Pacific West Health Medical Center Inc. Employees Retirement Trust et al ...ld Greenwich Group et al Doc. 106 Att. 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

Affidavit of Mark A C Diel

Tab 5

1 of 2

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Hedley Byrne & Co Ltd v Heller & Partners Ltd

[1963] 3 W.L.R. 101
House of Lords

Lord Reid, Lord Morris of Borth-Y-Gest, Lord Hodson, Lord Devlin, and Lord Pearce.

1963 Feb. 25, 26, 27, 28; Mar. 4, 5, 6, 7; May 28.

Negligence—Duty of care to Whom?—Careless misrepresentation—Bankers—References regarding company given by bankers to other bankers at customer's request—Communicated to customers inquiring about company's credit—worthiness—Express disclaimer of responsibility—Whether a special relationship creating duty of care—Whether action against bankers maintainable.Banking—Reference by bankers—Careless misrepresentation—References not justified—Plaintiffs' financial loss—Whether a special relationship creating a duty of care—Whether action against bankers maintainable.

The appellants were advertising agents, who had placed substantial forward advertising orders for a company on terms by which they, the appellants, were personally liable for the cost of the ***466** orders. They asked their bankers to inquire into the company's financial stability and their bankers made inquiries of the respondents, who were the company's bankers. The respondents gave favourable references but stipulated that these were "without responsibility." In reliance on these references the appellants placed orders which resulted in a loss of £17,000. They brought an action against the respondents for damages for negligence:-

that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment (post, pp. 486, 502, 514). However, since here there was an express disclaimer of responsibility, no such duty was, in any event, implied.

Nocton. v. Lord Ashburton [1914] A.C. 932 ; 30 T.L.R. 602 , H.L. applied.

Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164; [1951] 1 T.L.R. 371; [1951] 1 All E.R. 426 , C.A., overruled. Le Lievre v. Gould [1893] 1 Q.B. 491; 9 T.L.R. 243 , C.A. explained and not followed (post, pp. 488, 502, 519, 532, 535).

Per Lord Morris of Borth-y-Gest and Lord Hodson. *Semble,* 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 of him, any higher duty than that of giving an honest answer (post, pp. 504, 513).

Per Lord Devlin. The duty of care arises where the responsibility is voluntarily accepted or undertaken either generally, where a general relationship is created, or specifically in relation to a particular transaction (post, p. 529).

Per Lord Pearce. To import such a duty the representation must normally concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer (post, p. 539).

Decision of the Court of Appeal [1962] 1 Q.B. 396; [1961] 3 W.L.R. 1225; [1961] 3 All E.R. 891 , C.A. affirmed on different grounds.

APPEAL from the Court of Appeal (Ormerod, Pearson and Harman L.JJ.).

This was an appeal (by leave of the Court of Appeal) by the appellants, Hedley Byrne & Co. Ltd., who were the plaintiffs in the action, from an order

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of the Court of Appeal dated October 18, 1961, affirming the judgment of McNair J., dated December 20, 1960, in favour of the respondents, Heller & Partners Ltd., the defendants in the action, whereby it was held that the action failed on a point of law, but that otherwise the damages recoverable by the appellants would have been £15,454 3s. 6d. with ***467** interest at the rate of 4 per cent. per annum from January 1, 1959.

The appellants were a firm of advertising agents. The respondents were merchant bankers. Towards the end of 1957 the appellants on behalf of a customer, Easipower Ltd. placed some small orders for advertising. Later proposals were made to them for an advertising programme involving the expenditure of £100,000 and in November, 1957, they received indirectly from Martin's Bank Ltd., Easipower's then bankers, a reference reporting Easipower to be "a respectably constituted company whose trading connection is expanding speedily. We consider the company to be quite good for its engagements." They placed on behalf of Easipower on credit terms substantial orders for advertising time on television programmes and for advertising space in certain newspapers on terms that they themselves became personally liable to the television and newspaper companies.

