

# Pure economic loss in the law of tort: the history and theory of assumption of responsibility

## The Annual Tort Law Research Group Lecture

Western University, Ontario

26 September 2022

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I am grateful for the invitation from Western University to deliver this lecture. There is great value in the sharing of ideas within the family of common law jurisdictions. We speak the same legal language, even with some difference of accent. We can learn from each other.

I hope I will be forgiven for speaking from the perspective of English law, which is my home ground, rather than trying to lecture you about Canadian law. But in what follows I try to develop a thesis which is both historically informed and one which, I believe, offers conceptual coherence of a kind which is capable of resonance in other common law jurisdictions.

I will seek to defend use of the concept of assumption of responsibility as the basis of recovery for pure economic loss in negligence, while at the same time emphasising the limits of that concept. Sometimes it is not sufficient to explain or justify the imposition of liability, and when we reach its limits we must be prepared to offer further and different reasons for doing so.

The idea of assumption of responsibility as the foundation for a duty of care in tort in relation to pure economic loss came to the fore in *Hedley Byrne v Heller* in 1963. In English cases it has received considerable support as a theory of liability in negligence.

On the other hand, in her recent book *Three Essays on Torts*, Professor Jane Stapleton has castigated “assumption of responsibility” as being “no more than an opaque conclusionary label”.<sup>1</sup> Other commentators, such as Kit Barker in an article in the *Law Quarterly Review* in 1993, have made the same point.<sup>2</sup>

In this lecture I want to consider the concept’s history and its relationship with contract and tort. I will seek to put forward a middle position. The concept of assumption of responsibility cannot do the whole work to explain when a duty of care arises in tort in relation to economic loss. We should be wary of single concept explanations for duties of care, whether on the basis of the neighbour principle in *Donoghue v Stevenson*, assumption of responsibility or the “fair, just and reasonable” mantra adopted in the *Caparo Industries* case in the House of Lords. On the other hand, I will argue that there is a core category of case in which the concept of “assumption of responsibility” does real substantive work and cannot be dismissed as a conclusionary label.

My thesis is that assumption of responsibility is a viable and justified basis for imposition of a duty of care in tort in this core category of case, but outside that category it is much more difficult to sustain as an explanation, in itself, for liability in tort for pure economic loss. The attempt to extend the idea of assumption of responsibility outside that category removes it from the context which gives it determinate content. Accordingly, I will argue that Professor Stapleton's critique is misplaced so far as the core category of case is concerned, but may well be justified in relation to attempts to apply the idea outside that category. If the concept is to be applied outside the core category of case, Professor Stapleton is right to highlight the need for articulation of specific criteria to govern that application in those contexts. It would be better to be clear that other conceptual approaches should be used outside the core category, rather than distort the assumption of responsibility idea.

The concept of assumption of responsibility was not a novel doctrine cooked up in *Hedley Byrne v Heller*. It has its roots in old common law forms of action available before the systematisation of the law of obligations into the twin pillars of contract and tort from around the mid-nineteenth century onwards. The decision in *Hedley Byrne* and the identification of assumption of responsibility as a basis for liability can be viewed as a re-emergence of old strands of common law thinking as the bifurcated structure of contract and tort came under growing strain during the twentieth century.

That bifurcated structure was itself a major intellectual achievement, as the law came to be theorised in terms of substantive rights and obligations rather than as a commentary on the historic forms of action. But the claims for scientific rigour associated with that effort sometimes went too far in suppressing previous insights regarding the fair mediation of relationships which the old forms of action were capable of capturing. Human life is manifold and variegated and expresses a plurality of values. Sometimes a certain bagginess in common law doctrine can be helpful in accommodating this.

Examination of the historical roots of assumption of responsibility can help to elucidate its normative justification in the present. Although taught as part of the tort of negligence or cast as a form of 'contract-lite', in reality assumption of responsibility does not fit neatly within either of the orthodox categories of contract or tort. It might perhaps be better conceptualised as its own category as a distinct and significant source of rights and obligations with a particular history and purpose.

The idea of assumption of responsibility as re-discovered or restated in *Hedley Byrne* can be seen alongside other mid-twentieth century doctrinal developments including proprietary estoppel and unjust enrichment. They can be seen as a response to the same perception that a rigid insistence that claims be framed within the strict criteria of contract and tort carried the risk that the law would become divorced from common and fairly basic conceptions of justice. Assumption of responsibility can be seen in the same light. In particular, it provides a route to avoid claims foundering on the requirement of consideration in circumstances where insisting upon it would produce a morally unjust outcome. But it can be observed of all three areas that they carry their own risk of introducing uncertainty into the law. That has been a common criticism of each of these areas as doctrine has developed and has deviated from the strict paths of contract and tort, to explore other ways of looking at the creation of

obligations. The challenge is for doctrine in such areas to provide sufficiently determinate tests for liability and also to provide a sufficiently coherent account of their interaction with other areas of liability, in particular contract and tort.

