



Negligent
Misstatement

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NEGLIGENCE MISSTATEMENT

Introduction

The majority of professionals are aware that the provision of negligent advice or a negligent misstatement may expose them to liability. However, such professionals may not be aware of the extent of their potential liability.

Negligent misstatement relates to a representation of fact, which is carelessly made, and is relied on by another party to their disadvantage.

For some time it has been possible to claim for economic loss arising out of a negligent misstatement where no contractual or fiduciary relationship exists between the parties. This is provided however that a special relationship or a sufficient proximity¹ exists between the parties.

Special Relationship

Generally, a special relationship will exist where the adviser knows that the other party is justifiably relying on him for his skill, expertise or knowledge.

Where a person voluntarily takes it upon themselves to act on behalf of, or to advise, another in a professional capacity, they assume a duty to that other person to act or advise with care.

A court will not impute a duty of care following informal discussions or during social courtesies.

In attempting to define the scope of the term “special relationship”, a court will consider whether or not:-

- (i) the plaintiff *relied* on the defendant’s skill and judgement,
- (ii) the person who gave the advice knew, or ought to have known, that the other party was relying on him, and

¹ Hedley Byrne & Co. Ltd. –v- Heller & Partners Ltd [1964] AC465

- (iii) it was reasonable in the circumstances for the plaintiff to rely on the defendant.

Proximity Test

The Supreme Court² recently addressed the issue of whether or not a claim could arise when the negligent misrepresentation was not made to the plaintiff directly but to another individual making an inquiry of the defendant which concerned the plaintiff. The defendant asserted that as the statement was not made to the plaintiff directly there could be no liability.

The Supreme Court unanimously rejected the defendant's argument. It held that if it was foreseeable that a statement made would be relied upon by the plaintiff and there was sufficient proximity between the parties, it was "fair just and reasonable" that the party in question should be liable and that they should compensate the plaintiff for the losses incurred.

The Supreme Court held that in order to fulfil the "proximity" test in respect of negligent misstatement:-

- (i) the person effected must include persons in a limited and identifiable class,
- (ii) the maker of the statement can reasonably expect that they will rely on this statement, and
- (iii) such person or persons will act or not act in a particular manner on foot of the statement or advice.

This test of proximity embraces persons who could reasonably be expected to rely on the inaccurate information provided by the adviser even if the adviser has had no direct contact with that person.

Of further note is a recent High Court³ decision which reaffirmed the principle that an adviser is under a duty to ensure that the information they provide, for the benefit of a limited category of persons, is reasonably accurate in the circumstances provided that the relationship between the parties is sufficiently proximate to give rise to a "special relationship."

² Harold Wildgust and Carrickowen Ltd –v- Bank of Ireland and Norwich Union Life Insurance Society [2006] 2 ILRM 28

³ David Walsh –v- Jones Lang Lasalle Ltd [2007] IEHC 28

In this case the Court also addressed the issue of whether or not the presence of a waiver could exempt a party from liability arising out of a negligent misstatement. The defendant argued that the existence of a disclaimer on the material containing the misstatement precluded the existence of a “special relationship” and that it would make it unfair, unjust and unreasonable for the Court to impose an obligation on them.

The Court in finding for the plaintiff held that the waiver was not sufficient to relieve the defendant of liability. The Court held that the publication of the disclaimer was immaterial due to the fact that the information was directed at the plaintiff and he was influenced by it.

These cases illustrate the potential exposure of financial institutions and other professionals arising out of a negligent misstatement which detrimentally affects an individual deemed to have been sufficiently connected to the adviser. Clearly advisers should be wary of their potential liability due to the onus placed on them when providing advice, not only to a particular individual, but also to a third party making an inquiry about the individual in question.

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