HOUSE OF LORDS

HEDLEY BYRNE & COMPANY LIMITED

v.

HELLER & PARTNERS LIMITED

28th May, 1963.

Lord Reid

Lord Reid

Lord Morris of Borth-y-Gest

Lord Hodson

Lord Devlin

Lord Pearce

my lords,

This case raises the important question whether and in what circumstances

a person can recover damages for loss suffered by reason of his having

relied on an innocent but negligent misrepresentation. I cannot do better

than adopt the following statement of the case from the judgment of

McNair, J. :

" This case raised certain interesting questions of law as to the liability

" of bankers giving references as to the credit-worthiness of their

" customers. The plaintiffs are a firm of advertising agents. The

" defendants are merchant bankers. In outline, the plaintiffs' case

" against the defendants is that, having placed on behalf of a client,

" Easipower Limited, on credit terms substantial orders for advertising

" time on television programmes and for advertising space in certain

" newspapers on terms under which they, the plaintiffs, became per-

" sonally liable to the television and newspaper companies, they

" caused inquiries to be made through their own bank of the defendants

" as to the credit-worthiness of Easipower Limited who were customers of

" the defendants and were given by the defendants satisfactory

" references. These references turned out not to be justified, and the

" plaintiffs claim that in reliance on the references, which they had

" no reason to question, they refrained from cancelling the orders so

" as to relieve themselves of their current liabilities."

The Appellants, becoming doubtful about the financial position of Easi-

power, got their bank to communicate with the Respondents who were

Easipower's bankers. This was done by telephone and the following is

a contemporaneous note of the conversation which both parties agree is

accurate: —

" Heller & Partners, Ltd. Minute of telephone conversation. Call

" from National Provincial Bank Ltd., 15 Bishopsgate, E.C.2. 18.8.58.

" Person called: L. Heller, re Easipower, Ltd. They wanted to know

" in confidence, and without responsibility on our part, the respect-

" ability and standing of Easipower, Ltd., and whether they would be

" good for an advertising contract for £8,000 to £9,000. I replied, the

" company recently opened an account with us. Believed to be

" respectably constituted and considered good for its normal business

" engagements. The company is a subsidiary of Pena Industries, Ltd.,

" which is in liquidation, but we understand that the managing director,

" Mr. Williams, is endeavouring to buy the shares of Easipower, Ltd.,

" from the liquidator. We believe that the company would not under-

" take any commitments they are unable to fulfil."

Some months later the Appellants sought a further reference, and on 7th

November, 1958, the city office of the National Provincial Bank Limited

wrote to the Respondents in the following terms: —

" Dear Sir, We shall be obliged by your opinion in confidence as

" to the respectability and standing of Easipower Ltd., 27, Albemarle

" Street, London, W.1, and by stating whether you consider them

" trustworthy, in the way of business, to the extent of £100,000 per

" annum advertising contract. Yours faithfully,"

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On 11th November, 1958, the Respondents replied as follows: —

" CONFIDENTIAL

" For your private use and without responsibility on the part of this

" Bank or its officials.

" Dear Sir, In reply to your enquiry letter 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 Limited."

The National Provincial Bank communicated these replies to their

customers the Appellants, and it is not suggested that this was improper

or not warranted by modern custom. The Appellants relied on these

statements and as a result they lost over £17,000 when Easipower went into

liquidation.

The Appellants now seek to recover this loss from the Respondents as

damages on the ground that these replies were given negligently and in

breach of the Respondents' duty to exercise care in giving them. In his

judgment McNair, J. said:

" On the assumption stated above as to the existence of the duty,

" I have no hesitation in holding (1) that Mr. Heller was guilty of

" negligence in giving such a reference without making plain—as he

" did not—that it was intended to be a very guarded reference, and

" (2) that properly understood according to its ordinary and natural

" meaning the reference was not justified by facts known to Mr.

" Heller."

Before your Lordships the Respondents were anxious to contest this

finding, but your Lordships found it unnecessary to hear argument on this

matter, being of opinion that the appeal must fail even if Mr. Heller was

negligent. Accordingly I cannot and do not express any opinion on the

question whether Mr. Heller was in fact negligent But I should make it

plain that the Appellants' complaint is not that Mr. Heller gave his reply

without adequate knowledge of the position, nor that he intended to create

a false impression, but that what he said was in fact calculated to create a

false impression and that he ought to have realised that. And the same

applies to the Respondents' letter of 11th November.

McNair, J. gave judgment for the Respondents on the ground that they

owed no duty of care to the Appellants. He said:

" I am accordingly driven to the conclusion by authority binding

" upon me that no such action lies in the absence of contract or

" fiduciary relationship. On the facts before me there is clearly no

" contract, nor can I find a fiduciary relationship. It was urged on

" behalf of the Plaintiff that the fact that Easipower Limited were

" heavily indebted to the Defendants and that the Defendants might

" benefit from the advertising campaign financed by the Plaintiffs,

" were facts from which a special duty to exercise care might be

" inferred. In my judgment, however, these facts, though clearly

" relevant on the question of honesty if this had been in issue, are not

" sufficient to establish any special relationship involving a duty of

" care even if it was open to me to extend the sphere of special relation-

" ship beyond that of contract and fiduciary relationship."

This judgment was affirmed by the Court of Appeal both because they

were bound by authority and because they were not satisfied that it would

be reasonable to impose upon a banker the obligation suggested.

Before coming to the main question of law, it may be well to dispose

of an argument that there was no sufficiently close relationship between

these parties to give rise to any duty. It is said that the Respondents did

not know the precise purpose of the enquiries and did not even know

whether the National Provincial Bank wanted the information for its own

use or for the use of a customer: they knew nothing of the Appellants.

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I would reject that argument. They knew that the enquiry was in connection

with an advertising contract, and it was at least probable that the infor-

mation was wanted by the advertising contractors. It seems to me quite

immaterial that they did not know who these contractors were: there is no

suggestion of any speciality which could have influenced them in deciding

whether to give information or in what form to give it. I shall therefore

treat this as if it were a case where a negligent misrepresentation is made

directly to the person seeking information, opinion or advice, and I shall

not attempt to decide what kind or degree of proximity is necessary before

there can be a duty owed by the defendant to the plaintiff.

The Appellants' first argument was based on Donoghue v. Stevenson [1932]

A.C. 562. That is a very important decision, but I do not think that it has

any direct bearing on this case. That decision may encourage us to develop

existing lines of authority but it cannot entitle us to disregard them. Apart

altogether from authority, I would think that the law must treat negligent

words differently from negligent acts. The law ought so far as possible

to reflect the standards of the reasonable man, and that is what Donoghue

v. Stevenson sets out to do. The most obvious difference between negligent

words and negligent acts is this. Quite careful people often express definite

opinions on social or informal occasions even when they see that others

are likely to be influenced by them ; and they often do that without taking

that care which they would take if asked for their opinion professionally

or in a business connection. The Appellant agrees that there can be no

duty of care on such occasions, and we were referred to American and South

African authorities where that is recognised although their law appears to

have gone much further than ours has yet done. But it is at least unusual

casually to put into circulation negligently-made articles which are dan-

gerous. A man might give a friend a negligently-prepared bottle of home-

made wine and his friend's guests might drink it with dire results. But

it is by no means clear that those guests would have no action against the

negligent manufacturer.

Another obvious difference is that a negligently-made article will only

cause one accident and so it is not very difficult to find the necessary degree

of proximity or neighbourhood between the negligent manufacturer and

the person injured. But words can be broadcast with or without the consent

or the foresight of the speaker or writer. It would be one thing to say that

the speaker owes a duty to a limited class, but it would be going very

far to say that he owes a duty to every ultimate " consumer " who acts on

those words to his detriment. It would be no use to say that a speaker

or writer owes a duty but can disclaim responsibility if he wants to. He,

like the manufacturer, could make it part of a contract that he is not to be

liable for his negligence: but that contract would not protect him in a

question with a third party, at least if the third party was unaware of it.

So it seems to me that there is good sense behind our present law that

in general an innocent but negligent misrepresentation gives no cause of

action. There must be something more than the mere misstatement. I

therefore turn to the authorities to see what more is required. The most

natural requirement would be that expressly or by implication from the

circumstances the speaker or writer has undertaken some responsibility,

and that appears to me not to conflict with any authority which is binding

on this House. Where there is a contract there is no difficulty as regards

the contracting parties: the question is whether there is a warranty. The

refusal of English law to recognise any jus quaesitum tertio causes some

difficulties, but they are not relevant here. Then there are cases where a

person does not merely make a statement but performs a gratuitous service.

I do not intend to examine the cases about that, but at least they show that

in some cases that person owes a duty of care apart from any contract,

and to that extent they pave the way to holding that there can be a duty

of care in making a statement of fact or opinion which is independent of

contract.

Much of the difficulty in this field has been caused by Derry v. Peek,

14 App Cas 337. The action was brought against the directors of a com-

pany in respect of false statements in a prospectus. It was an action of

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deceit based on fraud and nothing else. But it was held that the directors

had believed that their statements were true although they had no reason-

able grounds for their belief. The Court of Appeal held that this amounted

to fraud in law, but naturally enough this House held that there can be no

fraud without dishonesty and that credulity is not dishonesty. The question

was never really considered whether the facts had imposed on the directors

a duty to exercise care. It must be implied that on the facts of that case

there was no such duty. But that was immediately remedied by the Directors

Liability Act 1890 which provided that a director is liable for untrue

statements in a prospectus unless he proves that he had reasonable ground

to believe and did believe that they were true.

It must now be taken that Deny v. Peek did not establish any universal

rule that in the absence of contract an innocent but negligent misrepresenta-

tion cannot give rise to an action. It is true Lord Bramwell said (at p. 347):

" To found an action for damages there must be a contract and breach, or

" fraud." And for the next twenty years it was generally assumed that

Derry v. Peek decided that. But it was shown in this House in Nocton v.

Ashburton [1914] A.C. 932 that that is much too widely stated. We cannot,

therefore, now accept as accurate the numerous statements to that effect in

cases between 1889 and 1914, and we must now determine the extent of the

exceptions to that rule.

In Nocton v. Ashburton a solicitor was sued for fraud. Fraud was not

proved but he was held liable for negligence. Viscount Haldane, L.C.

dealt with Derry v. Peek and pointed out (at p. 947) that while the relation-

ship of the parties in that case was not enough, the case did not decide

" that, where a different sort of relationship ought to be inferred from the

" circumstances, the case is to be concluded by asking whether an action

" for deceit will lie ... There are other obligations besides that of honesty

" the breach of which may give a right to damages. These obligations

" depend on principles which the judges have worked out in the fashion

" that is characteristic of a system where much of the law has always been

" judge-made and unwritten." It hardly needed Donoghue v. Stevenson

to show that that process can still operate. Then (at p. 950) Lord Haldane

quoted a passage from the speech of Lord Herschell in Derry v. Peek

where he excluded from the principle of that case " those cases where a

" person within whose special province it lay to know a particular fact

" has given an erroneous answer to an inquiry made with regard to it by

" a person desirous of ascertaining the fact for the purpose of determining

" his course ". Then (at p. 954) he explained the expression " constructive

" fraud " and said: " What it really means in this connection is, not moral

" fraud in the ordinary sense, but breach of the sort of obligation which is

" enforced by a court which from the beginning regarded itself as a court

" of conscience ". He went on to refer to " breach of special duty " and

said (at p. 955): "If such a duty can be inferred in a particular case of a

" person issuing a prospectus, as, for instance, in the case of directors

" issuing to the shareholders of the company which they direct a prospectus

" inviting the subscription by them of further capital, I do not find in Derry

" v. Peek an authority for the suggestion that an action for damages for

" misrepresentation without an actual intention to deceive may not lie."

I find no dissent from these views by the other noble and learned Lords.

Lord Shaw also quoted the passage I have quoted from the speech of Lord

Herschell, and, dealing with equitable relief, he approved (at p. 971) a

passage in an argument of Sir Roundell Palmer which concluded—" in

" order that a person may avail himself of relief founded on it he must

" show that there was such a proximate relation between himself and the

" person making the representation as to bring them virtually into the

" position of parties contracting with each other ": an interesting anticipation

in 1871 of the test of who is my neighbour.

Lord Haldane gave a further statement of his view in Robinson v.

National Bank of Scotland, 1916 SC (HL) 154, a case to which I shall

return. Having said that in that case there was no duty excepting the duty

of common honesty, he went on to say:

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" In saying that I wish emphatically to repeat what I said in advising

" this House in the case of Nocton v. Lord Ashburton, that it is a

" great mistake to suppose that, because the principle in Deny v. Peek

" clearly covers all cases of the class to which I have referred, therefore

" the freedom of action of the courts in recognising special duties

" arising out of other kinds of relationship which they find established

" by the evidence is in any way affected. I think, as I said in Nocton's

" case, that an exaggerated view was taken by a good many people

" of the scope of the decision in Derry v. Peek. 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 recognising that the duty of care may be

" established when such cases really occur."

This passage makes it clear that Lord Haldane did not think that a

duty to take care must be limited to cases of fiduciary relationship in the

narrow sense of relationships which had been recognised by the Court of

Chancery as being of a fiduciary character. He speaks of other special

relationships, and 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 enquirer was relying on him. I say " ought to have known " because

in questions of negligence we now apply the objective standard of what

the reasonable man would have done.

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 enquiry 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 enquirer which requires him to exercise such care as the circumstances

require.

If that is right, then it must follow that Candler v. Crane, Christmas & Co.

[1951] 2 K.B. 164 was wrongly decided. There the plaintiff wanted to see

the accounts of a company before deciding to invest in it. The defendants

were the company's accountants, and they were told by the company to

complete the company's accounts as soon as possible because they were to

be shown to the plaintiff who was a potential investor in the company.

At the company's request the defendants showed the completed accounts

to the plaintiff, discussed them with him, and allowed him to take a copy.

The accounts had been carelessly prepared and gave a wholly misleading

picture. It was obvious to the defendants that the plaintiff was relying

on their skill and judgment and on their having exercised that care which

by contract they owed to the company, and I think that any reasonable

man in the plaintiff's shoes would have relied on that. This seems to me

to be a typical case of agreeing to assume a responsibility: they knew

why the plaintiff wanted to see the accounts and why their employers, the

company, wanted them to be shown to him, and agreed to show them to

lim without even a suggestion that he should not rely on them.

The majority of the Court of Appeal held that they were bound by

Le Lievre v. Gould [1893] 1 Q.B. 491, and that Donoghue v. Stevenson had

no application. In so holding I think that they were right. The Court

of Appeal have bound themselves to follow all rationes decidendi of

previous Court of Appeal decisions, and, in face of that rule, it would have

been very difficult to say that the ratio in Le Lievre v. Gould did not cover

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Candler's case. Lord Denning, who dissented, distinguished Le Lievre v.

