purposes as follows (I do not mention the case of the skilled professional man who gives advice or information as such in his own sphere - this case of course is embraced within the judgments):- (1) an enquiry is made (2) to a person who has, and is known to the enquirer to have special knowledge of or ability to make careful enquiry on a particular subject (3) the enquirer, to the knowledge - or deemed knowledge - of that person relies on that person's advice or information and will act thereon (4) that person accepts the responsibility with such knowledge of giving the advice or information (5) the enquiry is made and the answer is given on a serious occasion and the reliance of the enquirer is reasonable.

As Lord Pearce said (p.539) the representation must normally concern a business or professional transaction whose nature makes clear the gravity of the enquiry and the importance and influence of the answer. Here it seems that His Lordship is directing attention to the fact that it is the nature of the business etc. transaction from whence the gravity of the enquiry emerges, not <u>necessarily</u> the degree of formality of the occasion when the enquiry is made.

If these tests are satisfied and the enquirer suffers financial loss as the result of acting upon carelessly, although honestly, given inaccurate advice or information, the enquirer has a good cause of action in tort founded on a breach of duty of care even though no consideration for the advice has passed from the enquirer to the defendant.

I will now re-examine the amended declaration the subject of this demurrer in the light of such summary.

It alleges:-

(1) that the plaintiff was making an enquiry of the defendant concerning the financial stability of a certain company H.G. Palmer (Consolidated) Limited and as to the safety of investments therein.

My comment is that in my opinion the enquiry and the answer to be given thereto as alleged concerned a business transaction of a nature which made clear the gravity of the enquiry. Perhaps it would be more accurate to state that the facts so far alleged are sufficient to justify them being taken into consideration by the trial judge who will have to rule whether or not the total evidence discloses a duty of care.

(2) that, as the plaintiff knew, the defendant had special facilities for obtaining full and up-to-date information concerning the financial affairs of H.G. Palmer (Consolidated) Limited and was in a position to give the plaintiff reliable and up-to-date advice concerning its financial stability.

My comment is that these appear to be relevant ultimate facts (as the reference to subsidiaries is not) which are capable of satisfying the next necessary test as enunciated by Lord Morris and Lord Hodson at pp.503 and 514 respectively. It is also capable of satisfying the test that the plaintiff's reliance must be reasonable (pp.503 and 514).

(3) that the defendant accepted the responsibility of furnishing such information and advice.

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I accept this as an allegation of ultimate fact and as not being a statement of law. It is a necessary test in all the speeches. Lord Devlin uses the precise phrase at p.531 whilst Lord Morris and Lord Hodson speak of "takes it upon himself".

(4) With knowledge that the plaintiff intended to act thereon in making a decision whether to retain existing investments in such company and whether to invest further therein.

(5) that the defendant negligently gave the required information and advice

(6) and that the plaintiff acted upon such negligently given advice and information to his financial loss.

(There is no express allegation that the advice and information was inaccurate but I think this sufficiently appears and this was clearly enough accepted during argument.)

In the light of the summary I have given of the principles which I regard as having been enunciated in the Hedley Byrne Case it seems to me inevitable that I should rule that a good cause of action is disclosed by the amended declaration. It is clear that sufficient is alleged therein which if proved at the trial would justify the trial judge in ruling that all the tests mentioned by their Lordships had been satisfied and which would then justify him in ruling that a duty of care had been shewn by the evidence. The reasonableness of the plaintiff's reliance upon the defendant's judgment or skill or ability to make careful enquiry is a jury matter but sufficient is alleged to make the declaration good as a pleading on this score. The same comment applies I think to whether the occasion was a serious one. As I read the majority of their Lordships' speeches it would not be necessary for the plaintiff here to allege a mutual business advantage although I think the facts alleged constitute a "business transaction" within the meaning of that phrase.

No allegation of consideration is necessary and no question of "proximity" arises as the plaintiff was the direct enquirer. Then as the

allegations sufficiently state the defendant "accepted the responsibility" of giving the advice knowing that the plaintiff reasonably relied upon it for the purpose of governing his future conduct, and there was no disclaimer of responsibility.

And so, deeming myself bound to follow the principles stated in the English decision, and however startling the result may be to the unwary giver of advice or information who does not protect himself by a disclaimer of responsibility - be he stockbroker, accountant, banker, grazing property agent, or consultant of any kind (to give but a few examples of those who may give honest but inaccurate information or advice in such circumstances as are alleged here) - I feel compelled to hold that the declaration discloses a good cause of action.

Some argument was addressed to us on matters related to technicalities of pleading - directed mainly I think to the use of the phrase "accepted the responsibility" (see per Lord Devlin at pp.529 and 530). The case is one of an "ad hoc" special relationship and applying the principle that a declaration in tort should state ultimate and not evidentiary facts, I can detect no departure from proper rules of pleading.

Since writing the foregoing I have had the benefit of reading the judgment of Asprey J.A. in its prepared form. I find much force in His Honour's views on "forecasts, honestly made", but cannot, on further reflection, reconcile them with the dicta in Hedley Byrne. The necessity for a misrepresentation to be factual is clear in certain fields both in equity and at common law when relief is sought based on the misrepresentation. This principle is untouched by the dicta in the Hedley Byrne Case. But the words "judgment" "skill" and "advice" appear throughout their Lordships' judgments whilst at p. 528 Lord Devlin said "It cannot matter whether the information consists of fact or opinion or a mixture of both". A financial consultant who says to his enquirer: "I advise you to invest in the X coy company" or "In my opinion X coy is a good investment" imports an element of prophecy based on knowledge, skill and judgment as well as a reference not only to the company's history but to its future prospects. Illustrations

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in other fields e.g. accountancy and medicine can be envisaged. I am unable for myself to construe their Lordships' speeches so as to confine this cause of action in tort to statements or expressions relating to existing or past facts. I am, with respect, of opinion that any reading down of their Lordships' phraseology is for a higher court.

The demurrer should be overruled and judgment on demurrer given for the plaintiff. As a considerable and perhaps major part of the argument was directed to the declaration in its unamended form (and on which it seems clear the plaintiff would have failed) I think a proper order in all the circumstances is that the costs of the demurrer be costs in the action.

JUDGMENT

Walsh, J.A.

WALSH, J.A.: In this demurrer to the plaintiff's declaration, counsel for the plaintiff contended that the declaration should be held good by reason of the principles which, according to his submissions, are to be extracted from the speeches delivered in the House of Lords in the case of Hedley Byrne & Co. Ltd. v. Heller & Partners Limited (1964 A.C. 465). The argument presented in support of the demurrer on behalf of the defendant was based upon the assumption that this Court would accept and apply the principles stated by Their Lordships, notwithstanding that the decision in the case was such that it may be said that most of the statements made by Their Lordships were obiter dicta. In my opinion, this assumption was rightly made.

The principal contest which developed in the arguments of counsel for the plaintiff and for the defendant may be stated in the following way. The defendant contended that it was a fair interpretation of the speeches of Their Lordships to extract from them the proposition that the person making a statement, for which it is sought to hold him liable in negligence, must be a person possessing or

professing to possess a special skill who, whilst practising within that sphere, makes the statement in the course of his profession or business knowing that the statement will be relied upon. Counsel for the plaintiff, whilst accepting that the conditions just stated in relation to the person making the statement are (together with any other relevant requirement such as the reliance of the plaintiff on the statement) sufficient to attract liability, contends that they are not essential and that the principle of the Hedley Byrne case extends further than that.

In my opinion, counsel for the plaintiff is correct in the contention that the principle can extend beyond the limit which the argument for the defendant seeks to put upon it. I think that this is demonstrated by the passages from the speeches of Their Lordships to which the learned President in his reasons for judgment in this case has referred, and particularly by what was said by Lord Reid (1964 A.C. at 486) and by the statement made by Lord Morris (at 503 beginning with the word "Furthermore") and adopted by Lord Hodson (at 514).

The statements of principle made by Their Lordships are such that difficulty may occur in particular cases in determining whether in the whole of the circumstances the duty of care has arisen or whether, on the other hand, the maker of the statement has either come under no duty to the person to whom it is made or has come under no greater duty than a duty to act and speak honestly. This difficulty is one which, in my opinion, could be much more satisfactorily resolved by a Judge or a Court upon an examination of all the evidence in the case than it can be by a Court hearing a demurrer. The extension in the Hedley Byrne case of the field of liability for negligence beyond what was previously considered to be its limits means that the pleader in a declaration in our system of pleading must make a decision as to what allegations will suffice to establish, within that extended field, a cause of action for which pleading precednets have not yet been developed and in respect of which the precise scope and limits of the area of liability have not yet been fully worked out in the case law by the process of the application in particular instances of the principles

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enunciated in the House of Lords. However, the Court is asked to deal with the matter on demurrer. Neither party has asked that it should be stood over until after a trial of the facts and I think that the Court should deal with it.

I have felt some difficulties about the allegation, to which a good deal of the argument was directed, that the defendant "accepted the responsibility of supplying the plaintiff with the said information and advice". But I have reached the conclusion that the amended declaration does not infringe the rule that the facts relied upon to establish that a duty of care exists must be sufficiently stated and that deficiencies in the statement of them cannot be made good by a mere statement to the effect that the duty exists. See Perry v. Willis (11 S.R. 479 at 487-488). I think that the allegation that the defendant accepted the responsibility can be properly regarded as an allegation of fact. According to Lord Reid (1964 A.C. at 483), it is a requirement of liability that "expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility". At 487 His Lordship used the phrase "agreeing to assume a responsibility". He was, of course, not using the word "agreeing" in the sense of making a contract supported by consideration, but in the sense of assenting to be treated as responsible for supplying the information or of undertaking or promising (although without consideration) to supply it. Bearing in mind those and other statements in the Hedley Byrne case, I think that in this declaration, as amended, the words to which I have referred constitute an allegation of fact as to the circumstances in which and the understanding with which the defendant made the statement and ought not to be read as an allegation of law. Further, I think that sufficient facts are alleged to show a situation in which a duty of care arose.

In his reasons for judgment herein, Asprey J.A. has drawn attention to a question which, as he points out, was not raised in the argument on the demurrer. In the declaration, there are allegations to the effect that the information and advice, which are alleged to have been negligently given, consisted in part of stating that H.G. Palmer (Consolidated) Limited was financially

stable and that existing investments therein were safe and in part in stating that it would continue to be financially stable and that existing investments would continue to be safe and that it would be safe further to invest therein. Asprey J.A. expresses the view that, whilst in the circumstances stated in the amended declaration liability could attach for negligence in making statements as to existing facts, it could not attach in respect of statements as to the future, which could only be statements of opinion or belief. There is, no doubt, much to be said in favour of the desirability of such a distinction, and it may find some support in the earlier cases. But I cannot find that in the speeches in the Hedley Byrne case that line of demarcation was drawn, either expressly or by implication. The formulations of the principle of liability contain references to "information or advice" or to "advice" and I think that in these statements "advice" should be taken to include statements of opinions as to the future. See 1964 A.C. at 486, 494, 503 and 514. In some passages in the speeches specific reference is made to statements of opinion as well as to statements of fact. Thus at 482, Lord Reid refers to a person "seeking information, opinion or advice" and at 484 he refers to "a statement of fact or opinion". At 528 Lord Devlin states "It cannot matter whether the information consists of fact or of opinion or is a mixture of both".

It may be that at the trial of an action such as this it will be material to consider, in relation to any information or advice which may be proved to have been given, the difference between statements as to existing facts and statements of opinion or belief as to the future course of events, both in deciding whether the defendant "accepted responsibility" and in deciding whether any negligence could be found in relation to such statements and, perhaps, in deciding whether or not the plaintiff reasonably relied upon them. But I do not think that we should be justified in holding, in reasons for judgment on demurrer, that, as a matter of law, no reliance can be placed on statements as to the future or that evidence concerning any such statements must be excluded as irrelevant.

I am in general agreement with the analysis

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which the learned President has made of the speeches in the Hedley Byrne case and of the allegations in the amended declaration. As he has dealt with these matters fully and in a manner which accords with my own views, I think it is unnecessary for me to expand the reasons which I have stated shortly for concluding that the demurrer to the amended declaration should be overruled and that there should be judgment for the plaintiff in demurrer. The costs of the demurrer should be costs in the cause.

JUDGMENT

Asprey, J.A.

ASPREY, J.A.: The plaintiff is suing the defendant for damages for negligence and this is a demurrer to the plaintiff's declaration. The nature of the argument presented on this appeal renders it necessary to analyse with some precision the allegations in the declaration which is claimed to be so framed as to enable the plaintiff to rely upon principles to be found in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (1964) A.C. 465. The allegations relied upon in the declaration as filed may be stated in the following way:-

(1) the plaintiff was a policy holder in the defendant

(2) the plaintiff was seeking from the defendant information and advice concerning the financial stability of H.G. Palmer (Consolidated) Limited and as to the safety of investments therein

(3) the defendant 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 (i) whether to retain investments already existing in H.G. Palmer (Consolidated) Limited and (ii) whether to invest further therein

(4) the defendant negligently informed and advised the plaintiff that H.G. Palmer (Consolidated) Limited (i) was and (ii) would continue financially stable and that (iii) the investments therein existing were and (iv) would continue safe and that (v) it would be safe to invest further therein

(5) the plaintiff, relying on the said information and advice, did not realise on certain investments in H.G. Palmer (Consolidated) Limited and invested further sums therein

(6) the plaintiff thereby lost the value of the aforesaid investment together with interest thereon and was otherwise greatly damnified.

During the course of the argument upon the appeal, the plaintiff asked that the declaration be amended by adding the following additional allegation immediately after the second allegation mentioned above. For convenience I will set forth this allegation with the number 2A.:-

(2A.) the defendant as the plaintiff well knew was associated with H.G. Palmer (Consolidated) Limited by reason of the fact that both companies were subsidiaries of The M.L.C. Limited and by virtue of this association the defendant as the plaintiff well knew had special facilities for obtaining full complete and up-to-date information concerning the financial affairs of H.G. Palmer (Consolidated) Limited and was in a position to give the plaintiff reliable and up-to-date advice concerning the financial stability of H.G. Palmer (Consolidated) Limited.

The actual decision in the Hedley Byrne Case is of no assistance to the plaintiff in the instant action because in that case, although advice had been given carelessly by the defendant banker which reached the plaintiff through its own banker, the defendant banker had expressly disclaimed responsibility for such advice and in those circumstances

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the House of Lords unanimously held that no duty of care could be implied. The plaintiff in the instant case, however, relies upon other material in the speeches in the Hedley Byrne Case to support his declaration. Strictly speaking, all those parts of the speeches in the Hedley Byrne Case upon which the plaintiff founds his argument are obiter dicta; but they were carefully considered dicta delivered per curiam and, sitting as a member of an intermediate Court of Appeal, I consider that I am bound thereby. Whatever the validity of the stringent criticisms which have been levelled against them (see, for example, the articles of Mr. D.M. Gordon Q.C. of the Bar of British Columbia in (1964-1965) 38 A.O.J. 39, 79), I think that, until I am otherwise directed by a superior tribunal, these dicta of the House of Lords should be regarded by me as determining principles of law, at any rate to the extent which I will endeavour to indicate.

The question posed for answer upon this demurrer cannot be easily dealt with by the application of some single, precise dictum readily capable of simple extraction from the Hedley Byrne Case and it appears to me that, in order to arrive at a conclusion whether the declaration stands good, the case should be approached in the following way. Firstly: there were five separate speeches delivered in the House of Lords and it is necessary to ascertain the basis upon which each of their Lordships thought that a negligent though honest misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby apart from the existence of a contractual or fiduciary relationship between the parties. Secondly: if it be found, as I think it will, that the dicta of all their Lordships has not always an identical basis, the course which this Court should, in my view, follow is not to select the particular dictum of its own preference but to endeavour to discover the ratio decidendi of the dicta in the same way as one would ascertain the ratio of an actual order made upon appeal as if the dicta were the authority for the ultimate decision in the appeal. Although, because of the disclaimer of responsibility, the case upon appeal went the other way, there is a considered decision to be found in the obiter dicta and, as it appears to me, the problem is to ascertain what is the

ratio of that "dicta decision" if I may respectfully call it so (cf. Ratio Decidendi and Obiter Dictum in Appellate Courts by Professors Paton and Sawer (1946) 63 L.Q.R. 461 which was described as "an illuminating discussion" by Lord Simonds in Jacobs v. London County Council (1950) A.C. 361 at p.370). I take this course because Counsel were unable to refer us to any case, either in the High Court of Australia or the Privy Council, which bore upon the question raised by the demurrer and, until the Hedley Byrne Case reached the House of Lords, I consider that this Court would have applied the law as laid down in a long line of authority culminating in the majority judgments in Candler v. Crane, Christmas & Co. (1951) 2 K.B.164. In these circumstances I think that I, as a member of this intermediate Court of Appeal, should depart from that situation only to the extent of the "decision" to be extracted from the dicta and that I should not attempt to extend the actual limits of that "dicta decision". Thirdly: the next problem is to ascertain whether the factual allegations contained in the declaration are sufficient to raise a duty of care which the ratio of the Hedley Byrne Case supports as a good cause of action.

The detailed facts in the Hedley Byrne Case are taken from the judgment of Pearson L.J. in the Court of Appeal and appear in (1962) 1 Q.B. at pp.397-399. It is, perhaps, not without importance that Pearson L.J. referred to two inquiries, one in August 1958 and the other in November 1958. The latter inquiry and its answer are referred to in the speeches of Lord Reid and Lord Morris. But with reference to the November 1958 inquiry Pearson L.J. said that he only referred to it by way of completeness and said that "as no separate point is raised with regard to it, there is no need to set it out." The significance of this would appear to be that prior to the August 1958 inquiry the plaintiff company on behalf of a client had placed forward orders for advertising which involved it in a personal liability for the cost thereof. It was alleged (and assumed for the purposes of the Hedley Byrne Case) that it was because of the terms of the answer to the August 1958 inquiry that the plaintiff company refrained from cancelling forthwith those orders which caused it the loss for which it sued. The answer was that the client is

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"believed to be respectably constituted and considered good for its normal business engagements". The facts were that the financial condition of the client in August 1958 was precarious and that it was dependent for its survival upon the continuance of financial facilities provided by the defendant banker. At first instance an allegation of fraud was abandoned and McNair J. (unreported) held that the defendant was negligent but owed no duty of care. The Court of Appeal likewise held that there was no duty of care and found it unnecessary to consider the question of negligence (1962) 1 Q.B. 396. When the case reached the House of Lords the defendant was successful on the ground, as mentioned above, that there could be no implication of a duty of care where there was an express disclaimer of responsibility.

In the present case we are relieved of problems arising, as they did in the Hedley Byrne Case, from information or advice not being passed directly from the defendant to the plaintiff and the defendant not knowing the identity of the person who would rely and act upon the information and advice or from any special inferences to be drawn from the identity of the person supplying it such as a banker (see per Lord Reid at p.489, per Lord Morris at pp.503-504 and per Lord Hodson at pp.512-514) or a barrister (see Rondel v. W. (1966) 3 All E.R. 657). The declaration does not allege either a contractual or fiduciary relationship between the plaintiff and the defendant; and it does not assert that the parties were negotiating to enter into a contract (cf. 81 L.Q.R. at p.590). It is not a case of fraud. It is a case in which, in essence, it is averred that the plaintiff "was seeking from the defendant" - a phrase which, in its context, I am prepared to read as "sought from the defendant" - information and advice concerning the financial stability of H.G. Palmer (Consolidated) Limited in which company the plaintiff made known to the defendant that he was already an investor and that he was contemplating investing further therein and that he asked the defendant for the information and advice making known to the defendant that he intended to act thereon. It is further averred (by the amendment) that the defendant had to the plaintiff's knowledge special facilities for obtaining complete information concerning the financial affairs of

H.G. Palmer (Consolidated) Limited as at the date when the defendant communicated the information to the plaintiff and at that date was in a position to give the plaintiff reliable advice concerning the financial stability of H.G. Palmer (Consolidated) Limited. In that situation the plaintiff declares that the defendant negligently informed the plaintiff (a) that H.G. Palmer (Consolidated) Limited was financially stable and that the plaintiff's existing investments therein were safe and (b) that H.G. Palmer (Consolidated) Limited would continue to be financially stable and that the plaintiff's existing investments therein would continue to be safe and (c) that the plaintiff could in the future safely make further investments of his moneys therein. I pause for the moment to consider the nature of the information and advice upon which the plaintiff contended he relied. I have divided this into three categories as above because of the futurity concept in both (b) and (c). In Cann v. Wilson 39 Ch.D. 39 the misrepresentation was as to the value of a property at the date of the representation. It is true that the valuers also stated that the property could be let "at any time" for £150 per annum but the judgment of Chitty J. makes it plain that this was regarded as a representation as to the rental value as at the date of the valuation - see the phrase "could then be let" at p.44. The representations in Lievre v. Gould (1893) 1 Q.B. 491 and Candler v. Crane, Christmas & Co. (1951) 2 K.B. 164 were as to an existing state of affairs; see too Derry v. Peek 14 A.C. 337, Low v. Bouverie (1891) 3 Ch. 82; Robinson v. The National Bank of Scotland (1916) S.C. (H.L.) 154; Woods v. Martin's Bank Ltd. (1959) 1 Q.B. 533; and see especially the analysis by Lord Atkinson of the allegations relied upon in Banbury v. Bank of Montreal (1918) A.C. 626 at pp.680-681. In the Hedley Byrne Case, although no attention was directed apparently to this aspect of the case, the nature of the answers given in response to the inquiries plainly show that the representations made in answer thereto were as to an existing state of affairs. It was because of its belief, induced by the defendant banker's reference, in the existing financial stability of its client that the plaintiff company did not at once reduce its liability by cancellation of the contracts and thereby suffered the loss for which it sued (see above). As I understand the facts,

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Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales in action No. 4670 of 1966

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Asprey, J.A.
(continued)

it was not suggested that the defendant banker was, as it were, by its reference warranting the future financial stability of the client throughout the term of the advertising contracts which had been entered into prior to the seeking of the credit reference. If that were not the situation in the Hedley Byrne case, I would have expected it to have been made plain in the report of the case and in the speeches of their Lordships as it certainly would have been a most unusual form of credit reference to have emanated from any banker. In any event it appears to me that their Lordships dealt with the case upon the footing of a representation of existing facts. In the instance case the representation as to the future stability of H.G. Palmer (Consolidated) Limited can only be treated in this context as a statement of opinion or belief but there is no assertion that the opinion was not honestly held when given (cf. Bisset v. Wilkinson (1927) A.C. 177; Federal Commissioner of Taxation v. Westgarth 81 C.L.R. 396 at p.407). I will return to this aspect of the case later herein.

