to them in deciding the question. And this is so because of the two traditional safeguards, namely, the requirement in *Evans*[73] that the misconduct be "grave and weighty" and that there must be "injury to health" under the principle in *Russell*,[74] to which the courts are bound to give effect.

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LIABILITY IN NEGLIGENCE FOR STATEMENT

HEDLEY BYRNE & CO. LTD. v. *HELLER & PARTNERS LTD.*[1]

> Mr. Foster for the respondents has given your Lordships three reasons why the appellants should not recover. The first is founded upon a general statement of the law which, if true, is of immense effect. Its hypothesis is that there is no general duty not to make careless statements. No one challenges that hypothesis. There is no duty to be careful in speech as there is a duty to be honest in speech. Nor indeed is there any general duty to be careful in action. The duty is limited to those who can establish some relationship of proximity such as was found to exist in *Donoghue* v. *Stevenson*.[2] 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. Mr. Foster submits that this special duty must be brought under one of three categories. It must be contractual; or it must be fiduciary; or it must arise from the relationship of proximity and the financial loss must flow from physical damage done to the person or the property of the plaintiff. The law is now settled, Mr. Foster submits, and these three categories are exhaustive. It was so decided in *Candler* v. *Crane, Christmas & Co.*[3] and that decision, Mr. Foster submits, is right in principle and in accordance with earlier authorities.[4]

This extract from the judgment of Lord Devlin sets out the issues involved in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[5] The facts of the case were:

The appellants were advertising agents, who had placed substantial forward advertising orders for a company on terms by which they, the appellants, were personally liable for the cost of the orders. They asked their bankers to enquire into the company's financial stability, and their bankers made enquiries of the respondents who were the company's bankers. The respondents gave favourable references but stipulated that these were "without responsibility". In reliance on these references the appellants placed orders which resulted in a loss of £17,000. They brought an action against the respondents for damages for negligence.

Both the trial judge, McNair, J., and the House of Lords found for the

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[73] *Op. cit.* n. 59.
[74] *Op. cit.* n. 58.
[1] (1963) 3 W.L.R. 101.
[2] (1932) A.C. 562.
[3] (1951) 2 K.B. 164.
[4] *Op. cit.* n. 1 at 134 *per* Lord Devlin.
[5] (1963) 3 W.L.R. 101; (1963) 2 All E.R. 575; (1964) A.C. 465.

respondents[6] on the ground that there was no duty of care, but they reached this conclusion on different grounds.

McNair, J. said: "I am accordingly driven to the conclusion by authority binding upon me that no such action lies in the absence of contract or fiduciary relationship."[7]

The authorities which McNair, J. had particularly in mind were *Le Lievre* v. *Gould*,[8] and *Candler* v. *Crane, Christmas & Co.*[9] He did say, however, that assuming there was a duty "I have no hesitation in holding that Mr. Heller was guilty of negligence. . . ."[10]

In the House of Lords these two cases were not followed, and in fact *Candler* v. *Crane, Christmas & Co.* was expressly overruled.[11] *Le Lievre* v. *Gould* was felt to have been correctly decided on its facts.[12] Likewise also the House of Lords did not consider the question of negligence. The case was argued and decided on the question of the existence of a duty of care. Ultimately, all their Lordships relied on the disclaimer of responsibility made by the respondents when giving the references to negative the existence of a duty of care in the circumstances of the case.

The unanimity disappeared, however, when the respondents' liability in negligence was considered by their Lordships on the hypothetical assumption that it had not expressly disclaimed liability. Lord Reid said:

> It appears that bankers now commonly give references with regard to their customers as part of their business. I do not know how far their customers generally permit them to disclose their affairs, but, even with permission, it cannot always be easy for a banker to reconcile his duty to his customer with his desire to give a fairly balanced reply to an inquiry. And inquirers can hardly expect a full and objective statement of opinion or accurate factual information such as skilled men would be expected to give in reply to other kinds of inquiry. So it seems to me to be unusually difficult to determine just what duty beyond a duty to be honest a banker would be held to have undertaken if he gave a reply without an adequate disclaimer of responsibility or other warning.[13]

Lord Morris, after referring to the judgment of Pearson, L.J. in the Court of Appeal and to *Robinson* v. *National Bank of Scotland*[14] and *Parsons* v. *Barclay & Co. Ltd.*,[15] said:

> 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[16]

and Lord Hodson, after referring to the same cases, spoke in similar terms.[17]

Lord Devlin did not specifically mention the point, but from the tenor of his judgment[18] it could be inferred that he would have found a duty of care owed by the bank.

