LIABILITY IN TORT FOR NEGLIGENT STATEMENTS

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The University of Utopia (a region where the common law still survives) conducts a Veterinary Research Institute and as a form of public service gives gratuitous advice on problems relating to livestock. A poultry farmer writes for advice as to the treatment of a certain disease and by post he receives directions concerning drugs to be added to the food. Through a typing error, the amount of the drug is wrongly stated and the result of the farmer’s following of the prescription is that all his fowls die. The first reaction of the lawyer is to advise that the University is liable for its negligence—but a survey of the English cases shows that the law is by no means clear. Is this conduct negligent advice for which no liability arises or the negligent execution of a voluntary service which creates liability in tort?

Survey of English Cases

It is trite law that Derry v. Peek\(^1\) rigidly limited the tort of deceit and rejected the view that the defendant’s lack of reasonable cause for his belief was sufficient to impose liability. In the view of Lord Haldane in a subsequent case the speeches of the Lords were confined to this issue: “the discussion of the case by the noble and learned lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit”.\(^2\) Judge Jeremiah Smith emphasized this point in the Harvard Law Review\(^3\) — “because an action for deceit, involving fraud, cannot be based on a merely negligent misrepresentation, it does not necessarily follow that there is to be no action for negligence”.\(^4\)

But certain dicta in the speeches of the Lords have been accepted by the Court of Appeal as laying down a doctrine that

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\(^1\) (1889), 14 A.C. 337.
\(^3\) (1900–1), 14 Harv. L.R. 184.
goes much further— that except in narrowly defined circumstances where there is a special relationship, there is no liability at common law for a negligent misrepresentation. There is now a long line of well-known cases illustrating this point. In Angus v. Clifford\(^5\) Lindley L.J. stated that Derry v. Peek settled once and for all the question whether an action could be brought for a negligent misrepresentation, as distinguished from a fraudulent misrepresentation. Soon thereafter it was held that a trustee owes no legal duty of care to one who, about to deal with the cestui que trust, inquires concerning encumbrances on the trust estate.\(^6\) In Le Lievre v. Gould\(^7\) mortgagees advanced money from time to time on the faith of certificates given by a surveyor concerning the progress of building and were denied recovery for loss caused by a negligently drawn certificate. Prior to Derry v. Peek it had been held that a telegraph company is not liable to the recipient of a telegram who suffers loss because of an error in transmission due to negligence.\(^8\) In Australian Steam Shipping Co. v. Devitt\(^9\) the management committee of Lloyd's Register approved the plans of a ship and then issued a certificate of safety. On the ship's first voyage, the foundations of some of the pillars gave way, because they were not strong enough to support the weight put upon them. It was held that the committee owed no duty to the owners of the ship. In Humphrey v. Bowers a Lloyd's surveyor negligently passed a ship as sound, when in fact the main mast was rotten. There being no contractual liability, Rowlatt J. decided that there was no duty owed by the surveyor to the owner of this yacht.\(^10\)

Finally an attempt was made after Donoghue's case\(^11\) to apply that principle to the problem. In Old Gate Estates Ltd. v. Toplis and Harding and Russell\(^12\) it was claimed that a valuer had been negligent in estimating the capital value of a block of flats. No rules of contract applied, because the valuation was made before the plaintiff company was formed and it was the plaintiff company that was suing for loss. It was argued that the principle