I turn next to the allegations contained in the amendment to the declaration - see paragraph (2A.) above. In essence, this is an allegation that the defendant had facilities at its disposal, if it wished to utilise them, for ascertaining the correct financial position of H.G. Palmer (Consolidated) Limited before or at the time that the defendant gave the information and advice to the plaintiff. It is implicit in the declaration that the defendant had not taken advantage of these facilities before it informed or advised the plaintiff because on the assumption that H.G. Palmer (Consolidated) Limited's financial affairs were not sound at the date of information and advice, that knowledge, if at that date in the possession of the defendant, would have impugned the honesty of the defendant and, as mentioned above, that is not suggested in this case. What is suggested, possibly, is that the defendant, having such facilities at its ready disposal, was under a duty to have utilised them before answering the inquiry of the plaintiff.

I will now proceed to summarise the relevant dicta of each of their Lordships in the Hedley Byrne Case. In addition to the articles by Mr.

Gordon Q.C. to which I have referred above, these dicta have been further discussed at some length by Mr. Robert Stevens in (1964) 27 M.L.R. 121 and for present purposes I need only refer to them in relation to the instant case. Lord Reid considered (p.483) that "in general an innocent but negligent misrepresentation gives no cause of action. There must be something more than mere misstatement..... The most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility." Lord Reid (at pp.485-486), after referring to Lord Haldane's use of the term "other special relationships" in Robinson v. National Bank of Scotland Limited (supra at p.157), continued: "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 inquirer was relying on him. I say 'ought to have known' because in questions of negligence we now apply the objective standard of what the reasonable man would have done. A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require".

Lord Morris (at p.494) said: "If A assumes a responsibility to B to tender him deliberate advice, there could be a liability if the advice is negligently given". He explained the use of the phrase "could be" on the basis that legal obligations would not attach "to every kindly and friendly act". After stating that there should

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be "an inquiry as to whether there was a relationship between the parties which created a duty and, if so, whether such duty included a duty of care" Lord Morris (at pp.502-503) proceeded: "If someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon 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 upon his judgment or his skill or upon 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 upon it, then a duty of care will arise".

Lord Hodson (at p.514) expressly agreed with the last sentence which I have just quoted from the speech of Lord Morris.

Lord Pearce (at p.539) said: "The true rule is that innocent misrepresentation per se gives no right to damages. If the misrepresentation was intended by the parties to form a warranty between two contracting parties, it gives on that ground a right to damages (Neilbut, Symons & Co. v. Buckleton (1913) A.C. 30). If an innocent misrepresentation is made between parties in a fiduciary relationship it may, on that ground, give a right to claim damages for negligence. There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded". He said that a casual inquiry would not raise such a duty and proceeded: "To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer ..... A most important circumstance is the form of the inquiry and of the answer."

Lord Devlin (at pp.514-515) said: "The duty" (i.e. the duty to be careful in speech) "is limited to those who can establish some relationship of

proximity such as was found to exist in Donoghue v. Stevenson (1932) A.C. 562. A plaintiff cannot, therefore, recover for financial loss caused by a careless statement unless he can show that the maker of the statement was under a special duty to him to be careful". He said (at pp.528-529: "The categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in Nocton v. Lord Ashburton (1914) A.C. 932 at p.972 are 'equivalent to contract', that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. 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". Earlier (at p.528) Lord Devlin had said: "It cannot matter whether the information consists of fact or of opinion or is a mixture of both, nor whether it was obtained as a result of special inquiries or comes direct from facts already in the defendant's possession or from his general store of professional knowledge. One cannot, as I have already endeavoured to show, distinguish in this respect between a duty to inquire and a duty to state". Lord Devlin (at p.529-530) continued: "I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relation, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction

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Asprey, J.A. (continued)

..... I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular..... Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility". Later (p.531) Lord Devlin said that "the essence of the matter.....is the acceptance of responsibility".

It seems to me that the ratio of the dicta decision is that (i) if A honestly makes to B a representation of fact and (ii) if, in making that statement, A expressly accepts responsibility for the correctness of that representation or if A stands in such a relationship to B as to raise an implication that A accepts responsibility for the correctness of that representation, A owes a duty to B to take reasonable care to ensure that the representation made by him is correct and (iii) if B, in reliance upon the correctness of that representation, acts to his financial loss which is caused thereby, then, B has a good cause of action against A for damages if the representation is incorrect and A has breached that duty of care.

More difficulty is encountered where there is no express acceptance of responsibility but the ratio of the dicta appears to found the proposition that the relationship in which an implication of acceptance of responsibility on the part of A towards B can arise may be established by showing that A has a special skill or special knowledge in relation to the fact represented by him and that B either expressly makes known to A that he is seeking information upon which he intends to act in some matter which involves B in some financial outlay or obligation or the occasion on which B is seeking information from A is such that A ought reasonably to know that B intends so to act thereon in such a matter in circumstances in which A knows or reasonably ought to know that B is trusting A to utilise his special skill or knowledge in imparting to him the requested information. Where A does not himself possess the special knowledge but only

has the means of obtaining it (cf. allegation (2A.) above) the situation is not so clear and different considerations may apply. It may be that in some circumstances it would not be reasonable to expect A to go to the trouble, and, perhaps, expense of obtaining it unless there existed some special professional relationship between A and B or it was in the ordinary course of A's business to supply information or advice of the nature sought by B (cf. American Restatement of the Law of Torts, Topic 3, Negligent Misrepresentations, para.553).

Turning to the allegations relied upon by the plaintiff in his declaration as filed, paragraph (1) was conceded (and would appear) to be irrelevant to the cause of action relied upon. I am prepared to assume for the purposes of this demurrer that the communication of the defendant to the plaintiff was not in answer to a mere casual inquiry and that the defendant appreciated that situation. Subject to one matter, the allegations contained in the remainder of the paragraphs would, accordingly, appear to ground a good cause of action with regard to the representation that the defendant carelessly informed the plaintiff that H.G. Palmer (Consolidated) Limited was financially stable and that the plaintiff's existing investments therein were safe. In this connection a difficulty that I have had is with reference to the phrase contained in paragraph (3) above, namely, "the defendant accepted the responsibility of supplying" etc. Counsel for the plaintiff asserted during argument that this phrase was and was intended by the plaintiff to be a statement of ultimate fact. That type of phraseology appears throughout the judgments in the Hedley Byrne Case. Upon consideration I think it could be regarded as a statement of fact which could be proved either by evidence that the defendant expressly accepted responsibility for the correctness of the representation or by proving facts which would enable a jury to say that the defendant had impliedly accepted such responsibility. I am concerned here, not with proof, but with the statement of sufficient facts to ground a cause of action.

However, with regard to the representations relied upon that H.G. Palmer (Consolidated) Limited would continue to be financially stable, that the plaintiff's investments therein would continue to

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be safe and that the plaintiff could in the future make further investments of his moneys therein, these allegations appear to me to fall into quite a different category. Such statements which relate to a state of affairs which could only happen in the future are not statements of existing fact but a statement of opinion or belief. Fraud is not alleged, no question is raised as to the honesty of the defendant and it is not alleged that the defendant did not in fact hold the opinion or belief which was communicated by it to the plaintiff. Prima facie, if a person, who holds a genuine opinion on a matter, chooses to state that opinion in absolute form as a fact, the law will hold that he has made a representation of fact (A.G. v. Ray 9 Ch.App. 397; Brownlie v. Campbell 5 A.C. 925 per Lord Selborne L.C. at p.936). But a statement in absolute form, i.e. "this company is prosperous", although not prefaced by qualifying words such as "I am of opinion that" or "I believe that", is, nevertheless, only a statement of opinion or belief where the person to whom the statement is made is aware that the speaker has no sufficient information or knowledge to justify the statement. The quality of the statement is controlled by the sense in which it ought reasonably to be understood (Smith v. Chadwick 9 A.C. 187 per Lord Selborne L.C. at pp.190-191 ; Bisset v. Wilkinson (supra) at p.183). The form of the statement, although not accompanied by those words of express qualification, may control the sense in which the statement ought reasonably to be understood for by its very nature the person addressed ought reasonably to be aware of the insufficiency of the information or knowledge. It may be one thing to say that the sun will rise during the next 24 hours and quite another to say that a company will continue to prosper for an indefinite period in the future as neither the person who makes the latter statement, even one intimately connected with the company's affairs, nor the person to whom he speaks, can have knowledge of events which have not yet occurred or can safely ignore the contingencies of the future; no matter how confidently it may be asserted, no matter how past events may afford ground for optimism or pessimism, no matter how expert the speaker, it is no more than an opinion, a prediction of the future. As George Eliot once wrote, prophecy is the most gratuitous form of error. Common experience in every sphere

of affairs shows us that this is so. Sincere predictions are frequently made, not upon the lessons of the past or the state of the present, but upon intuitive expectations or judgments which, to borrow the language of Cardozo J. in another context, are "too subtle to be formulated, too imponderable to be valued, too volatile to be localized or even fully apprehended". I find it difficult to fit honest predictions into the established principles of the law of negligence and the Hedley Byrne Case does not alter those principles but merely authorises a new category of negligence whose categories are never closed. I think that the law would not hold that a person would be justified in so relying upon a prediction of that nature as to impose legal responsibility upon the party making it as both must be taken to be aware of the uncertainties which lie in the path of the happening of future events and to succeed in this cause of action a plaintiff must not only prove that in fact he relied upon a representation but show that it was one on which in law he was justified in so acting, that is to say, one that is not trivial, not one that he regarded as ambiguous, one that he can assert he believed was true and not one which he could only assert might or might not happen. Misrepresentation, whether fraudulent or negligent, must, I think, bear the essential characteristics of misrepresentation; what alters is the context of circumstances in which the representation is made, a failure to believe in the truth of what is represented on the one hand with intent to deceive and on the other careless but honest conduct. The only fact ordinarily involved in an expression of opinion is the state of mind of the speaker, i.e. the fact that he holds that opinion (see Karberg's Case (1892) 3 Ch. 1 per Lindley L.J. at p.15) and, if he honestly holds it, the law does not regard an erroneous opinion as to a future happening as a representation which will found any action for relief. There is also the less common type of case where, if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion (Smith v. Land & House Property Corporation 28 Ch.D. 7 per Bowen L.J. at p.15; Brown v. Raphael (1958) Ch. 636); but in these cases, it will be found that opinion is expressed as to existing facts and not as to a future situation

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Asprey, J.A. (continued)

On occasions when the language of a representation has borne the appearance of prediction, Courts have been able to conclude that, when properly construed, it is to be understood as a representation (see Gerhard v. Bates 22 L.J.Q.B. 364 per Lord Campbell L.C. at p.370; Re Pacaya Rubber & Produce Co. Ltd. (1914) 1 Ch. 542 at p. 549). In the instant case where the allegations declared upon are in a context which contains allegations both as to the existing and the future financial stability of H.G. Palmer (Consolidated) Limited and the existing and future safety of investments therein, it would not be possible to construe the allegations which contain the concept of futurity as relating only to conditions existing at the date of the representations in a declaration which must be read against the pleader (cf. Bellairs v. Tucker L.R. 13 Q.B.D. 562 at pp.572-574). The Hedley Byrne Case, in my view, affords no authority for the view that forecasts, honestly made, of the continuing prosperity of a business undertaking will sound in damages when subsequently be proved to be mistaken for the reason that such statements are not representations of fact (see New Brunswick and Canada Railway Co. v. Conybeare 9 M.L.C. 711 at p.729; 11 E.R. 710 at p.730; Bisset v. Wilkinson (supra)), and, as I have tried earlier herein to show, the speeches in that case were addressed only to a situation of misrepresentation of fact. The words "advice", "opinion", or the like which appear in the speeches are quite consistent with an intellectual judgment formed in relation to facts in existence before or at the time when the nature of the judgment is communicated by the speaker or writer to the addressee (Winfield: Law of Tort 7th Edn. pp.552-553). Such words do not necessarily relate to a prophetic judgment and, in ascertaining their meaning, I think that I should heed the oft-repeated observations of Lord Halsbury and read them as applicable to the particular facts proved or assumed to be proved and to regard the Hedley Byrne dicta as authority only for what they actually decide. In my opinion, therefore, it follows that in so far as the declaration is based upon the allegations relating to the future of H.G. Palmer (Consolidated) Limited it would not afford a good cause of action.

This point was not argued before us but having regard to the importance and novelty of the principles relied upon so far as the Courts of this

State are concerned, I think that this case should not go to trial with the form of the declaration in its present terms wherein the plaintiff alleges his reliance generally upon a set of representations some of which would not entitle him to relief in the action. It is regrettable that such a case should be argued upon demurrer but, as in the long run greater expense may be saved if my views were correct, I have thought it proper to set them forth upon the legal effect of the declaration at this early stage rather than risk an abortive trial.

I have the misfortune not to be in agreement with the other members of the Court but I would be of the opinion that the demurrer should be allowed, that there should be judgment for the defendant in the demurrer and that the plaintiff should have 21 days within which to amend his declaration. As the defendant did not argue the question upon which I think it should succeed I think that there should be no order as to costs.

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Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales in action No. 4670 of 1966

28th June 1967

Asprey, J.A. (continued)

No. 6

No. 6

RULE OF THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES dated 18th December 1967

Rule of the Court of Appeal of the Supreme Court of New South Wales

18th December 1967

No. 9725 of 1967.

BETWEEN: CLIVE RALEIGH EVATT
Plaintiff

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

The eighteenth day of December 1967.

The demurrers herein coming on to be argued this day WHEREUPON AND UPON READING the demurrer books and UPON HEARING Mr. A.B. Kerrigan of Queens Counsel with whom was Mr. T.R. Morling of Counsel in support of the defendants' demurrers herein and in opposition to the plaintiff's demurrers herein and Mr. K.R. Handley of Counsel with whom was Mr.

In the Supreme Court of New South Wales, Court of Appeal

No. 6

Rule of the Court of Appeal of the Supreme Court of New South Wales

18th December 1967 (continued)

J.M. Bennett of Counsel in support of such plaintiff's demurrers and in opposition to such defendants' demurrers IT IS ORDERED that judgment be for the plaintiff on such defendants' demurrers with costs and IT IS FURTHER ORDERED that judgment be for the plaintiff on such plaintiff's demurrers with costs.

By the Court,
For the Registrar

B. MUIRHEAD
Acting Chief Clerk.

In the High Court of Australia New South Wales Registry

No. 7

Order granting Leave to Appeal to the High Court of Australia

12th March 1968

No. 7

ORDER GRANTING LEAVE TO APPEAL TO THE HIGH COURT OF AUSTRALIA dated 12th March 1968

No. 7 of 1968.

IN THE MATTER of proceedings No. 9725 of 1967 pending in the Court of Appeal of the Supreme Court of New South Wales

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

AND CLIVE RALEIGH EVATT
Respondent
(Plaintiff)

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR GARFIELD BARWICK MR. JUSTICE McTIERNAN MR. JUSTICE KITTO MR. JUSTICE TAYLOR AND MR. JUSTICE OWEN

TUESDAY THE 12th DAY OF MARCH 1968

UPON APPLICATION made to the Court this day at Sydney by Counsel on behalf of The Mutual Life & Citizens' Assurance Company Limited and The M.L.C. Limited (hereinafter called "the Applicants") AND UPON READING the Notice of Motion dated the 3rd day of January 1968 and the two several Affidavits of Roderick McLeod sworn the 27th day of December 1967 and the 16th day of February 1968 and the exhibits referred to in the said Affidavits all

filed herein AND UPON HEARING Mr. A.B.Kerrigan of Queens Counsel and Mr. P.R. Capelin of Counsel for the Applicants and Mr. R.S. Hulme of Counsel for the Respondent THIS COURT DOTH ORDER that leave be and the same is hereby granted to the Applicants to appeal to this Court from the judgment and order of the said Court of Appeal of the Supreme Court of New South Wales delivered and made on the 18th day of December 1967.

In the High Court of Australia New South Wales Registry

No. 7

Order granting Leave to Appeal to the High Court of Australia

12th March 1968 (continued)

By the Court

(Sgd.) H. Cannon (Seal)

District Registrar

No. 8

NOTICE OF APPEAL TO THE HIGH COURT OF AUSTRALIA dated 15th March 1968

No. 8

Notice of Appeal to the High Court of Australia

15th March 1968

No. 7 of 1968.

ON APPEAL FROM THE COURT OF APPEAL OF NEW SOUTH WALES

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

AND CLIVE RALEIGH EVATT
Respondent
(Plaintiff)

NOTICE OF APPEAL

TAKE NOTICE that the Appellants herein by leave of the High Court granted the 12th day of March 1968 appeal to the Full Court of the High Court of Australia from the whole of the judgment and order of the Court of Appeal of New South Wales delivered and made on 18th December 1967 in matter No. 9725 of 1967 by which the said Court of Appeal ordered that the demurrers filed by the Appellants (Defendants in such proceedings) should be overruled and that the demurrers filed by the Respondent (Plaintiff in such proceedings) should be upheld and judgment on demurrer given for the Respondent (Plaintiff) and that the costs of the demurrers should be paid by the Appellants (Defendants), on the following grounds:

In the High Court of Australia New South Wales Registry

No. 8

Notice of Appeal to the High Court of Australia

15th March 1968 (continued)

1. That the Court of Appeal was in error in holding that all three counts in the declaration disclosed causes of action known to the law.

2. That the Court of Appeal was in error in holding that the three several pleas of the Appellants (Defendants) to which the Respondent (Plaintiff) demurred were not good pleas in bar of the Plaintiff's causes of action to which they were respectively pleaded.

AND FURTHER TAKE NOTICE that the Appellants in lieu of the judgment and order appealed from will seek an order that the demurrers filed by the Appellants be upheld and that the demurrers filed by the Respondent be overruled and that the Respondent pay the costs of the demurrers in the Court of Appeal and that the Respondent pay the costs of this appeal.

DATED this 15th day of March 1968.

E.A. O'Halloran (Sgd.)
Solicitor for the Appellants.

This Notice of Appeal is filed by Messrs. Freehill, Hollingdale & Page of 187-191 Macquarie Street Sydney the solicitors for the Appellants The Mutual Life & Citizens' Assurance Company Limited and The M.L.C. Limited whose registered offices are situated at Victoria Cross, North Sydney in the State of New South Wales.

TO: The District Registrar, High Court of Australia, Sydney.

AND TO: The Prothonotary.

AND TO: The Respondent Clive Raleigh Evatt and his solicitors, Messrs. R.A.O. Martin & Hinchcliffe, 155 Castlereagh Street, Sydney.

No. 10

Reasons for Judgment of the High Court of Australia dated 11th November 1968.

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

v.

EVATT

In the High Court of Australia

No.9

Reasons for Judgment of the High Court of Australia

11th November 1968.

