

# THE ABSENCE OF NEGLIGENCE IN *HEDLEY BYRNE v HELLER*

DAVID CAMPBELL\*

## INTRODUCTION

In the course of recently writing a chapter of a collection of reflections on *Hedley Byrne and Co. Ltd. v Heller and Partners Ltd.*<sup>1</sup> published some fifty years after the case was decided,<sup>2</sup> I was led to a document which I think will be of great interest to those who study that case. In his own earlier legal history of *Hedley Byrne*, Professor Paul Mitchell had discussed the facts with direct reference to the first instance judgment which, unlike the appeals, was not publicly available.<sup>3</sup> Further aided by Professor Mitchell, I was able to locate a transcript of this judgment in the *Hedley Byrne* case papers held in the House of Lords Library, and by the efforts of Ms. Jennie Lynch of the Parliamentary Archives these papers have now been formally opened for consultation.<sup>4</sup> Ms. Lynch supplied me with a copy of the transcript and it has been published as an appendix to the collection in which my own chapter has appeared.

This first instance decision is a judgment of McNair J. handed down in the Commercial Court<sup>5</sup> on 20 December 1960. The importance of *Hedley Byrne* was, of course, that in it the House of Lords extended liability for negligence in making a statement beyond the bounds

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\* Lancaster University Law School. I am grateful to Allan Beever, David Milman, Paul Mitchell and Warren Swain for their comments.

<sup>1</sup> [1962] 1 Q.B. 396, [1961] 3 W.L.R. 1225 (C.A.); [1964] A.C. 465, [1963] 3 W.L.R. 101 (H.L.).

<sup>2</sup> D. Campbell, "The Dog that Did Bark in the Night-time: What Mischief Does *Hedley Byrne and Co. Ltd. v Heller and Partners* Correct?" in K. Barker et al., eds, *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford: Hart, 2015).

<sup>3</sup> P. Mitchell, "*Hedley Byrne and Co. Ltd. v Heller and Partners Ltd.* (1963)" in C. Mitchell and P. Mitchell, eds., *Landmark Cases in the Law of Tort* (Oxford: Hart, 2010) at pp.174-75. In his important article published nine months after the Lords' judgment was handed down, Professor Stevens had made use of this transcript: R. Stevens, "*Hedley Byrne v Heller: Judicial Creativity and Doctrinal Possibility*" (1964) 27 M.L.R. 121 at n.5. Stevens, indeed, seems to have possessed some knowledge of the trial which cannot be obtained from the transcript.

<sup>4</sup> The reference by which these papers may now be most conveniently found when searching the Parliamentary Archives database (Portcullis) is HL/PO/JUU/4/3/1107. Other papers are held in HL/PO/JO/10/11/810/358, but these are purely procedural.

<sup>5</sup> Stevens, "*Hedley Byrne v Heller*" (1964) 27 M.L.R. 121 at 124.

identified with *Derry v Peek*<sup>6</sup> so as to create, let us allow for the purposes of argument, despite a leading authority having said outright that the name of the tort is essentially misleading,<sup>7</sup> a tort of negligent misstatement. I do not want to go in any detail into the difficulties of the law of negligent misstatement. I want, with reference to the now readily available transcript,<sup>8</sup> to show that the defendant, Heller and Partners Ltd., was not even negligent. I long ago provisionally formed this opinion after study of the statements of the facts and the quotations of the first instance judgment in the reports of the appellate judgments.<sup>9</sup> But it will be argued that the full transcript of the first instance judgment, which, for reasons which will emerge,<sup>10</sup> even more than one usually expects discussed the facts in greater detail than they were discussed on appeal, confirms that the defendant was not negligent. I will briefly conclude by reflecting on the pernicious effects of the absence of negligence in *Hedley Byrne* itself on the law of negligent misstatement as it has since been developed.

#### WHY WERE *HELLER AND PARTNERS* NOT LIABLE?

I will be extremely brief about the basic facts of *Hedley Byrne*, which will be thoroughly well known to any reader of this paper. When considering whether to undertake a commission for a manufacturer, Easipower Ltd, which, because the commission had to be carried out effectively on a *del credere* basis, the claimant advertising agency feared would put it at a particular financial risk of between £8,000 to £9,000 (now *circa* £175,000), the claimant requested its bank, National Provincial Ltd., to obtain a credit reference for Easipower. The

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<sup>6</sup> (1889) 14 App. Cas. 337 (H.L.).

<sup>7</sup> A. Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007) at pp.282, 283.

<sup>8</sup> Unattributed page references in parentheses are to the now published transcript.

<sup>9</sup> *Hedley Byrne* [1962] 1 Q.B. 396 (C.A.) at 397-99, 402-403; [1964] A.C. 465 (H.L.) at 466-69, 480-81. An important discussion of the shortcomings of *Hedley Byrne* drawing on the trial judgment as it may be known from this material was put forward in R. Buxton, "How the Common Law Gets Made: *Hedley Byrne* and Other Cautionary Tales" (2009) 125 L.Q.R. 60 at 61-68.

