The Bold Spirits Have Conquered: Hedley, Byrne & Co. v. Heller

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Commentary

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The bold spirits have conquered; the timorous souls are vanquished. The House of Lords has recently re-examined the principle of liability for negligent statements and as a result has extended the scope of such liability. This extension was the result of a long development of the law. Thirty years passed since Donoghue v. Stevenson and forty years since the American courts recognized liability for negligent misstatement. The case of Hedley, Byrne & Co. v. Heller established the principle which had been evolving over the years, but it has not cast aside the fears that had plagued the judiciary for centuries.

Exponents of freedom of speech had successfully maintained that words were not as harmful as physical acts and so liability should not attach to negligent words. About 1800, the courts began to recognize a general duty of honesty in speech. The argument against the extension of the duty to the realm of negligence was based on the supposed protection of freedom of speech, the reason reflecting the laissez faire philosophy which permeated all aspects of society.

It was not until after Donoghue v. Stevenson that the courts began to accept the principle that in certain circumstances words must be treated similarly to acts. Writers and judges argued that liability attached in Donoghue v. Stevenson not so much for allowing the snail to get into the bottle as for permitting the bottle to give an appearance of safety. As a result, the courts started to extend liability to situations where the negligent statements resulted in physical harm to the plaintiff. Gradually as the distinction between negligent words and acts began to blur, the proponents of limited liability for negligent mis-statement shifted the field of battle from the cause of

by any other party thereto or person bound thereby who is injured or suffers damage as a result of the breach.

(3) For the purposes of suing or being sued as permitted under this Act, employers’ organizations and trade unions are legal entities capable of suing or being sued.

The British Columbia Trade-Unions Act, R.S.B.C. 1960, c. 384, s. 4(1) and s. 7(3) are expressed in similar terms. If Ontario were to enact this type of legislation there would be no need for retaining s. 3(2) of the Rights of Labour Act. (The grounds for trade union liability need not be as wide.)
the harm to the nature of the damage suffered: economic loss as distinct from physical harm.

Here also, the courts had rigidly opposed the extension of liability because of the overriding fear that this would impose too heavy and unpredictable a burden on human activity. \(^8\) Claims were refused on the basis that they were too remote. As moral sensitivity increased, individuals demanded greater protection. As a result the courts entertained claims for economic loss under certain conditions. The concept of remoteness was rejected and replaced by the more flexible concept of foreseeability. This permitted the courts to hear actions where the economic loss was coupled with physical damage to person or property. \(^9\) But, where the loss suffered was purely economic recovery still was denied, on the grounds of unforeseeability. The line drawn, as most writers point out, did not have any basis in reason but simply reflected the judiciary's fear of unlimited liability. \(^10\) Rather than state that public policy demanded such limitations they chose instead to base their decisions on the fallacious grounds of the unforeseeability of economic damage. \(^11\) The principle as such, was seldom questioned; it was just accepted as law and became a refuge for mechanical decisions.

Another fetter on judicial action sprang from the contractual doctrine of privity. The principle of Winterbottom v. Wright \(^12\) apparently destroyed by Donoghue v. Stevenson \(^13\) was still being applied in the area of negligent misstatements. Intent on limiting liability the courts grasped at the doctrine of privity to restrict the duty of care in a negligence action. Denning L.J. (as he then was) vainly attempted to point out in Candler v. Crane, Christmas \(^14\) the privity had no place in the law of torts, but his reminder seemed to go largely unheeded.

In the landmark case of Hedley, Byrne & Co. v. Heller, \(^15\) the House of Lords faced the problems raised squarely.

**FACTS**

In Hedley, Byrne & Co. v. Heller \(^16\) the plaintiffs were advertising agents who assumed financial responsibility for the advertisement space they obtained for their clients. The plaintiffs asked their bank

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\(^8\) Seavey: *Reliance Upon Gratuitous Promises or Other Conduct*, (1951), 64 Har.L.Rev. 913, 919.
\(^12\) Supra, footnote 1.
\(^13\) [1842], 152 E.R. 402.
\(^14\) (1851) 1 All E.R. 426, 431.
\(^15\) Supra, footnote 3.
\(^16\) Supra, footnote 3.
to find out if E, one of their clients, had a credit rating sufficient to meet a commitment of over £8,000. The bank made inquiries of the Defendant, E's bank. The reference given was that E company was “believed to be respectably constituted and considered good for its nominal business engagements.” This information was passed on to the plaintiff by his bank. In reliance on the reference the plaintiffs expended a large amount of money which they subsequently lost, when E went bankrupt.

In an action against the Defendant the plaintiff abandoned all allegations of fraud and claimed damages on the basis that the report had been negligently given and as a result of reliance thereon financial loss was incurred.

