1

Hedley Byrne v Heller: Issues at the Beginning of the Twenty-First Century

KIT BARKER

I. Introduction

Aside from *Donoghue v Stevenson*,[1] there are few twentieth-century tort cases as well known, or as often cited in commonwealth jurisdictions as *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[2] Although the case's importance is clear, determining exactly what it stood for at the time—or indeed what it stands for now—is rather more difficult and remains a matter of persistent controversy. Variously, it has been construed as a case about liability for careless words,[3] about the scope of duties in respect of pure economic loss, or about the proper boundaries between our modern categories of contract, tort and trust (fiduciary duty). Some suggest that it resurrected an ancient form of action that was entirely familiar to lawyers of a former age,[4] while others see it as a landmark of modernism in English law. It has been understood as providing a commentary (laudatory or damning, depending on your point of view) about the way judges set about making new law in the common law system;[5] about the (im)proper role of private law in regulating information markets[6] or protecting persons in relationships of dependency;[7] about the need for proper 'rights thinking' in modern understandings of the tort

[1] *Donoghue v Stevenson* [1932] AC 562 (HL).

[2] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) ('*Hedley Byrne*').

[3] This is how the case itself reads, little mention being made of the fact that the losses were economic.

[4] P Mitchell, '*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Tort* (Oxford, Hart Publishing, 2010) 171. It is certainly true that this is how it would have been conceived historically. Whether it makes sense to continue to think of it in these terms is much more debateable.

[5] For recent damnation, see R Buxton, 'How the Common Law Gets Made: Hedley Byrne & Other Cautionary Tales' (2009) 125 *LQR* 60. See also Campbell (Chapter 5).

[6] Campbell (Chapter 5).

[7] See, eg, SR Perry, 'Protected Interests and Undertakings in the Law of Negligence' (1992) 42 *University of Toronto Law Journal* 247, 270–81; N McBride and A Hughes, 'Hedley Byrne in the House of Lords—An Interpretation' (1995) 15 *Legal Studies* 376.

of negligence;[8] about the fragile role of fictions in the law;[9] and about the relationship between equitable, common law and statutory remedies for misleading and deceptive practices. In fact, in the 50 years or so since it was decided, the case has been said to be significant in pretty much every way one can conceive of as a commentator—historically, conceptually, taxonomically, constitutionally, socially, jurisprudentially and economically. This is no small thing, when one considers that the claim which formed the focus of the House of Lords' attention on that fateful day failed straightforwardly and was disposed of on a narrow point. Rarely has so much that was *stricto sensu* immaterial to the outcome of a case been the subject of so much critical attention, or had such lasting reverberations.

Since 1963, much has happened to cause us to reflect further on the case. Economic loss liabilities in tort generally—and in cases of misstatement in particular—have become more extensive, more uncertain and more complex. The extension of liability we have seen is not just significant for the victims of misleading informational practices, who obviously welcome it, but also for governmental and professional advisory sectors, which have been exposed to a range of new and potentially burdensome liabilities. So significant has *Hedley Byrne* and its legacy proven for these actors that public bodies have curbed some of their more risky advisory practices;[10] and governments in many jurisdictions have intervened to permit the capping or redistribution of advisors' liabilities in order to reduce their legal exposure.[11] The perception among the governments implementing these changes has been that tort liabilities have been allowed to go too far and that they are potentially deleterious to the broader social welfare by undermining the viability of insurance and information markets, unfairly burdening defendants with disproportionate or crushing liabilities, or reducing plaintiffs' incentives to protect their own financial interests, thereby encouraging hedonistic 'compensation cultures' in which plaintiffs look to others to compensate their losses *ex post facto*, rather than to themselves *ex ante* for prudential precaution in making their investment decisions.

Whether any of these perceptions about the supposed empirical effects of the new tort liabilities is justified is what Sherlock Holmes might have referred to as a 'three pipe problem'.[12] It seems equally unlikely as likely.[13] Nonetheless, the idea that we live in an age when tort has gone too far is not unique to governments that have had professional advisor organisations or powerful insurance lobbies

[8] See, eg, R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 33–6; A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) ch 8.

[9] See, eg, K Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 *LQR* 461.

[10] One example in Australia is the cessation of the practice, in which some Councils used to engage, of issuing certificates to purchasers of buildings of their compliance with building regulations. For a case illustrating the risk, see *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 (NSWCA).

[11] For a critical, comparative overview, see K Barker and J Steele, 'Drifting Towards Proportionate Liability: Ethics and Pragmatics' (2015) 74 *CLJ* 1.

[12] A Conan Doyle, *The Adventures of Sherlock Holmes* (London, George Newnes, 1892) 188 ('The Red-Headed League').

[13] On the evidential gap, see Barker and Steele (n 11) 23–28.

banging on their doors. It is also shared by some judges and influential academic commentators.[14] In Australia, for example, it is now reflected in the way the High Court openly considers whether or not a plaintiff could reasonably have protected *himself* against a foreseeable financial loss, before determining that a defendant owed him a duty of care.[15] This more pro-defendant attitudinal shift is key to understanding the way in which negligent misstatement liabilities and economic duties are being modelled by courts in the modern day. Many of the progressive social welfare assumptions that prevailed in the age of *Hedley Byrne* (what the late Tony Weir once referred to as the 'let it all hang out' atmosphere of the 1960s)[16] are being questioned in more exigent, conservative times.

The recent series of cases in Australian law referring to the importance of self-protection in economic matters[17] prompts the interesting question of how the duty question posed in *Hedley Byrne* itself would now be determined by the High Court in the modern day, assuming there to be no operative disclaimer by an advisor. Are orthodox assumptions that a duty would exist on such facts still safe (if indeed they ever were)?[18] Although it is certain still to be accepted by courts that no contract is needed for there to be a negligence liability for pure economic loss, it is now potentially open to a defendant to argue that the *availability* of contract to a plaintiff as a risk-allocation mechanism is a good reason, on some facts, to deny that any economic duty of care is owed. The difference between these two positions (no contract duty does not necessarily mean no tort duty, but the availability of contractual protection for a plaintiff could preclude it) may be too subtle to be stable. Few have as yet dared (or perhaps been required?)[19] to argue the point, but there is nothing in principle to prevent the High Court in 2015 deciding that a sophisticated commercial party seeking and obtaining a financial reference about a client from the client's bank on a gratuitous basis is owed no duty of care, on the basis that it has the capacity to make alternative investigations about the client's solvency, to seek security from the client in the ordinary way, or to contract for the reference on a commercial basis.[20] The more restrictive, recent approach

[14] See, eg, J Stapleton, 'Duty of Care—Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 *LQR* 301; 'Pure Economic Loss Doctrine in Australia and Commercial Arrangements' (Paper delivered at the Bar Association of Queensland, Brisbane, 24 July 2014).

[15] See, eg, *Perre v Apand Pty Ltd* [1999] HCA 36; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; *Brookfield Multiplex Ltd v Owners Corporation Strata Plan* 61288 [2014] HCA 36.

[16] T Weir, 'All or Nothing' (2004) 78 *Tulane Law Review* 511, 549.

[17] See n 15. See also *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27; *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412.

[18] For the view that they were not, see Buxton (n 5), Mitchell (n 4), Swain (Chapter 3) and Robertson and Wang (Chapter 3).

[19] Most such claims in Australia will now be argued under the Australian Consumer Law, not in negligence. See Chapter 7.