<sup>10</sup> See text accompanying nn.19-20 below

National Provincial made telephone inquiry of the defendant, Easipower's bank, and was later that day given by telephone what it understood to be a satisfactory reference, the substance of which it almost immediately communicated to the claimant. When Easipower shortly thereafter went into liquidation, leaving the claimant with a loss even greater than it feared (356), the claimant brought an action in what was to become negligent misstatement against the defendant.

I, like I am sure many others, can testify to the difficulty of explaining to students the actual finding in *Hedley Byrne*, which was that the defendant was not liable. If we put aside the specific remoteness argument raised by the defendant,<sup>11</sup> for the poor students now are told that their painfully acquired learning of proximity is even more of a snare when it comes to understanding negligent misstatement than it is when it comes to understanding everything else about negligence, the first thing that must be explained is the existence of a disclaimer. The claimant's bank did not require or pay for the defendant to undertake a specific inquiry into Easipower's creditworthiness, and the reference was given "without making any charge for it and in the usual way"<sup>12</sup> as an instance of common<sup>13</sup> commercial courtesy.<sup>14</sup> I shall return to this but for the moment wish to note only that the reference, as with references of this kind, had been sought on the basis that it would be given "without responsibility on [the defendant's] part", and it was given with an explicit disclaimer to this effect.<sup>15</sup> As it then respected the parties' voluntary establishment of the bounds to their liabilities in a way which the law of negligence in general and the law of negligent misstatement in particular has since

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<sup>11</sup> i.e. remoteness on the facts, not in terms of the general issue of pure economic loss. This argument failed before those who considered it in the House of Lords: *Hedley Byrne* [1964] A.C. 465 (H.L.) at 482 (Lord Reid), 493-94, 503 (Lord Morris). Other discussions of "proximity" in all the judgments were discussions of proximity in the sense of whether a duty of care existed. Other separate points raised by the defence were, in fact, of considerable interest but are incidental to the argument here.

<sup>12</sup> *Hedley Byrne* [1964] A.C. 465 (H.L.) at 514.

<sup>13</sup> *Hedley Byrne* [1964] A.C. 465 (H.L.) at 489

<sup>14</sup> *Hedley Byrne* [1964] A.C. 465 (H.L.) at 503.

<sup>15</sup> *Hedley Byrne* [1964] A.C. 465 (H.L.) at 492.

worked against, the House of Lords was not going to find liability in *Hedley Byrne* itself. Even Lord Devlin, whose speech most closely prefigured what was to become the law of negligent misstatement,<sup>16</sup> accepted that “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”.<sup>17</sup> This adds to the puzzlement of *Hedley Byrne* when viewed, as it almost never is, as private litigation, for one cannot but wonder how satisfactory the claimant found its use of the civil courts when it became clear to it that law reform had been funded by its taking an action it could have had little hope of winning so far as the Lords.<sup>18</sup>

Confusion is by no means lessened when the possible liability of the defendant absent the disclaimer is considered. The often difficult distinction between whether a duty of care is owed and whether, if owed, it has been breached must be drawn at this point. In *Hedley Byrne* the House of Lords created tort liability for negligent misstatement as an, as it were, abstract or general point of law. But, as I shall argue, neither Pearson L.J., speaking for the entire Court of Appeal, nor four of their Lordships regarded Heller and Partners Ltd. as having breached the new duty. Given the disclaimer, the House of Lords believed itself to be relieved of the necessity of deciding or even hearing argument whether the defendant had actually been negligent in the sense of giving the reference carelessly, which the defendant denied at all hearings of the case.<sup>19</sup> As the Court of Appeal had taken the same line,<sup>20</sup> this left

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<sup>16</sup> See n.46 below.

<sup>17</sup> *Hedley Byrne* [1964] A.C. 465 (H.L.) at 533. See also 492 (Lord Reid), 504 (Lord Morris), 511 (Lord Hodson), 539-40 (Lord Pearce).

<sup>18</sup> The disclaimer does not feature in McNair J.’s judgment, and his finding of negligence surely is called into question by this. In the Court of Appeal the claimant in effect drew on the law of contract to argue that, narrowly interpreted as exemptions from negligence should be, the disclaimer did not cover the defendant’s conduct: *Hedley Byrne* [1962] 1 Q.B. 396 (C.A.) at 414. As it did not find that there was a duty of care, the Court of Appeal did not feel obliged to comment on this argument. That such a challenge to the disclaimer was essential to the claimant’s prospects of success was recognised in the House of Lords, but the realistic possibility of such a challenge was quickly dismissed: *Hedley Byrne* [1964] A.C. 465 (H.L.) at 492-93 (Lord Reid), 504 (Lord Morris), 511 (Lord Hodson), 540 (Lord Pearce). Lord Devlin did not consider the argument, but the *dicta* just quoted in the main text surely shows that he did not think it even merited specific refutation.

