

HEDLEY BYRNE AND PRE-CONTRACTUAL MISREPRESENTATIONS: TORT LAW TO THE AID OF CONTRACT?

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One of the weakest areas of Canadian contract law concerns the remedies for innocent (*i.e.* non-fraudulent) misrepresentation which, by and large, are still governed by rules that are archaic and inadequate.¹ If *A*, during the course of negotiations, honestly but carelessly makes a false statement of fact which induces *B* to enter into a contract with him and the mis-statement does not amount to a contractual term, it is trite law that *B* has no remedy in damages, at least at common law.² As Lord Moulton stated in *Heilbut, Symons & Co. v. Buckleton*, "in order to establish a cause of action [in contract] sounding in damages for misrepresentation, the statement must be fraudulent"³ *B*'s only redress under the ordinary law of contract is to rescind the contract and claim indemnity. But even this limited remedy may not always be available because the power to rescind a voidable contract is subject to certain equitable bars.⁴

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¹ See generally G. FRIDMAN, *THE LAW OF CONTRACT IN CANADA* 118-21 (1976); S. WADDAMS, *THE LAW OF CONTRACTS* 248-57 (1977); Williams, *Misrepresentation in Commercial Transactions*, in *STUDIES IN CANADIAN BUSINESS LAW* 25-48 (G. Fridman ed. 1971).

² *Aliter* if there is a fiduciary relationship between the parties and the conduct of the representor amounts to a breach of a fiduciary obligation. See, *e.g.*, *Nocton v. Lord Ashburton*, [1914] A.C. 932, 83 L.J.Ch. 784 (H.L.); *Laskin v. Bache & Co.*, [1972] 1 O.R. 465, 23 D.L.R. (3d) 385 (C.A. 1971). The governing principles were recently reviewed in *Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada*, 17 O.R. (2d) 529, 81 D.L.R. (3d) 139 (C.A. 1977), *aff'd* 5 O.R. (2d) 137, 49 D.L.R. (3d) 641 (H.C. 1974).

³ [1913] A.C. 30, at 49, 82 L.J.K.B. 245, at 256 (H.L. 1912).

⁴ *Viz.*, affirmation or undue delay (*United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330, 78 L.J.P.C. 101); inability to effect *restitutio in integrum* (*Steedman v. Frigidaire Corp.*, [1932] 3 W.W.R. 544, [1933] 1 D.L.R. 161 (P.C.)); third party rights (*Domenco v. Domenco*, 44 W.W.R. 549, 41 D.L.R. (2d) 267 (Man. Q.B. 1963)) and the bar on rescinding executed contracts. This controversial bar applies to contracts dealing with land (*Redican v. Nesbitt*, [1924] S.C.R. 135, [1924] 1 D.L.R. 536 (1923)) and perhaps also to contracts dealing with chattels, although the status of *Seddon v. N.E. Salt Co.* [1905] 1 Ch. 326, 74 L.J.Ch. 199 (1904) in Canada is open to debate. See FRIDMAN, *supra* note 1, at 119-21; cf. WADDAMS, *supra* note 1, at 251-55 and Ziegel, *Reform of the Law of Innocent Misrepresentation*, 27 SASK. B. REV. 134 (1962). In many cases, involving both land and chattels, the courts have managed to avoid injustice by the generous use of the doctrine of *error in substantialibus* (see, *e.g.*, *Alessio v. Jovica*, [1974] 2 W.W.R. 126, 42 D.L.R. (3d) 242 (Alta. C.A. 1973); *Wiebe v. Butchart's Motors Ltd.*, [1949] 2 W.W.R. 688, [1949] 4 D.L.R. 838 (B.C.C.A.)); ignoring the rule in *Seddon* (*F. & B. Transp. Ltd.*

Sometimes the courts will aid the representee by characterizing the representation as a contractual term where justice so requires and the pleadings permit.⁵ Since the distinction between a representation and a warranty ultimately turns on the elastic criterion of intention, in many cases this is not a difficult judicial exercise.⁶ However, even where this is feasible it may not always assist the representee if there are exclusion clauses in the contract.⁷ Furthermore, while calling a misrepresentation a warranty may serve the ends of justice in a particular case, it introduces an element of unpredictability into an area where the legal boundaries are already difficult to draw.

Faced with similar inadequacies in the ordinary law, England and some parts of Australia have enacted comprehensive legislation which considerably strengthens the representee's right of rescission and also enables the court to award damages instead of rescission where it is deemed appropriate to do so.⁸ In Canada, however, statutory reform has so far been fragmentary and of limited scope, affecting only consumer contracts made in the four provinces that have enacted consumer legislation against unfair trade practices. In Alberta, British Columbia, Ontario and Prince Edward Island, a representee who is induced to enter into a "consumer contract" by false, misleading or

v. White Truck Sales Manitoba Ltd., 51 W.W.R. 124, 49 D.L.R. (2d) 670 (Man. C.A. 1965)); refusing to apply it (*Bevan v. Anderson*, 23 W.W.R. 508, 12 D.L.R. (2d) 69 (Alta. S.C. 1957)) or creating *ad hoc* exceptions (*O'Flaherty v. McKinley*, 30 M.P.R. 172, [1953] 2 D.L.R. 514 (Nfld. S.C. 1951) and *Ouchar v. Bryan's Car Corner Ltd.*, [1975] W.W.D. 123 (Alta. Dist. C.)). Nevertheless, to echo the remarks of the Report of the English LAW REFORM COMMITTEE, (TENTH REPORT) (INNOCENT MISREPRESENTATION) Cmnd. 1782 (1962), para. 9, it cannot be right that a matter of such everyday importance should have to be settled by the accidents of litigation.

⁵ As Lord Denning, with his usual candour, admitted recently in a case that illustrates many of the problems in this area: "[T]here have been many cases since I have sat in this court where we have readily held a representation — which induces a person to enter into a contract — to be a warranty sounding in damages." *Esso Petroleum Co. v. Mardon*, [1976] 1 Q.B. 801, at 817, [1976] 2 All E.R. 5, at 13 (C.A.), *varying* [1975] 1 Q.B. 819, [1975] 1 All E.R. 203 (1974), discussed *infra*.

⁶ "An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended". *Heilbut, Symons & Co. v. Buckleton*, *supra* note 3, at 49, 82 L.J.K.B. at 256, *per* Lord Moulton attributing the test — perhaps wrongly — to Holt C.J. (see Atiyah, *Misrepresentation, Warranty and Estoppel*, 9 ALTA. L. REV. 347, at 348-49 (1971)). Whatever its origins, it is the accepted test in Canada. See, e.g., *Richview Constr. Co. v. Raspa*, 11 O.R. (2d) 377, 66 D.L.R. (3d) 193 (C.A. 1975) and *Yorke v. Duval*, 9 W.W.R. (N.S.) 523, at 524, [1953] 3 D.L.R. 820, at 821 (B.C.C.A.).

⁷ I.e. excluding liability for breach of a contractual term but not for misrepresentation. Very often, of course, both, and more, are excluded. See generally Côté, *Exculpatory Clauses*, in *STUDIES IN CANADIAN BUSINESS LAW*, *supra* note 1, at 1-24. For an analysis of the various judicial responses, see Waddams, Comment, 49 CAN. B. REV. 578 (1971); and limitations, McLauchlan, *The Inconsistent Contract*, 3 DALHOUSIE. L.J. 136 (1976).

⁸ Misrepresentation Act 1967, U.K. 1967, c. 7; Misrepresentation Act 1971-72 (S. Aust.); Misrepresentation Ordinance 1975 (A.C.T.). The Trades Practices Act 1974-1976 (Aust.), ss. 52, 82 and 87 would also appear to offer a remedy in damages to the representee who is induced to enter into a contract subject to that Act. See Goldring, *The Trades Practices Act 1974-75 and the Law of Innocent Misrepresentation*, 50 AUST. L.J. 126 (1976).

deceptive misrepresentations has certain additional remedies including the recovery of damages and more extensive rights of rescission.⁹ Other contracts, and those made elsewhere, are subject to the ordinary law with all its defects.¹⁰

In sum, the legal position of the representee in the ordinary case is presently unsatisfactory and comprehensive reform is needed. But pending such reform, can the victim of an honest but careless misrepresentation circumvent the deficiencies of the law of contract by framing his action in tort and suing for damages under the principle in *Hedley Byrne & Co. v. Heller & Partners Ltd.*?¹¹ The success of an action in tort would seem to turn on the answers to several questions. First, there is the basic question whether the *Hedley Byrne* principle can apply to a negligent, pre-contractual misrepresentation. The second question is whether the conditions for establishing liability in tort match the prerequisites of an action in contract sufficiently closely so as to make an action under the *Hedley Byrne* principle a practical alternative in most cases of pre-contractual misrepresentations. Finally, assuming liability for a pre-contractual negligent misrepresentation can be and has been established under the *Hedley Byrne* principle, upon what basis are damages to be assessed? These questions are the focus of this paper.

I. DOES THE HEDLEY BYRNE DOCTRINE APPLY TO PRE-CONTRACTUAL MISREPRESENTATIONS?

The decision in *Hedley Byrne & Co. v. Heller & Partners Ltd.* established that in certain conditions negligent words causing economic loss may sometimes give rise to liability in tort.¹²

⁹ The Unfair Trades Practices Act, S.A. 1975, c. 33, as amended by S.A. 1976, c. 54; Trades Practices Act, S.B.C. 1974, c. 96, as amended by S.B.C. 1975, c. 80; The Business Practices Act, 1974, S.O. 1974, c. 131; Business Practices Act, S.P.E.I. 1977, c. 31. For an analysis of the legislation including its limitations, see Belobaba, *Unfair Trades Practices Legislation: Symbolism and Substance in Consumer Protection*, 15 OSGOODE HALL L.J. 327 (1977).

¹⁰ It is possible that a representee could, in some circumstances, recover damages for innocent misrepresentation by virtue of s. 31.1 of the Combines Investigation Act, R.S.C. 1970, c. C-23, as amended by S.C. 1974-75-76, c. 76. That section entitles a person to sue to recover any loss resulting from a breach of Part V of the Act, which contains the provisions against false advertising. False advertising can be as specific as a misrepresentation made orally by a salesman to a customer. See *R. v. Ameublement Dumouchel Furniture Ltd.*, 15 MCGILL L.J. 671 (Ont. Prov. Ct. Feb. 6, 1970). But whether s. 31.1 is constitutionally valid in the light of *MacDonald v. Vapour Canada Ltd.*, [1977] 2 S.C.R. 134, 22 C.P.R. (2d) 1, 66 D.L.R. (3d) 1 (1976) is open to question; this section has not yet been tested in the courts. See generally Hogg & Grover, *The Constitutionality of the Competition Bill*, 1 CAN. BUS. L.J. 197 (1976).

¹¹ [1964] A.C. 465, [1963] 2 All E.R. 575, [1963] 3 W.L.R. 101 (H.L.), adopted in Canada by *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530 (1973).

¹² The literature generated by this landmark decision is voluminous. The leading articles include Stevens, *Hedley Byrne v. Heller: Judicial Creativity and Doctrinal*

The facts of this landmark decision are familiar and need not be repeated except to note that the tort of negligent mis-statement was established in the context of a tripartite situation. *A* (Heller & Partners), by their negligent mis-statement, induced *B* (Hedley Byrne & Co. Ltd.) to enter into a contract with *C* (Easipower Ltd.). Logically, there is no reason that the doctrine should be confined to the three party context. The same right of action should be available in a two party situation where *A*'s negligent mis-statement is a pre-contractual misrepresentation which induces *B* to enter into a contract with *A*. Given the state of law in England when *Hedley Byrne* was handed down, some four years before the Misrepresentation Act 1967, one might therefore have expected the decision to have been recognized as laying at least the basis of a new remedy in tort which could serve to bolster the existing weak remedies available in contract to the representee.

Yet, the initial response of the courts was negative. Almost ten years elapsed before it was finally established that the *Hedley Byrne* doctrine could apply to pre-contractual misrepresentations and, by that time, statutory reforms had rendered the issue moot in some jurisdictions. One can only surmise as to why its acceptance took so long, for there is surprisingly little litigation on the question during this period and it was not until 1974, in the case of *Esso Petroleum Co. v. Mardon*¹³ that the arguments for refusing to apply *Hedley Byrne* to pre-contractual misrepresentations were fully stated, considered and rejected. Drawing on the pleadings in that case, three objections to extending the *Hedley Byrne* principle to pre-contractual misrepresentations may be singled out.

A. *Objections to Using Hedley Byrne in the Pre-contractual Context*

The first stems from certain *dicta* in the *Hedley Byrne* decision itself. The House of Lords did not directly address the question of whether the tort of negligent mis-statement could apply to pre-contractual misrepresentations and some of the pertinent *dicta* to be found in their speeches are equivocal. Lord Reid, at one point, appeared to declare that *Hedley Byrne* could not apply in the contractual sphere: "Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty."¹⁴ This might

Possibility, 27 MODERN L. REV. 121 (1964); Goodhart, *Liability for Innocent but Negligent Misrepresentations*, 74 YALE L.J. 286 (1964); Honoré, *Hedley Byrne & Co., Ltd. v. Heller & Partners. Ltd.*, 8 J. SOC. PUB. T.L. (N.S.) 284 (1965); Glasbeek, *Limited Liability for Negligent Misstatement*, in STUDIES IN CANADIAN TORT LAW 115 (A. Linden ed. 1968).

¹³ *Supra* note 5.

