

THE AMBIT OF LIABILITY OF PROFESSIONALS FOR NEGLIGENT ADVICE OR INFORMATION: THE LAW IN GREAT BRITAIN AND AUSTRALIA

Norman A Katter, (email: n.katter@qut.edu.au), School of Accountancy, Queensland University of Technology

Abstract

The historical development of the tort of negligent misstatement through the foundation cases of Candler v Crane Christmas and Co¹ and Hedley Byrne Co Ltd v Heller Partners Ltd² and the later articulation and development of those principles in the House of Lords³ and High Court of Australia⁴ indicates a significant parallel in the approach and ambit of duty of care in Great Britain and Australia. It is now possible to crystallise and define from the case law in both countries, four distinct categories of potential claimants for negligent advice or information and the potential liability of the professional provider in each category

Consequently this article seeks to provide a matrix or framework for gauging the duty of care in any circumstance of negligent advice or information.

Introduction

From its origins, the tort of negligent misstatement has raised floodgate concerns, firstly, with the volatility of words in contrast to acts and secondly, in its propensity to generate purely economic loss.⁵ Lord Pearce, in *Hedley Byrne Co. v Heller Partners Ltd⁶* advised caution with respect to liability for words, referring to the greater potential of negligent words to cause harm:-

"The reason for some divergence between the law of negligence in words and that of negligence in act is clear. Negligence in words creates problems different from those in negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expensed and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage. How far they are relied on unchecked ... must in many cases be a matter of doubt and difficulty. If the mere hearing or reading of words were held to create proximity, there might be no limit to the persons to whom the speaker or writer could be liable."⁷

The controls utilised in personal injury cases may not be appropriate when it comes to cases involving purely economic loss.⁸ This is particularly so when reasonable foreseeability is applied as the controlling test of a duty of care in negligent misstatement cases. Lord Oliver in *Caparo Industries Plc v Dickman⁹* commented on the limitless vista of risk for professionals where reasonable foreseeability was the only control:-

"It is always foreseeable that a report – even a confidential report – may come to be communicated to persons other than the original or intended recipient. To apply as a test of liability only the foreseeability of possible damage without some further control would be to create a liability wholly indefinite in area, duration and amount and would open up a limitless vista of uninsurable risk for the professional man."¹⁰

Consequently, the courts have invoked mechanisms additional to reasonable foreseeability in the determination of duty of care in cases of negligent advice or information.¹¹

The additional control mechanism has been expressed in terms of a special or proximate relationship between the defendant provider of advice or information and the plaintiff user.¹² This special relationship requirement provides the content for satisfying the control mechanism of proximity in the tort of negligent misstatement.¹³

A relationship of sufficient proximity forms the second limb of the tripartite test identified by Lord Bridge of Harwich in *Caparo Plc v Dickman*¹⁴. The dual elements of reasonable foreseeability and proximity are required for a duty of care in Australia¹⁵.

Intended User or Class of User

Tracing the historical development of the tort of negligent misstatement through the foundation cases of *Candler v Crane Christmas & Co*¹⁶ and *Hedley Byrne Co Ltd v Heller Partners Ltd*¹⁷ and the later articulation and development of those principles in the High Court of Australia in *Mutual Life and Citizens Assurance Co Ltd v Evatt*¹⁸, *Shaddock & Associates Pty v Parramatta City Council*¹⁹, *San Sebastian Pty Ltd v The Minister*²⁰ and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*²¹ indicates that until 1990 the common law in Australia (and in Great Britain) recognised a duty of care for statements in the limited circumstance of a special or proximate relationship where a provider of advice or information supplied the statement either directly or indirectly to the plaintiff or a class of persons which included the plaintiff, specifically for use by the plaintiff or members of that class for some serious business purpose or transaction or class of transactions. The oft quoted ratio of Barwick CJ in *Mutual Life and Citizens Assurance Co Ltd v Evatt*²² of a special or proximate relationship sufficient to raise a duty of care was stated in the context of the facts and issues of that case, namely where a defendant assurance company had supplied negligent advice or information to the plaintiff for the plaintiff's use. The plaintiff was a policy holder of the defendant assurance company and sought information and advice from the defendant about the financial stability of one of its subsidiaries and of the merits of investing in that subsidiary. Barwick CJ in this case defined the proximate or special relationship required for a duty of care. This special relationship required a reliance by the recipient which was both foreseeable by the speaker and reasonable in all the circumstances.²³

The special relationship arose "whenever a person gives information and advice to another upon a serious matter in circumstances where the speaker realises, or ought to realise, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for that other party to act on that information or advice".²⁴

A similar statement of the special or proximate relationship was provided in Great Britain in *Candler v Crane Christmas and Co*²⁵. In *Candler* accountants of a company prepared a report for a particular third party whom the accountants knew would rely on the report to make an investment decision in the company.

