Pacific West Health Medical Center Inc. Employees Retirement Trust et al ...ld Greenwich Group et al Doc. 106 Att. 6

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

2 of 2

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worded report." (I quote the words of Pearson L.J. Nor does it seem to me that the inquiring bank (nor therefore their customer) would expect such a process. This was, I think, what was denoted by Lord Haldane in his speech in Robinson v. National Bank of Scotland Ltd. when he spoke of a "mere inquiry" being made by one banker of another. In Parsons v. Barclay & Co. Ltd. ***504** Cozens-Hardy M.R. expressed the view that it was no part of a banker's duty, when asked for a reference, to make inquiries outside as to the solvency or otherwise of the person asked about or to do more than answer the question put to him honestly from what he knew from the books and accounts before him. There was in the present case no contemplation of receiving anything like a formal and detailed report such as might be given by some concern charged with the duty (probably for reward) of making all proper and relevant inquiries concerning the nature, scope and extent of a company's activities and of obtaining and marshalling all available evidence as to its credit, efficiency, standing and business reputation. There is much to be said, therefore, for the view that if a banker gives a reference in the form of a brief expression of opinion in regard to credit-worthiness he does not accept, and there is not expected from him, any higher duty than that of giving an honest answer. I need not, however, seek to deal further with this aspect of the matter, which perhaps cannot be covered by any statement of general application, because, in my judgment, the bank in the present case, by the words which they employed, effectively disclaimed any assumption of a duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given. They cannot accept a reply given with a stipulation and then reject the stipulation. Furthermore, within accepted principles (as illustrated in Rutter v. Palmer the words employed were apt to exclude any liability for negligence.

I would therefore dismiss the appeal.LORD HODSON.

My Lords, the appellants, who are advertising agents, claim damages for loss which they allege they have suffered through the negligence of the respondents, who are merchant bankers. The negligence attributed to the respondents consists of their failure to act with reasonable skill and care in giving references as to the credit-worthiness of a company called Easipower Ltd. which went into liquidation after the references had been given so that the appellants were unable to recover the bulk of the costs of advertising orders which Easipower Ltd. had placed with them. The learned judge at the trial found that the respondent bankers had been negligent in the advice which they gave in ***505** the form of bankers' references, the appellants being a company which acted in reliance on the references and suffered financial loss accordingly, but that he must enter judgment for the respondents since there was no duty imposed by law to exercise care in giving these references, the duty being only to act honestly in so doing.

The respondents have at all times maintained that they were in no sense negligent and further that no damage flowed from the giving of references, but first they took the point that, whether or no they were careless and whether or no the appellants suffered damage as a result of their carelessness, they must succeed on the footing that no duty was owed by them. This point has been taken throughout as being, if the respondents are right, decisive of the whole matter. I will deal with it first, although the underlying question is whether the respondent bankers who at all times disclaimed responsibility ever assumed any duty at all.

The appellants depend on the existence of a duty said to be assumed by or imposed on the respondents when they gave a reference as to the credit-worthiness of Easipower Ltd. knowing that it would or might be relied upon by the appellants or some other third party in like situation.

The case has been argued first on the footing that

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the duty was imposed by the relationship between the parties recognised by law as being a special relationship derived either from the notion of proximity introduced by Lord Esher in Heaven v. Pender, or from those cases firmly established in our law which show that those who hold themselves out as possessing a special skill are under a duty to exercise it with reasonable care.

The important case of Donoghue v. Stevenson shows that the area of negligence is extensive, for, as Lord Macmillan said: "The grounds of action may be as various and manifold as humar errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. ... Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken."

In that case the necessary relationship was held to have been ***506** established where the manufacturer of an article, ginger beer in a bottle, sold it to a distributor in circumstances which prevented the distributor or the ultimate purchaser or consumer from discovering by inspection any defect. He is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from injurious defect. No doubt that was the actual decision in that case, and indeed it was thought by Wrottesley J. in Old Gate Estates Ltd. v. Toplis & Harding & Russell that he was precluded from awarding damages in tort for a negligent valuation made by a firm of valuers which knew it was to be used by the plaintiffs since the doctrine of Donoghue v. Stevenson was confined to negligence which results in danger to life, limb or health. I do not think that this is the true view of Donoghue v. Stevenson, but the decision itself, although its effect has been extended to cases where there was no expectation as contrasted with opportunity of inspection (see Grant v. Australian Knitting Mills Ltd. and to liability of repairers (see Haseldine v. C. A. Daw & Son Ltd. , has never been applied to cases where damages are claimed in tort for negligent statements producing damage. The attempt so to apply it failed as recently as 1951, when in Candler v. Crane, Christmas & Co. the Court of Appeal by a majority held that a false statement made carelessly, as contrasted with fraudulently, by one person to another, though acted on by that other to his detriment, was not actionable in the absence of any contractual or fiduciary relationship between the parties and that this principle had in no way been modified by the decision in Donoghue v. Stevenson. Cohen L.J., one of the majority of the court, referred to the language of Lord Esher M.R. in Le Lievre v. Gould, who, repeating the substance of what he had said in Heaven v. Pender, said: "If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." Asquith L.J., the other member of the majority of the court, held that the "neighbour" doctrine had not been applied where the damage complained of was not physical in its incidence to either person or property. The majority thus went no further than Wrottesley J., ***507** in the Old Gate Estates case save that injury to property was said to be contemplated by the doctrine expounded in Donoghue v. Stevenson. It is desirable to consider the reasons given by the majority for their decision in the Candler case, for the appellants rely upon the dissenting judgment of Denning L.J. in the same case. The majority, as also the learned trial judge, held that they were bound by the decision of the Court of Appeal in Le Lievre v. Gould, in which the leading judgment was given by Lord Esher M.R. and referred to as authoritative by Lord Atkin in Donoghue v. Stevenson.