The appellants, becoming doubtful of the financial position of Easipower, wanted a bankers' report concerning the company which then had an account with the respondents. They themselves banked at the Piccadilly branch of the National Provincial Bank Ltd. which they asked to obtain a report. The Piccadilly branch communicated with its City office, a representative of which telephoned the respondents on August 18, 1958, and it was common ground that a contemporaneous note of the ensuing conversation was 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 respectability 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 Pera 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 undertake any commitments they were unable to fulfil." In due course this answer was communicated orally by the Piccadilly branch of National Provincial to the appellants. On August 21, 1958, ***468** a letter of confirmation was sent to them by that branch. The letter had the headings "confidential" and "for your private use and without responsibility on the part of this bank or the manager." In the letter the oral answer which the respondents had given to the City office was passed on with the prefatory words "In reply to your telephoned inquiry of August 18, bankers say ..." The information had been given by the respondents gratuitously.

On November 4, 1958, a letter was sent to the Piccadilly branch of National Provincial on behalf of the appellants saying: "I have been requested by the directors to again ask you to check the financial structure and status of Easipower Ltd." After some particular references, the letter concluded: "I would be appreciative if you could make your check as exhaustive as you reasonably can." on November 7, 1958, the City office of National Provincial wrote the respondents a letter headed "private and confidential" 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 ..." On November 11, 1958, the respondents replied in a letter headed:

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CONFIDENTIAL

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

The letter continued:

"Dear Sir, In reply to your inquiring 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 Ltd.

On November 14, 1958, the Piccadilly branch of National Provincial wrote to the appellants, passing on what the respondents had stated in this letter, heading their own letter "Confidential. For your private use and without responsibility on the part of this bank or the manager" and prefacing it ***469** with the words: "In reply to your inquiry letter of November 4, bankers say ..."

The appellants relied on these statements and as a result they lost sums, calculated as £17,661 18s. 6d. in their statement of claim, when Easipower went into liquidation. In this action they sought to recover this loss from the respondents as damages on the ground that their replies were given negligently and in breach of the respondents' duty to exercise care in giving them. An allegation of fraud was originally made but was abandoned. McNair J. held that the respondents were negligent but that they owed no duty of care to the appellants. The Court of Appeal likewise held that there was no duty of care and it was therefore unnecessary to consider whether the finding of negligence was correct.

Gerald Gardiner Q.C., D. G. A. Lowe and *B. Anns* for the appellants. It is submitted: (1) Donoghue v. Stevenson is part of the law of England in its statement of the duty to act with care. It is authority for holding that a false statement made carelessly and acted upon by the person to whom it is made to his detriment is actionable, though no contractual relationship may exist between them. In Heaven v. Pender the majority of the court were wrong and the minority view was right. (2) Where a man holds himself out as exercising special skill or where he exercises a particular profession, he is under a duty to exercise skill and care. A surgeon or a doctor or a solicitor or a surveyor owes a duty to act with reasonable skill and care, whether or not he is acting gratuitously. (3) These particular defendants in the particular and highly peculiar circumstances of this case did owe a duty of care to these particular plaintiffs.

The old cases on professional services are relevant: Shiells v. Blackburne ; Wilkinson v. Coverdale ; Gladwell v. Steggall and Donaldson v. Haldane. George v. Skivington was followed in Cann v. Willson, a case rightly decided and wrongly overruled in Le Lievre v. Gould, which is a troublesome case for the appellants, because it was rightly decided, but on the wrong ***470** basis. Derry v. Peek did not establish that innocent but negligent misrepresentation cannot give rise to a cause of action. Nocton v. Lord Ashburton, which is relied on, indicates that a duty of care can be inferred in the present circumstances. Estoppel is not put forward.

Donoghue v. Stevenson is in the main stream of judicial decision. Already Macpherson v. Buick Motor Co. had been decided in the same way in the United States. The distinction between a negligent act and a negligent word in England is not clear. It would be strange if a person who handled his pen so carelessly as to put out X's eye were liable to pay damages, but not if he handled it so carelessly in writing, that X was financially ruined. The great advantage of the common law is the readiness of the judges to adapt the law to changing conditions.

