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SHADDOCK v PARRAMATTA CITY COUNCIL ;

A POSSIBLE KEY TO THE PROBLEMS OF NEGLIGENT MIS-STATEMENT IN NEW ZEALAND ?

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I) Introduction

Tort Law has always been considered the branch of the law most ready to respond to the needs of society generally. [1] A growth area in this field has been that of liability for negligent mis-statement causing economic loss.

Unfortunately, this growing area of the law has hit a "road block." In their determination of who owes a duty of care for statements given, the Privy Council in Mutual Life & Citizens Assurance Co. Ltd v Evatt [2] have limited possible liability to a point that many commentators consider unreasonable. The decision has certainly narrowed the scope of liability envisaged by their Lordships in Hedley Byrne & Co Ltd v Heller & Partners Ltd. [3]

Not only has it obstructed this area of the law, but it has also caused a measure of confusion in its application.

It is the aim of this legal writing to examine the development of this area of Tort, to look at the application of the 'MLC test' in New Zealand Courts, and then to determine whether, in the light of the recent Australian decision in Shaddock v Parramatta City Council [4], it is possible to predict the future approach of the New Zealand Courts on this issue.

II) The Development of the Doctrine of Negligent Mis-statement

One of the primary problems to be dealt with by the Courts is the question of who owes a duty to take care when making statements.

Early formulations on the principle were enunciated by Lord Denning as a dissenting judge in the English Court of Appeal decision of Candler v Crane, Christmas & Co [5]. In that case Lord Denning was of the opinion that a duty of care could arise if a sufficiently "proximate" relationship existed. [6]

The learned judge felt that accountants, surveyors, valuers and analysts whose profession or occupation involved making reports and surveys upon which other people rely come under a duty of care to those people to whom they or their employers show the report (provided the relationship was sufficiently proximate).

The idea that a duty of care arose in cases of negligent mis-statement did not gain House of Lords approval for another thirteen years. It came forth in 1964, in case of Hedley Byrne v Heller.[7] Their Lordships in that case, were of the opinion that a duty of care could arise in cases of negligent mis-statement. However, as Lord Ried, stated, because the effect of words may be unlimited in time and distance, and as liability could tend to arise more often in the case of words, strong reasons exist for the law treating negligent words differently from negligent acts.[8]

The House of Lords all agreed that what was important in establishing a duty of care was the existence of a "special relationship", which would create a duty of care, irrespective of contractual or fiduciary obligations.[9] The court did not however, attempt to list all the situations in which this duty of care would arise, but it is possible to determine several broad requirements that allow you to determine whether or not such a relationship exists. Lord Morris gives a good account of these requirements at Page 502.

> "... it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise, the fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgement or his skill or upon his ability to make careful

> enquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

It is then possible to draw three basic requirements for the existence of a duty of care. Firstly there must be some assumption of responsibility. This is usually assumed when the speaker chooses to give advice or information, but this assumption may be negated if the speaker expressly disclaims such responsiblity. [10] Secondly, the reliance on the advice or information must be reasonable. In this context advice tendered during social, or informal intercourse will not usually attract a relationship of care. [11] Lastly, the informant must reasonably foresee some reliance on the information or advice. [12]

The approach in Hedley-Byrne means that the existence of a duty of care remains subject to the facts of the case. It is flexible enough to encompass a variety of possible situations but retains enough certainty to allow an amount of prediction as to the result of a clients case. It is interesting to note that the judges in Hedley Byrne i) did not limit a duty to professional or especially skilled people, ii) reserved a possible right of disclaimer for the adviser.

The common law, however has an innate hostility towards doctrines that are "flexible". Certainty is the catch cry of the judiciary, and accordingly it was not long before a judicial attempt was made to detail this area of the law. The case in which this occured was the High Court of Australia's decision in the case of Mutual Life & Citizens v Evatt. [13]

In that case, The Plaintiff, Mr Evatt was a policy holder in the defendant Company. He sought advice from them on the financial soundness of another Company, which along with the defendant company was a subsidary of Mutual Life Corporation Ltd.

The defendant's were, as a result of this relationship, in a better position to obtain the requested information, than Mr Evatt, and it had suitably trained officers, and the facilities, to answer the enquiry.

On the basis of the information he received, Mr Evatt not only maintained his existing interest in the Company, but he also made further investment. Mutual Life & Citizens were negligent in giving the advice and information. (The reply they supplied was incorrect) and as a consequence Mr Evatt lost his money.

He brought an action in an attempt to recover damages for the loss he suffered as a consequence of the negligent advice.

The judgment of Barwick C.J. in the High Court of Australia [14] has been lauded as one of the "most important judicial discussions of this branch of the law since Hedley Byrne itself." [15]

Barwick C.J. agreed with the Hedley Byrne principle that it was necessary to establish a "special relationship" before a duty of care would arise. [16] He, also, made no attempt to define all the situations where such a relationship would arise, but he sought to define in more detail the "necessary elements" or features of the relationship out of which the duty of care arises.[17]

There were four basic factors that Barwick C.J. saw as constituting these "necessary elements". [18]

The first was that the reasonable speaker must realise that he is being relied upon by the recipient to give advice or information which the recipient belives the speaker to have, or to have access to, or to be better qualified to pronounce upon.

Secondly, the speaker must realise, or ought to realise, that the recipient intends to act upon the information or advice.

Thirdly, the information or advice must be on a matter of business, or serious consequence.

Fourthly, it must be reasonable in the circumstances that the recipient seeks or accepts, and relies upon the information that is given.