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\(^5\) [1891] 2 Ch. 449, at pp. 463-4.
\(^6\) Law v. Bouverie, [1891] 3 Ch. 82.
\(^7\) [1898] 1 Q.B. 491.
\(^8\) Dickson v. Reuter's Telegram Co. Ltd. (1877), 3 C.P.D. 1.
\(^9\) (1917), 33 T.L.R. 178.
\(^10\) (1929), 45 T.L.R. 297. "No doubt where one person's body or property may be endangered by want of care and skill of another, there are many classes of circumstances in which a duty of care or skill does arise independently of contract on the part of the latter towards the former. . . . But is is not in every set of circumstances where the interests of one party depend really upon the care of another that this duty arises."
\(^12\) [1939] 3 All E.R. 209.
of Donoghue v. Stevenson\(^{18}\) should be applied, since the defendants in making the valuation were aware that it was to be used for the purposes of the company and therefore owed a duty to the company to take proper care in making the valuation. Wrotesley J. considered that “the exceptions to the rule that a man is obliged to be careful only to those to whom he owes a duty by contract are, as I understand the decision (in Donoghue’s case) confined to negligence which results in danger to life, danger to limb or danger to health and, this being no one of those, I think that the plaintiffs have no cause of action.”\(^{14}\)

This decision was followed in an interesting Queensland case. Plaintiff was the owner of a horse which ran in a race and was not placed first by the judge. Plaintiff sued the club and the judge and led evidence to prove that his horse was first. Macrossan C.J. directed a non-suit against both defendants, the club escaping because of the particular rules of racing which bound the plaintiff and the judge on the ground that a duty to take care is imposed only where there is a risk of physical damage to person or property.\(^{15}\) Charlesworth was cited as supporting this doctrine.\(^{16}\)

Bohlen points out that “it would certainly be turning the world upside down to hold an individual who, either as a volunteer or by request, gratuitously gives a friend information upon a business matter, is liable if he merely fails to exercise reasonable care in acquainting himself with the underlying facts or to exercise sound judgment in estimating their effect”.\(^{17}\) Bohlen admits that the cases put greater emphasis on the security of person or property than of interests that are merely economic or financial.

Salmond accepts these cases as laying down that “a false statement is not actionable as a tort unless it is wilfully false. Mere negligence in the making of false statements is not actionable either as deceit or any other kind of tort.”\(^{18}\)

There are dicta in the Lords which touch on the problem. Lord Finley has said: “It is beyond dispute that on a gratuitous bailment the bailee may be liable for want of ordinary care. But it was said that the consideration there consists in his being entrusted with the property of another. The consideration really is the confidence reposed in the person who undertakes the duty...
This consideration applies just as much to the case of gratuitous advice as to that of gratuitous bailment. Indeed, it was admitted in argument, or at least it was not denied, that a physician who undertakes to treat a patient gratuitously would be liable for negligence, but it was sought to distinguish such a case on the ground of the important and responsible duty which such a profession involves. There is in point of law no difference between the case of advice given by a physician and advice given by a solicitor or banker in the course of his business. By undertaking to advise he makes himself liable for failing to exercise due care in the discharge of his duty to the person who has entrusted him, and the fact that he undertook it gratuitously is irrelevant. This case related to oral advice negligently given to the plaintiff by a manager of one of defendant’s banks and the majority held that there was no evidence on which the jury could reasonably find that the manager had any authority from the bank to advise the plaintiff. The statement of Lord Finlay was an obiter dictum because he himself thought that the advice was not given gratuitously, but as a matter of business.

In the same case Lord Atkinson remarked: “It is well established that if a doctor proceeded to treat a patient gratuitously, even in a case where the patient was insensible at the time and incapable of employing him, the doctor would be bound to exercise all the professional skill and knowledge he possessed, or professed to possess, and would be guilty of gross negligence if he omitted to do so. I think prescribing medicines or a course of dietary for the patient would come within the same rule and I do not well see any difference between a doctor telling a patient he has heart disease, for instance, and prescribing a remedy, and merely telling him he has disease without prescribing a remedy . . . . . Neither do I think it can be said that a solicitor who merely advises a client as to his legal rights, but does not undertake to conduct his cause, can well be said not to do something for the client. In other words, I do not, as at present advised, think that the acts done, or to be done, can be confined, at all events in the case of skilled persons, to physical as distinguished from mental acts.” But this again was treated by the noble Lord as an obiter dictum.