<sup>19</sup> *Hedley Byrne* [1964] A.C. 465 (H.L.) at 481, 493, 505.

<sup>20</sup> *Hedley Byrne* [1962] 1 Q.B. 396 (C.A.) at 402, 403.

the finding of McNair J. that the defendant had been negligent in this sense intact though unconfirmed on appeal, but nevertheless this finding is, I believe, the point on which the case has all but universally been thought to hang.

The overwhelmingly dominant interpretation of *Hedley Byrne* is that: (1) the defendant gave the reference negligently; and (2) this would have amounted to a breach of the duty of care which was, as a general and abstract matter, found to exist by the House of Lords; except that (3) even if such a duty had been in force, it was successfully disclaimed. It is, in truth, impossible to construct a *ratio* to this effect from the five speeches handed down by their Lordships, and so, as Professor Stevens quickly pointed out, *Hedley Byrne* is worthless as precedent, which has had the effect that, even if one swallows the principle of judicial legislation, this act of judicial legislation was marred from the outset because it was wholly unclear what had been legislated.<sup>21</sup> To this day it remains, of course, highly controversial what the basis and scope of liability in tort for negligent misstatement are.

I nevertheless submit that *some* idea of the defendant's negligent blameworthiness, though I would be the last to say it can coherently be defined, is essential to *Hedley Byrne* and to the tort of negligent misstatement, in the sense that we would not think of finding the defendant liable if it were not in some way negligently blameworthy. Surely the new tort, the absence of which Denning L.J. had in *Candler v Crane, Christmas and Co.* taken to be evidence that England and Wales were not "in a state of civilisation",<sup>22</sup> must be directed at

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<sup>21</sup> Stevens, "*Hedley Byrne v Heller*" (1964) 27 M.L.R. 121 at 125 even goes so far as to say that *Hedley Byrne* theoretically need not have been followed and at n.14 quotes from the fascinating speech to the 1963 Bar Council A.G.M. of the Council's outgoing Chairman, the extremely distinguished Chancery counsel Sir (Edward) Milner Holland, in which Sir Milner placed great emphasis on the fact that the new law created by the House of Lords less than two months earlier rested on *dicta* entirely *obiter*. Of course, Stevens was fully aware of the, as it were, *realpolitik* of the judicial legislation, and it is to this that his paper is addressed, his more sophisticated point being the one I have sought to state in the main text.

<sup>22</sup> [1951] 2 K.B. 164 at 176, [1951] 1 All E.R. 426 (C.A.) at 431C, quoting *Slim v Croucher* (1860) 1 De G.F. & J. 518 at 527, 45 E.R. 462 at 466 (Ch.) (Knight Bruce L.J.).

some fault? Pearson L.J. for the Court of Appeal<sup>23</sup> and Lord Reid in the first speech in the Lords both set the scene, as it were, by referring to McNair J.'s conclusion that the defendant had been negligent, therefore setting up the existing law's inability to possibly ground liability for that negligence as a problem the appeal courts should address. As Lord Reid put it at the beginning of his speech:

“The appellants now seek to recover [their] loss from the respondents as damages on the ground that these replies were given negligently and in breach of the respondent's duty to exercise care in giving them. In his judgment McNair J. said ... ‘I have no hesitation in holding (1) that Mr. Heller was guilty of negligence in giving such a reference without making plain – as he did not – that it was intended to be a very guarded reference, and (2) that properly understood according to its ordinary and natural meaning the reference was not justified by facts known to Mr. Heller’”.<sup>24</sup>

But, as I shall now show, the detailed examination of McNair's judgment that is now possible shows that this conclusion was quite wrong.

#### THE TRIAL COURT'S FINDINGS OF FACT

The better student who actually reads the reports of the appellate judgments is also puzzled to find that the case was not even originally framed in terms of negligence but in terms of fraud.<sup>25</sup> The obvious advantage of this was that a finding of fraud would bring the claim under *Derry v Peek*, but the allegation of fraud was abandoned at trial (345), apparently on the first morning of the six day hearing,<sup>26</sup> and McNair J. accepted the defendant's honesty “without reservation” (350, 354). Some discussion of this allegation is, however, of interest as it bears on the question of the defendant's negligence.

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<sup>23</sup> *Hedley Byrne* [1962] 1 Q.B. 396 (C.A.) at 403.

<sup>24</sup> *Hedley Byrne* [1964] A.C. 465 (H.L.) at 481, quoting (350). Perhaps as a practical matter even more influentially, the headnote of the report of the House of Lords judgment says that McNair J. had “held that the action failed on a point of law, but that otherwise [substantial] damages [would have been] recoverable”: *Hedley Byrne* [1964] A.C. 465 (H.L.) at 466.

<sup>25</sup> *Hedley Byrne* [1962] 1 Q.B. 396 (C.A.) at 399; [1964] A.C. 465 (H.L.) at 481, 493.

<sup>26</sup> Stevens, “*Hedley Byrne v Heller*” (1964) 27 M.L.R. 121 at 124.

