Liability for Negligent Misrepresentation in the Finance Industry

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Abstract

Sometimes statements made by people working in the finance industry when giving advice may be incorrect. This article examines how the tort of negligence applies to the making of these misrepresentations. Cases discussed include *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, *Mutual Life & Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556, *Shaddock & Associates Pty Ltd v Parramatta City Council* (1980-1981) 150 CLR 225, *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1, *Caparo Industries plc v Dickman* [1990] 2 AC 605 and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

Introduction

The types of occupation that are included within the broad category of 'the finance industry' cover a wide range of duties. Many of these occupations require the giving of advice, perhaps to individual clients concerned about their personal finances or to business clients looking to optimise the financial outcomes for their business. The type of advice may relate, for example, to investment strategies, superannuation, products and services. If this advice turns out to be incorrect and the person or business to whom it was given loses money as a result, they may seek compensation from the advice giver. The legal action most likely to be used is that of the tort of negligence, for what is known variously as 'negligent misstatement' or 'negligent misrepresentation'.

This article examines how an advisor in the finance industry may be liable in the tort of negligence for information or advice given in the course of his or her employment. Negligence is where the negligent act of one party causes a loss (known as damage) to another and the law determines that that the circumstances are such that the loss should be shifted from one to the other. In negligence the loss may be personal injury, including pure psychiatric injury, property damage or pure economic (financial) loss.[1] The person who suffers the loss is the plaintiff and the defendant is the person that the plaintiff considers to be responsible for that particular loss. In the situation being discussed in this article the loss is pure economic loss and the defendant is the giver of the financial advice, i.e. the person in the finance industry.

Background

A distinction must be made between those situations where the advice or information is given with the knowledge that it is untrue (and with the intention it should be relied upon), and those situations where the giver of the advice is negligent as to whether it is true or false. The former is fraud, or fraudulent misrepresentation, and the plaintiff can sue in deceit; the latter is negligent misrepresentation, the subject of this article. The tort of deceit may be quite difficult for a plaintiff to successfully claim. The plaintiff must show

[1] 'Pure' psychiatric loss and 'pure' economic loss in this context means the loss is unattached to any accompanying physical injury or property damage. Where there is physical injury or property damage any resultant psychiatric injury or economic loss may be recovered as one of the heads of compensatory damage: F McGlone and A Stickley, *Australian Torts Law* (2009) 338-341.

(on the balance of probabilities) that there was a misrepresentation of fact which the defendant knew to be false, that the plaintiff suffered financial loss as a result of relying on the misrepresentation, and the defendant intended that reliance.[2] The knowledge of the falsity may be absolute on the part of the defendant or it may be reckless, but carelessness is not sufficient for deceit.[3] While deceit may be harder to prove, the damages awarded are more favourable than in the tort of negligence, and disclaimers are not effective where there is fraud.[4]

It should also be noted that the *Trade Practices Act 1974* (Cth) ('the TPA') has eroded the use of actions in tort for misrepresentations. This is particularly true of s 52(1) of the TPA which provides that 'a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.[5] Actions brought under s 52 can generally only be brought against a corporation,[6] but the employer of the advisor in the financial industry is usually going to qualify as a corporation.[7] The TPA circumvents problems with a 'special relationship' existing between the plaintiff and defendant in negligence, discussed later, or the requirement to prove intention in deceit. However, in most cases where advice is given in the finance industry, the use of s 52 of the TPA is excluded by s 51AF which says the relevant part of the TPA does not apply to financial services.[8]

Where there is a contract between the plaintiff and the defendant, as there is between the financial advisor and his or her client, the client may sue in contract for loss suffered as a result of negligent advice given. If there is no express term in the contract stating that the services shall be carried out with due care and skill, there will be such a term implied by statute to that effect.[9] The client may also sue in negligence, and this may be preferable to suing for breach of contract in certain situations. In contract law the limitation period commences when the contract is breached,[10] and the resultant damage may not be immediately obvious. In tort, the limitation period starts when the damage is discovered.[11] In addition the assessment of damages is more advantageous to the plaintiff in a tort action.

Pure economic loss may also occur where there is no immediate relationship between the giver of the advice and the person who acts on it. An example of this is the 1964 UK House of Lords case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* ('*Hedley Byrne*').[12] A bank (Heller & Partners) gave a report on the creditworthiness of one of its clients (Easipower Ltd) to the bank (the National Provincial Bank) of a third party (Hedley Byrne & Co Ltd) who requested this information before making a decision about granting credit to Easipower. Based on the report given by Heller & Partners to the National Provincial Bank, Hedley Byrne & Co Ltd granted credit to Easipower and lost money when Easipower went into liquidation.