**PROBLEM BEFORE COURT**

The Court of Appeal had in a number of decisions rigidly upheld the proposition that no duty to take care arises with regard to negligent misstatements resulting in financial loss.17 Starting in 1891, they had inferred from the decision of the House of Lords in *Derry v. Peek*18 that,

> the law of England . . . does not consider what a man writes on paper is like a gun or other dangerous instrument and unless he intended to deceive the law does not in the absence of contract hold him responsible.19

In *Heilbut Symon & Co. v. Buckleton*20 it was said,

> the law must maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation in what way or under what form the attack is made.21

The latest approval of the principle came in 1951, in the case of *Candler v. Crane, Christmas.*22 Thus insofar as the Court of Appeal was concerned the issue was for all intents and purposes settled.

However, the plaintiffs did not lack authority in attempting to convince the House of Lords that such a duty should exist.

In *Cann v. Wilson*23 money had been advanced by a mortgagee on the strength of a valuator’s report. The report was negligently made and as a result of reliance upon it the mortgagee lost money. Chitty, L.J. concluded that there was no contract in existence between

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18 [1889], 14 A.C. 337.
21 Supra, footnote 20, at page 91.
22 Supra, footnote 14.
23 (1889) 39 Ch. D. 39.
the valuator and the mortgagee, but he was prepared to base the valuator's liability upon negligence. He said,

It seems to me that the Defendants knowingly placed themselves in that position and in point of law incurred a duty toward him (mortgagee) to use reasonable care in the preparation of the document called a valuation.24

More recently, and probably the most forceful argument in favour of the plaintiffs, were the remarks of Denning, L.J. (as he then was) in his famous dissent in Candler v. Crane, Christmas.25 There he stated that the decisions in the Court of Appeal on the subject resulted from a misconception of the law as it then stood and as a result cases such as Cann v. Wilson26 were still the law.

An important consideration in the plaintiff's favour was that although a number of cases had been brought before the House of Lords concerning statements either negligently or falsely made, not one of the decisions rendered restricted the Lords in their approach to Hedley, Byrne & Co. v. Heller.27 Whereas the Court of Appeal had taken a rigid view of Derry v. Peek,28 the Lords consciously strove to point out, that in their view the question still remained open. In Nocton v. Lord Ashburton,29 Viscount Haldane stated,

I do not find in Derry v. Peek, an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. What was decided there was that from facts proved in that case no special duty to be careful in statement could be inferred.30

Lord Parmoor seconded this view in his concurring judgment noting that, in his opinion,

The case (Derry v. Peek) ... has no bearing whatever on actions founded on a breach of duty in which dishonesty is not a necessary factor.31

In the subsequent case of Robinson v. National Bank of Scotland32 Viscount Haldane reiterated his statements regarding the importance of Derry v. Peek,33 and negligent statements in general when he said, the whole of the doctrines ... as to duty of care arising from other special relationships which courts may find to exist in particular cases still remain.34

Further there existed obiter to the effect that such a duty was capable of arising, outside contract. In particular, Lord Finlay had stated the general proposition in Banbury v. Bank of Montreal that

if he (the banker) undertakes to advise he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise but if he undertakes to do so he will incur liability if he does so negligently.35

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24 Ibid., at p. 42.
25 Supra, footnote 14 at p. 498.
26 (1888), 39 Ch. D. 39.
27 Supra, footnote 3.
28 (1889) 14 A.C. 337.
30 Ibid., at p. 955.
31 Ibid., at p. 978.
33 Supra, footnote 28.
DECISION

At the trial McNair J. held that in law no greater duty was upon the Defendants than the general duty of honesty, which was in fact satisfied and therefore the case was dismissed.36

In the Court of Appeal after a general review of the authorities binding upon the Court, Pearson, L.J. concluded that in point of fact Hedley, Byrne & Co. v. Heller, was indistinguishable from the prior binding authorities of Le Lievre v. Gould37 and Candler v. Crane, Christmas38 and therefore the appeal must be dismissed.39 He concluded that the only circumstances which would permit a court to establish a duty of care in cases of negligent misrepresentation resulting in financial loss were circumstances either of a contractual or fiduciary nature.40 In the words of Harman, L.J.,

once the plaintiffs decided to abandon their charge of fraud they had no hope of success.41

Although the House of Lords affirmed the Court of Appeal decision, it did so on the basis of the particular facts. However, its reasons revealed an extension of the general principles involved in negligent misstatement. In effect they disagreed with the reasoning and logic of the Court of Appeal.

