The danger of an innocent contracting party being altogether defeated is reduced somewhat by the principles derived from *Collen* v. *Wright*.[26] That case lays down that a cause of action lies for damages for the breach by an agent of his implied warranty of the authority of his principal. This cause of action is well established. Windeyer, J. specifically,[27] and the other judges by inference,[28] indicate that there could be a cause of action for breach of warranty by a person who represents that he is a director of an existing company which has power to enter into a contract to purchase land. Windeyer, J. observes[29] that the principle in *Collen* v. *Wright* is of very general application, and he quotes several cases as authority for his proposition. There is no doubt that such a principle is a reasonable one, and it appears that the High Court would hold that it exists if called upon to do so. In *Black* v. *Smallwood*, every judge was at pains to point out that the only question for decision was whether the plaintiff was entitled to specific performance of the contract by Cooper and Smallwood, and that they were not called upon to decide the question of a breach of warranty.

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REPRESENTATION OR CONTRACTUAL TERM?

DICK BENTLEY PRODUCTIONS, LTD. AND ANOTHER v. *HAROLD SMITH (MOTORS), LTD.*

One of the most confusing areas of the modern English law of contract is that dealing with what is usually referred to as "the terms of the contract".[1] This part of the law is one of fine distinctions and ill-defined terminology. Thus, a statement passing between parties entering into a contract may be simply a "puff",[2] or a mere representation, or a representation which constitutes a term of the contract.

The first of these three categories refers to statements of an obviously exaggerated and optimistic nature to which the law, naturally enough, pays no regard. Legal consequences do, however, follow from statements falling within the other two categories and, because these consequences differ, it is necessary to distinguish these latter categories. The distinction between a mere representation and a contractual term lies in the fact that whilst a term forms part of the contract a mere representation does not; it is simply a factor which may have induced the representee to enter into the contract.[3] With regard to remedies, the distinction between terms and mere representations has always been that breach of a term entitles the plaintiff to recover damages, whilst the falsity of a mere representation, though it may entitle the representee to the remedy of rescission, does not give him a contractual right to recover damages.[4]

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[26] (1857) 8 E. & B. 647, 120 E.R. 241.
[27] 39 A.L.J.R. at 409E.
[28] *Id.* at 407D, 407G-08A.
[29] *Id.* at 409F.
[1] See e.g., 1 *Chitty on Contracts* (22 ed. Pt. 3).
[2] E.g., *Scott* v. *Hanson* (1829) 1 Russ. & M. 128: land described as "uncommonly rich water meadow".
[3] Cheshire & Fifoot, *The Law of Contract* (6 ed.) at 226.
[4] Damages are recoverable in respect of a fraudulently made misrepresentation which

A fundamental problem arises in the identification of those representations which are to be regarded as terms of the contract as distinct from mere representations. It was this problem which engaged the attention of the Court of Appeal in the *Dick Bentley Case*[5] which may well have introduced a novel development in this area of the law.

The Facts and Decision

The facts of the case were quite simple. The second plaintiff, Dick Bentley, had had dealings with Mr. Harold Smith of Harold Smith (Motors) Ltd., the defendant, for some years. Bentley informed Smith that he was on the lookout for a "well vetted" Bentley car and Smith later wrote to Bentley telling him that he had just purchased such a vehicle. Smith had previously told Bentley that he was in a position to find out the history of cars.

Bentley went to see the car and Smith informed him that it had been fitted with a replacement engine and gearbox, and that the car had done only 20,000 miles since this replacement. A check by Smith with the manufacturers, who maintained history records of all Bentley cars, would have revealed that this representation as to mileage was "palpably wrong".[6]

Later the same day, Bentley brought his wife to see the car and repeated to her in Smith's presence what the latter had said about the vehicle, particularly as to its mileage. Bentley bought the car for £1,850. Some time later, Bentley discovered that the representation as to the car's mileage was untrue and be brought an action for breach of warranty claiming damages of £400. The County Court Judge held that Smith was not dishonest and the defendants were not guilty of fraud, but that the untrue representation amounted to a warranty. Judgment for the plaintiffs was given accordingly.

