

Queen v. Cognos Inc., [1993] 1 S.C.R. 87

**Douglas J. Queen**

*Appellant*

v.

**Cognos Incorporated**

*Respondent*

**Indexed as: Queen v. Cognos Inc.**

File No.: 22004.

1992: January 29; 1993: January 21.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Stevenson\* and Iacobucci JJ.

on appeal from the court of appeal for ontario

*Torts -- Negligence -- Negligent misrepresentation -- Duty of care -- Employer's representative allegedly making negligent misrepresentations to prospective employee during hiring interview -- Whether employer or representative owed prospective employee a duty of care -- If so, whether duty of care breached -- Effect of subsequent employment agreement allowing termination without cause and reassignment.*

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\*Stevenson J. took no part in the judgment.

Cognos is an Ottawa-based computer software company. The manager of product development for a particular line of accounting software, with the full knowledge of the company's senior management, advertised for an accountant to help with the development of the product. Appellant, a chartered accountant, applied and was interviewed for the position. He was living in Calgary with his wife and children at the time, where he occupied a relatively well paid and secure managerial position. He was actively seeking employment outside Calgary, because he wanted more challenging opportunities. During the job interview the manager told the appellant that the project in question was a major one which would be developed over a period of two years with enhancements and maintenance thereafter, and that the position being interviewed for would be needed throughout this period. It was represented that the staff required to develop the product modules would double. At no point during the interview was the appellant made aware of the fact that there was no guaranteed funding for the project as described to him, or that the position being applied for was subject to budgetary approval. Appellant was offered the job of manager, financial standards, and accepted immediately. He signed a written employment contract which permitted Cognos to terminate his employment at any time "without cause" upon one month's notice, or payment of one month's salary in lieu of notice, and to reassign him to another position within the company without reduction in salary, upon one month's notice. Appellant commenced employment in April 1983. In September he was advised that there would be a reassignment of personnel involved with the project owing to diminished research and development funding. The first notice of termination of employment he received was rescinded, but in July 1984 he received a second notice effective October 25, 1984. He worked until that day and was paid until November 15. The trial judge upheld the appellant's

action against Cognos and awarded him damages for negligent misrepresentation. The Court of Appeal reversed the judgment and dismissed the action. The issues raised by this appeal are (1) whether Cognos or its representative owed the appellant a duty of care with respect to the representations made about Cognos and the nature and existence of the employment opportunity being offered; (2) whether Cognos or its representative breached this duty of care; and (3) what is the effect of the fact that the appellant signed an employment agreement after the negligent misrepresentations containing a termination "without cause" and a reassignment provision.

*Held:* The appeal should be allowed.

*Per La Forest, L'Heureux-Dubé and Gonthier JJ.:* Subject to what was said in *Checo*, issued concurrently, the reasons of Iacobucci and McLachlin JJ. were agreed with. This is not a case of concurrency. The tort here was independent of the contract and the liability was not limited by an exclusion clause in the contract.

*Per Sopinka and Iacobucci JJ.:* The tort of negligent misrepresentation is an established principle of Canadian tort law. There are five general requirements for a successful claim: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

An action in tort for negligent misrepresentation may lie even though the relevant parties to the action are in a contractual relationship. The fact that the alleged negligent misrepresentations are made in a pre-contractual setting, such as during negotiations or in the course of an employment hiring interview, and the fact that a contract is subsequently entered into by the parties do not, in themselves, bar an action in tort for damages caused by the misrepresentations. Depending on the circumstances, however, the subsequent contract may play a very important role in determining whether or not, and to what extent, a claim for negligent misrepresentation will succeed. Such a contract can have the effect of negating the action in tort and of confining the plaintiff to whatever remedies are available under the law of contract. Moreover, even if the tort claim is not barred altogether by the contract, the duty or liability of the defendant with respect to negligent misrepresentations may be limited or excluded by a term of the subsequent contract so as to diminish or extinguish the plaintiff's remedy in tort. Equally, however, there are cases where the subsequent contract will have no effect whatsoever on the plaintiff's claim for damages in tort.

The first and foremost question should be whether there is a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which the representee alleges the representor has breached. If the pre-contractual representation relied on by the plaintiff became an express term of the subsequent contract then absent any overriding considerations arising from the context in which the transaction occurred, the plaintiff cannot bring a concurrent action in tort for negligent misrepresentation and is confined to whatever remedies are available under the law of contract. Here, there is no

concurrency. The employment agreement signed by the appellant does not contain any express contractual obligation co-extensive with the duty of care Cognos is alleged to have breached. The appellant's claim was not that the manager negligently misrepresented the amount of time he would be working on the project in question or the conditions under which his employment could be terminated. Rather, the appellant argued that the manager negligently misrepresented the nature and existence of the employment opportunity being offered. It is the existence, or reality, of the job being interviewed for, not the extent of the appellant's involvement therein, which is at the heart of this tort action, and the employment agreement contains no express provisions dealing with Cognos's obligations with respect to the nature and existence of the project.

There existed a "special relationship" between the parties, and Cognos and its representative, the manager, accordingly owed a duty of care toward the appellant to exercise reasonable care and diligence in making representations as to the employer and the employment opportunity being offered. The misrepresentations by the manager during the interview were made negligently, and the duty of care was therefore breached. It is not sufficient that the manager was truthful during the interview and that he believed in what he was representing. The applicable standard of care should be the one used in every negligence case, namely the universally accepted "reasonable person". The standard of care required by a person making representations is an objective one: it is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading. The trial judge did not depart from the applicable standard of care in rendering his decision. He found that, "in all the circumstances", the

misrepresentations made by the respondent's representative were negligently made. The trial judge did not impose a duty to make full disclosure on the respondent and its representative. He simply imposed a duty of care, the respect of which required, among other things and in the circumstances of this case, that the appellant be given highly relevant information about the nature and existence of the employment opportunity for which he had applied.

The specific employment agreement signed by the appellant is, in the circumstances of this case, irrelevant to his action for negligent misrepresentation. The common law duty of care invoked by the appellant is "independent" of the employment agreement, and neither Cognos's duty of care nor its liability is affected by the terms of the agreement. In particular, the agreement does not contain any valid disclaimer of responsibility for the representations made during the interview.

*Per McLachlin J.:* The fact that the parties in this case entered into a contract which contained a specific term governing termination does not preclude the appellant's action in tort for negligent misrepresentation as to the employment. The pre-contractual representation was different in scope and effect from the contractual obligation. The representation at issue in this case concerned the risk of termination coming about, and was not that Cognos would not have the discretion to terminate or transfer the appellant on one month's notice. The appellant relied on that representation in deciding to enter into the contract. It turned out to have been negligently made and false. It follows that the appellant is entitled to damages for the loss suffered as a result of that representation.

The trial judge held that the respondent had a duty not to hold out to applicants that the project was secure when it knew that funding was not approved and knew or should have known that the final approval was not a rubber stamp process and the secure funding was not a foregone conclusion. This is the appropriate standard and the duty of care with respect to representations made in a pre-employment situation is the same as that which applies generally.

### **Cases Cited**

By La Forest J.

**Referred to:** *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 000.

By Iacobucci J.

**Distinguished:** *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 000, rev'g in part (1990), 44 B.C.L.R. (2d) 145; **referred to:** *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465; *Burrows v. Burke* (1984), 49 O.R. (2d) 76; *Carman Construction Ltd. v. Canadian Pacific Railway Co.*, [1982] 1 S.C.R. 958, aff'g (1981), 33 O.R. (2d) 472 (Ont. C.A.); *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957; *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *Hodgins v. Hydro-Electric Commission of the Township of Nepean*, [1976] 2 S.C.R.

501; *The Pas (Town of) v. Porky Packers Ltd.*, [1977] 1 S.C.R. 51; *Haig v. Bamford*, [1977] 1 S.C.R. 466; *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3; *Steer v. Aerovox Inc.* (1984), 65 N.S.R. (2d) 91; *H.B. Nickerson & Sons Ltd. v. Wooldridge* (1980), 115 D.L.R. (3d) 97; *Williams v. School District No. 63 (Saanich)* (1986), 11 C.C.E.L. 233 (B.C.S.C.), aff'd on other grounds (1987), 17 C.C.E.L. 257 (B.C.C.A.); *Grenier v. Timmins Board of Education* (1984), 26 A.C.W.S. (2d) 285; *Pettit v. Prince George & District Credit Union* (1991), 35 C.C.E.L. 140; *Roy v. B.N.P.P. Regional Police Commission* (1986), 15 C.C.E.L. 167; *Esso Petroleum Co. v. Mardon*, [1976] 2 All E.R. 5; *Sodd Corporation Inc. v. Tessis* (1977), 17 O.R. (2d) 158; *Kingu v. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568; *Mutual Life and Citizens' Assurance Co. v. Evatt*, [1971] A.C. 793; *Howard Marine and Dredging Co. v. A. Ogden & Sons (Excavations) Ltd.*, [1978] Q.B. 574; *Shaddock & Associates Pty. Ltd. v. Parramatta City Council* (1981), 150 C.L.R. 225; *Blair v. Canada Trust Co.* (1986), 38 C.C.L.T. 300; *Nelson Lumber Co. v. Koch* (1980), 13 C.C.L.T. 201; *Fine's Flowers Ltd. v. General Accident Assurance Co.* (1974), 5 O.R. (2d) 137 (H.C.), aff'd (1977), 17 O.R. (2d) 529 (C.A.); *Hendrick v. De Marsh* (1984), 45 O.R. (2d) 463 (H.C.), aff'd on other grounds (1986), 54 O.R. (2d) 185 (C.A.); *W. B. Anderson & Sons, Ltd. v. Rhodes (Liverpool), Ltd.*, [1967] 2 All E.R. 850; *Hayward v. Mellick* (1984), 45 O.R. (2d) 110; *Datile Financial Corp. v. Royal Trust Corp. of Canada* (1991), 5 O.R. (3d) 358; *Foster Advertising Ltd. v. Keenberg* (1987), 38 C.C.L.T. 309; *Andronyk v. Williams* (1985), 35 C.C.L.T. 38; *Minister Administering the Environmental Planning and Assessment Act, 1979 v. San Sebastian Pty. Ltd.*, [1983] 2 N.S.W.L.R. 268 (C.A.), aff'd on other grounds (1986),

68 A.L.R. 161 (H.C.); *Banque Financière de la Cité SA v. Westgate Insurance Co.*, [1989] 2 All E.R. 952, aff'd on other grounds [1990] 2 All E.R. 947 (H.L.); *Doherty v. Allen* (1988), 55 D.L.R. (4th) 746.

By McLachlin J.

**Referred to:** *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 000.

#### **Authors Cited**

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Klar, Lewis N. *Tort Law*. Toronto: Thomson Professional Publishing Canada, 1991.

Linden, Allen M. *Canadian Tort Law*, 4th ed. Toronto: Butterworths, 1988.