Barwick C.J.

The respondent is the plaintiff in actions at common law in the Supreme Court of New South Wales in which he claims that the appellants jointly and severally gave him incorrect information and advice as to the security of his investments, actual and projected, in a company H.G. Palmer (Consolidated) Limited (H.G. Palmer) and that in doing so the appellants were in breach of a duty to be careful in giving such information and advice which they jointly and severally owed to him in the circumstances. H.G. Palmer was a wholly owned subsidiary of the appellant The M.L.C.Limited (the holding company) of which the other appellant, The Mutual Life & Citizens' Assurance Company Limited (the assurance company) was also a wholly owned subsidiary.

There are two actions: in the first there is but one defendant, the appellant the assurance company; in the second there are two defendants, both the present appellants. In each case the substantial structure of the respondent's pleading alleging his cause of action is the same, though that in the second action contains more than one count, one against the holding company, another against the assurance company and a third against the appellants jointly. In each action demurrers were entered by the appropriate appellant or appellants to the respective count of the respondent's declaration the demurrer point being the failure of the count to disclose a cause of action. In the second action the appellants pleaded aa well as demurred and in three pleas the sixth seventh and eighth each in the same terms but respectively pleaded by the assurance company and the holding company

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severally and by the appellants jointly, alleged that the information and advice alleged by the respondent to have been given by the respective appellant or the appellants was "a representation or assurance made or given concerning or relating to the conduct, credit, trade or dealings of H.G. Palmer to the intent or purpose that H.G. Palmer might obtain credit or money", that such representation or assurance was not made in writing signed by the appellant or appellants as appropriate and that the action was in each case brought to charge that appellant or those appellants upon or by reason of such representation or assurance. This plea was based on Sec. 10 of the Usury, Bills of Lading and Written Memoranda Act, 1902 (N.S.W.) which reproduces Lord Tenterden's Act, the Statute of Frauds Amendment Act 1828 (U.K.) To these pleas the respondent demurred, the demurrer point being that sec. 10 "does not apply where the plaintiff's cause of action is founded on breach of a duty of care". Joinders in demurrer having been filed, the demurrers were heard by the Supreme Court (Court of Appeal Division), that in the first action on one occasion, and those in the second action on a subsequent occasion; but on each occasion by a bench comprised of the same judges. The Supreme Court ruled that the judgment should be entered for the respondent on all the demurrers. This Court granted leave to appeal in each case and the matters on appeal to this Court have now been argued together.

The essential assertions made by the respondent in his pleading are as follows (and for this recital I take the declaration against the assurance company);

(1) That he sought information and advice from the appellant as to the financial stability of H.G. Palmer;

(2) That the appellant was associated in business with H.G. Palmer both being subsidiaries of the holding company and was in a position to obtain full, complete and up-to-date information concerning the financial affairs of H.G. Palmer and in a position to give the respondent reliable and up-to-date advice concerning

the financial stability of H.G. Palmer;

(3) That the respondent knew (which I take to include, if it does not mean, that he believed on reasonable grounds), that the appellant was in the position abovementioned;

(4) That the appellant knew that the respondent intended to act upon the information and advice received in deciding whether to retain his existing investments in H.G. Palmer and whether to invest further in that Company;

(5) That the appellant did give the respondent information and advice as sought concerning the financial stability of H.G.Palmer;

(6) That the respondent acted upon such information and advice and by reason thereof retained his investments in H.G. Palmer and invested further funds in that Company;

(7) That the appellant was negligent in giving that information and advice to the respondent whereby the respondent lost the value and advantage of his investments.

It is implicit, I think, in these assertions that the information and advice given by the appellant to the respondent was incorrect, that its incorrectness was due to a want of care in the appellant in not obtaining information which it could have obtained or in using the information it did obtain as to H.G. Palmer's financial affairs or in exercising or in expressing its judgment upon and in relation to such information as it had as to those affairs, or in some combination of these possibilities. In accepting these assertions as present in the pleading, it is of course necessary to make the word "negligently" do much work which in a better drawn pleading it would not be required to do.

The count in the declaration also contained an allegation that the appellant "accepted the responsibility of supplying" the respondent with the said information and advice. We were told by counsel for the respondent that

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we are not to take this allegation as the assertion of any express acceptance by the appellant of a contractual or any obligation to use care in giving the information or the advice but rather that we are to accept it as an assertion of a conclusion arising from the relationship of the parties as pleaded and the giving of the information and advice in the circumstances. Counsel for the appellants raised no objection to this course. The presence of the allegation is no doubt due to an attempt to accommodate the pleading to some of the statements in the speeches in the House of Lords in Hedley Byrne & Co.Ltd. v Heller & Partners Ltd.(1964) A.C. 465.

It is to be noted that the respondent does not assert in his pleading that there was any consideration given or promised by the respondent in respect of the giving of the information or advice or that the appellant generally held itself out as able to give the particular information or as skilled in the giving of advice on the subject matter of the respondent's enquiry. It is also clear that there is no allegation of dishonesty in the giving of the information and advice.

Two questions arise in the first action, one of fundamental principle and of considerable import and the other, one of expression and content in pleading, which, whilst not of such major import, is not only related to the principal question but significant if for no other reason in that its resolution assists, I think, to clarify the practical consequence of the principal question. The first question is whether an action will lie at common law for negligence in the giving of information or advice where there is no relevant contractual right or obligation between the parties, nor any consideration provided nor any profession on the part of the informant or adviser, nor any element of deceit; and the second is whether, if such a cause of action is possible, the respondent has sufficiently alleged the necessary facts to support it against the appellant. Both of these questions also arise in the second action with the additional question whether Lord Tenterden's Act applies in relation to the cause of action asserted by

the respondent.

The principal submission behind the appellants' demurrers is in substance that there are no circumstances in which a duty of care in the giving of information or of advice can arise at common law, unless there is consideration moving to the informant or adviser in respect of the giving of such information or advice. A subsidiary submission is that if, contrary to the principal submission such an action will lie without the presence of such consideration, it will only do so if the person giving the information or advice has held himself out as "professionally" expert in that connection. But I have not understood this submission to go so far as to confine such cases to information or advice given by a person practising one of the traditionally recognised professions.

The matter so far as this Court is concerned is free of any binding authority. The Court's task therefore is to declare the common law in this respect for Australia. There are indicative decisions in the Courts of England; these are to be regarded and respected. With the aid of these and of any decisions of Courts of other countries which follow the common law and of its own understanding of the common law, its history and its development, the Court's task is to express what is the law on this subject as appropriate to current times in Australia. This will not necessarily be identical with the common law of England: see Australian Consolidated Press Limited v. Uren (1967) 41 A.L.J.R. 66, though it may always be preferable if substantial divergence between the two can be avoided. This inevitably means that the common law is what the Court, so informed, decides that it should be, subject of course to correction by the Judicial Committee in a case in which Her Majesty's Privy Council retains jurisdiction. For, where no authority binds or current of acceptable decision compels, it is not enough, nor indeed apposite, to say that the function of the Court in general is to declare what the law is and not to decide what it ought to be. In such a

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case, in my opinion, the common law is as much in gremio judicis as ever it was, assisted and instructed now no doubt by all that has happened through the years of its growth: and thus in such a case the two positions of what is and of what should be are in reality coincident. But, of course, the Court is not to depart from what it realises the common law would provide in order to arrive at some idiosyncratic solution. So to do is to attempt to legislate and to tread forbidden ground.

The House of Lords, as it seems to me, was in the position of being able thus to declare the common law when deciding Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (supra) even though at that time the Lord Chancellor's announcement of the year 1966 on behalf of the Law Lords had not been made: see (1966) 1 W.L.R. 1234. In that case there was no need in order to arrive at its conclusion for the House to overrule any decision of its own by which at that time it would have been bound; nor indeed was it necessary as their Lordships viewed the case to overrule any decision at all other than that in Le Lievre v. Gould (1893) 1 Q.B. 491 and that in Candler v. Crane, Christmas & Co. (1951) 2 K.B. 164.

For the future, even where an existing decision of the House of Lords currently governs a matter which comes before it, it would seem that the House of Lords will be in the same situation as is this Court where no precise decision of the Privy Council governs the matter in hand. It will be free to overrule its own decision in order properly to express the common law. The Lord Chancellor's statement of 26th July, 1966, in my respectful opinion, is a useful indication of the balance which needs to be sought between the maintenance of a stable system of law and the provision of rules which are appropriate to do and to ensure justice in current situations. It recognises rightly, if I may respectfully say so, that the perpetuation of error by an ultimate Court of Appeal is not an indispensable nor a desirable feature of a stable system of law grounded on judicial precedent. However, there is no need presently to further explore the situation

because, as I have said, in the instant case, this Court is not bound by any authority which stands in the path of its resolution of the major question in either sense.

Lord Reid, in his speech in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (supra) in my respectful opinion, convincingly demonstrated that, Le Lievre v. Gould (supra) and Candler v. Crane, Christmas & Co. (supra) apart, no decision of an English Court, properly understood, denied the possibility of an action for breach of a duty of care in the utterance of words, whether by way of giving information or of giving advice, or both. I would respectfully adopt his Lordship's recital and analysis of the earlier decisions of the English Courts including those in Le Lievre v. Gould (supra) and Candler v. Crane, Christmas & Co. (supra), and I find no need to go over that ground in any respect. It is, to my mind, abundantly clear that Derry v. Peek 14 App. Cas. 337 did not decide that no action could be brought at law upon an incorrect statement whether by way of information or by way of advice made in breach of a duty of care, or that there were no circumstances short of contract or fiduciary relationship in which a duty to be careful in utterance could arise. Derry v. Peek (supra) was decided by the House of Lords in 1889 and there was built upon it the view that no action at law would lie in any circumstances for incorrect but honest statement. This view culminated in Candler v. Crane, Christmas & Co. (supra) founded proximately upon Le Lievre v. Gould (supra). I respectfully agree with Lord Reid and those members of the House of Lords who agree with him in this respect in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (supra) that the former of those cases was not well decided and that at least the ratio decidendi of the latter was insupportable, though those who decided these cases felt that they were committed thus to decide because of what became the commonly held view of the common law as a result of Derry v. Peek (supra). It seems to me that this view, despite the clear and repeated indications to the contrary by Lord Haldane, derived from the error of treating the course of reasoning in that case as

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constituting authority for more than the case itself decided on its own facts and circumstances bearing in mind the fundamental conclusion of law upon which the order of the Court was grounded. Derry v. Peek (supra) decided no more than that in an action at law for deceit, dishonesty must be proved and that carelessness in making the incorrect statement will not establish dishonesty for the purpose of such an action. Carelessness in this use of the term is not of course synonomous with negligence. Also, Derry v. Peek (supra) was decided in the area of representation which, to my mind, is not in exactly the same area of discourse as utterance in a special relationship, though such utterance is sometimes spoken of as representation or misrepresentation, as the case may be. In this connection, passages in Banbury v. Bank of Montreal (1918) A.C. 626 at p. 640 and at 719 are of some interest.

In considering the principal question which this appeal raises, I have derived great assistance from their Lordships' speech in Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd. (supra): but I do not think that a discussion in these reasons of their Lordships' several approaches to that question, though in the result it did not really fall for decision, is an appropriate course, as I see this matter, for me to follow. It is sufficient, in my opinion, that, with unfeigned gratitude and respect, I have had the benefit of the reasoning of those speeches, reasoning which I have most carefully considered and which as will appear has had considerable influence in the formation of the views I am about to express.

The common law in its development has arrived at the point where a duty of care in relation to physical acts or omissions has come to arise out of the circumstance that one person is placed in some relationship to another. The duty is imposed by law because of the existence of that relationship. I think it can be said that these relationships and the specific duties to which they give rise have progressively become less categorised as the law of negligence has developed. Whilst

special relationships and particular duties in relation to them still obtain in this connection, the tendency of the law of negligence has been towards a more general expression of duty arising out of a more generally expressed relationship. In the case of acts or omissions the universal duty of care is said to be owed by the actor towards all those whom he ought reasonably to contemplate as within the direct influence of his projected act or omission. It is said that proximity as a concept describes the relationship out of which this duty springs. The duty varies in extent but is radically the same in nature. It does not really derive from contract though a contractual relationship may create the relevant proximity. Indeed the person to whom the duty is owed is not necessarily in any conscious relationship to the actor. But, of course, there may none the less be a contractual duty to be careful, express or implied: see generally Donoghue v. Stevenson (1932) A.C. 562.

If one were to express this development of the common law in sociological terms, one could say, I think, that the society is treated as organised upon the basis of its members being bound in duty to one another to use reasonable care whenever the one is within the proximate influence of the conduct of the other. This basis, it seems to me, has been progressively found to be satisfactory in relation to physical acts and omissions and in relation to damage of a physical kind. The development is not complete in the sense that the occasions for the imposition of a duty of care do not constitute a closed list. Some notable increase in such occasions is to be observed. But the basic concept of a duty of care arising by operation of law out of some relationship of one person to another remains constant. The flexibility of that concept in operation in the ever varying circumstances of a modern community has been found satisfactory and conducive to justice in connection with physical damage resulting from act or omission. But I think it is quite clear that the relationship of proximity, adequate for compensation of injury caused by physical acts or omissions, would be inappropriate in the case of utterance by way

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of information or advice which causes loss or damage. The necessary relationship in that connection must needs be more specific.

It is necessary as a step in deciding whether or not a duty of care in such utterance can arise out of any, and if so, what, relationships, to consider a question which has been raised in connection with the relationship of any such utterance to loss or damage which is claimed to result from it.

What then of financial loss - undoubtedly a form of damage - caused by utterance of words by way of information or advice as distinct from such loss and other damage arising from physical act or omission? Is there any radical difference between the two situations or any logical or other reason that the one should be the subject of compensation whilst the other may not? To take for instance an area in which physical damage caused by a want of care, even where the act performed is a gratuitous act, may be recovered by action, would it not be strange indeed if the physical harm done to a person by careless medical attention of a physical kind was in any different case to financial loss caused by careless erroneous medical advice, the parties standing in each case in the same relationship to each other? Would it not be odd that I may obtain redress in respect of gratuitous medical attention which by want of care causes me physical injury but not for loss of my wages if directly due to medical advice given without due care?

It was suggested in argument that there is a significant difference in causation between injury and damage by a physical act or omission and loss and damage attributable to an utterance byway of information or advice. In the first, it is said that the injury and damage is direct and obvious without any intervening act whilst in the latter nothing results unless the hearer acts upon the utterance, the loss and damage in a real sense directly arising out of the hearer's own action. This indirection of the loss and damage was claimed to be definitive of the essential difference between the result of a

physical act or omission and the result of such an utterance and to be a satisfactory reason for denying any relevant comparability between a lack of care in relation to such an act or omission and a lack of care in the making of such an utterance.

I am unable to accept this as a valid distinction. It has long been accepted that loss and damage caused by action taken upon careless professional advice given for consideration is recoverable: see, for example, Howell v. Young (1826) 5 B. & C. 259 and Harmer v. Cornelius (1858) 5 C.B. (N.S.) 238, and this would be so it seems to me even if the professional adviser has given the careless advice gratuitously: see also Kitchen v. R.A.F. Assocn. and others (1958) 2 All E.R.241 The indirection of the loss and damage has not been held to be a reason either for denying a cause of action or for holding that the loss or damage, albeit only occurring because of the advised person's action upon the advice, irrecoverable. But though it may be indirect in this sense, the loss and damage must none the less be causally related to the want of care. Thus, it will not be recoverable if it flows entirely from an independent exercise of judgment on the part of the claimant uninfluenced by the information or advice given. Whether or not it does so in any given case may constitute a serious and difficult question of fact. It is no doubt easier to conclude that the advice caused the loss in the case of technical advice such as legal or medical advice, though even in these cases there are often considerable areas in which the person advised has room for personal judgment and decision. In less technical matters, the area for such judgment and decision may be greater and the question of causation correspondingly more difficult. But these difficulties would not seem to me to be a reason for denying the cause of action. After much consideration I cannot find any reason in what I have called the indirection of the loss and damage flowing from incorrect information or advice to deny the possibility of a cause of action for breach of a duty of care in the giving of such information or advice.

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Is there then such a radical difference between physical acts or omissions and the utterance of words by way of information and advice, injury and damage or loss and damage being caused in each case that the concept of a duty of care arising by law out of a specific relationship should not be as appropriate and reasonable in connection with such an utterance as it is in connection with physical acts or omissions? I have been unable to find any such radical difference between the performance of physical acts or omissions and an utterance by way of information and advice as would require the common law to deny a cause of action in the case of the latter whilst conceding it in the case of the former. Of course, as I mentioned earlier, the general relationship of proximity which has been found appropriate in the case of physical acts or omission, is clearly not appropriate in the case of utterances by way of information or advice. But none the less, it seems to me that the concept of a duty to be careful in the utterance of words is as appropriate in the regulation of human affairs in a society as is a duty of care in the case of physical acts or omissions. In each case of course the duty would spring out of some relationship and the cause of action depend on loss and damage causally related to the breach of the duty. And in each case, in my opinion, the duty would be imposed by law and not arise out of any consensual or unilateral assumption of the duty.

But of course there must be significant differences between the nature of the relationships out of which a duty of care in utterance can be said to arise and the nature of those relationships out of which a duty of care in relation to acts or omissions springs. Also there must be a much greater number of occasions in connection with the utterance of words which will notgive rise to any duty than is the case with physical acts or omissions. Discussion and communication upon a social occasion when no legal relationships could possibly be in contemplation or utterances on matters of no serious or business import are instances of such occasions. But even on social occasions legal responsibility for acts or

omissions may not arise as, for example, in the case of some physical acts or omissions in the course of a sport or pastime: see Rootes v. Shelton (1967) 41 A.L.J.R. 172 and there are other occasions and situations in which legal liability will not be attracted. cf. Balfour v. Balfour (1919) 2 K.B. 571 and Rose and Frank Co. v. J.R. Crompton & Bros. Ltd. (1925) A.C.445.

Yet granted these differences, I am unable to see any reason why a duty of care in uttering words may not arise out of some particular relationship. That incorrect information or advice can cause loss and damage cannot, I think, be denied. I agree with respect with Lord Devlin in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (supra) when he observes upon the grave defect there would be in the common law if recovery permitted in the case of physical acts or omissions were denied in the case of information and advice given with a lack of due care: see p. 516 of the report. In my opinion, the common law is not so defective. After a great deal of consideration, I am clearly of opinion that a duty of care in utterance can arise out of some relationships, which for want of a more precisely designated genus can be called "special".

The critical question, however, undoubtedly is what are the relationships, or, rather, what are the elements of the relationship out of which the duty of care will arise, that is, will be imposed by law. As in the case of negligent acts, the relationship, though for emphasis as well as for lack of suitable nomenclature styled "special", ought not to be, and quite possibly cannot be, expressed in or confined to fixed and labelled categories. For my own part, I would prefer that no such attempt be made. Rather I would seek to state what seem to me to be the necessary elements or features of a relationship out of which the duty of care will arise. All else will be elucidated in the course of time as particular facts are submitted for consideration in cases coming forward for decision.

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However, in the case of utterance, though the duty will arise out of circumstances which create the requisite relationship, there is one distinguishing feature to which I ought to advert, a feature which is not present or rather certainly not universally present in the case of the relationships which give rise to a duty of care in the case of physical acts or omissions. The information or advice will be sought or accepted by a person on his own behalf or on behalf of another identified or identifiable person or on behalf of an identified or identifiable class of persons. The person giving the information or advice must do so willingly and knowingly in the sense that he is aware of the circumstances which create the relevant relationship. He must give the information or advice to some identified or identifiable person in the given circumstances of the implications of which he is, or ought to be, aware. The identity and position of the recipient of the utterance form part of the relevant circumstances. It is this seemingly "bilateral" aspect of the necessary relationship which, it seems to me, inclines the mind to the use of the expression "assumption of responsibility" to describe the source of the duty of care and to the employment of concepts of consensus and contract, in the explanation of the emergence of the duty of care in utterance. But, though the willingness of the speaker to give or the giving of the information or advice can be described as an acceptance of the duty to be careful in the sense that having in the circumstances a choice to speak or to remain silent, or perhaps to speak with reservation (a matter to which I will later revert), the speaker elects to speak and thus by his voluntary act attracts the duty to be careful both in preparing himself for what he says and in the manner of saying it, yet, in my opinion, the resulting cause of action is tortious and in no sense arises excontractu, or by reason of any consensus, or any assumption of responsibility by the speaker. The duty of care, in my opinion, is imposed by law in the circumstances.