Gould on its facts, but, as I understand the rule which the Court of

Appeal have adopted, that is not sufficient if the ratio applies; and this is

not an appropriate occasion to consider whether the Court of Appeal's

rule is a good one. So the question which we now have to consider is

whether the ratio in Le Lievre v. Gould can be supported. But before

leaving Candler's case I must note that Cohen, L.J. (as he then was)

attached considerable importance to a New York decision, Ultramares

Corporation v. Touche (1931) 255 N.Y. 170, a decision of Cardozo, CJ.

But I think that another decision of that great judge, Glanzer v. Shepherd

233 N.Y. 236, is more in point because in the latter case there was a direct

relationship between the weigher who gave a certificate and the pur-

chaser of the goods weighed, who the weigher knew was relying on his

certificate: there the weigher was held to owe a duty to the purchaser

with whom he had no contract. The Ultramares case can be regarded

as nearer to Le Lievre v. Gould.

In Le Lievre v. Gould a surveyor, Gould, gave certificates to a builder

who employed him. The plaintiffs were mortgagees of the builders' interest

and Gould knew nothing about them or the terms of their mortgage; but

the builder, without Gould's authority, chose to show them Gould's report.

I have said that I do not intend to decide anything about the degree of

proximity necessary to establish a relationship giving rise to a duty of

care, but it would seem difficult to find such proximity in this case and

the actual decision in Le Lievre v. Gould may therefore be correct. But

the decision was not put on that ground: if it had been Cann v. Willson,

39 Ch. D. 39, would not have been overruled.

Lord Esher, M.R. held that there was no contract between the plaintiffs

and the defendant and that this House in Derry v. Peek had " restated

" the old law that, in the absence of contract, an action for negligence

" cannot be maintained when there is no fraud " (p. 498). Bowen, L.J.

gave a similar reason: he said: " Then Derry v. Peek decided this further

" point—viz. that in cases like the present (of which Derry v. Peek was

" itself an instance) there is no duty enforceable in law to be careful "

(p. 501); and he added that the law of England " does not consider that

" what a man writes on paper is like a gun or other dangerous instrument;

" and, unless he intended to deceive, the law does not, in the absence of

" contract, hold him responsible for drawing his certificate carelessly"

(p. 502). So both he and Lord Esher held that Cann v. Willson was wrong

in deciding that there was a duty to take care. We now know on

the authority of Donoghue v. Stevenson 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 was wrong and that Cann v. Willson ought not to

have been overruled.

Now I must try to apply these principles to the present case. What the

Appellants complain of is not negligence in the ordinary sense of carelessness,

but rather misjudgment in that Mr. Heller, while honestly seeking to give a

fair assessment, in fact made a statement which gave a false and misleading

impression of his customer's credit. It appears that bankers now commonly

give references with regard to their customers as part of their business. I

do not know how far their customers generally permit them to disclose their

affairs, but even with permission it cannot always be easy for a banker to

reconcile his duty to his customer with his desire to give a fairly balanced

reply to an enquiry. And enquirers can hardly expect a full and objective

statement of opinion or accurate factual information such as skilled men

would be expected to give in reply to other kinds of enquiry. So it seems to

me to be unusually difficult to determine just what duty beyond a duty to be

honest a banker would be held to have undertaken if he gave a reply without

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an adequate disclaimer of responsibility or other warning. It is in light of

such considerations that I approach an examination of the case of Robinson

v. National Bank of Scotland.

It is not easy to extract the facts from the report of the case in the Court of

Session (1916 S.C. 46). Several of the witnesses were held to be unreliable

and the principal issue in the case, fraud, is not relevant for present purposes.

But the position appears to have been this. Harley and two brothers Inglis

wished to raise money. They approached an insurance company on the false

basis that Harley was to be the borrower and the Inglis brothers were to be

guarantors. To satisfy the company as to the financial standing of the Inglis

brothers Harley got his London bank to write to M'Arthur, a branch agent

of the National Bank of Scotland, and M'Arthur on 28th July, 1910, sent a

reply which was ultimately held to be culpably careless but not fraudulent.

Robinson, the pursuer in the action, said that he had been approached by

Harley to become a guarantor before the enquiry was made by Harley but

he was disbelieved by the Lord Ordinary who held that he was not brought

into the matter before September. This was accepted by the majority in

•the Inner House and there is no indication that any of their Lordships in

this House questioned the finding that the letter of 28th July was not obtained

on behalf of Robinson.

Harley and the brothers Inglis did not proceed with their scheme in July

but they resumed negotiations in September. The company wanted an

additional guarantor and Harley approached Robinson. A further reference

was asked and obtained from M'Arthur on 1st October about the brothers

Inglis but no point was made of this. The whole case turned on M'Arthur's

letter of 28th July. After further negotiation the company made a loan to

Harley with the brothers Inglis and Robinson as guarantors. Harley and

the brothers Inglis all became bankrupt and Robinson had to pay the company

under his guarantee.

Robinson sued the National Bank and M'Arthur. He alleged that

M'Arthur's letter was fraudulent and that he had been induced by it to

guarantee the loan. He also alleged that M'Arthur had a duty to disclose

certain facts about the brothers Inglis which were known to him, but this

alternative case played a very minor part in the litigation. Long opinions

were given in the Court of Session on the question of fraud but the alternative

case of a duty to disclose was dealt with summarily. The Lord Justice

Clerk said (at p. 63): " It appears to me that there was no such duty of dis-

" closure imposed upon Mr. M'Arthur towards the pursuer as would justify

" us in applying the principle on which Norton's case was decided." Lord

Dundas referred (at p. 67) to cases of liability of a solicitor to his client for

erroneous advice and of similar liability arising from a fiduciary relationship

and said " such decisions seem to me to have no bearing on, or application to,

" the facts of the present case." He also drew attention to the last sentence

of the letter of 28th July which he said would become important if fraud

were out of the case. That sentence is : " The above information is to be

" considered strictly confidential, and is given on the express understanding

" that we incur no responsibility whatever in furnishing it." Lord Salvesen,

who dissented, did not deal with the point: and Lord Guthrie merely said

(at p. 85) that here there was no fiduciary relationship.

In this House an unusual course was taken during the argument.

I quote from the Session Cases report—1916 SC (HL) 154: " After Counsel

" for the respondents had been heard for a short time. Earl Loreburn informed

" him that their Lordships, as at present advised, thought that there was no

" special duty on M'Arthur toward the pursuer; that the respondents were

" not liable unless M'Arthur's representations were dishonest; and that their

" Lordships had not been satisfied as yet that the representations were dis-

" honest . . . that under the circumstances the House was prepared to

" dismiss the appeal, but that they considered the pursuer had been badly

" treated though he had not any cause of action at law, and that, therefore,

" their Lordships were disposed to direct that there should be no costs of the

" action on either side. Earl Loreburn said that Mr. Blackburn might prefer

" to argue the case further and endeavour to alter these views, but of course

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" he would run the risk of altering their Lordships' views as to the legal

" responsibility as well as upon the subject of costs." Mr. Blackburn then

—wisely no doubt—said no more, and judgment was given for the bank but

with no costs here or below.

That case is very nearly indistinguishable from the present case. Lord

Loreburn regarded the fact that M'Arthur knew that his letter might be

used to influence others besides the immediate enquirer as entitling Robinson

to found on it if fraud had been proved. But it is not clear to me that he

intended to decide that there would have been sufficient proximity between

Robinson and M'Arthur to enable him to maintain that there was a special

relationship involving a duty of care if the other facts had been sufficient to

create such a relationship. I would not regard this as a binding decision on

that question.

With regard to the bank's duty Lord Haldane said: " There is only one

'' other point about which I wish to say anything, and that is the question

" which was argued by the appellant, as to there being a special duty of

" care under the circumstances here. I think the case of Deny v. Peek in

" this House has finally settled in Scotland, as well as in England and Ireland,

" the conclusion that in a case like this no duty to be careful is established.

" There is the general duty of common honesty, and that duty, of course

" applies to the circumstances of this case as it applies to all other circum-

" stances. But when a mere inquiry is made by one banker of another, who

" stands in no special relation to him, then, in the absence of special circum-

" stances from which a contract to be careful can be inferred, I think there

" is no duty excepting the duty of common honesty to which I have

" referred."

I think that by " a contract to be careful " Lord Haldane must have meant

an agreement or undertaking to be careful. This was a Scots case and by

Scots law there can be a contract without consideration: Lord Haldane

cannot have meant that similar cases in Scotland and England would be

decided differently on the matter of special relationship for that reason. I

am, I think, entitled to note that this was an extempore judgment. So

Lord Haldane was contrasting a " mere inquiry " with a case where there

are special circumstances from which an undertaking to be careful can be

inferred. In Robinson's case any such undertaking was excluded by the

sentence in M'Arthur's letter which I have quoted and in which he said

that the information was given " on the express understanding that we incur

" no responsibility whatever in furnishing it."

It appears to me that the only possible distinction in the present case is

that here there was no adequate disclaimer of responsibility. But here the

Appellants' bank, who were their agents in making the enquiry, began by

saying that " they wanted to know in confidence and without responsibility

" on our part ", that is, on the part of the Respondents. So I cannot see how

the Appellants can now be entitled to disregard that and maintain that the

Respondents did incur a responsibility to them.

The Appellants founded on a number of cases in contract where very

clear words were required to exclude the duty of care which would otherwise

have flowed from the contract. To that argument there are, I think, two

answers. In the case of a contract it is necessary to exclude liability for

negligence, but in this case the question is whether an undertaking to assume

a duty to take care can be inferred: and that is a very different matter. And,

secondly, even in cases of contract general words may be sufficient if there

was no other kind of liability to be excluded except liability for negligence:

the general rule is that a party is not exempted from liability for negligence

" unless adequate words are used "—per Scrutton, L.J., in Rutter v. Palmer

[1922] 2 K.B. 87. It being admitted that there was here a duty to give an

honest reply, I do not see what further liability there could be to exclude

except liability for negligence: there being no contract there was no question

of warranty.

I am therefore of opinion that it is clear that the Respondents never under-

took any duty to exercise care in giving their replies. The Appellants cannot

succeed unless there was such a duty, and therefore in my judgment this

appeal must be dismissed.

Lord Morris of Borth-y-Gest

MY LORDS,

The important question of law which has concerned your Lordships in

this appeal is whether in the circumstances of the case there was a duty of

care owed by the Respondents, whom I will call " the bank", to the

Appellants, whom I will call " Hedleys ". In order to recover the damages

which they claim Hedleys must establish that the bank owed them a duty,

that the bank failed to discharge such duty, and that as a consequence

Hedleys suffered loss.

An allegation of fraud was originally made but was abandoned. The

learned Judge held that the bank had been negligent but that they owed

no duty to Hedleys to exercise care. The Court of Appeal agreed with the

learned Judge that no such duty was owed and it was therefore not necessary

for them to consider whether the finding of negligence ought or ought not

be upheld. In your Lordships' House the legal issues were debated and

again it did not become necessary to consider whether the finding of negli-

gence ought or ought not be upheld. It is but fair to the bank to state that

they firmly contend that they were not in any way negligent and that they

were prepared to make submissions by way of challenge of the conclusions

of the learned Judge.

Hedleys were doing business with a company called Easipower Ltd. In

August, 1958, Hedleys wanted a banker's report concerning that company

who then had an account with the bank. [In November, 1957, Hedleys had

received a report about the company which had been given by another bank

though not by direct communication.] Hedleys banked at a Piccadilly

branch of the National Provincial Bank Limited. Hedleys asked that a

report concerning Easipower Ltd. should be obtained. The Piccadilly

branch communicated with the City office of their bank, the National

Provincial. The National Provincial City office telephoned the bank on the

18th August, 1958, and it is common ground that the representative of the

National Provincial said that " they wanted to know in confidence " and

" without responsibility " on the part of the bank as to the respectability

and standing of Easipower Ltd. and whether Easipower Ltd. " would be

" good for an advertising contract for £8/9,000." To that oral inquiry the

bank then gave an oral answer. In due course the answer then given was

communicated by the Piccadilly branch of the National Provincial to Hedleys.

It was communicated orally and a letter of confirmation from that branch

(dated the 21st August, 1958) was sent to Hedleys. The letter had the

headings " Confidential" and " For your private use and without responsi-

" bility on the part of this Bank or the Manager." The oral answer which

the bank had given to the City office of the National Provincial was passed

on with the prefatory words—" In reply to your telephoned enquiry of

" 18th August, Bankers say:—".

There was a later enquiry. On the 4th November, 1958, in a letter to the

Piccadilly branch of the National Provincial Hedleys wrote: " I have been

" requested by the Directors to again ask you to check the financial structure

" and status of Easipower Limited ": Hedleys made some particular refer-

ences and concluded their letter with the words: " I would be appreciative

" if you could make your check as exhaustive as you reasonably can." In

a letter dated the 7th November and headed "Private and Confidential"

the City office of the National Provincial asked the bank for their " opinion

" in confidence as to the respectability and standing of Easipower Ltd."

and asked the bank to state whether they considered Easipower Ltd. " trust-

" worthy, in the way of business, to the extent of £100,000 per annum

" advertising contract." The bank replied in a letter dated the 11th

November and sent to the City office of the National Provincial. The letter

had the headings "Confidential" and "For your private use and without

" responsibility on the part of this Bank or its officials." On the 14th

November the Piccadilly branch of the National Provincial wrote to Hedleys

(heading their letter " Confidential. For your private use and without

" responsibility on the part of this Bank or the Manager") and, with the

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prefatory words: " In reply to your enquiry letter of 4th November, Bankers

" say ", passed on what the bank had stated in their letter to the City

office of the National Provincial.

It is, I think, a reasonable and proper inference that the bank must have

known that the National Provincial were making their enquiry because some

customer of theirs was or might be entering into some advertising contract

in respect of which Easipower Ltd. might become under a liability to such

customer to the extent of the figures mentioned. The enquiries were from

one bank to another. The name of the customer (Hedleys) was not men-

tioned by the enquiring bank (National Provincial) to the answering bank

(the bank): nor did the enquiring bank (National Provincial) give to the

customer (Hedleys) the name of the answering bank (the bank). These

circumstances do not seem to me to be material. The bank must have

known that the enquiry was being made by someone who was contemplating

doing business with Easipower Ltd. and that their answer or the substance

of it would in fact be passed on to such person. The conditions subject

to which the bank gave their answers are important but the fact that the

person to whom the answers would in all probability be passed on was

unnamed and unknown to the bank is not important for the purposes of a

consideration of the legal issue which now arises. It is inherently unlikely

that the bank would have entertained a direct application from Hedleys

asking for a report or would have answered an enquiry made by Hedleys

themselves: even if they had they would certainly have stipulated that their

answer was without responsibility. The present appeal does not raise any

question as to the circumstances under which a banker is entitled (apart

from direct authorisation) to answer an enquiry. I leave that question as

it was left by Atkin, L.J. in Tournier v. National Provincial & Union Bank

of England [1924] 1 K.B. 461, when (at p. 486) he said: " I do not desire to

" express any final opinion on the practice of bankers to give one another

" information as to the affairs of their respective customers, except to say

" it appears to me that if it is justified it must be upon the basis of an

" implied consent of the customer."

