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**Corrective Justice and Liability for
Misstatements**

Nicholas Wellesley Hoggard

Doctoral Thesis

DURHAM LAW SCHOOL

DURHAM UNIVERSITY

2019

ABSTRACT. Negligent misstatement isn't about the creation or recognition of a new right to information *per se*. Instead, the law of misstatements allows us better to enjoy our existing rights and to make better decisions with respect to them. Currently, the dominant manifestation of liability for negligent misstatements is predicated on an assumption of responsibility by the defendant (whether actual or implied). Those skeptical of the rights-based thesis are, perhaps not surprisingly, similarly skeptical of the assumption of responsibility model. As such, this model has become something of a shibboleth in misstatement theory between rights-based theorists and others. This thesis crosses party lines. While adhering to corrective justice, it denies that an assumption of responsibility by the defendant is the touchstone of liability for negligent misstatements. Indeed, there is nothing particularly distinct about misstatement liability as against normal liability in negligence predicated on proximity and foreseeability of harm. Further, this thesis argues that corrective justice is not only consistent with such a reading of the law, but necessitates it. Recognising a right means paying heed to its congeners. If we are to take rights seriously, then we must eschew reasoning—such as the assumption of responsibility thesis—that at once submerges real, extant rights while at the same time promoting a 'right' that is diffuse, ill-defined, and with little basis in law.

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Contents

Acknowledgements	iii
Table of Cases	ix
Australia	ix
Canada	ix
European Union	ix
New Zealand	x
United Kingdom	x
United States	xvi
Introduction	1
1. A right to information?	2
2. A muddled orthodoxy	5
3. The course of the argument	12
Part 1. The Basis of Liability in Tort	19
Chapter 1. Competing Normative Foundations	21
The normative landscape	22
1. Corrective Justice	24
2. Distributive Justice	30
Conclusion	38

Chapter 2. The Remedial Relationship	41
1. What are we correcting?	42
2. From right to remedy: the juridical sequence	67
3. Who is liable to make correction?	70
4. Duty and rights	81
5. The view outwith tort	87
Conclusion	101
Part 2. Negligent Misstatement	103
Chapter 3. Delineating Negligent Misstatement	105
1. A right to accurate information?	107
2. Different taxonomic plains: negligent infringement of a right	120
3. Purely economic losses	134
4. Further protected rights	156
Conclusion	160
Chapter 4. The Justification for Liability	163
1. Assumption of Responsibility	163
2. The Justification for <i>Hedley Byrne</i> Liability	179
Conclusion	187
Conclusion	189
Bibliography	193
Chapters and edited volumes	193
Books	197

CONTENTS

vii

Journal Articles

200

Table of Cases

Australia

- Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317 (HCA)
- Attorney-General for New South Wales v Perpetual Trustee Co Ltd [1955] 1 AC 457 (HCA)
- Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [2003] VSC 27
- Mount Isa Mines Ltd v Pusey (1971) 125 CLR 383 (HCA)
- Wallace v Kam [2013] HCA 19

Canada

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- Edgeworth Construction Ltd v M D Lea & Associates Ltd [1993] 3 SCR 206
- Horsley v MacLaren [1972] SCR 441

European Union

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- Case 39/72 Commission of the European Communities v Italian Republic [1973] ECR 101

New Zealand

- Balfour v Attorney-General [1991] 1 NZLR 519
- Furniss v Fitchett [1958] NZLR 396
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United Kingdom

- ABC v St George’s Healthcare NHS Trust & Ors [2017] EWCA Civ 336
- Abu Dhabi Investment Co and others v H Clarkson & Co and others [2008] EWCA Civ 699
- Alcock v Chief Constable of South Yorkshire Police [1991] UKHL 5; [1992] 1 AC 310 (HL)
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- Anglo-Algerian Steamship Co Ltd v The Houlder Line Ltd [1908] 1 KB 659
- Attorney General v Blake (Jonathan Cape Ltd, third party) [1997] EWCA Civ 3008; [1998] 1 All ER 833
- Attorney General v Blake and another [2000] UKHL 45
- Bacciottini & Anor v Gotelee & Goldsmith (a firm) [2016] EWCA Civ 170
- Barclays Bank Ltd v WJ Simms Ltd [1980] QB 667
- Barker v Corus (UK) plc [2006] UKHL 20
- Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5) [2012] FCA 1200

- Bolam v Friern Hospital Management Committee [1957] 1 WLR 582
- Bollinger v Costa Brava Wine Co Ltd [1960] Ch 262
- BPE Solicitors and anor v Hughes-Holland (in substitution for Gabriel) [2017] UKSC 21
- Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205 (HL)
- Brennan v Bolt Bros [2005] QB 303
- British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673
- Brown v Raphael [1958] Ch 636
- Burnett v British Waterways Board [1973] 1 WLR 700
- Caparo v Dickman [1990] UKHL 2; [1990] 2 AC 605 (HL)
- Capital & Counties plc v Hampshire County Council [1997] EWCA Civ 3091, [1997] QB 1004
- Cattle v The Stockton Waterworks Co (1875) LR 10 QB 453
- Cancer Research Campaign v Ernest Brown [1998] PNLR 592
- Central Ry of Venezuela v Kisch (1867) LR 2 HL 99
- Chandler v Cape plc [2012] EWCA Civ 525
- Chester v Afshar [2004] UKHL 41; [2005] 1 AC 134; [2004] 4 All ER 587
- Clay v AJ Crump and Sons Ltd [1964] 1 QB 533 (CA)
- Cleese v Associated Newspapers [2004] EMLR 3
- Coggs v Bernard (1703) 2 Ld Raym 909, 92 ER 107 (QB)
- Collins v Wilcock [1984] 1 WLR 1172

- Credit Lyonnais Bank Nederland v Export Credit Guarantee Department [1996] 1 Lloyd’s Rep 200
- Customs and Excise Commissioners v Barclays Bank plc [2007] 1 AC 181 (HL)
- Dean v Allin & Watts [2001] 2 Lloyd’s Rep 249 (CA)
- Derry v Peek [1889] UKHL 1; (1889) 14 App Cas 337
- Donoghue v Stevenson [1932] UKHL 100; SC 31 (HL)
- Downsview Nominees Ltd v First City Corporation Ltd [1993] AC 295
- Eckman v Midland Bank Ltd [1973] QB 519
- Economides v Commercial Assurance Co plc [1997] 1 QB 587 (CA)
- Elliott Steam Tug Co Ltd v Shipping Controller [1922] 1 KB 127
- Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22
- Farrell v Avon Health Authority [2001] Lloyd’s Rep Med 458
- Foley v Hill (1848) 2 HLC 28 (HL)
- Gregg v Scott [2005] 2 AC 176 (HL)
- Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 2 All ER 575 (HL)
- Henderson v Merrett Syndicates [1994] UKHL 5; [1994] 2 AC 145
- Hotson v East Berkshire Area Health Authority [1987] 2 All ER 909
- Holt v Markham [1923] 1 KB 504
- Iqbal v Prison Officers Association [2009] EWCA Civ 1310
- Jameel v Dow Jones & Co Inc [2005] EWCA Civ 75
- JSC BTA Bank v Ablayzov [2015] UKSC 64; [2016] 1 All ER 608
- Keates v Lord Cadogan (1851) 10 CB 591

- Kelly v Solari (1841) 152 ER 24
- Kent v Griffiths [2001] 1 QB 36
- Kleinwort Benson v Lincoln CC [1999] 2 AC 349
- La Société Anonyme de Remorquage à Hélice v Bennets [1911] 1 KB 243
- Lachaux v Independent Print Ltd and another [2017] EWCA Civ 1334
- Larner v LCC [1949] 2 KB 683
- Lazarus Estates Ltd v Beasley [1956] 1 QB 702 (CA)
- Leigh and Silavan Ltd v Aliakmon Shipping Ltd, The Aliakmon [1986] 1 AC 785 (HL)
- McFarlane v Tayside Health Board [2000] 2 AC 59
- Miller v Race (1878) 1 Burr 452
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- Morgan v Ashcroft [1938] 1 KB 49
- Morgan Crucible Co plc v Hill Samuel & Co Ltd [1991] Ch 295 (CA)
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- Mortgage Express v Countrywide Surveyors Limited [2016] EWHC 1830 (Ch)
- Moschi v Lep Air Services [1973] AC 331 (HL)
- Norwich Union v Wm H Price Ltd [1934] AC 455
- Nurdin & Peacock plc v D B Ramsden & Co Ltd [1999] 1 WLR 1249
- Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1997] 1 WLR 1627

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- Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty) [1994] 1 All ER 470; [1994] Lloyd's Rep 365; [1994] 1 WLR 161
- Pearce v United Bristol Healthcare NHS Trust (1998) 48 BMLR 118 (CA)
- Perrett v Collins [1998] 2 Lloyd's Rep 255 (CA)
- Phelps v Hillingdon LBC [2001] 2 AC 619 (HL)
- Photo Production Ltd v Securicor Transport Ltd [1980] UKHL 2; [1980] AC 827
- Playboy Club London Limited & Ors v Banca Nazionale del Lavoro SpA [2016] EWCA Civ 457
- Banca Nazionale del Lavoro SpA v Playboy Club London Limited and others [2018] UKSC 43
- RE Jones v Waring & Gallow Ltd [1926] AC 670
- R v Clarence (1888) 2 QBD 23
- R v Cunningham [1957] 2 QB 396
- R v Flattery (1877) 2 QBD 410
- R v G and another [2003] UKHL 50
- R v Kohn (David James) (1979) 69 Cr App R 395
- R v Woollin [1999] 1 AC 82 (HL)
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- SCM (United Kingdom) Ltd v WJ Whittall & Son Ltd [1970] 2 All ER 417 (CA)

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- Smith v Eric S Bush [1990] 1 AC 831 (HL)
- South Australia Asset Management Corporation v York Montague Ltd [1996] UKHL 10; [1997] AC 191
- Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] 1 QB 27; [1972] 3 All ER 556 (CA)
- Spring v Guardian Assurance plc [1995] 2 AC 296 (HL)
- Swingcastle Ltd v Alastair Gibson (a firm) [1991] 2 AC 223; [1991] 2 All ER 353
- The Grandcamp [1961] Lloyd’s Rep 504
- Torkington v Magee [1902] 2 KB 427 (DC)
- W v Essex County Council [1998] 3 WLR 534 (CA)
- W v Essex County Council [2001] 2 AC 592 (HL)
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- Wilkinson v Coverdale (1793) 1 Esp 75, (1801) 170 ER 284
- Williams v Natural Life Health Foods [1998] 2 All ER 577; [1998] 1 WLR 829 (HL)
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- Wilson v Health and Safety Executive [2009] EWCA Civ 1074 (CA)
- Wilson v Pringle [1987] QB 237
- Wrotham Park Estate Co v Parkside Homes Ltd [1974] 1 WLR 798

United States

- Canterbury v Spence (1972) 464 F 2d 772
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- Depue v Flatau 111 NW 1 (MN Minn SC 1907)
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Introduction

NEGLIGENT MISSTATEMENT LIABILITY IS poorly understood—not for want of trying, but certainly for want of consensus. The dominant manifestation of liability seems to be predicated on an assumption of responsibility by the defendant (whether actual or implied). A quasi-contractual relationship such as this suits the rights-based thesis. Those skeptical of the rights-based thesis are, perhaps not surprisingly, similarly skeptical of the assumption of responsibility model. As such, this model has become something of a shibboleth in misstatement theory. This thesis crosses party lines. The argument presented herein is that it is not only possible to be both a rights-based theorist and skeptical of assumption-based models, but entirely necessary if we are to accord respect to rights and also to avoid multiplication of hypotheses.

Negligent misstatement isn't about the recognition of a new right to information *per se*. We possess a range of rights—rights to body, property, holdings of wealth *etc*—and our ability properly to exercise such rights often depends upon being properly informed or advised. Our rights are vulnerable to deprivation and loss when others make misstatements to us because, for example, we enter into inadvisable transactions as a result of them. The law of misstatements allows us better to enjoy our existing rights and to make better decisions with respect to them. This thesis

will consider this proposition in relation to a range of situations from medical advice to the effect of misstatements upon subsequent transactions.

1. A right to information?

It is an observation at once trifling and fundamental that we rely daily on information, information we are often unable to question, and information provided not necessarily to us directly but also to the public at large. This information takes manifold forms: weather forecasts, travel information, news (and, indeed, fake news), financial information, directions, road signs, allergy advice, *etc.* Statements such as these dominate our lives.

Much of this information is provided without obligation on the part of the provider, inasmuch as he or she is under no obligation to the receiver to provide the information. If I approach you in the street and ask for directions to the nearest purveyor of groceries, then—no matter how lost I am and no matter the extent of my need for asparagus—you infringe no right of mine nor curb any obligation of yours in failing to provide that information. That I rely on you does not, *ipso facto*, generate any obligation on your part, nor right on mine.

If, on the other hand, you do choose to provide directions, I find no further entitlement to accurate information simply because I am not in a position to question it. Short of hearing your advice and cross-checking it with another hapless stranger—an exercise potentially as futile as it is mildly bizarre—I genuinely rely upon the accuracy of the information because I know no better. The same is true of the weather forecast. My own ability to foretell the weather is limited by a distinct paucity of data, *inter alia*, so if you (assuming your new role as weather forecaster)

tell me that it is going to rain next week, I am in no position to question it. Even if other weather forecasters appear to disagree, my criticism of your forecast is limited solely to some probabilistic estimate—the majority of other informed people seem to think you are wrong—and is not informed by any expertise on my part.

The temptation would be to argue that my genuine reliance should generate some obligation on your part, this being the counter-point to an alternative formulation: if I were able to check with relative ease information provided to me—if I asked for directions but am also able to access a map on my mobile phone, say—then it would seem strange to burden the generous passer-by with any kind of legal obligation. However, it does not follow as a matter of logical necessity that my *inability* to check the information should therefore generate an obligation on your part; the existence of thing A may provide a good reason for not doing action B, but the absence of A does not necessarily provide a reason for definitely doing B. Were it the month of June, I might note that it would be a bad time to eat oysters, and so choose not to. However, were it not June (or May, July, or August), I do not then become subject to an imperative to eat oysters at every other time of year; a reason may be sufficient on its own to mandate or prohibit action, but merely being a sufficient reason does not allow us to suppose that it is the *only* reason, or a necessary reason. The crude examples above are just a couple of the manifold instances where such liability is clearly not generated, despite my reliance on accurate information.

Indeed, there is a non-trivial (though, as we shall see, problematic) argument to be made that my reliance on you is a very good reason *not* to burden you with legal liability: the law should encourage you to do me a voluntary favour, and not saddle you with the consequences of failing to do so, or failing to do so well. On its

own, however, this reason is clearly insufficient to negative a finding of liability: that non-negligent action may carry with it some benefit is no reason to ignore the effects of negligent action. Surgery to correct chronic back-pain is clearly of benefit, but less so if the result of negligent surgery is death or paralysis. It would be no defence for the negligent surgeon to argue that there was benefit *in posse* such that his or her negligence should be ignored.

The reason that we struggle when considering situations such as this—the reason that we struggle to define why someone is liable for the provision of misleading information—is that we are casting about for a right to be informed or a duty to inform. This thesis argues that no such duty or right exists, save indirectly as a product of prior rights (such as the right to bodily integrity, or to dispose of your property as you wish, *etc*).

The thesis will advocate in favour of corrective justice; private law, at its core, is concerned with one person's entitlement to demand of another a remedy for interference with a right, whether in the form of damages for loss, adjustment of gain, refrainment from interference with that right, *etc*.

However, this thesis departs from the rights-based school of thought in refuting the assumption of responsibility argument. This amounts to a multiplication of hypotheses: it is neither necessary nor helpful in explaining the existence of liability for misstatements. We should permit only the minimum number of concepts to explain legal phenomena, and shun duplication and poor reasoning.

It is worth considering the academic and judicial context of some of these arguments.

2. A muddled orthodoxy

The various analytic approaches to liability in tort law are manifold, varying from realist approaches by tort scholars such as Jane Stapleton—who would argue in support of tort law’s purposive welfare function,¹ embracing both principle and policy—to more formalist approaches by scholars such as Ernest Weinrib,² whose concern lies in the careful exposition of the structure of tort law.

Tort law is not alone in this regard; contract law, for example, can be analysed as an instrument of economic exchange, as a manifestation of interpersonal justice, as a logical part of the broader map of the law of obligations, and so on.

However, this thesis proposes an alternative analysis of our understanding of duty and rights in the law of negligence, and the approach taken is—not unthinkingly—formalist, in that the methodology and analysis is directed towards achieving a coherent understanding of the law. Coherence is ‘a necessary condition that both the law and theories about it must satisfy in order to qualify as such’;³ it may be that there are other possible coherent systems of law, but it is hoped that, by founding the analysis on our current and well-reasoned understanding of the most basic elements of negligence (e.g. that claims are founded on loss), there is more to be said in favour of this analysis than mere coherence.

¹See J Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, Clarendon Press 1998) 59, and see also J Stapleton, ‘The Golden Thread at the Heart of Tort Law: Protecting the Vulnerable’ (2003) 24 *Aust Bar Rev* 135, 135–137.

²Note Weinrib’s famous dictum, ‘true purpose of private law is to be private law’, in E Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 5.

³R Stevens, ‘The Conflict of Rights’, in A Robertson and H W Tang (eds), *The Goals of Private Law* (Oxford, Hart Publishing 2009) 141.

Two examples demonstrate well the lack of coherence affecting the law of negligent misstatement, though this is not to suggest they are unique in this regard. It is worth considering them to some extent, in order that the importance of clear taxonomy is clearly demonstrated.

The first is economic loss. Students of the common law—and, indeed, of the civil—will know well of courts’ reluctance to recognise claims for losses which are purely economic. They will know of it, but experience suggests that understanding is rare. The trite mantra that *you cannot claim for pure economic loss* causes considerable confusion because, of course, you can claim for purely economic losses. Consider contracts: the breach of the primary duty of performance (or, indeed, the right to performance) generates a remedial relation to provide the claimant ‘with the value of the performance to which he was entitled under the primary relation’.⁴ No court would strike out a claim on the basis that the expectation interest contingent upon due performance was purely financial in nature. Similarly, in the case of mistaken payments, or enrichments *sine causa*, the purely financial nature of the claim would be no bar to the right to restitution. Even in the realm of tort law, economic loss is recoverable in public (and perhaps even private⁵) nuisance, albeit that this must be predicated on a restriction of the claimant’s reasonable enjoyment of their land.

No doubt the student would here offer some rejoinder, that of course the bar only applies to negligence claims. Even if this were actually the case (which, given that one can recover purely economic losses flowing from negligent misstatements, it is

⁴P Jaffey, ‘Damages and the Protection of Contractual Reliance’ in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Oxford, Hart Publishing 2008) 140.

⁵*SCM (United Kingdom) Ltd v WJ Whittall & Son Ltd* [1970] 2 All ER 417, 430 (CA).

not), it doesn't elucidate our problem in any real sense. Given the law's willingness to allow recovery in almost any other instance, one sensibly entertains a suspicion that the bar does not exist purely—if at all—because the losses are economic in nature, but rather because the loss is not founded on any identifiable right; put simply, the rule does not speak for itself. This point will be elaborated as one of the core themes of the thesis.