[20] Once one accepts that a defendant can be expected to protect himself by negotiating contractual protection with the defendant or a third party, it also becomes difficult to ignore the question whether or not he could have obtained insurance, assuming evidence regarding the insurance market to be available and non-contested. See *Johnson Tiles* (n 17). Questioning traditional paradigms regarding the relationship between liability and insurance see R Merkin and J Steele, *Insurance and the Law of Obligations* (Oxford, Oxford University Press, 2013).

towards the recovery of pure economic losses is not unique to Australia, but can be detected in the slowing or reversal of the expansionist trends of the 1970s and 1980s elsewhere across the common law world.

There have therefore been significant ideological shifts within and around negligence law as a whole in the last few decades, driven by the different social conditions of the modern day. The new ideology is conservative with a small 'c' and essential to understanding the potential reach and role of advisor liability in future years. The new conservatism sits well with the agenda of modern 'rights' theorists such as Professor Robert Stevens,[21] who has suggested at one conference I have attended (perhaps only half tongue-in-cheek) that the law of negligence needs to take a 'giant step forwards to the nineteenth century'. Humour aside, he is making a serious point about both the bounds of liability, which he regards as overextended, and the abstruse reasoning upon which it is too often based. As we shall see, some contributors to this volume quietly rue the attitudinal change that has taken place and the shift away from welfarism back to the mechanisms of market voluntarism. Others clearly regard it as welcome and argue that it should be more radical still, such that *Hedley Byrne* and negligent misstatement liabilities should be excised from the law[22] (or the law of tort)[23] altogether, at least as regards recovery for pure economic loss.

The fragility and uncertainty of the ideological and social changes occurring in common law jurisdictions make general predictions about likely direction difficult. They also explain the doctrinal tensions that are evident in the case law of all the jurisdictions we touch on in this work; and indeed the varying positions that are taken by jurisdictions more generally regarding the scope of advisors' economic duties in cases involving remoter relationships.[24] On the one hand, the realisation that the recent global financial crisis has been driven at least in part by under-regulation of private financial orderings suggests that advisors such as accountants, auditors and lawyers ought to be playing a more attentive and active role in policing market failures. On this approach, stringent tort rules are needed to incentivise efficient practices of detection and disclosure and the restriction of liabilities to contractual or 'near-contractual' relationships is counter-intuitive. On the other hand, the true social cost of these cataclysmic failures is clearly well beyond the capacity of individual actors within the information economy to bear, and imposing crushing liabilities upon them in a way that disregards the practicalities could itself have unforeseen and undesirable social effects.

Another complicating feature for those seeking to understand the contours of misstatement liability as a whole in the modern day is the fact that the tort

[21] See n 8.

[22] Campbell (Chapter 5).

[23] Beever (Chapter 4).

[24] For an excellent comparative view of this issue, see V Palmer and M Bussani, *Pure Economic Loss—New Horizons in Comparative Law* (London, Routledge-Cavendish, 2009) case-study six (auditor's liability). On the US position, see also J Feinman, 'The Economic Loss Rule and Private Ordering' (2006) 48 *Arizona Law Review* 813.

liabilities of advisors under negligence doctrine now intersect in several common law jurisdictions with (relatively) new 'strict' liability 'consumer protection' provisions, which provide generous remedies to the victims of misleading and deceptive trade practices;[25] with statutory remedies for pre-contractual misrepresentation;[26] and with equitable remedies and doctrines in cases involving estoppel, breach of fiduciary duty and other types of equitable fraud.[27] Even ignoring the laws of defamation, malicious falsehood and passing off (all of which involve remedies for mistruths of one sort or another), misstatements now potentially give rise to liabilities under multiple analytical heads and the various categories of liability can give rise to quite different remedies, governed by distinct principles. An increasingly urgent question is how we should now understand and define the relationship between the various regimes. Should principles of equitable and common law compensation be subjected to the same basic analytical framework?[28] Should the several principles and sources of misstatement liability created by judges be formally restated to bring greater clarity and coherence to the law?[29] Since the mid-1970s, statutory regimes have supplanted tort remedies for misstatement in Australia and New Zealand in a significant number of cases and this has, for all its good intentions, introduced a brand new set of problems, as we shall see. In the United States, the American Law Institute is now engaged in its own review of advisor liabilities as part of the *Restatement (Third) of Torts: Liability for Economic Harm*.[30]

A final hazard faced by the law of misstatements in the twenty-first century is the high degree of complexity and uncertainty that currently attends its norms. The uncertainty stems in part from the overlap between contractual, tortious, equitable and statutory principles—from what one might call 'source proliferation' or 'source co-ordination' problems—but it also flows from more basic conceptual and doctrinal confusions within the discrete fields of law themselves. Perhaps the most obvious of these relates to the role of the concepts that are commonly regarded as most central to the judgments in *Hedley Byrne*—the idea that duties of economic protection in the tort of negligence are (or should be) based

[25] See the Australian Consumer Law (Competition and Consumer Act 2010, schedule 2) (Cth) s 18 (formerly the Trade Practices Act 1974 (Cth) s 52) and associated State and Territory legislation; Fair Trading Act 1986 (NZ) s 9; Bant and Paterson (Chapter 7).

[26] Misrepresentation Act 1967 (UK); Contractual Remedies Act 1979 (NZ) s 6; McLauchlan (Chapter 12). See further J Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 3rd edn (London, Sweet & Maxwell, 2012).

[27] See Finn (Chapter 6); IE Davidson, 'The Equitable Remedy of Compensation' (1981–1982) 13 *Melbourne University Law Review* 349.

[28] A Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 *OJLS* 1.

[29] Restatements are best known in the US, but similar projects have started to appear in complex fields of private law even in singular jurisdictions. See A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford, Oxford University Press, 2012) reviewed by K Barker, 'Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales' (2014) 34 *OJLS* 631. The complexities and confusions surrounding the common law of tort in many jurisdictions might well make such projects valuable even where the jurisdiction is smaller and less disparate than in the US.

[30] First Tentative Draft (St Paul, Minn., ALI, 2012) ('*Third Restatement*').

on 'assumptions of responsibility' and/or 'reliance'.[31] In the jurisdictions in which these concepts have taken off, they have proven unruly; and their role and utility both within and beyond misstatement law is the subject of several important contributions to this work. The costs of the confusion are high, not simply in terms of wasted litigation, but also in preventing defendant advisors and their insurers arranging appropriate levels of cover and setting their prices in such a way as to make prospective liabilities sustainable. The irony is that while courts often insist that indeterminate (uncertain) *amounts* of liability are a normative problem for defendants in misstatement cases, indeterminate *liability rules* are currently woefully prevalent in many jurisdictions.

The upshot is that the debates that *Hedley Byrne* originally inspired about the respective roles of tort, contract, equity and statute in protecting economic interests; and about the proper balance between contractarian, free-market ideology on the one hand, and interventionist regulatory welfarism, on the other, have grown in intensity, significance and difficulty over the last 50 years. We have witnessed how these debates panned out in favour of plaintiffs in the relatively good times of the 1960s and 1970s and are now confronted with the awkward question of how they should be answered (and whether indeed they should *in principle* be answered any differently) when markets fail and money is short. It is naïve to think that judges are completely unaffected in the way they develop the law by the broader social conditions within which it operates, even accepting that there are limits to their authority and competence to set social policy in the way that government does.

