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Tort Law

Frances Quinn

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Tort Law

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I also particularly like the use of practitioner interviews within the book; they provide valuable comments on their particular area of expertise.’

Lesley Lomax, Sheffield Hallam University

‘An excellent book. It is comprehensive, very accessible and Frances Quinn brings a welcome new approach to the subject, making it ideal for any undergraduate course. This book must be considered by anyone teaching tort.’

Sean Curley, Principle Lecturer, University of Huddersfield.

In the early 1960s, the House of Lords made a major change to the law, in the case of *Hedley Byrne* v. *Heller* (1963). They said that claims for economic loss caused by misstatements should now be allowed, but only where there was a 'special relationship between the parties', and the defendants had supplied advice or information knowing that the claimants would rely on it for a particular purpose. This type of claim is known as **negligent misstatement**, and it is now an important part of the law of negligence. We will look at the facts of this case and the changes it made later in this chapter, but for now let's carry on with an overview of the history.

So, after *Hedley Byrne*, the position was that claims for economic loss caused by negligent misstatements were allowed in certain circumstances, but claims for economic loss caused by acts or omissions were not. By the 1970s, however, the original cautious approach to negligence was being widely criticised by some judges, who believed that the law should be used to create wider liability for damage negligently caused to others. Their view began to gather support, and in *Anns* v. *Merton London Borough* (1978), the House of Lords decided it was time to move the law on.

Case Summary

The claimants in *Anns* were living in flats in a block which was negligently built and sued the builders, and the council who had approved the building works, for the cost of repairs. The case against the builders was settled, but the council argued that it had no duty of care. At first glance the damage in this case might look like property damage, but the courts had always held that a defect in property is not the same thing as damage. Where a defect caused personal injury or property damage, the victim could claim for those types of damage, but the defect itself was always considered economic loss because it arises from the reduced value of the defective thing. So, following the traditional principle, the claimants would not have been able to claim.

However, the House of Lords decided that it was time to change this, and in the process widen the scope of the law of negligence generally. Lord Wilberforce, giving the leading judgment, said that the approach to new duties of care should change. In order to decide whether a duty of care existed in a new factual situation, the courts should use a two-stage test. First, they should ask whether the parties satisfied the neighbour test: was the claimant someone to whom the defendant could reasonably be expected to foresee a risk of harm? If they were, the second test was to ask whether there were any reasons of policy which suggested that a duty should not exist. If not, a duty of care should be imposed. This meant that new duties of care could be created wherever the neighbour test was satisfied, unless there were good policy reasons not to. It was no longer necessary to find a good policy reason in favour of creating a new duty, only to make sure that there was no good reason not to. This made it likely that many more claims would be allowed.

In *Anns* itself, the claimants clearly passed the neighbour test and the House of Lords decided that there were no good policy reasons for denying a duty. But Lord Wilberforce neatly skipped over the issue of whether this new approach meant that economic loss for negligent acts should now be compensated, by simply deciding that the defect in the building was property damage for which there had always been a duty of care.

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However, the House of Lords faced the issue head-on in the case of *Junior Books* v. *Veitchi* (1983). The claimants had had a factory built for them under a contract with a building firm. The factory needed a special type of floor in order to support the weight of the machinery they planned to use, and they asked the builders to use Veitchi, a specialist flooring firm, to provide the floor. After Veitchi laid the floor it was found to be defective. If the factory owners had contracted directly with Veitchi they could have sued in contract, but their only contract was with the building company and it was

Veitchi, not the builders, who had been negligent. The floor was not dangerous, and nor did it cause damage to the building, which meant that Junior Books' claim for the cost of replacing the flooring was pure economic loss.

Applying the *Anns* two-stage test, the House of Lords said the claimants passed the neighbour test, because it was clearly foreseeable that if Veitchi carried out the work negligently Junior Books would suffer a loss. Regarding the second stage of the test, the only reason which had been put forward for not imposing a duty was that the claim was for economic loss, and such claims had not been allowed before. Lord Roskill, giving the leading judgment, said this was not a good enough reason to deny a duty of care. The House of Lords therefore found that there was a duty of care from the flooring company to the factory owners. This meant that it was now possible to claim for economic loss by acts, using the new two-stage *Anns* test, as well as for economic loss caused by statements, under the rules in *Hedley Byrne*.