*Pure economic loss in negligence*

In *Spartan Steel v Martin & Co*<sup>3</sup> in 1973 a contractor carrying out work digging up a road negligently damaged an electric cable which they knew supplied power to the claimant's factory. The claimant had to dispose of molten metal out of their furnace to prevent damage to the furnace, which meant that the metal lost value and they suffered a loss of profit when they sold it. They also lost profits from further smelting they could have undertaken had the power not been cut. The Court of Appeal held that the defendant was liable for the loss of profit on the ruined metal as foreseeable financial damage immediately consequential on the physical damage to the metal, but not for loss of profit from the further smelting. That was pure economic loss which was irrecoverable.

The basic rationale for limiting the circumstances in which liability will be imposed in tort for causing pure economic loss is well-known. On one view, as explained by Lord Denning in *Spartan Steel*, the decision to limit liability is fundamentally a policy one. If the law allowed recovery for all economic loss the extent of liability in many situations would be enormous. The contractor who cut the mainline electricity cable would have been liable to a range of businesses whose trade had been interrupted as a result. This single mistake would have bankrupted the contractor. It would have been forced to carry an excessive part of the risk associated with a socially useful activity which it carried on.

As Cardozo CJ famously stated in *Ultramares Corp v Touche*, to permit recovery of all loss suffered by anyone as a result of having relied on a negligent misstatement which came to their attention would be unacceptable, as it would involve imposing "liability in an indeterminate amount, for an indeterminate time, to an indeterminate class".<sup>4</sup> This has an underlying policy basis as well. But it also hints at something else. To impose liability for economic loss suffered in such circumstances would mean that the ambit of liability would pull apart from the forms of relationship which might justify imposing liability in the first place. To provide a just balance of interests, the law has to focus more specifically on what exactly is the relationship between claimant and defendant, in order to see whether the nature of that relationship justifies the imposition of liability, and to what extent it justifies imposition of liability.

The law has sought to protect defendants from being exposed to an unknowable scope of potential liability. A company like the contractor in *Spartan Steel* could not meaningfully incorporate such an indeterminate risk into the price charged for its services, nor realistically could it obtain insurance to protect itself. It is unable to bargain around the risk it takes on, such that without a rule against the recovery for pure economic loss it would in fact bear all of the risk. If the risk cannot be managed in these ways, there will be a chill effect deterring the activity from being carried on at all. Or the practical implication may be that the contractor is not actually incentivised to take proper care, since if the liability to be imposed if an accident occurs is crushingly great, and there is no way to eliminate all risk of accident,

it may calculate that it should simply cut its own costs as it might as well be hanged for stealing a sheep as for stealing a lamb.

By contrast, assumption of responsibility provides a sound justification for imposition of liability in a distinct subset of pure economic loss cases in which the defendant does have an effective opportunity to bargain over the extent of the obligation to which it is to be subject. Where the relationship between the parties is of a character where the claimant's potential loss is foreseeable by both parties, such that there is a meaningful opportunity for them to bargain over the liability to be taken on by the defendant, it is possible to spell out determinate criteria to explain when and to what extent liability should be imposed when something goes wrong. In a context where the defendant had a meaningful opportunity to negotiate over taking on the risk or refusing it, the concept of assumption of responsibility is the appropriate one to use.

Take *Hedley Byrne*. The defendant bank provided a credit reference to Hedley Byrne which was negligently prepared, and Hedley Byrne suffered loss as a result of relying on it. The bank had no contractual relationship with Hedley Byrne but knew that it would only be Hedley Byrne who suffered loss if their advice was negligent. Their risk exposure was therefore limited and identifiable. Although the bank opted to provide the statement for free, it had the possibility of negotiating the extent of risk it would take on and potentially extract a price for doing so. Indeed, it took advantage of that opportunity, by expressly excluding any liability based on the statement. Given the opportunity to bargain which existed, it was appropriate to frame the claim in terms of whether the bank had assumed responsibility to the claimant for action which resulted in loss to the claimant.

Seen in this context, assumption of responsibility has proved a useful concept for delineating a principled basis for when recovery for pure economic loss is justifiable.

Following *Hedley Byrne* and its extension to the negligent performance of a service in *Henderson v Merrett Syndicates*<sup>5</sup>, it is now commonplace for the courts to impose a duty of care in respect of pure economic loss on the grounds that the defendant had assumed responsibility to the claimant. In *Lejonvarn v Burgess*<sup>6</sup>, for example, the Court of Appeal in 2017 held that assumption of responsibility provided a standalone basis for a duty of care for purely economic loss where an architect had provided her expertise as a project manager free of charge to friends wanting to carry out extensive landscaping to their garden. There were major cost overruns due to the negligence of the architect. The basis for the duty was explained to be that the architect had “voluntarily tender[ed] skilled professional services in circumstances where she knew the [claimants] would rely on the proper performance of those services.”

