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Negligent Misrepresentation

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I. ORIGINS

Every so often the common law erupts: there is a cataclysm, and some new height emerges from the disturbance, a height shaped and smoothed by the subsequent winds and rains of litigation, under which it settles into the ultimate configuration which represents the law. Such a major alteration in the appearance of the common law, or at least the common law of torts, last occurred in 1963, when the House of Lords decided the case of *Hedley Byrne & Co.* v. *Heller & Partners Ltd.*[1] After little more than ten years experience of the operation of the doctrine stated in the *Hedley Byrne* case, lawyers in the Commonwealth can see with greater clarity the probable final shape of the liability that was first formed by that decision. In this article I am concerned more especially with what has happened in Canada in consequence of the *Hedley Byrne* case — and with what has not yet happened. Since the story is incomplete, as will appear later, a definitive account of this form of liability cannot yet be rendered.

What is so fascinating about the *Hedley Byrne* case is that it purported to be simply a logical extension of previous law, or a reinterpretation of the earlier position under *Donoghue* v. *Stevenson*,[2] in which for the first time an English court enunciated a more generalized principle of negligence liability. Yet the 1963 decision of the

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1 [1963] 2 All E.R. 575: on which see the early comment by A. M. Honoré, *Hedley Byrne & Co., Ltd.* v. *Heller & Partners Ltd.* (1965) 7 J.Soc.Pub.T.L. 284.

2 [1932] A.C. 562.

House of Lords was really a completely new departure, a repudiation no less of some fundamental doctrines of law, particularly the law of contract. This statement merits some explanation, not only to justify its validity, but also to lay the foundations for what will be said later as to future developments that may occur.

Prior to 1963 certain principles could be stated with some degree of certainty. Thus: (i) there was liability for the negligent infliction of physical harm to a person or his property wherever there was a duty to avoid such harm by taking reasonable care; (ii) there was liability for inflicting economic loss unconnected with physical injury or damage only (a) where there was fraud, (b) where there was a special fiduciary relationship between the causer of the harm and the sufferer or (c) where there was a contract between the parties, *i.e.* a relationship involving consideration; (iii) a misrepresentation which was relied upon to the detriment of the one giving such reliance was only actionable if (a) it was fraudulent, or (b) it constituted a term of any contract existing between the parties; (iv) negligence in making a representation or any other kind of statement which was relied or acted upon to the detriment of the person so relying was only actionable if it amounted to the negligent breach of a contract between the parties.

These principles overlap. But I have deliberately stated them in a form which reveals the obvious duplication so as to emphasize the vital and leading issue: The common law, whether the approach was contractual or tortious, was unwilling to permit liability for a negligent, non-fraudulent misstatement which caused injury or damage to another, unless he had "purchased" the benefit of a duty of care on the part of the other party, by giving consideration for the inaccurate and misleading statement. Either there was a contract or there was not. If there was, a duty existed; if not, the statement was a "mere" representation giving rise to no duty (other than the duty of being honest, *i.e.* to refrain from fraud or deceit).[3]

Equity took a slightly different view of such non-fraudulent representations. In the first place, any misrepresentation (whether made negligently or in circumstances exonerating the maker of any fault whatsoever) could be the foundation of an action for rescission and indemnification, provided that such misrepresentation, even though not a term, materially induced the other party to make a contract. But equity restricted the injured party's claim to indemnification, in other words, reimbursement of expenses incurred under the contract, and did not go so far as to permit the recovery of

[3] See the discussion in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.

general damages for loss resulting from the representation.[4] Secondly, equity took a rather broader view of "fraud" than did the common law. People in certain special relationships to each other were obliged to behave with greater honesty and more care than those not so related, *i.e.*, strangers both in equity and in common law.[5] The categories of those in such a special relationship were not limited and there seems to have been sufficient flexibility in this regard to permit some development. For example, in *Woods* v. *Martins Bank*[6] (a case decided prior to *Hedley Byrne*), an English court albeit only of first instance, held that there could be a fiduciary relationship of this kind between the manager and a client of a bank (in a transaction which was not governed by any contract between the bank and the client). Hence a duty of care over and above a duty to act with honesty was imposed upon the manager, for the breach of which the bank was vicariously liable.[7] Possibly therefore, some enlargement of liability for negligent misrepresentation might have taken place by the manipulation of equitable doctrines. On the other hand there is a limit to the breadth of the concept of fiduciary relationships, and the lack of any generalized remedy in damages might have been felt if the common law had been unprepared and had remained unwilling to expand its horizons and introduce a new type of responsibility.

The major obstacle to this expansion has already been mentioned — the strictness and rigidity of the doctrine of consideration. A second possible obstacle related to the first, though capable of distinct difficulty, is the doctrine of privity of contract, which bedevilled the law of negligence generally until it received its quietus in this respect in *Donoghue* v. *Stevenson*.[8] Under the doctrine of privity of contract, a third person who is not a party to a contract cannot acquire benefits thereunder, at least not to the extent of being able to compel the conferment of any such benefit by an action against one of the parties to the contract. Thus if A and B agree that in consideration of A paying B $10,000, B will give C his car,

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[4] See *e.g.*, *Whittington* v. *Seale-Hayne* (1900) 82 L.T. 49. Some change in the law has occurred in England as a result of the *Misrepresentation Act, 1967*, 15-16 Eliz.II, c.7, s.2(2), on which see G.C. Cheshire & C.H.S. Fifoot, *Law of Contract* 8th ed. (1972), 268-271.

[5] *Nocton* v. *Lord Ashburton* [1914] A.C. 932. *Cf.* in more recent times the "trust" relationship that existed between the parties in *Nixon* v. *Hillman Realty Ltd* (1974) 52 D.L.R. (3d) 447.

[6] [1959] 1 Q.B. 55.

[7] Regarding the issue of vicarious liability however, contrast the case of *Bank of Montreal* v. *Young* (1966) 60 D.L.R. (2d) 220.

[8] *Supra*, note 2.

a duty may rest on B to give his car to C but C cannot enforce performance. Only A can sue if B fails to do as he has promised.[9]

What this meant therefore, was that if there were a contract between A and B under which B was obliged to exercise care in its performance (for example in giving technical advice), and B was negligent in carrying out his duties, C would have no right of action against B even if he were damaged as a consequence (perhaps because he too relied on the statements made by B). Early nineteenth century English authority established that if B, in my example, had been guilty of *fraud vis-à-vis* A, and C suffered damage, C would have an action (at least where C was physically injured).[10] A leading case before the important decision by the House of Lords in *Derry* v. *Peek*[11] also made clear that if the damage alleged to flow from the fraud were purely financial, it would have to be shown that the fraudulent misrepresentation, alleged to have been responsible for such damage, was made directly to the person relying on it. It would also have to be proved that the circumstances were such that he *did* rely on it and so suffered the loss in question.[12] In other words, merely to allege that *at some time in the past* a fraudulent statement had been made which may have operated on A (in the A-B relationship referred to above), that subsequently there was an A-C relationship and that C suffered loss, was not sufficient. A more direct connection between the fraud of B and the loss incurred by C would have to be established.

Privity and consideration were the twin pillars of the classical notion of contract. In a sense therefore, it may be said that they enabled a differentiation to be drawn between contractual relationships and those arising under the law of tort. It is still correct to state that consideration is the hallmark of contract and that there can be no rights and liabilities arising *ex contractu* unless the party claiming the right or being subjected to the liability is privy to the contract. However, recent developments in the common law and modern critical writing in the area of contract would suggest that there as been a "softening" of the common law ideas of consideration and privity, or at the very least some reappraisal of what they mean and how they are to be applied. Whether this has been the consequence of the *Hedley Byrne* case or whether it was the back-

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[9] There are exceptions, but they do not affect the issues raised in this article; see *e.g.*, *Beswick* v. *Beswick* [1968] A.C. 58.

[10] *Langridge* v. *Levy* (1837) 2 M. & W. 519.

[11] (1889) 14 App. Cas. 337.

[12] *Peek* v. *Gurney* (1873) L.R. 6 H.L. 377. *Cf. Briess* v. *Woolley* [1954] A.C. 333.

ground which enabled that decision to be made is uncertain. Personally I think there is much to be said for the argument that there has been, and was prior to 1963, a subtle alteration in the attitude of judges, in England at any rate, towards the older, stricter doctrines. This alteration manifested itself in several decisions which, from time to time, had made inroads upon the meaning and application of consideration, the doctrine of adequacy of consideration, the need for consideration in contract, the application of the privity doctrine, and the extension of the exceptions to that doctrine. Furthermore, examining the same period from the standpoint of the law of tort, the previous differentiation between physical and financial damage and the reluctance of the courts to equate the two (even where negligence clearly existed), was undergoing change. All in all, therefore, it could be said that when the *Hedley Byrne* case came before the House of Lords, the time was ripe for some new development in the law which would result in a more radical departure both from the rigid distinction between tort and contract, and from the differentiation between physical and financial damage. This applied to the remedies available in each instance and to their juridical basis. Such is what occurred.

II. THE DUTY

1. Basic Principles

In the *Hedley Byrne*[13] case, no liability was imposed upon the bank, maker of the inaccurate statement (which concerned the credit of a particular company with which the inquirer wanted to do business), because the bank expressly excluded any responsibility for the accuracy of its information. Nonetheless the House of Lords was prepared to hold that if such exemption had not been present, the bank would have been liable on the basis of a duty to take care which had been broken by the negligence of its servants in making the misstatement. To achieve this result it was necessary for their Lordships to postulate or "create" such a duty of care. On what was this to be founded? Or, to put it another way, how was this duty to be formulated, not only for the purposes of the instant case, but also for future reference? Different members of the House put the formulation of the duty in different ways, though it is suggested that the effect of the language used amounted to the same thing in the end.

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[13] *Supra,* note 1.