Analysis of the Problem

The English cases, therefore, seem fairly unanimous in rejecting a general action for negligent misrepresentation. Before

20 Same case at pp. 689–90.
considering the arguments in favour of their approach it is necessary to analyse the problem further, firstly by enumerating the cases where special circumstances may create liability and secondly by enumerating the typical situations in which the problem of liability for gratuitous advice arises.

(A) There may be liability for careless speech in the following cases:

1. Where there is a contractual duty or the words constitute a warranty.

2. Estoppel. Where the defendant is estopped from denying the truth of his statement — but before a statement can be treated as an estoppel, it must be precise and unambiguous: moreover, estoppel is not a cause of action but rather a rule of evidence. It operates, therefore, only within narrow limits.

3. Fiduciary relationships. Where there is a fiduciary relationship between the parties, a duty of care arises. Lord Haldane remarks: "If among the great common lawyers who decided Derry v. Peek there had been present some versed in the practice of the Court of Chancery, it may well be that the decision would not have been different, but that more and explicit attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, Courts of Equity gave a remedy". This remedy has not been narrowed by Derry v. Peek.

4. In many cases there may be liability for the carrying out of a gratuitous service, or if the service is paid for, there may be an independent liability in tort. This part of the law is bound up with the evolution of assumpsit which was delictual in origin, then became the basis of contract and then of quasi-contract. With such an historical background, it is not surprising that today the boundaries of tort and contract are rather confused. Even if no action would lie in contract, yet if plaintiff undertook to do something, entered upon the task and was guilty of a misfeasance, he was liable. This action in essence was delictual. Thus in Wilkinson v. Coverdale the plaintiff alleged that the defendant had promised to secure for him an insurance policy against fire and that defendant conducted himself so negligently in obtaining the insurance that the company was not liable when

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22 Supra.
24 (1793), 1 Esp. 75.
the premises were burnt. Lord Kenyon accepted counsel’s submission that “though there was no consideration for one party’s undertaking to procure an insurance for another, yet where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so negligently or unskilfully that the party could derive no benefit from it, in that case he should be liable to an action on the case”.

This is echoed by the dictum of Willes J. in 1867. “If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it.” Mandate and gratuitous bailment are obvious examples in modern law. For long an attempt was made to find consideration, but it is now clearly recognized that these actions are delictual and not contractual. The gist of the action is the undertaking. This explains a passage which is rather curious at first sight: “If a smith’s servant lames a horse while he is shoeing him, an action lies against the master but not against the servant”. The servant had given no express undertaking, whereas his master may have.

In gratuitous bailment, there is a duty of care — many of the authorities still state that the gratuitous bailee is liable only for gross negligence or fraud. This doctrine stems from Lord Holt’s judgment in Coggs v. Bernard. On the other hand “for all practical purposes the rule may be stated to be that the failure to exercise reasonable care, skill and diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs and such skill as he has. From the latter is reasonably expected care and diligence such as are exercised in the ordinary and proper course of similar business and such skill as he ought to have i.e. the skill requisite in the business for which he receives payment.” Lord Finlay requires only lack of “ordinary care”.

In the carrying out of a gratuitous mandate many of the cases state that gross negligence is necessary to found liability. On the other hand Rolfe B. can see no difference between gross and simple negligence — the addition of a vituperative epithet does

26 Ames, op. cit., iii, 262.
27 (1703), 2 Ld. Raym. 909.
28 Beal v. S. Devon Rly. (1864), 3 H & C. 337, per Crompton J.
30 Skellis v. Blackburne (1789), 1 H.Bl. 158.
not change the standard. It would not be in point to argue out
the precise standard of care — these cases are adduced only to
show that in many cases of gratuitous service negligence creates
liability. In gratuitous carriage, there is certainly a duty to
take reasonable care in driving the vehicle, but it is still an open
point whether there is a duty to take reasonable care to see
that the vehicle is in a fit state of repair: some suggest that in
this last case gross negligence must be proved.

