

THE CONVERGENCE OF TORT AND CONTRACT

JANE SWANTON*

The fact that the boundaries between the fields of tortious and contractual liability are becoming increasingly blurred has recently been the subject of considerable discussion both in legal treatises and more particularly in the periodical literature. The purpose of this article is simply to give an overview of the respects in which this convergence is seen to be occurring, and to outline some of the problems created thereby.

The primary reason for the phenomenon is the dramatic expansion during this century of the scope of the tort of negligence. The main developments are the House of Lords decisions in *Donoghue v. Stevenson*¹ and *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*². The former recognized that, contrary to popular belief, the circumstance that conduct constitutes a breach of contract towards X is no bar to its also constituting a tort towards Y. The latter opened the door to the recovery of damages in the tort of negligence for purely economic loss unaccompanied by physical damage to person or property; hitherto it had been thought that recovery for economic loss was primarily the province of the law of contract.

The encroachment of tort on contract is manifested in a number of ways. For example there are an increasing number of situations in which the law recognizes that a defendant may be concurrently liable for his negligent conduct both in tort and contract. Then there is the recognition that in some circumstances liability may arise in tort for economic loss caused by a breach of contract to a stranger to the contract, thereby sidestepping the doctrine of privity of contract. Another development is the imposition of liability in the tort of negligence for statements made in the course of negotiations for a contract, even though, because of the strictness of the rules with respect to incorporation or implication of terms, there may be no liability for breach of contract. The extent to which the law of tort will further impinge on the law of

* Senior Lecturer in Law, University of Sydney.

¹ [1932] A.C. 562.

² [1964] A.C. 465.

contract depends mainly on how far the courts are prepared to extend the range of circumstances in which an action in the tort of negligence can be brought for purely economic loss.

THE DISTINCTION BETWEEN TORT AND CONTRACT

Traditionally it has been said that there are three main distinctions between duties in tort and contract.³ Firstly it is said that tort duties are owed to the whole world, whereas duties in contract are owed only to the other party to the contract. For example one owes a duty to everyone not to assault or defame him or, damage or appropriate his property. A major criticism of this suggestion is that many tort duties can be described as being owed only to specific individuals or a class of persons. For example one's duty not to convert a chattel is owed only to the person who has possession or a right to possession of it, one's duty not to trespass on land is owed only to the person in possession and one's duty to refrain from negligently inflicting injury is owed only to persons foreseeably likely to be injured as a result of such carelessness. Moreover, on a more general plane, it can be said duties in contract are owed to the whole world, in the sense that one owes a duty to every person in the world not to break a contractual promise made to him should one choose to enter a contract with him.

A second distinction, that duties in contract are assumed by the parties whereas those in tort are imposed by law, may also be criticized. One response is to say that many duties in tort *can* be said to be assumed in the sense that the defendant chooses to enter a relationship which gives rise to a duty. For example, by permitting the plaintiff to enter his land or his car, by employing him as his servant or by choosing to offer professional advice a defendant could be said to assume a duty in tort. Moreover, many contractual duties which derive from implied rather than express terms give the appearance of being imposed rather than assumed. And where, as is frequently the case, a contract is entered into on a standard form, the reality often is that contractual terms are imposed by one party on the other, rather than voluntarily assumed. Additionally it must be remembered that whether a contractual duty exists is determined objectively rather than subjectively. Thus there may be a contract where there is the outward appearance of assent though no subjective intention to be bound.

Finally it is said that the law of tort and contract protect different 'interests'. Tort protects a variety of interests, primarily those in the security of the person and of real and personal property, but also less tangible interests, such as that in one's reputation. Contract on the other hand,

³ The first two derive from Winfield's much-quoted definition of tortious liability, namely that it is liability which "arises from the breach of a duty primarily fixed by law: this duty is towards persons generally and its breach is redressible by an action for unliquidated damages." (See *Winfield & Jolowicz on Tort* (12th ed. 1984) at 3).

is said to protect a person's interest in having promises performed; that is, it is concerned to ensure that an expectation created in him of receipt of a benefit will not be disappointed. Thus the general rule is said to be that tort damages are designed to restore the *status quo ante*, that is, to place the plaintiff in the position he was in before the tort was committed (reliance or indemnity damages), while contract damages are designed to put the plaintiff in the position he would have been in if the contract had been performed (expectation damages). On this analysis liability does not generally arise in tort for pure 'nonfeasance', but only for active 'misfeasance'. Compensation for 'nonfeasance', in the sense of failure to confer a promised benefit is the province of the law of contract.

However the law of tort is now moving into the field of protecting economic interests⁴ in an increasing variety of situations, and in a number of these cases it seems that the complaint is not so much that the defendant has inflicted positive losses on the plaintiff but rather that he has failed to ensure receipt of an expected benefit. Moreover it is not always the case that, in a contract action the plaintiff will seek, or be entitled to, compensation for a disappointed expectation. In some cases, in a contract action, even though the loss is economic, damages are assessed on the basis of restoration of the *status quo ante* by compensating the plaintiff for the fact that he has acted on the promise to his detriment (reliance damages) or by restoring to him a benefit which he has conferred, pursuant to the contract, on the defendant (restitution damages). In addition, it is clear that the law of contract does protect similar interests to those which the law of tort vindicates, in as much as, if the breach of contract causes actual damage to person or property, or even perhaps to reputation, contract damages are assessed in the same way as tort damages (indemnity damages).

In sum, it would seem that the traditional suggested distinctions between tort and contract never were wholly convincing, and are even less so today. The expansion of the tort of negligence has reached the point where observers are asserting that the law is moving towards a principle that every breach of contract which could be avoided by reasonable care is a tort towards a person foreseeably affected thereby.⁵

An even more radical line of thinking, is that the entire law of contract is becoming redundant. Some writers, most notably Professor Atiyah,⁶ query the moral justification for enforcement of 'purely executory'

⁴ The "interest in earning or maintaining wealth" as R. Hayes puts it in "The Duty of Care & Liability for Pure Economic Loss" (1979) 12 *Melb. U. L. Rev.* 79.

⁵ *Winfield & Jolowicz on Tort* (12th ed. 1984) at 7; G. H. L. Fridman, "The Interaction of Tort & Contract" (1977) 93 *L.Q.R.* 422 at 436; A. J. E. Jaffey, "Contract in Tort's Clothing" (1985) 5 *Legal Studies* 77 at 92.

⁶ *The Rise & Fall of Freedom of Contract* (1979) many of the conclusions of which are dealt with in summary form in "Contracts, Promises & the Law of Obligations" (1978) 94 *L.Q.R.* 193 (for criticisms see A. S. Burrows, "Contract, Tort & Restitution—A Satisfactory Division or Not?" (1983) 99 *L.Q.R.* 217); see also *Promises, Morals & the Law* (1982) Ch. 7.

promises, that is, promises which have neither been relied on by the promisee to his detriment nor induced him to confer a benefit on the promisor. Clearly the law should, it is argued, compensate a plaintiff who has relied reasonably to his detriment on a defendant's promise; and it should restore to him a benefit conferred on the defendant in circumstances where the defendant is unjustly enriched at the plaintiff's expense. But, the argument runs, the law of tort and the doctrine of promissory estoppel are capable of ensuring compensation for detrimental reliance; and the law of quasi-contract or restitution is capable of ensuring restitution of benefits unjustly received. The peculiar province of the law of contract is therefore the enforcement of the purely executory promise. But the interest vindicated here is solely the interest in having an expectation fulfilled. It may be doubted whether such an intangible harm as the disappointment experienced by a promisee because of non-fulfilment of a promise is worthy of legal protection.

It can hardly be suggested that in Australian law doctrines of tort, promissory estoppel and restitution are sufficiently developed to be capable, in the near future, of succeeding in a take-over bid for all of the province of the law of contract save the enforcement of purely executory promises. But it can be argued that the law is tending in this direction. And in the United States, writers have suggested that this point has nearly been reached. Grant Gilmore in his famous work *The Death of Contract*, said in 1974 that:

"We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed. When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort . . . the two fields which had been artificially set apart, are gradually merging and becoming one".⁷

THE TORT OF NEGLIGENCE⁸

For a time, during the nineteenth and the earlier part of the twentieth centuries it seems to have been thought that the law recognized two nearly mutually exclusive fields of civil liability, contract and tort. *Donoghue v. Stevenson* is credited with having exploded the "contract fallacy", namely, the view that conduct which constitutes a breach of

⁷ At 88; cf. D. F. Partlett "Economic Loss & the Limits of Negligence" (1986) 60 *A.L.J.* 64 who maintains that "contract, like Lazarus, has been brought back from the dead and now possesses great strength and vitality." (at 64).

⁸ Negligence is the tort most likely to coincide with breach of contract though other torts such as trespass and conversion may do so; see *Clerk & Lindsell on Torts* (15th ed. 1983) at 4. For the extent to which economic interests are protected by the law of tort generally see B. Kercher & M. Noone, *Remedies* (1983) Ch. 10; D. Harris, *Remedies in Contract and Tort* (1988) Ch. 28.

contract does not normally have any other legal effect, such as constituting a tort. Thus it was no bar to the plaintiff's claim in that case for damages in tort for illness caused by drinking contaminated ginger beer, that the defendant manufacturer would presumably have been in breach of contract towards the original purchaser from him.

The decision and dicta in *Donoghue v. Stevenson* appeared to be directed towards claims for physical damage to person or property. The primary object of the law of tort has, at any rate until quite recently, been viewed as making reparation for infliction of positive physical harm.⁹ Contract claims, on the other hand, are usually made in respect of financial loss. The loss may have been suffered in one of three ways (though these are not mutually exclusive). The plaintiff may have incurred expenditure in reliance on the contract (reliance damages) or he may have conferred a benefit on the defendant which he seeks to have restored (restitution damages) or he may have failed to make the expected profit from the transaction (expectation damages). Clearly a claim for breach of contract may also lie where actual physical damage to person or property results from the breach (indemnity damages), but financial loss is the normal complaint in a contract action.

The law of negligence has now moved into the field of compensation for economic loss.¹⁰ The landmark case is of course *Hedley Byrne & Co. Ltd v. Heller & Partners*¹¹ where the House of Lords recognised the possibility of an action in tort being available where a person carelessly makes a statement (in that case a statement by a bank about the credit-worthiness of a company with which the plaintiff was proposing to do business) for which he can be said to have assumed responsibility and on which the plaintiff relies, foreseeably and reasonably, to his detriment. Although *Hedley Byrne* involved negligence in word rather than deed its implications obviously extended beyond this type of negligent behaviour.

⁹ The policy underlying the 'exclusionary' rule regarding economic loss has been examined by L. L. Stevens, "Negligent Acts Causing Pure Economic Loss: Policy Factors at work" (1973) 23 *U. Toronto L.J.* 431; D. Partlett, "Recovery of Economic Loss for Negligence in Australia" (1980) 9 *Syd. L. Rev.* 121; P. S. Atiyah, "Negligence and Economic Loss" (1967) 83 *L.Q.R.* 248; F. A. Trindale & P. Cane, *The Law of Torts in Australia* (1985) at 297-9. For an analysis in terms of economic theory see the exchange between W. Bishop & M. J. Rizzo in (1982) 2 *O.J.L.S.* 1, 197, 207 & (1982) 11 *J. Legal Studies* 281, & W. Bishop in *The Law of Tort: Policies & Trends in Liability for Damage to Property & Economic Loss*, (ed. M. Furmston, 1986) ch. 4.

¹⁰ This development has spawned a voluminous periodical literature over the last 25 years. Some of the leading articles are: P. S. Atiyah, "Negligence & Economic Loss" (1967) 83 *L.Q.R.* 248; H. Glass, "Duty to Avoid Economic Loss" (1977) 51 *A.L.J.* 372; R. Hayes, "The Duty of Care & Liability for Purely Economic Loss" (1979) 12 *Melb. U.L. Rev.* 79; P. Cane, "Physical Loss, Economic Loss & Products Liability" (1979) 95 *L.Q.R.* 117, "The Metes & Bounds of *Hedley Byrne*" (1981) 55 *A.L.J.* 862; D. F. Partlett, "Recovery of Economic Loss for Negligence in Australia" (1980) 9 *Syd. L. Rev.* 121, "Economic Loss & the Limits of Negligence" (1986) 60 *A.L.J.* 64; J. A. Smillie, "Negligence & Economic Loss" (1982) 32 *U. of Toronto L.J.* 231; J. C. Smith, "Economic Loss & the Common Law Marriage of Contracts & Torts" (1984) *U.B.C.L. Rev.* 95; M. McGrath, "The Recovery of Pure Economic Loss in Negligence—an Emerging Dichotomy" (1985) 5 *O.J.L.S.* 350. And see the collection of papers in *The Law of Tort: Policies & Trends in Liability for Damage to Property & Economic Loss* (ed. M. Furmston, 1986), and in the Symposium on "Recent Developments on Liability for Economic Negligence" (1987) 12 *Can. Bus. L.J.* 241.