One of the problems with dealing with negligent misstatement and economic loss is due to the language of negligence over the past century, which has been duty-focussed. Lord Atkin, despite much mastery in his judgment in *Donoghue v Stevenson*,⁶ set us on a doomed path. In his speech, he noted

The liability for negligence[...]⁶is no doubt based upon a general public sentiment of wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁷

⁶[1932] SC 31 (HL).

⁷ibid at 44.

The quotation is lengthy, but deliberately so; the focus is consistently on the defendant, and the question as to whom they owed a duty of care. ‘Who is my neighbour?’ translates without any loss of meaning to ‘to whom do I owe an obligation?’, but it is a stretch in this context to suggest that it translates with as much ease to ‘who has a right that I must not infringe?’. In fact, in Lord Atkin’s view the right to relief is born almost entirely of this breach of a duty of care. This thesis will show how this cannot be the case. The doomed path consists in trying to isolate an element that establishes the defendant’s liability in the abstract and beyond the causation of harm (infringement of right).

Similarly, the continual reversion to defendant-focused liability in the form of ‘assumption of responsibility’, as most recently articulated in *Chandler v Cape plc*,⁸ is leading the law into unusual and alien territory, and almost certainly as an unintended consequence. For example, Lord Steyn in *Williams v Natural Life Health Foods*⁹ advocated what Professor Barker has termed the ‘strong’ version of the assumption of responsibility approach.¹⁰ The assumption, so the argument went, need not have been explicit, but certainly there must have been an implication that the defendant agreed to be responsible; such an analysis would appeal to those who would view tort (erroneously, it is submitted) as quasi-contractual, as articulated by Lord Devlin.¹¹ However, an agreement to incorporate liability—explicit or otherwise—is clearly a marked departure from the precepts of tort, a subject which ‘is most typically concerned with unilateral decisions to act that cause harm to others and

⁸[2012] EWCA Civ 525.

⁹[1998] 1 WLR 829 (HL).

¹⁰K Barker, ‘Wielding Occam’s Razor: Pruning Strategies for Economic Loss’ (2006) 26 OJLS 290.

¹¹See also *McFarlane v Tayside Health Board* [2000] 2 AC 59, 76 (Lord Slynn).

obligations are typically imposed as between strangers.¹² The analysis is further stretched when one considers the many situations in which ‘the services or advice provided[. . .]were in no sense voluntary’¹³, but provided with a disclaimer of responsibility (as in *Smith v Eric S Bush*¹⁴) or under statutory obligation (as in *Ministry of Housing and Local Government v Sharp*¹⁵), for example. Such an interpretation seems almost to be unworkably restrictive, and so easily circumvented.

Discarding the language of implied subjective assumption, and rightly so, others have argued for a far weaker interpretation—an objective interpretation—such as that favoured by the House of Lords in *Henderson v Merrett Syndicates*¹⁶ and, subsequently, in *Spring v Guardian Assurance plc.*¹⁷ The difficulty in applying the traditional *Hedley Byrne*¹⁸ formulation of liability stems from the fact that the dealings were in no sense direct; the defendant ex-employers were required to produce a reference about the claimant, though—unlike in *Hedley Byrne*—not to the claimant. However, under the objective interpretation, the question of whether the claimant was the intended recipient or not rather misses the point: the claimant still *relied* on the reference, and the fact that such reliance required no act or volition on his part arguably lends even greater weight to a finding of liability.¹⁹ Indeed, surely this is the point: the extent of the claimant’s volition is inversely proportional to the

¹²C Witting, ‘Justifying Liability to Third Parties for Negligent Misstatements’ (2000) 20 OJLS 4, 642.

¹³Barker (n 10).

¹⁴[1990] 1 AC 831 (HL).

¹⁵[1970] 2 QB 223.

¹⁶[1994] UKHL 5.

¹⁷[1995] 2 AC 296 (HL).

¹⁸*Hedley Byrne & Co Ltd v Heller Partners Ltd* [1964] AC 465 (HL).

¹⁹See Witting (n 12), in which Professor Witting states that where ‘few[. . .]decisions or acts of volition intervene in the sequence of events leading to the damage’, this will evidence a close causal connection.

foreseeability of his relying on the defendant's statement. How the reliance manifests itself—directly or through a third party—is thus of secondary import to the question of whether there is reliance at all. The language of *assumption* is therefore entirely misleading as describing any relevant test, as ultimately it is a question of law.²⁰ Rather, many have argued that it is enough for the purposes of any test that a person has undertaken a task in the knowledge that some other person 'is generally reliant upon him for protection against harm'.²¹

This seems to be a reasonable enough formulation, though its inherent breadth and ambiguity haunt it still. Consideration of the law relating to third party liability in general will show this to be true. What if one holds, as Lords Goff and Browne-Wilkinson did in *White v Jones*,²² that reliance (which requires the claimant to have altered their position in some way *in reliance* on the defendant) need not strictly apply to all cases, but only to misstatements because damage does not necessarily flow therefrom, and that a broader test for third party liability is one of dependence?²³ Well, then there is no real logical difference between the former scenario and the scenario where a solicitor, who negligently failed to alter a will such that the intended beneficiaries failed to inherit, is thus liable to the beneficiaries (despite the contractual relationship being with the testator). This was the case in *White v Jones*, and it bears further analysis.

²⁰See *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 (HL).

²¹K Barker (n 10). It is also worth noting here the models of negligence liability identified in K Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 LQR 461, which vary from the strong—assumptions of responsibility based on promise—to weakest versions whereby the assumption of responsibility is born of the mere decision to act. Barker is apt to warn against 'assumption of responsibility' as a 'conceptual veil' rather than a term offering concrete guidance or clarification (483).

²²[1995] 2 AC 207 (HL).

²³*White* (n22) 275.

Under the strong assumption of responsibility test, it is clear that the solicitor—being in contractual relations with the testator and not with the beneficiaries—could not have assumed responsibility towards the beneficiaries. Indeed, the objective test is on no firmer ground given that the beneficiaries, being ignorant of the will, could not have relied on it in the traditional sense of having altered their position. However, the aforementioned conclusion of Lord Browne-Wilkinson—that dependence rather than reliance can be applicable for cases beyond negligent misstatement—might seem wholly reasonable; as with the discussion relating to *Spring* above, the material fact is that the beneficiaries’ interests could be harmed by the actions of the defendant and such harm was not dependent in any way on the volition of the beneficiaries. As *per* Lord Browne-Wilkinson, ‘[t]he solicitor who accepts instructions to draw a will knows that the future economic welfare of the intended beneficiary is dependent upon his careful execution of the task.’²⁴ It is clear, not least from the speech of Lord Goff, that their Lordships were keen to provide a remedy where otherwise the beneficiaries would have no claim.²⁵ Nonetheless, however understandable such a motivation be, such a broad determinant of liability casts the net far too wide.

We see the acute problem of the *White v Jones* reasoning in other cases. What is different, then, between that situation and the situation in *Dean v Allin & Watts*²⁶ in which it was held that the defendant solicitor acting for a counter-party (the borrowers) in an arm’s-length transaction owed a duty of care to the claimant (a lender)? On the facts, it was clear that the solicitor knew his failure to act (in this case, to create an effective security interest in a property) would be of detriment to

²⁴*ibid.*

²⁵*White* (n 22) 259.

²⁶[2001] 2 Lloyd’s Rep 249 (CA).

the claimant, and that the claimant was both dependent and reliant on the security being effective. The absurdity of this situation is made most clear when one considers that it would be difficult indeed to argue that the counter-party's solicitor owed the claimant a duty of care, but that the counter-party himself did not owe a similar duty of care.

The language used across the whole subject of negligence has become at once complicated and vague, persistent and inconsistent. This thesis, developing the recent—and highly persuasive—arguments of Professor Weinrib in *Corrective Justice*,²⁷ will attempt to reconstruct our theoretical understanding of negligence by looking again at its most basic building blocks: rights and duties. It will propose, in a departure from traditional negligence jurisprudence, that the focus on a right to information or on an abstract duty to inform is incorrect, and so too—as a corollary of such—must be the assumption of responsibility thesis.

3. The course of the argument

How, then, will the argument against the assumption of responsibility thesis be presented? The overall thesis is presented in two parts: the first concerns underlying theories of tort law and negligence; the second concerns negligent misstatement specifically, and the locus of liability. Turning, then, to each chapter in turn.

3.1. Chapter 1: Competing Normative Foundations. This thesis advocates a corrective justice approach to tort law. The purpose of this chapter is to emphasise the normative basis of corrective justice. If we are to take rights seriously, and if we are to treat parties as equal before the law, then infringements of rights

²⁷E Weinrib, *Corrective Justice* (OUP 2012).

demand correction. An action that benefits A at the expense of B's rights necessitates rectification, otherwise there is no sense in which A and B are equal before the law. The problem with goal-oriented approaches is that there is an inevitable requirement that the claim be regarded as an opportunity to advance some unrelated or minimally-related social goal. Distributive justice is a stark example of this; if we submerge rights beneath a general distributive intent, then our rights will only be respected in an arbitrary, *ad hoc* fashion. The right informs the claim, it delineates the parties' relation, and thus it should have primacy in the remedy.

3.2. Chapter 2: The Remedial Relationship. This chapter considers the legal nexus between the parties: why they are legally related, and how that necessitates specific remedial action. The chapter is divided into four sections. The first, 'What are we correcting?', focuses in more detail on the nature of rights. It argues that the rights which generate a subsequent claim are *prior* rights in the sense that they are not mere claim rights that exist in a reflexive relationship with duty. My right not to be caused physical harm, for example, is not a *product* of your duty not to injure me. Indeed, whatever your duty is can only be informed by the prior existence of rights. Whatever moral regard we may have for certain risk-taking, a claim only exists at the point that rights are infringed, and not because of risk-taking in the abstract. These rights can, of course, be waived to certain extents²⁸: reasonably foreseeable and/or reasonable behaviour does not infringe our rights necessarily; by placing ourselves in situation where we are at foreseeable risk of reasonably inflicted harm, we have consented to injury relative to that right.

²⁸I use the term 'waived' here because it most aptly describes the effect on the right. By this, I do not mean to invoke the specific notion of waiver as it relates to waiver by contract or deed. Rather, it is a more general notion of forgoing applying to the underlying right.

Recognising that we live in a capricious, chaotic world—where the manifold interactions of humans, and of humans and nature, will produce consequences that are both entirely unforeseen and unforeseeable—we must accept that we waive our rights to some extent, that we cannot claim against a defendant merely because he or she was the last in a fateful chain of blameless causation. We do not need proactively to act in order to become subject to the changes and chances of the world, though by volunteering to undertake an activity we will tacitly waive our right with respect to would-be infringements that we ought reasonably to foresee as inherent in that activity—assuming that all others are acting reasonably—and also to those risks and harms that no one could have foreseen. Our rights can thus only be unlawfully²⁹ infringed by one acting unreasonably, whereby an imperfect but otherwise reasonable *status quo* is disrupted.

The second section considers the relationship between right and remedy. It argues, developing Weinrib's writings on the juridical sequence, that the remedy is the continuation of the right, and that awards that do anything other than offer remedy (or prevention of further infringement) are, put bluntly, entirely arbitrary.

In the third section, we consider the final element of the juridical sequence: the *doer* of the harm. It is very important to note that, just as the right was not a reflex of duty, the duty is not a reflex of right. In defining duty and breach thereof, we morally particularise the defendant amongst the manifold elements of the chain of causation. So the defendant must have been a cause of the injury, but such an observation is meaningless without more. Statements to the effect of 'you have a duty not to infringe my right'—so, for example, saying 'you have a duty not to kill

²⁹That is without lawful excuse, which would include lawful arrest, detention under the Mental Health Act 1983, stop and search under PACE 1984, *etc.*

me’—are entirely meaningless, for they presuppose a morally blameworthy action such that you can be regarded as having exercised some blameworthy agency in causing my downfall.

Having identified the wrong, the chapter turns in its final section towards contract and unjust enrichment. The purpose of this chapter is twofold: (i) to argue that the remedy as articulated in the preceding sections is not at odds with private law in general—the remedies act minimally to return the parties to the equitable *status quo*; and (ii) to highlight the importance of intention/consent in framing the discussion about rights. This will be of especial importance when considering *Hedley Byrne* liability in the fourth chapter.

3.3. Chapter 3: Delineating Negligent Misstatement. Having discussed rights at some length, we need to be aware of the taxonomic difference between negligence and rights, and specifically we need to have an understanding of where negligent misstatement as an enquiry may sit in that taxonomy: is it, as its name would suggest, an instance of the broader negligence enquiry, to wit an enquiry into *how* rights may be infringed by a misstatement? Or is negligent misstatement actually an instance of an altogether different right (such as, perhaps, a right not to be lied to, or a positive right to information)? This chapter argues that the former interpretation is to be preferred. We do not have some pre-existing right to information or to accurate information *per se*. This argument will be expounded by reference to two medical law cases—*Chester v Afshar*³⁰ and *ABC v St George’s*

³⁰[2004] UKHL 41.

*Healthcare NHS Trust & Ors*³¹—both of which concerned the questions of a patient’s right to be informed and, correspondingly, the doctor’s duty to inform.

The chapter then proceeds to the second element, viz. if there is no pre-existing right to information, how does the negligent misstatement enquiry relate to our rights? This question is addressed by analysing an instance of a right that smells and tastes a lot like negligent misstatement: defamation. It will be seen that the enquiries are not the same; they exist on different taxonomic levels. Defamation is an instance of a specific right (or at least interest), whereas misstatement does not concern itself with any one particular right.

The chapter concludes with a discussion of economic loss, and argues that the rights-based thesis is not corrupted merely by permitting certain purely economic claims.

3.4. Chapter 4: The Justification for Liability. In a sense, the previous three chapters have been laying the groundwork for this chapter. The purpose of this chapter is twofold: firstly it will deny that an assumption of responsibility is or can be the touchstone of *Hedley Byrne* liability. Secondly, it will offer an account of such liability that remains predicated on the infringement of right. It will be noted that this right does not arise *ex contractu* or out of some quasi contract—such is the realm of the assumption of responsibility thesis. Negligent misstatement is a creature of negligence, and thus the chapter affirms Christian Witting’s opinion—albeit from the corrective justice perspective—that the law of negligent misstatement is not to be regarded as somehow apart from the broader law of negligence. Assumption of responsibility models essentially collapse into standard proximity models.

³¹[2017] EWCA Civ 336.

To reiterate, the purpose of this thesis is to present a conception of negligent misstatement that is both in accordance with corrective justice and private law more generally, while also—and logically consistently—denying appeals to assumption of responsibility. While such an explanation is not necessarily simple in the everyday sense, it is simple inasmuch as it explains what it needs to explain without being excessively restrictive or, as we will see in some cases, being excessively broad. That is to say, it is as simple as possible, but not simpler.

Part 1

The Basis of Liability in Tort

CHAPTER 1

Competing Normative Foundations

IN THE FOLLOWING TWO CHAPTERS of this part, I will seek to elucidate the law of tort, to offer an account of tort that is at once coherent while also respecting the notion of fault or blameworthiness that is the traditional essence of negligence. The approach taken will be self-consciously formalist, and—it is hoped—logical, taking as its main axiom the simple precept that we are free to act with respect to one another inasmuch as our actions do not infringe another’s rights; conduct that is otherwise blameworthy, but absent this infringement, is not the concern of tort law (though it may well be the concern of public law).

However, the discussion ought not to proceed without fully considering the philosophical context of this axiom and its attendant implications, or the opposing normative foundations. So although the discussion of negligent misstatement in Part II will proceed on the basis of tortious liability as already enucleated, it is important to note that this analysis rests on one of a few approaches to tort law. The importance is explained thusly: though my submission, of course, is that the corrective justice approach I shall adopt is to be preferred, those who would object to my argument may find that they object to the initial axiom, but, on the given axiom, can accept the line of reasoning that flows therefrom.

This is not intended to be an exhaustive account of the normative foundations of tort law; the purpose of this thesis could be entirely subsumed by that discussion

alone. Further, eminent scholars such as William Lucy¹ and Izhak Englard² (amongst others) have written scrupulous analyses on the subject, and there is no need for a poor imitation to appear here. Hopefully, though, this brief chapter will at least make clear the architecture of my thoughts. Having addressed corrective justice, the chapter will address various manifestations of the distributive justice approach, though it will be seen that corrective justice is nonetheless to be preferred.

The normative landscape

The differing normative approaches to tort law can be placed—with varying levels of comfort—into two camps: rights-oriented, and goal-oriented. In practice, the dichotomy is perhaps a false one, for the proponents of the rights-oriented approach would hardly consider themselves to be outcome-blind, whilst one would be hard-pushed to find an adherent to the goal-oriented approach advocating that case-by-case decisions be determined solely according to a set of *a priori* social goals. Of course, the question is one of degree, but the principles that determine that degree do differ fundamentally. The rights-oriented approach, of which corrective justice theory is the dominant manifestation,³ takes as its axiom the fundamental equality of individuals: they equally and individually possess—or are equally at legal liberty (if not practical liberty) to acquire—rights. For example, we are all possessed of an equal and individual right to bodily integrity (individual inasmuch as my bodily

¹W Lucy, *Philosophy of Private Law* (Oxford, Clarendon Press 2007).

²I Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (OUP 2009).

³Cf, for example, D Campbell, ‘The Curious Incident of the Dog that did Bark in the Night-Time: What Mischief does *Hedley Byrne v Heller* Correct?’ in K Barker, R Grantham, and W Swain, *The Law of Misstatements* (2015) 122: ‘[. . .]the technicalities of neo-classical economics are expressive of fundamental moral rights and duties which emerge from acknowledging the autonomy, and therefore responsibility, of economic actors.’

integrity is not infringed just because yours is), and we are all equally at liberty to acquire contractual rights. The private law thus exists as a framework to correct uninvited infringement of our rights, but also, crucially, is the logical manifestation of respect for equal rights. It is an end in itself.

However, to approach private law with certain goals in mind is to view rights and rights-holders as means to an end, rather than an end in themselves. In an entirely abstract sense, these ends or goals could be anything, including the goal that all individuals be accorded equal rights (however such a goal would manifest itself). This (admittedly unusual) example is illuminating; at first glance, it would appear to be the same as the rights-oriented approach. Except, of course, it approaches the law from an entirely different perspective. Whereas proponents of the rights-oriented approach argue that the law exists as a manifestation of these rights, a goal-oriented approach would be to argue that the law is what it is in order to achieve these rights, but is not a necessary corollary of a system of equal individual rights. In litigating—to view it another way—legal persons would be seen as acting functionally, in order to progress broader social goals. Under such an account, the law is a tool, not a logical necessity. In practice, of course, the goals tend to be less abstruse: redistribution of wealth, perhaps, or economic efficiency.

This chapter will consider corrective justice as a manifestation of the rights-oriented approach, and distributive justice as a manifestation of the goal-oriented approach.