In assessing the problem the Lords started from the premise that an innocent but negligent misrepresentation in itself gives no cause of action.42 To establish a cause of action the injured party must prove that the Defendant owed him a duty of care. Up to this point in their argument the Lords were in complete agreement with the Court of Appeal. However, the next step taken by the Law Lords was a step which the Court of Appeal refused to take and necessarily involved overruling a number of appellate decisions.43 The five Lords unanimously stated that a duty of care could arise outside a contractual or fiduciary relationship if the parties were in sufficient proximity. In the words of Lord Hodson,

... apart from fiduciary relationships ... there are other circumstances in which the law imposes a duty to be careful, which is not limited to a duty to be careful to avoid personal injury or injury to property but covers a duty to avoid inflicting pecuniary loss.44

HOW THE DUTY EVOLVED

Once it was decided that such a duty existed the task then was to trace its legal evolution.

36 Supra, footnote 3, p. 580.
37 [1893] 1 Q.B. 491.
38 Supra, footnote 14.
40 Ibid., 895.
41 Ibid., 901.
42 Supra, footnote 3, p. 581.
43 Ibid., at p. 612 where Lord Devlin says:
"In my opinion Le Livre v. Gould and all the decisions based upon its reasoning can no longer be regarded as authoritative."
44 Ibid., at p. 598.
Many American jurisdictions had extended the action of deceit to the situation where the defendant honestly but negligently believes that he has told the exact truth on the rationale that the duty to learn of the facts is the equivalent of knowledge of their existence, or on the basis that the fault is just as great and the reliance of the plaintiff equally justified in the one as in the other. However, the judiciary in England had rigidly opposed such an extension of the doctrine. In order to ground an action of deceit there must be scienter on the part of the defendant. Honest belief in the truth of the statement is a complete defence under all circumstances.

Could the duty then be based upon the principle of Donoghue v. Stevenson? If so, this would equate negligent acts and words. Or was it to be a new mutation of the duty approach based upon words alone, thus maintaining the distinction between negligent words and acts? In other words, were the principles of foreseeability and risk to be applicable equally to words as to deeds or was a new and different duty to be created dealing with words alone? It is suggested that the latter was the route taken by Hedley Byrne v. Heller.

At this point a number of important distinctions must be appreciated. The case in question concerns the liability for negligent misstatements causing financial damage. It is not concerned with negligent misstatements causing physical damage to person or property, although several of the Lords made statements concerning the latter. Lord Hodson said,

I cannot see that there is any valid distinction in this field between a negligent statement, i.e., an incorrect label on a bottle which leads to injury, and a negligent compounding of ingredients which leads to the same result.

Further Lord Morris said,

In logic I can see no essential reason for distinguishing injury which is caused by reliance on words from injury which is caused by the reliance on the safety of a ship.

These opinions seem to substantiate the view that where the negligent misrepresentation results in physical injury the same principles apply as would be applicable to any other mode of unreasonable conduct.

On the other hand several of the Lords (Lord Hodson, Lord Devlin, Lord Pearce) made statements to the effect that there should be no distinction between financial damage and physical damage. Lord Hodson states that,

it is difficult to see why liability as such should depend upon the nature of the damage.
Lord Devlin is even more emphatic in his condemnation of the distinction:

the interposition of the physical injury is said to make a difference in principle, I can find neither logic or common sense in this . . . I am bound to say my Lords that I think this is nonsense.52

If all of these statements were literally accepted, the logical conclusion would seem to be that the principles applicable to cases such as Donoghue v. Stevenson53 would be equally applicable to cases such as Hedley, Byrne & Co. v. Heller.54 But the judgments show this is not the case.

Not one of the Lords concluded that negligent misstatements should be treated in the same manner as negligent acts where the damage complained of is similar to that in Hedley, Byrne & Co. v. Heller.

In fact Lord Reid and Lord Pearce were quite vigorous in their determination to ensure that the distinction between the two should continue. To Lord Pearce the reason for distinguishing was clear,—negligence in words creates different problems from negligence in acts.55 The other three members of the court were equally emphatic in their insistence that Donoghue v. Stevenson was inapplicable to the case under discussion.56

It appears that the Lords, although anxious to rid themselves of the idea that relief should not be dependent upon the nature of the damage suffered, and confronted with the proposition that there is in fact no distinction between an act and word causing physical harm, refused to apply the principles of one to the facts of the other. Public policy demanded liability for negligent statement but judicial discretion demanded greater limitations than were inherent in the "neighbour doctrine" of Lord Atkin.57

This dilemma can be and is in fact resolved in Hedley, Byrne & Co. v. Heller is regarded as establishing a new field of liability under the law of negligence—an area confined to negligent words and extending to financial loss as distinct from physical injury.

If this is the result, then the application of Donoghue v. Stevenson58 illustrates how the law can be developed to solve particular problems. In the words of Lord Devlin,

the general conception (principle of proximity) can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides. The field is very different but the object of the search is still the same.59

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52 Ibid., at p. 603.
53 Supra, footnote 1.
54 Supra, footnote 3.
55 Ibid., at p. 613.
56 Ibid., at p. 573, 608, and 615.
57 Supra, footnote 1.
58 Ibid.
59 Supra, footnote 3 at p. 607.
Lord Pearce expressed similar views when he said, "Donoghue v. Stevenson ... affords some analogy from the broad outlook which it imposed on the law relating to physical negligence."  