The Court of Appeal[7] unanimously affirmed the judgment and dismissed the defendant's appeal. On the facts, the decision of the Court of Appeal is not particularly noteworthy; it is simply a finding that certain statements made prior to a contract of sale amounted to a warranty as distinct from a mere representation. Such a decision must, of course, always depend upon the particular facts of the case.[8] The case is interesting, however, because of a remarkable passage[9] in the judgment of Lord Denning, M.R., in which his Lordship dealt with the principles which are relevant in determining whether a representation constitutes a term of the contract.

When is a Representation a Term of the Contract?

Lord Denning, M.R., with whose judgment Danckwerts, L.J. agreed,[10] indicated that the question for decision was whether the representation as to mileage was "an innocent misrepresentation (which does not give rise to damages) or whether it was a warranty".[11] This, he said, must depend upon the intention of the parties. As he had previously explained in *Oscar Chess Ltd.* v. *Williams*,[12] this intention was to be determined objectively, by reference

is not part of the contract, but this is really the tortious remedy of deceit. The House of Lords' decision in *Derry* v. *Peek* (1889) 14 A.C. 337 makes it clear that negligence is not fraud and that the distinction between negligence and fraud must not be blurred.

[5] *Dick Bentley Productions, Ltd. & Anor.* v. *Harold Smith (Motors) Ltd.* (1965) 2 All E.R. 65; (1965) 1 W.L.R. 623.

[6] (1965) 1 W.L.R. 623 at 626. In fact the car had done nearly 100,000 miles: *Id.* at 628.

[7] Lord Denning, M.R., Danckwerts and Salmon, L.JJ.

[8] See *Oscar Chess Ltd.* v. *Williams* (1957) 1 All E.R. 325.

[9] See *infra* text to n. 14.

[10] It is not clear whether Salmon, L.J. agreed with Lord Denning's judgment.

[11] (1965) 2 All E.R. 65 at 67.

[12] (1957) 1 All E.R. 325.

to what an intelligent bystander would infer from "the conduct of the parties, . . . their words and behaviour, rather than . . . their thoughts".[13]

These statements of principle are thusfar completely orthodox and it is not surprising that, on the facts, his Lordship found that a warranty was intended. However, in reaching this conclusion, he attempted to lay down some guide lines to assist the intelligent bystander in his search for that elusive intention which the parties will seldom have made manifest. These guide lines appear in the following passage:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

His Lordship continued:

> But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it and that it would not be reasonable in the circumstances for him to be bound by it.[14]

A Prima Facie Inference of Warranty

In the first part of the above passage, Lord Denning lays down what appears to be a *prima facie* test for determining when a representation will amount to a "warranty". His Lordship formulated this test after "looking at the cases", although he did not, in fact, cite any authority for the proposition and, indeed, it appears to be without precedent.

It is an elementary principle that the question whether what the parties have said or written has become a substantive part of their contract must be determined by the intention of the parties, or at least by what the court will infer to have been their intention. As Lord Denning himself pointed out in the *Dick Bentley Case*,[15] the intention of the parties is to be discovered by an objective test. In *Oscar Chess Ltd.* v. *Williams*,[16] Denning, L.J. (as he then was) defined "warranty" as "a binding promise".[17] One would think, therefore, that in order to discover whether a warranty has been given, one must look for an objective intention to make a binding promise as to the existence or non-existence of certain facts.[18]

The first part of the test enunciated in the present case by Lord Denning, however, refers only to an intention in the representor that his representation should induce the representee to act upon it by entering into the contract. This appears to make the test impossibly wide, because it is surely true to say that virtually every representation made by a person in the course of negotiations for a contract is made for the purpose of inducing the other party to enter into the contract. In order to rely on Lord Denning's *prima facie* test a plaintiff representee has to prove (1) that the representation was made, (2) that it was made in the course of negotiations for a contract, (3) that the representor intended it to be acted upon by the representee and (4) that the representee in fact so acted upon it by entering into the contract. In

[13] *Id.* at 328.
[14] (1965) 2 All E.R. 65 at 67.
[15] *Supra* n. 5.
[16] *Supra* n. 8.
[17] *Id.* at 327.
[18] See Salmon, L.J. in the *Dick Bentley Case* (1965) 2 All E.R. 65 at 68: "Was what Mr. Smith said intended and understood as a legally binding promise?"

the light of what has been said, the burden of establishing the third element may well be considerably lighter than would at first appear.