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On the first point Barwick C. J. felt that an unequal position between the parties did not have to exist in fact as long as the belief held by the recipient would be reasonable.

He was of the opinion that several other factors may be of assistance in determining the existence of a special relationship, but were not "necessary elements".

There is no distinction, according to Barwick C. J., between the giving of information or advice, although in many circumstances the giving of information may make it harder to prove a special relationship (i.e. reliance may not be reasonable). [19]

The information or advice many be as a response to an inquiry or volunteered, so long as the necessary elements of the special relationship are satisfied. [20]

The advice given may apply equally to an opinion on a future event, or on some existing circumstance, [21] and a duty of care is not limited to persons of a professional nature, although the existence of such a professional capacity may satisfy some of the necessary elements of the special relationship. [22]

The High Court decided in favour of Mr Evatt, but leave to appeal to the Privy Council was granted Mutual Life & Citizens, arguing before the Privy Council, contended that as their business did not include giving advice on investments, and because it had at no stage claimed the necessary skill and competence to do so, its duty to Mr Evatt was merely to give an honest answer.

The majority of the Privy Council in delivering their judgment, chose to narrow the field of negligent mis-statement from that level accepted by Barwick .CJ. The majority (comprising Lord Hodson, Lord Guest and Lord Diplock), in a decision delivered by Lord Diplock, agreed with the appellants arguments, and held that a special relationship, and therefore a duty of care, will only arise when the advice is given by a party who has special skill and competence. [23]

This special skill and competence is normally evidenced by the carrying on of a business or profession which involves giving advice of the type sought.[24] By doing so the individual not only lets it be known he possesses this skill and competence, but also that he is willing to exercise the degree of diligence normally possessed and exercised by persons of that business or profession.[25] The statement given must be one in respect of which that business or profession is carried on,[26] and the skill or competence of the advisor in making the statement should be such that the advisor himself does not possess it.[27]

Their Lordships did, however, include as giving rise to a special relationship, situations where the advisor although not carrying on that business or profession, lets it be known in some other way that he claims to possess a comparable level of skill and competence to those in a business or profession, and he is willing to exercise that level of skill and competence.[28]

If the defendant, and the nature of the statement, are such that these criteria are satisfied then a duty of care will arise. The majority also emphasised that if the circumstances are such that a reasonable person would realise that the adviser was not prepared to exercise the degreee of diligence he would in his professional or business capacity then there is no duty. Thus, casual advice given by a professional on a social or informal occasion would not create a special relationship.[29]

Mr Evatts case failed, their Lordships decided, because of a "fatal gap" in his presentation.There was no allegation by Mr Evatt that the Company had claimed to possess the necessary skill and competence to answer his enquiry, or that they were prepared to exercise the necessary diligence to give him reliable advice on the subject matter of his enquiry. The Company was therefore under no obligation to do more than give an honest answer.[30]

In closing the Privy Council emphasised the fact that Hedley Byrne was not intended to lay down the field of negligence which was emerging. The limits are, they said, to be decided step by step, according to the facts of the cases as they came before the courts. Their Lordships felt that situations

may arise where the"missing characteristic" in relationships where a duty of care is sought to exist may well be non-essential. The example they gave was where the adviser has a financial interest in the transaction upon which he give his advice. According to Lord Diplock, "The categories of negligence are never closed and their Lordships opinion in the instant appeal, like all judicial reasoning, must be understood "secundum subjectam materiam" (according to the subject matter)" [31].

The minority of Lords Ried and Morris disagreed with this "skill principle." [32] In their opinion, it was not possible to determine set principles governing when a duty of care arises, which was what the majority were attempting to do, but that it was possible, and necessary, to determine the general principles to be applied to varying circumstances.[33]

They agreed that no special relationship occurs when advice is given casually or in a social context, but that it was going too far to say that a duty of care could only exist when advice is sought or given at a business or professional level, for there might be unusal circumstances requiring a wider application of the principle. [34]

In their judgment, if an inquirer consults a business man and makes it plain that he is seeking considered advice and that he intends to act upon that advice, then that businessman, in choosing to answer without any warning or qualification, puts himself within the principles established in Hedley Byrne, and in giving such advice he creates on himself a legal duty to to take such care as is reasonable in the circumstances. [35]

It would appear then from the minority judgment that although some skill and competence is necessary on the part of the adviser, the level possessed by him/her that they would require, would not be as high as that expressed by the majority (i.e. not to that of a professional.)

Their Lordships felt that the test given in the majority decision was such that it created a "distinction that a specially skilled man must exercise care but a less skilled man need not do so"[36]

Indeed, the majority decision seems to be placing a premium on a lack of skill as a way of avoiding liability.

III) Application of the Hedley Byrne "doctrine" in New Zealand

There have been a number of High Court decisions dealing with this aspect of Tort Law in New Zealand, but to an extent many of these cases appear to be inconsistent in application of the law. It is generally conceded in these judgments that the majority test of the Privy Council in MLC is the one the New Zealand Courts are obliged to follow.[37] The problems flowing from this decision are widely discussed in a variety of articles but I will in this paper examine them with particular reference to the application of the MLC test in New Zealand.

The test in MLC is usually considered a reversion to the narrower field of liability first postulated by Lord Denning in Candler v Crane, Christmas & Co. It would appear on the face of it that liability for negligent mis-statement will be limited strictly to professionals and business people, or individuals holding themselves out as having similar or equal skill and competence as professional or business people, in a particular area, who indicate they are prepared to exercise that skill and competence to the requisite level. The New Zealand Courts have in the main been reluctant to construe the ambit of liability so narrowly.