II. Aims and Overview

There is therefore much to think about. The purpose of this work is to look anew at *Hedley Byrne* from a variety of different perspectives, drawing on the more recent experience of five important common law jurisdictions—the United Kingdom, the United States, Canada, New Zealand and Australia. The chapters which follow review the laws of misstatement and pure economic loss from a number of complementary points of view—comparative, historical, conceptual, theoretical and economic. The aim is not simply to engage in retrospection, but to provide a stable platform for debate upon which a clearer and better law of misstatement(s) might be built in the twenty-first century—one that is fair and comprehensible to

[31] On which see generally, J Beale, 'Gratuitous Undertakings' (1891) 5 *Harvard Law Review* 222; A Weir and R Dias, 'Liability for Syntax' [1963] *CLJ* 216, 217; P Cane, 'The Metes and Bounds of Hedley Byrne' (1981) 55 *Australian Law Journal* 862, 869; Perry (n 7); Barker (n 9); B Coote 'Assumption of Responsibility and Pure Economic Loss in New Zealand' [2005] *New Zealand Law Review* 1; K Barker, 'Wielding Occam's Razor—Pruning Strategies for Economic Loss' (2006) 26 *OJLS* 289; R Brown, 'Assumption of Responsibility and Loss of Bargain in Tort Law' (2006) 29 *Dalhousie Law Journal* 345.

all involved. This means confronting some important contemporary issues and challenges.

Part 2 opens the debate with a discussion of historical, conceptual and theoretical issues. The focus here is on the background to *Hedley Byrne* and the way it has been received in Australia (Chapter 2); the nature, meaning(s) and use(s) of the concept of 'assumption of responsibility', both in negligent misstatement cases and more broadly in negligence law (Chapter 3); the proper way of understanding the foundational basis of negligent misstatement liability (Chapter 4); and its rationality (or otherwise) from the liberal-economic point of view (Chapter 5). Part 3 then examines the intersections between tort liability and the liability of advisors and others for equitable fraud (Chapter 6) and under the strict liability statutory regime for misleading or deceptive trade practices that now dominates the field in Australia (Chapter 7). These chapters, along with some of the later contributions in the work, set tort liabilities and concepts in their context and address the challenge of how properly to configure and co-ordinate liability rules that have different sources and historical traditions. The same Part also contains an important contribution on the way in which the liabilities of advisors and other co-defendants responsible for causing the same financial loss are now distributed *inter se* (Chapter 8). These rules are extraordinarily complex and have, since *Hedley Byrne*, been altered in some jurisdictions to reduce the exposure of 'deep pocket' or 'peripheral' defendants (including advisors) to the risk of their co-defendants' insolvency.

The final Part of the book ('Comparative Perspectives') contains specific contributions addressing aspects of the law in each of the main common law jurisdictions. As well as having a distinct, jurisdictional focus, these contributions build upon discussions in previous chapters and contribute further to the development of their themes. Chapter 9 hence examines the modern English law, but revisits in the process the analytical and theoretical debates that raged in Part 2. Chapter 10 tracks the American law of negligent misstatement from its early days to the most recent *Third Restatement* draft, highlighting ideological and political shifts (from classical private ordering to public ordering, and back again) along the way. Chapter 11 examines the modern Canadian law and advocates a return to *Hedley Byrne*'s earlier logic and concepts. Chapter 12 considers both the way in which the negligence liability posited in *Hedley Byrne* came to be applied to pre-contractual misrepresentations (the author clearly thinks this was a mistake) and comments on the New Zealand experience with two statutory regimes—one governing pre-contractual misrepresentations, which is unique in the common law world, the other governing misleading or deceptive trade practices, which is similar to that existing in Australia. The lessons here are salutary, but not very encouraging. Finally, Chapter 13 highlights some of the consequences for negligence law of its neglect in Australia in the shadow cast by the powerful statutory protections now prevailing in that jurisdiction. It focuses on the confusions currently attending duty of care rules in 'three-party' misstatement cases and tries to bring greater order and rationality to them.

III. History, Concepts and Theory

A. History

Hedley Byrne was not the first negligence case to contemplate the award of monetary compensation for pure economic loss caused by false information outside of contract. As Professor Feinman points out, America got there much earlier in *Glanzer v Sheppard*.[32] Nor was it just the common law that historically awarded monetary compensation. Professors Swain and Finn hence both refer to a brief period in the nineteenth century when equity developed its own jurisdiction to 'make good' misrepresentations of both fact and intention, even without a defendant being proven dishonest. This jurisdiction performed much the same function as the modern law of contract, stripped of its formalities, or the modern law of tort.

On this there appears to be much agreement. Less clear is the answer to the specific question whether the action in *Hedley Byrne* itself would have succeeded had no disclaimer of responsibility been made. Would a duty have been owed, or breached? As regards the first issue, it has commonly been assumed that a duty would indeed have arisen, but both Professor Swain (Chapter 2) and Professor Robertson and Julia Wang (in Chapter 3) hint that this may be a lie that has attained the dignity of age.[33] Although the respective contributors read Lord Pearce slightly differently, both resolve that there was no clear majority in favour of that conclusion, and that both Lord Morris and Lord Hodson seemed set against it.

As regards breach, things are perhaps more intriguing still. The issue was never considered by the House of Lords, but the first instance judgment of McNair J, which we append to this work, provides some fascinating insights. Heller and Partners in fact gave two references, not one, as is sometimes assumed. On the 18th August 1958 it gave an oral reference to the plaintiff's bank (National Provincial Bank ('NP')) regarding the capacity of one of its clients (Easipower) to meet a contract worth £8–9,000. This did not include any disclaimer of responsibility in its terms, although it appears that in the telephone conversation in which the reference was sought, NP made clear that this was the basis on which it was understood as being given. The reference indicated that Easipower was 'respectably constituted' and 'good for its normal business engagements'. The contents of the oral reference were relayed by NP to the plaintiff in a letter dated the 21st August. This letter indicated that it was for the plaintiff's 'private use' and contained a disclaimer on the part of NP and NP's manager of any responsibility for its accuracy.

[32] *Glanzer v Sheppard* (1922) 135 NE 275 (NY). In Chapter 2, Swain points to the earlier English case of *Cann v Willson* (1888) 39 Ch D 39, but concludes that it was not 'strong authority'. See more generally, M Lobban, 'Nineteenth Century Frauds in Company Law: Derry v Peek in Context' (1996) 112 *LQR* 287, 'Contractual Fraud in Law and Equity, c1750–c1850' (1997) 17 *OJLS* 44.

[33] A turn of phrase attributable to the American journalist HL Mencken.

On the 4th November Heller supplied a second, written reference to NP regarding Easipower's capacity to pay for a contract worth the much larger sum of £100,000. This reference is the better known. It was short, stated to be for the 'private use' of NP and was apparently much more guarded in its terms. Although the same phrase ('respectably constituted, good for its ordinary business engagements') was repeated, the text added 'the figures are larger than we are accustomed to see'. That letter was relayed to the plaintiffs by NP on the 14th November.

Throughout, Heller knew that Easipower was the subsidiary of another company, Pena Industries Ltd, which was in liquidation. This fact was indeed the subject of express comment by Heller in the first reference. Heller knew that efforts were being made by Easipower's managing director to acquire Easipower from the liquidator, but it also knew that these efforts had been unsuccessful. By the time the second, written reference was supplied, it also knew that the director had 'wholly falsified' his financial projections so as to give a misleading impression of Easipower's prospects as an independent trading entity.

McNair J had no hesitation in finding that insufficient care had been taken in the giving of either the first or second reference, but Professor Buxton has recently suggested that his conclusions were wrong because the references both contained 'coded warnings' or 'red flags' regarding Easipower's viability, which would have been readily apparent to NP.[34] These observations are astute, but I respectfully question their conclusive force. Precisely these arguments were put by the defendant, but rejected by McNair J, before whom all the facts lay. As regards the first reference, his Honour admitted that the evidence regarding the way bankers might understand it was 'not very precise', but decided that whatever special, subtle meanings might be attributed to its words, it was too favourable overall and failed sufficiently to identify the known risks. As regards the second reference, he accepted that the terms used were much more cautious, but thought that it was also still too positive in tone, given Heller's knowledge by that time that financial figures relating to Easipower were false and that the managing director had failed in his bid to rescue the company from the liquidator's grasp.

