



The Law of Torts (Part 2)

Negligent misstatements

Ref: CACL Ch 14

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Revision: Duty of care and breach of duty



Example 1

- G bought long underwear from a retailer who had purchased them from a manufacturer. He wore them for a day and began to get itchy. At the end of the week he swapped them for another pair. He developed acute dermatitis so severe that he had to spend 17 week in hospital. The underwear contained chemicals that had somehow not been washed out during the manufacturing process.
- Advise G whether he can sue the retailer and/or the manufacturer
- What if G had an unusually sensitive skin with a predisposition to dermatitis?

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**Example 2**

- J, a 13 year old boy was given as a shanghai as a birthday present. He was playing with it when he fired a stone that struck his friend in the eye.
- Advise K of his rights against J's parents.
- Assume the parents had given the boy very clear instructions as to how to use the shanghai and instructed him to be very careful

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**Example 3**

- N had never visited Rottnest Island before. When he arrived at a rock pool he dived from a partially submerged rock ledge into the water. His head struck a fully submerged rock and he became a quadriplegic.
- Advise N

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- Example 4
- X is an inexperienced engineer/accountant/driver/surgeon. What standard of care does the law expect of such an inexperienced person? See *Imbree v McNeil* (14.400)
- What if you hold yourself out as having particular skills (eg as a surgeon or adviser such as a tax expert)

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Introduction

- Liability for negligent misstatement (or negligent advice) is governed by the same broad rules as for 'ordinary' negligence – a plaintiff needs to prove that the defendant owed a duty of care that has been breached and loss resulted
- The major conceptual difference between the 'ordinary' negligence that we have been looking at is that '**words**' rather than '**acts**' cause the loss and that loss is '**pure economic loss**' (rather than physical or psychological loss)
- For a long time courts said **no duty of care** owed by **professionals** (like bankers, lawyers, accountants, auditors) for negligent advice causing pure economic loss.
- Why?
 - The reason was summed up in 1931 in *Ultramares v Touche* (CACL 14.180) Cardozo J said that no duty of care was owed by the auditor to its client because such a finding of liability may lead to liability for *indeterminate amount of money* for an *indeterminate (period of) time* to an *indeterminate class* of possible plaintiffs

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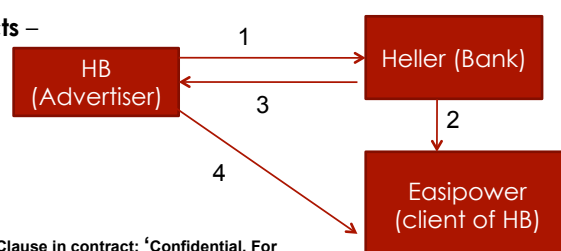
- The major difference concerns the duty of care issue. In order to establish a **duty of care**, the plaintiff must do more than the show loss was 'reasonably foreseeable' under the 'neighbour' test first encountered on Donoghue v Stevenson.
- To succeed the plaintiff must prove that there was a **special relationship** based on
 - An **assumption of responsibility** by the defendant adviser and
 - **Reasonable reliance** by the plaintiff

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The breakthrough case

Hedley Byrne v Heller (1963) (CACL 14.270)

Facts –



Clause in contract: 'Confidential. For private use & without responsibility on part of bank'.

Issue: Is Heller liable for the negligent advice it gave to HB that caused pure economic loss?

Decision: A duty of care can exist provided there is a **"special relationship" based on some element of "reliance"**. However the limitation clause saved Heller.

Following cases have fleshed out what this "special relationship/reliance" means

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The Australian story

- **MLC v Evatt** (CACL 14.280)

- **Facts:** MLC made statements to Evatt about the state of Palmer Ltd. Evatt acted on the advice and lost money.

- **Issue:** did MLC owe a duty of care in these circumstances?

- **Decision:** Privy Council (used to be our highest court) said no duty of care existed *unless advice was given by an expert with specific skills*. However, earlier, when the case was heard by the HCA, the HCA decided there was a duty of care. Barwick CJ explained the nature of the **special relationship and when it arises (next slide)**

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- When does a 'special relationship' arise? Barwick CJ:

- Whenever a person gives **information** or advice
 - Whether that information is actively sought or merely accepted by the other person
 - Upon a serious matter (esp business matter) and
 - The relationship of the parties arising out of the circumstances is such that the speaker realises or ought to realise that he is being trusted
 - Particularly if he access information or expertise as to the matter in question
 - The speaker, choosing to give information and advice, comes under a duty to provide that information or advice with reasonable care

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Shaddock v Parramatta City Council (1981) (CACL 14,290)

- The Parramatta City Council was asked by Shaddock, a developer, whether the land that it intended to acquire was affected by a road-widening proposal.
- The Parramatta advised the developer that the land (pictured on north-west corner of Macquarie and O'Connell St) was not affected by a road-widening proposal, when in fact it was.
- Shaddock suffered **pure economic loss** as a result of the Council's failure to disclose the information (the development had to be scaled back)



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- The High Court posed three questions (similar to Barwick):
 - was the advice given in respect of a *serious or business matter*?
 - were the circumstances such that the *adviser should have realized that the defendant was being trusted to give correct advice* on which the advised intended to act?; and
 - in the circumstances, *was it reasonable for the advised to have relied on the advice*?
- HCA answered these questions in the affirmative – and said there was **no distinction between providing advice** (as an auditor does) and **'merely' providing information** (as the PCC council officer did) because it was the kind of information that required 'skill and competence' that the Council had. Where else do you get this information???
- This was sufficient to create a **'special relationship'**.
- NB – no 'indeterminacy' issue here – just one plaintiff with finite loss...compare next case...