It is true that Lord Esher refused to extend the proximity doctrine so as to cover the relationship between the parties in that case and the majority in Candler's case were unable to draw a valid distinc-

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tion between the facts of that case and the case of Le Lievre v. Gould. Denning L.J., however, accepted the argument for the appellant which has been repeated before your Lordships, that the facts in Le Lievre v. Gould were not such as to impose a liability, for the plaintiff mortgagees who alleged that the owner's surveyor owed a duty to them not only had the opportunity but had stipulated for inspection by their own surveyor. The defendant's employee who prepared the accounts in Candler's case knew that the plaintiff was a potential investor in the company of which the accounts were negligently prepared and that the accounts were required in order that they might be shown to the plaintiff. In these circumstances I agree with Denning L.J. that there is a valid distinction between the two cases. In Le Lievre v. Gould it was held that an older case of Cann v. Willson was overruled. That is a case where the facts were in pari materia with those in Candler's case and Chitty J. held the defendants liable because (1) they independently of contract owed a duty to the plaintiff which they failed to discharge, (2) that they had made reckless statements on which the plaintiff had acted. This case was decided before this House, in Derry v. Peek, overruled the Court of Appeal on the second proposition but the first proposition was untouched by Derry v. Peek, and, in so far as it depended on the authority of George ***508** v. Skivington, the latter case was expressly affirmed in Donoghue v. Stevenson although it had often previously been impugned. It is true that, as Asquith L.J. pointed out in referring to George v. Skivington, the hair wash, put into circulation with the knowledge that it was intended to be used by the purchaser's wife, was a negligently compounded hair wash so that the case was so far on all fours with Donoghue v. Stevenson, but the declaration also averred that the defendant had said that the hair wash was safe. I cannot see that there is any valid distinction in this field between a negligent statement, for example, an incorrect label on a bottle which leads to injury and a negligent compounding of ingredients which leads to the same result. It may well be that at the time when Le Lievre v. Gould was decided the decision of this House in Derry v. Peek was thought to go further than it did. It certainly decided that careless statements recklessly but honestly made by directors in a prospectus issued to the public were not actionable on the basis of fraud, and inferentially that such statements would not be actionable in negligence (which had not in fact been pleaded), but it was pointed out by this House in Nocton v. Lord Ashburton that an action does lie for negligent misstatement where the circumstances disclose a duty to be careful. It is necessary in this connection to quote the actual language of Lord Haldane : "Such a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity. If such a duty can be inferred in a particular case of a person issuing a prospectus, as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I do not find in Derry v. Peek an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care therefore gave rise to no cause of action. In other words, it was decided that the directors stood ***509** in no fiduciary relation and therefore were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe. I have only to add that the special relationship must, whenever it is alleged, be clearly shown to exist."

So far I have done no more than summarise the argument addressed to the Court of Appeal in Candler's case to which effect was given in the dissenting judgment of Denning L.J., with which I respectfully agree in so far as it dealt with the facts of that case. I am therefore of opinion that his judgment is to be preferred to that of the majority, although the opinion of the majority is undoubtedly supported by the ratio decidendi of Le Lievre v. Gould which they cannot be criticised for following.

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This, however, does not carry the appellants further than this, that, provided they can establish a special duty, they are entitled to succeed in an action based on breach of that duty.

I shall later refer to certain cases which support the view that, apart from what are usually called fiduciary relationships such as those between trustee and cestui que trust, solicitor and client, parent and child, or guardian and ward, there are other circumstances in which the law imposes a duty to be careful, which is not limited to a duty to be careful to avoid personal injury or injury to property but covers a duty to avoid inflicting pecuniary loss provided always that there is a sufficiently close relationship to give rise to a duty of care.

The courts of equity recognised that a fiduciary relationship exists "in almost every shape," to quote from Field J. in Plowright v. Lambert. He went on to refer to a case (Tate v. Williamson which had said that the relationship could be created "voluntarily, as it were, by a person coming into a state of confidential relationship with another by offering to give advice in a matter, and so being disabled thereafter from purchasing."

It is difficult to see why liability as such should depend on the nature of the damage. Lord Roche in Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners) instanced damage to a lorry by the negligence of the driver of another lorry which, while it does no damage to the goods in the second lorry, causes the goods owner to be put to expense which is recoverable by direct action against the negligent driver. ***510**

It is not to be supposed that the majority of the Court of Appeal who decided as they did in Candler's case were unmindful of the decision in Nocton v. Lord Ashburton, to which their attention was drawn, but they seem to have been impressed with the view that in the passage I have quoted Lord Haldane had in mind only fiduciary relationships in the strict sense, but, in my opinion, the words need not be so limited. I am fortified in this opinion by examples to be found in the old authorities such as Shiells v. Blackburne, Wilkinson v. Coverdale and Gladwell v. Steggall, which are illustrations of cases where the law has held that a duty to exercise reasonable care (breach of which is remediable in damages) has been imposed in the absence of a fiduciary relationship where persons hold themselves out as possessing special skill and are thus under a duty to exercise it with reasonable care. The statement of Lord Loughborough in Shiells v. Blackburne is always accepted as authoritative and ought not to be dismissed as dictum, although the plaintiff failed to establish facts which satisfied the standard he set. He said: "... if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence." True that proximity is more difficult to establish where words are concerned than in the case of other activities and mere casual observations are not to be relied upon (see Fish v. Kelly , but these matters go to difficulty of proof rather than principle.

A modern instance is to be found in the case of Woods v. Martins Bank Ltd., where Salmon J. held that on the facts of the case the defendant bank which had held itself out as being advisers on investments (which was within the scope of their business) and had not given the plaintiff reasonably careful or skilful advice so that he suffered loss were held in breach of duty and so liable in damages even though the plaintiff may not have been a customer of the bank at the material time.

True that the learned judge based this part of his conclusion on a fiduciary relationship which he held to exist between the plaintiff and the bank and thus brought himself within the scope of the decision in Candler's case by which he was bound. For ***511** my part, I should have thought that even if the learned judge put a strained interpretation on the word "fiduciary" which is based on the idea of trust, the decision can be properly sustained as an example involving a special relationship.

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I do not overlook the point forcefully made by Harman L.J. in his judgment and elaborated by counsel for the respondents before your Lordships, that it may in certain cases appear to be strange that, whereas innocent misrepresentation does not sound in damages, yet in the special cases under consideration an injured party may sue in tort a third party whose negligent misrepresentation has induced him to enter into the contract. As was pointed out by Lord Wrenbury, however, in Banbury v. Bank of Montreal, innocent misrepresentation is not the cause of action but evidence of the negligence which is the cause of action.

Was there, then, a special relationship here? I cannot exclude from consideration the actual terms in which the reference was given and I cannot see how the appellants can get over the difficulty which these words put in their way. They cannot say that the respondents are seeking, as it were, to contract out of their duty by the use of language which is insufficient for the purpose, if the truth of the matter is that the respondents never assumed a duty of care nor was such a duty imposed upon them.

The first question is whether a duty was ever imposed, and the language used must be considered before the question can be answered. In the case of a person giving a reference I see no objection in law or morals to the giver of the reference protecting himself by giving it without taking responsibility for anything more than the honesty of his opinion - which must involve without taking responsibility for negligence in giving that opinion. I cannot accept the contention of the appellants that the responsibility disclaimed was limited to the bank to which the reference was given, nor can I agree that it referred only to responsibility for accuracy of detail.

Similar words were present in the case of Robinson v. National Bank of Scotland Ltd., a case in which the facts cannot, I think, be distinguished in any material respect from this. Moreover, in the Inner House the words of disclaimer were, I think, treated as not without significance.

