

Tort of Negligence (II): Negligent Misstatement

Part 2: The Australian Legal Environment for Business

Unit 7: Week 9 Tutorial

Learning Objectives

At the end of this tutorial, you should be able to:

- Define negligent misstatement.
- Understand and apply the elements required to establish negligent misstatement.
- Understand and apply the relevant provisions of the *Civil Liability Act 2002* (NSW).
- Explain the concept of vicarious liability in negligence cases.
- Identify and apply possible defences in negligence claims.
- Apply the IPAC method to resolve a legal problem.
- Develop critical thinking and collaboration skills through group work and presentations.

Before this tutorial, you should have:

- Attended Unit 7 lecture
- Read the assigned Readings
- Completed the Tutorial Questions
- Read the In-Class Collaboration and Presentations questions

During this tutorial, you will:

- Demonstrate an understanding of the topic in the unit
- Participate in tutorial activities by:
 - Contributing to group discussions
 - Asking questions
 - Listening actively
 - Working collaboratively with other students
- Complete the In-Class Collaboration and Presentations activity

After this tutorial, you should:

- Consider attending one of the scheduled consultations and attempt to resolve any questions that you have as soon as possible.



Readings

Negligent Misstatement

The provision of careless advice that leads to economic loss is known as negligent misstatement. This is an aspect of the law of negligence that is directly relevant to professionals such as accountants, auditors, financial advisers, investment consultants and anyone who regularly gives advice to clients.

Negligent Words: The “Special Relationship” Concept

Negligent misstatement depends on whether there is a “special relationship” between the parties. The court in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1963] UKHL 4 ([See below](#)) determined that a negligent though honest misrepresentation may give rise to an action for damages for any economic loss caused.

The law will impose a **duty of care** if there is a “special relationship” between the parties. This was an application and extension of the ‘neighbour’ principle in *Donoghue v Stevenson*, with two differences:

- (1) the damage resulted from written words, not physical action or omission, and
- (2) the damage was purely economic, not as a result of physical damage to persons or property.

***Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1963] UKHL 4**

Facts

Hedley Byrne & Co, an advertising agent, was about to place some orders for advertising for its client (Easipower Ltd) on TV and in newspapers which it (Hedley Byrne) would be personally liable for (as an agent). Before going ahead with the placement of the order, Hedley Byrne asked its bank to contact the client's bank (Heller and Partners) for a credit check.

Heller and Partners replied in a letter headed:

“CONFIDENTIAL

For your private use and without responsibility on the part of this bank or its officials . . .

In reply to your inquiring letter of 7th instant we beg to advise

Re Easipower Ltd

Respectably constituted company, considered good for its ordinary business engagements.

Your figures are larger than we are accustomed to see.”

Hedley Byrne relied on this bank reference and placed large orders, which they lost when Easipower went into liquidation. Hedley Byrne sued the Heller and Partners for negligence.

Decision

The court established the tort of negligent misstatement and the principle of responsibility for negligent misstatement. However, Hedley Byrne lost the case. The bank was held not to be liable because there was a disclaimer (See “Defences” below) in the letter.

The features of a “special relationship” where the law will impose a duty of care were confirmed in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* [1968] HCA 74.

This case is remembered for the test of Barwick CJ in the High Court which defined “special relationship”.

***Mutual Life & Citizens' Assurance Co Ltd v Evatt* [1968] HCA 74 (High Court); [1970] HCA 46(Privy Council)**

Facts

MLC Assurance Co Ltd and HG Palmer (Consolidated) Ltd were both subsidiaries of MLC Ltd. A policy holder of MLC asked for advice on the investment performance of HG Palmer. An ‘officer’ of MLC Assurance Co Ltd 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 policy holder invested further. HG Palmer went into liquidation, and the policy holder lost his investment (and interest) and claimed damages in negligence from either MLC Assurance or MLC Ltd or both.

Decision

MLC Assurance did not owe a duty of care to the policy holder in providing the advice. 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.