One of the ways they have attempted to avoid doing so is to interpret "business" as having a wider meaning than it would normally (and perhaps than was intended).

In the case of Richardson v Norris Smith [38], Beattie J, as he then was, held that the business of being a land agent was one that called for special skill and competence and therefore was sufficient to satisfy the test in MLC. [39]

Similarly in Capital Motors v Beecham [40], Cooke J, as he then was, held that a car salesman acting in the course of his employment was within the MLC test, especially as the information he gave to the plaintiff was a kind that he was particularly competent to give.

However, if business was intended to encompass the employee acting in the course of his/her employment then the decision in Plummer Allinson v Avery [42] may present an anomaly. In that case Chilwell J. held that an insurance clerk passing on information in response to an inquiry he had undertaken to answer, did not incur liability because that task was not one that required special skill and competence beyond that possessed by the ordinary insurance company employee. Chilwell J. apparently choose to ignore the possibility that a clerk for an insurance company may have some special skill and competence particular to that employment (as a clerk).

This decision could then be seen as limiting liability to business people in the "narrow" sense of the word. Chilwell J. would seem to be discounting the possibility that a person acting in the course of his/her employment might be under a duty of care, unless he/she is of a professional capacity.

In my opinion, however, it is likely that Chilwell J did not in fact intend to create such a narrow distinction. The situation that the Insurance clerk was merely passing information, on which he had no specialist knowledge, did not in Chilwell J's opinion constitute an exercise of special skill or competence relevant to his employment - i.e. it was not a skill related to the employment as a clerk. As Chilwell J says "Any normally intelligent diligent insurance company employee handling an insurance claim, such as the one in hand, could pass on the information "(emphasis added)" [43]. The effect of Chilwell J's decision is, with respect, one leading to a number of absurd consequences.

As D. W. McLauchlan [41] says, under this decision "no person whether professional or otherwise, can be liable for careless statements the subject matter of which calls for no competence beyond that possessed by the ordinary reasonable man, e.g. statements of bare fact requiring no explanation or interpretation, and the imparting of information which the speaker has in his possession or to which he

has no special access."

Do the other New Zealand cases support the result that Plummer-Allinson achieves - do they limit liability to advice or information requiring some special explanation or interpretation, or can the passage of simple information also create a duty of care?

In MLC the majority of the Privy Council suggested that on the facts of the case no distinction needed to be drawn between information and advice, but that in MLC's case the inquiry called for the adviser to exercise special skill and competence in the subject matter of the advice, and that special skill and competence extended to the selection of the particular facts (information) which needed to be ascertained in order to form a reliable judgment.[45]

The decision itself therefore leaves open the question whether the passage of simple information incurs a duty, but it indicates that such statements must require the exercise of some special skill and competence. Cooke J. in Capital Motors appears to accept this idea. He was of the opinion that if the information given is of such a nature that the speaker is particularly competent to give it then a duty of care will arise.[46] The approach of Cooke J., may, however, be wider than the majority in MLC intended, as in Capital Motors the information given was such that the party requesting it could of obtained the information himself, a course not open to Mr Evatt in MLC.

Cooke J's interpretation is supported by Beattie J in Richardson v Norris Smith, where the learned judge found that even though subsequent inquiries by the plaintiff could have found the information requested of the defendant there was no reason to bar the plaintiffs claim.[47]

The judges in both these cases placed great emphasis on the fact that the defendants undertaking to answer the inquiry was what probably stopped the Plaintiff from making investigations of his own. This idea appears to be in sympathy with the importance of assumption of responsibility by the defendant as emphasised in

Hedley Byrne MLC, however, would appear to have rejected this element as important in creating a special relationship, unless coupled with some relevant skill and competence. As we have seen these decisions also appear to be contrary to Plummer Allinson, where a clerk (who we assume had some skill or competence) on undertaking to answer an inquiry was under no duty of care.

Spreight J in his decision in AGH Finance Ltd v Adolph [48] would also support Chilwell J. He was of the opinion that an action for mis-representation failed because the information requested by the plaintiff was of such a nature that it could have been determined by the plaintiff making his own inquiries, and therefore there was no need for him to rely upon the defendant.

It would appear then that the Law in New Zealand on this point is divided. Even adopting the wider interpretation, if the subject matter of the inquiry is simple information obtainable through further independant investigation, it will be necessary to establish the exercise of some special skill and competence. This result seems absurd. There exists situations where one party will rely on that particular information because the speaker gave it and in many of these cases such reliance and lack of further inquiry will be quite reasonable. Most of this difficulty leads from the problem of construing thenature of the "skill and competence" necessary under the MLC test.

Cooke J. seems to feel that particular competence in itself is sufficent, while Chilwell J. would seem to require skill and competence. A literal interpretation of competence would indicate ability or capacity to deal with the subject of the inquiry, and if this is the case then surely the task undertaken by the insurance clerk was one requiring some competence. Chilwell J. was of the opinion that it required no special skill and competence beyond that possessed by the ordinary man. [49] On this analysis then Cooke J decision in Capital Motors is at variance with MLC - the information on the Motor vehicles ownership was equally accessible to the ordinary man. It is my opinion that the task of contacting a Company handling such inquiries [50], instigating such investigation and then reporting back the findings undertaken by the insurance clerk in Plummer-Allinson did involve some competence (certainly special knowledge) not possessed by the ordinary man.