The judicial retreat

The decision in *Junior Books* was controversial, for two reasons: first, it seemed to sweep away the distinction between contract and tort; and secondly, it substantially increased the number of claims which could now be brought, and therefore increased the need for, and cost of, insurance against such claims. It was widely criticised, and the courts seemed to agree that they had gone too far because, in a number of cases over the following few years, they began tightening the law up again.

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This process came to a head in *Murphy* v. *Brentwood District Council* (1990), where the House of Lords decided not just to call a halt to the expansion, but to wind things back a little. As you will know if you have studied the English legal system, in 1966 the House of Lords created a power for themselves to overrule their own previous decisions. In *Murphy* they decided to use this power to overrule *Anns*. They stated that the two-stage test for a duty of care no longer applied, and that the courts should go back to a more gradual approach. They could still find new duties of care, but the way to do this was by building the law step by step, using comparisons with established duty of care situations, although policy would still be a relevant consideration.

The facts of *Murphy* were quite similar to those of *Anns*, involving defects in a building. The House of Lords reverted to the pre-*Anns* position, where such defects were classified as economic loss, and stated that there was no liability for them. This meant that after *Murphy* it was no longer possible to claim for economic loss caused by acts.

Liability for economic loss: the law today

After this series of swings backwards and forwards, the current position is that the law on economic loss in negligence essentially has two separate categories, which are treated differently:

- loss caused by negligent acts;
- loss caused by negligent statements, advice and in some cases, services.

Loss caused by negligent acts

There are three main types of situation in which pure economic loss can be caused by a negligent act:

- Negligent manufacture or building may create a product or building with a defect that makes it less valuable, as in *Anns* and in *Murphy*.
- A three-way business arrangement like that in *Junior Books* may mean that one of the parties is caused loss by the second, but only has a contract with the third.
- A claimant may be caused pure economic loss because of damage to property that belongs to a third party, such as an electricity cable as in *Spartan Steel*.

It is now clear that there is no duty of care for economic loss in any of these situations.

Defects in products and buildings

In the first of the above categories, *Murphy* v. *Brentwood* established that there was no duty of care regarding economic loss caused by defective buildings. The issue of other defective products was examined in *Muirhead* v. *Industrial Tank Specialities* (1986). Here the claimant planned to run a business which involved buying lobsters at times when they were inexpensive, and keeping them in tanks in order to sell at a profit when prices were higher. Unfortunately the pumps he bought for the tanks were made in France, and the voltage they used was not the same as in the UK. As a result, many of his lobsters died. Although he had a contract with the seller, that firm had gone bankrupt, so he sued the manufacturer in negligence instead. The Court of Appeal said he was able to claim for the cost of the dead lobsters, but not for the profit he expected to make on them because this was pure economic loss.

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Three-party agreements

Regarding the second of the categories above, three-party business agreements like those in *Junior Books*, the same applies: there is no duty of care. *Junior Books* itself has never been specifically overruled, but in a series of cases on three-party agreements the courts have declined to follow it, and it is no longer thought to be good law. In *Simaan General Contracting Co.* v. *Pilkington Glass* (1988), Simaan were a company who were constructing a building in Abu Dhabi. The building was to have a glass wall panel, and the claimant's clients had specified that the glass had to be a particular shade of green. Simaan were using another firm to do some of the work (this is called sub-contracting), and that firm ordered the glass from Pilkington. Pilkington supplied the wrong colour, and Simaan's client refused to pay. Usually Simaan could have sued the sub-contractors, but they had gone out of business, so they sued Pilkington in negligence. The Court of Appeal said that Pilkington could not have a duty of care towards Simaan to supply the right kind of glass, because the only loss caused by their failure to do so was economic.