In this House the opinion was clearly expressed that the representations made were careless. inaccurate and misleading but ***512** that the pursuer had no remedy since there was no special duty on the bank's representative towards the pursuer. This conclusion was reached quite apart from the disclaimer of responsibility contained in the defender bank's letters.

Viscount Haldane recalled the case of Nocton v. Lord Ashburton in the following passage : "In saying that I wish emphatically to repeat what I said in advising this House in the case of Nocton v. Lord Ashburton, that it is a great mistake to suppose that, because the principle in 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 authority is, I think, conclusive against the appellants and is not effectively weakened by the fact that the case came to an end before that matter had been fully argued upon the House intimating that it was prepared to dismiss the appeal without costs on either side since the pursuer had, in its opinion, been badly treated. Since no detailed reasons were given by the House for the view that a banker's reference given honestly does not in the ordinary course carry with it a duty to take reasonable care, that duty being based on a special relationship, it will not, I hope, be out of place if I express my con-

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currence with the observations of Pearson L.J. who delivered the leading judgment in the Court of Appeal and said : "Apart from authority, I am not satisfied that it would be reasonable to impose upon a banker the obligation suggested, if that obligation really adds ***513** anything to the duty of giving an honest answer. It is conceded by Mr. Cooke that the banker is not expected to make outside inquiries to supplement the information which he already has. Is he then expected, in business hours in the bank's time, to expend time and trouble in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced and well-worded report? That seems wholly unreasonable. Then, if he is not expected to do any of those things, and if he is permitted to give an impromptu answer in the words that immediately come to his mind on the basis of the facts which he happens to remember or is able to ascertain from a quick glance at the file or one of the files, the duty of care seems to add little, if anything, to the duty of honesty. If the answer given is seriously wrong, that is some evidence - of course, only some evidence - of dishonesty. Therefore, apart from authority, it is far from clear, to my mind, that the banker, in answering such an inquiry, could reasonably be supposed to be assuming any duty higher than that of giving an honest answer."

This is to the same effect as the opinion of Cozens Hardy M.R. in Parsons v. Barclay & Co. Ltd. : "I desire for myself to repudiate entirely the suggestion that when one banker is asked by another for a customer such a question as was asked here, it is in any way the duty of the banker to make inquiries other than what appears from the books of account before him, or, of course, to give information other than what he is acquainted with from his own personal knowledge ... I think that if we were to take the contrary view ... we should necessarily be putting a stop to that very wholesome and useful habit by which the banker answers in confidence and answers honestly, to another banker."

It would, I think, be unreasonable to impose an additional burden on persons such as bankers who are asked to give references and might, if more than honesty were required, be put to great trouble before all available material had been explored and considered.

It was held in Low v. Bouverie that if a trustee takes upon himself to answer the inquiries of a stranger about to deal with the cestui que trust, he is not under a legal obligation to do more than to give honest answers to the best of his actual ***514** knowledge and belief, he is not bound to make inquiries himself. I do not think a banker giving references in the ordinary exercise of business should be in any worse position than the trustee. I have already pointed out that a banker, like anyone else, may find himself involved in a special relationship involving liability, as in Woods v. Martins Bank Ltd., but there are no special features here which enable the appellants to succeed.

I do not think it is possible to catalogue the special features which must be found to exist before the duty of care will arise in a given case, but since preparing this opinion I have had the opportunity of reading the speech which my noble and learned friend, Lord Morris of Borth-y-Gest, has prepared. I agree with him that if in a sphere where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry such person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows, or should know, will place reliance upon it, then a duty of care will arise.

I would dismiss the appeal.LORD DEVLIN.

My Lords, the bare facts of this case, stated sufficiently to raise the general point of law, are these. The appellants, being anxious to know whether they could safely extend credit to certain traders with whom they were dealing, sought a banker's reference about them. For this purpose their bank, the National Provincial, approached the respondents who are the traders' bank. The respondents gave,

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without making any charge for it and in the usual way, a reference which was so carelessly phrased that it led the appellants to believe the traders to be creditworthy when in fact they were not. The appellants seek to recover from the respondents the consequent loss.

Mr. Foster, for the respondents, has given your Lordships three reasons why the appellants should not recover. The first is founded upon a general statement of the law which, if true, is of immense effect. Its hypothesis is that there is no general duty not to make careless statements. No one challenges that hypothesis. There is no duty to be careful in speech as there is a duty to be honest in speech. Nor indeed is there any general duty to be careful in action. The duty is limited to those who ***515** can establish some relationship of proximity such as was found to exist in Donoghue v. Stevenson. A plaintiff cannot, therefore, recover for financial loss caused by a careless statement unless he can show that the maker of the statement was under a special duty to him to be careful. Mr. Foster submits that this special duty must be brought under one of three categories. It must be contractual; or it must be fiduciary; or it must arise from the relationship of proximity and the financial loss must flow from physical damage done to the person or the property of the plaintiff. The law is now settled, Mr. Foster submits, and these three categories are exhaustive. It was so decided in Candler v. Crane, Christmas & Co. and that decision, Mr. Foster submits, is right in principle and in accordance with earlier authorities.

Mr. Gardiner, for the appellants, agrees that outside contractual and fiduciary duty there must be a relationship of proximity - that is Donoghue v. Stevenson - but he disputes that recovery is then limited to loss flowing from physical damage. He has not been able to cite a single case in which a defendant has been held liable for a careless statement leading, otherwise than through the channel of physical damage, to financial loss. But he submits that in principle such loss ought to be recoverable and that there is no authority which prevents your Lordships from acting upon that principle. Unless Mr. Gardiner can persuade your Lordships of this, his case fails at the outset. This, therefore, is the first and the most fundamental of the issues which the House is asked to decide.

Mr. Foster's second reason is that, if it is open to your Lordships to declare that there are or can be special or proximate relationships outside the categories he has named, your Lordships cannot formulate one to fit the case of a banker who gives a reference to a third party who is not his customer; and he contends that your Lordships have already decided that point in Robinson v. National Bank of Scotland Ltd.' His third reason is that if there can be found in cases such as this a special relationship between bankers and third parties, on the facts of the present case the appellants fall outside it; and here he relies particularly on the fact that the reference was marked Strictly confidential and given on the express understanding that we incur no responsibility whatever in furnishing it."

My Lords, I approach the consideration of the first and ***516** fundamental question in the way in which Lord Atkin approached the same sort of question - that is, in essence the same sort, though in particulars very different - in Donoghue v. stevenson. If Mr. Foster's proposition is the result of the authorities, then, as Lord Atkin said, "I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House." So before I examine the authorities, I shall explain why I think that the law, if settled as Mr. Foster says it is, would be defective. As well as being defective in the sense that it would leave a man without a remedy where he ought to have one and where it is well within the scope of the law to give him one, it would also be profoundly illogical. The common law is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it.

