

## The Problem of the Applicability of Tort Liability to Negligent Mis-statements in Contractual Situations: A Critique on the Nunes Diamonds and Sealand Cases

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As Winfield wrote in 1931, "there is no tort more likely to co-exist with breach of contract than negligence. In a great number of instances a contractor fails in what he has promised because he has acted incompetently".<sup>1</sup> There are, he said, "a large number of cases in which the foundation of the action springs out of privity of contract between the parties, but in which nevertheless the remedy is alternatively in contract or in tort".<sup>1a</sup>

Historically, nowhere was this overlap of the two branches of the civil law more evident than in the case of the so-called "common callings", where tortious liability was not ruled out purely by the fortuitous concurrence of a contractual remedy. Such exceptions as existed, and still do exist, to this overlap, e.g., the professions of stockbroker, architect and solicitor, are anomalous and not all of long-standing creation.<sup>2</sup> Thus, it is not surprising to find the judicial admission in *Jarvis v. Moy, Davies and Co.* (concerning the liability of stockbrokers) from Greer L.J. that "It does not follow . . . that there may not be cases . . . where, in order to found a case in tort, it may be essential as part of the history to allege that it commenced by a contract".<sup>3</sup>

It is also not without significance that this "contract only" rule relating to solicitors received a judicial hammering from Lord Haldane in *Nocton v. Ashburton*,<sup>3a</sup> a 1914 House of Lords decision.

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<sup>1</sup> Winfield, *The Province of the Law of Tort* (1931), 63.

<sup>1a</sup> *Ibid.*, 65.

<sup>2</sup> See Poulton, *Tort or Contract* (1966) 82 L.Q.R. 346.

<sup>3</sup> [1936] 1 K.B. 399, 405. In the Scottish case of *Robertson v. Bannigan* [1965] S.L.T. 66, 67, Lord Hunter opined that, although the relationship of solicitor and client might *originate* from contract, professional negligence could still lead to an action in delict; as he said, "I cannot see any ground for distinguishing in this respect between the relationship between the solicitor and client, on the one hand, and that of doctor and patient on the other . . .".

<sup>3a</sup> [1914] A.C. 932.

This case was ultimately used as the lynch-pin for the formulation of the "special relationship" in negligent mis-statement by the same court in *Hedley Byrne*.<sup>3b</sup> As Lord Haldane stated:

... the solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him. In the early history of the action of assumpsit this liability was indeed treated as one of tort.<sup>4</sup>

A strong affirmation of the contract/tort overlap is to be seen in the recent Australian case, *Ellul v. Oakes*, where in response to the contention that *Hedley Byrne* did not apply at all where there was a contract following a misrepresentation, Zelling J. stated:

Causes of action have overlapped for centuries in the law, and always there has been this cry that there ought to be only one cause of action arising out of a given set of facts. It was so when assumpsit superseded debt, it was so when trover and later conversion superseded detinue, and there are many other such examples. The fact is that the same set of facts may give rise to a number of causes of action and the plaintiff elects which one will best enable him to win his case or gives him the better measure of damages as the case may be.<sup>4a</sup>

Just as the potentiality of this tort/contract overlap has been enhanced by the continuing process of the expansion of the categories of "duty" situations in the sphere of negligent acts,<sup>5</sup> so too has the same process been even more enhanced since *Hedley Byrne* in the sphere of negligent words<sup>5a</sup> — the common vehicle of harm in professional negligence cases — where often a contractual relationship will exist. Prior to *Hedley Byrne* and its principle of liability in tort, liability for negligent words causing economic loss was

<sup>3b</sup> *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, [1963] 2 All E.R. 575.

<sup>4</sup> *Supra*, f.n.3a, 956 (italics added). It is ironic that the absence of a contractual nexus between barrister and client was once thought to be the reason for a bar to proceedings in tort against a negligent barrister; but see now *Rondel v. Worsley* [1969] A.C. 191 (H.L.), and the recent New Zealand case of *Rees v. Sinclair* [1973] 1 N.Z.L.R. 236, 240 (1st inst.); [1974] 1 N.Z.L.R. 180, 186 (C.A.) (solicitor as advocate). In the recent English case of *McInerny v. Lloyds Bank* [1973] 2 Lloyds Rep. 389, 401, Kerr J. rejected counsel for the defendant's ingenious argument, based on Lord Devlin's "equivalent to contract" dictum in *Hedley Byrne*, that if on the facts there was no liability in contract because no intention to contract could be inferred, this was also the end of the case in tort, and that, in view of the situation of proximity in which they were placed in the facts of the case, there could thus be no liability in negligence.

<sup>4a</sup> [1972] 3 S.A.S.R. 377, 390 (S. Austr. Sup. Ct.); see also the dictum of Wells J., 393.

<sup>5</sup> Poulton, *supra*, f.n.2, 364.

<sup>5a</sup> See *Dillingham Constructions v. Downs* [1972] 2 N.S.W. L.R. 49, 58.

confined (apart from fraud) to situations where there was a contractual duty, or a fiduciary relationship such as would be recognized in equity.<sup>6</sup> It would therefore appear to have been safe to say soon after the *Hedley Byrne* decision that:

Since *Donoghue v. Stevenson* there has been general liability for acts which are foreseeably likely to cause damage; and the fact that the parties are in contractual relationship should not affect the plaintiff's right to sue in tort. *Hedley Byrne* ... imposed liability in some circumstances for negligent statements: again this liability should not depend upon the absence of a contract between the parties.<sup>7</sup>

Certainly there are no dicta in *Hedley Byrne* itself to gainsay such a predicted development; indeed, as will be seen, there are dicta seemingly to the contrary.<sup>8</sup> Just as there is a judicial view expressed that *Hedley Byrne* "was very much nearer contract than tort",<sup>9</sup> so too there have been academic doubts about whether the new action does really lie within the traditional ambit of tort.<sup>10</sup> It would be ironic indeed if, just as in the earlier development of negligence law the *absence* of a contractual relationship was in some circumstances an effective bar to a claim in tort,<sup>11</sup> the *presence* of a contractual relationship between the parties in a negligent mis-statement situation should now rigidly rule out tortious liability.<sup>12</sup> Yet this appears to be the way the law is drifting in Canada as the result of two recent cases: *Nunes Diamonds Ltd.*

<sup>6</sup> See *Candler v. Crane, Christmas & Co. Ltd.* [1951] 1 All E.R. 426.

<sup>7</sup> Poulton, *supra*, f.n.2, 364. In the most recent case decided in England on the applicability of *Hedley Byrne* to the contractual situation, *Esso Petroleum v. Mardon*, *The Times*, Aug. 2, 1974 (1st inst.), Lawson J. stated that the fact that personal injuries or damage to property could give rise to a claim for negligence, even though the parties' relationship had arisen solely out of contract, indicated that in principle there was no reason to limit the duty of care in making statements to circumstances which did not result in contractual relations between the maker and the hearer of the statement.

<sup>8</sup> Thus in the *Esso Petroleum* case, *ibid.*, Lawson J. rejected any assumption from the decision in *Hedley Byrne* that a statement made in the context of pre-contract negotiations excludes a duty of care. Not only did he find that this assumption was not justified, taking into account the speeches in *Hedley Byrne* as a whole, but also that the observations of Lord Devlin in that case were a clear indication against this assumption.

<sup>9</sup> *The World Harmony* [1967] P. 341, 362 *per* Hewson J.

<sup>10</sup> Stevens, *Hedley Byrne v. Heller: Judicial Creativity and Doctrinal Possibility* (1964) 27 M.L.R. 121, 161.

<sup>11</sup> *E.g.*, under the rigid rule in *Winterbottom v. Wright* (1842) 10 M. & W. 109, 152 E.R. 402.

<sup>12</sup> In *Candler v. Crane, Christmas, supra*, f.n.6, 179, Lord Denning (dissenting) described the submission that the defendant accountants were under a purely contractual duty to their clients, and therefore not liable in tort to someone outside the contract, as "simply a repetition of the nineteenth century fallacy...".

*v. Dominion Electric Protection Co.* (decided by the Supreme Court of Canada in 1971),<sup>13</sup> followed at first instance in the British Columbia Supreme Court in *Sealand of the Pacific v. Ocean Cement Ltd.*<sup>14</sup>

### Nunes Diamonds

In this case the plaintiff diamond merchant's safe was protected by the defendant's alarm system, which was as good as any system in commercial use in Canada. After a burglary at the premises of another diamond merchant who was protected by the same system as that supplied to the plaintiff, the plaintiff asked the defendant to send someone to inspect the system. The workman sent by the defendant asserted during his inspection of the plaintiff's installation that "even our own engineers could not go through this system without setting an alarm". Copies of two letters written by the defendant's general manager were also sent to the plaintiff company, the originals having been sent to insurance brokers shortly after the theft at the other diamond merchant's premises. The letters stated that an investigation was still continuing, that no conclusions had been reached, that "the system performed its functions properly" and that every effort would be made to find an answer to the burglary. There was no further communication after this to either the plaintiff or the brokers before thieves broke into the plaintiff's safe by circumventing the alarm and stole a large quantity of diamonds.

The contract between plaintiff and defendant merely stipulated for the supply of certain equipment and the performance of certain services for a rental price. It expressly negated the existence of any "conditions, warranties or representations", provided that the defendant was "not an insurer" and limited liability under the contract to \$50 as "liquidated damages". The plaintiff, alleging reliance on both the workman's representation at the time of the inspection and the statements in the letters to the brokers, sued the defendant in both contract and tort.

On an appeal to the Supreme Court of Canada from the judgment of the Ontario Court of Appeal,<sup>14a</sup> which had dismissed an appeal from a judgment of Addy J. at first instance,<sup>14b</sup> the plaintiff failed in an action for damages for breach of contract and tort. By a narrow majority (Spence and Laskin JJ. dissenting), the Supreme Court

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<sup>13</sup> (1972) 26 D.L.R. (3d) 699.

<sup>14</sup> (1973) 33 D.L.R. (3d) 625.

<sup>14a</sup> (1971) 15 D.L.R. (3d) 26.

<sup>14b</sup> (1969) 5 D.L.R. (3d) 679.

held, in the judgment of Pigeon J. (Martland and Judson JJ. concurring) not only that there was no contractual liability, but also no tortious liability. The broad reason for finding no tortious liability, *i.e.*, that liability in tort could only be based on a tort unconnected with the performance of the contract, forms the basis of discussion in this article.