¹⁴ *Supra* note 11, at 483, [1963] 2 All E.R. at 581, [1963] 3 W.L.R. at 107. See also Harman L.J. at the Court of Appeal stage, [1962] 1 Q.B. 396, at 415-16, [1961] 3 All E.R. 891, at 902-03 (C.A.)

account for the later *dictum* of McNair J. in *Oleificio Zucchi S.p.A. v. Northern Sales, Ltd.*, that the submission that *Hedley Byrne* applies between contracting parties is without foundation.¹⁵ On the other hand, it is equally clear from the tenor of Lord Devlin's speech that the new tort was not so limited in principle and did extend to pre-contractual misrepresentations.¹⁶ Other *dicta* in *Hedley Byrne* are somewhat obscure on the point.¹⁷ However, read in context and taken as whole, one is led to agree with Lawson J., in *Esso Petroleum v. Mardon*, that, while the decision offers little direct guidance on this question, "it is not right to regard *Hedley Byrne* as containing anything which excludes the duty of care relationship in a pre-contractual negotiation situation."¹⁸

The second concerns the so-called dichotomy between tort and contract.¹⁹ The direct effect of *Hedley Byrne* was to impose liability in tort where previously there had existed no liability of any kind. In the case of a pre-contractual misrepresentation, the representee has a remedy in contract, in theory if not always in practice, and so the argument goes, his recourse should lie exclusively in contract law. The argument is unconvincing because it focuses on the exceptions to the rule rather than the rule itself. The general rule is that liability in contract and tort may exist concurrently and where the same facts give rise to alternative claims, the plaintiff may select his course of action.²⁰ This was recently reaffirmed by the Ontario Court of Appeal in *Dominion Chain Co. v. Eastern Construction Co.*,²¹ but perhaps the point was most clearly made in the context of negligent pre-contractual misrepresentations by Zelling J. in the Australian case of *Ellul v. Oakes*. He commented:

Causes of action have overlapped for centuries in the law, and always there has been this cry that there ought to be only one cause of action arising out of a given set of facts. It was so when *assumpsit* superseded debt, it was so

¹⁵ [1965] 2 Lloyd's Rep. 496, at 519 (Q.B.).

¹⁶ *Supra* note 11, at 528-30, [1963] 2 All E.R. at 610-11, [1963] 3 W.L.R. at 145-47.

¹⁷ See, e.g., *dicta* by Lord Pearce, *id.* at 539, [1963] 2 All E.R. at 617, [1963] 3 W.L.R. at 154; Lord Morris, *id.* at 502-03, [1963] 2 All E.R. at 594, [1963] 3 W.L.R. at 124; and Lord Hodson, *id.* at 509, [1963] 2 All E.R. at 598, [1963] 3 W.L.R. at 129.

¹⁸ [1975] 1 Q.B. 819, at 831, [1975] 1 All E.R. 203, at 220 (1974). See also Stevens, *supra* note 12, at 155-56; Greig, *Misrepresentations and Sales of Goods*, 87 L.Q.R. 179, at 192-93 (1971).

¹⁹ See generally Poulton, *Tort or Contract*, 82 L.Q.R. 346 (1966); Fridman, *The Interaction of Tort and Contract*, 93 L.Q.R. 422 (1977); J. FLEMING, *THE LAW OF TORTS* 175-78 (5th ed. 1977).

²⁰ "It is trite law that a single act of negligence may give rise to a claim either in tort or . . . in . . . contract." *Lister v. Romford Ice & Cold Storage Co.*, [1957] A.C. 555, at 573, [1957] 1 All E.R. 125, at 131 (H.L. 1956) (Viscount Simonds).

²¹ 12 O.R. (2d) 201, at 208, 68 D.L.R. (3d) 385, at 392 (C.A. 1976), *rev'g in part* 3 O.R. (2d) 481, 46 D.L.R. (3d) 28 (H.C. 1974). See also *Dabous v. Zuliani*, 12 O.R. (2d) 230, 68 D.L.R. (3d) 414 (C.A. 1976), *rev'g in part* 6 O.R. (2d) 344, 52 D.L.R. (3d) 664 (H.C. 1974). For a discussion of these cases and suggestions as to their impact on the law, see Considine, *Some Implications from Recent Cases on the Differences Between Contract and Tort*, 12 U.B.C.L. REV. 85 (1978).

when trover and later conversion superseded detinue, and there are many other such examples. The fact is that the same set of facts may give rise to a number of causes of action and the plaintiff elects which one will best enable him to win his case or gives him the better measure of damages as the case may be.²²

Until very recently it was generally accepted that in a few anomalous cases liability in contract and tort was not concurrent. These exceptions were narrowly defined, affecting principally actions by a client against a solicitor for negligent performance of their contract. In such cases it was thought that the client could sue only in contract.²³ But the status of even these few survivors of the age of formalism must now be regarded as questionable. In *Dabous v. Zuliani*,²⁴ the Ontario Court of Appeal put an end to the exception for architects and, following Lord Denning's lead,²⁵ indicated in the *Dominion Chain* case that it was disposed to abolish all remaining exceptions including "[t]he anachronistic exemption of solicitors from concurrent tort liability".²⁶ Hence, any argument that because the representee has or — if rescission is barred — once had a remedy in contract he is precluded from suing in tort, is unsound.

The third possible objection is that to permit the recovery of damages in tort for what in contract is an innocent misrepresentation would be to ignore Lord Moulton's admonition in *Heilbut, Symons & Co. v. Buckleton* that "[i]t is . . . of the greatest importance . . . [to] maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made."²⁷ There are several answers to this argument which reflects an exaggerated attachment to the outworn philosophy of *caveat emptor*. In the first place, it conveniently ignores the frequent incursions on the strict common law principle made by the courts such as calling a representation a warranty in order to avoid hardship and recent statutory reforms allowing the recovery of damages, both of which have already been noted.²⁸ Secondly, the principle of no damages for non-fraudulent misrepresentations had been abandoned in

²² 3 S.A.S.R. 377, at 390 (C.A. 1972).

²³ *Clark v. Kirby-Smith*, [1964] 1 Ch. 506, [1964] 2 All E.R. 835 (solicitor); *Bagot v. Stevens Scanlan & Co.*, [1966] 1 Q.B. 197, [1964] 3 All E.R. 577 (architect); *Schwebel v. Telekes*, [1967] 1 O.R. 541, 61 D.L.R. (2d) 470 (C.A.) (notary).

²⁴ *Supra* note 21 (Wilson J.A. dissenting).

²⁵ In *Esso Petroleum Co. v. Mardon*, *supra* note 5, at 819-20, [1976] 2 All E.R. at 15.

²⁶ *Supra* note 21, at 209, 68 D.L.R. (3d) at 393 (*per* Jessup J.A., Zuber J.A. concurring; Wilson J.A. dissented). The matter had not been settled for the decision was appealed to the Supreme Court (*sub nom.* *Giffels Associates Ltd. v. Eastern Construction Co.*, 19 N.R. 298, 84 D.L.R. (3d) 344 (S.C.C. 1978)). The appeal was dismissed but Laskin C.J.C., delivering judgment for the Court, did not deal with the issue of concurrent liability. In another recent case, *Smith v. McInnis* (S.C.C. Mar. 7, 1978), one of the issues was whether a solicitor was liable to his client in tort or only in contract. Unfortunately, the appeal was decided without examining this issue (Pigeon and Beetz JJ. dissenting).

²⁷ *Supra* note 3, at 51, 82 L.J.K.B. at 257.

²⁸ See text between notes 5 and 9, *supra*.

theory even before *Hedley Byrne* was decided. In 1962, a Report of the English Law Reform Committee recommended a remedy in damages for non-fraudulent misrepresentation as an alternative to rescission.²⁹ Another answer to this objection was provided by Lord Pearce in the *Hedley Byrne* decision. The true rule, he said, is not that an innocent misrepresentation gives no right to damages but that alone and *per se* it can give no right to damages.³⁰ If there is something more, such as a duty of care imposed on the representor either in equity because of a fiduciary relationship between the parties or in tort by virtue of a special relationship between the parties, damages can be recovered for a non-fraudulent misrepresentation made in breach of that duty.

B. *The Canadian Cases*

After initial hesitation the courts in Australia, England and New Zealand accepted that the *Hedley Byrne* principle could apply to pre-contractual misrepresentations.³¹ In Canada, however, the situation remained uncertain until quite recently. In *Walter Cabott Construction Ltd. v. The Queen*,³² Mahoney J. of the Trial Division of the Federal Court was prepared to apply the *Hedley Byrne* principle to award damages for a negligent misrepresentation inducing the contract between the parties. However, it was only one of several grounds in a judgment which suffers from certain internal inconsistencies.³³ The decision was varied on appeal and the Federal Court of Appeal made no reference to this issue.³⁴ The new grounds for decision were based exclusively on breach of contractual terms. A further weakness in Mahoney J.'s judgment was the absence of any reference to the Supreme Court decision in the *Nunes Diamonds* case and the controversial "independent tort" doctrine propounded by Pigeon J., which has clouded the potential use of the *Hedley Byrne* principle in the contractual context.

In *Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*,³⁵ the plaintiff, a diamond merchant, rented from the defendant an alarm

²⁹ LAW REFORM COMMITTEE (TENTH REPORT), *supra* note 4, para. 17.

³⁰ *Supra* note 11, at 539, [1963] 2 All E.R. at 617.

³¹ England: *Esso Petroleum Co. v. Mardon*, *supra* note 5; Australia: *Dillingham Constructions Pty. v. Downs*, [1972] 2 N.S.W.L.R. 49 (S.C.); New Zealand: *Capital Motors Ltd. v. Beecham*, [1975] 1 N.Z.L.R. 576 (S.C.). See generally Ruff, *Esso Petroleum Co. Ltd. v. Mardon: When is a Misstatement not a Misrepresentation?*, 11 LAW TEACHER 100 (1977).

³² 44 D.L.R. (3d) 82 (F.C. Trial D. 1974), varied 12 N.R. 285, 69 D.L.R. (3d) 542 (F.C. App. D. 1975). See also *Reid v. Traders Gen. Ins. Co.*, 41 D.L.R. (2d) 148 (N.S.S.C. 1963), an early case where it was assumed, without discussion, that the *Hedley Byrne* doctrine applied to pre-contractual misrepresentations.

³³ It is unclear from the judgment whether the statements (or omissions) were treated as misrepresentations, warranties, or both. See further Schwartz, *Annual Survey of Canadian Law: Contracts*, 8 OTTAWA L. REV. 588, at 620-22 (1976).

³⁴ *Supra* note 32.

³⁵ [1972] S.C.R. 769, 26 D.L.R. (3d) 699, *aff'g* [1971] 1 O.R. 218, 15 D.L.R. (3d) 26 (C.A. 1970), *aff'g* [1969] 2 O.R. 473, 5 D.L.R. (3d) 679 (H.C.).

system to protect its premises. Following a burglary at the store of a competitor in which an identical alarm system, also rented from the defendant, was circumvented, the plaintiff asked the defendant to send a representative to check its own alarm. The representative found no fault with the system and reassured the concerned plaintiff that "even [their] own engineers could not go through the system without setting an alarm".³⁶ But the alarm system was not foolproof: it could be circumvented in a few minutes by a person who had learned the required technique and possessed the necessary equipment. Some time later, thieves broke into the plaintiff's premises, circumvented the alarm and stole a large quantity of diamonds. The plaintiff sued the defendant in contract and tort. The action in contract failed because the contract expressly provided that the defendant was not an insurer and contained an exemption clause which effectively limited liability for breach of contract to \$50.00. There was also some question as to whether the exemption clause was not effective to limit the defendant's liability in any tort action.³⁷ However, the initial question, so far as the tort action was concerned, was whether the *Hedley Byrne* principle could apply where there was a contractual relationship between the parties. The response of Pigeon J., who delivered judgment for a bare majority of a five man court, was as follows:

[T]he basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of that contract, as expressed in *Elder, Dempster & Co., Ltd. v. Paterson Zochonis & Co., Ltd.* [1924] A.C. 522 at p. 548. This is specially important in the present case on account of the provisions of the contract with respect to the nature of the obligations assumed and the practical exclusion of responsibility for failure to perform them In my view, the representations relied on by appellant cannot be considered as acts independent of the contractual relationship between the parties.³⁸

The precise meaning and ramifications of this statement, which contains one of the grounds for rejecting the claim³⁹ in tort, are unclear.

³⁶ *Id.* at 788, 795, 26 D.L.R. (3d) at 706, 711. The defendant also sent the plaintiff copies of letters addressed to two insurance brokers stating that while no conclusions had been reached as to the cause of the burglary, "[t]he system performed its functions properly". *Id.* at 792, 26 D.L.R. (3d) at 708.

³⁷ The relevant exemption clause provided *inter alia* that "[n]o . . . representations have been made by Dominion Company, its officers, servants or agents other than those endorsed hereon in writing". *Id.* at 783, 26 D.L.R. (3d) at 702 (emphasis added). Did it cover future statements, made after the contract had been signed?

³⁸ *Id.* at 777-78, 26 D.L.R. (3d) at 727-28 (Martland and Judson JJ. concurring).

³⁹ The statement might be regarded strictly as an *obiter dictum*, the reasons for decision being the absence of a special relationship giving rise to a duty of care and, secondly, the absence of a misrepresentation (see WADDAMS, *supra* note 1, at 258-59). Read in context, however, it would appear to be an additional ground for the decision, as suggested by Fridman in *Negligent Misrepresentation*, 22 MCGILL L.J. 1, at 22 (1976), but see Fridman, *supra* note 19, at 429. This is how it was viewed by the Supreme Court in *Rivtow Marine Ltd. v. Washington Iron Works*, *supra* note 11, at 1214, 40 D.L.R. (3d) at 546 (Ritchie J.).

At its narrowest, it may merely reaffirm that an action in tort is subject to the terms of a contract between the parties and may be qualified or excluded by a suitably worded exemption clause.⁴⁰ As understood and rejected by the minority of the Supreme Court in *Nunes Diamonds*, however, and as applied in some subsequent cases, the statement means that the "mere existence of an antecedent contract foreclose[s] tort liability under the *Hedley Byrne* principle"⁴¹ — unless the tort is "unconnected" with the contract. Thus interpreted, the "independent tort" doctrine undermines the common law principle, alluded to earlier, entitling the plaintiff to choose his cause of action where the same facts present alternative bases of liability.