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Originally it was thought that the tort of negligence must be confined entirely to deeds and could not extend to words. That was supposed to have been decided by Derry v. Peek. I cannot imagine that anyone would now dispute that if this were the law, the law would be gravely defective. The practical proof of this is that the supposed deficiency was in relation to the facts in Derry v. Peek immediately made good by Act of Parliament. Today it is unthinkable that the law could permit directors to be as careless as they liked in the statements they made in a prospectus.

A simple distinction between negligence in word and negligence in deed might leave the law defective but at least it would be intelligible. This is not, however, the distinction that is drawn in Mr. Foster's argument and it is one which would be unworkable. A defendant who is given a car to overhaul and repair if necessary is liable to the injured driver (a) if he overhauls it and repairs it negligently and tells the driver it is safe when it is not; (b) if he overhauls it and negligently finds it not to be in need of repair and tells the driver it is safe when it is not; and (c) if he negligently omits to overhaul it at all and tells the driver that it is safe when it is not. It would be absurd in any of these cases to argue that the proximate cause of the driver's injury was not what the defendant did or failed to do but his negligent statement on the faith of which the driver ***517** drove the car and for which he could not recover. In this type of case, where if there were a contract there would undoubtedly be a duty of service, it is not practicable to distinguish between the inspection or examination, the acts done or omitted to be done, and the advice or information given. So neither in this case nor in Candler v. Crane, Christmas & Co. (Denning L.J. noted the point where he gave the example of the analyst who negligently certifies food to be harmless) has Mr. Foster argued that, the distinction lies there.

This is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this. If irrespective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy. Unless, of course, the patient was a private patient and the doctor accepted half a guinea for his trouble: then the patient can recover all. I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle. It just happens to be the line which those who have been driven from the extreme assertion that negligent statements in the absence of contractual or fiduciary duty give no cause of action have in the course of their retreat so far reached.

I shall now examine the relevant authorities, and your Lordships will, I hope pardon me if with one exception I attend only to those that have been decided in this House, for I have made it plain that I will not in this matter yield to persuasion but only to compulsion. The exception is the case of Le Lievre v. Gould, for your Lordships will not easily upset decisions of the Court of Appeal if they have stood unquestioned for as long as 70 years. The five relevant decisions of this House are Derry v. Peek, ***518** Nocton v. Lord Ashburton, Robinson v. National Bank of Scotland Ltd., Donoghue v. Stevenson, and The Greystoke Castle. The last of these I can deal with at once, for it lies outside the main stream of authority on this point. It is a case in which damage was done to a ship as the result of a collision with another ship. The owners of cargo on the first ship, which cargo was not itself damaged, thus became liable to the owners of the first

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ship for a general average contribution. They sued the second ship as being partly to blame for the collision. Thus they were claiming for the financial loss caused to them by having to make the general average contribution although their property sustained no physical damage. This House held that they could recover. Their Lordships did not in that case lay down any general principle about liability for financial loss in the absence of physical damage; but the case itself makes it impossible to argue that there is any general rule showing that such loss is of its nature irrecoverable.

I turn back to the earlier authorities beginning with Derry v. Peek. The facts in this case are so well known that I need not state them again. Nor need I state in my own words the effect of the decision. That has been done authoritatively by this House in Nocton v. Lord Ashburton. I quote Lord Haldane as stating most comprehensively the limits of the decision, noting that his view of the case is fully supported by Lord Shaw and Lord Parmoor : "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. Peck were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an action for deceit will lie."

There was in Derry v. Peek, as the report of the case ***519** shows, no plea of innocent or negligent misrepresentation and so their Lordships did not make any pronouncement on that. I am bound to say that had there been such a plea I am sure that the House would have rejected it. As Lord Haldane said, their Lordships must "be taken to have thought" that there was no liability in negligence. But what your Lordships may be taken to have thought, though it may exercise great influence upon those who thereafter have to form their own opinion on the subject, is not the law of England. It is impossible to say how their Lordships would have formulated the principle if they had laid one down. They might have made it general or they might have confined it to the facts of the case. They might have made an exception of the sort indicated by Lord Herschell or they might not. This is speculation. All that is certain is that on this point the House laid down no law at all.

Clearly in Le Lievre v. Gould it was thought that the House had done so. Lord Esher M.R. treated Derry v. Peek as restating the old law "that, in the absence of contract, an action for negligence cannot be maintained when there is no fraud." A. L. Smith L.J. stated the law in the same way. This is wrong and the House, in effect, said so in Nocton v. Lord Ashburton.

My Lords, I need not consider how far thereafter a court of equal authority was bound to follow Le Lievre v. Gould. It may be that the decision on the facts was correct even though the reasoning was too wide. There has been a difference of opinion about the effect of the decision: compare Asquith L.J. in Candler v. Crane, Christmas & Co. with Denning L.J. Nor need I consider what part of the reasoning, if any, should be held to survive Nocton v. Lord Ashburton. It is clear that after 1914 it would be to Nocton v. Lord Ashburton and not to Le Lievre v. Gould that the lawyer would look in order to ascertain what the exceptions were to the general principle that a man is not liable for careless misrepresentation. I cannot feel, therefore that there is any principle enunciated in Le Lievre v. Gould which is now so deeply embedded in the law that your Lordships ought not to disturb it. ***520**

I come now to the case of Nocton v. Lord Ashburton, which both sides put forward as the most important of the authorities which your Lordships have to consider. The appellants say that it removed

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the restrictions which Derry v. Peek was thought to have put upon liability for negligent misrepresentation. The respondents say that it removed those restrictions only to a very limited extent, that is to say, by adding fiduciary obligation to contract as a source of special duty; and that it closed the door on any further expansion. I propose, therefore, to examine it with some care because it is not at all easy to determine exactly what it decided. Lord Haldane L.C. began his speech by saying: "Owing to the mode in which this case has been treated both by the learned judge who tried it and by the Court of Appeal, the question to be decided has been the subject of some uncertainty and much argument." He went on to say that the difficulties in giving relief were concerned with form and not with substance. The main difficulty, I think, lies in discovering from the statement of claim what the cause of action was. Lord Ashburton sought relief from the consequences of having advanced money on mortgage to several persons of whom the defendant Nocton was one. The statement of claim consists of a long narrative of events interspersed with complaints. Although in the end the vital fact was that Nocton was Lord Ashburton's solicitor, there is no allegation of any retainer and nothing is pleaded in contract. The fact that Nocton was a solicitor emerges only in the framing of the complaint in paragraph 13 where it was said that Nocton's advice to make the advance of £65,000 "was not that of a solicitor advising his client in good faith, but was given for his own private ends." The relief asked for in respect of this transaction is a declaration "that [the plaintiff] was improperly advised and induced by the defendant Nocton whilst acting as the plaintiff's confidential solicitor" to advance £65,000. In paragraphs 31 to 33 of the statement of claim it is related that the plaintiff was asked to release part of his security for the loan; and it is said that: "The defendant Nocton in advising the plaintiff to execute the said release allowed the plaintiff to believe that he was advising the plaintiff independently and in good faith and in the plaintiff's interest." No separate relief was sought in respect of this transaction. ***521**

Until the case reached this House no substantial point of law was raised. Neville J. at the trial held that the only issue raised by the statement of claim was whether the defendant Nocton was guilty of fraud and that the plaintiff had failed to prove it. The Court of Appeal agreed with the judge's view of the pleadings. Cozens-Hardy M.R. said that if damages had been claimed on the ground of negligence, the action would have been practically undefended. But it was then too late to amend the statement of claim, if only because a new cause of action would have been statute-barred. On the facts the Court of Appeal reversed in part the judge's finding of fraud, holding that there was fraud in relation to the release.

