Word Count: 781 (excluding referencing and headers)

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Kamonchanok Suban Na Ayudtaya

19 May 2020

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**Question 1**

Pharma Farm Corp (PFC) would obtain a patent for its novel, inventive and useful, veterinary medicinal product. This grant the PFC the exclusive right to use, sell, distribute, export and make its medicinal product for 20 years (non-renewable after expiration)[[1]](#footnote-2).

Additionally, PFC would obtain a trademark for the graphical and distinguishable terms “Flatten Flatulence” and “FlatFlat”. This will grant PFC the exclusive rights to market their product using these terms for 10 years (renewable after expiration)[[2]](#footnote-3).

**Question 2**

**Issue**

Acting on Abbie’s statement, Emily invested in PFC’s shares. As PFC’s approval was rescinded, Emily lost her investment. Does Emily have the grounds to bring an action of negligence against Abbie?

**Law**

Established in Hedley Byrne & Co Ltd v Heller & Partners LTD[[3]](#footnote-4), a claim for negligent misstatement arises when the defendant who owes a duty of care to a claimant, breaches the duty to take care when making a statement and an economic loss is incurred by the claimant as a result of reliance.

A duty of care transpires when the statement made by the defendant, is within their field of expertise and the defendant knows or should have known that the claimant will use the statement, what it will be used for, and that it would be relied on.

A breach in duty is determined by the foreseeability of the harm. If the harm was foreseeable the likeliness, potential harm, and cost of prevention are weighted to decide what reasonable action would have been taken by an average expert.

A loss is one which occurs as a consequence of reliance on the statement made by the defendant. This is measured based on causation, foreseeability, and remoteness.

**Application**

Duty of care

Abbie who is employed at PFC and possesses a strong knowledge of biochemistry, may be observed as an expert in the field of PFC’s operations.

Abbie was aware that her statement was directed at Emily and assuming Abbie was conscious of Emily’s interest in stocks, she knew what it would be likely used for. Although due to the informal nature of the conversation, it is unclear to what extent Abbie knew or should have known that Emily would rely on her statement. Especially as her remark about PFC’s stock value, is beyond her range of expertise.

In Hedley Byrne & Co Ltd v Heller & Partners LTD[[4]](#footnote-5), the court found that a defendant may disclaim away their duty of care by accompanying their statement with a disclaimer, which Abbie made during the conversation.

Therefore, based on an unclear level of reliance and Hedley Byrne & Co Ltd v Heller & Partners LTD[[5]](#footnote-6), Emily is unlikely to have substantial grounds to claim that Abbie owed Emily a duty of care.

Breach in duty of care

Assuming there was a duty of care and Abbie was aware that Emily has an interest in stocks, Abbie could foresee Emily acting on her statement and investing in PFC shares.

However, the likelihood of this occurring was small as Abbie advised Emily against action and instead told her to consult with her stockbroker.

Nevertheless, the potential harm of Emily acting on Abbie’s advice was relatively high as the stock market is known to be volatile and PFC as a company was in an unpredictable position.

Comparatively, the cost to prevent this harm is relatively low as Abbie could refrain from making a statement about PFC’s position.

In Wagon Mound No.2[[6]](#footnote-7), where the likelihood of harm was low, potential harm was high and the cost of prevention was low, the court found the defendant had breached a duty of care. Therefore, based on of Wagon Mound No.2[[7]](#footnote-8), Emily may have grounds to claim that Abbie breached her duty of care.

Loss

While Abbie’s statement may have influenced Emily to invest in PFC, it was Emily’s decision to ignore her stockbroker’s advice which directly caused her to lose her investment. In Macfarlane v Tayside[[8]](#footnote-9), it was found that a defendant is only liable for harm that is closely connected to their negligence.

Additionally, Abbie is not involved in PFC’s regulatory process, therefore it was unforeseeable that PFC’s position would suddenly change. In Wagon Mound No.1[[9]](#footnote-10), it was found that the defendant is only liable for harm which is foreseeable from their breach of care.

Therefore, based on Macfarlane v Tayside[[10]](#footnote-11) and Wagon Mound No.1[[11]](#footnote-12), Emily is unlikely to have substantial grounds to claim for loss due to remoteness and foreseeability.

**Conclusion**

Emily does not have a strong basis to bring an action of negligent misstatement against Abbie. This is because she would be unable to establish a duty of care between herself and Abbie, of which would be required to prove a breach in duty. Additionally, it would be difficult to prove that relying on Abbie’s statement directly caused her economic loss.

1. James & Wells “Patent FAQs” (2019) <<http://www.jamesandwells.com/resource/patent-faqs/>> [↑](#footnote-ref-2)
2. Ministry of Business, Innovation and Employment “Trade marks” <<https://www.iponz.govt.nz/about-ip/trade-marks>> [↑](#footnote-ref-3)
3. *Hedley Byrne Co Ltd v Heller & Partners LTD* [1964] AC 465 [↑](#footnote-ref-4)
4. *Hedley Byrne Co Ltd v Heller & Partners LTD,* above n 1 [↑](#footnote-ref-5)
5. *Hedley Byrne Co Ltd v Heller & Partners LTD,* above n 1 [↑](#footnote-ref-6)
6. *Wagon Mound No.2* [1967] 1 AC617(PC) [↑](#footnote-ref-7)
7. *Wagon Mound No.2,* above n 4 [↑](#footnote-ref-8)
8. *Macfarlane v Tayside* [2000] 2 AC 59 (HL) [↑](#footnote-ref-9)
9. *Wagon Mound No.1* [1961] AC 388 (PC) [↑](#footnote-ref-10)
10. *Macfarlane v Tayside,* above n 6 [↑](#footnote-ref-11)
11. *Wagon Mound No.1,* above n 7 [↑](#footnote-ref-12)