The legal issue which arises is, therefore, whether the bank would have

been under a liability to Hedleys if they had failed to exercise care. This

involves the questions whether the circumstances were such that the bank

owed a duty of care to Hedleys, or would have owed such a duty but for

the words " Without Responsibility ", or whether they owed such a duty

but were given a defence by the words " Without Responsibility " which

would protect them if they had failed to exercise due care.

My Lords, it seems to me that if A assumes a responsibility to B to

tender him deliberate advice there could be a liability if the advice is

negligently given. I say " could be " because the ordinary courtesies and

exchanges of life would become impossible if it were sought to attach

legal obligation to every kindly and friendly act. But the principle of the

matter would not appear to be in doubt. If A employs B (who might

for example be a professional man such as an accountant or a solicitor

or a doctor) for reward to give advice and if the advice is negligently given

there could be a liability in B to pay damages. The fact that the advice

is given in words would not, in my view, prevent liability from arising.

Quite apart, however, from employment or contract there may be circum-

stances in which a duty to exercise care will arise if a service is voluntarily

undertaken. A medical man may unexpectedly come across an unconscious

man, who is a complete stranger to him, and who is in urgent need of

skilled attention: if the medical man, following the fine traditions of his

profession, proceeds to treat the unconscious man he must exercise reason-

able skill and care in doing so. In his speech in Banbury v. Bank of

Montreal [1918] A.C. 626 Lord Atkinson (at p. 689) said: "It is well

" established that if a doctor proceeded to treat a patient gratuitously, even

" in a case where the patient was insensible at the time and incapable of

" employing him, the doctor would be bound to exercise all the professional

" skill and knowledge he possessed, or professed to possess, and would

" be guilty of gross negligence if he omitted to do so". To a similar

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effect were the words of Lord Loughborough in the much earlier case

of Shiells v. Blackburne (1789) 1 H.B1. 158 when at p. 162 he said: "If

" a man gratuitously undertakes to do a thing to the best of his skill,

" where his situation or profession is such as to imply skill, an omission

" of that skill is imputable to him as gross negligence." Compare also

Wilkinson v. Coverdale (1793) 1 Esp. 75. I can see no difference of principle

in the case of a banker. If someone who was not a customer of a bank

made a formal approach to the bank with a definite request that the

bank would give him deliberate advice as to certain financial matters of

a nature with which the bank ordinarily dealt the bank would be under

no obligation to accede to the request: if however they undertook, though

gratuitously, to give deliberate advice (I exclude what I might call casual

and perfunctory conversations) they would be under a duty to exercise

reasonable care in giving it. They would be liable if they were negligent

although, there being no consideration, no enforceable contractual relation-

ship was created.

In the absence of any direct dealings between one person and another,

there are many and varied situations in which a duty is owed by one

person to another. A road user owes a duty of care towards other road

users. They are his " neighbours ". A duty was owed by the dock owner

in Heaven v. Pender, L.R. 11 Q.B.D. 503. Under a contract with a ship-

owner he had put up a staging outside a ship in his dock. The plaintiff

used the staging because he was employed by a ship painter who had

contracted with the shipowner to paint the outside of the ship. The

presence of the plaintiff was for business in which the dock owner was

interested and the plaintiff was to be considered as having been invited

by the dock owner to use the staging. The dock owner was therefore

under an obligation to take reasonable care that at the time when the

staging was provided by him for immediate use it was in a fit state to be

used. For an injury which the plaintiff suffered because the staging had

been carelessly put up he was entitled to succeed in a claim against the

defendant. The chemist in George v. Skivington, L.R. 5 Ex. 1 sold

the bottle of hair wash to the husband knowing that it was to be used

by the wife. It was held on demurrer that the chemist owed a duty towards

the wife to use ordinary care in compounding the hair wash. In Donoghue

v Stevenson [19321 A.C. 562 it was held that the manufacturer of an article

of food, medicine, or the like, is under a duty to the ultimate consumer

to take reasonable care that the article is free from defect likely to cause

injury to health.

My Lords, these are but familiar and well known illustrations, which

could be multiplied, which show that irrespective of any contractual or

fiduciary relationship and irrespective of any direct dealing, a duty may be

owed by one person to another. It is said, however, that where careless

(but not fraudulent) misstatements are in question there can be no liability

in the maker of them unless there is either some contractual or fiduciary

relationship with a person adversely affected by the making of them or

unless through the making of them something is created or circulated or some

situation is created which is dangerous to life, limb or property. In logic

I can see no essential reason for distinguishing injury which is caused by a

reliance upon words from injury which is caused by a reliance upon the

safety of the staging to a ship or by a reliance upon the safety for use of

the contents of a bottle of hair wash or a bottle of some consumable liquid.

It seems to me, therefore, that if A claims that he has suffered injury or

loss as a result of acting upon some misstatement made by B who is not

in any contractual or fiduciary relationship with him the enquiry that is

first raised is whether B owed any duty to A: if he did the further enquiry

is raised as to the nature of the duty. There may be circumstances under

which the only duty owed by B to A is the duty of being honest: there

may be circumstances under which B owes to A the duty not only of being

honest but also a duty of taking reasonable care. The issue in the present

case is whether the bank owed any duty to Hedleys and if so what the

duty was.

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Leaving aside cases where there is some contractual or fiduciary relation-

ship, there may be many situations in which one person voluntarily or

gratuitously undertakes to do something for another person and becomes

under a duty to exercise reasonable care. I have given illustrations. But

apart from cases where there is some direct dealing there may be cases

where one person issues a document which should be the result of an

exercise of the skill and judgment required by him in his calling and where

he knows and intends that its accuracy will be relied upon by another. In

this connection it will be helpful to consider the case of Cann v. Willson

L.R. 39 Ch.D. 39. The owner of some property wished to obtain an

advance of money on mortgage of the property and applied to a firm of

solicitors for the purpose of their finding a mortgagee. Being informed

by the solicitors that for the purpose of finding a mortgagee he should

have a valuation made of the property he consulted the defendants and

asked them to make a valuation. They surveyed and inspected the property

and then made a valuation which they sent to the solicitors. The solicitors

then particularly called the defendants' attention to the purpose for which

the valuation was wanted and to the responsibility they were undertaking.

The defendants staled that their valuation was a moderate one and certainly

was not made in favour of the borrower. The valuation and representations

so made by the defendants to the solicitors were communicated to the

plaintiff (and a co-trustee of his) by the solicitors. The plaintiff (and his

co-trustee, who died before the commencement of the action) then advanced

money to the owner upon the security of a mortgage of his property.

Chitty, J., held on the evidence (1) that the defendants were aware of

the purpose for which the valuation was made, and (2) that the " valuation

" was sent by the Defendants direct to the agents of the Plaintiff for the

" purpose of inducing the Plaintiff and his co-trustee to lay out the trust

" money on mortgage". The owner made default in payment and the

property proved insufficient to answer the mortgage. The plaintiff alleged

that the value of the property was not anything like the value given by

the defendants in their valuation. Chitty, J., held that " the valuation as

" made was, in fact, no valuation at all." In those circumstances the claim

made was on the basis that the plaintiff has sustained loss through the

negligence, want of skill, breach of duty and misrepresentation of the

defendants. Chilly, J., held the defendants liable. His decision was

principally based upon his finding that the defendants owed a duty of

care to the plaintiff. It had been argued that there was also liability in

the defendants in contract (referred to in the judgment as the first ground)

and on the ground of fraud (referred to as the third ground). At the end

of his judgment Chitty, J., said: "I have entirely passed by the question

" of contract. It is unnecessary to decide that point. I consider on these

" two last grounds—and if I were to prefer one to the other it would be

" the second ground—that the Defendant is liable for the negligence." In

the course of his judgment he said: " It is not necessary, in my opinion,

" to decide the case with reference to the third point, but even on the third

" point I think the Defendants are liable—and that is what may be termed

" fraudulent misrepresentation." He then (that is, on the 7th June, 1888) re-

ferred to the judgment in the Court of Appeal in Peek v. Derry (37 Ch. D.

541). That judgment was reversed in the House of Lords on the 1st July,

1889. Chitty, J., compared the situation with that which arose in Heaven v.

Pender (supra). He pointed out that in that case there was " no contractual

" relation between the Plaintiff and the dock owner, and there was no

" personal direct invitation to the Plaintiff to come and do the work on

" that ship, yet it was held that the dock owner had undertaken an obliga-

" tion towards the Plaintiff, who was one of the persons likely to come

" and do the work to the vessel, and that he was liable to him and was

" under an obligation to him to use due diligence in the construction of

" the staging." Chitty, J., went on, therefore, to hold that as the defendants

had "knowingly placed themselves" in the position of sending their

valuation " direct to the agents of the Plaintiff for the purpose of inducing

" the Plaintiff " then they " in point of law incurred a duty towards him

" to use reasonable care in the preparation of the document." He likened

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the case to George v. Skivington (supra) and continued: "In this case

" the document supplied appears to me to stand upon a similar footing

" and not to be distinguished from that case, as if it had been an actual

" article that had been handed over for the particular purpose of being so

" used. I think, therefore, that the Defendants stood with regard to the

" Plaintiff—quite apart from any question of there being a contract or not

" in the peculiar circumstances of this case—in the position of being under

" an obligation or duty towards him." My Lords, I can see no fault or

flaw in his reasoning and I am prepared to uphold it. If it is correct, then

it is submitted that in the present case the bank knew that some existing

(though to them by name unknown) person was going to place reliance upon

what they said and that accordingly they owed a duty of care to such

person. I will examine this submission. Before doing so I must, however,

further consider Cann v. Willson. It was overruled by the Court of Appeal

in Le Lievre and Dennes v. Gould [1893] 1 Q.B. 491. The latter

case, binding on the Court of Appeal, in turn led to the decision in

Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164. It is necessary,

therefore, to consider the reasons which governed the Court of Appeal in

Le Lievre v. Gould in overruling Cann v. Willson. I do not propose to

examine the facts in Le Lievre v. Gould: nor need I consider whether

the result would have been no different had Cann v. Willson not been

overruled. Lord Esher, M.R. (at p. 497) said: "But I do not hesitate

" to say that Cann v Willson is not now law. Chitty, J., in deciding that

" case, acted upon an erroneous proposition of law, which has been since

" overruled by the House of Lords in Deny v. Peek when they restated

" the old law that, in the absence of contract, an action for negligence cannot

" be maintained when there is no fraud." Bowen, L.J., said (at p. 499)

that he considered that Derry v. Peek had overruled Cann v. Willson. He

considered that Heaven v. Pender gave no support for that decision because

it was no more than an instance of the class of cases where one who,

having the conduct and control of premises which may injure those whom

he knows will have a right to and will use them, owes a duty to protect

them. He said (at p. 501): " Then Derry v. Peek decided this further point—

" viz., that in cases like the present (of which Derry v. Peek was itself

" an instance) there is no duty enforceable in law to be careful." He

followed the view expressed by Romer, J., in Scholes v. Brook, 63 L.T.

(N.S.) 837, that the decision of the House of Lords in Derry v. Peek by

implication negatived the existence of any such general rule as laid down

in Cann v. Willson. The reasoning of A. L Smith, L.J., in overruling

Cann v. Willson was on similar lines.

The enquiry is thus raised as to whether it was correct to say that Derry

v. Peek had either directly or at least by implication overruled that part

of the reasoning in Cann v. Willson which led Chitty, J. to say that quite

apart from contract and quite apart from fraud there was a duty of care

owed by the defendants to the plaintiffs. My Lords, whatever views may

have been held at one time as to the effect of Derry v. Peek, authoritative

guidance as to this matter was given in your Lordships' House in 1914 in

the case of Nocton v. Ashburton [19141 A.C. 932. In his speech in that case

Viscount Haldane, L.C. (at p. 947) said: " My Lords, the discussion of the

" case by the noble and learned Lords who took part in the decision appears

" to me to exclude the hypothesis that they considered any other question

" to be before them than what was the necessary foundation of an ordinary

" action for deceit. They must indeed be taken to have thought that the

" facts proved as to the relationship of the parties in Derry v. Peek were

" not enough to establish any special duty arising out of that relationship

" other than the general duty of honesty. But they do not say that where

" a different sort of relationship ought to be inferred from the circumstances

" the case is to be concluded by asking whether an action for deceit will

" lie. I think that the authorities subsequent to the decision of the House

" of Lords shew a tendency to assume that it was intended to mean more

" than it did. In reality the judgment covered only a part of the field in

" which liabilities may arise. There are other obligations besides that of

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" honesty the breach of which may give a right to damages. These obliga-

" tions depend on principles which the judges have worked out in the

" fashion that is characteristic of a system where much of the law has always

" been judge-made and unwritten." After a review of many authorities

Lord Haldane said (at p. 955): "But side by side with the enforcement

" of the duty of universal obligation to be honest and the principle which

" gave the right to rescission, the Courts, and especially the Court of Chan-

" cery, had to deal with the other cases to which I have referred, cases

" raising claims of an essentially different character, which have often been

" mistaken for actions of deceit. Such claims raise the question whether

" the circumstances and relations of the parties are such as to give rise to

" duties of particular obligation which have not been fulfilled." Lord

Haldane pointed out that from the circumstances and relations of the parties

a special duty may arise: there may be an implied contract at law or a

fiduciary obligation in equity. What Deny v. Peek decided was that the

directors were under no fiduciary duty to the public to whom they had

addressed the invitation to subscribe. (I need not here refer to statutory

enactments since Deny v. Peek.)

In his speech in the same case Lord Dunedin pointed out that there can

be no negligence unless there is a duty but that a duty may arise in many

ways. There may be duties owing to the world at large: alterum non

laedere. There may be duties arising from contract. There may be duties

which arise from a relationship without the intervention of contract in the

ordinary sense of the term, such as the duties of a trustee to his cestui que

trust or of a guardian to his ward.

