TORTS—NEGLIGENCE—INACCURATE STATMENTS OF FINANCIAL STANDING INTENDED TO BE RELIED UPON

One of the hallmarks of the English Common Law has been its ability to adjust to changing social and political conditions without the help of legislation. The scope for judge-made law is decreasing, however, with the growth of statutory law. The recent decision of the House of Lords in *Hedley Byrne & Co., Ltd.* v. *Heller & Partners, Ltd.*,[1] shows that judge-made law is not dead, and illustrates the truth of Lord Macmillan's observation that "the categories of negligence are never closed".[2]

In the *Hedley* case, the plaintiff, Hedley Byrne & Co., asked its banker, National Provincial Bank, to inquire as to the financial standings of one of the appellant's clients, Easipower Ltd. National Provincial Bank communicated by telephone with the respondents, Heller & Partners Ltd., who were Easipower's bankers, stated that they wanted to know in confidence and without responsibility on the part of the respondents, the respectability of Easipower Ltd. The respondents replied that they believed the company to be respectably constituted and good for its normal business engagements. Some months later the bank wrote to the respondents asking in confidence the respondents' opinion of the respectability and standing of Easipower, Ltd. by stating whether the respondents considered the company trustworthy, in the way of business, to the extent of £100,000 *per annum*. The respondents replied as follows:

> CONFIDENTIAL
>
> For your private use and without responsibility on the part of the bank or its officials.
>
> Dear Sir, In reply to your inquiry of 7th instant. We beg to advise:— Re E. . . . . Ltd. Respectably constituted company, considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see. Yours faithfully . . . Per pro. Heller & Partners, Ltd.[3]

The respondents' reply was communicated to the bank's customers, the appellants. Relying on these statements, the appellants, who were advertising agents, placed orders for advertising time and space for Easipower, Ltd., and assumed personal responsibility for payment to the television and newspaper companies concerned. Easipower, Ltd. went into liquidation and the appellants lost over £17,000 on the advertising contracts. The appellants sued the respondents for the amount of the loss, alleging that the respondents' replies to the bank's inquiries were given negligently (in the sense of misjudgment), by making a statement which gave a false impression as to Easipower's credit. Negligence was found at the trial, and assumed by the Court of Appeal.

Although the House of Lords found that the respondents were not liable because of their express disclaimer of responsibility, the case is important for the statement of principle that it enunciated. Lord Morris, after reviewing the previous cases, stated:

> 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

1 (H.L. (E.)) [1964] A.C. 465; [1963] 2 All E.R. 575.
2 *Donoghue* v. *Stevenson* (H.L. (Sc.)) [1932] A.C. 562, 619; [1932] All E.R. Rep. 1, 30.
3 *Supra* n. 1, at 468 (A.C.), 579 (All E.R.).

> on 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 on his judgement or his skill or his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.[4]

Lord Devlin adds:

> The respondents in this case cannot deny that they were performing a service. Their sheet anchor is that they were performing it gratuitously and therefore no liability for its performance can arise. My Lords, in my opinion this is not the law. A promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort.[5]

In reaching this conclusion, it was necessary for the House of Lords to disapprove of two previous decisions of high authority. Lord Reid stated, that if the principle he laid down was correct, "then it must follow that *Candler* v. *Crane, Christmas & Co.*[6] was wrongly decided."[7] Further, in discussing the decision in *Le Lievre* v. *Gould*[8] he said:

> We now know on the authority of *Donoghue* v. *Stephenson*[9] that Bowen, L.J. was wrong in limiting duty of care to guns or other dangerous instruments, and I think that, for reasons which I have already given, he was also wrong in limiting the duty of care with regard to statements to cases where there is a contract. On both points Bowen, L.J. was expressing what was then generally believed to be the law, but later statements in this House have gone far to remove those limitations. I would therefore hold that the ratio in *Le Lievre* v. *Gould*[8] was wrong and that *Cann* v. *Willson*[10] ought not to have been overruled.[11]

There are two features which distinguish the *Hedley* case from the typical action for negligence: it was an action for negligence in word, not deed, and it caused financial loss, not physical damage.

