**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. To what extent is a professional advisor liable in civil law for their misstatement and how does the law seek to regulate their activities and liabilities?

**Indicative content outline answer:**

* The general rule of law was that claims for pure economic loss could not be claimed – for many reasons including the floodgates argument.
* In some cases businesses provide expert advice that clients and others rely on when investing money, making decisions and so on, and when these have been negligently made, the recipient may suffer losses.
* *Hedley Byrne & Co. v Heller* - The House of Lords held that this case involved a ‘special relationship of proximity’ between the parties and this would enable a claim for the losses due to the negligent misstatement.
* In *Caparo v Dickman* the Lords defined the factors that would establish a ‘special relationship’ and where liability for a negligent misstatement would be imposed:
1. The advice is required for a purpose which is made known, either actually or inferentially, to the adviser at the time when the advice is given;
2. The adviser knows that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose;
3. It is known that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and
4. It is so acted upon by the advisee to his detriment.
* The case of *James McNaughten v Hicks* demonstrated the necessity of the defendant being aware of the claimant’s use of the information that was being provided. The following points should be considered:
1. The purpose for which the statement is made.
2. The purpose for which the statement was communicated.
3. The relationship between the advisor, advisee, and any relevant third party.
4. The size of any class to which the advisee belongs.
5. The state of knowledge of the adviser.
6. Reliance by the advisee.
* In *Yorkshire Enterprise Ltd v Robson Rhodes* it was held that liability would be imposed as the defendants were aware of why the claimants wanted the information, and what they had intended to do with this information. Therefore when considering whether liability will be imposed in cases of negligent misstatement, the following points should be considered:
1. There must have been negligence when the statement was made.

## The statement must be given by an expert acting in the course of his/her expertise.

## There must be a duty of care owed to the person who acts on the statement – an assumption of responsibility.

## There must be reliance on the statement by the persons to whom it was addressed.

## There must be foreseeable loss arising out of the reliance.

## Following *Caparo*, it must be fair, just and equitable to impose the duty.

* Note, however, that the Lords stated in *Commissioners for Customs and Excise v Barclays Bank Plc* that the tests established in the cases above were correct and had led to justice being served, but they are specific to the cases to which they relate, and sweeping statements regarding the application of tests are not possible. The cases have to be considered on their facts.

2. ‘The case of Alcock v Chief Constable of South Yorkshire identified the rules to be satisfied before a successful claim as a secondary victim could be made. The judgment demonstrates the problems and practical difficulties in successfully establishing a claim where the claimant has not suffered any direct harm, or feared personal harm. As such, liability for psychiatric damage in such cases is rarely held and for all practical purposes should be abolished.’

Critically analyse the above statement.

**Indicative content outline answer:**

* There are increasing situations where liability is imposed for non-physical injuries, such as employees being placed under stresses at work, or where rescuers (such as those employed in the emergency services) suffer through the traumatic nature of their job.
* There may exist situations where persons are exposed to situations where they are not necessarily employees, but liability for psychiatric injury is imposed. In *Bourhill v Young* the claim failed, *inter alia*, due to the lack or proximity between the claimant and defendant, but raised the interesting element of whether to hold a defendant liable in cases of psychiatric harm.
* The person must exhibit ‘phlegm and fortitude’ in the event of witnessing acts that may be upsetting. As in *Bourhill* where the pregnant fishwife had witnessed the aftermath of an accident, this did not place her in direct and immediate danger.
* Those persons who have experienced injury, even psychiatric injury, from having been placed in fear of personal danger are referred to as ‘primary victims.’ The other type of claimant who suffers psychiatric injury after witnessing an event involving injury to others comes under the heading ‘secondary victims.’ It should be noted that the expression ‘nervous shock’ is important in identifying that the claims in this matter relates to sudden events which are distressing, rather than a protracted event or series of events.

***Primary Victims***

* These are claimants who assert they have suffered some form of psychiatric injury as a result of being in the zone of physical danger of fearing for their own safety. This is tested on the basis of the reasonable forseeability of the defendant’s actions as can be seen in *Dulieu v White and Sons*.

***Secondary Victims***

* Secondary victims have a more difficult task in proving that they have the right to seek damages under negligence. Reasonable forseeability is again the test to be invoked, but this is on the basis of the proximity of relationship.
* There must exist some direct relationship between the injured party and the claimant that would enable a claim (as no physical injury has been sustained, and the claimant was not in fear of their own safety). Such a close relationship may exist between siblings, or between spouses.
* The tests were established in *Alcock v Chief Constable of South Yorkshire* which provided for the following:

1) There must exist close proximity between the claimant and the person suffering harm (such as close tie of love and affection and so on);

2) The claimant must have been present at the scene of the accident or there in the immediate aftermath; and

3) The claimant must have perceived directly the events of the accident or the immediate aftermath.