1. Corrective Justice

At fundament, corrective justice reflects the relatively simple Aristotelian notion that people should be viewed as ends in themselves, rather than merely functional actors in a broader system of justice. That said, Aristotelian though the notion is, Aristotle did also assert that, to some extent, a human being is a social animal who ‘realises this life in co-operation with others’ (i.e. that they are, to some extent, functional). Thus, Aristotle provided an account of distributive justice that he claimed could co-exist with corrective justice. This careful exposition of both distributive and corrective justice formed much of book IV of Aristotle’s *Eudemian Ethics* and book V of the *Nicomachean Ethics*, and informs a debate between corrective justice and distributive justice that is still fought today (indeed, it is not even clear that the two are mutually exclusive, as a notable school of thought subscribes to a co-existence thesis⁴). We will return to distributive justice later in this chapter, for the co-existence thesis is at least questioned, certainly as it relates to private law (as will become clear in the following).⁵

Central to Aristotle’s argument on corrective justice was an arithmetic notion of justice, such that the unjust gain of one party at the expense of another should be subtracted so to make up the other’s loss. This requirement for ‘gain’ is not to be taken literally: scholars of unjust enrichment will immediately recognise the formulation, but it has broader application beyond modern unjust enrichment; Aristotle’s

⁴As noted in W Lucy, *The Philosophy of Private Law* (OUP 2007), ‘the coexistence thesis seems to be a fleeting background presence in Coleman’s recent work’. See J L Coleman, *The Practice of Principle* (Oxford, Clarendon Press 2001).

⁵See, for example, E J Weinrib, ‘Corrective Justice’ (1992) 77 Iowa L Rev 403, 420.

formulation was ‘little more than a skeletal description of the law’s ‘corrective’ function of rectifying torts’⁶ and, in any case, Athenian law at the time was not such as to draw explicit, clear distinctions between, say, unjust enrichment and tort. What Aristotle was suggesting in this formulation was a system of rectificatory justice,⁷ in the sense that those responsible for losses should repair them. Indeed, as James Gordley has noted, the gain can be seen ‘in the sense that he has pursued his own objectives at another’s expense.’⁸

The requirement for *rectification* of wrongs is, on certain views, the essence of corrective justice: namely, that the party who has suffered wrongful loss is to be made good by the party responsible for that loss. Jules Coleman⁹ and Ernest Weinrib¹⁰ have, separately, advanced two of the most comprehensive accounts of this essence of corrective justice. There are important differences in the two authors’ approaches—for example, as Coleman submits, ‘in [Weinrib’s] account the object of rectification is the ‘wrong’, whereas in my account it is the wrongful loss’¹¹ The wrongful loss is predicated on wrongful interference with ‘legitimate interests’, which include—but are not limited to—rights.¹² It should be noted that this author is skeptical of responses to the challenges of doctrinal consistency that pay much heed to interests. This is not to deny that there may be some merit in a taxonomy that contains both

⁶D G Owen, ‘Why Philosophy Matters to Tort Law’ in D G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Clarendon Press 1995) 1.

⁷Aristotle, *Nicomachean Ethics* V.ii 1130b.

⁸J Gordley, ‘The Aristotelian Tradition’ in Owen (n 6) 157.

⁹J L Coleman, *Risks and Wrongs* (OUP 1992).

¹⁰E J Weinrib, *The Idea of Private Law* (OUP 1995).

¹¹J L Coleman, ‘The Practice of Corrective Justice’, in Owen (n 6) 66.

¹²Coleman (n 9) 331. Coleman actually describes two distinct types of harm. The first type consists in wrongs, which are ‘actions contrary to rights’, but this is not synonymous with wrongful action.

rights and interests, but the taxonomy of rights and interests at present is muddled indeed.

Consider the right to physical integrity. I say ‘right’, because we are more than happy to concede that bare interference with our physical integrity will constitute a trespass. Nothing further is needed. Except, in the face of a negligence claim, all of a sudden this right is demoted to the status of an interest, infringement of which needs to be made manifest in contingent harm. The reason, obviously, is because of the historical development of tort law. However, as Lucy is astute to observe, ‘That this answer carries no or very little moral weight is equally obvious and serves to highlight one way in which private law’s catalogue of wrongs is and should be subject to moral[.]..]criticism.’¹³ It is not at all clear why the presence of intention in trespass can elevate an interest to a right, or the lack of intention can demote it. There may be good arguments that we should regard the *proximity*¹⁴ between the parties as closer where one party actively set out to trespass on another, but this reasoning does not explain why the notion of harm actually suffered should differ. If I negligently crash my car into you on one day, and *intentionally* do so on another, causing identical injuries on each occasion, your physical pain will feel no different across the two days. The physical violation of your integrity is identical on each occasion. If we want to limit the liability of those who commit negligent acts as against those who act with a more deliberate outcome in mind, then adjusting the pre-existing rights of the claimant *ex post* seems to be a very strange way to achieve it.

¹³Lucy (n 1) 218.

¹⁴Proximity is one of the traditional limbs of the duty of care ‘test’ from *Caparo Industries plc v Dickman* [1990] UKHL 2—the others being reasonable foreseeability and the policy limb—that concerns the potential for harm between the specific claimant and defendant.

By requiring an element of unreasonableness alongside the infringement of the legitimate interests, Coleman practically unwinds the tight logic that would have led to a clearer understanding of the law. To Coleman's credit, perhaps, he does so knowingly; it is his view that 'private law adjudication is a process of weighing the competing interests *ex post*',¹⁵ but this is precisely what has troubled tort law for so long; we need to be clearer about what it is that triggers liability. However, such clarity in matters of protected interests (inasmuch as they are not rights) is, for the moment at least, a mere will-o'-the-wisp.

These differences in the theories are important—and this thesis will proceed largely on the Weinribian view—but what is more important is that there is broad agreement that any account of corrective justice should view rectification as a core element. The basis of this agreement can, again, be traced back to Aristotle. Aristotle's account of corrective justice relied on the two parties being viewed as equals, an account which echoed many centuries later in the philosophy of Thomas Aquinas—who regarded justice as 'the steady willingness to give to others *what is theirs*'¹⁶—and of Immanuel Kant.¹⁷ The 'core of the Kantian-Aristotelian concept of Right or justice', so Richard Wright argues, '[...]is not the meaningless pursuit of aggregate social welfare[...]but rather the promotion of the equal (positive and negative) freedom of each individual in the community.'¹⁸ As Ernest Weinrib summarises this approach, to view the parties as having equal or reciprocal freedom is to view the parties 'as

¹⁵Lucy (n 1) 312.

¹⁶J Finnis, *Philosophy of Law: Collected Essays Volume IV* (OUP 2013) 116.

¹⁷Kant and Aquinas were not the only ones to take up the Aristotelian mantle: Aquinas famously reawakened Aristotle in the minds of the medieval philosophers—the Platonic tradition having long trumped Aristotle's philosophy—followed by the natural law Enlightenment thinkers such as Grotius (whose theory as it most closely relates to this discussion was expounded in *De iure praedae commentarius*) and Pufendorf, both founders of the Northern Natural Law School.

¹⁸R Wright, 'Right, Justice and Tort Law' in Owen (n 6) 181.

free beings who interact with each other as holders of rights (to physical integrity, to property, to contractual performance, and so on) that are the juridical manifestations of their freedom.¹⁹ This seems logically satisfactory: in a world where A and B are accorded equal status, an action that benefits B at the expense of A necessitates rectification, otherwise there is no sense in which A and B actually have equal status.

The requirement for rectification based on equality necessitates a further conclusion: the rectification must be *correlative* (for a remedy that did not subtract the gain but remedied loss, or vice-versa, would not be treating the parties as equal). Coleman regards this as another core element of corrective justice, alongside rectification. In simplistic terms, this seems obvious enough: justice simultaneously removes the defendant's gain and makes good the claimant's loss; these are not two discrete operations, but a single one, that reflects the one wrongdoing. As Coleman conceded (albeit that he remains more skeptical than Weinrib of the complete explanatory force of corrective justice²⁰), '[a] person does not[. . .]have a claim in corrective justice to repair *in the air*, against no one in particular.'²¹ For Weinrib, especially, correlativity is the very thing that 'informs the injustice'.²² In other words, the correlativity has a normative function, '[b]ecause the defendant, if liable, has committed the same injustice that the defendant has suffered'²³ and therefore 'the reason the plaintiff wins ought to be the same reason the defendant loses.'²⁴ Stephen Perry's summary is useful, in that it classifies this aspect of corrective justice as 'agent-specific', rather

¹⁹E J Weinrib, *Corrective Justice* (OUP 2012) 7.

²⁰See J L Coleman, 'Tort Law and the Demands of Corrective Justice', (1992) 67 *Ind L J* 349, 379.

²¹J L Coleman, 'The Practice of Corrective Justice', in D G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Clarendon Press 1995) 67.

²²Weinrib (n 19) 17.

²³*ibid.*

²⁴*ibid.*

than ‘agent-general’,²⁵ the latter implying a duty that would bind the whole world as opposed to the specific parties who have come into legal relations because of a specific occurrence.

For Ernest Weinrib, corrective justice finds its normative, moral foundation in the respect it accords to the equal freedom of all parties. There is much to be said in favour of this argument, not least of which is that what we are dealing with here is *private law*, the law as between individuals, not some panacea to all problems that may face a state; the law would be capricious indeed were it to take into account the status of parties without regard to whether that status pertained to the specific wrongdoing that was the subject of the complaint. As Charles Fried has argued, ‘[r]edistribution is not a burden to be borne in a random, ad hoc way by those who happen to cross paths with persons poorer than themselves. Such a conception, heartwarmingly spontaneous though it may be, would in the end undermine our ability to plan and to live our lives as we choose.’²⁶

Despite this, many have criticised corrective justice for lacking normative value. One of the main criticisms is that it makes no attempt to prescribe rights—it is merely a structured response. It is not clear that corrective justice stands or falls on the recognition of any particular right; it is simply a logical and necessary response to a legal system that recognises rights. Corrective justice does not necessitate the existence of a right to physical integrity (for example), but such a right necessitates the existence of corrective justice. If rights are to be meaningful and respected, then surely it goes without saying that we should be at pains to ensure we understand

²⁵S Perry, ‘On the Relationship between Corrective and Distributive Justice’ in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford, Clarendon Press 2000) 238–239.

²⁶C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass., Harvard University Press 1981) 106.

those rights and how they relate to different rights (whether being similar rights in third parties or entirely different rights).

2. Distributive Justice

A second criticism is that, in regarding all as equal, it fails to address *de facto* inequalities; ‘the filthy rich can appeal to corrective justice if their holdings are filched by the grinding poor.’²⁷

Theorists of *distributive* justice suggest that the moral void can be filled by understanding that judicial decisions and legal systems more generally ‘contribute to the establishment of a pattern of distribution of[. . .]resource and burden within society’²⁸ (the indirect argument) and, as those who would propose direct distributive justice would argue, should contribute to a pattern of distribution. To employ William Lucy’s example of the most simple formulation of this argument:

[. . .]if it is established that Croesus is wealthy as a King, his immense wealth incompatible with the accepted principle of distributive justice, and that Diogenes is so poor he lives like a feral dog, his lack of resources also contrary to the demands of distributive justice, then surely no duty to compensate arises.²⁹

Unfortunately there is not opportunity here to give due credit to the multiple theories on distributive justice, many of which tread in waters far beyond private law. John Rawls’ *A Theory of Justice*,³⁰ for example, sits like a colossus over the field of distributive justice (along with Ronald Dworkin, Robert Nozick, and Michael Walzer,

²⁷T Honoré, ‘The Morality of Tort Law’, in D G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Clarendon Press 1995) 84.

²⁸P Cane, ‘Distributive Justice and Tort Law’ (2001) 4 *New Zealand Law Review* 401, 404.

²⁹W Lucy, *Philosophy of Private Law* (OUP 2007) 358.

³⁰J Rawls, *A Theory of Justice* (Oxford, Clarendon Press 1971).

among others).³¹ However, for our purposes, energies may be better expended focusing on those who concentrate on distributive justice as it applies particularly to private law. We will take the indirect and direct views in turn.

2.1. Indirect. For Peter Cane, it is an undeniable feature of tort law that it has redistributive effects, inasmuch as it either maintains or transfers a burden and a benefit, and thus it is a matter of distributive justice. The nature of this argument is such that it can co-exist with corrective justice; the effects of applying the law according to the precepts of corrective justice will have distributive effect. Corrective justice is therefore not necessarily at odds with distributive justice, providing that distributive justice has defined ‘the grounds and bounds of tort liability’³² in the first place (the direct element). Superficially, at least, this argument appears to have merit. A narrow reading of corrective justice could fairly conclude that it makes no claim in matters substantive—beyond the fact that it demands parties be treated correlatively in respect of the single wrong, it does not attempt to define the rights that, in their breach, define the wrong—and thus there is ample work for distributive justice in defining the grounds of liability.

However, this argument begins to break down. Though we will look at the direct element later in this section, for now it suffices to say that corrective justice is more than a mere tool of law; it has normative value. For example, if substantive laws were excessively distributive, they could fall foul of corrective justice’s insistence on treating the parties as equals. The indirect argument is also not without its

³¹See, for example: R Dworkin, *Sovereign Virtue* (Harvard University Press 2000); R Nozick, *Anarchy, State and Utopia* (Oxford, Basil Blackwell 1974); and M Walzer, *Spheres of Justice* (Oxford, Martin Robertson 1983).

³²Cane (n 28) 412.

flaws. William Lucy criticises it on three counts: distributive intent, triviality, and normative usefulness.³³ As to the first, it can easily be seen that, just as a cake can be divided and distributed, a judgment distributes benefit and burden; this is not really in dispute. However, as Lucy notes, to divide a cake is, by its nature, possessed of distributive intent: why else would one divide a cake? The same cannot be said for judgments, for ‘[w]hile it might be undeniable that both a legal system *tout court* and particular liability decisions within such a system have distributive effects, it could well be maintained that neither are intended to have such effects.’³⁴ My buying a newspaper has a redistributive function, but it is very difficult to ascribe any normative value to this transaction (at least on distributive principles) if my intent was solely to be possessed of a newspaper and not to redistribute wealth in any way. Similarly, a judgment made on corrective justice principles can claim no normative significance in matters distributive unless there was some intention to advance a general pattern of distribution.

Or can it? Intention aside, is it enough that the *effect* was distributive, even if the intention was not? The answer, undoubtedly, is that it is not. Firstly, a system that is deliberately distributive—i.e. it is good if and only if it is distributive—but without any intended pattern of distribution, would seem haphazard, redistributing for the sake of redistributing; it would be utterly pointless. Further—and this is Lucy’s second line of criticism—as a general insight into the nature of distribution it is entirely trivial. If all human conduct, from buying newspapers to donating to charity, is essentially distributive, what is the value of an insight that claims judicial decision-making also happens to be distributive? This is not to say that no feature of

³³Lucy (n 29) 340–342.

³⁴*ibid* 340.

human conduct is possessed of distributive intent and governed accordingly; rather, the argument is that it is not impossible to consider that all human conduct is distributive, whether or not it is possessed of distributive intent. If judicial decision-making cannot be separated from the rest of the human experience in this sense, then it is hard to see what a distributive justice analysis can offer in this regard.

Lucy's third line of criticism—and this was perhaps prefigured in my criticism at the beginning of the last paragraph—is that it is difficult to know on Cane's theory of distributive justice which distributive effects 'are significant, and should thus fall within the ambit of distributive justice',³⁵ and which are not: this 'is surely not a question that can be answered by simply noting those effects.'³⁶ Distributive justice needs its own theory *ab initio*, for the 'just distribution of burdens and losses among the members of a society requires that a criterion be found[...]*]*according to which they may fairly be allocated.'³⁷ This is the realm of the direct analysis.

2.2. Direct. The example offered at the beginning of this section concerning Croesus and Diogenes is a simple, albeit legitimate, argument that could be made by direct appeals to distributive justice. However, it is one of a vast array of arguments that could fall under the general description of distributive justice. Other arguments may appeal to the substantive law itself, rather than the law as adjudicated, whereas some arguments may similarly appeal to the adjudication, but on a rather more subtle basis. The late Ronald Dworkin provides one of the most substantive accounts of distributive justice as it could apply to judicial decision-making in his

³⁵*ibid* 342.

³⁶*ibid*.

³⁷Honoré (n 27) 83.

book *Law's Empire*,³⁸ in which he tackles a problem which has particular resonance in tort claims: that of competing rights (the reader may wish to consult the discussion in chapter 2, specifically the reference to Christian Witting's argument that, in practice, wrongdoing is assessed by reference to competing autonomies³⁹). The work is important to note here, because, as we shall see, it rests on a notion that law does not exist to further specific social goals but, rather, that it should act in a way that is coherent and principled towards all of its members. Distributive justice is not merely bare functionalism furthering goals external to the parties before the court. In this sense, Dworkin's argument provides a particularly useful comparison to corrective justice; if one of the main arguments in favour of corrective justice is that it views all parties as equal before the law and is concerned with justice between the parties, why not then accept Dworkin's argument on distributive justice on the basis that he, too, founds his theory on conceptions of equality and justice between the parties? Similar to Weinrib's model, is there not a sense in which a Dworkinian private law can exist absent extrinsic considerations? No. We will see that these conceptions of equality differ significantly and that the distributive model that Dworkin advocates is neither workable nor particularly representative of our legal system.

Dworkin's argument requires at least an initial equal distribution of resources, beyond which human beings are responsible for the decisions they make, and thus they can choose to make any legitimate transaction.⁴⁰ *Law's Empire* was an attempt to apply this principle—and the many principles articulated in *Sovereign Virtue*—to the question of tort law:

³⁸R Dworkin, *Law's Empire* (Oxford, Hart Publishing 1998).

³⁹C Witting, 'The House that Dr Beaver Built' (2008) 71 MLR 621, 628.

⁴⁰R Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 73-83.

The practical elaboration of equality of resources, for example, requires compensating for unequal inheritance of wealth and health and talent through redistribution, but the libertarian conception rejects redistribution as theft in principle.[. . .]Since my main argument is to show the connection between a conception of equality and accident law, I shall not argue but only assume that equality of resources is superior to the libertarian conception: it fits our legal and moral practices no worse and is better in abstract moral theory.⁴¹

In distinguishing between abstract rights (the general rights you and I possess by virtue of being a citizen within a society) and concrete rights (the rights realisable in any given situation), Dworkin offers the example of a trumpet player and a student of algebra, both of whom wish to carry out their activities (and, absent any other factors, would be at liberty so to do) but, in so doing, would be precluding the other from fulfilling their liberty. If the two are to be treated as equals, whom is society to restrict?

The following will be a short paraphrase of Dworkin's answer at best, and I am grateful too to William Lucy for his erudite account of Dworkin's views.⁴² However, for our purpose of broadly delineating two competing normative foundations, viz. corrective and distributive justice, it should suffice. Dworkin's solution to this situation, where rights conflict, would be to calculate the relative cost to each party of inhibiting their freedom. This analysis does not feel particularly foreign to an English lawyer, especially one with experience of injunctions and the like, but it has a logical form beyond the mere intuitive: it regards both parties' rights as equal,

⁴¹Dworkin (n 38) 301.