Because it is so imposed, I doubt whether the speaker may always except himself from the

performance of the duty by some express reservation at the time of his utterance. But the fact of such a reservation, particularly if acknowledged by the recipient will in many instances be one of the circumstances to be taken into consideration in deciding whether or no a duty of care has arisen and it may be sufficiently potent in some cases to prevent the creation of the necessary relationship. Whether it is so or not must, in my opinion, depend upon all the circumstances of and surrounding the giving of the information or advice.

As I do not think that it is either necessary or desirable to categorise the relationships which will give rise to the duty of care, and as I prefer to endeavour to state the essential elements which the relevant relationship must exhibit, I turn now to consider what are the features of the special relationship in which the law will import a duty of care in utterance by way of information or advice.

First of all, I think the circumstances must be such as to have caused the speaker or be calculated to cause a reasonable person in the position of the speaker to realise that he is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker to possess or to which the recipient believes the speaker to have access or to give advice, about a matter upon or in respect of which the recipient believes the speaker to possess a capacity or opportunity for judgment, in either case the subject matter of the information or advice being of a serious or business nature. It seems to me that it is this element of trust which the one has of the other which is at the heart of the relevant relationship. I should think that in general this element will arise out of an unequal position of the parties which the recipient reasonably believes to exist. The recipient will believe that the speaker has superior information, either in hand or at hand with respect to the subject matter or that the speaker has greater capacity or opportunity for judgment than the recipient. But I do not think it can be said

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that this must always be so, that inequality in these respects must necessarily in fact be present or be thought to be present if the special relationship is to exist.

Then the speaker must realise or the circumstances be such that he ought to have realised that the recipient intends to act upon the information or advice in respect of his property or of himself in connection with some matter of business or serious consequence. Of course, utterances in the course of social intercourse with no thought of legal consequence could not satisfy such a condition.

Further, it seems to me that the circumstances must be such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker. The nature of the subject matter, the occasion of the interchange, and the identity and relative position of the parties as regards knowledge actual or potential and relevant capacity to form or exercise judgment will all be included in the factors which will determine the reasonableness of the acceptance of, and of the reliance by the recipient upon, the words of, the speaker.

I have used throughout the description "recipient" to cover both the case where the incorrect utterance is sought by a question or enquiry and the case where it is volunteered by the speaker. Though it must be relatively rare that the latter case will give rise to a cause of action, the possibility cannot, in my opinion, be ruled out.

Also, I have not differentiated information and advice in the treatment I have given to the subject matter. I have considered whether each can be the subject of the duty of care, and whether there is any valid reason to distinguish in this connection between information and advice. After reflection, I can find none which would compel or require a different conclusion in connection with the one from that drawn in respect of the other. In many instances the distinction between the two is very slight: on occasions "information" spills over and becomes

inextricable from "advice": but, even where the separation of the two is quite substantial, I do not think each calls for separate treatment. Incorrect information can cause loss and damage as well as incorrect advice. Inequality in the possession of or capacity to obtain information upon a serious topic or a matter of business can exist as between speaker and recipient as well as it may in the capacity or opportunity to exercise judgment on such topics or matters. The possession of accurate information in a business matter can be as of much consequence as advice about that matter. As will later appear, I do not regard Low v. Bouverie (1891) 3 Ch. 82 as requiring any relevant differentiation between the giving of information and the giving of advice. But, no doubt, it may be more difficult to make out all the essential elements of the necessary special relationships in connection with the giving of information than it may be in connection with the giving of advice.

It seems to me therefore that whenever a person gives information or advice to another, whether that information is actively sought or merely accepted by that other upon a serious matter, and particularly a matter of business, and the relationship of the parties arising out of the circumstances is such that on the one hand the speaker realises or ought to realise that he is being trusted, particularly if he is thought by the other to have, or to have particular access to information or to have a capacity or opportunity to exercise judgment or both as to the matter in hand, to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to seek or accept and in either case to act upon that information and advice the speaker, choosing to give the information or advice in such circumstances, comes under a duty of care both to utilise with reasonable care the information and sources of information at his disposal and to employ with reasonable care what capacity he has for judgment in relation to the matter and to exercise reasonable care in the expression of what he is prepared to convey by way of information or

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advice. If he chooses not to speak, he is not merely because of the relationship bound to make any enquiries. But it does mean that, if he is being trusted because of the sources of information at his disposal, and he speaks on the footing of the information which might then be available to him, he will be in breach of his duty if he does not utilise these sources of information before speaking and if his communication is incorrect. But, it should be emphasised, the obligation of the speaker is no more than to use reasonable care in the circumstances. He is not in breach merely because his communicated information is incorrect or his proferred advice erroneous. Speaking in the relationship whose elements I have indicated does not mean that he warrants the accuracy of his utterance. He is merely required to exercise reasonable care in preparing himself to speak in conveying information, in exercise of his judgment and in expressing the information or advice which he chooses to convey.

In this connection, I would observe that it is, in my opinion, incorrect to limit the advice which may carry liability to advice about an existing situation. The exercise of judgment so often involves an element of prognosis. For this reason, the distinction and limitations which form the basis of the minority judgment in the Supreme Court in this case are, in my opinion, irrelevant to the matter which was in hand. It is, in my opinion, no answer to a claim for lack of care in the exercise of judgment that the result of that exercise was an opinion as to the future. It would indeed be strange that a medical practitioner could be sued for negligent diagnosis but not for a prognosis given with a lack of reasonable care. Each, the diagnosis and the prognosis, may reasonably be the basis of detrimental action by the person advised.

It follows from what I have so far said that, in my opinion, the duty of care in utterance cannot be limited to the case of persons professing to have special access to information or special skill or judgment in some area. In my opinion, the profession of

the speaker in such a case necessarily supplies some of the elements to which I have referred as requisite in the special relationship. For if he professes, or holds himself out in the relevant respect, it is both reasonable to seek and to accept his assistance and of necessity he must be taken to know that he and his judgment are being trusted in relation to the information or advice being sought or accepted: cf. the attribution of skill and competence in a lawyer or medical man or artisan from the fact that he is or puts himself forward as such. Also, as I have mentioned, it may be easier to establish the causal relation between the advice and the loss in such a case: see Shiells and Thorne v. Blackburne (1789) 1 H. Bl. 158 and Harmer v. Cornelius (supra). But, in my opinion, the elements of the special relationship to which I have referred do not require either the actual possession of skill or judgment on the part of the speaker or any profession by him to possess the same. His willingness to proffer the information or advice in the relationship which I have described is, in my opinion, sufficient.

I would now wish to advert briefly to Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (supra). The question in that case was whether or not a banker owes a duty of care to the customer of another bank which seeks of him information and opinion as to the financial capacity of one of his customers. The House of Lords, as I read their Lordships' speeches, did seem to favour the view that a banker in such a situation did owe such a duty, though I do not think the House really decided that question. The question arose in that case as to the position of the enquiring bank's customer in relation to the answering bank and also the question whether, in any case, having regard to the relationship of a bank to its own customer, it was reasonable for the enquiring bank to expect complete frankness or to rely upon the expressions of opinion of the answering bank. In the present case, no such questions arise. I have therefore no need in this case to express any view as to what is the proper conclusion in the case of enquiries made by one banker to another with a view to passing the information

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or advice to its customer. For me, that remains an open question.

Also, in Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd. (supra) the question of giving information or advice without recourse arose for consideration. It does not do so in this case. I have already indicated a view as to whether such a reservation ought only to be regarded as part of the circumstances out of which the requisite relationship is said to arise or whether it can effectively qualify an obligation to take care which the law would impose by reason of the circumstances.

In writing the foregoing, I have not seen any necessity to discuss the authorities, this being fully done in the speeches in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (supra). But, having regard to what I have written I ought to say something about the decision and the reasoning in Low v. Bouverie (supra).

Solicitors acting for an intending lender upon the security of an equitable life interest asked the trustee of the settlement under which the life interest arose whether the trustee held any mortgage or knew of any encumbrance upon the life tenant's interest under the settlement. The trustee said that the life interest was charged with the payment of premiums on two life policies and with the payment of interest for money advanced to the extent of £34 per annum. In fact the life interest was then subject to no less than six mortgages. But the trustee in the subsequent proceedings swore that, although he had had notice of these mortgages prior to answering the solicitor's enquiry, at the time of answering, he had forgotten that fact: and in this he was believed. The Solicitor's client lent a sum against the security of the life interest relying on the trustee's reply. In the result, he paid out money in respect of the prior encumbrances to protect his security.

In a suit by the lender claiming a declaration that the trustee was liable to pay him the amount of his advance and the moneys paid by him to protect his security, North J.

made a declaration that the trustee was liable for the payment of the amount lent which had been wholly lost and for the payment of the moneys laid out in the attempt to protect the security. North J. relied upon the decisions in Burrowes v. Lock 10 Ves. 470 and Slim v. Croucher 1 D.F. & J. 518. But the Court of Appeal (Lindley, Bowen and Kay L.JJ.) allowed an appeal against the decree and dismissed the lender's suit.

The case was decided under the shadow of Derry v Peek (supra) which had been decided but two years earlier. The line of the reasoning of Lindley L.J. was, first, that the trustee was not bound to answer the enquiry: second, that if he chose to answer, he was not liable unless he was dishonest, or warranted the answer, or, by some means could be estopped from denying the truth of his answer. It is clear that Lindley L.J. took more from Derry v. Peek (supra) than would now, in my opinion, be taken. He said at p. 100 of the report:

> ".... but unless he does one or the other (i.e. warrants the answer, or acts so as to be estopped) I do not know on what principle consistent with Derry v. Peek he can, if he answer honestly, expose himself to liability. I say, 'consistent with Derry v. Peek,' because, until that case was decided, it was generally supposed to be settled in Equity that liability was incurred by a person who carelessly, although honestly, made a false representation to another about to deal in a matter of business upon the faith of such representation: Burrowes v. Lock 10 Ves. 470; Slim v. Croucher 1 D.F. & J. 518, 525. This general proposition is, however, quite inconsistent with Derry v. Peek."

His Lordship examined the possibility of estoppel being available against the trustee. He denied that there could be any estoppel on the facts because he treated the enquiry as seeking no more than the trustee's present (and unaided) memory as to the facts relating to encumbrances though the solicitors, mistakenly, took him to be stating that in fact there were

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no other encumbrances than those mentioned by him (see pp. 103/104 of the report). He said:

> " Knowledge and means of knowledge are very different things; and if a person truly says he only knows or remembers so and so, is it right to treat him as saying that he knows more, even if it is his duty to inform himself accurately before he speaks? I do not think that so to hold would be consistent with Derry v. Peek. To treat him in the case supposed as saying more than he did, would be to resuscitate the doctrine condemned in Derry v. Peek, and to hold him liable in damages for a negligent misrepresentation." (p. 103).

It is fairly plain from the passages I have quoted that Lindley L.J. thought Derry v. Peek (supra) to have decided that no action would lie for a breach of a duty of care in the giving of information.

It seems to me, with all due respect, that if his Lordship's view as to the effect of Derry v. Peek is put on one side, the conclusion he ultimately reached in the case can only be supported if it be decided - as perhaps his Lordship in a sense did decide (see p. 104 of the report) - that it was unreasonable for the plaintiff to have relied in the circumstances upon the actual answer which the trustee gave.

Bowen L.J. conceded that Derry v. Peek did not preclude an action for careless statement if a duty to be careful existed at law in the circumstances: but his Lordship, accepting the reasons of Lindley L.J., apparently found no duty to be careful to rest upon the trustee in the circumstances of that case. He came to the conclusion, so far as estoppel was concerned, that the trustee's answer "would be reasonably understood as conveying an intimation of the state of his belief, without an assertion that the fact was so apart from the limitation of his own knowledge" which is a possible though, with all due respect, to my mind, an unacceptable interpretation of the facts.

Kay L.J. after examining a number of cases ranging through the years 1682 to 1850 said that they resulted in a number of conclusions, including the following:

> "1. There has been from ancient time a jurisdiction in Courts of Equity in certain cases to enforce a personal demand against one who made an untrue representation upon which he knew that the person to whom it was made intended to act, if such person did act upon the faith of it and suffered loss by so acting.
>
> 2. This was readily done where the representation was fraudulently made, in which case an action of deceit would lie at law.
>
> 3. Relief will also be given at Law and in Equity, even though the representation was innocently made without fraud, in all cases where the suit will be effective if the defendant is estopped from denying the truth of his representation."

Finally, his Lordship decided that the trustee's statement was not so clear and unambiguous as to form the basis of an estoppel against him.

It is thus fairly plain that Low v. Bouverie decided no more than that, on the footing that the trustee was under no duty to be careful in giving the information, his answer amounted to no more than a statement of his present unaided recollection which was not shown to be incorrect: indeed, it was found to be true. It was also decided that the trustee was under no duty to answer the enquiry made of him: and in that respect the decision was approved by Lord Haldane in Nocton v. Lord Ashburton (1914) A.C. 932 at 950. But that does not mean that, though under no duty to answer, if he chooses to do so, the trustee will not come under a duty of care, the performance of which may involve him in making enquiries which otherwise he may not have been bound to make. In my opinion, having regard to what I think is the right view of Derry v. Peek (supra) the question of

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whether on the facts of the case such a relationship had sprung up between the plaintiff's solicitor and the trustee that a duty of care had arisen towards the plaintiff would now need serious consideration and be approached somewhat differently to the way the Court of Appeal approached the question of estoppel. But whatever be the right view in that connection, in my opinion, the case does not stand in the way of any of the propositions which I have adopted in these reasons.

I conclude, therefore, in relation to the principal question arising in this case that a cause of action for breach of a duty of care in the gratuitous giving of information and advice by a person who does not profess a calling or particular capacity can be maintained and that loss and damage causally related to incorrect information or advice so given in breach of duty may be recovered at law.

I now turn to the question whether the respondent in his pleadings has alleged facts which, if established, would support such a cause of action. At the outset, it could not be said that the pleading was exemplary. It is far from it: but I think its form has resulted from an attempt on the part of the pleader to accommodate his assertions to various portions of the speeches of their Lordships in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (supra). However, it is not enough to excuse its form: it is necessary to examine it closely to determine whether, though obscurely, it still sufficiently alleges enough to maintain the cause of action.

After some hesitancy, I have come to the conclusion that it does. Again I deal with the declaration in the action against the assurance company; for, in my opinion, if this declaration is supportable, so is that in the other action. Each no doubt have their difficulties of proof. As the appellants are corporate bodies, and as there are subjective elements in the necessary relationship, the identity and capacity of those natural persons whose acts are to satisfy the allegations against the appellants will doubtless loom

largely and require close examination in the trial of the action which has yet to take place. But these difficulties are of no present moment.

The declaration sufficiently alleges, as I think, as a fact and not merely as a conclusion from other facts, that the appellant had at its hand the requisite information to enable it to give the respondent the information and advice he wanted as to the financial stability of H.G. Palmer: and that the appellant knew that the respondent intended to act upon the information and advice he received. The information and advice was clearly upon a matter of business and of its nature involved both objective facts and subjective interpretations of them, calling no doubt for the exercise of judgment whether what resulted be called information or advice. I think the pleading should be approached on the footing that there was no benefit arising to any of the appellants from either the act of the respondent in retaining his investments in H.G. Palmer or from his act in investing further funds in that company. Consequently, as I have already indicated, the giving of the information or advice should be regarded as being wholly gratuitous. Now could it be inferred that the appellant knew or ought to have known that it was being trusted by the respondent to give to him the best information and advice it reasonably could? I have come to the conclusion, I am bound to say not without some lingering doubt, but on the whole with sufficient firmness, that such an inference could be made from the material in the declaration. The assumption from the pleading is that the respondent describing himself to the appellant as one with money already invested and as contemplating further investment in a company of whose affairs the appellant had sufficient knowledge in hand or at hand to enable it to know of the financial stability of that company, asked as to that stability with a view, as the appellant is said to have known, to determining his course of action in relation to investment in that company. I think it could be inferred that the appellant at least ought to have realised that it was being trusted in relation to its knowledge,

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actual or potential, and as to its judgment upon that information as to the financial stability of H.G. Palmer. Again, the identity and capacity of the officer or officers of the appropriate appellant whose acts are relied upon in satisfaction of the assumptions of the pleading may well prove critical at the trial: but, again, that is not a matter which presently arises.

Could it be said upon the facts alleged in the pleading that it was reasonable for the respondent to seek of the appellant information and advice as to the stability of H.G. Palmer: and reasonable to accept and act upon what information and advice he got? If those facts would warrant the inference of reasonableness, I think the declaration would be sufficient: though, of course, an express allegation following a more detailed assertion as to the circumstances would undoubtedly have been preferable. Again, with some periods of hesitancy, I have come to the conclusion that it could be said upon the pleaded facts, that it was reasonable for the respondent to take the course he says he took. But again I say this, conscious of the possibilities of proof at the trial of facts which would fail to support or perhaps destroy the inference.

Lastly, the declaration is 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. The mere use of the word "negligently" is expected to do the complete work of denominating the extent of the duty and of specifying the manner of its breach. Perhaps particulars can aid the elucidation of these aspects of the pleading. I think on demurrer I ought to treat the word "negligently" as covering the matters which earlier I said were implicit in the declaration. The appellants chose the course of demurring to raise the principal question rather than of dealing in a minor key with the pleading deficiencies and obscurities of the declaration. My doubts and reservations as to its sufficiency have been indicated and no doubt the pleadings as they are made up as issues for trial may well bear little resemblance to those with which we have had perforce to deal at this stage.

I have come to the conclusion that, on balance, the pleading with bare sufficiency alleges the cause of action which, in my opinion, the common law provides for incorrect information or advice given in breach of a duty of care arising out of the special relationship of the parties.

In this connection I ought to say that it was, I think, a real question when the matter first came before the Supreme Court whether the demurrer should be decided upon the pleadings as they stood rather than send the case for trial when the Court would be in a position to determine the issues of law which did then arise upon the actual facts. However, upon due consideration I have come to think the Supreme Court was right in entertaining those demurrers having regard to the fundamental nature of the questions involved in the decision and to the effect a decision thereon must have on the course of a trial.

In my opinion, the appellants' demurrers ought to be overruled.

I turn now to the respondent's demurrers to the appellants' pleas raising Lord Tenterden's Act as a defence. The demurrer invites the Court to depart from the decision in Banbury v. Bank of Montreal (supra) That case is precisely in point and distinguishes between an action for breach of duty and an action for "misrepresentation". It followed a long line of decisions which had treated sec. 6 of Lord Tenterden's Act, which has its counterpart in sec. 10 of the New South Wales statute, as confined to actions founded on deceit. The question basically is one of construction, bearing in mind, if ambiguity is met, what is known of the mischief with which the legislation was evidently intended to deal. I find the reasons given in Banbury v. Bank of Montreal (supra) convincing and see no reason whatever to depart from the conclusions reached in that case. Accordingly, even if I felt that what the declaration alleges was an assurance as to the credit of H.G. Palmer and was given to the intent or purpose that H.G. Palmer might obtain money from the respondent, I would favour the allowance of the respondent's demurrer. But,

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in any case I am not convinced that what is set up by the pleading is such an assurance. What is alleged is information and advice as to the financial stability of H.G. Palmer given to the respondent with knowledge that he may act upon it. The respondent's case would be made out upon the cause of action he sets up without proof that the intent or purpose of the giving of that information or advice was that H.G. Palmer should obtain money from the respondent. In my opinion, sec. 10 of the Usury, Bills of Lading and Written Memoranda Act, 1902 (N.S.W.) does not afford the appellants a defence to this cause of action alleged by the respondent. The respondent's demurrer should be allowed.

For all these reasons, the appeals, in my opinion, should be dismissed.

Kitto J.

There can be no doubt, at least since the Hedley Byrne case (1964) A.C. 465, that one who gives information or advice to another, being guilty of no fraud, breach of contract or breach of fiduciary duty but without having used reasonable care and skill to ensure that in the case of information it was correct and in the case of advice it was sound, is liable in tort for damages if the other incurs loss by acting in reliance upon the information or advice, provided that he stood in such a relation to the other that the law holds him to have owed a duty to the other to use care and skill in the giving of the information or advice, and that the other's loss was not too remote from the careless or unskilful giving of the information or advice to be treated in law as having been caused thereby.

The declaration which the judgment under appeal has sustained seeks in three counts damages against one or other or both of the appellants for having negligently given the respondent certain information and advice concerning the financial stability of a company called H.G. Palmer (Consolidated) Limited and as to the safety of investments therein. Each count was demurred to in the Supreme Court as

disclosing no cause of action. The demurrers were overruled, and the appellants now seek from this Court a decision that none of the counts describes a relationship which imposed upon them or either of them a duty of care in giving the respondent such information and advice as he alleges was a cause of his loss. It is convenient to consider the first count by itself in the first instance.