APPEAL from a judgment of the Ontario Court of Appeal (1990), 74 O.R. (2d) 176, 38 O.A.C. 180, 69 D.L.R. (4th) 288, 30 C.C.E.L. 1, 90 CCLC ¶14, 024, setting aside a judgment of White J. (1987), 63 O.R. (2d) 389, 18 C.C.E.L. 146, allowing the appellant's action for damages for negligent misrepresentation. Appeal allowed.

*Peter J. Bishop and Tom Brooker*, for the appellant.

*Charles T. Hackland and Mark Josselyn*, for the respondent.

//*La Forest J.*//

The judgment of La Forest, L'Heureux-Dubé and Gonthier JJ. was delivered by

LA FOREST J. -- Subject to what I have had to say in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 000, issued concurrently, I agree with Justices Iacobucci and McLachlin, and would dispose of the appeal in the manner proposed by them. Though Iacobucci J. repeats the essence of his analysis in *Checo*, the present case is not one of concurrency at all. It is sufficient for me to say that the tort here was independent of the contract and the liability was not limited by an exclusion clause in the contract.

//*Iacobucci J.*//

The reasons of Sopinka and Iacobucci JJ. were delivered by

IACOBUCCI J. -- This appeal involves the application of the tort of negligent misrepresentation to a pre-employment representation made by an employer to a prospective employee in the course of a hiring interview. Specifically, this Court is being asked to determine in what circumstances a representation made during a hiring interview becomes, in law, a "negligent misrepresentation". A subsidiary question deals with the effect of a subsequent employment agreement signed by the plaintiff, and its provisions allowing termination "without cause" and reassignment, on a claim for damages for negligent misrepresentation.

I. Facts

The trial judge conducted an extensive and thorough review of the facts in the course of his reasons for judgment. None of his findings of fact has been challenged in a direct manner by the respondent or altered by the Court of Appeal. As the facts are particularly important in the case at bar, I will review in some detail the trial judge's most relevant findings.

The respondent, Cognos Incorporated (previously named Quasar Corporation and hereinafter referred to as "Cognos" or "respondent"), is an Ottawa-based company which carries on the business of designing, developing and marketing computer programmes and software. In December of 1982, the respondent's President (Mr. Mike Potter) instructed Mr. Sean Johnston, the recently appointed Manager of Product Development for a product line of accounting software known as "Multiview", that Cognos intended to develop Multiview to an equal standing with its main product line called "Power House". Mr. Johnston had also received instructions from the Vice-President of Research and Development of Cognos (Mr. Bob Minns), at the time of accepting the position of Manager of Product Development, that the respondent wished to see Multiview expand beyond the general ledger module (the software involved consists of various "modules") then developed and in circulation, and the accounts payable module then under development. In particular, he was told that the respondent wished to see the development of three additional modules, namely, accounts receivable, cash flow, and fixed assets. Mr. Johnston was instructed by Cognos's senior management to

take charge and to do whatever was necessary to make Multiview a marketable and profitable product.

A meeting was held on December 21, 1982, during which Mr. Johnston and several senior executives of Cognos reviewed plans for the development of the Multiview line of products according to the mandate that had just been given. Criticisms were voiced by Mr. Johnston about the development of Multiview currently under way. He filed a project schedule covering a period of time up to 1985 and contemplating the development of modules such as accounts payable, accounts receivable, and cash flow.

Mr. Johnston indicated that there was a need on the research and development team of Multiview for an accountant to assist in the writing and maintenance of the software. Mr. Johnston proceeded, with the full knowledge of the respondent's senior management, to advertise for (and later hire) an accountant to help with the development of Multiview. An advertisement was placed in *The Globe and Mail* in mid-January, 1983, and many responses were received. In February of that year, a short list of six chartered accountants were interviewed by Mr. Johnston and two other executives of Cognos. The appellant, Douglas J. Queen, was one of the persons interviewed.

At the time of his interview, the appellant had been qualified as a chartered accountant for some eight and a half years. Since May of 1975, he had been living in Calgary with his wife and children and had occupied positions with three different employers, whereby he gained experience in working with computer

accounting systems. For the three and a half years prior to the interview, the appellant had been the Regional Controller for a Calgary-based corporation named Genstar Development Corporation, occupying a relatively well paying and secure managerial position. In the fall of 1982, the appellant was actively seeking employment outside Calgary and was interested in the high-tech industry in the Ottawa area. In the words of the trial judge, the appellant wanted more challenging opportunities than were available for him in Calgary; he wanted a senior financial position that would make use of his expertise in management information computer systems.

On February 14, 1983, the appellant was interviewed for approximately an hour and a half. During this interview, Mr. Johnston made a number of representations (as he had to the other five candidates) about the Multiview project and about the successful candidate's role in its development. These representations are fully canvassed at pp. 396-98 of the reported reasons of the trial judge: (1987), 63 O.R. (2d) 389.

In sum, Mr. Johnston told the appellant that Multiview was a major project which would be developed over a period of two years (the "primary development period") with enhancements and maintenance thereafter, and that the position being interviewed for would be needed throughout this period. It was made clear that Cognos was committed to the development of additional modules of Multiview beyond general ledger (then developed), accounts payable (development under way), and accounts receivable (planned, but not yet under development). Those additional modules were cash flow, fixed assets, inventory, and order entry.

Moreover, it was represented that the staff required to develop the Multiview modules would double, from 16 to 32, by August, 1983 (the appellant's evidence), or by the end of the two-year primary development period (Mr. Johnston's evidence). Throughout the interview, it was understood that the successful candidate would play an important role as a chartered accountant in the Multiview project, advising on accounting standards throughout the life of the project. In addition, the trial judge found, based on his assessment of all the evidence, that it was implicitly represented that there was a reasonable plan in existence for the additional modules and that Cognos had made a financial commitment for such development in the way of budgetary provisions.

At the time of this interview, Mr. Johnston's knowledge as to the respondent's commitment to the development of Multiview was based on conversations and meetings with senior executives of Cognos. He was aware, however, that the funding needed for the full development of Multiview in accordance with his mandate had not yet been approved by the respondent's corporate management team. While this body had met in early February to discuss and formulate strategies and plans for the development of Multiview, it had not yet given any financial commitment commensurate with the mandate given to Mr. Johnston. Mr. Johnston was also aware that this body had the ultimate responsibility of deciding whether to allocate corporate funds for the research and development of Multiview. At no point during the interview was the appellant made aware of the fact that there was no guaranteed funding for the Multiview project as described to him, or that the position being applied for was subject, in any respect, to budgetary approval.

The appellant was offered the job of Manager, Financial Standards, by telephone early in the month of March, 1983. He accepted immediately and Mr. Johnston mailed to him a written contract of employment. It is undisputed that, prior to signing, the appellant read and understood the employment agreement. He knew that its purpose was to define the rights and obligations of the parties. One clause in the contract (clause 14) permitted the respondent to terminate at any time the appellant's employment "without cause" upon one month's notice, or payment of one month's salary in lieu of notice. Another clause (clause 13) enabled the respondent to reassign the appellant to another position within Cognos without reduction in salary and upon one month's notice. Much importance was given to these provisions by the Court of Appeal as well as by the respondent in argument before this Court.

For convenience, I shall reproduce clauses 13 and 14 of the employment agreement:

TRANSFER

13. Quasar Systems reserves the right to reassign you to another position with the Company without reduction of your salary or benefits and upon one month's notice to you. Should such reassignment require your permanent relocation to another city, the Company will reimburse you for your expenses in accordance with the then current relocation policy.

TERMINATION NOTICE -- ONE MONTH

14. This Agreement may be terminated at any time and without cause by Quasar Systems Ltd. or by you. In the event of termination, Quasar Systems Ltd. will give you one month's notice of termination plus any additional notice that may be required by any applicable legislation. Similarly, you shall give Quasar Systems Ltd. one month's notice if you voluntarily terminate this Agreement. Quasar Systems Ltd. may pay you one month's salary in lieu of the aforesaid notice in which event this Agreement and your employment will be terminated on the date such payment in lieu of notice is made.

The trial judge specifically accepted the appellant's evidence that he signed the contract of employment based on the representations made to him during the interview, and that were it not for those representations he would not have signed it. In order to accept employment with Cognos, the appellant was required to give up a relatively well paying and secure, albeit not as challenging, position in Calgary and to move himself and his family more than halfway across the country.

The appellant commenced employment with Cognos on April 11, 1983. Two weeks later, on April 25, 1983, the corporate management team of the respondent considered for the very first time the project cost estimates for the Multiview project. This body rejected Mr. Johnston's funding proposal which was in excess of \$1,000,000. It decided to commit research and development funds to the Power House project in priority to Multiview. This decision was based on a number of market considerations, including the continuing low sales of the then developed Multiview module (general ledger) and the continuing high sales of the various Power House modules. The corporate management team allotted a budget of only \$200,000 to Multiview, thus making the development of additional modules beyond accounts receivable quite unrealistic. Further meetings of the management team took place in the following months at which time additional funding curtailment of the

Multiview project occurred. On September 9, 1983, barely five months after his arrival in Ottawa, the appellant and others were advised that there would be a reassignment of personnel involved with Multiview owing to diminished research and development funding. The appellant was informed that, unless a position was available for him in the finance and administration department of the respondent, he would most likely be laid off.

On October 28, 1983, the appellant was given his first written notice of termination of employment effective March 21, 1984. The appellant negotiated an amendment to his employment agreement in order to eliminate his obligation to repay \$7,500 of moving expenses, otherwise repayable in the event that his position was terminated within the first year of employment. This notice was rescinded in November, 1983, and the appellant was assigned to quality control of one of the aspects of the Power House project. On May 1, 1984, after having been informed earlier in March that he would no longer be needed with quality control, the appellant secured the position of Manager of Finance in the finance department of the respondent. He performed various tasks while in this function. On July 31, 1984, he received his second written notice of termination effective October 25, 1984. He worked until that day and was paid until November 15, 1984. The trial judge found that the appellant was not dismissed as a result of an unsatisfactory assessment of his job performance.

On March 25, 1985, the appellant commenced an action against the respondent seeking damages for negligent and fraudulent misrepresentation. He apparently discontinued his claim for fraudulent misrepresentation at some point

after filing the statement of claim, and proceeded only in negligence. From the beginning, the appellant's cause of action has been founded wholly and solely in tort. At no time did he argue breach of contract, breach of collateral warranty or any other contractual cause of action against the respondent. He did not dispute the fact that some of the terms of his employment contract appeared to be inconsistent with the representations made by Mr. Johnston. However, it was his understanding from the interview that the Multiview project was a reality and that its existence was not contingent on the happening of some future event. He testified that were it not for the representations made during the interview as to the nature and existence of the employment opportunity, he would not have left his secure position in Calgary.

In a judgment rendered on December 31, 1987, White J. of the Ontario High Court of Justice upheld the appellant's claim and awarded him \$67,224 in damages: (1987), 63 O.R. (2d) 389, 18 C.C.E.L. 146. On May 1, 1990, an appeal by the respondent to the Court of Appeal for Ontario was allowed; the trial judgment was set aside and replaced by a judgment dismissing the action with costs: (1990), 74 O.R. (2d) 176, 38 O.A.C. 180, 69 D.L.R. (4th) 288, 30 C.C.E.L. 1, 90 CLLC ¶14,024. The appellant was granted leave to appeal to this Court on January 17, 1991, [1991] 1 S.C.R. xii.