⁴²Lucy (n 29) 364-368.

because one who ‘abstains from some act on the ground that it would cost his neighbour more than it would benefit him takes his neighbour’s welfare into account on equal terms with his own’.⁴³ The next stage of Dworkin’s answer captures the essentially distributive nature of the approach: if one assumes that the two parties are of equal resource (‘you and I have roughly equal wealth, and neither is handicapped or otherwise has special needs or requirements’⁴⁴), then the decision-maker must ‘act so as to minimise the inequality of the distribution[. . .]and that means so that the loser loses less’.⁴⁵ The most simple way of determining this is by reference to each party’s willingness to pay to carry out their activity uninhibited, because (*ceteris paribus*) that is the best way of determining the relative value placed on the activity by each party. As Dworkin notes, this avoids the problem posed when the losses in question are not obviously financial.⁴⁶

The logic is enticing. Certainly it accords equal respect to the rights of each party, and can do so in specific situations: these are, in my submission, the core benefits of the corrective justice approach, but taken from the opposing normative foundation. But it has a fatal weakness, at least when it comes to applying it to society as it exists. Dworkin has produced a rabbit from a hat—an extraordinary trick, but a trick nonetheless, for the rabbit was in there from the beginning. The argument requires resource parity—not just as a moral good or social goal, but as a fundamental precursor to and justification for the model—and if we were to remove this cornerstone from the argument, then the edifice rather collapses. The point of the exercise is to measure, in financial terms, ‘the relative importance of the two

⁴³Dworkin (n 38) 295.

⁴⁴*ibid* 302.

⁴⁵*ibid* 303.

⁴⁶*ibid*.

activities to each of us in our overall schemes of what we want to do with our lives.⁴⁷ So the parties, in assessing such costs, must either assume wealth parity (which is sufficiently fictitious as to render the exercise entirely pointless) or must engage in an assessment of payment relative to wealth (a sort of purchasing power parity) which is an exercise so cumbersome as to be entirely unworkable in practice. Stephen Perry's criticism of Dworkin's argument echoes this latter point. If Dworkin's model were an accurate description of the Anglo-American legal system,

there would be no reason why courts, when required in tort actions to distribute actual losses *ex post*, should not make an effort to ascertain the relative wealth of the litigants[. . .]to try to realize as adequately as possible the abstract ideal of equality of resources. In fact, the courts generally consistently refuse, as a matter of principle, to try to do anything like this.⁴⁸

The point is apt: we know the courts regularly set standards by reference not to the parties but to the *reasonable* person, an objective measure that deliberately ignores a great many of the parties' specific characteristics.

Even Dworkin can't meaningfully be advocating ongoing equality of resources—by his own argument, we should be free to choose (and pay for) our own legitimate transactions according to what we perceive our interests to be (indeed, morality dictates that we should be responsible for them)—so, in fact, on his own terms it is very unlikely that there would be persisting equality without state coercion. By removing the cornerstone of equality, then willingness to pay is clearly an unworkable measure,

⁴⁷ibid 304.

⁴⁸S R Perry, 'On the Relationship between Corrective and Distributive Justice' in A Kavanagh and J Oberdiek (eds), *Arguing About Law* (New York, Routledge 2009) 558.

for either we would allow it to favour the wealthy—and distributive justice would have to resemble the rather more extreme, simple version mentioned at the beginning of this section—or we would have to engage in an wasteful, onerous assessments of the parties' characteristics.

Dworkin's views are interesting to consider because of this focus on the correlativity of the parties—what is one willing to pay to exercise his liberty at the expense of the rights of the other—but ultimately it requires a profound coercion external to the parties' rights or interests in order to foster the equality of resources necessary to justify the exercise.

Conclusion

The purpose of this thesis is to illuminate the law, to make it more coherent and, thus, predictable. A theory of justice that seeks to explain the law in terms of redistribution, where the outcome of any given case will be dependent on the status of the actors and not on principles that apply equally to all, is capricious. It is not justice. In the limited purview of this chapter, I have attempted to elaborate the nature both of corrective justice and distributive justice, and to provide accounts of each from some of the most influential authors. Corrective justice has an inherent appeal within the limited role of private law, because it regards actors as equal and, from that axiom, forms an account of law that provides a genuinely normative explanation for rectification, regarding the two parties as the doer and sufferer of the same wrong (or wrongful loss). Dworkin's argument makes for an interesting comparison with corrective justice in that it provides an account of distributive justice that, like corrective justice (and unlike the functionalism that permeates

much distributive justice thinking), respects the equality of the actors. For the reasons noted above—the epistemic blindness that is the legal fiction of equality or the coercion required to make it so, or the onerous task of correcting for inequality in all transactions—corrective justice is to be preferred even to the least functional reading of distributive justice.

CHAPTER 2

The Remedial Relationship

A GAINST THAT GENERAL PHILOSOPHICAL BACKGROUND, it is worth considering in further detail the nature of the remedial relationship under corrective justice. This will obviously be expounded in some detail in relation to negligent misstatement in the second part; for now it is sufficient to consider what is meant by a ‘remedial relationship’, and how that manifests itself in various categories of private law. The reason it is worth considering various aspects of private law is in order that we may better understand the corrective function of the remedy, because it will differ depending on the nature of the infringement. Upon considering categories of false statement, for example, it may appear odd that there are different types; to wit, either a statement is false, or it is not. Except, of course, a false statement can affect our rights in different ways depending on its manifestation. For example, false statements in pre-contractual negotiations can impart a fatal *vitium* in the resulting contract, as the parties are not *ad idem*. The remedy will therefore be one that aims to restore the parties to the pre-contractual position (subject to the usual bars to rescission). Conversely, where a party has been misled and has chosen to dispose of their rights in a manner that, but for the misstatement, they would not have done, the remedy will be one that aims to restore the parties to the position they were in before their reliance on the misstatement.

It is important to note at this stage that this chapter is not a mere précis of the various remedies available for claims in private law; rather, the question to which this chapter is addressed is where the remedy afforded in law finds its justification within the legal nexus that exists between the parties. Thus, do we correct for the false statement, or for the harm caused thereby?

However, this requires us first to consider that legal nexus, and its constituent elements. That is to say, what is it—as a matter of the relationship (rather than any specific action)—that makes the claimant *the claimant*, and the defendant *the defendant*? What injustice are we correcting, and why is the defendant liable? This chapter will therefore begin with three sections concerned with that question, namely: (i) what are we correcting; (ii) how does this relate to the remedy; and (iii) who should provide the remedy? The fourth section considers in detail the relationship between right and duty, and the fifth section will relate these responses to the broader realm of private law obligations.

1. What are we correcting?

The answer to this question is prefigured in the discussion concerning corrective justice: the law's role is to remedy harm to the claimant. The purpose of this section is to define the limits of the negligence inquiry by arguing that it is an inquiry that can only follow an *a priori* recognition of rights, and—in so doing—will argue that such a proposition is not outwith the course of historical legal analysis, but merely the logical conclusion of such.

1.1. Pre-existing rights and rights to damages. All elements of private law are concerned with the creation and the exigibility of rights between parties (be they

rights *in personam* or rights *in rem*). Some may rightly note that private law is more than this (just as an octopus has eight legs, but that is not its sole feature), and more so that not all laws concerned with such rights belong to private law (in the same way that not all creatures with eight legs are octopuses), but neither comment invalidates our observation. Those laws recognising the creation of rights include the law of property and the law of contract. These laws recognise a rights-creating event; by legally recognised means, one can acquire a property right, and one can acquire a contractual right. The rights do not pre-exist such legally recognised means, and as such the laws of property and contract have somehow to prescribe those means.

The law of unjust enrichment, by contrast, does not create rights, save rights which may vindicate the pre-existing rights (the term may be described by many as a remedy, but this is an imperilled road, down which many an eminent academic has laid a snare¹). It is, to this end, concerned with the exigibility of rights; if you receive an enrichment at my expense for which there exists no legal explanation, then the law will recognise my right over whatever lesser right you have subsequently acquired. Similarly, the law of contract also concerns itself with the exigibility of contractually acquired rights, in the same way that the law of property concerns itself with the exigibility of property rights.

A simplistic view might posit that the law of negligence is also concerned with the creation of rights, inasmuch as a proscribed act—a wrong—that harms another will generate a right on the part of the harmed party. Except, of course, this is merely a right to damages, in the same way that breach of contract generates a right to damages. In and of itself, it provides no real explanation as to why the harm results

¹P Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1.

in a right to damages. The traditional view would suggest that the negligent act in part generates the right (for certainly no right to damages lies absent this act), but, given that negligent conduct that doesn't result in harm also provides no such right, it is hard to understand on what basis negligence can be regarded as concerned with the creation of rights. This is not within the realm of negligence; negligence is an exercise in exigibility, not creation.

This is quite an important caveat, and lends further light to the purpose of this analysis. We are concerned, in the first part of this thesis, with the structure of tort law, not the specific rights that the law may or may not recognise. Though, of course, some specific rights will be mentioned, this will be done with a view to elucidating the structure. To ape an oft-quoted example, we would be concerned with the principle that cars driving in opposing directions should drive on opposite sides of the road. We are not yet concerned with the question of whether we should drive on the left or the right.

1.2. The demarcation of rights. But can we not, in the alternative, define that harm in terms of obligation? That is to say, is my right to sue a product primarily of your breached obligation, and not of some further harm caused to me? In many respects, this is *the* core question underlying this thesis. The proposition, it shall be noted, does not bear scrutiny. This section will demonstrate that a system of tort law that even vaguely resembles our own must have, at its core, the correction of an infringement of the claimant's right, and that right cannot be the mere reflex of the defendant's duty. As we shall see, duty alone cannot inform the remedial relationship.

If I breach a duty—a duty not to kick you, say—then on what basis do you have standing to sue? Is it because my duty was in respect of you (i.e. you were the object of the duty; I had a duty not to kick *you*)? Presumably, of course, I owe exactly the same duty in respect of everyone else: do I therefore owe a theoretically infinite² number of duties? *Prima facie*, this proposition does not sound too far-fetched; you can claim against me because I had a duty to you not to kick you, which I breached by kicking you.

However, let us further assume that manufacturers owe a private law duty not to emit certain pollutants. This seems like a sensible duty, and it *seems* like the sort of thing for which I should be made liable, were I a polluting manufacturer. Question: is that one duty, or an infinite number of individual duties? If the former, then it does not (without more) explain why *you*, as a stand-alone party, are entitled to sue me; indeed, it lends no clarity to the question of whom exactly I have wronged, unless we assume that my duty was owed not to a group of individuals but to an amorphous *people* and its norms. Such an assumption would seem to have more in common with criminal or public law—in which the wrong is against the state—than it does with private law. If the latter, then it does not explain why you, more than any other, are entitled to sue me: my duty to you was not to emit pollutants, a duty I have breached by emitting pollutants. However, in a sense, it does not matter which of the two interpretations we prefer: the objects of my duty have either been wronged cumulatively—as one—or individually *and equally*; in neither scenario are you able to claim a unique right to sue. Thus, the existence of a perfectly reasonable

²This is infinite in the sense that it is a duty owed in respect of everyone existing from time to time; the set is determinate, because we can adequately define its membership—every human is a member thereof—but that membership is limited by practicality rather than theory.

duty does not, as a matter of logical necessity, define the claimant. Thus, it cannot define the private law remedial relationship (certainly not as we understand it).

Perhaps it is not impossible to conceive of a system of tort in which we can sue for general carelessness, but it is a system that would look entirely different to that which we have. This is because the claimant would necessarily mandate modes of all behaviour: if a right to damages arose merely because you happened to be careless, you would necessarily have to alter your behaviour. Yet in our system of law, we know that your negligence has to be relative to me and has to interfere with my rights (by, for example, injury) in order for my right to damages to crystallise. Your liberty to be negligent 'in the air' exists only insofar as it is not relative to me and to my primary rights. As Robert Stevens identifies the conflict (albeit with reference to the Hohfeldian notion of claim right as a right reflexive of duty), we cannot say both that 'A has a claim right that B does not drive his car negligently so as to injure A' and 'B is at liberty with respect to A to drive his car in any manner B so chooses[. . .]; either A has the claim right, which excludes B's liberty, or he does not.'³ The words 'with respect to A' are of fundamental importance: we have no right to demand that B does not drive carelessly. The state may wish to prohibit such behaviour, and does so through various criminal sanctions, but we as individuals hold no such right. We do, however, have a right when such carelessness is with respect to us, so as to injure us. If tort law mandates modes of behaviour at all, it is an indirect benefit, not the claimant's primary justification for claiming a remedy.

Perhaps, though, I could argue that the manufacturer's breach of their general obligation—howsoever formulated—not to emit pollutants affected me more than

³R Stevens, 'The Conflict of Rights', in A Robertson and H W Tang (eds), *The Goals of Private Law* (Oxford, Hart Publishing 2009) 143.

anyone else. But what are we actually saying when we argue that it ‘affected’ me? Such a proposition necessitates the existence of rights. Let us assume instead that you are not a legal person, but a wall. If I demolish you,⁴ are you able to claim against me? We can probably agree that demolishing a wall that is not my own constitutes some sort of legal wrong—in our hypothetical scenario we would argue that I have a ‘duty’ not to destroy the wall—so why can you, the wall, not sue? The answer, of course, is because of the very fact that you are not a legal person: we do not regard walls as possessors of rights. A wall does not acquire an entitlement to compensation simply because I had an obligation that pertained to it. We know, then, that the extent of my obligation is limited by the existence of rights. Further, we know that the extent of the obligation must be limited by the existence of *relevant* rights: the local publican or postman are unable to sue, not (unlike the wall) because they aren’t capable of possessing rights at all, but because they have no rights with respect to the wall. Were you instead the *owner* of the wall, then you would have rights in respect of the wall and it is your rights that I have infringed by destroying your property. My duty not to destroy the wall is actually, then, a duty not to infringe your better right to the wall. Thus—and this is the crux of the matter—the only way we can meaningfully define and limit the duty is by reference to the right it notionally protects.

This conclusion is not a particularly marked departure from the accepted law on duties of care. In *Caparo v Dickman*, Lord Bridge opined that

⁴For the benefit of the logicians, one ought concede that I have changed your state from a wall of many bricks to a wall of fewer bricks.

It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.⁵

Of course, Lord Bridge was not explicitly advocating a rights-based thesis, but it amounts to the same thing: the duty must be a product of a right, for that is its function and, by extension, its limit. We will return to the specific question of duty later in this chapter, for it informs the second question (viz. who shall be liable).

So, the reason you can sue me for kicking you is because I have infringed your right. Similarly, in our previous example, I am entitled to sue the manufacturer because they have infringed my right by poisoning me, or causing me a nuisance. I do not sue them as some instrument of the state, reaping the benefit of a normative loss borne by the state. I sue because the loss is my own, and because I had a better right to whatever I lost than the manufacturers did. Right informs duty in a way that duty cannot inform right.

As Professor Weinrib noted in his seminal work *The Idea of Private Law*, the ‘wrongfulness of negligence consists not in unsocial conduct at large, but in the potential violation of another’s right.’⁶ The wrongfulness element will be a matter for further analysis later in the chapter, but for now it suffices to say that our right to claim crystallises only at the point B’s actions cause us injury.

Put another way, I have no prior right in tort to prevent a party from putting me at risk. Those who create risk ‘negligently’ (inasmuch as their actions are not reasonable) are liable for nothing unless that risk culminates in injury; until such

⁵*Caparo v Dickman* [1990] 2 AC 605, 627 (HL) (Lord Bridge).

⁶E Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 160

a time as they cause me loss, they have not infringed my right. The *Fairchild*⁷ exception (which the unwary may wish to cite as evidence that negligent creation of risk can found a claim) is just that—an exception—which owes its existence to evidential lacunae. Similarly, the House of Lords in *Barker v Corus*⁸—in which, absent clear scientific causation, liability was apportioned between defendants on a proportional basis (rather than jointly and severally)—justified the apportionment of liability on the basis that ‘this is a case in which science can deal only in probabilities, the law should accept that position and[. . .]liability should be divided according to the probability that one or other caused the harm.’⁹ The justification lies in the probability that one party *actually caused* the harm; it is, in effect, a fiction of causation where factual causation can neither be confirmed nor negated.¹⁰ That is a very different thing from arguing that causation is not actually a requirement: we would never allow a court to hear a claim against a negligent party who merely increased the risk of injury if, all the while, we knew that the injury was actually the result of the negligence of another.

⁷*Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22

⁸*Barker v Corus (UK) plc* [2006] UKHL 20

⁹[2006] UKHL 20 at [43] (Lord Hoffman)

¹⁰It is not, to be clear, a manifestation of the unfortunate and incorrect decision at first instance in *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909, in which damages were reduced to reflect the balance of probabilities (there was a 75 per cent chance that the claimant would have suffered the injuries whether or not the hospital had been negligent, and so damages were awarded at 25 per cent of the full value); this was a profound misunderstanding of the nature of balance of probabilities: where causation can be confirmed on the balance of probabilities, that is sufficient to establish absolute causation. The exceptional cases, such as *Fairchild* and *Barker*, exist where the balance of probabilities neither confirms nor negates the causal element.

Certain authors have, however, sought to challenge this seemingly trite assertion. Both Judith Thompson¹¹ and Glen Robinson¹² have discussed situations analogous to where A and B both negligently shoot in C's direction, but only A's shot actually hits C. As Ernest Weinrib summarises their argument (albeit that he does not agree with it), '[i]f we hold A liable but not B, we allow the fortuity of causation to distinguish between morally equivalent wrongdoings.'¹³ It is an appealing argument; like a lie which happens not to be believed,¹⁴ the shot that misses is cast as morally wrong regardless of the outcome, and thus—so the argument goes—any loss that occurs is attributable to the defendant because their action was *a priori* morally wrong. As we will see in the next section, the emphasis here is incorrect: the loss is attributable to the defendant because he was a *cause* of that loss, and there is a reason to regard that causal relationship as being legally relevant. For the purposes of this section, however, it is sufficient that we understand that there must be a reason, beyond merely moral wrongdoing by the defendant, why the *claimant* has any claim. As Weinrib himself argues, '[t]ort law is not interested in the defendant's culpability aside from the plaintiff's entitlement to redress'.¹⁵ His analysis—using the precepts of corrective justice—is that to focus tortious liability on the defendant's culpability alone is to ignore the claimant's injury, thus 'introducing a one-sidedness inconsistent with the bipolarity of corrective justice.'¹⁶ The parties are united because the loss is attributable to the defendant.

¹¹J J Thompson, *Rights, Restitution, and Risk: Essays in Moral Theory* (Harvard University Press 1986) 192.

¹²G O Robinson, 'Probabilistic Causation and Compensation for Tortious Risk' (1986) 14 *Journal of Legal Studies* 779, 789–791.

¹³Weinrib (n 6) 155.

¹⁴R Stevens, *Torts and Rights* (OUP 2007) 8.

¹⁵Weinrib (n 6) 160.

¹⁶*ibid*, 156.

Equally, to employ Robinson's moderated probabilistic analysis—whereby the right to claim flows from the *probability* that injury will occur—would leave us in something of a quandary. How can we be possessed of a right (for this right would be the analytic reflex of Robinson's conception of liability) that consists in the absence of the prospect of injury, without a further notion of why injury is itself wrong?¹⁷ This highlights the fundamental problem with the defendant-based analyses: they simply miss a basic logical point. How can we conceive of risk or action as a wrong without a further notion of why the *loss* envisaged by the risk or action is itself wrong? As Weinrib notes, 'risk is always the risk of something. In corrective justice, that something encompasses the right that defines the plaintiff's claim. Risk refers to the possibility of normative loss. It is not itself the normative loss.'¹⁸ Therefore, neither risk, nor even the unreasonable creation of risk, forms the basis of a rights-creating event.¹⁹

Further, it is worth noting Professor Weinrib's observation that loss 'differs from right because it lacks both the distinct legal content and the correlative significance that together impose coherent limits on liability'.²⁰ This elegantly summarises the conceptual problem with loss. Loss, in the sense of diminished wealth, might by its very nature flow from the infringement of a right (in this sense, the notion is axiomatic: if you didn't have a prior right to something, in what sense can that

¹⁷ibid, 157.