But whatever the true significance of the much criticized "independent tort" doctrine,⁴² it was formulated in the context of a mis-statement

⁴⁰ As, for example, in the recent case of *Peters v. Parkway Mercury Sales Ltd.*, 10 N.B.R. (2d) 703, 58 D.L.R. (3d) 128 (C.A. 1975). Pigeon J. appears to have accepted that the exemption clause covered the statements in question. The reference to *Elder Dempster* is to a passage in Viscount Finlay's judgment concerning the scope of an exemption clause:

[T]he bill of lading provided that the owners are not to be liable for stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. *But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action.* . . .

[1924] A.C. 522, at 548, 93 L.J.K.B. 625, at 637-38 (H.L.) (emphasis added).

Or, as explained by Scrutton L.J. in *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205, at 213, 101 L.J.K.B. 679, at 683: "[W]here the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort: *Elder, Dempster & Co v. Paterson, Zochonis & Co.*, per Lord Cave, Lord Finlay and Lord Sumner."

⁴¹ *Supra* note 35, at 810-11, 26 D.L.R. (3d) at 723 (Spence and Laskin JJ. concurring). See also *Sealand of the Pacific Ltd. v. Ocean Cement Ltd.*, [1973] 3 W.W.R. 60, 33 D.L.R. (3d) 625 (B.C.S.C.), *varied, sub nom.* *Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd.*, [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 702 (B.C.C.A.); *Rivtow Marine Ltd. v. Washington Iron Works*, *supra* note 11; *Porky Packers Ltd. v. The Pas*, [1974] 2 W.W.R. 673, 46 D.L.R. (3d) 83 (Man. C.A.), *rev'd* [1977] 1 S.C.R. 51, 7 N.R. 569, [1976] 3 W.W.R. 138, 65 D.L.R. (3d) 1. However, in *Northwestern Mut. Ins. Co. v. J. T. O'Bryan & Co.*, [1974] 5 W.W.R. 322, 51 D.L.R. (3d) 693 (B.C.C.A.), a judgment delivered only two weeks before the Court of Appeal decision in the *Sealand of the Pacific* case, a differently constituted Court of Appeal held the defendants liable in tort for a negligent mis-statement made in the performance of a contract, without any reference to the *Nunes Diamonds* decision. The *Northwestern* decision was "explained" by the Court of Appeal in the *Sealand of the Pacific* case as an action in tort which arose independently of the contract between the parties, [1974] 6 W.W.R. at 731, 51 D.L.R. (3d) at 709 (*sed quaere*) and was ignored in a very recent decision of the B.C. Supreme Court which accepted and applied the independent tort doctrine in the *Nunes Diamonds* case. See *Beebe v. Robb*, 81 D.L.R. (3d) 349, at 352-53 (B.C.S.C. 1977) (Ruttan J.). See further Blom, *Negligent Misstatement in Contractual Situations and the British Columbia Court of Appeal — Northwestern Mutual Insurance Co. v. J. T. O'Bryan & Co. and Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd.*, 10 U.B.C.L. REV. 145 (1975).

⁴² For a comprehensive discussion see Symmons, *The Problem of the Applicability of Tort Liability to Negligent Mis-statements in Contractual Situations: A Critique on the Nunes Diamonds and Sealand Cases*, 21 MCGILL L.J. 79 (1975). See also Considine, *supra* note 21; Fridman, *supra* note 19, at 428-30 who suggests at 429 that "while there has been some acceptance, or apparent acceptance, of [the independent tort doctrine], it is still open to the courts to reject such an approach". Pigeon J. recently reiterated his "independent tort" doctrine, *dissenting* in *Smith v. McInnis*, *supra* note 26, at 10.

made during the course of performing a contract already concluded between the parties and need not apply to pre-contractual misrepresentations. It is not inconsistent either with the facts of *Nunes Diamonds* or the judgment of Pigeon J. to distinguish pre-contractual misrepresentations where relations between the parties are not yet governed by contract from those made during the performance of the contract and confine the ambit of the independent tort doctrine to the latter.⁴³

This was the path followed by McKay J. in *Sealand of the Pacific Ltd. v. Ocean Cement Ltd.*,⁴⁴ where one of the issues was whether the defendant was liable in tort for the negligent representation of its employee that "zonolite" was a suitable product for lining the display tanks of the plaintiff's oceanarium. Relying on this representation, the plaintiff bought a quantity of zonolite from the defendant which proved to be unsuitable for the purpose. The defendant, citing Pigeon J. in the *Nunes Diamonds* case, argued that the *Hedley Byrne* principle was inapplicable because the relationship between the parties was governed by contract. McKay J. rejected this contention and distinguished *Nunes Diamonds* on the ground that the misrepresentation in question was made "months before any contractual arrangement was entered into" and was therefore outside the ambit of the independent tort doctrine.⁴⁵ He also held the defendant liable for breach of contract. The defendant appealed both findings.

The British Columbia Court of Appeal upheld the finding in contract but cast doubt upon the finding in tort for a pre-contractual negligent misrepresentation although it did not explain why. Seaton J.A., who delivered the judgment of the court, said cryptically:

The trial Judge also found Ocean Cement liable in tort and that finding is challenged on the ground that Sealand relied exclusively upon McHaffie Ltd. The evidence does not support that contention. There are some additional problems in a negligence action but I do not think there is to be any purpose in examining them once liability in contract has been established.⁴⁶

The unspecified "additional problems" referred to by the court may well have included the effect of *Nunes Diamonds* on pre-contractual misrepresentations although there are also other difficulties inherent in the tort action, some of which are discussed below.⁴⁷ For this reason it was not entirely clear after the *Sealand of the Pacific* case whether the

⁴³ Indeed, such a distinction is supported by Pigeon J.'s judgment. Just before formulating his "independent tort" doctrine, Pigeon J. said of the case before him: "It is not a case of misrepresentation leading to the making of a contract." *Supra* note 35, at 777, 26 D.L.R. (3d) at 727.

⁴⁴ *Supra* note 41.

⁴⁵ *Id.* at 69, 33 D.L.R. (3d) at 633.

⁴⁶ *Supra* note 41, at 725, 51 D.L.R. (3d) at 704.

⁴⁷ They may well have concerned the effect that the "special relationship" between the parties has on the measure of damages. See *infra* and the analysis of this decision by Blom, *supra* note 41, at 153 n. 29.

Hedley Byrne principle covered pre-contractual misrepresentations in Canada. The issue has now been settled by the recent decision of the Ontario Court of Appeal in *Sodd Corporation v. Tessis*.⁴⁸

In that case, where the status of *Nunes Diamonds* with regard to pre-contractual misrepresentations was squarely in issue, the Ontario Court of Appeal drew the same distinction as McKay J. in the *Sealand of the Pacific* case,⁴⁹ confining *Nunes Diamonds* to mis-statements made after the formation of the contract between the parties. The defendant was a chartered accountant and licensed trustee in bankruptcy who represented to the plaintiff that the retail value of a certain stock of goods for sale by tender was \$33,500, calculated on the basis of twice their wholesale cost. Relying on this representation the plaintiff was induced to submit what proved to be the successful tender. In fact, as was discovered later, using invoices and catalogues and the same method of calculation, the defendant had overstated the retail value of the stock by approximately 100 per cent. The plaintiff brought an action in damages for the tort of negligent misrepresentation.

The trial judge found that the necessary ingredients for liability under the *Hedley Byrne* principle had been established and that an exemption clause in the contract was ineffective to exclude liability for the misrepresentation. The plaintiff was awarded damages and the judgment of the County Court was upheld by the Court of Appeal.⁵⁰

At trial, the issue whether *Hedley Byrne* could be applied to pre-contractual mis-statements was disposed of in one sentence without any mention of the *Nunes Diamonds* decision. Dymond J. said in an oral judgment:

I believe that the general principle enunciated in the *Hedley Byrne* case and applied in our Courts, has overruled *Oldrieve v. Anderson* [35 O.L.R. 396, 27 D.L.R. 231 (C.A. 1916)] and *King v. Foote* [[1961] O.R. 489, 28 D.L.R. (2d) 337 (H.C.)] as far as the law being that only fraudulent misrepresentation gives rise to an action for damages in cases of this nature.⁵¹

This issue was more fully canvassed in the Court of Appeal. Lacourcière J.A., who delivered the brief judgment of the court, rejected the contention that *Nunes Diamonds* precluded the use of *Hedley Byrne* whenever there existed a contractual relationship between the parties. He said:

We are . . . unable to accept the appellant's argument that, since the relationship between the parties was contractual, the *Hedley Byrne* principle does not apply on the basis of *J. Nunes Diamonds Ltd. v. Dominion Electric Protection*

⁴⁸ 17 O.R. (2d) 158, 79 D.L.R. (3d) 632 (C.A. 1977).

⁴⁹ Without, however, referring to that decision.

⁵⁰ *Supra* note 48, at 161, 79 D.L.R. (3d) at 635. The Court of Appeal also indicated that had the action been argued in contract it would have held that the mis-statement in issue amounted to a breach of a term in a collateral contract. It seems that although the case was argued in tort, the pleadings had been framed in contract.

⁵¹ *Id.* at 159, 79 D.L.R. (3d) at 634.

Co., [1972] S.C.R. 769, 26 D.L.R. (3d) 699; in that case Pigeon, J., observed, at pp. 777-78, that "the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as, 'an independent tort' unconnected with the performance of that contract . . .". However, the present case did, in fact, involve a pre-contractual negligent misrepresentation which induced the plaintiff to submit its tender, and the defendant's liability follows on the authority of *Esso Petroleum Co. Ltd. v. Mardon*, [1976] 2 All E.R. 5; see also *Walter Cabott Construction Ltd. v. The Queen* (1974), 44 D.L.R. (3d) 82; *varied* (1975), 69 D.L.R. (3d) 542, 12 N.R. 285.⁵²

There can no longer be any doubt that the *Hedley Byrne* principle can apply to a negligent misrepresentation inducing a contract between the parties.

II. INGREDIENTS OF LIABILITY

The practical value of the *Hedley Byrne* doctrine as a general means of overcoming the obstacles to recovery in contract for innocent misrepresentation will depend on whether there is a sufficient correspondence between the ingredients of the respective actions.

Reduced to essentials, the action in contract is composed of two fundamental elements: (a) a misrepresentation, consisting of a false statement of fact addressed to the representee and (b) reliance: the representee must rely on the representation as an inducement to enter into a contract with the representor.

A. The Misrepresentation

So far as the representation itself is concerned, the overlap between contract and tort is sufficient to bring within the scope of the tort action most misrepresentations that are actionable in contract. The misrepresentation in tort, as in contract, may consist of words or conduct,⁵³ half-truths⁵⁴ or in those cases where there is a duty to speak, complete silence.⁵⁵ It was thought initially that the *Hedley Byrne* principle was confined to negligent mis-statements made in response to an inquiry or a request for information.⁵⁶ Certainly, all the classic formulations of the

⁵² *Id.* at 160, 79 D.L.R. (3d) at 634-35.

⁵³ Although there appears to be no authority on point, there is no reason to suppose that a "nod or a wink, or a shake of the head" (*Walters v. Morgan*, 3 De G.F. & J. 718, at 724, 45 E.R. 1056, at 1059 (Ch. 1861) (Lord Campbell L.C.)) or any assertive conduct would not constitute representations for the purpose of *Hedley Byrne*. See *Stevens*, *supra* note 12, at 156-57.

⁵⁴ See *With v. O'Flanagan*, [1936] 1 Ch. 575, [1936] 1 All E.R. 727 (C.A.), and its equivalent in tort, *Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, *supra* note 35, at 799, 26 D.L.R. (3d) at 714, where Spence J. described statements by the defendant as "more than a mere 'economy of truth'".

⁵⁵ See, e.g., *Walter Cabott Constr. Ltd. v. The Queen*, *supra* note 32 (failure to disclose that plaintiff would not have exclusive use of site).

⁵⁶ See, e.g., Coote, *The Effect of Hedley Byrne*, 2 N.Z.U.L. Rev. 263, at 276 (1967).

Hedley Byrne principle refer to a party "seeking advice" or "requesting information"⁵⁷ but, although this is, no doubt, its typical domain in practice, the *Hedley Byrne* doctrine is not so limited in law. Like its contractual equivalent, it can also apply to unsolicited negligent mis-statements.⁵⁸ This is clear from several cases where it was recognized that liability could be imposed for negligent mis-statements contained in a corporate prospectus,⁵⁹ or made by securities salesmen⁶⁰ or used car salesmen⁶¹ as part of their sales pitch, or in the listings of a real estate agent.⁶²

In one respect the scope of the *Hedley Byrne* principle is wider than the action in contract for it encompasses mis-statements of law⁶³ and opinion⁶⁴ as well as false statements of fact. In another respect, it is narrower: proof that the representation is inaccurate will suffice for an action in contract but to found liability in tort the erroneous representation must also have been made negligently. But so far as the representation is concerned, the extra requirement of carelessness is wide enough to cover most pre-contractual misrepresentations involving some degree of culpability. Thus, in a recent case, it was accepted that a misrepresentation made by an inexperienced used car salesman, who did not bother to check beforehand, that a vehicle was "in good shape" when in fact it required extensive mechanical repairs, was a negligent misrepresentation for the purpose of *Hedley Byrne*.⁶⁵ An "honest blunder" will usually suffice.

B. *Reliance*

The other key element, reliance by the representee or, in this context, inducement to enter into the contract, is common to both actions but subject to certain differences.⁶⁶ Reliance for the purposes of

⁵⁷ See Lord Reid in the *Hedley Byrne* decision, *supra* note 11, at 486, [1963] 2 All E.R. at 583; Lord Diplock in *Mutual Life & Citizens' Assurance Co. v. Evatt*, [1971] A.C. 793, at 802-03, [1971] 1 All E.R. 150, at 155, [1971] 2 W.L.R. 23, at 29 (P.C. 1970).