In its capacity as Easipower's bank, the defendant had extended various forms of finance to, and was itself a very substantial creditor of, Easipower (348-51). The facts, of course, arose only because Easipower and Pena Industries Ltd., the company of which Easipower was a subsidiary, were in serious financial difficulty, and whilst Easipower had definite prospects,<sup>27</sup> it was at the time the reference was given wholly dependent on financing from the defendant for its survival.<sup>28</sup> It was indeed the defendant, when it no longer wished to continue with this arrangement, that put Easipower into liquidation (351). As a secured bank creditor, the defendant recovered 100% of its debt plus interest, doing much better out of the insolvency than the claimant, an unsecured trade creditor which recovered at most 25% of what it was owed and perhaps much less (351-52, 356).<sup>29</sup> The defendant's possible motivation for intentionally misleading the claimant would have been that it led the claimant to refrain from cancelling orders which would have reduced its exposure to Easipower (345),<sup>30</sup> for this would have further diminished Easipower's prospects, in which, of course, the defendant had an interest. Speculating with the aid of the now available case papers,<sup>31</sup> one could perhaps begin to form an opinion about the wisdom of the law regulating banks' use of insolvency proceedings in general and sympathise with the claimant harbouring resentment against the defendant in this particular case. Indeed, one could go on to sympathise with McNair J.'s own expression of such resentment (353-54). But it must be repeated that the allegation of fraud was abandoned at the start of the trial and I have not been able to find evidence of fraud in any of the now publicly available materials.

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<sup>27</sup> Stevens, "*Hedley Byrne v Heller*" (1964) 27 M.L.R. 121 at n.6 tells us that, after these events, a re-formed Easipower resumed trading as Dreamland Electrical Appliances Ltd., and effectively this company remains in business today as the U.K.'s leading supplier of domestic electrically heated bedding.

<sup>28</sup> *Hedley Byrne* [1962] 1 Q.B. 396 (C.A.) at 398.

<sup>29</sup> Stevens, "*Hedley Byrne v Heller*" (1964) 27 M.L.R. 121 at n.6 provides further information.

<sup>30</sup> This step would have been preceded by the claimant demanding that Easipower pre-pay its accounts, and cancelling after a refusal to do so, a refusal which the evidence seems to show would have been very likely or even inevitable (350).

<sup>31</sup> In further research I shall attempt to explain McNair J.'s reasoning in detail, but this is not necessary for the argument of this paper.

On 18 August 1958, one Mr. Draycott, the claimant's Company Secretary, asked one Mr. Webber, Assistant Manager of the Piccadilly Branch of the National Provincial where the claimant banked, for a reference concerning Easipower's ability to meet a debt of up to £9,000. The terms on which this reference was sought from and was given by the defendant are recorded in a minute of a telephone conversation of the same date between an employee of the City office of the National Provincial and Mr. Lipman Heller, a Director of Heller and Partners Ltd., dictated by Mr. Heller and accepted as accurate before McNair J. It was Mr. Heller who, after consultation with his brother Mr. Isadore Heller, the Chief Administrative Officer of the defendant, gave the telephone reference. His minute read:<sup>32</sup>

"Heller & Partners Limited. Minute of telephone conversation National Provincial Bank Ltd. Call from 15, Bishopsgate, EC2. Date 18.8.58. Person called, L Heller. re Easipower Ltd. They wanted to know in confidence and without responsibility on our part, the respectability and standing of Easipower Limited and whether they would be good for an advertising contract for £8/9,000. I reply, the Company recently opened an account with us, believed to be respectably constituted and considered good for its normal business engagements. The Company is a subsidiary of Pena Industries Ltd. which is in liquidation, but we understand that the Managing Director, Mr Williams, is endeavouring to buy the shares of Easipower Limited from the liquidator. We believe that the Company would not undertake any commitments they are unable to fulfil (346)".<sup>33</sup>

Mr. Webber replied to Mr. Draycott by telephone later that day and three days later sent him the following written confirmation of their conversation:

"Confirmation of our telephoned reply. 21st August, 1958. Confidential. For your private use and without responsibility on the part of this Bank or the Manager. Hedley Byrne & Co Ltd. Dear Sir, In reply to your telephone inquiry of 18th August Bankers say: 'The subject recently opened an account with us. It is a respectably constituted Company and is considered good for business engagements. It is a subsidiary of Pena Industries Limited, which is in liquidation, but we understand that Mr Williams the Managing Director of E Ltd, is endeavouring to buy the shares of E Ltd from the liquidators. We feel the subject Company would not undertake commitments it could not fulfill.' Yours faithfully (346)".

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<sup>32</sup> I have on all occasions transcribed without alteration the evidence as it is to be found in the transcript.

<sup>33</sup> In the Court of Appeal, this minute was quoted in full from the transcript of McNair J.'s judgment, and it was quoted in part in the House of Lords: *Hedley Byrne* [1962] 1 Q.B. 396 (C.A.) at 398; [1964] A.C. 465 (H.L.) at 467.