Thus there are many illustrations which show that a defendant
in carrying out a gratuitous service is bound to some degree of
care. If an action is refused for negligent misrepresentation, the
reason can hardly lie in the gratuitous nature of the service — it
must be sought in other factors. The limitation suggested by
Wrottesley J. was that the doctrine of Donoghue v. Stevenson
was confined to injury to the person and therefore that there was no
action for negligent misrepresentation. Historically this is not
sound, for the cases of mandate relate not only to injury to
property but also give a remedy for injury to intangible interests,
e.g. failure to recover from an insurance company because of
negligence in insuring property.

The rules relating to a common calling fall under the same
head. In many of these cases there is a contract and therefore an
obvious remedy. At first it was necessary to prove a special
assumpsit, but the action was then founded on the custom of the
realm.

With regard to surgeons, this was clearly laid down in
1822 in a passage which seems rather amusing today. Garrow
B. said “It would be of most mischievous consequence if this
declaration could not be sustained. In the practice of surgery
particularly, the public are exposed to great risks from the number
of ignorant persons expressing a knowledge of the art, without the
least pretensions to the necessary qualifications and they often
inflit very serious injury on those who are so unfortunate as to
fall into their hands.”

31 Wilson v. Brett (1843), 11 M. & W. 113. The J. C. uses the test
reasonable care in Commonwealth Portland Cement Co. v. Weber (1904),
91 L.T. 813. A modern Queensland case requires gross negligence —
32 Harris v. Perry & Co., [1903] 2 K.B. 219 lays down a duty of reasonable
care so far as the driving is concerned, although the J.C. in Moffatt v. Bateman
(1869), L.R. 3 P.C. 115 required gross negligence: in Haseldine v. Daw, [1941]
2 K.B. at p. 373 Goddard L.J. considered that the law was not certain with
regard to the duty concerning the state of the vehicle.
33 Old Gate Estates Ltd. v. Toplis & Harding & Russell (supra).
34 Supra.
35 E.g., Shiells v. Blackburne (supra).
36 Pippin v. Sheppard (1822), 11 Price 400. For a case in tort against a
dentist, see Edwards v. Mallan, [1908] 1 K.B. 1002.
In the cases suggested by Tindal C.J.\(^{37}\) (attorneys, surgeons and other professional men, actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions) “the action is brought in tort or contract at the election of the plaintiff”. To express it in other terms, there is an independent duty of care in tort, independent of contractual liability. Where these professions are concerned, it is submitted that mere negligence in statement may be considered professional carelessness for which an action would lie even in the absence of contract. “If a medical practitioner miscopies a formula from a pharmacopoeia or medical treatise, and his patient is poisoned by the druggist making it up as copied, surely that is actionable negligence, and actionable apart from any contract.”\(^{38}\) In the case of the doctor, we may argue (along the lines of *Old Gate Estates v. Toplis & Harding & Russell*\(^{39}\)) that the negligent advice of the doctor is likely to lead to injury to the person. But if the same rule applies to the solicitor we have an illustration where the possible damage is not to the person, usually not even to tangible forms of property but rather to financial or economic interests. This would deprive the decision of Wrottesley J. of its real base. Both Lord Finlay and Lord Atkinson regard advice given by a doctor as on the same plane as that given by a solicitor or a banker.\(^{40}\)

In English law the exact limit of the “common callings” can apparently be determined only by historical investigation — not by any rules of logic applied to the modern world.\(^{41}\) A valuer, a Lloyd’s surveyor, a telegraph company and a company promoter are not at common law bound by a duty of careful statement in the absence of a contractual tie.\(^{42}\) Pollock asks why a telegraph company should not be in the same position as the smith who pricks a horse with a nail or an unskilful surgeon.\(^{43}\)

It seems rather absurd that an independent duty of care in tort should be recognized only in those callings which were regarded as important in the formative period of the common law.

(B) In cases where there are present none of the factors set out above, English law, as the cases now stand, denies a remedy.

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\(^{39}\) *Supra*.


\(^{41}\) Cardozo J. in *Glanzer v. Shepard* (1922), 233 N.Y. 236, uses the analogy of public calling in discussing the liability of one who runs a public weighbridge.

