NEGLIGENCE AND MISLEADING CONDUCT UNDER S 52 OF THE TRADE PRACTICES ACT 1974

JUSTICE BA BEAUMONT

Federal Court of Australia

> "There must come a time when the genie released by Lord Atkin is put back in the bottle ..."
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> "Whatever was done, Wooloomooloo was not a place for ad hocery. The Council needed rules for its guidance and set out to provide them ..."
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> per Hutley, JA in The Minister v San Sebastian Pty Ltd [1983] 2 NSWLR 268 at 279; 287.

I turn first to the question of negligence at common law in particular negligent misstatements, causing economic loss. Although the title "negligence" is general, I have assumed that the interests of banking lawyers lie in this direction.

It is convenient to commence our discussion with a consideration of the recent decision of the Court of Appeal of the Supreme Court of New South Wales in The Minister v San Sebastian Pty Ltd [1983] 2 NSWLR 268. The case is a current illustration of the problem, largely of judicial policy, of reconciling, on the one hand, the width of the Atkinian aphorism in Donoghue v Stevenson [1932] AC 562 and, on the other, the need to exclude liability in certain categories which unfortunately, seem to be of indeterminate reference (see per Lord Reid in Home Office v Dorset Yacht Co [1970] AC 1004 at 1027). In the field of negligence causing economic loss, the tensions thus generated are such that the courts have been forced to resort to "ad hocery" of the kind criticised, albeit in a different context, by Hutley JA. However attractive this judicial gradualism is in the resolution of the case in hand, the result has been an uncertainty which hopefully will be resolved when the High Court deals with the appeal in San Sebastian.

The facts of the case, as summarised in the headnote, were that in 1968 and 1969 the State Planning Authority of New South Wales, as consultant to the Sydney City Council, prepared (it would seem negligently) a redevelopment planning study for the Wooloomooloo area in the city. The council adopted the plan, which had no other operative or statutory effect, and which contained no statement as to feasibility of implementation either generally or

in respect of a particular matter, placed it on public exhibition, and adhered to it until late 1972 when they abandoned it. Certain developers who had acquired real estate in the area after the publication of the study suffered financial loss as a result of their intentions being aborted. They claimed damages against both the authority and the council alleging negligence in the preparation of the study, in the publication thereof, and in the failure to warn the developers of the possibility of abandonment of the study because of the unfeasibility of its implementation.

It was held that neither the authority nor the council was in the circumstances liable in negligence for the financial loss of the developers; that neither the authority nor the council was liable in negligence for pure economic loss in respect of the mere preparation in a negligent manner of the plan of development and that neither the authority nor the council was liable in negligence for pure economic loss in respect of the publication of the plan of development.

Although the members of the court were unanimous in allowing the appeal by the defendants, their reasoning processes differed in significant respects. Hutley JA was much influenced by the circumstance that the plan did not contain express or tantamount to express statements which gave "information or advice" on a matter of a serious or business nature, under circumstances in which there was an element of trust on the part of the recipient and knowledge of that trust on the part of the maker of the statements. His Honour was of the view that where a responsible municipal authority formulates rules for its own guidance by means of a development plan and publishes it then it is laying down policy for itself and its actions in so doing, if done in good faith, do not give rise to any duty of care upon which an action in negligence can be founded.

On the other hand, Glass JA thought that liability for negligent statements does not arise unless there is proof of a Hedley Byrne special relationship by which, in the circumstances, the responsible municipal authority would owe a duty to the class of developers to whom the development plan was directed and whose co-operation thereon was being sought, to exercise care in relation to what was contained in the development plan taken as a whole and would incur liability for breach of that duty if it contained material which was information or advice for the accuracy of which they accepted responsibility.

Mahoney JA held that liability for negligent statements did not arise unless there was incorporated in such a development plan a careless statement or a statements sufficiently significant to be seen as a reason for recovery.

It was further held by each member of the Court of Appeal that neither the authority nor the council was liable in negligence for pure economic loss in respect of its failure to warn of its adherence to, revision of, decision to review, possible abandonment or abandonment of a plan of development having no operative or statutory effect. Again there were differences in the approach taken by the members of the court. Hutley JA

thought that the power to formulate and publish without immunity should carry with it the power to review without immunity. In the opinion of Glass JA the proximity relationship raises no duty where economic loss is the only consequence to which the plaintiff is exposed by the carelessness of the defendant. Further, assuming a Caltex situation (Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 529), the prima facie duty of care generated by the relationship was negated by policy considerations of the kind coming within Anns case (Anns v Merton London Borough Council [1978] AC 728). At all events, Glass JA held, a responsible municipal authority owes no duty to developers owning or about to own land in a particular area by reason of an overriding social interest that legislative acts of that kind should not be inhibited by any obligation to exercise care for the interests of those who may be adversely affected in a financial sense.