Apart from defamation, liability in damages for misstatement may be founded: (a) on a breach of contract or fiduciary relation; (b) on an action for deceit; and (c) on a negligent breach of duty.

No action for breach of contract lay because there was no contractual relationship. For the purpose of this case comment it is necessary to do no more than draw attention to the fact that the borderland between tort and contract, and the nature and limitations of the tort action arising out of a breach of contract, are poorly defined. Although this has its disadvantages, it also has its advantages as is pointed out by Dean Prosser:

> . . . the very uncertainty of the rules has permitted a degree of flexibility which has advantages of its own. Where the cause of action is neither fish nor fowl, but both or either, the courts have been free to look to the purpose of the rule of law in question, and come out with one rule of the survival of actions, or the statute of limitations, or the measure of damages, to be applied to cases of personal injury, and a different rule for property or pecuniary loss.
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> . . . When the ghosts of case and assumpsit walk hand in hand at midnight, it is sometimes a convenient and comforting thing to have a borderland in which they may lose themselves.[12]

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4 *id.* at 502-03 (A.C.), 579 (All E.R.).
5 *id.* at 526 (A.C.), 608 (All E.R.).
6 (C.A.) [1951] 2 K.B. 164, [1951] 1 All E.R. 426.
7 *Supra* n. 1, at 487 (A.C.), 583 (All E.R.).
8 (C.A.) [1893] 1 Q.B. 491.
9 (H.L. (Sc.)) [1932] A.C. 562, [1932] All E.R. Rep. 1.
10 (1888) 39 Ch. D. 39.
11 *Supra* n. 1, at 488-89 (A.C.), 584 (All E.R.).
12 Prosser, *Selected Topics on the Law of Torts* 452 (1953).

It is submitted that this lack of a precise line of demarcation is one of the reasons why the law of torts has been able to make inroads into areas traditionally reserved for contract. The movement is visible in *Donoghue* v. *Stevenson*,[13] and is evident in the *Hedley* case. As a result the courts have created a duty, which is the basis for an action in negligence, where the lack of a common law consideration prevented recovery in contract.[14]

In order to make the defendant liable in an action for deceit *Derry* v. *Peek*[15] established that it was necessary for the plaintiff to prove actual fraud. Much of the difficulty in this area of negligent misstatement has been caused by the interpretation put on this case. It is true Lord Bramwell said: "To found an action for damages there must be a contract and breach, or fraud";[16] but it was shown in the House of Lords in *Nocton* v. *Ashburton*[17] that that statement was much too wide. Reiterating his position in *Robinson* v. *National Bank of Scotland*[18] Lord Haldane said:

> I think, as I said in *Nocton's* case,[17] that an exaggerated view was taken by a good many people of the scope of the decision in *Derry* v. *Peek*.[15] The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the courts may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the courts are in any way hampered in recognizing that the duty of care may be established when such cases really occur.

Until the *Hedley* case, a plaintiff's remedies were confined almost solely to breach of contract or an action for deceit. It is true that if a special relationship between the parties was found, the defendant could be held liable in negligence for his misstatement; such a breach of fiduciary relationship was found in *Nocton* v. *Ashburton*.[17] In that case a mortgagee brought an action against his solicitor, claiming to be indemnified against the loss which he had sustained by having been improperly advised and induced by the defendant, acting as his confidential solicitor, to release a part of a mortgage security, whereby the security had become insufficient. The Court held that an action for indemnity would lie for loss arising from a misrepresentation made in breach of a special duty imposed by the Court by reason of the relationship of the parties. A special relationship was also found to exist in *Woods* v. *Martins Bank, Ltd.*,[19] between a bank and its customers.

However, there was no general duty of care as can be seen from the decisions in *Le Lievre* v. *Gould*,[20] and *Candler v. Crane, Christmas &*

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13 *Supra* n. 9.

14 To compensate for this development in the law of torts, there is a movement afoot in the realm of contract law, to modify the doctrine of consideration. Lord Denning is the prime advocate of this approach and a statement of his views is found in *Central London Property Trust Limited* v. *High Trees House Limited*, [1947] 1 K.B. 130, 134-35:

> There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on . . . The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it . . . In my opinion the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result so much the better.