\(^{42}\) See cases cited earlier.

\(^{43}\) *Torts* (14th ed.), p. 443.
(i) The defendant is paid for giving advice to A and knows that A is securing the advice in order to influence B's action. (The owner of a yacht pays for a certificate of its seaworthiness, stating that B will purchase the yacht if the certificate is satisfactory.) In this case there is no reason of policy why liability should not be imposed. The defendant is bound by contract to use reasonable care and in tort this duty should extend at least to a vendor within the contemplation of the defendant.

(ii) The defendant is paid for giving advice to A and knows that A will use the certificate in trying to influence members of a class (e.g. potential purchasers or investors in a company). Here again the law should give a remedy. The usual argument against the imposition of liability is the indefinite and indeterminate nature of the class to whom the duty is owed. Where it is the case of a sale of a definite res, while the class of potential purchasers may be large, in the final result only one will buy and therefore earn the right to sue for damages. Where, however, an accountant gives a certificate to a company this may affect the actions of a large class of investors. Even in deceit the plaintiff can sue only if the representation was made directly to him with intent that he should act upon it, and hence some American authorities stress that to impose a duty of care to such a large class would open for the accountant a terrifying vista of possible liability.

(iii) The defendant in the course of his business provides a gratuitous service of advice. Although there is no consideration in any particular case, the service provides good advertisement. This is illustrated by De la Bere v. Pearson,44 although the court on the facts held that a contract was created. The defendants, who were newspaper proprietors, advertised that their city edition would answer inquiries from readers desiring financial advice. The plaintiff asked for a safe investment and also the name of a good stockbroker. The defendant recommended a man whom he knew to be an "outside broker" but whom he did not know to be an undischarged bankrupt. This broker misappropriated £1400 which the plaintiff entrusted to him for investment. Vaughan Williams L.J. thought that there was a consideration in the fact that the publication of replies in the newspaper would tend to increase the circulation. It is questionable whether

44 [1908] 1 K.B. 280.
a consideration was correctly found. Cheshire and Fifoot\textsuperscript{45} suggest that it is better to treat this case as outside the law of contract altogether.

(iv) Being pressed by a friend, the defendant gives advice in circumstances which do not entitle the plaintiff to rely upon it. (The plaintiff insists on disturbing an evening's bridge by asking advice from a lawyer on a complicated issue.) Here the short reply is the old quip that free advice is usually worth what is paid for it. The circumstances give the plaintiff no justification for assuming that the defendant has taken it upon himself to warrant that reasonable care has been used.

**Critics of the Present State of the Law**

There are many critics of the present state of the law. Judge Jeremiah Smith writes that it is really beside the point to say (as does Bowen L.J.)\textsuperscript{46} that the law of England "does not consider that what a man writes on paper is like a gun or other dangerous instrument", for no one has suggested that the strict duty relating to chattels dangerous per se should be applied and written as verbal representations. All that is proposed is that an action for negligence would reasonably lie in some cases. "If in handling a pen I carelessly scratch my neighbour's face, I am liable to him for the damage thus done. If, with the same pen, I write a letter to my neighbour making statements not true in fact, whose untruth would have been known to me if I had exercised reasonable care, and my neighbour is induced (as I had intended he should be) to peril his fortune in reliance on my statements, why should he be denied a remedy against me in case of his financial ruin?"\textsuperscript{47}

Winfield roundly denounces the effect of the English decisions, asking why careless statements should not fall within the ordinary principles of negligence. Technically, the learned writer considers that the question is an open one for the House of Lords, but that the "judicial atmosphere" is unfavourable to the success of an action for negligent misrepresentation\textsuperscript{48} and that this leaves the law in a "regrettable state"\textsuperscript{49}.