Thus Lord Reid said:

> 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.[14]

Lord Morris felt that it should now be regarded as settled

> ... that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.[15]

To Lord Devlin there was ample authority to justify their lordships

> ... in saying now that the categories of special relationships, which may give rise to a duty to take care in word as well as in deed, are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which ... are "equivalent to contract" that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.[16]

A little later in his speech the same Judge said that

> ... wherever there is a relationship equivalent to contract there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer .... Where there is a general relationship of this sort it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.[17]

Analyzing such statements, it becomes plain that what the House of Lords had in mind in the *Hedley Byrne* case were situations in which one person gratuitously, but otherwise for good reasons,

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[14] *Ibid.*, 583.
[15] *Ibid.*, 594.
[16] *Ibid.*, 610.
[17] *Ibid.*, 611.

seriously undertook, expressly or by implication, the obligation of providing information or advice to another, at the other's request. The circumstances must be such that the former knew or should have known (and indeed may have intended) that the latter was going to rely on the information or advice for the purpose of some action of his own, and might therefore come to some sort of harm if it were inaccurate or misleading. Whether the harm was physical or financial was irrelevant, though the latter might be more likely in many instances. Hence in such situations it was not enough that the person providing the information or advice was honest: he would have to exercise reasonable care to ensure that the information or advice was not going to be misleading and therefore harmful. To this extent such situations resembled those which involved not a statement representing information or advice, but some kind of physical act which might have physical repercussions or consequences. That was the burden of the reasoning of the House of Lords in *Donoghue* v. *Stevenson*.[18] Looked at from one point of view, all that the House of Lords did in the *Hedley Byrne* case was to extend the doctrine of *Donoghue* v. *Stevenson* to (i) statements likely to cause harm if misleading and (ii) situations where the only possible harm that was likely to occur was financial loss not accompanied by, or resulting from, physical injury or damage to property.

Such a broad, sweeping enunciation of the law at once changed the face of the common law with respect to innocent but negligent misrepresentations, and opened the door wide to an entirely new field of operations for the law of tort in general and the law of negligence in particular. For precisely that reason the majority of the Court of Appeal rejected the opportunity to achieve the same result twelve years earlier in *Candler* v. *Crane, Christmas & Co.*[19] The "timorous souls", as Asquith L.J. called them,[20] won the day on that occasion, over the brilliant and innovative dissent of Denning L.J., as he then was.[21] By the time the *Hedley Byrne* case came before the House of Lords the atmosphere, as already suggested, had changed. The legal, social and judicial climate was different; the "timorous souls" were no longer in the ascendent. Quite the contrary,

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[18] *Supra,* note 2.

[19] *Supra,* note 3. *Cf.* the facts in the recent Saskatchewan case of *Haig* v. *Bamford* [1974] 6 W.W.R. 236 where a majority of the Court of Appeal *still* denied a duty even after *Hedley Byrne.* Contrast the position with respect to the liability of company auditors to a director who invested shares in reliance on negligently prepared statements; *West Coast Finance Ltd* v. *Gundesson* [1975] 4 W.W.R. 501.

[20] *Supra,* note 3, 195.

[21] See my discussion in *Negligence By Words* (1954) 32 Can.Bar Rev. 638.

there were those in the House of Lords who were prepared and willing to extend and enlarge the scope of the law of negligence and overthrow the previously narrow attitude. It is strange then, and possibly unfortunate, that within a few years another senior and important judicial body, the Judicial Committee of the Privy Council, appears to have repented of the earlier liberalization of the law, and to have retreated somewhat from the position occupied by the House of Lords in the *Hedley Byrne* case. It is all the more strange in view of the fact that two members of the Judicial Committee who dissented from the majority decision, and dissented with some force and vigour, were two Law Lords who had sat on and participated fully in the decision and reasoning in the *Hedley Byrne* case.

I am referring to the case of *Mutual Life & Citizens' Assurance Co.* v. *Evatt*.[22] In that case, the plaintiff sought advice regarding financial investment in a certain company from the defendant, another company, which was in the insurance business. The company about which the advice was being sought, however, was an associate company of the defendant insurance company (both of them being subsidiaries of a third company). Thus, even though it might be argued that normally speaking a potential investor does not seek investment advice or information from an insurance company, there were special circumstances in this instance which might have explained and justified the investor's request to the insurance company. Nonetheless, the majority of the Judicial Committee, over the dissent of Lords Reid and Morris, held that the insurance company owed no duty of care to the investor. Hence the insurance company was not liable when the investor relied upon the information and advice received, invested his money, and lost a substantial amount by reason of the poor financial state of the company in which the investment was made. Lord Diplock, giving the opinion of the majority of the Judicial Committee, explained that in the *Hedley Byrne* case the reference to, and discussion of, "such care as the circumstances require" presupposed

> ... an ascertainable standard of skill, competence and diligence with which the advisor is acquainted or had represented that he is. 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 ... he cannot be reasonably held to have accepted the responsibility of conforming to a

[22] [1971] 1 All E.R. 150. It is interesting to note in *Esso Petroleum Co.* v. *Mardon* [1975] 1 All E.R. 203 that Lawson J. was able to hold that even on the majority view in *Evatt*, a party who was negotiating with another party and had a financial interest in the outcome of advice given, owed a duty of care with respect to such advice.

> standard of skill, competence or diligence of which he is unaware, simply because he answers the enquiry with knowledge that the advisee intends to rely on his answer.[23]

The pleadings of the plaintiff in that case failed to aver

> ... that the company to the knowledge of the [plaintiff] carried on the business of giving advice on investments or in some other way had let it be known to him that they claimed to possess the necessary skill and competence to do so and were prepared to exercise the necessary diligence to give reliable advice to him on the subject-matter of his enquiry.[24]

In the absence of any such allegation the plaintiff was therefore not entitled to assume that the insurance company had undertaken any other duty than to give him an honest answer to his inquiry; nor did the law impose any higher duty on the company.

It may be seen, therefore, that this decision, which has been severely criticized by writers[25] though not as yet by the courts, limited the scope of the original *Hedley Byrne* case.[26] To establish the duty of care after the *Evatt* decision, it is not enough to prove a request for information and advice on a gratuitous basis, in circumstances which reveal the serious intent of the person so requesting, and a recognition by the one to whom the request is made that reliance will be placed upon the answer. It is also necessary to establish that the one to whom the request is made habitually proffers such information or advice, that he is in the trade, business or profession of giving such information or advice, or, at the very least, purports to occupy such a position. Putting it simply, you cannot ask a doctor for advice about dentistry and expect to hold the doctor liable for a negligent opinion or for information negligently given; you cannot ask someone in the tobacco business for information or advice about the wheat business and expect compensation if the information misleads and results in financial loss.

Yet this does not seem to accord fully with what appears to be the intent and meaning of the language and decision in the *Hedley Byrne* case. Can it be, as I intimated earlier, that a reaction set in

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[23] *Ibid.*, 159.

[24] *Ibid.*, 160.

[25] See *e.g.*, H.J. Glasbeek, *Negligent Misstatements in the Privy Council — Area of Liability Clearly Delimited* (1972) 50 Can.Bar Rev. 128.

[26] Note also the possible limitation which arises if the person whose negligence is in issue is for some reason of public policy not bound by a duty of care, *e.g.*, if he is acting in a judicial capacity or in connection with the administration of justice: See *Rondel* v. *Worsley* [1969] 1 A.C. 191; *Sutcliffe* v. *Thackrah* [1974] 1 All E.R. 859 and the discussion of that case by the House of Lords in *Arenson* v. *Carson Beckman Rutley and Co.* [1975] 3 All E.R. 901.

on the part of those Lords who sat in the *Hedley Byrne* case or those who joined the House after 1963; a reaction against the seeming breadth of that decision, based upon fears that its limitless application might open the doors of liability too wide? Such a reaction might be not at all unreasonable if the *Hedley Byrne* decision, in its pristine pre-*Evatt* form, were being interpreted and utilized by courts subsequently in too cavalier and incautious a manner. I would suggest, however, that the cases decided since *Hedley Byrne*, both before and after *Evatt*, do not indicate that there was any kind of undisciplined use of the *Hedley Byrne* case giving rise to unjustified, unlimited liability where a person's oral or written statements were made without what could be considered due care. Indeed an examination of the decisions, and more particularly for present purposes the Canadian decisions, reveals a somewhat conservative, even tentative application by the courts of the *Hedley Byrne* case. The following discussion will show clearly that the courts were feeling their way in this novel area of legal liability towards some refinement of the original doctrine.

2. Applicable cases

To start with, there are the decisions in which the *Hedley Byrne* case has been applied to various kinds of relationships which it has been held give rise to a duty of care owed by one party to the other. In *Reid* v. *Traders General Insurance*,[27] the agent of a car dealer sold a car to the plaintiff. The agent undertook to arrange insurance. On the insurance application form, which the agent filled in for the plaintiff, the agent concealed the known fact that the plaintiff's husband had had his driving licence cancelled. The car sold to the plaintiff was damaged and the insurance company was held not liable to the plaintiff. In an action brought by the plaintiff against the agent and his principal, the car dealer, it was held that both were liable, irrespective of a contractual relationship between the agent and the plaintiff, on the basis of breach of duty, *viz.*, tortious duty, arising under the *Hedley Byrne* case. Here, in effect, the relationship was one of seller and buyer, although the sale was made on behalf of a principal, not the party actually negotiating the sale.

It is interesting to point out however, that the contract between the agent (or his principal) and the plaintiff was one concerning the sale of some goods, and the breach of duty was not with respect to any aspect of that contract. (This is especially so in view of later

[27] (1963) 41 D.L.R. (2d) 148.

statements as to the existence of potential tort liability where there is a contractual relationship between the relevant parties, which will be considered in due course.) There was nothing wrong with the goods, the contract was not broken, either deliberately or negligently. The wrongdoing was quite collateral to the contract even though it would seem that its purpose was to make sure that the plaintiff could obtain insurance which, in turn, would probably have had the desired effect of bringing about the sale of the car. This presumably was to the advantage of the agent, as well as his principal, since the agent would thereupon earn commission. While the agent and his principal, the car dealer, were not professionals or experts in relation to the insurance business, nevertheless it could be argued that in comparison with the plaintiff, a housewife, they possessed expertise and connections which were useful and important and upon which she relied in order to obtain what she wanted, namely a car that was properly insured. It is suggested however, that on the basis of the reasoning and judgment in the *Evatt* case,[28] this decision would not be the same today if the facts were to arise again.