### **Sealand of the Pacific Ltd. v. Ocean Cement Ltd.**

In this case the plaintiff (Sealand) was the owner of an oceanarium, a large part of which was housed in a special ship surrounded by tanks containing various forms of sea life. These tanks were viewable from a special area built into the bowels of the ship by means of windows, and a charge was made for viewing. The ship had been expertly designed by a naval architect, and when Sealand made additional changes to the ship adding to its overall weight, the architect warned Sealand that the reserve buoyancy would have to be increased. After discussions with other experts, Sealand decided to displace some of the water in the tanks and replace it with a lighter than sea water substance. Sealand accordingly arranged a meeting to discuss the sea water substitute at which Robinson, the sales representative of the defendant Ocean Cement, recommended without any reservation a light-weight concrete ("zenolite") made by his company as suitable for the job. Sealand then contacted the second main defendants in the case, McHaffie and his company, McHaffie Ltd., asking him to do the design work for the proposed modifications and to act as supervising engineer.

McHaffie met Robinson and discussed the properties of zenolite concrete. It was agreed that Ocean Cement would mix and supply the cement in the quantities specified by McHaffie, but that another firm would do the actual pouring and finishing at the site. Prior to the start of the work, Sealand asked McHaffie to consider whether styrofoam would not be a more suitable replacement substance than the concrete: McHaffie recommended the concrete. After the concrete had been installed, however, the ship settled even deeper into the water. The trial judge, McKay J., found saturation of the cement by water to be the effective cause for this. He held that Ocean Cement was liable in tort under the *Hedley Byrne* principle for Robinson's representations about the concrete, and liable in contract under s.20(a) of the 1960 *Sale of Goods Act*<sup>14c</sup> for breach of an implied condition that the goods

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<sup>14c</sup> R.S.B.C. 1960, c.344.

were reasonably fit for the required purpose. The claim against McHaffie and his company, seemingly based on both contract and tort, was dismissed: McKay J. held that McHaffie was not personally liable under the *Hedley Byrne* principle and had not fallen beneath the degree of skill, care and judgment which could reasonably be expected of a person in his profession. He and his company were entitled to rely on Robinson's representations.

### The Problem Arising from the Above Cases

The basic difficulty arising from these two cases is how, if at all, the tortious liability postulated in *Hedley Byrne* can arise where there exists a contractual relationship. The problem centres round a dictum of Pigeon J. in *Nunes Diamonds*, which was approved and applied by McKay J. in *Sealand*, to the effect that

... the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, [14d] unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of that contract, as expressed in *Elder, Dempster & Co. Ltd., v. Paterson, Zochonis & Co. Ltd.*, [1924] A.C. 522 at p. 548.<sup>15</sup>

Pigeon J. qualifies this statement to some extent by stressing that this point was "especially important in the present case on account of the provisions of the contract with respect to the nature of the obligations assumed and the practical exclusion of responsibility for failure to perform them".<sup>16</sup> The general tenor of his judgment and his definition of acts "independent" of the contractual relationship, however, leave little or no scope for the *Hedley Byrne* principle to flourish in contractual situations. Such an interpretation of his judgment is to be found in the dissenting minority judgment given by Spence J. in the same case. He stated, "I cannot agree that the mere existence of an antecedent contract foreclosed liability under the *Hedley Byrne* principle."<sup>17</sup> A similar far-reaching interpretation of Pigeon J.'s dictum was expressed in the *Sealand* case. McKay J. accepted the argument, following Pigeon J.'s test, that liability of McHaffie and his company would have arisen out of the contract

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<sup>14d</sup> In the very recent case of *Porky Packers Ltd. v. Town of Pas* (1974) 46 D.L.R. (3d) 83, the Manitoba Court of Appeal has distinguished *Nunes Diamonds* on the basis of the contract not being so governed: see *infra*, f.n.137.

<sup>15</sup> *Supra*, f.n.13, 727, 728.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, 723; he admits, however, at 703, that the question of the defendant's liability in tort was a "very troublesome question".

and therefore the *Hedley Byrne* principle could not be applied to McHaffie personally for his expressed opinion that zenolite concrete was to be preferred to styrofoam.<sup>18</sup> Moreover, as regards the tortious liability of Ocean Cement for Robinson's representation, he applied the converse of Pigeon J.'s dictum, stating that the representation "was made months before any contractual arrangement was entered into",<sup>19</sup> so that the *Hedley Byrne* principle could apply. The authority for Pigeon J.'s principle will now be examined.

### Elder, Dempster Case

The only authority cited by Pigeon J. to support his restrictive view was the House of Lords decision in the *Elder, Dempster* case,<sup>19a</sup> which concerned the exclusion of liability under a bill of lading, an area very different from mis-statement. This case is some authority for saying that where the defendant has protection from liability for certain acts under the terms of a contract to which he is not a party, and he performs such acts negligently, the plaintiff (who is a party) may be unable to disregard the terms of the contract and allege against him a wider liability in tort. Judging from the page reference in *Elder, Dempster* which he cited, Pigeon J. must have been referring to that part of Viscount Finlay's judgment which dealt with the question of whether the owners of the palm oil barrels (the plaintiffs) could sue the shipowners "apart from the contract altogether" for the negligent destruction of their goods on board a chartered ship. The defendant shipowners were not a party to the bill of lading which limited liability. As Viscount Finlay said,

If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation of liability therein contained must attach, whatever the form of action and whether owner or charterer be sued. It would be absurd that the owner of goods could get rid of the protective clauses of the bill of lading in respect of all stowage, by suing the owner of the ship in tort.<sup>20</sup>

It should be noted straight away that Viscount Finlay was not denying the concurrence of tortious and contractual liability. He was

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<sup>18</sup> *Supra*, f.n.14, 634.

<sup>19</sup> *Ibid.*, 633. For further discussion, see *infra*.

<sup>19a</sup> *Elder, Dempster & Co. Ltd. v. Paterson, Zochonis Co. Ltd.* [1924] A.C. 522.

<sup>20</sup> *Ibid.*, 548; *cf.* 564, the words of Lord Sumner ("entirely independent of contract").

merely stressing the point that on the particular facts, the limitation of liability would apply irrespective of the type of label used to categorize the plaintiff's action, except in the case of an "independent" tort, on which he failed to elaborate.<sup>21</sup> Thus, Pigeon J. seems, with respect, to be construing Viscount Finlay's words beyond their intended meaning, for Viscount Finlay was not ruling out the idea of "connected" tort.

This apart, though, the "very obscure"<sup>22</sup> ratio of *Elder, Dempster* has already met with disapproval from the House of Lords in the 1962 case of *Scruttons v. Midland Silicones Ltd.*<sup>22a</sup> Here, interestingly, Lord Denning failed to evince his usual disregard of awkward precedent, and attempted to explain away the decision, *inter alia*, on the basis that "at that time negligence was not an independent tort",<sup>23</sup> and that contract and tort liability were then interconnected. Furthermore, in 1953 the Court of Appeal in *White v. John Warwick & Co. Ltd.*<sup>24</sup> had made it quite clear that in the light of the *contra proferentem* rule, a contractual exclusion would not necessarily exclude concurrent tort liability unless it was couched in sufficiently wide and unambiguous terms. Indeed, the case was cited to emphasize this very point by Addy J. at first instance in *Nunes Diamonds*.<sup>25</sup> The *Elder, Dempster* case, therefore, has no direct bearing on the substantive issue of the extent of co-existence of actions in tort and in contract for negligent acts, and still less for negligent words. Thus, authority for a proposition such as that enunciated by Pigeon J. must be sought elsewhere. However, only one English

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<sup>21</sup> Lord Denning in *Scruttons v. Midland Silicones* [1962] 1 All E.R. 1, 18, *did* elaborate on what he thought Viscount Finlay meant by "independent": "For instance, if the shipowner owned another ship which negligently ran into this one, that would be an independent tort for which the shipowner would be liable: and the exceptions would not avail him."

<sup>22</sup> So described by Lord Reid in *Scruttons, ibid.*, 12. It is significant that the *Elder, Dempster* principle was not applied in the important Canadian misstatement case of *Dodds v. Millman* (1965) 45 D.L.R. (2d) 472, where a purchaser was held able to sue in tort the vendor's real estate agent for a misstatement over the capability of the apartment building subject to the sale to produce a profit; the "escape clause" in the contract between purchaser and vendor, which protected the latter, was held not to afford any protection to the agent who was not a party.

<sup>22a</sup> *Supra*, f.n.21.

<sup>23</sup> *Ibid.*, 18.

<sup>24</sup> [1953] 2 All E.R. 1021. See also *Hollier v. Rambler Motors* [1972] 1 All E.R. 399.

<sup>25</sup> *Supra*, f.n.14b, 688, 689.

decision after *Hedley Byrne*,<sup>26</sup> and that at first instance, gives any support to the proposition: the case of *Clark v. Kirby-Smith*,<sup>27</sup> which was not cited in *Nunes Diamonds* at any stage.

### Clark v. Kirby-Smith

In this case an allegedly negligent solicitor was sued by the client-plaintiff in contract and in tort for failing to renew the option on a lease. The claim was also pleaded in tort because it was conceded that part of the damages claimed could only be awarded in tort. As a result, plaintiff's counsel tried to avoid the weight of previous authority to the effect that a solicitor (not being, historically, engaged in a "common calling") could only be sued for negligence *ex contractu* by a client; he argued that the decision in *Hedley Byrne* had cut across this occupational distinction and as a contract of retainer existed between solicitor and client, a solicitor ought not to be put in a better ("worse" in the Law Reports is surely a misprint) position than a person in a relationship "equivalent to contract" as envisaged by Lord Devlin in *Hedley Byrne*.<sup>28</sup>

As Plowman J. said:

[Counsel] for the plaintiffs claims to recover... on the basis that this is an action founded in tort. He argues that the result of the decision of the House of Lords in [*Hedley Byrne*] is that negligence is a tort whether it arises out of negligent mis-statements made by a person who is not under any contractual or fiduciary obligation to give information or advice, which

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<sup>26</sup> Apart from the unsatisfactory *obiter dictum* in *Oleificio Zucchi v. Northern Sales* [1965] 2 Lloyd's Rep. 496, 519, from McNair J. that "...as at present advised, I consider the submission... that the ruling... [in *Hedley Byrne*] applies as between contracting parties, is without foundation". This dictum was disapproved by Zelling J. in the recent Australian case of *Ellul v. Oakes*, *supra*, f.n.4a, 390, and by Lawson J. in *Esso Petroleum v. Mardon*, *supra*, f.n.7. Cf. the dictum of Rees J. in *Vacwell Engineering v. B.D.H. Chemicals* [1969] 3 All E.R. 1681, 1697, 1698, to opposite effect outside the mis-statement field:

Counsel for ... [the defendants] indicated that he desired to keep open the argument that, where the parties are in a contractual relationship, their rights and obligations are governed by the terms of their contract and it is not open to one of them to sue the other for a tort arising out of the performance of the contract. I have not heard the argument and will say no more than that it is a *novel proposition*. [Italics added]

See Greig, *Misrepresentations and Sales of Goods* (1971) 87 L.Q.R. 179, 193, 194.