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[6] As did the Court of Appeal.
[7] As reported in the House of Lords report (1963) 3 W.L.R. at 105.
[8] (1893) 1 Q.B. 491.
[9] (1951) 2 K.B. 164.
[10] As reported in the House of Lords report (1963) 3 W.L.R. at 104.
[11] Lord Reid at 109; Lord Hodson at 129; Lord Pearce at 154; and impliedly in the other judgments.
[12] Lord Reid at 110; Lord Devlin at 138; Lord Pearce at 151.
[13] *Op. cit.* n. 1 at 111.
[14] (1916) S.C. (H.L.) 154.
[15] (1910) 103 L.T. 196.
[16] *Op. cit.* n. 1 at 125.
[17] *Id.* at 133.
[18] *Id.* at 149.

Lord Pearce refers to *Robinson's Case* where Lord Haldane mentions "a mere enquiry . . . made by one banker of another".[19] This seems to imply diffidence over imposing a duty of care, outside special circumstances on a banker giving a brief credit reference.

Probably, therefore, the result would have been the same if Hellers had not expressly negatived a possible duty of care.

Their Lordships, however, did not confine themselves to the duty of care problem on the facts before them, but ranged broadly over the field of liability in negligence for misstatement. They all took pains to point out the fallacy in the respondents' argument referred to above, namely that liability arises from a special duty which exists only in the case of a contractual or fiduciary relationship or from a relationship of proximity in which the financial loss suffered must flow from physical damage done to the person or property of the plaintiff.

Taking this classification of liability, there could be no question of liability in contract as the respondents at no stage dealt with the appellants. Nor could the appellants bring themselves within a recognised category of fiduciary relationship. Their case could only be rested on a finding that there was a special relationship between themselves and Hellers imposing a duty of care on Hellers. This was not found because of the circumstances of the case but their Lordships all dealt at length with the question of liability in negligence for statement. Strictly speaking, this was *obiter*, but the tenor of the speeches leaves no doubt that the House will in the future follow the propositions laid down, and it is submitted that this is the aspect of the case which will receive the most ardent attention of advocates in the future, and it is proposed to deal with these wider issues in the remainder of this review.

Counsel for the appellant conceded that outside contractual and fiduciary duty there must be a relationship of proximity but he disputed that recovery was limited to financial loss flowing from physical damage. In this their Lordships concurred,[20] but they did point out that there is a distinction between negligent words and negligent acts.[21] Lord Reid listed two distinctions:

1. Negligent opinions given in response to a casual social inquiry as opposed to business or professional advice would not be actionable, but as he says "it is at least unusual casually to put into circulation negligently made articles which are dangerous".
2. . . . a negligently made article will only cause one accident, and so it is not very difficult to find the necessary degree of proximity or neighbourhood between the negligent manufacturer and the person injured. But words can be broadcast with or without the consent or the foresight of the speaker or the writer. It would be one thing to say that the speaker owes a duty to a limited class, but it would be going very far to say that he owes a duty to every ultimate "consumer" who acts on those words to his detriment.[22]

Accepting this distinction, then the question of negligent acts and the effect of *Donoghue* v. *Stevenson* could be placed to one side for the only reliance placed on *Donoghue* v. *Stevenson* was that "it shows how the law can be developed to solve particular problems".[23]

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[19] *Id.* at 155.

[20] Contrast *Revesz* v. *The Commonwealth* (1951) 51 S.R. (N.S.W.) 63 with *Barnes* v. *The Commonwealth* (1937) 37 S.R. (N.S.W.) 511. In *Levi* v. *Colgate Palmolive*, Jordan, C.J. states that "as a general rule the legal duty to take care which exists at common law is restricted to physical injury either to person or to property". (1941) 41 S.R. (N.S.W.) 48 at 50.

[21] But not so Lord Morris. *Op. cit.* n. 1 at 118.

[22] *Id.* at 106.

[23] *Id.* at 143 *per* Lord Devlin.