The same may not be true of *Dodds & Dodds* v. *Millman*,[29] another case decided soon after the *Hedley Byrne* decision was reported. In this case the real estate agent of the vendor of some property made statements to a prospective purchaser about the expected earning capacity of the property. The projected revenue and expenses were contained in what was called an "operating statement", which gave a false impression of the potential profitability of the property. There was no fraud found by the Court on the part of the agent, nonetheless he was held liable in tort to the plaintiff purchaser. Since there was no contract between the plaintiff and the agent, it was necessary to discover some tortious basis for liability; the contract between the purchaser and the vendor, which contained a clause exempting the vendor from liability, could not be invoked to protect the *agent* of the vendor from liability to the purchaser. In this instance there can be no doubt that the requirements laid down by the House of Lords in the *Hedley Byrne* case were fulfilled. It is suggested, however, that even under the *Evatt* test, there would still have been liability, since the real estate agent was being asked for his opinion and advice on a matter which was clearly within his professional expertise and competence.

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[28] *Supra*, note 22.

[29] (1964) 45 D.L.R. (2d) 472. *Cf. Hopkins* v. *Butts* (1968) 65 D.L.R. (2d) 711. See also, *Bango* v. *Halt* (1971) 21 D.L.R. (3d) 66 which speaks of the quasi-fiduciary duty of the real estate agent towards a potential purchaser of property.

A third case belonging to this period (though not reported until two years later when the Ontario Court of Appeal upheld the decision of the trial judge), is *Myers* v. *Thompson & London Life Insurance Co.*[30] This concerned a request to a life insurance agent by the solicitor of the agent's client. In order to arrange the affairs of the client, it was necessary for the agent to take certain steps to avoid the tax implications of existing insurance arrangements. On the instructions of the client, the solicitor in turn instructed the agent (on a gratuitous basis since both were acting for the same person) to do what was required in the circumstances. The agent did nothing. As a result of his neglect, the client's estate suffered loss through the imposition of succession duties which became payable on the death of the insured (the client). It was held that the life insurance agent was liable for the extra duty payable as a consequence of his negligent failure to act, on the basis of the *Hedley Byrne* case, since the agent was

> ... a person possessed of a special skill and [the insured's solicitor] was entitled to rely on him to exercise due care and [the agent] in turn knew or ought to have known that reliance was being placed on his skill and knowledge in this matter.[31]

Once again the facts reveal a relationship involving an expert in a particular field (insurance in this instance), a situation which comes not only within the original *Hedley Byrne* doctrine but which also fits under the smaller umbrella of *Evatt.*

Up to that point in time therefore, it can be argued that even without the direction of the Judicial Committee in the *Evatt* case, Canadian courts were applying the *Hedley Byrne* case in situations which fitted within the doctrine as it was subsequently restated and restricted.

In *Windsor Motors Ltd* v. *Corporation of Powell River,*[32] an interesting, and in some ways important step was taken. What the Court did in this case was to extend the scope of potential liability beyond the sphere of private activity (such as advice given by lawyers, bankers and other professionals), into the area of public conduct or responsibility, *i.e.* government action. The case was concerned with information as to zoning provided by a licensing inspector, employed by the city, to a prospective lessee of a site, who wanted to utilize it for a used-car business. There was little point in leasing the site if he could not use it for such a purpose, hence his inquiry. The answer elicited led to the lease of the site. When it

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[30] (1967) 63 D.L.R. (2d) 476.
[31] *Ibid.*, 483.
[32] (1965) 68 W.W.R. 173.

turned out not to be zoned in such a way as to permit him to conduct the business in question, the lessee sued the city, basing his action on the *Hedley Byrne* case. He argued that there was a duty not to mislead him by negligently-given advice, by following which he had incurred loss. In holding the city liable, Branca J.A. of the British Columbia Court of Appeal set out the salient facts which brought the case within the *Hedley Byrne* principle. They were as follows:[33] (i) the lessee was unfamiliar with the zoning by-law; (ii) the lessee sought information from someone who was a responsible officer of the corporation; (iii) the lessee trusted that official to give reliable information; (iv) the lessee expected that care would be taken given the official's specialized knowledge; (v) the official knew that the lessee relied on him to exercise reasonable care; (vi) the lessee acted on information received from the official in question.

An important feature of this case, stressed in some subsequent decisions as will appear, was that the inspector not only gave advice that was inaccurate due to his negligence, but also issued a licence. The lessee of the site went into the used-car business in reliance on the advice and the licence. In other words, more than simply a statement by the defendant was involved: there was a positive act which misled the plaintiff and caused him to act to his detriment with consequential financial loss. Did this make a difference? From what occurred in later Canadian cases, to be examined below, it is possible that the fact of issuing a licence, a document purporting to entitle the plaintiff to operate in a certain manner, was a vital link in the chain of ultimate liability. The duty was not simply one of care in relation to the spoken or written word, but also in relation to the administrative act of granting official permission. The case is similar to the English decision of *Ministry of Housing and Local Government* v. *Sharp*[34] in which the issuance by a land registrar of a certificate of clear title when in fact the plaintiff Ministry had registered a compensation notice against the land in question, was vital to the finding that the defendant Council was vicariously liable for the negligence of its servant, the registrar, under the doctrine of *Hedley Byrne*.

It seems that the Court in the *Windsor Motors*[35] case was confining liability under *Hedley Byrne* to cases where there was what

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[33] *Ibid.*, 178.

[34] [1970] 2 Q.B. 223. *Cf.* the Canadian case of *Collins* v. *Haliburton, Kawartha Pine Ridge District Health Unit* [1972] 2 O.R. 508 which concerned the negligent issuance of a letter stating that the plaintiff's business was an "offensive trade".

[35] *Supra*, note 32.

might be termed a "professional" reliance upon the words, information, advice, or other statement provided by the defendant. This is borne out by the language of Verchere J. of the Supreme Court of British Columbia, in *George* v. *Dominick Corporation of Canada*, a case in which this kind of liability was not found (although there was liability for breach of contract). The learned Judge, summarizing the effect of the *Hedley Byrne* case, said this:

> A person exercising a profession or calling is liable for failure to exercise due care and skill, despite the absence of a contractual relationship, if the person to whom his careless advice is given is relying on him to take the care required in the circumstances, such reliance being reasonable, and he knows or ought to know that he is being relied on ... .[36]

This was a case in which it was alleged that a stockbroker had failed to inform a client of Stock Exchange rules concerning margins payable on certain shares, which led to some extra cost on the part of the client. In the event the Judge held that there had been no failure to take reasonable care; hence there could be no tort liability. The passage just cited however, indicates an attitude towards the *Hedley Byrne* case that, with respect, was probably not justified before the judgment in the *Evatt* case. Yet in this decision which may be said to echo the effects, if not the language, of earlier Canadian cases after *Hedley Byrne*, there is every manifestation of a restrictive approach to the development opened up by the House of Lords in 1963.

That the *Evatt* case was restrictive was admitted by Parker J. of the High Court of Ontario in *Gadutsis* v. *Milne*.[37] In this case a municipal employee was asked whether the plaintiffs were permitted by the zoning laws to alter certain premises and use them as a restaurant. The employee negligently advised that the alterations could be made and issued the necessary building permit. Relying upon this, the plaintiffs incurred expense in connection with the alterations only to discover later that they were not permitted by the municipality to use the property as they had intended. An action was brought in negligence against the municipal employee (and against the municipality on the basis of vicarious liability), which was maintained. But once again, as in the *Windsor Motors* case, it can be argued that the basis of liability was not *Hedley Byrne* — bad advice negligently given — but a negligent *act*, namely issuing a permit when one should not have been given, in reliance upon which the plaintiffs acted to their financial detriment. However, the Judge

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[36] (1969) 8 D.L.R. (3d) 631, 640.

[37] (1972) 34 D.L.R. (3d) 455, 459.

was able to find the defendants liable on a "true" *Hedley Byrne* basis because the municipal employees consulted by the plaintiffs

> ... were there to give out information as to zoning. The city employees in the zoning department must have known that persons inquiring would place reliance upon what they said.[38]

In this aspect the case was different from the *Evatt* decision, since in the latter it was not the normal duty of an insurance company to give financial advice about other companies. So even with the *Evatt* qualification of the *Hedley Byrne* case, the facts in the *Gadutsis* situation could be brought within the scope of liability for negligent misrepresentation, quite apart from any negligence in the issuance of the permit.

Furthermore, the negligent conduct was not excused by the exculpatory clause contained in the building permit application form filled out by the plaintiffs. This only protected the municipality from liability in the event of "revocation" of the permit. It was held however, that the damage flowed not from the revocation, but from the original *issuance* of the permit, which would never have happened had it not been for the negligence of the employees at the very outset of the plaintiffs' inquiries. Hence the disclaimer clause was inoperative. While this smacks a little of casuistry, the end result was probably just and reasonable. So far as the question of duty is concerned, however, this decision, without actually approving the *Evatt* case, is a step towards suggesting that its limitations on the *Hedley Byrne* principle should be adopted by courts in Canada.

In two more recent cases, the courts held that a duty of care in making a statement was owed by the defendant to the plaintiff. In one case[39] the defendant was a stockbroker and the plaintiff was the bank of one of the stockbroker's clients. It was held that the stockbroker owed a duty to the bank to take care when providing information relating to potential financing by the bank of the client. The request for information was made not on a social occasion but in a business connection, a distinction which was drawn in the *Hedley Byrne* case. For other reasons, however, of which more later, there was no liability, but the case illustrates the business type relationship which must be involved before the *Hedley Byrne* case can

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[38] *Ibid.*

[39] *Bank für Handel und Effekten* v. *Davidson & Co.* (1974) 46 D.L.R. (3d) 3, upheld on appeal (1975) 55 D.L.R. (3d) 303. See also *Northwestern Mutual Insurance Co.* v. *J.T. O'Bryan and Co.* [1974] 5 W.W.R. 322 on the subject of an insurance agent's duty to the *insurer* to warn him that he was still obliged to cover a particular risk, so that he could have cancelled the policy in time to avoid liability.

become operative.[40] In the other case, *Porky Packers Ltd* v. *Town of The Pas*,[41] a municipality was again held negligent in granting a building permit which was acted upon by the grantee to his financial detriment, when it was found to have been given invalidly. Subject to some later comments regarding another issue, this case does not carry the story very much further.

Summarizing what these decisions achieve, it may be said that they have explored the kinds of relationship first suggested in the *Hedley Byrne* case, with a view to establishing when a duty of care can arise with respect to giving advice, issuing permits and providing information. There seem to be two major groupings. The first consists of professional or semi-professional people whose business it is in the normal course of things to offer advice and information in reliance upon which the one advised will act. More often than not, some financial implication is involved, with possible and, as it turns out in these cases, actual economic loss.[42] The second is composed of public or government officials, whether federal, provincial or municipal (though so far, only the last class seem to have been involved). Such people, by virtue of their position and their duties, may be obliged to use care in the way that they advise the public, or exercise their prerogatives to issue permits and licences which enable members of the public to do certain things otherwise not allowed. *Virtute officii*, such people must use reasonable care in the way they perform their work in addition to their duty to act honestly and in the public interest.