<sup>27</sup> [1964] Ch. 506; followed in the Canadian case of *Schwebel v. Telekes* (1967) 61 D.L.R. (2d) 470 (concerning a negligence action against a notary public in a contractual relationship) where Laskin J. at 472 merely states that the situation is "distinguishable from *Hedley Byrne*".

<sup>28</sup> *Ibid.*, 509.

represents the state of affairs with which the House of Lords was concerned in the *Hedley Byrne* case, or whether, as here, it arises out of the contractual relationship of solicitor and client. I do not accept the argument that the *Hedley Byrne* case is an authority for saying that the liability of a solicitor to his client for negligence is a liability in tort. A line of cases going back for nearly 150 years shows, I think, that the client's cause of action is in contract and not in tort.<sup>29</sup>

This case is hardly authority for asserting that *Hedley Byrne* does not apply to a contractual situation and that "it is clear that the mere existence of a contract will prevent the founding of liability for negligent mis-statement".<sup>30</sup> Firstly, there was in *Clark* no question of a negligent mis-statement<sup>31</sup> from the solicitor; he had merely negligently omitted to renew the lease. Thus, plaintiff's counsel's arguments could only be couched in the wider view that *Hedley Byrne* had affected the law relating to professional relationships generally.

Secondly, the only reason given by Plowman J. for denying the applicability of the *Hedley Byrne* principle was the anomalous historical precedent that a solicitor cannot be sued tortiously by his client, a rule which now has no logical basis and is inapplicable in any case to the so-called "common callings".<sup>32</sup> Furthermore, as already seen in *Nocton v. Ashburton*,<sup>33</sup> a solicitor/client case which *did* involve a mis-statement, it was expressly stated by Lord Haldane that a solicitor could be sued tortiously for negligence, and he surmised that the plaintiff had not relied on his contractual right because of

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<sup>29</sup> *Ibid.*, 510.

<sup>30</sup> Glasbeek, "Limited Liability for Negligent Mis-statement" in Linden (ed.), *Studies in Canadian Tort Law* (1968), 121. He cryptically qualifies this statement by a footnote to the effect that "... even if there is a contract, there may be a special relationship if the parties are connected in some particular way". He later asserts (at 130) that, where a mis-statement has become a term of the contract, the plaintiff to succeed in tort "will have to show that his cause of action does not emanate from the contract itself, but from the relationship... which subsists regardless of contract". This test is, with respect, as unsatisfactory as that of Pigeon J. in *Nunes Diamonds*.

<sup>31</sup> Thus Cusack J., in *Dutton v. Bognor Regis U.D.C.* [1971] 2 All E.R. 1003, 1008 (1st inst.), refused to apply the principles of *Hedley Byrne* because the case was not one of negligent mis-statement at all in his opinion.

<sup>32</sup> See note by Jolowicz, [1965] C.L.J. 27, 30, and the Scottish case of *Robertson v. Bannigan*, *supra*, f.n.3. Weir, [1963] C.L.J. 216, 219, takes the view that "that line of cases which held that the liability of the careless broker, architect, solicitor or similar professional sounds only in contract must have been silently overruled... [by *Hedley Byrne*]"; see also Greig, *supra*, f.n.26, 196.

<sup>33</sup> *Supra*, f.n.3a, 957.

a difficulty over the Statute of Limitations, which would not have applied if the statement of claim was "framed mainly on the lines of breach of fiduciary duty".<sup>33a</sup> Thus, at most, the decision in *Clark v. Kirby-Smith* is of limited validity with reference to the instant problem.

There does exist one first instance case in Canada which gives limited support to the "if contract, no tort" argument in the mis-statement field: *Reid v. Traders General Insurance Co.*<sup>34</sup> Strangely, it was only judicially referred to at first instance by Addy J. in *Nunes Diamonds*.

### **Reid v. Traders General Insurance Co.**

Here the defendant car dealing company, through its salesman M, made a contract with the plaintiff to sell her a car and look after insurance for it. M filled out the insurance application form and in so doing deliberately misrepresented a fact required to be stated thereon. The plaintiff, to M's knowledge, then signed the application without reading it over. The plaintiff's car was damaged in an accident and the insurers resisted payment because of the misrepresentation in the application form. The plaintiff brought an action, *inter alios*, against the car dealing company and M.

It was held by Ilesley C.J. that M and, vicariously, the car dealing company owed a duty to the plaintiff to fill in the application form truthfully, and were liable for breach of that duty quite independently of contract, the car dealing company also being liable in the same measure of damages for breach of contract. Thus, having found the facts pleaded were sufficient to constitute an allegation of negligence, Ilesley C.J. stated:

I respectfully adopt the principles of the recent and important House of Lords case *Hedley Byrne* . . . . The application of these principles leads me to the conclusion that *whether or not there has been any contractual relationship* between Dares Motors [the dealers] and the plaintiffs, Dares Motors through [M] would have owed the plaintiff a duty of care in filling out the application form for the breach of which Dares Motors would be liable to the plaintiff if injury resulted to her.<sup>35</sup>

Ilesley C.J. does, however, qualify this broad statement by considering whether the fact that the insurance transaction was tied up with the car sale transaction resulted in a breach of duty arising solely out of contractual obligations, in which event he understood

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<sup>33a</sup> *Ibid.*, 937.

<sup>34</sup> (1963) 41 D.L.R. (2d) 148.

<sup>35</sup> *Ibid.*, 153 (italics added).

"there would be no liability in tort on the part of Dares Motors or M to the plaintiff".<sup>36</sup> He concluded, citing *Jackson v. Mayfair Window Cleaning Co.*,<sup>37</sup> that Dares Motors and M owed a duty independently of contract to the plaintiff. As will be seen *infra*, his definition of "independent" duty was novel, but the case does show at least some potentiality of a contract/tort overlap for negligent mis-statement.<sup>38</sup> It must now be seen whether *Hedley Byrne* itself and *Mutual Life Assurance Co. v. Evatt*,<sup>39</sup> both cited by Pigeon J. in *Nunes Diamonds*, support such an overlap more fully.

### Hedley Byrne and the Question of Contractual Overlap

Although on the facts of *Hedley Byrne* there was no contractual nexus between the defendant bank and the plaintiff advertising agents for whom the information as to the third party's credit-worthiness was supplied, there are sufficient dicta, particularly in the judgment of Lord Devlin, to support the contention that even where there is a contractual (or, for that matter, a fiduciary)<sup>40</sup> relationship between the parties, a tortious "special relationship" may arise. Pigeon J. in *Nunes Diamonds* implicitly found no such authority, and Schroeder J. in the Ontario Court of Appeal in the same case emphasized that "caution must be exercised not to extend its [*i.e.* *Hedley Byrne's*] scope beyond the peculiar factual and circumstantial framework of that case. There the relationship between the parties was not contractual as in the present case."<sup>41</sup> He concluded:

A contractual relationship would not necessarily preclude the parties from bringing tortious actions against each other, but if the action were founded on a negligent mis-statement, the plaintiff, in order to succeed, would have to show that the cause of action did not emerge *directly*

<sup>36</sup> *Ibid.*, 154.

<sup>37</sup> [1952] 1 All E.R. 215.

<sup>38</sup> For recent cases in England which show the potentiality of a tort overlap with contract in the mis-statement area *without* any criterion of "independent" duty, see *Coats Patons (Retail) Ltd. v. Birmingham Corporation* (1971) 69 L.G.R. 356, where the defendants were held liable in contract *and* tort for negligent mis-statement, and the *Esso Petroleum* case, *supra*, f.n.7.

<sup>39</sup> [1971] A.C. 793, [1971] 1 All E.R. 150.

<sup>40</sup> No fiduciary relationship was found to exist in *Nunes Diamonds*; see Schroeder J.A., *supra*, f.n.14a, 37:

The contract in the present case is not one which established a fiduciary relationship between the parties as between a solicitor and his client, or a physician or surgeon and his patient, or a trustee and a cestui que trust; see also Pigeon J. in *Nunes Diamonds*, *supra*, f.n.13, 727.

<sup>41</sup> *Ibid.*, 36.

from the contract itself, but rather from a relationship existing between him and the defendant which was brought into being by the contract.<sup>42</sup>

A dictum such as Schroeder J.A.'s plays down to a low level the *direct* relevance of contract to the *Hedley Byrne* principle, but does show some interrelationship. Such an interrelationship is not surprising if one accepts that the gist of the "special relationship" in *Hedley Byrne* was the *assumption of responsibility* by the defendant, as was stressed by Spence J. in his joint dissenting judgment in *Nunes Diamonds*.<sup>43</sup> It is indeed difficult to deny the view that there are obvious points of similarity between a contractual promise and an "assumption of responsibility" under *Hedley Byrne*.<sup>44</sup> It may be pointedly asked why in some circumstances a man should be seemingly worse off as far as his rights in tort are concerned because he has given consideration and purchased advice rather than having received it gratuitously.<sup>45</sup> To similar effect, Poulton has argued that

A man who is not liable if he is acting gratuitously may nonetheless be liable *in tort* if he is acting for *reward*, for this is a factor in imposing a duty of care... This is clear from the speeches in [*Hedley Byrne v. Heller*].<sup>46</sup>

It is in Lord Devlin's speech in *Hedley Byrne* that most support for the contract/tort overlap in the "special relationship" is to be found.<sup>46a</sup> He formulated the "special relationship" in terms of a situation "equivalent to contract",<sup>47</sup> *i.e.*, where but for the absence of consideration there would have been a contract between the parties. This has provoked the pithy riposte from Weir that "the

<sup>42</sup> *Ibid.*, 36, 37 (italics added). The *Hedley Byrne* principle had been specifically invoked by counsel. Cf. Glasbeek's test, *supra*, f.n.30. This statement of the law by Schroeder J.A. was strongly approved by Zelling J. in *Ellul v. Oakes*, *supra*, f.n.4a, 390, 391.

<sup>43</sup> *Supra*, f.n.13, 720; he also thought the decision of *Nocton v. Ashburton* was "enough to justify a decision in favour of the appellant" (*ibid.*).

<sup>44</sup> See Miller, *Losses Caused by Incorrect Information or Advice* (1971 Ford Foundation Workshop paper, unpublished); summarized in (1972) 12 J.S.P.T.L. 186, 187.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Supra*, f.n.2, 368, n.64 (italics added). Not only has the idea of liability for gratuitous words been criticized (Gordon, *Hedley Byrne v. Heller in the House of Lords* (1964) 38 A.L.J. 39), but also Weir expresses the view that "[o]ne can hope, perhaps, that in most cases it will continue to be 'reasonable' to rely only on a word one has bought": *Liability for Syntax* [1963] C.L.J. 216, 218.