Pollock writes: "A man who volunteers positive assertions to his neighbour, intending them to be acted upon for some

\textsuperscript{45} Law of Contract, p. 59.
\textsuperscript{46} Le Lièvre v. Gould (supra).
\textsuperscript{47} (1900), 14 Harv. L.R. 184, at p. 190.
\textsuperscript{48} Torts (3rd ed.), p. 378.
purpose of his own advantage, is certainly bound in morality to use the ordinary care of a reasonable man to see that his assertion is warranted by the fact. It has never yet been decided that he is so bound in law, but it would be quite in accordance with the lines of development which the common law has followed in regard to actions and undertakings affecting the safety of others in person or property. And I believe that the law will one day come to this, in other English speaking countries if not here. It remains to be seen whether the decision in Derry v. Peek will do more, even here, than retard and complicate the process."

Survey of American Law

Goodhart also is critical and points out that the New York Court of Appeals has repudiated the English rule which Judge Andrews describes as conflicting "with what conscience, fair dealing and the usages of business require". In International Products Co. v. The Erie R. R. Co. the plaintiff, wishing to insure his goods, asked the defendant where they would be stored on arrival. He was incorrectly informed that they were in Dock A and therefore he could not recover from the insurance company when the goods were burnt in Dock B. There was no contractual relationship between plaintiff and defendant but the former was allowed recovery. "There must be knowledge or its equivalent that the information is desired for a serious purpose: that he to whom it is given intends to rely and act upon it: that if false or erroneous he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care."

Goodhart asks whether there can be any doubt that this doctrine accords better with modern business methods and morality than does the strict English rule.

It cannot, however, be accepted that this is the general rule of American law. Harper points out some jurisdictions extended the tort of deceit to cover situations where the defendant had no reasonable grounds for believing the statement to be true.

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50 Pollock (1889), 5 L.Q.R., at pp. 422-3.
52 244 N.Y. 381. In Weston v. Brown (1925), 82 N.H. 157, Marble J. said that: "In this jurisdiction [New Hampshire] the principle is well established that negligent words as well as negligent deeds may constitute actionable fault".
54 Harper: Torts, s. 76. See also F. H. Bohlen: Deceit, Negligence, Warranty (1928-9), 42 Harv. L.R. 733.
But the error of this was emphasized by Judge Jeremiah Smith\textsuperscript{65} and then some courts recognized an action for negligent misrepresentation,\textsuperscript{56} but "the overwhelming majority of cases have held . . . that one negligently furnishing a false certificate or report subsequently relied on by a third person with whom he has no contractual relations, is not liable for misinformation negligently furnished in such report or certificate".\textsuperscript{57} Most of these decisions do not necessarily deny that no action for negligent language can ever lie in appropriate circumstances, but are rather to be regarded as decisions that there was no duty in the particular circumstances before the court. "Where the relationship is of such a character as to require in good faith the exercise of diligence, and where it is felt that the relationship of the parties justifies a reliance by the plaintiff upon the information, liability is imposed, even by many courts which in other situations require a contractual relation as a condition to liability. Thus there are numerous decisions holding abstractors liable for a negligently furnished certificate, if it appeared that the defendant knew that a purchaser of the property intended to rely thereon and that the certificates was furnished for that very purpose."\textsuperscript{58}

On the other hand, in Ultramarines Corp. v. Touche,\textsuperscript{59} the defendants, public accountants, prepared an audit of the financial condition of a corporation showing assets worth one million dollars when in fact reasonable investigation would have shown that the company was insolvent. The plaintiff relied on the audit and lent money to the corporation. The appellate Division allowed the plaintiff to recover in an action based on negligence but the judgment of Cardozo C.J. reversed this, holding that on the cases it would be a revolutionary change to impose liability. Many plaintiffs had failed because they could not prove actual fraud — were all these well-known decisions to be explained only as a mistake of the plaintiff as to the form of action? Moreover, even in fraud, there must be intent that the plaintiff shall rely upon the statement — there must, therefore, be some relationship between the parties. "Public accountants are public only in the sense that their services are offered to anyone who chooses to

