

**The Mutual Life and Citizens' Assurance Company Limited**  
**and another** - - - - - *Appellants*  
v.  
**Clive Raleigh Evatt** - - - - - *Respondent*

FROM  
**THE HIGH COURT OF AUSTRALIA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 16TH NOVEMBER 1970

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*Present at the Hearing :*

LORD REID  
LORD MORRIS OF BORTH-Y-GEST  
LORD HODSON  
LORD GUEST  
LORD DIPLOCK

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*(Majority Judgment delivered by LORD DIPLOCK)*

The appellants are defendants to an action brought against them in the Supreme Court of New South Wales by the respondent, Mr. Evatt, claiming damages for negligent information and advice given to him gratuitously by the appellants. New South Wales still preserves the system of pleading current in England a hundred years ago between the passing of the Common Law Procedure Acts 1852-62 and the passing of the Judicature Act 1875, and expounded in the famous Third Edition of Bullen & Leake (1868). Mr. Evatt's Declaration contains three counts substantially in the same form—the first against The Mutual Life and Citizens' Assurance Company Ltd., the second against The M.L.C. Ltd. and the third against the two companies jointly. To each of these counts the defendant companies demurred upon the ground that the facts alleged in the count did not disclose any cause of action known to the law. The demurrer was dismissed by the Court of Appeal of the Supreme Court of New South Wales (Wallace P. and Walsh J.A.; Asprey J.A. dissenting). On appeal to the High Court of Australia this judgment was upheld by a majority of the High Court (Barwick C.J. and Kitto and Menzies J.J.; Taylor and Owen J.J. dissenting). It now comes before this Board by special leave granted by Her Majesty in Council.

Special leave was granted because, as has been common ground at the hearing before their Lordships and in the courts below, what is really at issue between the parties upon the demurrer does not depend upon the procedural niceties of the system of pleading followed in New South Wales but upon a question of substantive law of outstanding importance in the development of that branch of the law of tort which was expounded in the speeches in the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

In each of the courts in which the demurrer has been heard attention has been confined to the first count in which Mr. Evatt sues the first appellant (hereinafter called "the Company") alone. Their Lordships do not think that it would be helpful to set out this count *ipsisima verba*. It was amended during the hearing in the Supreme Court of New South Wales by inserting an additional phrase in the middle of the count which resulted, as a matter of grammar, in an unintended alteration in the meaning of a subsequent phrase. In the High Court of Australia, which has no jurisdiction to allow amendment of the Declaration, Counsel for Mr. Evatt was very sensibly permitted to put an oral gloss upon some of the actual words and phrases appearing in the Declaration so as to enable the Court to rule upon the actual question of substantive law which was in issue between the parties rather than that the matter should go off upon the technicalities of pre-Judicature Act pleading. This might not have been permissible at the time of the Third Edition of Bullen and Leake. But a hundred years have passed since then; and their Lordships have followed the example of the High Court in interpreting the first count of the Declaration in the light of the explanations given orally by Counsel in the High Court, and have themselves accepted further explanation of its intended meaning where this has appeared to them to be necessary in order to isolate and define the point of substantive law which the parties wish to have determined.

In the light of these explanations the facts relied upon by Mr. Evatt as constituting his cause of action against the Company may be stated as follows:

- (1) Mr. Evatt was a policy holder in the Company.
- (2) He was seeking from the Company information and advice concerning the financial stability of another company, H.G. Palmer (Consolidated) Ltd. (herein called "Palmer") and as to the safety of investments in Palmer.
- (3) The Company and Palmer were subsidiary companies of The M.L.C. Ltd.
- (4) By virtue of that association the Company had better facilities than Mr. Evatt for obtaining full, complete and up-to-date information concerning the financial affairs of Palmer, though at the time of the inquiry by Mr. Evatt it was not in actual possession of such information.
- (5) The Company had in its employ officers who were capable of forming a reliable judgment upon information obtained concerning Palmer's financial affairs.
- (6) Mr. Evatt knew the facts stated in (3), (4) and (5).
- (7) The Company by itself, its servants and agents informed and advised Mr. Evatt that Palmer was and would continue to be financially stable and that it would be safe further to invest therein.
- (8) The Company supplied that information and advice without disclaimer of responsibility and with the knowledge that Mr. Evatt intended to act thereon in making a decision whether to retain investments already existing in Palmer and whether to invest further therein.
- (9) The Company supplied the information and advice negligently.
- (10) In reliance on the information and advice supplied by the Company, Mr. Evatt did not realise on certain investments existing in Palmer and invested further sums therein whereby he lost the value of the investments together with interest thereon.