In this House at the conclusion of the appellant's argument the respondent's counsel was told that the House was unlikely to differ from the judgment of Neville J. on fraud. The pith of the respondent's argument is reported as follows : "Assuming that fraud is out of the question, the allegations in the statement of claim are wide enough to found a claim for dereliction of duty by a person occupying a fiduciary relation. In the old cases in equity the term 'fraud' was frequently applied to "cases of a breach of fiduciary obligation." He was then stopped.

It can now be understood why Lord Haldane regarded the question as one of form rather than of substance. The first question which the House had to consider was whether the statement of claim was wide enough to cover negligence. Lord Parmoor thought that it was and decided the appeal on that ground. So, I think, in the end did Lord Dunedin, but he also expressed his agreement with the opinion of Lord Haldane L.C. Lord Haldane, With whom Lord Atkinson concurred, thought that possibly negligence was covered, but he did not take the view that the statement of claim must be interpreted either as an allegation of deceit or as an allegation of negligence. He said : "There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in

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Chancery to enforce compensation for breach of a fiduciary obligation. There appears to have been an impression that the necessity which recent authorities have established of proving moral fraud in order to succeed in an action of deceit has narrowed the scope of this remedy. For the reasons which I am about to offer to ***522** your Lordships, I do not think that this is so." The Lord Chancellor then went on to examine Derry v. Peek . in order to determine exactly what it had decided.

I find most interest for present purposes in the speech of Lord Shaw. He held that the pleadings disclosed "a claim for liability upon a ground quite independent of fraud, namely, of misrepresentations and misstatements made by a person entrusted with a duty to another, and in failure of that duty." He posed what he considered to be the crucial question: What was the relation in which the parties stood to each other. at the time of the transaction? "He stated that the defendant was Lord Ashburton's solicitor and so under a duty to advise. He concluded in the following terms: "... once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given not fraudulently but in good faith. It is admitted in the present case that misrepresentations were made; that they were material; that they were the cause of loss; that they were made by a solicitor to his client in a situation in which the client was entitled to rely, and did rely, upon the information received. I accordingly think that that situation is plainly open for the application of the principle of liability to which I have referred, namely, liability for the consequences of a failure of duty in circumstances in which it was a matter equivalent to contract between the parties that that duty should be fulfilled." Lord Shaw does not anywhere in his speech refer to the relationship as being of a fiduciary character.

Lord Haldane L.C. laid down the general principle in much the same terms. He said: "Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is nonetheless true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which ***523** people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement." It is quite true that Lord Haldane L.C. applied this principle only to cases of breach of fiduciary duty. But that was inevitable on the facts of the case since upon the view of the pleadings on which he was proceeding it was necessary to show equitable fraud.

In my judgment, the effect of this case is as follows. The House clearly considered the view of Derry v. Peek, exemplified in Le Lievre v. Gould, too narrow. It considered that outside contract (for contract was not pleaded in the case), there could be a special relationship between parties which imposed a duty to give careful advice and accurate information. The majority of their Lordships did not extend the application of this principle beyond the breach of a fiduciary obligation but none of them said anything at all to show that it was limited to fiduciary obligation. Your Lordships can, therefore, proceed upon the footing that there is such a general principle and that it is for you to say to what cases, beyond those of fiduciary obligation, it can properly be extended.

I shall not at this stage deal in any detail with Robinson v. National Bank of Scotland Ltd. Its chief relevance is to Mr. Foster's second point. All that need be said about it on his first point is that it is no authority for the proposition that those relationships which give rise to a special duty of care

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are limited to the contractual and the fiduciary. On the contrary, it is a clear authority for the view that Lord Haldane did not mean the general principle he stated in Nocton v. Lord Ashburton to be limited to fiduciary relationships. He said that he wished emphatically to repeat what he had said in Nocton v. Lord Ashburton, that it would be a great mistake to suppose that the principle in Derry v. Peek affected the freedom of action of the courts in recognising special duties arising out of other kinds of relationship. He went on: "The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the courts may find ***524** 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."

I come next to Donoghue v. stevenson. In his celebrated speech in that case Lord Atkin did two things. He stated what he described as a "general conception" and from that conception he formulated a specific proposition of law. In between he gave a warning "against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted."

What Lord Atkin called a "general conception of relations giving rise to a duty of care" is now often referred to as the principle of proximity. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question.

The specific proposition arising out of this conception is that "a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

Now, it is not, in my opinion, a sensible application of what Lord Atkin was saying for a Judge to be invited on the facts of any particular case to say whether or not there was "proximity" between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops. What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such a duty in the category of articles that were dangerous in themselves. ***525** What Donoghue v. Stevenson did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides.

Lord Thankerton and Lord Macmillan approached the problem fundamentally in the same way, though they left any general conception on which they were acting to be implied. They inquired directly - Lord Thankerton and Lord Macmillan - whether the relationship between the plaintiff and the defendant was such as to give rise to a duty to take care. It is significant, whether it is a coincidence or not, that the term "special relationship" used by Lord Thankerton is also the one used by Lord Haldane in Nocton v. Lord Ashburton. The field is very different but the object of the search is the same.

In my opinion, the appellants in their argument tried to press Donoghue v. Stevenson too hard. They asked whether the principle of proximity

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should not apply as well to words as to deeds. I think it should, but as it is only a general conception it does not get them very far. Then they take the specific proposition laid down by Donoghue v. Stevenson and try to apply it literally to a certificate or a banker's reference. That will not do, for a general conception cannot be applied to pieces of paper in the same way as to articles of commerce or to writers in the same way as to manufacturers. An inquiry into the possibilities of intermediate examination of a certificate will not be fruitful. The real value of Donoghue v. Stevenson to the argument in this case is that it shows how the law can be developed to solve particular problems. Is the relationship between the parties in this case such that it can be brought within a category giving rise to a special duty? As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight.