¹⁸ibid, 158.

¹⁹It is worth forestalling a superficially appealing criticism of this view. It may be that the state has, or deems itself to have, some obligation to protect its members against loss in the first place—to mitigate risk—but such public law considerations are not our concern; we are concerned with those rights exigible against individuals. Similarly, courts may act for prophylactic purposes [R Stevens (n3) 150] when they know that, but for such a *phylax*, rights will be infringed (e.g. defamation or trespass). That a court may grant an injunction—affirming a right that, but for their order, would be infringed—is not necessarily evidence that a right has already been infringed.

²⁰E Weinrib, *Corrective Justice* (OUP 2012) 56.

thing now be lost to you?). But the loss flowing from an infringement and the underlying right are conceptually discrete. Thus, we do not need to ask whether we have a pre-existing right not to be caused loss; the loss is not the right.²¹

1.3. Limiting and waiving our rights. These rights, however, are not unchanging, ever-fixed marks. ‘Risk is an unavoidable concomitant of human action’.²² In a world of risks, our rights are qualified by our own expectation that we may occasionally suffer loss as a result of any number of unforeseeable, perhaps even random, events. We accept—or, in certain circumstances by our actions, ought reasonably to be deemed as having accepted—that our rights will from time to time be infringed. In effect, we waive them to this extent. This waiver does not defeat our rights, but it does qualify them.

I am conscious that ‘waiver’ is a concept external to tort (at least inasmuch as rights of action can be waived by the rules of contract or deeds), so I employ it here cautiously. However, it is the most accurate term to describe the concepts which are at work in the law here. It is a particularly useful term in this sense because it describes something that is happening to the right; ‘consent’, by contrast, is a term that is essentially question-begging or at least incomplete: consent to *what?*

Much time has so far been afforded to the notion of claimant right as a predicate of defendant liability. The traditional negligence enquiry has been excessively defendant-focussed to the extent that the rights-based analysis has been eschewed. As will be seen in the following sections, there remain sound reasons to retain much

²¹This is discussed in further detail in the chapter four. See D Nolan, ‘Rights, Damage and Loss’ (2017) 37(2) OJLS 255, 267; R Stevens, ‘Rights and Other Things’ in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 119.

²²Weinrib (n 6) 151.

of the duty enquiry: the breach of duty identifies the defendant as a legally relevant cause of loss. However, if we are to take rights seriously, then we must also consider whether and to what extent the claimant's actions may limit or waive their *a priori* rights. This is the claimant-focussed analysis. The analysis will not always be required: the patient who suffers terrible facial injury at the hands of a drunk dentist charged only with inspecting their teeth will not have waived their rights in this respect (beyond the consent allowing the dentist to probe their mouth); discussion of waiver would, in this case, appear otiose. Where a passenger has knowingly consented to be taken home by a drunk driver, on the other hand, the waiver of rights in respect of foreseeable injury seems pretty unequivocal.

To this extent, the traditional 'defence' of *volenti* is not a defence at all; it is a denial. It is a denial because a fundamental element of the cause of action is absent, to wit the right. The claimant consented to the risk and has therefore waived or limited his or her right. Edwin Peel and James Goudkamp argue that *volenti* should be abandoned as a sui generis doctrine because the analysis does little more than replicate other elements of the action (albeit that they do not consider the rights question, and acknowledge that there has been no consensus as to which of the traditional elements of the cause of action are affected by *volenti*).²³ This view merits much sympathy, albeit that the argument here is that the element affected is unequivocal: it is the right.

Consider—admittedly somewhat prosaically—a journey on the London Underground at 8am on a Monday morning. We expect to be subjected to physical—very

²³W E Peel and J Goudkamp, *Winfield & Jolowicz on Tort* (19th edn, Sweet and Maxwell 2014) 26.018.

occasionally quite forceful—contact with any number of strangers. Such contact theoretically amounts to a breach of right, yet this is a reasonable expectation in the circumstances. To employ the language of negligence, it is foreseeable that our rights will be infringed. In choosing to undertake the journey regardless, we consent to that infringement (such that it cannot, in fact, be an infringement); we have waived our right. Indeed, it may be reasonable for the law to deem you as having waived your right, for to undertake such a journey without taking significant precaution to protect your right (which would presumably include notice) would be unreasonable.

This is not to say that we consent to all foreseeable risks. The agreement to those foreseeable risks must be genuinely voluntary rather than a product of pressure (see, for example, *Burnett v British Waterways Board*²⁴ in which it was held that Mr Burnett, a lighterman of the River Thames, had not freely and voluntarily agreed to incur the risk of negligence by the Board on the basis that he was entering the lock in the course of his employment and so had no meaningful choice about whether to do so). However, where a risk of infringement of right is foreseeable it must surely cause us to question whether the claimant had consented to that risk and so waived their right to an extent.

The other side of this coin is equally true: where the risks are not at all foreseeable, it would be unreasonable to suppose that you had waived your rights (for you could not reasonably be expected to have foreseen the risks which may have necessitated such a waiver).

In assessing the risks concomitant with an action, it is reasonable to suppose that all other actors are acting reasonably; to do otherwise would be to invite infinite

²⁴[1973] 1 WLR 700.

speculation. (Unless, of course, you have knowledge that someone is not acting reasonably, such as the drunk driver in the example above). Therefore, when others do not act reasonably, it disrupts our expectation of those concomitant risks. Put another way, it falls outwith our waiver. Indeed, the notion that the waiver is limited in a number of ways is not alien to us. Consider again the operation. We waive our rights to bodily integrity as against the doctors and nurses for the purpose of the operation: in so doing, we do not invite them to interfere with our bodily integrity for other purposes, nor does that allow the hospital's chef to help himself to one of our kidneys.

It may be helpful to think of this in relation to an area of the law where waiver and consent are commonplace. Suppose you have suffered neurological damage and thus require surgery to your neck. As your surgeon, I am at pains to point out that you are under no obligation to subject yourself to the operation—you are perfectly within your rights to refuse medical treatment—but I make no mention of any associated risk, nor even of the detail of the procedure; on what basis can you make your decision? More accurately in this context, on what basis do you decide to waive your right to bodily integrity? Specifically, which rights do you waive? Many people may rightly deduce, on the basis of experience or knowledge, that all operations come with a small risk of infection, so you may factor such general risks into your assessment. Put another way, it may arguably be reasonable to regard you as having consented to those obvious risks, albeit that they weren't specifically mentioned. However, broadly speaking, you could not be criticised for taking my silence to mean that there were no other risks (risks not foreseeable to the non-specialist) and thus you consent to the operation. Unfortunately, however, the operation is not a success;

rather than fixing the neurological condition, I have left you with partial paralysis. On examination, it transpires that this was no fault of my own, and was a risk inherent in the operation (albeit a very small risk, c.1 per cent). On discovering this, you claim that you would never have consented to the operation had you been aware of the risk. Would I have been under a duty to make you aware of this risk? Have your rights been infringed? There has been a tendency to describe the infringed right as the right to information. This is not the case.

The facts above will be recognised as those of *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and others*.²⁵ Lord Scarman’s powerful dissent in *Sidaway* emphasised the importance of the patient’s right to make an informed decision—though, notably, not a right to information *per se*—and identified a landmark decision of the United States Court of Appeals, District of Columbia Circuit, in the case of *Canterbury v Spence*.²⁶ As cited with approval by Lord Scarman:

(1) the root premise is the concept that every human being of adult years and of sound mind has a right to determine what shall be done with his own body. (2) the consent is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each[...](3) the doctor must, therefore, disclose all “material risks”.²⁷

In defining what was meant by material risks, Lord Scarman used the definition employed by the court in *Spence*:

²⁵[1985] AC 871, sub nom *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643.

²⁶(1972) 464 F 2d 772.

²⁷*Sidaway* [1985] AC 871, 887 (Lord Scarman).

[a] risk is[...]material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy.²⁸

The doctor's duty, then, can only be determined by reference to the right of personal autonomy, inasmuch as the 'doctor's duty arises from his patient's rights'²⁹ (but, of course, is not a mere reflex thereof). Your consent to an operation is not meaningful—indeed, it is defective—if it is predicated on misinformation. This is what we mean by a right to choose what is done with your body as distinct from a right to information. You have no right to information in the abstract. The focus on the patient's right to choose as determining duty has been echoed in later cases: for example, in *Pearce v United Bristol Healthcare NHS Trust*,³⁰ Lord Woolf formulated the test in terms of what information the reasonable patient (albeit the reasonable patient in the particular patient's position) would require in order to determine what course he or she should adopt.³¹ It is therefore submitted that, despite being a dissenting judgment, Lord Scarman's formulation—with its focus on the right of the patient and respect for autonomy—has considerable judicial merit.

Indeed, it is not even clear that the majority in *Sidaway* disagreed with Lord Scarman *holus-bolus*. Lord Scarman was attempting to assert a legal, objective test to establish the scope of the duty to inform. Whilst this was rejected by the majority in favour of the *Bolam* test (such that a doctor will not be held negligent if a reasonable

²⁸*Spence* (1972) 464 F 2d 772, 787 (Robinson J).

²⁹*Sidaway* [1985] AC 871, 888 (Lord Scarman).

³⁰(1998) 48 BMLR 118 (CA).

³¹(1998) 48 BMLR 118, 125 (Lord Woolf MR).

body of medical opinion would regard his actions as reasonable),³² it seems that a significant factor in this decision—well articulated by Lord Templeman—was the reluctance to concede that the patient ought to know everything, because ‘some information might confuse, other information might alarm a particular patient’³³. This was clearly for a doctor to decide. Of course, it doesn’t alter the fact that the doctor still had to provide enough information to the patient in order that they could make a reasonable decision. So, despite rejecting Lord Scarman’s specific proposal—and thus also *Canterbury v Spence*—it is clear that all of their Lordships in *Sidaway* recognised the importance of the patient’s right to decide, and the force of Lord Scarman’s logic on this particular issue (a point highlighted by Lord Hope in *Chester v Afshar*³⁴).

However, the argument was taken somewhat too far at times in *Chester* in which Lord Steyn noted that ‘[i]n modern law medical paternalism no longer rules and a patient has a *prima facie* right to be informed by a surgeon of a small, but well established, risk of serious injury as a result of surgery’.³⁵ This duplication of rights adds unnecessarily to the analysis: if I have a right to do with my kidney whatsoever I choose,³⁶ it adds nothing to this analysis to claim that I have a further right to information; if my decision to allow you access to my kidney was predicated on false information, then my consent is vitiated. Whether I bear the burden of that vitiated

³²*Bolam v Friern HMC* [1957] 1 WLR 582.

³³*Sidaway* [1985] AC 871, 904 (Lord Templeman). Indeed, this is the ‘paternalism’ noted in Lord Steyn’s speech in *Chester v Afshar* [2005] 1 AC 134 (HL), [2004] 4 All ER 587, [2004] UKHL 41 at [16].

³⁴*ibid* at [53] (Lord Hope).

³⁵[2004] UKHL 41 at [16] (Lord Steyn).

³⁶Issues of commodification aside.

consent or you do will depend very much on the extent to which we each were acting reasonably. This does not mean I have some legal right to information.

Regardless, as Professor Brazier and José Miola concluded, that '[e]ven the cynic must concede that, whatever the outcome on the facts, the 'reasonable doctor' test received a body blow in *Pearce*. It survives only if the 'reasonable doctor' understands that he must offer the patient what the 'reasonable patient' would be likely to need to exercise his right to make informed decisions about his care.'³⁷ Certainly, the law needs explicit clarification,³⁸ but the tide seems very much to have ebbed away from *Bolam* and the doctor-focused 'duty', and flowed towards a patient-focused conception of informed consent or, at the most problematic extreme, the right to information.

In 2015, the Supreme Court in *Montgomery v Lanarkshire Health Board*³⁹ confirmed the primacy of the patient's right to determine what constitutes informed consent, making it clear that this was not a forum in which the *Bolam* test was appropriate.⁴⁰ Lords Kerr and Reed affirmed the approach of Lord Scarman in *Sidaway*, that, subject to the therapeutic exception,⁴¹ the general rule must be that:

³⁷M Brazier and J Miola, 'Bye Bye Bolam: A Medical Litigation Revolution?' (2000) 8 *Med Law Rev* 85.

³⁸See A MacLean, 'From Sidaway to Pearce and Beyond: Is the Legal Regulation of Consent Any Better Following a Quarter of a Century of Judicial Scrutiny?' (2012) 20 *Med Law Rev* 108.

³⁹[2015] UKSC 11.

⁴⁰*ibid* [84] (Lord Kerr and Lord Reed).

⁴¹*ibid* [85].

[t]he doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment[...]. The test of materiality is whether, in the circumstances of that particular case, a reasonable person in the patient's position would be likely to attach significance to the risk[...].⁴²

Where does this leave the discussion of waiver? The *Bolam* test—take it or leave it—was always going to struggle to curry favour in the context of informed consent because, fundamentally, it is a strange articulation of the scope of this duty, in that it doesn't explain why the doctor owes a duty at all: the *raison d'être* of the duty is grounded in the validity of the patient's decisions in respect of her own body—effectively to waive certain of her rights to varying degrees—so the scope of the duty needs to be grounded more specifically in relation to the rights and waiver. If a patient has not consented to certain risks—and thus not waived her right in those respects to bodily privacy—then the doctor, in operating, will be liable, because he will be causing her harm without her consent.⁴³ Perhaps this is taking the point too far. But the point remains that we find nothing strange in the notion that we can consent to certain infringements of our rights, and we cannot consent to a risk we have not foreseen or of which we have not been warned. In the context of medical law,

⁴²*ibid* [87].

⁴³We are here interested in the effect of such consent on the negligence action. Of course, there is a different consideration concerning battery. A simplistic analysis might conclude that there clearly would be: this is intentional touching (indeed, quite a lot more than 'touching') absent consent. However, there is persuasive authority suggesting that consent is to be determined not as a matter of fact, but as a matter of the defendant's *reasonable* belief—see, e.g. *O'Brien v Cunard SS Co* 28 NE 266 (Mass. 1891). So if the patient lacks true consent owing to the doctor's own negligence, but nonetheless the reasonable person would regard the patient as consenting on the basis of the patient's actions, then the doctor may well not be liable for a battery. See also W E Peel and J Goudkamp, *Winfield & Jolowicz on Tort* (19th edn, London, Sweet and Maxwell 2014) 4-013.

as discussed above, this point is well understood (even if its exact legal manifestation is not).

As is perhaps clear from the above, the test is not completely shifting to the claimant: we still require some notion of what renders the defendant's act unreasonable. However, it is important that we understand that, if we are to take rights seriously as the predicate for liability, we must take seriously those decisions or actions that appear to waive or limit rights. This is the claimant-focussed aspect of the analysis.

1.4. Competing rights. Before we proceed to consider the juridical sequence, the nexus of right and remedy, it is worth considering for a moment the problem of competing rights. If we are to take seriously the notion that rights are the predicate of legal wrongs, we must be astute in asserting that rights are knowable and determinable *ex ante*.⁴⁴ There will be situations, of course, where rights conflict. But we must be wary of framing the argument solely in terms of competing autonomies or, worse, in terms of 'determination' of rights; determination *ex post* of something that should be knowable *ex ante* makes no sense; it is contradictory.⁴⁵ Further, if the existence of the right itself cannot be determined *ex post* by the actions of another, then neither can its breach. If my arm is caused to break, and thus my right infringed, it is no less broken (and my right no less infringed) merely because the action breaking it was one thing and not another.⁴⁶ As Jules Coleman has argued,

⁴⁴R Dworkin, *Taking Rights Seriously* (London, Duckworth 1977) ch4.

⁴⁵W Lucy, *Philosophy of Private Law* (Oxford, Clarendon Press 2007) 313.

⁴⁶Now, this is clearly not to say that all actions that appear *prima facie* to infringe my right are so doing. Consenting to an operation, for example, involves an invasion of my bodily integrity, but no one except an uninformed observer would suggest that it infringed my right. Clearly, I had waived that right for that purpose. Equally, that specific consent does not destroy my right to bodily integrity: consent, even by contract, is merely an agreement that I would not exercise the right.

our right can be infringed regardless of the justification of the action that infringes it (though, of course, this is not to say that such would be a legal ‘wrong’).⁴⁷

Coleman has rightly noted that the principles of tort litigation are rooted in the relationship between the parties; the chief failure of economic or functionalist readings of tort law is that they provide no principled reason for requiring one party to make reparation to another.⁴⁸ If we lose sight of the rights upon which the claim is founded, then the justification for remedial obligation becomes diffuse.

In contrast, Professor Witting noted that a theory that sought to define all of tort law solely in terms of rights ‘ignores the way that courts actually determine the extent of redress in tort law’.⁴⁹ Wrongdoing, Witting argues, is concerned with (*inter alia*) ‘the extent to which the claimant’s autonomy is compromised by that action, and the infringement upon the defendant’s autonomy that would be represented by an award of damages’.⁵⁰ This, Witting argues, is why the courts engage in discussion of the reasonableness of the defendant’s actions. However, we must be wary of assuming that discussions pertaining to competing autonomies mean that the foundation of tort law lies in the same. There is no right to autonomy, to self-government. My autonomy is inhibited on a daily basis by students sending me questioning emails, tourists lurking in groups outside my gate, the parking attendant requiring me to move my car, *etc.* Absent a right, why is it that awards of damages should be moderated by appeals to autonomy? Why is it that we should be regarded as having an intrinsic or derivative interest in autonomy, either at all or at least in preference to

This must be true, because subsequent withdrawal of consent is not a rights-creating event, yet no one would question that continuation would constitute a battery.

⁴⁷J Coleman, *Risks and Wrongs* (OUP 1992) 324.

⁴⁸*ibid* 377-80.

⁴⁹C Witting, ‘The House that Dr Beever Built’ 71 MLR 621, 628.

⁵⁰*ibid.* See also Lucy (n 38) 206.

rights?⁵¹ The irony in such an endeavour, it seems, is that we run the risk of creating a right *de novo*, having attempted to circumvent the problem of conflicting rights by appealing to competing autonomies. Competing rights can be weighed, and many other considerations can be brought to bear in weighing competing rights (including, for example, the extent of the interference in those rights), but it is not obvious why rights should be trumped generally by appeals to autonomy as a supervening determiner.

1.5. A new departure? There is a sense in which this conclusion is nothing new, albeit that it has not been well-articulated; relatively recently (in the long history of the law), Cardozo J, in *Palsgraf v Long Island Railroad Co*,⁵² famously stated that '[n]egligence is not actionable unless it involves the invasion of a legally protected interest'.⁵³ More fundamentally, the ongoing debate surrounding the recognition of economic losses has been—on the whole—astute to recognise this feature of negligence law. The question of whether one could recover having been prevented from obtaining something of value was first considered by the natural lawyers of the 16th century. Long before then, under Roman law, specifically under the *lex Aquila*,⁵⁴ it was generally necessary that harm be incurred in a physically direct way.⁵⁵ However, the later *actio in factum* and *actio utilis* effectively abolished this necessity,⁵⁶ and, in

⁵¹See G Postema, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) 103(3) *Yale Law Journal* 861, 867.