## II. Judgments in the Courts Below

### A. *Ontario High Court of Justice* (1987), 63 O.R. (2d) 389

The trial judge found, in all the circumstances, that there existed a "special relationship" between the respondent (via Mr. Johnston) and the appellant, within the meaning of *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.), so as to give rise to a duty of care with respect to the representations made during the hiring interview. The fact that this case involved pre-contractual or pre-employment negotiations did not alter this conclusion. Based on his assessment of all the evidence adduced at trial, White J. also found that certain representations made to the appellant during the interview were inaccurate or misleading (i.e., they were misrepresentations), and that these misrepresentations were made in a negligent manner (i.e., they were negligent misrepresentations). Some of his comments in this respect warrant repeating (at pp. 415-16):

I find that misrepresentations were made to the [appellant] by Sean Johnston in the hiring interview. The effect of these misrepresentations was that the [appellant] would have a position in the research and development of the product "Multiview"; that that position would be a significant one and would involve his expertise as an accountant; that he would perform the responsible role of seeing to proper accounting standards being implemented into the product; that beyond the three modules immediately in contemplation were a minimum of four other modules; and that the project of "Multiview", in connection with which [the appellant] would be hired would last a minimum of two years. I find further that Mr. Johnston implicitly represented that management had made a firm budgetary commitment to the development of four other modules in addition to those then presently under development.

I find further, in all the circumstances, that Sean Johnston made those misrepresentations negligently. Based upon his expertise in the field of computer development, he was aware, according to his evidence, that until there is a feasibility study in which cost estimates have been submitted to and have been considered and approved by senior management, one could not say that the [respondent] had made a firm commitment to the project as Mr. Johnston envisaged it and as he described it to [the appellant] in the interview.

Other circumstances which the trial judge took into consideration in concluding that the misrepresentations were negligently made include the following: (1) Mr. Johnston knew, or ought to have known, that the truth of his representations depended on the approval by the corporate management team of the cost estimates he had prepared for the research and development of the Multiview project; (2) it is reasonable to infer that Mr. Johnston, at the time of the interview, contemplated that the budgetary needs for the Multiview project would be substantial and that approval was at best speculative; (3) Mr. Johnston must have been aware of the continued poor sales performance of the Multiview product line; (4) Mr. Johnston did not disclose to the appellant that senior management had not yet given the financial commitment required to make the plans for the Multiview project a probable reality; (5) Mr. Johnston's expertise in the computer development field should have made him aware that, notwithstanding his conversations with senior management and the meeting of December 21, 1982, there was still a considerable risk that senior management would not give budgetary approval to his plans; (6) Mr. Johnston knew that the appellant was relying on the information he was providing during the interview; (7) Mr. Johnston knew that the appellant had a secure, responsible, and well-paying employment as a chartered accountant in Calgary and that coming to Ottawa would involve moving himself and his family across the country; and (8) Mr. Johnston was aware that the appellant was relying on the position with Cognos to enhance his career significantly as an accountant.

The trial judge also found that, even if Mr. Johnston felt justified in making the representations that he did (based on his conversations with senior management and the meeting of December 21, 1982), and assuming that this

deprived his misrepresentations of their negligent quality, then such misrepresentations, while not negligently made by Mr. Johnston, were negligently made by the senior management of the respondent "through Mr. Johnston as an innocent instrument of the [respondent] company" (p. 418).

White J. further found that the appellant had relied upon the negligent misrepresentations, to his detriment, and that he had sustained substantial damages (at p. 419):

The misrepresentations induced [the appellant] to quit his job as controller of the Calgary Division of Genstar Development Corporation and to accept employment with the [respondent]. Those representations induced him to sign the contract of employment. But for those representations he would have remained working for the Genstar Development Corporation for some further period of time and would not have become an employee of the [respondent].

Finally, the trial judge addressed a number of arguments raised by the respondent in defence. First, he rejected the proposition that the representations were truthful and that Mr. Johnston was simply giving an opinion as to future events. In his view, the representations were untruthful: "What was untruthful in the representations was the implied assurance in those representations that Mr. Johnston had made a sufficient study of the relevant facts, including the decision of senior management to make a financial commitment to the development of 'Multiview' beyond the accounts receivable module, to be able to make the unqualified representations that he made" (pp. 417-18). All Mr. Johnston had to say, in the trial judge's opinion, was that the feasibility study of the project had not yet been completed. Second, senior management of the respondent made no attempt to

disclaim expressly any representations made to the appellant during the interview. Third, the trial judge rejected the defence put forward that the appellant, by his conduct subsequent to learning the situation of Multiview, had affirmed his contract of employment. In this respect, White J. distinguished the decision relied on by the respondent (*Burrows v. Burke* (1984), 49 O.R. (2d) 76 (C.A.)), and held that the appellant's conduct was not one of affirming the contract of employment but of a person in a difficult situation attempting to "minimize his damages" (p. 420). In any event, his conduct "did not amount to an explicit waiver of his right to claim damages in tort arising out of negligent misrepresentations made to him inducing the contract" (p. 421). In his view, whether the contract is affirmed or not, the cause of action in tort is preserved as it is external to the contract. And fourth, the trial judge rejected the respondent's defence of business necessity on the basis that there was no evidence of any such necessity which would exonerate the respondent from the negligent misrepresentations in issue.

Thus, White J. allowed the appellant's claim for negligent misrepresentation. He assessed the damages payable to the appellant at \$67,224. This amount represented what was necessary, according to White J., "to put the [appellant] in the same position as he would have been if the negligent misrepresentation had not been made" (p. 414). It consists of \$50,000 for loss of income, \$252 for costs of obtaining a new employment, \$11,972 for the loss on the purchase and sale of his home in the Ottawa area, and \$5,000 in general damages for emotional stress.

B. *Ontario Court of Appeal* (1990), 74 O.R. (2d) 176

Finlayson J.A. (Griffiths and Arbour JJ.A. concurring) held that the trial judge made two errors in allowing the appellant's claim to succeed. Finlayson J.A. accepted that there was a "special relationship" between the appellant and the respondent so as to give rise to a duty of care of the sort described in *Hedley Byrne, supra*, and subsequent cases. However, he was of the view that, in the circumstances of the present case, White J. had erred in the manner in which he dealt with the issues of contractual disclaimer and of negligence.

With respect to disclaimer, Finlayson J.A. felt the trial judge had erred in requiring an express disavowal of any representations that may have been made during the pre-contractual negotiations in order for a disclaimer argument to succeed, as it had in *Hedley Byrne, supra*, and in *Carman Construction Ltd. v. Canadian Pacific Railway Co.*, [1982] 1 S.C.R. 958. In Finlayson J.A.'s opinion, something less than an express disclaimer could suffice (at p. 183): "it is a sufficient disclaimer if the contract contains terms which contradict or are inconsistent with the representations relied upon." He noted that the contract of employment, which the appellant read and understood, contained provisions relating to the possibility of reassignment and, more importantly, to the termination of employment on one month's notice. He found that such provisions were sufficient to constitute a valid disclaimer (at pp. 183 and 185):

In the case on appeal, the [appellant] stated that he would not have given up his secure position in Calgary for a move to Ottawa that was without permanence, and yet he signed a contract which provided him with no assurances respecting his place of employment or its tenure. To rely on *Hedley Byrne*, the negligent misrepresentation must have amounted to a warranty of job security and yet the contract of employment was surely a disclaimer of just that. No representations as to job security, whether

based on performance or on job availability, could have survived the one-month termination notice "without cause" contained in the contract.

...

The pre-employment discussions in this case merged in the contract of employment. There is no separate tort, even accepting the trial judge's findings of innocent misrepresentation, because the terms of the contract amounted to a disclaimer within the meaning of *Hedley Byrne*. The references to the Multiview project did not amount to warranties or representations that were independent of the contract of employment and they cannot survive the written agreement.

According to Finlayson J.A., this disclaimer was fatal to the appellant's claim as it had the effect of negating any assumption of duty of care on the part of the respondent; a conclusion similar to the one reached in *Hedley Byrne* and *Carman Construction, supra*.

In any event, Finlayson J.A. was of the view that the trial judge had erred in his finding of negligent misrepresentation because he imposed a "higher duty of care" on the respondent than was required in the circumstances. According to Finlayson J.A., the duty in the case at bar is no more than a duty to take care that the representations made were "responsible and accurate to the knowledge of Johnston and of his principal, Cognos" (p. 186). He observed that the same representations were made to all the six candidates, that the purpose of the interview was to make the position sound attractive enough that the successful candidate would accept it, and that Mr. Johnston believed in the veracity of what he was saying during the interview. Moreover, he noted that the trial judge criticized more what was not said by Mr. Johnston, than what was actually said by him. In his view, any duty of care had been fully discharged in the circumstances of this case -- there had been no negligent misrepresentation (at pp. 187-88):

Johnston was hired to oversee the Multiview project. Counsel for [the appellant] conceded that Johnston was as surprised as anyone at the corporate decision not to concentrate on it. Johnston believed in what he said to the job applicants about Multiview. The trial judge found that he had a duty to go further and to point out the details of the internal decision-making process at Cognos and stress that that process had not been completed. In other words, his own *bona fide* belief as a knowledgeable executive that the program was going forward was not sufficient. He had to divulge to all of the applicants that he interviewed the precise status of the corporate commitment to the development of the new product so that they could make their own assessment of the viability of the project.

In my opinion, this casts the duty too high. It suggests that at least a quasi-fiduciary relationship existed between corporation and job applicant, giving rise to a duty to make full disclosure. Such a duty can exist in a given "special relationship" required by *Hedley Byrne* . . . but it does not exist in this one. The trial judge was in error in extending to this situation the narrow class of contract cases where *uberrima fides* is the standard.

...

In my opinion, while a "special relationship" existed between [the respondent] and the six applicants, any duty of care that arose from it was discharged. I say this without reference to the disclaimer in [the appellant's] contract. Johnston was not obliged to go farther than he did in describing the job prospects. What he said was truthful, he believed in it, that was enough.

There was an appeal and cross-appeal as to damages. Finlayson J.A. held that if, contrary to his view, the appellant's action was successful, he would not have interfered with the assessment of damages made by the trial judge.

### III. Issues

I would characterize the issues raised by this appeal as follows:

(1) Disregarding for now the employment agreement signed by the appellant in March of 1983, did the respondent or its representative Mr. Johnston owe a duty of care to the appellant during the pre-employment interview of February 14, 1983, with respect to the representations made to the appellant about the respondent and the nature and existence of the employment opportunity being offered?

(2) If so, again disregarding for now the contract between the parties, did the respondent or its representative Mr. Johnston breach this duty of care in all the circumstances of this case?