The allegation in (9) that the Company supplied the information and advice "negligently" is an assertion of a breach of a duty of care owed by the Company to Mr. Evatt. But under the common law system of pleading still in force in New South Wales the plaintiff in an action for negligence must allege facts from which if they *and no other facts* were proved at the trial, the law will deduce a duty of care. The question for their Lordships is whether the facts stated in (1) to (8) are *in themselves* sufficient to give rise to a duty owed by the Company to Mr. Evatt to take care in giving him the information and advice which he sought.

The question is thus different from that which arises under the modern system of pleading in England upon an application to strike out a statement of claim as disclosing no reasonable cause of action. There the question is whether it would be open to the plaintiffs upon the pleadings to prove facts at the trial which would constitute a cause of action. See *Dorset Yacht Co. v. Home Office* [1970] 2WLR 1140.

Mr. Evatt does not allege that at or prior to the time of his inquiry the Company carried on the business of supplying information or advice on investments to its policy holders or to anyone else, or that the Company had claimed, professed or represented to him or to anyone else that it possessed any qualification, skill or competence to do so greater than that possessed by the ordinary reasonable man. Nor does he allege that at the time of his inquiry the Company undertook or represented to him that it would make use of its facilities to obtain full, complete or up-to-date information concerning the financial affairs of Palmer or that it would obtain and communicate to him the opinion of officers in its employment who were capable of forming a reliable judgment on such information if obtained. Nor does he allege that at the time the Company supplied him with the information and advice it represented to him that it had done any of these things.

Counsel for Mr. Evatt concedes that, in order to establish a duty of care owed by the Company to Mr. Evatt it will be necessary to establish one or other of these facts in addition to those set out in (1) to (8) above, the Company's demurrer should succeed. The question in this appeal is whether or not it is so necessary.

The several speeches in *Hedley Byrne & Co. Ltd v. Heller and Partners Ltd.* [1964] A.C. 465 have lain at the heart of the argument in the courts of Australia and before their Lordships' Board. That case broadened the category of relationships between one man and another which give rise to a duty at common law to use reasonable skill and care in making statements of fact or of opinion. Prior to *Hedley Byrne* it was accepted law in England that in the absence of contract the maker of a statement of fact or of opinion owed to a person whom he could reasonably foresee would rely upon it in a matter affecting his economic interest, a duty to be honest in making the statement. But he did not owe any duty to be careful, unless the relationship between him and the person who acted upon it to his economic detriment fell within the category of relationships which the law classified as fiduciary. *Hedley Byrne* decided that the class of relationships between the maker of the statement and the person who acted upon it to his economic detriment which attracted the duty to be careful was not so limited, but could extend to relationships which though not fiduciary in character possessed other characteristics.

In *Hedley Byrne* itself and in the previous English cases on negligent statements which were analysed in the speeches, with the notable exceptions of *Fish v. Kelly* 17 CB NS 194, *Derry v. Peek* 14 App. Cas. 337 and *Low v. Bouverie* [1891] 3 Ch. 82, the relationship possessed the

characteristics (1) that the maker of the statement had made it in the ordinary course of his business or profession and (2) that the subject-matter of the statement called for the exercise of some qualification, skill or competence not possessed by the ordinary reasonable man, to which the maker of the statement was known by the recipient to lay claim by reason of his engaging in that business or profession.

In the United States of America, where the development of this branch of the common law of negligence had anticipated the English decision in *Hedley Byrne*, the American Restatement of the Law of Torts (2nd) Vol. III, para. 552, which was referred to by Lord Devlin (at p. 531) and by Lord Pearce (p. 539) specifies as a necessary characteristic of a relationship which gives rise to a duty of care on the part of the maker of the statement that he should be a person who makes it a part of his business or profession to supply for the guidance of others in their business transactions information of the kind contained in the statement and that the statement should be made by him in the course of that business or profession.

A requirement that the existence of a similar characteristic is necessary in order to attract a duty of care is not stated unequivocally in any of the speeches in *Hedley Byrne*. But those speeches, like all judgments under the common law system must be understood *secundum subjectam materiam*. The fact that the characteristics were present in the relationship between the maker and the recipient of the statement under consideration in *Hedley Byrne* made it unnecessary for those who expressed the reasons for their decision of the case to direct their minds to the question whether the terms in which the reasons were expressed would have called for some qualification in their application to cases where those characteristics were absent—as they are in the instant appeal. The speeches in *Hedley Byrne* cannot thus be determinative in themselves of whether or not the presence of these characteristics in the relationship between the maker and the recipient is necessary in order to give rise to a duty of care at common law.