If this analysis is correct, then it indicates the conservatism of the courts to which reference has already been made. Support for this assertion is to be found in two cases of the Supreme Court of Canada[43] in which, *on the issue of whether or not a duty existed*, it

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[40] On appeal the majority upheld the trial judge on the issue of causation, but Bull J.A. thought that no duty of care was owed; (1975) 55 D.L.R. (3d) 303.

[41] (1974) 46 D.L.R. (3d) 83.

[42] But if such "professionals", *e.g.*, valuers, are acting as arbitrators or quasi-arbitrators in a judicial way, resolving a dispute that has been formulated between the parties (as opposed to making a valuation) they may be immune from a duty of care in the same way as judges and barristers. See the discussion by the House of Lords in *Sutcliffe* v. *Thackrah, supra,* note 26 and more recently in *Arenson* v. *Carson Beckman Rutley and Co., supra,* note 26; in both cases the Court of Appeal was reversed.

[43] *Welbridge Holdings Ltd* v. *Metropolitan Corporation of Greater Winnipeg* (1969) 4 D.L.R. (3d) 509 (Man. Q.B.); aff'd (1970) 12 D.L.R. (3d) 124 (Man. C.A.); aff'd [1971] S.C.R. 957, (1970) 22 D.L.R. (3d) 470. *J. Nunes Diamond Ltd* v. *Dominion Electric Protection Co.* (1969) 5 D.L.R. (3d) 679 (Ont.H.C.); aff'd (1970) 15 D.L.R. (3d) 26 (Ont.C.A.); aff'd [1972] S.C.R. 769, 26 D.L.R. (3d) 699.

was held that none arose under the law of tort. In both cases the attitude of the Court was that the relationship between the parties was such as to negate any duty of care in respect of the kind of activity that was being carried out by the defendant on the occasion in question. The reasons why this was so in each case were so different that they reveal some desire on the part of the Court to limit the extent of the *Hedley Byrne* doctrine, quite distinct from the qualification which is to be found in the *Evatt* case.

3. Inapplicable cases

Take first the *Welbridge* case.[44] The plaintiff relied upon a grant of building permission, in other words a representation as to zoning, made by a municipality. In consequence the plaintiff incurred certain expense in connection with the building. The courts, culminating in the Supreme Court of Canada,[45] held that the zoning by-law had been improperly passed; the zoning was therefore illegal and the building permission given to the plaintiff was inoperative. For the loss incurred the plaintiff sued in negligence, relying on the *Hedley Byrne* doctrine. At all stages of the case the plaintiff was unsuccessful (though Freedman J.A. did dissent in favour of the plaintiff when the case was before the Manitoba Court of Appeal). How could this be, particularly in the light of the *Windsor Motors* case?[46] There appears to have been negligence on the part of officials of the municipality, which caused the loss of which the plaintiff complained. Surely there was a duty on the municipality to see that its by-laws were properly passed, so as to preclude the possibility of a successful challenge in the courts?

A vital point in this regard seems to have been that the negligence alleged was not that of a servant of the municipality, for which the latter was being held vicariously liable, as was the situation in the *Windsor Motors* case, and later in *Gadutsis* v. *Milne*.[47] In the *Welbridge* case the negligence alleged was that of the municipality itself. It was argued that there was a duty on the municipality in enacting a zoning by-law enlarging the development possibilities of designated land, to exercise reasonable care to see that the procedures upon which valid enactment depended were followed. Economic loss was foreseeable; such loss occurred; therefore there was a duty to take care to avoid such loss. But the Supreme Court, speaking through

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[44] *Ibid.*
[45] *Ibid.*
[46] *Supra*, note 32.
[47] (1972) 34 D.L.R. (3d) 455.

Laskin J., refused to accept this. The duty must be established before dealing with the question of "the consequences for which reparation should be made".[48] This harks back to a famous statement by Lord Sumner on the distinction between culpability and compensation,[49] a differentiation which, with great respect to the present Chief Justice of Canada, was demolished for most if not all purposes by the Judicial Committee in *The Wagon Mound (No. 1)*,[50] fifteen years ago. Surely the prospect, which would be known to a reasonable man (or in the instant circumstances, a reasonable municipality) was that if there was something legally wrong with the by-law there would be loss on the part of those who relied upon its validity to organize their affairs. Foresight of harm, in this case of economic harm, is indeed the crucial feature of such situations and the liability that may flow from them. The cases cited by Laskin J. to support his contention, *Liesbosch* v. *Edison*[51] and *S.C.M. (United Kingdom) Ltd* v. *W. J. Whittall & Son Ltd*,[52] do not deal with the existence of a duty but with the consequences for which a person will be liable in the event of breach of a duty undoubtedly owed. They raise and discuss the issue of liability for the economic consequences of a physical injury or damage inflicted upon the plaintiff by a negligent defendant (a very different issue which does not arise in the present context).[53] The cases which turn upon the question of negligent misrepresentation are all cases in which the *only* damage is economic or financial, in which the very basis of liability is the prospect or foreseeability of that type of damage.

Be that as it may, the approach of the Supreme Court to the "duty" issue in the *Welbridge* case was hardly expansive. To quote Laskin J.:

> Accepting that *Hedley Byrne* has expanded the concept of duty of care, whether in amplification or extension of *Donoghue* v. *Stevenson*, it does not, nor, in my view, would any underlying principle which animates it, reach the case of a legislative body, or other statutory tribunal with quasi-judicial functions, which in the good faith exercise of its powers promulgates an enactment or makes a decision which turns out to be invalid because of anterior procedural defects.[54]

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[48] *Welbridge Holdings Ltd* v. *Metropolitan Corporation of Greater Winnipeg* [1971] S.C.R. 957, 966.

[49] *Weld-Blundell* v. *Stephens* [1920] A.C. 956, 984.

[50] [1961] A.C. 388.

[51] [1933] A.C. 449.

[52] [1971] 1 Q.B. 337.

[53] See C. Harvey, *Economic Losses and Negligence: The Search for a Just Solution* (1972) 50 Can.Bar Rev. 580.

[54] *Supra*, note 48, 967.

There is no doubt that a deliberate abuse of such powers with the aim of harming another, is actionable, either in its own right or possibly on the grounds of conspiracy. But a merely negligent abuse of powers does not give rise to liability, despite *Hedley Byrne*. Why not? Because there was no special relationship between the municipality and the plaintiff, nor did the municipality assume any responsibility to the plaintiff with respect to procedural regularity. Laskin J. drew a distinction between the legislative, quasi-judicial powers, and administrative, ministerial or business powers of the municipal corporation. There could be contractual or tortious liability (including liability for negligence) with respect to the last group of powers, but not with respect to the others. In the words of Laskin J.:

> There may... be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty.[55]

The difference lies in the distinction between the public or governmental aspects of a municipality and its business functions, which is also the demarcation line between a municipal corporation and a private one.

A second ground for refusing liability was that the making of the by-law was really a part of the legislative and not the quasi-judicial functions of the municipality, even if there could have been liability for negligence in relation to the performance of the latter. But this was not possible in any event. A failure to observe the rules of natural justice in a quasi-judicial activity may invalidate the results of such activity, but it gives no right to damages to a person injured or suffering loss in consequence, where the failure in question is said to spring from negligence. (The situation, as already observed, whether a private or public body is involved, will be different if the failure was deliberate and malicious.)[56]

Lastly, the loss to the plaintiff was not the result of a misrepresentation, but the consequence of a faultily enacted by-law[57] (contrary to the view of Freedman J.A. in the Manitoba Court of Appeal).[58] Hence the more general doctrine of the *Hedley Byrne* case, founded as it is upon the notion of a misrepresentation arising from a statement made by the defendant, could not apply to the circumstan-

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[55] *Ibid.*, 968.

[56] *Ibid.*, 967. *Cf.* similar situations where the allegedly negligent party was exercising a judicial or arbitral function: See the cases cited *supra*, notes 26 and 42.

[57] *Ibid.*

[58] (1970) 12 D.L.R. (3d) 124, 138-140.

ces of this case. This was not so in *Windsor Motors*.[59] Such a decision plainly depends upon how the court characterizes the nature of the alleged wrongdoing on the part of the defendant. With respect, there seems to have been every justification for the view adopted by Freedman J.A. that the negligence of the municipality flowed as much from their representation of the ability of the plaintiff to build as he wished, as from the manner in which the municipality enacted the relevant by-law. It was not simply a case of passing the by-law and saying nothing to the plaintiff as it seems to have appeared to Laskin J. and the other members of the Supreme Court.

What then emerges from this fascinating and difficult case? Simply put, its effect may be summarized as follows: that there is no duty of care imposed upon public bodies when they are exercising their *legislative* or *quasi-judicial* functions, though there may well be when they are engaged in day-to-day administration. Is this a valid and logical distinction capable of being derived from the law of negligence in general and the *Hedley Byrne* doctrine in particular? Or is it more a difference based upon requirements and dictates of policy? We have it on the recent authority of Lord Denning M.R. in *Dutton* v. *Bognor Regis United Building Co.* that "[i]n previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt?".[60] But the question has always been there in the background, concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable or not? "Nowadays", said Lord Denning, "we direct ourselves to considerations of policy".[61] Perhaps not all judges are as honest about this as Lord Denning. Nonetheless it must be recognized that there is such a concept as judicial policy, and it is inherent, if not explicit, in many if not all major decisions. I would suggest that in the *Welbridge* case,[62] at the base of the decision was the policy of not rendering municipalities or other governmental institutions potentially liable to suits for negligence where miscalculations, errors, or improprieties may have caused harm to people relying upon the valid conduct of the affairs of the institution in question. It would be an added terror to government, it would possibly become expensive for the public purse, and it might prove a hindrance to the proper man-

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[59] *Supra*, note 32.

[60] [1972] 1 All E.R. 462, 475.