As to the application of Donoghue v. Stevenson, see Grant v. Australian Knitting Mills Ltd. and Barnes v. Irwell Valley Water Board. Old Gate

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Estates Ltd. v. Toplis & Harding & Russell was wrongly decided. See also Sharp v. Avery and Kenwood ; Watson v. Buckley, Owen, Garrett & Co. Ltd. ; Haseldine v. C. A. Daw & Son Ltd. ; Bourhill v. Young ; Woods v. Duncan ; Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners) and Denny v. Supplies & Transport Co. Ltd. Candler v. Crane, Christmas & Co. was wrongly decided by the majority and the dissenting judgment of Denning L.J. was correct. On the law as there laid down compare the American Restatement of the Law of Torts, Vol. III, pp. 122-123, para. 552, comment (a); Glanzer v. Shepherd ; International Products Co. v. Erie Railroad Co. ; Mulroy v. Wright ; ***471** Doyle v. Chatham & Phoenix National Bank ; Ultramares Corporation v. Touche and Edwards v. Lamb. The result reached in a large number of the American cases shows that, even though there is no contract, there may be special circumstances giving rise to a fiduciary relationship. In Candler's case the accountants were persons who had assumed a special skill and were in a position to know the facts required by the investor, who would act on the information given and would suffer damage if it was not accurate. On those facts the defendants should have been held liable and in the present case the same principles should apply to bankers in a state of facts which produces the same situation. It makes no difference whether or not the person giving the information is interested in the result.

Reliance is placed on Swift v. Jewsbury, in which the manager of a bank was held liable for knowingly making a false statement of this kind. See also Hosegood v. Bull and Hirst v. West Riding Union Banking Co. Ltd., It is conceded that, as was held in Parsons v. Barclay & Co. Ltd., the bankers were under no duty to make special inquiries before giving the references. Robinson v. National Bank of ScotlandLtd., should not be followed in modern times, and, in any event, the facts were different from those of the present case, because in that case the pursuer did not rely on the report given as the report in the present case was relied on. Although up to the time of the decision of that case it may have been reasonable to confine the obligation arising out of the giving of a banker's reference to giving an honest answer, modern business practice imposes the further obligation that there must be no negligence. In that case Lord Haldane did not exclude the possibility that in special circumstances a duty might arise.

Reliance is also placed on Banbury v. Bank of Montreal ; Evans v. Barclays Bank ; Batts Combe Quarry Co. v. Barclays Bank Ltd. ; Woods v. Martins Bank Ltd. ; Plowright v. ***472** Lambert and Clayton v. Woodman & Son (Builders) Ltd. See also Halsbury's Laws of England, 3rd ed., Vol. II, p. 241, para. 455; Emanuel on Banking, 3rd ed., p. 19, and Paget on Banking, 6th ed., pp. 139-143. As to the application of the principle stare decisis, see Caledonian Railway Co. v. Walker's Trustees ; Quinn v. Leatham and Midland Silicones Ltd. v. Scruttons Ltd.

In the present case if English law did not provide a remedy, it would be an unfortunate gap. It would be a discredit to English law if, however fraudulent or negligent a bank might be in giving such information, there was no remedy against it. If there is no such duty as the appellants submit, it could be said successfully that the information given was either not given in writing or not under seal. But on the correct application of Donoghue v. Stevenson there should be judgment for the appellants. It should apply to words as well as deeds. Behind it are the principles which have been applied to distributors of goods, to architects in relation to workmen on a building, to advice given by bankers and to motor-cyclists playing "follow my leader." It was evident that if the bank in the present case did not exercise due care it would be likely to cause loss to the person for whom the report was made and who could do nothing to avert the damage. The bank was in a special position to know the facts. The correct application of the principle in Donoghue v. Stevenson, which is not limited to damage to person or property, imposes on it a duty to take reason-