Their Lordships accordingly conceive it to be their task in the instant appeal to examine that question as one of principle in the light of the earlier development of this branch of the law of negligence in the cases which preceded, and were for the most part referred to, in *Hedley Byrne*, as well as in the light of the speeches in *Hedley Byrne* themselves.

The instant appeal is concerned with a statement consisting of “information and advice concerning the financial stability of a certain company . . . and as to the safety of investments therein”. In regard to this subject-matter viz. financial stability and safety of investment, no distinction need be drawn between “information” and “advice” and it is convenient to use the latter word. Such advice to be reliable (i.e. to be of a quality upon which it would be reasonable for the advisee to rely in determining his course of action in a matter which affected his economic interests) calls for the exercise on the part of the advisor of special skill and competence to form a judgment in the subject-matter of the advice, which the advisee does not possess himself. The problem to be solved arises in that field of human activity which calls for the services of a skilled man.

The proposition stated in the maxim *spondet peritiam artis et imperitia culpa adnumeratur* is one of the oldest principles in English law. The duty imposed by law upon those who followed a calling which required skill and competence to exercise in their calling such reasonable skill and competence as was appropriate to it lies at the origin of the action of *assumpsit* itself. It was first applied to artificers “for it is the duty of every artificer to exercise his art right and truly as he ought”

(Fitzherbert *Natura Brevium* (1534) 94D). It was later extended to all other occupations which involve the doing of acts calling for some special skill or competence not possessed by the ordinary man. The standard of skill and competence was that which is generally possessed by persons who engage in the calling, business or profession of doing acts of that kind for reward. The duty to conform to the standard was attracted by engaging in that particular calling, business or profession because by doing so a man holds himself out as possessing the necessary skill and competence for it. To undertake to do an act requiring special skill and competence for reward was also a sufficient holding out by the obligor to the obligee. But the doing of the act gratuitously by a person who did not engage in the calling, business or profession, did not attract the duty to exercise skill and competence *Shiells v. Blackburn* (1789) 1 H. Bl. 158 at p. 162. See also the references to the relevant cases in the speeches in *Hedley Byrne* of Lord Hodson (at p. 510) and Lord Pearce (at pp. 537-8).

Where advice which calls for the exercise of special skill and competence by the advisor is not to be based exclusively upon facts communicated to him by the advisee no relevant distinction can be drawn between the ascertaining by the advisor of the facts upon which to base his judgment as to the advice to be given, and the forming of that judgment itself. The need for special skill and competence extends to the selection of the particular facts which need to be ascertained in order to form a reliable judgment and to the identification of the sources from which such facts can be obtained.

As in the case of a person who gratuitously does an act which calls for the exercise of some special skill and competence, a duty of care which lies upon an advisor must be a duty to conform to an ascertainable standard of skill and competence in relation to the subject-matter of the advice. Otherwise there can be no way of determining whether the advisor was in breach of his duty of care. The problem cannot be solved by saying that the advisor must do his honest best according to the skill and competence which he in fact possesses, for in the law of negligence standards of care are always objective. The passages in the judgment of Cozens-Hardy M.R. in *Parsons v. Barclays Bank Ltd.* 103 L.T. 196 at p. 199 and of Pearson L.J. in the Court of Appeal [1962] 1 Q.B. 396 at pp. 414-5 in *Hedley Byrne* itself, which were quoted with approval in the House of Lords make it clear that a banker giving a gratuitous reference is not required to do his best by, for instance, making enquiries from outside sources which are available to him, though this would make his reference more reliable. All that he is required to do is to conform to that standard of skill and competence and diligence which is generally shown by persons who carry on the business of providing references of that kind. Equally it is no excuse to him to say that he has done his honest best, if what he does falls below that standard because in fact he lacks the necessary skill and competence to attain to it.

The reason which the law requires him to conform to this standard of skill and competence and diligence is that by carrying on a business which includes the giving of references of this kind he has let it be known to the recipient of the reference that he claims to possess that degree of skill and competence and is willing to apply that degree of diligence to the provision of any reference which he supplies in the course of that business, whether gratuitously so far as the recipient is concerned or not. If he supplies the reference the law requires him to make good his claim.

It would not in their Lordships' view be consonant with the principles hitherto accepted in the common law that the duty to comply with that

objective standard should be extended to an advisor who, at the time at which his advice is sought, has not let it be known to the advisee that he claims to possess the standard of skill and competence and is prepared to exercise diligence which is generally shown by persons who carry on the business of giving advice of the kind sought. He has given the advisee no reason to suppose that he is acquainted with the standard or capable of complying with it or that he has such appreciation of the nature and magnitude of the loss which the advisee may sustain by reason of any failure by that advisor to attain that standard as a reasonable man would require before assuming a liability to answer for the loss.