<sup>46a</sup> See the dicta of Lawson J. in the very recent *Esso Petroleum* case, *supra*, f.n.7, and the recent Canadian case of *Walter Cabott Constructions Ltd. v. The Queen* (1974) 44 D.L.R. (3d) 82, 97, 98 (Fed. Ct., Trial Div.).

<sup>47</sup> *Supra*, f.n.3b, 529.

relationship most equivalent to contract is contract itself".<sup>48</sup> Lord Devlin drew heavily for this formulation on the judgment of Lord Shaw in *Nocton v. Ashburton*, who used the words "circumstances in which it was a matter equivalent to contract between the parties that that duty should be fulfilled".<sup>49</sup> Lord Shaw in turn relied on a dictum from *Peek v. Gurney*<sup>49a</sup> to the effect that in certain circumstances,

... the representation in equity is equivalent to a contract and very nearly coincides with a *warranty* at law; and in order that a person may avail himself of relief founded on it he must shew that there was such a proximate relation between himself and the person making the representation as to bring them *virtually into the position of parties contracting with each other*.<sup>50</sup>

Lord Devlin expanded on his description of the "special relationship" by deprecating the artificiality of the courts in striving to find consideration, where there is really none, in order to impose contractual liability on the defendant for his negligent mis-statement, as in *De La Bere v. Pearson*.<sup>51</sup> He stressed the fact that even in tort, the absence or presence of consideration is by no means immaterial in determining the assumption of responsibility. He stated:

Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration it will be necessary to exercise greater care in distinguishing between ... those [relationships] which are of a contractual character and those which are not.<sup>52</sup>

Furthermore, Lord Devlin continued, "Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed".<sup>53</sup> Thus, throughout his judgment in *Hedley Byrne*, Lord Devlin attempted to emphasize the interconnection between tortious liability for negligent mis-statement and contractual responsibility.<sup>54</sup>

<sup>48</sup> *Supra*, f.n.46, 220.

<sup>49</sup> *Supra*, f.n.3a, 932, 972.

<sup>49a</sup> (1873) L.R. 6 (H.L.).

<sup>50</sup> *Supra*, f.n.49, 971, 972 (italics added).

<sup>51</sup> [1908] 1 K.B. 28; Stevens, *supra*, f.n.10, 156, assumes from this further support for the overlap of tort and contract in negligent mis-statement.

<sup>52</sup> *Supra*, f.n.3b, 529.

<sup>53</sup> *Ibid.*, 530, 531.

<sup>54</sup> Weir, *supra*, f.n.46, 220, surely reads too much into Lord Devlin's judgment when he claims that "Thus all breaches of contract which might with reasonable care have been avoided become torts overnight". Cf. the more moderate

A dictum of Lord Pearce from the same case also indirectly supports the view that *Hedley Byrne* did not rule out a contractual relationship as being a "special relationship". In discussing the effect of disclaimers as to responsibility for mis-statements, his Lordship declared that he did not "accept that even if the parties were *already in contractual or other special relationship* the words would give no immunity as to a negligent answer".<sup>55</sup> It is interesting to note also that several of their Lordships in *Hedley Byrne*<sup>56</sup> referred to and approved of the nineteenth century decision of *Cann v. Willson*,<sup>57</sup> in which the seeds of development of a tortious action for negligent mis-statement were seen to have been sown, only to be shortly thereafter eradicated by the Court of Appeal in *Le Lievre v. Gould*.<sup>58</sup> In the *Cann* case there was a contractual relationship but Chitty J. stated, "I have entirely passed by the question of contract. It is unnecessary to decide that point", and expressed a preference for finding the defendant valuer liable in "negligence".<sup>59</sup>

In the light of the above dicta from *Hedley Byrne*, it is submitted that there is plentiful evidence to suggest that if there is a mis-

statement by Barwick C.J. in the Australian High Court in *Evatt's* case, (1968) 42 A.L.J.R. 316, 319: "It [*i.e.*, the duty of care in negligence] does not really derive from contract though a contractual relationship may create the relevant proximity." This latter view coincides closely with that of Schroeder J.A. in *Nunes Diamonds* and, outside the mis-statement field, that of Lord Wheatley in the Scottish professional negligence case of *Robertson v. Bannigan*, *supra*, f.n.3, 70:

The contractual relationship between parties and its nature (or the absence of a contractual relationship) may be factors in deciding this issue of legal neighbourliness [under *Donoghue v. Stevenson*], but the existence of such a contractual relationship cannot, in my opinion, ipso facto constitute a legal bar to an action of delict when one of the parties is claiming damages on the ground of the negligence of the other arising out of the circumstances created by their contractual relationship. The conditions of the contractual relationship may govern and regulate the nature and extent of the duties of the parties . . . .

<sup>55</sup> *Supra*, f.n.3b, 540 (italics added). Stevens, *supra*, f.n.10, 156, assumes from this dictum that "Lord Pearce implied that a contractual relationship was *per se* a special relationship", concluding (at 143) that *Hedley Byrne* relationships "will presumably embrace an increasing number of contractual and precontractual relationships".

<sup>56</sup> See esp. the judgment of Lord Morris: *ibid.*, 497, 498.

<sup>57</sup> (1888) 39 Ch.D. 39.

<sup>58</sup> [1893] 1 Q.B. 491.

<sup>59</sup> *Supra*, f.n.57, 44. Note also that in *Woods v. Martins Bank* [1958] 3 All E.R. 167, Salmon J. found that although the plaintiff was not a customer at the time the first mis-statement was made, he was a customer at the later date when the negligent advice from the bank was implicitly repeated; yet the bank was still found liable in negligence.

statement on a matter intrinsically related to the subject matter of the particular contract, such a contractual nexus can at least reinforce the requisite "assumption of responsibility".<sup>60</sup> Also, even where a mis-statement is made on a matter *outside* the subject-matter of the contract, the contractual nexus is still of importance in establishing the "special relationship" since, broadly speaking, this relationship is of a "contractual character".

Thus Barwick C.J. in the *Evatt* case talked about obligations outside the "relevant" contract.<sup>61</sup> In the same case before the Privy Council, Lords Reid and Morris in their joint dissenting judgment thought that it appeared to be common for businesses to perform gratuitous services for customers,<sup>62</sup> presumably to acquire and retain goodwill, and that such services could be outside the strict ambits of the contractual subject matter. Such was the case in *Reid v. Traders General Insurance*,<sup>62a</sup> where the main contractual relationship was in connection with the sale of the car, and not with the incidental insurance application in which the mis-statement occurred.

Similarly in *Evatt* the contractual relationship was of insurer and insured, though the defendant's advice related specifically to investment prospects in a subsidiary company. Thus, one of the plaintiff's allegations to prove a duty was owed to him was that he was a policy-holder in the defendant company. Lord Diplock in his majority judgment in *Evatt* did not totally ignore this contractual nexus, but stressed that such additional allegations were "insufficient to fill the fatal gap in the declaration that it contains no averment that the company to the knowledge of [the plaintiff] carried on the business of giving advice upon investments . . .".<sup>63</sup>

<sup>60</sup> See Stevens, *supra*, f.n.10, 143.

<sup>61</sup> *Supra*, f.n.54, 318:

The first question is whether an action will lie at common law for negligence in the giving of information or advice where there is no relevant contractual right or obligation between the parties nor any consideration given . . . .

<sup>62</sup> *Supra*, f.n.39, 162.

<sup>62a</sup> *Supra*, f.n.34.

<sup>63</sup> *Supra*, f.n.39, 160. Investment advice is also a service which banks provide, though whether this is a *true* banking service can be disputed; see *Banbury v. Bank of Montreal* [1918] A.C. 626, as distinguished in *Woods v. Martins Bank Ltd.*, *supra*, f.n.59, 172. Of course, if the service provided is outside the purview of the contractual subject-matter, it may well now fall foul of Lord Diplock's limitation in *Evatt's* case that the advisers are not carrying on the profession of giving advice of the kind sought. It is interesting that Lawson J. in *Esso Petroleum v. Mardon*, *supra*, f.n.7, considers the majority view of the Privy Council in *Evatt* to be unduly restrictive of the ambit of the duty for mis-statement and prefers the minority reasoning of Lords Reid and Morris in that

At the very least, even this more limited form of contractual relationship<sup>64</sup> implies a "face-to-face" transaction between the parties and the identity of the recipient of the information or advice being known; *i.e.*, what Lord Morris called a "direct dealing" in *Hedley Byrne*.<sup>65</sup> As Barwick C.J. said in *Evatt's* case,

He [the respondent] must give the information to some identified or identifiable person... . It is this seemingly "bilateral" aspect of the necessary relationship which, it seems to me, inclines the mind to the use of the expression "assumption of responsibility" to describe the source of the duty of care and to the employment of concepts of consensus and contract, in the explanation of the emergence of the duty of care in utterance.<sup>66</sup>

This apart, the fact that the mis-statement actually relates to the subject matter of the relevant contract will usually indicate the following matters, which cumulatively (as far as can be distilled from existing case law) have an important bearing on the "special relationship":

1. full knowledge on the part of the defendant about the purpose for which the advice or information is sought and the particular use to which it is to be put;
2. the enhanced foreseeability of the reliance and reasonableness of such reliance by the plaintiff, especially where the defendant holds a position of advantage over the plaintiff; in which case, as Schroeder J.A. said in *Nunes Diamonds*, "it is easier to infer an assumption of liability for negligent misadvice or misinformation";<sup>67</sup>
3. an intention by the defendant to enter into legal relations with the plaintiff, so ruling out an informal mis-statement or one made on a social occasion;

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case. See the statement of McKay J. in the *Sealand* case, *supra*, f.n.14, 633, where he rejects counsel for the defendant's argument that *Evatt's* case showed there was no duty on the instant facts: "Ocean Cement, as part of its regular business, gives advice to prospective customers on the characteristics of its products and on the use to which they can be put, and from the giving of such advice much of its business flows."

<sup>64</sup> It comes within the ambit of a relationship which "was brought into being by the contract" as described by Schroeder J.A. in *Nunes Diamonds*, *supra*, f.n.14a, 37.

<sup>65</sup> *Supra*, f.n.3b, 497; see Stoljar, *Mistake and Misrepresentation* (1968), 131.

<sup>66</sup> *Supra*, f.n.54, 321.