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able care. Robinson's case is not to be treated as a decision that no banker can ever owe such a duty to a person to whom he gives a reference; it only held that the bank there in question was not liable in fraud because it had not been fraudulent. Giving references and certificates is part of a banker's professional work in which, like a doctor, he is to exercise reasonable care and skill. Bank customers are now taken to have consented impliedly to their banks giving references with regard to them, unless they specifically forbid it. At the time when Tournier v. National Provincial and Union Bank of England was decided, it was the reverse. Bankers' references are important in the business world. They should be integrated in the banking system and there should be a duty of care in regard to them. It has never been suggested that if a person with professional skill undertakes work so that he is bound to exercise reasonable care and skill, there is a rule limiting liability to a particular sort of damage, physical damage and damage to property, for example, in the case of a doctor who misdiagnoses a patient.

In summary, the information as to creditworthiness given was intended by the respondents to be communicated by the National Provincial Bank to a customer, whose identity was immaterial to the respondents, for that customer's use, and in giving that information, knowing that it would be relied on by some third party, such as the appellants, there was a duty imposed on the respondents to use reasonable care. In fact the information the respondents gave was calculated to give a false impression and the person giving it should have realised that. There is no reason in principle or authority why losses flowing from a careless statement of this description should not be recoverable, since there is the necessary relationship of proximity.

John Foster Q.C., J. M. Shaw and *L. Blom-Cooper* for the respondents. Bankers in giving references use guarded terms because to speak straight out would be a breach of duty to their customers. Because of that duty it is necessary for them to say "light grey" instead of "black." In giving this information the respondents had no interest of their own. The service was given gratuitously. Further, the evidence shows that they did not know that the National Provincial Bank required this information for the appellants or any other customer and in giving it they did not have in mind any definite person or class of persons. They knew nothing of the appellants and never intended the information to be communicated to them. The reference was marked "confidential" and given on the express understanding that no responsibility was incurred. So far as the respondents were concerned, the National Provincial Bank might have been wanting to know the financial standing of a would-be customer. At most it might have been inferred that the National Provincial Bank required the information as background for advising one of their customers. An undisclosed principal is not *474 a "neighbour" within the rule in Donoghue v. Stevenson. This case does not come within the ambit of the principle enunciated in that decision. There is no liability here. The information was only an expression of opinion. If there had been a liability, it would not be one which could be taken over by third parties like the appellants, to whom no duty was owed. The attitude of the respondents was: (1) They did not contemplate anyone but the National Provincial Bank being interested. (2) The information was given personally and confidentially to the National Provincial Bank and so, even if the person who gave it contemplated that there might be a customer who was interested, it would be a customer hearing the National Provincial Bank's version of the situation. (3) Even in the case of a written document sent to the National Provincial Bank, there would be ample opportunity for that bank to check its contents. The spoken or written word is not packaged, so that it cannot be examined like the ginger-beer bottle in Donoghue v. Stevenson, which allowed no chance of intermediate examination and so created a proximity. This information could be examined.

There is no liability for negligent misrepresentation unless through a careless misstatement something is

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created or a situation arises which is dangerous to life or limb or harmful to property, for example, a negligent misstatement that it is safe to go into a cellar or to use a lift, when it is not, or a statement by a doctor that a person has not got leprosy when he has. In those cases the safety is part of the res gestae. There is no liability for innocent misrepresentation: see Heilbut, Symons & Co. v. Buckleton.

There being no general duty not to make careless statements, liability can only arise under three categories, which are exhaustive and under which a special duty is created. That duty (a) must be contractual or (b) must be fiduciary or (c) must arise from a relationship of proximity, the breach causing financial loss which flows from physical damage to the person or property of the plaintiff. To extend the law to create a general duty would open the floodgates of litigation.