Acting on this reference, Mr. J.O. Hedley, the Chairman and Managing Director of the claimant, agreed to undertake the commission for Easipower on the usual effectively *del credere* basis and to bear the concomitant risk.

After reviewing the evidence of the financial difficulties of Pena Industries and Easipower (348-49), McNair J. formed the view that, as of 18 August 1958, Easipower, which on that date had an overdraft of £53,865 (now *circa* £1.15 million), was either actually “insolvent” or “showing all the signs of early insolvency” (349). Even when a troubled company’s affairs are not as complicated as those of Pena Industries and Easipower, such things are, of course, matters of judgement about which parties can legitimately differ,<sup>34</sup> and the defendant nevertheless continued to finance the company after 18 August, albeit in a way which made plain its concern, until it refused to honour a cheque for £2,711 in favour of the claimants on 2 December 1958. But as the facts about Easipower’s perilous state were, of course, known to Mr. Heller, McNair J. further formed the view that, in effect, the reference did not sufficiently convey the threat of Easipower’s insolvency. He was in particular critical of what was said in connection with one Mr. F.A. Williams. Mr. Williams founded and successfully developed Easipower prior to its acquisition by Pena Industries (346), after which he continued as Managing Director of Easipower. When Pena Industries got into difficulties, Mr. Williams personally attempted to buy back Easipower (348-49). As the Messrs. Heller had “complete faith” in Mr. Williams’ “capacity and integrity” (348), Mr. Lipman Heller could view this as a very positive possible development, as did McNair J., who found this repurchase to be a ‘vital fact that the survival of Easipower Limited as a trading concern depended upon’ (350). But McNair J. also found that whether Mr. Williams would be successful in his attempt to buy Easipower was an “uncertain contingency” (350).

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<sup>34</sup> This point was mentioned but not developed by Lord Reid: *Hedley Byrne* [1964] A.C. 465 (H.L.) at 489.

It was essentially the failure of the reference to sufficiently convey the possibility of insolvency in the light of these facts known to Mr. Heller that led McNair J. to reach his conclusion that the defendant was negligent which has, as it appears in the speech of Lord Reid, been quoted above, but which, for the sake of convenience, I quote again:

“I have no hesitation in holding (1) that Mr. Heller was guilty of negligence in giving such a reference without making plain – as he did not – that it was intended to be a very guarded reference, and (2) that properly understood according to its ordinary and natural meaning the reference was not justified by facts known to Mr. Heller (350)”.

On 4 November 1958 another reference was sought by National Provincial on behalf of the claimant and given by the defendant (351). This reference does in fact raise some significant additional issues but its essential nature may be regarded as of a piece with the 18 August reference and, for reasons of brevity, I will not discuss this later reference.

In his testimony, Mr. Lipman Heller could not and did not deny that the reference had actually failed sufficiently to convey the threat of insolvency. His defence was more sophisticated. McNair J. gave the following account of it in his judgment:

“Mr Heller ... stated that he regarded the reference ... as a very guarded reference, and stated that it contained three red lights or warnings. First, that the statement that ‘the Company recently opened an account with us’ meant that he could only speak from a short experience of the account; secondly, that the expression ‘good for its normal business engagements’, unqualified by the words ‘including your figures’ indicated that no expression of opinion was made as to its creditworthiness for £8,000 or £9,000. It was conceded that the omission of the word ‘normal’ when the reference was passed on to the Plaintiffs is immaterial. Thirdly, that the statement that ‘the Company is a subsidiary of Pena Industries Limited which is in liquidation’ was a warning to make further inquiries before giving extended credit, because the liquidator could put the Company into liquidation at any moment. Mr Heller agreed that the qualifying phrase introduced by the word ‘but’ was a balancing factor, though he stated that the light was still glowing red. At the conclusion of his evidence, I stated that I would infer that he would give the most favourable reference he could for his clients and that accordingly this was the best reference which he could honestly give on the

information available to him. Mr Heller agreed that this was the correct inference (350)”.<sup>35</sup>

With this interpretation of the reference, McNair J. flatly disagreed:

“In my judgment, whatever may be the meaning which certain expressions in the reference may be understood to have as between bankers — and on this the evidence was not very precise — the reference as a whole and the particular expressions relied upon cannot as a matter of construction reasonably be held to bear the interpretation which Mr Heller seeks to place upon it or them. As a matter of construction, I would regard the reference, as Mr Hedley did, as a favourable reference for £8,000 to £9,000 without any real qualification, and that it meant that Easipower Limited could safely be granted credit for that sum (350)”.