<sup>67</sup> *Supra*, f.n.14a, 37. See recently *Dillingham Construction v. Downs*, *supra*, f.n.5a, 57-59. As far as pre-contractual mis-statements are concerned, the factors (such as the defendant's superior knowledge and position of advantage) which are relevant to decide whether *in contract* a representation is a *term* of the contract may also be relevant to decide whether, in tort, there exists a duty of care. See *infra*, f.n.93 and f.n.94.

4. direct financial interest by the adviser in the transaction on which he gives his advice,<sup>68</sup> although recent Australian cases have played down this factor.<sup>69</sup>

It is submitted, therefore, that the dissenting judgment of Spence J. in *Nunes Diamonds* accords with the spirit of *Hedley Byrne* and logical legal principle, and that the contractual relationship may in and of itself be an important factor in evidencing the tortious duty.<sup>70</sup> As he stated,

... under the circumstances which existed in the present case, that is, that the respondent was supplying to the appellant a very important service under a written contract and the enquiry was whether such service was and could be efficiently performed... the decision in *Nocton v. Lord Ashburton* is enough to justify a decision in favour of the appellant.<sup>71</sup>

He agreed with Addy J. at first instance who felt that,

... in the present case, ... due to the existence of the contract and also the special knowledge which D.E.P. [the defendants] had, covering the subject-matter of burglar protection systems, a special relation existed between the plaintiff and the defendant.<sup>72</sup>

At the end of his dissenting judgment, Spence J. added that

[t]he agreement between the parties is of importance in so far as it established a relationship between them and thus provided a basis upon which, in the light of subsequent events, the appellant could rightly assess that the negligent misrepresentations of the respondent were made in breach of a duty of care to the appellant.<sup>73</sup>

By contrast, Pigeon J.'s majority opinion stressed the contractual relationship to opposite effect, denying any other relationship. He stated:

<sup>68</sup> See *Anderson v. Rhodes* [1967] 2 All E.R. 850; cited in *Evatt, supra*, f.n.39, 161.

<sup>69</sup> *Ellul v. Oakes, supra*, f.n.4a, 392 ("... the mere fact that he [the defendant] had a financial interest in the transaction in which the statement was made was not sufficient to convert it into the sort of advice" which leads to a tortious claim: *per Zelling J.*); see also *Dillingham Constructions v. Downs, supra*, f.n.5a, 59 ("direct substantial financial interest" of the defendants in contract unsuccessfully alleged by the plaintiffs). *Cf. Greig, supra*, f.n.26, 200. ("The existence of a contractual relationship together with the seller's obvious financial interest in the conclusion of the bargain would seem to be grounds upon which to found a duty of care.")

<sup>70</sup> Though as Addy J. pointed out at first instance in *Nunes Diamonds, supra*, f.n.14b, 690, there was not here "as in the case of a solicitor or of a doctor who is being paid for his advice, a specific duty to advise. There is, of course, if advice is requested and advice is in fact given or if advice is given without being requested, a duty to advise properly...".

<sup>71</sup> *Supra*, f.n.13, 720.

<sup>72</sup> *Supra*, f.n.14b, 689.

<sup>73</sup> *Supra*, f.n.13, 723.

D.E.P. [the respondent] did not act in any fiduciary or advisory capacity towards Nunes. Its situation was that of a party contracting to supply specified services. The insurance brokers were those who were giving advice to Nunes. By giving them information, D.E.P. did not cease to be a contractor and become an advisor to the appellant on the matter of burglary protection.<sup>74</sup>

Thus for him, tortious liability could not even arise indirectly.<sup>75</sup> Pigeon J.'s one concession to his rule against the overlap of contract and tort in negligent mis-statement was where "the negligence relied on can properly be considered as an 'independent tort' unconnected with the performance of that contract".<sup>76</sup> It is worthwhile to examine what this "independence" test amounts to and what authority there is for it.

### The "Independent Tort" Test

Just as Pigeon J. in *Nunes Diamonds* cited *Elder, Dempster*, a case quite unconnected with negligent mis-statement, as authority for his "independent tort" test, so also Ilesley J. in the previous Canadian case of *Reid* cited for his test the even more unconnected first instance English case of *Jackson v. Mayfair Window Cleaning Co.*<sup>77</sup> Thus the whole matter was thrown back to the fundamental and broad issue of the difference between contractual and tortious liability. The *Jackson* case in fact epitomizes the overlap problem and recites yet again the question-begging judicial distinctions

<sup>74</sup> *Ibid.*, 727.

<sup>75</sup> Schroeder J.A. took a similar view in the court below; as he said, *supra*, f.n.14a, 37, 38:

Viewing the plaintiff's cause of action as flowing not directly from the contract itself and built upon the relationship which it created between the parties, I feel difficulty in appreciating the force of the plaintiff's contention that liability has been established under the *Hedley Byrne* rule. He held that, excluding the alleged mis-statement of the defendant's "technician", the evidence established that the defendants had followed the "first course" mentioned by Lord Reid in *Hedley Byrne*, *viz.*, keeping silent or declining to give the information or advice sought *vis-à-vis* the sending to the plaintiff of copies of the letters written to the insurance brokers. *Cf.* the judgment of Mahoney J. in the recent Canadian case of *Walter Cabott Constructions Ltd. v. The Queen*, *supra*, f.n.46a, 97, where it was held that the relationship between a defendant inviting tenders for a building contract and a plaintiff building contractor contemplating the submission of a tender is such that the defendant owes a duty of care not to withhold material information, and that in the circumstances such a withholding amounted to an actionable tortious mis-statement.

<sup>76</sup> *Supra*, f.n.13, 727, 728.

<sup>77</sup> *Supra*, f.n.37.

between the two types of civil action. It was there held that the defendants, who had contracted to clean the plaintiff's chandelier, should be sued in tort when the article was damaged because the cause of action was not a nonfeasance or failure to clean the chandelier, but arose out of an obligation to keep the chandelier safe and not damage the property. The case illustrates an illogical strait-jacketing of the law into procrustean contract or tort categories, as is also to be found in some of the professional negligence cases. This particular straitjacket, though, was of statutory creation through the *County Courts Act, 1934*, which forced the courts to make a rigid choice between contract or tort for the purpose of costs. This *ipso jure* precluded the finding of any overlap.<sup>78</sup> Faced with such a problem, the courts could but constantly repeat the vague tests of differentiation, as in *Jackson* itself, where the well-known test of Greer L.J. in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, a professional negligence case concerning a stockbroker, was applied:

The distinction in the modern view, for this purpose between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract.<sup>79</sup>

Such a test, of course, begs the vital question of what "independently" means, and when the courts have been forced to be more specific, as in *Nunes Diamonds*, several meanings appear to have emerged.

Firstly, in the old "common calling" cases, tortious liability seemingly arose concurrently with a contractual undertaking because, by operation of law, occupations based on "status" were considered to give rise to liability in tort because of the "public calling"<sup>80</sup> quality of the occupation.

<sup>78</sup> See Winfield, *The Province of the Law of Tort* (1931), 64:

... the County Court Acts have thrust upon us the distinction between actions "founded upon tort" and actions "founded upon contract". This Parliamentary effort of jurisprudence, whatever its practical value, has been a scientific failure ... it deliberately ignores our legal history and ... it has tied the hands of the judges ...

See also Guest, *Tort or Contract?* (1961) 3 Malaya L.R. 191, 202 *et seq.*

<sup>79</sup> *Supra*, f.n.3, 405.

<sup>80</sup> The phrase used by Slessor L.J. in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, *ibid.*, 407. See also the Canadian case of *Terrace Board of School Trustees v. Beswick* (1963) 38 D.L.R. (2d) 498 (cited in *Reid's case, supra*, f.n.34) concerning the tortious liability of an architect. It was there stated that where a professional man is sued in his capacity as such for breach of contract or

Secondly, in the *Jackson* case, the court seemed prepared to find liability independent of contract where a misfeasance rather than an omission caused *physical* damage to the plaintiff or his property despite the relationship being contractual. Here the principles of *Donoghue v. Stevenson* can more easily be applied.<sup>81</sup>

Thirdly, in the *Reid* case, the judge tested the concurrence of actions by the "fictitious gift" approach, asking whether, if there had been no consideration in the transaction and the car had been given to the plaintiff, there would still have been assumption of responsibility for the inaccurate information actually inserted into the insurance application by the defendant salesman.<sup>82</sup> This test, of course, makes the whole event artificial and ignores commercial realities; the business deal over the car sale was surely of vital relevance to such an assumption of responsibility (as was in fact found).

Fourthly, in *Nunes Diamonds*, Pigeon J. appears to have postulated a "pseudo-causation" test of tortious independence in concluding that "the representations relied on by the appellant cannot be considered as acts independent of the contractual relationship between the parties".<sup>83</sup> He asks, "Would these representations have been made if the parties had not been in the contractual relationship

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negligence and it is necessary to prove the terms of the contract to establish the claim, the action must be taken to sound in contract, and moreover, that it is doubtful that *any* duties are attached to an architect by the general law so as to support an action in tort. Most recently in New Zealand the same view has been taken of an architect's duty to his client after ritual citation of the *Bagot, Jarvis and Clark* cases: *Bevan v. Blackhall and Struthers* (No. 2) [1973] 2 N.Z.L.R. 45, 82 (N.Z.Sup.Cit): "The relationship was contractual, the duty was contractual and... any cause of action must be in contract": *per* Beattie J.

<sup>81</sup> See Greig, *supra*, f.n.26, 195:

In the case of professional men a distinction was drawn between those like medical, dental or veterinary practitioners, negligence by whom was likely to give rise to physical damage to the plaintiff or his property, and others. However, it is clear that most of the cases that could be cited in support of the distinction were dependent upon the principle that no remedy was available in tort for innocent misrepresentation and for financial loss, and so were no longer reliable authority after *Hedley Byrne*.

Lawson J. in the *Esso Petroleum* case, *supra*, f.n.7, felt that to deny a tortious duty of care in a contractual mis-statement situation would be harking back to the law as it was before *Hedley Byrne* when a real distinction was made between negligence with regard to statement and negligence in other situations.

<sup>82</sup> *Supra*, f.n.34.