It is suggested that the proper question to ask is: "Was the representee, as a reasonable man, entitled to assume that the other party was, by his representation, intending to make a binding promise?". If the test is formulated in this manner, the actual intention of the representor is not conclusive and this is clearly in line with the established rule that intention is to be determined objectively. A test such as Lord Denning's, depending as it does upon the representor's intention that his statement be acted upon, would tend to destroy the well-established distinction[19] between contractual terms and mere representations by making virtually every statement made during negotiations *prima facie* a term of the contract (or to use Lord Denning's terminology, a warranty).[20]

This writer is not intending to defend the distinction drawn between terms and mere representations and the anomalies to which this may lead, but there is no doubt that this distinction is part of the law. The test enunciated by Lord Denning in the present case, with respect, necessarily obscures the distinction and the result of this may be to add further confusion to this area of the law.

Rebuttal of the Inference of Warranty

The second part of Lord Denning's statement introduces a qualification limiting the very wide *prima facie* inference, which arises under the first part, that any representation intended to induce entry into a contract is intended as a warranty. Lord Denning, in effect, concedes that this *prima facie* inference can be rebutted if the representor can show that his statement "really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it".[21] But again this tends to lead to confusion for it seems partly to employ a test of whether a representation is innocent or not as the criterion of whether that representation has become part of the contract; if the representor can show that in making his representation he was "innocent of fault" then he may rebut the inference that the representation was intended as a term of the contract. As stressed above, whether a representation has become a contractual term depends on the intention of the parties objectively assessed—not on the innocence or negligence of either party. The law of contract is generally not concerned with the presence or absence of blame in a party, but rather with agreement and assumption of responsibility by the parties.

Lord Denning states that in order to rebut the inference of warranty, the representor must not only show that he is innocent of fault, but also that it would be unreasonable in the circumstances for him to be bound by his representation. As an example of the inference being rebutted, he cites *Oscar*

[19] This distinction was established as far back as *Chandler* v. *Lopus* (1603) Cro. Jac. 4, and there have been many judicial pronouncements insisting upon its observance. See e.g., *Heilbut, Symons & Co.* v. *Buckleton* (1913) A.C. 30 at 49 for Lord Moulton's speech against "attempts to extend the doctrine of warranty beyond its just limits and find that a warranty existed in cases where there was nothing more than an innocent misrepresentation."

[20] It seems fairly clear that here, as in the *Oscar Chess Case supra* n. 8 at 327-28, by "warranty" Lord Denning means a term of the contract, and is not intending to differentiate between warranties and conditions. While the phrase "contractual term", rather than "warranty", may have been more appropriate if his Lordship was intending to lay down a general rule, it is clear that his use of the word "warranty" was quite proper in the circumstances of the case, since any condition in the contract of sale would have been reduced to the level of a warranty *ex post facto* by virtue of s. 11 (1) (c) of the Sale of Goods Act, 1893 (s. 16(3) of the N.S.W. Sale of Goods Act). Unless otherwise indicated, the word "warranty" is used in this note in its non-technical sense, as meaning a term of the contract.

[21] (1965) 2 All E.R. 65 at 67.

Chess Ltd. v. *Williams*,[22] explaining that the representation there was held not to have been a term of the contract because the representor "honestly believed on reasonable grounds that it was true. He was completely innocent of fault".[23] In the present case, the inference was not rebutted because Smith was in a position to discover the true facts relating to the car, but he did not do so. He had "no reasonable foundation" for his representation as to the mileage. "He ought to have known better."[24]