(3) If so, should the answers given to questions 1 and 2, or the result that would normally follow from such conclusions (i.e. liability of the respondent for the damages caused to the appellant, fixed by the trial judge at \$67,224, upheld by the Court of Appeal, and unchallenged before this Court), be different in any way in view of the fact that the appellant signed an employment agreement after the negligent misrepresentations containing, *inter alia*, a termination "without cause" provision (clause 14) as well as a reassignment provision (clause 13)?

For reasons that follow, I am of the opinion that questions 1 and 2 should be answered in the affirmative and that question 3 should be answered in the negative. The appeal should therefore be allowed and the judgment of White J. in favour of the appellant and granting him damages in the amount of \$67,224 should be restored.

#### IV. Analysis

##### A. *Introduction*

This appeal involves an action in tort to recover damages caused by alleged negligent misrepresentations made in the course of a hiring interview by an employer (the respondent), through its representative, to a prospective employee (the appellant) with respect to the employer and the nature and existence of the employment opportunity. Though a relatively recent feature of the common law, the tort of negligent misrepresentation relied on by the appellant and first recognized by the House of Lords in *Hedley Byrne, supra*, is now an established principle of Canadian tort law. This Court has confirmed on many occasions, sometimes tacitly, that an action in tort may lie, in appropriate circumstances, for damages caused by a misrepresentation made in a negligent manner: see *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957; *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *Hodgins v. Hydro-Electric Commission of the Township of Nepean*, [1976] 2 S.C.R. 501; *The Pas (Town of) v. Porky Packers Ltd.*, [1977] 1 S.C.R. 51; *Haig v. Bamford*, [1977] 1 S.C.R. 466; *Carman Construction, supra*; *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271; and *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3.

While the doctrine of *Hedley Byrne, supra*, is well established in Canada, the exact breadth of its applicability is, like any common law principle, subject to

debate and to continuous development. At the time this appeal was heard, there have only been a handful of cases where the tort of negligent misrepresentation was used in a pre-employment context such as the one involved here: see *Steer v. Aerovox Inc.* (1984), 65 N.S.R. (2d) 91 (S.C.T.D.); *H.B. Nickerson & Sons Ltd. v. Wooldridge* (1980), 115 D.L.R. (3d) 97 (N.S.S.C.A.D.); *Williams v. School District No. 63 (Saanich)* (1986), 11 C.C.E.L. 233 (B.C.S.C.), aff'd on other grounds (1987), 17 C.C.E.L. 257 (B.C.C.A.); *Grenier v. Timmins Board of Education, Ont. H.C.*, No. 1250/82, May 31, 1984, 26 A.C.W.S. (2d) 285; *Pettit v. Prince George & District Credit Union* (1991), 35 C.C.E.L. 140 (B.C.S.C.); and *Roy v. B.N.P.P. Regional Police Commission* (1986), 15 C.C.E.L. 167 (N.B.Q.B.). Without question, the present factual situation is a novel one for this Court.

Some have suggested that it is inappropriate to extend the application of *Hedley Byrne, supra*, to representations made by an employer to a prospective employee in the course of an interview because it places a heavy burden on employers. As will be apparent from my reasons herein, I disagree in principle with this view. However, I find it unnecessary for the purposes of this appeal to engage in a general and abstract discussion on the applicability of the tort of negligent misrepresentation to pre-employment representations. The thrust of the respondent's argument before this Court is not that the appellant's action is unfounded in law. Rather, the respondent argues that the appellant has not made out a case for compensation based on negligent misrepresentation. Accordingly, this appeal may be disposed of simply by considering whether or not the required elements under the *Hedley Byrne* doctrine are established in the facts of this case. In my view, they are.

The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. In the case at bar, the trial judge found that all elements were present and allowed the appellant's claim.

In particular, White J. found, as a fact, that the respondent's representative, Mr. Johnston, had misrepresented the nature and existence of the employment opportunity for which the appellant had applied, and that the appellant had relied to his detriment on those misrepresentations. These findings of fact were undisturbed by the Court of Appeal and, except for a few passing remarks, the respondent does not challenge them before this Court. Thus, the second, fourth, and fifth requirements are not in question here.

The only issues before this Court deal with the duty of care owed to the appellant in the circumstances of this case and the alleged breach of this duty (i.e., the alleged negligence). The respondent concedes that a "special relationship" existed between itself (through its representative) and the appellant so as to give rise to a duty of care. However, it argues that this duty is negated by a disclaimer contained in the employment contract signed by the appellant more than two weeks

after the interview. Furthermore, the respondent argues that any misrepresentations made during the hiring interview were not made in a negligent manner. For reasons that follow, it is my view that both submissions fail.

However, before turning to these issues, I intend to deal with a preliminary matter not directly raised in argument. This appeal was argued before this Court in close proximity to the case *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 000. That case involved circumstances somewhat similar to those in the present appeal in that it also dealt with a claim for damages based on an alleged negligent misrepresentation stemming from pre-contractual negotiations. Generally speaking, in *BG Checo* as in the case at bar, it was argued that certain representations made in a pre-contractual setting did not correspond with the post-agreement reality and were made in a negligent manner. In both cases, the defendants relied on the contract signed by the parties subsequent to the alleged negligent misrepresentation in order to bar the plaintiffs' claim in tort. As my conclusion in *BG Checo* is opposite from the one I take herein, I believe it is useful at the outset to explain why this case is clearly distinguishable from *BG Checo*. In doing so, my hope is to clarify some of the confusion which currently exists with respect to pre-contractual negligent misrepresentations.

B. *Preliminary Observations on the Effect of the Employment Agreement on this Appeal*

As I stated in *BG Checo*, it is now clear that an action in tort for negligent misrepresentation may lie even though the relevant parties to the action (i.e., the representee/plaintiff and the representor/defendant) are in a contractual relationship:

see *Esso Petroleum Co. v. Mardon*, [1976] 2 All E.R. 5 (C.A.); *Sodd Corporation Inc. v. Tessis* (1977), 17 O.R. (2d) 158 (C.A.); *Kingu v. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51 (B.C.C.A.); *Carman Construction*, *supra*; *V.K. Mason Construction*, *supra*; *Rainbow Industrial Caterers*, *supra*; and L. N. Klar, *Tort Law* (1991), at p. 162, n. 89. More particularly, the fact that the alleged negligent misrepresentations are made in a pre-contractual setting, such as during negotiations or in the course of an employment hiring interview, and the fact that a contract is subsequently entered into by the parties do not, in themselves, bar an action in tort for damages caused by said misrepresentations: see, for example, *Esso Petroleum*, *supra*, and the cases cited above dealing specifically with pre-employment misrepresentation.

This is not to say that the contract in such a case is irrelevant and that a court should dispose of the plaintiff's tort claim independently of the contractual arrangement. On the contrary, depending on the circumstances, the subsequent contract may play a very important role in determining whether or not, and to what extent, a claim for negligent misrepresentation shall succeed. Indeed, as evidenced by my conclusion in *BG Checo*, such a contract can have the effect of negating the action in tort and of confining the plaintiff to whatever remedies are available under the law of contract. On the other hand, even if the tort claim is not barred altogether by the contract, the duty or liability of the defendant with respect to negligent misrepresentations may be limited or excluded by a term of the subsequent contract so as to diminish or extinguish the plaintiff's remedy in tort: see, for example, *Hedley Byrne* (although this case did not involve a contract) and *Carman Construction* (although this case involved mostly post-contractual representations),

*supra*. Equally true, however, is that there are cases where the subsequent contract will have no effect whatsoever on the plaintiff's claim for damages in tort. As will be apparent from these reasons, it is my view that the employment agreement signed by the appellant in March of 1983 is governed by this last proposition.

When considering the effect of the subsequent contract on the representee's tort action, everything revolves around the nature of the contractual obligations assumed by the parties and the nature of the alleged negligent misrepresentation. The first and foremost question should be whether there is a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which the representee alleges the representor has breached. Put another way, did the pre-contractual representation relied on by the plaintiff become an express term of the subsequent contract? If so, absent any overriding considerations arising from the context in which the transaction occurred, the plaintiff cannot bring a concurrent action in tort for negligent misrepresentation and is confined to whatever remedies are available under the law of contract. The authorities supporting this proposition, including the decision of this Court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, are fully canvassed in my reasons in *BG Checo*. As alluded to in *BG Checo*, this principle is an exception to the general rule of concurrency espoused by this Court in *Central Trust v. Rafuse, supra*.

There lies, in my view, the fundamental difference between the present appeal and *BG Checo, supra*. In the latter case, the alleged pre-contractual misrepresentation had been incorporated verbatim as an express term of the

subsequent contract. As such, the common law duty of care relied on by the plaintiff in its tort action was co-extensive with a duty imposed on the defendant in contract by an express term of their agreement. Thus, it was my view that the plaintiff was barred from exercising a concurrent action in tort for the alleged breach of said duty, and this view was reinforced by the commercial context in which the transaction occurred. In the case at bar, however, there is no such concurrency. The employment agreement signed by the appellant in March of 1983 does not contain any express contractual obligation co-extensive with the duty of care the respondent is alleged to have breached. The provisions most relevant to this appeal (clauses 13 and 14) contain contractual duties clearly different from, not co-extensive with, the common law duty invoked by the appellant in his tort action.

Had the appellant's action been based on pre-contractual representations concerning the length of his involvement on the Multiview project or his "job security", as characterized by the Court of Appeal, the concurrency question might be resolved differently in light of the termination and reassignment provisions of the contract. However, it is clear that the appellant's claim was not that Mr. Johnston negligently misrepresented the amount of time he would be working on Multiview or the conditions under which his employment could be terminated. In other words, he did not argue that the respondent, through its representative, breached a common law duty of care by negligently misrepresenting his security of employment with Cognos. Rather, the appellant argued that Mr. Johnston negligently misrepresented the nature and existence of the employment opportunity being offered. It is the existence, or reality, of the job being interviewed for, not the extent of the appellant's involvement therein, which is at the heart of this tort action. A close reading of the

employment agreement reveals that it contains no express provisions dealing with the respondent's obligations with respect to the nature and existence of the Multiview project. Accordingly, the *ratio decidendi* of my reasons in *BG Checo* is inapplicable to the present appeal. While both cases involve pre-contractual negligent misrepresentations, only *BG Checo* involved an impermissible concurrent liability in tort and contract, an exception to the general rule of concurrency set out in *Central Trust v. Rafuse, supra*. The case at bar does not involve concurrency at all, let alone an exception thereto.

Having said this, it does not follow that the employment agreement is irrelevant to the disposition of this appeal. As I mentioned earlier, even if the tort claim is not barred altogether by the contract as in *BG Checo*, the duty or liability of the representor in tort may be limited or excluded by a term of the subsequent contract. In this respect, the respondent submits that the Court of Appeal was correct in finding that clauses 13 and 14 of the employment agreement represent a valid disclaimer for the misrepresentations allegedly made during the hiring interview, thereby negating any duty of care. I shall return to this issue in the last part of my reasons. I prefer to deal next with the questions of whether the respondent or its representative owed a duty of care to the appellant during the pre-employment interview and, if so, whether there was a breach of this duty in all the circumstances of this case.