[2] *Derry v Peek* (1889) 14 App Cas 337, 347-348 (Lord Bramwell).
[3] McGlone and Stickley, above n 1, 417, 419.
[4] J Fleming, *The Law of Torts* (1998) 696 fn14, 702-703.
[5] Section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') mirrors the provisions of s 52 of the TPA.
[6] There are certain limited exceptions in s 6 of the TPA which allows actions to be brought against individuals.
[7] Plaintiffs generally sue the employer of the person who caused the loss (financial or otherwise) as this is the 'deep pocket'; the employer is vicariously liable for the torts committed by an employee in the course of employment. If the defendant is not a corporation, the action can be brought under the mirror legislation in the various states: in Western Australia this is the *Fair Trading Act 1987* (WA) s 10.
[8] 'Financial service' is defined in s 51AF of the TPA by reference to Part 2 of Division 2 of the ASIC Act. This in turn answers the question 'When does a person provide a financial service?' with 'if they provide financial product advice': s 12BAB ASIC Act.
[9] For example by s 12ED of the ASIC Act.
[10] This is the period within which a plaintiff must commence an action. In Western Australia the limitation period for tort and contract is six years: *Limitation Act 2005* (WA) s 13.
[11] In misrepresentation cases it may be difficult to pinpoint when exactly the limitation period starts. For a discussion on this see Margot Clarkson, *Negligent Misstatement Causing Economic Loss – When Does the Statutory Limitation Period Begin to Run?* (2008) Clarkson Giacomi Solicitors < http://www.clarksongiacomi.com.au/download/Limitation_of_Actions.pdf > at 10 Aug 2009.
[12] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. The facts are given here, and the case is discussed again in more detail later.

Historically the courts were reluctant to compensate for pure economic loss in these circumstances. As Fleming puts it:[13]

> The courts were daunted by the prospect of a vast liability that was feared to descend on the frail shoulders of such as accountants, surveyors, bankers and lawyers whose daily job it is to offer guidance in financial transactions of frequently considerable dimensions. Such information is apt to be used by many persons other than the immediate client, but the cost of liability cannot be spread among them the way a manufacturer of goods can spread it over his products. In consequence the burden of potential liability could be wholly disproportionate to the professional's fee.

This is a policy argument for limiting recovery referred to as the 'floodgates argument'.[14] In the 1931 American case of *Ultramares Corp v Touche* ('*Ultramares*'), Cardozo CJ expressed it as 'a liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[15] This case concerned misrepresentations made by accountants (Touche). In both *Ultramares* and *Hedley Byrne* the plaintiffs lost, but in the latter case the law had incrementally expanded and the loss was only because of a disclaimer attached to the information.

The legal requirements in a negligent misrepresentation action

Where the loss suffered by the plaintiff is the result of a negligent misrepresentation (negligent misstatement) the ordinary laws of negligence apply.[16] There are some slight variations to the legal requirements because the loss is purely economic, and, as mentioned above, this is a developing area because of the historic concerns regarding indeterminate liability.

In a negligence action the plaintiff must prove three things: the defendant owes the plaintiff a duty of care; the defendant fell below the required standard of care (scope of duty or standard of care); there has been material damage (here economic loss) caused to the plaintiff which is not too remote.[17]

The duty of care (the legal duty to be careful)

Fleming defines the duty of care as '… an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others.'[18] In pure economic loss cases it is this particular requirement that poses difficulties for the plaintiff. This is where the arguments in relation to indeterminacy are played out. The history of the duty concept shows that the courts envisaged that there must be a nearness or closeness between the parties, a relationship that Lord Atkin defined in his 'neighbour' speech in *Donoghue v Stevenson.*[19] Lord Atkin said:[20]

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be person who are so closely and directly affected by my act that I ought reasonably have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Where the 'damage' suffered by the plaintiff is personal injury, or damage to property, the courts generally have no difficulty in finding that a duty of care exists. In these cases the nature of the damage demonstrates that there must have been at least a physical closeness between the parties at some point. However, where the damage is pure economic loss, it may be harder to

[13] Fleming, above n 4, 189-191.
[14] F Trindade and P Cane, *The Law of Torts in Australia* (1999), 357.
[15] *Ultramares Corp v Touche* 174 NE 441 at 444 (NY1931).
[16] Note that negligence actions are now guided by the legislation enacted in the various Australian jurisdictions following the publication in 2002 of the *Review of the Law of Negligence Report* (commonly known as the Ipp Report). In Western Australia this is the *Civil Liability Act 2002* (WA) ('CLA').