The *Lejonvarn* case provides a good encapsulation of the fundamental rationale of assumption of responsibility as a basis for finding a duty of care. An assumption of responsibility occurs when a person has voluntarily elected to take on a task for the claimant in circumstances where the claimant's intended reliance on the performance of that task is apparent along with the consequences should the defendant fail to perform with due skill and care. Unlike in classic examples of negligence where a duty of care can exist simply by virtue of a person's general position or status, for example as a road user, the duty of care based on assumption

of responsibility only arises because of something that a defendant has committed to do for a particular party and – typically - has in fact done. As was pointed out in *Lejornvorn*, the architect “did not have to provide [her] such services, but to the extent that she did she owed a duty to exercise reasonable skill and care in the provision of those services.”<sup>7</sup>

In contrast to contract, assumption of responsibility normally provides no remedy against a person who has promised to do something but entirely fails to carry out the promised task. It is the commencement of the task which normally triggers liability. There may, however, be the possibility that the making of the promise to do something might itself be an act which induces detrimental reliance by the claimant, in the sense that the claimant believes that the promisor has indeed made arrangements to do that thing and therefore takes no steps to do it for themselves, maybe until it is too late. The basic structure of an assumption of responsibility claim might be fulfilled in those circumstances. There would have been an interaction between claimant and defendant, in circumstances where there was an effective opportunity to bargain over the extent of the responsibility to be assumed, and where the defendant’s taking on responsibility to do the act meant that the claimant was put off – as the defendant appreciated they would be – from protecting their interest in some other way.

This also raises an issue associated with potential ambiguity of the phrase “assumption of responsibility”. Is the basis for liability an assumption of responsibility in the sense of a promise by the defendant, express or implied from its action in taking on a task knowing that the claimant will rely on it to carry it out with reasonable care, or an assumption of responsibility in the sense of simply voluntarily acting to carry out a task, knowing that the claimant will be affected if it is not done with proper care.<sup>8</sup> Professor Donal Nolan argues that the cases show that the relevant sense is that A has taken on a job or task for B.<sup>9</sup> The strongest type of case is one where the defendant says to the claimant, in effect, “Here, let me do that for you”, and the claimant accepts and leaves that task to the defendant. What is important is the free choice of the defendant, in its direct interaction with the claimant, to take on the task for the benefit of the claimant, involving in ordinary circumstances detrimental reliance by the claimant in being put off from taking other steps.

In terms of modern doctrine, the concept of assumption of responsibility has escaped the confines of pure economic loss. Given its historic antecedents, this is not surprising. But questions arise how far any satisfactory unifying principle can be stated to cover all such cases. Following the UK Supreme Court’s 2015 decision in *Michael v Chief Constable of South Wales*<sup>10</sup>, for example, there has been much consideration of the circumstances in which the police can be said to have assumed positive obligations towards particular persons.<sup>11</sup> Similarly, the idea of assumption of responsibility has been used to try to identify when a non-delegable duty of care arises. I question the extent to which a unifying theory can be applied across all the contexts in which the idea of assumption of responsibility has been invoked. It seems to me that the core pure economic loss cases have a distinctive rationale based on the availability of an opportunity to bargain which justifies the imposition of liability. How far that underlying idea can be carried outside the present context is a matter I leave for another day.

*Assumption of responsibility: the history of an idea*

The idea of assumption of responsibility has deep historical roots. As Cardozo J observed in 1922, “it is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all”.<sup>12</sup>

Ancestors to modern ideas of assumption of responsibility arose in the late medieval period, and have been termed the “assumpsit duties”. Long predating the bifurcation of the law of obligations into the now standard categories of tort and contract, claims were not defined or delineated by substantive principles. Claims had to be brought using one of the various forms of action available. These were usually framed by reference to particular established relationships, but also included the more general “action on the case”. This provided a remedy for the invasion of personal or property interests where the other established forms were not suitable. The criteria for making out an action on the case were not precisely defined. As Professor Winfield commented, “the action on the case has been the life-blood of the English law of torts but is calculated to make any professor of jurisprudence desperate”.<sup>13</sup>

As Maitland put it, from the fourteenth century onwards “various precedents collect in which the allegation is made that the defendant had undertaken to do something and then hurt the plaintiff either in his person or in his goods by doing it badly”.<sup>14</sup>

One significant category of the action on the case was where a defendant professed a so-called “common” calling. Various occupations were classified in this way, which meant that the services rendered in the course of carrying on the occupation were required to be performed with reasonable skill.<sup>15</sup> Such callings included surgeons and attorneys. Usually, of course, the services were rendered in return for payment.

Another category was bailment. This provides perhaps the clearest antecedent for contemporary understandings of assumption of responsibility.

The leading case is *Coggs v Barnard*, of 1703. An action on the case was brought against a carrier for carelessly transporting a hogshead of wine, causing it to be damaged. The claim succeeded, even though the carrier agreed to carry the wine without payment. In Chief Justice Holt’s words, “assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing”.<sup>16</sup> In giving an undertaking even without reward in return, the bailee led the bailor to believe that he possessed the capability to transport the wine carefully, thereby inducing the bailor to entrust the wine to the bailee to carry out a service. The basis of liability was stated to be the “particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect.”<sup>17</sup>

There were important limits to the bailee’s responsibilities, however. Powell J drew a distinction between non-performance and mis-performance. The distinction has significance because of the idea of consideration. If a promise was made but no consideration was given for it, he concluded that “[a]n action will not lie for *not* doing the thing for want of a sufficient consideration; but if the bailee will take the goods into his custody, he shall be answerable for them; for the taking of the goods into his custody is his own act.”<sup>18</sup> The carrier could of

course have elected not to carry the wine or decided only to do so for something in return. The reasoning here is essentially indistinguishable from that in modern assumption of responsibility cases such as *Lejonvarn v Burgess*. The fact that the assumption of responsibility was gratuitous in both cases did not matter because the defendants in both cases *could* have negotiated either a price in return or a different allocation of the risk, or simply walked away from the proposed arrangement. It is the existence of a real opportunity to bargain over the task and the extent of the responsibility to be taken on which makes it appropriate to speak of assumption of responsibility, and to treat that as the source of liability.