Lord Reid pointed out in the Hedley Byrne case (at pp. 482, 483) that claims for alleged negligence in the spoken or written word do not admit of decision by a simple application of the principle of Donoghue v. Stevenson (1932) A.C. 562. In many cases, if it be asked whether, in reference to the giving of information or advice, the plaintiff was the defendant's neighbour, in the sense that the defendant could reasonably foresee that if he were to give the information or advice carelessly he would be likely to cause loss to the plaintiff, a difficult question or remoteness will arise. This is not the case here, however, for the allegation is that the information and advice were given by the defendant The Mutual Life and Citizen's Assurance Company Limited to the plaintiff directly and in answer to a request directly made, the defendant knowing that the plaintiff intended to act upon the information and advice in deciding whether to retain investments which he held in H.G. Palmer (Consolidated) Limited and whether to invest further in that company. The difficulty of the case arises from another point of difference between words and acts considered as causes of loss. It is in the nature of words that they cause nothing save by their influence upon the mind of a person whose ears or eyes they reach. Between the words and any loss they may be said to cause to a hearer or reader there must always be the hearer's or reader's decision to follow the course of conduct which proves injurious. Accordingly the question whether the words are properly to be described as a cause of the loss depends upon their potency as an influence upon that decision; and the question whether the speaker or writer of the words could reasonably have foreseen a likelihood that his statement would cause the other to pursue the potentially

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injurious course becomes a question whether it was reasonable for that other to understand and accept the statement as intended to relieve him, so far as an exercise by the speaker or writer of reasonable care and skill in inquiry (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. But such an intention is not reasonably to be inferred unless the circumstances of the statement supply a context of the kind which normally characterizes matters of business. In the Hedley Byrne case various expressions are used to make this clear. In particular, reference is made to the speaker or writer undertaking, or agreeing to accept, "responsibility" for the carefulness and the skilfulness with which the words are uttered; and this I take to mean that he shows that he is engaged in communication on a business level, intending to stand behind what he says or writes with the same accountability for the consequences of any lack of care or skill in checking facts or forming judgments as if he were being paid. Otherwise it would be unreasonable, according to ordinary human experience, for the hearer or reader to suppose that he was being relieved to any extent of the task of making up his own mind about the facts and about matters of opinion, and making a decision wholly upon his own responsibility.

In the Hedley Byrne case, Lord Reid (at pp. 482, 483) illustrated the problem which has to be solved in a case such as the present by pointing out that quite careful people often express definite opinions on "social or informal occasions", even when they see that others are likely to be influenced by them, and often do so without taking the care they would take if asked for their opinion "professionally or in a business connexion". But the contrasting expressions are illustrative only. The relationships in which a legal duty of care in the giving of information and advice cannot reasonably be held to be incurred are of infinite variety; and his Lordship's ultimate generalization was that a relationship which gives rise to such a duty exists 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" (1964) A.C. at p. 486.

Lord Morris expressed the same notion when (at pp. 494-495) he spoke of A as assuming a responsibility to B to tender him deliberate advice; and he expanded it in words not very different from those of Lord Reid: "if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to..... another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise" (1964) A.C. at p. 503.

With this statement of principle Lord Hodson specifically agreed (at p. 514), and Lord Devlin expressed a view which seems to me not materially different. He considered (1964) A.C. at pp. 528, 529 "that the categories of special relationships which may give rise to a duty of care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include relationships which in the words of Lord Shaw in Nocton v. Lord Ashburton (1914) A.C. 932, 972, are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract." Lord Shaw had used the expression "equivalent to contract" to describe a quality in the relationship which made it reasonable for the person to whom information or advice was given "to rely upon it as the basis of a transaction"; and Lord Devlin adopted it, as I understand his Lordship, for the purpose of making plain the nature and serious quality that an occasion must possess if the inference is to be that the person giving the information or advice assumed responsibility for his statements in the sense that he took upon himself - took upon his conscience - the responsibility of making them

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as statements which the other might reasonably rely upon, and is likely to rely upon, as the basis for a decision exposing him to possible loss.

Lord Pearce (1964) A.C. at p. 539 expressed what I take to be the same view. His Lordship thought it necessary to look "normally" for "a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer", as contrasted with "a casual social approach to the inquiry".

The need to exclude cases where parties are dealing with one another in circumstances inappropriate for the attribution of legal consequences to the words that pass between them is common to the law of contract, the law of negligence and the law as to the granting of equitable relief on the footing that a representation binds the conscience of the representor and obliges him to make it good. In the lastmentioned case, as Sir Roundell Palmer said in arguing Peek v. Gurney L.R. 13 Eq. 79 at p. 97 in a passage cited with approval by Lord Shaw in Nocton v. Lord Ashburton (1914) A.C. 932 at p. 971, "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 show 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." Whether the relevant sphere of law be that of implied warranty, of responsibility in equity, or of liability in tort for want of care, the question whether a person who sought the information or advice was entitled as a matter of law to have care exercised by the person from whom he sought it is thus to be decided by considering whether the circumstances made it reasonable for the inquirer to suppose that the other was replying with an intention of accepting the full responsibility that is ordinarily appropriate to a business transaction. Just as words which would otherwise create a contract will be held to produce no legal results if accompanied by an expression of intention to

keep to the field of informal and merely friendly arrangement, as in Rose and Frank Co. v. J.R. Crompton & Bros. Ltd. (1925) A.C. 445, so, as the actual decision in the Hedley Byrne case shows, words giving information or advice accompanied by a disclaimer of responsibility which shows a like intention will be held not to have the legal consequences which they would have had if uttered in other circumstances. This is the extreme case of the class where the circumstances show that the person to whom information or advice is given could not reasonably have relied upon a belief that the other was dealing with him on a basis where questions of legal responsibility are relevant. Less extreme illustrations may be given also. Just as words which otherwise would create a contract (because the speaker or writer receives a quid pro quo) are held not to do so if the parties are dealing with one another on a plane where there is really no intention of altering legal relations - as in the case of purely domestic arrangements (see Balfour v. Balfour (1919) 2 K.B. 571, Cohen v. Cohen (1929) 42 C.L.R. 91, Gage v. King (1961) 1 Q.B. 188, In re Bishop, National Provincial Bank v. Bishop (1965) Ch. 450), or of casual discussions (see Booker v. Palmer (1942) All E.R. 674), or of many kinds of arrangements with respect to government assistance (see Administration of Papua and New Guinea v. Leahy (1961) 105 C.L.R.6) - so words giving information or advice without any quid pro quo will be held to entail no legal responsibility for carelessness if the correct conclusion from the circumstances be that the person who acted upon them could not reasonably have understood them as uttered, as one might say, in the way of business, or (to express it more generally) as uttered on a plane to which legal liability naturally belongs.

We are here concerned with a declaration under the common law system of pleading still in force in New South Wales. 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 to allege facts from which, if proved at the trial, the law will deduce the duty; Seymour v. Maddox (1851) 16 Q.B. 326, 117 E.R. 904; cf. Bullen & Leake's Precedents of Pleading, 3rd ed., (1868) p. 912l.

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He has alleged that the plaintiff sought the information and advice from the defendant and acted upon it to his loss. He has alleged that the defendant when giving the information and advice knew that the plaintiff intended to act upon it in the way that caused the loss. If the count contained nothing more bearing upon the question of the existence of a duty of care it would be demurrable as not showing that the defendant in giving the information and advice was acting in pursuance either of a general relationship to the plaintiff such as would need only be stated to show that a duty of care existed (e.g. the relationship of stockbroker and his client) or of a special relationship exhibiting the features necessary to raise such a duty: see Fish v. Kelly (1864) 17 C.B. (N.S.) 194, 144 E.R. 78. But the count contains allegations from which a special relationship appears, that is to say the relationship of persons dealing with one another in the circumstances of a special occasion; and it seems to me that the requirements of each of the speeches delivered in the Hedley Byrne case are satisfied if, in the circumstances alleged, the defendant ought reasonably to have appreciated that its answers to the plaintiff's inquiry would be understood by him as made with the acceptance of responsibility that would have been implicit if the information and advice were being paid for.

The count implies plainly enough that the defendant is a life assurance company and it expressly alleges that the plaintiff is a policy holder therein. It depicts the policy holder as seeking from his assurance company information and advice as to the present and prospective soundness of H.G. Palmer (Consolidated) Limited as a company in which to invest money, and the assurance company as giving the information and advice knowing that the policy holder intended to act upon it. There is no allegation that the defendant carried on any business, or followed any general practice, of giving information or advice of this kind to its policy holders; but by alleging that the inquiry was made from and answered by the defendant itself, i.e. as a corporate body, with corporate knowledge that the policy holder intended to act

upon its statement in adventuring his money, the count puts the plaintiff's case as high as that the information and advice were given by an agent or agents of the defendant acting in the course of his or their employment or within the ostensible scope of his or their authority, and that the giving of the information and advice was an act which the defendant might possibly be authorised by its constitution to do: see the cases cited in Halsbury's Laws of England, 3rd ed., vol. 6, p. 422, para. 818. Then the count alleges, in substance, that the defendant and H.G. Palmer (Consolidated) Limited were associated together in the sense that they were both subsidiaries of a third company; that the association between them gave the defendant in fact special facilities for obtaining information concerning the financial affairs of H.G. Palmer (Consolidated) Limited and placed the defendant in a position to give the plaintiff reliable advice concerning the financial stability of that company; that the plaintiff knew all these things; and that the defendant supplied the information and advice without any disclaimer of responsibility. (Here I have accepted the meaning which the plaintiff's counsel put upon the allegation that the defendant "accepted the responsibility" of supplying the plaintiff with the information and advice.) It seems to me that nothing need be added to these allegations to show that the information and advice were given in circumstances in which the only reasonable conclusion for both parties was that the same care on the part of the defendant was demanded as if a contract for the giving of the information and advice had existed between them, and in which it was reasonable for the plaintiff to be induced to keep and increase his investments in H.G. Palmer (Consolidated) Limited by the defendant's implied assurance that it had taken that care. The count therefore seems to me to allege a cause of action according to the law as explained in Hedley Byrne, though I am not prepared to say that substantial amendments might not be made with advantage.

It remains to say something of the cases upon which the appellants have relied as decisions that in circumstances said to be comparable with those alleged in the present

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case no duty of care existed.

Derry v. Peek (1889) 14 A.C. 337 undoubtedly stands in the respondent's way if it be regarded as authority for the proposition that the circumstances of that case did not impose upon the directors a duty to persons likely to act upon the prospectus to take care in respect of the statement that the company had the right to use steam power instead of horses. It must be conceded that that proposition was accepted by the learned Lords who decided the case, but later decisions seem to me to show conclusively that in this respect the case is out of line with the current of authority and ought not to be regarded as a precedent. As Lord Reid observed in the Hedley Byrne case, "the question was never really considered whether the facts hadimposed on the directors a duty to exercise care" (1964) A.C. at p. 484; and in so saying his Lordship was echoing Viscount Haldane's remark in Nocton v. Lord Ashburton (1914) A.C. 932 at p. 947 that the discussion of the case by those who took part in the decision appeared to him "to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit." Lord Morris mentioned (1964) A.C. at p. 501 that Lord Shaw, agreeing with Viscount Haldane, had said (1914) A.C. at p. 971 that "certain expressions by learned Lords may seem to have made incursions into the region of negligence, but Derry v. Peek as a decision was directed to the single and specific point" that "fraud must ex necessitate contain the element of moral delinquency." Lord Devlin said (1964) A.C. at pp. 518, 519: "There was in Derry v. Peek, as the report of the case shows, no plea of innocent or negligent misrepresentation and so their Lordships did not make any pronouncement on that. I am bound to say that had there been such a plea I am sure that the House would have rejected it. As Lord Haldane said, their Lordships must 'be taken to have thought' that there was no liability in negligence. But what your Lordships may be taken to have thought, though it may exercise great influence upon those who thereafter have to form their own opinion on the subject, is not the law of England. It is impossible to say how their

Lordships would have formulated the principle if they had laid one down. They might have made it general or they might have confined it to the facts of the case. They might have made an exception of the sort indicated by Lord Herschell 14 App. Cas. 337, 360 or they might not. This is speculation. All that is certain is that on this point the House laid down no law at all." It seems to me, then, that it would be a mistake to treat Derry v. Peek as laying down or implying any general proposition applicable to the facts of a different case, except in so far as it dealt with the tort of deceit.

Another decision relied upon was Low v. Bouverie (1891) 3 Ch. 82. Whether or not that case was rightly decided on its facts, one cannot, I think, read the judgments in the Court of Appeal without seeing that the treatment of the case would have been different if the learned Lords Justices had had before them the speeches in Nocton v. Lord Ashburton. I do not think that anything they said can be safely relied upon as a guide to the proper conclusion in such a case as the present.

Finally there are cases concerning the giving of advice by a banker as to the financial position of his customer, notably Parsons v. Barclay & Co. Limited (1910) 103 L.T. 196 and Robinson v. National Bank of Scotland Ltd. (1916) S.C. (H.L.) 154. The basis of these decisions, I think, is that in view of the degree of toil and trouble that would be involved for a banker if he were to accept a responsibility to be careful as well as honest in responding to the multitudinous inquiries of this kind that everyone knows are constantly made of bankers, it could not be reasonable for an inquirer to suppose that the banker was accepting so onerous an obligation. "Is he then expected", asked Pearson L.J. in the Court of Appeal in the Hedley Byrne case (1962) 1 Q.B. 396 at p. 414, "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." Lord Hodson (1964) A.C.

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at pp. 512-3 adopted the statement. Such a case as that which is now before us seems to me to be radically different. It is surely not sufficient to say that there is a resemblance between an inquiry made of one financial institution and an inquiry made of another. If we assume, as we must for present purposes, that all the allegations in the first count are true the plaintiff's request for information and advice was a request to use the special means which the defendant possessed for the purpose of providing reliable guidance for the plaintiff in relation to his existing and contemplated investments in H.G. Palmer (Consolidated) Limited. It faced the defendant with a choice between answering with as serious a sense of responsibility as a contractual relationship would have required, answering with a warning that responsibility had not been accepted, and refusing to answer at all. (cf. per Lord Reid, (1964) A.C. at p. 486). It seems to me that if all the facts here alleged are proved it will necessarily follow that the plaintiff was justified in inferring, from the defendant's action in giving him information and advice on the matter he put to it, that the defendant was choosing the first of the three courses abovementioned.

For these reasons I am of opinion that the first count is good. The allegations in the second and third counts differ somewhat, but similar reasoning applies to them. I would accordingly hold that the judgment of the Supreme Court was right and that the appeal should be dismissed.

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This appeal is primarily concerned with an order of the Court of Appeal by which demurrers to the respondent's declaration were overruled. There were three counts in the declaration and the appellants had demurred to each of them. By the first count the plaintiff, now the respondent, sued to recover damages from the first-named appellant and, by the other two counts, he sued, respectively, to recover damages from the second-named appellant and from both appellants jointly.

No question arose as to whether the joinder of these causes of action was permissible under s.2 of the Law Reform (Miscellaneous Provisions) Act, 1946 and I do not, therefore, advert further to this matter.

Broadly each of the counts claimed damages for losses alleged to have been sustained by the respondent as the result of negligence on the part of the appellants in voluntarily advising him as to the financial stability of a company, H.G. Palmer (Consolidated) Limited (Palmers), in which he had certain existing investments and in which he alleged he was contemplating a further investment. Needless to say the decision of the House of Lords in Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd. (1964 A.C.465) was the main topic of discussion upon this part of the appeal.

For the purpose of the demurrers all allegations of fact contained in the respective counts of the declaration must be taken to be admitted and the narrow question before us is whether such allegations, if proved, would entitle the plaintiff to succeed in the action on any count. But before examining this question it is important to ascertain, as precisely as possible, what it was that Hedley Byrne's Case decided and, in pursuing this inquiry, I find it necessary, first of all, to make some more or less general observations. The headnote to the case says that it decided "that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary

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relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment". But the headnote is misleading in spite of Lord Reid's prefatory observation (at p. 480) that "this case raises the important question whether and in what circumstances a person can recover damages for loss suffered by reason of his having relied on an innocent but negligent misrepresentation". The problem, it seems to me, was stated more precisely by Lord Morris when he said (at p. 493), "the important question of law which has concerned your Lordships in this appeal is whether, in the circumstances of the case, there was a duty of care owed by the respondents, whom I will call 'the bank', to the appellants, whom I will call 'Hedleys' ", and that "In order to recover the damages which they claim Hedleys must establish that the bank owed them a duty, that the bank failed to discharge such duty, and that as a consequence Hedleys suffered loss". That this was the character of the preoblem sufficiently appears, I think, from the speeches of the other noble and learned Lords who took part in the decision.

It is important that this should be made clear for the case is authority for the proposition that an opinion, expressed in response to a request for advice, may give rise to an action for damages even though it is an opinion which is, in fact, honestly entertained and its expression does not involve any misrepresentation of fact. The test of liability is said to be, of course, whether in the circumstances of the case a duty of care was owed to the person seeking the advice and whether the opinion was formed and expressed negligently. The problem in such a case, it seems to ne, is quite different from the case where a person is merely seeking information as to facts for the formation of an opinion in a field of inquiry may well require the exercise of particular skill and judgment upon which the inquirer proposes to rely whereas the imparting of information as to facts, known to one person but not to another, does not. Further, in the

latter case misrepresentation is a condition precedent to liability whereas in the former it is not. I mention these matters for two reasons. First of all because Hedley Byrne's Case was one where the appellant had sought and obtained advice in the form of a banker's reference or report as to "the respectability and standing", and later, "an opinion ... as to the respectability and standing", of a company with which it was engaged in commercial dealings and because of the different ways in which their Lordships, after reviewing the existing authorities, proceeded to specify the circumstances in which a duty of care would arise in such a case. Secondly, the complaint which is common to each count of the declaration is, in substance, that the defendant negligently expressed an opinion concerning the credit-worthiness of Palmers and there is no allegation that there was any misrepresentation of fact on the part of any defendant.

Hedley Byrne's Case has been the subject of much criticism but it is plain enough that their Lordships laid down emphatically that, apart from contractual and fiduciary relationships, a duty of care may exist in relation to the use of words equally as well as in relation to the doing of acts, even though in the former case any resulting damage does not follow immediately from the breach of duty. They were unanimous that such a duty will arise whenever there is a "special relationship" between a person seeking advice and a person giving advice. The difficulty is, of course, in defining what is meant by a "special relationship" and in specifying the circumstances in which it will be held to exist. But one cannot find fault with the general proposition which was enunciated in spite of the decision in Derry v. Peek (14 App. Cas. 337) which was the subject of much discussion in the case. Their Lordships were of the opinion that Derry v. Peck "did not establish any universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action" and Lord Bramwell's observation in Derry v. Peek to the effect that

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"To found an action for damages there must be a contract and breach, or fraud" was said to be much too widely stated (per Lord Reid at p. 484 - see also Lord Morris at pp. 499-501; Lord Hodson at p. 508; Lord Devlin at p. 519; and Lord Pearce at p. 535). It would, indeed, be a bold assertion now to say that in no conceivable circumstance can a duty of care be said to arise, apart from contract or some fiduciary relationship, when one person seeks and obtains advice from a willing adviser. But the difficulty remains of exhaustively postulating the kinds of relationship, apart from those previously recognized and acknowledged, which will give rise to such a duty.

Lord Reid (at p. 486) thought that the relationship arises "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". He added, "A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require". On the other hand Lord Morris seems to have taken a somewhat more restricted view. He said (at p. 502) that he considered "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 upon 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

of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make a careful inquiry, a person takes it upon himself to give information or advice to ... another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise". Lord Hodson (at p. 514) said that he did not think it was possible to catalogue the special features which must be found to exist before the duty of care will arise in a given case, but he agreed with the observations of Lord Morris on this point. Lord Devlin (at p. 530) enunciated the proposition that "wherever there is a relationship equivalent to contract, there is a duty of care". He then proceeded "Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former Nocton v. Lord Ashburton has long stood as the authority and for the latter there is the decision of Salmon J. in Woods v. Martins Bank Ltd. which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility". Finally, Lord Pearce said (at p. 539) "To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer. It is conceded that Salmon J. rightly found a duty of care in Woods v. Martins Bank Ltd. but the facts in that case were wholly different from those in the present case".

Lord Devlin, having said (at p. 529) that he had had the advantage of studying the terms which their Lordships had framed by way

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of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them, then said that he did not understand any of their Lordships to hold that "it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations". "It is" he said "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". His further observation at this place emphasizes that he considered that responsibility would attach only if the doing of the act (i.e. the giving of advice) "implied a voluntary undertaking to assume responsibility". But with the greatest respect I do not think this notion was common to the reasons of the rest of their Lordships who decided the case. Nor do I think that the test of the existence of a duty to take reasonable care in circumstances such as the present can be said to rest upon whether there was or was not an "implied ... undertaking to assume responsibility" on the part of the appellants. By this, I understand his Lordship to mean an undertaking which must be implied in order to give effect to the intention of the parties and as much part of the transaction as an express undertaking to the same effect would be. However I confess that I am quite unable to see any foundation for such an implication in circumstances such as those disclosed by the evidence in Hedley Byrne's Case.