<sup>83</sup> *Supra*, f.n.13, 728.

in which they stood?"<sup>84</sup> He answers in the negative and concludes that "the question of liability arising out of those representations should not be approached as if the parties had been strangers, but on the basis of the contract between them".<sup>85</sup> If this is a "let's pretend they're strangers" test which simply asks, "Would there have been any representation *at all* but for the contract?" it is, with respect, unrealistic and artificial like the test in *Reid*, as well as being novel. But this certainly appears to be McKay J.'s understanding of the test in the later *Sealand* case, where counsel for the plaintiff tried to argue that the *Hedley Byrne* principle could apply to McHaffie personally for his allegedly negligent opinion that zenolite concrete was to be preferred to styrofoam. Applying Pigeon J.'s test,<sup>86</sup> McKay J. concluded:

That opinion by McHaffie would not have been expressed but for the contract between Sealand and Robert C. McHaffie Ltd. [the company] and cannot be considered as independent of the contractual relationship.<sup>87</sup>

However, Pigeon J.'s dictum goes on to express concern whether the later mis-statements were intended to *vary* the pre-existing contractual terms, which he views as not putting the defendants in the position of "insurers".<sup>88</sup> It may therefore be possible to interpret his test as constituting yet a fifth test of "independence", namely, "Would the defendant and their agent have made such assurances if they did not already consider themselves immune from liability under the *terms* of the contract?" (*i.e.*, not simply because of the *existence* of a contract). This sort of "sense of security" causation test to determine whether the mis-statements would have been made at all without the imagined protection of the contract is again novel, but at least it does tie in with the solution suggested *infra* to the *Nunes Diamonds* and *Sealand* problem, particularly concerning pre-contractual and post-contractual mis-statements.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Supra*, f.n.14, 634 ("Pigeon J. in the *Nunes Diamonds* case... formulated a test to assist in determining whether the act complained of is independent of the contractual relationship").

<sup>87</sup> *Ibid.*, 635.

<sup>88</sup> *Supra*, f.n.13, 728:

Hence the question should be: May this contract of service be considered as having been turned into the equivalent of a contract of insurance, by virtue of inaccurate or incomplete representations respecting the actual value of the protection service supplied? In my view, there is no doubt that this question should be answered in the negative. There is nothing from which it can properly be inferred that Nunes considered that the contract had been so altered and it is perfectly obvious that D.E.P.'s management never intended to assume such obligations.

### A Suggested Solution to the Nunes Diamonds Problem

As already seen, the most extreme interpretation of *Nunes Diamonds* in the Canadian Supreme Court is that if a mis-statement is made at or after the creation of a contract (*Nunes Diamonds* comes into the latter category),<sup>89</sup> then *Hedley Byrne prima facie* has no application and any liability must normally be contractual. Such a principle was twisted in *Sealand* to rebound to the plaintiff's advantage in the case of the pre-contractual representation by Robinson, with whose employers a contract later materialized,<sup>90</sup> although, rather anomalously, the employers' liability for Robinson was found to have both contractual and tortious overtones. McKay J. stated:

In addition to its liability in tort, I am of the view that Ocean Cement is liable in contract [under s.20a of the British Columbia *Sale of Goods Act*, 1960]. ... In the case at bar there is not only the implied condition [under the *Sale of Goods Act*] ... but there is the express warranty by Robinson that the product was reasonably fit for the purpose.<sup>91</sup>

Thus, McKay J. does consider that the pre-contractual misrepresentation had an effect on the contractual warranty, and yet still found Robinson's employers liable in *tort* for the misrepresentation.

As regards pre-contractual misrepresentations, there is much force in the argument of Glasbeek that,

... when the relationship between the parties is one of negotiations towards a binding agreement, it is fair to postulate that neither of the

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<sup>89</sup> The contract there was very much of a continuing nature, the consideration *per annum* being payable in monthly instalments; thus Schroeder J.A. in the Ontario Court of Appeal uses the phrase "continuing contractual duty": *supra*, f.n.14a, 32; later in his judgment (at 38), he again seems to doubt whether the defendant's alleged mis-statements were truly post-contractual when he discusses the problem of representations not made "prior to or simultaneously with the entry into the contract, but after the completion of the formalities and during its currency".

<sup>90</sup> Cf. Stevens, *supra*, f.n.10, 156, who states that "the most misleading aspect of Lord Hodson's remark [in *Hedley Byrne* in respect of innocent misrepresentations] ... is the implication (if it be so) that *Hedley Byrne* does not apply to those who ultimately enter into a contract".

<sup>91</sup> *Supra*, f.n.14, 634. In *Nunes Diamonds*, Addy J. stressed at first instance that "there was no suggestion that there was any failure to comply with the supplying of the equipment or any evidence that the equipment supplied was defective *in se...*", and he found that the equipment was in fact reasonably suited to do the job; nor could there be liability in tort for selling an inherently dangerous product because, in his opinion, nothing in the security system *caused* the damage, which was "entirely the action of the thieves": see *supra*, f.n.14b, 687, 692.

parties is willing to assume responsibility for anything he does not in fact specifically endorse by inclusion in the contract.<sup>92</sup>

Although he surmises that *Hedley Byrne* might be "most useful" to the representee where the defendant's mis-statement has induced a contract,<sup>93</sup> but is not a term of it, he concludes that:

It will, however, be difficult to impute to the representor an assumption of responsibility for the truth of his statement in a situation where that statement could not also be validly considered to be in the nature of a contractual warranty, and hence actionable under contract law.<sup>94</sup>

<sup>92</sup> *Supra*, f.n.30, 131. In *Dillingham Constructions v. Downs*, *supra*, f.n.5a, 55, Hardie J. in the Supreme Court of South Australia seemingly endorsed the view of counsel for the defendants that persons in pre-contract negotiations are entitled to, and usually do, seek to make the most advantageous deal they can and are at liberty to have regard solely to their own interests.

<sup>93</sup> There is some implication in *Nunes Diamonds* that there may be tortious liability under *Hedley Byrne* for a misrepresentation which induces the contract, *viz.*, "It is not a case of misrepresentation leading to the making of a contract": *supra*, f.n.13, 727 *per* Pigeon J. *Cf.* Coote, *infra*, f.n.94, 276, 277: "... it is very difficult to envisage any circumstances in which a person could be said to have accepted responsibility in tort for a representation inducing a contract where he could not be held also to have accepted responsibility in contract".

In England, since the 1967 *Misrepresentation Act*, there may be statutory liability under s.2(1) where the defendant induces the plaintiff into contracting with him; thus the Act "dispenses with the need to show a special relationship and puts on the defendant the burden of disproving that he was fraudulent or careless in saying what he did": Weir, *Casebook on Tort* 2d ed. (1970), 46. See also Stoljar, *supra*, f.n.65, 143, 144. In the recent case in England which touches, albeit *obiter*, on this point, *McInerny v. Lloyds Bank* [1974] 1 *Lloyds Rep.* 246, 253 (C.A.), Lord Denning states,

...it seems to me that if one person, by negligent mis-statement, induces another to enter into a contract — *with himself* or with a third person — he may be liable in damages. This is *quite* independent of the *Misrepresentation Act*, 1967, which deals only with misrepresentation made by a party to the contract. [*Italics added*]

Also, at 253:

...when one man makes a statement to another with the intention of inducing him into a contract, with him..., on the faith of it, the maker must be regarded as accepting responsibility for the statement.

The reason why the *Misrepresentation Act* was not utilized by the counter-claiming defendant in *Esso Petroleum v. Mardon*, *supra*, f.n.7, (the latest English case) was apparently because the alleged misrepresentation was made prior to 1967, and s.5 states that the Act is not retrospective.

<sup>94</sup> *Supra*, f.n.30, 132. Is tort liability, therefore, coincident with the "term of contract" rule? See Honoré, (1965) 8 *J.S.P.T.L.* 284, 296, 297:

...it does not seem that the impact of these relationships [*i.e.*, tortious relationships] on the liability of parties to a contract is likely to be great. If in the circumstances it can be inferred that one party assumes responsibility for the truth of a statement made to the other, the law

However, despite Harman L.J.'s fears at the Court of Appeal stage in *Hedley Byrne* that a mis-statement action in negligence would have repercussions for contract and the hallowed rule that an innocent misrepresentation should not lead to damages,<sup>95</sup> the generally accepted academic view is to the effect that "it would not have been unduly difficult to apply them [*i.e.*, the tests in *Hedley Byrne*] to a situation which arises between the parties preparatory to entering into a contract and so to have imposed liability in damages for negligent misrepresentation".<sup>96</sup> *Sealand* now provides clear authority to this effect, at least where the mis-statement stands apart from the later contract;<sup>97</sup> but not, it appears, if it later becomes a term in the

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of contract, independently of *Hedley Byrne*, imposes a liability sounding in damages.

And Coote, *The Effect of Hedley Byrne* (1967) 2 N.Z.U.L.R. 263, 277:

The consequence is that while *Hedley Byrne* might in limited cases provide additional grounds for relief in respect of misrepresentations which are already conditions or warranties, it is unlikely to provide separate relief in damages for mere misrepresentations not forming part of the contract.

For further restriction on the tortious inroad, see Coote, *ibid.*, 269, where he points out that if *Hedley Byrne* liability is "restricted to skilled or professional persons, the *Hedley Byrne* principle cannot as was at one time conjectured might be the case, create a general remedy in damages for innocent misrepresentations including contracts". But *cf.* the recently expressed view of Lawson J. in *Esso Petroleum v. Mardon*, *supra*, f.n.7. Furthermore, in *Ellul v. Oakes*, *supra*, f.n.4a, 379, it was emphasized that in a negligent misrepresentation claim in tort, "damage is the gist of the action", and in this case the plaintiff could prove none though he could still succeed in the alternative claim for breach of warranty that the house was seweraged, and was then entitled to damages in contract for the cost of seweraging the house. See also f.n.106 and f.n.128, *infra*, for further differences between the basis of liability in contract and tort for pre-contractual mis-statements.

<sup>95</sup> [1961] 3 All E.R. 891, 902, 903.

<sup>96</sup> *Anson on Contract* 23d ed. (1969), 223. See also Weir, *supra*, f.n.46, 220, who maintains that the next relationship to contract itself to qualify as equivalent to contract "must surely be that of the parties in the process of contracting. If so, then there must be a tort action whenever in the preliminaries one party either generally by unreasonable behaviour or specifically ... causes loss to the other ...".