Denning L.J. in *Candler*:-

*"The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him?"*²⁶

Later in the same judgment he commented:-

*"It will be noticed that I have confined the duty to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question."*²⁷

These statements by Lord Denning were the forerunner of the special relationship requirement propounded in *Hedley Byrne*.

Hedley Byrne involved defendant bankers supplying a negligent credit reference to a specific identified plaintiff. Proximity was defined in these cases in terms of a special relationship between plaintiff user and defendant provider. There was a close or special relationship between a plaintiff who had requested advice or information, who was known or identifiable by the defendant, and to whom the defendant had supplied such advice or information for use specifically by the plaintiff.

An analysis of the judgments in *Hedley Byrne* indicates that the court made reference to a number of factors upon which it was appropriate to find a duty of care for negligent misstatement. These factors may be listed as: special relationship based on reliance which is both foreseeable and reasonable; voluntary assumption of responsibility; relationship equivalent to contract. Numerous references to these factors appear in the judgments.²⁸ These factors are indicators of a close and direct relationship (proximity).

The facts in each of the cases of *Candler*, *Hedley Byrne*, *Evatt*, *Shaddock* and *San Sebastian* involved situations of advice or information supplied by the defendant directly or indirectly to the plaintiff or a class which included the plaintiff, for their specific use for a serious business purpose.

The law of negligent misstatement up till the 1990s had not widened the ambit of duty of care beyond situations where negligent advice or information had been supplied to an intended recipient or class of recipients with knowledge of its intended use by that recipient or class for some serious business purpose.

Known but Unintended User

The ambit of duty of care for negligent misstatement was widened in 1990 to include a known but unintended user who relied on negligent advice or information for a serious business purpose and thereby suffered economic loss.²⁹ The House of Lords in *Smith v Bush* increased the scope of duty of care to include a plaintiff who was a known user in a contemplated transaction although not the intended recipient of the defendant's negligent advice or information. In *Smith v Bush* a defendant valuer engaged by a mortgagee building society, supplied a negligent valuation to the mortgagee society, knowing that the valuation *would be relied upon* by the plaintiff mortgagor in deciding whether to enter the mortgage transaction and purchase the house. (The italics are mine.) There was an overwhelming probability that the purchaser in *Smith v Bush* would rely upon the valuation (90% of purchasers did so)³⁰ consequently, *Smith v Bush* is not authority for the proposition that a duty of care for negligent misstatement arises where the provider of that statement knows that an unintended recipient or user *might rely* on that statement. This latter proposition is nothing more than reasonable foreseeability that a third party might rely upon such a statement³¹. This was the very proposition disclosed in the pleadings in *Esanda* and rejected by the High Court of Australia as raising a duty of care³².

The extension of duty of care as expressed in *Smith v Bush* to a known but unintended user who would very likely rely on the information or advice for a serious business purpose, was also adopted in *Caparo* in England and in Australia by the High Court in *Esanda*. Lord Oliver in *Caparo Industries Plc v Dickman* commented on *Smith v Bush* as follows:-

"The most recent authority on negligent misstatement in this House – the two appeals in Smith v Bush and Harris v Wyrie Forest District Council which were heard together do not, I think, justify any broader proposition than that

already set out, say that they make it clear that the absence of a positive intention that the advice shall be acted upon by anyone other than the immediate recipient – indeed an expressed intention that it shall not be acted upon by anyone else – cannot prevail against actual or presumed knowledge that it is in fact likely to be relied upon in a particular transaction.”³³

Lord Oliver in *Caparo* also adopted the following passage in the judgment of Lord Griffiths in *Smith v Bush*:-

“The essential distinction between the present case and the situation being considered in Hedley Byrne and in the two earlier cases, is that in those cases advice was being given with the intention of persuading the recipients to act upon it. In the present case, the purpose of providing the report is to advise the mortgagee but it is given in circumstances in which it is highly probable that the purchaser will in fact act on its contents, although that was not the primary purpose of the report. I have had considerable doubts whether it is wise to increase the scope of the duty for negligent advice beyond the person directly intended by the giver of the advice to act upon it to those whom he knows may do so.”³⁴

As a result of *Smith v Bush*, Lord Oliver in *Caparo* listed the expanded circumstances necessary to establish the relationship of proximity between speaker and user:-

“...(1) The advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time the advice is given, (2) the adviser knows either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose, (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry and (4) it is so acted upon by the advisee to his detriment.”³⁵

In *Esanda* Brennan CJ in the High Court of Australia formulated a similar test for duty of care:-

“But, in every case it is necessary for the plaintiff to allege and prove that the defendant knew or ought reasonably to have known that the information or advice would be communicated to the plaintiff, either individually or as a member of an identified class, that the information or advice would be so communicated for a purpose that would be very likely to lead the plaintiff to enter into a transaction of the kind that the plaintiff does enter into and that it would be very likely that the plaintiff would enter into such a transaction in reliance on the information or advice and thereby risk the incurring of economic loss if the statement should be untrue or the advice should be unsound.”³⁶

Statements in the joint judgment of Toohey and Gaudron JJ³⁷ and in the judgment of Gummow J³⁸ in *Esanda* support Brennan CJ's statement of the ambit of duty of care for negligent misstatement.