It would be surprising if the sort of problem that is created by the facts of this case had never until recently arisen in English law. As a problem it is a by-product of the doctrine of consideration. If the respondents had made a nominal charge for the reference, the problem would not exist. If it were possible in ***526** English law to construct a contract without consideration, the problem would move at once out of the first and general phase into the particular; and the question would be, not whether on the facts of the case there was a special relationship, but whether on the facts of the case there was a contract.

The respondents in this case cannot deny that they were performing a service. Their sheet anchor is that they were performing it gratuitously and therefore no liability for its performance can arise. My Lords, in my opinion this is not the law. A promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort. This is the foundation of the liability of a gratuitous bailee. In the famous case of Coggs v. Bernard, where the defendant had charge of brandy belonging to the plaintiff and had spilt a quantity of it, there was a motion in arrest of judgment "for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains." The declaration was held to be good notwithstanding that there was not any consideration laid. Gould J. said : "The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect." This proposition is not limited to the law of bailment. In Skelton v. London & North Western Railway Co. Willes J. applied it generally to the law of negligence. He said: "Actionable negligence must consist in the breach of some duty ... if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of Coggs v. Bernard." Likewise in Banbury v. Bank of Montreal, where the bank had advised a customer on his investments, Lord Finlay L.C. said: "He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently."

The principle has been applied to cases where as a result of the negligence no damage was done to person or to property and the consequential loss was purely financial. In Wilkinson v. Coverdale the defendant undertook gratuitously to get a fire ***527** policy renewed for the plaintiff, but, in doing so, neglected formalities, the omission of which rendered the policy inoperative. It was held that an action would lie. In two similar cases the defendants succeeded on the ground that negligence was not proved in fact. Both cases were thus decided on the basis that in law an action would lie. In the first of them, Shiells v. Blackburne, the defendant had, acting voluntarily and without compensation, made an entry of the plaintiff's leather as wrought leather instead of dressed leather, with the result that the leather was seized. In Dartnall v. Howard & Gibbs the defendants purchased an annuity for the

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plaintiff but on the personal security of two insolvent persons. The court, after verdict, arrested the judgment upon the ground that the defendants appeared to be gratuitous agents and that it was not averred that they had acted either with negligence or dishonesty.

Many cases could be cited in which the same result has been achieved by setting up some nominal consideration and suing in contract instead of in tort. In Coggs v. Bernard Holt C.J. put the obligation on both grounds. He said: "... secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owners trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. and if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing."

De La Bere v. Pearson Ltd. is an example of a case of this sort decided on the ground that there was a sufficiency of consideration. The defendants advertised in their newspaper that their city editor would answer inquiries from readers of the paper desiring financial advice. The plaintiff asked for the name of a good stockbroker. The editor recommended the name of a person whom he knew to be an outside broker and whom he ought to *528 have known, if he had made proper inquiries, to be an undischarged bankrupt. The plaintiff dealt with him and lost his money. The case being brought in contract, Vaughan Williams L.J. thought that there was sufficient consideration in the fact that the plaintiff consented to the publication of his question in the defendants' paper if the defendants so chose. For Barnes P. the consideration appears to have lain in the plaintiff addressing an inquiry as invited. In the same way when in Everett v. Griffiths the Court of Appeal was considering the liability of a doctor towards the person he was certifying, Scrutton L.J. said that the submission to treatment would be a good consideration.

My Lords, I have cited these instances so as to show that in one way or another the law has ensured that in this type of case a just result has been reached. But I think that today the result can and should be achieved by the application of the law of negligence and that it is unnecessary and undesirable to construct an artificial consideration. I agree with Sir Frederick Pollock's note on the case of De La Bere v. Pearson Ltd. where he said in Contracts, 13th ed., p. 140, that "the cause of action is better regarded as arising from default in the performance of a voluntary undertaking independent of contract."

My Lords, it is true that this principle of law has not yet been clearly applied to a case where the service which the defendant undertakes to perform is or includes the obtaining and imparting of information. But I cannot see why it should not be: and if it had not been thought erroneously that Derry v. Peek negatived any liability for negligent statements, I think that by now it probably would have been. It cannot matter whether the information consists of fact or of opinion or is a mixture of both, nor whether it was obtained as a result of special inquiries or comes direct from facts already in the defendant's possession or from his general store of professional knowledge. One cannot, as I have already endeavoured to show, distinguish in this respect between a duty to inquire and a duty to state.

I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or *529 to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in Nocton v. Lord Ashburton are "equivalent to con-

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tract," that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good.

I have had the advantage of reading all the opinions prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction. In the present case the appellants were not, as in Woods v. Martins Bank Ltd., the customers or potential customers of the bank. Responsibility can attach only to the single act, that is, the giving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility. This is a point of great importance because it is, as I understand it, the foundation for the ground on which in the end the House dismisses the appeal. I do not think it possible to ***530** formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking any more than it is possible to formulate those in which the law will imply a contract. But in so far as your Lordships describe the circumstances in which an implication will ordinarily be drawn, I am prepared to adopt any one of your Lordships' statements as showing the general rule: and I pay the same respect to the statement by Denning L.J. in his dissenting judgment in Candler v. Crane, Christmas & Co. about the circumstances in which he says a duty to use care in making a statement exists.

I do not go further than this for two reasons. The first is that I have found in the speech of Lord Shaw in Nocton v. Lord Ashburton and in the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arises in this case. Mr. Gardiner does not claim to succeed unless he can establish that the reference was intended by the respondents to be communicated by the National Provincial Bank to some unnamed customer of theirs, whose identity was immaterial to the respondents, for that customer's use. All that was lacking was formal consideration. The case is well within the authorities I have already cited and of which Wilkinson v. Coverdale is the most apposite example.

I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former Nocton v. Lord Ashburton has long stood as the authority and for the latter there is the decision of Salmon J. in Woods v. Martins Bank Ltd. which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its

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existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.

I regard this proposition as an application of the general conception of proximity. Cases may arise in the future in which ***531** a new and wider proposition, quite independent of any notion of contract, will be needed. There may, for example, be cases in which a statement is not supplied for the use of any particular person. any more than in Donoghue v. Stevenson the ginger beer was supplied for consumption by any particular person; and it will then be necessary to return to the general conception of proximity and to see whether there can be evolved from it, as was done in Donoghue v. Stevenson, a specific proposition to fit the case. When that has to be done, the speeches of your Lordships today as well as the judgment of Denning L.J. to which I have referred - and also, I may add, the proposition in the American Restatement of the Law of Torts, Vol. III, p. 122, para. 552, and the cases which exemplify it - will afford good guidance as to what ought to be said. I prefer to see what shape such cases take before committing myself to any formulation, for I bear in mind Lord Àtkin's warning, which I have quoted, against placing unnecessary restrictions on the adaptability of English law. I have, I hope, made it clear that I take quite literally the dictum of Lord Macmillan, so often quoted from the same case, that "the categories of negligence are never closed." English law is wide enough to embrace any new category or proposition that exemplifies the principle of proximity.