With all these references to "innocence of fault" and "honest belief" it may well be considered that Lord Denning is here making a subjective consideration of the representor himself rather than an objective assessment of his intentions. Indeed, his Lordship's statements in this case have been severely criticised on the ground that they "completely defy that scrupulous objectivity which canons of contractual construction have invariably demanded".[25] Yet is it fair to interpret Lord Denning's statement in this manner? After all, it was his Lordship himself who, in *Oscar Chess Ltd.* v. *Williams*,[26] was instrumental in firmly establishing the doctrine that intention in contractual cases is to be determined objectively. It may possibly be argued that all that the second part of Lord Denning's statement means is that the inference will be rebutted if an intelligent bystander would not reasonably infer that a warranty was intended. This is unobjectionable except that in the orthodox view (Lord Denning's test aside) the fact that an intelligent bystander would not consider that a warranty was intended would prevent any inference of warranty from arising in the first place. In the light of this, it would appear that the primary effect of his Lordship's statement is to shift the burden of proof. Thus, on the orthodox view, the onus would be on the plaintiff to prove that an intelligent bystander would have reasonably inferred that a particular representation was intended as a contractual promise. On the other hand, if the principles enunciated by Lord Denning in the present case are applied, once the plaintiff adduces evidence to raise a *prima facie* inference of a contractual promise, the onus thereupon shifts to the defendant to prove that an intelligent bystander would not have drawn this inference in the particular circumstances.

If this view is adopted, it may be easier to reconcile at least part of Lord Denning's statement with established doctrines. However, as pointed out above, it is still impossible to justify the imposition of contractual liability in damages on a party merely because he has made a negligent misrepresentation. In the law of contract the orthodox view is that there are two categories of misrepresentation, *viz.* fraudulent and innocent. Since negligence does not amount to fraud,[27] a misrepresentation made innocently, though negligently, has always been regarded as falling within the category of innocent misrepresentation and the creation by Lord Denning of an independent category of negligent misrepresentation would appear to be, as far as the law of contract is concerned, entirely without precedent. Indeed, the criteria of innocence of blame and, in this context, reasonableness appear more suited to an action in tort rather than contract. However, it seems clear from his terminology that Lord Denning is referring to a contractual remedy.

Influence of the Hedley Byrne Principle

It is possible that Lord Denning, perhaps encouraged by the fact that the

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[22] *Supra* n. 8.
[23] (1965) 2 All E.R. 65 at 67.
[24] *Ibid.*
[25] L. S. Sealy, "Representations, Warranties and the Reasonable Man" (1965) *C.L.J.* 178 at 180, 181.
[26] *Supra* n. 8.
[27] *Derry* v. *Peek* (1889) 14 A.C. 337.

views he expressed in his dissenting judgment in *Candler* v. *Crane, Christmas & Co.*[28] were approved by members of the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners, Ltd.*,[29] is in fact attempting in the present case to apply in the law of contract a similar principle to that which emerges from the *Hedley Byrne Case*,[30] a case to which he made no reference. That case, of course, was concerned with the tort of negligence and, while the speeches of their Lordships may be indicative of a current judicial willingness to extend the boundaries of legal responsibility in that particular area, there is nothing in the case which suggests that this willingness will spread to the law of contract. Indeed, there are passages in the speeches which seem to indicate that their Lordships accepted the principle that in the law of contract a mere innocent misrepresentation cannot found a claim for damages.[31]

It is interesting to compare Lord Denning's statement in the present case with the view of the *Hedley Byrne Case*[32] taken by the learned editor of the latest edition of *Anson's Law of Contract*.[33] In discussing the ramifications of the *Hedley Byrne* principle, he puts forward the following proposition:[34]

> It may . . . safely be hazarded that the relationship which exists between two parties preparatory to entering into a contract imposes a special duty of care by virtue of the fact that the party making the representation knows, or should know, that the other party will place reliance on it. So, where such a representation has been made without reasonable care being taken to ensure its accurancy, the person to whom it is made will in general be able to recover any loss which he may have suffered as a result of its untruth in an action for negligence.

Now this proposition, which purports to be founded on the *Hedley Byrne Case*,[35] bears a remarkable resemblance to the statement of Lord Denning in the present case—but it should be noted that while *Anson* makes it clear that liability in damages for negligent misrepresentation is purely a tortious liability, Lord Denning's principle envisages a liability in contract.

