

# Foundation Studies

# Business Environments

## Part 2: The Legal Environment of Business

### Unit 7

#### Tort of Negligence (II): Negligent Misstatement

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# Overview

- Negligent misstatement: negligent words and advice
  - Duty of care
    - “Special relationship”
  - Breach
    - Revision and Section 50
  - Causation and Remoteness: Revision
- Remedies in tort
- Defences
- Vicarious liability

# Legislation and Cases in this unit

## Legislation

*Civil Liability Act 2002 (NSW)*

- Section 50

## Cases

*Hedley Byrne & Co Ltd v Heller & Partners Ltd*

*Mutual Life & Citizens' Assurance v Evatt*

*Shaddock & Associates v Parramatta City Council*

# Negligent Misstatement

- The giving of **careless advice** that leads to economic loss.
- Earlier law did not award damages for negligent advice where the damage resulted from words, not physical action or omission.
- The law changed with *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465
- The duty of advisers covers both careless statements and the failure to disclose information that should have been disclosed.

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## **Duty of Care**

**The defendant owed plaintiff a duty to take reasonable care**



# Negligent Misstatement

***Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465***

## Facts

- Hedley Byrne (an advertising agent), was about to place some orders for advertising for its client (Easipower Ltd)
- Before placing the orders, Hedley Byrne asked its bank to contact the client's bank (Heller & Partners) for a credit check.
- Heller & Partners replied in a letter:  
*"For your private use and without responsibility on the part of this bank or its officials ... In reply to your inquiring letter ... we ... advise ...  
Re Easipower Ltd  
Respectably constituted company, considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see."*
- HB relied on this bank reference and placed large orders.
- Easipower went into liquidation.

# Negligent Misstatement

***Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465***

## Issue

- Hedley Byrne sued Heller & Partners for negligent misstatement.

## Decision

- Heller & Partners assumed responsibility. They knew why Hedley Byrne wanted a credit reference and why. Hedley Byrne relied on their skill and judgment.
- Negligent misstatement depends on a 'special relationship' between the parties and there was a special relationship between the parties.
- However, the bank was not liable because there was an exclusion clause in the letter.
  - *"without responsibility on the part of this bank or its officials"*

# Negligent Misstatement

## Significance of *Hedley Byrne v Heller & Partners*

- The case established the tort of negligent misstatement and the principle of responsibility for negligent misstatement.
- Law will impose a duty of care when there is a 'special relationship' between parties.
- 'Special relationship' is an application of the 'who is my neighbour?' principle of *Donoghue v Stevenson*.
- The features of a 'special relationship' were confirmed in ***Mutual Life & Citizens' Assurance v Evatt* [1968] HCA 74**.

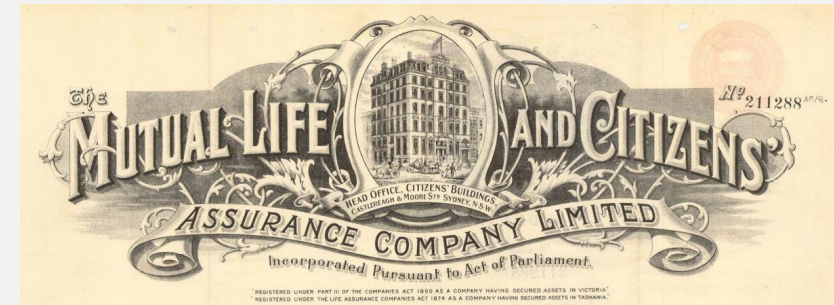


# Duty of Care

## ***Mutual Life & Citizens' Assurance v Evatt* [1968] HCA 74**

### Facts

- A policyholder of MLC asked for advice on the investment performance of HG Palmer. An 'officer' of MLC advised that HG Palmer would continue to be financially stable and that it would be safe to invest more in it.
- Relying on this advice, the policyholder invested further.
- HG Palmer went into liquidation, and the policy holder lost his investment



# Duty of Care

## ***Mutual Life & Citizens' Assurance v Evatt* [1968] HCA 74**

### Issue

- Whether MLC is negligent?

### Decision

- MLC assurance is not negligent – no duty of care
- MLC Assurance's business did not include giving advice on investments, and it did not claim to have the necessary skill and competence to give such advice and to exercise the necessary diligence to give reliable advice.

# Duty of Care

- ***Mutual Life & Citizens' Assurance v Evatt*** is remembered for the test of Barwick CJ in the High Court which defined the 'special relationship':
- Negligent misstatement – is there a 'special relationship'? – the **Barwick test** (4 steps)
  1. 'Assumption of responsibility' – the speaker must realise that the speaker is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker has or has access to.
  2. The subject matter of the information or advice must be of a 'serious or business nature'.
  3. The speaker must be aware – or the circumstances must show that the speaker should be aware – that the recipient intended to act upon the information or advice. This excludes advice given at a social occasion with no thought of its possible legal consequences.
  4. **Reasonable reliance** – It must be reasonable for the recipient to ask for and to rely on what the speaker says.