Part of the difficulty in resolving the issue of precisely what Heller should have said in its references stems from an uncertainty about who it thought might use them. The plaintiff's identity was never disclosed to Heller by NP. The way in which NP itself denied responsibility when reporting the contents of the first reference might also suggest that Heller provided the required information on that occasion merely to facilitate a reference that *NP* was providing to Hedley. On the other hand, it seems unlikely that Heller really thought the information was required for NP's own purposes, rather than those of an anonymous client. Perhaps the clinching point (and this was the one that seems to have appealed to McNair J) is that, even if Heller might reasonably have anticipated that the references would

[34] Buxton (n 5) 62 (describing Mc Nair J's conclusion as 'a striking finding'). Apparently Heller was keen to contest this issue on appeal, but never got the chance. For another doubter on this issue, see Campbell (Chapter 5, text at n 28 and n 84).

be read (or explained to a client) by a banking industry expert, Heller knew, by the 4th November, of significant additional risks: it was aware that the financial projections were false and that Easipower was fast heading for the rocks, with no sign of rescue. Even if, therefore, Heller was 'entitled to use the private language of bankers', as Buxton says,[35] it is unclear that it went far enough to downplay the potentially falsely favourable impression that its words might convey on the occasion of the second reference. It is hard to take issue with McNair J's conclusion on this point without having fuller access to the primary evidence.

The puzzle as to whether or not the House of Lords would have allowed the claim in *Hedley Byrne* in the absence of a disclaimer is probably now beyond our wit to solve. This is not just a product of our not being able to re-marshal all the evidence. Historical inquiries do not deal well with hypothetical questions about human decision making as opposed to empirical matters of fact because the problems posed by such questions are not simply epistemological, but inherently indeterministic.[36]

B. Concepts, Taxonomy and Foundational Theory

Three separate, but closely interrelated theoretical debates flowing from *Hedley Byrne* are canvassed in Part 2, although they are also addressed by later contributions in Part 4 'Comparative Perspectives'. The first relates to the foundational normative basis of the right foreshadowed in the case and subsequently made good in other misstatement cases involving pure economic loss. The second is a taxonomic debate about whether such cases 'belong' to the category of tort, contract or trust (consensual relationships of dependency or inequality). The third concerns the appropriate conceptual apparatus to apply when determining duty of care questions in cases of the misstatement/economic loss type. These issues have been very extensively debated in the last 50 years and it is appropriate now to try to bring matters to a head.

(i) Misstatement Liabilities as Consensual Private Ordering

Those who believe that the primary rights underpinning plaintiffs' actions in misstatement cases are based on the defendant's own will or consent (whether subjectively, or objectively conceived) tend to say that they belong in contract and argue that duties of care should only arise where there is a 'voluntary assumption of responsibility' or 'undertaking' to the plaintiff on the defendant's part. They emphasise the closeness of the relations in cases such as *Hedley Byrne* to formal

[35] ibid.

[36] The language is drawn from H Reece, 'Losses of Chances in the Law' (1996) 59 *MLR* 188. An event is indeterministic if it 'could not have been predicted at any point in the past, it cannot be predicted in the present even given unlimited time, resources and evidence and we cannot imagine how it would become predictable in the future' (at 194).

contracts, and the 'near-privity' of the parties. In consequence, they set such cases apart from others in negligence law and maintain that it is inappropriate to assimilate them into its broader analytical framework as mere examples of party 'proximity', or 'neighbourhood' in the Atkinian sense.

For such commentators, if any duty arises at all, it is not because the law (the state, acting through its courts) has chosen to grant plaintiffs any qualified primary 'right' to the protection of their economic interests, but rather because defendants themselves have exercised their will to create or bestow such rights on plaintiffs. Similarly, when judges talk about the importance of ascertaining the 'purpose' or 'end aim' of the information a defendant has provided, or whether or not the defendant 'invited' or 'intended' the plaintiff to rely on it in determining duty questions in misstatement cases, this reflects the fact that the source of the plaintiff's right lies within the defendant's will. This is a classical, contractarian, formalist model of obligation, which focuses on the value of autonomous private ordering. It excludes from consideration pragmatic 'policy concerns' about the potential effects of liability on defendants or markets, sweeping aside all talk of such matters as irrelevant to what is straightforwardly an ethical question to be decided between the parties themselves on the basis of their mutual wills as self-determining agents.

This type of vision is strongly endorsed by Professor Beever in Chapter 4 and has found favour with a number of other distinguished commentators,[37] many (but not all) of whom have been inspired by Professor Ernest Weinrib.[38] All of them rely extensively on the speech of Lord Devlin, whose language in *Hedley Byrne* is undoubtedly closest to the contractual paradigm.[39] Beever concludes that *Hedley Byrne* belongs within contract, not tort, and argues that the only reason it is not so placed is because people have overly rigid and inaccurate views about the nature of contract, which is not (or should not always be) constrained by the doctrine of consideration. He is attracted to the broader conception of contract law that exists in some European systems.[40] The same conclusion has also recently been expressed in the United States by Mark Gergen,[41] who details at some length the way in which understandings of contract law have shifted over time and who argues that the more realist environment that prevails in the United States in modern times could allow some of the formalist trappings of contract to be dropped.

[37] See, eg, Stevens (n 8). Compare P Benson, 'The Basis for Excluding Liability for Economic Loss in Tort' in D Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Oxford University Press, 1995) 427, 450–54. The consensual construction of 'common calling' cases also appealed to Blackstone: P Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 *LQR* 184, 189. The strength of Locke's influential social contract theory at the time that Blackstone was writing may in part explain this approach.

[38] E Weinrib, *The Idea of Private Law* (Cambridge, Mass., Harvard University Press, 1995).

[39] Mitchell (n 4) 196 suggests that Devlin may himself have been influenced by Professor Winfield, whose lectures he may have attended at Cambridge.

[40] On the consequences of adopting a narrow conception of contract, see B Markesinis, 'An Expanding Tort Law—The Price of a Rigid Contract Law' (1987) 103 *LQR* 354.

[41] MP Gergen, 'Negligent Misrepresentation as Contract' (2013) 101 *California Law Review* 953. See also A Jaffey, 'Contract in Tort's Clothing' (1985) 5 *Legal Studies* 77.

This approach chimes with a weakening of the classical paradigm of contract law elsewhere in the common law world through estoppel doctrines[42] and statutory extensions to privity rules.[43]

Qualified support for Beever's approach is expressed by Professor Feldthusen in Chapter 11[44] when criticising the Supreme Court of Canada's pragmatic approach to the duty question in *Hercules Management v Ernst & Young*.[45] Feldthusen sees Beever's analysis as an antidote both to the idea that there are any *general* rights to economic welfare in tort and to the more open-textured type of policy debacle that typically attends the pragmatist approach. For these reasons, Feldthusen is also an enthusiast for the idea that duties of care should be limited in misstatement cases by reference to the existence of an assumption of responsibility, which he defines as an objective intention on the defendant's part to induce a plaintiff to rely on him. One serious problem with the reasoning in *Hercules*, he argues, is that it wrongly implies that a duty of care is justified by a plaintiff's *unilateral* decision to rely on information that another person has supplied.

Some aspects of Beever's analysis also appeal to Professor Campbell in Chapter 5. This is initially very surprising, since Beever's premises are formalist and Kantian, whereas Campbell is an unashamed, pragmatic liberal economist. The fact that they nonetheless evidently agree on some things serves to demonstrate the point that liberal economics and Kantian deontology both have private ordering, decentralised decision making and individual choice at the heart of their worlds, even if they are otherwise awkward bedfellows. Both are united in detesting regulatory judicial intervention in financial markets.