\textsuperscript{65} (1901), 14 Harv. L.R. 184.
\textsuperscript{56} E.g., Glanzer v. Shepard (1920), 233 N.Y. 236.
\textsuperscript{57} Harper, at p. 178.
\textsuperscript{58} Harper (op. cit.). On the other hand in Phoenix Title & Trust Co. v. Continental Oil Co. (1934), 43 Ariz. 219, it was held that an abstractor of title was not liable for negligence save to his employer and that it was immaterial that the abstractor knows that the abstract is to be used for the benefit of some unknown person. The proprietor of a "news ticker" is not responsible for loss caused to customers by negligent errors: JaiIet v. Cashman (1923), 235 N.Y. 511.
\textsuperscript{59} (1931), 255 N.Y. 170.
employ them. This is far from saying that those who do not employ them are in the same position as those who do." The difficulty of drawing a clear line between the cases is shown by the fact that in *Glanzer v. Shepard*. Cardozo himself allowed liability for a negligent misrepresentation. A public weigher negligently gave the vendor an inaccurate certificate of weight and the buyer suffered loss by relying on it. Liability was imposed on the ground that the defendant gave a copy of the certificate to the purchaser and intended him to rely upon it — moreover he exercised a public calling and really was guilty not only of careless words but of the careless performances of a service. However in the *Ultramarines* case the defendants knew that their certificate would be shown to many persons who would rely upon it — indeed defendants supplied thirty-two counterpart originals. Cardozo himself seems to place the emphasis upon a question of degree rather than of logic. The weigher could be liable only to one purchaser — the accountant might become liable "for an indeterminate time to an indeterminate class". "The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

In 1937 an Illinois court laid down that "negligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all". In *Mulroy v. Wright* a municipal clerk was held liable to a purchaser of land, because he had given a certificate to the vendor which negligently stated that the land was not encumbered by a special assessment; relying on the certificate, the plaintiff bought the land and was subsequently required to pay a special assessment which had been levied prior to the sale. The basis of the decision was that the defendant, knowing that the certificate was to be relied on by someone, owed a duty of care to one so relying, though unaware of his identity.

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60 Pound, Crane, Lehman, Kellogg, O'Brien and Hubbs JJ. concurred with this judgment of Cardozo C.J. A new trial was granted in order to discover whether defendants deliberately certified to knowledge on one point when in fact they had none.
61 (1922), 233 N.Y. 236.
62 These two decisions are well analysed by Warren A. Seavey: Cardozo and the Law of Torts, 52 Harv. L.R. 394 et seq.
64 (1931), 158 Minn. 84, 240 N.W. 116, discussed 45 Harv. L.R. 937.
The Restatement of the Law of Torts imposes liability where there is a negligent misrepresentation which involves a risk of bodily harm:

311 (1) One a part of whose business or profession it is to give information upon which the bodily security of others depends and who in his business or professional capacity gives false information to another is subject to liability for bodily harm caused by the action taken in reliance upon such information by the recipient or by a third person to whom the actor should expect the information to be communicated if the actor, although believing the information to be accurate, has failed to exercise reasonable care

(a) to ascertain its accuracy, or
(b) in his choice of the language in which it is given.

(2) The actor is subject to liability under the statement in Subsection (1) not only to the recipient or to a third person who expectably acts in reliance upon it but as to such third persons as the actor should expect to be put in peril by the action taken.

The Comment makes clear that though the advice must be given in the course of business or professional activity, there need be no payment therefor. The example given is that an insurance company undertakes to inspect the plaintiff’s boiler and issues a certificate that the boiler is fit for use. The certificate is negligently given, and the company is liable for damage not only for the bodily harm suffered by the plaintiff but also for the damage to his buildings.