Lord Shaw in his speech pointed out (at p. 970) that Deny v. Peek " was

" an action wholly and solely of deceit, founded wholly and solely on fraud,

" was treated by this House on that footing alone and that—this being so—

" what was decided was that fraud must ex necessitate contain the element

" of moral delinquency. Certain expressions by learned Lords may seem

" to have made incursions into the region of negligence but Deny v. Peek

"as a decision was directed to the single and specific point just set out."

Lord Shaw (at p. 972) formulated the following principle: " That once the

" relations of parties have been ascertained to be those in which a duty is

" laid upon one person of giving information or advice to another upon

" which that other is entitled to rely as the basis of a transaction, responsi-

" bility for error amounting to misrepresentation in any statement made will

" attach to the adviser or informer although the information and advice

" have been given not fraudulently but in good faith."

Lord Parmoor in his speech said (at p. 978) in reference to Deny v. Peek :

" That case decides that in an action founded on deceit, and in which deceit

" is a necessary factor, actual dishonesty, involving mens rea, must be

" proved. The case, in my opinion, has no bearing whatever on actions

" founded on a breach of duty in which dishonesty is not a necessary factor."

My Lords, guided by the assistance given in Nocton v. Ashburton I con-

sider that it ought not to have been held in Le Lievre v. Gould that Cann

v. Willson was wrongly decided. Independently of contract there may be

circumstances where information is given or where advice is given which

establishes a relationship which creates a duty not only to be honest but

also to be careful.

In his speech in Heilbut, Symons & Co. v. Buckleton [1913] AC 30 Lord

Moulton (at p. 51) said that it was of the greatest importance to " maintain

" in its full integrity the principle that a person is not liable in damages

" for ar: innocent misrepresentation, no matter in what way or under what

" form the attack is made." That principle is, however, in no way impeached

by recognition of the fact that if a duty exists there is a remedy for the

breach of it. As Lord Bowen said in Low v. Bouverie [1891] 3 Ch. 82:

" the doctrine that negligent misrepresentation affords no cause of action

" is confined to cases in which there is no duty, such as the law recognises,

" to be careful."

The enquiry in the present case, and in similar cases, becomes, therefore,

an enquiry as to whether there was a relationship between the parties which

created a duty and if so whether such duty included a duty of care.

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The guidance which Lord Haldane gave in Nocton v. Ashburton was

repeated by him in his speech in Robinson v. National Bank of Scotland,

1916 SC (HL) 154. He clearly pointed out that Deny v. Peek did not

affect (1) the whole doctrine as to fiduciary relationship, (2) the duty of care

arising from implied as well as express contracts, and (3) the duty of care

arising from other special relationships which the courts may find to exist

in particular cases.

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 allows 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.

I do not propose to examine the facts of particular situations or the facts

of recently decided cases in the light of this analysis, but I proceed to apply

it to the facts of the case now under review. As I have stated, I approach

the case on the footing that the bank knew that what they said would in

fact be passed on to some unnamed person who was a customer of the

National Provincial Bank. The fact that it was said that " they ", that is,

the National Provincial Bank, " wanted to know " does not prevent this

conclusion. In these circumstances I think some duty towards the unnamed

person, whoever it was, was owed by the bank. There was a duty of honesty.

The great question, however, is whether there was a duty of care. The

bank need not have answered the enquiry from the National Provincial

Bank. It appears, however, that it is a matter of banking convenience

or courtesy and presumably of mutual business advantage that enquiries

as between banks will be answered. The fact that it is most unlikely that

the bank would have answered a direct enquiry from Hedleys does not

affect the question as to what the bank must have known as to the use that

would be made of any answer that they gave but it cannot be left out

of account in considering what it was that the bank undertook to do. It

does not seem to me that they undertook before answering an enquiry to

expend time or trouble " in searching records, studying documents, weighing

" and comparing the favourable and unfavourable features and producing

" a well-balanced and well-worded report." (I quote the words of Pearson,

L.J.). Nor does it seem to me that the enquiring bank (nor therefore

their customer) would expect such a process. This was, I think, what was

denoted by Lord Haldane in his speech in Robinson v. National Bank of

Scotland when he spoke of a " mere inquiry " being made by one banker

of another. In Parsons v. Barclay & Co. Ltd. [1910] 26 T.L.R. 628, 103 L.T.

196 C.A., Cozens-Hardy, M.R. expressed the view that it was no part of a

banker's duty, when asked for a reference, to make inquiries outside as to

the solvency or otherwise of the person asked about or to do more than

answer the question put to him honestly from what he knew from the books

and accounts before him. There was in the present case no contemplation

of receiving anything like a formal and detailed report such as might be

given by some concern charged with the duty (probably for reward) of

making all proper and relevant enquiries concerning the nature, scope and

extent of a company's activities and of obtaining and marshalling all avail-

able evidence as to its credit, efficiency, standing and business reputation.

There is much to be said, therefore, for the view that if a banker gives a

reference in the form of a brief expression of opinion in regard to credit-

worthiness he does not accept, and there is not expected from him, any

higher duty than that of giving an honest answer. I need not, however, seek

to deal further with this aspect of the matter, which perhaps cannot be

covered by any statement of general application, because in my judgment the

bank in the present case, by the words which they employed, effectively

disclaimed any assumption of a duty of care. They stated that they only

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responded to the inquiry on the basis that their reply was without responsi-

bility. If the enquirers chose to receive and act upon the reply they cannot

disregard the definite terms upon which it was given. They cannot accept

a reply given with a stipulation and then reject the stipulation. Further-

more, within accepted principles (as illustrated in Rutter v. Palmer [1922]

2 K.B. 87) the words employed were apt to exclude any liability for

negligence.

I would therefore dismiss the appeal.

Lord Hodson

MY LORDS,

The Appellants, who are advertising agents, claim damages for loss which

they allege they have suffered through the negligence of the Respondents,

who are merchant bankers.

The negligence attributed to the Respondents consists of their failure to

act with reasonable skill and care in giving references as to the credit-

worthiness of a company called Easipower Limited which went into liquida-

tion after the references had been given so that the Appellants were unable

to recover the bulk of the costs of advertising orders which Easipower

Limited had placed with them.

The learned Judge at the trial found that the Respondent bankers had

been negligent in the advice which they gave in the form of bankers

references, the Appellants being a company which acted in reliance on the

references and suffered financial loss accordingly but that he must enter

judgment for the Respondents since there was no duty imposed by law to

exercise care in giving these references, the duty being only to act honestly

in so doing.

The Respondents have at all times maintained that they were in no sense

negligent and further that no damage flowed from the giving of references

but first they took the point that whether or no they were careless and

whether or no the Appellants suffered damage as a result of their carelessness

they must succeed on the footing that no duty was owed by them. This

point has been taken throughout as being, if the Respondents are right,

decisive of the whole matter. I will deal with it first although the under-

lying question is whether the Respondent bankers who at all times disclaimed

responsibility ever assumed any duty at all.

The Appellants depend on the existence of a duty said to be assumed by

or imposed on the Respondents when they gave a reference as to the credit-

worthiness of Easipower Limited knowing that it would or might be relied

upon by the Appellants or some other third party in like situation.

The case has been argued first on the footing that the duty was imposed

by the relationship between the parties recognised by law as being a special

relationship derived either from the notion of proximity introduced by Lord

Esher in Heaven v. Pender, 11 Q.B. D. 503, 509, or from those cases firmly

established in our law which show that those who hold themselves out as

possessing a special skill are under a duty to exercise it with reasonable

care.

The important case of Donoghue v. Stevenson [1932] AC 562 shows that

the area of negligence is extensive, for as Lord Macmillan said at page 619:

" The grounds of action may be as various and manifold as human errancy ;

" and the conception of legal responsibility may develop in adaptation to

" altering social conditions and standards. The criterion of judgment must

" adjust and adapt itself to the changing circumstances of life. The categories

" of negligence are never closed. . . . Where there is room for diversity

" of view, it is in determining what circumstances will establish such a

" relationship between the parties as to give rise, on the one side, to a duty

" to take care, and on the other side to a right to have care taken."

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In that case the necessary relationship was held to have been established

where the manufacturer of an article, ginger beer in a bottle, sold it

to a distributor in circumstances which prevented the distributor or the

ultimate purchaser or consumer from discovering by inspection any defect.

He is under a legal duty to the ultimate purchaser or consumer to take

reasonable care that the article is free from injurious defect. No doubt that

was the actual decision in that case, and indeed it was thought by Wrottesley,

J. in Old Gates Estates, Ltd. v. Toplis & Harding & Russell [11939] 3 All E.R.

209 that he was precluded from awarding damages in tort for a negligent

valuation made by a firm of valuers which knew it was to be used by the

plaintiffs since the doctrine of Donoghue v. Stevenson was confined to

negligence which results in danger to life, limb or health. I do not think

that this is the true view of Donoghue v. Stevenson, but the decision itself,

although its effect has been extended to cases where there was no expectation

as contrasted with opportunity of inspection, see Grant v. Australian Knitting

Mills [1936] A.C. 85, and to liability of repairers, see Haseldine v. C. A.

Daw and Son, Ltd. [1941] 2 K.B. 343, has never been applied to cases where

damages are claimed in tort for negligent statements producing damage.

The attempt so to apply it failed as recently as 1951, when in Candler v.

Crane, Christmas & Co. [1951] 2 K.B. 164, the Court of Appeal by a

majority held that a false statement made carelessly as contrasted with

fraudulently by one person to another, though acted on by that other to

his detriment, was not actionable in the absence of any contractual or

fiduciary relationship between the parties and that this principle had in no

way been modified by the decision in Donoghue v. Stevenson. Cohen, L.J.

one of the majority of the Court, referred to the language of Lord Esher,

M.R. [1893] 1 Q.B. 491 in Le Lievre v. Gould who, repeating the substance

of what he had said in Heaven v. Pender [1883] 11 Q.B. 503, 509, said: " If

" one man is near to another, or is near to the property of another, a duty

" lies upon him not to do that which may cause a personal injury to that

" other, or may injure his property." Asquith, L.J. the other member of

the majority of the Court held that the " neighbour " doctrine had not been

applied where the damage complained of was not physical in its incidence

to either person or property. The majority thus went no further than

Wrottesley, J. in the Old Gate Estates case save that injury to property was

said to be contemplated by the doctrine expounded in Donoghue v.

Stevenson. It is desirable to consider the reasons given by the majority

for their decision in the Candler case, for the Appellants rely upon the dis-

senting judgment of Denning, L.J. in the same case. The majority, as also

the learned trial Judge, held that they were bound by the decision of the

Court of Appeal in Le Lievre v. Gould [1893] 1 Q.B. 491, in which the

leading judgment was given by Lord Esher, M.R. and referred to as authori-

tative by Lord Atkin in Donoghue v. Stevenson.

It is true that Lord Esher refused to extend the proximity doctrine so as

to cover the relationship between the parties in that case and the majority in

Candler's case were unable to draw a valid distinction between the facts of

that case and the case of Le Lievre v. Gould. Denning, L.J., however,

accepted the argument for the Appellant which has been repeated before

your Lordships, that the facts in Le Lievre v. Gould were not such as to

impose a liability, for the plaintiff mortgagees who alleged that the owner's

surveyor owed a duty to them not only had the opportunity but had

stipulated for inspection by their own surveyor. The defendant's employee

who prepared the accounts in Candler's case knew that the plaintiff was

a potential investor in the company of which the accounts were negligently

prepared and that the accounts were required in order that they might be

shown to the plaintiff. In these circumstances I agree with Denning, L.J.

that there is a valid distinction between the two cases. In Le Lievre v.

Gould it was held that an older case of Cann v. Wilson was overruled. That

is a case where the facts were in pari materia with those in Candler's case

and Chitty, J. held the defendants liable because (1) they independently of

contract owed a duty to the plaintiff which they failed to discharge, (2) that

they had made reckless statements on which the plaintiff had acted This

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case was decided before this House in Deny v. Peek, 14 App Cas 337, over-

ruled the Court of Appeal on the second proposition, but the first proposition

was untouched by Deny v. Peek and in so far as it depended on the authority

of George v. Skivington [1869] L.R. 5 Ex 1 the latter case was expressly

affirmed in Donoghue v. Stevenson although it had often previously been

impugned. It is true that, as Asquith, L.J. pointed out in referring to

George v. Skivington, the hair wash put into circulation knowing it was

intended to be used by the purchaser's wife was a negligently compounded

hair wash so that the case was so far on all fours with Donoghue v. Stevenson

but the declaration also averred that the defendant had said that the hair

wash was safe. I cannot see that there is any valid distinction in this field

between a negligent statement, for example, an incorrect label on a bottle

which leads to injury and a negligent compounding of ingredients which

leads to the same result. It may well be that at the time when Le Lievre and

Gould was decided the decision of this House in Deny v. Peek was thought

to go further than it did. It certainly decided that careless statements reck-

lessly but honestly made by directors in a prospectus issued to the public were

not actionable on the basis of fraud, and inferentially that such statements

would not be actionable in negligence (which had not in fact been pleaded)

but it was pointed out by this House in Nocton v. Ashburton [1914] A.C.

932 that an action does lie from negligent mistatement where the circum-

stances disclose a duty to be careful. It is necessary in this connection to

quote the actual language of Lord Haldane at pages 955-956:—

" Such a special duty may arise from the circumstances and relations

" of the parties. These may give rise to an implied contract at law or

" to a fiduciary obligation in equity. If such a duty can be inferred in

" a particular case of a person issuing a prospectus, as, for instance, in

" the case of directors issuing to the shareholders of the company which

" they direct a prospectus inviting the subscription by them of further

" capital, I do not find in Deny v. Peek an authority for the suggestion

" that an action for damages for misrepresentation without an actual

" intention to deceive may not lie. What was decided there was that

" from the facts proved in that case no such special duty to be careful

" in statement could be inferred, and that mere want of care therefore

" gave rise to no cause of action. In other words, it was decided that

" the directors stood in no fiduciary relation and therefore were under

" no fiduciary duty to the public to whom they had addressed the

" invitation to subscribe. I have only to add that the special relation-

" ship must, whenever it is alleged, be clearly shewn to exist."

So far I have done no more than summarise the argument addressed to

the Court of Appeal in Candler's case to which effect was given in the

dissenting judgment of Denning, L.J., with which I respectfully agree in so

far as it dealt with the facts of that case. I am therefore of opinion that

his judgment is to be preferred to that of the majority, although the opinion

of the majority is undoubtedly supported by the ratio decidendi of Le

Lievre v. Gould which they cannot be criticised for following.

This, however, does not carry the Appellants further than this, that

provided they can establish a special duty they are entitled to succeed in

an action based on breach of that duty.