Chilwell J's interpretation of the skill and competence requirement is, in terms of justice and practicality, too narrow. Part of this leads from the summary of MLC Chilwell J. adopted, from the judgement of Asprey JA in the Australian case of Presser v Cauldwell Estates [51]. Asprey J.A. attempted to define, in the narrowest possible terms, the "metes and bounds" of Hedley Byrne as laid out in MLC.

These "metes and bounds" have also been adopted by Davidson .C.J. in Meates v A.G. [52], and applied as the limit of the Hedley Byrne doctrine. This approach serves to limit the possible development of this field of the law, something that even the Privy Council in MLC denied they were doing.

The MLC test, having been accepted into New Zealand, causes an amount of confusion in the area of liability for non-professional's, but does it at least provide clear guidelines for establishing liability for people who are within the criteria of business of professional people ?

As Lords Morris and Reid pointed out in their minority decision in MLC. it may be difficult to determine whether or not an individuals advice is given within the context of his profession or business. The example they gave was where a professional gives advice on an area of this profession with which he is not particularly conversant "Even a man with a professional qualification is seldom an expert on all matters dealt with by members of that profession." [53]

Another possible situation that may lead to problems is where the individual assumes "two hats" - for example where he is a charted accountant and a small businessman. If he gives advice as a businessman, that utilises his skills as an accountant, is he under a duty of care?

These are two possible difficulties arising out of "professional" and certainly not the only ones. In New Zealand the issue of determining when an individual is working within his/her professional capacity, has not received a clear definition.

In the decision in Day v Ost [54], Cooke J. appears to have taken the position that whenever an advisor gives a statement on a matter concerning his/her business he/she comes under a duty to take care. In that case Cooke J. held that an architect giving advice to a tradesman working on the same building site on the financial status of the Company for whom they were both working had a duty of care in answering the inquiry. As the defendant was working in the course of his professional capacity as architect on the project, he had let it be known to the plaintiff that he had the necessary skill and competence to answer the inquiry. [55] It seems strange that a person whose professional capacity as architect qualifies him to give advice on the financial status of a Company by whom he is employed.

On another extreme is Davidson C.J. decision in Meates v A.G., where he held that a Government minister pledging state support to a financially unstable company, in a press statement, was not making a statement in the ordinary course of his business or profession, and was not exercising any skill, competence or qualification not possessed by the ordinary reasonable man. [56]

It is obvious then, from these two cases, that some difficulty arises in determining what constitutes an action within a business or professional capacity. It is likely this difficulty arises because of the nature of the question itself, and is therefore not capable of some hard and fast definition. This increases the uncertainty surrounding the MLC decision.

The last question raised by the Privy Council decision in MLC is the position of the adviser who has a financial interest in the transaction on which he/she give advice. There appears to be two current interpretations of this situation.

In Plummer Allinson, Chilwell J. was of the opinion that the financial interest must be such as to allow an implication to be drawn that the adviser has some special skill and competence relevant to the inquiry or advice. [57]

This interpretation of the financial interest situation is such as to give it very limited application. The only time such interest is likely to arise is in cases where a book keeper employed

by a company gives advice on its financial status, or some similar situation.[58]

The other possible approach to the "financial interest" is that is forms a true exception to the"skill principle." In Capital Motors and in Richardson both judges felt that a direct commission upon the sale of the subject of the mis-representation (be it a motor vehicle or realty) may be an important indication of a duty of care.[59] In Day v Ost Cooke J. felt that the fact the defendants fees were dependent upon the completion of the building would have been such as to allow him to infer a duty of care, although in that case there was no need to do so because the other elements creating a duty were satisfied.[60]

The actual effect of a "financial interest" is another of the questions raised in this area of the law that will need resolving in the future, along with a number of inconsistencies. Until we have a Court of Appeal decision on this branch of Tort or until another appeal to the Privy Council is heard this area will remain uncertain. It is obvious that members of the New Zealand judiciary are in disagreement on the application of the fundamental principles basic to the MLC test.

It is possible, however, to determine the approximate position of the New Zealand law on negligent mis-statement as a Tort[61], in-so-far as it now stands?

It is my submission that several broad propositions can be drawn:

i) So long as the business or profession engaged in requires some special skill or competence then the MLC test will be satisfied, providing the statement is in respect of that business or profession.

ii) If the subject matter of the statement made entails the use of some special skill or competence relevant to the ordinary employment of the speaker, ones not possessed by the ordinary person, then a duty of care may arise regardless of whether or not that employment is a professional one.

iii) If there is no skill or competence attached to either the employment or the subject matter of the advice or information, then the MLC test cannot be satisfied and no duty of care will arise.

The main difficulties I see arising in the application of the MLC test are:

i) What are the necessary requirements of the "skill principle - skill and competence or skill or competence ?

ii) Does the duty of care extend to simple information, that although requiring some competence in collection and giving, is accessible to either party?

iii) What is the requisite level of skill and/or competence - expert in the specific area, or a professional in that general occupation or a professional acting in the course of his/her business?

iv) What is the position of the adviser with a financial interest - indication of special skill and competence or a true exception?

It appears to me that apart from the difficulties of application that arise, the present position of the law in New Zealand exhibits a number of social and legal drawbacks.

Firstly, the MLC test limits liability to an extent that,in many cases, will be unjust and unreasonable.