As to the dichotomy between warranty and representation, see Hopkins v. Tanqueray ; Angus v. Clifford ; Low v. ***475** Bouverie ; Scholes v. Brook and Thiodon v. Tindall. Where there is a warranty there is a condition, and the person who gives it is liable in damages if he gives an untrue answer. The test in the case of a warranty is whether there is an intention to contract. It is an old-established principle that damages cannot be obtained for innocent misrepresentation unless there is a warranty.

When a person sets up as an investment adviser, that imposes on him a duty to the persons he advises. But no duty is raised simply by asking a person for advice. By asking a policeman the way one does not make him one's traffic adviser. Compare Woods v. Martins Bank Ltd. See also De la Bere v. Pearson Ltd. If the appellants' contentions are right the anomalous result might be produced that on the decision of Akerhielm v. De Mare a negligent defendant might be under a heavier liability than a fraudulent defendant.

Derry v. Peek ruled out any liability not arising from a fiduciary relationship and that indicates that the area was not covered by Nocton's case. See also Humphrey v. Bowers. If A is under a duty of care to B in contract, it is clear that no jus quaesitum tertio arises. Nor does a right of action in X arise when A has agreed with B to do something for the benefit of X. Accordingly, it would be strange if a jus quaesitum tertio could be inferred here. See also Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners). In Love v. Mack such a special duty as is here suggested would certainly have been invoked if it had existed. See also Heskell v. Continental Express Ltd. ; Groom v. Crocker ; Everett v. Griffiths ; Herschel v. Mrupi and Tournier v. National Provincial & Union Bank of England. The present case cannot be distinguished from Robinson v. National Bank of Scotland in the ***476** House of Lords, where it was laid down as a general rule that a banker giving an inquirer a reference as to the credit of a customer owed no duty to that inquirer except to answer honestly. No relationship fitting that case can now be formulated so as to create a liability.

One transaction, such as the one in the present case, cannot raise a relationship. In the end it is a matter of degree. To give advice is also quite different from expressing an opinion. To say "I advise you to go to Manchester" is very different from saying "In my opinion the road to Manchester is clear." A person asking one's advice about investments is in a very different position from a person asking one's opinion. In the latter case there can be no fiduciary relationship. To give advice does not correspond to the situation when one bank asks another about the credit situation of X. Banks must clearly reserve to themselves the right not to answer questions about their customers. There is no difference in principle between a query by a bank on behalf of one of its customers and a query by that customer. No duty arose here. See by analogy Australian Steam Shipping Co. Ltd. v. Devitt and Fish v. Kelly. If one goes into a plumber's shop to ask his advice about one's plumbing system, that mere situation does not create a fiduciary relationship so that, if he gives one bad advice, he is liable in damages. Thomson

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v. Schmitt is relied on. From a study of Nocton's case, on which the appellants relied, it appears that their case depends on a distinction made a long time ago, brought in by a side-wind and not in accordance with the current of the law. See also Kennedy v. Panama, New Zealand & Australian Royal Mail Co. Ltd.

The categories in which there exists a special duty to take care are fixed and exhaustive, as was rightly decided in Candler v. Crane, Christmas & Co, which is in accordance with the earlier authorities and with established principle.

When one is testing the duty of care there is a difference in kind between a physical act and words. The approach to negligent misstatement must be different. In the case of words, in order to create a liability, there must be an intention that the person to whom they are directed shall act on them in the manner ***477** which occasions the loss to him. Otherwise the effect on the whole community would be very grave and confusion would be created in many aspects of the law. One must distinguish in principle between cases where financial loss is caused through physical injury and where it is caused directly. The thing done is different when it is a case of mere words.

As to the American decisions, in Glanzer v. Shepherd there were special facts on which it was held that there existed a duty. See also International Products Co. v. Erie Railroad Co. But the Ultramares case is helpful. It demonstrates that Candler's case would have been decided in the same way in America as in England. It indicates that in such circumstances as the present there is no intention to create a legal relationship and no duty should be inferred. See also the American Restatement of the Law of Torts, Vol. III, p. 71, para. 531.