I shall later refer to certain cases which support the view that apart from

what are usually called fiduciary relationships such as those between trustee

and cestui que trust, solicitor and client, parent and child or guardian and

ward, there are other circumstances in which the law imposes a duty to be

careful, which is not limited to a duty to be careful to avoid personal injury

or injury to property but covers a duty to avoid inflicting pecuniary loss

provided always that there is a sufficiently close relationship to give rise

to a duty of care.

The Courts of Equity recognised that a fiduciary relationship exists " in

" almost every shape ", to quote from Field, J. in Plowright v. Lambert,

52 L.T. 646 at page 652. He went on to refer to a case which had said that

the relationship could be created voluntarily, as it were, by a person coming

into a state of confidential relationship with another by offering to give

advice in a matter, and so being disabled thereafter from purchasing

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It is difficult to see why liability as such should depend on the nature

of the damage. Lord Roche in Morrison Steamship Company, Ltd. v.

Greystoke Castle (Cargo Owners) [1947] A.C. 265 at page 280 instanced

damage to a lorry by the negligence of the driver of another lorry which

while it does no damage to the goods in the second lorry causes the goods

owner to be put to expense which is recoverable by direct action against the

negligent driver.

It is not to be supposed that the majority of the Court of Appeal who

decided as they did in Candler's case were unmindful of the decision in

Nocton v. Ashburton to which their attention was drawn, but they seem to

have been impressed with the view that in the passage I have quoted Lord

Haldane had in mind only fiduciary relationships in the strict sense, but in

my opinion the words need not be so limited. I am fortified in this opinion

by examples to be found in the old authorities such as Shiells and Another

v. Blackburne, 126 E.R. 94, Wilkinson v. Coverdale, 1 Esp. 75, 170 E.R.

283, and Gladwell v. Steggal, 132 E.R. 1282, which are illustrations of cases

where the law has held that a duty to exercise reasonable care (breach of

which is remediable in damages) has been imposed in the absence of a

fiduciary relationship where persons hold themselves out as possessing special

skill and are thus under a duty to exercise it with reasonable care. The

statement of Lord Loughborough in Shiells and another v. Blackburne

(supra) is always accepted as authoritative and ought not to be dismissed

as dictum, although the plaintiff failed to establish facts which satisfied the

standard he set. He said: " If a man gratuitously undertakes to do a thing

" to the best of his skill, where his situation or profession is such as to imply

" skill, an omission of that skill is imputable to him as gross negligence."

True that proximity is more difficult to establish where words are concerned

than in the case of other activities and mere casual observations are not to

be relied upon, see Fish v. Kelly, 17 C.B. (N.S.) 194, but these matters go

to difficulty of proof rather than principle.

A modern instance is to be found in the case of Woods v. Martins Bank,

Ltd. and Another [1959] 1 Q.B. 55, where Salmon, J. held that on the facts of

the case the defendant bank which had held itself out as being advisers on

investments (which was within the scope of their business) and had not given

the plaintiff reasonably careful or skilful advice so that he suffered loss were

held in breach of duty and so liable in damages even though the plaintiff

may not have been a customer of the bank at the material time.

True that the learned Judge based this part of his conclusion on a fiduciary

relationship which he held to exist between the plaintiff and the bank and

thus brought himself within the scope of the decision in Candler's case by

which he was bound. For my part I should have thought that even if the

learned Judge put a strained interpretation on the word " fiduciary " which

is based on the idea of trust, the decision can be properly sustained as an

example involving a special relationship.

I do not overlook the point forcefully made by Harman, L.J. in his judg-

ment ([1961] 3 W.L.R. 1239) and elaborated by counsel for the Respondent

before your Lordships that it may in certain cases appear to be strange that

whereas innocent misrepresentation does not sound in damages, yet in the

special cases under consideration an injured party may sue in tort a third

party whose negligent misrepresentation has induced him to enter into the

contract. As was pointed out by Lord Wrenbury, however, in Banbury v.

The Bank of Montreal [1918] A.C. 626 at p. 713, innocent misrepresentation

is not the cause of action but evidence of the negligence which is the cause

of action.

Was there, then, a special relationship here? I cannot exclude from

consideration the actual terms in which the reference was given and I cannot

see how the Appellants can get over the difficulty which these words put in

their way. They cannot say that the Respondents are seeking, as it were,

contract out of their duty by the use of language which is insufficient for

the purpose if the truth of the matter is that the Respondents never assumed

a duty of care nor was such a duty imposed upon them.

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The first question is whether a duty was ever imposed, and the language

used must be considered before the question can be answered. In the case

of a person giving a reference I see no objection in law or morals to the

giver of the reference protecting himself by giving it without taking responsi-

bility for anything more than the honesty of his opinion which must involve

without taking responsibility for negligence in giving that opinion. I cannot

accept the contention of the Appellant that the responsibility disclaimed was

limited to the bank to which the reference was given nor can I agree that

it referred only to responsibility for accuracy of detail.

Similar words were present in the case of Robinson v. National Bank of

Scotland, 1916, S.C. (H.L.) 154 at page 159, a case in which the facts cannot,

I think, be distinguished in any material respect from this. Moreover, in

the Inner House the words of disclaimer were, I think, treated as not

without significance.

In this House the opinion was clearly expressed that the representations

made were careless, inaccurate and misleading but that the pursuer had no

remedy since there was no special duty on the bank's representative towards

the pursuer. This conclusion was reached quite apart from the disclaimer

of responsibility contained in the defender bank's letters.

Viscount Haldane recalled the case of Nocton v. Ashburton in the

following passage at page 157: —

" In saying that I wish emphatically to repeat what I said in advising

" this House in the case of Nocton v. Lord Ashburton that it is a

" great mistake to suppose that, because the principle in Deny v. Peek

" clearly covers all cases of the class to which I have referred, therefore

" the freedom of action of the Courts in recognising special duties arising

" out of other kinds of relationship which they find established by the

" evidence is in any way affected. I think, as I said in Nocton's case,

" that an exaggerated view was taken by a good many people of the

" scope of the decision in Deny v. Peek. 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 recognising that the duty of care may be established when such

" cases really occur."

This authority is, I think, conclusive against the Appellants and is not

effectively weakened by the fact that the case came to an end before the

matter had been fully argued upon the House intimating that it was prepared

to dismiss the appeal without costs on either side since the pursuer had in

its opinion been badly treated. Since no detailed reasons were given by the

House for the view that a banker's reference given honestly does not in the

ordinary course carry with it a duty to take reasonable care, that duty being

based on a special relationship, it will not, I hope, be out of place if I express

my concurrence with the observations of Pearson, L.J. who delivered the

leading judgment in the Court of Appeal and said—see [1961] 3 W.L.R. at

p. 1239:

" Apart from authority, I am not satisfied that it would be reasonable

" to impose upon a banker the obligation suggested, if that obligation

" really adds anything to the duty of giving an honest answer. It is con-

" ceded by Mr. Cooke that the banker is not expected to make outside

" inquiries to supplement the information which he already has. Is he

" then expected, in business hours in the bank's time, to expend time and

" trouble in searching records, studying documents, weighing and com-

" paring the favourable and unfavourable features and producing a

" well-balanced and well-worded report? That seems wholly unreason-

" able. Then, if he is not expected to do any of those things, and if he

" is permitted to give an impromptu answer in the words that immedi-

" ately come to his mind on the basis of the facts which he happens to

" remember or is able to ascertain from a quick glance at the file

" or one of the files, the duty of care seems to add little, if anything,

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" to the duty of honesty. If the answer given is seriously wrong, that

" is some evidence—of course, only some evidence—of this honesty.

" Therefore, apart from authority, it is far from clear, to my mind, that

" fore, apart from authority, it is far from clear, to my mind, that

" the banker, hi answering such an inquiry, could reasonably be supposed

" to be assuming any duty higher than that of giving an honest answer."

This is to the same effect as the opinion of Lord Cozens-Hardy, M.R. in

Parsons v. Barclays Bank Ltd. (1910) 26 T.L.R. at page 628 cited as

follows :—

" His Lordship said he wished emphatically to repudiate the sug-

gestion that, when a banker was asked for a reference of this

" kind, it was any part of his duty to make inquiries outside as to the

" solvency or otherwise of the person asked about, or to do anything

" more than answer the question put to him honestly from what he

" knew from the books and accounts before him. To hold otherwise

" would be a very dangerous thing to do and would put an end to a very

" wholesome and useful practice and long established custom which was

" now largely followed by bankers."

It would, I think, be unreasonable to impose an additional burden on

persons such as bankers who are asked to give references and might if

more than honesty were required be put to great trouble before all available

material had been explored and considered.

It was held in Low v. Bouverie [1891] 3 Ch. 82 that if a trustee takes upon

himself to answer the enquiries of a stranger about to deal with the cestui

que trust, he is not under a legal obligation to do more than to give honest

answers to the best of his actual knowledge and belief, he is not bound to

make enquiries himself.

I do not think a banker giving references in the ordinary exercise of business

should be in any worse position than the trustee. I have already pointed

out that a banker, like anyone else, may find himself involved in a special

relationship involving liability, as in Wood v. Martins Bank Ltd. and

Another (supra) but there are no special features here which enable the

Appellants to succeed.

I do not think it is possible to catalogue the special features which must be

found to exist before the duty of care will arise in a given case, but since

preparing this Opinion I have had the opportunity of reading the speech

which my noble and learned friend, Lord Morris of Borth-y-Gest, has

prepared.

I agree with him that if in a sphere where a person is so placed that others

could reasonably rely upon his judgment or his skill or upon his ability to

make careful enquiry 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 shall know, will place reliance upon it, then

a duty of care will arise.

I would dismiss the appeal.

Lord Devlin

My lords,

The bare facts of this case, stated sufficiently to raise the general point

of law, are these. The Appellants, being anxious to know whether they

could safely extend credit to certain traders with whom they were dealing,

sought a banker's reference about them. For this purpose their bank, the

National Provincial, approached the Respondents who are the traders' bank.

The Respondents gave, without making any charge for it and in the usual

way, a reference which was so carelessly phrased that it led the Appellants

to believe the traders to be creditworthy when in fact they were not. The

Appellants seek to recover from the Respondents the consequent loss.

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Mr. Foster for the Respondents has given your Lordships three reasons

why the Appellants should not recover. The first is founded upon a general

statement of the law which, if true, is of immense effect. Its hypothesis is

that there is no general duty not to make careless statements. No one

challenges that hypothesis. There is no duty to be careful in speech as there

is a duty to be honest in speech. Nor indeed is there any general duty

to be careful in action. The duty is limited to those who can establish

some relationship of proximity such as was found to exist in Donoghue v.

Stevenson [1932] AC 562. A plaintiff cannot, therefore, recover for financial

loss caused by a careless statement unless he can show that the maker of

the statement was under a special duty to him to be careful. Mr. Foster

submits that this special duty must be brought under one of three categories.

It must be contractual; or it must be fiduciary; or it must arise from the

relationship of proximity and the financial loss must flow from physical

damage done to the person or the property of the plaintiff. The law is now

settled, Mr. Foster submits, and these three categories are exhaustive. It

was so decided in Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164, and

that decision, Mr. Foster submits, is right in principle and in accordance with

earlier authorities.

Mr. Gardiner for the Appellants agrees that outside contractual and

fiduciary duty there must be a relationship of proximity—that is Donoghue

v. Stevenson—but he disputes that recovery is then limited to loss flowing

from physical damage. He has not been able to cite a single case in which

a defendant has been held liable for a careless statement leading, otherwise

than through the channel of physical damage, to financial loss. But he

submits that in principle such loss ought to be recoverable and that there is

no authority which prevents your Lordships from acting upon that principle.

Unless Mr. Gardiner can persuade your Lordships of this, his case fails

at the outset. This, therefore, is the first and the most fundamental of the

issues which the House is asked to decide.

Mr. Foster's second reason is that, if it is open to your Lordships to

declare that there are or can be special or proximate relationships outside

the categories he has named, your Lordships cannot formulate one to fit

the case of a banker who gives a reference to a third party who is not his

customer; and he contends that your Lordships have already decided that

point in Robinson v. The National Bank of Scotland (1916) S.C. (H.L.) 154.

His third reason is that if there can be found in cases such as this a special

relationship between bankers and third parties, on the facts of the present

case the Appellants fall outside it; and here he relies particularly on the

fact that the reference was marked " Strictly confidential and given on the

" express understanding that we incur no responsibility whatever in

furnishing it."

My Lords, I approach the consideration of the first and fundamental

question in the way in which Lord Atkin approached the same sort of

question—that is, in essence the same sort, though in particulars very

different—in Donoghue v. Stevenson. If Mr. Foster's proposition is the

result of the authorities, then, as Lord Atkin said at page 582, " I should

" consider the result a grave defect in the law, and so contrary to principle

" that I should hesitate long before following any decision to that effect which

" had not the authority of this House." So before I examine the authorities,

I shall explain why I think that the law, if settled as Mr. Foster says it is,

would be defective. As well as being defective in the sense that it would

leave a man without a remedy where he ought to have one and where it is

well within the scope of the law to give him one, it would also be profoundly

illogical. The common law is tolerant of much illogicality, especially on the

surface; but no system of law can be workable if it has not got logic at the

root of it.

Originally it was thought that the tort of negligence must be confined

entirely to deeds and could not extend to words. That was supposed to

have been decided by Deny v. Peek (1889) 14 App. Cas. 337. I cannot

imagine that anyone would now dispute that if this were the law, the law

would be gravely defective. The practical proof of this is that the supposed

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deficiency was in relation to the facts in Deny v. Peek immediately made good

by Act of Parliament. Today it is unthinkable that the law could permit

directors to be as careless as they liked in the statements they made in a

prospectus.

A simple distinction between negligence in word and negligence in deed

might leave the law defective but at least it would be intelligible. This is

not however the distinction that is drawn in Mr. Foster's argument and it

is one which would be unworkable. A defendant who is given a car to

overhaul and repair if necessary is liable to the injured driver (a) if he over-

hauls it and repairs it negligently and tells the driver it is safe when it is

not; (b) if he overhauls it and negligently finds it not to be in need of repair

and tells the driver it is safe when it is not; and (c) if he negligently omits

to overhaul it at all and tells the driver that it is safe when it is not. 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 negli-

gent statement on the faith of which the driver drove the car and for which

he could not recover. In this type of case, where if there were a contract

there would undoubtedly be a duty of service, it is not practicable to distin-

guish between the inspection or examination, the acts done or omitted to

be done, and the advice or information given. So neither in this case nor

in Candler v. Crane, Christmas & Co. (Denning. L.J. noted the point at

page 179 where he gave the example of the analyst who negligently certifies

food to be harmless) has Mr. Foster argued that the distinction lies there.