After analysing the Hedley Byrne duty of careful statement and the Caltex duty of careful action and the major contribution to the evolution of negligence doctrine made by the High Court in Shaddock (L Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 150 CLR 225), Glass JA (at 300) attempted the following general formulation:

> "I find in this material a coherent body of doctrine in which the first question to be asked is whether the defendant's carelessness poses a reasonably foreseeable risk ie possibility of injury to the plaintiff's person or property. If so, their relationship is one of proximity and he is prima facie bound by a Donohue duty of care. If a Donohue duty exists, careless representations as well as careless conduct can amount to a breach of duty: Voli v Inglewood Shire Council (1963) 110 CLR 74, at 85, 86; Clayton v Woodman & Son (Builders) Ltd (1962) 2 QB 533; Clay v AJ Crump & Sons Ltd (1964) 1 QB 533. If no relationship of proximity exists, the defendant may nevertheless become subject to a duty to take care in giving information or advice so as to avoid causing economic loss if the special relationship of Hedley Byrne ... is established. If no proximity relationship exists, he may nevertheless become subject to a duty to act carefully to prevent the infliction of economic harm if the special relationship described in Caltex is present.
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> The three generative principles of a duty of care so defined operate in three mutually exclusive areas marked out by the legal concepts of physical damage due to carelessness in statement or action, economic loss due to careless statement and economic loss due to careless conduct. When the nature of the risk presented to the plaintiff by the defendant's carelessness is allotted to the appropriate sphere of human conduct, the situation linking the plaintiff and defendant is to be measured to determine whether the evidence discloses the appropriate relationship (proximate or special) productive of the relevant duty of care. If so, a prima facie duty of care is owed which may for policy reasons be displaced. But policy considerations have no role to play in determining whether the plaintiff and

> defendant are so placed in relation to each other that a prima facie duty of care is owed."

Glass JA explained the jurisprudential basis of the exclusion of liability for reasons of "policy" as follows:

> "When policy considerations are held to oust a duty of care derived from the application of the appropriate test, it is not due to the particular relationship between the parties but because some social interest transcending the circumstance of the litigants so requires. The point is made, I believe, by the following reported illustrations of duties of care being negatived by paramount social concerns. It would be contrary to public policy to subject a barrister to a duty of care when advocating his client's cause, Rondel v Worsley (1969) AC 191, to bind a statutory authority with a duty of care when it is exercising a purely discretionary power, Anns, to require a driver to exercise due care in the interests of his passenger when they are engaged in a joint criminal enterprise, Smith v Jenkins (1970) 119 CLR 397, or to enforce a duty of care against those conducting active military operations against the enemy, Shaw Savill and Albion Co Ltd v The Commonwealth (1940) 66 CLR 344, at 362."

His Honour then dealt with the question in the Caltex and Hedley Byrne contexts:

> "There is no reason to suppose the two stage enquiry described in Anns does not equally apply to a prima facie duty of care to avoid economic harm generated by a Caltex or Hedley Byrne relationship. The contrary view that, where economic loss is concerned, policy considerations can be brought directly to account in deciding whether a defendant should be fixed with a duty of care in light of the particular relationship between him and the plaintiff has been articulated by Lord Denning MR in Spartan & Alloys Ltd Steel v Martin & Co (Contractors) Ltd (1973) QB 27, at 37. He said:
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> 'So much so that I think the time has come to discard those tests of duty and remoteness) which have proved so elusive. It seems to me better to consider the particular relationship in hand, and to see whether or not, as a matter of policy, economic loss shall be recoverable, or not.'
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> The consequence of such an approach would be the production of a wilderness of single ad hoc decisions, each relationship in an infinitely variable series being judged individually for its suitability to be a matrix of duty without reference to any criterion except grounds of policy, the policy itself being wholly undetermined."

The reasoning in San Sebastian and, specifically, the approach adopted by Glass JA was followed by Wootten J in BT Australia Ltd v Raine & Horne Pty Ltd, [1983] 3 NSWLR 221. There, a valuer was held liable, on Hedley Byrne principles, for economic loss suffered by unit holders as passive third parties. The case is

of interest for its rejection of a defence based on a disclaimer clause to which reference will be made later.