It is true that Lord Reid said (at p. 483) that the most natural requirement (to create the special relationship) would be "that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility" but when he came finally to formulate the criteria by the application of which the problem should be resolved it is plain that it was essential to his definition of the circumstances in which a special relationship would arise that the person to whom the inquiry was addressed should know "that he was being trusted or that his skill and judgment were being relied upon". If he answered without

qualification he must, his Lordship thought, "be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require". The italics are mine and serve to emphasize that Lord Reid finally left open the question whether in such circumstances the duty of care was to be found in some implication or whether it was a duty imposed by law by virtue of the relationship. His Lordship's observations, I note in passing, seem to cover a wider field than that indicated by Lord Morris for they seem to extend not only to the seeking of advice but also to the seeking of information as to facts but I doubt if his Lordship intended to hold that if A knows that B has, or has available to him, knowledge of facts which are unknown to A and he inquires of B concerning those facts a duty of care, as distinct from what is referred to as a duty of honesty, will arise. In other words I do not think that his Lordship intended to overrule Low v. Bouverie (1891 3 Ch. 82) - a case to which I shall refer presently.

Lord Morris's definition of the circumstances in which a special relationship will arise is, it seems to me, confined to cases where inquiries are addressed to and answered by persons "possessed of a special skill" or of an "ability to make careful inquiry" and where the inquirer could reasonably rely upon such skill or ability. And by "ability" I do not take his Lordship to mean, merely, that the person to whom the inquiry is addressed has access to information which the inquirer has not but, rather, that he has a particular ability to examine and elucidate factual situations. Further, as I read his Lordship's observations, he did not, I think, regard the duty of care in such circumstances as one which arose from an implication of assumed "responsibility" but rather from the operation of the law upon a particular form of relationship. With these observations Lord Hodson agreed while Lord Pearce seems to have accepted the last proposition. "To import such a duty", he said,

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"the representation must ... concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer". His further observation that express words excluding responsibility would "prevent a special relationship from arising" plainly enough shows that his Lordship thought that the relevant duty of care arises out of the relationship and not as the result of an implication concerning the intention of the parties. This also, it seems to me, is the view which has been taken in New Zealand (Smith v. Auckland Hospital Board (1965 N.Z.L.R. 191 at pp. 197, 205 and 219) and Jones v. Still (1965 N.Z.L.R. 1071 at p. 1074)).

A learned author (Professor Robert Stevens, 27 M.L.R. 121 at p. 141) has been bold enough to suggest that the House of Lords in Hedley Byrne's Case, like Carlyle, "has led people out into the wilderness and left them there". But there is great difficulty in defining relationships, the significance of which had hitherto been unrecognized, which will, apart from contractual or fiduciary relationships, give rise to a duty to exercise reasonable care in the giving of advice or information to persons seeking the same. Definition in such circumstances can only be in the most general terms. Nevertheless, faced, as we are, with the problem of deciding whether or not the declaration alleges facts which, if proved, would give rise to a "special relationship", Professor Stevens's observation strikes a somewhat responsive chord and I shall endeavour to limit myself as far as possible to the particular problem which arises in this case. Before addressing myself to it, however, I should like to make some further observations about Hedley Byrne's Case.

The appellant in that case finally failed because the respondent had prefaced its advice with the statement that it was given "without responsibility". But it is by no means clear to me that the result of the case would have been different if this qualification had not been made (see Lord Reid at p. 489, Lord Morris at p. 503, Lord Hodson at pp. 513, 514 and Lord Pearce at pp. 539, 540). A majority of their Lordships, however, seems to have held that

whenever a "special relationship" exists a duty to exercise reasonable care in answering requests for advice arises by force of law and there was common agreement that such a relationship arises whenever it is apparent that the request is made because of the special skill and ability of the person to whom the request is addressed in the field with which the inquiry is concerned, that this is known to the person to whom the request is made, that the inquiry is not made informally and that the latter knows that it is likely that his skill and judgment will be relied upon.

Hedley Byrne's Case overruled Candler v. Crane, Christmas & Co. (1951 2 K.B. 164) and Le Lievre v. Gould (1893 1 Q.B. 491) was explained. The dissenting judgment of Denning L.J. (as he then was) in the former case makes it clear that his view was that there was a duty to exercise reasonable care imposed upon such persons "as accountants, surveyors, valuers and analysts, whose profession and occupation 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." "Their duty", he said, "is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports." He added, "Herein lies the difference between these professional men and other persons who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus: Derry v. Peek (now altered by statute), and trustees who answer inquiries about the trust funds: Low v. Bouverie. Those persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements: they can only be made responsible by the law affecting persons generally, such as contract, estoppal, innocent misrepresentation or fraud. But it is very different with persons who engage in a calling which requires special knowledge and skill."

On the other hand in Le Lievre v. Gould

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the facts were that the defendant was a surveyor who had made a report to a builder who had, without the defendant's authority, shown the report to the plaintiff and in Hedley Byrne's Case their Lordships thought that the actual decision might be justified by the fact that there was no "proximity" between the plaintiff and the defendant. The case, however, was one where the defendant was possessed of a particular skill. But the decision in Low v. Bouverie (1891 3 Ch. 82), which was under discussion in the course of the argument in Hedley Byrne's Case, was not overruled by their Lordships. Indeed it received the approval of Lord Hodson (at pp. 513, 514) and was referred to without any suggestion of disapproval by Lord Morris (at p. 502). Low v. Bouverie had, however, much earlier, received the express approval of the House of Lords in Nocton v. Lord Ashburton (1914 A.C. 932). There, in the course of a speech, parts of which played a vital part in the decision in Hedley Byrne's Case, Lord Haldane had referred to Low v. Bouverie and said:

> "There the defendant, who was trustee of a fund, had replied to the inquiry of a person who contemplated making a loan to a beneficiary on the security of the fund, that the interest of the latter was subject to certain incumbrances which he mentioned, but he did not say there were no others. In fact there were others which he had forgotten. That the defendant was not liable for deceit was clear, but it was contended that as a trustee he was liable for breach of duty to give correct information. But the Court of Appeal held, as I think rightly, that the duty of a trustee did not extend to furnishing answers to inquiries such as were made in the case."

(See also per Lord Shaw at p. 971). That was a case where the trustee was alleged, not to be possessed of any particular special skill or ability but merely to have, or to have available to him, knowledge of concrete facts and the request was for information as to those facts by a plaintiff who, to the trustee's knowledge,

was contemplating business with a beneficiary who, it was said, was agreeable to the trustee giving to the plaintiff information as to his means and position. The inquiry was a formal one and there can be little doubt that the defendant knew that the plaintiff would be influenced by his answer yet it was held that the defendant was not under a legal obligation to do more than give honest answers to the best of his actual knowledge and belief. It seems to me that this decision must be taken still to be good law.

The case of Woods v. Martins Bank Ltd. (1959 1 Q.B. 55), which met with the approval of their Lordships in Hedley Byrne's Case, was a case of a different character for there the plaintiff succeeded because he established that the Bank undertook, as part of its business activities, to give advice to its customers concerning their investments. The result in Banbury v. Bank of Montreal (1918 A.C. 626) was otherwise because, inter alia, the evidence did not establish that the defendant held itself out as an investment adviser or that any other "special facts and circumstances" existed which operated to create a duty of care (per Lord Atkinson at pp. 681-683 and Lord Parker at p. 703). They did not agree with the unqualified dictum of Viscount Finlay in his dissenting judgment (at p. 654) that, although a banker who is asked to give advice to a customer concerning his investments is under no obligation to advise, "but if he takes upon himself to do so, he will incur liability if he does so negligently." I make no comment concerning the grounds upon which their Lordships distinguished Hedley Burne's Case from Robinson v. The National Bank of Scotland Ltd. (1916 S.C. (H.L.) 46) but I cannot fail to observe that their Lordships - or a majority of them - must be taken to have assented to the proposition that where a banker offers advice in response to a mere inquiry - which I take to include an inquiry of the kind made in that case - he is not subject to a duty of care but merely to what has been called a duty of honesty. (See also Parsons v. Barclay & Co. Ltd. (103 L.T. 196).

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The last-mentioned case was referred to by Lord Morris in Hedley Byrne's Case in the course of a passage (at pp. 503, 504) in which he said:

"There was a duty of honesty. The great question, however, is whether there was a duty of care. The bank need not have answered the inquiry from the National Provincial Bank. It appears, however, that it is a matter of banking convenience or courtesy and presumably of mutual business advantage that inquiries as between banks will be answered. The fact that it is most unlikely that the bank would have answered a direct inquiry from Hedleys does not affect the question as to what the bank must have known as to the use that would be made of any answer that they gave but it cannot be left out of account in considering what it was that the bank undertook to do. It does not seem to me that they undertook before answering an inquiry to expend time or trouble 'in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced and well-worded report'. (I quote the words of Pearson L.J. [1962] 1 Q.B. 396,414). Nor does it seem to me that the inquiring bank (nor therefore their customer) would expect such a process. This was, I think, what was denoted by Lord Haldane in his speech in Robinson v. National Bank of Scotland Ltd., 1916 S.C. (H.L.) 154, when he spoke of a 'mere inquiry' being made by one banker of another. In Parsons v. Barclay & Co. Ltd. (1910) 103 L.T. 196, Cozens-Hardy M.R. expressed the view that it was no part of a banker's duty, when asked for a reference, to make inquiries outside as to the solvency or otherwise of the person asked about or to do more than answer the question put to him honestly from what he knew from the books and accounts before him. There was in the present case no contemplation of

receiving anything like a formal and detailed report such as might be given by some concern charged with the duty (probably for reward) of making all proper and relevant inquiries concerning the nature, scope and extent of a company's activities and of obtaining and marshalling all available evidence as to its credit, efficiency, standing and business reputation. There is much to be said, therefore, for the view that if a banker gives a reference in the form of a brief expression of opinion in regard to credit-worthiness he does not accept, and there is not expected from him, any higher duty than that of giving an honest answer."

Lord Hodson also dealt with this case and at the conclusion of his speech where, after quoting from Robinson v. National Bank of Scotland Ltd. (supra), he said (at pp. 512-514):

"Since no detailed reasons were given by the House for the view that a banker's reference given honestly does not in the ordinary course carry with it a duty to take reasonable care, that duty being based on a special relationship, it will not, I hope, be out of place if I express my concurrence with the observations of Pearson L.J. who delivered the leading judgment in the Court of Appeal and said [1962] 1 Q.B. 396, 414-5: '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 by Mr. Cooke 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

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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. If the answer given is seriously wrong, that is some evidence - of course, only some evidence - of dishonesty. Therefore, apart from authority, it is far from clear, to my mind, that the banker, in answering such an inquiry, could reasonably be supposed to be assuming any duty higher than that of giving an honest answer.'

This is to the same effect as the opinion of Cozens Hardy M.R. in Parsons v. Barclay & Co. Ltd. (103 L.T. 196, 199): 'I desire for myself to repudiate entirely the suggestion that when one banker is asked by another for a customer such a question as was asked here, it is in any way the duty of the banker to make inquiries other than what appears from the books of account before him, or, of course, to give information other than what appears from the books of account before him, or, of course, to give information other than what he is acquainted with from his own personal knowledge ... I think that if we were to take the contrary view ... we should necessarily be putting a stop to that very wholesome and useful habit by which the banker answers in confidence and answers honestly, to another banker.'

It would, I think, be unreasonable to impose an additional burden on persons such as bankers who are asked to give references and might, if more than

honesty were required, be put to great trouble before all available material had been explored and considered.

It was held in Low v. Bouverie (/1891/ 3 Ch. 82) that if a trustee takes upon himself to answer the inquiries of a stranger about to deal with the cestui que trust, he is not under a legal obligation to do more than to give honest answers to the best of his actual knowledge and belief, he is not bound to make inquiries himself. I do not think a banker giving references in the ordinary exercise of business should be in any worse position than the trustee. I have already pointed out that a banker, like anyone else, may find himself involved in a special relationship involving liability, as in Woods v. Martins Bank Ltd. (/1959/ 1 Q.B. 55) but there are no special features here which enable the appellants to succeed."

With these observations in mind I feel bound to say that where a person is simply asked for his opinion concerning the financial standing or reputation of another person or company he will not, in expressing his opinion, be subject to a duty of care unless it sufficiently appears that the advice was sought because of his skill and judgment in the field of the inquiry and that the inquirer proposes to rely upon such skill and judgment and that this was, or should reasonably have been, known to him. No doubt in considering the circumstances in which the inquiry is made the character of the profession or business of the person of whom the inquiry is made will be of some significance. But I do not regard Hedley Byrne's Case as authority for the proposition that a duty of care will arise whenever a person makes an inquiry of another merely because the latter is, or is thought to be, in possession of special information relating to the subject-matter of the inquiry, or, is in a better position than

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the inquirer to obtain such information. 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 inquiries 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.

In an attempt to allege facts proof of which would give rise to a duty of care on the part of the defendant it is alleged in the first count of the declaration that -

(1) The plaintiff was a policy holder in the life insurance company;

(2) He was seeking from that company information and advice cocerning the financial stability of Palmers as to the safety of investments in that company;

(3) The defendant company and Palmers were subsidiaries of The M.L.C. Limited;

(4) By virtue of that association the defendant company had "special facilities for obtaining full complete and up-to-date information concerning the financial affairs of Palmers";

(5) The defendant company was in a position to give the plaintiff reliable and up-to-date advice concerning the financial stability of Palmers; and

(6) The defendant 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 Palmers and whether to invest further therein.

At the request of the plaintiff I have treated the first part of this last allegation - which, on my view of Hedley Byrne's Case, seems to me to allege a conclusion of law - as meaning that the defendant supplied the information and advice "without a disclaimer of responsibility".

It is noticeable that the count does not allege that the appellant was in possession of "up-to-date information" concerning the financial affairs of Palmers at the time when the opinions were expressed. Allegation 5 is somewhat ambiguous but any such meaning was expressly disavowed by the respondent. Nor does it allege that the appellent had a right of access to such information. It merely alleges that by virtue of the fact that the appellant and Palmers had a common parent it had "special facilities" for obtaining it. By this, counsel for the respondent said, it meant that it was in a "better position than the respondent to obtain such information" and, indeed, it can mean no more.

The defendant, of course, is not a banker. As appears from the first count it is a life assurance company and, in my view, the count fails in a number of respects to allege facts which, if proved, would give rise to a "special relationship". First of all it is no part of the plaintiff's case, and there is no general allegation, that it was part of the business activities of the appellant to give advice to its policy holders concerning their investments or that the defendant held itself out as ready to give such advice to policy holders generally, or, to the respondent in particular. Nor does it allege the existence of facts capable, upon a narrower view, of giving rise to a "special relationship"; it does not allege that the officer or officers to whom the alleged inquiry was addressed, or the company itself, were possessed of any special skill or ability in the field in which advice was

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sought or that, to the knowledge of such officer or officers, the respondent proposed to rely on any such skill and judgment. In effect, it does no more than allege that they had sources of information not available to the plaintiff. Then, what is the negligence alleged? The bare allegation is that the defendant negligently advised the plaintiff but it is essential that it should appear from the count that the negligence relied upon constituted a breach of duty owed to the plaintiff However, it is consistent with the allegation 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 for obtaining full complete and up-to-date information concerning Palmers" and, since there is, in my view, nothing in the count to suggest that the defendant came under a duty to make such extraneous inquiries, this is an additional ground upon which the demurrer should be upheld.

In my view the first count is demurrable and, as these reasons apply with equal force to the second and third counts, they are also demurrable.

The appeal is also concerned with a demurrer to the appellants' pleas which raises as a defence s. 10 of the Usury, Bills of Lading, and Written Memoranda Act, 1902 and it is contended that the decision in Hedley Byrne's Case requires a reconsideration of the view that the provisions of that section apply only in the case of fraudulent misrepresentations. But it is clear from an examination of their Lordships' reasons in Banbury v. Bank of Montreal (supra) that they considered that the provisions of a similar section had no application to representations made in breach of a contractual duty or a duty of care imposed by law upon a defendant. However their Lordships did not have in contemplation a duty such as that recognized in Hedley Byrne's Case and I should like to hear the point fully argued before finally passing an opinion. But since I am of the opinion that the demurrers to the declaration should be upheld it follows that, in my view, the appeal should be allowed and, in accordance with s. 59 of the Common Law Procedure Act, 1899-1957, judgment in demurrer entered for the appellant (See Stephen on Pleading 7th edn. 141).

The principal question raised by the demurrers under consideration in these cases is whether the defendants, the appellants here, are liable to the plaintiff, the respondent here, in damages for breach of a duty of care if, through lack of care upon their part in advising the plaintiff to retain his investments in H.G. Palmer (Consolidated) Limited and to make further investments therein, they have caused the plaintiff to lose the money or part of the money so invested. In other words did the defendants or either of them owe the plaintiff any duty of care, and, if so, what is its content? The counts to which the defendants have demurred are set out in full in the judgments of other members of the Court.

The Court of Appeal of the Supreme Court of New South Wales (Wallace P. and Walsh J.A., Asprey J.A. dissenting) overruled the demurrers and entered judgments for the plaintiff in demurrer. Appeals by leave have been brought to this Court.

Until the decision of the House of Lords in Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd. (1964) A.C. 465, the prevailing view of the law in England was that in the absence of a contractual obligation to take reasonable care, damages were not recoverable for financial loss caused by the negligent giving of wrong advice. This view was supported by the decision of the Court of Appeal in Candler v. Crane, Christmas & Co. (1951) 2 K.B. 164, which in turn relied upon what had been said nearly 60 years earlier by the Court of Appeal in Le Lievre v. Gould (1893) 1 Q.B. 491. The House of Lords overruled Candler v. Crane, Christmas & Co. and while refraining from overruling Le Lievre v. Gould, explained that it could only be supported on grounds other than those expressed by the Court of Appeal there and adopted by the Court of Appeal in Candler v. Crane, Christmas & Co.

In deciding as it did, the House of Lords rejected the submission that, there

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being a relationship of proximity between the person giving and the person receiving negligent advice, damages could be recovered for acting upon the advice only if financial loss flowed from physical damage done to the property of the plaintiff. The House went on to decide that legal redress for loss caused by reliance upon negligent advice, could be recovered in some cases other than ex contractu, or, from the existence of a fiduciary relationship between the adviser and the advised.

The decision in Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd. has, in some quarters, been regarded as making new law, but, upon the whole, that is not my view of what was decided, notwithstanding the statements of the law to be found in the judgments of the Court of Appeal in the two cases to which I have already referred.

As long ago as 1888 in Cann v. Willson (1888) 39 Ch. D. 39, Mr. Justice Chitty, following George v. Skivington (1869) L.R. 5 Ex. 1; Heaven v. Pender (1883) 11 Q.B.D. 503, decided that in the absence of any contractual obligation the defendants, a firm of valuers who carelessly, but without any breach of contract, sent a misleading valuation to the agent of the plaintiff for the purpose of persuading the plaintiff and his co-trustee to lay out trust money on mortgage upon the property valued, incurred a duty towards the plaintiff to use reasonable care in the preparation of the valuation, and that the defendants being in breach of that duty were liable in damages for their negligence. In Cann v. Willson the plaintiff had relied upon three grounds for relief, namely (1) breach of contract, (2) negligence, and (3) fraudulent misrepresentation. The case was decided in the time between the decision of the Court of Appeal and that of the House of Lords in Derry v. Peek (1887) 37 Ch. D. 541; (1889) 14 App. Cas. 337, and the decision of the Court of Appeal, which was subsequently reversed by the House of Lords, was relied upon by Mr. Justice Chitty. It was not, however, relied upon to support the conclusion that the defendants were liable for giving advice negligently. In concluding his judgment, Mr. Justice Chitty said:

"I have entirely passed by the question of contract. It is unnecessary to decide that point. I consider on these two last grounds - and if I were to prefer one to the other it would be the second ground - that the defendant is liable for the negligence."

The decision of the House of Lords in Derry v.Peek was inconsistent with the opinion of Mr. Justice Chitty that the plaintiff was entitled to succeed upon the third ground, i.e. fraudulent misrepresentation. It was not, however, inconsistent with the actual decision, namely that the defendants were liable in damages for negligence.