Is There a “Special Relationship”? – the Barwick test

The special relationship was said to exist when the following four steps were satisfied:

- (1) “Assumption of responsibility” – the speaker must realise that he/she 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 he/she should be aware that the recipient intended to act upon the information or advice. This excludes advice given in a social context 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.

Reasonable Reliance

If the defendant negligently gave advice or provided information and the plaintiff reasonably relied upon this and suffered damage, the defendant must compensate the plaintiff.

In deciding whether there was reasonable reliance, the court considers a range of factors within the situation, e.g.:

- *Capacity of parties* – What were the respective skills, knowledge, experience of the parties?
- *Nature of subject matter* – Was the advice given or information provided in a serious context about a serious matter?
- *Occasion when the advice was given* – Was the advice given or information provided in a social or business context?

If the defendant holds themselves out as having a special skill or expertise (e.g. professional adviser, a financial adviser, an investment consultant or a mortgage broker) then the requirement that it be reasonable for the plaintiff to have relied upon the advice is more easily satisfied.

However, it is not a requirement that the defendant hold themselves out as having a special skill or expertise for a duty of care to exist. (See *Shaddock* below)

L Shaddock & Associates Pty Ltd v Parramatta City Council [1981] HCA 59

Facts

A municipal council was negligent for not disclosing a road widening proposal on the certificate it issued as part of a conveyancing transaction. The purchaser relied on the certificate and completed the purchase, only to find out later that there was a road widening proposal over the property. This road widening proposal would reduce the property's value and prevent any proposed development of the site. Shaddock sued the council for negligent misstatement.

Decision

The court awarded the plaintiff damages for the council's liability for negligent misstatement in the certificate, and the judge noted:

"A public body, by following the **practice of supplying information** upon which the recipients are likely to rely for serious purposes, lets it be known that it is willing to exercise reasonable skill and diligence in ensuring that the information supplied is accurate. In the circumstances, **diligence might be more important than skill**, although competence in searching for and transmitting the information must play a part. However, even if diligence only and not skill were required, a public body might be **specially competent to supply material which it had in its possession** for the purposes of its public functions".

(Gibbs CJ at [9], emphasis added)

Breach of Duty of Care

Section 50 of the Act defines the standard of care in circumstances where the defendant is a person acting in his or her professional capacity. A professional is not liable in negligence if it is established that they acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice. A Court, however, is not bound by the peer professional opinion if the Court considers the opinion to be irrational.

Section 50 of the *Civil Liability Act 2002* (NSW)

- (1) A person practising a profession ("a professional") does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
- (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
- (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
- (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

Vicarious Liability

Under the doctrine of vicarious (secondary) liability, one person is responsible for the wrongful act of another person because of the legal relationship between them, even if the former is not personally at fault. It arises most frequently within the relationship of employer and employee. 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 scope of employment.

For example:

Johnny runs a restaurant. Johnny will be liable for any harmful conduct by his employees at the restaurant while the employees are carrying out their duties within their scope of employment.

Employers are not vicariously liable for the actions of employees who act outside the scope of employment.

Defences

If the plaintiff cannot show the existence of duty of care, breach of duty of care, causation and remoteness, the action for negligence will fail. Even if the plaintiff has established all four elements of the tort of negligence, the defendant can still avoid liability, either completely or partially, if they can establish the existence of a defence.

Voluntary Assumption of Risk

If it can be established that the plaintiff was fully aware of the risk at the time the harm was caused and they voluntarily assumed (consent to take full legal responsibility) that risk, the defendant is relieved of all liability. This is called voluntary assumption of risk. This means voluntary assumption of risk is a complete defence if successfully proven in court.

Voluntary assumption of risk is based on the rationale that a person cannot complain of damage which results from a risk which they have agreed to take.

For example:

Compensation for injuries received after voluntarily accepting a lift with a drunk driver cannot be recovered, on the basis of voluntary assumption of risk.

Consent must, therefore, be consent to the full risk of injury. Just knowing about the risk of injury is not voluntary assumption of the risk.