If I interpret him correctly, Campbell goes even further than Beever. Rather than simply suggesting that *Hedley Byrne* is justified, but better classified within contract, he says that the idea that Heller might have been under any duty of care is straightforwardly wrong. The notion that a person can have a right to the protection of his economic interests without having paid for such a right is, from his point of view, 'economically irrational and, what is the same thing [question—is it?], morally unjust'. This is because it indemnifies him in respect of his choice to rely on something someone else has said, without him having had to pay for the indemnification. He is a freerider on another's intellectual capital.

The paradigm of payment as a source of duty and right in economic affairs that underlies Campbell's approach is reflected in the draft *Third Restatement*, where it is stipulated that for a duty of care to be imposed on a defendant in a misstatement case, he must be acting either in the course of business or trade, or in a transaction in which he has a 'pecuniary interest'.[46] The rationale of such liabilities is said to

[42] This weakening is strongest in those jurisdictions that allow promissory estoppel to work as a sword, such as Australia. See *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (HCA).

[43] eg Contracts (Rights of Third Parties) Act 1999 (UK).

[44] The qualifications are significant. Unlike Beever, Feldthusen places misstatement liabilities within tort; and accepts that they are not voluntary. His position is closest to Perry's (below), although there is again no exact match.

[45] *Hercules Management v Ernst & Young* [1997] 2 SCR 165 (SCC) ('*Hercules*').

[46] *Third Restatement* (n 30) §5(1).

be that they serve as a 'substitute for a contract between two parties who cannot conveniently write one'.[47] Like Campbell's, this approach also appears to view the economic world as primarily a sphere of self-interested private ordering. It does not, however, tell the whole American story. United States courts have, Professor Feinman points out in Chapter 10, taken a variety of different positions on misstatement duties since *Glanzer*, some of which are clearly more welfarist than others. In the wake of the *Restatement (Second) of Torts* of 1965, some of these cases came close to imposing liability according to a foreseeability standard, provided no dangers of indeterminate liability raised their ugly head. But in more recent years, Feinman signals, a significant body of courts (following the New York commercial jurisdiction) have reverted to more classical paradigms that impose near-privity-like restrictions on the sorts of relationships giving rise to duties of care. These restrictions are reflected in a focus on the need for close 'linking' or direct dealings between the parties, and on the defendant's intentions, understandings and motivations.

In Chapter 12, Professor McLauchlan also suggests an implicit preference for the conception of misstatement liability as private ordering, at least in the context of pre-contractual negotiations. This is an especially sensitive context commercially and one in which norms of self-protection are clearly at their strongest in the classical paradigm. In a candid reappraisal, he suggests that *Hedley Byrne* never intended to introduce duties of care into this context. Later decisions that did so in the 1970s were the product of confusion. The duty envisaged in *Hedley Byrne* itself was based on the idea of an objective (voluntary) warranty of care and it has few advantages for plaintiffs in the pre-contractual context in any event, given the other remedies likely to be available on such facts.

(ii) Misstatement Liabilities as Duties Imposed by Public Courts

At the other end of the spectrum, there are those who believe that the duty in misstatement cases and cases of economic loss more generally has nothing to do with the parties' wills, other than in the most rudimentary sense that is true in all tort cases, namely, that it is always a basic precursor to legal responsibility in any tort case that a defendant's *actions* (note—not *duties*) were voluntary. On this view, negligent misstatement cases are in principle no different from any other type of negligence case. Words are simply another form of conduct that can materially prejudice others' interests (rather like the making of defective products) and duties of care arise from the basic normative premise that we ought to take reasonable care to avoid harming the interests of others who may foreseeably and directly be affected by what we do or say. For such commentators, *Hedley Byrne* rightly belongs in tort and it is appropriate to approach it within the same basic analytical framework as any other negligence case. The 'special relationship' requirement is simply one instantiation of the sort of 'proximity' relationship that gives rise

[47] *Third Restatement* (n 30) comment (c) to §1 ('invited reliance').

to duties of care elsewhere in the law, its added stringency reflecting the need to constrain duties based on the foreseeable effects of careless behaviour for countervailing ethical or pragmatic reasons. Economic rights and duties are hence a product of a mix of basic ethical considerations relating to fault and legitimate policy concerns, not private ordering; and they are certainly not something we should have to pay for. Duties of care in respect of the economic losses of others are, on this view, simply progressive, incremental extensions of an existing, welfarist tradition in tort law that is exhibited historically though the torts of deceit, injurious falsehood, passing off, procurement of a breach of contract, intimidation, conspiracy and wrongful interference with another's trade. They exhibit the incremental creation of new, qualified rights of economic protection outside of instances in which the defendant is dishonest, or happens to have some harmful purpose in mind. This gradual genesis of additional economic rights itself reflects the rising importance of pure economic interests in the modern world, and the transition of holdings of wealth from tangible to intangible forms.

To my knowledge, no one in this camp takes issue with the idea that a genuine promise to take care in the provision of advice that is reasonably and detrimentally relied on by a plaintiff ought, in principle, to give rise to liability for economic loss. They simply tend to push such cases into contract law and its equitable acolytes in estoppel. Crucially, however, they refuse to confine misstatement or economic loss duties to cases in which such promises can be inferred from a defendant's behaviour (which is always a controversial matter), and they are sceptical of the idea that this is what is really going on in the law. They hence point to a host of tort cases in which duties have been imposed, where the inference of any promise of care on the defendant's part to the plaintiff seems not to be feasible without engaging in the type of fiction that rapidly brings the law into disrepute.

This sort of analysis is endorsed by Professor Robertson and Julia Wang (in Chapter 3), by Professor Witting (in Chapter 9)[48] and by myself (in Chapter 13).[49] Robertson and Wang argue that there is nothing unique, nor particularly helpful, about the use of the concept of an 'undertaking' or 'assumption of responsibility' in negligent misstatement cases. They demonstrate how the concept has been used in a wide variety of cases beyond misstatement and economic loss, including cases involving omissions and non-delegable duties of care; and they seek to dispel the illusion that there is anything meaningfully consensual about the obligations that arise in such instances. This analysis brings them into head-on collision with Beever. They are supported by Professor Witting, who also firmly rejects the idea that negligent misstatement cases are contractual, or that 'assumptions of responsibility' are anything more in most cases than conceptual devices manipulated by courts to achieve particular moral and policy outcomes. Such manipulation, he says, is clearly evident in English law in the case of *Williams v Natural Life Health*

[48] See also, C Witting, *Liability for Negligent Misstatements* (Oxford, Oxford University Press, 2004) ch 9; 'Duty of Care: An Analytical Approach' (2005) 25 *OJLS* 33.

[49] See also Barker (n 9 and n 31).

Foods Ltd.[50] Witting is scathing of the view that there is no such thing in tort law as an economic right that is not created by the defendant himself and he strongly asserts the view, which he says is pretty clear from the judgments in *Hedley Byrne* itself, that duties in respect of words are nothing more, nor less, than examples of duties that are imposed as a result of proximate relationships.

In Chapter 13, I feed some of these ideas into an analysis of the criteria that are applied by Australian courts in what are, in many ways, the 'crux' misstatement cases—those in which the relationship between an advisor and the person relying on his advice is 'indirect'. These cases (along with those involving disclaimers)[51] often strain the contractual paradigms and analogies relied on by 'voluntarists' beyond tolerance, in my respectful view. Whilst acknowledging the presence in the case law of factors such as the 'purpose' for which information is given, or the defendant's 'intentions' as to how it should be used (or who should use it), I suggest alternative, non-voluntaristic explanations for these concepts that root the cases firmly in tort law's protective, welfarist tradition. Intentions and purposes go, I suggest, to the foreseeability of harm, to a defendant's knowledge of its prospect and to the reasonableness or otherwise of a plaintiff's use of the information in question. They are not to be regarded, as Professors Feldthusen and Beever conceive of them, as stand-alone requirements for the existence of misstatement duties in their own right.