Similarly Denning L.J. (as he then was) in Candler v. Crane, Christmas used the neighbour or proximity principle for the purpose of showing that a new duty should and could be created. He does not use it to measure the scope and extent of the duty itself, when he introduces the concept of knowledge rather than foreseeability.

Having thus created the duty, the Lords then set out to establish its boundaries.

**BY WHOM IS THE DUTY OWED**

It would seem from the authorities, that the duty would cover skilled persons whose opinions are normally relied on by people in making financial decisions. Denning L.J. (as he then was), suggested in the Candler case that the persons concerned are,

such persons ... whose profession or occupation it is to examine books ... and make reports on which other people, other than their clients rely on in the ordinary course of business.

This view appears to have gained acceptance in Hedley, Byrne & Co. v. Heller. In the words of Lord Pearce,

if persons holding themselves out in a calling or profession take on a task within that profession they have a duty of skill and care. In terms of proximity one might say they are in particular close proximity to those who they know are relying on their skill and care although the proximity is not contractual.

The analogy with the duty of those in public callings is striking but the law on that subject is burdened with too much subtle learning to provide more than a rough guide for a duty situation in negligence. However, by using the analogy of public calling as a guide the exact parties or classes under such a duty can be identified in a general way. The accountant in Candler v. Crane, Christmas, the valuator in Cann v. Wilson, and the surveyor in LeLievre v. Gould would most certainly fall within such a class. In the United States liability has been imposed upon public weighers, doctors, abstractors, and lawyers.

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60 Ibid., at p. 615.
62 Supra, footnote 14 at p. 433.
63 Supra, footnote 3 at p. 616.
64 Wilson, Chattels and Certificates in Law of Negligence (1952) 15 Mod. L. Rev. 160, 166.
65 Supra, footnote 14.
66 (1888) 39 Ch. D. 39.
67 [1893] 1 Q.B. 491.
68 Glanzer v. Shephard (1922) 233 N.Y. 236.
69 Edwards v. Lamb (1899) 69 N. H. 599.
70 Dickle v. Abstracted Company (1890), 89 Tenn., 431.
71 Biakanja v. Irving (1962), 49 Cal. 2d., 647.
The exact depiction, however, of the classes to which the duty will extend is unnecessary for the reason that one of the main defences to an action of this type will be the contributory negligence of the plaintiff. The defendant would in all probability argue that since he was not a member of a professional class his opinion should not have been relied on by a reasonable man and the plaintiff was "volenti". In the American case of Varton Garopedian Inc. v. Anderson\(^7\) it was said,

> But even if such a duty were held to exist the Defendant would be entitled to a directed verdict since the plaintiff had failed to sustain the proof on the issue of contributory negligence . . . the plaintiff placed reliance on the reports merely because he understood the Defendant was a 'prominent citizen' and 'dressed nice'\(^7\)

But just sticking the defendant in the proper pigeon hole will not in itself attract liability.

**CIRCUMSTANCES WHEN “CLASS” LIABLE**

Is the banker to be liable for "kerbstone" comment given at a social gathering or is liability only to extend to a careful and well prepared report? On the authorities it appears that the duty to take care would not arise out of casual and unguarded comment.

In the case of *Fish v. Kelly*\(^7\) the plaintiff casually asked the Defendant, a solicitor, about his rights under a deed which the Defendant had earlier drawn up for the plaintiff’s employer. Relying on an erroneous recollection the Defendant gave an answer. In a subsequent negligence action, the Defendant was held not liable on the basis that,

> If this sort of action could be maintained it would be extremely hazardous for an attorney to venture to give an opinion upon any point of law in the course of a journey by Railway . . . I am unable to perceive any duty arising out of the casual conversation here.\(^7\)

Denning L.J. (as he then was) expressed similar feelings, in *Candler v. Crane, Christmas*\(^7\) when he said,

> a scientist or expert is not liable to his readers for careless statements in his published works for he publishes simply for the purpose of giving information and not with any transaction in mind at all.\(^7\)

As a consequence it would appear the statements relied on must arise from the conscious utilization of the skill which the professional man possesses. Further

> the representation must normally concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer.\(^7\)

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\(^7\) (1943) 31 A 2d 371.

\(^7\) Ibid., at p. 374.

\(^7\) (1864) 144 E.R. 78.

\(^7\) Ibid., at p. 83.

\(^7\) Supra, footnote 14.

\(^7\) Ibid., at p. 434.