<sup>97</sup> *Supra*, f.n.14, 633 (McKay J.):

Counsel for Ocean Cement took the position that the liability of Ocean Cement, if any, was based in contract and that the *Hedley Byrne* principle did not apply where the relationship of the parties is governed by a contract . . . . The short answer is that the representation by Robinson was made months before any contractual arrangement was entered into. Most recently in *Walter Cabott Constructions Ltd. v. The Queen*, *supra*, f.n.46a, 98, Mahoney J. held that he had:

. . . no difficulty in finding that the relationship between the person who

contract. Recent cases in Australia also suggest that, in appropriate circumstances, *Hedley Byrne* can apply to pre-contractual situations.<sup>98</sup>

Two Australian cases, in particular, are important: *Dillingham Constructions v. Downs*<sup>99</sup> and *Ellul v. Oakes*.<sup>100</sup> In the *Dillingham* case, the plaintiffs, two companies, entered into a contract with the defendants, the New South Wales Government, for the deepening of Newcastle harbour. The plaintiff's work did not reach the planned rate of progress because disused coal workings under the harbour, which the defendants had known about all along, made blasting at first relatively ineffective. The plaintiffs sued for the loss resulting from the performance of the contract, alleging, *inter alia*, negligent misrepresentation. On this count, Hardie J. in the New South Wales Supreme Court seems to have endorsed the defendants' assertion that the

... pre-contract relationship would not normally qualify as a special relationship of the type which would subject one or other of the parties to a duty of care in the assembly or presentation of facts, figures or other information, as to the subject matter of the contract, ... [and the policy of the common law is to uphold contracts freely made] ... because a person in pre-contract negotiation is entitled to and usually does seek to make the most advantageous deal he can ... [and] have regard solely to his own interests.<sup>101</sup>

Hardie J. found that upon a consideration of all relevant factors, there was no assumption of responsibility by the defendants nor reliance by the plaintiffs. However, in response to the plaintiffs' submission<sup>102</sup> that the fact of the parties negotiating a contract and the pending contractual relationship "constituted a strong nexus to bring the parties to that relationship of proximity which creates a duty of care", he opined that a duty of care of the type relied on by

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invites tenders on a building contract and those who accept that invitation is such a particular relationship as to impose a duty of care upon that person so as to render actionable an innocent but negligent misrepresentation in the information which he conveys to those whom he intends to act upon it.

<sup>98</sup> E.g., *Presser v. Caldwell Estates Party Ltd.* [1971] 2 N.S.W.R. 471, 486, 493 (negotiations for sale of real estate); *Morrison-Knudsen v. Commonwealth* (1972) 46 A.L.J.R. 265.

<sup>99</sup> *Supra*, f.n.5a, Lawson J. in *Esso Petroleum v. Mardon*, *supra*, f.n.7, relied strongly on the *Dillingham* case to show that *Hedley Byrne* could apply to a pre-contractual relationship, because there was no direct English authority in this area.

<sup>100</sup> *Supra*, f.n.4a.

<sup>101</sup> *Supra*, f.n.5a, 55.

<sup>102</sup> *Ibid.*, 59.

the plaintiffs depended on the language of the contract, the position, conduct, knowledge and intention of each of the parties and the communications passing between them.<sup>103</sup>

In the second case, *Ellul v. Oakes*, which went to the Supreme Court of South Australia, the defendant instructed an agent to sell his house and filled in particulars of the house on a form supplied by the agent. In answer to a question as to whether the house was sewerred, or was served by a septic tank, indicated by the words "septic/sewer", the defendant crossed out the word "septic" and wrote "yes" alongside the word "sewer". The house was in fact not sewerred. The plaintiff purchasers signed an agreement, subject to the vendor's approval, to buy the house. The agreement was never executed by the vendor, but a memorandum of transfer of the house to the plaintiffs was executed. Upon discovering some months after the sale that the house was not sewerred, the plaintiffs sued the vendor for damages for breach of warranty, or alternatively for negligent misrepresentation.

The warranty claim in contract was successful, the mis-statement being found to be part of the contract, and the plaintiffs were held entitled to an award of damages for the cost of sewerring the house. The claim in tort for negligence, however, failed because the plaintiffs had not on the facts proved damage, *i.e.*, that the house unsewerred was worth less than the price paid for it. But, *obiter*, all the members of the Supreme Court agreed that even if damage had been proved, an action based on *Hedley Byrne* would probably not have succeeded. As Zelling J. stated:

... I think the defendant in this case was not a person holding himself out as possessing a special skill or ability; he was not a person appealed to for advice and giving it; and the mere fact that he had a financial interest in the transaction in which the statement was made was not sufficient to convert it into the sort of advice which attracts the intervention of the Court in cases of negligent misrepresentation.<sup>104</sup>

Bray C.J., however, was more restrictive in his approach. He stated:

I do not doubt that such a claim may succeed in some circumstances notwithstanding that the misrepresentation is connected with a contract between the parties, but the law of vendor and purchaser is so familiar and well-developed, and so many claims for damages in respect of innocent misrepresentations in relation to the sale of land, often disguised as claims for breach of warranty, have failed, that it might be difficult now to apply the new [*Hedley Byrne*] principle to such claims.<sup>105</sup>

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<sup>103</sup> *Ibid.*, 56, 59.

<sup>104</sup> *Supra*, f.n.100, 392.

<sup>105</sup> *Ibid.*, 380.

It is submitted that the true principle in respect of a pre-contractual negligent mis-statement is that assumption of responsibility and reasonable reliance — the gist of the “special relationship” — may not be ruled out merely because both parties contemplate a later contract as regulating their relationship.<sup>106</sup> As Professor Millner points out, the volunteering of information as well as the exchange of question and answer in renegotiation of a contract “are normally seriously intended, pertinent to the conclusion of a specific contract, and understood by both parties to be so”.<sup>107</sup> It may well be that the later contractual terms should have to contain exempting or restrictive conditions in terms wide enough to comprehend tortious liability (see *White v. Warwick, infra*) in order to rule out any incipient tortious liability, particularly since the test of exemption for negligence involves comprehensibility to the “ordinarily literate and sensible” plaintiff.<sup>108</sup>

Thus, as regards pre-contractual mis-statements, it may even be argued that if no disclaimer of responsibility was made at that prior point of time, any later restriction or exclusion of liability, even if ostensibly affecting tortious liability, may be too late to be effec-

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<sup>106</sup> As Glasbeek, *supra*, f.n.30, 132, concedes, “it is probably less artificial to imply that a reasonable man in the defendant’s position assumed a duty of care, than to have the courts insert a term which the parties quite possibly ignored in their *quid pro quo* arrangements”. One obvious situation where contractual rule analogies could not be taken in tort is where the prior mis-statement relates to a matter of *opinion*, and not fact. Here the firm contractual rule is that “[a] mere statement of opinion, which proves to have been unfounded, will not be treated as a misrepresentation...”: see *Chitty on Contracts* 23d ed. (1968), 125. But the *Hedley Byrne* principle has applied to both negligent statements of fact and opinion: that is, to information and advice. Hence it has been pointed out that “in an action in tort it is not necessary to show that the statement complained of was a representation in the sense which this term bears in the law of contract”: Chitty, *ibid.*, 126.

<sup>107</sup> *Negligence in Modern Law* (1967), 40. Now, in England, Lawson J. has decided (*Esso Petroleum v. Mardon, supra*, f.n.7) that a duty of care which arises from the plaintiff’s special relationship with the defendant is not excluded or qualified by the fact that, as a result of the statement, they are brought into a contractual relationship, and that such a view of the law would not open the door wide and erode the principle of *caveat emptor*. In this case the plaintiff, Esso Petroleum, carelessly made a statement to the defendant about the through-put potential of a new petrol filling station which resulted in the defendant taking a tenancy from Esso. It was held that, in the circumstances, a special relationship existed between the parties which put Esso under a duty to the defendant. Thus the defendant’s counter-claim against Esso succeeded. See also the recent Canadian case of *Walter Cabott Constructions Ltd. v. The Queen, supra*, f.n.46a.

<sup>108</sup> *Hollier v. Rambler Motors, supra*, f.n.24, 404 per Salmond L.J.

tive,<sup>109</sup> though Coote thinks it is "arguable that even if the person replying does initially assume responsibility and thereby attracts a duty, he may thereafter take advantage of the ordinary rules relating to exemption clauses, as they are commonly understood".<sup>110</sup> In respect of Robinson's pre-contractual mis-statement in *Sealand*, the complication of such exemption clauses in the subsequent contract was lacking. This idea of self-contained tort liability was emphasized by Barwick C.J. of the High Court of Australia in the *Evatt* case, where he stressed that the duty of care for mis-statement is imposed by the "law" and "not by consensus". Indeed, he went so far as to say that "because it is so imposed, I doubt whether the speaker may always except himself from the performance of the duty by some express reservation at the time of utterance".<sup>111</sup> It was subsequently decided in Australia, in *Morrison-Knudsen International v. The Commonwealth*,<sup>112</sup> that where certain documents containing special and general conditions were communicated by the defendants to the plaintiff *before* the latter registered as tenderer for certain works in the construction of an airfield, these documents (which did not form part of the subsequent contract) were not necessarily fatal to the plaintiff contractor's case. As Menzies J. opined in the High Court, the alleged pre-contractual conditions were not contained in a *contract* denying the plaintiff any rights relating to the information, nor did they amount to a disclaimer, as in *Hedley Byrne v. Heller*.<sup>113</sup>

The same argument on the applicability of *Hedley Byrne* to pre-contractual mis-statements can also be applied, by analogy, to post-

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<sup>109</sup> See Lord Devlin in *Hedley Byrne*, *supra*, f.n.3b, 613. See also Stevens, *supra*, f.n.10, 155. Greig maintains, in the context of sale of goods, that "[i]t is probably true that a disclaimer . . . need not be given at the time of the statement, but it would have to be given before it is acted upon", and "[t]he inclusion of a disclaimer in the contract is almost certainly too late, because the representation has already had the desired effect, *i.e.*, induced the buyer to enter into the contract": *Misrepresentations and Sales of Goods*, *supra*, f.n.26, 201, 202.

<sup>110</sup> *Supra*, f.n.94, 274. See also Winfield and Jolowicz, *Tort* 9th ed. (1971), 237.

<sup>111</sup> *Supra*, f.n.54, 321. In England, the *Misrepresentation Act*, 1967, s.3 states that an exemption clause as to misrepresentations made by the defendant *before* the contract was made shall be "of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstance of the case". Could this statutory provision be applied, by analogy, to a *tortious* misrepresentation where no reliance is placed on the Act? See James, *Innocent Misrepresentation: An Unanswered Challenge* (1963) J.B.L. 207, 217.

<sup>112</sup> *Supra*, f.n.98.

<sup>113</sup> See also *ibid.*, 270 *per* Gibbs J. (whether there was a disclaimer "must

contractual mis-statements such as those in *Nunes Diamonds* or in *Sealand*. If the parties have already entered into a contractual relationship, the fact that a mis-statement has been made against such a background may enhance the likelihood of a "special relationship" being found to exist between them. However, it may still be argued by the defendant that, as the mis-statement is not contained in the contract itself as a term or made contemporaneously with it, he assumed no responsibility for it. This to some extent ties in with the second possible interpretation of Pigeon J.'s "independence" test, discussed *supra*. Once again, the negligent post-contractual mis-statement may be tempered by the existing restrictive terms of the contract which may manifest beyond doubt that there was no true assumption of responsibility in tort by the defendant and no possibility of reasonable reliance<sup>114</sup> by the plaintiff under *Hedley Byrne*. A situation similar to that of "non-contractual disclaimer", as in *Hedley Byrne* itself, may then be found to exist.