Looking beyond these contributions, there is another influential view from the United States that must be mentioned—that of Professor Stephen Perry.[52] Unlike Beever, Perry conceives of tort duties in economic loss cases as rightly belonging within that sphere and as genuinely imposed by courts, not voluntary. He nonetheless regards 'undertakings' and defendant 'intentions' as key moral concepts that serve to generate prima facie duties of care that would not otherwise exist in such cases. An 'undertaking' here is not (as I have suggested Beever to understand it) an implied promise to take care, or a manifestation of consent that itself serves to create a new economic duty. It is an objectively manifested, deliberate intention to induce another person to believe he may rely upon one, bringing about a relationship of dependency that interferes with that person's freedom of choice.[53] The interest protected by courts in cases like *Hedley Byrne* is hence not an *economic* interest that the plaintiff has at all (because such interests do not normally get protected in tort law), but the plaintiff's economic loss serves to help quantify the

[50] *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL) ('*Williams*').

[51] Cases in which a defendant has disclaimed responsibility, but still been found to owe a duty of care, are inconsistent with voluntaristic accounts of liability, whether the assumption of responsibility concept is construed subjectively or objectively. This was the point in *Smith v Eric Bush* [1990] 1 AC 831 (HL) (where liability was found despite the presence of a disclaimer). The only possible exception would be where a plaintiff was unaware of the relevant disclaimer (when it might still be logically possible to base liability on an objective approach to the defendant's intentions).

[52] Perry (n 7).

[53] ibid 281–82.

consequences of the defendant's interference with his *altogether distinct* right to make autonomous decisions.[54]

Some aspects of this analysis come close to McBride and Hughes' slightly later thesis in 1995, according to which the crucial driver of duty is the defendant's creation and abuse of a relationship of power or trust.[55] That language is certainly reflected in the opinions of some judges, including both Lord Reid in *Hedley Byrne* itself and Barwick CJ in *Mutual Life and Citizens' Assurance Co Ltd v Evatt*.[56] It makes the idea of reliance (dependence) the key one, not assumption of responsibility. But Perry's is actually a much more radical idea than simply the one that fiduciary (or fiduciary-like) relationships give rise to obligations of economic protection. It envisages the creation by tort law of legal rights to personal autonomy per se, which is a very radical, welfarist claim.[57] On Perry's view, *Hedley Byrne* is hence highly significant, but for reasons very different from those we customarily associate with the case. It certainly is not a case about pure economic loss.

From the point of view of the commentators and judges who disavow the language of 'assumed' duties or 'undertakings', a key point of Perry's with which they can nonetheless all agree is this: however the individual circumstances are described that give rise to liabilities in negligence for pure economic loss, the primary tort duties involved are *not* voluntarily created by defendants. Perry makes his position on this clear, by citing an important point made by Professor Raz that is all too often missed by theorists.[58] The mere fact, he points out, that a defendant chooses to act in a particular way (undertake a particular task), even in the certain knowledge that a legal duty of care will attach to his action, does not mean that the defendant has any normative power to create the duty, or that he is therefore its creator. It is courts that have the power and courts that create the primary duties. Tort law is a welfarist, public ordering still.

(iii) Prompts for Future Thought

It is not possible to fully resolve the debate here. Professor Winfield noted in 1926 that whether or not the duties born by legal advisors and others exercising 'common callings' are 'imposed' or 'assumed' was contested as long ago as the seventeenth century,[59] when the forms of action (on this occasion, 'assumpsit') served to suppress thinking about legal rights, as opposed to legal procedures. What hope is there that we shall reach unanimity now, all at once, when minds as great as those of Coke and Mansfield were unable to come to a clear view? Furthermore, it seems unlikely that the *ideological* oppositions that are evident in current

[54] ibid 250.

[55] McBride and Hughes (n 7).

[56] *Mutual Life and Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 (HCA).

[57] This is not to say that the idea is normatively unattractive. But as things stand in the law, autonomy is a value reflected within certain existing legal rights, not a free-standing right in itself. That is why I describe this claim as radically welfarist.

[58] Perry (n 7) 286. The same point is made by Feldthusen (Chapter 11).

[59] Winfield (n 37) 189.

debates will be easily reconciled. It is hard to prise anyone from their world view, even if you can persuade them to organise their office more rationally. Although consensus is an end aim of mine, I am also a realist. I confine myself for present purposes to making just four points, as prompts for further thought.

First, it is clearly possible to believe that the law of tort is about primary 'rights' without succumbing to the idea that such economic rights as it gives are necessarily the product of private ordering.[60] From the Hohfeldian point of view, whenever duties arise in cases of pure economic loss (as it is clear that they sometimes do), they are necessarily attended by correlative, qualified rights. This means that economic rights do exist in tort (because courts say that economic duties do), but it also says nothing about the origin or rationale of such rights. Rights do not come with any particular set of normative batteries supplied—they can be fuelled by a variety of different normative considerations.

Second and relatedly, it is surely possible to accept that law does and should create some qualified rights to reasonable care in respect of one's economic interests, without accepting that these rights will either be especially common ('general' in one sense of that word), or that the only question relevant to their formulation is the free will of the respective parties. The really important question is—what factors make out a 'special' case for duty? Is what we are looking for the existence of some additional *positive* reason for a duty that does not normally exist, or are we looking for the *absence* of things that otherwise might cause problems if liability for reasonably foreseeable harm were imposed—the absence of reasons *against* liability, such as worries about undermining free competition, party autonomy, risk allocation, norms of self-protection, or information markets?[61]

In practice, courts articulate a variety of factors that work together to create qualified economic rights, some of which are positive and some of which are negative. The existence of a genuine promise of care made to a plaintiff might be one of these, providing a good, positive justification for duty, and it would then simply be a question of taxonomy whether we located the case within contract or tort. It could genuinely fall within both: the promise might itself create a new duty that is *authentically* consensual (and therefore classically 'contractual' save for the absence of formality), and simultaneously prove specific knowledge on the part of a defendant that his careless words may harm a particular plaintiff's interests, thereby evidencing a relationship sufficiently close, determinate and direct to justify courts *imposing* a duty of care upon him (in tort). Nonetheless, the fact that promises could indeed positively justify economic duties of care in misstatement cases does *not* mean that tort law has no reason to act in their absence, or that

[60] For the debate about 'rights' in private law see generally D Nolan and A Robertson, *Rights and Private Law* (Oxford, Hart Publishing, 2011).

[61] The difficulties involved in producing coherent legal rules that respond to reasons of the negative type are explored in K Barker, 'Economic Loss and the Duty of Care: A Study in the Exercise of Legal Justification' in C Rickett (ed), *Justifying Private Law Remedies* (Oxford, Hart Publishing, 2008) 173. On the construction of a list of key concerns, see, seminally, J Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *LQR* 249.

when it does recognise such duties it is promises that necessarily lie at their heart. Its logic is not so limited.