The approach in *Coggs* was confirmed in 1793 in *Elsee v Gatward*.<sup>19</sup> It was explained that “if a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeasance in the course of that work”.

But *Elsee* also illustrates the gradual division of the action on the case into distinctive categories of contract and tort during the eighteenth century. The shifting meaning of the word ‘assumpsit’ when compared with its use in *Coggs v Barnard* is notable. In *Coggs*, an ‘assumpsit’ essentially meant an undertaking. By the time of *Elsee*, however, the term had come to signify a distinct cause of action concerned with holding people to their agreements and possessed of its own principles, most centrally a requirement for consideration.

However, the line between contract and tort was not fully drawn by 1793. The basis for liability in *Elsee* combined elements of modern contract and tort. The significance given to the undertaking mirrored contract, while the imposition of liability for damage caused through negligence resembled tort. As Winfield observed of this line of cases, “[the] impression given... is that the courts never from the first made up their minds that the action was either in tort or in contract... partly because the peculiar origin of *assumpsit* would have puzzled anyone who tried to draw a distinction between tort and contract.”<sup>20</sup>

The principle in *Coggs v Barnard* also had application in contexts involving claims for pure economic loss. In *Wilkinson v Coverdale*<sup>21</sup> – also decided in 1793 – the defendant gratuitously undertook to get a fire policy renewal for the plaintiff but, in doing so, negligently omitted certain formalities, thus rendering the policy unenforceable. The plaintiff’s premises burnt down. Lord Kenyon “expressed a doubt whether any action could be maintained on such an undertaking” given that the defendant “had undertaken it gratuitously on the plaintiff’s account” without consideration. He eventually held, however, that “though there was no consideration for one party’s undertaking to procure an insurance for another... where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so negligently or unskilfully, that the party could derive no benefit from it, that in that case he should be liable to an action.” Lord Kenyon’s equivocation shows the law of obligations in flux. Consideration was becoming a central concept, but it co-existed uneasily alongside other established bases of liability not dependent upon the defendant having received something in exchange for their undertaking.

Going back to the old cases allows one to pick out an underlying logic displayed in them. This is that a defendant is taken to have assumed responsibility to carry out a task with reasonable care where they have dealt with the claimant in circumstances which allowed the defendant a fair opportunity to refuse to do the task or to bargain, if they wished, to limit or

define the extent of their responsibility, and where, knowing of the importance of the task for the claimant, the defendant chose to take it on. In all three cases I have mentioned the respective defendants could have negotiated to allocate differently the risk that they decided to take on, or alternatively could have chosen not to carry out the work. It was not for the courts to save them from the consequences of deciding to proceed.

*Assumption of responsibility under pressure from legal science*

This history shows that our concepts of contract and tort were not preordained, a priori systems of organisation. They emerged relatively late as dominant categories in the common law of obligations. This is well recognised in the scholarship on the history of the law of obligations. They were laid over the existing patterns of liability according to the forms of action, and came to mould those patterns in new ways according to a new set of ideas about substantive rights and obligations.

As the nineteenth century went on, the modern law of tort and contract began to be consolidated and developed. As a crude generalisation, *assumpsit* morphed into contract while various strands of the action on the case coalesced into the tort of negligence.<sup>22</sup> Contract and tort would be the dominant forms of liability within the law of obligations, apparently leaving little room for anything else.

Despite this, the ambiguous place of traditional assumption of responsibility cases in this schema was apparent. In *Boorman v Brown* in 1842,<sup>23</sup> the defendant oil broker was retained by the claimants to sell and deliver linseed oil to customers against receipt of cash. The defendant failed to use reasonable skill and care to comply with this instruction and delivered the oil to a customer on credit, who then became bankrupt so that the claimant was unable to recover the price due for its oil. The claim was for pure economic loss, brought as an action on the case, not in *assumpsit*. Nonetheless, the Court of Exchequer Chamber held that the claimant could recover from the defendant. On its analysis, the duty to exercise care resulted from a contract between claimant and defendant, but an action in tort lay for breach of that duty. It was necessary to refer to the terms of the particular contract, since the detail of what the defendant broker was supposed to do could not simply be derived from their status as broker. The argument was framed in terms of whether there was a misfeasance or a non-feasance and ranged across many authorities, including *Coggs v Barnard* and *Else v Gatward*.