15 (H.L. (E.) 1889) 14 App.Cas. 337.

16 *id.* at 347.

17 (H.L. (E.)) [1914] A.C. 932.

18 (H.L. (Sc.)) 1916 S.C. 154, 157.

19 [1959] 1 Q.B. 55, [1958] 3 All E.R. 166.

20 *Supra* n. 8.

Co.;[21] *Cann* v. *Willson*,[22] which had decided that there was a duty to take care, had been overruled by *Le Lievre* v. *Gould*.[20] By extending responsibility to cases where there is "a particular relationship created *ad hoc*",[23] the House of Lords is doing for negligent misstatement what it did for manufactured articles in *Donoghue* v. *Stevenson*.[24]

The objection that there is no duty to act on the part of the defendant so if he acts negligently, no liability should attach, is rejected by Lord Reid when he states:

> A reasonable man, knowing that he was being trusted or that his skill and judgement 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.[25]

It is submitted that the rationale behind this conclusion reached by Lord Reid is found in the fact that in his last example the defendant's affirmative conduct has made the situation worse, either by increasing the danger, or by lulling the plaintiff into false security, or by depriving him of the possibility of help from someone else.

The idea of holding liable a person voluntarily undertaking to do a task if he does not exercise care in fulfilling the task, is not foreign to the Common Law. If a doctor gratuitously undertakes to treat a patient then he is bound to exercise the professional skill and knowledge expected by a reasonable man. This policy has led to criticism, since some doctors intentionally avoid giving aid to the injured unless they are relieved of the responsibility which is placed upon them when they donate their services. However, the alternative of not holding a doctor liable, even if he is negligent, is even less equitable. Another example is to be found in the case of a gratuitous bailment, where, since 1623 a gratuitous bailee could be liable in assumpsit for failure to look after the bailed property properly.[26]

There are definite reasons why the law has been slow in giving plaintiffs a remedy in this area of negligent misstatement. Where there is a contract, then the people to whom a contractual duty is owed are readily ascertainable. In the case of deceit the difficulty of ascertaining the victim of the fraud is not very hard. However, in the case of a misstatement there is no clear line that can be drawn so as to limit the liability of the defendant. But this problem of duty has been encountered in other areas of tort and has not been found to be insurmountable. It is obvious that all misstatements cannot be actionable. Quite often even careful people express definite opinions on social or informal occasions, even when they see others are likely to be influenced by them, and they often do it without taking that care which they would take if asked for their opinion professionally, or in a business connection. There must be present some relationship between the parties requiring the speaker to exercise reasonable care.

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21 *Supra* n. 6.
22 *Supra* n. 10.
23 *Supra* n. 1, at 530 (A.C.), 611 (All E.R.).
24 *Supra* n. 9.
25 *Supra* n. 7, at 486 (A.C.), 583 (All E.R.).
26 Ames, *The History of Assumpsit* (1888) 2 Harv. L. Rev. 1, 6.

The *Restatment of the Law of Torts*,[27] outlines the conditions of liability for negligent misstatement as follows:

> §552. One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if
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> (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
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> (b) the harm is suffered
>
> (i) by the person or one of the class of persons for whose guidance the information was supplied, and
>
> (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

Lord Devlin recognizes not only the difficulty in drawing the distinction between a negligent act and a negligent statement, but also the absurdity of trying to make this differentiation a material factor in ascertaining liability. When speaking of a defendant who is given a car to overhaul, and who negligently repairs or omits to repair it, he says,

> It would be absurd in any of these cases to argue that the proximate cause of the driver's injury was not what the defendant did or failed to do but his negligent statement on the faith of which the driver drove the car and for which he could not recover.[28]

The principle that a person is not liable for an innocent misrepresentation is in no way impeached by recognition of the fact that if a duty exists then there is a remedy for breach of it. This is supported by Lord Justice Bowen's statement in *Low* v. *Bouverie*[29] that

> . . . the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty, such as the law recognizes, to be careful.