⁵²162 NE 99 (NYCA 1928).

⁵³*ibid* at 99.

⁵⁴A law concerned with fault-based injury to property.

⁵⁵J Gordley, *Foundations of Private Law* (OUP 2006) 264.

⁵⁶R Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town, Juta & Co 1990) 993-6. In Zimmerman's words (at 995), they 'appear to have been two separate techniques by means of which the *praetors* were able to supplement, to correct and to adapt the *ius civile*.'

any case, neither the Romans nor later medieval jurists were seeking to discover unifying principles of tort; rather, they were discussing concrete instances of recovery. The scholastic approach, on the other hand, in attempting to provide a theoretical basis for recovery, borrowed from Aristotelian principles of commutative justice in involuntary transactions: ‘commutative justice is violated when one person harms another without giving back what he took or making compensation’.⁵⁷

The road was not, however, smooth. At times, the analysis reverted to one based in fault, not right. As Grotius argued, ‘[f]rom[...].fault, if damage is caused, an obligation arises, namely, that the damage should be made good.’⁵⁸ However, it was at least recognised that to have goods *in potentia* is not the same as to have them. Aquinas, in describing the type of harm whereby one is prevented from acquiring goods he was on the way to having—*in via*—noted that it was less to have a thing virtually than to have it actually, and thus compensation should be less.⁵⁹

In England, though the waters of the debate have been muddied over the extent to which contractual rights are recognised at all in the law of negligence, the debate has at least largely been focused on rights, as illustrated in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*.⁶⁰ The defendants cut the power supply to the plaintiffs’ furnace, with the result that the material therein solidified. The plaintiffs were able to recover for the damage to the material but not for lost profits as a result of not being able to melt other material. Earlier cases provided the rationale;

⁵⁷J Gordley, ‘Liability in Tort for Pure Economic Loss’, in *Foundations of Private Law* (OUP 2006) 267.

⁵⁸B J A de Kanter-van Hettinga Tromp (ed), *De iure belli ac pacis: libri tres* (Leiden, Brill 1939) II.xvii.1–2.

⁵⁹T Aquinas, *Summa theologiae* II–II, Q62, a4.

⁶⁰[1973] 1 QB 27.

citing *Cattle v The Stockton Waterworks Co*⁶¹ and *Anglo-Algerian Steamship Co Ltd v The Houlder Line Ltd*,⁶² Dr Stallybrass stated '[h]e who does a wrongful act is liable only to the person whose rights are violated.'⁶³ This interpretation of the cases was accepted by Justice Hamilton in *La Société Anonyme de Remorquage à Hélice v Bennets*,⁶⁴ in whose judgment plaintiffs must 'shew not only an *iniuria*, namely, the breach of the defendant's obligation, but also a *damnum* to themselves in the sense of damage recognised by law'.⁶⁵ The point was emphasised in *Elliott Steam Tug Co Ltd v Shipping Controller*,⁶⁶ the court stating that 'the common law rightly or wrongly does not recognise him as able to sue for such an injury to merely his contractual rights'. Viscount Simonds, in *Attorney-General for New South Wales v Perpetual Trustee Co Ltd*,⁶⁷ said '[i]t is fundamental[...]that the mere fact that an injury to A prevents a third party from getting from A a benefit which he would otherwise have obtained, does not invest the third party with a right of action against the wrongdoer[...]'.

Much further discussion will be had of the law relating to economic loss in later chapters, but our focus now is on a slightly broader point, that we understand the logic which determines this conclusion: the rights with which the law of negligence is concerned are prior rights, whatever we deem those rights to be. One should be wary, admittedly, of using qualifiers such as 'prior' or, indeed, 'primary rights',⁶⁸ for

⁶¹(1875) LR 10 QB 453.

⁶²[1908] 1 KB 659.

⁶³W T S Stallybrass, *Salmond on the Law of Torts* (8th edn, London, Sweet and Maxwell 1934) 133.

⁶⁴[1911] 1 KB 243.

⁶⁵*ibid* at 248.

⁶⁶[1922] 1 KB 127, 140.

⁶⁷[1955] 1 AC 457, 484.

⁶⁸K Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' [1998] CLJ 301, 319 ('Primary rights describe a person's initial legal entitlement').

clearly the right is not defeated by its own infringement,⁶⁹ but here it is meant simply to mean those rights which pre-exist the wrong.⁷⁰

In any case, what is becoming clear is that the inquiry of the law of negligence is actually quite limited in purview. Whereas, for example, the law of contract concerns itself with the creation of contractual rights (along with their breach or transgression, *inter alia*), and—at a higher level of taxonomy—the law of property is concerned with the creation of rights *in rem* and ‘the exigibility of that right against strangers to its creation’,⁷¹ the law of negligence is not an inquiry into the creation of rights (save the ultimate right to damages, but arguably that is nothing more than a manifestation of the pre-existing right anyway). Of course, the law of negligence requires the law to have an understanding of the *a priori* rights, but the inquiry as to whether or not we have a right to, say, bodily integrity⁷² is not the primary subject matter of negligence law. Thus, Professor Harris’ observation that the role of tort law ‘is to define a number of legally-protected interests’⁷³ is misleading. Negligence law is concerned with the nexus between the right infringed and liability; it is merely a necessary corollary of our understanding of loss that we are asking the court to realise a right. In this respect, it shares much with the law of unjust enrichment;

⁶⁹The right survives the injustice...’ E Weinrib, *Corrective Justice* (OUP 2012) 88.

⁷⁰This being the realm of tort, there is a sense in which the use of the word ‘wrong’ could be viewed legalistically (as in, rights *ex delicto*), as if the wrong is somehow separate from the infringement of the right; such a view is erroneous. The word is used here as shorthand simply to mean the concatenation of facts leading to the infringement of a right (with apologies to Birks for so doing, for in spurning such a loose use of the word he is certainly correct: see P Birks, ‘Right, Wrongs and Remedies’ (2000) 20 OJLS 1, 25).

⁷¹W Swadling, ‘Unjust Delivery’ in A Burrows and Lord Roger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 280.

⁷²Or, indeed, ‘rights to life and limb, health[...and rights of property, and[...rights under contracts.’ See P Birks, ‘Right, Wrongs and Remedies’ (2000) 20 OJLS 1, 5.

⁷³D Harris, ‘Objectives of the Law’ in D Harris, D Campbell and R Halson (eds), *Remedies in Contract & Tort* (CUP 2005) 289.

when we ask whether an enrichment has an explanation known to the law, or whether the defendant has an enrichment *sine causa*, we actually ask whether the defendant has a right to the enrichment that supersedes the claimant's right.

But the law of unjust enrichment has a convenience which eludes the law of negligence: there is a clear legal nexus between claimant and defendant that is a product of the defendant being possessed of an enrichment flowing from the claimant.⁷⁴ In negligence, the infringement of a right need not yield a benefit to the defendant for that defendant to be liable, and so we must locate the nexus elsewhere. This is the traditional realm of 'duty' as an inquiry, and will be considered in the third section of this chapter.

Now, before turning to the question of the defendant, it is necessary to consider the nexus between the right and the remedy.

2. From right to remedy: the juridical sequence

In the last chapter, we considered Weinrib's conception of the articulated unity, whereby the legal nexus between the parties is established by virtue of the fact that they are situated as doer and sufferer of the same harm. What this means in practice will vary according to the exact nature of the right infringed, for it is this infringement that requires correction. The law, in this sense, is acting minimally, in that

[t]he injustice is not an occasion for a court to do what is best, all things considered, given the present situation of the parties[...]. Because what is rightfully the plaintiff's remains constant throughout, the remedy is merely the continuation of the right; together they make up a single

⁷⁴E J Weinrib, 'Correctively Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 53.

unbroken juridical sequence. In postulating so intimate a relationship between right and remedy, corrective justice merely draws out what the law takes for granted.⁷⁵

The purpose of the remedy is to afford recognition to the right, a right that pre-existed its infringement (obviously) and must survive the infringement (necessarily, for what good is a right that ceases to exist when it is infringed). Thus, the law acts only inasmuch as to return to the equitable status quo, to return the parties to their free and equal position before the birth of the remedial relationship.⁷⁶

Such a proposition is not without its critics. Hans Kelsen, in *Pure Theory of Law*, denies the normative explanatory force of such an analysis:

[...]a definite act or refrainment is a delict because it is connected with a coercive act, that is, with a sanction as its consequence. No immanent quality, no relation to meta-legal natural or divine norm is a reason for qualifying a specific human action as a delict; but only and exclusively the fact that the positive legal order has made this behaviour the condition of a coercive act—of a sanction.⁷⁷

Of course, there is a sense in which this is true: an act is only wrong inasmuch as we say it is wrong (just as loss is only loss inasmuch as we recognise some right from which we can subtract), but this is profoundly unhelpful if used to deny the quest for internal consistency and logic: while the law need not recognise a particular

⁷⁵E Weinrib, *Corrective Justice* (OUP 2012) 84.

⁷⁶See also E Weinrib, *The Idea of Private Law* (OUP 2012) 132. It is worth also noting that, of course, the return to the equitable status quo cannot and is not always achieved by simple transfer of funds. We know that there are manifold responses to wrongs, including restitutionary and equitable responses.

⁷⁷H Kelsen, *Pure Theory of Law* tr M Knight (Berkeley: University of California Press 1967) 111, as quoted in E Weinrib, *Corrective Justice* (OUP 2012) 83.

right, having done so it is required to pay heed to its congeners. For example, if two parties come before the Bar because one has received a mistaken payment from the other, a remedy that sought to do anything other than rectify the mistaken payment (howsoever it sought to do that) would, *ceteris paribus*, appear entirely arbitrary. To put it bluntly, it wouldn't be a *remedy* at all.

A more profound criticism, advanced by Christian Witting, is that such an intimate, unflinching linear relationship denies the court any normative power.⁷⁸ In a sense, the court becomes a mere conduit for the realisation of rights. This is clearly true in the limited sense that courts, having established that two parties are actually situated as doer and sufferer of the same harm, are then bound—under Weinrib's analysis—to provide a remedy that dignifies the right from which the defendant (or *doer*) has subtracted; the right binds the court, in a sense. This is, of course, nothing new: having successfully made out a claim, damages are the claimant's by right anyway. However, it is not difficult to find examples in practice where that tight linear connection is observed with rather less adherence: punitive damages, for example, clearly go beyond rectificatory considerations. There may be reasons for the award of punitive damages—deterrence is an obvious if problematic example—but it is not at all clear why the claimant's loss should be vindicated by an award of damages that is not predicated at all on the claimant's loss; the claimant is being put in a better position than the one in which they found themselves prior to the tortious act. If this is the way in which courts flex their normative muscles, then private law starts to appear more as a tool of public law, the infringement being not of the

⁷⁸C Witting, 'The Relationship Between Negligence and Misstatements' in K Barker, R Grantham and W Swain, *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford, Hart Publishing 2015) 225.

claimant's right so much as an infringement of society's 'right'. This moves us a very long way from corrective justice, and quite a long way from a law that regards public and private law as distinct.

We needn't go so far. The normative power of the court is realised in the recognition of the wrong: the court identifies that the claimant suffered harm and that the defendant or defendants can be regarded as the *doer* of that harm. As we will see in the next section, that part of the sequence is a normative evaluation. That juridical sequence—the continuation of the right—has normative force, and is the nexus which justifies requiring the defendant to pay damages. If the sole argument for undertaking a further and different normative analysis at the remedial stage is that there is no other normative function performed by the court, this argument would appear to be unfounded.

3. Who is liable to make correction?

This section considers how we can morally particularise the defendant, which is ultimately a question of causation.⁷⁹ However, unlike 'causation' as delineated in the traditional negligence analysis, this is not so much a question of whether the defendant was *a* cause—of course, as noted above, he or she would have to be a cause, lest the liability be entirely arbitrary⁸⁰—but rather why it is that the defendant can be regarded as a cause such that they are legally culpable and the other causes are not. Consider this. If I punch you, then the legal nexus is relatively unequivocal: I have done something that is plainly wrong, and that wrong has caused you harm. The assertion we make about this causation is uncomplicated; there appear to be

⁷⁹See S Steel, *Proof of Causation in Tort Law* (Cambridge University Press 2015) 109.

⁸⁰Modulo considerations of *Fairchild* and *Barker*

few, if any, factors that interrupt the chain of causation that began with my decision to act and resulted in your harm. To this end, I am *the* cause. Except, of course, this is a fiction (the temptation is actually to describe it as a *legal* fiction, in the context). I am not *the* cause, but one of many, yet the fiction of sole causal responsibility is one that common sense dictates almost every day: we ignore the questions of brute fact causation⁸¹—viz. those facts ‘not dependent for their existence upon human beliefs’,⁸² which would include, for example, a sub-atomic analysis of causation—in favour of a normative factual evaluation.⁸³ We say the act was an operative cause because it involved voluntary human agency, and we ascribe responsibility on the basis of a normative judgement about the exercise of that agency. In identifying a person as doer rather than merely a blameless participant in a fateful chain of causation, the court is making a normative judgement.

As Sandy Steel notes, the particularisation of the defendant requires more than mere factual causation, but further a notion of outcome responsibility such that the defendant ‘can appropriately be required to explain why [they] brought the outcome about.’⁸⁴ Steel is employing Tony Honoré’s concept of outcome responsibility, as articulated in ‘Responsibility and Luck: The Moral Basis of Strict Liability’,⁸⁵ the essence of which is that human interaction in the world carries with it some risk, both of reward and of failure; if we are to be regarded as authors of our own conduct, such that we reap the rewards of success, then so too must we accept that our interference in the world can carry negative consequences. Where we are authors of our own

⁸¹W Lucy, *Philosophy of Private Law* (OUP 2007) 193.

⁸²*ibid.*

⁸³J Stapleton, ‘Unpacking Causation’ in P Cane and J Gardner (eds), *Relating to Responsibility* (Oxford: Hart Publishing 2001) 153.

⁸⁴Steel (n 43) 110.

⁸⁵(1988) LQR 104, 537–545.

conduct, we are responsible for the outcomes thereof. It is this element of Honoré's argument that justifies Steel's assertion that we can be morally responsible for an outcome to the extent that it was based on actual conduct and was 'to some extent avoidable'.⁸⁶

It is, perhaps, easy to forget that we are not discussing negligence specifically here: the example was of a battery.⁸⁷ But the analysis is not altered by this fact. If I hit you, but have no intention so to do, then I have not been the author of my own conduct. If, unbeknownst to you, I intend to hit you but miss, then I am the author of my own conduct, but the outcome for which I am responsible is not an outcome in which your rights meaningfully feature. Now, in the former scenario I may well be liable in negligence, were it the case that I intended to do an action the foreseeable result of which was your being struck; it is important to understand that the outcome does not have to be the intended outcome for you to have been regarded as the author of your conduct. As Honoré later argued, 'though our conduct must have intentional aspects, what we do includes its unintended aspects or consequences.'⁸⁸ This is so, just as Oedipus intended to take the hand of a queen in marriage and with her bear children, but had not intended that the queen be his mother.

The historical development of tort has done much to obscure this unifying feature. It is a commonly held view that the law of tort is more accurately termed the law of *torts*: it is a collective of individual actionable wrongs,⁸⁹ none of which finds its

⁸⁶Steel (n 43) 110.

⁸⁷Distracting quibbles about harm aside, it is not immediately clear that a battery is not also a negligent act, *sensu stricto*, though the question is rarely considered because, so long as the intention element is easy to establish, the claim in battery is more simple to make out.

⁸⁸T Honoré, 'Being Responsible and Being a Victim of Circumstance' (1998) *Proceedings of the British Academy* 97, 176.

⁸⁹See, for example, *Bollinger v Costa Brava Wine Co Ltd* [1960] Ch 262, 283 (Danckwerts J).

‘origin in an any all-embracing general principle of tortious liability.’⁹⁰ Defamation and nuisance, for example, would seem to bear little relation to each other, as indeed would negligence and trespass. Though this is not exactly the position assumed herein (they exist at different levels of generality), there is a sense in which it is true, at least as a description of how tort has developed in the courts. For much of the 19th century, broad questions concerning breach of duty or of right had no direct bearing on whether one could claim against a defendant. Instead, the plaintiff would have to purchase a writ—to wit, writs of trespass, and trespass on the case—and establish that the facts of their claim were sufficient to satisfy a recognised form of action. Though we no longer employ this system, the categories will be less alien to the modern lawyer than they first appear: trespass concerned direct injuries to land, person and goods (though, as Professor Rogers notes, “injuries” must be read in an extended sense, because the tort was actionable *per se*’⁹¹), whereas trespass on the case required proof of damage (though the damage need not have been direct). The labels of battery or of trespass (in the current sense of the word) and of negligence relate respectively to trespass and trespass on the case, albeit that the classification is now implicit.

Similarly, there is another subdivision—and it is one that explicitly persists—between intentional and unintentional torts. Though it is not always clear what the defendant needs to have intended, a number of actions seem *prima facie* to require intention of some kind: trespasses to the person,⁹² false imprisonment,⁹³ deceit (if it

⁹⁰*Furniss v Fitchett* [1958] NZLR 396, 401 (Barrowclough CJ).

⁹¹W V H Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) 61.

⁹²See *Collins v Wilcock* [1984] 1 WLR 1172 (cf. *Wilson v Pringle* [1987] QB 237 concerning the requirement of hostility).

⁹³*Iqbal v Prison Officers Association* [2009] EWCA Civ 1310. Smith LJ’s view in *Iqbal* is the prevailing view, though it is far from clear that negligence would not suffice.

still exists in any meaningful sense),⁹⁴ *etc.* It is difficult to see how actions concerning the vindication of some right could be born of the same theoretical family that regards the defendant's intention as relevant in determining liability, and thus the tempting conclusion is that the intentional torts are indeed categorically separate from those that would require mere negligence.⁹⁵

The point regarding the separate nature of torts can, perhaps, be taken too far: it would be to patronise the courts to argue that they have developed categories of actionable wrongs in ignorance of other categories; the analogous nature of judicial reasoning is such that there are few (if any) genuinely isolated islands of actionable wrongdoing. But that is not to say that the courts have identified a feature common to *all* 'torts': though some may share attributes with certain others, no court has stated explicitly that all tortious instances share one attribute beyond the nebulous attribute of being 'civil wrongs'. The purpose of this part, however, is to demonstrate a taxonomic method, and it is certainly submitted that many of the different torts thus far identified are congeners to the core case: that is, that tort is concerned with the infringement of rights that consists in conduct over which we make negative normative evaluations.

3.1. Duty: a barren term? Turning to negligence specifically, the moral particularisation is the function of duty. For the avoidance of doubt, one must not be tempted to the conclusion that 'duty' is merely some analytic reflex of the right,

⁹⁴*Derry v Peek* (1889) 14 App Cas 337 has been rendered largely irrelevant by *Hedley Byrne v Heller* [1964] AC 465. See D Howarth, 'A Future for the Intentional Torts' in P Birks (ed), *A Classification of Obligations* (Clarendon Press 1997) 242–243.

⁹⁵For what it's worth, I consider it highly unlikely that 'intention' could ever be the defining feature of a tort if we argue (as I do) that private law finds its coherence through recognising and correcting for infringements of rights: its role is nonetheless still relevant, but perhaps limited to the mucilaginous world of legal causation, where it may have some bearing on, say, remoteness.

that it means no more than an obligation not to infringe whatever that right may be. The correlation between duty and right to damages is as to *duty of care* rather than the bare duty not to cause loss; as we shall see in the following, they exist as an articulated unity whereby the breached duty of care has caused an infringement of a right.