[17] See, for example, McGlone and Stickley, above n 1, Ch 8.
[18] Fleming, above n 4, 149.
[19] *Donoghue v Stevenson* [1932] AC 562.
[20] Ibid 580.

demonstrate that a sufficient relationship exists between the parties for a duty of care to be established.

There are different categories of potential plaintiff who may make use of the negligent misrepresentation. Katter suggests these can be identified as the 'intended user or class of user', the 'known but unintended user', the 'unintended and unknown user' and the 'passive sufferer'.[21] The difficulty in showing that a duty of care exists increases with each category. In the first category it is easier to establish the necessary nearness or closeness between the parties, not least because there may be a contract in existence between the two.

The other two categories are more problematic for the plaintiff. In *Hedley Byrne*, Lord Pearce articulated the issue as follows:[22]

> Negligence in words creates problems different from those of negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expended and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage.

Hedley Byrne, the facts of which have been discussed earlier, technically fell into the first category although there was no direct relationship between the plaintiff and defendant. Because there was no direct relationship, and no immediate contact between the parties, the courts until that case had held fast on finding no duty existed because of the floodgates principal. An example is the English Court of Appeal case *Candler v Crane Christmas & Co* where it was held by Cohen LJ and Asquith LJ, in the majority, that there was no duty owed by an accountant to a foreseeable third party for negligent advice.[23] This case would otherwise be unexceptional for the time if it were not for the dissenting judgment of Denning LJ who held that a duty in such circumstances should exist. Denning LJ found that the plaintiff was owed a duty of care because the defendant accountant was aware that the accounts would be given to a particular party, here the plaintiff, and that party would make use of them.[24]

In *Hedley Byrne* the House of Lords found that a duty did exist, but the plaintiff was unsuccessful because of an express disclaimer which stated at the beginning of the credit report 'in confidence and without responsibility'.[25] What is clear in *Hedley Byrne* is that although a duty of care may exist in these circumstances, it is limited, and only arises where the plaintiff can show there is a 'special relationship' between the plaintiff and the defendant.

In *Mutual Life & Citizens Assurance Co Ltd v Evatt* ('*Mutual Life*'),[26] Barwick CJ said of the special relationship:[27]

> 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 business nature.

In *Mutual Life* the plaintiff sought information and advice from the defendant assurance company, with

[21] N Katter, 'The Ambit of Liability of Professionals for Negligent Advice or Information: The Laws in Great Britain and Australia' (Working Paper No. 2003-002, School of Accountancy, Queensland University of Technology, 2003) 2, 3, 5. It is beyond the scope of this paper to discuss all except those categories most relevant to the topic.

[22] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 534 (Lord Pearce).

[23] *Candler v Crane Christmas & Co* [1951] 2 KB 164, 195 (Asquith LJ).

[24] Ibid 182-184 (Denning LJ).

[25] An example of the judiciary opening the door a crack, but leaving it to their more adventurous successors to walk through.

[26] *Mutual Life & Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556.

[27] Ibid 572 (Barwick CJ).

which the plaintiff was a policy holder, about the financial stability of one of the defendant's subsidiaries. The advice given was that the subsidiary was financially secure, so the plaintiff increased his investment in the subsidiary (by way of further unsecured loans). When the subsidiary was liquidated, the plaintiff lost his investment. In the High Court of Australia the plaintiff was successful, but at the time appeals from the High Court to the Privy Council were still possible and the decision was overturned by the Privy Council.[28] The Privy Council, by a majority, preferred a narrow approach holding that a duty of care would exist only where the giver of the advice was skilled in the particular field in which the advice was being sought.[29]