¹¹ [1964] A.C. 465.

Once it is accepted that there is no absolute bar to claims in the tort of negligence for purely economic loss it cannot logically be argued that such claims can only succeed where the negligence was in word. On the contrary, it has often been said that the courts are and should be more wary about imposing liability for negligent statements as opposed to negligent conduct. Thus the significance of *Hedley Byrne* is not just that it recognized a new 'category of negligence' but that it opened the door to recovery in the tort of negligence, in appropriate cases, for purely economic loss whether the negligence was in word or deed.

Important developments in the law relating to liability in tort for negligently inflicted economic loss since *Hedley Byrne* include the following.

(1) *Concurrent liability in tort and contract*

It has long been accepted that there are circumstances where alternate remedies lie in contract and in tort. Thus both a tortious and a contractual duty may be owed by a carrier to a passenger, a bailee to a bailor, an employer to an employee and an occupier to an entrant. But it seems that since *Hedley Byrne* the point is rapidly being reached where it is recognized that liability may arise in tort for negligence in giving advice, opinions or information, as a result of which the representee suffers economic loss, despite the existence of a contract between the parties, a term of which requires the exercise of such reasonable care. Thus it seems that professional persons such as solicitors, accountants, architects, valuers and so on may be liable to their clients both in contract and in tort.¹²

Hitherto it had been thought that such concurrent liability in contract and tort for the supply of services arose only where the defendant was a person who exercised one of the so-called 'common callings' such as bailee, innkeeper, surgeon or farrier and not where he exercised one of the so-called 'modern callings' such as solicitor, stockbroker or architect. This illogical distinction is breaking down and the better view would seem to be that liability arises in tort for negligent misperformance of a contract for the supply of services wherever there would be liability in tort if the work or service were performed gratuitously.¹³ It has been argued that *Hedley Byrne* supports the wide proposition that "a defendant who undertakes to perform a business or professional service a principal object of which is to protect or advance the plaintiff's economic interests

¹² A. Underwood & S. Holt, *Professional Negligence* (1981); D. F. Partlett, *Professional Negligence* (1985); R. M. Jackson & J. L. Powell, *Professional Negligence* (2nd ed. 1987). Deane J. in *Hawkins v. Clayton* (1988) 62 A.L.J.R. 240 doubted whether it is normally appropriate to imply a contractual duty of care where there exists a tort duty of co-extensive content and concurrent operation.

¹³ J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 169; B. Kercher & M. Noone, *Remedies* (1983) at 55; W. D. C. Poulton, "Tort & Contract" (1966) 82 L.Q.R. 346.

will be liable to the plaintiff for purely economic loss caused by negligent performance of or failure to perform that service."¹⁴

Despite the trend towards recognition of concurrent liability in contract and the tort of negligence in circumstances where one aspect of the contractual obligation is a duty to exercise care towards the other contracting party, a possible retreat should be noted. The Privy Council recently expressed a preference for a contractual analysis of the duty owed by a customer to a bank and doubted the usefulness, to the law's development, in searching for a liability in tort where the parties are in a contractual relationship.¹⁵

(2) *Liability in the absence of reliance*¹⁶

An important extension occurred when it was recognized that liability could arise despite the absence of any kind of reliance by the plaintiff on the defendant's misstatement. In some cases liability has been imposed where the defendant's statement or advice was not made or given to the plaintiff directly and relied on by him, but made or given to a third party. Thus in *Minister of Housing v. Sharp*¹⁷ the plaintiff's action succeeded where a land registrar negligently issued a clear certificate to a prospective purchaser of land, thereby defeating a recorded charge in favour of the plaintiff. Similarly in *Ross v. Caunters*¹⁸ Megarry V-C held a solicitor liable for negligence towards a person whom a testator intended to benefit under his will. The solicitor's negligence in failing to ensure the proper execution of the will had resulted in the plaintiff losing his legacy.

(3) *Pre-contract statements*¹⁹

Another development is the recognition that liability may arise in tort for negligent statements in the course of pre-contract negotiations. In *Hedley Byrne* itself the statement in question induced a contract, not between the plaintiff and defendant, but between the plaintiff and a third party. However in *Esso Petroleum Ltd v. Mardon*²⁰ a negligently prepared

¹⁴ J. A. Smillie, "Negligence & Economic Loss" (1982) 32 *U. of Toronto L.J.* 231 at 233. The case law on concurrent liability in tort and contract is examined by C. French, "The Contract/Tort Dilemma" (1983) 5 *Otago L. Rev.* 236; D. A. Free, "Can Parties in Contractual Relations be Liable to Each other in Tort?" (1978) 3 *Auckland U.L. Rev.* 243; K. Mason, "Contract & Tort: Looking Across the Boundary from the Side of Contract" (1987) 61 *A.L.J.* 228; B. Morgan, "The Negligent Contract-Breaker" (1980) 58 *Can. Bar Rev.* 299; D. F. Partlett, *Professional Negligence* (1985) Ch. 6.

¹⁵ *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] A.C. 80 at 107; see also for a criticism of concurrent liability of solicitors, J. M. Kaye "The Liability of Solicitors in Tort" (1984) 100 *L.Q.R.* 680.

¹⁶ See D. Partlett, *Professional Negligence* (1985) at 277-94; for criticism of the extension of tort into this field see F. M. B. Reynolds, "Tort Actions in Contractual Situations", (1985) 11 *N.Z.U.L. Rev.* 215.

¹⁷ [1970] 2 Q.B. 223.

¹⁸ [1980] Ch. 297; other cases on similar facts are discussed by G. Bates "Liability of Solicitors for Negligence to Beneficiaries under a Will" (1985) 59 *A.L.J.* 327.

¹⁹ S. Schwartz, "*Hedley Byrne* & Pre-Contractual Misrepresentations: Tort Law to the Aid of Contract?" (1978) 10 *Ottawa L. Rev.* 581.

²⁰ [1976] Q.B. 801.

estimate by Esso of the likely 'throughput' of a garage which the plaintiff was proposing to lease from Esso resulted in the plaintiff's entering the lease and suffering financial detriment through running the business at a loss. The Court of Appeal rejected the argument that where a negligent misrepresentation induces a contract between the parties, the law of contract governs the situation so that, if the statement has not been made a term, there is no remedy in damages.

(4) *Defective structures*

There has been considerable development in the law with respect to liability for defective structures. The position has been reached, in English law at any rate, where a duty of care in tort is owed, not only by such persons as builders, architects and developers,²¹ but even local authorities who have statutory power to supervise and inspect building work (*Anns v. Merton London Borough Council*²²). Moreover liability has been imposed not only where the negligence results in actual damage to person or independent property or to the structure itself, but also where the only 'damage' is the expenditure required to render the building safe. There is some disagreement about whether, in the latter circumstances, the loss or damage is appropriately classified as financial or physical.²³ Some would argue that a claim for expenditure incurred in order to forestall the occurrence of physical damage in the future can be described as a claim in respect of physical damage. However this argument cannot prevail if the complaint is not that the building is unsafe, but simply that, because of the negligence, it is less valuable than it should be. In other words, if the structure is only defective but not dangerous, the plaintiff's loss can only be described as financial.²⁴

Until recently it was thought that this point marked the boundary between tort and contract. Where an article was 'safe but shoddy' the possessor would have no action for damages unless he could establish a breach of a contract to which he was privy. However in *Junior Books Ltd. v. Veitchi Co. Ltd.*²⁵ the House of Lords imposed liability in tort on a sub-contractor for negligent construction of a factory floor. The plaintiff factory owner's contract was of course with the head contractor

²¹ *Dutton v. Bognor Regis U.D.C.* [1972] 1 Q.B. 373; *Batty v. Metropolitan Property Realisations Ltd.* [1978] Q.B. 554; *Bowen v. Paramount Builders (Hamilton) Ltd. & McKay* [1977] 1 N.Z.L.R. 394.

²² [1978] A.C. 728; cf. *Sutherland Council v. Heyman* (1984) 157 C.L.R. 424 (discussed by D. G. Gardiner, "An End to the Short Reign of *Anns*: The Contracted Liability of Local Authorities in Australia for Defective Structures" (1986) 2 *Q.I.T.L.J.* 1; S. Todd, "The Negligence Liability of Public Authorities: Divergence in the Common Law" (1986) 102 *L.Q.R.* 370).

²³ Discussed by S. Todd, "Claims in Tort by Owners or Purchasers of Defective Property" (1984) 4 *Legal Studies* 312; A. Grubb, "A Case for Recognizing Economic Loss in Defective Building Cases" (1984) 43 *Cambridge L.J.* 111; J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 478-9.

²⁴ J. C. Smith, *Liability in Negligence* (1984), argues that there is no fundamental difference between physical damage and pure economic loss resulting from an act which has caused or created a risk of physical damage; the fundamental difference lies between acts which create risks of physical damage and acts which create risks of only pure financial loss. (at 80)

²⁵ [1983] 1 A.C. 520.

not the defendant sub-contractor, but the plaintiff recovered in tort against the sub-contractor even though the floor was not in any sense dangerous, but only defective. The complaint was that the operations of the factory were more expensive to conduct because of the added cost of maintaining the floor, and that expenditure would be required to replace it.

The implications of *Junior Books* are potentially enormous.²⁶ As yet the principle applied in that case has not been extended to goods, but logically there seems to be no reason to distinguish realty and personalty.²⁷ The possibility arises therefore of the doctrine of privity of contract being totally sidestepped in circumstances where a breach of contract is negligent. The position may ultimately be reached where a person who 'puts into circulation' a defective structure or chattel may be liable for his negligence, not only to his immediate purchaser in contract but also to any subsequent possessor who is foreseeably likely to suffer financial loss.²⁸ Negligence may not be difficult to prove with the assistance of the 'res ipsa loquitur' maxim.

Another important aspect of the decisions on defective structures is the recognition that liability may arise in the tort of negligence for nonfeasance as opposed to active misfeasance; for example where a building inspector negligently omits to make any inspection whatever of a building under construction.²⁹ As noted earlier liability for failure to act has generally been considered the province of contract rather than tort. This aspect of the decisions constitutes a further illustration of the "general modern tendency for osmosis between contract and tort."³⁰

(5) *Relational interests*

Traditionally the law of negligence has not applied in circumstances where the defendant has negligently inflicted personal injury on or damaged the property of X, and as a result the plaintiff, because of his relationship with X, has suffered financial loss. In other words, 'relational

²⁶ J. C. Smith, *Liability in Negligence* (1984) at 68 writes: "If *Hedley Byrne v. Heller* announced the engagement of contract and tort, it is *Junior Books v. The Veitchi Co.* which has solemnized the union; cf. J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 479: "There is now a consensus that the decision must be confined to its specific facts; J. Holyoak, "Economic Loss in Product and Premises Liability Cases" [1988] J. Bus. Law 139 at 145: "For the moment it must be accepted that the *Junior Books* principle can only be seen as a restricted one."

²⁷ D. Cohen, "Bleeding Hearts & Peeling Floors: Compensation for Economic Loss at the House of Lords" (1984) 18 *U.B.C.L. Rev.* 289; S. Todd "Claims in Tort by Owners or Purchasers of Defective Property" (1984) 4 *Legal Studies* 312 at 331; cf. Lords Fraser & Roskill [1983] 1 A.C. at 533, 546-7 who thought that *reliance* would not normally exist between the manufacturer and consumer of a chattel.

²⁸ These implications were a major reason for Lord Brandon's dissenting opinion.