*C. The Duty of Care Owed to the Appellant*

The respondent concedes that it itself and its representative, Mr. Johnston, owed a duty of care towards the six job applicants being interviewed, including the appellant, not to make negligent misrepresentations as to Cognos and the nature and permanence of the job being offered. In so doing, it accepts as correct the findings of both the trial judge and the Court of Appeal that there existed between the parties a "special relationship" within the meaning of *Hedley Byrne, supra*.

In my view, this concession is a sensible one. Without a doubt, when all the circumstances of this case are taken into account, the respondent and Mr. Johnston were under an obligation to exercise due diligence throughout the hiring interview with respect to the representations made to the appellant about Cognos and the nature and existence of the employment opportunity.

There is some debate in academic circles, fuelled by various judicial pronouncements, about the proper test that should be applied to determine when a "special relationship" exists between the representor and the representee which will give rise to a duty of care. Some have suggested that "foreseeable and reasonable reliance" on the representations is the key element to the analysis, while others speak of "voluntary assumption of responsibility" on the part of the representor. Recently, in *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (H.L.), a case unlike the present one in that there the whole issue revolved around the existence of a duty of care, the House of Lords suggested that three criteria determine the imposition of a duty of care: foreseeability of damage, proximity of relationship, and the reasonableness or otherwise of imposing a duty.

For my part, I find it unnecessary -- and unwise in view of the respondent's concession -- to take part in this debate. Regardless of the test applied, the result which the circumstances of this case dictate would be the same. It was foreseeable that the appellant would be relying on the information given during the hiring interview in order to make his career decision. It was reasonable for the appellant to rely on said representations. There is nothing before this Court that suggests that the respondent was not, at the time of the interview or shortly thereafter, assuming responsibility for what was being represented to the appellant by Mr. Johnston. As noted by the trial judge, Mr. Johnston discussed the Multiview project in an unqualified manner, without making any relevant *caveats*. The alleged disclaimers of responsibility are provisions of a contract signed more than two weeks after the interview. For reasons that I give in the last part of this analysis, these provisions are not valid disclaimers. They do not negate the duty of care owed to the appellant or prevent it from arising as in *Hedley Byrne* and *Carman Construction, supra*. It was foreseeable to the respondent and its representative that the appellant would sustain damages should the representations relied on prove to be false and negligently made. There was, undoubtedly, a relationship of proximity between the parties at all material times. Finally, it is not unreasonable to impose a duty of care in all the circumstances of this case; quite the contrary, it would be unreasonable not to impose such a duty. In short, therefore, there existed between the parties a "special relationship" at the time of the interview. The respondent and its representative Mr. Johnston were under a duty of care during the pre-employment interview to exercise reasonable care and diligence in making representations as to the employer and the employment opportunity being offered.

Although it was not argued before this Court, I wish to add what is implicit in my acceptance of the respondent's concession, namely, that I reject the so-called restrictive approach as to who can owe a *Hedley Byrne* duty of care, often associated with the majority judgment in *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt*, [1971] A.C. 793 (P.C.). In my opinion, confining this duty of care to "professionals" who are in the business of providing information and advice, such as doctors, lawyers, bankers, architects, and engineers, reflects an overly simplistic view of the analysis required in cases such as the present one. The question of whether a duty of care with respect to representations exists depends on a number of considerations including, but not limited to, the representor's profession. While this factor may provide a good indication as to whether a "special relationship" exists between the parties, it should not be treated in all cases as a threshold requirement. There may be situations where the surrounding circumstances provide sufficient indicia of a duty of care, notwithstanding the representor's profession. Indeed, the case at bar is a good example. I find support for a more flexible approach on this question in a number of authorities: see, for example, the dissenting reasons of Lord Reid and Lord Morris in *Mutual Life*, *supra*; *Esso Petroleum*, *supra*; *Howard Marine and Dredging Co. v. A. Ogden & Sons (Excavations) Ltd.*, [1978] Q.B. 574 (C.A.); *Shaddock & Associates Pty. Ltd. v. Parramatta City Council* (1981), 150 C.L.R. 225 (H.C. Aust.); *Blair v. Canada Trust Co.* (1986), 38 C.C.L.T. 300 (B.C.S.C.); *Nelson Lumber Co. v. Koch* (1980), 13 C.C.L.T. 201 (Sask. C.A.); and A. M. Linden, *Canadian Tort Law* (4th ed. 1988), at pp. 400-404.

#### D. *The Breach of the Duty of Care*

(1) Introduction

The next issue deals with whether the above duty of care was breached during the course of the pre-employment interview of February 14, 1983. The main question to be addressed here is whether the misrepresentations of Mr. Johnston during the interview were negligently made, as found by the trial judge.

In order to answer this question, it will be necessary to determine the nature and extent of the duty of care owed to the appellant in the circumstances of this case or, as I prefer to characterize it, the standard of care imposed by law on the respondent and its representative. Specifically, we must ask ourselves whether it is sufficient, in law, that Mr. Johnston was truthful during the interview and that he believed in what he was representing, as found by the Court of Appeal, or whether something more was required of him.

I will also deal under this heading with a subissue raised by the respondent, namely, the nature of the misrepresentations made in the case at bar. As previously noted, the trial judge found as a fact that some of the representations made to the appellant in the course of the pre-employment interview were misrepresentations in the sense that they were inaccurate or misleading. This finding, made on the basis of White J.'s assessment of all the evidence, was not disturbed in any way by the Court of Appeal. The respondent is not challenging -- at least not directly -- this finding of fact before this Court. However, it is arguing that regardless of any negligence these misrepresentations are not actionable at law under the *Hedley Byrne* principle because they depend on inferences or implications

rather than on direct and express statements, and because they relate to a future expectation. I shall address this submission following my review of the relevant standard of care and of its application to the facts of this case.

(2) The Standard of Care Imposed on the Respondent

According to Finlayson J.A., the duty imposed on the respondent and its representative is "no more than a duty to take care that the representations made were responsible and accurate to the knowledge of Johnston and of his principal, Cognos" (p. 186). In his view, Mr. Johnston was not obliged to go further than he did in describing the employment opportunity to the appellant: "What he said was truthful, he believed in it, that was enough" (p. 188).

Before this Court, the respondent adopts the position of Finlayson J.A. with respect to the applicable standard of care. It also adopts his finding that the trial judge erred in imposing a higher standard than was required in the circumstances, namely, a standard of disclosure to the appellant concerning the extent of the respondent's financial commitment to the Multiview project. It is submitted that the trial judge's approach is an unwarranted extension to the law of master/servant of a quasi-fiduciary duty of *uberrima fides*. Finally, the respondent adopts the finding of Finlayson J.A. that the duty of care imposed on the respondent and its representative was fully discharged. In this respect, the respondent emphasizes the fact that the recruitment process for the position in question had been commenced by Mr. Johnston with full knowledge and support of a number of senior executives of

the respondent, and that there was in fact a "commitment" of the respondent to develop Multiview in the way outlined by Mr. Johnston during the interview.

The appellant characterizes the applicable standard of care in a somewhat different manner. He submits that the respondent's duty of care required that both it itself and Mr. Johnston take reasonable steps to avoid conveying information to the appellant about his prospective employment that was materially inaccurate or misleading. According to him, this duty also required them to put themselves "in the appellant's shoes" in assessing the possible impact of their representations on his career choices. In particular, it is argued that they had a duty to consider what inferences the appellant would probably make from the pre-employment statements. The appellant concedes that this standard appears to be high; however, he submits that it is justified in a pre-employment situation based on a number of "policy considerations". Finally, the appellant argues that the applicable standard requires not only that an employer provide accurate information regarding the employment opportunity, but it also requires that he or she provide complete information, viz. full disclosure. In the case at bar, the appellant submits that the duty of care was not discharged since the information provided by Mr. Johnston was incomplete; there was no mention of the absence of a financial commitment. In any event, it is submitted that there was negligence even under a lower standard of care because the respondent and its representative did not ensure that the information provided, both expressly and impliedly, was accurate.

In my view, the relevant standard of care is neither the one advanced by the respondent and the Court of Appeal nor the one proposed by the appellant. The

former is too low as it equates, in essence, a duty of care with a duty of common honesty. On the other hand, the standard of care proposed by the appellant is too onerous as it is tantamount to requiring full disclosure from employers during pre-employment interviews. This Court has been presented with no compelling reasons to treat representations made in an employment context differently from representations made in any other context. It is unfortunate that the appellant has spent considerable time in his argument trying to convince this Court to recognize a fundamentally new standard of care, specific to the employment context. Clearly, the standard of care normally required by law is sufficient to dispose of this appeal in the appellant's favour. Upholding the trial judge's finding of negligence does not require an expansion of tort law into previously uncharted and hence unknown waters. Rather, it simply requires an application of well established principles of the law of negligence.

The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, "reasonable person". The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading: see *Hedley Byrne, supra*, at p. 486, *per* Lord Reid; *Hodgins v. Hydro-Electric Commission, supra*, at pp. 506-9, *per* Ritchie J. for the majority of this Court; *H.B. Nickerson & Sons v. Wooldridge, supra*, at pp. 135-36; J. G. Fleming, *The Law of Torts* (7th ed. 1987), at pp. 96-104 and 614; Linden, *supra*, at pp. 105-19; and Klar, *supra*, at pp. 159-60. Professor Klar provides some useful insight on this issue (at p. 160):

An advisor does not guarantee the accuracy of the statement made, but is only required to exercise reasonable care with respect to it. As with the issue of standard of care in negligence in general, this is a question of fact which must be determined according to the circumstances of the case. Taking into account the nature of the occasion, the purpose for which the statement was made, the foreseeable use of the statement, the probable damage which will result from an inaccurate statement, the status of the advisor and the level of competence generally observed by others similarly placed, the trier of fact will determine whether the advisor was negligent.

In my opinion, the trial judge did not depart from the applicable standard of care in rendering his decision. He found that, "in all the circumstances", the misrepresentations made by the respondent's representative were negligently made. Unlike the Court of Appeal, I find no reason to interfere with his careful and considered finding on this point.

As I see it, the Court of Appeal erred in two important respects when it interfered with White J.'s finding of negligence. First, it mischaracterized his reasons on the negligence issue. Finlayson J.A. said the following (at p. 187):

The trial judge found that [Mr. Johnston] had a duty to go further and to point out the details of the internal decision-making process at Cognos and stress that that process had not been completed. In other words, his own *bona fide* belief as a knowledgeable executive that the program was going forward was not sufficient. He had to divulge to all of the applicants that he interviewed the precise status of the corporate commitment to the development of the new product so that they could make their own assessment of the viability of the project.

In my opinion, this casts the duty too high. It suggests that at least a quasi-fiduciary relationship existed between corporation and job applicant, giving rise to a duty to make full disclosure.