This is why the distinction is now said to depend on whether financial

loss is caused through physical injury or whether it is caused directly. The

interposition of the physical injury is said to make a difference of principle.

I can find neither logic nor common sense in this. If irrespective of contract,

a doctor negligently advises a patient that he can safely pursue his occupation

and he cannot and the patient's health suffers and he loses his livelihood,

the patient has a remedy. But if the doctor negligently advises him that he

cannot safely pursue his occupation when in fact he can and he loses his

livelihood, there is said to be no remedy. Unless, of course, the patient was

a private patient and the doctor accepted half a guinea for his trouble:

then the patient can recover all. I am bound to say, my Lords, that I think

this to be nonsense. It is not the sort of nonsense that can arise even in

the best system of law out of the need to draw nice distinctions between

borderline cases. It arises, if it is the law, simply out of a refusal to make

sense. The line is not drawn on any intelligible principle. It just happens

to be the line which those who have been driven from the extreme assertion

that negligent statements in the absence of contractual or fiduciary duty give

no cause of action have in the course of their retreat so far reached.

I shall now examine the relevant authorities, and your Lordships will, I

hope, pardon me if with one exception I attend only to those that have been

decided in this House, for I have made it plain that I will not in this matter

yield to persuasion but only to compulsion. The exception is the case of

Le Lievre v. Gould [1893] 1 Q.B. 491, for your Lordships will not easily

upset decisions of the Court of Appeal if they have stood unquestioned for

as long as 70 years. The five relevant decisions of this House are Deny v.

Peek, Nocton v. Ashburton [1914] A.C. 932, Robinson v. National Bank of

Scotland, Donoghue v. Stevenson, and the Greystoke Castle [1947] A.C. 265.

The last of these I can deal with at once, for it lies outside the main stream

of authority on this point. It is a case in which damage was done to a ship

as the result of a collision with another ship. The owners of cargo on the

first ship, which cargo was not itself damaged, thus became liable to the

owners of the first ship for a general average contribution. They sued the

second ship as being partly to blame for the collision. Thus they were

claiming for the financial loss caused to them by having to make the general

average contribution although their property sustained no physical damage.

This House held that they could recover. Their Lordships did not in that

case lay down any general principle about liability for financial loss in

the absence of physical damage; but the case itself makes it impossible to

argue that there is any general rule showing that such loss is of its nature

irrecoverable.

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I turn back to the earlier authorities beginning with Derry v. Peek. The

facts in this case are so well known that I need not state them again. Nor

need I state in my own words the effect of the decision. That has been

done authoritatively by this House in Nocton v. Ashburton. I quote Lord

Haldane at page 947 as stating most comprehensively the limits of the

decision, noting that his view of the case is fully supported by Lord Shaw

at page 970 and Lord Parmoor at page 978. " My Lords, the discussion of

" the case by the noble and learned Lords who took part in the decision

" appears to me to exclude the hypothesis that they considered any other

" question to be before them than what was the necessary foundation of an

" ordinary action for deceit. They must indeed be taken to have thought that

" the facts proved as to the relationship of the parties in Derry v. Peek were

" not enough to establish any special duty arising out of that relationship

" other than the general duty of honesty. But they do not say that where a

" different sort of relationship ought to be inferred from the circumstances

" the case is to be concluded by asking whether an action for deceit will lie."

There was in Derry v. Peek, as the report of the case in 14 A.C. at page 338

shows, no plea of innocent or negligent misrepresentation and so their Lord-

ships did not make any pronouncement on that. I am bound to say that

had there been such a plea I am sure that the House would have rejected it.

As Lord Haldane said, their Lordships must " be taken to have thought"

that there was no liability in negligence. But what your Lordships may

be taken to have thought, though it may exercise great influence upon those

who thereafter have to form their own opinion on the subject, is not the

law of England. It is impossible to say how their Lordships would have

formulated the principle if they had laid one down. They might have made

it general or they might have confined it to the facts of the case. They

might have made an exception of the sort indicated by Lord Herschell at

page 360 or they might not. This is speculation. All that is certain is that on

this point the House laid down no law at all.

Clearly in Le Lievre v. Gould it was thought that the House had done

so. Esher, M.R. at page 498 treated Derry v. Peek as restating the old law

" that, in the absence of contract, an action for negligence cannot be main-

" tained when there is no fraud ". A. L. Smith, L.J., stated the law in the

same way at page 504. This is wrong and the House, in effect, said so in

Nocton v. Ashburton.

My Lords, I need not consider how far thereafter a court of equal authority

was bound to follow Le Lievre v. Gould. It may be that the decision on

the facts was correct even though the reasoning was too wide. There has

been a difference of opinion about the effect of the decision: compare

Asquith, L.J., in Candler v. Crane, Christmas & Co., at page 193 with

Denning, L.J. at page 181. Nor need I consider what part of the reasoning,

if any, should be held to survive Nocton v. Ashburton. It is clear that after

1914 it would be to Nocton v. Ashburton and not to Le Lievre v. Gould that

the lawyer would look in order to ascertain what the exceptions were to the

general principle that a man is not liable for careless misrepresentation.

I cannot feel, therefore, that there is any principle enunciated in Le Lievre v.

Gould which is now so deeply embedded in the law that your Lordships

ought not to disturb it.

I come now to the case of Nocton v. Ashburton, which both sides put

forward as the most important of the authorities which your Lordships have

to consider. The Appellants say that it removed the restrictions which

Derry v. Peek was thought to have put upon liability for negligent mis-

representation. The Respondents say that it removed those restrictions

only to a very limited extent, that is to say, by adding fiduciary obligation to

contract as a source of special duty; and that it closed the door on any

further expansion. I propose, therefore, to examine it with some care

because it is not at all easy to determine exactly what it decided.

Haldane, L.C. at page 943 began his speech by saying: " Owing to the mode

" in which this case has been treated both by the learned Judge who tried

" it and by the Court of Appeal, the question to be decided has been the

" subject of some uncertainty and much argument." He went on to say

that the difficulties in giving relief were concerned with form and not with

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substance. The main difficulty, I think, lies in discovering from the state-

ment of claim what the cause of action was. Lord Ashburton sought

relief from the consequences of having advanced money on mortgage to

several persons of whom the defendant Nocton was one. The statement

of claim consists of a long narrative of events interspersed with complaints.

Although in the end the vital fact was that Nocton was Ashburton's solicitor,

there is no allegation of any retainer and nothing is pleaded in contract.

The fact that Nocton was a solicitor emerges only in the framing of the

complaint in paragraph 13 where it was said that Nocton's advice to make

the advance of £65,000 " was not that of a solicitor advising his client in

" good faith but was given for his own private ends ". The relief asked for

in respect of this transaction is a declaration that the plaintiff " was im-

" properly advised and induced by the defendant Nocton whilst acting as

" the plaintiff's confidential solicitor " to advance £65,000. In paragraphs

31 to 33 of the statement of claim it is related that the plaintiff was asked

to release part of his security for the loan ; and it is said that " The defendant

" Nocton in advising the plaintiff to execute the said release allowed the

"' plaintiff to believe that he was advising the plaintiff independently and in

" good faith and in the plaintiff's interest". No separate relief was sought

in respect of this transaction.

Until the case reached this House no substantial point of law was raised.

Neville, J. at the trial held that the only issue raised by the statement of

claim was whether the defendant Nocton was guilty of fraud and that the

plaintiff had failed to prove it. The Court of Appeal agreed with the

judge's view of the pleadings. Cozens-Hardy, M.R. said that if damages

had been claimed on the ground of negligence, the action would have been

practically undefended. But it was then too late to amend the statement

of claim if only because a new cause of action would have been statute-

barred. On the facts the Court of Appeal reversed in part the judge's

finding of fraud, holding that there was fraud in relation to the release.

In this House at the conclusion of the Appellant's argument the

Respondent's counsel was told that the House was unlikely to differ from

the judgment of Neville, J. on fraud. The pith of the Respondent's argu-

ment is reported as follows at page 943: " Assuming that fraud is out of the

" question, the allegations in the statement of claim are wide enough to found

" a claim for dereliction of duty by a person occupying a fiduciary relation.

" In the old cases in equity the term ' fraud' was frequently applied to cases

" of a breach of fiduciary obligation." He was then stopped.

It can now be understood why Lord Haldane regarded the question as

one of form rather than of substance. The first question which the House

had to consider was whether the statement of claim was wide enough to

cover negligence. Lord Parmoor thought that it was and at page 965 decided

the appeal on that ground. So I think in the end did Lord Dunedin at

page 965, but he also expressed his agreement with the opinion of Haldane,

L.C. Lord Haldane, with whom Lord Atkinson concurred, thought that

possibly negligence was covered, but he did not take the view that the

statement of claim must be interpreted either as an allegation of deceit or as

an allegation of negligence. He said at page 946: " There is a third form of

" procedure to which the statement of claim approximated very closely, and

" that is the old bill in Chancery to enforce compensation for breach of a

" fiduciary obligation. There appears to have been an impression that the

" necessity which recent authorities have established of proving moral fraud

" in order to succeed in an action of deceit has narrowed the scope of this

" remedy. For the reasons which I am about to offer to your Lordships, I do

" not think that this is so." The Lord Chancellor then went on to examine

Deny v. Peek in order to determine exactly what it had decided.

I find most interest for present purposes in the speech of Lord Shaw.

He held at page 967 that the pleadings disclosed " a claim for liability upon a

" ground quite independent of fraud, namely, of misrepresentations and

" misstatements made by a person entrusted with a duty to another, and

" in failure of that duty." He posed at page 968 what he considered to be the

crucial question: —" What was the relation in which the parties stood to

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" each other at the time of the transaction." He stated at page 969 that the

defendant was Lord Ashburton's solicitor and so under a duty to advise.

He concluded at page 972 in the following terms: "Once the relations of

" parties have been ascertained to be those in which a duty is laid upon one

" person of giving information or advice to another upon which that other is

" entitled to rely as the basis of a transaction, responsibility for error

" amounting to misrepresentation in any statement made will attach to the

" adviser or informer, although the information and advice have been given

" not fraudulently but in good faith. It is admitted in the present case

" that misrepresentations were made; that they were material; that they

" were the cause of the loss; that they were made by a solicitor to his

" client in a situation in which the client was entitled to rely, and did rely,

" upon the information received. I accordingly think that that situation

" is plainly open for the application of the principle of liability to which I

" have referred, namely, liability for the consequences of a failure of duty

" in circumstances in which it was a matter equivalent to contract between

" the parties that that duty should be fulfilled." Lord Shaw does not

anywhere in his speech refer to the relationship as being of a fiduciary

character.

Haldane, L.C., at page 948 laid down the general principle in much the

same terms. He said: " Although liability for negligence in word has in

" material respects been developed in our law differently from liability for

" negligence in act, it is none the less true that a man may come under a

" special duty to exercise care in giving information or advice. I should

" accordingly be sorry to be thought to lend countenance to the idea that

" recent decisions have been intended to stereotype the cases in which people

" can be held to have assumed such a special duty. Whether such a duty has

" been assumed must depend on the relationship of the parties, and it is at

" least certain that there are a good many cases in which that relationship may

" be properly treated as giving rise to a special duty of care in statement."

It is quite true that Haldane, L.C. applied this principle only to cases of

breach of fiduciary duty. But that was inevitable on the facts of the case

since upon the view of the pleading on which he was proceeding it was

necessary to show equitable fraud.

In my judgment the effect of this case is as follows. The House clearly

considered the view of Deny v. Peek, exemplified in Le Lievre v. Gould,

too narrow. It considered that outside contract (for contract was not

pleaded in the case), there could be a special relationship between parties

which imposed a duty to give careful advice and accurate information. The

majority of their Lordships did not extend the application of this principle

beyond the breach of a fiduciary obligation but none of them said anything

at all to show that it was limited to fiduciary obligation. Your Lordships

can, therefore, proceed upon the footing that there is such a general principle

and that it is for you to say to what cases, beyond those of fiduciary obliga-

tion, it can properly be extended.

I shall not at this stage deal in any detail with Robinson v. National Bank

of Scotland. Its chief relevance is to Mr. Foster's second point. All that

need be said about it on his first point is that it is no authority for the

proposition that those relationships which give rise to a special duty of care

are limited to the contractual and the fiduciary. On the contrary, it is

a clear authority for the view that Lord Haldane did not mean the general

principle he stated in Nocton v. Ashburton to be limited to fiduciary rela-

tionships. He said at page 157 that he wished emphatically to repeat what he

had said in Nocton v. Ashburton, that it would be a great mistake to suppose

that the principle in Deny v. Peek affected the freedom of action of the

courts in recognising special duties arising out of other kinds of relation-

ship. He went on: " 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 recognising that the duty of care may be estab-

" lished when such cases really occur."

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I come next to Donoghue v. Stevenson. In his celebrated speech in that

case Lord Atkin did two things. He stated at page 580 what he described as

a general conception and from that conception he formulated at page 599 a

specific proposition of law. In between at page 584 he gave a warning

" against the danger of stating propositions of law in wider terms than is

" necessary, lest essential factors be omitted in the wider survey and the

" inherent adaptability of English law be unduly restricted ".

What Lord Atkin called a " general conception of relations giving rise

" to a duty of care " is now often referred to as the principle of proximity.

You must take reasonable care to avoid acts or omissions which you can

reasonably foresee would be likely to injure your neighbour. In the eyes

of the law your neighbour is a person who is so closely and directly affected

by your act that you ought reasonably to have him in contemplation as

being so affected when you are directing your mind to the acts or omissions

which are called in question.

The specific proposition arising out of this conception is that " a manu-

" facturer of products, which he sells in such a form as to show that he

" intends them to reach the ultimate consumer in the form in which they

" left him with no reasonable possibility of intermediate examination, and

" with the knowledge that the absence of reasonable care in the preparation

" or putting up of the products will result in an injury to the consumer's

" life or property, owes a duty to the consumer to take that reasonable

" care".

Now, it is not in my opinion a sensible application of what Lord Atkin

was saying for a judge to be invited on the facts of any particular case to

say whether or not there was " proximity " between the plaintiff and the

defendant. That would be a misuse of a general conception and it is not

the way in which English law develops. What Lord Atkin did was to use

his general conception to open up a category of cases giving rise to a special

duty. It was already clear that the law recognised the existence of such

duty in the category of articles that were dangerous in themselves. What

Donoghue v. Stevenson did may be described either as the widening of

an old category or as the creation of a new and similar one. The general

conception can be used to produce other categories in the same way. An

existing category grows as instances of its application multiply until the

time comes when the cell divides.