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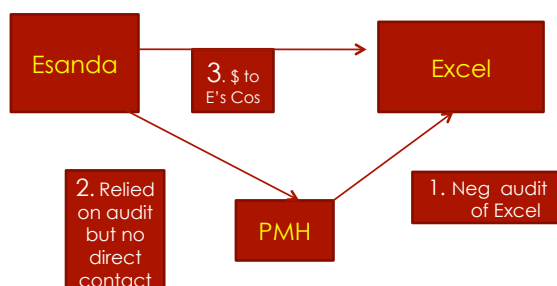
■ **San Sebastian v Minister** (CACL 14.300)

- **Facts:** SS a private developer. Development plan by Minister encouraged private developers to buy land sites and build skyscrapers. On the basis of the plan SS bought land with a view to development. Plan abandoned. SS suffered pure economic loss.
- **Issue:** did M owe SS a duty of care?
- **Decision:** No duty of care.
- **Reasons:**
 - SS failed to establish that M made the representations with the intention of inducing developers to act in **reliance on the reps.**
 - HCA said that *usually* there would be an **antecedent request** from P to D (eg 'please provide me with information about road widening or credit worthiness') as a means of establishing **reliance** and the **special relationship** that must exist but not necessary.
 - Indeterminacy issue?

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Third party scenarios

- Where there are **three parties** in the transaction (eg auditor – client – third party investor) the duty of care is harder to establish: see **Esanda Finance v PMH (CACL 14.335)**



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- **Issue:** when is a duty owed in these circumstances where P did not request the advice?
- **Decision** – PMH owed no duty to Esanda. What is the test?
 - McHugh J - No duty of care (where D is not acting on P's request) unless:
 - D **knew or ought to have known** that the **information or advice** would be communicated to the P **individually or as a member of a class to which P belongs** (eg investors or shareholders)
 - For a purpose that would be very likely to lead the plaintiff to enter into a transaction of the kind P did enter into
 - In reliance on the information or advice and thereby
 - Risk incurring the economic loss if statements were untrue
 - Mere knowledge that someone **might see the advice and act on it** is not enough.
 - Why the extra limitation (the need for an 'intention to induce')?

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Extra case

- **R Lowe Lippman Figdor & Franck v AGC**
- Facts: LLF (auditors) prepared negligently audited accounts to X Ltd (their client company) in the knowledge that the company would probably supply a copy to their lender, AGC, which required the accounts for loan review purposes.
- Despite holding that the auditors had this knowledge, the *Full Court of the Victorian Supreme Court* held that:
 - *the auditor who supplies its report to the company in the usual way cannot be liable unless its purpose, or one of its purposes, in making the statement in question is to induce the plaintiff, or a class which includes the plaintiff, to act on it.*

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2. Breach of duty

■ Same two-stage process as earlier:

- Was there a foreseeable risk of harm (risk not insignificant) – common law and Wrongs Act s48(1)
- How would a reasonable person have responded?: Common law and s48(2)
- The four factors do not work well with neg misstatement and pure economic loss cases.

■ Instead we consider:

■ 1. The test in *Rogers v Whitaker* (CACL 14.410)

- For professionals and persons with special training or skills – accountants, engineers, lawyers, doctors etc – it has been accepted that *the standard of care to be met by a person with special skill or competence is that of the ordinary person exercising and professing to have that special skill.*

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■ 2. Standard of care for professionals (CACL 14.480) – the 'peer professional opinion' test

- *Wrongs Act ss59-60* (CACL 14.480) – see the four elements
 - A professional does not incur liability if he or she acted in a manner that was widely accepted by peer professional opinion as competent professional practice
 - However court can overrule if the opinion is irrational
 - There may be differing opinions on a matter
 - Peer professional opinion does not need to be unanimous to be considered widely accepted
- **NB** This is a **defence** once a breach has been established – **once P proves breach of prof standard of care D is liable unless he or she can show he acted in accord with peer professional opinion**

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- An interesting 'standard of care' case for professionals:
 - **Mules v Ferguson (2015)** (CA 14.485)
 - **Facts:** a GP misdiagnosed M's condition (musculoskeletal instead of cryptococcal meningitis) with catastrophic consequences. F failed to physically examine M.
 - **Issue:** was there a failure to act with 'reasonable skill and care'? (remember that professionals do not have to be perfect – just behave reasonably!). Defendant relied on peer professional advice defence.
 - **Decision:**
 - **Trial judge** found there was a breach of duty but **the breach did not cause the injury because an examination would not have caused F to think differently about the symptoms.** He also allowed the peer professional opinion defence
 - **Appeal court** denied it because the two GPs based their evidence on F's version of events – not the trial judge's finding of fact that (a) F had complained of headaches and flushing and (b) F was aware of her limited neck movement.
 - F liable for M's injuries

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- **3. Damages**
 - Same two requirements as for negligence acts. Need to establish:
 - **Causation**
 - 'but for' test/Wrongs Act s51(1)(a)
 - See Mules v Ferguson as an example
 - **Remoteness**
 - 'Reasonably foreseeable' loss/Wrongs Act s51(1)(b)

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- **Relevance of ACL s18 to neg misstatement.**
- **Section 18** of the ACL is used in many negligent misstatement cases, often in conjunction with common law negligence.
- Review the s18 criteria and see why it is attractive:
 - **“Engage in conduct”** – broadly defined, including silence and omissions
 - **“Misleading or deceptive”** – “lead into error” (not high barrier)
 - **Causal connection** between conduct and loss is required but, if shown, no fault required (cf negligence – where it is at the heart of the claim)
 - **No exclusion of s18 permitted** – though P can be put on notice that it cannot rely on the statements: *Butcher v Lachlan Realty* (CACL 13.177)
 - **Wide remedies** including damages under s236