I think that this passage is, with respect, entirely wrong and I will argue this in the next section of this paper. Before doing so, however, a final finding, if this is the right word, of fact by McNair J., which is not even alluded to in the appellate judgments, must be mentioned. We have seen that on 18 August Mr. Webber of the National Provincial communicated the gist of the reference he had been given by Mr. Heller to Mr. Draycott, the claimant’s Company Secretary, by telephone, confirming this in writing three days later. It appears that Mr. Draycott had a written note made of this conversation and of this McNair J said:

“For completeness I should add that there is a contemporary note in the handwriting of Mr Draycott’s secretary which purports to record the summary of a telephone conversation on 18th May as follows: ‘August 18th.’ phoned Bank who gave a fair but guarded report upon future credit angle of new set-up’, but as neither Mr Draycott nor Mr Webber was able to confirm this conversation I make no finding as to its accuracy (347-48)”.

I will return to this note.<sup>36</sup>

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<sup>35</sup> In addition to the general discussion of this passage in the main text, two specific points are taken up in nn.41, 48 below.

<sup>36</sup> See text accompanying n.49 below.

## THE IMPLICATIONS OF THE FINDINGS OF FACT FOR BANKERS GIVING CREDIT REFERENCES

Putting aside the general law of misstatement, Gardiner Q.C. for the claimants was right insistently to argue before the House of Lords that the proper regulation<sup>37</sup> of an important specific commercial practice, that of banker's giving credit references as a matter of commercial courtesy, was at issue in *Hedley Byrne*.<sup>38</sup> McNair J. had put the issue this way:

“Apart from authority there would be much to be said for the view that a person who answers an inquiry as to the credit worthiness of another, knowing that the inquirer will probably act upon the answer, should be held to be under a duty to exercise reasonable care in giving the answer and to be answerable in damages if the answer proves to have been given negligently (352)”.

It is, with respect, submitted that, throughout his judgment, McNair J. fails to give appropriate weight to its being simply normal for a commercial party seeking to obtain the benefit of such a duty (and such a liability) as he describes to do so by contracting for it, i.e. by paying for the advice, although he would, of course, have been perfectly well aware of this in a general sense. I have explored the overall position at length in my chapter on *Hedley Byrne* which I have mentioned. Here I want to briefly argue that, once the importance of payment is appreciated, then it is clear that the defendant in *Hedley Byrne* was not negligent. We have seen that McNair J. was very sceptical of Mr. Lipman Heller's claim to have used expressions in a way which would be perfectly well known to convey caution to bankers (350). I do not wish to engage in a general discussion of the interpretation of the 'implicit dimensions' of parties (near-)contractual relationships.<sup>39</sup> I want to focus on the specific significance of the absence of payment.

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<sup>37</sup> R.H. Coase, "Advertising and Free Speech" (1977) 6 *Journal of Legal Studies* 1 at 5: "Economic regulation is the establishment of the legal framework within which economic activity is carried out. The term 'regulation' ... is often confined to the work of the [executive], but regulation is also the result of legislative and judicial actions, and it seems ill-advised not to take these into consideration".

<sup>38</sup> *Hedley Byrne* [1964] A.C. 465 (H.L.) at 472-73.

<sup>39</sup> D. Campbell and H. Collins, 'Discovering the Implicit Dimensions of Contract' in D. Campbell et al., eds., *The Implicit Dimensions of Contract* (Oxford: Hart, 2003).

If the claimant wanted a detailed investigation made of Easipower's finances on which it could confidently rely to protect it from the risk of assuming the *del credere* obligations it undertook, it would have had to take steps very different from those it did take. It would have had to pay for such an investigation by accountants or other business analysts (perhaps as employees or agents of its bank) who were able to secure access to normally private information about Easipower (and Pena Industries). Such parties will by default be liable in contract, not merely for fraud, but for negligence assessed against the background of the scope and scale of the investigation and the size of the payment for it.<sup>40</sup> This is a very long way from the facts of *Hedley Byrne*. It is not so much that, in fact, the defendant gave the reference almost immediately in a brief, impromptu telephone conversation as that in an important sense informal references of this kind cannot be thought to be able to provide a full assessment of the likelihood of default,<sup>41</sup> and, the crucial point, it cannot reasonably be thought that they even seek to do it; indeed it is ridiculous to think they do.<sup>42</sup>

What can the claimant reasonably be thought to have hoped to obtain from for a reference requested in the way they requested it? Surely it cannot have amounted to much more than a duty to honestly disclose any blatant evidence that Easipower had a bad commercial character. One might speculate about situations in which negligence constituted a breach of this duty, such as a bank confusing the company about which it clearly had been

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<sup>40</sup> At the cost of pointing out the obvious, negligently making a statement would breach the duty to take reasonable care which is of the essence of a contract to provide professional advice and the like now codified under the Supply of Goods and Services Act 1982 s. 13 (c. 29). Exclusion of this liability between commercial parties is now regulated under s. 16 and, behind this, the Unfair Contract Terms Act 1977 (c. 50). It is, of course, possible to contract for strict liability for a statement's being incorrect, but it is extremely difficult to conceive of a party making a statement on this basis.