This section is in line with the Old Gate Estates case in limiting liability to a misrepresentation which involves a risk of bodily harm. Presumably the explanation of the illustration is that, if there is a risk of bodily harm and it results, consequential damage to property may also be recovered. Bodily harm is a factor affecting the duty of care and not the extent of liability. Section 552 of the Restatement goes rather further:

One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if

(a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
(b) the harm is suffered

(i) by the person or one of the class of persons for whose guidance the information was supplied, and
(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.
This section is carefully drafted so as to confine liability to those who are intended to rely upon the information and who rely upon it in a type of transaction in which it is the maker's purpose to influence their conduct. It is not enough that a reasonable man would foresee that the information may be communicated to others who will rely upon it. The Comment specifically excludes the case of a "kerbstone opinion", e.g. where a lawyer gives an off-hand opinion to a friend in the street or at the dinner table, for in such cases the recipient is not justified in assuming that the informant has exercised the necessary care and skill.

The information need not be directly furnished. Thus if a vendor contracts with a public weigher to weigh beans, the subject matter of the sale, the latter is liable for negligence to the purchaser — apparently the reason being that the certificate is meant for the purchaser, although the vendor is the actual recipient of it. But liability is only to those for whose guidance the information is supplied — the analogy of fraudulent representation is specifically used, although it is somewhat extended to include a class of persons. The illustration given is that A is negotiating with a bank for an overdraft. The bank requires an audit of A's business and A employs a firm of public accountants to make an audit, informing them that it is to meet the requirements of the bank. The bank closes its doors before A produces the accountant's certificate to them and A thereupon obtains an overdraft from another bank which relies upon the certificate. The certificate grossly overstates A's financial resources. The accountant is liable according to whether or not he undertook the task on condition that the certificate should be used for the first and the first bank only.

Another illustration is that A, wishing to sell his car, employs an expert mechanic to certify to its condition and informs the mechanic that he wishes to give the certificate to B, a prospective purchaser. In such a case the mechanic is regarded as supplying the certificate for the guidance of any purchaser whom A may find.

This section was cited in Pennsylvania in 1938. The officer of a trust company sent a copy of the wrong will to the plaintiff who held a second mortgage on property owned by the heir. This misled the mortgage holder who suffered loss but

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55 See Comment p. 123, Restat. Tort vol. iii.
56 Cf., Glanzer v. Shepard (supra).
57 Restat. iii, 126.
recovery was refused on the ground that it was not part of defendant's business to furnish the information.

The Restatement was also relied upon in another case. An automobile finance company was held liable to a dealer in cars for a negligent statement that the balance due on a leased car, of which the finance company was lessor, was less than the actual balance, this statement causing damage to the dealer since he accepted the car as part payment for a new one.\(^9\)

Even the few cases cited show the difficulty of discovering a clear principle in American law. Two learned writers attempted in 1938 to create a synthesis of the law of misrepresentation,\(^7\) but with regard to negligent statements no precise test could be laid down. "The issue... upon which the court must exercise its judgment, then, is whether the parties in the type of transaction in question are in such a relationship as to bring them within 'a general public sentiment of wrongdoing' if they fail to exercise care; whether business practice and the common assumptions which constitute the tacit psychological basis of their dealings are sufficiently important to justify the imposition of a legal duty to employ care in making material representations."\(^7\)

**Conclusion**

Whatever the precise rule should be concerning liability for fraudulent misrepresentation, it is confidently submitted that the present rules of English law are too narrow. It would be more appropriate to adopt the rules of the American Restatement which are carefully drafted so as to prevent the doctrine of liability from being pushed too far. It would be in keeping with the spirit of the history of the common law at least to impose liability on those who in the course of business give gratuitous advice. There is no duty to act gratuitously but if the defendant takes the task upon himself why should not an action lie. In *Le Lievre v. Gould, Dickson v. Reuters Telegram Co. Ltd.* and *Humphrey v. Bowers* the advice was not only given in the course of business, but the defendant was paid for it. In contract it may be relevant that the plaintiff in each case was outside the contract, but the duty of care in tort should not be limited by these considerations.

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\(^7\) F. V. Harper and Mary C. McNeely, *22 Minn. L.R. 939.*

\(^7\) *Op. cit.*, at p. 983.