But if it would not be just or reasonable to require him to conform to this objective standard of care which would be incumbent upon a person who carried on the business of giving advice of the kind sought, there is in their Lordships' view no half-way house between that and the common law duty which each man owes his neighbour irrespective of his skill—the duty of honesty. No half-way house has been suggested in the argument in the instant appeal or in any of the decided cases. That the duty was confined to that of honesty was decided, as their Lordships think rightly, in *Low v. Bouverie* [1891] 3 Ch. 82. The judgment of Lindley L.J. in that case no doubt treated *Derry v. Peek* (1889) App. Cas. 337 as going further than it was subsequently held to have gone in *Nocton v. Ashburton* [1914] A.C. 932; but Bowen L.J. did not fall into that error, and the decision itself was approved in *Nocton v. Ashburton* by Lord Haldane (at p. 950) with whom Lord Atkinson concurred. It was also referred to without any indication of dissent by Lord Shaw of Dunfermline (at p. 968). In *Hedley Byrne, Le Lievre v. Gould* [1893] 1 Q.B. 491, which concerned a practising surveyor, and *Candler v. Crane, Christmas & Co.* [1951] 2 Q.B. 164, which concerned practising accountants, were expressly over-ruled; but *Low v. Bouverie* so far from being over-ruled was cited without disapproval by Lord Morris of Borth-y-Gest (at p. 502) and accepted as correctly expressing the law by Lord Hodson (at p. 513).

In *Low v. Bouverie* it was made plain to the defendant, who was trustee of a settlement, that the information sought from him as to encumbrances upon the life interest of his cestui qui trust was required by the inquirer for the purpose of enabling him to make a decision upon a business transaction and that he would rely upon that information. The trustee informed the inquirer of the existence of certain encumbrances but omitted to mention six prior mortgages whose existence he had forgotten, though they were recited in the deed by which he had been appointed trustee of the settlement four years before. The only skill and competence on his part which was called for to enable him to provide accurate information was the ability to appreciate the need to look at the deed of appointment.

In their Lordships' view the crucial distinction between this case and those cases which it was held in *Hedley Byrne* gave rise to a duty of care as well as honesty (viz. *Cann v. Wilson* (1883) 39 Ch.D. 39, *Le Lievre v. Gould* (*ubi sup.*), *Candler v. Crane, Christmas & Co.* (*ubi sup.*), *Woods v. Martins Bank Ltd.* [1959] 1 Q.B. 55 and *Hedley Byrne* itself), is that the trustee in *Low v. Bouverie* did not hold himself out to the inquirer as being prepared to supply in the course of his business information of the kind sought. He had made no claim to any skill or competence which the law could require him to make good.

The carrying on of a business or profession which involves the giving of advice of a kind which calls for special skill and competence is the normal way in which a person lets it be known to the recipient of the advice that he claims to possess that degree of skill and competence and

is willing to exercise that degree of diligence which is generally possessed and exercised by persons who carry on the business or profession of giving advice of the kind sought. The American Restatement of the Law of Tort (2nd) confines the duty of care in giving advice to persons who make it part of their business to supply advice; though later tentative re-drafts suggest that the duty also attaches where the advisor has a financial interest in the transaction—a situation which is not relevant to the instant appeal. Lord Denning M.R. also so confined it in his dissenting judgment in *Candler's Case* (at pp. 179/180) where after stating that the persons subject to a duty of care in giving advice are “those persons such as accountants, surveyors, valuers and analysts whose profession and occupation it is to examine books, accounts and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business”, added “herein lies the difference between these professional men and other persons who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus: *Derry v. Peek* (now altered by statute) and trustees who answer inquiries about the trust funds: *Low v. Bouverie*. These persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements: they can only be made responsible by the law affecting persons generally, such as contract, estoppel, innocent misrepresentation or fraud”. This dissenting judgment was referred to with approval in *Hedley Byrne* in the speeches of Lord Hodson (p. 509), Lord Devlin (p. 530) and Lord Pearce (p. 538).

While accepting this as the common case giving rise to the duty of care their Lordships would not wish to exclude the case where the advisor, although not carrying on the business or profession generally, has, at or before the time at which his advice is sought, let it be known in some other way that he claims to possess skill and competence in the subject-matter of the particular inquiry comparable to those who do carry on the business or profession of advising on that subject-matter and is prepared to exercise a comparable skill and competence in giving the advice. Here too, by parity of reasoning, the law should require him to make good his claim. But the mere giving of advice with knowledge, as in *Low v. Bouverie*, that the inquirer intends to rely upon it does not, of itself, in their Lordships' view, amount to such a claim.