Recent decisions in Great Britain and Australia have confirmed that the ambit of duty of care for negligent misstatement now extends to a known but unintended user of such a statement.

In the Court of Appeal in *Law Society v KPMG Peat Marwick*³⁹ the facts as summarised in the headnote were that the defendant accountants were retained by a firm of solicitors, to prepare the annual reports which the solicitors were required to deliver to the Law Society under s34 of the Solicitors Act 1974. Such reports, which had to indicate whether a solicitor's practice had complied with the rules on the handling of client funds, were intended to alert the Society to any dishonesty, enabling it to exercise its statutory powers of intervention and thereby protect the compensation fund. In 1992 the Society discovered that two partners in the solicitors' firm had defrauded a number of the firm's clients. Several hundred of them made claims on the compensation fund, and payments totalling some 8.5 million pounds were eventually paid out of the fund. In its capacity as trustee of the fund, the Society subsequently brought proceedings for negligence against the accountants in respect of the preparation of the 1989, 1990 and 1991 reports, seeking damages to compensate for the payments made from the fund.⁴⁰ The Court of Appeal in dismissing the appeal found that the accountants owed a duty of care to the Law Society. This finding was made although the reporting accountant is

instructed to act by the solicitor, is bound by contract with the solicitor to act with due care and is remunerated by the solicitor.⁴¹ However, the purpose of the report is to assist the Law Society in supervising compliance by the solicitor with the Law Society's accounts rules.⁴² Consequently, it was argued for the defendant accountants that the Law Society was not the intended recipient nor client of the accountants but merely a known user and therefore there was no assumption of responsibility to the Law Society. The Court of Appeal found that the known use and reliance by the Law Society was sufficient to satisfy the test of proximity and to raise a duty of care on the part of the accountants to the Law Society.

The recent appeal in the High Court of Australia in *Tepko Pty Limited v Water Board* provided an instance of a known but unintended user of negligent advice. The sole issue in the *Tepko* appeal as expressed in the joint judgment of Kirby and Callinan JJ. was whether a statutory water authority (Water Board in New South Wales) owed a duty of care to the developer (Tepko) who wished to know, and was negligently told, how much approximately ("ball park" figure) the authority might charge to bring town water to Tepko's land to enable it to subdivide it. By a four-three majority (Kirby, Callinan and McHugh JJ's in dissent) the court found that no duty of care was owed to the developer (Tepko). The court accepted that there was carelessness in the calculation of the "ball park" figure by the Water Board but was divided on the critical issue of whether the Water Board owed a duty of care in the circumstances. The facts in *Tepko* indicated that the Water Board supplied the information to its Minister for further action by the Minister, however, knowing that the information would be passed on to the plaintiff *Tepko* and that *Tepko* would be very likely to rely on such information for serious business purposes relating to the proposed development. Consequently *Tepko* was a case of a known but unintended user of negligent information. There is nothing in the judgments of all members of the High Court to suggest that the conditions of a special relationship necessary for a duty of care could not encompass a known user of negligent statements as well as an intended user. To the contrary, both the majority and minority judgments proceeded on an examination of the elements of the special relationship in relation to the known but unintended user in *Tepko*. The points of disagreement between the majority and minority judges in *Tepko* related to the degree of foresight required by the provider of advice or information and the reasonableness of reliance by the user.

Unintended and Unknown User

The classic illustration of this category of user found in the reported litigation, is the unidentified plaintiff in the market place who relies on published audited reports prepared by defendant accountants in fulfillment of statutory requirements relating to company accounts. This factual situation has primarily been litigated in Great Britain⁴³ but instances of such litigation in New Zealand,⁴⁴ and Australia⁴⁵ can also be found. A major consideration for the courts in litigation by an unidentified user of negligent information who is not the intended recipient is the "floodgate" concern of indeterminate liability.