⁵⁸ See P. ANISMAN, TAKEOVER BID LEGISLATION IN CANADA: A COMPARATIVE ANALYSIS 308-09 (1974).

⁵⁹ *Coleman v. Myers*, [1977] 2 N.Z.L.R. 298 (C.A.), *rev'g* [1977] 2 N.Z.L.R. 225 (S.C. 1976).

⁶⁰ *Central B. C. Planers Ltd. v. Hocker*, 72 W.W.R. 561, 10 D.L.R. (3d) 689 (B.C.C.A. 1970), *aff'd* [1971] S.C.R. v. [1971] 5 W.W.R. 89, 16 D.L.R. (3d) 368; *Culling v. Sansai Securities Ltd.*, [1974] 3 W.W.R. 686, 45 D.L.R. (3d) 456 (B.C.S.C.); *Elderkin v. Merrill Lynch, Royal Securities Ltd.*, 22 N.S.R. (2d) 218, 80 D.L.R. (3d) 313 (C.A. 1977).

⁶¹ *Peters v. Parkway Mercury Sales Ltd.*, *supra* note 40.

⁶² *Hopkins v. Butts*, 65 D.L.R. (2d) 711 (B.C.S.C. 1967).

⁶³ See, e.g., *Porky Packers Ltd. v. The Pas*, *supra* note 41; *Welbridge Holdings Ltd. v. Winnipeg*, [1971] S.C.R. 957, [1972] 3 W.W.R. 433, 22 D.L.R. (3d) 470.

⁶⁴ At least there will be no need to convince a court that a statement of opinion is really one of fact (see *Bowen L.J.* in *Smith v. Land and House Property Corp.*, 28 Ch. D. 7, 51 L.T. 718 (C.A. 1884)).

⁶⁵ *Peters v. Parkway Mercury Sales Ltd.*, *supra* note 40.

⁶⁶ See S. STOLJAR, MISTAKE AND MISREPRESENTATION 90-91 (1968).

contract is a subjective element: was the representee in fact induced, either in whole or in part, by the misrepresentation to make the contract?⁶⁷ Liability in tort can arise only if in addition to actual reliance, it was reasonable for the representee to rely on the misrepresentation and the representor knew or ought to have realized that the representee would do so.⁶⁸ However, these distinctions may be of little practical consequence particularly if, as some contend, there exists an additional requirement in contract that in order to be actionable the misrepresentation be material, in the sense that a reasonable man would have been influenced by it in deciding whether to enter the contract.⁶⁹ Even on the other view, that materiality affects only proof of inducement, so that reliance will be presumed where the representation is material but must be proved by the representee where it is not,⁷⁰ the examples of cases where liability has been imposed in contract or has turned on actual but unreasonable reliance on a false statement of fact are rare indeed. The approximate match between the corresponding requirements of reliance in tort and contract is sufficient in practice to cover most pre-contractual misrepresentations which mislead the representee into concluding a contract.⁷¹

C. *Duty of Care*

The real stumbling block to the potential use of *Hedley Byrne* as a general remedy for pre-contractual misrepresentations is, of course, proof that the representor owes a duty of care. In order to be liable in negligence the representor must owe a duty of care to the representee and under the *Hedley Byrne* principle the duty of care arises only if there is a "special relationship" between the parties. Various formulations of the special relationship requirement were proposed in *Hedley Byrne* and while one might agree with one learned commentator that it is "consonant with the tenor of the judgment in the *Hedley Byrne* case that

⁶⁷ *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 55 L.J. Ch. 650 (C.A. 1885).

⁶⁸ See *Hedley Byrne & Co. v. Heller & Partners Ltd.*, *supra* note 11, at 486, [1963] 2 All E.R. at 583, [1963] 3 W.L.R. at 109 (Lord Reid); *Patrick L. Roberts Ltd. v. Sollinger Industries Ltd.*, 19 O.R. (2d) 44, at 50-51, 84 D.L.R. (3d) 113, at 118-19 (C.A.); and *Porky Packers Ltd. v. Town of The Pas*, *supra* note 41, at 68, 7 N.R. at 583, [1976] 3 W.W.R. at 151, 65 D.L.R. (3d) at 13.

⁶⁹ So that the representation must (1) be of such a nature as would induce a person to enter into a contract and (2) actually induce, or contribute to inducing the contract: *Smith v. Chadwick*, 20 Ch. D. 27, at 44, 51 L.J. Ch. 597, at 601 (C.A. 1882). See also G. TREITEL, *THE LAW OF CONTRACT* 222-23 (4th ed. 1975).

⁷⁰ See, e.g., Vol. I, CHITTY ON CONTRACTS paras. 365-66 (24th ed. A. Guest 1977).

⁷¹ For a detailed analysis, see Stevens, *supra* note 12, at 155-61. Difficult problems of causation and establishing the extent of the duty of care exemplified by *Haig v. Bamford*, [1977] 1 S.C.R. 466, 9 N.R. 43, [1976] 3 W.W.R. 331, 72 D.L.R. (3d) 68, *rev'g* [1974] 6 W.W.R. 236, 53 D.L.R. (3d) 85 (Sask. C.A.), *rev'g* [1972] 6 W.W.R. 557, 32 D.L.R. (3d) 66 (Sask. Q.B.) do not arise in two-party situations.

persons negotiating a contract would *ordinarily* be amongst those who stand in a special relationship to each other in regard to the statements which pass between them relative to the contemplated transaction",⁷² the law on this question is still unsettled. In the light of subsequent cases, particularly the leading decision of the Privy Council in *Mutual Life and Citizens' Assurance Co. v. Evatt*,⁷³ there would appear to exist two divergent views as to when there exists a special relationship sufficient to impose a duty of care.

1. *The Special Relationship Requirement: Two Views*

The first is the restrictive interpretation of *Hedley Byrne*, expounded by Lord Diplock, delivering the judgment for the majority of the Privy Council in *Mutual Life v. Evatt*. According to this view, "special relationships" are restricted to particular categories of persons or particular types of situations. A duty of care is imposed only on those carrying on, or claiming to carry on, "a business or profession which involves the giving of advice of a kind which calls for special skill and competence".⁷⁴ Liability in tort for a negligent misrepresentation could arise only if it were shown that the representor fell within one of these categories and had failed to conform to an "ascertainable standard of skill and competence in relation to the subject-matter of the advice".⁷⁵ Thus, the majority of the Privy Council denied recovery to Evatt for negligent advice provided gratuitously by an insurance company in which he was a policy-holder because he had failed to allege⁷⁶ that the defendant insurance company carried on the business of giving information on investments or that it had, or claimed to have, any special skills or competence.

In contrast is the broad test which Lords Reid and Morris formulated as members of the House of Lords in the *Hedley Byrne* decision and restated in substance as the dissenting members of the Privy Council in *Mutual Life v. Evatt*. In *Hedley Byrne* Lord Reid stated that he could see:

no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him

⁷² M. MILLNER, *NEGLIGENCE IN MODERN LAW* 141 (1967) (emphasis added).

⁷³ *Supra* note 57, analyzed by Lindgren, *Professional Negligence in Words and The Privy Council*, 46 *AUST. L.J.* 176 (1972); Rickford, *A Mirage in the Wilderness: Hedley Byrne Considered*, 34 *MODERN L. REV.* 328 (1971).

⁷⁴ *Id.* at 805, [1971] 1 *All E.R.* at 157, [1971] 2 *W.L.R.* at 31.

⁷⁵ *Id.* at 803, [1971] 1 *All E.R.* at 156, [1971] 2 *W.L.R.* at 29.

⁷⁶ The action was on a demurrer.

to do that, and where the other gave the information or advice which he knew or ought to have known that the inquirer was relying on him."⁷⁷

In *Mutual Life v. Evatt*, joined by Lord Morris, he said: "We can see no ground for the distinction that a specially skilled man must exercise care but a less skilled man need not do so. We are unable to accept the argument that a duty to take care is the same as the duty to conform to a particular standard of skill."⁷⁸

This formulation would impose a duty of care whenever the representor can reasonably be said to have assumed responsibility for the accuracy of his statement. It has the merits of breadth and flexibility, for it excludes only statements made in a purely social context and recognizes the futility of trying to lay down hard-and-fast rules as to when a duty of care arises.⁷⁹ It allows the sphere of special relationships to be drawn according to the needs of society, which, as Lord Pearce said in *Hedley Byrne*, is the proper gauge to determine the scope of the duty of care.⁸⁰ It is also far more conducive to the development of a general remedy in tort for honest but careless pre-contractual misrepresentations for, unlike the majority view in *Mutual Life v. Evatt*, it does not exclude from its ambit ordinary commercial relationships where the representor neither has nor lays claim to any special status or defined skills, or transactions between private individuals, where the representor is not in the business of giving advice or information but can reasonably be taken to have assumed responsibility for the accuracy of his representation. The minority view in *Mutual Life v. Evatt* would certainly provide the more effective remedy for negligent pre-contractual misrepresentations.⁸¹

⁷⁷ *Supra* note 11, at 486, [1963] 2 All E.R. at 583, [1963] 3 W.L.R. at 109. Lord Morris said:

[I]f in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice 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.

Id. at 503, [1963] 2 All E.R. at 594, [1963] 3 W.L.R. at 124.

⁷⁸ *Supra* note 73, at 812, [1971] 1 All E.R. at 163, [1971] 2 W.L.R. at 37.

⁷⁹ "When, in the past, judges have attempted to lay down rigid rules or classifications or categories in negligence they have later had to be abandoned." Lords Reid and Morris, dissenting, in *Mutual Life v. Evatt*, *id.* at 810, [1971] 1 All E.R. at 162, [1971] 2 W.L.R. at 36.

⁸⁰ "How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others." *Supra* note 11, at 536, [1963] 2 All E.R. at 615, [1963] 3 W.L.R. at 152.

⁸¹ As MILLNER wrote, before the decision in *Mutual Life v. Evatt*:

The volunteering of information as well as the exchange of question and answer in this situation are normally seriously intended, pertinent to the conclusion of a specific contract, and understood by both parties to be so. . . . [T]he element of reliance is ordinarily a prominent feature in negotiations, increasing in strength as the matters referred to fall more exclusively within the knowledge of the representor. And, what is more important, the average person would, unless there are special features in the particular negotiations, think it probable that what he says will be a significant factor in determining the other party's decision.

Supra note 72, at 40-41.

In England, it would appear that the majority view in *Evatt* has been rejected as an undesirable gloss on the *Hedley Byrne* principle. In *Esso Petroleum Co. v. Mardon*,⁸² the recent leading decision which belatedly recognized that the *Hedley Byrne* principle is applicable to pre-contractual negligent misrepresentations, the trial judge and a majority of the Court of Appeal declined to adopt the majority view in *Evatt* as the governing criterion for determining the existence of a duty of care. The plaintiff, Mardon, had been induced to lease a service station from the defendants as a result of a grossly inaccurate estimate of projected gasoline sales made by its experienced but negligent representative. In an action for damages,⁸³ Lawson J. at first instance held that the erroneous estimate was, in law, a negligent pre-contractual misrepresentation and proceeded to award substantial damages under the *Hedley Byrne* principle.⁸⁴ The Court of Appeal upheld this finding but only as a secondary, alternative *ratio*, for they disagreed with Lawson J. about the legal character of the statements in issue. The estimate was, in their view, a contractual term, not a representation, so the principal basis of their decision in favour of Mardon was, therefore, breach of warranty.⁸⁵

One of the issues which fell to be considered under the head of negligent misrepresentation was the question of the "special relationship between the parties" and thus, the Privy Council decision in *Mutual Life v. Evatt*. Ormrod L.J. stated with respect to that decision: "Like Lawson J. I much prefer the reasoning of the minority . . . and think that it should be followed. If the majority view were to be accepted, the effect of *Hedley Byrne* would be so radically curtailed as to be virtually eliminated."⁸⁶ In a later passage, he observed: "There is no magic in the phrase 'special relationship'; it means no more than a relationship the nature of which is such that one party, for a variety of possible reasons, will be regarded by the law as under a duty of care to the other."⁸⁷ He left no doubt that, in his view, the critical question was that posed by Lord Reid in *Hedley Byrne*; namely, whether the representor had in the

⁸² *Supra* note 5.

⁸³ The action was by way of counter-claim and had to be decided according to common law principles since the cause of action arose in 1963, four years before the enactment of the Misrepresentation Act 1967, U.K. 1967, c. 7. S. 5 of that Act provides: "Nothing in this Act shall apply in relation to any misrepresentation or contract of sale which is made before the commencement of this Act."

⁸⁴ In a separate unreported judgment by Lawson J. (Q.B. Jan. 13, 1975), summarized in [1976] 1 Q.B. at 806.

⁸⁵ For an analysis of the decision at first instance see Ziegel, *Tortious Liability for Pre-contractual and Intra-contractual Misrepresentations*, 1 Can. Bus. L.J. 259 (1975); Sealy, *Hedley Byrne and Contracting Parties*, [1975] Camb. L.J. 194; and in the Court of Appeal see Sealy, *Negligent Misstatement in the Court of Appeal*, [1976] C.A.M.B. L.J. 221; Gravells, *Negligent Misrepresentation — A Wasted Opportunity for Clarification*, 39 Modern L. Rev. 462 (1976).

⁸⁶ *Supra* note 5, at 827, [1976] 2 All E.R. at 22.