Unlike Finlayson J.A., I do not read the trial judge's reasons as suggesting that the respondent and its representative had a duty to make "full disclosure" in the sense described above, and that the respondent was liable for a failure to meet this duty. Rather, I read his reasons as suggesting that, in all the circumstances of this case, Mr. Johnston breached a duty to exercise reasonable care by, *inter alia*, representing the employment opportunity in the way he did without, at the same time, informing the appellant about the precarious nature of the respondent's financial commitment to the development of Multiview. In reality, the trial judge did not impose a duty to make full disclosure on the respondent and its representative. He simply imposed a duty of care, the respect of which required, among other things and in the circumstances of this case, that the appellant be given highly relevant information about the nature and existence of the employment opportunity for which he had applied.

There are many reported cases in which a failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made: see, for example, *Fine's Flowers Ltd. v. General Accident Assurance Co.* (1974), 5 O.R. (2d) 137 (H.C.), at p. 147, aff'd (1977), 17 O.R. (2d) 529 (C.A.); *Grenier v. Timmins Board of Education*, *supra*; *H.B. Nickerson & Sons v. Wooldridge*, *supra*; *Hendrick v. De Marsh* (1984), 45 O.R. (2d) 463 (H.C.), aff'd on other grounds (1986), 54 O.R. (2d) 185 (C.A.); *Steer v. Aerovox*, *supra*; *W. B. Anderson & Sons Ltd. v. Rhodes (Liverpool), Ltd.*, [1967] 2 All E.R. 850 (Liverpool Assizes); and *V.K. Mason Construction*, *supra*. In the last case, Wilson J. said the following speaking for this Court (at p. 284):

The statement was negligent because it was made without revealing that the Bank was giving an assurance based solely on a loan arrangement which Mason had already said was insufficient assurance to it of the existence of adequate financing.

In so doing, these cases and the trial judgment in the case at bar are not applying a standard of *uberrima fides* to the transactions involved therein. Quite frankly, this notion is irrelevant to a determination of whether the representor has breached a common law duty of care in tort. These decisions simply reflect the applicable law by taking into account all relevant circumstances in deciding whether the representor's conduct was negligent. In some cases, this includes the failure to divulge highly pertinent information.

The second error made by the Court of Appeal is that it substituted for the "higher" standard of care allegedly imposed by the trial judge, a standard well below the one required by law. Once again, it is worth repeating the final words of Finlayson J.A. on the negligence issue: "Johnston was not obliged to go farther than he did in describing the job prospects. What he said was truthful, he believed in it, that was enough" (p. 188). In essence, the Court of Appeal reduced a common law duty of care to a duty of common honesty. Undoubtedly, the latter duty existed in the case at bar, as it exists during any pre-contractual negotiations.

However, the duty of care owed by a representor to a representee, when there exists a "special relationship" within the meaning of *Hedley Byrne, supra*, is distinct in nature and scope from a duty to be honest and truthful. As was stated in *Hedley Byrne* by Lord Morris (at pp. 502-3):

Independently of contract, there may be circumstances where information is given or where advice is given which establish a relationship which creates a duty not only to be honest but also to be careful.

...

In these circumstances, I think some duty towards the unnamed person, whoever it was, was owed by the bank. There was a duty of honesty. The great question, however, is whether there was a duty of care.

and by Lord Pearce (at p. 539):

There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded.

See also *Hayward v. Mellick* (1984), 45 O.R. (2d) 110 (C.A.), and *Carman Construction, supra*, at p. 973.

A duty of care with respect to representations made during pre-contractual negotiations is over and above a duty to be honest in making those representations. It requires not just that the representor be truthful and honest in his or her representations. It also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading.

Although the representor's subjective belief in the accuracy of the representations and his moral blameworthiness, or lack thereof, are highly relevant when considering whether or not a misrepresentation was fraudulently made, they serve little, if any, purpose in an inquiry into negligence. As noted above, the

applicable standard of care is that of the objective reasonable person. The representor's belief in the truth of his or her representations is irrelevant to that standard of care. The position adopted by the Court of Appeal seems to absolve those who make negligent misrepresentations from liability if they believe that their representations are true. Such a position would virtually eliminate liability for negligent misrepresentation as liability would result only where there is actual knowledge that the representation made is not true; the basis of fraudulent misrepresentation. In essence, the Court of Appeal has returned to the pre-*Hedley Byrne* state of law where a misrepresentation had to be accompanied by moral blameworthiness in order to support an action in tort for damages: see, in this respect, my discussion in *BG Checo, supra*, of the context in which *Hedley Byrne* was decided. The question facing the trial judge on the negligence issue was not whether Mr. Johnston was truthful or believed in what he was representing to the appellant. The question was whether he exercised such reasonable care as the circumstances required so as to ensure the accuracy of his representations.

The trial judge found that the respondent's representative had acted negligently in making the misrepresentations to the appellant about the nature and existence of the employment opportunity and, in particular, the extent of the respondent's commitment to the Multiview project. He found that Mr. Johnston was aware, based upon his expertise in the field of computer development, that until there was a feasibility study in which cost estimates had been submitted, considered, and approved by senior management, one could not say that the respondent had made a firm commitment to the project as Mr. Johnston envisaged it and as he described it to the appellant in the interview.

As noted above, the trial judge also made the following important findings: Mr. Johnston knew, or ought to have known, that the truth of his representations depended on the approval by the corporate management team of the cost estimates he had prepared for the research and development of the Multiview project; it is reasonable to infer that Mr. Johnston, at the time of the interview, contemplated that the budgetary needs for the Multiview project would be substantial and that approval was at best speculative; Mr. Johnston must have been aware of the continued poor sales performance of the Multiview product line; Mr. Johnston did not disclose to the appellant that senior management had not yet given the financial commitment required to make the plans for the Multiview project a probable reality; Mr. Johnston's expertise in the computer development field should have made him aware that, notwithstanding his conversations with senior management and the meeting of December 21, 1982, there was still a considerable risk that senior management would not give budgetary approval to his plans; Mr. Johnston knew that the appellant was relying on the information he was providing during the interview; Mr. Johnston knew that the appellant had a secure, responsible, and well-paying position as a chartered accountant in Calgary and that coming to Ottawa would involve moving himself and his family across the country; and Mr. Johnston was aware that the appellant was relying on the position with Cognos to enhance significantly his career as an accountant.

These findings are fully supported by the evidence adduced at trial. I see no reason to interfere with the trial judge's conclusion that the misrepresentations made to the appellant were, in all the circumstances, "negligent misrepresentations". Under the standard of care described above, Mr. Johnston failed to exercise such

reasonable care as the circumstances required him to in making the representations he did during the interview. Particularly, he should not have led the appellant to believe that the Multiview project as described during the interview was a reality when, in fact, he knew very well that the most important factor to the existence of the project, as he was describing it, was financial support by the respondent.

Before this Court, the respondent made extensive reference to the evidence adduced at trial to indicate that it did, in reality, plan to develop Multiview and to make it a profitable project. While it seems to be true that Cognos was "committed" to the project at the end of 1982 and in early 1983, it was not committed in the most crucial respect, namely funding. As found by the trial judge, the impression given during the interview was not consistent with the fundamental reality that funding for the project was not yet approved.

In the end, I am unable to find any ground for interfering with White J.'s finding of negligence. There was, in the circumstances of this case, a breach of the duty of care owed to the appellant. In light of this conclusion, it is unnecessary to determine whether, as argued by the appellant, other members of the respondent such as senior management were negligent on the facts of this case. Mr. Johnston's conduct during the interview is sufficient to support a finding of liability against the respondent.

(3) The Nature of the Misrepresentations

The respondent takes the alternate position that, even accepting the trial judge's findings of misrepresentations and of negligence, the appellant's action must fail because the representations relied on are not actionable under the *Hedley Byrne* doctrine. In this respect, the respondent argues that the representations depend on inferences or implications, rather than on direct statements, and also relate to a future expectation. The appellant makes no submissions on this point. It is unclear whether this submission of the respondent was advanced prior to the appeal to this Court. If so, it has received very little attention by the courts below. There is only a brief discussion, and rejection, of the "future expectation" aspect of the argument in the trial judge's reasons and the Court of Appeal makes no reference whatsoever to this submission.

In my view, the respondent's alternate position cannot succeed in the circumstances of this case. First of all, I reject as incorrect the suggestion that the representations in question relate solely to future events or expectations. I reproduce again, for convenience, a passage from White J.'s judgment in which he finds, as a fact, that misrepresentations were made to the appellant in the hiring interview (at pp. 415-16):

The effect of these misrepresentations was that the [appellant] would have a position in the research and development of the product "Multiview"; that that position would be a significant one and would involve his expertise as an accountant; that he would perform the responsible role of seeing to proper accounting standards being implemented into the product; that beyond the three modules immediately in contemplation were a minimum of four other modules; and that the project of "Multiview", in connection with which [the appellant] would be hired would last a minimum of two years. I find further that Mr. Johnston implicitly represented that management had made a firm budgetary commitment to the development of four other modules in addition to those presently under development.

Obviously, some aspects of the misrepresentations made to the appellant about the employment opportunity were, by their very nature, matters *in futuro*. Statements about the appellant's involvement with the respondent and his responsibilities should he be offered a position are representations that relate to future conduct and events. There are authorities supporting the view that only representations of existing facts, and not those relating to future occurrences, can give rise to actionable negligence: see, for example, *Williams v. School District No. 63 (Saanich)* (B.C.S.C.), *supra*; *Datile Financial Corp. v. Royal Trust Corp. of Canada* (1991), 5 O.R. (3d) 358 (Gen. Div.); *Foster Advertising Ltd. v. Keenberg* (1987), 38 C.C.L.T. 309 (Man. C.A.); and *Andronyk v. Williams* (1985), 35 C.C.L.T. 38 (Man. C.A.).

However, assuming without deciding that this view of the law is correct, the representations most relevant to the appellant's action are not those relating to his future involvement and responsibilities with Cognos, but those relating to the very existence of the job for which he had applied. That is a matter of existing fact. It was implicitly represented that the job applied for did in fact, at the time of the interview, exist in the manner described by Mr. Johnston. As found by the trial judge, however, such was not the case. The employment opportunity described to the appellant was not, at the time of the interview, a *fait accompli* for the respondent. Clearly, this misrepresentation relates to facts presumed to have existed at the time of the interview: the respondent's financial commitment to the development of Multiview and the existence of the employment opportunity offered. It is not a "remark by a defendant concerning the outcome of a future event" (*Williams v. School District No. 63 (Saanich)* (B.C.S.C.), *supra*, at p. 240), a "representation . . .

as to future occurrences" (*Datile Financial Corp. v. Royal Trust, supra*, at p. 379), a "statement of intention or forecast of the future" (*Foster Advertising Ltd. v. Keenberg, supra*, at p. 325), or "forecasting" (*Andronyk v. Williams, supra*, at p. 57).

The other aspect of the respondent's argument is that representations which depend on implications or inferences cannot give rise to actionable negligence under the *Hedley Byrne* doctrine. Again, I reject this submission. However, on this issue, I prefer, for obvious reasons, to challenge the principle advanced by the respondent rather than simply reject its application to the facts of this case.