Reliance is also placed on Peek v. Gurney ; Halsey v. Brotherhood ; Scholfield v. Earl of Londesborough ; Rutter v. Palmer ; Ashdown v. Samuel Williams & Sons Ltd. and Sinclair v. Cleary. See also "Misrepresentation as Deceit, Negligence or Warranty," by Francis H. Bohlen (1929) 42 Harvard Law Review 733; "Liability in Negligence for False Statements," by W. L. Morrison (1951) 67 Law Quarterly Review 212, 214-215, and "Liability in Tort for Negligent Statements," by G. W. Paton (1947) 25 Canadian Bar Review 123.

In summary, the finding of McNair J. that there was negligence in giving the reference was incorrect on the evidence. Even if there had been negligence, the respondents would not have been liable, because there was no duty on them to take care. No special relationship was created imposing such a duty on them. They were acting gratuitously and they expressly disclaimed all responsibility. The appellants had ample opportunity to check the information given and the damage they suffered did not flow from the misrepresentation. If the law had ***478** been as the appellants submit, many authorities would have been decided otherwise than they were.

J. M. Shaw following. In the statement of claim there was no allegation of any special duty owed by the respondents to the appellants. The relationship between the respondents and Easipower, which was said to constitute a special relationship, was pleaded in the statement of claim as particulars of negligence and this was the only relevance of it. There is nothing to distinguish Robinson's case from the present one.

Gerald Gardiner Q. C. in reply. In considering the development of this branch of the law the American cases are significant: Macpherson v. Buick Motor Co. and Devlin v. Smith. The Ultramares case is the American equivalent of Le Lievre v. Gould. Though South Africa has a different system of law, its decisions in this field are almost identical with the American: Perlman v. Zoukendyk and Herschel v. Mrupi. It is substantially similar to the law expressed in the American Restatement.

In Candler's case the accounts were got out for the sole purpose of the plaintiff seeing them. The duty was imposed on the defendants when they started getting out those accounts, knowing that Candler

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was going to see them for the purpose of deciding whether or not to invest in the business in question. There is no difficulty in developing the law laid down in Donoghue v. Stevenson to cover cases of this kind. The law imposes a duty to take care on a person acting in such circumstances that, if he stopped to think, he would know that someone else's person or property would be injured by his negligence. This principle should be extended to the field of skilled persons who know that, if they do not use their skill and care, someone will be damaged. When a professional man undertakes to do a professional job and provides information or advice, whether directly or through an agent, knowing that a sum of money depends on it, this imposes on him a duty of care. The fact that in the case of a warranty there must be an intention to contract is true but irrelevant because that is in the realm of contract, while this is in the realm of tort. Section 14 of the ***479** Sale of Goods Act, 1893, which was a consolidating Act, dealing with the law as it already stood, embodied the conception that if a seller sold something knowing that it was for a particular purpose, he owed a duty to the purchaser. Reliance is placed on Nocton's case, treating Derry v. Peek wholly as an action founded on deceit. See also Scholes v. Brook ; De la Bere v. Pearson Ltd. ; Thiodon v. Tindall ; Edwards v. Mallan ; Thomson v. Schmitt ; Everett v. Griffiths ; Love v. Mack ; Shiells v. Blackburne ; Doorman v. Jenkins ; Whitehead v. Greetan ; Fish v. Kelly and Sorrell v. Smith. In Robinson v. National Bank of Scotland the decision turned on the Lord Ordinary's view of the facts, which was accepted by the House of Lords. Candler's case was discussed in an article by Warren A. Seavey (1951) 67 Law Quarterly Review 466.