The converse of this is the case where a person who does carry on a business or profession which involves the giving of advice of the kind sought by the inquirer, does so in circumstances which should let it be known to a reasonable inquirer that he was not prepared to exercise in relation to the particular advice sought that degree of diligence which he would exercise in giving such advice for reward in the course of his business or profession. Casual advice given by a professional man upon a social or informal occasion is the typical example, of which *Fish v. Kelly* 17 C.B. N.S. 194 provides an illustration among the decided cases.

There are two passages in the speeches in *Hedley Byrne* which have been particularly relied upon, in the argument before their Lordships and in the majority judgments in each of the courts below, as amounting to a decision that the law imposes a “duty of care” upon a person who gives advice to another on a subject-matter requiring skill and competence and diligence, so long as he knows or ought to have known that the other intends to rely upon it in a matter affecting his economic interests, notwithstanding that the advisor neither carries on the business of giving advice of that kind nor has let it be known in some other way to the advisee at or before the time his advice is sought that *he claims* to possess a comparable skill and competence and is prepared to exercise a comparable diligence.

The passage in Lord Reid's speech (at p.486) is that in which he poses the courses of action open to a reasonable man upon being asked for advice on a matter requiring skill and competence and diligence. It reads as follows:

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

This is not the language of statutory codification of the law of tort but of judicial exposition of the reasons for reaching a particular decision upon the facts of the case.

Read out of the context in which the whole argument in *Hedley Byrne* proceeded, viz. advice given in the course of a business or profession which involved the giving of skilled, competent and diligent advice, these words are wide enough to sustain Mr. Evatt's case in the instant appeal. But in their Lordships' view the reference to "such care as the circumstances require" pre-supposes an ascertainable standard of skill, competence and diligence with which the advisor is acquainted or has represented that he is. Unless he carries on the business or profession of giving advice of that kind he cannot be reasonably expected to know whether any and if so what degree of skill, competence or diligence is called for, and *a fortiori*, in their Lordships' view, he cannot be reasonably held to have accepted the responsibility of conforming to a standard of skill, competence and diligence of which he is unaware, simply because he answers the inquiry with knowledge that the advisee intends to rely on his answer.

This passage should in their Lordships' view be understood as restricted to advisors who carry on the business or profession of giving advice of the kind sought and to advice given by them in the course of that business.

The other passage relied upon by Counsel for Mr. Evatt occurs in the speech of Lord Morris of Borth-y-Gest (at pp. 502-3).

It reads as follows:

"My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allow his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

This passage states a conclusion which follows from a consideration of the decided cases previously examined by Lord Morris in which advice or information was given by a person in the course of carrying on a business or profession which involved giving such advice or information



for reward. The dichotomy between the two parts of this passage would appear to be between skilled persons who “undertake” to give skilled advice or information “quite irrespective of contract”, and persons placed “in a sphere” in which others could reasonably rely upon his skill, judgment or “ability” to make careful inquiry—an expression which, in the context of “careful” inquiry cannot mean merely that he has an “opportunity” to make inquiry which a skilled person would realise was necessary but an unskilled person would not. In their Lordships’ view the reference to the sphere in which the person is placed should be understood in this context as referring to that sphere in which were placed the persons referred to in the cases previously discussed by Lord Morris in which the advisor had been held, or in his expressed opinion should have been held, to be subject to a duty of care, viz. that of carrying on a business or profession of giving advice or undertaking inquiries of that kind.

In Mr. Evatt’s Declaration as originally framed before amendment in the Court of Appeal of the Supreme Court of New South Wales it contained no allegation that the Company was in any better position than Mr. Evatt himself to give reliable advice concerning the financial stability of Palmer or as to the safety of investments therein. The fact that the Company gave the advice without disclaimer of responsibility and with the knowledge that Mr. Evatt intended to rely upon it in making a decision about his existing and future investments in Palmer was relied upon as sufficient in itself to attract the duty of care. It is implicit in the allegation that the advice was given by a corporation “by itself its servants and agents” that the giving of such advice was not *ultra vires* the Company’s powers; but it is not implicit that it in fact carried on or held itself out as carrying on the business of giving skilled as distinct from mere honest advice of this character. Before their Lordships’ Board Counsel for Mr. Evatt has expressly disavowed any such implication; though there are passages in the judgments of Kitto and Menzies JJ. in the High Court of Australia which suggest that this disavowal may not have been so explicit in the courts below. The corporate character of the defendant may therefore be ignored. The legal position would be no different if the defendant were a natural person not subject to the doctrine of *ultra vires*.