[61] *Ibid.*

[62] *Welbridge Holdings Ltd* v. *Metropolitan Corporation of Greater Winnipeg* [1971] S.C.R. 957.

agement of the particular form of government that was involved. The law of negligence may be extended so far — indeed a good deal farther than perhaps originally contemplated by Lord Atkin in 1932 — but it will not be extended *ad infinitum.*

Could it be said by way of justification of the attitude adopted by the Supreme Court in the *Welbridge* case that a municipal corporation, when acting as this one did, was not purporting to offer professional or business guidance on the faith of which the plaintiff relied and could have been foreseen to rely? If so, then it might be argued that in any event, the circumstances of the *Welbridge* case did not fall within *Hedley Byrne,* at least as that case has been interpreted, especially by *Evatt.*

That was one, though not the only ground upon which the Supreme Court (over the dissent of Spence J. on this occasion) denied liability in the second case — *J. Nunes Diamonds Ltd* v. *Dominion Electric Protection Co.*[63] In that case the defendants installed a warning system to protect the plaintiffs' jewellery against burglary. The contract stipulated the supply of equipment and provision of services for a rental price. It excluded conditions, warranties and representations, and provided that the defendants were not insurers and were only liable for $50 damages. As there had been a theft from other premises protected by the defendants' system, when the alarm had not gone off, the plaintiffs brought in the defendants to check their system. It was on this occasion that an employee of the defendants, a technician, made a statement to a servant of the plaintiffs, which clearly indicated that the system installed by the defendants was foolproof and could not be rendered inoperative, even by the defendants themselves. The defendants wrote to the plaintiffs saying that investigations into the earlier burglary were taking place. It was never discovered whether the system was faulty or whether the protection company's employees had been guilty of complicity. Subsequently the defendants' system was circumvented and the plaintiffs were burgled, losing a considerable quantity of jewellery. They sued the defendants, alleging negligence. The latter were held not liable.

Two reasons for this emerge from the majority judgment given by Pigeon J. In the first place, the defendants had not undertaken any duty to give accurate advice, as required under the *Hedley Byrne* doctrine. The insurance brokers utilized by the plaintiffs provided advice; the defendants merely contracted to supply specific services, namely a system for burglary protection. If the defendants did make

[63] [1972] S.C.R. 769.

an honest but inaccurate statement as to the performance of its system,

> ... it did not thereby assume responsibility for all damage which might thereafter be sustained by the [plaintiffs] if its system, on his premises, was circumvented.[64]

This was not a case where a person sought information from another whose business it was to give such information (as established by *Evatt* which seems to have been approved by the Supreme Court in this case). Nor was there any misrepresentation resulting in a contract being entered into, which leads us to the second reason for the decision. In this case the parties had mutually established their respective rights and obligations by contract, the terms of which did not make the defendants an insurer of the plaintiffs' property against the risk of burglary. The plaintiffs had agreed to accept the system for what it was worth, and the alleged misrepresentation by the defendants' employee as to the infallibility of the protection system could not introduce any alternative or more extensive duty than that fixed by the contract.[65]

Perhaps by way of reinforcement (although from the language of Pigeon J. it seems more like an additional reason), it was said that the *Hedley Byrne* principle was inapplicable to any case where the relationship between the parties is governed by contract, unless the negligence relied on can properly be considered as "an independent tort", outside the purview of application of the contract.[66] It is this feature of the case which is the most interesting and important in the present context. Before considering it further, however, it must be pointed out that Spence J. dissented on the ground that the facts involved the kind of misrepresentation, made in the kind of situation and by the kind of person contemplated by the *Hedley Byrne* case, justifying the imposition of a duty which had been breached by the defendants, with consequent liability. Such representations had been made by the defendants' manager in response to written inquiries, and by their technician in response to an oral question made by the plaintiffs. On both occasions there was a serious communication "made in circumstances where the representor could have no other view than that his expert opinion was intended to be relied on".[67]

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[64] *Ibid.*, 777.

[65] *Ibid.* Contrast the situation in *Esso Petroleum Co.* v. *Mardon* [1975] 1 All E.R. 203, and in *Walter Cabott Construction Ltd* v. *The Queen* (1974) 44 D.L.R. (3d) 82 in which it was held that where the statement or advice was made or given in a pre-contractual situation there could be a duty. *Cf. Dillingham Constructions Pty. Ltd* v. *Downs* [1972] 2 N.S.W. L.R. 49.

[66] *Supra*, note 63, 777-728.

[67] *Ibid.*, 807.

With this view of the case the present writer respectfully agrees. But even if it were accepted as correct, there would remain as a stumbling-block to a decision in favour of the plaintiffs the other line of reasoning contained in the judgment of the majority — the contract-tort dichotomy.

If this reasoning is correct, and it is a matter of some debate in the English as well as the Canadian courts, the result would appear to be that if there is a contract between the parties, no alternative basis for potential liability for negligence can be found in the creation of a tortious duty of care. There are English cases which support such a proposition.[68] However there is also at least one English decision, arising out of a contract of sale of goods, in which the issue was raised but the trial judge refused to deny possible tort liability.[69] Moreover, since the *Nunes Diamonds* case there has been a Canadian decision (from British Columbia)[70] in which, despite the existence of a contract of sale of goods between the parties, it was held at first instance that there *could* be liability on the part of the seller to the buyer not under the contract but in tort, on the basis of a negligent misrepresentation. This was reversed on appeal.[71] However, with regard to pre-contractual situations[72] where a subsequent contract ensues, the decision casts some doubt on the matter.

The contract-tort dichotomy is questionable from the point of view of authority. How does it stand in principle? Is it correct and reasonable to confine the parties within the limits of any contract which they may have made if it is conceivable to postulate liability some other way, by basing their relationship on duties and rights arising outside the contract? One argument in favour of the strict approach is that once the parties have taken the trouble to express their relationship in contractual terms, they do not intend to be regulated by the more general law. On the other hand, if for some reason the contract will not be effective in whole or in part as for instance where there is an exemption clause, it may be that notwithstanding such exclusion or limitation of liability under the contract, there will be tortious liability.[73] Alternatively, the contract

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[68] *Clark* v. *Kirkby-Smith* [1964] Ch.506; *Bagot* v. *Stevens, Scanlon & Co.* [1966] 1 Q.B. 197. *Cf. Banks* v. *Reid* (1974) 53 D.L.R. (3d) 27 and *Samayoce* v. *Marks* (1974) 53 D.L.R. (3d) 42 with regard to the situation between solicitor and client.

[69] *Vacwell Engineering Co.* v. *B.D.H. Chemicals Ltd* [1971] 1 Q.B. 111.

[70] *Sealand of the Pacific Ltd* v. *Ocean Cement Ltd* (1973) 33 D.L.R. (3d) 625.

[71] *Sub. nom., Sealand of the Pacific Ltd* v. *McHaffie Ltd* [1974] 6 W.W.R. 724.

[72] See the cases cited *supra*, note 65.

[73] *White* v. *John Warwick & Co. Ltd* [1953] 1 W.L.R. 1285.

may not deal with the exact situation which has arisen and will not govern, making room for the law of tort. A further argument still is that save in cases where exact and comprehensive language is utilized by the parties (as the House of Lords in the *Suisse Atlantique* case[74] visualized might be possible), the parties will not have covered every possibility by their contractual language. In the *Nunes Diamonds* case,[75] for instance (despite what was said by Pigeon J.), is it reasonable to conclude that the plaintiffs were not relying on statements or implicit representations on the part of the defendants, whether contractual in character or not, in deciding whether to make use of the defendants' system of burglary protection rather than any other means or device? Of course, as is true of many other situations, much depends upon the interpretation of the language comprising the contract, but there is no more difficulty about this in the present context than in any other.

In short, therefore, it is suggested that the refusal to invoke the *Hedley Byrne* doctrine in a case covered by an express contract between the parties, except in the narrow circumstances envisaged by Pigeon J., is unjustified and an unnecessary restriction upon the scope of the duty of care enunciated in 1963. The fact that the Supreme Court adopted such an attitude exemplifies excessive caution, and a very limiting approach to the innovative concepts propounded in the *Hedley Byrne* case. Possibly the statements in the *Nunes Diamonds* case on this point may be considered as *obiter dicta* and ultimately not to be followed strictly. Perhaps the dissent of Spence J., who did not take the same point of view on this matter, will help in this regard.[76]

4. Other aspects of the duty

Answering the question whether a duty of care with respect to making a statement or giving advice is owed by the defendant in the circumstances does not always totally resolve the issue of liability. Other subsidiary or collateral matters have to be decided, although they may be looked upon as aspects of the duty issue.

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[74] *Suisse Atlantique Société D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

[75] *Supra*, note 63.

[76] The Canadian, English and Australian cases are critically discussed by C.R. 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* (1975) 21 McGill L.J. 79, in which the whole problem is canvassed at length.

(a) *Who is protected?*

One minor problem arose in the *Welbridge* case.[77] Given that a duty of care might be owed to those who could be affected injuriously by a failure to observe the procedures upon which valid enactment of the by-law depended (a position ultimately not accepted by the Court), who precisely would come within this category? Obviously the residents of the area affected by the by-law, possibly even the residents at large of the municipality. The plaintiff in this case however, was a company which not only came into existence, but also did not acquire any interest in the affected land, until *after* the passage of the invalid by-law. The preliminary inquiries and actions were taken by promoters who only formed the company when it became clear (as they thought) that their project would be feasible. In an *obiter dictum,* Laskin J. said that he would not exclude the company from the class of those to whom a duty was owed (if *any* duty were owed) merely because of this later acquisition of legal personality and interest in the land.[78] This suggests that a duty of care, at least of the variety under discussion in this article, could be owed to someone not in existence at the time the duty arose and was broken— a novel proposition when comparison is made with cases which are concerned with the duty of care not to cause physical injury. For a long time there has been a controversy as to whether a duty of care of this sort could be owed to an unborn child, who might be affected by an act of negligence committed before its birth, and more immediately to its mother, so as to produce some subsequent physical deformity. There has been some movement towards the idea that a duty could be owed to such a non-person.[79] The language of Laskin J. in this case, albeit the legal problem is slightly different, could be cited in support of such movement.

It was certainly relied upon by the Manitoba Court of Appeal in the case of *Port Packers Ltd* v. *Town of The Pas.*[80] There was a duty of care in that case, and there was a breach which could be the foundation of liability as already considered. But as in the *Welbridge* case, the company suing was not in existence at the time of the misrepresentation which was the cause of action. That misrepresentation was made to various people who subsequently formed the company to undertake the activity for which they thought

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[77] *Supra,* note 62.