Thirdly, it seems to me unlikely that any greater certainty will be introduced into this field by substituting for the existing inquiry as to whether a defendant 'assumed responsibility' to the plaintiff an alternative one as to whether he 'intended' to induce the plaintiff to rely on his words. I am brought into a respectful tension with Professor Feldthusen in this respect. This is because the language of intention is at least as slippery as that of assumption. The problem is well known to criminal lawyers and philosophers of criminal responsibility,[62] who have done much to try to bring clear definition to its use in public law, but in tort law the concept of intention is loosely defined and under-theorised.[63] Does a defendant who knows that it is 'very likely' (or even an absolute certainty) that another will rely on his words 'intend' that reliance, if he speaks? What is the relationship between 'intention' and 'desire', 'purpose', 'subjective recklessness', 'knowledge' or 'foresight'? If a defendant's intentions are relevant in a non-promissory way, why is this? Are they relevant from the point of view of distributive justice, on the basis that those who intend potentially bad things are themselves bad, and 'bad people pay more'?[64] Do defendant intentions simply help to define the nature of the task the defendant is performing, such that courts are then able to properly assess whether or not the task was done badly, relative to the way in which other, reasonable people would have done it? Or is the insistence on a defendant's intention simply a 'control device' limiting his exposure to indeterminate liabilities? Does the fact that a defendant has made it clear that he intends his words to be used for purpose 'X' perhaps simply indicate that it is likely to be unforeseeable (and unreasonable) for a plaintiff rely on it for another purpose, 'Y'?

All of these are possibilities. I express my own views at the end of this book, but am under no illusion that the answer to any of these questions is easy. Although I do not personally regard a requirement of intention (whether subjective or objective) as a just precondition to a defendant's liability for pure economic loss in cases of careless misstatement for reasons later explained, I confine myself here to observing that if the law does end up settling on it, we can expect courts to waiver considerably about its meaning. I also expect that judges will end up deliberately reading that meaning 'up' or 'down' for policy reasons in precisely the same way

[62] For a particularly fine exploration in the philosophy of criminal responsibility, see A Duff, *Intention, Agency and Criminal Responsibility: Philosophy of Action and the Criminal Law* (Oxford, Blackwell, 1990).

[63] The reasons for this are explained by P Cane, 'Mens Rea in Tort Law' (2000) 4 *OJLS* 433 (tort is more concerned than crime with victim interests and social values in constructing its conceptions of responsibility).

[64] See T Weir, 'Errare Humanum Est' in P Birks (ed), *Frontiers of Liability* (Oxford, Oxford University Press, 1994) vol 2, 103. This way of understanding the role of intention may lie at the heart of comments in the High Court of Australia to the effect that where a defendant intends to induce reliance, whether or not that reliance is reasonable is no longer critical: *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 (HCA) 358.

that they have done when defining 'assumptions.'[65] Out of the frying pan and into the fire we go.

Finally, it is undoubtedly legitimate to question—as those favouring private ordering do—the extent to which broad questions of social 'policy' and considerations about the potential empirical social effects of advisor liabilities ought to feature in judicial reasoning.[66] Some of these questions (those concerning 'indeterminate liability' especially) are highly controversial and courts often lack the empirical evidence, or the authority, to determine them. It is for this reason that we may now need to think more carefully about the relationship between common law and statutory solutions to the problems that misstatements raise. One possible vision of this relationship is that it is for courts to decide duty questions as a matter of interpersonal justice, guided solely by ethics, and for government then to intervene to cut back on, or supplement, the rights so created, if it considers their social side-effects to be undesirable. The way in which legislatures have intervened to change the balance of liabilities as between advisors and co-defendants responsible for the same economic loss (to which I refer in Section IVB below) provides one example of this sort of approach. I suspect that Beever might approve of it. In practice, however, the division of the respective labours of justice and social policy as between legislatures and courts is always likely to be less clean cut than this. The broader point is then really that there can be no complete solution to the question about the proper metes and bounds of misstatement liabilities, or the sorts of criteria that should be allowed to influence them in negligence law without us first developing a clear and stable conception of the respective roles and capacities of courts and governments.

IV. Intersections and Distributions of Liability

This brings us neatly to Part 3 of the volume, which is designed to explore the relationship between tort liabilities for misstatement and others forms of liability in equity and under statute. It also considers the way in which both courts and legislatures have chosen to distribute liabilities as between negligent advisors and others who are also responsible for a plaintiff's financial losses.

A. Intersections

The more sources of duty in respect of a misstatement there are, the more important it becomes to co-ordinate them efficiently. The right hand must be careful

[65] On which, see Witting's discussion of *Williams* (n 50) in Chapter 9.

[66] For one, especially coherent exploration of the dynamics of this issue, see A Robertson, 'Justice, Community Welfare and the Duty of Care' (2011) 127 *LQR* 370.

to consider what the left is doing. One of the complications highlighted in the introduction is the fact that misrepresentations now potentially give rise to such a bewildering array of liabilities in contract (whether bilateral, unilateral or collateral), estoppel (promissory, proprietary, conventional), tort (deceit, injurious falsehood, passing off, negligence), equity (breach of fiduciary duty, knowing assistance in a breach of trust, 'unconscionable conduct') and under statute (liability for pre-contractual misrepresentation, misleading or deceptive conduct, or the breach of directors' statutory obligations, to name but some examples). Each of these regimes is distinct, each has its own sphere of application, conceptual apparatus, liability requirements, causation and remoteness of damages principles, remedies, defences, limitation rules and principles of loss assessment.

Historically, there has been tension between the common law and equity. This was evident in *Derry v Peek*.[67] In the modern day, that relationship is more mutually respectful and the tension has softened into a concern to ensure that justice is done without one set of rules treading on the toes of the other, in a complementary way. The additional introduction in some jurisdictions of statutory regimes has, however, made the challenge of maintaining overall coherence within the system more difficult. Unless the field is to be completely codified (an unlikely prospect in most common law jurisdictions), courts and legislatures must become better team players.

In Chapter 6, Professor Finn demonstrates not just the antiquity of equitable doctrine in combating misrepresentation and other forms of equitable fraud, but its fertility as a source of rights and remedies in the current day. Through the rescue and renaissance of its earlier jurisdiction to award compensation for pure economic loss, he argues, equity now does much 'tort work' and plays a crucial role in bringing fairness to financial dealings. Finn applauds equity's more radical uses in this regard in several jurisdictions and suggests that discretionary equitable compensation should be available in respect of all wrongs falling within equity's exclusive jurisdiction. This is a welfarist vision in which equitable doctrine operates to moderate classical voluntary orderings even in the commercial arena, responding directly to plaintiff vulnerabilities. Such vulnerabilities are arguably greater in the modern day than they have been in the past, owing to the extraordinary complexity of many financial products and investors' corresponding dependence on expert opinion.

By contrast, Professor Bant and Dr Paterson (in Chapter 7) and Professor McLauchlan (in Chapter 12) explore the relationship between common law principles developed in contract and tort and the strict liability statutory regimes now applying in Australia and New Zealand. Bant and Paterson envisage a constructive, two-way interpretive relationship between the law of negligence and the provisions of Australia's 'strict' liability regime for misleading or deceptive conduct. Negligence concepts, they suggest, can sometimes help to shed light on the Act's provisions; and, reciprocally, the standards in the Act can sometimes assist courts in deciding duty questions at common law.

[67] *Derry v Peek* (1889) 14 App Cas 337 (HL).

The key phrase is 'sometimes'. There are bound to be constraints on the extent to which one can interpret the provisions of a strict-liability regulatory provision by reference to a fault-based tort, as the authors admit. This is especially likely to be the case where a statute was introduced to reverse a direction that has been taken in tort, or (as in this instance) to consciously step beyond it in terms of the protection accorded to plaintiffs. If we set too much store by negligence concepts in interpreting legislation in the latter type of case, there is a risk of hobbling what was intended by Parliament to be a liberalising, welfarist development. But 'strict liability' statutes are sometimes not as far removed from negligence regimes in substance as they appear to be superficially[68] and where this is so, there must be merit in the authors' views that it would be counter-intuitive to entirely ignore judicial precedents regarding an issue common to both regimes. This is one way of creating a constructive interface between private law and public regulation; and of ensuring a co-ordinated approach to the law as a whole. If Bant and Paterson are right, there is more space within the strict liability provisions of the Act for ideas about fault, defendant intentions and plaintiffs' obligations to take reasonable measures to protect themselves than one might assume.