²⁹ *Anns v. Merton London Borough Council* [1978] A.C. 728; the High Court appears to agree with these dicta in *Sutherland Council v. Heyman* (1984) 157 C.L.R. 424 at 445, 456-68, 484. See also *Shaddock & Associates Pty. Ltd. v. Parramatta City Council* (1981) 150 C.L.R. 225. For criticism of extension of the 'neighbour principle' to nonfeasance see J. C. Smith & P. Burns, "Donoghue v. Stevenson—The Not So Golden Anniversary" (1983) 46 *Mod. L. Rev.* 147 & J. C. Smith, *Liability in Negligence* (1984) Ch. 3.

³⁰ J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 170.

interests' are not generally protected. Thus, for example, it has been held that where a defendant negligently damages an electricity cable, thereby cutting off the supply of electricity to the plaintiff's business premises, the plaintiff has no action against the negligent actor if his loss is solely financial and not consequential on some damage to property.³¹

However a claim for financial loss resulting from negligent damage to the property of another did succeed before the High Court of Australia in *Caltex Oil (Australia) Pty. Ltd. v. The Dredge 'Willemstad'*.³² In that case the defendant negligently damaged a pipeline which ran across the bed of Botany Bay and was used to carry oil from a refinery to the Caltex oil terminal. Although the pipeline was not the property of Caltex, its claim for damages for the extra cost of transporting the oil by other means while the pipeline was out of service was successful. The reasoning of the judges in the High Court was not uniform and the *ratio* of the case is still unclear.³³ However certain members of the Court emphasized the fact that the circumstances were such that the defendant should have foreseen damage to the plaintiff individually and not merely as a member of an unascertained class.³⁴ This feature of the case no doubt allayed the fear which courts have always had in cases involving purely economic loss, that allowing the claim may lead to an opening of the floodgates. Where the defendant injures X or damages the property of X, clearly financial loss to others such as X's family, employees, contractual privies or others with whom he has relationships is within the realm of foreseeability. But to allow claims on the basis of foreseeability alone would be to open the door to recovery 'in an indeterminate amount, for an indeterminate time to an indeterminate class.'³⁵

The *Caltex* principle has not subsequently been successfully invoked and the Privy Council and the House of Lords have recently re-affirmed the rule that the absence of a possessory or proprietary interest is normally fatal to a claim in tort for damage to goods.³⁶ It would seem therefore that the policy against allowing recovery for injury to relational interests is still strongly maintained. However the developments referred to above in the area of liability for economic loss resulting from negligence in *word* must surely have an influence on this area of liability for economic

³¹ *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27.

³² (1976) 136 C.L.R. 529.

³³ The Privy Council was unable to extract any single *ratio decidendi* in *Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Lines Ltd.* [1986] 1 A.C. 1 at 22. B. Kercher & M. Noone, *Remedies* (1983) suggest that the *ratio* is that "recovery is possible in third party property damage cases, in circumstances where the plaintiff is engaged in a joint venture with the third party and where it is reasonable to ascribe knowledge to the defendant of the plaintiff's economic dependence upon the continuation of a service, which has been interrupted by the damage caused by the defendant to the third party's property." (at 263)

³⁴ Gibbs & Mason J.J.

³⁵ *Ultramares Corporation v. Touche* (1931) 174 N.E. 441 at 444 *per* Cardozo C.J.

³⁶ *Candlewood Navigation Corporation Ltd. v. Mitsui O.S.K. Ltd.* [1986] 1 A.C. 1; *Leigh & Silavan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] 1 A.C. 785.

loss resulting from negligence in *deed*, and further extensions may be expected to occur.³⁷

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For completeness it should be mentioned that these claims for recovery for economic loss in the tort of negligence have caused the judges considerable doctrinal difficulties. Put simply, the main issue seems to be the relationship between Lord Atkin's 'neighbour principle' in *Donoghue v. Stevenson*,³⁸ the 'special relationship' recognized in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*³⁹ as giving rise to liability for negligence in word causing economic loss and the principle on which the *Caltex* case was decided. Whether the economic loss cases since *Hedley Byrne* should be viewed as applications of the 'neighbour principle' or extensions of the 'special relationship', and the entire question of the role of the neighbour principle in the law of negligence are matters on which an enormous amount of ink has been spilled by judges and commentators alike. No clear consensus has yet been reached with respect to these matters.⁴⁰

PROMISSORY ESTOPPEL

What is the relationship between these developments in the law of negligence, especially the *Hedley Byrne* principle, and the doctrine of promissory estoppel? It seems that what we are seeing in the negligence cases is the evolution of some sort of doctrine of 'detrimental reliance'; that is, a recognition that there may be a right to damages for reasonable and foreseeable detrimental reliance by a plaintiff on a representation or undertaking by the defendant, even though no consideration may have been furnished by the plaintiff in return for that representation or undertaking. The absence of some such principle in the law has long been seen as an unfortunate gap.⁴¹ One of the recommendations of the United Kingdom Law Revision Committee in its report on the doctrine of consideration in 1937 was that "a promise which the promisor knows, or reasonably should know, will be relied on by the promisee shall be

³⁷ cf. J. A. Smillie, "Negligence & Economic Loss" (1982) 32 *U. of Toronto L.J.* 231 who argues that the traditional rule of no liability should normally be applied to deny recovery of purely economic loss which results from physical damage to a third person.

³⁸ [1932] A.C. 562.

³⁹ [1964] A.C. 465.

⁴⁰ For a discussion of these matters see S. Berns, "The Expanding Domain of Negligent Misstatement" (1985) 8 *U. Tas. L. Rev.* 127; J. A. Smillie, "Principle, Policy & Negligence" (1984) 11 *N.Z.U.L. Rev.* 111; S. Quinlan & D. Gardiner, "New Developments with Respect to the Duty of Care in Tort" (1988) 62 *A.L.J.* 347; R. Kidner, "Resiling from the *Anns* Principle: the Variable Nature of Proximity in Negligence" (1987) 7 *Leg. Stud.* 319.

⁴¹ A. S. Burrows, "Contract, Tort & Restitution—A Satisfactory Division or Not?" (1983) 99 *L.Q.R.* 217 at 241; S. M. Morgan, "A Comparative Analysis of the Doctrine of Promissory Estoppel in Australia, Great Britain & the United States" (1985) 15 *Melb. U. L. Rev.* 134; but cf. K. C. T. Sutton, *Consideration Reconsidered* (1974) who argues that such a principle already exists in the law.

enforceable if the promisee has altered his position to his detriment in reliance on the promise."⁴²

As is well known the gap has been filled in the United States by the recognition of a much broader doctrine of promissory estoppel than that which as yet exists in Anglo-Australian law. S. 90 of the *Restatement (Second) of the Law of Contracts* provides

- (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
- (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance."

Clearly this doctrine is capable of swallowing up and rendering redundant a large part of the law of contract.⁴³ In most actions for breach of contract the plaintiff will have suffered loss through detrimental reliance on the defendant's promise. In such cases proof of the existence of a contract, that is, that the defendant's promise was given for consideration, would strictly speaking be unnecessary as the plaintiff promisee could in any event rely on the principle in s. 90. Thus it would only be in cases where it is sought to enforce a purely executory promise (one which has not been performed or relied on) that there would be a need to establish that the promise formed part of a binding contract. Admittedly however, proof of the existence of a contract would have the advantage that there would be no disputing the promisee's entitlement to assessment of damages on a 'loss of expectancy' rather than a 'reliance' basis.⁴⁴

Promissory estoppel, though well established in English law, was not formally pronounced to be part of Australian law until the decision of the High Court in *Legione v. Hately*⁴⁵ in 1983. Even then, it appeared that promissory estoppel in English and Australian law remained a limited doctrine which could be used as a 'shield' or defence but not as a 'sword'

⁴² 6th Interim Report, Cmnd. 5449.

⁴³ G. Gilmore, *The Death of Contract* (1974) at 61; S. D. Henderson "Promissory Estoppel and Traditional Contract Doctrine" (1969) 78 *Yale L.J.* 343; P. S. Atiyah, *The Rise & Fall of Freedom of Contract* (1979) at 777-8.

⁴⁴ It seems that it is not settled whether expectation damages are recoverable under s. 90. See A. S. Burrows, "Contract, Tort & Restitution—A Satisfactory Division or Not?" (1983) 99 *L.Q.R.* 217 at 243; L. L. Fuller & W. R. Perdue, "The Reliance Interest in Contract Damages" (1936) 46 *Yale L.J.* 52, 373 at 69, 401.

⁴⁵ (1983) 152 C.L.R. 406; K. E. Lindgren & K. G. Nicholson, "Promissory Estoppel in Australia" (1984) 58 *A.L.J.* 249; G. A. Kennedy, "Equitable Estoppel" (1984) 58 *A.L.J.* 573. On the relationship between equitable estoppel, proprietary estoppel and conventional estoppel see D. M. J. Bennett, "Equitable Estoppel & Related Estoppels" (1987) 61 *A.L.J.* 540.

to found a cause of action.⁴⁶ The typical case for its application was where a contracting party reneged on a promise not to enforce strict contractual rights. He would be estopped from doing so if the promisee had altered his position in reliance on the promise and would incur a detriment if it was withdrawn. However the High Court of Australia in *Waltons Stores (Interstate) Ltd. v. Maher*⁴⁷ has now held that the doctrine is not limited in this way. The ingredients for raising such an estoppel were stated thus by Brennan J.:⁴⁸

"In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed or expected that a particular legal relationship exists between the plaintiff and the defendant or that a particular legal relationship will exist between them and, in the latter case, that the defendant is not free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise."

The situation in that case was that a proposed lessee allowed the proposed lessor to assume that exchange of contracts for the grant of a lease would occur imminently,⁴⁹ thereby inducing the lessor to demolish a building and commence construction of another, to the lessee's specifications, on the subject land. The proposed lessee then purported to stand on its strict legal rights by refusing to proceed with the transaction since exchange had not taken place. It was held that an estoppel arose which bound the lessee to the terms of the proposed lease. Damages were awarded to the lessor.

⁴⁶ G. H. Treitel, *The Law of Contract* (7th ed. 1987) at 91; K. E. Lindgren, J. W. Carter & D. J. Harland, *Contract Law in Australia* (1986) at 125-7; *Chitty on Contracts* Vol. 1 (25th ed. 1983) at 118-9; *Anson's Law of Contract* (26th ed. 1984) at 108; *Cheshire, Fifoot & Furmston's Law of Contract* (11th ed. 1986) at 95. But for the view that there is authority which supports the proposition that promissory estoppel can be used as a sword see M. P. Thompson, "From Representation to Expectation: Estoppel as a Cause as Action" (1983) 42 *Cambridge L.J.* 257; A. S. Burrows, "Contract, Tort & Restitution—A Satisfactory Division or Not?" (1983) 99 *L.Q.R.* 217 at 240; P. J. Millett, "*Crabb v. Arun District Council—A Riposte*" (1976) 92 *L.Q.R.* 342; K. C. T. Sutton, *Consideration Reconsidered* (1974) who maintains that "the notion of promissory estoppel, as a basis for the enforcement of a promise and not merely as a weapon of defence, is widely established in English law and is of respectable antiquity" (at 88). The question is exhaustively examined by D. W. Greig & J. L. R. Davis, *The Law of Contract* (1987) Ch. 4.

⁴⁷ (1988) 62 A.L.J.R. 110.

⁴⁸ *Id.* 127.

⁴⁹ *Per* Mason C.J., Wilson and Brennan J.J. Deane and Gaudron J.J. considered, as did the Courts below, that the proposed lessor believed that exchange *had* occurred and thus the assumption was one of fact rather than of future intention. However Deane J. thought that an estoppel would arise even if the lessor's belief was that exchange *would* occur as a matter of course.

All the members of the Court (except Gaudron J., not deciding) accepted that the doctrine of promissory estoppel was not limited to promises not to enforce existing rights but could extend to undertakings to confer rights. Thus the doctrine could operate, in an appropriate case, to give legal force to a gratuitous or voluntary promise. But they denied that the doctrine therefore undermined the doctrine of consideration. The mere fact of detrimental reliance on a gratuitous promise would not invariably raise an estoppel. There must be an assumption or understanding on the part of the representee, induced by the representor, that the representation or undertaking was not revocable; and it must be possible to say that it would be unjust and unconscionable for the representor to renege. Failure to fulfil a promise would not of itself be unconscionable.