[78] *Ibid.,* 966.

[79] Children affected by thalidomide were successful because the defendants settled the claims.

[80] *Supra,* note 41.

permission had been granted by the municipality. Matas J.A., giving the judgment of the Court, discussed the case of a pre-incorporation contract,[81] which at common law could not be ratified and adopted by a company subsequently coming into existence, and which may now be validated under statute, for example in Manitoba under *The Companies Act*.[82] That provision could entitle a company to sue for representations made to trustees for the company, on the faith of which the trustees contracted and made commitments on behalf of the company. Thus, by the application of statutory provisions relating to companies (which may have been intended to validate *contracts* and deal with property rights, rather than cope with potential *tort* actions), and by adopting the lead provided by Laskin J. in the *Welbridge* case, the opportunity was seized by the Manitoba Court to create liability in negligence for a misrepresentation made to *another* party, not the plaintiff, on the faith of which the *plaintiff* was alleged to have suffered loss. This, it seems, is a far cry from the unborn child being injured *en ventre sa mère* by the negligent act of the defendant; and an even further cry from the notion of Lord Atkin[83] and many others that a duty of care cannot exist in the air, but must be owed to someone, presumably someone in existence, if it is to give rise to liability.

There may be some analogy between the child in the womb at the time the mother is subjected to the defendant's negligence, with the result that the physical trauma is transmitted to the child, and the company which is in the contemplation of promoters, trustees or others at the time a misrepresentation is made to them, so that it is passed on to the company in the fullness of time and produces financial loss. But such an analogy cannot be taken too far. There is a difference between actual injury to the foetus and potential loss to the company not yet created. The Manitoba Court of Appeal justified their treatment of the problem in terms of the transmission of accrued rights (under the statutory provision referred to above), from the people who formed the company to the company itself. What the Court was doing was treating a potential right to sue for misrepresentation as an accrued right of this kind. In a sense this is legitimate, but there is something inelegant about the whole idea,

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[81] *Ibid.*, 90-92.

[82] S.M. 1964 (2d Sess.), c.3, s.142 (now R.S.M. 1970, c.C-160, s.159): "Subject to its ratification by the corporation, every corporation is upon its incorporation vested with all the property, rights, assets, privileges and franchises theretofore held for it and subject to the liabilities under any trust created with a view to its incorporation."

[83] In *Donoghue* v. *Stevenson, supra,* note 2.

particularly when the comparison with physical injuries is made. Since this whole area of liability for negligent conduct is an extension of the original notion contained in *Donoghue* v. *Stevenson*,[84] in which it was related to physical damage, it might be thought reasonable, wherever the doctrine is being extended or applied, to bear in mind the connection betwen different types of injury, lest the law relating to one kind is made to differ fundamentally from that relating to another. This, it is suggested, ought not to occur unless there is very good reason.[85] With respect, and despite the dictum of Laskin J. in the *Welbridge* case,[86] it is suggested that the treatment of misrepresentations ultimately affecting corporations not in existence at the time the misrepresentations are made as being capable of giving rise to liability is misconceived. Indeed, two members of the Manitoba Court of Appeal in the *Welbridge* case were clearly of this opinion.[87] The later decision in the *Porky Packers* case[88] is very much open to question. It is an instance of a very liberal view of the law, based upon incorrect principle, and leading to results that are disruptive of logic, as well as unjustified in terms of that elusive concept "justice".

(b) *Directness*

At least in the *Porky Packers* case it could be said that there was a direct link between the promoters and the company eventually created. Thus there was a direct causal connection between the representation by the municipality to the promoters and the ultimate reliance and loss by the company. In the absence of such a direct connection there would appear to be no duty of care for the reason that there can only be the sort of "special" relationship envisaged in the *Hedley Byrne* case and exemplified in subsequent decisions, where the maker of the inaccurate statement had or ought to have had in mind the person who in the end result relied upon the statement and thereby suffered loss. In the *Porky Packers* case one could, as the Court appears to have done, substitute the original recipients

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[84] *Ibid.*

[85] On the question of measurement of damages, *cf.* the recent case of *Uncle Ben's Tartan Holdings Ltd* v. *Northwest Sports Enterprises Ltd* (1974) 46 D.L.R. (3d) 280, in which it was held that in an action for negligent misrepresentation only "out of pocket" loss is recoverable, not loss of bargain. This is comparable to the measurement of damages in cases of physical injury.

[86] *Supra*, note 62, 966.

[87] (1970) 12 D.L.R. (3d) 124, 145-146 *per* Guy J.A., 159-160 *per* Dickson J.A. Support for this position is given by the later case of *Haig* v. *Bamford*, *supra*, note 19.

[88] *Supra*, note 41.

of the representation, with the company which they formed later on in time. Looking at it from one point of view the company was simply a new organization of the people who in the first instance were misled by the municipality. The same might have been said of the company in the *Welbridge* case. As argued above, this sort of result is not the most desirable. But it is to some extent understandable, and possibly can be accepted for the purpose of fulfilling one essential requirement of liability under the *Hedley Byrne* doctrine. In two more recent cases, however, the court did not find either the necessary directness or the required reliance which would support a claim based upon alleged negligent misrepresentation.

One of these cases is *Central B.C. Planers Ltd* v. *Hocker*.[89] Salesman A working for some stockholders informed salesman B, from another branch of the firm, of an oil strike which he mistakenly believed had occurred. A told B that he had received orders to buy shares in the company which had an interest in the oil well. B told several of his customers of this report, but his version differed somewhat from the story as he had received it from A. In effect he gave his customers the impression that there was a considerable oil discovery, that this was not known by the public, and that the first salesman, A, had orders for 25,000 shares of the company. On the strength of this, his customers bought shares which, since the report was unfounded, were not as valuable as believed, and they lost money. They sued the two salesmen, alleging misrepresentation. It was held that salesman B was liable, on the basis of the trust reposed in him by his customers in consideration of his and his firm's knowledge, skill and expertise. But salesman A was not liable, since there was no direct relationship between him and the customers of B. Moreover, the representation B made to his customers was not in the same terms as the representation made to B by A. Possibly if B had merely repeated what A had told him, the situation would have been different. As it was, even if a duty was owed by A, the conduct of B did not constitute a breach of that duty by A. In other words, A's misrepresentation was not made to the plaintiffs directly, nor did the plaintiffs rely on it. Therefore while A may have been negligent regarding the accuracy of his information, he was not negligent *vis-à-vis* the plaintiffs.

This was held in spite of the fact that the Judge found that A knew or should have known that the information he gave to B would be passed on to B's customers. Since it was foreseeable on A's

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[89] (1970) 10 D.L.R. (3d) 689. See also re the lack of foresight and *control* over the use of a statement, *Haig* v. *Bamford, supra,* note 19.

part that by misleading B, he would be likely to mislead others, especially customers or prospective customers of B, why should A not have been responsible, as well as B, as the one who, in effect, instigated the whole chain of events that led to the plaintiff's loss?

A stronger instance of no foreseeability of loss, and of no reliance on the misrepresentation, is provided by the more recent decision in *Bank für Handel und Effekten* v. *Davidson & Co. Ltd*[90] X was a client of both the plaintiff bank and the defendant stockbroker. While performing certain stock transactions for X, the defendant sent the plaintiff telex messages confirming the sale of shares owned by X, as a result of which the plaintiff credited X's account with the sale price. X turned out to be the buyer *and* seller of the same shares so that contrary to what the plaintiff bank expected, there was no money forthcoming from these transactions. In consequence the plaintiff bank suffered loss and sued the stockbroker alleging breach of contract and negligence. It was held that since the bank was not acting as a stockbroker in these circumstances, there was no contractual relationship to support an action for breach of contract. More importantly in the present context, there was no liability in negligence for two reasons. First of all, while a duty was owed by the stockbroker to the bank under *Hedley Byrne*, there was no negligence since the stockbroker could not have foreseen that the bank would credit the customer with the total sale price of the shares in question. Following the principles of *The Wagon Mound (No.)1*,[91] the loss suffered by the bank was not of such a kind as the reasonable man should have foreseen. Applying the law of British Columbia (which, failing evidence to the contrary, was presumed to be the same as the law of Switzerland where the bank was situated and the entries in the books made) and the facts as found, Hinckson J. held that the loss was unforeseeable. Therefore, the stockbroker had not been guilty of negligence, *i.e.* a breach of duty.

The second reason for the decision against the plaintiff bank was that their action in giving credit to X, which led to the loss in issue, was not the result of reliance upon the messages from the stockbroker as to the sale of shares, but stemmed from reliance upon other collateral security held by the bank. In this the learned Judge adopted and applied a dictum in the *Dutton* case to the effect that the "professional man must know that the other is relying on his skill and the other must in fact rely on it",[92] for there to be liability under the *Hedley Byrne* doctrine.

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[90] *Supra*, note 39. *Cf. Haig* v. *Bamford, ibid.*

[91] *Supra*, note 50.

[92] *Supra*, note 39, 26.

Thus as these cases show, there may be a duty in the abstract, or the circumstances may justify the conclusion that the necessary relationship existed between the parties to substantiate potential liability for negligent misrepresentation, but that will not be enough. The loss must be foreseeable, and it must be caused by direct reliance on the misrepresentation, by someone (the plaintiff) whose reliance is itself foreseeable.

(c) *The nature of the duty*

What is the nature of the duty that is owed, when it arises? It is a duty of care which presumably transcends the duty of honesty which is owed in any event, though this was never made clear in the *Hedley Byrne* case. Extrapolating from the general law of negligence regarding physical injuries, the duty of a person to exercise reasonable care with regard to making statements, giving advice and so on, involves the imposition of the responsibility to be as accurate as can be expected of a reasonable man in his position, with his skill and knowledge, in the circumstances of the case. With regard to the last factor, the availability of facts and other necessary requirements to provide the information or advice in question must be borne in mind.[93] In most if not all the cases which have thus far come before the courts, especially the Canadian courts, the defendant has responded to a request for information, advice or guidance. For various reasons, his negligence in failing to provide the right answer has or has not led to liability as the case may be. The point is that in these instances the plaintiff (or his agent, servant, official, promoter, *etc.*) has approached the defendant and put the matter in motion. In one case, however, *Rivtow Marine Ltd* v. *Washington Iron Works*,[94] which ultimately raised other issues upon which it was decided, there was no such specific request for information. Nevertheless, even without such action on the part of the plaintiff, there was an obligation on the defendant to provide information, in effect an obligation to warn, in certain circumstances.[95] However, this was regarded primarily as an aspect of the manufacturer's duty of care rather than negligent misrepresentation.[96]

The *Rivtow* case involved a faulty crane which, because of its defects, could not be used by the plaintiffs, the ultimate purchasers,

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[93] Hence there was no failure to take reasonable care, and no liability on this basis in *George* v. *Dominick Corp. of Canada* (1969) 8 D.L.R. (3d) 631.