It is suggested that such a concern may have predisposed the House of Lords to adopt the incremental approach on the duty question in *Caparo Industries plc v Dickman*⁴⁶. The adoption by the House of this approach provided a restrictive control device capable of confining liability to the established categories of *identified user* situations found in *Hedley Byrne*⁴⁷ and *Smith v Bush*⁴⁸. This meant that to find a duty of care owed to an unidentified investor in the market who relied on published accounts involved opening a new category of duty, a step the court could simply refuse to take on policy grounds. The House Lords did refuse to take this step in *Caparo*. Lord Bridge referred to the policy concern of opening flood-gates as a reason for not finding a duty of care to potential investors:-

"If a duty of care were owed so widely, it is difficult to see any reason why it should not equally extend to all who rely on the accounts in relation to other dealings with a company as lenders or merchants extending credit to the company. The only support for an unlimited duty of care owed by auditors for the accuracy of their accounts to all who may foreseeably rely upon them is to be found in some jurisdictions of the United States of America where there are striking differences in the law in different states. In this jurisdiction I have no doubt that the creation of such an unlimited duty would be a legislative step which it would be for Parliament, not the courts, to take."⁴⁹

The current law in Australia and Great Britain on negligent misstatement does not recognise a duty of care by a provider of advice or information to an unintended and unknown user.⁵⁰ There is simply not a sufficient proximity of relationship between speaker and user to raise a duty of care. This conclusion is confirmed in the High Court of Australia in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*⁵¹ where the High Court dismissed an appeal from the Full Court of the Supreme Court of South Australia wherein the Full Court struck out certain paragraphs from the statement of claim on the ground that the statement of claim did not disclose a cause of action in negligence against the defendant. In the *Esanda* case the plaintiff was a creditor and financier of a company Excel, who relied on negligently prepared company accounts and reports prepared by the defendant auditors and thereby suffered economic loss. The pleadings, so far as negligence, were struck out on the basis that they relied solely on reasonable foreseeability as a foundation for duty of care. The High Court in upholding the finding of the Full Court in South Australia, held that mere foreseeability of a likely reliance on information or advice by a third party is not sufficient to establish a relationship of proximity necessary for a duty of care in the area of negligent misstatement. At the very least, the pleading, to disclose a duty of care, would need to state that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, and will be relied upon for a serious business purpose. In *Esanda* the accountants had no knowledge of use of their published reports by any specific third party in any specific type of transaction. The accountants had not specifically provided the report to Esanda nor had they any specific knowledge of use by Esanda. Consequently, the plaintiff (Esanda) fell squarely into the category of an unknown and unintended user. At best, the accountants could reasonably foresee that third parties in the market place such as Esanda might rely for serious purposes on the published audited information. But reasonable foreseeability of a likely reliance was not sufficient to found the special relationship necessary to raise a duty of care.

Instances of unidentified users of negligent advice may occur in vastly different contexts, far apart from the auditing profession. An instance in Great Britain occurred in an action for wrongful birth. In *Goodwill v British Pregnancy Advisory Service*⁵² a third party, who later had sexual intercourse with the plaintiff, underwent a vasectomy operation arranged by the defendant pregnancy advisory service. The defendants advised the third party that the operation had been successful and that he would not need to use contraception in future. In 1988, the plaintiff commenced a sexual relationship with the third party. Having been told by him that he had had a vasectomy and of its purported success and permanency, and having consulted her own doctor who assured her that the chances of her becoming pregnant by the third party were minute, the plaintiff did not use any form of contraception in their relationship and nor did the third party. In 1989 the plaintiff became pregnant by the third party and later gave birth to the daughter. She brought an action against the defendants claiming damages for the expenses of the birth, the cost of bringing up her daughter and loss of income arising from her reduced working hours. The facts of this case therefore fell into the category of an unidentified and unintended user of negligent advice who thereby suffered economic loss. The judgments of Gibson LJ and Thorpe LJ in the Court of Appeal were against an extension of the existing categories of negligent misstatement where there was an intended and/or known user of the advice, whether as an individual or member of a class, to include an unidentified and unintended user for an unknown purpose. With reference to the incremental approach to duty of care a

finding of duty in the present case did not involve a modest step from an established category but a "giant and impermissible leap".⁵³ No comfort could be obtained by the plaintiff from an analogy with the disappointed legatee cases such as *White v Jones*⁵⁴ since in the latter situation the defendant solicitor knew of the particular beneficiaries and knew that his negligence would directly affect the particular beneficiaries. In the present case the plaintiff was unknown to the defendant and there was no knowledge by the defendant that the advice given to the third party after his vasectomy would be relied upon by a subsequent party such as the plaintiff. As a matter of policy, to find a duty of care in the present case would not be fair, just or reasonable. As Gibson LJ stated the doctor who performs a vasectomy on a man on his instructions cannot realistically be described as employed to confer a benefit on the man's sexual partners in the form of avoiding pregnancy. Still less can he be so described when he is giving advice on tests after the operation. The doctor is concerned only with the man, his patient, and possibly that man's wife or partner if the doctor intends her to receive and she receives advice from the doctor in relation to the vasectomy and the subsequent tests.⁵⁵

It is suggested that a negative finding of duty in the *Goodwill* case was amply justified on the grounds of lack of special relationship or proximity between the defendant advisory service and some unknown party (plaintiff) who at some indeterminate future time relied on advice given to another person who underwent a vasectomy operation.