I have another reason for caution. Since the essence of the matter in the present case and in others of the same type is the acceptance of responsibility, I should like to guard against the imposition of restrictive terms notwithstanding that the essential condition is fulfilled. If a defendant says to a plaintiff: Let me do this for you; do not waste your money in employing a professional, I will do it for nothing and you can rely on me," I do not think he could escape liability simply because he belonged to no profession or calling, had no qualifications or special skill and did not hold himself out as having any. The relevance of these factors is to show the unlikelihood of a defendant in such circumstances assuming a legal responsibility, and as such they may often be decisive. But they are not theoretically conclusive and so cannot be the subject of definition. It would be unfortunate if they were. For it would mean that plaintiffs would seek to avoid the rigidity of the definition by bringing the action in contract as in De Le Bere v. Pearson Ltd. and setting up something that would do for consideration. That, to my mind, ***532** would be an undesirable development in the law; and the best way of avoiding it is to settle the law so that the presence or absence of consideration makes no difference.

Your Lordships' attention was called to a number of cases in courts of first instance or of appeal which it was said would have been decided differently if the appellants' main contention was correct. I do not propose to go through them in order to consider whether on the facts of each it should or should not be upheld. I shall content myself with saying that, in my opinion, Le Lievre v. Gould and all decisions based on its reasoning (in which I specifically include, lest otherwise it might be thought that generalia specialibus non derogant, the decision of Devlin J. in Heskell v. Continental Express Ltd. can no longer be regarded as authoritative; and, when similar facts arise in the future, the case will have to be judged afresh in the light of the principles which the House has now laid down.

My Lords, I have devoted much time and thought to considering the first reason given by Mr. Foster for rejecting the appellants' claim. I have done so not only because his reason was based on a ground so fundamental that it called for a full refutation, but also because it is impossible to find the correct answer on the facts to the appellants' claim until the relevant criteria for ascertaining whether or not there is a duty to take care have been clearly estab-

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lished. Once that is done, their application to the facts of this case can be done very shortly, for the case then becomes a very simple one.

I am satisfied, for the reasons I have given, that a person for whose use a banker's reference is furnished is not, simply because no consideration has passed, prevented from contending that the banker is responsible to him for what he has said. The question is whether the appellants can set up a claim equivalent to contract and rely on an implied undertaking to accept responsibility. Mr. Foster's second point is that in Robinson v. National Bank of Scotland Ltd. this House has already laid it down as a general rule that in the case of a banker furnishing a reference that cannot be done. I do not agree. The facts in that case have been stated by my noble and learned friend Lord Reid, and I need not repeat them. I think it is plain upon those facts that the bank in that case was not furnishing ***533** the reference for the use of the pursuer; he was not a person for whose use of the reference they were undertaking any responsibility, and that quite apart from their general disclaimer. Furthermore, the pursuer never saw the reference; he was given only what the Lord Justice-Clerk described as "a gloss of it." This makes the connection between the pursuer and the defendants far too remote to constitute a relationship of a contractual character.

On the facts of the present case Mr. Foster has under his third head argued for the same result. He submits, first, that it ought not to be inferred that the respondents knew that the National Provincial Bank were asking for the reference for the use of a customer. If the respondents did know that, then Mr. Foster submits that they did not intend that the reference itself should be communicated to the customer; it was intended only as material upon which the customer's bank could advise the customer on its own responsibility. I should consider it necessary to examine these contentions were it not for the general disclaimer of responsibility which appears to me in any event to be conclusive. I agree entirely with the reasoning and conclusion on this point of my noble and learned friend, Lord Reid. A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not. The problem of reconciling words of exemption with the existence of a duty arises only when a party is claiming exemption from a responsibility which he has already undertaken or which he is contracting to undertake. For this reason alone, I would dismiss the appeal.LORD PEARCE.

My Lords, "although liability for negligence in word," said Lord Haldane in Nocton v. Lord Ashburton, has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many ***534** cases in which that relationship may be properly treated as giving rise to a special duty of care in statement."

The law of negligence has been deliberately limited in its range by the courts' insistence that there can be no actionable negligence in vacuo without the existence of some duty to the plaintiff. For it would be impracticable to grant relief to everybody who suffers damage through the carelessness of another.

The reason for some divergence between the law of negligence in word and that of negligence in act is clear. Negligence in word creates problems different from those of negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expended and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage. How far they are relied on unchecked (by analogy with there being no probability of intermediate inspection - see Grant v. Aus-

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tralian Knitting Mills Ltd. must in many cases be a matter of doubt and difficulty. If the mere hearing or reading of words were held to create proximity, there might be no limit to the persons to whom the speaker or writer could be liable. Damage by negligent acts to persons or property on the other hand is more visible and obvious; its limits are more easily defined, and it is with this damage that the earlier cases were more concerned. It was not until 1789 that Pasley v. Freeman recognised and laid down a duty of honesty in words to the world at large - thus creating a remedy designed to protect the economic as opposed to the physical interests of the community. Any attempts to extend this remedy by imposing a duty of care as well as a duty of honesty in representations by word were curbed by Derry v. Peek.

In Cann v. Willson it had been held that a valuer was liable in respect of a negligent valuation which he had been employed by the owner of property to make for the purpose of raising a mortgage, and which the valuer himself put before the proposed mortgagee's solicitor. Chitty J. there said : "It seems to me that the defendants knowingly placed themselves in that position, and in point of law incurred a duty towards him to use reasonable care in the preparation of the document Galled a valuation. I think it is like the case of the supply of an article - the supply of the hairwash in the case of George v. ***535** Skivington, " later approved in Donoghue v. Stevenson. Thus in the case of economic damage alone he was drawing an analogy from a case where physical damage to the wife of a purchaser was held to give rise to an action for negligence.

Cann v. Willson was, however, overruled by Le Lievre v. Gould on the ground, erroneous as it seems to me, that it could not stand with Derry v. Peek. The particular facts in Le Lievre v. Gould justified the particular decision, as Denning L.J. explained in Candler v. Crane, Christmas & Co. But the ratio decidendi was wrong since it attributed to Derry v. Peek more than that case decided. In Nocton v. Lord Ashburton this House pointed out that too much had been ascribed to Derry v. Peek. Lord Haldane said : "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." Lord Haldane spoke to a like effect in Robinson v. National Bank of Scotland Ltd. : "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. ***536** 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 court may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the courts are in any way hampered in recognising that the duty of care may be established when such cases really occur." Lord Haldane was thus in terms preserving unencumbered the area of special relationships which created a duty of care; and he was not restricting the area to cases where courts of equity would find a fiduciary duty.