<sup>41</sup> For reasons of brevity and because I do not seek precisely to describe the actual duties a banker undertakes when giving references of this kind I put to one side the important point, a sort of conflict of interest point, raised by Lord Reid, about how frank one can reasonably expect a bank to be about its customer's position when replying to an inquiry of this sort: *Hedley Byrne* [1964] A.C. 465 (H.L.) at 489. In the passage of his judgment quoted in the text accompanying n.35 above, McNair J. seems to have interpreted this point somewhat to the disadvantage of Mr. Lipman Heller (350).

<sup>42</sup> I would not presume to develop this theme further than it was set out, before the House of Lords judgment had even reached the *Law Reports*, by the late Mr. Weir in the first of those casenotes which established his mastery of the form: J.A. Weir, "Liability for Syntax" [1963] C.L.J. 216.

asked to provide a reference with another similarly named company, but such speculation is far fetched and must raise the concept of “gross negligence” which the law of England and Wales does not use in drawing the line between fraud and negligence.<sup>43</sup> To ground liability, the sort of act or omission which speculation brings to mind must support a finding of fraud, and so a breach of the duty of honesty to which Heller and Partners Ltd. unarguably was subject, but which the claimant accepted it had not breached.

After an extensive review of authority on the nature of bankers’ duties when giving references of this sort, all these points were in effect put forward on the basis of their substance by Pearson L.J.:

“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 anything to the duty of giving an honest answer. It is conceded by Mr. Cooke [for the claimant] 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”.<sup>44</sup>

The Court of Appeal’s position was also taken, though less fully argued, by all their Lordships<sup>45</sup> save Lord Devlin.<sup>46</sup> Were it not for the disclaimer (and some confusion attendant

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<sup>43</sup> *Armitage v Nurse* [1997] Ch. 241, [1997] 3 W.L.R.1046 (C.A.) at 254B-E.

<sup>44</sup> *Hedley Byrne* [1962] 1 Q.B. 396 (C.A.) at 414-15.

<sup>45</sup> *Hedley Byrne* [1964] A.C. 465 (H.L.) at 489 (Lord Reid), 503-504 (Lord Morris), 512-14 (Lord Hodson), 539-40 (Lord Pearce).

<sup>46</sup> The entire point of Lord Devlin’s speech – the core statement of *Hedley Byrne* liability as it has been developed - was to treat an ‘assumption of responsibility’ without ‘consideration’ as ‘equivalent to contract’, i.e., as I have argued in my chapter to which I have referred, to erase the difference between the liability one undertakes under a contract for which one is paid and the liability imposed on one, under the name of an assumption, without payment under *Hedley Byrne*: *Hedley Byrne* [1964] A.C. 465 (H.L.) at 532-33.

on the discussion of the existence of the duty of care), the *ratio* of *Hedley Byrne* would be that the defendant was not liable because it was not negligent.

The position of the National Provincial has been inadequately examined in the enormous case law and academic literature on *Hedley Byrne*. We have seen that Mr. Lipman Heller of the defendant communicated the reference by telephone to the National Provincial and that Mr. Webber of the National Provincial in turn communicated the reference to Mr. Draycott, the claimant's Company Secretary, by telephone followed by written confirmation. Examination of the texts of Mr. Heller's agreed note of what he had said and of Mr. Webber's confirmation, quoted above,<sup>47</sup> shows them to be in almost all material respects identical.<sup>48</sup> If the defendant had concealed undeniable evidence of Easipower's inability to meet its liabilities, this would have been a fraud by the defendant which deceived the National Provincial in a way which left the National Provincial blameless. But this was not at all the issue. The issue was a matter of what the claimant could reasonably infer from the honest reference given. The National Provincial effectively simply transmitted the defendant's reference. Why, if the defendant was negligent, was the National Provincial also not negligent? If anything, the National Provincial might have been expected to add a commentary on what a commercial party might and might not expect to learn from a banker's reference. The National Provincial was at least being paid, albeit not in a specifically itemised manner, for the reference which it conveyed to the claimant.

But this is to speculate beyond the facts of the case, for surely the now available note Mr. Draycott had made of how he understood the reference he had received<sup>49</sup> confirms what one might conclude from reading the appellate judgments in *Hedley Byrne* as an, as it were,

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<sup>47</sup> See text accompanying n.33 above.

<sup>48</sup> One point of divergence, the omission of the word 'normal' in the defendant's reference as it was conveyed to the claimant, which seems to be to the pronounced disadvantage of the National Provincial, was conceded to be 'immaterial': see the quotation from *McNair J.s* judgment in the text accompanying n.35 above.

<sup>49</sup> See text accompanying n.36 above.

*obiter* decision on the facts of the case rather than as judicial legislation. This note shows how the commercial parties involved had actually understood the bankers' expressions which McNair J. puts to one side. The claimant's view of the reference it had received, formed within the framework of what commercial parties could in general expect from a reference of this nature, was that it was guarded but disclosed no blatant evidence of commercial bad character. This being so, it is submitted incontrovertible that the defendant in *Hedley Byrne* was not negligent. This was not, of course, directly relevant to the *obiter* judicial legislation that was carried out. But that the tort of negligent misstatement was founded on a case in which there was no negligence and no misstatement goes some way to explaining the nature of the subsequent career of this tort.