Contributory Negligence

People must not be careless towards themselves. To be 'contributory', the negligence must help cause the damage. There must be a failure to take reasonable care for one's own safety.

If the defendant can show that the plaintiff's own negligence contributed to the harm suffered, the damages paid to the plaintiff will be reduced proportionally – liability will be apportioned between the

defendant and the plaintiff. Under the *Civil Liability Act*, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

For example:

If Johnny was a pedestrian injured by Adam in his car, the court might decide that Adam drove negligently but that Johnny was also negligent because he failed to look both ways before crossing the road. The court would apportion liability: it might decide that Adam was 70% responsible and Johnny was 30% responsible, and the damages payable by Adam to Johnny would be reduced by 30%.

Disclaimer

A disclaimer is a legal statement which may be used to remove or reduce liability of a defendant. The law of negligence interprets disclaimers strictly which means that they may not be effective. An exclusion clause only excludes negligence if it clearly says so.

Remedies in Tort

The basic remedy in tort is an award of damages (a monetary payment awarded to the plaintiff) and its purpose is to compensate for the damage suffered, and not to punish the defendant.

A damages award in tort aims to put a plaintiff in the position that they would have been in if the tort had not been committed.

References

Ciro, T, Goldwasser, V & Reeta V 2014, *Law and Business*, Oxford University Press, South Melbourne, Victoria, Australia.

James, N 2021, *Business Law*, John Wiley, Brisbane, Australia.

Latimer, P 2016, *Australian Business Law 2016*, CCH Australia, Sydney, NSW, Australia.



Tutorial Questions

Students must complete the following questions before coming to class

Terms and Concepts

The following terms and concepts must be understood in the context of the tutorial.

Provide written explanations of these terms and concepts in the space provided.

Terms/Concepts	Explanation
Negligent Misstatement	
Vicarious liability	
Contributory negligence	
Voluntary assumption of risk	
Disclaimer	

Vicarious Liability

1. Read the given facts below. Answer the question.

Andy has been given advice by his tax accountant, Fiona, who works for Jones & Jones Taxation Accountants. Fiona negligently advised Andy on a complex tax issue.

Can Andy sue Jones & Jones Taxation Accountants?

Defences

2. Read the given facts below. Answer the question.

Kathy is at a party. She accepts the offer of a ride home in a car with Tim. She knows that Tim has been drinking a lot of alcohol at the party. While driving home, there is a serious accident and Kathy is injured. Kathy is suing Tim for compensation of her medical expenses under tort of negligence.

What possible defences could Tim use?

3. Read the given facts below. Answer the question.

Ava is riding a bicycle at night on a freeway. She is wearing black clothing and there is no light on the back of her bicycle. Ben is talking on his mobile phone whilst driving a truck close to where Ava is riding her bicycle. Distracted, Ben's truck leaves its lane and strikes Ava. Ava is suing Ben for compensation under tort of negligence.

What possible defences could Ben use?

Negligent Misstatement

4. Read the given facts below. Use the IPAC method to analyse the case.

Lisa is a 30-year-old marketing professional who has been working in the industry for over 8 years. Recently, Lisa received a significant bonus of \$40,000 from her employer for her outstanding performance. Lisa has always wanted to start her own online business and decides to use the bonus to launch an e-commerce store. However, she has no prior experience in running an online business.

Lisa approaches Mark, a business advisor at Startup Success Pty Ltd ("Startup Success"), a reputable business consultancy firm. During a paid consultation at Mark's office, Lisa asks Mark if he thinks selling eco-friendly products online would be a profitable venture. Lisa makes it clear to Mark that her ability to succeed and achieve financial independence depends on the success of this business.

Due to his busy schedule and numerous clients, Mark advises Lisa in writing that selling eco-friendly products online is a lucrative market based on a brief conversation he had with a colleague, without conducting any further research. Mark includes a disclaimer in his advice.