Under the"skill principle" people not possessing some special skill and competence will not be under any duty of care in imparting information, but there exist a number of situations where information and even advice will be imparted by individuals without the necessary exercise of some special skill and competence (for example Bank tellers, giving account balances from a Banks ledgers) and that information or advice will be of significant consequence.

To refuse liability when these people do so negligently is absurd. Such a stance will deny recovery to those who have suffered loss and who may well deserve some compensation. It may also have some undesirable consequences, in that such people, knowing they are under no legal obligation to take care, may be less diligent than they would be knowing they could be liable for their negligent acts.

Secondly, it seems unreasonable that non-professionals and people not claiming some special skill and competence will be absolved of liability, even though they may have voluntarily undertaken to make an inquiry or give advice, knowing that they were to be relied upon by the recipients, in circumstances where such reliance is quite reasonable. In situations like this it is likely, and reasonable that such undertakings will also preclude the recipient from taking steps to determine the facts themselves.

It has been suggested [62] that the Privy Council in MLC sought to limit liability to this extent for a number of undisclosed policy reasons.

One policy reason suggested was that the majority in the Privy Council were attempting to put liability on the shoulders of those best equipped to handle it. Business and professional people are more likely to have malpractice insurance and if not are probably better suited financially to meet claims against them.

A variety of reasons can also be given to negate these policy reasons: i) Usually the individual giving the advice does not suffer the direct burden of the liability, it is met by the employer (i.e. the Insurance Company in Plummer Allinson and Capital Motors in Capital Motors)

ii) Tort law should not be aimed at protecting those people making and giving negligent advice, but rather at compensating those who suffer loss as a result of another negligence.

MLC tends to limit the boundaries of this area of tort law (something the judges in Hedley Byrne deemed to be unwise) [63] and has been construed as defining the boundaries of liability. Tort law has always been responsvie to the needs of society and with this in mind I now turn to Shaddock v Parramatta City Council [64]

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to examine how it may aid us in returning the law to a more just and equitable position.

IV) Shaddock v Parramatta City Council: Its treatment of MLC

The judgment in Shaddock contains two different approaches to the problems posed by MLC . The majority comprising Mason J, Aickin J and Murphy J rejected the MLC test outright, Mason J and Aickin J choosing to apply Barwick CJ "necessary elements" test, while Murphy J applied criteria similar to those expressed in MLC, as being adequate for the purposes of the Appeal.

The minority of Gibbs CJ and Stephen J held MLC to be limited "secundum subjectam materiam", and then analysed the position of the law in the factual situation they were dealing with.

The appeal arose from the following. The plaintiff's solicitor made two inquiries as to whether or not land which his client wished to purchase was affected by any road widening proposals. One inquiry was made over the telephone and was answered in the negative. The other inquiry was appended to an application for a certificate under S342 A of the Local Government Act 1919 (NSW) regarding proposed planning schemes. The Council had a statutory duty to give the certificate but it was under no such obligation to answer the secondary inquiry. It was, however, the Council's practice to endorse the certificate issued under S342A if the answer was affirmative, but not to do anything if the answer was negative. The Council returned the certificate without the endorsement, when in fact the land was to be zoned for development. The High Court held that the practice of the Council in not endorsing the Certificate, was such that failure to do so in this case constituted a negligent mis-statement.[65] The question then to be answered was "whether there was a duty to answer carefully the questions put to the Council orally and in writing".[66] Two of the judges in the High Court (Gibbs C.J. and Stephen J) were of the opinion that even if the views of the majority in MLC were accepted a duty of care would still arise.

Gibbs C.J. was of the opinion that although the High Court of Australia was free to reject the decision in MLC, it was "desirable to follow the exmaple already set by the House of Lords and the Judicial Committee, and to avoid attempting to lay down comprehensive rules, but rather to proceed cautiously, step by step". [67]

On that basis Gibbs C.J. declined to choose outright between the two conflicting views in MLC and instead applied the MLC rules as being secundum subjectam materiam. As the Privy Council did not deal with the idea of a public body in the practice of giving information of which it is possessed in its public duties, he then went on to examine how the rules in MLC would apply in that factual situation. [68]

In principle the learned judge drew no distinction between a person carrying on the business of giving advice and a public body which in the exercise of its public function is in the practice of supplying information.

> "A public body," said Gibbs C.J.," by following the practice of supplying information upon which the recipients are likely to rely for serious purposes, let it be known that it is willing to exercise reasonable skill and diligence in ensuring that the information supplied is accurate" [69] (emphasis added).

"However," he concluded on this point," even if diligence only and not skill were required, a public body might be specially competent to supply material which it had in its possession for the purposes of its public functions"[69] (emphasis added).

This approach by Gibbs C.J. is really applying the MLC test of skill and competence by extending it to fit a different set of facts.