Passive sufferer

Passive sufferer cases in the area of negligent misstatement are anomalous and, as Lord Oliver commented in *Caparo*, "do not readily fit into easily definable categories".⁵⁶ This latter statement was a reference to the fact that the existing categories of duty situations had developed from situations where the plaintiff either as intended or unintended recipient, had ultimately used and relied on the negligent advice or information and thereby suffered damage. However, the passive sufferer of a negligent statement has not used or relied on that statement. The reliance has been by a third party with resultant damage to the passive sufferer. Instances of plaintiff passive sufferers of negligent statements are found in Great Britain,⁵⁷ Australia⁵⁸ and New Zealand.⁵⁹ The "disappointed legatee" cases such as *White v Jones*⁶⁰ and *Gartside v Sheffield Young and Ellis*⁶¹ (failure to prepare and execute a will within a reasonable time), *Hill v Van Erp*⁶² and *Seale v Perry*⁶³ (failure to ensure proper execution of a will) and *Ross v Caunters*⁶⁴ (failure to give warning concerning proper execution of the will) are examples of passive sufferers and while strictly not cases of negligent advice or information are so analogous as to suggest that if solicitors had in these cases given negligent advice to the testator (eg concerning execution of a will) the results on the duty of care to disappointed beneficiaries would have been the same.

The decision of the High Court of Australia in *Hill v Van Erp*⁶⁵ suggests the ambit of duty of care for negligent misstatement may well encompass a third party passive sufferer of a negligent misstatement. The facts of this case briefly concerned a claim against a solicitor for economic loss by a disappointed beneficiary under a failed will. The will failed due to the negligence of the solicitor in failing to ensure that the spouse of a beneficiary did not witness the execution of the will. The plaintiff beneficiary recovered judgment in the District Court in Queensland for negligence against the solicitor. The solicitor's appeal to the Court of Appeal failed. The High Court of Australia by a majority of five to one dismissed the solicitor's further appeal to that court.

A primary consideration for the High Court was the conceptual difficulty raised in *White v Jones* that a solicitor acting on behalf of a client owes a duty of care only to his client. The relationship between a solicitor and his client is nearly

always contractual, and the scope of the solicitor's duties will be set by the terms of his retainer. The Chief Justice dealt with this objection⁶⁶ by stating that although a solicitor's contractual duty is owed solely to the client, the existence of that duty does not necessarily negate a duty of care owed to a third party in tort. To the contrary, the undertaking of a specialist task pursuant to a contract between A and B may be the occasion that gives rise to a duty of care owed to C who may be damaged if the task is carelessly performed. This acknowledged that the contract between solicitor and client was merely the positive sphere of activity entered upon by the solicitor which not only raised concurrent duties in contract and tort to the client but also brought the solicitor into a relationship of proximity to the third party beneficiary such that a duty was owed to that third party.

The plaintiff in *B.T. Australia Ltd and Another v Raine and Horne Pty Ltd*⁶⁷ was a passive sufferer of a negligent misstatement supplied by a valuer to a trustee for unit holders. The trustee of a trust used as an investment fund for the assets of superannuation funds of which the trustee was the investment manager sought from a professional valuer, the value to be attributed to certain units in the trust fund. The valuation was to be used and relied on by the trustee in the carrying out of its duties as investment manager of the fund and in ascertaining the value of certain trust property. The valuer, with this knowledge of the use to which the valuation would be put, supplied a valuation which contained an error attributable to its negligence. As a result of the error in the valuation individual unit holders as clients of the trust's superannuation fund suffered economic loss.

Wootten J found a duty of care owed by the valuer to the unit holders. This prima facie duty arose from a proximate relationship based on an assumption of responsibility⁶⁸ by the valuer. The valuer was aware that the trustee would himself act on the information in the execution of a duty which he owed to the plaintiff unit holder in a way which might cause economic loss to that plaintiff. Wootten J stated that there were no policy reasons which should displace any prima facie duty.

The passive sufferer cases in negligent misstatement have posed particular difficulties for application of an incremental approach to duty of care. The step required for courts to move from the existing categories of "reliance" cases, where the plaintiff was the user of the negligent statement, to situations where the user was a third party with resultant economic loss to the passive plaintiff cannot be described as incremental. To find a duty of care owed to the passive plaintiff has presented the court with a choice to open either an entirely new category, or confine liability to the existing categories. The incremental approach to the duty question, has generally provided no yardstick or starting point in the passive sufferer cases and the courts have searched elsewhere for determinants of the duty issue. Salmon LJ. in *Ministry of Housing v Sharp* adverted to this difficulty in the "passive sufferer" case before him:-