Cann v. Willson was not, it seems, referred to in the House of Lords in Derry v. Peek, where it was decided that the Court of Appeal was wrong in its conclusion that, in an action for deceit claiming damages for fraudulent misrepresentation inducing the taking of shares, the plaintiff could succeed upon proof of an inducing statement made without reasonable grounds for the belief that it was true. Upon this point Mr. Justice Chitty had cited Cotton L.J. in Derry v. Peek 37 Ch. D. at p. 568 and decided that a statement made without reasonable ground for believing it to be true to induce another to act upon it amounts to fraud. The decision of the House of Lords in Derry v. Peek appears clearly enough from the short speech of Lord Watson, where his Lordship said:

"My Lords, I agree with Stirling J. that, as matter of fact, the appellants did honestly believe in the truth of the representation upon which this action of deceit is based. It is by no means clear that the learned judges of the Court of Appeal meant to differ from that conclusion; but they seem to have held that a man who makes a representation with the view of its being acted upon, in the honest belief that it is

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true, commits a fraud in the eye of the law, if the court or a jury shall be of opinion that he had not reasonable grounds for his belief. I have no hesitation in rejecting that doctrine, for which I can find no warrant in the law of England."

Lord Herschell, referring to the passage cited in Cann v. Willson from the judgment of Cotton L.J., said:

"About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, that is without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief."

It is true that Lord Bramwell did make an observation going beyond what Derry v. Peek decided. After saying that actual fraud must be established in a case like this, his Lordship said: "To found an action for damages there must be a contract and breach, or fraud". However, every general observation must be read in its context and there is nothing whatever to suggest that Lord Bramwell had in mind expressly to deny that damages could be recovered for negligent misstatement. Lord FitzGerald said:

"A director is bound in all particulars to be careful and circumspect, and not, either in his statements to the public

or in the performance of the duties he has undertaken, to be careless or negligent, or rash".

A director being so bound, it can hardly be thought that his Lordship was confining the duty of care to a contractual relationship. Lord Halsbury said:

> "The learned judge who saw and heard the witnesses acquitted the defendants of intentional deceit, and although the Court of Appeal held them liable, overruling the decision of the learned judge below, they appear to me to have justified their decision upon grounds which I do not think tenable, namely, that they, the directors, were liable because they had no reasonable ground for the belief which nevertheless it is assumed they sincerely entertained.
> ..... Nevertheless, if, as I have said, the facts are reconcilable with the innocence of the directors, and with the absence of the mens rea which I consider an essential condition of an action for deceit, the mere fact of the inaccuracy of the statement ought not to be pressed into constituting a liability which appears to me not to exist according to the law of England."

A close examination of Derry v. Peek convinces me that all that was being discussed was whether the absence of any reasonable ground for a belief, which was nevertheless held, was tantamount to fraud. The House of Lords negatived this, but, apart possibly from Lord Bramwell and Lord FitzGerald, had nothing to say about the existence of a duty to take care and the consequences of a breach of such a duty by advising negligently. The obvious difference between a careless statement, and a statement made with no reasonable grounds for belief, seems to me to indicate the matter to which their Lordships were

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directing their attention. It had not been decided by the Court of Appeal that a careless statement was fradulent but that a statement made "without any reasonable ground for believing it to be true" would support an action for deceit. This is what the House of Lords rejected and it was only upon this point that Cann v. Willson was impliedly disproved.

Consequently, when four years later in Le Lievre v. Gould the Court of Appeal said that Cann v. Willson had been overruled by Derry v. Peek, the Court was I think mistaken. Le Lievre v. Gould was an action alleging fraud and, alternatively, negligence, on the part of a surveyor in giving to mortgagees to whom he was not bound by contract, certificates stating the progress of buildings and upon which the mortgagees lent and lost money. It was found that, in consequence of negligence on the part of the surveyor, the certificates contained untrue statements as to the progess of the buildings but there was no flaw on his part. The Court decided that the surveyor owed no duty to the mortgagees to exercise care in the giving of certificates and that they could not maintain an action against him by reason of his negligence. Thus Lord Esher M.R. said:

> "No doubt, if Cann v. Willson (39 Ch. D. 39) stood as good law, it would cover the present case. But I do not hesitate to say that Cann v. Willson is not now law. Chitty J., in deciding that case, acted upon an erroneous proposition of law, which has been since overruled by the House of Lords in Derry v. Peek (14 App. Cas. 337), when they restated the old law that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud."

This, for the reason I have already given, is an over-statement of the decision of the House of Lords in Derry v. Peek. A.L. Smith L.J. said:

"We cannot decide this case against the plaintiffs without overruling Cann v. Willson (39 Ch. D. 39). ... That case was decided by Chitty J., after the decision of the Court of Appeal in Peek v. Derry (37 Ch. D. 541), and before that decision had been reversed by the House of Lords in Derry v. Peek (14 App. Cas. 337); and Chitty J., quoted from the judgment of Cotton, L.J., in Peek v. Derry (37 Ch. D. 541), in the Court of Appeal, and he based his judgment (1) on the ground that the defendant owed a duty to the plaintiffs, irrespective of contract, and (2) on the ground that the defendant had recklessly, though without a fraudulent intention, made a representation which was untrue, with the intention that the plaintiffs should act upon it. In my opinion, the decision in Cann v. Willson (39 Ch. D. 39) cannot be upheld, and I think that Romer J., in Scholes v. Brook (63 L.T. (N.S.) 837) was right in so treating it.

There was no appeal to the House of Lords from the decision of the Court of Appeal in Le Lievre v. Gould; but had there been, and, had the House of Lords then decided that Cann v. Willson had not been overruled by Derry v. Peek, could it have been thought that the House of Lords was making new law? I think not. It seems to me that when the point first came to the House of Lords in 1964, the only added circumstance was that Le Lievre v. Gould was being challenged 70 years rather than immediately after it had been decided upon a wrong principle, and that, in the meantime, the majority of the Court of Appeal in Candler v. Crane, Christmas & Co. had felt constrained to adhere to the law as stated by the Court of Appeal nearly 60 years earlier.

In the meantime, however, members of the House of Lords had made observations upon

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Derry v. Peek which bear upon the point that was in issue in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. Thus in Banbury v. Bank of Montreal (1918) A.C. 626, Lord Wrenbury had put his finger upon what I think is the essential difference between awarding damages for innocent misrepresentation and awarding damages for negligent misstatement. His Lordship said:

> "An innocent representation per se constitutes no cause of action. If there existed a duty, an action lies for negligence and breach of duty, and in that action the fact that there was misrepresentation, although innocent, is material. But an action cannot be maintained upon an innocent representation simpliciter. It is maintained upon the breach of duty. The innocent misrepresentation is not the cause of action, but evidence of the negligence which is the cause of action." - The italics are mine.

In the same case Lord Finlay L.C. said:

> "... a banker may, as such, give advice on investments to a customer who consults him, or, indeed, to any one who comes to him for advice, and whom he chooses to advise. If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently." - The italics are mine.

Lord Atkinson said:

> "Well, it was urged that Canadian banks and their officers in this matter of advising their customers as to investments are in the position of skilled persons, such as doctors and lawyers, who, if they undertake, even gratuitously, to treat or

advise a person, are bound to use the skill and knowledge they have, or profess to have, and that if they omit to do so they are guilty of gross negligence: Shiells v. Blackburne (1 H. Bl. 158): Coggs v. Bernard (2 Ld. Raym. 909; 1 Sm. L.C., 12th ed., 191) ... Mr. Ogden Lawrence contended on behalf of the respondents that the principle of Coggs v. Bernard (2 Ld. Raym. 909) never could apply to the mere giving gratuitously of advice. No doubt in most, if not all, of the authorities mentioned in the notes to that case in 1 Smith's Leading Cases, 172, 188 et. seq., something amounting to agency existed between the person for whom the gratuitous service was performed and the person who rendered it; but in the case of persons who possess or purport to possess skill and knowledge in some art or profession, such for instance as doctors or lawyers, I do not think it can be said that the giving of advice is not an act done for the patient or client advised, as the case may be .... I do not, as at present advised, think that the acts done, or to be done, can be confined, at all events in the case of skilled persons, to physical as distinguished from mental acts. Owing to the view I take on the other issues in the case it is not necessary for me to express a definite opinion on this point, and I abstain from doing so."

These observations were made in the case where the points being discussed were, whether it was part of a banker's business to advise the plaintiff as to his investments, and, whether Galletly, the branch manager, had the authority of the Bank to advise the plaintiff. The decision on these points was

"that there was no evidence upon

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which the jury could reasonably find that Galletly had authority to advise the plaintiff as to his investments or that the bank owed any duty to the plaintiff to advise him carefully or at all".

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The second matter was not, however, disposed of by the adoption of the general proposition, supported by Le Lievre v. Gould, supra, to the effect that negligent advice causing loss cannot, in the absence of a contractual obligation to take care, be disregarded as not giving rise to any cause of action.

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Then in Nocton v. Lord Ashburton (1914) A.C. 932, the House of Lords in deciding that Derry v. Peek did not preclude an action for indemnity for loss arising from a misrepresentation, not fraudulent but made in breach of a special duty arising by reason of a fiduciary relationship between the parties, made some general observations that are relevant. Thus, at p. 947, Viscount Haldane L.C., said:

> "My Lords, the discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must indeed be taken to have thought that the facts proved as to the relationship of the parties in Derry v. Peek (14 App. Cas. 337) were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an action for deceit will lie. I think that the authorities subsequent to the decision of the House of Lords

shew a tendency to assume that it was intended to mean more than it did. In reality the judgment covered only a part of the field in which liabilities may arise. There are other obligations besides that of honesty the breach of which may give a right to damages. These obligations depend on principles which the judges have worked out in the fashion that is characteristic of a system where much of the law has always been judge-made and unwritten."

Lord Shaw of Dunfermline said:

"... it should not be forgotten that Derry v. Peek (14 App. Cas.337) was an action wholly and solely of deceit, founded wholly and solely on fraud, was treated by this House on that footing alone, and that - this being so - what was decided was that fraud must ex necessitate contain the element of moral delinquency. Certain expressions by learned Lords may seem to have made incursions into the region of negligence, but Derry v. Peek as a decision was directed to the single and specific point just set out."

Lord Parmoor said:

"My Lords, reference was made during the hearing in your Lordships' House to the case of Derry v. Peek (14 App. Cas. 337). That case decides that in an action founded on deceit, and in which deceit is a necessary factor, actual dishonesty, involving mens rea, must be proved. The case in my opinion has no bearing whatever on actions founded on a breach of duty in which dishonesty is not a necessary factor."

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Finally, in Robinson v. National Bank of Scotland (1916) S.C. (H.L.) 154, Viscount Haldane L.C. said this:

"There is only one other point about which I wish to say anything, and that is the question which was argued by the appellant, as to there being a special duty of care under the circumstances here. I think the case of Derry v. Peek ((1889) 14 App. Cas. 337) in this House has finally settled in Scotland, as well as in England and Ireland, the conclusion that in a case like this no duty to be careful is established. There is the general duty of common honesty, and that duty of course applies to the circumstances of this case as it applies to all other circumstances. But when a mere inquiry is made by one banker of another, who stands in no special relation to him, then, in the absence of special circumstances from which a contract to be careful can be inferred, I think there is no duty excepting the duty of common honesty to which I have referred.

In saying that I wish emphatically to repeat what I said in advising this House in the case of Nocton v. Lord Ashburton ((1914) A.C. 932) that it is a great mistake to suppose that, because the principle in Derry v. Peek clearly covers all cases of the class to which I have referred, therefore the freedom of action of the Courts in recognizing special duties arising out of other kinds of relationship which they find established by the evidence is in any way affected. 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."

All this goes to show what I think is apparent from a careful reading of the judgments themselves - that the Court of Appeal in Le Lievre v. Gould attributed too much to Derry v. Peek and there was no justification for treating the House of Lords decision as overruling the decision in Cann v. Willson that a duty to advise carefully can arise from a relationship independently of contract.

In these circumstances it was not, I think, surprising that the House of Lords overruled Candler v. Crane, Christmas & Co. It is also important to observe that Le Lievre v. Gould has never been considered by the High Court. In my opinion Le Lievre v. Gould was wrongly decided; in overruling Cann v. Willson the Court of Appeal misapplied the decision of the House of Lords in Derry v. Peek; the Court of Appeal introduced an arbitrary and stultifying limitation into the law relating to negligence which was, in effect, properly overruled on the first occasion when its correctness was considered by a court having the power to overrule it.

To go so far, however, is not to solve the substantial difficulty of this case. The problem of determining, whether, the facts pleaded here, are such as to give rise to a duty of care on the part of the defendants in giving advice to the plaintiff, is no easy matter. Before turning to the pleadings, which are, to my mind, the root difficulty here, it is necessary to say something in general terms about the duty to take care in giving advice.

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In Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. their Lordships were not concerned merely with the correctness of the principles underlying the decision in Le Lievre v. Gould. What was attempted was the formulation of some guidance of a general nature about the circumstances in which the duty of care in giving advice will arise independently of contract or of a special relationship of a fiduciary character. Thus, after referring to Viscount Haldane's observations in Robinson v. National Bank of Scotland that the duty of care may arise from a special relationship not being of a fiduciary character, Lord Reid, in endeavouring to define such a relationship, said:

> ".... 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 inquirer was relying on him. I say 'ought to have known' because in questions of negligence we now apply the objective standard of what the reasonable man would have done.
>
> A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought; or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a

relationship with the inquirer which requires him to exercise such care as the circumstances require."

It seems to me that Lord Reid adopted as his criterion the voluntary acceptance of responsibility for taking care. Lord Morris of Borth-y-Gest, at pp. 502, 503, said:

"My Lords, I consider that it follows and 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 upon 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 upon his judgment or his skill or upon 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 upon it, then a duty of care will arise."

Lord Hodgson accepted this staeement. Lord Devlin's positive statements were as follows:

"I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in Nocton v. Lord Ashburton (1914 A.C. 932, 972) are 'equivalent to contract',

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that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract

.....

I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular .... Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.

.....

I am satisfied, for the reasons I have given, that a person for whose use a banker's reference is furnished is not, simply because no consideration has passed, prevented from contending that the banker is responsible to him for what he has said. The question is whether the appellants can set up a claim equivalent to contract and rely on an implied understanding to accept responsibility.

Lord Pearce said:

"The true rule is that innocent misrepresentation per se gives no right to damages. If the misrepresentation was intended by the parties to form a warranty between two contracting parties, it gives on that ground a right to damages (Hailbutt, Symons & Co. v. Buckleton (1913) A.C. 30, H.L.). If an innocent misrepresentation is made between parties in a fiduciary relationship it may, on

> that ground, give a right to claim damages for negligence. There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded.
>
> .....
>
> To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer."

The actual decision in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. was that Heller & Partners Ltd. owed Hedley Byrne & Co. Ltd. no duty of care because the advice which was given by the former about the financial strength of Easipower Ltd. to the National Provincial Bank Ltd. and passed on to the latter, was given without due care it was nevertheless given "confidentially" and "without responsibility". Their Lordships were unanimous that this disclaimer prevented any duty of care from arising. This element of the decision is, I think, of great importance because it indicates that there can be no duty of care imposed upon a person who, in voluntarily advising, effectively disclaims responsibility.

It is also clear that all their Lordships rejected the notion that there is "a general duty to exercise reasonable care not to injure others by false statements just as there is a duty not to injure them by harmful acts", to use the language of Dr. Goodhart in his article in the Yale Law Journal, vol. 74 at p. 301. Their Lordships having decided that some special relationship was necessary before any duty of care could arise, were concerned to define the sort of special relationship which would give rise to a duty to advise carefully.

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Menzies J. (continued)

There is one further point about the decision of the House of Lords. Candler v. Crane, Christmas & Co. was overruled and the dissenting judgment of Denning L.J. was preferred to the judgments of the majority. Denning L.J. was not only unwilling to accept the reasoning of Le Lievre v. Gould. His judgment rested on the proposition that accountants, exercising a calling requiring knowledge and skill, owed a duty to use care not only to their clients, but to third persons to whom they knew that the reports would be shown, when, to the knowledge of the accountants, the third persons would consider the reports with a view to the investment of money, or, taking other action to their gain or detriment. Since Candler v. Crane, Christmas & Co. was overruled it is apparent that their Lordships in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. accepted this conclusion. Denning L.J. added that other skilled persons, such as surveyors, valuers and analysts, are under a duty similar to that which he found rested upon the accountants who made the report which was the basis of the case.

I do not wish to attempt the enunciation of a principle to be applied in all cases where the question is whether one person is liable in damages for loss suffered by another from acting upon advice carelessly given. "One step enough for me." My task, as I see it, is to ascertain whether the facts pleaded by the plaintiff would, if proved, give rise to a duty of care, owed by the defendants or one of them to the plaintiff, to advise without negligence, if, as is alleged, advice was given. Moreover it is not, I think, necessary to draw any fine distinction between the two defendants.

The declaration is unsatisfactory and must, as the respondent's counsel conceded, be amended before there can be a proper trial of the action. However, it is, in effect, pleaded that H.G. Palmer (Consolidated) Limited (which I shall call "Palmer's") was a subsidiary of the defendant M.L.C. Limited (which I shall call "the M.L.C."), in which the M.L.C. had 90 per cent of the ordinary shares and had some

directors in common with the M.L.C.; that the other defendant, The Mutual Life & Citizens' Assurance Company Limited (which I shall call "the Assurance Company") was also a subsidiary of the M.L.C.; that the plaintiff was a policyholder in the Assurance Company; that the plaintiff sought advice from the defendants about the financial stability of Palmer's; that the defendants, by reason of their company relationship with Palmer's were in a position of special advantage to get and to give accurate information about its financial stability; that the plaintiff relied upon the defendants to do so; that the defendants elected to advise or accepted the responsibility of advising the plaintiff, knowing that the plaintiff intended to rely upon their advice in deciding whether to retain his investments in Palmer's and to make further investments; that the defendants advised the plaintiff that Palmer's was and would continue financially stable and that investments therein were and would continue safe and that it would be safe to invest further in Palmer's; that this advice was given negligently; that, relying upon the advice so given, the plaintiff retained his investments in Palmer's and made further investments and thereby suffered loss.

These being, in substance, the facts pleaded, the real point is whether the defendants were under a duty to the-plaintiff to advise him carefully, if they advised him at all. Had there been consideration for the giving of the advice it would have been a breach of duty for the defendants to advise carelessly; had the defendants held themselves out as expert advisers upon investments, the mere fact that the advice had not been given under a contract would not have excused them from the exercise of the skill which they held themselves out as having. So much, I think, follows from the decision of the House of Lords in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., the dissenting judgment of Denning L.J. in Candler v. Crane, Christmas & Co., and

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from the judgment of Mr. Justice Salmon in Woods v. Martins Bank Ltd. (1959) 1 Q.B. 55, which the House of Lords has, I think, approved.

The novelty of this case seems to me that the special relationship giving rise to a duty of care which the plaintiff seeks to establish between himself and the defendants will depend, in part, upon proof of a particular relationship between the defendants and Palmer's. This is not, however, an insuperable obstacle to the establishment of a special relationship because if, for instance, a prospective lender to a private company sought the advice of the managing director and principal shareholder about the financial stability of the company in order to decide whether or not to make the loan, it is not difficult to envisage circumstances, outside contract, that would give rise in law to a duty to advise with care if advice were to be given. It is here alleged (1) that the defendants were in a position of special advantage to get and give accurate information about the financial stability of Palmer's and (2) that the defendants elected to advise and accepted the responsibility of advising the plaintiff upon his request for advice about Palmer's; (3) that the defendants advised the plaintiff knowing that he would act upon their advice. As I have said, the pleadings are in need of amendment in order that there may be a proper trial, but it seems to me that we must here take them as they are and that, basically, what has been alleged would, if proved, establish the existence of a duty to take care in giving any advice that was given about the financial stability of Palmer's. It seems to me that every speech in the House of Lords in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. supports this conclusion, for all emphasize that a duty to use care in giving advice arises 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. See too W.B. Anderson & Sons Ltd. and Others

v. Rhodes (Liverpool) Ltd. and Others (1967) 2 All. E.R. 850. Furthermore, if, as has now been established, there is a duty to advise carefully outside contractual or fiduciary relationships, the allegations here would, if proved, give rise to such a duty unless some stopping point can be found such a limitation that such a duty arises only when advice is given by a person being in business to advise or holding himself out generally as having some special skill to advise. I do not think that such limitations exist. The absence of allegations that it is part of the business of the defendants to advie policy-holders or others upon their investments or that the defendants hold themselves out generally as having some special skill to advise upon investments is nevertheless an important consideration here because it throws the plaintiff back upon proof that the advice upon which he relied was given by an officer with authority to commit, and one who did commit, the defendants to the obligation of advising the plaintiff with care. The existence of a special relationship is, therefore, obviously of critical importance in this case to found any duty of care.