How does a plaintiff show the requisite proximity to succeed? The House spoke of this as a "special relationship" and to establish this, Lord Reid 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 is 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".[24]

To reach this conclusion Lord Reid relied on Viscount Haldane's judgments in *Nocton* v. *Lord Ashburton*[25] and *Robinson* v. *National Bank of Scotland Ltd.*,[26] and especially on the latter case where Lord Haldane said:

> 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.*[27] 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 court 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 recognising that the duty of care may be established when such cases really occur.[28]

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. All their Lordships come to this conclusion after citing passages from Lord Haldane's judgments in these two cases. No mention is made of some passages in these judgments that seem to conflict with the above view of *Derry* v. *Peek.*[29]

Lord Morris formulated the "special relationship" thus:

> 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 enquiry 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.[30]

Lord Pearce, after discussing the liability of persons in a contractual or fiduciary relationship, went on to say:

> 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.[31]
>
> Was there such a special relationship in the present case . . .? The answer to that question depends on the circumstances of the transaction.

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[24] *Id.* at 109.
[25] (1914) A.C. 932.
[26] (1916) S.C. (H.L.) 154.
[27] (1889) 14 App. Cas. 337.
[28] *Op. cit.* n. 1 at 109.
[29] See, for example, the passages cited in "Negligence and Liability for Statements" reprinted by courtesy of *The Law Journal*, England in (1964) 5 *Australian Lawyer* 59 at 64.
[30] *Op. cit.* n. 1 at 124.
[31] *Id.* at 154.

> 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*[32]). 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.[33]

What else can we say of these special relationships? It seems significant that Lords Hodson and Pearce discuss in their judgments *Shiells* v. *Blackburne*,[34] *Gladwell* v. *Stegall*[35] and *Wilkinson* v. *Coverdale*[36] of which Lord Pearce says:

> In those cases there was no dichotomy between negligence in act and in word, nor between physical and economic loss. The basis underlying them 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.[37]

Lord Morris spoke of persons "possessed of a special skill".[38] Possibly the cases where a person exercising a common calling has been held liable inspired this line of reasoning, but the number of persons who exercise a common calling has been severely limited and this would not seem to offer scope for development.[39]

Lord Devlin was prepared to accept any of the formulations of the special relationship, although he preferred a relationship regarded as "equivalent to contract". In this context he felt that *De La Bere* v. *Pearson Ltd.*[40] was better regarded as a case in tort than in contract. No doubt the search for a consideration severely taxed the judges in many such cases.[41] Most probably the confusion in the past has stemmed from the development of simple contract out of the old tort action on the case.

Most of the judgments refer to the "casual approach" situation in which a duty of care would not arise. But where it is apparent to a reasonable person that the inquirer is reasonably relying on the informant's skill, judgment or careful inquiry, and the informant answers or advises with this knowledge, a duty of care will arise towards the inquirer. There can be no obligation on him to answer and thus "consummate" the relationship, but if he chooses so to do then he will be liable for negligent misstatement.

It seems, therefore, that Lord Pearce's conclusion that a duty will normally only arise when the representation concerns "a business or professional" transaction would be in keeping with the feeling of the House. The person sought to be made liable must be a person possessed of some special skill or ability which he has consented to make available, by means of information or advice, to an enquirer who could, on an objective basis, reasonably be expected to place reliance on it. Further the information or

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[32] (1864) 17 C.B.N.S. 194.

[33] *Op. cit.* n. 1 at 154-5.

[34] (1789) 1 H. Bl. 158.

[35] (1839) 5 Bing. N.C. 733.

[36] (1793) 1 Esp. 75.

[37] At 153-4.

[38] At 124.

[39] See *Groom* v. *Crocker* (1939) 1 K.B. 194.

[40] (1908) 1 K.B. 280. Probably this case is an illustration of judicial attempts to "stretch" the existing law of contract to provide a remedy in a field in which it was thought *Derry* v. *Peek* precluded a remedy based on tort.

[41] See also Lord Reid at 114 where he refers to Lord Haldane's judgment in *Robinson* v. *National Bank of Scotland* and draws attention to the fact that by *Scots* law consideration is not necessary for a simple contract.

advice may be relied on by "another person who, as he knows or should know, will place reliance upon it".[42] This was the situation in which Hellers found themselves for they did not know, when they gave the reference, for whose benefit it was being given, but it was a reasonable inference that they realised it would be passed on to a customer of the inquiring Bank.