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Damage to property owned by a third party

Finally, there is no duty of care in the third category, of economic loss caused by damage to property belonging to a third party. As we saw, this was the case in *Spartan Steel*, and although it was decided before the temporary expansion of negligence, it still applies. In

Londonwaste v. *AMEC Civil Engineering* (1997), Londonwaste's business was burning rubbish to generate electricity, which they sold to companies that supply electricity to homes and businesses. AMEC's employees negligently severed a cable, which carried electricity from the Londonwaste site and was owned by another company, Eastern Electricity. The power cut caused some damage to Londonwaste's machinery, and also meant that they had to pay to get rid of the rubbish that arrived during the power cut and could not be burnt. They also lost the profit they would have made on the electricity they would have generated if the power had not been cut off. The court allowed them to claim the cost of the damage to their machinery, but not the cost of disposing of the rubbish, nor the loss of profit. These did not result from damage to Londonwaste's property, and were pure economic losses.

Case Summary

You be the judge

Source: Pearson Education Ltd/Shenval/Alamy

Q: Superfun Parks Ltd is the owner of a theme park, which decides to expand. They ask a firm called BigFun Builders to build a new area of the park. As part of this project, BigFun Builders agrees to buy a roller coaster from Rollicking Rollercoasters. There is a contract between Superfun Parks and BigFun Builders, and one between BigFun Builders and Rollicking Rollercoasters. The roller coaster is negligently built, and as a result an hour after the new area of the park is opened there is an accident in which 12 visitors are seriously injured. Superfun Parks is forced to close the park for the rest of the day, and give back every visitor the cost of their ticket. A week later, BigFun Builders goes bust.

Do Rollicking Rollercoasters owe a duty of care to Superfun Parks? Do they owe a duty of care to the visitors who are injured?

A: Rollicking Rollercoasters do not owe a duty of care to Superfun Parks, because the loss they caused to the park company results from a defect in a product and so is considered pure economic loss. They do owe a duty to the people on the ride because their loss is personal injury.

Loss caused by negligent statements (negligent misstatement)

When it comes to economic loss caused by statements, the situation is different. In the case of *Hedley Byrne* v. *Heller* (1963), the House of Lords decided that it should be possible to claim for economic loss caused by statements, providing certain requirements are met. This came to be known as a claim for negligent misstatement.

The *Hedley Byrne* principles

The claimants in ***Hedley Byrne* v. *Heller*** (1963) were an advertising agency, who had been asked by a firm called Easipower to buy substantial amounts of advertising space on their behalf. Hedley Byrne wanted to make sure Easipower would be able to pay, so

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Case Navigator

they asked their own bank, National Provincial, to check on them. National Provincial contacted Heller, who were Easipower's bank, and Heller confirmed in a letter that Easipower were creditworthy. The letter contained a disclaimer, which said the information was provided 'without responsibility on the part of this bank or its officials'. Relying on that information, Hedley Byrne went ahead with the arrangement with Easipower and bought £17,000 worth of advertising space for them. Easipower later went bust, leaving Hedley Byrne to pay the bill for the space. They then sought to claim this amount from Heller, on the grounds that the advice had been provided negligently.

The House of Lords held that the fact that Heller had issued the information with a disclaimer meant there could be no duty of care, and so the claim failed (as we will see later in the chapter, the effect of the disclaimer might be different if the case was decided today). However, their Lordships decided to consider what the position would have been if there had been no disclaimer, and this is where the importance of the case lies. They stated that, in appropriate circumstances, there could be a duty to be careful when giving advice or information, and that breach of that duty could give rise to liability for negligence, even though the only loss was economic.

However, the decision does not establish that there will always be a duty of care for loss caused by negligent advice or statements. In order to establish a duty of care under *Hedley Byrne*, their Lordships said, four requirements must be met:

- there must be a 'special relationship' between the parties;
- there must be a voluntary assumption of responsibility by the party giving the advice;
- the party receiving the advice must rely on it; and
- it must be reasonable for that party to have relied on that advice.