\(^7\) Supra, footnote 3 at p. 617.
In \textit{Hedley Byrne \& Co. v. Heller},\textsuperscript{79} there was considerable doubt as to whether a banker's reference of the type submitted by the defendant would satisfy the above requirements. Three of the Lords (Lord Reid, Lord Morris, Lord Hodson) infer that the amount of time and effort which the bank would be expected to spend in compiling such a reference would place no higher duty on the bank than one of honesty. Of the three, Lord Reid and Lord Morris refuse to express a concrete opinion stating only that if the question arose in a future case it would be difficult to place a duty of care on the banks for such a reply.\textsuperscript{80}

Lord Hodson states that to place a higher duty upon banks than the general duty of honesty would under the circumstances be unwarranted.\textsuperscript{81} The replies made to such inquiries are impromptu answers, and not the result of searching records and studying documents, and the inquirer would be unreasonable in expecting anything more.

The two other Lords, Lord Devlin and Lord Pearce do not specifically address their minds to the question, but Lord Pearce seems to assume that the making of an inquiry of the type in this case is insufficient to raise a duty of care.

In the case of \textit{Robinson v. National Bank of Scotland},\textsuperscript{82} a reference similar to the Hedley case was given by the bank. In a subsequent action for negligence Viscount Haldane said,

\begin{quote}
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 honesty.\textsuperscript{83}
\end{quote}

What should the court look to in determining whether, under the circumstances prevailing, a duty of care exists on the professional man? Should it place primary emphasis upon the intended reliance of the beneficiary or should the professional's knowledge that his skill is being relied on be the governing factor? On the basis of the above statements it would appear that the latter principle is to be preferred.

In both \textit{Hedley Byrne \& Co. v. Heller}\textsuperscript{84} and \textit{Robinson v. National Bank}\textsuperscript{85} the ultimate beneficiary intended to rely on the report to a great extent but since this intended reliance was not transmitted to the defendant no duty other than that of honesty would arise.

If at the time the defendant undertakes to do the work, he is made aware of the intended reliance to be placed upon his skill, and he undertakes to provide it without limiting his liability then clearly a duty of care would arise. Furthermore, knowing that his skill was

\footnotesize{\textsuperscript{79} Ibid. \textsuperscript{80} Ibid., at p. 584 (Lord Reid), and p. 594 (Lord Morris). \textsuperscript{81} Ibid., at p. 600. \textsuperscript{82} (1916) Scots L.T.R. 336. \textsuperscript{83} Ibid., at p. 337. \textsuperscript{84} Supra, footnote 3. \textsuperscript{85} Supra, footnote 82.}
being relied upon the defendant would in all probability charge for
his service and the report that he submits will be the
result of expending time and trouble in searching records, studying docu-
ments, weighing and comparing the favourable and unfavourable.\textsuperscript{86}
Thus when determining whether the circumstances of the particular
case give rise to a duty of care it would prove beneficial to look to
the nature of the report actually made, and the consideration received
on the basis that when a lengthy report is made and a high fee charged
it is usually done by the maker in the knowledge that it will be relied
on. In \textit{Candler v. Crane, Christmas}\textsuperscript{87} a fee was paid by the company
concerned to the accountants, whereas in \textit{Hedley Byrne & Co. v. Hell-
er}\textsuperscript{88} the work was to all intents and purposes gratuitously undertaken
by the one bank for the benefit of the other. In the words of Lord
Devlin,

where there is no consideration it will be necessary to exercise greater
care in distinguishing between social and professional relationships.\textsuperscript{89}

\textbf{EXTENT OF DUTY}

From the decided cases it appears that the plaintiff must estab-
lish both that the Defendant knew that his skill was being relied on,
and also that he knew the specific transaction for which his skill was
going to be used. Denning, L.J. (as he then was) in \textit{Candler v. Crane, Christmas}\textsuperscript{90} said,

... it (the duty) only extends to those transactions which the Defendant
knew their accounts were required ... the duty extends only to the very
transaction in mind at the time.\textsuperscript{91}

Logically, it is hard to understand why such a restriction should be
imposed upon the duty. If the defendant is aware of the reliance placed
upon the report by the plaintiff, then why should he be allowed to
avoid liability because the plaintiff used the report for a transaction
slightly different than that which he contemplated?

The American \textit{Restatement}, S552, in describing the duty is not
as restrictive as Denning L.J. It states that liability would extend,

... to transactions in which it was intended to influence his (the plain-
tiff's) conduct or in a transaction substantially identical therewith.\textsuperscript{92}

The extension under the \textit{Restatement} is more reasonable since it gives
the plaintiff certain freedom in his conduct arising from the report
but does not allow him to depart completely from the purpose for
which the report was made.