There is a second question to be considered; namely whether the defendants' pleas based upon s. 10 of the Usury Bill of Lading and Written Memoranda Act 1902 (N.S.W.) amount to a defence to the cause of action disclosed by the declarations. In my opinion they do not. I have found no reason for distinguishing the decisions in Banbury v. Bank of Montreal that Lord Tenterden's Act has no application to an action, not for fraud, but for negligence. That powerful fifty year old decision of the House of Lords reversing the decision of the Court of Appeal is not, I think, open to question. See W.B. Anderson & Sons Ltd. and Others v. Rhodes (Liverpool) Ltd. and Others.

For the foregoing reasons I have come to the conclusion that the appeals should be dismissed.

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In the first count of his declaration in this action the plaintiff seeks to recover damages from the Mutual Life & Citizens' Assurance Company Limited (which I will call "the Assurance Company"). The count alleges (a) that the plaintiff sought from the Assurance Company in formation and advice concerning the financial stability of a company, to which I will refer as "Palmer", and as to the safety of investments therein; (b) that the Assurance Company was associated with Palmer by reason of the fact that both Companies were subsidiaries of the M.L.C. Ltd., the second-named defendant, and that by virtue of that fact the Assurance Company, as the plaintiff knew, had special facilities for obtaining full, complete and up-to-date information concerning the financial affairs of Palmer and was in a position to give the plaintiff reliable and up-to-date information concerning the financial affairs and financial stability of Palmer; (c) that the defendant accepted the responsibility of supplying the plaintiff with the information and advice which he had sought, knowing that the plaintiff intended to act thereon in deciding whether to retain his existing investments in Palmer and whether to make further investments in that Company; (d) that the defendant by its servants and agents thereupon negligently informed and advised him that Palmer was and would continue to be financially stable and that investments in it were and would continue to be safe and that it would be safe to invest further moneys in it; (e) that in reliance on the information and advice given by the defendant he did not realize his existing investments in Palmer and invested further moneys in that Company; and (f) that he thereby lost the value of his investments.

Counsel for the plaintiff informed us that the allgeation in (b) above that the defendant "was in a position" to give the information concerning Palmer's financial stability - a phrase which also appears in the other counts of the declaration - was intended to mean that the defendant "had in its employ officers who were capable of forming a reliable judgment upon information obtained concerning Palmer's financial affairs", and that the words "accepted

the responsibility of supplying" in (c) above were intended to mean "supplied without disclaimer of responsibility". It is with the declaration as it stands at present that we have to deal but, as will appear later, in the view that I take of the case it is immaterial whether it is the declaration as framed that is to be considered or whether the demurrer is to be decided as though the counts had been amended so as to accord with what counsel told us.

In his second count the plaintiff claims damages from the second-named defendant, the M.L.C. Ltd., alleging (a) that that Company owned over ninety per cent of the ordinary shares in Palmer and that certain of the directors of the M.L.C. Ltd. were also directors of Palmer; (b) that the plaintiff had made unsecured loans to Palmer and knew that the defendant had, by virtue of its share-holding 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 that Company's financial stability and as to the safety of loans made to Palmer; (c) that the plaintiff sought from the defendant information and advice concerning Palmer's financial stability and as to the safety of unsecured loans made to that Company; (d) that the defendant elected to supply the plaintiff with the information and advice sought from it by the plaintiff knowing that the latter intended to act thereon in deciding whether to "retain" his existing loans to Palmer and whether to make further loans to that Company: (e) that the defendant thereupon negligently informed and advised the plaintiff that Palmer was and would continue to be financially stable and that existing loans made to that Company were and would continue to be safe and that it would be safe to make further unsecured loans to it; and (f) that the plaintiff in reliance upon this information and advice refrained from

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realizing his existing investments in Palmer and made further unsecured loans to that Company so that when Palmer became insolvent the plaintiff lost the value of his investments in that Company.

In his third count the plaintiff claims damages from both defendants alleging (a) that the M.L.C. Ltd. owned over ninety per cent of the ordinary shares in Palmer and all the ordinary shares in the Assurance Company; (b) that both defendants had the same directors and that some of those directors were also directors of Palmer; (c) that the Assurance Company owned some of the ordinary shares in Palmer; (d) that the plaintiff had made unsecured loans to Palmer and that he, with knowledge that the defendants, by virtue of their shareholdings in Palmer "and otherwise", had special facilities for obtaining full, complete and up-to-date information concerning Palmer's financial affairs and were in a position to give the plaintiff reliable and up-to-date advice concerning that Company's financial stability, sought from the defendants information and advice concerning Palmer's financial stability and as to the safety of unsecured loans made to it; (e) that the defendants, knowing that the plaintiff intended to act upon information and advice given by them in making a decision whether to retain his existing unsecured loans to Palmer and whether to make further unsecured loans to it, elected to supply the plaintiff with the information and advice sought by him; (f) that the defendants thereupon negligently informed and advised the plaintiff that Palmer was and would continue to be financially stable and that existing unsecured loans were and would continue to be safe and that it would be safe to make further unsecured loans to that Company; and (g) that in reliance upon such information and advice the plaintiff refrained from realizing his existing investments in Palmer and made further unsecured loans to it so that when Palmer became insolvent the plaintiff lost the value of his investments in that Company. To each of these counts demurrers were filed. The Court of Appeal over-ruled them and from its order this appeal is brought.

It will be seen that in none of the counts is it alleged that the defendants or either of them acted fraudulently or that there was any contractual relationship between the parties under which the defendants or either of them agreed to exercise care in advising the plaintiff or that any fiduciary relationship existed between the parties which would give rise to a duty of care owed by the defendants to the plaintiff. Nor is it alleged that either of the defendants carried on business as an investment adviser or held itslf out as possessing special skill in advising on investments. What the plaintiff contends is that if some or all of various passages in the speeches in Hedley Byrne v. Heller & Partners Ltd. (1964) A.C. 465 are applied, the facts alleged in each of the counts would, if proved, give rise to a relationship between the parties as a result of which the defendants and each of them owed to the plaintiff a duty to exercise reasonable care in forming an opinion as to Palmer's present and future financial stability and in advising the plaintiff that investments in that Company were then and would continue to be safe.

It has been said that, when regard is had to the actual decision in Hedley Byrne, the passages relied upon were obiter (see, for example, Rondel v. Worsley (1967) 1 Q.B. 443 per Dankwerts L.J. at p. 514), but it would be wrong, in my opinion, to put them on one side for that reason since the views expressed by their Lordships were stated after hearing full argument. But they seem to me to have introduced into a branch of the common law which had previously been thought by lawyers, at least in Australia, to have been reasonably well settled a considerable degree of uncertainty and, with all respect, I am not prepared to accept them to their full extent as stating the common law of this country.

Each of their Lordships was of opinion

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that, in addition to those cases in which there is a contractual obligation to exercise due care or some fiduciary relationship giving rise to a similar obligation, there are cases in which a "special relationship" may be found to exist between A and B under which a duty is owed by B to A to exercise reasonable care in advising A. With this very general proposition I respectfully agree. No doubt a doctor who gratuitously gives medical advice to a sick man is bound to exercise due care in giving that advice, and a person whose business it is to give skilled advice on financial matters to those who seek it, as was the case in Woods v. Martins Bank (1959) 1 Q.B. 55, and who, in the course of his business, gratuitously advises a person who seeks his opinion on financial matters may be held liable if the opinion given has been negligently formed or negligently expressed and the person to whom it is given acts in reliance upon it and suffers financial loss.

The statement of the circumstances in which such a "special relationship" arises were necessarily expressed by each of their Lordships in very general terms. Lord Reid, at p. 486, could

> "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 inquirer was relying on him. .....
>
> A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought; or he could give an answer with a clear qualification that he

accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require."

Lord Morris said, at pp. 502-503,

"My Lords, I consider that it follows and 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 upon 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 upon his judgment or his skill or upon his ability to make careful inquiry, 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 upon it, then a duty of care will arise."

Lord Hodson, at p. 514, said,

"I do not think it is possible to catalogue the special features which must be found to exist before the duty of care will arise in a given case, but since preparing this opinion I have had

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the opportunity of reading the speech which my moble and learned friend, Lord Morris of Borth-y-Gest, has prepared. I agree with him that if in a sphere where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry such person takes it upon himself to give information or advice to, or allow his information or advice to be passed on to, another person who, as he knows, or should know, will place reliance upon it, then a duty of care will arise."

Lord Devlin considered, at pp. 528-529, that

"the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in Nocton v. Lord Ashburton (1914) A.C. 932, 972, are 'equivalent to contract', that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract."

Lord Pearce said at p.539

"There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded."

and that

"To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer."

But these broad propositions should, in my opinion, be read in the light of a number of well-known authorities which had been decided before Hedley Byrne and to which references were made in that

case, on occasions with approval and - as it seems to me - on no occasion with disapproval. They are cases in which advice or information was given by one person to another and in which it was held that the relationship between the parties was not such as to give rise to a duty of care owed by the person who gave the advice or information to the person who sought it and that the only duty owed by the former to the latter was one of honesty.

The first is Derry v. Peek (1889) 14 A.C. 337. The facts in that case are well known and I need not detail them. It is sufficient for present purposes to say that the directors of a company had issued a prospectus containing a false statement and on the faith of that statement the plaintiff had bought stock in the company. The directors believed the statement to be true, although they had no reasonable grounds for theirbelief, and it was held that in these circumstances an action for deceit could not be maintained since, although their conduct had been negligent, it was not fraudulent. I think it is plain that if the action had been framed in negligence and not in fraud it would have failed since their Lordships' opinion was that the only duty owed by the directors to those to whom the prospectus was addressed was a duty of honesty and there had been no breach of that duty.

This was the view taken of the decision by several of those who heard the appeal to the House of Lords in Nocton v. Lord Ashburton (1914) A.C. 932. Lord Haldane, with whom Lord Atkinson agreed, said, at p. 947, of Derry v.Peek that their Lordships

> "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."

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And, at p. 956, that

> "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."

To the same effect is a passage in the judgment of Bowen L.J. in Low v. Bouverie (1891) 3 Ch. 82 at p. 105, which was quoted with approval by Lord Shaw in Nocton's Case at p. 971. Bowen L.J. had said:

> "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 inquiry. In Derry v. Peek, the House of Lords considered that the circumstances 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."

And in Hedley Byrne, Lord Reid, at p. 484, said of Derry v. Peek that:

> "It must be implied that on the facts of that case there was no such duty."

Lord Morris, at p. 500, quoted with approval, an extract from Lord Haldane's speech in Nocton's Case, including the passage, at p. 947, which

I have set out above, and Lord Hodson, at p. 508, said that Derry v. Peek had decided "inferentially" that the careless statements made in the prospectus would not be "actionable in negligence", while Lord Pearce, at p. 534, spoke of the decision as having "curbed" attempts to impose a duty of care as well as a duty of honesty in the case of representation by words.

The next case to which I refer is Low v. Bouverie. There the defendant was one of the trustees of a settlement. The life tenant under the settlement sought to borrow money from the plaintiff, a money-lender, upon the security of his life interest and referred the plaintiff to the defendant for information as to his, the life tenant's, means and position. The plaintiff, through his solicitors, thereupon informed the defendant that he was "doing some business" with the life tenant and enquired whether the latter was "still entitled to the full benefit" of his life interest, adding that it was understood that he had not in any way mortgaged or parted with his life interest. The defendant replied that the life tenant's interest was subject to certain encumbrances which he mentioned. The plaintiff thereupon made a loan on the security of a mortgage of the life interest. The fact was that that interest was subject to six encumbrances in addition to those mentioned by the defendant. Notice of these additional encumbrances had been given to the defendant but he had forgotten about them when he answered the plaintiff's enquiry. The life tenant became bankrupt and, the plaintiff's security proving to be insufficient, he sought to recover the amount of the deficiency from the defendant. After saying that a trustee was under no obligation to answer an enquiry such as had been made by the plaintiff, Lindley L.J. went on, at p. 100, to deal with the position where a trustee answers such an enquiry and held that his only duty was to give an honest answer. Bowen L.J. was of the same opinion.

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In Nocton's Case Lord Haldane, at p. 950, expressly agreed with the decision and reference was made to it in Hedley Byrne, without disapproval, by Lord Morris at p. 502, while Lord Hodson, at pp. 513-514, said of it:

> "It was held in Low v. Bouverie that if a trustee takes upon himself to answer the inquiries of a stranger about to deal with the cestui que trust, he is not under a legal obligation to do more than to give honest answers to the best of his actual knowledge and belief, he is not bound to make inquiries himself."

and added that he did not

> "think a banker giving references in the ordinary exercise of business should be in any worse position than the trustee."

The next case is Parsons v. Barclay & Co. Ltd. 103 L.T. 196. There a bank, as in Hedley Byrne, had been asked for and had given advice regarding the financial standing of one of its customers. In the course of his judgment Cozens-Hardy M.R. expressed the opinion that in answering such an enquiry the only duty owed by the bank was one of honesty and what the Master of the Rolls then said was referred to in Hedley Byrne by Lord Morris at pp. 503-504 without any indication of disapproval. Lord Hodson, at p. 512, after expressing his agreement with a passage from the judgment of Pearson L.J., who had delivered the leading judgment in the Court of Appeal in Hedley Byrne, that

> "Apart from authority, I am not satisfied that it would be reasonable to impose upon a banker the obligation suggested"- that is the obligation to take reasonable care - "if that obligation really adds anything to the duty of giving an honest answer. It is conceded by Mr. Cooke 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. If the answer given is seriously wrong, that is some evidence - of course, only some evidence - of dishonesty. Therefore, apart from authority, it is far from clear, to my mind, that the banker, in answering such an inquiry, could reasonably be supposed to be assuming any duty higher than that of giving an honest answer."

went on, at p. 513,

"This is to the same effect as the opinion of Cozens-Hardy M.R. in Parsons v. Barclay & Co. Ltd.: 'I desire for myself to repudiate entirely the suggestion that when one banker is asked by another for a customer such a question as was asked here, it is in any way the duty of the banker to make inquiries other than what appears from the books of account before him, or, of course, to give information other than what he is

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acquainted with from his own personal knowledge ..... I think that if we were to take the contrary view ..... we should necessarily be putting a stop to that very wholesome and useful habit by which the banker answers in confidence and answers honestly, to another banker'.

It would, I think, be unreasonable to impose an additional burden on persons such as bankers who are asked to give references and might, if more than honesty were required, be put to great trouble before all available material had been explored and considered."

In Robinson v. National Bank of Scotland Ltd. (1916) S.C. (H.L.) 154 their Lordships took a similar view of the duty of a banker in answering enquiries as to the financial standing of others. Lord Haldane said, at p. 157,

"There is only one other point about which I wish to say anything, and that is the question which was argued by the appellant, as to there being a special duty of care under the circumstances here. I think the case of Derry v. Peek in this House has finally settled in Scotland, as well as in England, and Ireland, the conclusion that in a case like this no duty to be careful is established. There is the general duty of common honesty, and that duty, of course, applies to the circumstances of this case as it applies to all other circumstances. But when a mere inquiry is made by one banker of another, who stands in no special relation to him, then, in the absence of special circumstances from which a contract to be careful can be inferred, I think there is no duty excepting the duty of common honesty to which I have referred."

This passage was quoted in Hedley Byrne by Lord Reid at pp. 491-492 and by Lord Hodson at pp. 511-512. It is true that in Robinson's Case the bank's letters contained a disclaimer of responsibility in terms similar to those which had been used by the defendant in Hedley Byrne, but, as Lord Hodson pointed out, at p. 512, the conclusion reached by the House of Lords in Robinson's Case that the bank owed no duty of care to the pursuer was in no way based upon the disclaimer.

There are then authorities of great weight which lead me to the conclusion that on the facts alleged in each count of the declaration in the present case the only duty which lay upon the defendants was a duty to be honest in answering the plaintiff's enquiry. I can see no reason why an insurance company which, in answer to an enquiry, states its opinion of the financial stability of another company with which it is associated, should owe to the person who makes the enquiry any wider duty than was owed by the directors in Derry v. Peek to those to whom the prospectus was addressed, or was owed by the trustee in Low v. Bouverie or the bankers in Parsons v. Barclay & Co. Ltd. and in Robinson v. National Bank of Scotland to those who sought information and advice from them.

I would allow the appeal, set aside the order of the Court of Appeal and in lieu thereof order that judgment in demurrer be entered for the Assurance Company on the first count of the declaration; for the M.L.C. Ltd. on the second count and for both defendants on the third count. In these circumstances it is unnecessary to consider whether the defendants' pleas based upon s. 10 of the Usury, Bills of Lading and Written Memoranda Act would have afforded a defence had the declaration disclosed a cause of action.

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New South Wales Registry

No.10

Order of the High Court of Australia

11th November 1968

NO. 10

ORDER OF THE HIGH COURT OF AUSTRALIA
Dated 11th November 1968

IN THE HIGH COURT OF AUSTRALIA No.7 of 1968

NEW SOUTH WALES REGISTRY

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

(Court of Appeal Division)

B E T W E E N :

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

- and -

CLIVE RALEIGH EVATT Respondent

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR GARFIELD BARWICK, MR. JUSTICE KITTO, MR. JUSTICE TAYLOR, MR. JUSTICE MENZIES AND MR. JUSTICE OWEN

MONDAY THE 11TH DAY OF NOVEMBER 1968

THIS APPEAL against the whole of the judgments and orders of the Court of Appeal of the Supreme Court of New South Wales given and made on the 18th day of December 1967 coming on for hearing before this Court atSydney on the 1st, 2nd, 3rd and 4th days of April 1968 pursuant to leave to appeal granted by this Court on the 12th day of March 1968 UPON READING the transcript record of proceedings herein AND UPON HEARING Mr. A.B. Kerrigan of Queen's Counsel and Mr. T.R. Morling of Counsel for the Appellants and Mr. K.R. Handley of Counsel for the Respondent THIS COURT DID ORDER on the 4th day of April 1968 that this appeal should stand for judgment and the same standing for judgment this day accordingly at Sydney THIS COURT DOTH ORDER that this appeal be and the same is hereby dismissed AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the

Respondent of this appeal and that such costs when so taxed and certified be paid by the Appellants to the Respondent or to his Solicitors Messrs. Keith Hinchcliffe & Company AND THIS COURT DOTH BY CONSENT FURTHER ORDER that the sum of one hundred dollars ($100.00) paid into Court as security for the costs of this appeal be paid out to the Respondent or to his said Solicitors Messrs. Keith Hinchcliffe & Company in or towards satisfaction of the Respondent's said taxed costs.

BY THE COURT

H. Cannon

DISTRICT REGISTRAR

In the High Court of Australia

New South Wales Registry

No.10

Order of the High Court of Australia

11th November 1968 (continued)

NO. 11

ORDER IN COUNCIL GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL
Dated 31st July 1969

In the Privy Council

No.11

Order in Council granting special leave to appeal to Her Majesty in Council

31st July 1969

AT THE COURT AT ARUNDEL PARK

The 31st day of July, 1969

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT	SIR MICHAEL ADEANE
EARL MARSHAL	SIR ELWYN JONES
LORD CHALFONT	MR. LEVER

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 15th day of July 1969 in the words following, viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a

In the
Privy Council

No.11

Order in Council granting special leave to appeal to Her Majesty in Council

31st July 1969
(continued)

humble Petition of (1) The Mutual Life & Citizens' Assurance Company Limited and (2) The M.L.C. Limited in the matter of an Appeal from the High Court of Australia between the Petitioners and Clive Raleigh Evatt Respondent setting forth that the Respondent commenced two actions at common law in the Supreme Court of New South Wales: that in each action demurrers were entered by the Petitioner or Petitioners as the case may be to the counts in the Respondent's declarations: that joinders in demurrer were filed and the demurrers were head by the Supreme Court of New South Wales (Court of Appeal Division): that the said Supreme Court ruled that Judgment should be entered for the Respondent on all the demurrers: that the High Court of Australia granted to the Petitioners leave to appeal in each case: that on the 11th November 1968 the said High Court dismissed the Appeals: And humbly praying Your Majesty in Council to order that the Petitioners should have special leave to appeal against the said Judgment of the High Court of Australia dated the 11th November 1968 or for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the High Court of Australia dated the 11th November 1968 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"And Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W.G. Agnew

In the Privy Council

No.11

Order in Council granting special leave to appeal to Her Majesty in Council

31st July 1969 (continued)

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 — Appellants (Defendants)

- and -

CLIVE RALEIGH EVATT — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

LINKLATERS & PAINES,
Barrington House,
59/67 Gresham Street,
London, E.C.2.
Solicitors for the
Appellants.

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