Moreover, the second distinction based on whether loss is occasioned by a physical or non-physical injury, can be supported no longer either. In the early development of the Common Law great stress was placed on physical acts; thus we see the requirement of livery of seisin in property law, and the peppercorn theory of consideration in contracts; and only recently has tort law recognized that there could be recovery for mental shock even if there was no accompanying physical injury. Our society is becoming increasingly commercialized and it is only logical that the law recognize that a man can suffer without the concomitant physical pain that was for such a long time the basis for recovery in this branch of torts.

Therefore, there is no reason to distinguish between damages occasioned by means of word from those occasioned by means of deed, or to say that the harm was merely financial not physical. As long as a duty can be found to exist then the Court should compensate the injured party. When a duty exists will have to be determined on the facts of each case; and in this regard the statement of Lord Morris,[30] must be considered as laying down an important test for "duty" in such circumstances.

Although the House of Lords applied Lord Justice Denning's dissent in *Candler* v. *Crane, Christmas & Co.* their formulation of the rule was wider than that enunciated by Lord Justice Denning, who stated his

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27 3 Am. L. Inst., *Restatement of the Law of Torts*, 122 (1938).

28 *Supra* n. 1, at 516-17 (A.C.), 602 (All E.R.).

29 (C.A.) [1891] 3 Ch. 82, 105.

30 *Supra* n. 4.

rule in terms of answers to three questions:[31] (1) what persons are under a duty to use care, apart from contract, in making a statement?

> My answer is 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. Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports. 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, . . . Those 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.[32]

(2) To whom do these professional people owe this duty?

> They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts . . .
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> 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?[33]

(3) To what transactions does the duty of care extend?

> It extends, I think, only to those transactions for which the accountants knew their accounts were required.[34]

Lord Reid's view of the rule in the *Hedley* case was not limited to cases of fiduciary relationship in the narrow sense of relationships which had been recognized by the Court of Chancery as being of a fiduciary character. He states,

> . . . I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.[35]

Lord Morris in his statement of the rule goes even further.[36] His concept of the assumption of responsibility required no request, and far from liability being limited to reliance by the inquirer, he found that it was not material that the person to whom the answers were to be given was unnamed and unknown to the bank.[37]

Lord Hodson did not think it was possible to catalogue the special features which must be found to exist before the duty of care will arise in a given case.[38] His formulation of the rule was similar to that of Lord Morris. He states

> . . . that if in a sphere where a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry such person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows, or should know, will place reliance on it, then a duty of care will arise.[39]

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31 (C.A.) [1951] 2 K.B. 179-82, [1951] 1 All E.R. 433-36.
32 *Id.* at 179-80 (K.B.), 433 (All E.R.).
33 *Id.* at 180-81 (K.B.), 434 (All E.R.).
34 *Id.* at 182 (K.B.), 435 (All E.R.).
35 *Supra* n. 1, at 486 (A.C.), 583 (All E.R.).
36 *Supra* n. 4.
37 *Supra* n. 1, at 493 (A.C.), 588 (All E.R.).
38 *Id.* at 514 (A.C.), 601 (All E.R.).
39 *Ibid.*

Lord Devlin was ready "to adopt any one of your Lordships' statements as showing the general rule;"[40] but he himself was content "with the proposition that wherever there is a relationship equivalent to contract there is a duty of care".[41] Such a relationship may be either general, as that of solicitor and client, or specific, in relation to a particular transaction.

Lord Pearce states,

> There is also in my opinion a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded . . . .
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> To impart such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer.[42]

From this examination of the judgments, it can be seen that there is no unanimity as to the test to be employed in determining liability in the case of a negligent misstatement.

The *Hedley* case can also be attacked on a number of other grounds. The statements of principle were all *obiter* since the court did not have to decide the question of negligent misstatement in view of the express disclaimer. The upholding of the disclaimer itself can provide a convenient escape for those who may be affected by the statement of principle in the future.

Because of the different ways in which the Lords enunciated their opinions, there is some ground for saying that the *Hedley* case only decided that there is a duty of care to be honest. Lord Reid[43] and Lord Pearce[44] consider that in circumstances such as a banker in the position of Hellers, not only a duty to be honest, but also a duty of care is owed. Lord Morris[45] and Lord Hodson[46] state that only a duty to be honest is required. Lord Devlin did not commit himself. It is submitted that if all that is required is a duty to be honest then the case decides little more than what was already stated in *Derry* v. *Peek*, and from the interest the Lords took in the *Hedley* case it is unlikely that they intended their statements to be little more than a reiteration of the older case.