* More recently the Court of Appeal has identified the criteria necessary when attributing liability in cases of psychiatric injury - *French v Chief Constable of Sussex*:
1. There exists a duty to exercise reasonable care not to cause psychiatric injury or to place the claimant in fear for his/her physical safety;
2. The defendant that breaches the duty not to endanger the physical safety of the claimant will be liable if the breach causes not physical but psychiatric injury, even if it was not reasonably foreseeable that psychiatric injury alone might result;
3. There is no general duty to exercise reasonable care not to cause psychiatric injury as a result of causing death or injury of someone (the primary victim) which is witnessed by the claimant (the secondary victim);
4. Point ‘3’ applies equally where the claimant is employed by the defendant; and
5. As an exception to point ‘3’ there is a duty not to cause psychiatric injury to the claimant as a result of causing the death or injury of someone loved by the claimant in circumstances where the claimant sees or hears the accident or its aftermath.

**PROBLEM QUESTIONS**

1. Rayan runs a firm of estate agents who provide a service of surveying and valuing properties, including domestic dwellings.

Henry approaches Rayan and states that he would like a house valued at £500,000 to have a full survey before he decides whether to proceed with the purchase or not. Rayan accepts the contract and instructs an employee of his (Brian) to perform the survey. Brian visits the property, carries out the survey but is more interested in speaking with his friend on his mobile phone than performing his task diligently. Brian negligently performs the survey and misses very important defects in the property such as dry rot, and that the house is built on the tracks of a disused mine and may be subject to subsidence.

Based on the favourable report produced by Brian, Henry purchases the property and later discovers these faults. The house, due to the defects, is actually only worth £300,000 and as a consequence Henry has lost a large amount of his investment.

Advise Henry on any rights he may have to claim for the (potential) professional negligence of Rayan and the estate agencies.

**Indicative content outline answer:**

* The issue in this question is the liability for pure economic loss.
* Claims on the basis of a statement having been negligently made, prior to case law in 1964, had to be made in the tort of deceit and required that the defendant had acted dishonestly, rather than just negligently.
* The law was changed Hedley Byrne & Co. v Heller.
* In *Hedley Byrne* the House of Lords held that to establish liability in pure economic loss there must exist a ‘special relationship of proximity’ (beyond the ‘standard’ level of proximity established in Donoghue v Stevenson) between the parties and this would enable a claim (in theory).
* The problem (for the claimant) in *Hedley Byrne* was the bank’s use of an exclusion clause, disclaiming responsibility for any losses due to the statement, which prevented the damages action succeeding (although the point of law regarding the possibility of claims remained). However, such a disclaimer if used today would have to satisfy the requirements of the Unfair Contract Terms Act 1977 as being reasonable. So a business may not always be able to evade liability by the inclusion of a disclaimer.
* It may be worth considering the distinction between *Hedley Byrne* and Caparo Industries Plc. v Dickman and Others and how the Lords established the factors necessary for the imposition of liability in these cases:

1 the advice is required for a purpose which is made known, either actually or inferentially, to the adviser at the time when the advice is given;

2 the adviser knows that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose;

3 it is known that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and

4 it is so acted upon by the advisee to his detriment.

* In Yorkshire Enterprise Ltd v Robson Rhodes, it was held the following points should be considered before establishing liability:

1 There must have been negligence when the statement was made.

2 The statement must be given by an expert acting in the course of his/her expertise.

3 There must be a duty of care owed to the person who acts on the statement–an assumption of responsibility.

4 There must be reliance on the statement by the persons to whom it was addressed.

5 There must be foreseeable loss arising out of the reliance.

6 Following Caparo, it must be fair, just, and equitable to impose the duty.

* Note, however, that the Lords stated in Commissioners for Customs and Excise v Barclays Bank Plc that the tests established in the cases above were correct and had led to justice being served, but they are specific to the cases to which they relate, and sweeping statements regarding the application of tests are not possible. The cases have to be considered on their facts.

2. Esteban and Jerry are commuters. They regularly caught the same train together. In this way they had become friends socially. One Monday morning, Esteban, a stockbroker, remarked to Jerry that British Bailout Ltd were an extremely attractive proposition on the stockmarket. Being a teacher, Jerry knew little about the state of the market, but expressed interest in the company’s shares. Esteban assured him that the investment would ‘make money hand over fist’. As a result, Jerry invested £1,000 in the company, which has just gone into liquidation. Jerry has lost his investment.

Explain the potential liability of Esteban for Jerry’s economic losses.

**Indicative content outline answer:**

* The case is based on *Derry v Peek* and the limitations to claiming for losses as a result of negligent misstatements.
* In *Derry*, the directors of a company issued a prospectus stating the company was empowered to run steam trams, although the statement had been made before the Board of Trade (the regulating authority) had granted this permission.
* The directors had acted as though the permission was a formality when it was not. When the authority refused the running of steam trams losses were incurred by people who relied on the statement – who then brought a claim for their losses.
* The House of Lords held that the action for damages must fail. The directors honestly believed in the truth of the statement made.
* They had not made it recklessly or without a reasonable belief in its truthfulness.
* Estaban did not know what Jerry would do with the information and certainly there can be no liability imposed on Estaban for Jerry using the information provided in a social setting as ‘financial advice’ or to have established a ‘special relationship’.