For the reasons already given, the Declaration in its original form, which appears to be based upon the passage in Lord Reid’s speech in *Hedley Byrne* which has already been cited, does not, in their Lordships’ view, disclose any cause of action.

The amendments introduced in the Court of Appeal state the respects in which it is alleged that the Company was, and was known by Mr. Evatt to be, in a better position than he was to give reliable advice upon the subject-matter of his inquiry. They were in a better position than he was to obtain from an outside source information, not alleged to be already in their possession, concerning the financial affairs of Palmer, and, if such information were obtained they had officers in their employment who had the necessary skill and competence to form a reliable judgment concerning Palmer’s financial affairs if the Company had chosen to use their services to do so. It is not, however, alleged that it was to any officer possessed of this skill and competence that Mr. Evatt addressed his inquiry to the Company for its advice; nor is it alleged that the officer or servant of the Company to whom his inquiry was actually addressed undertook or represented to Mr. Evatt that any such inquiries would be made of any outside source or that any officer of the Company possessed of the relevant skill and competence would be consulted.

The facts alleged if proved at the trial would establish no more than that the Company could have provided Mr. Evatt with reliable advice if it had chosen to make the inquiries requisite to provide the material necessary to form a reliable judgment and had required its skilled and competent officers, who *ex concessu* were not employed for that purpose, to divert themselves from their ordinary employment to exercise their skill and competence upon the information so obtained.

The same could be said of the successful defendant in *Low v. Bouverie* (*ubi sup.*). The requisite inquiry which he failed to make, viz. to inspect his own deed of appointment, indeed, involved no recourse to outside sources. If he did not realise the need to do so or its significance when inspected he could have consulted his solicitor. As respects recourse to outside sources of information the same might be said of any banker giving a reference in the actual course of his business, for, as already pointed out, although by virtue of his carrying on that business the law does impose upon him some duty of care, that duty does not extend to making inquiries of outside sources.

In their Lordships' view these additional allegations are insufficient to fill the fatal gap in the Declaration that it contains no averment that the Company to the knowledge of Mr. Evatt carried on the business of giving advice upon investments or in some other way had let it be known to him that they claimed to possess the necessary skill and competence to do so and were prepared to exercise the necessary diligence to give reliable advice to him upon the subject-matter of his inquiry. In the absence of any allegation to this effect Mr. Evatt was not entitled to assume that the Company had accepted any other duty towards him than to give an honest answer to his inquiry nor, in the opinion of their Lordships, did the law impose any higher duty upon them. This is in agreement with the reasoning of Taylor J. in the High Court of Australia with which the judgment of Owen J. is also consistent.

As with any other important case in the development of the common law *Hedley Byrne* should not be regarded as intended to lay down the metes and bounds of the new field of negligence of which the gate is now opened. Those will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them. The instant appeal is an example; but their Lordships would emphasise that the missing characteristic of the relationship which they consider to be essential to give rise to a duty of care in a situation of the kind in which Mr. Evatt and the Company found themselves when he sought their advice, is not necessarily essential in other situations—such as, perhaps, where the advisor has a financial interest in the transaction upon which he gives his advice. (c.f. *Anderson v. Rhodes* [1967] 2 A.E.R. 850. American Restatement of the Law of Torts th. Tentative Redraft). On this, as on any other metes and bounds of the doctrine of *Hedley Byrne* their Lordships are expressing no opinion. The categories of negligence are never closed and their Lordships' opinion in the instant appeal, like all judicial reasoning, must be understood *secundum subjectam materiam*.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed. In accordance with undertakings given when special leave to appeal was granted, there will be no Order as to the costs before their Lordships' Board and the Orders for costs below will not be disturbed.

*(Dissenting Judgment by LORD REID and  
LORD MORRIS OF BORTH-Y-GEST)*

The main question in this appeal is whether the appellant Company owed any duty of care to the respondent when, in response to his request for information and advice about the financial stability of another company referred to as Palmer, it gave to him an opinion that Palmer were financially stable. The appellant accepts the principles laid down by the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 that in certain circumstances such a duty can arise although there is no contract between the parties, but maintains that no such duty could arise in the present case. The present case is complicated by the fact that the appeal arises on a demurrer and that there is a dispute as to the meaning and effect of the respondent's pleading. The Supreme Court of New South Wales gave judgment for the plaintiff (the present respondent) on the demurrer and the High Court of Australia by a majority dismissed an appeal from that judgment. If we agree with the majority of the High Court with regard to the principles involved, it would not in our judgment be proper for the Board to reverse the decision of the Australian Courts on the grounds that the respondent's pleading appears to the Board to be defective. That is a matter which must chiefly depend on the practice in the Courts of New South Wales—a matter with which the Australian Courts are familiar but we are not.