[94] (1970) 74 W.W.R. 110 (B.C.S.C.); rev'd in part (1972) 26 D.L.R. (3d) 559 (B.C.C.A.); rev'd in part [1974] S.C.R. 1189, (1973) 40 D.L.R. (3d) 530.

[95] [1974] S.C.R. 1189, 1209 *per* Ritchie J.

[96] *Ibid.*, 1214.

thereby involving them in expense in two ways: (i) repairs to the crane; (ii) loss of revenue through inability to use it for the period of the repairs. The action was brought against the manufacturer, and was based upon the *Donoghue* v. *Stevenson* principle. Since neither personal nor proprietary damage had followed however, the issue in the case was whether the plaintiffs could recover for the "purely" economic loss which had followed from the negligence of the manufacturer of the crane. In the event it was held that the loss of revenue was recoverable, but not the cost of the repairs (though on this point there was dissent in the Supreme Court of Canada, ably and comprehensively expressed by Laskin J.).[97] If liability in such a case is to be based upon faulty manufacture it does leave open, as the split in the Supreme Court reveals, the question whether damage of the kind complained of by the plaintiff is recoverable in such an action. But suppose the cause of action could be founded upon negligent misrepresentation? Suppose the plaintiff argued that he was deceived into believing that the crane was satisfactory and in working order by implied if not express representations made by the manufacturer in permitting it to go on the market? Would that extend the scope of damage recoverable by an injured plaintiff?

Even if it might do so, a point which will be considered more fully later, the problem is raised whether this is a legitimate method of approaching such cases. It involves utilizing the *Hedley Byrne* case in a different way.[98] Furthermore it would result in a revolution as far as *Donoghue* v. *Stevenson* type duties and liabilities are concerned. Under that case the manufacturer's duty was to take reasonable care that his product was safe for an ultimate and foreseeable consumer. In some circumstances it might be sufficient if he provided an adequate warning, just as the occupier might discharge his duty to certain types of visitors by such a warning. In other cases however, a warning might not be enough; something more positive might have to be done to ensure the safety of the product. Once there is negligence in the manufacture of the product, however, this could be transformed into a negligent failure to warn an ultimate consumer of the dangerous character of the product, so that liability could be founded not upon negligent manufacture, but upon negligent misrepresentation. In other words, when the manufacturer knows or ought to know that there has been a lack of care in the manufacture of his product, he is under a duty to provide clear warning of possible

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[97] *Ibid.*, 1216.

[98] This the Supreme Court did not do, but possibly because it was never "suggested" to them that they should: See the language of Ritchie J., *ibid.*, 1214; *cf.* Laskin J. (dissenting), 1218.

danger. This could be extended possibly to others, much as the *Donoghue* v. *Stevenson* doctrine itself has been extended.[99] His failure to do so is a *distinct* act of negligence of the *Hedley Byrne* type, upon which alternate or additional liability could be founded. This may seem to be uunecessary in view of the breadth of liability under *Donoghue* v. *Stevenson.* On the other hand it may be another way to tackle the vexed question of economic loss arising out of the physical infliction of damage. Mention of this leads to a new and equally important aspect of this type of liability.

III. DAMAGES

What is recoverable in actions for negligent misrepresentation of this kind? The answer given in the *Porky Packers* case related to the "direct and foreseeable consequences of the town's negligence".[100] Itemized this proved to be: a) "costs incurred by the company for land, construction of the building and installation of fixtures"; b) "local improvements and utilities"; c) "watchman's expenses"; d) "interest"; e) "costs to be incurred for removing the company's chattels from the premises".[101] Certain other losses were alleged and claimed for by the plaintiffs, but not allowed by the Court, despite the success of the plaintiff's action. Notable among these were the costs of closing the present plant and opening the new one, as well as general damages for loss of business reputation. Nor were the estimated costs of purchasing new land and attendant costs in connection with the erection of another building included in the final damages awarded by the Court against the municipality.[102]

It is clear that in this sort of case the loss suffered by the plaintiff is purely economic and is never likely to be physical. Though there are pre-*Hedley Byrne* and post-*Hedley Byrne* cases in which physical injury has resulted from a negligent misrepresentation,[103] those instances would have resulted in liability even without

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[99] Particularly as expanded by the Supreme Court of Canada, through Laskin J., in *Lambert* v. *Lastoplex Chemicals Co. Ltd* (1971) 25 D.L.R. (3d) 121, 124-125. *Cf.* also the language and decision of the Judicial Committee of the Privy Council in *Distillers Company Ltd* v. *Thompson* [1971] 1 All E.R. 694, discussed, in relation to another matter, in G.H.L. Fridman, *Where is a Tort Committed?* (1974) 24 U.of T.L.J. 247, 260-261.

[100] *Supra,* note 41, 97.

[101] *Ibid.*

[102] *Ibid.,* 88, 98-100.

[103] *Sharpe* v. *Avery* [1938] 4 All E.R. 85; *Clayton* v. *Woodman & Sons* [1962] 2 Q.B. 533; *Grange Motors* v. *Spence* [1969] 1 W.L.R. 53; *Robson* v. *Chrysler Corp.* (1962) 32 D.L.R. (2d) 49.

the doctrine of the *Hedley Byrne* case, which suggests that they may be dealt with under the basic doctrine of *Donoghue* v. *Stevenson,* without recourse to the newer notion of negligent misrepresentation. The *Hedley Byrne* case has been used, judicially and by writers, to support a new outlook on liability for economic loss.[104] However, granted that there is now recognized recovery in cases of pure economic loss, two problems still remain: Firstly, whether the occurrence of economic loss is sufficient to establish liability; secondly, given that there is liability, how extensive the recovery in respect of the economic loss actually suffered will be.

The first issue seems to have been resolved by Laskin J. in the *Welbridge* case,[105] when he said that liability could not be based merely on the fact that economic loss would foreseeably result to the plaintiffs in consequence of an invalid act on the part of the defendant municipality. Foresight of harm, even of the particular harm incurred, is not enough unless there is a duty to prevent such harm and a subsequent breach of that duty. On the other hand, the decision whether or not a duty exists must be based to some degree upon the foresight of the defendant of the kind of harm suffered by the affected person. This surely is the burden of *The Wagon Mound (No.1),*[106] and even earlier, of *Bourhill* v. *Young.*[107] Unforeseeable damage to an unforeseeable plaintiff gives rise to no liability. Hence the arguments put forward earlier against the attitude towards the unincorporated company expressed in the *Welbridge* and *Porky Packers* cases.

This leads to the second issue. How extensive will be the defendant's liability, once it has been shown that he owed a duty, foresaw the kind of damage suffered by the plaintiff, and failed to exercise reasonable care? The resolution of the *Porky Packers* case reveals that not all actual loss will be recoverable. There are limits, based presumably upon the same principles of law as would be applicable to a claim for physical injury, or the economic consequences of any such injury. Directness and foreseeability are the tests. Some of the various aspects of the problem of economic loss have been discussed at length in recent cases and in different legal periodicals.[108] With the broader ramifications of this problem I am not concerned in

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[104] See *e.g.,* C. Harvey, *supra,* note 53; P. Atiyah, *Negligence and Economic Loss* (1967) 83 L.Q.R. 248; L.L. Stevens, *Negligent Act Causing Pure Financial Loss: Policy Factors at Work* (1973) 23 U.of T. L.J. 431; and cases cited therein.

[105] *Supra,* note 48.

[106] *Supra,* note 50.

[107] [1943] A.C. 92.

[108] See *supra,* note 104.

this article. But I am concerned with the question of limits. Since economic loss is what is postulated, what is expected and what must be guarded against by taking reasonable care, then it is no answer to say only that economic loss was suffered. But is only such economic loss as could have been foreseen as being likely to result from the failure or neglect in question recoverable? Or will the net be drawn more widely? If so, how? Possibly it is even more difficult to define or delimit the consequences of a negligent misrepresentation than those of a physical act such as negligent driving. Thus far, it is suggested, the courts have not had to contend seriously with the problems. But if, for example, it is possible to obtain damages for nervous shock or for being upset in an action for breach of contract, as has been held in England,[109] would it ever be possible to recover such damages in an action for negligent misrepresentation?[110] And if the plaintiff is to be limited to purely economic loss, how far will this stretch? Certain expenditure is recoverable as is obvious from the decided cases. But not all is recoverable as the *Porky Packers* case shows; nor, apparently, is loss of bargain or profits.[111]

This brings me back to the *Rivtow* case.[111a] The cost of the repairs was not recoverable under what might be called "normal" *Donoghue* v. *Stevenson* principles. Supposing the claim for such repairs had been founded upon a negligent misrepresentation on the part of the manufacturer? Let us assume for this purpose that the argument propounded earlier as to the feasibility and correctness of such an action in these circumstances has been conceded, and that the *Hedley Byrne* doctrine can extend this far. Would it enable the plaintiff to recover such loss in an action such as that brought in the *Rivtow* case where a different action would fail? I would suggest, in the light of the cases previously discussed in which actions for negligent misrepresentation were successful, that the expense of repairs on the part of the buyer of the defective crane would be precisely the kind of loss that was foreseeable by, and therefore recoverable from, the negligent manufacturer who failed to warn of the defects and their consequences. Such expense was as direct and foreseeable as the cost of the building in the *Porky Packers*[111b] case, or the cost of

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[109] *Cf. Jarvis* v. *Swans Tours Ltd* [1973] 1 All E.R. 71.

[110] *Cf.* the *indecisive* judgments in *Guay* v. *Sun Publishing Co.* [1953] 2 S.C.R. 216.

[111] "Out of pocket" expenses was the test applied in *West Coast Finance Ltd* v. *Gunderson, supra,* note 19 and *Uncle Ben's Tartan Holdings Ltd* v. *Northwest Sports Enterprises Ltd, supra,* note 85. But see *Collins* v. *Haliburton, Kawartha Pine Ridge District Health Unit, supra,* note 34.