Tindall CJ observed that there was “a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance is indifferently either *assumpsit* or case upon tort”, eg claims against attorneys, surgeons and other professional men, “for want of competent skill or proper care in the service they undertake to render”. For such claims, the claimant could elect to proceed in tort or contract. The distinction between misfeasance and non-feasance was said to be “very fine and scarcely perceptible”. Tindall CJ noted that “the action of case upon tort very frequently occurs where there is a simple nonperformance of the contract ... as in the case of *Coggs v Barnard* ...”. He observed, “The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon a tort”.

Over the course of the nineteenth century the previously diffusely applied principle that a person could be civilly liable for inadvertent harm to someone else crystallized into the distinct tort of negligence. The great innovation was the emergence at the end of the century of a distinct requirement that the claimant demonstrate that the defendant had been under a precedent duty of care before liability could be imposed.<sup>24</sup> So, compared to assumption of responsibility as a way of thinking about certain classes of case, negligence in its modern form was very much a latecomer. Moreover, as *Boorman v Brown* shows, duty of care analysis and assumption of responsibility analysis were not wholly distinct, but overlapped.

Ideas of contract had a much longer history, yet again these were also only rationalised into the contemporary model during the nineteenth century. European Will Theory was especially influential. This conceptualised contractual liability as stemming from the mutual assent of the parties to a bargain rather than the breaking of a promise given freely by one party to another. The aim of contract law became simply to discover what the parties had agreed and enforce it.<sup>25</sup>

Historians such as David Ibbetson have argued that the common law concept of consideration sat uncomfortably with Will Theory. They suggest that if liability depended exclusively on the union of the parties' wills then there was no reason to impose any additional element of reciprocity.<sup>26</sup> Yet consideration continued to be regarded as an important element in the law of contract and was the principal dividing line which marked it off from the province of tort.

Consideration was not entirely at odds with Will Theory. If there is consideration for an agreement, it can serve as a proxy or marker that the party to it had made use of a genuine opportunity to bargain over the terms on which they were prepared to accept legal responsibility for the task for which the agreement provides. On this view, what they ended up agreeing to can be regarded as a genuine product of the exercise of their will. The modern assumption of responsibility cases in the pure economic loss context can be explained by reference to a similar rationale based on the opportunity to bargain, albeit this depends on an analysis of the particular facts without using the proxy of consideration to reach that conclusion.

Moreover, a form of assumption of responsibility found a firm place in contract doctrine in the rules governing remoteness of loss. The rule in *Hadley v Baxendale*, limiting legal liability for damages arising from a breach of contract to matters of which the party in breach was aware at the time of contracting, and in relation to which it had a fair opportunity to bargain either as to price or limitation of liability, is highly redolent of this way of thinking.<sup>27</sup>

However, the supposed rigours of nineteenth century legal "science" made it more difficult to maintain a picture of disparate sources for legal obligations springing up in a vibrant and variegated garden. The ambiguous position of assumption of responsibility as between contract and tort made it vulnerable. Its focus on a one-sided undertaking, not necessarily tied to consideration, was at odds with Will Theory's preoccupation with mutuality. Moreover, the imposition of liability for inadvertent fault had coalesced into the tort of negligence, which did not depend on any undertaking being willingly given by the defendant.

According to negligence analysis, strangers might owe duties of care to each other. Road accidents were a classic example of this. *Donoghue v Stevenson*<sup>28</sup> was the product of this view of the tort.

*Legal science under pressure: re-emergence of assumption of responsibility in Hedley Byrne*

Both assumption of responsibility and detrimental reliance in the form of proprietary estoppel re-emerged in the mid-part of the twentieth century. I suggest that their re-emergence was a response to the same phenomenon. As the twentieth century progressed, aspects of the law of obligations came to seem increasingly untethered from common conceptions of justice. The bright line rules favoured by the nineteenth century jurists – especially in the realm of contract – came to be seen as too rigid, being overly focused on certainty and predictability at the expense of a more basic sense of doing what is right.

*Hedley Byrne* came about in this context. The Law Lords strained to find a way around the unforgiving requirements of contract doctrine. This is particularly clear in Lord Devlin's speech, most obviously in his incredulity that "if a doctor negligently advises a patient that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy. Unless, of course, the patient was a private patient and the doctor accepted half a guinea for his trouble: then the patient can recover all. I am bound to say, my Lords, that I think this to be nonsense".<sup>29</sup>

Lord Devlin's invoked the line of authority from *Coggs v Barnard*, drawing from it the conclusion that "a promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort."<sup>30</sup> Lord Devlin recognised, however, that too much had passed simply to revive the old approach wholesale. The regime of tort and contract was too entrenched, and any reassertion of the assumption of responsibility concept needed to work against this backdrop. This led him to limit assumption of responsibility to "relationships which... are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract."<sup>31</sup>

"Contract without consideration" is not an unfair characterisation of *Hedley Byrne*, and it implies a proper focus on the face-to-face nature of the concept of assumption of responsibility derived from the old authorities. But it perhaps obscures the more radical leap that the House of Lords was making by reviving a doctrine with a distinct grounding and a distinct set of obligations and entitlements. It is also wrong to see assumption of responsibility as a threat to contract. Contract does not exhaust the category of promises or agreements having legal effect.<sup>32</sup> Contract still requires consideration and remains the only means of securing particular entitlements. Most obviously, only a contract provides a remedy for pure non-performance. If a guarantee of performance is required, a person has to buy it by paying a price.