It is difficult to understand why Denning L.J. departed from the
Restatement at this juncture, for up to this point in his judgment he

\textsuperscript{86} \textit{Supra}, footnote 3 at p. 617.
\textsuperscript{87} \textit{Supra}, footnote 14.
\textsuperscript{88} \textit{Supra}, footnote 3.
\textsuperscript{89} \textit{Ibid.}, at p. 617.
\textsuperscript{90} \textit{Supra}, footnote 14.
\textsuperscript{91} \textit{Ibid.}, at p. 435.
\textsuperscript{92} \textit{Restatement} of Torts, Ch. 22, S. 552, 112.
appears to rely heavily upon the principles enunciated therein. This probably results from a conscious attempt to recognize a duty in situations such as the one before him, yet at the same time to keep the incidence of liability within strict controls lest it create an impossible burden out of all proportion to the fault involved.

**TO WHOM DOES THE DUTY EXTEND**

The possible liability which might result from the communication of a statement to remote plaintiffs is so great and may be so far out of proportion to the fault involved that there is a general agreement that a more restricted rule is necessary in the case of economic loss than where there is tangible harm to property. As noted this more restricted rule requires actual knowledge on the part of the Defendant rather than the principle of foreseeability of risk as is applicable to negligent acts. The Defendant must not only know that his skill is being relied upon, know the transaction in which such skill is going to be used, but it also seems that he must know the person who is going to rely upon his skill. In the words of Denning, L.J., the duty is owed "to their employer or client, and to any third person to whom they themselves show the account or to whom they know their employer is going to show the account." It is worth observing that the words "ought to know" are expressly omitted from the above.

In *Hedley, Byrne & Co. v. Heller*, the Defendants were not aware either of the purpose of the inquiry nor of the identity of the party intending to rely on it. But in the words of Lord Reid:

> ... they know that the advertisement was in connection with an advertising contract and it was at least probable that the information was wanted by the advertising contractors. It seems to me quite immaterial that they did not know who these contractors were.

Lord Morris seems to deny that knowledge is a requirement:

> ... the fact that the person to whom the answers would in all probability be passed on was unnamed and unknown to the bank is not important.

This statement must be read in light of the fact that the bank knew the inquiries were made in regard to advertising contracts.

So too in *Robinson v. National Bank of Scotland*, a case which Lord Reid considered nearly indistinguishable from *Hedley Byrne & Co. v. Heller*, Lord Dundas stated in regard to the question of Knowledge:

> the question then becomes whether or not the pursuer can fairly be regarded as belonging to the 'class' within the scope and contemplation of the letter.

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94 Supra, footnote 14 at p. 434.
95 Supra, footnote 3.
96 Ibid., at p. 580.
97 Ibid., at p. 583.
99 Ibid., at p. 67.
And later in the report:

If it is to be assumed that the letter was in fact obtained through the S
bank on behalf of the pursuer though his identity and, very existence
were unknown to the Defendant I should answer the question in the
affirmative.\textsuperscript{100}

On the actual facts of the case the pursuer did not become a party
to the transaction until after the time the letter had been sent and
as a result was not a member of the protected class.

However, even if the above statements are strictly read they
are not as stringent in their requirements as that of Denning L.J. in
Candler. If the Defendant had knowledge of a restricted class of per-
sons who might rely upon the report, this would seem sufficient to
satisfy Lord Reid, Lord Morris and Lord Dundas. If this be the case
then in this aspect of the duty the position of the British and Ameri-
can courts would coincide. In the American Restatement, the harm
must be suffered "by the person or one of the class of persons for
whose guidance the report was supplied."\textsuperscript{101}

However, it is submitted "class of persons" must be a very re-
stricted class and not all inclusive such as investors. Cardozo, J. in
Glanzer v. Shephard said:

The Defendant weighed and certified at the order of one with the very
end and aim of shaping the conduct of another. Diligence was owing not
only to him who ordered but also to him who relied.\textsuperscript{102}

In another of Cardozo J.'s judgments, Ultramares Corporation v.
Touche,\textsuperscript{103} the Defendants who were a firm of public accountants
certified a balance sheet for use by a company to obtain credit. The
balance sheet was negligently prepared and as a result the plaintiffs
lost money by relying upon it. The Defendant did not know the
persons to whom it would be shown or the extent or number of
transactions in which it would be used, nor did they know of the
existence of the plaintiff. The action was dismissed on the basis that
to hold the Defendants liable, "...may expose accountants to a
liability in an indeterminate amount for an indefinite time to an
indeterminate class."\textsuperscript{104} Glanzer v. Shephard\textsuperscript{105} was distinguished
upon the ground that the transmission of the weigher's certificate
to the plaintiff was not merely one possibility among many.

Hence it would appear that in order for a duty to arise either
one of two situations must exist: the Defendant must (1) know the
person who is going to rely on his statement or (2) know that the
report was being prepared for a specific purpose and was intended
to be relied on by a certain class of persons.