"The present case does not precisely fit into any category of negligence yet considered by the courts. The plaintiff has not been misled by any careless statement made to him by the defendant or made by the defendant to someone else who the defendant knew would be likely to pass it on to a third party such as the plaintiff, in circumstances in which the third party might reasonably be expected to rely upon it: See, for example, Denning L.J.'s dissenting judgment in Candler v Crane Christmas and Co [1951] 2 KB 164, 174, which was adopted and approved by the House of Lords in Hedley Byrne [1964] AC 465. I am not, however, troubled by the fact that the present case is, in many respects, unique. I rely on the celebrated dictum of Lord MacMillan that 'the categories of negligence are never closed', Donoghue v Stevenson [1932] AC 562, 619."⁶⁹

Ministry of Housing v Sharp involved the following facts. The Ministry of Housing and Local Government registered a planning charge with the local land registry. The charge was on a piece of land at King's Langley owned by a Mr Neale.

Subsequently a company which intended to purchase the land requisitioned an official search at the local land registry. The clerk in the registry, who made the search, was negligent. He failed to notice the Ministry's charge; or to include it in the official certificate. He issued a clear certificate to the purchasers. They completed the purchase on that footing. The Ministry as a consequence of the clear certificate issued to the purchasers lost the benefit of their charge. The Ministry sued the clerk and the local Council for negligence. The Ministry was a passive sufferer of economic loss due to the clerk's negligent misstatement in the certificate supplied to and relied upon by the purchaser. In *Sharp* the Court of Appeal applied proximity as the control on duty of care. Cross L.J. stated:-

*"The question is whether there was sufficient 'proximity' between the Ministry and the searcher - whether he was sufficiently their 'neighbour' - to render him liable to be sued under the modern developments of the law of tort which were initiated by Donoghue v Stevenson [1932] AC 562 and extended to negligent statements in Hedley Byrne and Co Ltd v Heller and Partners Ltd [1964] AC 465."*⁷⁰

Salmon L.J. in the same case relied on proximity:-

*"The servant and certainly the Council must or should have known that unless the search was conducted and the certificate prepared with reasonable care, any chargee or encumbrancer whose registered charge or quasi charge was carelessly omitted from the certificate would lose it and be likely to suffer damage. In my view, this factor certainly creates as close a degree of proximity between the Council and the encumbrancer as existed between the appellant and respondent in Donoghue v Stevenson [1932] AC 562."*⁷¹

There was a direct reliance on the element of insurance in the case as supporting the prima facie duty arising on proximity. Lord Denning commented⁷² that a finding of duty was not in the least unfair to the registrar since the government always stands behind the Chief Land Registrar and indemnifies him and the local authorities always insure the local land registrar. The action was being defended by the insurers and they would have calculated a premium commensurate with the risk of mistake and should therefore be prepared to pay for the loss when it occurs.

The House of Lords more recently in *Spring v Guardian Assurance plc*⁷³ dealt with a passive sufferer situation involving an employee who failed to obtain employment as a result of a negligent reference supplied by his former employer to a prospective future employer. The employee sued his former employer for the economic loss resulting from the negligent reference supplied by the defendant. This case fell outside the facts of *Hedley Byrne* since in *Hedley Byrne* the plaintiff was the intended recipient of the negligent credit reference, whereas the plaintiff in *Spring* was not the intended recipient of the reference but the passive sufferer of its use by the intended recipient. The principal issues in *Spring* were whether a prima facie duty of care should be found and if so whether the existence of such a duty of care would be negated because it would if recognised undermine the policy underlying the defence of qualified privilege in the law of defamation. The majority of Lord Goff, Lord Lowry, Lord Slynn and Lord Woolf found a prima facie duty of care owed by the former employer and were not persuaded by the public policy arguments relating to undermining the law of defamation such that the prima facie duty should be overridden. It is noteworthy that the House of Lords approached the duty question from what was essentially a two-stage *Anns* approach rather than an incremental categories approach. The latter approach was preferred by the House of Lords in *Caparo*.

Lord Goff in *Spring*⁷⁴ found a prima facie duty of care based on the *Hedley Byrne* principle viz an assumption of responsibility by the former employer to the plaintiff in respect of the reference and reliance by the plaintiff upon the exercise of due care in respect of its preparation. These were indicators of a proximate relationship sufficient for a prima facie duty. As to the point of undermining the policy underlying the defence of qualified privilege in the law of defamation Lord Goff could see no reason why the duty to exercise due skill and care which rests upon the employer should be

negated because, if the plaintiff were instead to bring an action for damage to his reputation, he would be met by the defence of qualified privilege which could only be defeated by proof of malice. The *Hedley Byrne* duty arises where there is a relationship which is either contractual or equivalent to contract and therefore principles of the law of defamation are not relevant. Lord Goff acknowledged⁷⁵ that a duty of care to an employee in cases such as the present may have some inhibiting effect on the manner in which references are expressed. Lord Goff considered that such an inhibition already existed and employers are generally unwilling to indulge in unnecessary criticism of their employees and this was the reason behind Rule 3.3(2) of the *Lautro* rules.