As the facts have not been investigated and there is a dispute as to the meaning of the respondent's allegation, it is not possible to set out the alleged facts except in the most general way. The respondent had certain investments in Palmer and he had in mind to invest further in that Company. He was a policy holder in the appellant insurance Company. The appellant and Palmer were associated in that they were both subsidiaries of another Company. The appellant was in a position to obtain information about Palmer's affairs which was not available to the respondent. And the appellant had officers in its employment who were capable of forming a reliable judgment upon information which the appellant could obtain from Palmer. So the respondent sought advice from the appellant about the safety of his investments in Palmer. The appellant, knowing that the respondent intended to act on its advice, gave him advice which caused him to leave his existing investments with Palmer and to make further investments in that Company. That advice turned out to be bad advice with the result that the respondent lost a large sum of money. The respondent's case is that if the appellant had taken that amount of care which was reasonable in the circumstances its advice would have been different and he would not have lost his money.

In our judgment it is not possible to lay down hard and fast rules as to when a duty of care arises in this or in any other class of case where negligence is alleged. When in the past judges have attempted to lay down rigid rules or classifications or categories they have later had to be abandoned. But it is possible and necessary to determine the principles which have to be applied in determining whether in given circumstances any duty to take care arises.

In this class of case the first principle is that no duty beyond the duty to give an honest answer can arise when advice is given casually or in a social context, and the reason is that it would be quite unreasonable for the enquirer to expect more in such circumstances and quite unreasonable to impose any greater duty on the adviser. The law must keep in step with the habits of the reasonable man and consider whether ordinary people would think they had some obligation beyond merely giving an honest answer.

It may be going too far to say that a duty to take care can only arise where advice is sought and given in a business or professional context, for there might be unusual cases requiring a wider application of this principle. But for present purposes we think that the appropriate question is whether this advice was given on a business occasion or in the course of the appellant's business activities. The solution of this question may be difficult where advice is given by an individual, but here the advice is alleged to have been given by a Company. It must in fact have been given by some individual. If it was given by the Company that must mean that the individual who gave the advice must have had general or special authority from the Company to give it, or at least that the Company must have held him out as authorised to give it. It is not suggested that this Company was so limited by its Memorandum and Articles that it could not give such authority. We are unable to see how a Company can authorise the giving of such advice otherwise than as a part of its business activities. So long as a Company does not act *ultra vires* it is for the Company to determine the scope of its business. It appears to be quite common practice for businesses to perform gratuitous services for their customers with the object of retaining or acquiring their goodwill. If they incur expense in doing so it has never so far as we are aware been suggested that such expense is not a business expense. And we think that where companies do perform such service both they and their customers would be surprised to learn that the Company is under no obligation to take any care in the matter.

The ordinary rule, that a defendant can only be liable for loss which was caused by his acts or omissions, appears to us to afford the answer to a number of questions discussed in argument. If the plaintiff acted reasonably in seeking the advice of the defendant and made it clear to the defendant that he intended to rely on the advice with regard to a certain matter, then it could properly be said that by giving the advice the defendant caused the plaintiff to act as he did. If however the plaintiff acted unreasonably in taking or following the advice then it was his own fault if he suffered loss and it would be unnecessary to consider whether the defendant owed any duty of care when giving the advice. Accordingly we are only concerned with a case where the plaintiff acted reasonably. In this case the respondent alleges that he was aware that the appellant had special facilities for obtaining the necessary information and was in a position to give reliable and up-to-date advice, and was aware that he intended to act on the appellant's advice. So if taking care would have caused the appellant to give different advice, these allegations would enable the respondent to prove that the appellant's failure to take care caused his loss.

Much of the argument was directed to establishing that a person giving advice cannot be under any duty to take care unless he has some special skill competence qualification or information with regard to the matter on which his advice is sought. But then how much skill or competence must he have? Even a man with a professional qualification is seldom an expert on all matters dealt with by members of his profession. Must the adviser be an expert or specialist in the matter on which his advice is sought? And when it comes to matters of business or finance where those whose business it is to deal with such matters generally have no recognised formal qualification, how is the sufficiency of the adviser's special skill or competence to be measured? If the adviser is invited in a business context to advise on a certain matter and he chooses to accept that invitation and to give without warning or qualification what appears to be considered advice, is he to be allowed to turn round later and say that he was under no duty to take care because in fact he had no sufficient skill or competence to give the advice?