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The range of negligence in act was greatly extended in Donoghue v. Stevenson on the wide principle of the good neighbour; sic utere tuo ut alienum non laedas. It is argued that the principles enunciated in Donoghue v. Stevenson, apply fully to negligence in word. It may well be that Wrottesley J. in Old Gate Estates Ltd. put the matter too narrowly when he confined the applicability of the principles laid down in Donoghue v. Stevenson to negligence which caused damage to life, limb or health. But they were certainly not purporting to deal with such issues as, for instance, how far economic loss alone, without some physical or material damage to support it, can afford a cause of action in negligence by act. See Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners), where it was held that it could do so. The House in Donoghue v. Stevenson was, in fact, dealing with negligent acts causing physical damage, and the opinions cannot be read as if they were dealing with negligence in word causing economic damage. Had it been otherwise some consideration would have been given to problems peculiar to negligence in words. That case, therefore, can give no more help in this sphere than by affording some analogy from the broad outlook which it imposed on the law relating to physical negligence.

How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person and property. It may ***537** be that the size and the width of the range of possible claims has acted as a deterrent to extension of economic protection.

In this sphere the law was developed in the United States in Glanzer v. Shepherd, where a public weigher employed by a vendor was held liable to a purchaser for giving him a certificate which negligently overstated the amount of the goods supplied to him. The defendant was thus engaged on a task in which, as he knew, vendor and purchaser alike depended on his skill and care and the fact that it was the vendor who paid him was merely an accident of commerce. This case was followed and developed in later cases.

In the Ultramares case, however, the court felt the undesirability of exposing defendants to a potential liability "in an indeterminate amount for an indefinite time to an indeterminate class." It decided that auditors were not liable for negligence in the preparation of their accounts (of which they supplied thirty copies, although they were not aware of the specific purpose, namely, to obtain financial help) to a plaintiff who lent money on the strength of them.

In South Africa, under a different system of law, two cases show a similar advance and subsequent restriction (Perlman v. Zoukendyk and Herschel v. Mrupi .

Some guidance may be obtained from the case of Shiells v. Blackburne. There a general merchant undertook voluntarily and without reward to enter a parcel of the goods of another, together with a parcel of his own of the same sort, at the Customs House for exportation. Acting, it was contended, with gross negligence, he made the entry under a wrong denomination whereby both parcels were seized. The plaintiff failed on the facts to make out a case of gross negligence. But Lord Loughborough said : "... where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailie is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the Custom House, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment ***538** necessarily imply a competent degree of knowledge in making such entries." Heath J. said : "... the surgeon would also be liable for such negligence, if he undertook gratis to attend a sick per-

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son, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable."

In Gladwell v. Steggall an infant plaintiff, 10 years old, recovered damages for injury to health from a surgeon and apothecary who had treated her. She did not sue in contract but brought an action ex delicto alleging a breach of duty arising out of his employment by her, although it was her father to whom the bill was made out. and in Wilkinson v. Coverdale Lord Kenyon accepted the proposition that a defendant who had gratuitously undertaken to take out an insurance policy, and who did it negligently, could be liable in damages.

In those cases there was no dichotomy between negligence in act and in word, nor between physical and economic loss. The basis underlying them is that if persons holding themselves out in a calling or situation or profession take on a task within that calling or situation or profession, they have a duty of skill and care. In terms of proximity one might say that they are in particularly close proximity to those who, as they know, are relying on their skill and care although the proximity is not contractual.

The reasoning of Shiells v. Blackburne was applied in Everett v. Griffiths, where the Court of Appeal held that a doctor owed a duty of care to a man by whom he was not employed but whom he had a duty to examine under the Lunacy Act. It was also relied on by Denning L.J. in his dissenting judgment in Candler v. Crane, Christmas & Co. He reached the conclusion that in respect of reports and work that resulted in such reports there was a duty of care laid on "those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts and other things. and to make reports on which other people - other than their clients - rely in the ordinary course of business." The duty is, in his opinion, owed (apart from contractual duty to their empoyer) to any third person to whom they themselves show the accounts, ***539** or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them." He excludes strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to hand their accounts. "The test of proximity in these cases is. did the accountants know that the accounts were required for submission to the plaintiff and use by him?" (It is to be noted that these expressions of opinion produce a result somewhat similar to the American Restatement of the Law of Tort, vol. III, p. 122, para. 552.) I agree with those words. In my opinion, they are consonant with the earlier cases and with the observations of Lord Haldane.

It is argued that so to hold would create confusion in many aspects of the law and infringe the established rule that innocent misrepresentation gives no right to damages. I cannot accept that argument. The true rule is that innocent misrepresentation per se gives no right to damages. If the misrepresentation intended by the parties to form a warranty between two contracting parties, it gives on that ground a right to damages Symons & Co. v. Buckleton . If an innocent misrepresentation is made between parties in a fiduciary relationship it may, on that ground, give a right to claim damages for negligence. There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded.

Was there such a special relationship in the present case as to impose on the defendants a duty of care to the plaintiffs as the undisclosed principals for whom the National Provincial Bank was making the inquiry? The answer to that question depends on the circumstances of the transaction. If, for instance, they disclosed a casual social approach to the inquiry, no such special relationship or duty of care would be assumed (see Fish v. Kelly , To import such a duty the representation must normally, I

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think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer. It is conceded that Salmon J. rightly found a duty of care in Woods v. Martins Bank Ltd. but the facts in that case were wholly different from those in the present case. A most important circumstance is the form of the inquiry and of the answer. Both were here plainly ***540** stated to be without liability. Mr. Gardiner argues that those words are not sufficiently precise to exclude liability for negligence. Nothing, however, except negligence could, in the facts of this case, create a liability (apart from fraud, to which they cannot have been intended to refer and against which the words would be no protection, since they would be part of the fraud). I do not, therefore, accept that even if the parties were already in contractual or other special relationship the words would give no immunity to a negligent answer. But in any event they clearly prevent a special relationship from arising. They are part of the material from which one deduces whether a duty of care and a liability for negligence was assumed. If both parties say expressly (in a case where neither is deliberately taking advantage of the other) that there shall be no liability, I do not find it possible to say that a liability was assumed.

In Robinson v. National Bank of Scotland Ltd. also the correspondence expressly excluded responsibility. Possibly that factor weighed with Lord Haldane when he said : "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 appreciate Mr. Gardiner's emphasis on the general importance to the business world of bankers' references and the desirability that in an integrated banking system there should be a duty of care with regard to them, but on the facts before us it is in my opinion not possible to hold that there was a special duty of care and a liability for negligence.

I would therefore dismiss the appeal.Appeal dismissed. (F. C.)
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