The requirements are to some extent interlinked, but some specific principles can be drawn out from cases in which *Hedley Byrne* has been applied. Since the 1990s, there has been a tendency to apply the *Hedley Byrne* principles in combination with the three-part ***Caparo* test** of foreseeability, proximity, and justice, fairness and reasonableness.

Negligent misstatement: the 'special relationship'

In *Hedley Byrne*, Lord Reid said a special relationship would arise where 'it is plain that the party seeking advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for [the party seeking advice] to do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him'. In other words, there will be a 'special relationship' if the person asking advice was putting their trust in the person they asked, it was reasonable for them to do that, and the person giving the advice realised that or should have realised that the other person would trust their advice.

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An example of this kind of special relationship can be seen in *Esso Petroleum Co. Ltd* v. *Mardon* (1976). The claimant had leased a petrol station after Esso advised him that he could expect to sell at least 200,000 gallons of petrol a year. In fact he managed to sell only 78,000 gallons in 15 months, and so made much less money than he had expected. The Court of Appeal held that Esso had special knowledge of the petrol market, which the claimant did not have, and as a result they knew that he was relying on their advice; in fact they intended him to rely on it in order to convince him to take on the petrol station.

The party giving advice need not be a specialist in the relevant area, nor someone whose job or business is giving advice, as long as it is reasonable for the claimant to have trusted their advice, and they knew or should have known that. In *Lennon* v. *Commissioner of Police of the Metropolis* (2004), Mr Lennon was an officer in the Metropolitan Police, who was changing jobs to go to work in the police force in Northern Ireland. He had been entitled to a housing allowance, and wanted to make sure this would continue, so he asked a personnel officer at the Metropolitan Police whether taking time off between finishing his old job and starting his new one would affect his entitlement to the allowance. She advised him that it would not be a problem. In fact, under the rules about the allowance, taking time off between the two jobs was counted as a break in employment, and by taking this break he lost the allowance for ever. He sued the Metropolitan Police, and the Court of Appeal upheld his claim. They said that even though the personnel officer was not a professional adviser, she had a managerial job in the police service and had, or had access to, special knowledge about the effect of job changes on the type of allowances Mr Lennon had asked about. In addition, she had allowed the claimant to believe that he could rely on her advice, when she could have simply told him that the question was outside her area of expertise and suggested he took advice from elsewhere.

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Advice given outside business settings

In *Hedley Byrne*, Lord Reid made it plain that the special relationship will only arise when advice is given within a business context. He said:

> Quite careful people often express their opinions on social or informal occasions, even when they see that others are likely to be influenced by them; and they often do that without taking the care which they would take if asked for their opinion professionally, or in a business connection . . . there can be no duty of care on such occasions.

This means that where someone gives advice in a purely social setting, no duty of care will arise, even if they have expertise in the area which the advice covers. For example, both doctors and lawyers frequently complain that as soon as they disclose their profession at parties, there will always be a fellow guest who wants free advice on their back problem or their dispute with their neighbour. Lord Reid's words make it clear that, even if they cannot escape those boring conversations, they can at least be sure that they cannot be sued for negligence if the advice they give is wrong.

Curiously, there is one case in which a claimant successfully sued under the *Hedley Byrne* principles, even though the advice was given in a purely friendly setting. In *Chaudry* v. *Prabhakar* (1988), the defendant and the claimant were friends. The claimant was planning to buy a used car and the defendant, who claimed to know about cars, advised on the choice. However, he failed to notice that the car he recommended had been in an accident and was in fact unfit to be driven. The claimant sued him and succeeded, despite Lord Reid's words in *Hedley Byrne*. However, it appears this may have been because, for some reason, the defendant's lawyer did not attempt to deny that there was a duty of care and so the judges were not required to decide this point. One of them said that if they had been asked to decide this point, no duty of care would have been found. *Chaudry* does not, therefore, change the basic rule that only advice given in a business setting will lead to liability for economic loss.

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