Here a tort was committed and accordingly it does not matter what was in the mind of the person who gave the information. If what one has done amounts to a tort, it is no answer to an action to say that one acted from the best of motives. If one is in the field of the imposition of a duty, that duty is imposed whether or not the defendant thought that he owed it. In the present case the law imposed on the respondents a duty towards anyone who might be injured by their negligence, as in Donoghue v. Stevenson. A banker is not obliged to give this sort of information, but, if he does, the law imposes on him a duty to take care. In such a case a defendant has open to him all the usual defences, just as in a case of negligent driving, when an injured passenger is suing, the defendant may rely on the principle volenti non fit injuria or that the passenger has agreed that there is to be no liability for any negligence by the driver. It would be strange if in the present circumstances there was a tort in which one could not recover pecuniary loss suffered. The ***480** result of upholding the appellants' contentions would not be to open the floodgates of litigation.

The primary contentions of the appellants are: (1) The correct application of Donoghue v. Stevenson results in the conclusion that the appellants are entitled to recover and that Candler's case was wrongly decided. (2) The appellants are entitled to recover because due care was not exercised by the respondents. (3) on the evidence a fiduciary relationship was created: see Plowright v. Lambert. Woods v. Martins Bank Ltd. was rightly decided.

If liability for negligence is to be limited, it must be limited in clear terms: Olley v. Marlborough Court Ltd. ; Canada Steamship Lines Ltd. v. The King and White v. John Warwick &; Co. Ltd.

There is no hardship or unfairness in making a bank responsible for exercising care in giving references. If the respondents wanted to make a contract whereby the persons on whose behalf the inquiries were made were to have no right of action for negligence, they should have made this clear. To mark the communication "confidential" and "without responsibility" is a mere "rubber stamp" routine. Such vague language cannot save the bank from liability.

Their Lordships took time for consideration.May 28.LORD REID.

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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 Ltd., on credit terms substantial orders for advertising time on television programmes and for advertising space in certain newspapers on ***481** terms under which they, the plaintiffs, became personally 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 Ltd. 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."

[His Lordship stated the facts and continued:] 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 November 11.

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 Ltd. were heavily indebted to the defendants and that the defendants might benefit from the advertising campaign financed by ***482** 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 relationship 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 inquir-

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ies 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. I would reject that argument. They knew that the inquiry was in connection with an advertising contract, and it was at least probable that the information 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. 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 ***483** 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 dangerous. A man might give a friend a negligently-prepared bottle of homemade 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 tertii 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

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there ***484** 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. The action was brought against the directors of a company in respect of false statements in a prospectus. It was an action of 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 reasonable 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 Derry v. Peek did not establish any universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action. It is true Lord Bramwell said : "To found an action for damages there must be a contract and breach, or fraud." and for the next 20 years it was generally assumed that Derry v. Peek decided that. But it was shown in this House in Nocton v. Lord Ashburton 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. Lord 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 that while the relationship 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 ***485** 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 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 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 : "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 a passage in an argument of Sir Roundell Palmer in Peek v. Gurney 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

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who is my neighbour.

Lord Haldane gave a further statement of his view in Robinson v. National Bank of Scotland Ltd., 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: "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 ***486** great mistake to suppose that, because the principle in Derry 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 inquirer 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 inquiry 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 inquirer which requires him to exercise such care as the circumstances require.***487**

If that is right, then it must follow that Candler v. Crane, Christmas & Co. 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 him 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 and that Donoghue v. Stevenson had no application. In so

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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 Candler's case. Denning L.J., 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. a decision of Cardozo C.J. But I think that another ***488** decision of that great judge, Glanzer v. Shepherd, is more in point because in the latter case there was a direct relationship between the weigher who gave a certificate and the purchaser 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 builder's 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 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." 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"; 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." 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 ***489** 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 inquiry. and inquirers can hardly expect a full and objective statement of opinion or accurate factual information

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such as skilled men would be expected to give in reply to other kinds of inquiry. 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 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 Ltd.