⁸⁷ *Id.* at 827-28, [1976] 2 All E.R. at 22.

circumstances assumed responsibility for the accuracy of the representation. Shaw L.J. was less explicit on the point but made it clear that he, too, favoured the same approach.⁸⁸ On the other hand, Lord Denning M.R. expressly adopted the majority view in *Evatt*, which, he said, incorporated the test he himself had formulated in *Candler v. Crane, Christmas & Co.*⁸⁹ Nevertheless, he held, even judged by this strict criterion, the relationship between the parties in this instance was such as to impose upon the defendant a duty of care. "[I]t is plain that Esso professed to have — and did in fact have — special knowledge or skill in estimating the throughput of a filling station."⁹⁰ It is significant that the Court of Appeal in *Esso Petroleum v. Mardon* did not have to choose between those competing criteria in order to hold the defendant liable because the relationship between the parties was such as to impose a duty of care on either view in *Evatt*. Yet, the court did so and a majority of its members preferred the minority view.⁹¹

2. *Mutual Life v. Evatt* in Canada

In Canada, the legal situation is less clear. As in England, the Privy Council decision in *Mutual Life v. Evatt* is of only persuasive authority but, so far, it has neither been expressly rejected nor adopted by the Supreme Court. It has been discussed and commented upon in several Supreme Court decisions but the Court has yet to provide a clear indication as to which of the competing views in *Evatt* is to apply in Canada.⁹² The closest the Supreme Court has yet come to dealing

⁸⁸ "I agree entirely with the reasons and conclusions of the judge on [the negligence issue]." *Id.* at 832, [1976] 2 All E.R. at 26.

⁸⁹ It follows that I cannot accept [counsel for Esso's proposition]. It seems to me that *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another — be it advice, information or opinion — with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side into a contract with him, he is liable in damages. This proposition is in line with what I said in *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164, 179-180, which was approved by the majority of the Privy Council in *Mutual Life and Citizens' Assurance Co Ltd. v. Evatt*, [1971] A.C. 793.

Id. at 820, [1976] 2 All E.R. at 16. However, Lord Denning's views on the appropriate criterion have not been entirely consistent: cf. the overt public policy approach he advocated in *Dutton v. Bognor Regis Urban District Council*, [1972] 1 Q.B. 373, at 397, [1972] 1 All E.R. 462, at 475 (C.A.).

⁹⁰ *Supra* note 5, at 820, [1976] 2 All E.R. at 16.

⁹¹ See CHARLESWORTH ON NEGLIGENCE, para. 934 n. 51 (6th ed. R. Percy 1977): "[T]he limitation on the duty of care, opined by the Judicial Committee, has been firmly rejected by the English courts in *Esso Petroleum Co. Ltd. v. Mardon*. . . ."

⁹² See generally Fridman, *Negligent Misrepresentation*, *supra* note 39 and *Negligent Misrepresentation: A Postscript*, 22 MCGILL L.J. 649 (1976); A. LINDEN, CANADIAN TORT LAW ch. 12 (1977).

directly with this question was in the *Nunes Diamonds* case,⁹³ where the nature of the special relationship requirement was one of the issues which divided the Court, although not one upon which the decision turned. Pigeon J. for the majority cited with seeming approval Lord Diplock's narrow test in *Mutual Life v. Evatt*⁹⁴ and concluded that the defendant owed no duty of care with respect to an honest but inaccurate statement about the expected performance of the alarm system it had supplied to the plaintiffs. "This [was] not", he said, "a case where a person seeks information from another, whose business it is to give such information."⁹⁵ If it had been found that there had been a careless misrepresentation by the defendants and liability in tort was not barred by either the "independent tort" doctrine or the exemption clause in the contract then the plaintiff's action would still have failed because, according to the majority view in *Evatt*, there was no special relationship between the parties. Spence J., for the dissentients, disagreed. He made no reference at all to the decision in *Mutual Life v. Evatt* but, quoting extensively from the speeches of Lords Reid, Morris and Devlin in the *Hedley Byrne* decision, made it clear that he preferred the broad criterion according to which the defendant did owe a duty of care.⁹⁶ Thus, in the *Nunes Diamonds* case, a narrow majority of the Supreme Court would seem to have indicated its approval of the narrow majority judgment in *Mutual Life v. Evatt*.

The majority view in *Evatt* received a similarly oblique but more equivocal nod of approval in a later Supreme Court decision, *Hodgins v. Hydro-Electric Commission of Nepean*.⁹⁷ In that case, the alleged negligent mis-statement consisted of an inaccurate estimate of the cost of heating a proposed extension to a house which was to include an indoor swimming pool.

The Ontario Court of Appeal evidently considered the majority view in *Mutual Life v. Evatt* to be the appropriate test in Ontario, although no reference was made to the *Nunes Diamonds* decision. Evans J.A., who delivered the judgment of the court, stated:

⁹³ *Supra* note 35.

⁹⁴ *Id.* at 775-76, 26 D.L.R. (3d) at 726-27.

⁹⁵ *Id.* at 777, 26 D.L.R. (3d) at 727.

⁹⁶ He adopted (*id.* at 807, 26 D.L.R. (3d) at 720), as a summary of the law, the following passage from FLEMING, *THE LAW OF TORTS* 564 (4th ed. 1971):

The sheet anchor of a duty of care is the speaker's assumption of responsibility for what he says. In other words, the recipient must have had reasonable grounds for believing that the speaker expected to be trusted. There is a world of difference, e.g., between casual statements on social or informal occasions and serious communications made in circumstances warranting reliance. Usually, though by no means exclusively, the latter are encountered in the sphere of business or professional affairs, though not necessarily between persons linked by a contractual or fiduciary tie in the conventional sense.

⁹⁷ [1976] 2 S.C.R. 501, 6 N.R. 451, 60 D.L.R. (3d) 1 (1975), *aff'd* 10 O.R. (2d) 713 (C.A. 1973), *rev'd* [1972] 3 O.R. 332, 28 D.L.R. (3d) 174 (Ct. Ct.).

I am of the opinion that following the principle enunciated in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, and further considered in *Mutual Life & Citizen's [sic] Ass'ce Co. Ltd. et al. v. Evatt*, [1971] 1 All E.R. 150, that there was a duty of care owed to the plaintiff by the defendant. Runions was a person with special skills from whom the plaintiff sought information and Runions knew that the plaintiff intended to rely, and did in fact rely, on the heating cost statements which Runions prepared as a result of his special skill and competence. Moreover, it was part of the ordinary business carried on by the defendant to prepare heating cost estimates.⁹⁸

The Ontario Court of Appeal agreed with the trial judge that the defendant owed a duty of care but allowed the appeal on the ground that the defendant had committed no breach of duty.

In the Supreme Court, Ritchie J., for the majority, citing a familiar passage from Lord Reid's judgment in *Hedley Byrne*,⁹⁹ held that "the respondent must be taken 'to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship' with the appellant requiring its employee to exercise 'such care as the circumstances require'." ¹⁰⁰ But he turned to Lord Diplock's judgment in *Mutual Life v. Evatt* to determine the meaning of that phrase:

The words "such care as the circumstances require" as employed in the *Hedley Byrne* case, *supra*, are made the subject of comment in *Mutual Life & Citizens' Ass'ce Ltd. et al. v. Evatt*, [1971] 1 All E.R. 150, where Lord Diplock observed in the course of delivering his opinion at p.159:

... in their Lordships' view the reference to "such care as the circumstances require" pre-supposes an ascertainable standard of skill, competence and diligence with which the advisor is acquainted or has represented that he is.¹⁰¹

The intriguing question is whether Ritchie J. is to be understood as having accepted implicitly the other qualifications on Lord Reid's judgment contained in the rest of that passage, which continued:

Unless he carries on the business or profession of giving advice of that kind he cannot be reasonably expected to know whether any and if so what degree of skill, competence or diligence is called for, and a fortiori, in their Lordships' view, he cannot be reasonably held to have accepted the responsibility of conforming to a standard of skill, competence and diligence of which he is unaware, simply because he answers the inquiry with knowledge that the

⁹⁸ 10 O.R. (2d) at 715.

⁹⁹ A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

Supra note 11, at 486, [1963] 2 All E.R. at 583, [1963] 3 W.L.R. at 109 (Lord Reid).

¹⁰⁰ *Supra* note 97, at 507, 6 N.R. at 456, 60 D.L.R. (3d) at 9.

¹⁰¹ *Id.* at 508, 6 N.R. at 457, 60 D.L.R. (3d) at 10.

advisee intends to rely on his answer. This passage should in their Lordships' view be understood as restricted to advisers who carry on the business or profession of giving advice of the kind sought and to advice given by them in the course of that business.¹⁰²

The majority of the Supreme Court agreed with the Ontario Court of Appeal that there had been no breach of duty because they could find:

no evidence that Runions acted carelessly or failed to live up to the ascertainable standard of competence and diligence existing in the electrical heating field in 1967 as described by the expert, Scott. On the contrary, the evidence appears to me to indicate that Runions complied with such standards as were then ascertainable. The estimate was an opinion and the fact that the respondent company was known to be in the business of making heating cost estimates does not convert it into a guaranteed cost.¹⁰³

The Supreme Court had another opportunity to clarify the legal status in Canada of *Mutual Life v. Evatt* in the later decision of *Porky Packers Ltd. v. Town of The Pas*.¹⁰⁴ In that case, the defendant municipality had been held liable in tort for selling land to the plaintiff company for the construction of an abattoir and subsequently encouraging the plaintiff to continue building the plant after it was discovered that the proposed use contravened health by-laws and that objectors had instituted what proved to be successful proceedings to annul the sale. Matas J.A., delivering judgment for the Manitoba Court of Appeal,¹⁰⁵ affirmed the decision of the trial judge that the municipality was under a duty of care. Referring to the *Hedley Byrne* decision, he stated:

For a limitation on the *Hedley Byrne* principle see *Mutual Life & Citizens' Assurance Co. Ltd. et al. v. Evatt*, [1971] 1 All E.R. 150; for an extension of it see *Dutton v. Bognor Regis United Building Co. Ltd. et al.*, [1972] 1 All E.R. 462, [1972] 1 Q.B. 373. And for a recent example of applying the *Hedley Byrne* case to municipal officials see *Gadutsis et al. v. Milne et al.* (1972), 34 D.L.R. (3d) 455, [1973] 2 O.R. 503. See *Charlesworth on Negligence*, 5th ed. (1971), pp. 31-5, paras. 49-52. At p. 32, the learned author said:

The House of Lords has thus expressed the opinion that if in the ordinary course of business including professional affairs a person seeks advice or information from another who is not under any contractual or fiduciary obligation to give it, in circumstances in which a reasonable man so asked would know that he was being trusted or that his skill or judgment was being relied on, and such person then chooses to give the requested advice or information without clearly disclaiming any responsibility for it, then he accepts a legal duty to exercise such care as the circumstances require in

¹⁰² *Supra* note 57, at 807, [1971] 1 All E.R. at 159, [1971] 2 W.L.R. at 33.

¹⁰³ *Supra* note 97, at 508, 6 N.R. at 457, 60 D.L.R. (3d) at 10. Martland, Judson, Beetz and de Grandpré JJ. concurred. Laskin C.J.C. delivered a separate concurring judgment. Spence J. dissented; in his opinion "there was evidence fully justifying the . . . finding that Mr. Runions had been negligent in that he had failed to 'exercise such care as the circumstances required', per Lord Reid in *Hedley Byrne*". *Id.* at 516-17, 6 N.R. at 466, 60 D.L.R. (3d) at 17.

¹⁰⁴ *Supra* note 41.

¹⁰⁵ Freedman C.J.M., Monnin and Matas JJ.A.

making his reply; for a failure to exercise that care, an action for negligence will lie if damage or loss results.¹⁰⁶

The Supreme Court unanimously allowed the appeal on grounds that were unrelated to the existence of a duty of care,¹⁰⁷ so the observations on this question by Spence J. delivering, on this occasion, one of the majority judgments, are *obiter dicta*. Spence J. adopted as a correct statement of the law the passage from *Charlesworth on Negligence* quoted by Matas J.A.,¹⁰⁸ but made no reference to the subsequent decisions of *Mutual Life v. Evatt* and *Nunes Diamonds*, which Matas J.A. had also cited in another context. His own brief summary of the elements of the tort of negligent mis-statement is phrased in a manner consistent with part of Lord Morris' judgment in *Hedley Byrne* and with the conflicting view of the majority judgment in *Mutual Life v. Evatt*:

It is a requisite for liability under the *Hedley Byrne* principle that the representations be made to a person who has not expert knowledge himself by a person whom the representee believes has a particular skill or judgment in the matter, and that the representations were relied upon to the detriment of the representee.¹⁰⁹

Another opportunity for clarification had been missed.¹¹⁰

The most recent Supreme Court decision to examine the *Hedley Byrne* doctrine is *Haig v. Bamford*.¹¹¹ There, however, the issue to be decided was not who should owe a duty of care, but to whom that duty is owed, and the discussion was narrowly confined to the issue before the Court. The defendant was a firm of chartered accountants which had negligently prepared an audited statement of accounts knowing that it was to be shown to a particular prospective investor and used to attract

¹⁰⁶ *Supra* note 41, at 685, 46 D.L.R. (3d) at 95. The passage from CHARLESWORTH ON NEGLIGENCE (which was written before the Privy Council decision in *Mutual Life v. Evatt* and should be read in the context of the latest edition of that work, *supra* note 91, at para. 165) has also been cited in subsequent cases as a correct statement of law: *see, e.g.,* Manitoba Sausage Mfg. Co. v. City of Winnipeg, 1 C.C.L.T. 221 (Man. C.A. 1976); Faunatlantic Ltd. v. New Brunswick, 20 N.B.R. (2d) 128 (Q.B. 1977); Sharadan Builders Inc. v. Mahler, 17 O.R. (2d) 161, 79 D.L.R. (3d) 439 (H.C. 1977).

¹⁰⁷ The plaintiffs had relied on their own skill and judgment (Spence J., Laskin C.J.C., Judson, Dickson, Beetz and de Grandpré JJ. concurring). No action can lie in tort for representations made with regard to an illegal contract (Pigeon, Martland and Ritchie JJ.).