Stephen J. took an even broader approach to the statement that MLC must be read "secundum subjectam materiam". He considered that the decision in MLC was only dealing with a case where there was no allegation that the plaintiff knew the advisor carried on the business of giving advice of the type sought or that the advisor claimed to possess the necessary skill and competence to give such advice, and was prepared to exercise the diligence necessary to do so [71]

(This was the "fatal gap" in Mr Evatts case) According to Stephen J. the concern of the Privy Council was therefore with what might be inferred from the conduct of those engaged in a business or profession as to holding themselves out as being capable of giving such advice. It was in this context, says Stephen J, that the Privy Council formulated the two elements necessary for a duty of care - the possession of skill or competence as was necessary to give the advice, and a willingness to put that skill or competence at the disposal of others.[72]

As he points out, "their Lordships were careful, on more than one occasion, to make it clear that it was no hard and fast rule which they were enunicating," and that in fact the MLC decision was only "one step in the step by step ascertainment of the limits of the new area opened by Hedley Byrne. "

Stephen J. did not interpret their Lordships judgment as being in any way intended to suggest that only those engaged in particular trades or professions may attract a duty of care. The necessary element the judges in MLC found was absent was a "holding out", by the advisors, that they were capable of giving the information sought. In other contexts, apart from carrying on the business or profession of giving advice of the type sought, conduct of a different kind many suffice.[73]

Conduct such as setting up a system of information collection and collation, possession of special knowledge over which a monopoly is held, and a willingness to distribute that information, was in Stephen J's view, such as to constitute a "holding out". This was the position of the council, he decided, and was, consistently with MLC's majority, enough to attract a duty of care.[74]

As a necessary consequence of the line of reasoning, adopted by both Gibbs CJ and Stephens J, it was necessary for them to examine whether or not there was a distinction between the giving of advice or information with regard to the duty of care.

Gibbs CJ rejected such a distinction on the basis that it was one that the Privy Council had not intended to draw, that the High Court of Australia and the English Court of Appeal had rejected that distinction and that it was not valid because often the giving of information necessitated the use of special skill, diligence and competence.[75]

Stephen J condemmed such a distinction as not only unintended by the Privy Council, but one unnecessary in principle and likely to lead to insoluble problems in practice. Even if providing information did not require special skill or competence in some cases, this did not automatically preclude a duty of care, as this aspect was not subject to the facts of MLC - the Privy Council were only dealing with an act requiring special skill and competence, therefore it was impossible to attach their principles to such a different factual position.[76]

On this basis, even if the Parramatta City Council had no special skill and/or competence in marshalling and having available its store of information, there is no reason to assume that on the facts of the case no duty of care arose (even according to MLC).

The three judges constituting the majority in the decision of Shaddock rejected the decision in MLC and I now turn to examine why and how they did so.

Justice Mason was of the opinion that Lord Diplock had formulated a principle of "General application", one that could not be put aside as a judgement which

> "though dealing with the liability of those who have an objection to bring to bear skill and competence in the provision of advice and information, acknowledged that there is a general liability for negligent mis-statement on the part of others who do not possess or profess to possess skill and competence."[78]

It was his belief that liability in this field was limited by MLC to business or professional people possessing some special skill or competence or someone professing to have a comparable level of skill or competence, except perhaps in the situation of the financial interest exception.

He completely rejected the unexpressed policy basis on which the majority in the Privy Council grounded their reasoning. Although it may in some circumstances be better to limit liability to those who can best afford it, there are, he suggests, stronger reasons for rejecting this premise, especially in the area of negligent mis-statement causing economic loss.

> It denies a remedy to those who sustain serious loss at the hands of those who are not members of the limited class who may be liable, but whose conduct is negligent.
>
> It ignores the availability of insurance against liability.
>
> It provides no logical basis for excluding people who, though lacking special skill and competence, assume a responsibility to give advice or information to others on a serious matter which may occasion loss or damage.
>
> It is well established that economic loss not consequent upon property damage, may be recoverable from those whose negligence occasions it. [79]

For these reasons he chose to reject the MLC majority test altogether. He was able to do so because of the case of Viro v The Queen [80], where the Australian High Court decided that since the commencement of the Privy Council (Appeals from the High Court) Act 1975 it was not bound by any decisions of the Privy Council.

In Viro Mason J. turned to, and emphasised the recognition awarded by the Privy Council, in Australian Consolidated Press Ltd v Uren [81], to the fact that the common law may develop differently in Australia from the Common Law in England and other countries in which an appeal may lie to the Privy Council. In reliance of this recognition Mason J was of the opinion that it fell upon the High Court of Australia to determine what the law of its own nation was.

The judges in Shaddock therefore holding themselves not be bound, proceeded determine what test to apply. Mason J. with the approval of Aickin J selected the most appropriate test as being the one laid out by Barwick CJ in the Australian High Court decision in MLC. One of the main reasons for selecting this test was that it did not confine liability to those who carry on a business or a profession. [82]

> In applying Barwick CJ's criteria to the facts of Shaddock, Mason J held that "the specialised nature of the information, the importance which it has to an owner or intending purchaser and the fact that it concerns what the authority proposes to do in the exercise of its public functions and powers, form a solid base for saying that when information (or advice) is sought on a serious matter, in such circumstances that the authority realises, or ought to realise, that the enquirer intends to act upon it, a duty of care arises in relation to the provision of the information and advice." [83]

Although Murphy J chose to reject MLC as the necessary test he did not follow Mason J in nominating Barwick CJ's necessary elements. "For the purposes of this appeal" he said, "it is enough to hold that liability extends to those whose profession or business it is to give advice or information whether gratuitously or not."

V) Shaddock - its possible influence in New Zealand.

How can Shaddock assist the New Zealand courts in the resolution of the difficulties posed by the decision in MLC v Evatt?

Although the decision in Shaddock is not one that has any binding authority on the New Zealand Courts, it may as persausive authority, or by the use of inference from judicial reasoning, have some positive influence in deciding a case on this issue. The decision is not significant as much for the test of a duty of care that it applies, as for the way it handles MLC as regards that decisions authority.

In Shaddock two judges decide MLC when read "secundum subjectam materiam" is as a strict test limited to only certain types of case. Accordingly, when deciding a case of a different nature, different criteria will be taken into account, while doing so remains consistent with the decision in the House of Lords.