The judicial opinion in Canada has not been entirely sympathetic to the view of the law as laid down in *Candler* v. *Crane, Christmas & Co., supra.* In *Guay* v. *Sun Publishing Co.*,[47] two of the five judges in the Supreme Court of Canada held that there was a duty on a newspaper to take reasonable care in checking the correctness of articles it printed. In their opinion there was no more reason to allow escape from liability for carelessly inflicting a mental shock by means of words, than for carelessly inflicting injury by physical contact. Although the majority held that the defendant newspaper was not liable for negligently publishing the false statement that the plaintiff's husband and children were killed in an auto accident, the division of the Court on this point was significant.

Evidence of the fact that the Canadian Courts are striving to achieve more equitable results in this area is also found in the decision of the Nova Scotia Supreme Court in *Fillmore's Valley Nurseries Ltd.* v. *North Am-*

40 *Id.* at 530 (A.C.), 611 (All E.R.).
41 *Ibid.*
42 *Id.* at 539 (A.C.), 617 (All E.R.).
43 *Id.* at 492 (A.C.), 586 (All E.R.).
44 *Id.* at 540 (A.C.), 618 (All E.R.).
45 *Id.* at 495, 502-03 (A.C.), 589, 594 (All E.R.).
46 *Id.* at 513 (A.C.), 600 (All E.R.).
47 [1953] S.C.R. 216.

erican Cyanamid, Ltd.[48] There the plaintiff nursery, relying on the statements of the defendant manufacturer's senior agriculturalist, Dr. Cooper, who stated that no harmful effects from a chemical weed killer would be left in the soil after two weeks, had nearly its entire crop of plants destroyed when planted two months after application. The court found the defendant liable both in negligence and in contract. However, it would not decide if the statement by Dr. Cooper would in itself constitute actionable negligence, but the innocent misrepresentation coupled with the supply of amino trialzale for the purpose made known to the defendant, and with the omission to caution or warn, did constitute actionable negligence.

It is submitted that the coupling of the sale with the statement, to achieve actionable negligence, was an attempt by the Court to show its displeasure with the general rule of no liability; and the coupling was just as means to an end.

In *Boyd* v. *Ackley*[49] a firm of accountants claimed to be employed not by the plaintiff, but by his company. Although the British Columbia Supreme Court found them to be actually employed by the plaintiff so therefore liable in contract, Whittaker, J. stated:

> If it had been necessary for me to decide whether the defendants owed the plaintiffs a duty of care apart from contract, I think I would have been inclined to hold that under the special circumstances there was such a duty.[50]

Therefore, it is submitted that the decision of the House of Lords in the *Hedley* case is a welcome addition to our jurisprudence. A number of commentators have expressed concern with the repercussions that could follow if the case is carried to its extreme, but the Courts are not blind to these dangers and in all probability will confine the principle laid down in the case until its effect is fully appreciated.[51]

Although English cases are no longer binding on Canadian courts, decisions of the House of Lords still carry much weight in Canada. For this reason future victims of negligent misstatements, armed with the *dicta* in a number of Canadian cases, and the unanimous statement of principle in the *Hedley* case, can see a greater hope for success in recovering for damages occasioned by such misstatements, and this is only reasonable.

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48 (1958) 14 D.L.R. (2d) 297.
49 (1962) 32 D.L.R. (2d) 77.
50 *id.* at 80.
51 Irish, writing in (1963) 62 Mich. L. Rev. 145, criticizes *Texas Tunnelling Co.* v. *Chattanooga* (E.D. Tenn. 1962) 204 Fed. Supp. 821, which reached conclusions similar to those in the *Hedley* case. Irish advocates a more moderate approach which would prevent the imposition of huge and unforeseeable liability, though he does admit that the law in this area is in a state of flux and is not likely to reach a satisfactory state for some time.