¹⁰⁸ *Supra* note 41, at 63, 7 N.R. at 579, [1976] 3 W.W.R. at 146, 65 D.L.R. (3d) at 9.

¹⁰⁹ *Id.* at 68, 7 N.R. at 583, [1976] 3 W.W.R. at 151, 65 D.L.R. (3d) at 13; *compare supra* note 11, at 502-03, [1963] 2 All E.R. at 594, [1963] 3 W.L.R. at 124 (Lord Morris) with *supra* note 57, at 806-08, [1971] 1 All E.R. at 158-59, [1971] 2 W.L.R. at 32-33.

¹¹⁰ The Supreme Court also missed an opportunity to settle the status of the controversial "independent tort" doctrine. In the Court of Appeal, the municipality had argued that the action in tort was barred by the independent tort doctrine, because "the relationship between . . . Porky Packers Ltd. and . . . The Town of The Pas was a contractual relationship arising out of the sale of land. The doctrine of *Hedley Byrne* does not apply to contractual relationship [*sic*]." The Court of Appeal rejected this argument: "Put in this way, the principle is stated too broadly." *Supra* note 41, at 683, 46 D.L.R. (3d) at 94. The Supreme Court decision is silent on this question.

¹¹¹ *Supra* note 71. *See* Fridman, *supra* note 92, at 649-55.

capital from other unspecified investors. Did the duty of care owed by the defendant extend to the plaintiff, a potential investor unknown to the defendant, who had been shown and relied on the financial statement? Dickson J., delivering the principal judgment for a unanimous Court,¹¹² held the defendant liable: the relationship between the parties was sufficiently proximate. He did refer briefly to *Mutual Life v. Evatt*, but only to point out that the restrictions imposed by the majority of the Privy Council were not relevant in the instant case: "Here the accountants held themselves out as possessing special qualifications, skill, and competence which, for reward, they were prepared to place at the disposal of the public."¹¹³

With such limited guidance from the Supreme Court, it is not surprising that lower courts have hesitated to choose between the judgments of the Privy Council in *Mutual Life v. Evatt*¹¹⁴ and that the decided cases manifest a degree of inconsistency as to the appropriate criteria for determining when a duty of care arises. *Mutual Life v. Evatt* has been variously accepted as a decision restricting the scope of the *Hedley Byrne* doctrine¹¹⁵ and rejected for that proposition.¹¹⁶ The current state of uncertainty is illustrated by a recent decision of the Ontario Court of Appeal where, although the Privy Council decision was not cited, its effects were not altogether ignored. In that case,¹¹⁷ the court had to decide whether a loan officer employed by the Ontario Development Corporation owed a duty of care to the plaintiff in making certain

¹¹² Laskin C.J.C., Ritchie, Spence, Pigeon and Beetz JJ. concurring.

¹¹³ *Supra* note 71, at 480, 9 N.R. at 55, [1976] 3 W.W.R. at 342.

¹¹⁴ See, e.g., *Sodd Corp. Inc. v. Tessis*, *supra* note 48, the facts of which have already been noted; counsel for Tessis submitted that there was no special relationship between the parties and cited in support of his argument both Lord Diplock in *Mutual Life v. Evatt* and Lord Reid in the *Hedley Byrne* decision. The Ontario Court of Appeal rejected this argument: as a licensed trustee in bankruptcy and chartered accountant acting in a professional capacity, the representor clearly owed a duty of care even in the most restrictive formulation of the special relationship requirement. But they did so summarily, in one brief sentence, without indicating which formulation was, in their view, the appropriate criterion. *Id.* at 159-60, 79 D.L.R. (3d) at 634.

¹¹⁵ *Gadutsis v. Milne*, [1973] 2 O.R. 503, at 506-07, 34 D.L.R. (3d) 455, at 458-59 (H.C. 1972); *Sealand of the Pacific Ltd. v. Ocean Cement Ltd.*, at the Supreme Court stage, *supra* note 41; *Hodgins v. Hydro-Electric Commission of Nepean*, at the Court of Appeal and Supreme Court levels, *supra* note 97.

¹¹⁶ *Zahara v. Hood*, [1977] 1 W.W.R. 359 (Alta. Dist. C. 1976), where Rowbotham J. adopted the judgment of Ormrod L.J. in *Esso Petroleum Co. v. Mardon*, *supra* note 5. But cf. *Faunatlastic Ltd. v. New Brunswick*, *supra* note 106, where the New Brunswick Court of Appeal adopted *obiter* Lord Denning's more restrictive judgment.

Mutual Life v. Evatt has also been cited for the proposition that characteristics of the relationship giving rise to the duty of care are not confined to the fact pattern in the *Hedley Byrne* decision (*Bank Für Handel und Effekten v. Davidson & Co.*, 55 D.L.R. (3d) 303, at 305 (B.C.C.A. 1975) *per* Bull J.A.) and as a decision of the High Court of Australia (*Mutual Life & Citizens' Assurance Co. v. Evatt*, 122 C.L.R. 556, 42 A.L.J.R. 316 (Aust. H.C. 1968)), for the broad criterion subsequently rejected by the Privy Council (*Toromont Indus. Holdings Ltd. v. Thorne, Gunn, Helliwell & Christensen*, 10 O.R. (2d) 65, at 86-87, 62 D.L.R. (3d) 225, at 246-47 (H.C. 1975), *aff'd and varied as to damages* 14 O.R. (2d) 87 (C.A. 1976).

¹¹⁷ *Patrick L. Roberts Ltd. v. Sollinger Industries Ltd.*, *supra* note 68.

assurances that the O.D.C. was financing the purchase of certain pollution equipment that the plaintiff had contracted to supply to Sollinger Industries Ltd. On the strength of these assurances which were inaccurate and carelessly given, the plaintiff executed the contract and suffered losses when Sollinger Industries failed to pay. In holding that the loan officer was under a duty of care, MacKinnon J.A., who delivered the judgment of the court, seemed to be applying the restrictive test in *Mutual Life v. Evatt* when he said:

Although [the loan officer] was not a "professional man", as these words are commonly understood, he had a special responsibility, and a special knowledge, which left him in a position to give reliable advice which advice he knew would be acted upon.¹¹⁸

Yet, he referred only to the *Hedley Byrne* decision, relying principally on the key passages in the judgments of Lords Reid and Morris that were subsequently "explained" by Lord Diplock in *Mutual Life v. Evatt* and the tenor of the rest of his judgment reflects the broad approach of the minority in *Mutual Life v. Evatt*. In a phrase reminiscent of Lord Pearce's speech in the *Hedley Byrne* decision, MacKinnon J.A. said: "The demands of society for protection from the carelessness of others must extend to the facts of this case."¹¹⁹ One is left wondering what will happen in marginal cases where the representor neither has nor claims to have any special skills and yet can reasonably be said to have accepted responsibility for the accuracy of his statements.

In sum: whether the *Hedley Byrne* doctrine can provide a general right of action in tort for pre-contractual misrepresentations as an effective, practical alternative to the inadequate remedy in contract ultimately turns on whether the extent to which the special relationship required to give rise to a duty of care will be satisfied by the pre-contractual nexus between representor and representee. On the present state of authorities in Canada it is clear that the pre-contractual nexus alone is not enough, but what more is required has not yet been authoritatively determined. The restrictive view in *Mutual Life v. Evatt* has not so far been expressly adopted in Canada, but if the courts do not always stipulate that the representor must have or claim a special status, skill or competence not possessed by the ordinary reasonable man, such is usually required in order to succeed.¹²⁰ Such skills may be acquired by formal qualifications, training or experience and the level of expertise

¹¹⁸ *Id.* at 50, 84 D.L.R. (3d) at 118. Cf. Evans J.A., who takes a somewhat similar approach in *Hodgins v. Hydro-Electric Comm'n of Nepean*, *supra* note 98.

¹¹⁹ *Id.* at 51, 84 D.L.R. (3d) at 119.

¹²⁰ Even before *Mutual Life v. Evatt*, the Canadian courts tended to equate special relationships with professional or quasi-professional relationships and, apart from situations involving public officials exercising statutory powers or duties, were slow to extend the duty of care beyond this limited sphere. There were some exceptions: see, e.g., *Reid v. Traders Gen. Ins. Co.*, *supra* note 32; *Babcock v. Servacar Ltd.*, [1970] 1 O.R. 125 (Cty. Ct. 1969). The leading cases have been reviewed by Fridman, *supra* note 39.

demand is not particularly high.¹²¹ This leaves some scope for providing a remedy in damages for pre-contractual misrepresentations but the equation between the special relationship and the pre-contractual nexus would no doubt be closer if the minority view in *Mutual Life v. Evatt* were firmly established as the law in Canada. For these reasons, an alternative route to expanding the duty of care seems worth examining.

3. The "Financial Interest" of the Representor

This route lies in the majority judgment in *Mutual Life v. Evatt* itself and has so far not been explored by any Canadian court. In a passage not referred to by Pigeon J. in the *Nunes Diamonds* case, Lord Diplock qualified his narrow test of proximity, allowing that a duty of care might arise in some situations independently of any special status or skills of the representor "such as, perhaps, where the adviser has a financial interest in the transaction upon which he gives his advice On this, as on other metes and bounds of the doctrine of *Hedley Byrne* their Lordships are expressing no opinion."¹²²

This guarded *dictum* has particular significance so far as the potential application of the *Hedley Byrne* doctrine to pre-contractual misrepresentations is concerned. If a financial interest is *ipso facto* sufficient to impose a duty of care, independently of the status and skills of the representor, it could extend the reach of the *Hedley Byrne* doctrine to all transactions involving a financial consideration. Parties negotiating a contract of sale or other commercial agreements, whether they be private parties or vendor and customer, by definition have a financial interest in the outcome of the transaction. The pre-contractual nexus between representor and representee would be sufficient in such cases to impose a duty of care.

However, the effect of this *dictum* is not free from controversy.¹²³ In *Hedley Byrne v. Heller & Partners*, Lord Devlin had stated, as part of his broad test of proximity, that "[p]ayment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form."¹²⁴ Yet Lord Diplock, and the majority of the Privy Council in *Evatt*, while rejecting the broad formulation of the duty of care, were apparently going further than Lord

¹²¹ In *Peters v. Parkway Mercury Sales Ltd.*, *supra* note 40, the New Brunswick Court of Appeal suggested that an inexperienced trainee salesman owed a duty of care to his prospective customers.

¹²² *Supra* note 57, at 809, [1971] 1 All E.R. at 161, [1971] 2 W.L.R. at 35.

¹²³ See, e.g., Rickford, *supra* note 73, at 334-35; Davies, *Torts*, [1974] A.S.C.L. 299, at 310-11.

¹²⁴ *Supra* note 11, at 529, [1963] 2 All E.R. at 610, [1963] 3 W.L.R. at 146 (emphasis added).

Devlin by making a financial interest in the transaction not merely evidence but *ipso facto* sufficient to raise a duty of care. Doubts whether this *dictum* could have such far-reaching consequences¹²⁵ were reinforced by the guarded language in which it was couched and the relatively weak authority on which it was based.

Lord Diplock supported his *dictum* by referring, without analysis, to one first instance decision and the American *Restatement of the Law of Torts*. In *W.B. Anderson & Sons, Ltd. v. Rhodes (Liverpool) Ltd.*,¹²⁶ the single decision cited, the plaintiff sold goods to a company in reliance on an assurance by the defendants, which has had previous dealings with the company and were then acting as its purchasing agents, that the company was creditworthy. At the time the assurance was given the company's account with the defendants in respect of those dealings was at least £2500 lbs overdue. The representation by the defendants was therefore inaccurate and since its source was their own careless book-keeping, it was also negligent. The company failed to pay the plaintiffs and became insolvent. The plaintiffs sued the defendants for negligent misrepresentation. Cairns J., after examining at length the judgments in *Hedley Byrne*, held that the defendants owed a duty of care to the plaintiff because:

to use a test suggested by Lord Pearce; the representation here concerned a business transaction whose nature made clear the gravity of the enquiry and the importance and influence attached to the answers. I say that this test was satisfied, because it is clear that none of the plaintiffs would have been willing to sell to Taylors unless they had been assured that Taylors were "all right", or something to the same effect. I do not think that Denning L.J. intended to lay down that the duty of care could arise only in the case of professional men, and if he did this would not be consistent with the view of at least three of the law lords in the *Hedley Byrne* case.¹²⁷

Thus, although the defendant, as commission agent, certainly had a financial interest in the transactions induced by its negligent misrepresentations, the case did not turn on this point. It was at most one factor in Cairns J.'s decision which was based on the adoption of the broad formulation of the "special relationship" requirement formulated by Lords Reid and Morris in the *Hedley Byrne* decision and a finding that the defendants had in the circumstances assumed responsibility for the accuracy of their statements. The result is therefore consistent with Lord Diplock's *dictum*, but not with the stated reasons of the court.

Furthermore, as was pointed out in the Australian case of *Presser v. Caldwell Estates Property Ltd.*,¹²⁸ if it was necessary to reinterpret — or

¹²⁵ See *dicta* in *Presser v. Caldwell Estates Property Ltd.*, [1971] 2 N.S.W.L.R. 471 (C.A.) (financial interest in a transaction is by itself not enough to raise a duty of care); but see *O'Leary v. Lamb*, 7 S.A.S.R. 159 (S.C. 1973) (a financial interest can suffice).

¹²⁶ [1967] 2 All E.R. 850 (Liverpool Assizes). See Dean, *Hedley Byrne and the Eager Business Man*, 31 MODERN L. REV. 322 (1968).

¹²⁷ *Supra* note 126, at 862.