Although the plaintiff ultimately lost the case in the Privy Council, the High Court decision still has influence. This is evidenced by the decision in *Shaddock & Associates Pty Ltd v Parramatta City Council* ('*Shaddock*'),[30] where the High Court reverted to a wider approach as to those relationships where a duty of care would exist. In *Shaddock*, it was information rather than advice that was the issue, but the case again involved an intended user. The High Court found the Parramatta City Council liable to the plaintiff developer for failing to advise of road widening plans in existence at the time of the purchase by the plaintiff of a development property. The facts of the case were that the plaintiff's solicitor had submitted a form to the Council in application for a certificate under s 342AS of the *Local Government Act 1919* (NSW). The form asked whether there were any road widening proposals affecting the property, to which the Council made no response. As it was the usual practice of the Council to make a notation on the certificate if such proposals did apply, the solicitor assumed that the property was clear and the purchase went ahead. The developer sued the Council, losing at first instance and on appeal to New South Wales Court of Appeal Division, but won in the High Court. A total of \$173,938 damages were awarded. This was made up of \$133,000 for the difference in price between the actual value of the property and the price paid by the developer, an amount of \$18,745 for consequential damage, including, for example, such items as Council rates, land tax, insurance, stamp duty, and an interest component of \$22,193.

In *Tepko Pty Ltd v Water Board* ('*Tepko*')[31] the plaintiff was not successful. The plaintiff was engaging in a series of business arrangements for which it obtained a loan from a bank. As one part of these business arrangements the plaintiff proposed to develop a parcel of land into rural residential allotments; this required the rezoning of the land from rural to residential. As security for the loan, the bank had a first registered mortgage over the land. The proposed development was just outside the defendant's supply system which serviced the nearest town (Wallacia in NSW), and it became clear that the rezoning approval by the two local councils was conditional upon an arrangement for the supply of water by the defendant to the subdivision. The defendant indicated this would be complex and expensive, and the continuance of the bank loan then became dependant on some precise costing rather than an estimate. The plaintiff came into possession of correspondence on the matter between the defendant and third parties giving an estimate of the cost of establishing the water supply to the proposed development. When the plaintiffs made the bank aware of this water supply costing, the bank decided the project was not viable, and appointed a receiver. It then

[28] The *Australia Act 1986* (Cth) abolished appeals to the Privy Council.
[29] Between *Mutual Life* and *Shaddock* the High Court decision in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 further developed liability in Australia for pure economic loss. The defendant was found to owe the plaintiff a duty of care in a case of what is termed 'relational loss'. This is where the pure economic loss claimed by the plaintiff arises out of damage to the property of a third party rather than to the property of the plaintiff.
[30] *Shaddock & Associates Pty Ltd v Parramatta City Council* (1980-1981) 150 CLR 225.
[31] *Tepko Pty Ltd v Water Board* [1999] NSWCA 40; *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1.

exercised its power of sale as a mortgagee by selling the land. It eventuated that the cost of supply was in fact considerably less than originally stated, and, as a result, the land had been sold at a discount. The plaintiff sued the defendant for negligence, i.e. the negligent misstatement in the estimate.[32] A 4:3 majority of the High Court held that no duty of care was owed. The justices in the majority acknowledged that it was foreseeable by the defendant that the plaintiff would become aware of the estimated figure. They found, however, that there was no assumption of responsibility on the part of the defendant, nor was the reliance on the estimate by plaintiffs reasonable.[33] In Katter's classification, mentioned earlier, the High Court majority found the plaintiff to be a known but unintended user. In the words of Gleeson CJ, Gummow and Hayne JJ:[34]

> [I]t cannot be concluded, in my view, that the Water Board either knew or should have known that the appellants intended to act upon that cost estimate for any purpose, let alone a serious purpose. And because the Water Board indicated that it was prepared to enter into further discussions with the appellants, it cannot be concluded that it assumed any responsibility in relation to that estimate.

What becomes clear from the cases discussed above is that in order for a duty of care to exist where there is no immediate relationship between the parties (such as exists between a financial advisor and client), there are a number of factors that are relevant.[35] In particular, the court will consider such matters as reasonable reliance by the recipient; the knowledge of this reliance and an associated assumption of responsibility by the giver of the advice or information (or by a reasonable defendant), and any negation of that assumption of responsibility by way of a disclaimer.[36]