The similarity to the action of deceit in this respect is striking.
In an action for deceit the plaintiff must establish that the defendant
intended him to rely upon the statement and that in fact he did. As

\textsuperscript{100} Ibid., at p. 67.
\textsuperscript{101} Restatement of Torts, Ch. 22, s. 552, 122.
\textsuperscript{102} (1922) 233 N.Y. 236, 240.
\textsuperscript{103} (1931) 255 N.Y. 170.
\textsuperscript{104} Ibid., at p. 174.
\textsuperscript{105 Supra, footnote 102.
in the case of negligent misrepresentation, the principle of foreseeability has been held to have no application. One of the great difficulties in an action of this type is to distinguish merely foreseeable consequences from actual intended reliance. The simple fact that the defendant as a reasonable man should have realized the likelihood that the plaintiff might rely on it to his detriment is not sufficient; reliance must have been intended. In addition, in the action of deceit the intended reliance of the defendant is applicable to a restricted class as well as to the individual. In the leading case of *Peek v. Gurney* it was held that a company prospectus is ordinarily addressed only to the members of the public who are invited to take up shares from the company itself and does not avail an investor who purchased his shares in the market from another shareholder.\(^\text{106}\)

**FURTHER LIMITATIONS UPON THE DUTY**

If one of the important elements in ascertaining whether the parties are in a special relationship which gives rise to a duty of care is knowledge by the defendant that reliance will be placed upon his skills, then liability could be avoided if the defendant states he will not be responsible for any reliance put on his statement.

Lord Devlin puts it thus:

> A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not.\(^\text{107}\)

In *Hedley Byrne & Co. v. Heller*\(^\text{108}\) an exculpatory clause was included in the reply given, to the effect that the report was made in strictest confidence and without responsibility. It would be improper to equate this clause to a contractual exculpatory clause. The latter operates when a duty is found to exist and has the effect of discharging the duty. In *Hedley Byrne & Co. v. Heller*\(^\text{109}\) the crucial question was whether a duty ever existed. The clause was relied on to show that when the information was given by the defendants they expressly rejected liability resulting from reliance. The Lords unanimously agreed that the rejection of liability effectively enabled the bank to prevent any duty arising. Such clauses are standard in forms used by Canadian banks.\(^\text{110}\)

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\(^{107}\) Supra, footnote 3 at p. 613.

\(^{108}\) Ibid.

\(^{109}\) Ibid.

\(^{110}\) Canadian Imperial Bank of Commerce

"The following information is given in confidence and for your exclusive use upon the express understanding and agreement that neither the writer nor this bank shall incur any liability for or by reason of giving the same, or any error therein or omission therefrom; also upon the express condition that if you communicate the same or any part thereof you will indemnify the writer and this Bank from any consequent liability."

*Royal Bank of Canada*

"This information in this letter is furnished at your request for your personal use only and in strictest confidence. It is not to be taken as a representation or guarantee of any kind whatsoever and neither the Bank nor the writer incurs any liability in furnishing it."

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Another possible limitation upon the action is the obvious difficulties the Courts will have in recognizing the existence of negligence.

In *Hedley Byrne & Co. v. Heller* the trial judge found that if a duty of care existed the defendants were negligent. This finding was disputed in the House of Lords but was not dealt with directly as the decision was based on other grounds. However, one of the Lords, Lord Reid commented upon the finding of the trial judge when he said:

> what the appellants complain of is not negligence in the ordinary sense of carelessness but rather misjudgment in that H. while honestly seeking to give a fair assessment in fact made a statement which gave a false and misleading impression.\(^\text{111}\)

In the case of a professional man negligence could arise in three ways. Either he is negligent in ascertaining the facts, in transmitting the facts to his principal, or in drawing inferences from the facts themselves. The bank would not be negligent simply because it was wrong or because its employees failed to exercise some extraordinary care and skill. The obligation of the bank in all three respects would be to use the ordinary care and skill which the normal bank uses in answering such inquiries.

The plaintiff's onus would be to establish the standard of banks in regard to the transaction in question. Once having obtained evidence of the custom of the trade then resort could be had to the particular event in dispute. Was the report compiled by the Defendant obtained in accordance with the general standard of the whole profession? If so, then the question would become, were the facts negligently transmitted to the plaintiff or was the inference drawn from the compiled facts negligently made?

In regard to the latter the fact that it is merely an error in judgment will not per se exonerate the defendant. The question will be, has he exercised the quality of judgment to be reasonably expected of a reasonable man in his profession?