¹²⁸ *Supra* note 125.

rationalize — *Anderson v. Rhodes* to make it conform to the new narrow test of special relationships laid down in *Mutual Life v. Evatt*, it was possible to do so without making the financial interest of the representor essential to the plaintiff's success. The New South Wales Court of Appeal suggested that Rhodes had by inference held itself out as having special knowledge about the financial affairs of the company. It had assumed and therefore should be treated as being in the business of giving credit references. This, in their view, was the distinguishing feature of the case and not the defendant's financial interest "which is an ordinary, everyday incident of a commission agent's business".¹²⁹ The court declined to hold a real estate agent under a duty of care merely because the agent had a financial interest in the form of a commission on sales.¹³⁰

So far as the *Restatement* is concerned, section 552 of the *Restatement (Second) of Torts*, which Lord Diplock had in mind,¹³¹ does provide that the pecuniary interest of the representor creates *ipso facto* a duty of care:

Section 552

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. (emphasis added)

The language of the provision would appear to cover both two party and three party situations.¹³² However, the law of misrepresentation has developed differently in the United States,¹³³ which weakens the com-

¹²⁹ *Id.* at 483.

¹³⁰ *Id.* at 482-84 (Asprey J.A.) and at 492-93 (Mason J.A.). The same result might also have been reached by finding *ex post facto* a collateral contract.

¹³¹ Lord Diplock referred to s. 552 of the Third Tentative Redraft of the American Law Institute's *RESTATEMENT OF THE LAW OF TORTS*, since incorporated as s. 552 of *THE AMERICAN LAW INSTITUTE, Vol. 3, RESTATEMENT (SECOND) OF TORTS (1977)*.

¹³² *RESTATEMENT (SECOND) OF TORTS* s. 552, Comment c.

¹³³ Thus, while s. 552 is framed broadly enough to cover pre-contractual misrepresentations including a contract with the representor, another section in the *RESTATEMENT* is designed to cover many aspects of this situation:

552C. Misrepresentation in Sale, Rental or Exchange Transaction

(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

As the Comments to s. 552C make clear, this section goes further than s. 552. It imposes strict liability for misrepresentation of a material fact which induces the representee to conclude a contract with the representor. But it is limited in scope to sale, rental or exchange transactions. Proof of negligence is unnecessary; factual inaccuracy will suffice to found liability. In effect, it provides a remedy in damages for what in contract is an innocent misrepresentation. The extent to which s. 552C reflects existing law in the United States is controversial. See Hill, *Damages for Innocent Misrepresentation*, 73 *COLUM. L. REV.* 679 (1973). According to W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 711-12 (4th ed. 1971), s. 552C represents the law applied in 18 states.

parative value the relevant sections of the *Restatement* might otherwise have in Commonwealth courts.

Notwithstanding these weaknesses, the *dictum* has been applied on several occasions as an independent criterion and there is beginning to emerge a clear line of authority which recognizes that the financial interest of the representor in the transaction to which he speaks is sufficient itself to impose a duty of care. At least two of these cases have concerned pre-contractual misrepresentations.

In *Esso Petroleum v. Mardon*,¹³⁴ which has already been discussed, Lawson J. at first instance, after declaring that he much preferred the minority view in *Mutual Life v. Evatt*, said:

I am satisfied that there was, in the circumstances of the present case, a special relationship, and this special relationship I find to have existed even if one applies the tests indicated by the majority in *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt* [1971] A.C. 793. The present was a situation in which in fact the plaintiffs did have a financial interest in the advice which they gave. This was advice which was given to the defendant who, as they knew, was asking or seeking information and was in fact given information which would lead him into the decision to enter into the tenancy agreement, the benefit of which the plaintiffs as landlords would have.¹³⁵

In Lawson J.'s opinion, the financial interest of the representor was sufficient to impose a duty of care. This aspect of his judgment was not pursued in the Court of Appeal, but Shaw L.J. expressly approved the reasoning and conclusions of Lawson J. on the question of negligent misrepresentation.¹³⁶

The second decision, the New Zealand case of *Capital Motors v. Beecham*,¹³⁷ is more interesting because unlike *Esso Petroleum v. Mardon*, the claim was founded exclusively on negligent misrepresentation; it proceeded on the basis that the majority view in *Evatt* was the applicable law and involved a very common situation — a purchaser who was misled by a used car salesman. In that case, Beecham entered into a contract to buy a used car in reliance on an assurance by the defendant's salesman that it had had no more than two previous owners. Two months later the plaintiff discovered that there had been five previous owners. In a successful action for damages for negligent misrepresentation, the magistrate applied the majority judgment in *Evatt*:

as authority for the proposition that where a negligent misrepresentation is made by a person having a financial interest in the transaction, as the salesman (who was remunerated by commission) had in this case, damages can be awarded despite the fact that the defendant did not carry on the business of giving advice, or did not have any particular skill or competence in the field where the advice was given.¹³⁸

¹³⁴ *Supra* note 5.

¹³⁵ *Supra* note 5, at 830, [1975] 1 All E.R. at 220.

¹³⁶ See discussion in text between notes 82-91, *supra*.

¹³⁷ *Supra* note 31.

¹³⁸ *Id.* at 577.

On appeal, much of the discussion appears to have focussed on the question of principle whether an action in tort could lie for a pre-contractual misrepresentation. After considering various decisions including the *Sealand of the Pacific* case at first instance and *Esso Petroleum v. Mardon*, which had just been decided at first instance, Cooke J. concluded that:

a statement which has caused economic loss . . . made by a prospective seller of goods to the prospective buyer in pre-contract negotiations does not ipso facto rule out a duty of care. On the other hand it would be no exaggeration to say that the authorities fall far short of establishing that a prospective seller is always, or usually, under a duty of care in his statements to a prospective buyer.¹³⁹

He went on to hold that consistently with both the *Hedley Byrne* and *Mutual Life* decisions the salesman owed a duty of care to the purchaser because he had a direct financial interest in making the sale.¹⁴⁰ His hesitation is perhaps understandable given the fact that the only decisions available to the learned judge were the *Sealand of the Pacific* case and *Esso Petroleum v. Mardon*, both at first instance only.

This decision is clear on the point that the financial interest in the transaction of the representor is sufficient to raise a duty of care. It also shows how the *Hedley Byrne* principle can provide a remedy in circumstances where none would otherwise have been available. The contract in this case had been executed: rescission for misrepresentation was no longer possible¹⁴¹ and the pleadings precluded any finding of breach of warranty.

Cooke J.'s judgment also raises an interesting question, so far not answered in any of the cases: what constitutes a sufficient "financial interest in the transaction"? Liability in this case appears to have stemmed from the fact that the salesman was paid by commission. It was this fact which Cooke J. held gave him a "direct financial interest" in the transaction, imposed a duty of care and ultimately resulted in the vicarious liability of the defendant for the tort of its employees. How "direct" must the financial interest be in order to raise a duty of care? Lord Diplock, it will be remembered, spoke only of "a financial interest in the transaction".¹⁴² Of his supporting authorities, *Anderson v. Rhodes*,¹⁴³ like *Capital Motors Ltd. v. Beecham*, involved a direct commission while the Comments to section 552 of the *Restatement* make it clear that the "pecuniary interest" referred to may be direct or indirect.¹⁴⁴ It is clear from *Mutual Life v. Evatt* itself that the financial interest cannot be too remote: otherwise a duty of care based on that

¹³⁹ *Id.* at 580.

¹⁴⁰ *Id.*

¹⁴¹ See *Riddiford v. Warren*, 20 N.Z.L.R. 572 (C.A. 1901).

¹⁴² *Supra* note 122.

¹⁴³ *Supra* note 126.

¹⁴⁴ RESTATEMENT (SECOND) OF TORTS s. 552, Comment d.

criterion should have been imposed in that case.¹⁴⁵ Intangibles such as the threat of dismissal, loss of bonuses or effects on possible advancement may be too vague to qualify but, on the other hand, to insist that it be "direct" and restrict it to commission would seem to be unwarranted. Suppose the employee had been paid a fixed salary? Surely, the plaintiff's right of action should not depend on the means by which a salesman happens to be paid.

Such problems might have been avoided in *Capital Motors v. Beecham* and similar cases had the court focussed its attention on the employer rather than the employee and analyzed the situation in terms of agency instead of tort. Whether or not the employee has a financial interest in the transaction induced by his negligent misrepresentation, the employer or vendor invariably has such an interest which, it is submitted, should be regarded as sufficiently "direct" for the purposes of *Hedley Byrne*. Provided the negligent misrepresentation occurs within the scope of the salesman's ostensible authority, and the other conditions of *Hedley Byrne* are satisfied, the vendor will be fixed with liability.¹⁴⁶ The negligent representation will be ascribed to the vendor who, because of his financial interest, will be under a duty of care.¹⁴⁷

The situation in New Zealand was complicated by the later decision in *Plummer-Allinson v. Spencer L. Ayrey Ltd.*,¹⁴⁸ where Chilwell J., relying principally on *Presser v. Caldwell Estates Property Ltd.*,¹⁴⁹ but without citing *Capital Motors Ltd. v. Beecham*, held that a financial interest in the transaction was a relevant but not a self-sufficient ground for imposing a duty of care. The plaintiff had relied on negligent assurance by an employee of the second defendant (the plaintiff's fire insurance company) that certain hair dye exposed to heat following a fire at the salon was still fit for use. This defendant was financially interested in the transaction because if it were unfit for use they would

¹⁴⁵ The plaintiff Evatt, who had invested and was contemplating further investment in a company, "Palmer", asked the defendant whether Palmer was financially sound. Since the defendant and Palmer were subsidiaries of the same parent company, it could be argued that the defendant had an indirect financial interest in the transaction upon which it gave its advice. See Rickford, *supra* note 73, at 335.

¹⁴⁶ Thus in *Esso Petroleum Co. v. Mardon*, *supra* note 5, the petroleum company was directly liable to Mardon for breach of its own duty of care. The boundaries between personal and vicarious liability in the context of *Hedley Byrne* have not yet been worked out. See the discussion in *Presser v. Caldwell Estates Property Ltd.*, *supra* note 125, at 485-86 (Asprey J.A.) and Blom, *supra* note 41, at 158-59.

¹⁴⁷ See BOWSTEAD ON AGENCY 316-17 (14th ed. F. Reynolds & B. Davenport 1976); Stephens, *Vicarious Liability of the Principal for the Unauthorised Conduct of his Agent*, 27 CURRENT LEG. PROB. 59, at 70-75 (1974). Although on this analysis the vendor/employer would be solely liable whereas in tort the employee would be jointly and severally liable, this difference would be of little practical consequence. In practice, the employee-tortfeasor is not usually joined (he was not joined in *Capital Motors Ltd. v. Beecham*) and if joined there is rarely any attempt to execute judgment against the servant. See J. FLEMING, *THE LAW OF TORTS*, *supra* note 19, at 356.

¹⁴⁸ [1976] 2 N.Z.L.R. 254 (S.C.).

¹⁴⁹ *Supra* note 125.

have been liable to indemnify the plaintiffs under their insurance policy. Chilwell J. said:

In the present case it is my opinion that the fact that the second defendant was financially interested in escaping liability under its policy of fire insurance is not the type of financial interest from which an implication of special qualification, skill or competence on the part of Mr. Simister is to be made To accept as a proposition that the interest which one party has under a contract to escape any financial liability which might arise imposes a duty upon the potential payer not to make negligent statements by which payment is avoided would engraft a new remedy in tort on to a contractual obligation.¹⁵⁰

The authority of this decision is no doubt weakened by the absence of any reference to *Capital Motors Ltd. v. Beecham*. Furthermore, it concerned a mis-statement made in the course of performing a contract, rather than a pre-contractual misrepresentation and, in effect, appears to introduce into New Zealand an "independent tort" doctrine similar to that propounded by the Supreme Court in the *Nunes Diamonds* case.¹⁵¹

The financial interest criterion was also considered in another New Zealand case, *Coleman v. Myers*,¹⁵² a complex action for damages arising out of an insider takeover bid, as a result of which the plaintiffs, as dissenting minority shareholders, were induced to sell their shares to the defendants, who were directors of the company, at what they alleged was an undervaluation. One of the grounds on which relief was sought was negligent misrepresentation. The defendants, it was alleged, had negligently failed to disclose to the plaintiffs material information relating to the value of their shares when recommending that the offer should be accepted. Mahon J. at first instance held that the defendants neither possessed nor had laid claim to special skills or qualifications on matters of investment advice so as to satisfy the main test of the majority view in *Mutual Life v. Evatt*. He also expressed doubt as to whether the defendants' financial interest in the transaction could be sufficient to raise a duty of care, not simply in this case but generally. notwithstanding *Esso Petroleum v. Mardon*: "I cannot for the moment see that a financial interest in the transaction held by the adviser could be sufficient to elevate the ordinary relationship between buyer and seller to the special relationship upon which the *Hedley Byrne* liability depends."¹⁵³ Echoing Cooke J. in *Capital Motors v. Beecham*, Mahon J. was, in addition, reluctant to accept that the *Hedley Byrne* doctrine could generally apply to pre-contractual negligent misrepresentations:

¹⁵⁰ *Supra* note 148, at 265. Applying the majority view in *Mutual Life v. Evatt*, he also held that the defendant owed no duty of care.

¹⁵¹ *Supra* note 35.

¹⁵² *Supra* note 59. See, for a comment on the decision at trial, Hetherington, *Financing an Insider Take-Over*, 4 AUST. BUS. L. REV. 220, particularly at 229 (1976); Paterson, *A Role for Civil Liability in Canadian Securities Regulation? — Remedies for Breach of the Take-Over Bid Disclosure Requirements of the Securities Act 1967*, 12 U.B.C.L. REV. 32, at 52-55 (1978).

¹⁵³ *Supra* note 59, at 281.