What are the implications of this? Their Lordships clearly discard the construction of *Derry* v. *Peek* taken by the Court of Appeal in *Candler's Case*, and generally felt to have been the law at the time. *Derry* v. *Peek* was treated as a case resting solely on fraud, and did not touch on the question of negligent misrepresentation. Lord Devlin emphatically stated "All that is certain is that on this point (that is negligent misrepresentation) the House laid down no law at all".[43]

Candler's Case no doubt stated the law more narrowly than the weight of judicial dicta at that time justified.[44] The law had usually been stated in terms that there was no general duty to be careful in word as distinct from deed, but there were special situations in which a duty would arise including those in which the duty arose out of a contractual or fiduciary relationship. But nevertheless the majority judges in *Candler's Case* were probably justified on the materials then available to them in feeling they were stating the practical effect of the law when they limited recovery to situations in which a duty of care arose out of a contractual or fiduciary relationship; for though the law had been framed in terms of "special relationships" it was difficult to see how any further such relationships could be found without contravening *Derry* v. *Peek*.[45] There the plaintiff invested money in a company on the faith of a prospectus containing a false statement negligently inserted in it by the defendant directors. The statement in the prospectus was intended to be relied on by the category of persons of whom the plaintiff was one and it is difficult to imagine a more "proximate" relationship.

The Court of Appeal found for the plaintiff on the ground that proven negligence here amounted to deceit. The House of Lords held that it did not, without referring at all to a possible cause of action in negligence. When it is considered that there was a finding of negligence by a Judge not a jury it is easy to see why subsequently it was assumed that no cause of action existed in such a situation.

However, in the *Hedley Byrne Case* the Lords regarded *Derry* v. *Peek* as a case pleaded, argued and decided solely on the ground of fraud. In so doing they drew support from Lord Haldane and Lord Shaw in *Nocton* v. *Lord Ashburton*. This completely overturned the construction previously placed on *Derry* v. *Peek* and rendered redundant the Directors' Liability Act and its successors, or at least gives a further remedy to investors in addition to their already extensive range of remedies against directors and promoters under the 1961 Companies Act. This piece of judicial legislation was strongly resisted by Cardozo, C.J. in the United States when in *Ultramares Corporation* v.

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[42] *Per* Lord Morris 124.

[43] At 137.

[44] See the previous line of cases in the Court of Appeal: *Le Lievre* v. *Gould* (1893) 1 Q.B. 491; *Angus* v. *Clifford* (1891) 2 Ch. 449; *Low* v. *Bouverie* (1891) 3 Ch. 82; *Bishop* v. *Balkis Consolidated Co.* (1890) 25 Q.B.D. 512; *Glasier* v. *Rolls* (1889) 42 Ch. D.436.

[45] The following efforts to circumscribe *Derry* v. *Peek* may be noted:
(1) Importing a contract as in *De La Bere* v. *Pearson Ltd.* (1908) 1 K.B. 280. Note also Scrutton, J. in *Everett* v. *Griffiths* (1920) 3 K.B. 163;
(2) extending the concept of fiduciary relationship as in *Woods* v. *Martins Bank Ltd.* (1958) 3 All E.R. 166;
(3) by relying on the ill-defined distinction between statement and other conduct. This seems to be the basis of the Court of Appeal's finding for the plaintiff in *Sharp* v. *Avery* (1938) 4 All E.R. 85.

Touche[46] he expressed the view that such an extension of liability was a matter for statutory enactment.

Whether the decision is felt to be good or bad its weakness is that it does not give a precise test for establishing a duty of care in statement. Yet their Lordships do seem to be aware of this problem for they prefer to regard their decision as laying down a broad framework within which a plaintiff may be able to place himself in a particular fact situation rather than as setting a precise test for all situations. Lord Pearce seemed to be unusually frank when he said:

> How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the court's assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person and property.[47]

The Lords can see no reason for a distinction between physical injury and financial loss both stemming from negligent statement.[48] This causes no problems for in each case the real issue is the requisite degree of proximity between the plaintiff and the defendant. Each factual situation will involve a complex determination by the Court and it is submitted that recognised categories of "proximate" or "special" relationships will gradually develop. Two such categories presently recognised are the contractual and fiduciary relationship, while it appears that a banker does not owe a duty of care when he gives a brief expression of opinion of a customer's credit worthiness, and, of course, *a fortiori* if he disclaims liability when giving the reference. Difficulties will always arise when a plaintiff attempts to establish a new category outside those already recognised.