As we have seen, the duty analysis allows us to limit the manifold elements of the causal chain to the legally relevant. To say that your duty is not to infringe my right, and that you have breached such by infringing my right, is a meaningless sentence: it presupposes my legal or moral relevance in the chain of causation, dismissing without explanation the other causes. This is not a comment on multiple causation: the same criticism would apply to a sentence that read ‘parties X, Y and Z had a duty not to infringe my right, and breached that duty by infringing my right (albeit, perhaps, in manifold ways).’ The substance of the criticism is that sentences such as these tell us nothing of meaning in answering why we have morally particularised the defendant(s) as part of the chain of causation such that we can say that *they infringed* our rights (when we would not say that other elements of the chain of causation did: recall the distinction above between brute fact causation and normative factual evaluation).

By way of example, James Gobert, in an article on corporate manslaughter, fell into this trap. He was arguing that the requirement of an extant duty of care in establishing criminal liability for death was ‘otiose’ on the basis that ‘organisations[. . .]are already under a duty not to kill in the first place’.⁹⁶ This is a fallacious statement. It is not clear how the company can be said to have ‘killed’ without some *a priori* sense of why they were a legally relevant—as opposed to a blameless—part of the chain of

⁹⁶J Gobert, ‘The Corporate Manslaughter and Corporate Homicide Act 2007—Thirteen years in the making but was it worth the wait?’ (2008) 71(3) MLR 413–433, 416.

causation. In simple terms, we may be able to say that, as a matter of brute fact causation, D killed V. So, in answering the question ‘did D breach their duty not to kill V?’, we would have to answer ‘yes, D did kill V and therefore breached their duty not to kill V.’ Of course, there may be other elements of the chain of causation. Did the knife kill V? Yes, as a matter of strict causation. But in making a judgement about legal liability, we wouldn’t say that the knife killed V, just as wouldn’t say that a person, who happened to be holding a knife when D pushed him into V, killed V. When we are making judgements about whether D infringed my right, we are clearly asking more than whether there existed an element of brute fact causation. Necessarily, part of our answer involves an assessment of their normative blameworthiness. So, on one level, you may very well say that there does exist some duty not to infringe my right. But, in order to determine what it means to have infringed my right in any normative sense, there needs to be a further level of analysis. This is the role of the duty of care.

Of course, we may be tempted to ponder whether they were ‘negligent’ in some abstract sense of doing something we may regard as unreasonable, but we cannot conceive of standards of care (i.e. negligence) without also considering the relative positioning of the parties. The essence of standards of care lies in identifying foreseeable risks, and thus necessarily parties who may foreseeably be put at risk. You can’t be negligent ‘in the air’.⁹⁷

⁹⁷C Witting, ‘Physical Damage in Negligence’ (2002) 61 *Cambridge Law Journal* 189–208, 189. Notably, Witting was discussing the requirement of physical damage, but the phrase is equally apt in this context.

It is easy to fall into this erroneous line of reasoning. This is because, if we accept our initial lemma—that our right to damages is generated by an infringement of a prior right—it momentarily *seems* logical to infer that the corresponding duty (and therefore the locus of liability) would consist in an obligation not to cause loss/infringe my prior right; a simple analytic reflex, requiring only a causative relationship. The use of the word ‘obligation’ is problematic in this sense. The word has a specific legal meaning and cannot be conflated with duty; negligence law takes its place among the law of obligations in requiring the liable party to make good the infringement of the right (for negligence is certainly not concerned with the vindication of rights *in rem*; by its nature, the *vindicatio* does not require negligence). Whilst, as we have seen, negligence does not create a right, the claimant’s right manifests itself as an obligation on the part of the defendant to make good infringement. Indeed, in noting that the law of obligations is synonymous with the law of rights *in personam*, Peter Birks argued that ‘[i]t is correct, though momentarily shocking, to refer to the law of obligations as a category of right’.⁹⁸ So the word is problematic when used in this context because it can lead one to regard the duty of care either as synonymous or, at the very least, as redundant.

Why might such a conclusion be reached, given that we know—inasmuch as legal scholarship overwhelmingly tells us so—that the duty is more than obligation in this sense in that there is a duty to exercise care?⁹⁹ This failure to take care is the

⁹⁸P Birks, ‘Right, Wrongs and Remedies’ (2000) 20 OJLS 1, 21. And there is clearly a level of right that is something more than the obligation; whilst the obligation may be discharged, this right does not disappear, for a right cannot be defeated merely because the possessor thereof has been compensated for its infringement.

⁹⁹‘[.]a legal duty on the part of D towards C to exercise care in such conduct of D as falls within the scope of the duty.’ W V H Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) 5-1.

traditional essence of negligence (as against strict liability). It follows that the duty so defined can be breached without any corresponding right to damages arising on the part of the injured party. More specifically, this duty could be breached without affecting the rights of the claimant at all (for, as any first year law student has been taught, the breach of duty needs to be causally linked to the loss in order for the defendant to be liable to the claimant). This is unproblematic if you assume that duty is simply a means to limit the legally relevant causes. However, if you erroneously conflate obligation and duty, or somehow describe the duty as an ‘obligation’ not to infringe rights, then this renders the formulation of duty either:

- (a) paradoxical, (for how can a duty—a thing owed—exist without a corresponding right to it?); or
- (b) entirely meaningless (for what is the point of a duty that can be breached without generating some corresponding legal recourse?).

This is a problem. Duty, as an inquiry, is traditionally concerned with the question of the defendant’s liability for the claimant’s loss (for, as the traditional view stipulates, bare causation alone is an insufficient determiner; unforeseeable loss should not attract liability in *negligence*). If you denude duty of this role, then how is the defendant meaningfully to be identified?

It was initially tempting to consider that maybe our rights are naturally qualified to the extent that we have a right not to be caused foreseeable losses, but it is difficult to see how the problem could be avoided by collapsing this inquiry into our conception of rights. If, for example, we say that our right is not to be caused *foreseeable* losses—and our expectation is that ‘foreseeability’, if it is to be of any normative significance, must relate to the defendant’s perspective—then we circumvent the

problem that duty and right are not correlative. However, in so doing, we allow the nature of our right to be determined by the actions of another. We have already shown that ‘loss’ is merely the manifestation of a pre-existing right infringed. To ape the example offered earlier, if C were shot by both A and B—one negligent, the other not—C suffers harm in both instances. In each, C has a just claim to his own body which supersedes anyone else’s right thereto and, in both instances, that right was transgressed. And, of course, what the defendant needs to foresee is the likelihood of harm or loss; as we have already established, loss can only be conceived vis-à-vis the infringement of a right. We cannot therefore suggest that the right itself is determined by whether or not one can foresee the infringement of that right; the argument is circular. This is a clear demonstration of the importance of keeping *a priori* rights and rights to damages analytically discrete.

This point is actually broader than at first appears. Professor Weinrib has been one of the most articulate proponents of the concept of articulated unity, whereby right and duty both ‘constitute a single normative sequence, in which each assumes its character from its relationship with the other.’¹⁰⁰ This notion of articulated unity formed the basis of his more recent analysis on duty in his work *Corrective Justice*, in which he argued that ‘parties to a negligence action be understood as the doer and sufferer of a single wrong, and that the wrong must be seen as an integrated sequence in which prospect of the plaintiff’s injury is seen as a reason for considering the defendant’s act negligent.’¹⁰¹ It is a singularly powerful work on the subject of duty.

¹⁰⁰E Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 125.

¹⁰¹E Weinrib, *Corrective Justice* (OUP 2012) 79.

The broader point, then, is this: the wrong consists in more than the breach of the right and more than identification of the wrongdoer; it is both. The wrong thus forms the nexus between the two parties; one party can be regarded as a ‘doer’ of the harm inasmuch as they are normatively causally relevant, and the other suffered a wrong inasmuch as their rights were infringed as the misfortuned coda to the fateful chain of causation. Yet it remains one wrong; this is the essence of Weinrib’s articulated unity.

It is perhaps worth ending this section by noting that its purpose—indeed, the purpose of the chapter—is to make a taxonomic point. The identification of doer is analytically discrete from the enquiry that recognises rights, albeit that both are necessary for a remedial relationship, the relationship being a constraint on the remedy. Whether all instances of tortious liability as found throughout legal history can fall under the negligence analysis remains to be seen; indeed, it would be quite an achievement of analogous reasoning (or an accident of history) if all of the ‘torts’ so described did actually conform. Alternatively, some areas of liability we think to be tort may well be spurned in favour of categorical unity. This is not a problem. Indeed, it is quite the reverse. It is not a failure of taxonomy to fail to describe a general theory uniting everything we have thus far described as a tort; rather, the taxonomy is refined by carving out clear boundaries, and discarding those which fall outside.

4. Duty and rights

For the sake of clarity, it is worth drawing together and elaborating on the sections above in order to demonstrate more completely the duty model as envisaged in this rights-based schema.

Rights in this model are not the reflex of a duty owed to us. We have noted above that there is a relationship between the duty and the right, but we have also noted that they are not merely reflexive: it is not mirror-like correlativity. The duty is therefore something other than a bare duty not to infringe the right, albeit that it is in some sense defined by the right. What we mean by ‘right’, then, is something more than a Hohfeldian sense of claim right in which I have a claim right that you not kick me and therefore you fall under an obligation not to kick me.

Though not the argument presented here, it is not impossible, on one level, to argue that general rights such as a right to bodily privacy (which would seem not to accord to a simple Hohfeldian relation) are no more than collectives of Hohfeldian right relationships. This form of reflexive relationship has been described as *coercive*, employing Nicholas McBride’s taxonomy,¹⁰² or a *conclusion* to a duty, employing Charlie Webb’s.¹⁰³ In the former, I am compelled to act in a certain way, which means that I have a clear duty and you have an unequivocal right in respect of that duty. In the latter, I only have a right because you have a duty. The right is a conclusion because its existence can be explained by virtue of the duty: I have a right that you don’t kick me because you have a duty not to kick me. However, on this approach it does not really matter through which end of the telescope we

¹⁰²N J McBride, ‘Rights and the Basis of Tort Law’ in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing 2014) 342.

¹⁰³C Webb, ‘Three Concepts of Rights, Two of Property’ (2018) 38(2) OJLS 246, 252.

look: either way, one could make an argument (albeit not the one advanced here) that the right to bodily privacy only existed because there were a number of specific Hohfeldian relationships (such as my duty not to kick you, my duty not to drive my car into you, and so on) that, when taken together, amount to an interest in bodily privacy.

This is the position that McBride adopts (albeit rejecting Hohfeldian language of ‘claim right’), and it is not accepted. We have already considered earlier in this chapter (section 1.2) the problem with defining rights as a product of individuated duties. Yet there are further problems with the reflexive analysis. The first problem is that a purely reflexive system of rights and duties deprives either of explanatory force: you have one only because you have the other. As Peter Cane describes the problem, it deprives the argument

that rights are conceptually basic to tort law of any real bite because it equally supports the proposition that duties are conceptually basic to tort law. On the basis of Hohfeldian analysis, it can no more be said that rights are fundamental to private law than that duties occupy that place.¹⁰⁴

The second problem is that McBride proposes a secondary system of rights that also lacks explanatory force. McBride distinguishes between coercive rights—which he regards as ‘fundamental’—and liberty/interest rights, which are ‘secondary’.¹⁰⁵ For McBride, a right such as bodily privacy is in the latter category. He argues that ‘we can only know what liberty/interest rights we enjoy[. . .]once we know what coercive

¹⁰⁴P Cane, ‘Rights in Private Law’ in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing 2014) 43.

¹⁰⁵N J McBride, ‘Rights and the Basis of Tort Law’ in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing 2014) 344.

rights we have.¹⁰⁶ Without coercive rights against other people, the interest right does not exist: it would be ‘a thing written on water.’¹⁰⁷

The conclusion follows naturally enough from the taxonomy, and would be convincing *if* we were willing to accept that all rights are either coercive rights or the product of coercive rights. It is not clear why we have to accept this. McBride fortifies his argument by noting that the freedom of expression (a liberty/interest right) is nothing more than a product of coercive protections of my freedom of speech. The example works well enough to demonstrate his taxonomy, but falls into trouble when presented as a general truth. This is because private interferences in freedom of expression tend not to be actionable in private law anyway, so it is not particularly useful to present freedom of expression and bodily privacy as taxonomic bed-fellows. We have law—notably the Human Rights Act 1998 and defamation law—that mean that interferences *by the state or judiciary* in freedom of speech require justification and proportionality, but your shouting over me in a meeting is not ground for a claim in tort. Contrastingly, interferences in our bodily privacy—and, in the case of intentional torts, even very minor interferences—tend to ground an action in private law.¹⁰⁸

Further, why does it matter that I have a liberty right if that right is merely derivative? It might be expressive, but expressive of what? The tendency of the law

¹⁰⁶ibid.

¹⁰⁷ibid.

¹⁰⁸To forestall the inevitable criticism, I am not saying that the only reason we can say we have a right to bodily privacy is because the law protects it in specific instances: this would be closer to McBride’s position. What I am saying is that the frequency with which the law protects bodily privacy is evidence that it is an anterior right, just as the infrequency with which the private law protects freedom of speech would suggest that it is not (or at least not in the same way). The specific instances of protection afforded to such rights are *evidence* of their existence, not the *reason* for their existence.

to recognise certain types of right? This backwards formulation renders it somewhat pointless. The entire structure of rights lacks direction: unless the liberty right can guide coercive rights, the emergence of liberty rights is entirely arbitrary—and so too the coercive right. Citing Stevens’ analysis of the same case, Charlie Webb identifies this problem in *Smith v Bush*,¹⁰⁹ the outcome of which he noted could be adequately explained by reference to conclusion rights (which he terms *C-rights*), but the conclusion rights themselves lacked rationale.¹¹⁰ He argues that

There are any number of constructions of the form ‘B has a right that A f’ which the defendants’ conduct infringed: ‘Bush has a right that Smith take care when producing the survey’, ‘Bush has a right that Smith take care to ensure that Bush does not end up paying too much for the house’[...] and so on. All of these are fully intelligible and coherent as statements of C-rights.

Of course, the question for the court was not whether such formulations are possible, but whether it should endorse any of them, whether it should recognise any of these rights and their corresponding duties. But this is a question Hohfeld’s scheme cannot answer.¹¹¹

The mere existence of reflexive rights and duties provides no explanation as to why those rights and duties exist in the first place. Charlie Webb distinguishes two concepts of rights: the aforementioned C-rights, on the one hand, and reason rights or R-rights on the other.¹¹² The R-rights are those rights which provide the reason for the existence of the duty, and go beyond the simplistic reflexivity of ‘you

¹⁰⁹*Smith v Eric S Bush* [1990] 1 AC 831 (HL).

¹¹⁰C Webb, ‘Three Concepts of Rights, Two of Property’ (2018) 38(2) OJLS 246, 257.

¹¹¹*ibid.*

¹¹²C Webb, ‘Three Concepts of Rights, Two of Property’ (2018) 38(2) OJLS 246, 252.

have a duty to Y because I have a right that you Y.’ This employs Joseph Raz’s conception of rights in *The Morality of Freedom*.¹¹³ Raz’s argument is that ‘[a]ny moral theory which allows for the existence of duties must allow for the existence of reasons which are not duties.’¹¹⁴ This is the role of the reason right. ‘Right is the ground of the duty. It is wrong to translate statements of rights into statements of the corresponding duties.’¹¹⁵

Raz explains the existence of duties by relating it to rights—those aspects of your wellbeing that are of sufficient importance to warrant protection in the form of a duty. Rights here are justificatory. McBride argues that the language of rights in the Razian sense is misleading, because these are not strictly enforceable rights.¹¹⁶ Instead, McBride argues that these are interests giving rise to legal principles. McBride uses the ECHR as an example of this, and it is actually a very good demonstration of his argument. In McBride’s taxonomy, these are not rights, *sensu stricto*, because their infringement does not, without more, give rise to clear or enforceable duties on behalf of the states. The language of rights is therefore unnecessarily confusing, so McBride argues, and would have been better supplemented with ‘vital interest’.¹¹⁷

As will be clear from my comment above, however, we should be slow to jump to the conclusion that ‘rights’ under the ECHR are the same rights that we are talking about in tort law (or, at least, not merely by virtue of their inclusion in the ECHR). Nonetheless, ignoring the ECHR, the problem with this analysis—where rights are nothing more than justifications for duties—is that it denudes the notion

¹¹³J Raz, *The Morality of Freedom* (OUP 1986).

¹¹⁴J Raz, *The Morality of Freedom* (OUP 1986) 197.

¹¹⁵J Raz, *The Morality of Freedom* (OUP 1986) 171.

¹¹⁶N McBride, *The Humanity of Private Law: Part I: Explanation* (Bloomsbury 2019) ch 2.2.

¹¹⁷*ibid.*

of an ‘infringement’ of any content: that half of the wrong that lies in the infringement is missing. This structure explains why we have a duty, but does not tell us much about the point at which the infringement of the right grounds a prima facie claim. The argument in this thesis, however, is that they are justificatory by virtue of their being rights, not that they are rights by virtue of being justificatory. The breach of the right is legally recognised, inasmuch as it causes us to ask who was legally responsible for the infringement. The legal wrong consists in the breach of the duty of care *and* the infringement of the right.

By way of some interim conclusion of these sections, the essence of the articulated unity lies in identifying both the infringed right and the person (or, indeed, persons) who can be regarded in some normative sense as the author of that infringement (recall the discussion of Steel and Honoré in the preceding section). Often the legal nexus will be unequivocal: we have considered already those instances where my intentional application of force upon you renders the identification of the *doer* of harm fairly straightforward. We do not need to consider matters such as a duty of care in many torts, because there is a moral particularisation in the definition: *intentional* application of *unlawful* force, for example.

What it means to be the doer of harm in negligence is not always so straightforward: why are you or your co-defendants normatively relevant in the infringement of a right when other factors in the chain of causation are not? The duty of care performs this normative function; through proximity, for example, it allows us to identify potential pathways to harm between parties prior to the interaction, so allowing us to particularise defendants within a causal chain after the interaction. So we are asking: how is this defendant legally relevant in the infringement of the right?

To answer the question, the content of the duty must clearly be more than a reflection of the right. So the duty of care flows from the right, yet it is not a reflection of the right: it is grounded by the right (in Raz's words). The duty does not therefore create enforceable obligations that go beyond the right—that is not the direction of travel. The right constrains the duty, but it is not its sole content.

5. The view outwith tort

This section considers aspects of private law remedial relationships beyond tort to test two principles already mentioned: firstly, that private law acts minimally so as to correct the infringement of the right; and, secondly, that the law is concerned with normative evaluation of actions, which, in other areas of private law, finds its meaning in *intent*. Our understanding of the relationship between contract and unjust enrichment, and the remedies available, will be of fundamental importance for understanding some of the arguments justifying *Hedley Byrne* liability in the second part.