Lord Thankerton and Lord Macmillan approached the problem funda-

mentally in the same way, though they left any general conception on which

they were acting to be implied. They enquired directly—Lord Thankerton

at page 603 and Lord Macmillan at pages 619 and 620,—whether the rela-

tionship between the plaintiff and the defendant was such as to give rise to a

duty to take care. It is significant, whether it is a coincidence or not, that the

term " special relationship " used by Lord Thankerton is also the one used

by Lord Haldane in Nocton v. Ashburton. The field is very different but the

object of the search is the same.

In my opinion the Appellants in their argument tried to press Donoghue

v. Stevenson too hard. They asked whether the principle of proximity

should not apply as well to words as to deeds. I think it should, but as it

is only a general conception it does not get them very far. Then they

take the specific proposition laid down by Donoghue v. Stevenson and try

to apply it literally to a certificate or a banker's reference. That will not

do, for a general conception cannot be applied to pieces of paper in the

same way as to articles of commerce or to writers in the same way as to

manufacturers. An inquiry into the possibilities of intermediate examination

of a certificate will not be fruitful. The real value of Donoghue v. Stevenson

to the argument in this case is that it shows how the law can be developed

to solve particular problems. Is the relationship between the parties in

this case such that it can be brought within a category giving rise to a special

duty? As always in English law, the first step in such an inquiry is to see

how far the authorities have gone, for new categories in the law do not

spring into existence overnight.

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It would be surprising if the sort of problem that is created by the facts

of this case had never until recently arisen in English law. As a problem

it is a by-product of the doctrine of consideration. If the Respondents had

made a nominal charge for the reference, the problem would not exist. If

it were possible in English law to construct a contract without consideration,

the problem would move at once out of the first and general phase into

the particular; and the question would be, not whether on the facts of

the case there was a special relationship, but whether on the facts of the

case there was a contract.

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. This is the foundation of the liability of a

gratuitous bailee. In the famous case of Coggs v. Bernard (1703) Smith's

Leading Cases 13th Ed. Vol. 1 p. 175, where the defendant had charge of

brandy belonging to the plaintiff and had spilt a quantity of it, there was

a motion in arrest of judgment " for that it was not alleged in the declara-

" tion that the defendant was a common porter, nor averred that he had

" anything for his pains ". The declaration was held to be good notwith-

standing that there was not any consideration laid. Gould, J. said: " The

" reason of the action is, the particular trust reposed in the defendant,

" to which he has concurred by his assumption, and in the executing which

" he has miscarried by his neglect." This proposition is not limited to the

law of bailment. In Skelton v. London & North Western Railway Co. [1867]

L.R. 2 C.P. 631, Willes, J. at 636 applied it generally to the law of negli-

gence. He said: " Actionable negligence must consist in the breach of

'' some duty ... If a person undertakes to perform a voluntary act, he is

" liable if he performs it improperly, but not if he neglects to perform it.

" Such is the result of the decision in the case of Coggs v. Bernard." Like-

wise in Banbury v. Bank of Montreal [1918] A.C. 626, where the bank had

advised a customer on his investments, Finlay, L.C. at 654 said: " He is

" under no obligation to advise, but if he takes upon himself to do so, he

" will incur liability if he does so negligently."

The principle has been applied to cases where as a result of the negligence

no damage was done to person or to property and the consequential loss

was purely financial. In Wilkinson v. Coverdale (1793) 1 Esp. 75 the

defendant undertook gratuitously to get a fire policy renewed for the

plaintiff, but, in doing so, neglected formalities, the omission of which

rendered the policy inoperative. It was held that an action would lie. In

two similar cases the defendants succeeded on the ground that negligence

was not proved in fact. Both cases were thus decided on the basis that

in law an action would He. In the first of them, Shiells v. Blackburne [1789]

1 H. Bl. 158, the defendant had, acting voluntarily and without compensa-

tion, made an entry of the plaintiff's leather as wrought leather instead of

dressed leather, with the result that the leather was seized. In Dartnall

v. Howard (1825) B. & C. 345 the defendants purchased an annuity for the

plaintiff but on the personal security of two insolvent persons. The court,

after verdict, arrested the judgment upon the ground that the defendants

appeared to be gratuitous agents and that it was not averred that they had

acted either with negligence or dishonesty.

Many cases could be cited in which the same result has been achieved by

setting up some nominal consideration and suing in contract instead of

in tort. In Coggs v. Bernard Holt, C.J. at page 189 put the obligation on

both grounds He said : " Secondly, it is objected, that there is no considera-

tion to ground this promise upon, and therefore the undertaking is but

" nudum pactum. But to this I answer, that the owners trusting him with the

" goods is a sufficient consideration to oblige him to a careful management.

" Indeed, if the agreement had been executory, to carry these brandies from

" the one place to the other such a day, the defendant had not been bound to

" carry them. But this is a different case, for assumpsit does not only signify

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" a future agreement, but in such a case as this, it signifies an actual entry

" upon the thing, and taking the trust upon himself. And if a man will

" do that, and miscarries in the performance of his trust, an action will lie

" against him for that, though nobody could have compelled him to do the

" thing."

De La Bere v. Pearson Ltd. [1908] 1 K.B. 280 is an example of a case

of this sort decided on the ground that there was a sufficiency of considera-

tion. The defendants advertised in their newspaper that their city editor

would answer inquiries from readers of the paper desiring financial advice.

The plaintiff asked for the name of a good stockbroker. The editor recom-

mended the name of a person whom he knew to be an outside broker and

whom he ought to have known, if he had made proper inquiries, to be an

undischarged bankrupt. The plaintiff dealt with him and lost his money.

The case being brought in contract, Vaughan Williams, L.J. thought at 287

that there was sufficient consideration in the fact that the plaintiff consented

to the publication of his question in the defendants' paper if the defendants

so chose. For Sir Gorell Barnes, President, at page 289 the consideration

appears to have lain in the plaintiff addressing an inquiry as invited. In the

same way when in Everett v. Griffiths [1920] 3 K.B. 163 the Court of Appeal

was considering the liability of a doctor towards the person he was certifying,

Scrutton, L.J. at page 191 said that the submission to treatment would be a

good consideration.

My Lords, I have cited these instances so as to show that in one way

or another the law has ensured that in this type of case a just result has

been reached. But I think that today the result can and should be achieved

by the application of the law of negligence and that it is unnecessary and

undesirable to construct an artificial consideration. I agree with Sir Frederick

Pollock's note on the case of De La Bere v. Pearson, where he said in

"Contracts", 13th Edn., page 140, that "the cause of action is better

" regarded as arising from default in the performance of a voluntary

" undertaking independent of contract".

My Lords, it is true that this principle of law has not yet been clearly

applied to a case where the service which the defendant undertakes to perform

is or includes the obtaining and imparting of information. But I cannot

see why it should not be: and if it had not been thought erroneously that

Deny v. Peek negatived any liability for negligent statements, I think that

by now it probably would have been. It cannot matter whether the inform-

ation consists of fact or of opinion or is a mixture of both, nor whether it

was obtained as a result of special inquiries or comes direct from facts

already in the defendant's possession or from his general store of profes-

sional knowledge. One cannot, as I have already endeavoured to show,

distinguish in this respect between a duty to inquire and a duty to state.

I think, therefore, that there is ample authority to justify your Lordships

in saying now that the categories of special relationships which may give

rise to a duty to take care in word as well as in deed are not limited to

contractual relationships or to relationships of fiduciary duty, but include

also relationships which in the words of Lord Shaw in Nocton v. Ashburton

at page 972 are " equivalent to contract" that is, where there is an assump-

tion of responsibility in circumstances in which, but for the absence of con-

sideration, there would be a contract. Where there is an express undertaking,

an express warranty as distinct from mere representation, there can be

little difficulty. The difficulty arises in discerning those cases in which the

undertaking is to be implied. In this respect the absence of consideration

is not irrelevant. Payment for information or advice is very good evidence

that it is being relied upon and that the informer or adviser knows that it is.

Where there is no consideration, it will be necessary to exercise greater

care in distinguishing between social and professional relationships and

between those which are of a contractual character and those which are not.

It may often be material to consider whether the adviser is acting purely

out of good nature or whether he is getting his reward in some indirect form.

The service that a bank performs in giving a reference is not done simply

out of a desire to assist commerce. It would discourage the customers of

the bank if their deals fell through because the bank had refused to testify

to their credit when it was good.

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I have had the advantage of reading all the opinions prepared by your

Lordships and of studying the terms which your Lordships have framed

by way of definition of the sort of relationship which gives rise to a responsi-

bility towards those who act upon information or advice and so creates a

duty of care towards them. I do not understand any of your Lordships to

hold that it is a responsibility imposed by law upon certain types of persons

or in certain sorts of situations. It is a responsibility that is voluntarily

accepted or undertaken either generally where a general relationship, such

as that of solicitor and client or banker and customer, is created, or specific-

ally in relation to a particular transaction. In the present case the Appellants

were not, as in Woods v. Martins Bank, Ltd. and Another [1959] 1 Q.B. 55,

the customers or potential customers of the bank. Responsibility can attach

only to the single act, i.e. the giving of the reference, and only if the doing

of that act implied a voluntary undertaking to assume responsibility. This

is a point of great importance because it is, as I understand it, the foundation

for the ground on which in the end the House dismisses the appeal. I do

not think it possible to formulate with exactitude all the conditions under

which the law will in a specific case imply a voluntary undertaking any more

than it is possible to formulate those in which the law will imply a contract.

Rut in so far as your Lordships describe the circumstances in which an

implication will ordinarily be drawn, I am prepared to adopt any one of

your Lordships' statements as showing the general rule; and I pay the same

respect to the statement by Denning, L.J. in his dissenting judgment in

Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164 about the circumstances

in which he says a duty to use care in making a statement exists.

I do not go further than this for two reasons. The first is that I have

found in the speech of Lord Shaw in Nocton v. Ashburton and in the idea

of a relationship that is equivalent to contract all that is necessary to cover

the situation that arises in this case. Mr. Gardiner does not claim to

succeed unless he can establish that the reference was intended by the

Respondents to be communicated by the National Provincial Bank to some

unnamed customer of theirs, whose identity was immaterial to the Respon-

dents, for that customer's use. All that was lacking was formal consideration.

The case is well within the authorities I have already cited and of which

Wilkinson v. Coverdale is the most apposite example.

I shall therefore content myself with the proposition that wherever there

is a relationship equivalent to contract there is a duty of care. Such a

relationship may be either general or particular. Examples of a general

relationship are those of solicitor and client and of banker and customer.

For the former Nocton v. Ashburton has long stood as the authority and for

the latter there is the decision of Salmon, J. in Woods v. Martins Bank

which I respectfully approve. There may well be others yet to be established.

Where there is a general relationship of this sort it is unnecessary to do

more than prove its existence and the duty follows. Where, as in the present

case, what is relied on is a particular relationship created ad hoc, it will

be necessary to examine the particular facts to see whether there is an

express or implied undertaking of responsibility.

I regard this proposition as an application of the general conception of

proximity. Cases may arise in the future in which a new and wider

proposition, quite independent of any notion of contract, will be needed.

There may, for example, be cases in which a statement is not supplied

for the use of any particular person, any more than in Donoghue v.

Stevenson the ginger beer was supplied for consumption by any particular

person; and it will then be necessary to return to the general conception

of proximity and to see whether there can be evolved from it, as was done

in Donoghue v. Stevenson, a specific proposition to fit the case. When

that has to be done, the speeches of your Lordships today as well as the

judgment of Denning, L.J. to which I have referred— and also, I may add,

the proposition in the "Restatement" and the cases which exemplify it

will afford good guidance as to what ought to be said. I prefer to see what

shape such cases take before committing myself to any formulation, for I

bear in mind Lord Atkin's warning which I have quoted against placing

unnecessary restrictions on the adaptability of English law. I have, I hope,

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made it clear that I take quite literally the dictum of Lord Macmillan, so

often quoted from the same case, that " the categories of negligence are

" never closed ". English law is wide enough to embrace any new category

or proposition that exemplifies the principle of proximity.

I have another reason for caution. Since the essence of the matter in

the present case and in others of the same type is the acceptance of respon-

sibility, I should like to guard against the imposition of restrictive terms

notwithstanding that the essential condition is fulfilled. If a defendant

says to a plaintiff: " Let me do this for you, do not waste your money

" in employing a professional, I will do it for nothing and you can rely

" on me", I do not think he could escape liability simply because he

belonged to no profession or calling, had no qualifications or special skill

and did not hold himself out as having any. The relevance of these factors

is to show the unlikelihood of a defendant in such circumstances assuming

a legal responsibility, and as such they may often be decisive. But they are

not theoretically conclusive and so cannot be the subject of definition. It

would be unfortunate if they were. For it would mean that plaintiffs would

seek to avoid the rigidity of the definition by bringing the action in contract

as in De Le Bere v. Pearson and setting up something that would do for

consideration. That to my mind would be an undesirable development

in the law; and the best way of avoiding it is to settle the law so that the

presence or absence of consideration makes no difference.

Your Lordships' attention was called to a number of cases in courts of

first instance or of appeal which it was said would have been decided

differently if the Appellants main contention was correct. I do not propose

to go through them in order to consider whether on the facts of each it

should or should not be upheld. I shall content myself with saying that

in my opinion Le Lievre v. Gould and all decisions based on its reasoning

(in which I specifically include, lest otherwise it might be thought that

generalia specialibus non derogant, the decision of Devlin, J. in Heskell v.

Continental Exporters (1950) 1 All E. R. 1033 at page 1044) can no longer

be regarded as authoritative; and when similar facts arise in the future, the

case will have to be judged afresh in the light of the principles which the

House has now laid down.

My Lords, I have devoted much time and thought to considering the first

reason given by Mr. Foster for rejecting the Appellants' claim. I have

done so not only because his reason was based on a ground so fundamental

that it called for a full refutation, but also because it is impossible to find

the correct answer on the facts to the Appellants' claim until the relevant

criteria for ascertaining whether or not there is a duty to take care have been

clearly established. Once that is done their application to the facts of this

case can be done very shortly, for the case then becomes a very simple one.

I am satisfied for the reasons I have given that a person for whose use

a banker's reference is furnished is not, simply because no consideration

has passed, prevented from contending that the banker is responsible to

him for what he has said. The question is whether the Appellants can set

up a claim equivalent to contract and rely on an implied undertaking to

accept responsibility. Mr. Foster's second point is that in Robinson v.

National Bank of Scotland this House has already laid it down as a general

rule that in the case of a banker furnishing a reference that cannot be done.