Despite this disclaimer, it is clear that *Waltons Stores (Interstate) Ltd v. Maher*⁵⁰ represents a significant inroad into the doctrine of consideration.⁵¹ It may also ultimately turn out to constitute a major step towards the evolution in the law of a doctrine whereby representations become binding and give rise to legal remedies if they are relied on in such a way that a detriment would be suffered by the representee if they were not enforced. The tort of negligence is capable of going some way towards achieving the same purpose. Deane J. in *Waltons Stores* floated the idea that an action in negligence might have been available on the facts there (though this was not argued).⁵² Another suggestion that has been made⁵³ is that the *Hedley Byrne* principle could be invoked where a building contractor relied on a quote from a sub-contractor in preparing a tender for the construction of a building, and the quote was subsequently withdrawn (due to a careless mistake having been made in the preparation of the figures) after acceptance of the tender. In the United States the builder's remedy would be by way of promissory estoppel.⁵⁴

But the law of negligence has its limitations. The fact that negligence must be proved means that a person who deliberately makes and breaks a promise which he knows or should know will be relied on may not be caught. Thus it would seem that in the example referred to above the sub-contractor could be liable if the reason for his refusing to stand by his quote was that it was negligently prepared and therefore too low, but not if he simply changed his mind and withdrew his offer. Similarly

⁵⁰ (1988) 62 A.L.J.R. 110.

⁵¹ Spencer Bower & Turner, *The Law Relating to Estoppel by Representation* (3rd ed. 1977) maintain that it would be "impossible to allow promissory estoppel to found a cause of action without completely revising accepted ideas on the essentiality of consideration in contract" (at 387).

⁵² (1988) 62 A.L.J.R. at 138-9.

⁵³ *Cheshire, Fifoot & Furmston's Law of Contract* (11th ed. 1986) at 270; J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 611. J. C. Smith, *Liability in Negligence* (1984) argues for the development of the *Hedley Byrne* principle so as to result in a law of civil obligation, based on undertakings which create reliance, which will include equitable estoppel and fill the gap between the traditional law of negligence and the traditional law of contract. (ch. 6)

⁵⁴ *Drennan v. Star Paving Co.* 51 Cal. 2d. 409; 333 P. 2d. 757 (1958).

it might appear that in the situation in *Waltons Stores* a claim in negligence could be met with the response that in truth the proposed lessee's conduct in instructing its solicitors to hold off exchanging contracts while it reconsidered its position, involved wilful rather than negligent infliction of harm on the proposed lessor.

Moreover, though it is clear that the *Hedley Byrne* principle is not limited in its application to statements of fact but can apply to advice, opinions, predictions and even to silence,⁵⁵ it is by no means settled that it can apply to statements of intention or undertakings to perform acts in the future.⁵⁶ There is an ingrained idea that actions in tort are intended to compensate for acts of misfeasance causing positive harm rather than for nonfeasance or failure to fulfil an expectation. Additionally damages in tort are traditionally designed to restore the *status quo* before the tort rather than to compensate for loss of an expected benefit. It seems that no such limitation applies with respect to promissory estoppel. The form of relief given will depend on what is necessary to do justice in the case.⁵⁷

Another possible direction in which the law may go in its progress towards recognizing the enforceability of representations on which the representee has detrimentally relied, is a relaxation of the notion of consideration as a 'bargained-for' exchange for a promise. The courts have sometimes appeared to treat detrimental reliance as consideration for a promise despite its not having been expressly or impliedly stipulated as the 'price' of the promise.⁵⁸ Mason C.J. and Wilson J. in *Waltons Stores (Interstate) Ltd. v. Maher*⁵⁹ noted that the 'bargain theory' of consideration has not been expressly adopted in England or Australia.

QUASI-CONTRACT OR RESTITUTION

A brief reference to the law of quasi-contract or restitution is appropriate at this point in order to elucidate the argument referred to earlier that the law of contract is becoming almost redundant.⁶⁰ The argument is based on the view that the law of tort and the doctrine of promissory estoppel are capable of providing a claim for damages in circumstances where there has been detrimental reliance by the plaintiff on an undertaking given by the defendant, and that the law of restitution is capable of ensuring that payment is made for benefits received by

⁵⁵ J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 615.

⁵⁶ cf. *Meates v. A.-G.* [1983] 2 N.Z.L.R. 308.

⁵⁷ *Waltons Stores (Interstate) Ltd. v. Maher* (1988) 62 A.L.J.R. 110.

⁵⁸ As in such cases as *Collen v. Wright* (1857) 8 El. & Bl. 647; *Warlow v. Harrison* (1859) 1 E. & E. 309; *Shadwell v. Shadwell* (1860) 9 C.B. (N.S.) 159. This course is strongly advocated by P. S. Atiyah in *Consideration in Contracts: A Fundamental Restatement* (1971) and "When is an Enforceable Agreement not a Contract? Answer: When it is an Equity" (1976) 92 *L.Q.R.* 174.

⁵⁹ (1988) 62 A.L.J.R. 110 at 115.

⁶⁰ P. S. Atiyah, *The Rise & Fall of Freedom of Contract* (1979); G. Gilmore, *The Death of Contract* (1974).

the defendant in circumstances where he could be said to be unjustly enriched at the expense of the plaintiff.

Quasi-contract has common historical origins with the law of contract in that the remedy for both contractual and quasi-contractual claims was the form of action known as 'assumpsit'. Quasi-contractual actions are a miscellaneous collection of claims which at first glance appear to have little in common. At one time the prevailing view was that all such claims were based on implied contracts in the sense that wherever such an action was available it was because the law implied a promise to pay. It is now generally recognized that this explanation is fictitious and the law of quasi-contract is seen to fall more appropriately within a wider body of principles known as the law of restitution. In some circumstances where it can be said that the defendant is unjustly enriched at the expense of the plaintiff the law requires the defendant to disgorge the benefit or make restitution to the plaintiff. Quasi-contractual claims appear to be explicable on this basis of reversal of unjust enrichment. Thus the law of restitution encompasses the law of quasi-contract together with a number of other, mainly equitable doctrines based on aspects of the law with respect to trusts, fiduciary duties, tracing, acquiescence, subrogation and so on (described in the standard work by Goff and Jones).⁶¹

Quasi-contractual (or restitutionary as they should probably be described now) claims have always been a useful adjunct to the law of contract. Frequently a restitutionary claim will be available as an alternative to an action for breach of contract. For example, where a contract is discharged for breach the plaintiff may have the choice of suing for damages for breach of contract or making a restitutionary claim for recovery of money on a total failure of consideration or for a quantum meruit. Or a restitutionary claim may be available in respect of benefits conferred under a void, voidable or frustrated contract. And in some circumstances compensation can be obtained for work done in preparation for a contract which never eventuates.

It is apparent that there is a considerable overlap between the law of contract and the law of quasi-contract or restitution. Often in a contract action the plaintiff will be seeking to have damages assessed on a 'restitution' basis, that is, to have restored to him a benefit or the value of a benefit conferred by him on the defendant. It could be argued that where this is the appropriate measure of damages the law of contract is redundant since the law of restitution is capable of giving relief. Thus, the argument runs, if there existed in the law fully-fledged doctrines of detrimental reliance and of restitution, the only exclusive field for the

⁶¹ *The Law of Restitution* (3rd ed. 1986); see also P. Birks, *An Introduction to the Law of Restitution* (1985). The 'unifying legal concept' of unjust enrichment was recognized by the High Court of Australia in *Pavey & Matthews Pty. Ltd. v. Paul* (1987) 162 C.L.R. 221; G. Jones (1988) 1 *J. Contract Law* 8.

law of contract would be the enforcement of purely executory promises yielding expectation damages. Recently, as noted above, the moral and economic justification for enforcement of the latter have been called in question.

RAMIFICATIONS OF THE CONVERGENCE OF TORT AND CONTRACT

What is the practical significance of the increasing overlap between tort and contract? What are the problems raised by the apparent invasion of the field of contract by tort?

1. *The doctrine of consideration*

The doctrine of consideration has many critics and calls are not infrequently made either for its entire abolition or for modification in specific respects where it appears to cause injustice. Clearly the *Hedley Byrne* principle has by-passed the doctrine in that it allows an action to be brought for damages in tort in circumstances where economic loss results from advice or information supplied gratuitously. Before the decision in *Hedley Byrne* the supplier would have been under no liability for his negligence unless the court was able to manufacture or invent consideration.⁶² As mentioned above some would argue that the courts can and should extend the *Hedley Byrne* principle so that it applies to promises or undertakings with respect to future conduct generally. If this development occurred a partial cure would be found for one of the major perceived deficiencies of orthodox contract doctrine, namely, that mere foreseeable detrimental reliance on a promise, where that reliance is not the bargained-for exchange for the promise, is not regarded as consideration.

2. *The doctrine of privity of contract*

The law of negligence is developing an increasing potential to circumvent what many critics consider to be another defect in orthodox contract law, namely, that a third party beneficiary cannot, because of the doctrine of privity, enforce the contract in his own right.⁶³ The opportunity is now available, in circumstances like those in *Ross v. Caunters*⁶⁴ and *Junior Books Ltd. v. Veitchi Co. Ltd.*,⁶⁵ of avoiding the doctrine of privity by suing a contract breaker in tort.

⁶² As in *De La Bere v. Pearson Ltd.* [1908] 1 K.B. 280.

⁶³ L. Wilson, "Contract & Benefits for Third Parties" (1987) 11 *Syd. L. Rev.* 230; R. Flannigan, "Privity—The End of an Era (Error)" (1987) 103 *L.Q.R.* 564. The strictness of the doctrine has been modified in Australia, but query to what extent: *Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd.* (1988) 62 *A.L.J.R.* 508.

⁶⁴ (1980) Ch. 297.

⁶⁵ [1983] 1 A.C. 520.

(a) *The Standard of Care*

However the problem will have to be faced of the relevance to the tort claim of the various terms of the contract. The difficulty is that the standard of conduct required to avoid liability in the tort of negligence is the simple one of reasonable care; but the nature of a contractual duty turns on the terms of the contract. In some contracts, such as those for the supply of services by a professional person such as a solicitor, accountant or architect, the contractual duty will normally be a simple duty of care which corresponds with that imposed by the law of tort.⁶⁶ But this is not so in all cases. For example in a building contract the standard of conduct required may be high or low depending on the terms negotiated. The builder may have stipulated for a lower standard of workmanship in return for a lower price; or he may have excluded his liability entirely. How would such provisions affect the duty owed by the builder in tort to a third party to the contract? The problem was raised but not settled in *Junior Books* and was a major reason for the dissenting judgment of Lord Brandon.

In some circumstances it seems hard to accept the possibility that a contracting party may be under a higher duty to a stranger to the contract than that which he owes to his own client or customer. Or, to put it another way, it may seem anomalous that a person should be worse off because he pays for a service pursuant to a contract than he would be if the service were furnished gratuitously. The question of the significance of the terms of the contract to the claim of a third party in tort has not fallen for consideration in many of the recent economic loss cases and has not yet been subjected to thorough judicial analysis. One view is that the contract breaker who causes economic loss to a third party should be under no higher duty to the third party in tort than that which he owes to his immediate contractual privy.⁶⁷ Another view is that to apply the contractual standard would be to place a contractual burden on a third party which would be improper.⁶⁸ A third view is that the third party should be bound by the contractual standard if he knows or should know of the terms of the contract and be taken to have assented to them.⁶⁹

⁶⁶ Though the duty of care may be only one aspect of the entire contractual obligation: *Charlesworth & Percy on Negligence* (7th ed. 1983) at 511-2; A. Underwood & S. Holt, *Professional Negligence* (1981); R. M. Jackson & J. L. Powell, *Professional Negligence* (2nd ed. 1987).

⁶⁷ *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] A.C. 520 at 533-4 & 546 per Lords Fraser & Roskill; A. J. E. Jaffey, "Contract in Tort's Clothing" (1985) 5 *Legal Studies* 77 at 99-100; *Leigh & Sullivan Ltd. v. Aliakmon Shipping* [1985] 1 Q.B. 350 per Robert Goff L.J. at 396-8.