Although San Sebastian was only referred to in passing by Deane J in the recent nervous shock case Jaensch v Coffey (1984) 58 ALJR 426 (at 439), his Honour did make some observations which are of present interest:

> "... the essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence. They may apply to preclude altogether the existence of a duty of care in particular circumstances: see, for example, Rondel v Worsley (1969) 1 AC 191; or to limit the content of any duty of care or the class of persons to whom it is owed: see, for example, Hedley Byrne & Co Ltd v Heller and Partners Ltd (1964) AC 465; or the type of injury to which it extends: see, for example, Best v Samuel Fox & Co Ltd (1952) AC 716."

(See also per Gibbs CJ at 428.)

The uncertainties in the policy area under discussion are well illustrated by contrasting the recent decisions in Meates v Attorney-General [1983] NZLR 308 (a decision of New Zealand Court of Appeal) and Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1984] 3 WLR 953, a decision of the House of Lords. In the New Zealand case, the plaintiffs, who were ultimately successful in recovering a verdict against the Crown for negligent misstatement, had incorporated a company and established industries on the West Coast in the expectation of government assistance after discussions with the Prime Minister and other Ministers. It was held that the Government owed the shareholders a duty of care. The defendants' suggestion that the Government's political interests in the region should negate any private cause of action was rejected, Woodhouse P and Ongley J saying (at 335):

> "So the rather artificial point raised is whether the political or the socio-economic interests of the Government in stimulating the Matai venture should be regarded as something which diminished or negated its responsibility to handle with due care its side of the association and in particular the inquiries that were made. There can be only one answer to that proposition. The Government interest in the project was clearly no less powerful, being a political commitment, than the conventional implications of money for business people in a purely commercial setting."

On the other hand, in Peabody, the House of Lords held that a local authority owed no duty to the plaintiffs, the developers of a housing estate, to activate their powers under the Local Government Act 1963 (UK) in respect of a defective drainage system on their site, notwithstanding that the authority might reasonably have foreseen that failure to do so would result in

economic loss to the plaintiffs, because the purpose of avoiding such loss was not one of the purposes for which those powers were vested in the authority: the purpose for which those powers were conferred was the protection of the public health and not to safeguard building developers against economic loss resulting from their failure to comply with approved plans.

In his speech, concurred in by the other members of the House, Lord Keith framed the policy exclusion in the broadest terms (at p 960):

> "... in determining whether or not a duty of care of a particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so."

From this review of the authorities, one can only conclude that as a matter of policy, the courts are reluctant to hold public authorities liable for negligent conduct causing economic loss except in cases of response to a specific request which can reasonably be expected to be relied on, thus requiring some measure of formality, as in Shaddock. On this footing, Meates should be viewed as a case of business dealing rather than governmental function, despite its political context (cf Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520).

A further area of uncertainty is the operation of disclaimers in this area. In Hedley Byrne, of course, the disclaimer was decisive. On the other hand, in BT Wootten J read the disclaimer down so as to hold it inapplicable to the case at hand, saying (at p 236):

> "The disclaimer clause was unilaterally framed and inserted by Raine & Horne, and if it was intended to disclaim responsibility for the consequences of its use for the very purpose for which it was obtained, it was reasonable to expect Raine & Horne to say so in clear words."

Quite apart from techniques of construction to read down disclaimer clauses, it would seem that the courts will reserve to themselves an overriding power to treat such a provision as no more than one of the circumstances of the case and, presumably, if appropriate, to reject it (see Evatt's case (1908) 122 CLR 556 per Barwick CJ at p 571).

I turn now to s 52 of the Trade Practices Act 1974, which occupies a quite disparate area to the law of negligence and is not beset with the same uncertainties, especially so far as concerns "policy" considerations. Although written before the important decision of the High Court in Parkdale Custom-Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191, I can do no better than cite the general description of s 52 given by Fox J in Brown v Jam Factory Pty Ltd (1981) 35 ALR 79 at p 86:

> "Section 52(1) is a comprehensive provision of wide impact, which does not adopt the language of any common law cause of action. It does not purport to create liability at all; rather does it establish a norm of conduct, failure to

observe which has consequences provided for elsewhere in the same statute, or under the general law. The possible width of its operation and the fact that it may overlap other sections in Div 1 of Pt V is recognized by sub-s (2). In my view effect should be given to the ordinary meaning of the words used. They should not be qualified or (if it is possible) expanded, by reference to established common law principles of liability. At the same time, known concepts, such as those concerning the torts of deceit and passing off and the analyses made of them over the years, may prove helpful in deciding a case under s 52(1). It does not matter that a representation constituting "conduct" relates to a future event, or that what is said may not amount to a warranty. The view has not been taken that "conduct" necessarily involves a continuing course of conduct, or of repeated events, or of conduct known to the public or a group of the public (see Annand and Thompson Pty Ltd v Trade Practices Commission (1979) 25 ALR 91). Intention is not a necessary ingredient (Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd 140 CLR 216 at 228). The tort is more objective, but it is not precisely correct to apply the concept of the hypothetical reasonable man. One looks to the audience, or relevant part of it, and, eccentricities and absurdities aside, asks whether the conduct complained of was to them misleading or deceptive; but the question is not simply whether they (or he) were (or was) misled. Whether the conduct was misleading or deceptive is a matter for the court McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd v McDonald's System of Australia Pty Ltd (1980) 33 ALR 394). Doubtless the audience to be considered can be classified as "consumers". Conduct will not mislead or deceive a person having conscious awareness of the true or correct information."

Few areas of uncertainty now remain in the interpretation of s 52, although its operation is necessarily limited by constitutional considerations. The conduct of the defendant must be looked at as a whole (see Puxu at p 199); conduct which merely causes some confusion in the minds of relevant members of the public does not contravene s 52 (see Puxu); it is possible that in some circumstances silence, in the sense of refraining from making comment, may amount to engaging in the conduct contemplated by s 52 (see Bradford House Pty Ltd v Leroy Fashion Group Ltd (1983) ATPR 40-387); in the case of a misrepresentation inducing a contract, relief under s 87 will only be available if materiality of the matter misrepresented is established (see Duralla Pty Ltd v Plant (1984) 54 ALR 28 at p 35).

The mere fact that representations as to future conduct or events did not come to pass does not make them misleading or deceptive, notwithstanding that the applicant has relied on them; although reference may be made to later events, whether statements or representations of this type are misleading or deceptive must be determined at the time they are made (see Bill Acceptance Corporation Ltd v GWA Ltd (1983) 50 ALR 242). Apart from the

award of damages under s 82, the court has some degree of flexibility in the grant of relief under s 87; for instance, it may order the reduction of the purchase price in a contract of sale induced by misleading or deceptive conduct (see Gold Coast Mineral Springs Pty Ltd v Frith (1983) ATPR 40-394). But relief under s 87 is only available if damage has been proved and in the case of a contract for sale, the purchaser can establish damage only by comparing the value, as at the date of entering into the contract, of what he acquired under the contract with the cost payable by him of acquiring such rights (see Wildsmith v Daintford Ltd (1983) ATPR 40-419). Generally speaking, damages under s 82 are compensatory.

In the case of an isolated private transaction, a question can arise as to whether the conduct complained of occurred in trade or commerce so as to attract the operation of s 52 in the first place (see Lubidineuse v Bevanere Pty Ltd (1984) 55 ALR 273; cf James v Australian & New Zealand Banking Group Ltd (1985) ATPR 40-504; Menhaden Pty Ltd v Citibank NA [1984] 1 FCR 542). Another area of controversy is whether s 52 applies for the benefit of "consumers" in the strict sense only or whether it is of general application. The weight of judicial opinion now favours the latter view (see Lubidineuse).

Another area of controversy arose out of attempts to define a boundary between conduct which is misleading or deceptive and material which is defamatory (see Global Sportsman Pty Ltd v Mirror Newspapers Ltd 55 ALR 25; Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd (unreported), Toohey J 21 February 1985). This problem has now been avoided by the insertion of a new s 65A which excludes from the operation of s 52 and subsequent provisions a prescribed publication of matter by a prescribed information provider other than publication or matter in connection with the supply of goods or services in which the provider is interested.

Finally, it may be said that s 52 suffers from a lack of definition by virtue of the generality of its language. However, given the interpretation placed upon it in its relatively short history, few areas of uncertainty remain. The legislative alternative is to adopt the "shopping list" drafting technique employed in, for example, the Contracts Review Act 1980 (NSW), s 9. But there are inherent uncertainties in that form of legislation: it is not at all clear what comparative weight the court should attribute to each of the items specified to be taken into account. In the result, the matter is more or less left at large in the overriding discretion of the judge - yet another form of the "ad hocery" so rightly criticized by Hutley JA.

Summing up, it would seem that the private section of the banking industry is exposed to potential liability both under Hedley Byrne and now under s 52 of the Trade Practices Act 1974. On the other hand, so far as concerns the public aspect of the banking industry, unless the approach in Meates is adopted, it will be difficult to establish liability under the general law. Also, s 52 will only apply if the conduct of the public corporation is engaged in trade or commerce (see also s 2A(2) of the Trade Practices Act).