A recent instance in the Court of Appeal in Great Britain of "passive sufferer" claimants occurred in *Gorham and Others v British Telecommunications plc & Others*⁷⁶. Simply stated, the issue before the court was whether an insurance company advising a customer on insurance provision for pension and life cover owed a duty of care to the customer's dependents not to give negligent advice resulting in financial loss to the dependents upon the customer's death. This question was answered in the affirmative by the Court of Appeal. This case was very similar to the "disappointed beneficiary" cases such as *White v Jones*⁷⁷ and *Hill v Van Erp*⁷⁸ and hence there was significant reliance on *White v Jones* and analogous arguments before the court in *Gorham*. Pill, LJ who gave the leading judgment of the Court of Appeal stated that "it is fundamental to the giving and receiving of advice upon a scheme for pension provision and life insurance that the interests of the customer's dependents will arise for consideration. ... practical justice requires that disappointed beneficiaries should have a remedy against an insurance company in circumstances such as the present ... the advice in this case was given in a context in which the interests of the dependents were fundamental to the transaction, to the knowledge of the insurance company representative giving advice as well as to his customer, and a duty of care was owed additionally to the intended beneficiaries"⁷⁹.

A finding of duty owed to the "passive sufferers" in the above cases did not expose the defendants to an indeterminate liability to an unascertained class for an indeterminate amount of time. In each instance it was not unreasonable that the defendants should compensate plaintiffs who were so obviously to be directly and immediately affected because of the latter's close circumstantial relationship to the party supplied with the negligent misstatement.

Summary and Conclusion

There has been a parallel development in the ambit of duty of care for negligent misstatement in Great Britain and Australia. While the limits of the tort have been extended in both jurisdictions, the outer boundaries of liability are similar. Case law in both jurisdictions indicates that a duty of care may arise either, where a provider of negligent advice or information directs the statement to an intended user or class of user for their use or alternatively, has knowledge that the statement will be supplied to and used by a specific individual or class even though the provider never intended nor directed the statement to that individual or class.

For a duty of care to arise in the circumstances just outlined, not only must the speaker have foresight and knowledge that the user of the advice or information intends to rely on it for a serious business purpose even if not aware of the precise use contemplated by the recipient, but also the reliance by the user must be reasonable in the circumstances. Reliance may not be reasonable where it could reasonably be expected that the recipient would seek independent advice before relying on the statement.

Furthermore, a duty of care for negligent misstatement may be owed to a passive sufferer of a third party's reliance on negligent advice or information where the passive sufferer is so closely and directly affected because of their close circumstantial relationship (e.g. testator/beneficiary; trustee/beneficiary) to the intended user of the negligent misstatement.

Despite the extended boundaries for the tort of negligent misstatement in Great Britain and Australia, neither jurisdiction has widened the ambit of duty of care to encompass liability to an unknown and unintended third party user who might foreseeably rely on the negligent statement.⁸⁰

¹ [1951] 2KB 164

² [1964] AC 465

³ *Caparo Industries plc v Dickman* [1990] 2AC 605; *Smith v Bush* [1990] 1 AC 831; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Spring v Guardian Assurance plc* [1995] 2 AC 296; *Law Society v KPMG Peat Marwick* [2000] 4 All ER 540

⁴ *Mutual Life and Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556; *Shaddock and Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 71 ALJR 448

⁵ A. H. Brown, "The Recovery of Economic Loss in Tort" (1975) 2 Auck UL Rev 50

⁶ [1964] AC 465

⁷ *Ibid* at 534

⁸ R. S. Chambers "Economic Loss" in Finn Ed, *Essays on Torts*, (Law Book Co., Sydney, 1989), p52

⁹ [1990] 2 AC 605

¹⁰ *Ibid* at 643

¹¹ See T. P. Craig, "Negligent Misstatements, Negligent Acts and Economic Loss" (1976) 92 LQR 213

¹² *Mutual Life and Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 566 at 572-573; *Shaddock and Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225 at 250; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 356; See further N. Katter, *Duty of Care in Australia* (LBC, Sydney, 1999) p149 ff.

¹³ *Ibid*

¹⁴ [1990] 2 AC 605 at 617-619

¹⁵ See N. A. Katter, *Duty of Care in Australia*, (LBC Information Services, Sydney, 1999) and the cases therein cited.