I do not agree. The facts in that case have been stated by my noble and

learned friend, Lord Reid, and I need not repeat them. I think it is plain

upon those facts that the bank in that case was not furnishing the reference

for the use of the pursuer; he was not a person for whose use of the reference

they were undertaking any responsibility, and that quite apart from their

general disclaimer. Furthermore, the pursuer never saw the reference;

he was given only what the Lord Justice-Clerk at page 1916 S.C. 58 described

as " a gloss of it". This makes the connection between the pursuer and

the defendants far too remote to constitute a relationship of a contractual

character.

On the facts of the present case Mr. Foster has under his third head

argued for the same result. He submits, first, that it ought not to be

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inferred that the Respondents knew that the National Provincial Bank

were asking for the reference for the use of a customer. If the Respondents

did know that, then Mr. Foster submits that they did not intend that the

reference itself should be communicated to the customer; it was intended

only as material upon which the customer's bank could advise the customer

on its own responsibility. I should consider it necessary to examine these

contentions were it riot for the general disclaimer of responsibility which

appears to me in any event to be conclusive. I agree entirely with the

reasoning and conclusion on this point of my noble and learned friend.

Lord Reid. A man cannot be said voluntarily to be undertaking a

responsibility if at the very moment when he is said to be accepting it he

declares that in fact he is not. The problem of reconciling words of exemption

with the existence of a duty arises only when a party is claiming exemption

from a responsibility which he has already undertaken or which he is

contracting to undertake. For this reason alone, I would dismiss the appeal.

Lord Pearce

My lords,

" Although liability for negligence in word ", said Lord Haldane in Nocton

v. Ashburton [1914] A.C. 932 at page 948, "has in material respects been

" developed in our law differently from liability for negligence in act, it is

" none the less true that a man may come under a special duty to exercise

" care in giving information or advice. I should accordingly be sorry to

" be thought to lend countenance to the idea that recent decisions have

" been intended to stereotype the cases in which people can be held to

" have assumed such a special duty.

" Whether such a duty has been assumed must depend on the relationship

" of the parties, and it is at least certain that there are a good many cases

" in which that relationship may be properly treated as giving rise to a

" special duty of care in statement."

The law of negligence has been deliberately limited in its range by the

Courts' insistence that there can be no actionable negligence in vacuo

without the existence of some duty to the plaintiff. For it would be imprac-

ticable to grant relief to everybody who suffers damage through the careless-

ness of another.

The reason for some divergence between the law of negligence in word and

that of negligence in act is clear. Negligence in word creates problems

different from those of negligence in act. Words are more volatile than

deeds. They travel fast and far afield. They are used without being

expended and take effect in combination with innumerable facts and other

words. Yet they are dangerous and can cause vast financial damage. How

far they are relied on unchecked (by analogy with there being no probability

of intermediate inspection—See Grant v. Australian Knitting Mills Ltd.

[1936] AC 85) must in many cases be a matter of doubt and difficulty. If the

mere hearing or reading of words were held to create proximity, there might

be no limit to the persons to whom the speaker or writer could be liable.

Damage by negligent acts to persons or property on the other hand is more

visible and obvious; its limits are more easily defined, and it is with this

damage that the earlier cases were more concerned. It was not until 1789

thai Pasley and Another v. Freeman, 3 T.R. 51, recognised and laid down a

duty of honesty in words to the world at large—thus creating a remedy

designed to protect <the economic as opposed to the physical interests of the

community. Any attempts to extend this remedy by imposing a duty of

care as well as a duty of honesty in representations by word were curbed

by Deny v. Peek (14 App Cas 337).

In Cann v. Wilson, 39 C.D. 39, it had been held that a valuer was liable

in respect of a negligent valuation which he had been employed by the

owner of property to make for the purpose of raising a mortgage, and which

the valuer himself put before the proposed mortgagee's solicitor. Chitty, J,

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there said: " It seems to me that the defendants knowingly placed themselves

" in that position, and in point of law incurred a duty towards him to use

" reasonable care in the preparation of the document called a valuation.

" I think it is like the case of the supply of ... the hairwash in the case of

" George v. Skivington " (L.R. 5 Ex. 1), later approved in Donoghue v.

Stevenson. Thus in the case of economic damage alone he was drawing

an analogy from a case where physical damage to the wife of a purchaser

was held to give rise to an action for negligence.

Cann v. Wilson was, however, overruled by Le Lievre v. Gould [1893]

1 Q.B. 491 on the ground, erroneous as it seems to me, that it could not

stand with Derry v. Peek. The particular facts in Le Lievre v. Gould

justified the particular decision as Denning, L.J. explained in Candler v.

Crane, Christmas & Co. ([1951] 2 K.B. 164 at 181). But the ratio decidendi

was wrong since it attributed to Derry v. Peek more than that case decided.

In Nocton v. Ashburton ([1914] A.C. 932) this House pointed out that too

much had been ascribed to Derry v. Peek. Lord Haldane said at page 947:

" The discussion of the case by the noble and learned lords who took part

" in the decision appears to me to exclude the hypothesis that they considered

" any other question to be before them than what was the necessary founda-

" tion of an ordinary action for deceit. They must indeed be taken to have

" thought that the facts proved as to the relationship of the parties in Derry

" v. Peek were not enough to establish any special duty arising out of

" that relationship other than the general duty of honesty. But they do not

" say that where a different sort of relationship ought to be inferred from

" the circumstances the case is to be concluded by asking whether an action

" for deceit will lie. I think that the authorities subsequent to the decision

" of the House of Lords shew a tendency to assume that it was intended

" to mean more than it did. In reality the judgment covered only a part

" of the field in which liabilities may arise. There are other obligations

" besides that of honesty, the breach of which may give a right to damages.

" These obligations depend on principles which the judges have worked

" out in the fashion that is characteristic of a system where much of the

" law has always been judge-made and unwritten." Lord Haldane spoke to

a like effect in Robinson v. National Bank of Scotland, 1916 SC (HL) 154

at p. 157. "I think, as I said in Nocton's case, that an exaggerated view

" was taken by a good many people of the scope of the decision in Derry

" v. Peek. 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 recognising that the duty of care may be established

" when such cases really occur."

Lord Haldane was thus in terms preserving unencumbered the area of

special relationships which created a duty of care; and he was not restrict-

ing the area to cases where courts of equity would find a fiduciary duty.

The range of negligence in act was greatly extended in Donoghue v.

Stevenson [1932] AC 562 on the wide principle of the good neighbour; sic

utere tuo ut alienum non laedas. It is argued that the principles enunciated

in Donoghue v. Stevenson apply fully to negligence in word. It may well

be that Wrottesley, J. in Old Gate Estates, Ltd., 161 L.T. 227, put the matter

too narrowly when he confined the applicability of the principles laid down

in Donoghue v. Stevenson to negligence which caused damage to life, limb

or health. But they were certainly not purporting to deal with such issues

as, for instance, how far economic loss alone without some physical or

material damage to support it. can afford a cause of action in negligence

by act. See Morrison Steamship Co. Ltd. v. Greystroke Castle [1947] A.C.

265, where it was held that it could do so. The House in Donoghue v.

Stevenson was, in fact, dealing with negligent acts causing physical damage,

and the Opinions cannot be read as if they were dealing with negligence in

word causing economic damage. Had it been otherwise some consideration

would have been given to problems peculiar to negligence in words. That

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case, therefore, can give no more help in this sphere than by affording

some analogy from the broad outlook which it imposed on the law relating

to physical negligence.

How wide the sphere of the duty of care in negligence is to be laid

depends ultimately upon the Courts' assessment of the demands of society

for protection from the carelessness of others. Economic protection has

lagged behind protection in physical matters where there is injury to person

and property. It may be that the size and the width of the range of possible

claims has acted as a deterrent to extension of economic protection.

In this sphere the law was developed in the United States in Glanzer v.

Shepherd [1922] 233 N.Y. Rep. 236, where a public weigher employed by a

vendor was held liable to a purchaser for giving him a certificate which

negligently overstated the amount of the goods supplied to him. The

defendant was thus engaged on a task in which he knew vendor and pur-

chaser alike depended on his skill and care and the fact that it was the

vendor who paid him was merely an accident of commerce.

This case was followed and developed in later cases.

In the Ultramares case ([1931] 255 N.Y. Rep. 170) however, the Court felt

the undesirability of exposing defendants to a potential liability " in an inde-

" terminate amount for an indeterminate time to an indeterminate class ". It

decided that auditors were not liable for negligence in the preparation of

their accounts (of which they supplied thirty copies although they were

not aware of the specific purpose, namely, to obtain financial help) to a

plaintiff who lent money on the strength of them.

In South Africa, under a different system of law, two cases show a

similar advance and subsequent restriction (Perlman v. Zonkendyk [1934]

C.P.D. 151 and Herschell v. Marupi [1954] 3 SALR 464).

Some guidance may be obtained from the case of Shiells v. Blackburn

[1789] 1 H. Bl. 158, 162; 126 E.R. 94. There a general merchant undertook

voluntarily and without reward to enter a parcel of the goods of another,

together with a parcel of his own of the same sort, at the Customs House

for exportation. Acting, it was contended, with gross negligence, he made

the entry under a wrong denomination whereby both parcels were seized.

The plaintiff failed on the facts to make out a case of gross negligence. But

Lord Loughborough said (at page 162 ; 96) " Where a bailee undertakes to

" perform a gratuitous act, from which the bailor alone is to receive benefit,

" there the bailee is only liable for gross negligence ; but if a man gratuitously

" undertakes to do a thing to the best of his skill, where his situation or

" profession is such as to imply skill, an omission of that skill is imputable

" to him as gross negligence. If in this case a ship broker, or a clerk in

" the Custom-House had undertaken to enter the goods, a wrong entry would

" in them be gross negligence, because their situation and employment

" necessarily imply a competent degree of knowledge in making such entries."

Heath, J. said: "The surgeon would also be liable for negligence if he

" undertook gratis to attend a sick person, because his situation implies

" skill in surgery; but if the patient applies to a man of a different employ-

" ment or occupation for his gratuitous assistance, who either does not

" exert all his skill, or administers improper remedies to the best of his

" ability, such person is not liable."

In Gladwell v. Steggall, 5 Bing (N.C.) 733 ; 132 E.R. 1283, an infant

plaintiff, 10 years old, recovered damages for injury to health from a surgeon

and apothecary who had treated her. She did not sue in contract but

brought an action ex delicto alleging a breach of duty arising out of his

employment by her, although it was her father to whom the bill was made out.

And in Wilkinson v. Coverdale, 1 Esp. 75 ; 170 E.R. 284, Lord Kenyon

accepted the proposition that a defendant who had gratuitously undertaken

to take out an insurance policy and who did it negligently, could be liable

in damages.

In those cases there was no dichotomy between negligence in act and in

word, nor between physical and economic loss. The basis underlying them

Is that if persons holding themselves out in a calling or situation or profession

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take on a task within that calling or situation or profession they have a

duty of skill and care. In terms of proximity one might say that they

are in particularly close proximity to those who as they know are relying

on their skill and care although the proximity is not contractual.

The reasoning of Shiells v. Blackburne was applied in Everett v. Griffiths

[1920] 3 K.B. 163, 182, (see also 217), where the Court of Appeal held that

a doctor owed a duty of care to a man by whom he was not employed but

whom he had a duty to examine under the Lunacy Act. It was also relied

on by Denning, L.J. in his dissenting judgment in Candler v. Crane, Christmas

& Co. [1951] 2 K.B. 164 at page 179. He reached the conclusion that in

respect of reports and work that resulted in such reports there was a duty of

care laid on "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."

The duty is in his opinion owed (apart from contractual duty to their

employer) " 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." He excludes

strangers of whom they have heard nothing and to whom their employer

without their knowledge may choose to hand their accounts. " 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 ". (It is to be noted

that these expressions of opinion produce a result somewhat similar to the

Restatement para. 552.) I agree with those words. In my opinion they are

consonant with the earlier cases and with the observations of Lord Haldane.

It is argued that so to hold would create confusion in many aspects of

the law and infringe the established rule that innocent misrepresentation

gives no right to damages. I cannot accept that argument. The true rule

is that innocent misrepresentation per se gives no right to damages. If the

misrepresentation was intended by the parties to form a warranty between

two contracting parties, it gives on that ground a right to damages (Heilbutt,

Symons & Co. v. Buckleton [19131 A.C. 30). If an innocent misrepresentation

is made between parties in a fiduciary relationship it may, on that ground,

give a right to claim damages for negligence. 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.

Was there such a special relationship in the present case as to impose on

the defendants a duty of care to the plaintiffs as the undisclosed principals

for whom the National Provincial Bank was making the enquiry? The

answer to that question depends on the circumstances of the transaction.

If, for instance, they disclosed a casual social approach to the enquiry no

such special relationship or duty of care would be assumed (see Fish v.

Kelly 144 E.R. 78, 83). To import such a duty the representation must

normally, I think, concern a business or professional transaction whose nature

makes clear the gravity of the enquiry and the importance and influence

attached to the answer. It is conceded that Salmon, J., rightly found a duty

of care in Woods v. Martins Bank, Ltd. [1959] 1 Q.B. 55, but the facts in that

case were wholly different from those in the present case. A most important

circumstance is the form of the enquiry and of the answer. Both were here

plainly stated to be without liability. Mr. Gardiner argues that those words

are not sufficiently precise to exclude liability for negligence. Nothing, how-

ever, except negligence could, in the facts of this case, create a liability (apart

from fraud to which they cannot have been intended to refer and against

which the words would be no protection since they would be part of the

fraud). I do not, therefore, accept that even if the parties were already

in contractual or other special relationship the words would give no immunity

to a negligent answer. But in any event they clearly prevent a special

relationship from arising. They are part of the material from which one

deduces whether a duty of care and a liability for negligence was assumed.

If both parties say expressly (in a case where neither is deliberately taking

advantage of the other) that there shall be no liability, I do not find it possible

to say that a liability was assumed.

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In Robinson v. National Bank of Scotland also the correspondence

expressly excluded responsibility. Possibly that factor weighed with Lord

Haldane when (at p. 157) he said " But when a mere enquiry is made by

" one banker of another who stands in no special relation to him, then, in

" the absence of special circumstances from which a contract to be careful

" can be inferred, I think there is no duty excepting the duty of common

" honesty to which I have referred." I appreciate Mr. Gardiner's emphasis

on the general importance to the business world of bankers' references and

the desirability that in an integrated banking system there should be a duty

of care with regard to them, but on the facts before us it is in my opinion

not possible to hold that there was a special duty of care and a liability

for negligence.

I would therefore dismiss the appeal.