If his Lordship is attempting to apply to the law of contract a principle of the tort of negligence this may be seen as an attempt to rationalize the law of contract and tort, at least in regard to misrepresentation. Assuming it is possible to justify, on grounds of policy, this transplanting of principles from one branch of the law into another branch, it may well be asked whether Lord Denning's rationalization does in fact go far enough. For example, it may fail to overcome such peculiarities of the English law of contract as the parol evidence rule. This rule can, of course, be displaced by the doctrine of the collateral warranty[36] but in the *Dick Bentley Case*[37] Lord Denning stated that there was no need to refer to a warranty arising under the principles he enunciated as being collateral. On the facts of the case it was, indeed, not necessary to resort to the doctrine of collateral warranty since the contract had not been reduced to writing and the parol evidence rule was inapplicable. However, in a situation where the rule would apply it may operate to preclude a plaintiff from relying on a warranty inferred by Lord Denning's test as a term of the contract, unless that warranty can be regarded as collateral to the written contract.

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[28] (1951) 2 K.B. 164.
[29] (1964) A.C. 465; see Lord Hodson at 509; Lord Pearce at 539.
[30] *Supra* n. 29.
[31] *Ibid*, see e.g., Lord Reid at 483; Lord Pearce at 539.
[32] *Ibid.*
[33] 22nd edition, 1964. (Ed. A. G. Guest).
[34] *Id.* at 219.
[35] *Supra* n. 29.
[36] See e.g., *Anson's Law of Contract* (22 ed.) at 117.
[37] *Supra* n. 8 at 67.

Summary and Conclusion

In his judgment in the *Dick Bentley Case*, Lord Denning, M.R. firstly lays down a *prima facie* test to determine when a statement made by a contracting party may be presumed to be intended as a term of the contract. It has been suggested that this test is misleading and inconsistent with authority, because it loses sight of the well-established rule that whether a statement has become a term of the contract depends upon the objectively-assessed intention of the parties. As Lord Denning's test becomes so wide in its application, it blurs the distinction between contractual terms and mere representations, a distinction which high authority states must be preserved.

Lord Denning's statement then indicates when the *prima facie* inference arising from his test may be rebutted. It has been suggested that this part of his statement is also confusing because questions of moral innocence or blame simply have nothing to do with the contractual issue of whether or not a binding promise has been made. However, it may be possible to reconcile Lord Denning's statement with authority if it is regarded as merely operating to shift the burden of proof from plaintiff to defendant.

Finally, the relationship between Lord Denning's statement in the present case and the principles of liability in tort for negligent misrepresentation has been canvassed. The law relating to misrepresentation is undoubtedly in need of reform. The denial of a remedy in damages for a mere innocent misrepresentation may work injustice, at least where the misrepresentation has been made negligently. The first step to reform would probably be abolition of the concept of innocent misrepresentation and the introduction of a rule that any representation made in the course of negotiations, the natural tendency of which would ordinarily be to induce the representee to enter into the contract, should be regarded as a term of the contract.[38] This approach seems to have been followed by Lord Denning in the *Dick Bentley Case*[39] but, because of the doctrine of precedent, his Lordship was forced to cling to the old terminology and this may have resulted in the creation of the entirely new and anomalous contractual category of negligent misrepresentation. Just how this category fits into the established law on the subject is for the judges to discover in the future.

As the editor of the *All England Law Reports* points out,[40] Lord Denning's statement is in accordance with the recommendations of the English Law Reform Committee on the subject of innocent misrepresentation.[41] However, judicial reform alone is most unlikely to solve all the problems in any particular field, if only because the decision of a court is usually limited by reference to the facts of a particular case. Indeed, in an area requiring widespread reform, a decision such as the *Dick Bentley Case*[42] may create as many difficulties as it resolves. Accordingly, it is considered that a satisfactory solution of all the problems associated with misrepresentation in the law of contract will only be achieved, at any rate within a reasonable period of time, by comprehensive legislative action and not by piecemeal judicial reform.[43]

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[38] For such a rule to be effective it would probably also be necessary either to amend or abolish the parol evidence rule.

[39] *Supra* n. 5.

[40] (1965) 2 All E.R. 65.

[41] Tenth Report, 1962 (Cmnd. 1782).

[42] *Supra* n. 5.

[43] Many of the recommendations of the English Law Reform Committee are incorporated in the English Misrepresentation Bill, No. 22 of 1965-66. As at the beginning of 1967 this Bill had not passed into law.