The other three judges were of the opinion that MLC was not binding on the Australian High Court and could therefore be rejected completely. Two of them (Mason J. and Aickin J) chose to abandon the House of Lords test entirely and instead reverted to the High Court decision of Barwick C.J.

Are either of these alternatives viable in New Zealand? The second alternative has been discussed in the New Zealand context in an article by LL Stevens.[84] He was of the opinion that as an appeal from Australia to the Privy Council it was not binding on the New Zealand Courts, as it is a decision from another jurisdiction.

He cites as authority for this view the decision mentioned in Viro - Australian Consolidated Press v Uren. Unfortunately I am unable to construe Uren as providing any such authority. Although the Privy Council recognised that the law in different Commonwealth Countries develops differently all it decided was that the High Court of Australia (Prior to the Privy Council (Appeals from) Act 1975 was not bound by a House of Lords decision. This is, I suggest, a very different situation to the one surrounding MLC, which concerns the Authority of an Australian Appeal to the Privy Council. The Privy Council in the Uren decision, in fact implies that while the House of Lords may not make the law of the Commonwealth, the Privy Council does.[85]

Mr Stevens analysis becomes even more doubtful when considered subject to the Privy Council decision in Bakhshuwen v Bakhshuwen[86], which suggests that Privy Council decisions on the law one one jurisdiction may well be binding upon appeals from another jurisdiction.

It would appear that although MLC is not a New Zealand Appeal it is of such a status as to be either binding, or so extremely persausive, as to be functionally binding, on our Courts. It may be, if a decision is only extremely persausive, that the Court of Appeal will reject it if strong enough reasons exist, but they will always bear in mind the possibility that if such a decision is appealed the Privy Council may well support their earlier decision.

As Mr Stevens says, the present personnel of the N.Z.C.A are unlikely to fall into the category of "timorous souls" [87] who would be constrained to apply a doctrine they disagreed with. However, it is my submission that the judges of the Court of Appeal would refrain from a course of action that would put them in a position of opposition to the Privy Council, if an alternative means of achieving a just result presented itself.

The other possible course arising from Shaddock, that of reading MLC subject to the facts is one that may well find favour in our Court of Appeal. This approach as a possible way of dealing with MLC was raised by D.W. McLauchlan[88], while he was reviewing the decision in Plummer Allinson, where he suggested that course may well be open to the N.Z.C.A.

The Court of Appeal decision of Scott Group v MacFarlane [89] contains a number of statements made by Cooke J and Woodhouse J (as they then were) implying that they may well accept such an approach. Woodhouse J points out that the majority decision in the Privy Council turned on a particular application of the Hedley Byrne principles to the facts of the case.[90] Cooke J felt that both Hedley Byrne and MLC were concerned with specific requests for advice and that "naturally" the reasoning of their Lordships centred on situations of that sort." [91]

If the Court of Appeal were to limit MLC "secundum subjectam materiam", what are the facts they would consider central to the decision, and in what situations would the MLC test not apply?

Cooke J in his decision in Scott Group indicates two factors he considers portant to MLC ; i) whether or not the defendants have held themselves out as having professional skill [92]
ii) whether there was a specific request for advice.[93]

Stephens J, in Shaddock, decided that in MLC the claim to professional skill was evidenced by the carrying on of a business or profession of giving advice of the type sought. This was, he said, a "holding out", and this claim, or rather lack of it was of central importance to the MLC decision.

It would appear that in this Cooke J would agree with him. D.W. McLauchlan suggests that MLC is limited to affecting the liability of non-professionals or persons not proclaiming special skill, who makes a statement requiring the exercise of such skill. You will then have a completely different factual situation where a person in the ordinary course of his business (or, I would add, employment) imparts information, the ascertainment and provision of which is an unskilled task. Such a limitation while, appearing to be acceptable in the New Zealand courts, is one that will avoid a number of the problems leading from the decision in MLC. It means Hedley Byrne will no longer be limited to statements requiring special skill, or to people who possess or profess special skill and competence.

What, then, could the Courts use as a criteria for establishing a duty of care? Without presuming to anticipate any New Zealand decision, I would like to go on and examine the possible criterion laid out by Stephen J, in Shaddock.

His honour, went on to develop the notion of "holding out" as the general principle from which a duty of care can be determined. The carrying on of a business of a particular kind was in his opinion only one way of inferring a holding out. In other context's conduct of a quite different kind may suffice. He then went on to discuss the position of the Council in collecting and distributing information of the kind sought, as being a "holding out" so as to satisfy the general principle on which MLC was decided.

Application of Stephen J's reasoning means that in any situation where you can infer a "holding out" as to capacity to answer an inquiry, whether or not the advisor makes a business or profession of supply such answers, then you can have a duty of care, consistently with the decision in MLC.

How far is it possible to take this line of reasoning? It is my contention that it does not go far enough. The holding out, must, to be consistent with the facts of MLC, occur outside the transaction where the advice is sought or given. In MLC the Company undertook to answer the inquiry - yet obviously this assumption of responsibility was not enough to constitute a

"holding out" as to the capacity of the Company to answer the inquiry. The number of situations where a "holding out" may be implied from factors outside the transaction involved are limited, although not so much as through a strict application of the decision in MLC.