It is not easy to extract the facts from the report of the case in the Court of Session. 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 July 28, 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 ***490** to become a guarantor before the inquiry 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 July 28 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 October 1 about the Brothers Inglis, but no point was made of this. The whole case turned on M'Arthur's letter of July 28. 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 : "It appears to me that there was no such "duty of disclosure imposed upon Mr. M'Arthur towards the pursuer as would justify us in applying the principle on which Nocton's case was decided." Lord Dundas referred 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 July 28 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 ***491** Lord Guthrie merely said that here there was no fiduciary relationship.

In this House an unusual course was taken during the argument : "... after counsel for the respondents (Mr. Blackburn K.C.) 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 dishonest "... that under the circumstances the House was prepared to dismiss the appeal; but that they considered the pursuer had

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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 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 inquirer 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 Derry 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 ***492** that duty, of course, applies to the circumstances of this case as it applies to all other circumstances. 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 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 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 inquiry, 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. ***493** Palmer. It being admitted that there was here a duty to give an honest reply, I do not see what fur-

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ther 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 undertook 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 to be upheld. In your Lordships' House the legal issues were debated and again it did not become necessary to consider whether the finding of negligence ought or ought not to 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.

[His Lordship stated the facts and continued:] It is, I think, a reasonable and proper inference that the bank must have known that the National Provincial were making their inquiry 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 inquiries were from one bank to another. The name of the customer (Hedleys) was not mentioned by the inquiring bank (National Provincial) to the answering bank (the bank): nor did the inquiring 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 inquiry was being made by ***494** 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 of a direct application from Hedleys asking for a report or would have answered an inquiry 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 inquiry. I leave that question as it was left by Atkin L.J. in Tournier v. National Provincial & Union Bank of England when 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.

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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 ***495** there may be circumstances 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 reasonable skill and care in doing so. In his speech in Banbury v. Bank of Montreal Lord Atkinson 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 effect were the words of Lord Loughborough in the much earlier case of Shiells v. Blackburne when 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. 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 relationship 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. Under a contract with a shipowner 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 ***496** 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 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 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 re-

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lationship 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 inquiry that is first raised is whether B owed any duty to A: if he did the further inquiry 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. ***497** The issue in the present case is whether the bank owed any duty to Hedleys and if so what the duty was.

Leaving aside cases where there is some contractual or fiduciary relationship, 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.
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 stated 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 had sustained loss through the ***498** negligence, want of skill, breach of duty and misrepresentation of the defendants. Chitty 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

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to decide that point. I consider on these two last grounds - and if I were to prefer one to the other it would he the 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 June 7, 1888) referred to the judgment in the Court of Appeal in Peek v. Derry. That judgment was reversed in the House of Lords on July 1, 1889. Chitty J. compared the situation with that which arose in Heaven v. Pender. 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 obligation 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 the case to George v. Skivington 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 - ***499** 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 this 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 v. Gould. The latter case, binding on the Court of Appeal, in turn led to the decision in Candler v. Crane, Christmas & Co. 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. 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 Derry 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 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 : "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 that the decision of the House of Lords in ***500** 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 inquiry 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.

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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. Lord Ashburton. In his speech in that case Viscount Haldane L.C. 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 show 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." After a review of many authorities Lord Haldane said : "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 ***501**

Chancery, 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 Derry 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 Derry 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 that Derry 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 Derry v. Peek as a decision was directed to the single and specific point just set out." Lord Shaw 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, 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."

Lord Parmoor in his speech said in reference to Derry v. Peek : "That case decides that in an action founded on deceit, ***502** 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

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

My Lords, guided by the assistance given in Nocton v. Lord Ashburton, I consider 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 Lord Moulton 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 an 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 Bowen L.J. said in Low v. Bouverie : "... 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 inquiry in the present case, and in similar cases, becomes, therefore, an inquiry 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.

The guidance which Lord Haldane gave in Nocton v. Lord Ashburton was repeated by him in his speech in Robinson v. National Bank of Scotland Ltd. He clearly pointed out that Derry 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 ***503** 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 inquiry 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 inquiries as between banks will be answered. The fact that it is most unlikely that the bank would have answered a direct inquiry 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 inquiry 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-

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