⁶⁸ Lord Brandon (diss.) in *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] A.C. 520; *Bowen v. Paramount Builders* [1977] 1 N.Z.L.R. 394 per Richmond P. & Woodhouse J. at 407, 419.

⁶⁹ S. Todd, "Claims in Tort by Owners or Purchasers of Defective Property" (1984) 4 *Legal Studies* 312 at 320-6; P. Cane in *The Law of Tort: Policies & Trends in Liability for Damage to Property & Economic Loss* (ed. Furmston, 1986) at 118-9; cf. B. J. Reiter in *Studies in Contract Law* (eds. B. J. Reiter & J. Swan, 1980) at 301-10 who argues that the question should turn on what were the reasonable expectations of the third party.

An analogous issue which is raised, but not of course resolved, by such cases as *Junior Books* is whether various rules of the law of contract which may modify the defendant's duty to perform towards his own contractual privity, also modify his obligation in tort towards third parties. Would the fact that the defendant is entitled to be relieved of his contractual duty because of illegality, frustration, fundamental breach or promissory estoppel affect the third party plaintiff's rights in tort?⁷⁰

(b) *Exclusion clauses*

Given the recognition of the usefulness of the law of tort in enabling a third party beneficiary of a contract sometimes to avoid the doctrine of privity by suing in tort to enforce the benefit, it might have been expected that tort rules would have been successfully invoked in another analogous area. This is in the situation where a contracting party seeks, by means of an exemption clause, to confer protection on persons who work for him in performance of the contract, as his servants or agents. Generally a promise by one contracting party to absolve the other's servants or agents from liability for any loss or damage caused by them, is ineffective because the servants or agents are not parties to the contract; they are third party beneficiaries. The plaintiff can still sue the servant or agent in tort because his promise not to do so is not contained in a contract to which the defendant is a party.⁷¹

It has been held by the Privy Council that careful drafting can overcome the difficulty by creating a second unilateral contract between the one contracting party and the other's servants or agents. This second contract consists on the one hand of a promise of exemption from or limitation of liability by one party, supported by the consideration of the servants or agents of the other party to the main contract performing work under the contract. Most of the leading cases have involved contracts for the carriage of goods by sea in which the shipowner has sought to protect persons employed by him to perform part of the work of transporting the goods (such as stevedores who unload the ship) from liability for loss of or damage to the goods. It was first held in *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon)*⁷² that an appropriately worded clause (the clause used in that case has since become known as the 'Himalaya clause') could effectively create contractual relations between the shipper or owner of the goods on the one hand and the shipowner's servants or agents on the other.

A 'Himalaya clause' is clearly a convoluted and artificial device for achieving the reasonable objective of ensuring that the risk of loss

⁷⁰ N. E. Palmer & J. R. Murdoch, "Expanding Contracts" (1983) 46 *Mod. L. Rev.* 213 at 221.

⁷¹ *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 446; *Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd.* (1956) 95 C.L.R. 43; criticized by N. H. Andrews, "Does a Third Party Beneficiary Have a Right in English Law?" (1988) 8 *Leg. Stud.* 14.

⁷² [1975] A.C. 154.

of or damage to the goods is placed on the shipper, so that he alone need take out insurance cover. It has been persuasively argued⁷³ that a more direct, obvious and less hazardous (since the precise wording of the exemption clause is not of such vital importance) route for achieving the purpose of allocating the risk to the shipper would be by means of the defence of *volenti non fit injuria* or voluntary assumption of risk.⁷⁴ An argument based on *volenti* has not so far been pressed in any of the leading cases and therefore has not been upheld. But it would seem that an owner of goods who contracts for their carriage on the basis that he agrees to bear the cost of loss or damage which might occur in the course of transportation, is *volens* to the risk of any harm caused by the negligence of persons employed by the carrier. Thus tort proceedings in negligence against such persons should fail.

It may be hoped that the courts' increasing readiness to acknowledge that tort principles are capable of impinging on the law of contract in such a way as to cure some of its deficiencies, will be further demonstrated by the success of an argument of this kind in future cases.

3. Remedies⁷⁵

A number of issues arise.

(a) Remoteness of damage

First there is the question whether the rules for remoteness differ in tort and contract, and if so, which rule applies where the plaintiff has alternative remedies in tort and contract. In *Koufos v. C. Czarnikow Ltd.*⁷⁶ the House of Lords recognized that both the contract rule, deriving from *Hadley v. Baxendale*⁷⁷ and the tort rule, deriving from the *Wagon Mound*⁷⁸ cases are based on foreseeability. But it was said that the contract rule is more demanding in that a higher degree of foreseeability is required for its satisfaction than is the case with respect to the tort rule. The rationale for the distinction is that in a contract situation each party has the opportunity of alerting the other to special circumstances which make the occurrence of a particular type of loss likely. On the other hand tortfeasors are often strangers to one another and no such opportunity

⁷³ Lord Denning in *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 446; B. J. Reiter in *Studies in Contract Law* (eds. B. J. Reiter & J. Swan, 1980) at 299; G. H. L. Fridman, "The Interaction of Tort & Contract" (1977) 93 *L.Q.R.* 422 at 440-2; J. Holyoak, "Tort & Contract after *Junior Books*" (1983) 99 *L.Q.R.* 591 at 603; G. Battersby, "Exemption Clauses & Third Parties" (1975) 25 *U. Toronto L.J.* 371.

⁷⁴ On the distinction between this defence and exclusion of liability in tort by notice see N. C. Seddon, "Fault Without Liability—Exemption Clauses in Tort" (1981) 55 *A.L.J.* 22.

⁷⁵ See generally A. S. Burrows, *Remedies for Torts and Breach of Contract* (1987); D. Harris, *Remedies in Contract and Tort* (1988); B. Kercher & M. Noone, *Remedies* (1983).

⁷⁶ [1969] 1 A.C. 350.

⁷⁷ (1854) 9 Ex. 341.

⁷⁸ *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.* [1961] A.C. 388; *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty. Ltd.* [1967] 1 A.C. 617.

arises. There was no agreement in *Koufos* on the precise formulation of the degree of likelihood required to satisfy the contract test, but such expressions were used as "real danger", "serious possibility", "not unlikely" and "liable to result". It was also said that it is preferable to use the expression 'within the contemplation of the parties' in contract cases rather than the expression 'reasonably foreseeable' which is more appropriate to tort. From the *Wagon Mound* cases it appears that the tort rule will be satisfied so long as the risk of the damage occurring is not so slight as to be dismissed as a mere far-fetched, fanciful possibility.

The distinction between the tort and contract rules was thrown into confusion however by the subsequent English Court of Appeal decision in *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*⁷⁹ This case was argued in contract but no doubt it was a situation in which liability would also arise in tort. The defendants sold to the plaintiffs who were pig farmers, a large unit for storing pig nuts. In installing the unit the defendants failed to ensure that the ventilator was open and the pig nuts went mouldy in consequence. Consumption of the mouldy nuts resulted in an outbreak in the herd of an intestinal infection caused by the bacterium E-coli. This was a very unlikely occurrence. Nevertheless the plaintiff's action for breach of contract succeeded.

Lord Denning M.R. resolved the difficulty by saying that the more demanding contract rule applies only where the loss is economic and not where, as here, it is physical. Scarman and Orr L.J.J. could not accept this distinction but were able to conclude that the contract test was satisfied by posing the relevant question in broad rather than narrow terms. It was not a matter of asking what was the likelihood of the spread of E-coli resulting from the consumption of mouldy nuts. Rather the issue was whether the occurrence of some *kind* of illness in pigs would be contemplated as a 'serious possibility' by a supplier of a storage unit which was not reasonably fit for its purpose. The *extent* of the illness need not be within the realm of contemplation. Thus the question was framed in such a way as to achieve the desired result of imposing liability.

The reasoning of Scarman & Orr L.J.J. illustrates the possibility of the supposedly stricter contract rule being manipulated in such a way as to reach the same result as the application of the undemanding tort rule. However it is apparent that, despite the binding force of the House of Lords decision in *Koufos* to which they paid lip-service, these judges felt no warmth towards that decision. This is clear from the following dicta:

"My conclusion in the present case is the same as that of Lord Denning M.R. but I reach it by a different route. I would dismiss the appeal. I agree with him in thinking it absurd that the test for

⁷⁹ [1978] Q.B. 791, criticized by J. M. Steiner, "A Question of Remoteness" (1978) 29 *N. Ire. L.Q.* 282, examined by A. S. Burrows, *Remedies for Torts and Breach of Contract* (1987) at 44-51.

remoteness of damage should, in principle, differ according to the legal classification of the cause of action, though one must recognize that parties to a contract have the right to agree on a measure of damages which may be greater, or less, than the law would offer in the absence of agreement. I also agree with him in thinking that, notwithstanding the interpretation put on some dicta in *C. Czarnikow Ltd v. Koufos*, the law is not so absurd as to differentiate between contract and tort save in situations where the agreement, or the factual relationship, of the parties with each other requires it in the interests of justice.”⁸⁰

“ . . . I agree with Lord Denning M.R. in thinking that the law must be such that, in a factual situation where all have the same actual or imputed knowledge and the contract contains no term limiting the damages recoverable for breach, the amount of damages recoverable does not depend upon whether, as a matter of legal classification, the plaintiff's cause of action is breach of contract or tort. It may be that the necessary reconciliation is to be found, notwithstanding the strictures of Lord Reid at pp. 389-390, in holding that the difference between “reasonably foreseeable” (the test in tort) and “reasonably contemplated” (the test in contract) is semantic, not substantial. Certainly, Asquith L.J. in *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*. [1949] 2 K.B. 528, 535, and Lord Pearce in *C. Czarkikow Ltd. v. Koufos* [1969] 1 A.C. 350, 414, thought so: and I confess I think so too.”⁸¹

It seems that the House of Lords in *Koufos*, in stating firmly that the remoteness rules in tort and contract differ, did not have in mind the proliferating cases where a defendant is liable for the same act towards the plaintiff both in contract and tort; or liable towards one plaintiff in contract and another in tort; or where a plaintiff has an action for the same loss against one defendant in contract and another in tort. It seems probable that the courts, by whatever means, will not permit a party to exploit the difference between the contract and tort rules to his advantage where this would give the appearance of absurdity or injustice.

One matter which has not yet been finally settled is whether it is appropriate to apply the more generous *Wagon Mound* test in tort cases where the loss is purely economic. The majority in *Parsons* rejected Lord Denning M.R.'s suggestion that where damage is physical the tort rule applies whether the action is brought in tort or contract. But this did not foreclose the possibility that it may be considered appropriate to apply the more demanding contract test in a tort action where the damage is economic, or where the only risk involved in the wrongful conduct

⁸⁰ [1978] 1 Q.B. 791 per Scarman L.J. at 806.

⁸¹ *Id.* 807; cf. McHugh J.A. in *Alexander v. Cambridge Credit Corporation Ltd.* (1987) 5 A.C.L.C. 587 at 628 who thought the distinction a real not just a semantic one.

is of infliction of economic loss.⁸² It has also been suggested that the rule might be that the more generous *Wagon Mound* test applies in contract actions in circumstances where the plaintiff did not have the opportunity to alert the defendant to special circumstances which made the occurrence of the type of loss in question likely.⁸³

Finally in connection with remoteness, it must be remembered that the time at which the test applies is different in tort and contract, and this might have practical significance in a particular case. In tort the question is whether the damage was reasonably foreseeable at the time of the tort (which is usually the time when the damage is suffered), whereas in contract the relevant time for asking whether a particular loss was within the contemplation of the parties is the time of the making of the contract.

(b) Measure of damages

The method of assessment of damages in tort and contract is the same in so far as the object in both types of proceedings is to put the plaintiff, in a pecuniary sense, in the position he would have been in if the wrong had not been committed. However, as in the case of contract the wrong is the breach of contract not the entry into the contract, this means that prima facie damages in contract should be that sum which will place the plaintiff in the position he would have been in if the contract had been performed unbroken,⁸⁴ rather than the pre-contract position. On the other hand tort damages should be designed to place the plaintiff in his pre-tort position. This difference means that, in cases of overlap between tort and contract, it may have to be decided which method of calculation is appropriate.