**SETTING IN CANADA**

On August 2, 1963, less than two months after the decision had been reported in *Hedley Byrne & Co. v. Heller* was applied in a Canadian court. Ilsley, J. of the Supreme Court of Nova Scotia adopted "the principles" of law as therein set out. However, in his great enthusiasm to adopt the principles he did not in fact establish what they were and what application they had to the case before him.\(^\text{112}\)

Prior to this, the number of Canadian cases in which the problem arose was negligible and to a great extent any opinions expressed were in strict compliance with the approach in England. In the case of *Olmstead v. Pearce & Co.*\(^\text{113}\) the plaintiff, who was not a client of the

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\(^{111}\) Supra, footnote 3 at p. 584.

\(^{112}\) Reid v. Traders General Insurance Co., Dares Motors Ltd. and Myers (1964) 41 D.L.R. 2d 143.

\(^{113}\) [1937] 1 D.L.R. 625.
defendant, asked the defendant stock brokers to obtain a stock quotation for him. The defendant obtained the requisite information and transmitted it to the plaintiff, who attempted to pay the defendant for the services, but payment was refused. As it later turned out, the information was incorrect.

In a subsequent action for negligence, Hogg C.J. said,

the Defendants rested their defence on the well known principle of law established by Derry v. Peek that a person is not liable for a false representation upon the faith of which another person acts even though such representation is carelessly made provided it was made honestly.\[114\]

Later in the report he says:

the principles upon which in my opinion this case must be decided is that laid down in Derry v. Peek.\[115\]

and accordingly he dismissed the action.

However, after the Court of Appeal decided the case of Candler v. Crane, Christmas\[116\] a reaction to the decision arose in Canada. Numerous articles appeared criticizing the position taken by the court and this criticism was to a small extent exhibited in the few decisions on the topic since 1951.\[117\]

Probably the best known decision on negligent misstatement in Canada is that of Guay v. Sun Publishers\[118\] decided by the Supreme Court of Canada in 1952. Although the action was concerned with physical damage resulting from the negligent statement there is obiter expressed by the justices on the question under discussion. Chief Justice Kerwin said:

While there are traces in some quarters of a distinction being drawn between damages for injuries to a person in body or mind or damages to a person's property on the one hand and economic loss on the other, there would appear to be difficulty in ascertaining a sound basis for such a distinction.\[119\]

Of the other four Justices, three refused to comment upon the Candler decision and only Locke J. categorically repudiated the existence of any duty of care in words leading to economic loss.

In the recent case of Boyd v. Ackley\[120\] the plaintiffs sold a company which had previously retained the defendant as its chartered accountant and asked him to prepare a statement of the debts of the company which the plaintiffs had agreed to assume as a condition of the sale. Because of the defendant's negligence an erroneous statement was prepared and the plaintiffs overpaid $1,400.00. In the

\[114\] Ibid., at p. 633.
\[115\] Ibid., at p. 637.
\[116\] Supra, footnote 14.
\[120\] (1962) 32 D.L.R. (2d) 77.
subsequent action, the court concluded that there was in fact a contract in existence between the parties. However, in a dictum it was said,

if it had been necessary to decide whether the defendant owed the plaintiff a duty of care apart from contract, I think that I would have been inclined to hold that under the circumstances there was such a duty. The Candler case is distinguishable. The plaintiff at the time the information was given had no connection with the Company.121

The importance of the above lies in the fact that the court recognized that a duty could exist outside contract. Probably unintentionally, the court had, by stating this proposition, ruled impliedly that Le Lievre v. Gould122 and the other Court of Appeal decisions based upon it were wrong, and therefore rather than distinguish Candler v. Crane, Christmas123 the court should have stated that it was not valid law and would not be followed in Canada.

As Boyd v. Ackley124 was the last reported case to arise before Hedley Byrne & Co. v. Heller125 there was no judicial reactions recorded to the approach of the British Columbia Court, and to the question whether the proposition stated, similar, in many respects to that in Hedley Byrne would have been followed, or rejected.

CONCLUSION

Hedley Byrne & Co. v. Heller126 has finally established that liability may exist for negligent misstatement resulting in economic loss outside of a contractual or fiduciary relationship. However, in establishing the duty the court has been careful to confine it within rigid boundaries. The plaintiff must in any action establish:

(a) the defendant was a professional or skilled man acting in his professional capacity.

(b) the defendant knew that the work he was to do was going to be relied upon by the plaintiff, or knew that the party with whom he contracted was going to pass it on to a customer or other person who was going to rely upon it.

(c) the defendant undertook to do the work without any qualification.

(d) the defendant knew the exact transaction or a transaction nearly identical therewith in which the work was to be used.

(e) the report was in fact relied upon by the plaintiff and he suffered economic loss thereby.

(f) the Defendant was negligent in the preparation of the report.

These limitations are understandable. As befits the law which is no idle exercise, creative imagination must submit to the cautious discipline of experience.

121 Ibid., at p. 80.
122 [1885] 1 Q.B. 491.
123 [1951] 1 All E.R. 426.
125 Supra, footnote 14.
126 Ibid.