So far the cases covered have concerned fact situations where the plaintiff was known to the defendant, even if there was no immediate relationship. Where the plaintiff is an unintended and unknown user the prospects of success are most unlikely. This is clear from two cases, one decided by the House of Lords in the U.K. and the other by the Australian High Court. The former is *Caparo Industries plc v Dickman* ('*Caparo*'),[37] where the plaintiff, Caparo Industries, bought shares in a third party company relying on inaccurate accounts prepared by the defendant. The plaintiff already had shares in the company as part of a takeover bid. The plaintiff lost, on the basis that 'statutory audits … are addressed to shareholders as an entity, not as individuals'.[38] The Australian case is *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* ('*Esanda*').[39] The plaintiff Esanda entered into some financial transactions with a third party company, Excel, which later went into receivership resulting in loss to Esanda. Esanda sued Peat Marwick Hungerfords (PMH) alleging that, when entering into the financial transactions with Excel, Esanda had relied on accounts which had been negligently certified by PMH.[40] Because there was insufficiency of relationship between Esanda and PMH, Esanda lost; in other words Esanda could not show that it had any 'special relationship' with PMH in respect of the financial transactions undertaken with Excel. Brennan CJ stated the requirements for Esanda as follows:[41]

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[32] *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1, 1-2.
[33] Ibid 25-27. Interestingly the joint majority judgment of Gleeson CJ, Gummow & Hayne JJ says: '… it is not to the point that if the pleadings had tendered another issue and the evidence had been somewhat different, some duty with a changed content might have been established': *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1, 5-6.
[34] Ibid 26 (Gleeson CJ, Gummow & Hayne JJ).
[35] For further judicial examination of the relevant factors, see *Bryan v Maloney* (1995) 182 CLR 609; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Woolcock Street Investments Pty Ltd v CDG Property Ltd* (2004) 216 CLR 515. These are pure economic loss cases, but the loss did not result from a negligent misrepresentation.

[36] See, for example the headings in the joint majority judgment in *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1, 25-26 (Gleeson CJ, Gummow & Hayne JJ).
[37] *Caparo Industries plc v Dickman* [1990] 2 AC 605. See also *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28.
[38] Fleming, above n 4, 711.
[39] *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.
[40] Ibid 241.
[41] Ibid 249 (Brennan CJ). The italics are in the text.

> The statement of claim pleaded that AAS5 prescribed the standard of skill, care and competence which an auditor who purports to be performing a professional duty is required to observe. But a plaintiff who complains of an auditor's failure to observe an auditing standard must plead and prove that the auditor owed *to the plaintiff* a duty to observe that standard in performance of the duties of auditor.

Dawson J alluded to the problem of indeterminacy:[42]

> However, mere foreseeability of harm does not, where the only harm is pure economic loss, give rise to a duty of care. The reason for this is that a duty of care imposed by reference to the mere foreseeability of harm in the form of financial loss would extend liability in negligence beyond acceptable bounds. Financial loss occurs as the result of legitimate commercial competition, and commercial activity would be stifled if the law were to impose a duty to take care to avoid that loss. Moreover, if the circumstances in which there was a duty of care to avoid causing purely financial loss were not confined, the extent of the liability imposed would in many cases be virtually without limits, both in terms of persons and amount.

While the defendant in *Esanda* was an auditor, these principles apply equally to any case where the defendant is giving advice.

Standard of care (how careful is careful enough?)

This is the negligence part of a negligence action, and is also referred to as the scope of duty. The required standard of care expected of a defendant is reasonable care. Reasonable care is determined by objective standards: '… in other words, the appropriate standard is not that which the defendant *could* have reached, but rather the standard which the law says *should* have been reached.'[43]

Where there are professional standards regulating a particular profession, whether the regulations are imposed by the profession itself or by statute, the courts regard these as a minimum standard. Amendments to Chapter 7 and Chapter 8 of the *Corporations Act 2001* (Cth) by virtue of the *Financial Services Reform Act 2001* (Cth) brought the operators of a 'financial services business', meaning 'a business of providing financial services', under the purview of the Australian Securities and Investment Commission (ASIC).[44] Under Part 7.6 of Chapter 7 of the *Corporations Act 2001* (Cth), providers of financial services must be licensed. Division 3 of Part 7.6 imposes certain obligations on licensees, which include compliance with standards and requirements made or approved by ASIC.

In a negligence case, failure to conform to professional standards may mean the defendant has not reached the required standard of care. Conformance, however, does not necessarily mean the defendant has been careful enough. The same principles apply to compliance with custom and accepted commercial standards. The High Court has determined quite a long time ago that compliance with accepted standards would not necessarily exonerate the defendant from liability.[45]

Damage

The third element the plaintiff has to prove is that the plaintiff has suffered damage, i.e. the plaintiff has suffered material injury caused by the negligent act of the defendant (causation) and such damage is not too remote (remoteness). The damage, or material injury, claimed in negligent misrepresentation cases is the financial loss resulting from the negligence advice or information.