It is evident from Pigeon J.'s judgment in *Nunes Diamonds* that he was very worried about what he considered to be a later variation of contract through the agency of tort. As he said, "It is a case in which, the parties having mutually established their respective rights and obligations by contract, it is sought to impose upon one of them a much greater obligation than that fixed by the contract...".<sup>115</sup> The same worry is reflected in Schroeder J.A.'s judgment in the court below when he says:

To apply it [*i.e.*, the *Hedley Byrne* principle] here would be to make an unwarranted extension of it quite apart from the fact that the relations between the parties are governed by a *formal contract* which embodies all the essential terms upon which they have agreed.<sup>116</sup>

The reason for such over-emphasis on the contractual terms in *Nunes Diamonds* was undoubtedly due in large measure to the "practical exclusion of responsibility"<sup>117</sup> in the contract itself and the unjustifiable conclusion in the Supreme Court by the majority that this had inevitable repercussions on tortious liability. In the case, the contract stated in clause 16 that "No conditions, warranties or representations have been made by Dominion Company, its

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be considered in the light of all the circumstances").

<sup>114</sup> There is the interesting implication at the end of Pigeon J.'s judgment in *Nunes Diamonds* that the fact the plaintiff was *insured* in respect of the risk on which the defendant advised may have had some bearing on how much *actual reliance* the plaintiff put on the misrepresentation: see *supra*, f.n.13, 730.

<sup>115</sup> *Ibid.*, 727, 728 ("a fundamental alteration of the contract").

<sup>116</sup> *Supra*, f.n.28a, 38, 39 (italics added).

<sup>117</sup> *Supra*, f.n.13, 728.

officers, servants or agents other than those endorsed hereon in writing". But as Spence J. pointed out in his dissenting judgment, even if this limiting clause were applicable to tortious liability, which was doubted by Addy J. at first instance, it had been framed in the past tense and so was of no effect to post-contractual representations made some 13 months after the date of contract.<sup>118</sup> However, the contract also stated that the defendant was "not an insurer" and limited liability under the contract to "\$50 as liquidated damages". Pigeon J. seems to have stressed the latter stipulations because of the apparent inapplicability of the first "no conditions, warranties or representations" provision; but it may be argued that such stipulations might in any event have been ineffective as regards tortious liability because the terminology as to what was ruled out had a closer affinity to contract than tort, though possibly the term "representations" could have had a direct bearing on tortious liability on an analogy with a disclaimer clause.<sup>119</sup> Thus Spence J. agreed with Addy J. at first instance that:

... the plaintiff has not... contracted itself out of its right to claim damages against the defendant, if such damages can be founded on an action in tort. A clause purporting to provide for exclusion of liability for negligence will be strictly interpreted and, even though it might exempt from liability based on a contractual duty, it will not exempt from liability based on the breach of a general duty of care unless the words to that effect are clear and unequivocal.<sup>120</sup>

Even Schroeder J.A. in the Ontario Supreme Court mentioned the further consideration (with "intriguing implications" which he had no need to go into) of whether "having regard to the qualifying terms of the contract, it is open to the plaintiff to disregard them and allege a wider liability in tort".<sup>121</sup> It has already been held in England in *Coats Patons (Retail) v. Birmingham Corporation*<sup>122</sup> that an exemption clause in a contractual relationship to the effect that replies were given by the defendants on the "distinct understanding" that the defendants were not "legally responsible therefor" related only to contractual liability and therefore did not exclude negligence.

The assertion in *Nunes Diamonds* that no "representations" had been made could also be construed as reinforcing the exclusively

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<sup>118</sup> *Ibid.*, 722. Cf. the defendant vendor's exemption in *Dodds v. Millman*, *supra*, f.n.22 ("It is understood and agreed that there are no other representations, warranties, promises or agreements other than those contained in this agreement").

<sup>119</sup> Spence J. uses the phrase "tortious misrepresentation": *ibid.*, 723.

<sup>120</sup> See *supra*, f.n.13, 722, 723. See also Greig, *supra*, f.n.26, 202.

<sup>121</sup> *Supra*, f.n.28a, 38.

<sup>122</sup> *Supra*, f.n.38, 360, 361.

contractual rule against parol evidence. This point was made by Addy J. at first instance:

... it is definite enough to remove any liability from a strictly contractual standpoint which might flow from any misrepresentation previously made but not actually expressed in writing on the contract. Nunes Diamonds had contracted itself out of any right it might have had to insist that the parol evidence rule not be invoked against it.<sup>123</sup>

Because of the ostensible inapplicability of the first restrictive clause, Pigeon J. laid greater stress on the "no insurers" stipulation which the plaintiff had agreed to in the contract, saying:

It is an essential basis of the contract between the parties that D.E.P. is not to be in the situation of an insurer. It is in consideration of this stipulation that the charges are established "solely on the probable value of the service", not on the value of the goods intended to be protected.<sup>124</sup>

Even this argument, however, is dubious in relation to tortious liability because it presupposes that liability in tort for mis-statement can be based on a guarantee of accuracy, rather than on taking such care as the occasion demands.<sup>125</sup> The latter was the standard applied by Spence J. in *Nunes Diamonds* in concluding that

... the modesty of the contract fee is not relevant to the issue of whether the respondent should be held liable in damages, not for any breach of contract, but for tortious misrepresentation the serious consequences of which had been conveyed to it by Eyl Brothers [the plaintiff's insurance brokers].<sup>126</sup>

Of course, contractual liability may be measured by a higher duty such as a guarantee of accuracy if the contract in question can be so construed.<sup>127</sup> This was one reason why several commentators on *Hedley Byrne* have played down the fears that the formula there laid

<sup>123</sup> *Supra* f.n.70, 688. Cf. the defendant's pre-contractual assertion in *Morrison-Knudsen v. The Commonwealth*, *supra*, f.n.98, 269, that the document did not form part of the contract documents. Gibbs J. thought that this statement "no doubt showed that the information was not warranted, but this was of no importance since the plaintiff's claim is clearly not for a breach of warranty".

<sup>124</sup> *Supra*, f.n.13, 728.

<sup>125</sup> Cf. the dictum of Barwick C.J. in *Evatt's case*, *supra*, f.n.54, 322 ("it should be emphasized, the obligation of the speaker is no more than to use reasonable care in the circumstances").

<sup>126</sup> *Supra*, f.n.13, 709.

<sup>127</sup> It is interesting to note that, at the Court of Appeal stage of *Hedley Byrne*, Pearson L.J. adverted to counsel's contention there that the disclaimer words should be understood as only excluding a warranty of accuracy as to the reference given and that accordingly they should not be understood as excluding liability for negligence, for which purpose express and unambiguous words could be necessary. But His Lordship did not find it necessary to express any opinion on this point: [1962] 1 Q.B. 396, 414.

down would make drastic inroads into the common law rule (now to some extent overridden in England by the *Misrepresentation Act*, 1967)<sup>128</sup> that a misrepresentation, if not a term of the contract, does not give rise to an action in damages;<sup>129</sup> the case suggested that only *negligent* misrepresentations would be affected by the tortious inroad into contract. Thus, in *Sealand*, Robinson's pre-contractual representation was expressly found to have been negligent.<sup>130</sup> It can be argued, therefore, that though the "no insurers" stipulation might have operated like a disclaimer in tort, it could also have been found to have effect only with regard to the possible higher duty on the defendants in contract. Even the stipulation that "liquidated damages" of only \$50 might be obtained was couched in terms having greater affinity with contractual liability than with tort.<sup>131</sup>

### Conclusion

As cases like *White v. Warwick*,<sup>132</sup> *Rutter v. Palmer*,<sup>133</sup> and *Alderslade v. Hendon Laundry*<sup>134</sup> show, it is precisely in the essentially contractual situation, where there are contractual limitations or exclusions of liability, that the plaintiff will be most concerned to allege and prove alternative liability in tort which, as Prosser has said, is generally "likely to be more advantageous to the injured party in the greater number of cases"<sup>135</sup> and therefore may be a "valuable procedural weapon".<sup>136</sup> The *Nunes Diamonds* decision to a large extent has taken this weapon from the plaintiff's hands by an undue concentration on the "independent tort" principle in the old

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<sup>128</sup> "The fact that such an Act was felt desirable stands as an indictment of the timidity of the courts in failing to set precise limits upon a rule which could cause injustice by classifying a statement about the subject matter of the contract as an innocent misrepresentation and therefore falling outside a remedy in damages": Greig, *supra*, f.n.26, 206, 207. If the *Misrepresentation Act* had been applicable in *Esso Petroleum* (*supra*, f.n.7), there would have been no need for the judge to resort to common law principles. (See *supra*, f.n.93, for the reason the Act did not apply).

<sup>129</sup> *E.g.*, *Honoré*, *supra*, f.n.94, 297.

<sup>130</sup> *Supra*, f.n.13, 632.

<sup>131</sup> Where *unliquidated* damages are typical.

<sup>132</sup> [1953] 2 All E.R. 1021.

<sup>133</sup> [1922] 2 K.B. 87.

<sup>134</sup> [1945] 1 K.B. 189.

<sup>135</sup> "The Borderland of Contract and Tort" from *Selected Topics on the Law of Torts* (1953), 425. See the dictum of Zelling J. in *Ellul v. Oakes*, *supra*, f.n.4a, 390, on the right of the plaintiff to elect which course of action will benefit him.

<sup>136</sup> *Ibid.*, 401.

and unsatisfactory case of *Elder, Dempster*, and by a restrictive interpretation of the recent and eminently satisfactory case of *Hedley Byrne*,<sup>137</sup> thus severely limiting the natural overlap between contract and tort. Moreover, and most unfortunately, it manifests an illiberal approach to the *contra proferentem* rule which the courts have been progressively developing in the borderland of contract and tort to work justice for the deserving plaintiff.

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<sup>137</sup> It is perhaps significant that the latest Canadian case in which *Nunes Diamonds* has been cited, *Porky Packers v. Town of Pas* (1974) 46 D.L.R. (3d) 83 (Man. C.A.), concerning mis-statements in a contractual relationship (a sale of land), defendant counsel's argument that the doctrine of *Hedley Byrne* does not apply to a contractual relationship was rejected by Matas J.A. as being stated "too broadly". The judge categorized the relationship in the instant case as "quite different" from that in *Nunes Diamonds* because it was "*not governed by a contract*" (at 94, italics added).