In my view, there is no compelling reason in principle, authority, or policy for the proposition that, as a general rule, an implied representation cannot under any circumstance give rise to actionable negligence. The only authority offered by the respondent is the decision of the New South Wales Court of Appeal in *Minister Administering the Environmental Planning and Assessment Act, 1979 v. San Sebastian Pty. Ltd.*, [1983] 2 N.S.W.L.R. 268, aff'd on other grounds (1986), 68 A.L.R. 161 (H.C.), applied by Southin J.A. of the British Columbia Court of Appeal, in dissent, in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (1990), 44 B.C.L.R. (2d) 145. The reasons of Mahoney and Hutley J.J.A. in the former case appear indeed to support the proposition that nothing less than an express, or tantamount to an express, representation can suffice under the *Hedley Byrne* doctrine. It is not without significance, however, that the High Court of Australia in dismissing a subsequent appeal on different grounds expressly refrained from making any comments on this issue. Rather, the majority of the Court preferred to base its judgment, *inter alia*, on the fact that no misrepresentations, whether

"express or implied", had been made. In other words, the High Court found nothing misleading or inaccurate in what was represented, regardless of how the representation was characterized.

On the other hand, there is considerable authority for the more flexible view that, in appropriate circumstances, implied misrepresentations can, and often do, give rise to actionable negligence: see, for example, *Banque Financière de la Cité SA v. Westgate Insurance Co.*, [1989] 2 All E.R. 952 (C.A.), at p. 1000, aff'd on other grounds [1990] 2 All E.R. 947 (H.L.); *Datile Financial Corp. v. Royal Trust*, *supra*, at p. 379; *Hendrick v. De Marsh* (Ont. H.C.), *supra*; *Steer v. Aerovox*, *supra*; and *Doherty v. Allen* (1988), 55 D.L.R. (4th) 746 (N.B.C.A.).

In my opinion, a flexible approach to this issue is preferable. It is arbitrary and premature to declare as a general rule that nothing less than express or direct representations can succeed under the *Hedley Byrne* doctrine. Undoubtedly, there will be cases such as the present one where the surrounding circumstances are such that it makes little difference, if any, how one characterizes the manner in which the representation is made, and where it would be unjust to deny recovery simply because the representation relied on is said to be implied rather than express. It is unnecessary for me to set out in detail the circumstances in which so-called implied representations can be enough to sustain an action in tort for negligent misrepresentation. I prefer leaving this task to trial judges dealing with specific factual situations. Suffice it to say that the case at bar falls well within this category.

There was a considerable number of express representations made by Mr. Johnston during the interview which point directly towards the existence of the Multiview project and the nature of the respondent's commitment thereto. The implied misrepresentation found by the trial judge is not only reasonable in the surrounding circumstances, but it is also perhaps the only inference that could be drawn from the direct representations made to the appellant during the interview. A reasonable person placed in the appellant's position would, without a doubt, have drawn the same inference from what was being said that the appellant and trial judge did.

This is not a situation where many different and conflicting interpretations may reasonably be drawn from a series of direct representations and where the representee advances the implied meaning most favourable to recovery. This is a case where everything said and represented during the interview points to the same conclusion: the Multiview project as described by Mr. Johnston was a reality in that the respondent had given its financial support to its development. The appellant had a relatively secure and well paying job in Calgary and, as found by the trial judge, he would not have chosen to move across the country if he thought there was a substantial risk that the employment opportunity described to him would no longer exist, after his arrival in Ottawa. To a large extent, this risk was alleviated by the representations made during the interview. For these reasons, the fact that the representation in question falls short of being express should not, in the circumstances of this case, preclude the appellant from relying on the *Hedley Byrne* doctrine and from obtaining a remedy for the damages he suffered.

E. *The Employment Agreement Signed Subsequent to the Negligent Misrepresentations*

Thus far, I have stated that the courts below were correct in finding a "special relationship" between the parties as to give rise to a duty of care during the interview, and that the misrepresentations found by the trial judge were indeed made in a negligent manner in all the circumstances of the case. Again, there is no question in this appeal that the appellant reasonably relied, to his detriment, on these negligent misrepresentations. The only remaining issue is whether the employment agreement signed by the appellant more than two weeks after the interview affects, in any way, the above findings or the consequence that would normally follow therefrom, namely, liability of the respondent for the damages caused to the appellant.

Finlayson J.A. found that clauses 13 and 14 of the employment agreement constituted an adequate, albeit not express, "disclaimer of responsibility" for the representations made during the interview because these clauses contradicted or were inconsistent with those representations. The respondent adopts this conclusion, submitting that there is a clear inconsistency between the contract and the alleged misrepresentations and that this inconsistency is sufficient to constitute a disclaimer within the meaning of *Hedley Byrne, supra*. The respondent argues that the representation relied on by the appellant goes to the issue of job security and that the contract of employment specifically addresses, and contradicts, this issue in its provisions dealing with reassignment and termination of employment, "without cause", on one month's notice. Furthermore, the respondent relies on the decision of this Court in *J. Nunes Diamonds, supra*, for the proposition that the doctrine of

*Hedley Byrne, supra*, "is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract". It is argued that the tort in question is not "independent" from the contract. Moreover, the respondent submits that the one-month termination clause in the contract amounts to a "limitation of liability clause" and that the appellant is attempting to circumvent this clause by its present action in tort, contrary to the decision of this Court in *Central Trust v. Rafuse, supra*. Finally, the respondent argues that the appellant's conduct after his arrival at the company and his learning of the developments regarding the Multiview project amounts to an affirmation of his contract of employment.

For his part, the appellant submits that the tort at issue is "independent" of the employment agreement within the meaning of *J. Nunes Diamonds, supra*, and is not affected in any way by its provisions. In particular, it is submitted that clauses 13 and 14 of the employment contract do not amount to a valid disclaimer and have no bearing whatsoever on the respondent's liability in tort. In this respect, he argues that express contractual terms are required in order to negate an otherwise "independent" duty of care. Furthermore, the appellant claims he was simply attempting to mitigate his damages by staying with the respondent after the reassignments. According to him, any "affirmation" of the contract is irrelevant since the tort in issue is "independent" from the contract and because the damages crystallized at the moment he became aware of the misrepresentations.

As I see the matter, the specific employment agreement signed by the appellant is, in the circumstances of this case, irrelevant to his action for negligent misrepresentation. This contract falls within the third proposition suggested earlier in which a representee's claim for damages for a negligent pre-contractual misrepresentation is not affected, in any way, by the subsequent contract. I observed at p. 000 of these reasons that this appeal is clearly distinguishable from *BG Checo, supra*, in that the common law duty of care relied on by the appellant is not, unlike in *BG Checo*, co-extensive with a duty imposed on the respondent by an express term of the employment agreement. This conclusion, in effect, disposes of the respondent's argument based on *J. Nunes Diamonds, supra*.

Indeed, as I alluded to in *BG Checo*, the aspect of the judgment of the majority in *J. Nunes Diamonds, supra*, upon which the respondent relies (the passage found at pp. 777-78) was qualified by the unanimous judgment of this Court in *Central Trust v. Rafuse, supra*, recognizing concurrency between contract and tort as a general rule subject to certain "exceptions", including (at p. 205):

2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. [Emphasis added.]

Unlike in *BG Checo*, the common law duty of care invoked by the appellant is, for reasons already given, "independent" of the employment agreement. I would therefore reject this part of the respondent's argument which attempts to disallow the appellant's action in tort and to confine him to whatever remedies are available under the law of contract.

This leaves the question of whether the duty or liability of the respondent in tort is limited or excluded by a term of the employment agreement. As I see the matter, neither the respondent's duty of care nor its liability is affected by the terms of the employment agreement. For convenience, I reproduce again the provisions of this contract which play a determining role according to the Court of Appeal and the respondent:

TRANSFER

13. Quasar Systems reserves the right to reassign you to another position with the Company without reduction of your salary or benefits and upon one month's notice to you. Should such reassignment require your permanent relocation to another city, the Company will reimburse you for your expenses in accordance with the then current relocation policy.

TERMINATION NOTICE -- ONE MONTH

14. This Agreement may be terminated at any time and without cause by Quasar Systems Ltd. or by you. In the event of termination, Quasar Systems Ltd. will give you one month's notice of termination plus any additional notice that may be required by any applicable legislation. Similarly, you shall give Quasar Systems Ltd. one month's notice if you voluntarily terminate this Agreement. Quasar Systems Ltd. may pay you one month's salary in lieu of the aforesaid notice in which event this Agreement and your employment will be terminated on the date such payment in lieu of notice is made.

In my view, the Court of Appeal erred in giving to clauses 13 and 14 the effect of a "disclaimer of responsibility" within the meaning of *Hedley Byrne* and *Carman Construction, supra*. These provisions are clearly distinguishable from the disclaimers at issue in both *Hedley Byrne* and *Carman Construction*.

In *Hedley Byrne*, the representee's bank requested certain financial information from the representors, merchant bankers for a potential client of the representee, "in confidence and without responsibility" on the part of the representors. The latter replied to the inquiry, in part, as follows: "CONFIDENTIAL. For your private use and without responsibility on the part of the bank or its officials." Unlike the present appeal, there was never any contractual relationship between the representee and the representor in *Hedley Byrne*. The House of Lords unanimously held that even though a duty of care with respect to representations could, in appropriate circumstances, exist, such a duty could not arise

in *Hedley Byrne* since the representors had manifestly expressed, prior to the representations and to the knowledge of the representee, that they did not assume or accept responsibility for any of the information given.

*Carman Construction, supra*, on the other hand, concerned a misrepresentation made in a contractual setting. The corresponding clause in that case (cl. 3.1) expressly provided that the plaintiff was not relying on the representations of the defendant: "the Contractor does not rely upon any information given or statement made by him in relation to the work by the Company" (p. 961). The pertinent comments of Martland J., writing for a unanimous Court, are worth quoting (at pp. 972-73):

In the *Hedley Byrne* case the decision was that the disclaimer of responsibility for the persons alleged to be liable for negligent misrepresentation, communicated to the other party, excluded the assumption of a duty of care. I regard the wording of clause 3.1 of the agreement as having the like effect. The judgment at trial dealt with the situation on the basis that negligent misrepresentation had been established, but that clause 3.1 was an exemption clause which exempted C.P.R. from liability. In the circumstances of this case, I would prefer to regard the clause as establishing that C.P.R. did not assume any duty of care, and a claim in negligence will not arise in the absence of a duty of care.

I reach this conclusion in the light of the facts to which I have already referred in dealing with the issue of collateral warranty. Carman was made aware, when Fielding received the tender documents, and read and understood clause 3.1, that if it entered into an agreement with C.P.R. it was doing so on its own knowledge as to the quantities of material to be removed and that it would not rely upon any information or statement made to it by C.P.R. in relation to the work. Fielding was aware of this when he sought information from a C.P.R. employee. He knew that if information was obtained, Carman would be relying upon it at its own risk. In my opinion, on the facts of this case, a duty of care on the part of C.P.R. in respect of information provided by its employee never arose provided the information was given honestly. The trial judge has found that the misrepresentation made to Carman was made innocently without intent to defraud. [Emphasis added.]