*The modern uses of assumption of responsibility*

So I contend that the historical pedigree and theory behind assumption of responsibility as a concept are sound, when applied in the class of case where the assumption of responsibility is grounded in a direct relationship between claimant and defendant which gave the defendant a real opportunity to bargain over what it was prepared to do for the claimant and the extent of the liability therefor which it was prepared to take on. However, there is a danger of dissipating the moral basis it provides for imposing liability and its determinacy as a concept by trying to use it in an over-extensive way.

What about its application since *Hedley Byrne*? It is at this level that most of the academic disquiet, Professor Stapleton's included, seems to lie.

Much ink, judicial and academic, has been spilled in attempting to identify the precise circumstances in which an assumption of responsibility occurs. There is force in Roderick Bagshaw's observation that critics of the idea have perhaps been overly wedded to classical-form concepts carrying checklist-style criteria, drawing the conclusion that assumption of responsibility must be defective "if *all* applications of it do not involve the presence of facts satisfying some other concept, such as 'promise' or 'invited reliance'".<sup>33</sup> Bagshaw argues that assumption of responsibility is better understood as a "category including a cluster of examples, that are similar to each other in overlapping and criss-crossing ways."<sup>34</sup> This seems to me to capture the reality that assumption of responsibility becomes difficult to pin down if one moves too far beyond the core category of case I have been concerned with.

Considering this, I want to locate some of the areas of overlap in an attempt to suggest a viable normative basis to establish when a duty of care will arise from an assumption of responsibility in the core category of case to which I have referred. The central unifying feature of the cases is that the parties had a relationship in which it was open to the defendant to have bargained in respect of the risk involved in taking on a task for the claimant, in a context in which the defendant invited the claimant to rely on the due performance of the task. I suggest that it is this feature which – in the absence of other controlling mechanisms such as consideration – provides the principled basis for delineating the circumstances in which recovery for pure economic loss will be available and when it will not.

This comes through clearest in the cases in which the courts have concluded that there *was not* an assumption of responsibility in the relevant sense. I focus on *Commissioners of Customs and Excise v Barclays Bank* as one illustration. It was held that the bank did not owe a duty of care to the Commissioners when implementing a freezing injunction granted to protect their interests because this was not a task which it had agreed to undertake, but one which had been imposed on it by a court. Lord Bingham noted that in assumption of responsibility cases "a duty of care is ordinarily generated by something which the defendant has decided to *do*", but this could not be said of the bank because the obligation had been imposed on it. As Lord Walker commented, "[i]n this case the appellant bank has not, in any meaningful sense, made a voluntary assumption of responsibility. It has by the freezing order had responsibility thrust upon it".

One can argue that a person may assume a responsibility to another by electing to act in a role to which general obligations attach which are intended to safeguard others from harm, as here the bank chose to participate in banking activity and was therefore vulnerable to being

exposed to freezing orders.<sup>35</sup> But that involves slippage from the core case of voluntary assumption of risk in which imposition of a duty of care occurs and has been found to be justified; the question then is more redolent of whether a general duty ought to be imposed on grounds of the status of the defendant rather than by reference to their voluntary assumption of responsibility by dealing with this particular claimant in this particular context with this particular loss in contemplation: see the distinction in *Boorman v Brown* between the specific undertaking given (akin to contract) and obligations derived from general status. When issues of obligation associated with general status or role arise, which are more remote from obligations voluntarily assumed to the particular claimant in the defendant's face-to-face dealings with them, the moral foundation for imposition of duty based on the free consent of the defendant is weaker and the scope for introduction of wider considerations of policy is wider. Accordingly, the slippage in usage of the concept carries with it a requirement for further justification if a duty of care to hold harmless from pure economic loss is to be imposed.

This is more or less to reassert the rationale given thirty years earlier by Lord Bridge in *Caparo Industries v Dickman* for when imposition of a duty of care for negligent misstatements was appropriate. Having reviewed the authorities, Lord Bridge commented that:

“The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it... The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate.”<sup>36</sup>

Why is such knowledge on the part of the statement maker so determinative? The answer lies in the opportunity this shows the defendant had to bargain about the extent of the liability they were willing to take on. Where the defendant knows how and by whom their work will be used, they are able to foresee the risks should the work be deficient. They can then bargain around that risk, and agree via price mechanisms and limitations of liability as to how to allocate it should they wish to.