It has been recognized that there are three (or possibly four) different bases on which damages may be assessed in a civil action; or three (or possibly four) different ways in which an award of damages may be analyzed. First there are 'expectation' or 'loss of bargain' damages where the plaintiff is compensated for the defeat of an expectation of receipt of a benefit. Secondly there are 'restitution' damages where the court obliges the defendant to disgorge a benefit which he has received from the plaintiff. Thirdly there are 'reliance' damages which compensate the plaintiff for steps taken to his detriment in reliance on the defendant's behaviour. Finally, it is sometimes said that a plaintiff receives 'indemnity' damages where he is compensated for some actual harm positively inflicted on him by, or some expenditure incurred as a result of, the defendant's breach. These four methods of assessment are described as, protecting

⁸² R. W. M. Dias & B. S. Markesinis, *Tort Law* (1984) at 95; J. C. Smith, *Liability in Negligence* (1984) at 165; A. S. Burrows, *op. cit. supra* n. 79 at 45-6.

⁸³ G. H. Treitel, *The Law of Contract* (7th ed. 1987) at 747.

⁸⁴ *Robinson v. Harman* (1848) 1 Ex. 850 at 855.

four 'interests' which a person has; his 'expectation', 'reliance', 'restitution' and 'indemnity' interests.⁸⁵

Tortious liability generally derives from a failure to observe a negative obligation to refrain from inflicting positive injury to the plaintiff's person, property or reputation. Liability is normally imposed for active misfeasance and damages are said to be designed to restore the *status quo ante*, that is to compensate the plaintiff for out-of-pocket losses and put him in the position he was in before the tort was committed. This may be described as the 'reliance' measure if the loss results from the plaintiff's having acted to his detriment in reliance on the defendant's words or conduct. If this is not the case but the loss results from some positive act inflicting damage to person or property, the method of assessment may be described as the 'indemnity' measure. By contrast a contract will often require a contracting party to confer a benefit on the other party. The object of an award of damages is to compensate the plaintiff for loss of the expected benefit; he is to be placed in the position he would have been in if the contract had been performed. Liability is imposed on the defendant for nonfeasance and the plaintiff is compensated in respect of his 'expectation' interest.

These distinctions appear to be weakening.⁸⁶ It has long been accepted that in a contract action expectation damages are not always appropriate and a plaintiff may be entitled to claim, or may be forced to be content with, assessment on a reliance, restitution or indemnity basis. But it is only fairly recently that the English Court of Appeal in *Anglia Television Ltd v. Reed*⁸⁷ said that in a contract action the plaintiff has the right to choose between claiming for his lost profit (expectation damages) or for his wasted expenditure (reliance damages). In effect he has a right to choose between compensation for loss of his bargain, the usual contract measure, and *restitutio in integrum* the usual tort measure. This view has been criticized⁸⁸ on the ground that if it can be shown that the contract would have been an unprofitable one for the plaintiff and he would have incurred a loss if it had been performed, assessment on the reliance or tort basis under which he recovers his wasted expenditure, would result in a higher award. In other words he would be placed in a better position as a result of suing for damages for breach of contract

⁸⁵ The leading exponents of this type of analysis are L. L. Fuller & W. R. Perdue, "The Reliance Interest in Contract Damages" (1936) 46 *Yale L.J.* 52, 373. Not all writers distinguish the fourth type, but see A. I. Ogus, *The Law of Damages* (1973) Chs. 8, 9; B. Kercher & M. Noone, *Remedies* (1983) at 71-6. A. S. Burrows, "Tort, Contract & Restitution—A Satisfactory Division or Not?" (1983) 99 *L.Q.R.* 217 prefers to use the term 'status quo' interest to include both the reliance and indemnity interests.

⁸⁶ P. Cane, "Negligence, Economic Interests & The Assessment of Damages" (1984) 10 *Monash U. L. Rev.* 17.

⁸⁷ [1972] 1 Q.B. 60.

⁸⁸ A. I. Ogus, *The Law of Damages* (1973) at 351; D. W. Greig & J. L. R. Davis, *The Law of Contract* (1987) at 1356-9; cf. M. Owen, "Some Aspects of the Recovery of Reliance Damages in the Law of Contract" (1984) 4 *O.J.L.S.* 393.

than he would have been in if no breach had occurred and the contract had been performed. It has since been held that if the defendant can affirmatively establish that the contract would have yielded a loss rather than a profit to the plaintiff, the plaintiff is not entitled to claim full reliance damages.⁸⁹

A further issue is whether, in a tort action, the plaintiff's damages are ever assessed in effect on the contract basis. The question is complicated by the fact that it is by no means always obvious whether a particular award of damages is correctly to be analyzed as protecting the expectation, reliance, restitution or indemnity interest, or a combination of more than one of these. In addition the judges themselves rarely articulate the basis of assessment in terms of the particular interest involved. Exposition and analysis of the concepts of expectation, reliance, restitution and indemnity damages is a contribution of academic commentators rather than the judiciary.

Some writers⁹⁰ assert categorically that damages under the *Hedley Byrne* principle are awarded on a tort (reliance) basis rather than a contract (loss of bargain) basis. This was certainly true in the leading case *Esso Petroleum Co. Ltd. v. Mardon*.⁹¹ Damages were awarded to the plaintiff for out-of-pocket losses when he was induced by Esso's negligent misrepresentation about the likely 'throughput' of petrol, to take a lease of a service station. He was not entitled to damages for loss of his bargain in the sense of being put in the position he would have been in if the throughput was as predicted. But such a method of assessment would in any event have been inappropriate as Esso had not promised or guaranteed that the sales would be of any given quantity. They had merely expressed an opinion on the matter, and as they had taken insufficient care in making their forecast, and as, in the circumstances, the plaintiff's reliance thereon was reasonable and foreseeable, the *Hedley Byrne* principle was satisfied. It is significant that the plaintiff's action succeeded not only in tort but in contract as well. The Court was persuaded that the statement about the expected sales formed the subject matter of a collateral contract which induced the plaintiff to take the lease. But even in the contract claim loss of bargain damages were not awarded. The court thought it appropriate to assess damages on a reliance basis in the same way as in the tort action. Nevertheless the *Esso* case is sometimes cited in support of the proposition that damages under the *Hedley Byrne* principle are always to be assessed on the basis of *restitutio in integrum*.

⁸⁹ *C. & P. Haulage v. Middleton* [1983] 1 W.L.R. 1461; *C.C.C. Films (London) Ltd. v. Impact Quadrant Films Ltd.* [1985] Q.B. 16.

⁹⁰ J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 615-6; M. Kercher & B. Noone, *Remedies* (1983) at 276-8; B. J. Reiter in *Studies in Contract Law* (eds. B. J. Reiter & J. Swan, 1980) at 261; J. C. Smith, *Liability in Negligence* (1984) at 166; A. S. Burrows, "Contract, Tort & Restitution—A Satisfactory Division or Not?" (1983) 99 *L.Q.R.* 217 at 248.

⁹¹ [1976] Q.B. 801.

In further support of the proposition that damages under the *Hedley Byrne* principle are awarded on a tort (reliance) basis rather than a contract (expectation) basis is the position with respect to the tort of deceit. Where a fraudulent, as opposed to a negligent misrepresentation induces a contract, the method of assessment of damages is thought to differ depending on whether the statement has become a term of the contract or remains a 'mere representation' actionable only in the tort of deceit. Contract damages are measured by the difference between the value of the subject matter as it is and the value it would have had if the statement were true (expectation damages). Tort damages in deceit are measured by the difference between the actual value of the subject matter and the price paid (reliance damages).⁹² These may well be different figures.

However some of the economic loss cases in the tort of negligence, (though they may not strictly speaking be applications of the *Hedley Byrne* principle) give the appearance of awarding compensation for failure to ensure the receipt of an expected benefit rather than infliction of a positive loss, and a trend in this direction has been noted.⁹³ Examples are *Ross v. Caunters*⁹⁴ and *Junior Books Ltd. v. Veitchi Co.*⁹⁵ the facts of which are referred to above. The plaintiff in the former case recovered damages to compensate for defeat of the expectation of receiving a sound floor. In the latter the plaintiff was compensated for loss of the legacy which he would have received but for the defendant solicitor's negligence.

Moreover cases may arise where the reliance measure yields something which bears a resemblance to expectation damages.⁹⁶ Suppose that a professional person, instead of negligently advising in favour of a particular course of action (such as an investment), which proves financially detrimental to the advisee, negligently advises against a course of action which, if pursued, would have proved financially beneficial to the advisee. It would seem that the plaintiff should recover damages for failure to obtain the expected benefit, as part of his reliance damages. Doubtless where professional advice against a particular course of action causes physical as opposed to economic loss, an action will lie; as for example if a doctor advises a patient not to undergo a particular beneficial form of treatment. Is it sensible to distinguish cases where the loss is economic rather than physical? In fact, wherever it can be established

⁹² *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158; *Holmes v. Jones* (1907) 4 C.L.R. 1692; this position is criticized by K. M. Stanton, *The Law of Tort: Problems & Trends in Liability for Damage to Property & Economic Loss* (ed. M. Furmston, 1986) at 19.

⁹³ A. J. E. Jaffey, "Contract in Tort's Clothing" (1985) 5 *Legal Studies* 77; Winfield & Jolowicz on *Tort* (12th ed. 1984) at 7; Glanville Williams & B. A. Hepple, *Foundations of the Law of Tort* (2nd ed. 1984) at 16-17.

⁹⁴ [1980] Ch. 297.

⁹⁵ [1983] 1 A.C. 520.

⁹⁶ L. L. Fuller & W. R. Perdue, "The Reliance Interest in Contract Damages" (1936) 46 *Yale L.J.* 52, 373 at 55, 74; P. Cane in *The Law of Tort: Policies & Trends in Liability for Damage to Property & Economic Loss* (ed. Furmston, 1986) at 116-8.

that in reliance on a representation by the defendant the plaintiff has foregone other opportunities of gain, the reliance measure may properly be said to yield compensation for loss of a benefit.⁹⁷

In the *Caltex*⁹⁸ type of situation, where the plaintiff suffers financial loss because of damage to the property of another, it seems that the disposition of the High Court is to allow recovery only for expenditure actually incurred rather than lost profits.⁹⁹ However the plaintiff did not in fact in that case claim anything in respect of lost profits, and the view that such losses do not fall within the principle has been criticized.¹⁰⁰

All that can be said at the moment is that the extent to which, if at all, expectation damages or something similar may be recoverable in a tort action, is an issue which has not yet been clearly addressed by the courts.

(c) Type of damage

A further issue relates to the type of loss in respect of which the plaintiff can recover in contract and tort. Traditionally the law of contract has set its face against awarding damages for intangible, non-pecuniary harm, such as mental distress, injured feelings, embarrassment, humiliation, loss of reputation and so on. Nor are exemplary damages awarded. This view was taken by the House of Lords in *Addis v. Gramophone Co. Ltd.*,¹⁰¹ an action for wrongful dismissal. There have always been some exceptions to the exclusory rule, such as where the plaintiff's damage could more appropriately be described as physical discomfort or inconvenience rather than just mental distress, or where the breach of contract caused personal injuries with resulting pain and suffering.¹⁰² But recently the courts have begun to recognize the possibility of damages for mental distress being recoverable more generally. The restrictive view was said by Lord Denning M.R. to be outmoded in *Jarvis v. Swans Tours Ltd.*¹⁰³ where the plaintiff recovered damages for breach of a contract to provide a package ski holiday which had been described in glowing terms in the tour company's literature. He received not just the difference in value between the trip he was promised and that which he received, but compensation for his upset, distress, disappointment and failure to enjoy himself. Damages for vexation and distress were also awarded in a case where a solicitor failed

⁹⁷ *Gates v. City Mutual Life Assurance Society Ltd.* (1986) 160 C.L.R. 1. See K. M. Stanton in *The Law of Tort: Policies & Trends in Liability for Damage to Property & Economic Loss* (ed. M. Furmston, 1986) at 18 citing *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1979] Ch. 394; D. W. McLauchlan, "Assessment of Damages for Misrepresentations Inducing Contracts" (1987) 6 Otago L. Rev. 370.

⁹⁸ *Caltex Oil (Aust.) Pty. Ltd. v. The Dredge 'Willemstad'* (1976) 136 C.L.R. 529.

⁹⁹ R. Hayes, "The Duty of Care & Liability for Purely Economic Loss" (1979) 12 *Melb. U.L. Rev.* 79.