#### CONCLUSION

Why McNair J. dismissed Mr. Draycott's note in the way he did is something about which I am at present unable to hazard any sort of concrete view.<sup>50</sup> It is obvious that some strong belief that Denning L.J. had been entirely right that the law of liability for negligent misstatement as it stood at the time of *Candler v Crane, Christmas and Co.* evidenced a want of civilisation was in the air as *Hedley Byrne* wound its way through the courts in the early 60s.<sup>51</sup> Drawing very heavily on Mitchell's legal history, I have tried to describe this belief in my chapter on *Hedley Byrne* which I have mentioned. In this description the imposing figure of Baron Gardiner features prominently. Gerald Gardiner Q.C. sat on the Committee which in 1962 produced the Report<sup>52</sup> that led to the passage of the Misrepresentation Act 1967,<sup>53</sup> and was Lord Chancellor in the Wilson Governments of 1964-70 when that Act was passed. A

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<sup>50</sup> See n.31 above.

<sup>51</sup> Lord Denning, *The Discipline of Law* (London: Butterworths, 1979) at p.237: 'Fourteen years later my dissent in *Candler v Crane Christmas* was approved by the House of Lords'.

<sup>52</sup> Law Reform Committee, *Tenth Report: Innocent Misrepresentation* (Cmd 1782, 1962).

<sup>53</sup> c. 7.

very active member of the Labour Party and a noted political campaigner on numerous causes particularly related to legal issues, he had in 1963 co-edited a very influential book on law reform which included a demand by Aubrey Diamond, then Reader in Law at the L.S.E., that Lord Denning's dissent in *Candler* should be made the law.<sup>54</sup> For reasons that are unclear but can hardly be traced to a deficiency in the previous advocacy or advocate,<sup>55</sup> in the Lords Gardiner replaced S.B.R. Cooke Q.C., who had argued its case in the Court of Appeal, as leading counsel for the claimant,<sup>56</sup> one of Mr. Gardiner's arguments having been discussed above.<sup>57</sup> Some thread undoubtedly emerges. But even Mitchell's researches leave what went on, as it were, behind the scenes in *Hedley Byrne* known but inadequately and, given the extreme importance of the case, it is to be hoped that someone who, unlike the present author, has the competence to do so, will do further work in Mitchell's vein, which was, of course, the *metier* of the late Professor Brian Simpson.

If my knowledge of the history *Hedley Byrne* leaves me incapable of adequately explaining how what was done in that case was done, I am of the opinion that my knowledge of the subsequent history of the tort of negligent misstatement leaves me perfectly capable of forming a judgement on that tort: it should be abolished. The case for this that I have made in the chapter I have mentioned is that *Hedley Byrne* addresses no actual mischief. I hope here to have additionally shown that *Hedley Byrne* - though it did not do this itself - created the possibility of punishing conduct which is not even negligent, unless negligence is understood as allowing oneself to be the last solvent person in range of scattergun fire. This possibility

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<sup>54</sup> A. Diamond, "The Law of Contract and Tort" in G. Gardiner and A. Martin, eds., *Law Reform NOW* (London: Victor Gollancz, 1963) at pp.74-75

<sup>55</sup> Mitchell, "*Hedley Byrne and Co. Ltd. v Heller and Partners Ltd.* (1963)" in Mitchell and Mitchell, eds., *Landmark Cases in the Law of Tort*, at p. 182.

<sup>56</sup> The process of appointing the panel which eventually handed down the Lords judgment was a convoluted one in particular because Lord Radcliffe had to withdraw from the case in order to serve on the Vassall Tribunal. Professor Swain reports that, when counsel for the claimant, Gardiner "is said to have persuaded the Lord Chancellor, Lord Dilhorne, to include more common law judges on the new panel": W. Swain, "*Hedley Byrne v Heller* in Australia" in Barker et al., eds, *The Law of Misstatements*, at n.15.

<sup>57</sup> See text accompanying n.38 above.

has, I trust it is unarguable, been realised on many subsequent occasions,<sup>58</sup> and these have been so bad as to have been found disquieting even by the standards we perforce have had to adopt when evaluating what passes for the law of negligence after *Donoghue v Stevenson*.<sup>59</sup>

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<sup>58</sup> An example I myself find particularly striking is *Merrett v Babb* [2001] Q.B. 1174, [2001] 3 W.L.R. 1 (C.A.), a deplorable development of the line taken in *Yianni v Edwin Evans and Sons* [1982] Q.B. 483, [1981] 3 W.L.R. 843 (Q.B.D.) and approved in *Smith v Eric S. Bush* [1990] 1 A.C. 831, [1989] 2 W.L.R. 790 (H.L.).

<sup>59</sup> [1932] A.C. 562, 1932 S.C. 31 (H.L.).