¹⁶ [1951] 2KB 164

¹⁷ [1964] AC 465

¹⁸ (1968) 122 CLR 556

¹⁹ (1981) 150 CLR 225

²⁰ (1986) 162 CLR 340

²¹ (1997) 71 ALJR 448

²² (1968) 122 CLR 556 at 572, 573

²³ *Ibid*

²⁴ *Mutual Life and Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 566 at 572-573; *Shaddock and Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225 at 250; *San Sebastian Pty Ltd v Minister Administering Environmental, Planning and Assessment Act* (1979 NSW) (1986) 162 CLR 340 at 356

²⁵ [1951] 1 KB 164

²⁶ [1951] 2KB 164 at 181

²⁷ *Ibid* at 183

²⁸ See for instance Lord Reid at 483, 486, 487; Lord Morris at 502, 503; Lord Hodson at 505, 509, 510, 511 and 514; Lord Devlin at 528, 529, 530; Lord Pierce at 539.

²⁹ *Smith v Eric S. Bush* [1990] 1AC 831 at 865; *Caparo Industries Plc v Dickman* [1990] 2AC 605 at 638-639; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 71 ALJR 448 at 452, 455, 457, 481

³⁰ [1990] 1 AC 831 at 865

³¹ See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 71 ALJR 448 at 450 per Brennan CJ

³² *Ibid*

³³ [1990] 2 AC 605 at 638-639

³⁴ [1990] 1 AC 831 at 862

³⁵ [1990] 2 AC 605 at 638

³⁶ *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 71 ALJR 448 at 452-453

³⁷ *Ibid* at 457

³⁸ *Ibid* at 481, 482

³⁹ [2000] 4 All ER 540

⁴⁰ *Ibid*

⁴¹ [2000] 1 All ER at 519

⁴² *Ibid*

-
- ⁴³ *Caparo Industries Plc v Dickman* [1990] 2 AC 605; *Al Saudi Banque and Others v Clarke Pixley* (a firm) [1990] 2 WLR 344; *JEB Fasteners Ltd v Marks, Bloom and Co* [1983] 1 All E R 583; *Twomax Ltd v Dickson McFarlane and Robinson* [1983] SLT 98
- ⁴⁴ *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553
- ⁴⁵ *Columbia Coffee and Tea Pty Ltd and Donyoke Pty Ltd v Churchill and Others* (1993) 29 NSWLR 141; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 71 ALJR 448
- ⁴⁶ [1990] 2 AC 605
- ⁴⁷ [1964] AC 465
- ⁴⁸ [1990] 1 AC 831
- ⁴⁹ [1990] 2 AC 605 at 623
- ⁵⁰ See for instance, *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 71 ALJR 448; *Goodwill v British Pregnancy Advisory Service* [1996] 2 All ER 161.
- ⁵¹ (1997) 71 ALJR 448
- ⁵² [1996] 2 All ER 161
- ⁵³ *Ibid* at 163
- ⁵⁴ [1995] 2 AC 207
- ⁵⁵ *Ibid* at 167
- ⁵⁶ [1990] 2 AC 605 at 635; see also the difficulty Wootten J. had in defining the category of passive sufferers in *B.T. Australia Ltd and another v Raine and Horne Pty Ltd* [1983] 3 NSWLR 221
- ⁵⁷ *Gorham & Others v British Telecommunication plc & Others* [2000] 4 All ER 867; *Spring v Guardian Assurance plc.* [1995] 2 AC 296; *Ministry of Housing v Sharp* [1970] 2 QB 223;
- ⁵⁸ *B.T. Australia and another v Raine and Horne Pty Ltd* [1983] 3 NSWLR 21
- ⁵⁹ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282; *Balfour v Attorney-General* [1991] 1 NZLR 51; *Wild v National Bank of New Zealand Ltd* [1991] 2 NZLR 454
- ⁶⁰ [1995] 2 AC 207
- ⁶¹ [1983] NZLR 37
- ⁶² (1997) 71 ALJR 487
- ⁶³ [1982] VR 193
- ⁶⁴ [1980] 1 Ch. 297
- ⁶⁵ (1997) 71 ALJR 487
- ⁶⁶ *Ibid* at 490
- ⁶⁷ [1983] 3 NSWLR 221
- ⁶⁸ *Ibid* at 229, 235
- ⁶⁹ [1970] 2 QB 223 at 278
- ⁷⁰ [1970] 2 QB 223 at 290
- ⁷¹ *Ibid* at 278
- ⁷² *Ibid* at 269
- ⁷³ [1995] 2 AC 296
- ⁷⁴ *Ibid* at 316
- ⁷⁵ *Ibid* at 324
- ⁷⁶ [2000] 4 All ER 867
- ⁷⁷ [1995] 2 AC 207
- ⁷⁸ (1997) 188 CLR 159
- ⁷⁹ *Gorham & Others v British Telecommunications plc & Others* [2000] 4 All ER 867 at 878-879.
- ⁸⁰ This article was originally published in the United Kingdom in (2002) 18 PN 82 but it is suggested that the law as stated parallels the ambit of liability in other common law jurisdictions including the USA.