Professor MacLauchlan's account of the New Zealand legislation is more openly critical. The statutory scheme relating to pre-contractual misrepresentation[69] that was introduced to bring simplicity to the law has, in his view, merely muddled up expectation and reliance-based remedies in ways that are not just incoherent, but sometimes harmful to plaintiffs. Furthermore, its one main advantage—simplicity—has been undercut by the subsequent introduction of misleading or deceptive practices legislation[70] that was drafted in apparent ignorance (or disregard) of its aims. His account highlights, I think, the importance of keeping misrepresentation remedies connected to their underlying normative justifications—to their primary rights and the reasons underpinning those rights. A completely discretionary smorgasbord in which these ties are severed is an invitation to chaos. It also highlights what is potentially a significant problem for the coherence of the law of misstatements as a whole, which is the fact that governments have no formal obligation to respect prior legislative or judicial 'precedents' in the way that judges do. An ill-considered piece of legislation can at one careless stroke introduce radical incoherence into a field of law and no one—save another, later government—can do anything about it. Although I am not opposed to legislating private law, this is clearly a risk that it entails. My personal view is that legislative provisions in private law matters should always be enacted with a view to achieving coherent systemic solutions, not simply as isolated expressions of the political will of the moment. It is not just judges that have an obligation to develop the law

[68] This is true even of regimes that are designed to deal with personal injuries. See the Consumer Protection Act 1987 (UK), in respect of which it has been said that the protections mimic negligence law in some respects (in some cases), although the onus of proof is usually reversed: see K Oliphant (ed), *The Law of Tort*, 2nd edn (London, Butterworths, 2007) [19.58]–[19.59].

[69] Contractual Remedies Act 1979 (NZ).

[70] Fair Trading Act 1986 (NZ).

in a way that avoids contradiction and systemic incoherence in basic, private law matters. Governments do too.

B. Distribution

Finally, we come to the matter of distribution. An advisor is often only one party among several responsible for a plaintiff's financial loss. Sometimes, indeed, he is engaged by a plaintiff precisely in order to protect the latter against the risks created by other wrongdoers, including contract breakers and fraudsters. In these circumstances, if the other wrongdoer becomes insolvent, the advisor was, for many years after *Hedley Byrne*, responsible for paying 100 per cent of the plaintiff's loss, subject to whatever contribution he could obtain from co-defendants. That system of 'joint and several' liability was accepted for decades as perfectly sound on both welfarist and corrective justice grounds, but it has been questioned in recent years.[71] Several jurisdictions have introduced reforms that presumptively make a defendant advisor liable for only a proportion of the jointly caused, indivisible loss, so as to throw the risk of insolvencies back onto plaintiffs. This is now the position in Australia, for example. At a time when insolvent wrongdoers are common and financial misdoings have been rife in the market, this has had potentially serious repercussions for plaintiffs.[72]

In Chapter 8, Dr Harder examines in great detail the way in which liabilities are now distributed between advisors and their clients' contracting partners in circumstances where both advisor and partner are legally responsible for causing the very same financial loss. He examines the rules under both under joint and several liability systems (such as still prevail in the United Kingdom and New Zealand) and under the complex proportionate liability system that now exists in Australia. His detailed work sheds much needed light on a bewilderingly complex area of law.

Proportionate liability systems come with a health warning. They are sometimes billed as 'fairer' to defendants, but this conclusion is actually very questionable.[73] As between an innocent plaintiff and a careless advisor, the risk of one or more other defendants proving to be insolvent seems more fairly borne by the advisor, whether from the point of view of corrective,[74] or localised distributive justice.

[71] See Barker and Steele (n 11).

[72] For an exhibition of the new risk distribution, see *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 (HCA).

[73] Barker and Steele (n 11). See also W McNichols, 'Judicial Elimination of Joint and Several Liability because of Comparative Negligence—A Puzzling Choice' (1979) 32 *Oklahoma Law Review* 1; J Swanton and B McDonald, 'Reforms to the Law of Joint and Several Liability: Introduction of Proportionate Liability' (1997) 5 *Torts Law Journal* 1; A Burrows, 'Should One Reform Joint and Several Liability' in N Mullany and A Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (North Ryde, LBC Information Services, 1998) 102.

[74] R Wright, 'Allocating Liability among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure' (1987–88) 21 *University of California Davis Law Review* 1141.

Some systems try to tweak things further, by assigning the risk of insolvencies between all remaining solvent parties, including the plaintiff, in proportion to their own level of responsibility for the harm,[75] but even these systems leave the plaintiff bearing some part of a loss that in principle he should not have to bear. Although such systems can potentially relieve advisors of the burden of very high liabilities flowing from financial disasters, and although they have been applauded (in fact, of course, they were often instigated) by the insurance industry, they are also proving very complex and the complexities seem almost certain to inhibit settlements and cause great confusion. It is not clear that the changes are worth the systemic costs, particular now that insurance markets have largely recovered from recent shocks.

If highly uncertain and crushing liabilities stemming from recent global events really are a problem for auditors, accountants and other advisors and if they really do threaten the viability of information markets, then a simpler solution for keeping liabilities under control might lie, I suggest, in legislative capping, rather than proportionate liability. As is well known, caps work disproportionately harshly against those suffering the biggest losses but, on the other hand, they are clear and can be easily adjusted periodically to meet market conditions. They might enable advisors and insurers to overcome some of the indeterminacies regarding their liabilities that arguably cause problems for pricing and for liability cover. Addressing concerns about crushing or indeterminate liability through a legislative route may also be more acceptable than leaving judges to limit plaintiffs' rights at common law in order to meet the same concerns. Legislatures can canvas empirical evidence about social effects in ways that judges cannot.

V. Conclusion

Meanings change. *Hedley Byrne* was, at the time it was decided, a case of significance in English law concerning the power of words and their inherent risks. Now, it is possible to divine more in its judgments than their Lordships at the time could possibly have imagined—perhaps much more than they would ever have desired. Sadly for them, it is not possible to control that which we create and this is most especially true of words. In the second decade of the twenty-first century, the law of negligent misstatement is part of a much bigger and still-developing system for regulating the risks of economic markets. It is a small, but still potentially important, player on a field that has been reduced to a state of some liquefaction by the shudders of recent economic events and into which, in the meantime, other legal players have entered. It is also now the focal point for the next grand clash of liberal-economic and welfarist ideologies, for debates about the way in which private law should be organised; about the way our judges should reason; and

[75] This is the case in some US jurisdictions. See further Barker and Steele (n 11).

about the respective responsibilities of courts and legislatures in doing justice and dealing with its social effects.

If the 'law of misstatements' is to make more sense in the twenty-first century than it has done in the last 30 years, it will require not just more thinking about basic normative concerns and about the way those concerns can be integrated sensibly into stable, predictable rules, but also the development of closer co-ordination between the various legal players which we have set upon the field. Each of these players needs to have a keen eye both for the ball at its feet and for other doctrines and remedies on the pitch. That is a private law challenge, but no longer simply a challenge for judges. It is a challenge laid down for all those who aspire to make of the variegated pieces of the law a better overall picture, including governments. This book, it is hoped, improves the chances of a cleaner game.