I submit that the most sensible course to follow, having limited MLC to the facts outlined, is to return to a consideration of the requirements discussed in Hedley Byrne and the necessary elements put forward by Barwick CJ in the High Court of Australia. As we saw in the earlier discussion of the law in New Zealand there appears to be a favouring by a number of judges of "assumption of responsibility and reasonable reliance" as criteria for determining the existence of a duty of care.

I personally advocate a "back to basic's" move, away from the rigours imposed by the MLC test, by limiting it to its facts, and a use of the general Hedley Byrne principles in an attempt to return this area to a step by step ascertainment of its metes and bounds.

VI) Conclusion

The decision in Shaddock is noteworthy in the respect that it presents two possible avenues for the resolution of the problems precipitated by the Privy Council decision in MLC v Evatt. Unfortunately, as I have endeavoured to explain, one of the possible routes is apparently denied to our Courts at the moment. The other however, presents a viable alternative. By limiting the MLC decision to the facts the N.Z.C.A.(and perhaps even the High Court) could, and would be more likely to, achieve, in a significant number of cases, just and equitable results presently denied in such situations by the decision and application of the test in MLC.

Stephen J's approach would allow this position to be achieved in a manner that retains consistency with the judgment of the Privy Council and thereby maintaining a large measure of 'certainty' in this area of the law. It is not a perfect solution but, I contend,

the New Zealand Courts would tend to down play any deficiencies in order to resolve the difficulties I have discussed.

I do not consider that such decisions will alleviate all of the problems arising out the "Hedley Byrne doctrine", because as an area of developing law it is one that is bound to encounter problems of interpretation and implementation. It is, however, my belief that resolution of the difficulties posed by MLC will again allow this doctrine to advance in a way best calculated to satisfy the social and economic needs of our society.

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Footnotes

1) Lord Atkin in Donohue v Stevenson (1932) AC 552 expressed the view that legal principles should be in accord with the ordinary rules of civilised society.

2) [1971] AC 465

3) [1964] AC 465

4) (1981) 65 ALJR 713

5) [1951] 2 KB 164

6) Ibid; L. Denning 179

7) Ibid

8) Op Cit, L Pearce 534, L Ried 482-3

9) Ibid; L Ried; 486

10) Ibid;486

11) Idem L Pearce; 539

12) Idem L Ried; 486

13) Op. Cit

14) [1968] 12Z CLR 556

15) Winfield & Jolowicz On Tort 11th Ed. 1979. Sweet & Maxwell

16) Op. Cit; Barwick C.J.

17) Ibid;

18) Ibid;

19) Ibid

20) Ibid

21) Ibid

22) Ibid

23) Op Cit; 802

24) Ibid; 805

25) Idem

26) Ibid; 807

27) Ibid; 803

28) Ibid; 806

29) Idem

30) Ibid; 809

31) Idem

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32) It is interesting to note, that both of these judges disagreed with the interpretation the MLC majority gave to several passages of theirs in the decision in Hedley Byrne lbid; 813.

33) Ibid; 810

34) Ibid; 811

35) Ibid; 813

36) Ibid; 812

37) Davidson C.J. in Meates v A.G. [1979] NZLR 415 was of the opinion he was bound to follow MLC. I will discuss this aspect later in the paper.

38) [1977] NZLR; 152

39) Ibid 158

40) [1975] NZLR 576

41) Ibid;580 See Also Bernadine Fisheries Ltd v Allen [1975]R.L. 229

42) [1976]2 NZLR 254

43) Ibid 263

44) D.W. McLauchlan; Negligent mis-statement - the case of the careless clerk [1976] NZLJ 323

45) Op. Cit; 802-803

46) Op. Cit; 580

47) Op. Cit; 158

48) Unreported A No 869/78 Auckland Registry.

49) Op. Cit. 113

50) In the situation in Plummer-Allinson, a company able to carry out chemical analysis in a particular field, and assess the effectiveness of the subject of that inquiry.

51) [1971]2 NSWLR 471

52) Op. Cit.

53) Op. Cit; L. Morris; 812

54) [1973]2 NZLR 385

55) Ibid; 388

56) Op. Cit; 447

57) Op. Cit; 164-5

58) Such an example is given by Chilwell J; 265.

59) Op. Cit; Cooke J; 580, Beattie J, 158

60) Op. Cit 580

61) One must also take into account the effect of the Contractual Remedies Act, which apparently excludes Tortious liability for negligent pre-contractual representations made by or on behalf of the seller.

62) P. Crane; The Metes and Bounds of Hedley Byrne (1981) 55 ALJ. 865

63) Hedley Byrne, Op. Cit; L. Pearce 536

64) Donohue v Stevenson [1932] AC 562

65) Op. Cit Gibbs CJ; 715

66) Ibid; 715

67) Ibid; 717

68) Ibid

69) Ibid

70) Ibid

71) Ibid; Stephen J; 719

72) Ibid

73) Ibid

74) Ibid

75) Ibid; Gibbs CJ; 716

76) Ibid; Stephen J; 720

77) Ibid

78) Ibid; Mason J; 722

79) Ibid; 723

80) [1978] 141 CLR 88

81) [1967] 117 CLR 221

82) Op. Cit. Mason J; 723

83) Ibid; 724

84) L L Stevens; "Two steps forward, and three back ! Liability for negligent words" [1972] NZULR 39

85) Op. Cit; 241

86) 1951 AC 1

87) Idem; 615

88) Idem; 323

89) [1972] NZLR 582

90 Ibid; 572

91) Ibid; 583

92) Ibid; 582

93) Ibid; 583. For the purposes of this inquiry however, the significance of a request for advice will not be covered.