It must be borne in mind that there is here no question of warranty. If the adviser were to be held liable because his advice was bad then it would be relevant to enquire into his capacity to give the advice. But here and in cases coming within the principles laid down in *Hedley Byrne* the only duty in question is a duty to take reasonable care before giving the advice. We can see no ground for the distinction that a specially skilled man must exercise care but a less skilled man need not do so. We are unable to accept the argument that a duty to take care is the same as a duty to conform to a particular standard of skill. One must assume a reasonable man who has that degree of knowledge and skill which facts known to the enquirer (including statements made by the adviser) entitled him to expect of the adviser, and then enquire whether such a reasonable man could have given the advice which was in fact given if he had exercised reasonable care.

Then it was argued that an adviser ought not to be under any liability to exercise care unless he had, before the advice was sought, in some way held himself out as able and willing to give advice. We can see no virtue in a previous holding out. If the enquirer, knowing that the adviser is in a position to give informed advice, seeks that advice and the adviser agrees to give it we are unable to see why his duty should be more onerous by reason of the fact that he had previously done the same for others. And again, if the previous conduct of the adviser is relevant, would it be sufficient that, in order to attract new customers or increase the goodwill of existing customers, he had indicated a general willingness to do what he could to help enquirers, or must he have indicated a willingness and ability to deal with the precise kind of matter on which the enquirer seeks his assistance?

In our judgment when an enquirer consults a business man in the course of his business and makes it plain to him that he is seeking considered advice and intends to act on it in a particular way, any reasonable business man would realise that, if he chooses to give advice without any warning or qualification, he is putting himself under a moral obligation to take some care. It appears to us to be well within the principles established by the *Hedley Byrne* case to regard his action in giving such advice as creating a special relationship between him and the enquirer and to translate his moral obligation into a legal obligation to take such care as is reasonable in the whole circumstances.

In *Hedley Byrne* their Lordships were not laying down rules. They were developing a principle which flows, as in all branches of the tort of negligence, from giving legal effect to what ordinary reasonable men habitually do in certain circumstances. Admittedly there is nothing in *Hedley Byrne's* case which governs this case. The principles there indicated must be developed from time to time to cover new cases, and we have attempted to set out what we believe to be a proper development to meet the present case. We are unable to construe the passages from our speeches cited in the judgment of the majority in the way in which they are there construed. In our view they are consistent with and support the views which we have already expressed in the present case. We do not think that it would be useful to quote expressions from speeches used without having in mind circumstances such as we have here. Earlier authorities were explained in that case and, with one exception, we do not propose to add to those explanations.

We must however deal with *Low v. Bouverie* [1891] 3 Ch. 82 because the appellant argued that the respondent could not succeed if that case was rightly decided. We do not agree. We see nothing wrong with the decision although the judgments are to some extent coloured by a

view of the effect of *Derry v. Peek* 14 App. Cas. 337 which was held in *Hedley Byrne & Co's* case to be erroneous. In *Low & Bouverie*, Low, a moneylender, proposed to lend money to a relative of Bouverie who had interests in a trust of which Bouverie was a trustee. So at the instigation of the borrower he wrote to Bouverie asking whether those interests were mortgaged. In reply Bouverie mentioned two mortgages but failed to mention others which he had forgotten about. So Low lent money but lost it because the borrower became bankrupt and there was nothing left of the borrower's interest in the trust after payment of the mortgages which Bouverie had forgotten to mention.

In the first place Bouverie was not acting in any business capacity. He was acting in his private capacity as a trustee in a family trust and we have already said that in our view there is in general no duty to take care imposed on an adviser who is not acting in the course of his business or professional activities. And secondly it appears from the judgments of Lindley and Bowen L.J.J. that Bouverie's letters to Low were not unequivocal statements that there were no other encumbrances. "They are quite consistent with the view that the encumbrances mentioned by the defendant were all he knew of or remembered" (p. 103) "I think that his language would be reasonably understood as conveying an intimation of the state of his belief, without an assertion that the fact was so apart from the limitation of his own knowledge;" (p. 106) so it was not reasonable for Low to act on Bouverie's letters without taking further steps to check the information.

We think that the judgments of the majority in the High Court are consistent with the views which we have expressed as to the principles which should govern the present case. We are therefore of opinion that the appeal should be dismissed.



In the Privy Council

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THE MUTUAL LIFE AND CITIZENS'  
ASSURANCE COMPANY LIMITED  
AND ANOTHER

v.

CLIVE RALEIGH EVATT

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