[42] Ibid 254(Dawson J).
[43] Trindade and Cane, above n 14, 436. See Alderson B in *Blythe v Birmingham Waterworks Co* (1856) 11 Ex 781; *Wyong Shire Council v Shirt* (1980) 146 CLR 40.
[44] *Corporations Act 2001* (Cth), s 761A.
[45] *Mercer v Commissioner for Road Transport* (1937) 56 CLR 580, 589. For a more recent decision, see also *Rogers v Whitaker* (1992) 175 CLR 479 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) 483, 487-488.

Causation

Causation at common law requires the plaintiff to show that the defendant's negligence caused, or materially contributed to, the plaintiff's loss. The defendant's negligence does not have to be the only cause of the loss providing it is a cause of the loss. This may be established by using the 'but for' test: the question asked is, 'Would the plaintiff's loss have occurred "but for" the defendant's negligence?'[46] If the loss would have occurred even if the defendant had not been negligent, the defendant is not liable. The 'but for' test has practical limitations, for example 'the absurd and unjust position that there was no "cause" of an injury in any case where there were present two independent and sufficient causes of the accident in which the injury was sustained'.[47] Another limitation is where there is a superseding event between the defendant's negligent act and the plaintiff's injury. These difficulties have been resolved judicially by a combination of the 'but for' test and the 'common sense' test.[48]

There is now a statutory test for causation by virtue of the *Civil Liability Act* in each State. In the *Civil Liability Act 2002* (WA) (the 'CLA') this is referred to as 'factual causation', and where this cannot be established 'in accordance with established principles' (presumably by reference to the common law jurisprudence), the court is left to decide whether the loss should shift to the defendant or remain with the plaintiff.[49]

Where negligent misrepresentation on the part of an advisor in the financial services industry is concerned, causation may be a factor if it can be shown that the relevant advice or information was not the reason for the financial decision made by the plaintiff. An example would be where there is evidence that the plaintiff would have made the same decision even had they known the representation was false.[50]

Remoteness

Where the defendant's negligence has caused the plaintiff's injury, the plaintiff is only compensated where the damage caused by the defendant was reasonably foreseeable. Consequences are reasonably foreseeable if they are the result of the occurrence of 'a real risk … which would occur to the mind of a reasonable man … and which he would not brush aside as far-fetched'.[51] This appears in the CLA as 'scope of liability' and again allows a normative assessment by the judiciary of whether the loss should be shifted.[52]

Conclusion

An advisor in the finance industry may be liable in the tort of negligence for information or advice given in the course of his or her employment. This liability depends on whether a duty of care is owed by the defendant to the plaintiff who claims to have suffered financial loss because of the advice. The discussion of duty of care shows that where there is a contract between the plaintiff and defendant it is not difficult for the plaintiff to show a duty of care exists. Where the defendant has given the advice to a third party and the plaintiff (who is unknown to the defendant), has acted on the advice to their financial detriment the policy arguments, based on indeterminacy, work in favour of the defendant. In between the two exists a grey area where the courts will investigate certain factors before deciding whether a duty of care exists. These factors may include reasonable reliance by the recipient; the knowledge of this reliance and an associated assumption of responsibility by the giver of the advice or information

[46] *EH March v Stramare* (1990-1991) 171 CLR 506, 533-534 (McHugh J).
[47] Ibid 523 (Deane J).
[48] Ibid 519 (Mason CJ), 524 (Deane J).
[49] Section 5C (1)(a) and 5C(2) of the CLA.
[50] *JEB Fasteners Ltd v Marks, Bloom* [1983] 1 All ER 583.
[51] *Overseas Tankships (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617, 643 (Lord Reid).
[52] Section 5C (1)(b) and 5C(4) of the CLA. The Ipp Report specifically includes 'foreseeability' and 'remoteness of damage' in the list of terms subsumed into this provision: *Review of the Law of Negligence Final Report* (2002) Canberra, para. 7.49.

(or by a reasonable defendant), and any negation of that assumption of responsibility by way of a disclaimer. Liability in negligence also depends on whether the defendant has fallen below the required standard of care, measured against professional standards and regulations as a minimum, and also whether it was actually the negligent advice of the defendant that caused the financial loss to the plaintiff.