Also instructive is the following excerpt from the reasons of Wilson J.A. (as she then was), writing for the majority of the Court of Appeal, in *Carman Construction* ((1981), 33 O.R. (2d) 472, at p. 473):

This is not, in the view of the majority, a case in which, after making a negligent misrepresentation to the plaintiff in order to induce it to enter into a contract, the terms of which were at the time of the misrepresentation unknown, the defendant thereafter inserts into the contract an exculpatory clause in order to insulate itself against antecedent tort liability. This is a case in which the plaintiff tendered knowing that in the very contract on which it was tendering it had agreed to assume the risk of using any information obtained by it from the defendant's employees.

Contrary to *Hedley Byrne* and *Carman Construction*, *supra*, there is no contemporaneity in this case between the alleged disclaimers of responsibility and the negligent misrepresentations. More important than their timing, however, clauses 13 and 14 of the employment agreement are far from being statements, express or implied, that the respondent and its representative are not assuming responsibility for the representations made to the appellant during the hiring interview about the nature and existence of the Multiview project. Although I am not prepared to hold that nothing less than the clearest and most express disclaimer will suffice to negate a duty of care, something more than clauses 13 and 14 is definitely required. These provisions relate to the rights and obligations of the parties in the event of the appellant's termination or transfer. They have nothing to do with representations made during pre- or post-contractual negotiations, let alone disclaimers for said representations.

Assuming, for the sake of argument, that the principle set out in the judgment of the Court of Appeal is correct in law (i.e., "it is a sufficient disclaimer if the contract contains terms which contradict or are inconsistent with the representations relied upon" (p. 183)), there are no inconsistencies in the case at bar between clauses 13 and 14 of the contract and the representations relied on by the appellant. The only way to find such an inconsistency is to agree with Finlayson J.A. and the respondent that the representations relied on by the appellant amount to a warranty of job security. However, as noted above, the representations in question are not of this nature. Rather, they are representations that a particular job would exist and that it would have certain features. As the trial judge found, the representations made during the job interview were firm representations "that the [respondent] company was committed to the development of additional modules of `Multiview'" (p. 397), and there were implicit representations "that there was a reasonable plan in existence for the additional modules and that the company had made a financial commitment in the way of budgetary provisions for such development" (p. 398). Characterizing the representations in question as a warranty of job security seems particularly strained because Mr. Johnston actually indicated that the project would last only two years. Thus, Mr. Johnston did not represent that the position would last forever, although he certainly did represent that it would exist.

Again, the appellant's claim is not that Mr. Johnston negligently misrepresented the length of time he would be working on Multiview or the conditions under which his employment could be terminated. He does not argue that Cognos, through its representative, breached a duty of care by negligently

misrepresenting his security of employment with the respondent company. Rather, the appellant argues that Mr. Johnston misrepresented the nature and existence of the employment opportunity being offered. It is on these latter representations that the appellant relied in leaving his relatively secure and well paying job in Calgary. The employment agreement neither expressly nor impliedly states that there may be no job of the sort described during the interview after the appellant's arrival in Ottawa. Stipulations that an employee can be dismissed without cause upon proper notice or reassigned to another position are not incompatible with a pre-contractual representation that a particular job would exist, as described, should the employee accept employment.

As for the respondent's liability, clauses 13 and 14 of the employment agreement are clearly not, on their face, general limitation or exclusion of liability clauses as these expressions are commonly used. The language adopted by the parties is unambiguous. By stretching the common definition of "limitation of liability clause", one could interpret clauses 13 and 14 as "limiting" the respondent's "liability" in the event of a transfer or termination to what is specifically provided therein. However, even if this interpretation were adopted, the respondent's liability for pre-contractual negligent misrepresentations is clearly beyond the scope of these provisions. It is trite law that, in determining whether or not a limitation (or exclusion) of liability clause protects a defendant in a particular situation, the first step is to interpret the clause to see if it applies to the tort or breach of contract complained of. If the clause is wide enough to cover, for example, the defendant's negligence, then it may operate to limit effectively the defendant's liability for the

breach of a common law duty of care, subject to any overriding considerations. This is not, however, the situation facing this Court.

Clauses 13 and 14 of the employment agreement, even if characterized as "limitation of liability" clauses, cannot support an interpretation which would enable them to protect the respondent from the breach of a common law duty of care, let alone the breach of the particular duty invoked by the appellant in his action for negligent misrepresentation. These provisions are no more relevant to the outcome of this case than is clause 15 of the contract, permitting Cognos to terminate the appellant's employment for cause. Thus, contrary to the respondent's submission, the third proposition set out in *Central Trust v. Rafuse, supra*, at p. 206, is of no assistance to this appeal, that is, the appellant is not attempting by his tort claim to "circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort". Simply put, there is nothing in the employment agreement for the appellant to circumvent or to escape.

Finally, with respect to the respondent's argument that the appellant "affirmed" his contract by his conduct subsequent to his arrival in Ottawa, I would make two brief comments. First, the whole concept of "affirming" a contract is irrelevant in the case at bar as the appellant is seeking to rely on a tort remedy rather than a contractual one. Second, it seems somewhat harsh to characterize the appellant as having affirmed his contract of employment. The appellant found himself in a very difficult job situation, with increasing marital and health problems to exacerbate the situation. In my view, he acted quite reasonably in attempting to mitigate his losses before finally ending his employment relationship with Cognos.

F. *Conclusion*

In my view, the appellant has established all the required elements to succeed in his action. The respondent and its representative, Mr. Johnston, owed a duty of care to the appellant during the course of the hiring interview to exercise such reasonable care as the circumstances required to ensure that the representations made were accurate and not misleading. This duty of care is distinct from, and additional to, the duty of common honesty existing between negotiating parties. The trial judge found, as a fact, that misrepresentations -- both express and implied -- were made to the appellant and that he relied upon them, reasonably I might add, to his eventual detriment. In all the circumstances of this case, I agree with the trial judge that these misrepresentations were made by Mr. Johnston in a negligent manner. While a subsequent contract may, in appropriate cases, affect a *Hedley Byrne* claim relying on pre-contractual representations, the employment agreement signed by the appellant is irrelevant to this action. In particular, clauses 13 and 14 of the contract are not valid disclaimers of responsibility for the representations made during the interview.

V. Disposition

For the foregoing reasons, I would allow the appeal, set aside the judgment of the Ontario Court of Appeal, and restore the judgment of White J., finding the respondent liable and granting the appellant damages in the amount of \$67,224. The appellant should have his costs here and in the courts below.

//McLachlin J.//

The following are the reasons delivered by

MCLACHLIN J. -- I agree with my colleague Iacobucci J. that this appeal should be allowed, although for reasons which are obvious from my reasons in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 000 (released concurrently), I do not concur in all aspects of his reasons.

The first issue raised by this appeal is the effect of the fact that the parties in this case entered into a contract which contained a specific term governing termination. The Court of Appeal (1990), 74 O.R. (2d) 176 concluded that this precluded the plaintiff's action in tort for negligent misrepresentation as to the employment. Finlayson J.A., for the court, stated (at p. 183):

. . . the respondent Queen stated that he would not have given up his secure position in Calgary for a move to Ottawa that was without permanence, and yet he signed a contract which provided him with no assurances respecting his place of employment or its tenure. To rely on *Hedley Byrne*, the negligent misrepresentation must have amounted to a warranty of job security and yet the contract of employment was surely a disclaimer of just that. No representations as to job security, whether based on performance or job availability, could have survived the one-month termination notice "without cause" contained in the contract. [Emphasis added.]

My colleague, at p. 000, rejects this conclusion on the ground that the contractual duties were different from the common law duty associated with the tort of negligent misrepresentation. The misrepresentation concerned "the nature and existence of the employment opportunity being offered". The contract clauses, by

contrast, were concerned with the rights and remedies of the parties relating to termination.

I agree that the pre-contractual representation was different in scope and effect from the contractual obligation. The matter is not merely one of semantics. It turns on the plaintiff's assessment of the risk involved in leaving his employment and joining Cognos. When a person is deciding to enter a contract with terms governing termination, he or she makes an assessment as to the risk of such termination occurring. A stringent term as to termination may not deter the person from entering into the contract if he or she is satisfied that the risk of termination materializing is low. The representation at issue in this case concerned the risk of termination coming about. The representation was not that Cognos would not have the discretion to terminate or transfer the plaintiff on one month's notice. Rather, by implying that the Multiview project was a reality, that it had the financial support of Cognos, and that it had passed through the feasibility and costing stage, Johnston on behalf of Cognos caused the plaintiff to be misled as to the level of the risk to the plaintiff that Cognos might at some point choose to exercise its termination power under the employment contract. The plaintiff, believing Johnston, concluded that the risk of being transferred or terminated was low.

To elaborate, a number of situations can be envisaged in which Cognos might have decided to terminate the plaintiff's employment:

- (i) his employment not working out in the Multiview project, for reasons that did not amount to just cause for dismissal (e.g., say his work was mediocre, but not incompetent);
- (ii) unanticipated serious financial difficulties being encountered by Cognos, such that a decision might be made to lay off staff;
- (iii) the situation that actually developed, of Cognos's Corporate Management Team deciding, when the Multiview project reached the end of the feasibility and costing stage, not to make a financial commitment to proceeding with the full development of the Multiview line of products;
- (iv) Cognos's Corporate Management Team deciding after a financial commitment had been made to scale back or terminate the development of the Multiview line of products.

The representation excluded the third reason for dismissal, thereby reducing the risk of termination. As found by the trial judge, the plaintiff relied on that representation in deciding to enter into the contract. It turned out to have been negligently made and false. It follows that the plaintiff is entitled to damages for the loss suffered as a result of that representation.

The second issue on the appeal is whether the Court of Appeal was correct in concluding that the trial judge imposed too high a duty of care.

Finlayson J.A. correctly stated that the duty on Cognos was "no more than a duty to take care that the representations made were responsible and accurate to the knowledge of Johnston and of his principal, Cognos" (p. 186). However, he went on to conclude "What [Johnston] said was truthful, he believed in it, that was enough" (p. 188). With respect, the second statement cannot be supported. It is not enough that the defendant believed what he said; he must have been non-negligent in having formed and expressed that belief. At the same time, Finlayson J.A. exaggerated the duty of care which the trial judge applied, in stating the trial judge held that Johnston "had to divulge to all of the applicants that he interviewed the precise status of the corporate commitment to the development of the new product so that they could make their own assessment" (p. 187). In fact, the trial judge held only that the defendant had a duty not to hold out to applicants that the project was secure when it knew that funding was not approved and knew or should have known that the final approval was not a rubber stamp process and the secure funding was not a foregone conclusion. I agree with my colleague that this is the appropriate standard and that the duty of care with respect to representations made in a pre-employment situation is the same as that which applies generally. I also agree with my colleague that the argument that the representations are non-actionable by their nature must be rejected.

I would allow the appeal on the terms proposed by Iacobucci J.

*Appeal allowed with costs.*

*Solicitors for the appellant: Peter J. Bishop & Associates, Ottawa.*

*Solicitors for the respondent: Gowling, Strathy & Henderson, Ottawa.*