"The every day functions of the marketplace would be totally subverted."¹⁵⁴

However, Mahon J. found it unnecessary to reach any firm conclusion on the claim in tort and all these observations were *obiter dicta*. Regardless of whether the defendants were liable under the *Hedley Byrne* principle, *qua* directors they owed a fiduciary duty to the plaintiffs which, he held, had in the circumstances been satisfied since the plaintiffs had received a fair price for their shares. Moreover, his remarks were neutralized by the New Zealand Court of Appeal. That court agreed with the trial judge that the defendants owed a fiduciary duty to the plaintiffs but allowed the appeal because, it held, the defendants had breached that duty. The only member of the court to consider the alternative claim in negligent misrepresentation was Cooke J., the judge in *Capital Motors v. Beecham*. His brief remarks,¹⁵⁵ with which Woodhouse J. expressed his agreement,¹⁵⁶ clearly reaffirm his earlier view that the representor's financial interest in the transaction is a self-sufficient criterion for the creation of a duty of care under the *Hedley Byrne* doctrine. He said: "[This] case may be brought under the ambit tentatively contemplated by a majority of their Lordships in *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793, 809; [1971] 1 All ER 150, 161, in that the directors had financial interests in the transaction upon which they gave advice."¹⁵⁷

The status of Lord Diplock's *dictum* came up again in an English case, *Argy Trading Development Co. v. Lapid Developments Ltd.*,¹⁵⁸ the most recently reported decision on point. On this occasion, the representor's financial interest in the transaction was treated as one of three independent factors creating the special relationship necessary to give rise to a duty of care. Summarizing the effect of the major decisions from *Hedley Byrne* to *Mutual Life v. Evatt*, Croom-Johnson J. said:

[O]ne might say that there is a legal duty if there is a special relationship arising out of (1) a holding out: *Hedley Byrne* [1964] A.C. 465 and *Mutual Life Assurance* [1971] A.C. 793; (2) a statutory duty: *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223; (3) a business relationship between the parties or a financial interest in the promisor: *Mutual Life and Citizens' Assurance* [1971] A.C. 793. It is to be noted in all those cases there has also been (a) an inquiry by the plaintiffs, (b) advice or information or an opinion given by the defendants.¹⁵⁹

The learned judge saw no reason to modify that summary of the law in the light of *Esso Petroleum v. Mardon*, where Ormrod L.J. had expressly rejected the majority view in *Evatt*. He stated that "the *Esso*

¹⁵⁴ *Id.* at 282.

¹⁵⁵ *Supra* note 59, at 340.

¹⁵⁶ *Id.* at 326.

¹⁵⁷ *Supra* note 155.

¹⁵⁸ [1977] 3 All E.R. 785, [1977] 1 W.L.R. 444 (Q.B. 1976).

¹⁵⁹ *Id.* at 799, [1977] 1 W.L.R. at 459.

Petroleum case . . . is not inconsistent with the caveat of Lord Diplock"¹⁶⁰ In other words, they could be reconciled on the basis of the representor's financial interest in the transaction, the ground which Lawson J. had advanced at first instance.

Croom-Johnson J.'s restatement of the law in an otherwise undistinguished case¹⁶¹ is open to the criticism that perhaps it accords more weight to the majority view in *Evatt* than is warranted on the present state of the authorities in England.¹⁶² Nevertheless, it is important because it unequivocally recognizes the financial interest of the representor as a separate, self-sufficient ground for imposing a duty of care.

Thus, there is a line of authority which has treated the financial interest in the transaction induced by the misrepresentation as sufficient to impose a duty of care on the representor. What started as a guarded *dictum* has been elevated by some courts into an independent criterion of general application. The chain is short and some of the links are weak but it is strong enough to provide a route by which Canadian courts may develop, without too much strain, a general remedy in tort for honest but careless pre-contractual misrepresentations.

III. ASSESSMENT OF DAMAGES

If the *Hedley Byrne* principle can be used as suggested to provide a general remedy in damages for honest but negligent pre-contractual misrepresentation, there remains only the question of how those damages should be assessed. Since the action is in tort, it would follow that questions relating to the assessment of damages should be governed by tort principles like any other action for negligent mis-statement. Hence questions relating to remoteness of damage will be determined by the test of direct foreseeability at the time of breach and the measure of damages will be the "out of pocket" losses suffered by the representee.¹⁶³ Any more generous basis for assessing the question of recoverable damages for negligent pre-contractual misrepresentation would be anomalous since the measure of damages for fraudulent misrepresentation is the tort measure for deceit.¹⁶⁴ This may not always produce

¹⁶⁰ *Id.* at 800, [1977] 1 W.L.R. at 460.

¹⁶¹ It concerned the question whether a landlord was liable for having failed to notify his tenants, who were bound to keep the premises insured, that a fire insurance policy he had taken out on their behalf, without any contractual obligation, had lapsed. The court was prepared to find, with some hesitation, that the business relationship between the parties gave rise to a duty of care, but held there to be no breach of that duty.

¹⁶² His statement of the law — apart from the financial interest criterion — would seem to reflect more accurately the present Canadian situation.

¹⁶³ See *West Coast Fin. Ltd. v. Gunderson, Stokes, Walton & Co.*, [1974] 2 W.W.R. 428, 44 D.L.R. (3d) 232 (B.C.S.C.), and see generally A. LINDEN, *CANADIAN TORT LAW*, *supra* note 92, at 305-22; J. FLEMING, *THE LAW OF TORTS*, *supra* note 19, at 624-25.

¹⁶⁴ See, e.g., *Parna v. G. & S. Properties Ltd.*, [1969] 2 O.R. 346, 5 D.L.R. (3d) 315 (C.A.), *appeal dismissed* [1971] S.C.R. 306, 15 D.L.R. (3d) 336; *Charpentier v. Slauenwhite*, 3 N.S.R. (2d) 42, 22 D.L.R. (3d) 222 (S.C. 1971).

satisfactory results: for example, since the test of remoteness of damage in tort is broader than in contract,¹⁶⁵ it could allow the representee to recover compensation for losses which would not have been available had the representation been characterized as a warranty.¹⁶⁶ Nevertheless, pending a comprehensive revision of the law of misrepresentation,¹⁶⁷ it appears to be a reasonable basis and is, in fact, the one adopted by the courts. Thus, in *Capital Motors v. Beecham*, the plaintiff paid \$1,400 for a car, the true market value of which was \$1,300. He received \$100 damages. Cooke J. stated:

In an action for fraudulent misrepresentation on a sale the measure of damage is prima facie the difference between the price paid and the fair value at the time of purchase When an action lies for negligent misrepresentation inducing a sale, I think a similar measure may be appropriate¹⁶⁸

Unfortunately, not all the cases are quite so clear. In *Esso Petroleum Ltd. v. Mardon*, Lawson J., who based his decision exclusively on negligent misrepresentation, calculated damages by the tort measure.¹⁶⁹ In the Court of Appeal the question of the proper measure for pre-contractual negligent misrepresentation was obscured by the unanimous finding that the mis-statement in question was a promissory term. Damages were therefore assessed according to the contract measure. However, none of the judgments makes it clear how the respective bases for assessment differ. Lord Denning, whose discussion of the question was the most elaborate but not very illuminating, said:

Mr. Mardon is not to be compensated here for 'loss of a bargain'. He was given no bargain that the throughput *would* amount to 200,000 gallons a year. He is only to be compensated for having been induced to enter into a contract which turned out to be disastrous for him. Whether it be called breach of warranty or negligent misrepresentation, its effect was *not* to warrant the throughput, but only to induce him to enter the contract. So the damages in either case are to be measured by the loss he suffered.¹⁷⁰

¹⁶⁵ *Koufous v. C. Czarnikow, Ltd. (The Heron II)*, [1969] 1 A.C. 350, [1967] 3 All E.R. 686, [1967] 3 W.L.R. 1491 (H.L.); *Scott Maritimes Pulp Ltd. v. B. F. Goodrich Canada Ltd.*, 19 N.S.R. (2d) 181, 72 D.L.R. (3d) 680 (C.A. 1977). See *Considine, supra* note 21, at 95-98.

¹⁶⁶ See *Grieg, supra* note 18, at 205-06. On the other hand, any award would be subject to reduction for contributory negligence. In any event, the gap between contract and tort based on the kinds of damage recognized has steadily narrowed in recent years as a result of decisions such as *Keks v. Esquire Pleasure Tours Ltd.*, [1974] 3 W.W.R. 406 (Man. Ct. Ct.); *Elder v. Koppe*, 15 N.S.R. (2d) 688, 53 D.L.R. (3d) 705 (S.C. 1974); *Doyle v. Olby (Ironmongers) Ltd.*, [1969] 2 Q.B. 158, [1969] 2 All E.R. 119, [1969] 2 W.L.R. 673 (C.A.) (not yet applied in Canada). See further *Fridman, supra* note 19, at 431.

¹⁶⁷ And legislation that is clearer on the question of the method of assessing damages than the English Misrepresentation Act 1967, U.K. 1967, c. 7, s. 2. See *Atiyah & Treitel, Misrepresentation Act 1967*, 30 MODERN L. REV. 369, at 373-75 (1967).

¹⁶⁸ *Supra* note 31, at 581. See also *Sealand of the Pacific Ltd. v. Ocean Cement Ltd.*, *supra* note 41.

¹⁶⁹ *Supra* note 5.

¹⁷⁰ *Id.* at 830, [1976] 2 All E.R. at 16. In effect, *Esso* had warranted that reasonable care would be used in making the estimate of annual gasoline sales.

Since the nature of the warranty in this case involved no expectation of loss, the measure of damages in tort and contract were identical.

The recent Ontario decision in *Sodd Corporation v. Tessis* is also unclear on the issue of damages. Having held the defendant liable in tort for negligent misrepresentation the County Court judge awarded the plaintiff damages of \$4,500.¹⁷¹ This award was upheld by the Court of Appeal but there is no explanation in the reports as to how the damages were assessed. Lacourcière J.A. said: "While the appellant attacked the assessment of damages as being based in part on the plaintiff's figures which were found to be inaccurate, we are satisfied that the assessment of damages can be supported on the basis outlined by the learned trial Judge."¹⁷² The reasons for judgment of the trial judge are unreported. It appears from the transcript that the goods in question were represented to have a wholesale value of \$16,753.40. In fact they were worth only \$6,182.55. The plaintiff paid \$8,750 for these goods.¹⁷³ Therefore his out of pocket loss would seem to have been in the order of \$2,500. The higher figure awarded by the judge is the result of a different method of assessment which appears to take into account loss of the bargain:

[C]ounsel [for the plaintiff] suggested that if I find a difference between the wholesale cost represented and the actual wholesale cost to be \$10,000, I should allow at the least 60% of that figure based on the plaintiff's method of calculating his tender. I consider that the plaintiff's method of calculating his tender was, as he testified, on the base of 50% to 55% wholesale cost of . . . I will, therefore, use the 50 to 55% range in reaching an appropriate award. On all the evidence my best estimate of the damage suffered by the plaintiff with respect to Parcel 2, is \$4500, and the plaintiff should have judgment for that amount.¹⁷⁴

In other words, the court was less concerned about the real wholesale value of the goods than the price which the plaintiff would have been willing to pay for them. Regardless of what the goods were actually worth, the plaintiff was prepared to pay only 55% of their wholesale value. According to the court, he was therefore entitled to recover as damages 55% of the amount by which the stock had been overvalued. The amount would be unexceptionable had the mis-statement in question been a warranty, and the fact that the Court of Appeal indicated that they would have been prepared to hold that it was a term of a collateral contract may have influenced their decision to uphold the award.¹⁷⁵ However, as the Court of Appeal pointed out, since the case was argued only in negligence the appropriate measure of damages was therefore the tort measure. The method of assessment applied in this case did not, it would appear, conform to that measure.

¹⁷¹ *Supra* note 48, at 158, 79 D.L.R. (3d) at 633.

¹⁷² *Id.* at 161, 79 D.L.R. (3d) at 635.

¹⁷³ Transcript of proceedings at trial, at 280-81 (Cty. Ct. Dec. 10, 1975).

¹⁷⁴ *Id.* at 280-81.

¹⁷⁵ *Supra* note 48, at 161, 79 D.L.R. (3d) at 635.

IV. CONCLUSION

In the *Hedley Byrne* decision, Lord Devlin commented on how the law of contract had provided a makeshift remedy for negligent misstatements when there was none in tort.¹⁷⁶ That, he observed, was an undesirable situation, since it involved straining the already over-stretched doctrine of consideration. *Hedley Byrne* put to an end the need to invent a contract between representor and representee. It also established a flexible doctrine, the metes and bounds of which expressly were left vague,¹⁷⁷ with the potential to provide an effective supplemental remedy in damages in an area where the rules of contract are inadequate. To do so would require broadening the special relationship requirement by returning to the speeches of Lords Reid and Devlin in the *Hedley Byrne* decision or by making the financial interest of the representor a self-sufficient criterion for imposing a duty of care. Either development would seem to be possible on the existing case law.

Whatever the potential role of *Hedley Byrne* in this area — and it is submitted that with a little judicial ingenuity it could be made to flourish — it is, of course, no substitute for revamping the law of innocent misrepresentation, which is long overdue.

¹⁷⁶ *Supra* note 11, at 527-28, [1963] 2 All E.R. at 609-10, [1963] 3 W.L.R. at 144-45, referring to *De La Bere v. Pearson Ltd.*, [1908] 1 K.B. 280, 77 L.J.K.B. 380 (C.A. 1907).

¹⁷⁷ *Id.* at 531, [1963] 2 All E.R. at 612, [1963] 3 W.L.R. at 148 (Lord Devlin). The open-ended character of the doctrine was also emphasized by the majority and the minority in *Mutual Life v. Evatt*: "The principles there indicated must be developed from time to time to cover new cases. . . ." (Lords Reid and Morris dissenting, *supra* note 57, at 813, [1971] 1 All E.R. at 163-64, [1971] 2 W.L.R. at 38). "On this, as on any other metes and bounds of the doctrine of *Hedley Byrne* their Lordships are expressing no opinion." (Lord Diplock, *id.* at 809, [1971] 1 All E.R. at 161, [1971] 2 W.L.R. at 35).