Without further decisions of high authority in this field of the law it is impossible to say what response the general propositions enunciated by their Lordships will find. The trend clearly favoured by the House is that the development of this area of the law should parallel that of negligence in deed subsequent to *Donoghue* v. *Stevenson*. In both cases an all embracing test is not, and probably could not be, laid down for the existence of a duty of care. Remembering Lord Macmillan's famous statement, "The categories of negligence are never closed",[49] this is a reasonable conclusion.

Future Development

It is clear that the professional person is going to be principally affected by the decision. The field of finance now seems to be open to attack from dissatisfied investors and the courts will be faced with the problem of determining what in fact induced the plaintiff to invest just as the House of Lords had to face this problem in *Derry* v. *Peek*. Accountants and auditors will certainly owe a duty to those persons who may reasonably be expected to view the accounts and statements prepared by them. Some public accountants are not now furnishing an auditor's report for the accounts of Exempt Proprietary Companies whose accounts do not have to be filed at the office of the Registrar of Companies. Likewise surveyors, and even the builder in *Otto* v. *Bolton*,[50] would seem to be liable in an action brought by third parties.[51]

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[46] (1931) 174 N.E. 441. [47] At 152.

[48] Besides the cases cited in this review, the relevance of the type of damage suffered as a result of mis-statement has also been considered in *Australian Steam Shipping Co.* v *Devitt* (1917) 33 T.L.R. 178; *Humphery* v. *Bowers* (1929) 45 T.L.R. 178; *Old Gates Estates* v. *Toplis and Harding and Russell* (1939) 3 All E.R. 209.

[49] (1932) A.C. at 639. [50] *Otto* v. *Bolton & Norris* (1936) 1 All E.R. 960.

[51] As to the liability of builders note the curious result now reached in *Sharp* v.

It will be interesting to see if a duty of care in negligence is owed by barristers to litigants. Solicitors also might find themselves challenged by disappointed "beneficiaries" under a will, but whether such persons can bring themselves within the language of the formulations used by their Lordships remains to be seen.

Whatever the categories of persons who are shown to owe a duty of care, the problem becomes more and more complex the further apart or less proximate the two parties are. Consider the position posed by Denning, L.J. in *Candler* v. *Crane, Christmas & Co.* of a marine hydrographer whose negligence in preparing a chart leads to the loss of a ship.[52] The shipping company's loss is financial but flows from damage to its property and assuming the damage not to be too remote then it would have been recoverable under the old law. But what of the insurance company which pays out for the loss? It now seems to have an action against the hydrographer even though the payment was the result of the risk insured against. So, of course, the hydrographer must either disclaim liability when preparing the chart, an action which would discourage business, or take out a substantial insurance policy himself. The result seems to be more business for insurance companies.

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A RECONCILIATION PROBLEM IN REMOTENESS

HUGHES v. *LORD ADVOCATE*[1] and *DOUGHTY* v. *TURNER MANUFACTURING CO. LTD.*[2]

I *The Background*

The Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd.*[3] laid down that foreseeability is the test for determining the issue of remoteness of damage when it arises in an action for negligence: ". . . it is the foresight of the reasonable man which alone can determine responsibility."[4] It was stressed in the judgment of their lordships that the questions of duty, breach and damage must be dealt with in relation to each head of damage claimed separately: To hold one "liable for consequences however unforeseeable of a careless act, if, but only if, he is at the same time liable for some other damage however trivial, appears to be neither logical nor just".[5] The question of liability for some other damage is, therefore, irrelevant.

The Board did not, however, suggest that the exact consequences which occurred had to be shown to be foreseeable, since they recognized that no one "can be assumed to know all the processes of nature".[6] Nor did the case itself determine exactly how much of what occurs the law requires to be

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E. T. Sweeting & Son Ltd. (1963) 1 W.L.R. 665. A builder is liable for his negligence to a person who comes to live in the house after it is built—provided he is not a spec. builder. There is a duty on a man who is less in a position to do harm because he is likely to be under independent supervision but no duty on the spec. builder who is under no supervision at all because the latter completes and sells the house.

The anomalous position of the spec. builder flows from the existing authority of *Bottomley* v. *Bannister* (1932) 1 K.B. 458 and *Otto* v. *Bolton & Norris, supra*, as well as the House of Lords decision in *Cavalier* v. *Pope* (1906) A.C. 428.

[52] *Op. cit.* n. 3 at 183.

[1] (1963) A.C. 837.

[2] (1964) 1 All E.R. 98.

[3] (1961) A.C. 389.

[4] At 424.

[5] At 425.

[6] At 426.