This also seems to me to be the force of Lord Hoffmann's reasoning in *Customs and Excise Commissioners v Barclays Bank*, where he said:

“The purpose of the inquiry is to establish whether there was, in relation to the loss in question, the necessary relationship (or ‘proximity’) between the parties... the existence of that relationship and the foreseeability of economic loss will make

it unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability.”<sup>37</sup>

Again though, I would ask, what makes those two features – proximity (in the sense of a relationship of a particular character) between the parties and foreseeability of economic loss – so powerful as to preclude the need for any further inquiry? The reason is that those features are the ingredients which show that the parties were in a position where the defendant had a meaningful opportunity to bargain about the task and the extent of legal liability it was willing to take on, and the claimant’s reliance on the defendant taking on the task was particularly direct. The parties must be sufficiently “proximate” to allow for the possibility for the defendant to bargain about what it will do and the extent of its responsibility. The loss must be sufficiently foreseeable in order to allow the parties to negotiate as to how the risk of it should be allocated.

If I may be permitted a nod in the direction of the Canadian jurisprudence, this seems to me to be very close to the analysis in *Deloitte & Touche v Livent Inc.*<sup>38</sup>

By contrast with *Barclays Bank*, in cases in which an assumption of responsibility has been found it was in a context where it was possible for the defendant to bargain in this way.<sup>39</sup> In *Henderson v Merrett Syndicates*,<sup>40</sup> for example, the defendant underwriting agents took on the task of managing the insurance syndicates of which the claimants were members. As found by Lord Goff, the underwriting agents “well knew” that their expertise would be relied upon in circumstances where the risks were clear if the service was provided negligently. It was open to the defendants to bargain in respect of those risks or alternatively to walk away from the arrangement. The defendants did in fact bargain in making a contract, albeit not directly with the claimants, to provide their services. Explaining the relationship between tortious and contractual liability, Lord Goff stated:

“Approached as a matter of principle, therefore, it is right to attribute to that assumption of responsibility, together with its concomitant reliance, a tortious liability, and then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it.”

In other words, an assumption of responsibility will exist unless the parties elected to allocate the risk differently via contract. The presence of the contract in *Henderson* which did not allocate risk away from the defendant was clear evidence that the defendant could and indeed did bargain, and chose to accept the allocation of risk inherent in what it undertook to do. The finding of an assumption of responsibility in these circumstances concurrent with the contractual liability is therefore consistent with the rationale I have set out.

Professor Stapleton asks in her essay on pure economic loss in the *Three Essays* collection what the “coherent normative justification for a tort entitlement” in the *Hedley Byrne* type cases is, and further what “displace[s] the expectation that each participant in the commercial arrangement bears the risks to its own economic interests *inter se* arising out of the arrangement?”<sup>41</sup> My answer is that an assumption of responsibility will have occurred in circumstances where the defendant agreed with the claimant to take on a task, thereby

inviting the claimant's reliance on them, in circumstances where it could have bargained to secure an alternative allocation of risk or could simply have declined to do it.

Why in such cases is it the defendant rather than the claimant who should *prima facie* bear the risk if there is not an express agreement about how the risk is to be distributed. Absent agreement to the contrary, why shouldn't the claimant bear the risk when choosing to rely on the defendant when it was not required to?

The answer to this is to be found in the old cases on the proper performance of tasks which the defendant volunteers to do for the claimant. By taking on the task, the defendant invites the claimant to rely on its due performance of that task. Imposition of liability is justified by the moral claim that if a person voluntarily undertakes to do something in these circumstances it is right that they be required to do it to a proper standard. Even when the undertaking is given gratuitously, the courts have made a judgment that the force in this moral claim overpowers the countervailing claim that ordinarily claimants should bear their economic losses in circumstances where they have not chosen to contract in positive terms.

The voluntary assumption of responsibility by the defendant puts off the claimant from seeking to stipulate terms. If the defendant has volunteered to do the task, the claimant already has a moral claim to expect that it is done with proper care and does not have to negotiate to acquire a right to have that very expectation.

There remains good reason, however, for not over-extending the categories of case in which a duty to protect against pure economic loss will be found to arise. As Nicholas McBride argues in *The Humanity of Private Law*, ordinarily pure economic loss is simply not important enough to justify the law imposing general duties on people not to cause other people to suffer that kind of loss.<sup>42</sup> Economic loss consequent upon breach of legal obligations arises in many different ways, and it is legitimate for the law to seek to provide a focus for liability upon those forms of injury which implicate human interests which have choate and obvious forms, particularly bodily integrity and property (a type of economic interest, but in a crystallised form recognised in a variety of positive ways by the law), limiting liability for pure economic loss (such as loss of earnings or profits) to that particularly associated with damage to those interests. Special reasons, which include reasons of the kind I have been discussing, are required to overcome this general attitude.

### *Conclusion*

To conclude, therefore: assumption of responsibility is not an "opaque conclusionary label". On the contrary, it is an idea with deep roots in the law of obligations. It continues to serve a useful and principled objective. But it does not cover the whole field. Two things follow. First, for cases of pure economic loss outside the core category, we should look for other reasons if recovery is to be justified. We should not dilute or distort the assumption of responsibility concept and thereby lose sight of the true substantive role it ought to play. Secondly, we should not treat the conceptual confusion that arises from over-extending the concept to try to explain other cases as something that reflects back and devalues the use of the concept in the core area of its application.

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\* Lord Sales, Justice of the Supreme Court of the United Kingdom. I am grateful to my Judicial Assistant, Jake Thorold, for his excellent assistance in the preparation of this lecture.