A simple further investigation by Mark would have revealed that the market for eco-friendly products was already saturated and highly competitive. Lisa expresses her concerns about investing all her bonus in this venture, but Mark reassures her that it is a sound investment.

Relying on Mark's advice, Lisa invests her entire bonus in setting up the e-commerce store. Shortly after launching, Lisa struggles to attract customers due to the saturated market, resulting in significant financial loss.

Discuss Lisa's case in terms of all the elements she needs to establish to be successful in a negligence action against Startup Success.

Advise Lisa of any possible defences that Startup Success may use.

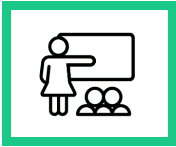
In your answer, you must consider and apply any relevant statutory provisions and decisions from any relevant cases you have studied.

Students are not to consider or apply section 50 of the *Civil Liability Act 2002* (NSW) regarding the professional standard of care.

Issue/s:

Principle/s and Application:

Conclusion:



In-Class Collaboration and Presentations

Students must read the following questions before coming to class.

Negligent Misstatement

In this activity, you are required to analyse a given fact scenario using the IPAC method (Issue, Principle, Application, Conclusion) and present your answer to the class in small groups.

Instructions:

1. Form small groups:

- Your tutor will divide the class into small groups of 3-5 students.

2. Understand the fact scenario:

- Carefully read the provided fact scenario.

3. Use the IPAC method to analyse the scenario:

- **Issue:**
 - What is the main legal question or problem that needs to be resolved?
 - Identify the specific issue in dispute.
- **Principle:**
 - What are the relevant laws or legal principles that apply to this issue?
 - State the rules or legal principles that govern the issue. This includes relevant statutes and/or case law.
- **Application:**
 - How do the legal principles apply to the facts of the case?
 - Analyse how the legal principles interact with the specific facts. Clearly explain how each fact relates to the legal principles you have identified.

Integrating Principles and Applications: Immediately follow the principle with an application. For each new principle, repeat the process.
- **Conclusion:**
 - What is the outcome based on your analysis?
 - State the final decision. Conclude whether the issue is resolved in favour of one party or another based on the application.

4. Prepare your presentation:

- Assign roles within your group (e.g., who will present each part of the IPAC method).
- Create a clear and concise presentation that covers each part of the IPAC method.

5. Present to the class:

- Each group will have 5-10 minutes to present their analysis.
- Ensure that each member of the group participates in the presentation.
- Be prepared to answer questions from your classmates and your tutor.

Fact scenario

Zoe, a first-time homebuyer, sought advice from Shane, a reputable real estate agent, about purchasing a property in a newly developed suburb. Shane assured Zoe that the property was a sound investment, highlighting its potential for significant appreciation in value due to upcoming infrastructure projects in the area.

Shane had been recommended to Zoe by a trusted friend who had successfully purchased property through him. Shane had over 15 years of experience in the real estate market and was known for his market insights. Shane provided Zoe with detailed market analysis reports and projections, which he claimed were based on thorough research. Shane explicitly assured Zoe that the property was a low-risk investment with high potential for future gains.

Zoe did not conduct her own research or seek a second opinion from another real estate professional. Zoe ignored several warning signs, such as local news reports about potential delays in the infrastructure projects. Zoe did not thoroughly review the financial implications and risks associated with the property purchase, despite having access to various resources.

Relying on Shane's advice, Zoe purchased the property. However, it was later discovered that the infrastructure projects were delayed indefinitely, and the property value plummeted. Further investigation revealed that Shane had not verified the status of the infrastructure projects and had relied on outdated information.

Discuss Zoe's case in terms of all the elements she needs to establish to be successful in a negligence action against Shane.

Advise Zoe of any possible defences that Shane may use.

In your answer, you must consider and apply any relevant statutory provisions and decisions from any relevant cases you have studied.

Students are not to consider or apply section 50 of the *Civil Liability Act 2002* (NSW) regarding the professional standard of care.

Issue/s:

Principle/s and Application:

Conclusion: