NEGLIGENCE AND MISLEADING AND DECEPTIVE CONDUCT UNDER SECTION 52

Comment by

DAVID BENNETT QC

Barrister, New South Wales

The state that the law of tort has got itself into over the last twenty or so years, since Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 ("Hedley Byrne") was decided, is certainly very untidy. There are, as has been pointed out, since San Sebastian Pty Ltd v The Minister administering the Environmental Planning and Assessment Act [1983] 2 NSWLR 268 ("San Sebastian"), and until someone tidies it up, at least three separate streams, and one general area of exclusion, which one has to bear in mind in considering this type of liability for negligence.

The first stream is Donohue v Stevenson [1932] AC 562 which lays down a general principle under which one is responsible for anything foreseeable, as long as what is foreseeable is injury to person or property.

Secondly, one has conduct causing economic loss. Here one applies the principle of Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 529 ("Caltex") and asks whether there was foreseeability, not of damage to the class of person who might be involved, but to the specific person. That seems to me to create all sorts of peculiar distinctions. For example, in Caltex, Caltex succeeded where there was a pipeline which transported its oil under Botany Bay and that pipeline was injured, although it did not itself own the pipeline. It was unable to get its oil through and suffered economic loss.

On the exposition of that case which appears in San Sebastian, and which seems to me to be right, it would not have succeeded if there had been six oil companies all pumping their oil through a public pipeline under the Bay. It seems to me that these distinctions become rather subtle and in many cases rather difficult to justify.

The third stream is the Hedley Byrne stream, where one has liability for economic loss caused by negligent misrepresentations. Here one has to talk about the extent to which there was a likelihood of reliance, and the extent to which the relationship can be described in such useful and precise words as "special" or "proximate". Whenever I see the

word "special" I always think of a bus that does not stop although I am told it does have some meaning to those who understand this arcane area of the law.

Superimposed on all those three principles, one then has this new type of exception - the San Sebastian "rule" - which excludes liability on innominate policy grounds.

The problem which one faces in this area is how one attacks it. Does one say, as is done in the Contracts Review Act, here is a judicial shopping list, the judge must take into account the following ten factors, and if, assessing those as best he can, he comes to a conclusion, that is the answer. Does one say, on the other hand, that no one really knows what the detailed exclusions are until the High Court has spoken. Does one say that precise tests should be defined which will end up producing exactly the same problems. All I want to suggest to you is that none of those solutions is ideal and that there is no easy answer to the question.

May I, to illustrate this, identify three criteria which have been referred to in some of the cases. These are, upon analysis, quite unsatisfactory.

The first is the criterion which is so beloved of the American writers and of those who would extend the law of torts - the insurance principle. One asks which party is more likely to be able to cover this sort of loss by insurance, and then provides that that party should be liable. The problem with this test is that it is circular. The process has five steps. First, people conduct themselves in a manner which may cause loss. Secondly, someone says to them, "you may be liable in this situation". Thirdly, there is a demand for insurance. Fourthly, they get insurance. Finally a judge says "this is a situation where people insure so I will find liability". Then presumably, we move on to the next area. That, it seems to me, cannot be accepted as a proper test. Indeed, the reductio ad absurdam of this test occurs when one gets these no fault schemes, which one has in New Zealand in relation to personal injuries and with which we are always being threatened with by law reformers in Australia. Fortunately, at least in New South Wales, the threat is a long way off. That is of course the ultimate application of the insurance principle equal compensation regardless of fault or of the individual suffering concerned.

A second type of criterion that has been identified, particularly in cases like The Mutual Life & Citizens Assurance Co Ltd v Evatt (1970) 122 CLR 628, whether the defendant is in the business of giving the type of advice in question. That criterion is now generally discredited, so one does not look too closely at the general activities of the defendant.

The third type of criterion that has been identified is what one might call the entrepreneurial risk criterion. If I read an afternoon newspaper and see that a tipster tells me that a horse is likely to win a race, that advice is negligent, and I rely on it and suffer loss when I place a bet on the horse, no-one would think for a moment that I have any cause of action. One reason

which is suggested is that, in the activity in which I was engaged, the taking of the advice inherently involved a risk which I ought not to be able to pass on. When one takes the next example, it may be a little harder. If I ring my futures broker and ask whether gold likely to rise or fall and whether I should buy or sell, we can still say that I should not be able to pass on that risk in an inherently risky entrepreneurial situation.

Then one comes to the third example. The little old lady goes to her stockbroker and says, can you recommend a blue chip? The stockbroker says: "there is this wonderful oil company which is drilling happily in the West, it is the best blue chip stock I can imagine". There we are much happier in saying that the entrepreneurial risk argument does not prevent liability being imposed.

It seems to me that the sort of distinctions that we are going to have to draw, if we introduce that as a factor, is such that it is not really viable.

What this last group of cases illustrates is that, in many of these situations, the common law solves the problem in a completely different way. It solves it not by talking of duty of care, but by talking of standard of care. It may be, and on one view of it this is the correct analysis, that the reason why I cannot sue the tipster is, not that he does not owe me a duty of care, but that I am never successfully going to prove a breach of it. The same might apply in relation to the stockbroker who was asked whether gold is going to go up or down. The advice he is giving is so inherently variable, and so inherently uncertain, that it is very hard for it to be negligent. However, I confidently await the first case in Australia where someone does sue a newspaper which negligently prints a horse's previous record, and someone relies upon it and loses money.

Turning to the second part of the paper, I disagree with Mr Justice Beaumont's modesty in expressing the view that section 52 has now been fully dealt with by the Federal Court so that no problems remain. I would have thought that the ingenuity of the profession is such that small justice is done to it by the suggestion that we will not think up any more problems under section 52.

Section 52 has proved to some extent a panacea for the problems to which I have been referring. Liability under it is in almost all respects, other than that it must be in trade and commerce, wider than liability under these convoluted areas of tort law with which we have been dealing. Of course everyone, when suing in the Federal Court under section 52, still add lots of counts under Hedley Byrne, under Donoghue v Stevenson, under Caltex and under various heads of tort liability taken from the precedent books. This really does not matter very much because what happens in every one of those cases is that the barristers and the judges simply look at section 52, and there is no need to consider the more difficult tort questions. Those questions are therefore left aside. I await the day when members of the Bar drawing statements of claim will have the courage of their

convictions and be able to leave out the tort counts altogether. They have not yet got to that stage but no doubt they will soon.

Section 52 serves lots of other useful purposes. Mr Justice Beaumont mentioned the Gold Coast cases. What he did not mention was the very important use of those cases to dispose of monopolistic practises in the legal profession. You will all doubtless be aware that in Queensland, unlike other Australian states, interstate barristers cannot obtain admission to practice. The problem was that Sydney and Melbourne purchasers had bought units in the Gold Coast from Queensland developers, the bottom fell out of the market, and they wanted to get out of their contracts. If they treated them as ordinary conveyancing cases, they would have to sue in Queensland, and their own lawyers would not be able to appear. Fortunately the legal profession was well able to deal with that problem. We discovered that by using section 52, one could bring the proceedings in the Federal Court, and import to Queensland, without any possibility of objection, one's Sydney and Melbourne barristers. That desirable consequence is a useful example of what can be achieved by legislation in this area.

It is important to note, when one sues under section 52, that the measure of damages is basically the same as in tort. It is the tort measure, not the contract measure. If you promise me that, if I go into a deal which will cost me $1,000, I will make $10,000, and there is a breach of warranty, my damage is the $10,000 I would have made. But if you negligently represent something so I go into the deal, or fraudulently represent it, or represent it in a misleading and deceptive manner under section 52, my damages are the $1,000 I have paid out, not the $10,000 I would have made were it true. That is something one has to bear in mind in cases where there is a contractual element under section 52.

It is also worth bearing in mind that, because section 52 is wider than tort in all areas except the requirement that the representation be made in trade and commerce, the law we have referred to in the beginning is really irrelevant except in cases involving governments, and in the fairly small areas left to private personal initiative, where one can make negligent misstatements other than in trade and commerce. Those situations fortunately are few.

There are very few Hedley Byrne cases brought today, in state jurisdictions. It is a defence one sometimes sees where one is desperate to generate a cross action to a liquidated claim. But genuine Hedley Byrne actions are rare, and the real effect of section 52 is to solve the problem of the increasing complexity in this area of the law.