<sup>1</sup> J Stapleton, *Three Essays on Torts* (2021), p.60. See also J Stapleton, 'Duty of Care Factors: a Selection from Judicial Menus' in P Cane and J Stapleton (eds), *Essays in Celebration of John Fleming* (1998), p.64-65 and J Stapleton, 'Duty of Care and Economic Loss: a Wider Agenda' (1991) 107 L.Q.R. 249.

<sup>2</sup> See also Kit Barker, "Unreliable assumptions in the modern law of negligence" (1993) 109 LQR 461.

<sup>3</sup> [1973] QB 27.

<sup>4</sup> *Ultramares Corp v Touche* 174 N.E. 441 (1932), at 444.

<sup>5</sup> [1994] 3 All ER 506.

<sup>6</sup> *Lejonvarn v Burgess* [2017] EWCA Civ 254.

<sup>7</sup> *Ibid* at [88].

<sup>8</sup> See the discussion in D Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 Current Legal Problems 123, 128-140.

<sup>9</sup> *Ibid*, 129.

<sup>10</sup> [2015] UKSC 2.

<sup>11</sup> See, for example, *Tindall v Chief Constable of Thames Valley* [2022] EWCA Civ 25.

<sup>12</sup> *Glanzer v Shepard* 135 NE 275 (1922), at 276.

<sup>13</sup> P Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 LQR 184 at 197.

<sup>14</sup> F. W. Maitland, *The Forms of Action at Common Law: A Course of Lectures* (1948) at 68.

<sup>15</sup> See, for example, *Elsie v Gatward* (1793) 5 TR 143, in which Ashurst J describes common carriers, porters and ferrymen as being "bound from their situations in life to perform the work tendered to them". Winfield describes that as "by professing a common calling a man in mediaeval times in effect assumed what we should call a *status* from which the duty sprang without further undertaking" (P Winfield, 'Duty in Tortious Negligence' (1934) 34 Colum L Rev 41 at 45).

<sup>16</sup> (1703) 2 Ld Raym 909, 919; 92 ER 999.

<sup>17</sup> *Coggs v Bernard* (1703) 2 Ld Raym 909 at 909.

<sup>18</sup> 2 Ld Raym 909 at 911. This distinction between non-performance and mis-performance was presaged in the earlier case of *Powtney v Walton* (1597) 1 Ro Abr 10. See D Ibbetson, *Coggs v Barnard* (1703) in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract* (2008).

<sup>19</sup> (1793) 5 TR 143.

<sup>20</sup> P Winfield, 'The Province of the Law of Tort: Tagore Law Lectures delivered in 1930' (1931), 96.

<sup>21</sup> *Wilkinson v Coverdale* (1793) 1 Esp 75, at 170.

<sup>22</sup> For a detailed account of this, see D Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), Part 3.

<sup>23</sup> *Boorman v Brown* (1841) 3 QB 511, 525-526; *aff'd* 11 Cl & F 1; 8 ER 1003 (HL).

<sup>24</sup> See in particular *Heaven v Pender* (1883) 11 QBD 503.

<sup>25</sup> Pothier's book *Traite des obligations* was translated into English in 1806. See W.D. Evans, *A Treatise on the Law of Obligations or Contracts*, by M. Pothier (1806).

<sup>26</sup> See D. Ibbetson, *A Historical Introduction to the Law of Obligations*, p.236.

<sup>27</sup> *Hadley v Baxendale* (1854) 9 Exch 341; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18.

<sup>28</sup> [1932] AC 562.

<sup>29</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465, 520.

<sup>30</sup> *Ibid*, 526.

<sup>31</sup> *Ibid* at 528-529.

<sup>32</sup> G Treitel, *The Law of Contract* (11<sup>th</sup> edn, 2003), p.73

<sup>33</sup> R Bagshaw, 'Tort Law, Concepts and What Really Matters' in A Robertson and T H Wu (eds), *The Goals of Private Law* (2009), p.248.

<sup>34</sup> *Ibid*, p.240.

<sup>35</sup> See also the discussion in *Poole BC v GN*, above, of the circumstances in which a person subject to a statutory duty may have a duty of care imposed in respect of how the statutory duty is implemented.

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<sup>36</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605 at pp 620-621.

<sup>37</sup> [2007] 1 AC 181 at para 35.

<sup>38</sup> [2017] SCC 63.

<sup>39</sup> This is debatable in the case of *Spring v Guardian Assurance* [1995] 2 AC 296 (request for reference from prospective employer, not from the employee whose chance of employment was ruined by the negligent preparation of the reference) and *Smith v Eric S Bush* [1990] 1 AC 831 (which was not itself decided on the basis of assumption of responsibility, but is sometimes sought to be explained in that way; the surveyor in one of the appeals did not appreciate that his survey would be shown to the claimant purchasers of a property): see D Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 *Current Legal Problems* 123, 132-133.

<sup>40</sup> [1995] 2 AC 145.

<sup>41</sup> J Stapleton, 'Cooperation and Economic Self-Reliance', p.60.

<sup>42</sup> N McBride, *The Humanity of Private Law* (2019), p.131.