¹⁰⁰ P. Cane, "Economic Loss & the Tort of Negligence" (1980) 12 *Melb. U.L. Rev.* 408.

¹⁰¹ [1909] A.C. 488.

¹⁰² *McGregor on Damages* (14th ed. 1980) at 45-8.

¹⁰³ [1973] 1 Q.B. 233; see also *Jackson v. Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468.

to institute proceedings to restrain molestation of the plaintiff by a particular individual, with the result that the molestation continued.¹⁰⁴

It remains unclear how far the law permits recovery for this type of harm in a contract action.¹⁰⁵ The narrow view would be that such damages are only appropriate where the terms of the contract expressly or impliedly confer on the plaintiff a right to expect the provision of enjoyment or pleasure (as in the holiday cases) or freedom from distress or suffering (as in the non-molestation case). It can be argued that if this 'expectation' is not created by the contract itself then the mental distress is better described as the infliction of a positive loss by a wrongdoer (traditionally the province of tort) rather than a consequence of failure to ensure receipt of an expected benefit (the traditional province of contract). A somewhat more liberal approach would be to distinguish 'commercial' and 'personal' contracts and to allow damages for mental suffering only in respect of the latter.

The broad view would be that no limit should be placed on recovery of damages for this sort of intangible loss in a contract action, save the rules of remoteness of damage. But no doubt courts have always been and will continue to be influenced by the fear that recognition of this type of loss is likely to result in an unduly heavy burden of liability on contract breakers, as breaches of contract would very commonly cause distress, anxiety and vexation to individual plaintiffs. It seems that the English courts may be reverting to the older more restrictive way of thinking. The Court of Appeal has recently applied *Addis* and held that damages for mental distress were not available where an employer wrongfully required an employee to undergo a psychiatric examination.¹⁰⁶

Recognition of the possibility of recovering damages in a contract action for injury to feelings and so on could be described as an invasion of the province of tort by contract. Although this development appears to be occurring quite independently of the invasion of contract by tort with respect to negligent infliction of economic loss, the change in approach can be viewed as a reflection of the courts' perception of the artificiality of drawing a rigid distinction between these two types of civil liability.

(d) Remedies other than damages

In cases where the plaintiff has alternative claims in tort or for breach of contract it is worth remembering that the range of remedies for breach of contract is wider than in tort. Thus in a given case a

¹⁰⁴ *Heywood v. Wellers* [1976] Q.B. 446.

¹⁰⁵ The case law is examined by F. Dawson, "General Damages in Contract for Non-Pecuniary Loss" (1983) 10 N.Z.U.L.R. 232; A. S. Burrows, "Mental Distress Damages in Contract—a Decade of Change" (1984) *Lloyd's Mar. & Com. L.Q.* 119; M. G. Bridge, "Contractual Damages for Intangible Loss: a Comparative Analysis" (1984) 62 *Can. Bar Rev.* 323.

¹⁰⁶ *Bliss v. South East Thames Regional Health Authority* [1985] 1 R.L.R. 308.

contracting party may be better off exercising his right to rescind the contract, if this is available to him, rather than suing for damages. Or a decree of specific performance or an injunction or rectification may be a more beneficial form of relief than damages.

4. *Contributory negligence*

Whether contributory negligence is available as a defence to an action for breach of contract is an issue which arises more frequently nowadays in view of the increasing number of situations where concurrent liability in tort and contract is recognized to exist. The question turns on the construction of the apportionment legislation which is virtually uniform in all Australian jurisdictions.¹⁰⁷ The statutes provide that the plaintiff's damages may be reduced to such extent as the court thinks just and equitable, in circumstances where both plaintiff and defendant are at 'fault' as defined in the legislation. Fault means 'negligence, or other act or omission which gives rise to a liability in tort or would . . . give rise to the defence of contributory negligence'.

Clearly a possible construction of the legislation is that the defendant is at 'fault', even though sued for breach of contract, if he would also be liable in tort had the plaintiff chosen to frame his action in that way. Another construction of course is that the defendant can only argue that he is at 'fault' and set up contributory negligence as a defence if the proceedings are in fact framed in tort. An added difficulty is that there is no clear authority as to whether contributory negligence ever was a defence to a contract action at common law (though it would seem that it was not) and whether therefore the requirement of 'fault' on the plaintiff's part can be satisfied.

There is as yet no authoritative decision¹⁰⁸ on the interpretation of the legislation in this regard and it is possible that the matter may be resolved in some jurisdictions by amendment of the legislation before this occurs. Meanwhile it does seem anomalous that where a defendant is concurrently liable both in tort and contract the plaintiff should be able to avoid the defence of contributory negligence by choosing to frame his action in contract rather than tort. Therefore, at any rate where the defendant owes the same duty of reasonable care both in contract and

¹⁰⁷ The apportionment legislation is as follows: Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.) Part III; Wrongs Act 1958 (Vic.) Part V; Wrongs Act 1936-1975 (S.A.) s. 27a; Law Reform (Tortfeasors' Contribution Contributory Negligence and Division of Chattels) Act 1952 (Qld.) Part III; Tortfeasors' and Contributory Negligence Act 1954 (Tas.) s. 4; Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (W.A.) s. 4; Law Reform (Miscellaneous Provisions) Act 1956 (N.T.) Part V; Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.) Part V.

¹⁰⁸ The case law and proposals for reform are discussed by K. Mason, "Contract & Tort: Looking Across the Boundary from the Side of Contract" (1987) 62 *A.L.J.* 228 at 231-4; A. M. Dugdale, "Proposals to Reform the Law of Civil Contribution" (1984) 2 *Canterbury L. Rev.* 171; N. E. Palmer & P. J. Davies, "Contributory Negligence & Breach of Contract—English & Australasian Attitudes Compared" (1980) 29 *Int. & Comp. L.Q.* 415; J. Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract" (1981) 55 *A.L.J.* 278; R. M. Jackson & J. L. Powell, *Professional Negligence* (2nd ed. 1987) at 20-3; A. S. Burrows, *Remedies for Torts and Breach of Contract* (1987) at 73-8.

tort, it would seem that the legislation should be construed as applying to an action framed in contract.

5. *Contribution between contract breakers*

A similar issue arises in connection with the contribution legislation as with the apportionment legislation. Both sets of provisions were designed to deal with tortious conduct rather than breaches of contract. In their original form, following the English Act of 1935,¹⁰⁹ the Australian contribution statutes¹¹⁰ only gave a right to a 'tortfeasor liable' in respect of damage to recover contribution from 'any other tortfeasor who is, or would if sued have been liable' in respect of the same damage. Where a defendant is held liable for breach of contract and the situation is one where he could alternatively have been sued in tort, some courts have been prepared to construe the legislation as applicable.¹¹¹ However where the defendant's breach of contract is not also a tort the legislation in its original form cannot apply. From the point of view of policy it would seem that there is no convincing reason for limiting the right to contribution to tortfeasors, and an extension to include contract breakers has been either introduced or proposed in a number of jurisdictions.¹¹²

6. *Collateral contracts*

A further issue thrown up by the expansion of the principle in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*¹¹³ is the relationship between an action in the tort of negligence in respect of a statement made by one party to another in negotiations for a contract, and an action on a collateral contract. On one view of the decision in *Hedley Byrne* the criteria for determining whether an action in tort lies for pre-contract negligent misrepresentation would be the same as those which determine whether a collateral contract exists. Lord Devlin in particular spoke of there being an action in the tort of negligence where there is a relationship 'equivalent to contract', that is, where, but for the absence of consideration, there would be a contract.¹¹⁴ Many of their Lordships, though not

¹⁰⁹ Law Reform (Married Women & Tortfeasors) Act s. 6.

¹¹⁰ Law Reform (Miscellaneous Provisions) Act 1946 (N.S.W.) s. 5; Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act 1952 (Qld.) ss. 5-9; Wrongs Act 1936-1975 (S.A.) ss. 24-27; Tortfeasors and Contributory Negligence Act 1954 (Tas.) s. 3; Wrongs Act 1958 (Vic.) s. 24; Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act (W.A.) 1947 s. 7; Law Reform (Miscellaneous Provisions) Act (N.T.) ss. 13-14; Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.) ss. 10-13.

¹¹¹ e.g. *Macpherson & Kelley v. Kevin J. Prunty & Associates* [1983] V.R. 573.

¹¹² Civil Liability (Contribution) Act 1978 (U.K.); Wrongs (Contribution) Act 1985 (Vic.). The question is discussed by K. Mason, "Contract & Tort: Looking Across the Boundary from the Side of Contract" (1987) 61 *A.L.J.* 228 at 234-6; A. M. Dugdale, "Proposals to Reform the Law of Civil Contribution" (1984) 2 *Canterbury L. Rev.* 171; E. J. Weinrib, "Contribution in a Contractual Setting" (1976) 54 *Can. Bar Rev.* 338.

¹¹³ [1964] A.C. 465.

¹¹⁴ *Id.* 525.

specifically requiring a relationship 'equivalent to contract', thought that for liability to arise in tort some sort of 'assumption of responsibility' was necessary.

Discovery of a collateral contract has often been described as a 'device' which was 'invented' by the courts in order to repair the deficiencies in the law of misrepresentation. A collateral contract is one in which one party's consideration is entry into some other contract. Where a statement is made during negotiations for a contract, which cannot be shown to be fraudulent so as to give rise to an action in the tort of deceit, nor to be a term of the main contract, the courts will sometimes hold that it forms the subject matter of a collateral contract. In this way damages can be awarded if the statement turns out to be false.

It is necessary of course for the establishment of a collateral contract that *animus contrahendi* or an intention to enter legal relations should be shown. It might have been thought that this requirement was substantially the same as that of an 'assumption of responsibility' for the purpose of the *Hedley Byrne* principle. However the English Court of Appeal has held that this is not so and that where a negligent misrepresentation induces the misrepresentee to enter a contract with the misrepresenter, the question whether there is an action in tort under *Hedley Byrne* is distinct from the question whether a collateral contract exists.¹¹⁵ The relationship and distinction between the two doctrines therefore remains obscure.¹¹⁶

7. Limitation periods¹¹⁷

The limitation period begins to run when a cause of action is complete. In the case of a breach of contract this occurs at the time of the breach whether or not actual damage has yet been suffered. However in most tort actions (those deriving from the action on the case where damage was the 'gist' of the action) there is no concluded cause of action until damage occurs. Thus if the plaintiff has alternative remedies for breach of contract and in tort it may happen that, though the former is barred, the latter is not.

This distinction has generated some litigation on the question of whether tort and contract remedies co-exist. For example in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*¹¹⁸ the plaintiff's solicitor negligently failed to register an option granted to the plaintiff over certain land, with

¹¹⁵ *Howard Marine & Dredging Co. Ltd. v. A. Ogden & Sons (Excavations) Ltd.* [1978] 1 Q.B. 574.

¹¹⁶ For the argument that the availability of an action for negligent misrepresentation is to be encouraged so as to avoid the 'subterfuge' of resort to a collateral contract, see B. J. Reiter in *Studies in Contract Law* (eds. B. J. Reiter & J. Swan, 1980) at 261-3; G. H. L. Fridman, "The Interaction of Tort & Contract" (1977) 93 *L.Q.R.* 422 at 443-4; D. W. Greig, "Misrepresentations & Sales of Goods" (1971) 87 *L.Q.R.* 179; F. M. B. Reynolds, "Tort Actions in Contractual Situations" (1985) 11 *N.Z.U.L. Rev.* 215 at 219.

¹¹⁷ D. F. Partlett, *Professional Negligence* (1985) at 350-64; Jackson & Powell, *op. cit. supra* n. 108 at 29-45.

¹¹⁸ [1979] Ch. 384.

the result that when the property was sold some years later, the optionee's rights were lost. It was held that, whether or not the plaintiff's contractual claim against his solicitor was statute barred, he had a cause of action in tort which did not accrue until the damage was suffered, that is, when the property was sold.