# Duty of Care

## Reasonable Reliance

- Reasonably relies upon advice or information
- Court will look at the circumstances justifying reasonable reliance, e.g.
  - Capacity of parties
    - Respective skills, knowledge, experience
  - Nature of subject matter
    - Serious / business
  - Occasion when the advice was given
    - Social / business context

# Duty of Care

## ***Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 150 CLR 225***

### Facts

- Shaddock (a property development company) was considering purchasing a property in Parramatta for redevelopment.
- Shaddock's solicitor made two oral inquiries and one written inquiry to Parramatta City Council regarding any planned road widening that might affect the property.
- The Council, through its officers, orally informed Shaddock's solicitor that there were no such proposals. The written response (a certificate) from the Council also did not disclose any planned road widening.
- Relying on this information, Shaddock purchased the property.
- After the purchase, it was discovered that there was a proposal to widen the road, which significantly affected the value of the property and the feasibility of their redevelopment plans.

# Duty of Care

***Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225**

## Issue

- Whether the Council owed a duty of care to Shaddock to provide accurate information?
- Whether the provision of incorrect information constituted a negligent misstatement for which the Council could be held liable.

## Decision

- The Council did owe a duty of care to Shaddock & Associates. The Council's officers had been negligent in providing incorrect information.
- Public authorities could be held liable for negligent misstatements if it was reasonable for the recipient of the information to rely on it and they did rely on it to their detriment.
- The Council is a public body. It followed the practice of supplying information upon which the recipients are likely to rely for serious purposes. Skills were not required; a public body might be specially competent to supply material which it had in its possession for the purposes of its public functions.

# Duty of Care

## **Significance of *Shaddock & Associates Pty Ltd v Parramatta City Council***

- Broadened the scope of duty of care. Special relationship can exist even when:
  - advisor does not profess to possess any actual skill or judgment
  - advisee did not pay for the advice

# 2

## **Breach of Duty of Care**

**The defendant did not meet the standard or level of care under that duty**





# Breach of Duty of Care

## Section 5B of the *Civil Liability Act 2002* (NSW)

- (1) A person is not negligent in failing to take precautions against a risk of harm unless:
- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
  - (b) the risk was not insignificant, and
  - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

# Breach of Duty of Care

## Standard of care for professionals

- **Section 50** of the *Civil Liability Act 2002 (NSW)* defines the standard of care in circumstances where the defendant is a professional acting in his or her professional capacity.
- A professional is not liable in negligence if it is established that the professional acted in a manner that was **widely accepted in Australia by peer professional opinion** as competent professional practice.
- A court is not bound by the peer professional opinion if the Court considers the opinion to be irrational.

# 3

## **Causation**

**The plaintiff suffered loss, damage or injury  
that was caused by the breach**

(See Unit 6)



# 4

## **Remoteness**

**The loss, damage or injury was not too remote**

(See Unit 6)



# Remedies in Tort



# Damages

- An award of monetary sum to provide compensation for the damage suffered.
- Purpose of damages in tort is compensation – aims to put plaintiff in the position in which they would have been if the tort had not been committed (not to punish wrongdoer)
- Compensation for:
  - loss of earning capacity
  - medical expenses (e.g., hospital, physiotherapy)
  - rehabilitation expenses (e.g., wheelchairs)
  - personal care including gratuitous care
  - pain and suffering
  - loss of amenities, such as the inability to enjoy normal activities as a result (for example, of loss of limb)
  - loss of faculty (such as permanent unconsciousness)

# Defences



# Defences

## Contributory Negligence

- A person must not be careless towards themselves, and if they are, any compensation will be reduced (apportioned) to show that they contributed to the injury.
- For example, if X negligently drives into and injures Y, who negligently stepped off the footpath in front of X's car, Y can still sue for damages. If the court is prepared to award Y damages of \$100,000, but decides that Y was 20% to blame for his injury, the award would be reduced to \$80,000.
- Under the *Civil Liability Act*, the court can reduce liability by 100% if a court thinks that it is just and equitable to do so. A 100% reduction in liability would defeat the claim for damages.
- To be 'contributory',
  - Plaintiff's own negligence must contribute to cause the damage, and
  - Plaintiff failed to take reasonable care for their own safety.



# Defences

## Voluntary Assumption of Risk

- A person cannot complain of damage which results from a risk they have consented to take.
- For example,
  - Voluntarily accepting a lift with a drunk driver
  - Involving risky recreational activities like bungy jumping
- Complete defence: no damages awarded
- There can only be a voluntary assumption of risk if:
  - **Knowledge:** Plaintiff had full knowledge and appreciation of the risk, and
  - **Voluntary action:** Plaintiff voluntarily (freely and willingly) made the choice to undertake the risk.

# Vicarious Liability



# Vicarious Liability of Employer

- One person is responsible for the wrongful act of another person because of the legal relationship between them, even if the first person is not personally at fault.
- Employers are vicariously liable to third parties for the actions of their **employees in the course of their employment**. The unlawful action must be within the scope of the employee's actual or implied authority, or incidental to it.
  - Employers are not vicariously liable for the actions of employees who act outside the scope of employment.
- An independent contractor is not an employee.

# End of Lecture

Next week:

The Legal Environment of Business: Consumer Protection Law



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