[111a] *Supra,* note 94.

[111b] *Supra,* note 41.

the alterations in the case of *Gadutsis* v. *Milne*,[112] or the extra tax paid in the *Myers* case,[113] to cite only a few examples. In most *Donoghue* v. *Stevenson* type situations, no repair expenditure is involved. There is loss in the form of a valuable product, and more often than not, physical injury to the plaintiff's person or to his property. The *Rivtow* case provided a novel fact situation and a new kind of damage. Nor can it be said, as was said of the loss of profit in *Weller* v. *Foot & Mouth Disease Research Institute*,[114] that it was speculative or remote. The cost of repairing the defective crane was perfectly foreseeable as a likely and probable consequence of the manufacturer's failure to warn. Its recovery was excluded on the ground that it was not something which was normally recoverable on *Donoghue* v. *Stevenson* principles, since it was neither physical damage nor consequent economic loss of the usual kind, *i.e.*, loss of profit through the non-availability of the chattel purchased to make a profit. But had the action been in contract such loss would presumably have been recoverable.[115] Why not, then, in an action for negligent misrepresentation, if one could be launched in such circumstances and on such a foundation?

This suggestion leads to the further thought that actions for negligent misrepresentation may resemble actions for breach of contract more closely than actions for negligence in tort. This in turn leads to the more general question of the status of this action now and more particularly in the future.

IV. FUTURE DEVELOPMENTS

The past few years, as the foregoing survey has attempted to show, have witnessed the gradual acceptance and to a limited extent the maturation of liability for negligent misrepresentation; what was once regarded as an impossibility has come to pass: even in the absence of a contract between the parties a duty of care may arise regarding the way one speaks or writes to another. The judgments in *Hedley Byrne*[116] show that what was being done in that case was not the final, definitive statement of the law on this matter, but a general and indicative presentation of the attitude that the law should adopt. The cases since that date reveal that there remain several queries as yet unanswered regarding the scope and effects

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[112] *Supra*, note 47.
[113] *Supra*, note 30.
[114] [1966] 1 Q.B. 569. *Cf.* the cases cited *supra*, note 111.
[115] *Cf.* G.H.L. Fridman, *Sale of Goods in Canada* (1973), 376-382.
[116] *Supra*, note 1.

of this kind of liability. What may be asked at this stage is the question: Where is the law going in relation to this form of liability?

One possibility is that in some situations this kind of liability will provide an alternative to liability in contract. In other words, where there is an absence of consideration so that it is not open to a court to find a contractual relationship between the parties which imposes duties and creates rights, a court might be able to discover a relationship involving at least a duty of care, so that one party may be held liable in the event of negligence. The development of the law relating to promissory estoppel since 1947 when the *High Trees* case[117] was decided, has led to a situation in which a promise or representation not supported by consideration may provide a *defense* to, but not give rise to, a distinct course of action. To some extent this has acclimatized the courts to the idea that some statements or representations may have legal effect even if they are neither fraudulently nor negligently made, and even if they relate to *future* action on the part of the representor. While the courts have not yet gone so far as to use such representations as a foundation for a positive action, as a "sword" rather than a "shield", they have at least accepted that some result flows from such statements.[118] Perhaps the doctrine of liability for negligent misrepresentation under *Hedley Byrne* could be employed to amplify and to a certain extent complete the doctrine of promissory estoppel, so as to enable parties who have arranged their affairs in reliance upon the statements of another to take positive action for damages (in the style of the modern American approach),[119] as well as having a defense when sued upon the basis of pre-existing formal legal rights which have been modified by representations.

There are, of course, limitations to this. Firstly, only a fraudulent or negligent misrepresentation would have such effect. Secondly, the statement would have to be in the form of advice, counsel or information rather than a promise or undertaking as to the future, *stricto sensu*. Thirdly, there would have to be facts which evidenced the sort of "special relationship" or "relationship akin to contract" to which reference has been made previously, notably in some of the judgments in the *Hedley Byrne* case. However, these limitations could be interpreted very flexibly, if the courts were so inclined. As indicat-

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[117] *Central London Property Trust Ltd* v. *High Trees House Ltd* [1947] K.B. 130.

[118] For discussion of this see G.H.L. Fridman, *Promissory Estoppel* (1957) 35 Can.Bar Rev. 279; *The Basis of Contractual Obligation* (1974) 1 Loyola U.L.Rev. (L.A.) 1; and the cases and articles therein cited.

[119] American Law Institute, *Restatement (Second) of Contracts*, para.90.

ed earlier, there does not appear to be a strong trend in this direction, but that might change, especially if the courts begin to realize how useful a weapon they have forged.

Such an approach would tend towards the greater assimilation of contract and tort or, to put it more correctly, towards the greater assimilation of contractual and tortious remedies. There is at least one other stumbling block impeding such progress: It is the notion that where there is a contract there cannot be a tort remedy for negligent misrepresentation. I have already considered and I hope disposed of that proposition. If it can be overcome then there might be great scope for a development of this kind. It would mean that the action for negligent misrepresentation might well become (if it has not already moved that way) an alternative type of action for breach of contract, applicable in some very special instances. The writer can see nothing harmful in such a development and much that is beneficial. Contract may not be dead, as Professor Gilmore has recently suggested,[120] but in England and Canada at any rate, it has not shown many signs of liveliness. This suggested use of the *Hedley Byrne* case could be a way of bringing some sort of vivacity into an area of law that is becoming archaic, ossified and more and more out of touch with the realities of social, commercial and economic life.

A second possibility, perhaps the most conservative and limited, is that this liability is going to be looked upon, as may already be the case, as merely another illustration of the operation of the *Donoghue* v. *Stevenson* doctrine;[121] in other words, the "neighbour" principle of Lord Atkin, applied within the maybe narrow confines of a special relationship when it comes to a duty of care in respect to the spoken or written word. Once again, there are indications in at least some of the judgments in the *Hedley Byrne* case that this is what their Lordships had in mind, reinforced possibly by the later opinion of the Judicial Committee in the *Evatt* case. If this is all that the *Hedley Byrne* case achieved, or is regarded as having achieved, then while some advance may have been made towards broader negligence liability, and while one previously unoccupied area of legal activity has been taken over, the change will have been minimal. Liability for negligent misrepresentation will have to be fitted into the general scheme of liability for negligence, and it will not be usable for any grander or more extensive purposes. Particularly if the restrictions which have already been considered are allowed

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[120] G. Gilmore, *The Death of Contract* (1974).

[121] *Supra*, note 2.

to stand, this highly original notion will be so attenuated as to serve only the most limited of uses, and be available only in the most special and rare instances. There may have been a number of cases in which recourse has been had to *Hedley Byrne* by an injured party, but as already noted, success has not always come the way of the plaintiff. When it has come, it has not always been as complete as he may have wanted or deserved. Consequently, far from being a liberating doctrine, improving the legal position of injured parties, it may turn out to be an illusory development, purporting to offer more than is actually provided by the language in the *Hedley Byrne* case.

The final prospect is that liability for negligent misrepresentation, while remaining firmly entrenched in tort, will be treated as a separate and distinct variety of negligence. This would mean that it would be possible to speak of the tort of negligent misrepresentation (or, if fraud were to be included within this category of liability, the tort of misrepresentation). At the present time, notwithstanding the generalized *Donoghue* v. *Stevenson* principle, it is possible to make a distinction between particular types of negligence such as occupier's liability, employer's liability *etc.*, and individual kinds of negligence which relate to, and incorporate certain of the rules and principles of, general negligence liability, but which are also regulated by specific subsidiary rules of their own.[122] An example of this are suggestions that liability for nervous shock may be a subvariety of negligence which should be handled by the law of tort in a slightly different way from what might be called "ordinary" negligence.

Thus in place of the synthesis of negligence which may have been stimulated by the judgments in *Donoghue* v. *Stevenson*, especially that of Lord Atkin, we may be reaching a new analytical approach to negligence that does not repudiate the Atkin doctrine, but builds upon it for greater refinement and improved protection. Such an approach would not be reactionary; it would not amount to a return to the more disjointed attitude of the law in nineteenth century England. Rather, it would be capable of providing greater flexibility and more precision. For one thing, it might encourage a better attitude towards problems of remoteness and calculation of damages in respect of economic loss resulting from negligent misrepresentation. Since the courts would not be bound by the rules pertaining

[122] *E.g.*, in the case of occupiers' liability in Alberta and England, possibly even rules stated in a statute: See *The Occupiers' Liability Act*, S.A. 1973, c.79 and *Occupiers' Liability Act, 1957*, 5-6 Eliz.II, c.31 (U.K.).

to physical injury or consequent economic loss resulting from such injury, they might be in a better position to cope with the special and specific problems arising from the infliction of damage by misrepresentation. It might also permit courts to approach such matters as "foresight" and "directness" from the special and different point of view of the particular problems involved in negligent speech and negligent writing, without being obliged to follow the trends and precedents of the law as it pertains to other categories of negligence, for example automobile accidents. There is a limit, after all, to the resemblances that can be made between such an accident and the harmful consequences of faultily given advice or information. To put all such matters equally within the straitjacket of the "ordinary" law of negligence might be detrimental to the proper application of the law and to its most valuable lines of development.

What has been written in the immediately preceding paragraphs is not intended to be an exhaustive account of what could happen in this area of the law; nor is it designed to deal with all the present and future problems arising in connection with liability for negligent misrepresentation. What I have endeavoured to do is to provide some thoughts which might stimulate further, more detailed investigation of this newly opened field of legal activity. Clearly, although I have not emphasized them to any degree, there may be dangers in too wide and untrammelled an application of the *Hedley Byrne* doctrine. It would do no good to eradicate one source of difficulty from the law at the expense of creating new sores or opportunities for dissatisfaction. Development of the law of torts wholly in favour of potential plaintiffs should not be permitted if it will create the possibility of too many and too diffuse a group of potential defendants. In other words here, as elsewhere in the law of torts, a proper balance must be kept between granting a remedy where damage has been suffered, and protecting from liability people who may have inflicted harm but do not thereby merit condemnation by being made to underwrite the loss that has resulted. What may sound all very well in theory therefore, may have to be sacrificed to what is expedient and practical. This choice must be left to the courts; but it is to be hoped that in making it, they will be actuated by a desire to achieve logical consistency and to maintain the validity of juridical principles.