Developments in the law of negligence have thrown up difficult cases where it is not obvious at what point the damage should be considered to have been suffered. For example, in connection with defective structures there has been some doubt about whether the limitation period begins to run when some actual structural damage occurs, albeit that it might be undetectable, or whether time begins to run only when the defect is discovered or could with the exercise of reasonable care have been discovered. The House of Lords fixed on the date when some actual damage occurs, whether discovered or discoverable or not, as the relevant date, in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners*.¹¹⁹

However the decision in *Junior Books Ltd. v. Veitchi Co. Ltd.*¹²⁰ is hard to square with this analysis.¹²¹ *Junior Books* recognizes that liability can arise for negligence in creating a defective structure, even though the defect does not cause any physical damage at all, either to person(s) or independent property or to the structure itself. The damage in that case was purely economic as the plaintiff was in effect complaining that the floor was worth less than it would have been but for the negligence. It seems therefore that in some cases concerning defective structures liability is dependent on, and the cause of action accrues on the occurrence of, actual damage, while in other cases actual physical damage is not essential. In cases of the latter type presumably the damage occurs and the cause of action accrues on the completion of the structure.

Further difficulties may arise if land on which a defective structure is erected passes into different hands. Does a new cause of action accrue to each purchaser as he acquires the land, thus possibly extending the limitation period indefinitely? In *Pirelli* the House of Lords thought not. Lord Fraser said:

"I think the true view is that the duty of the builder and of the local authority is owed to owners of the property as a class, and that if time runs against one owner, it also runs against all his

¹¹⁹ [1983] 2 A.C. 1; but if the structure was 'doomed from the start' the limitation period would run from the completion of construction (at 16, 18). The case is criticized by C. J. Rossiter & M. Stone, "Latent Defects in Buildings: When Does the Cause of Action Arise?" (1985) 58 *A.L.J.* 606; M. A. Jones, "Defective Premises & Subsequent Purchasers" (1984) 100 *L.Q.R.* 413. The House of Lords has held that the mere fact that a building is constructed in such a way that damage is bound to occur eventually is not sufficient to render it 'doomed from the start': *Ketterman v. Hansel Properties Ltd.* [1987] 2 *W.L.R.* 312.

¹²⁰ [1983] 1 A.C. 520.

¹²¹ S. Todd, "Claims in Tort by Owners or Purchasers of Defective Property" (1984) 4 *Legal Studies* 312 at 326-7; A. Grubb, "A Case for Recognizing Economic Loss in Defective Building Cases" (1984) 43 *Cambridge L.J.* 111.

successors in title. No owner in the chain can have a better claim than his predecessor in title."¹²²

But these dicta were directed to situations where actual structural damage to the building does occur at some stage due to the negligence. They may not be applicable where the complaint is that the negligence has caused economic loss. In that situation it can be argued that economic loss is only suffered by a plaintiff when he acquires an interest in the property, and that the limitation period can only begin to run against him from that point.

It may be that the problems involved in determining the appropriate limitation period in cases of this kind can only be resolved by legislation.¹²³

8. *Miscellaneous matters*

The availability of alternative claims in tort and contract may require consideration of a variety of other aspects of the law where the rules in tort and contract differ, thus making it more beneficial to frame an action in one way or the other. The rules of tort and contract may differ with respect to such matters as costs, the effect of bankruptcy, liability of minors, assignment of causes of action, conflict of laws, service of process outside the jurisdiction, fatal accidents and vicarious liability.

In some cases it has been said that where tort and contract rules differ in a particular respect, it is necessary to discover the 'gist' or 'gravamen' of the complaint in order to decide which applies. But such statements cannot be regarded as of general application because in other cases the attitude has been that the plaintiff is free to elect to pursue whichever claim is most beneficial to him. The latter would seem to be the better view.¹²⁴ It is probably only in circumstances where particular legislation requires a claim to be classified as contractual or tortious, for example for the purpose of determining the appropriate scale of costs, that a search for the 'gist' or 'gravamen' of the claim is justified.

In some situations it may not appear unjust that the plaintiff should be allowed to choose whether to avail himself of a tort or contract rule where these differ, as for example if the object is to save a claim from being barred by the running of a limitation period. But, as pointed out

¹²² [1983] 1 A.C. at 18; criticized by G. Robertson, "Defective Premises & Subsequent Purchasers" (1983) 99 *L.Q.R.* 559 and A. Grubb, "A Case for Recognizing Economic Loss in Defective Building Cases" (1984) 43 *Cambridge L.J.* 111 at 126.

¹²³ C. J. Rossiter & M. Stone, "Latent Defects in Buildings: When Does the Cause of Action Arise?" (1985) 58 *A.L.J.* 606; Latent Damage Act 1986 c. 37 (U.K.).

¹²⁴ J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 169-70; F. A. Trindade & P. Cane, *The Law of Torts in Australia* (1985) at 18; *Charlesworth & Percy on Negligence* (7th ed. 1983) at 514; cf. *Chitty on Contracts* (25th ed. 1983) Vol. 1 at 10 & C. French, "The Contract/Tort Dilemma" (1983) 5 *Otago L. Rev.* 236 at 261-2 where it is pointed out that the courts have adopted no one single attitude: in some cases they have allowed the plaintiff a full and free choice, in others they have sought to discover the true "substance" of the action, in others they have determined the issue of characterisation by the way the case is pleaded, and in others still they have simply inquired whether the requirements of a particular statute have been met.

above, the right to elect can give rise to anomalies where the plaintiff seeks, by the way in which he pleads his case, to defeat the policy of the law with respect to such matters as contributory negligence or remoteness of damage. It has been suggested that the best solution is for the law to ensure that the same rules apply in these overlapping situations so that such a possibility does not arise and that: "The general modern tendency for osmosis between contract and tort would favour this development."¹²⁵

CONCLUSION

Historically tort and contract have common origins in 'the action on the case'.¹²⁶ The modern law of contract grew out of the form of action known as 'assumpsit'. Most tort actions (other than the trespassory ones) grew out of the various forms of the action on the case, some nominate such as trover, nuisance, negligence, deceit and defamation, others remaining innominate or being labelled by the case in which they were first recognized (such as the 'rule in *Rylands v. Fletcher*'). Legal historians agree that it was only during the nineteenth century that tort and contract came to be regarded as separate compartments of the law. What we are seeing now is viewed by some as a trend towards a 're-absorption of contract into the mainstream of tort',¹²⁷ or a reversion to a 'law of obligations' encompassing the traditional fields of tort, contract and quasi-contract (or restitution).¹²⁸

What has occurred so far can only be described as a relatively modest encroachment of tort on the field of contract. It is possible to conceive of the tort of negligence ultimately expanding to the point where all negligent breaches of contract could be regarded as tortious wrongs towards persons foreseeably affected thereby.¹²⁹ But faultless breaches of strict contractual duties cannot be subsumed within the field of tort. The law of contract will not be superseded or enveloped by other doctrines unless three momentous developments occur in the law. First there would need to evolve, by whatever means, a doctrine of detrimental or injurious reliance whereby damages are payable for foreseeable, detrimental reliance on a promise. Secondly there would need to be the recognition of a general principle of reversal of unjust enrichment. Thirdly Professor Atiyah's

¹²⁵ J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 170.

¹²⁶ M. Bridge, "The Overlap of Tort & Contract" (1982) 27 *McGill L.J.* 872.

¹²⁷ G. Gilmore, *The Death of Contract* (1974) at 87.

¹²⁸ P. S. Atiyah, *The Rise & Fall of Freedom of Contract* (1979); B. J. Reiter in *Studies in Contract Law* (eds. B. J. Reiter & J. Swan, 1980) Ch. 8; G. H. L. Fridman, "The Interaction of Tort & Contract" (1977) 93 *L.Q.R.* 422; J. C. Smith, *Liability in Negligence* (1984); but cf. J. Holyoak, "Tort & Contract after *Junior Books*" (1983) 99 *L.Q.R.* 591, D. F. Partlett, "Economic Loss & the Limits of Negligence" (1986) 60 *A.L.J.* 64 and A. S. Burrows, "Contract, Tort & Restitution—A Satisfactory Division or Not?" (1983) 99 *L.Q.R.* who argue that contract is alive and well.

¹²⁹ G. H. L. Fridman, "The Interaction of Tort & Contract" (1977) 93 *L.Q.R.* 422 at 436; A. J. E. Jaffey, "Contract in Tort's Clothing" (1985) 5 *Legal Studies* 77 at 92; *Winfield & Jolowicz on Tort* (12th ed. 1984) at 7.

views¹³⁰ about the enforcement of purely executory promises would have to be accepted.

Professor Atiyah heretically questions the extent to which there is justification in morality or support in practice for the enforcement of purely executory promises, that is, where the promisee has neither relied on the promise to his detriment nor conferred a benefit on the promisor as a result of the promise. This scepticism is not universally shared. Many contract lawyers believe that the trust created by the expectation that performance of an executory promise given for consideration is legally enforceable is essential to the conduct of trade and commerce in a free-enterprise credit economy; and that enforcement of purely executory promises, given for consideration, accords with commonly accepted notions of morality.¹³¹

Given the method by which and the pace at which the common law evolves in our system, such dramatic innovations, if thought desirable, would obviously have to be introduced by legislation. It is inconceivable that a development as extreme as the virtual dismantling of the carefully constructed edifice of the law of contract could take place by judicial fiat within the foreseeable future. Nevertheless there is no doubt that recent developments demonstrate that the once largely separate fields of tort and contract are coalescing in a variety of respects. This process may be considered beneficial especially where the result is to overcome some of the perceived defects in the law of contract such as those flowing from the doctrines of consideration and privity, and the distinction between contractual terms and mere representations.¹³²

Clearly the law of civil obligations is undergoing considerable development and judges are displaying a willingness to be innovative in extending and even departing, from existing doctrines. There is an increasing awareness today among lawyers and law-makers of the artificiality of drawing a rigid distinction between tort and contract. It is likely therefore that, in circumstances where tort and contract overlap, collide or intersect, the disposition of judges will be towards a search for a just and rational solution for the particular problem, rather than a mechanical application of orthodox rules flowing from characterisation

¹³⁰ *The Rise & Fall of Freedom of Contract* (1979); "Contracts, Promises & the Law of Obligations" (1978) 94 *L.Q.R.* 193.

¹³¹ C. Fried, *Contract as Promise* (1981); G. H. Treitel, *The Law of Contract* (7th ed. 1984) at 6; *Anson's Law of Contract* (26th ed. 1983) at 1-3; *Chitty on Contracts* (25th ed. 1983) Vol. 1 at 1; A. S. Burrows, "Contract, Tort & Restitution—A Satisfactory Division or Not?" (1983) 99 *L.Q.R.* 217; L. L. Fuller & W. R. Perdue, "The Reliance Interest in Contract Damages" (1936) 46 *Yale L.J.* 52, 373 at 57-66; F. M. B. Reynolds, "Tort Actions in Contractual Situations" (1985) 11 *N.Z.U.L. Rev.* 215 at 230-1.

¹³² cf. D. Harris & C. Veljanovski in *The Law of Tort: Policies & Trends in Liability for Damage to Property & Economic Loss* (ed. M. Furmston, 1986) at 59 who consider that using the law of torts to plug gaps left by contract law is a 'second-best' solution to the more rational way forward which would be to widen the legal category of 'contract' to cover cases like *Junior Books* and *Hedley Byrne* (though this would probably need legislation); similarly, B. S. Markesinis, "An Expanding Tort Law—The Price of a Rigid Contract Law" (1987) 103 *L.Q.R.* 354.

of the claim as strictly one of tort or contract.¹³³ Thus, where a plaintiff's claim appears just and meritorious his legal advisers should not be dissuaded by traditional barriers or by an absence of direct authority, from mounting an argument on the basis of such expanding doctrines as negligent misrepresentation, promissory estoppel, restitution or unilateral contracts. Nor should they be hesitant in seeking to have damages awarded for whatever loss and on whatever basis yields the more just result, irrespective of whether this may appear to conflict with orthodox methods of assessment.¹³⁴

¹³³ Advocated by B. J. Reiter in *Studies in Contract Law* (eds. B. J. Reiter & J. Swan, 1980) at 264-5, J. G. Fleming, *The Law of Torts* (7th ed. 1987) at 169-70 and M. Bridge, "The Overlap of Tort and Contract" (1982) 27 *McGill L.J.* 872 at 913-4.

¹³⁴ P. Cane, "Negligence, Economic Interests and the Assessment of Damages" (1984) 10 *Monash U. L. Rev.* 17.