What is it that makes tort different from contract or unjust enrichment? It is all very well saying that contract is a manifestation of consent whereas tort is in the realm of 'wrongs', but in what way are tortious wrongs different from what the layperson would call wrong (breach of contract, a mistaken payment, *etc*)? In other words, what is it that makes a tort *qua* tort different from a breach of contract, from an unjust enrichment, or from some other causative event? The answer must be framed in terms of the parties' relationship: in contract, one is liable—by virtue of the voluntary, mutually burdensome promise—either to perform or to make good non-performance. In unjust enrichment, a party is liable by virtue of their having

received an enrichment that lacks legal explanation. The legal nexus has been more difficult to identify in tort, because there is neither a specific contract, nor is liability established by virtue of a transfer of value.

However, the previous chapter went some way in identifying that legal nexus. We saw that the focus of tort must be on the infringement of the right if it is to be logical. Further, we saw that negligence, as an enquiry, is taxonomically different from asking if those rights may otherwise be recognised in tort. Recognising that we live in a capricious, chaotic world—where the manifold interactions of humans, and of humans and nature, will produce consequences that are both entirely unforeseen and unforeseeable—we must accept that we waive our rights to some extent, that we cannot claim against a defendant merely because he or she was the last in a fateful chain of blameless causation. We do not need proactively to act in order to become subject to the changes and chances of the world, though by volunteering to undertake an activity we will tacitly waive our right with respect to would-be infringements that we ought reasonably to foresee as inherent in that activity—assuming that all others are acting reasonably—and also to those risks and harms that no one could have foreseen.

This is a proposition based on our understanding of rights and duties, and it seems to apply well to negligence, but thus far we have not looked extensively at the other side of the coin—that is to say, at the rights or ‘interests’ recognised in obligations more generally. Of course, this thesis is directed at an exposition of negligent misstatement, and thus we need to have an understanding of where negligent misstatement as an enquiry may sit: is it, as its name would suggest, an instance of the broader negligence enquiry, to wit an enquiry into *how* rights may

be infringed by a misstatement? Or is negligent misstatement actually an instance of an altogether different right (such as, perhaps, a right not to be lied to)? The answer to that question will be developed in the next chapter. But this chapter will aid our understanding by analysing how intention manifests itself across private law. It is important for what follows that we appreciate the interaction of intention and rights generally.

5.1. Minimally corrective remedy.

5.1.1. *Contractual expectation.* The reason a party would enter into a contract would be because he or she believed a benefit or, for those of an EAL¹¹⁸ bent, a ‘surplus’ could be realised. This seems uncontroversial; why would you enter into a contract if you believed *ab initio* that you were going to be worse-off (or at least no better-off) as a result? The contract is little more than the mutual promise of performance between the parties, so where one party does not perform in full, potentially the benefit cannot be realised in full. Thus, the law regards failure to hold to a contractual promise as demanding of remedy because one party has been deprived of an expected benefit or surplus.¹¹⁹ This reasoning is not, I should argue, based on an economic functionalist reading of contract, or utilitarian principles of wealth creation, but given that damages based on expectation form the basic measure of damages in contract—a secondary right behind primary performance, and the only remedy by right in court—such a proposition seems fair for present purposes.

Of course, the analysis can be refined because, taking this simple argument to its logical conclusion, we would find ourselves concluding that the law upholds the

¹¹⁸Economic analysis of the law.

¹¹⁹R Halson, ‘The protected contractual interests’ in D Harris, D Campbell and R Halson, *Remedies in Contract and Tort* (2nd edn, Cambridge University Press 2005) 74.

intended surplus regardless of whether the claimant was ever to realise that surplus in fact; this cannot be the case. Rather, the law respects the intention of the parties by ensuring ‘that those whom we induce to rely upon us[...]are not left worse-off.’¹²⁰ This was the logic employed in *Robinson v Harman*,¹²¹ in which it was stated that the purpose of the contract remedy was ‘to put the aggrieved party in as good a financial position as that in which he would have been if the contract had been duly performed.’¹²² Thus, we can refine Professor Smith’s statement and declare that the law of contract ensures that those whom we induce to rely upon us are not left worse-off than they would have been *if the contract had been properly performed*. This would therefore include situations where the contract was a losing contract, where the costs of performance outweighed the expected return from the full performance of the contract; restricting the language to deprivation of a ‘surplus’ would seem erroneously to ignore such situations.

Accordingly, this is the first point: the law respects your legitimate, objective expectation in entering a contract because you have intentionally and voluntarily burdened yourself to support that expectation. The semantics aside, at fundament this does not seem a particularly controversial point.

5.1.2. *The limits of the legal relationship*. It therefore seems axiomatic that the remedy that ought to be provided is one correcting the lost expectation, i.e. loss-based damages.¹²³ If you respect a contract because actually you are recognising

¹²⁰S A Smith, *Atiyah’s Introduction to the Law of Contract* (6th edn, Oxford, Clarendon Press 2005) 2.

¹²¹(1848) 1 Exch 850.

¹²²G H Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press 1988) 82.

¹²³See *Attorney General v Blake (Jonathan Cape Ltd, third party)* [1997] EWCA Civ 3008; [1998] 1 All ER 833, 844C (Lord Woolf MR), and *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518; [2000] 3 WLR 946, 987 (Lord Jauncey of Tullichettle).

that there is a supported expectation, it would be absurd to make good a failed contract by reference to, say, the defendant's gain. In respecting the institution of the contract enough to recognise its breach, the courts must surely respect the legitimate intentions that created the contract, which cannot be assumed to include restitution for breach given that the intention was for performance; to do otherwise would be schizophrenic. This is an important point: it logically follows from the above analysis that the expectation—whether through performance or loss-based damages—was the claimant's *by right*. What we cannot say is that any benefit realised by the party in breach would otherwise have rightly inured to the benefit of the claimant, simply because they weren't the party in breach.

The force of this logic is ineluctable. The House of Lords tried to avoid it in *AG v Blake*¹²⁴ in order to award restitution for breach of contract (for the claimant's losses were completely unquantifiable, and the defendant had profited through the breach). They did so by attacking it on two fronts. First, they claimed that the breach (which herein included breach of the Official Secrets Act) was *contra bonos mores*. Even though benefiting from a breach that is clearly *contra bonos mores* but that has caused no quantifiable loss, such as in *City of New Orleans v Fireman's Charitable Association*,¹²⁵ appears to be a striking example of injustice,¹²⁶ it is hard to see why this necessitates restitution. True, there is a sense in which 'the ordinary member of the public would be shocked if the position was that the courts were powerless to prevent [the defendant] profiting from his[. . .]conduct',¹²⁷ but quite why

¹²⁴*Attorney General v Blake and another* [2000] UKHL 45.

¹²⁵9 So 486 (1891). In this case, the party providing fire protection to a city were actually seriously under-resourced, breaching the terms of the contract, though no complaint was made that this breach resulted in a failure to extinguish any fires.

¹²⁶G Jones, 'The Recovery of Benefits Gained from a Breach of Contract' (1983) 99 LQR 443, 459.

¹²⁷*AG v Blake* [1998] 1 All ER 833, 851 (Lord Woolf MR).

the law must afford this protection through the laws of contract or restitution is far from explicable. The motive is not one of protection of a commercial interest, of their expectation, nor even of a proprietary interest, but rather an entirely punitive one, and as such should be grasped with the consciousness that it is what it is rather than shoe-horned into a distortion of private law. To this end, one may have sympathy with the powerful dissent in *Snepp v United States*¹²⁸ that punitive damages, rather than restitutionary damages, are far preferable if one's aim is to punish for general harm caused and to deter similar actions. Question, though, whether the private law is the appropriate forum for punishment. In any case—and this surely is the point—it is very hard to see why the claimant should *ipso facto* be remedied for a breach *contra bonos mores*, (especially if, save inasmuch as he is a member of the shocked public, he has suffered no loss).

The second prong of their Lordships' attack followed the decision in *Wrotham Park Estate Co v Parkside Homes Ltd*,¹²⁹ in which it was argued that the defendant's breach of a restrictive covenant had deprived the claimant of the opportunity to bargain over release of the covenant—to renegotiate—and that the price of release would have been a 5 per cent share in the defendant's profits. The court therefore awarded disgorgement of 5 per cent of the defendant's profits. This is the 'hypothetical release' argument. However, brief consideration of the logic shows this to be a fallacy. By presuming renegotiation of the contract—and this is undoubtedly in the claimant's favour as the discussion wouldn't be had if the claimant's losses were quantifiable and larger than the restitutionary award—the courts are effectively stating that the claimant would have had a legal right to renegotiate the contract

¹²⁸444 US 507 (1980) at 523.

¹²⁹[1974] 1 WLR 798.

anyway, as if somehow the breach both created and usurped this right. This is a complete fiction, and it is a fiction that can apparently be brought about simply by virtue of the fact that the claimant cannot quantify his losses. Of course, as Ian Jackman points out, *Wrotham Park* can be explained perfectly simply on the basis that it wasn't a pure contract case, because breach of a restrictive covenant constitutes an infringement of a proprietary right: the claim was based on the wrong legal relationship.¹³⁰ Still, the reasoning here is our concern and it is clearly inconsistent with the rationale underlying the law of contract.

And so, passing over *Blake* as the aberration that it is, we conclude our second point: the legal relationship between two contracting parties exists because of mutual obligation and thus expectation, and is therefore limited to that. A remedy that does not aim to meet that expectation presumes a relationship which did not, in fact, exist.

5.1.3. *Preservation of the equitable status quo.* There is a crucial caveat, however, which refines the paradigm: the defendant is only liable for those losses which were a result of his failure to perform, and not otherwise avoidable losses, hence the award of damages is not one compensating all losses, but one compensating for a failure to perform that causes loss.¹³¹ The law, in this sense, is acting minimally, i.e., the law is providing a remedy for a breach (or a wrong, or an unjust enrichment), but it does not seek to alter the facts that brought about that breach. It may be that prior facts can and ought to be reinterpreted after a causative event (that is, one giving rise to rights), but the law, in realising those rights, does not seek to change the basis upon which those rights arose. For now, it will be sufficient that this point—our third point—is merely borne in mind; we will return to this later on.

¹³⁰I M Jackman, 'Restitution for Wrongs' (1989) CLJ 302.

¹³¹*Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL 2; [1980] AC 827.

By way of brief summary, then, we have established that the law respects the intentions and expectations of the parties creating the contract, and that means that it recognises that the legal relationship is limited by those intentions and expectations, and interferes only as much as is necessary to preserve the equitable *status quo*. To do anything more than the above would be either to presume a fiction or schizophrenic.

5.2. The value of intent. As an oak cometh of a little spire, so from this simple proposition—that the law respects the expectations and intentions of the contracting parties—can we make a number of subsequent propositions. The importance of intention, and specifically of donative intent and contractual will, will become apparent in the second part. Suffice to say, impairment of will forms the central justification for *Hedley Byrne* liability. For now, it is sufficient that the point is broadly understood.

5.2.1. *Restitution and the ineffective contract.* The first step is this: if damages are the only appropriate remedy for breach of contract, then a party seeking restitution will have to base their claim on a causative event other than contract, most notably (though not exclusively) through unjust enrichment. It is not difficult to conceive of situations where the restitutionary award would exceed the award in damages for breach of contract, notably where the claimant would have made a loss were the contract to have been properly performed, but one must avoid the temptation to suggest that the claimant can simply choose the most beneficial; the legal relationships and causative events that give rise to each remedy are fundamentally different, and it is not for the claimant to decide which is applicable. Under the claim in contract, one's argument is that a contract is extant and you therefore have to

make good on the obligations, either in damages or through performance. In order for the argument in unjust enrichment to work, one has to claim that there is no contractual obligation at all, and hence the transfer of value lacks legal explanation. As Friedmann states, recovery cannot be had for ‘benefits conferred in fulfilment of a valid obligation owed to the recipient’.¹³² Where a plaintiff has contracted to confer a benefit on another, he has effectively agreed ‘to forgo his right of restitution from another’.¹³³ The notion is axiomatic; if one asserts that there remains an obligation, the ‘recipient’s enrichment is based on a legal right and is not therefore in the legal sense unjust.’¹³⁴ The proposition leads inexorably to the conclusion that a claim in restitution can only succeed if the relevant contract is ineffective.¹³⁵

5.2.2. *Intention and termination.* However, this is only half of the story. You might naturally ask why the claimant seeking restitution, wary of these restrictions, cannot simply declare the contract to be ineffective. In one sense, he can; where the defendant has breached the contract sufficiently seriously or fundamentally such that it amounts to a repudiatory breach, ‘the breaching party will be treated as if she had intended to repudiate the contract’¹³⁶ and thus the claimant can accept that breach. It is a legal fiction, of course, but the presumption seems justifiable. Where the defendant’s actual performance falls so far short of the required contractual

¹³²D Friedmann, ‘Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution’ in A S Burrows (ed), *Essays on the Law of Restitution* (OUP 1993) 247–8.

¹³³R Goff and G Jones, *The Law of Restitution* (5th edn, Sweet & Maxwell 1998) 48.

¹³⁴J Beatson, ‘The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims’ in W Swadling and G Jones, *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 2000) 149.

¹³⁵A Burrows, *The Law of Restitution* (2nd edn, OUP 2002) 320.

¹³⁶S A Smith, *Atiyah’s Introduction to the Law of Contract* (6th edn, Clarendon Press 2005) 198.

reciprocation, it may in fact be unreasonable to presume that the defendant did intend to be bound by the contract.

Notwithstanding, the legal fiction—however justifiable in one sense—is a limited one. We are here concerned with *intention*. Treitel’s assertion that this presumption can include situations where the defendant is unable to render the contractual performance¹³⁷ is, with respect, specious. Merely denuding the claimant of the benefit of the contract is clearly not a basis upon which to presume lack of intention.¹³⁸ Consider, for example, the situation where the defendant has performed to a significant degree (e.g. in building a ship) but is nevertheless unable to deliver the benefit of that performance to the claimant (because of, say, insolvency prior to completion). The presumption, here, would lack any basis.

This distinction is of crucial importance. Whilst a breach may bring a contract to an end, i.e. contractual termination, in a very real sense the contract is still persisting,¹³⁹ as the secondary obligations to remedy breach of the primary obligations subsist.¹⁴⁰ But a lack of intention—presumed or otherwise—causes a contract to fail on a far more fundamental level. It is—in truth as much as effect—akin to stating that there was no intention to create legal relations, either *ab initio* or subsequently, and therefore the contract fails. Here, again, we see that the law is respecting the *status quo*; allowing the contract to be rescinded by operation of law simply because it was impracticable amounts to a fundamental usurpation of the *status quo*. There are, of course, also practical reasons to respect it: ‘serious difficulties arise if the law

¹³⁷G Treitel, *The Law of Contract* (10th edn, Sweet & Maxwell 1999) 977.

¹³⁸S A Smith, *Atiyah’s Introduction to the Law of Contract* (6th edn, Clarendon Press 2005) 199.

¹³⁹D Campbell, ‘Self-help’ in D Harris, D Campbell and R Halson (eds), *Remedies in Contract and Tort* (2nd edn, Cambridge University Press 2005) 51.

¹⁴⁰*Moschi v Lep Air Services* [1973] AC 331 (HL).

seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract.’¹⁴¹ Indeed, the ‘courts would at a stroke have accepted the task of regulating the whole business of economic exchange’.¹⁴²

5.2.3. *Intention in unjust enrichment.* If this concentration on intention or its elevation to primacy appears a tendentious reading of the law, consider its application in the law of unjust enrichment. This is not an arbitrary comparison; both contract and unjust enrichment are concerned with the transfer of benefit. In many senses, they are two sides of the same coin, differing by volition.

In the common law approach to unjust enrichment, vitiating of intent has formed the analytical basis for almost all of the unjust factors, be it mistake of fact or law, ignorance, undue influence, illegitimate pressure, incapacity, and so on. In all of the factors, it could be said that the will of the transferor was impaired, either due to a mistake, ignorance or crippled autonomy, and thus the enrichment was unjust.

To demonstrate the point that intention does, albeit obliquely, form the basis for the unjust factors, let us consider the common law’s approach to mistake (being, as it is, the most inclusive of misrepresentation). Over time, tests have been established to determine whether the mistake was relevant. Historically, the test was narrow, limiting recognition of the claim to one where there was a mistake of fact, specifically as to one’s supposed liability, i.e. that the mistake of fact was as to his supposed legal liability to make the payment and was the cause of that payment. For example, in *Kelly v Solari*,¹⁴³ an insurance company paid out on the mistaken belief that all of

¹⁴¹*Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 All ER 470; [1994] 1 Lloyd’s Rep 365; [1994] 1 WLR 161, 166 (Goff LJ).

¹⁴²P Birks, *An Introduction to the Law of Restitution* (Clarendon 1985) 47.

¹⁴³(1841) 152 ER 24.

the premium payments were current. When they subsequently discovered that this was not the case, they were allowed to recover the money.

However, the mistake must also have caused the payment to be made (*Holt v Markham*¹⁴⁴). In this case, at the end of World War One, certain categories of officer were entitled to money, and this officer had been paid under the mistaken belief that he was in the relevant category when he was not. The court held that, whilst there had been a mistake, the payment would have been made anyway. Legally speaking, this transfer was a gift; it was given without care as to whether they were liable to pay, so was perhaps less gracious than a gift intended as such, but it was a gift nonetheless. A sort of reckless gift.

It was eventually seen that ‘supposed liability’ was too narrow a test, and so began a long period of expansion through the courts. Slowly, a number of exceptions to the supposed liability test were established:

- (a) the claimant was under a mistaken belief that he was legally liable to a third party as opposed to the defendant (*RE Jones v Waring & Gillow Ltd*¹⁴⁵);
- (b) the claimant was under the mistaken belief that he was morally liable to the defendant (*Larner v LCC*¹⁴⁶);
- (c) mistake of identity (*Morgan v Ashcroft*¹⁴⁷); or
- (d) the mistake was fundamental (*Norwich Union v Wm H Price Ltd*¹⁴⁸).

In this case, the insurance company paid on the basis that they thought the loss event was an insured event, when it was not. Lord Wright suggested that mistake

¹⁴⁴[1923] 1 KB 504.

¹⁴⁵[1926] AC 670.

¹⁴⁶[1949] 2 KB 683.

¹⁴⁷[1938] 1 KB 49.

¹⁴⁸[1934] AC 455.

has nothing to do with supposed liability, but rather if the mistake was fundamental to the transaction.

It is important to recall that these are exceptions to the supposed liability test; supposed liability was still the main test. Yet, a few years later, everything changed again: in *Barclays Bank Ltd v WJ Simms Ltd*,¹⁴⁹ Goff J considered the test for mistake was a causal one. The starting point was whether the mistake caused the payment, i.e. but for the mistake, you wouldn't have made the payment. As with the other test, though, there were exceptions: (i) where the payer intended that the payee should have the money in all events; (ii) where the payment was for good consideration, and, (iii) as suggested in *Brennan v Bolt Bros*,¹⁵⁰ where the mistake was one of law, it had to be fundamental.

However, the problem with the unjust factors approach is that, despite the fact that each test and every exception thereto concerned vitiated intent, it has not in any sense made intent itself the test. In *Kelly v Solari*,¹⁵¹ Birks' core case in unjust enrichment, Parke B noted '[if money] is paid under the impression of a fact which is untrue, it may, generally speaking, be recovered back[. . .]. In such a case, the receiver was neither entitled to have it, nor intended to have it'.¹⁵² This is a statement which leaves us uncertain as to whether entitlement or intent has primacy. As a result of this confusion, the common law has restricted itself to these unjust factors, and thus failed adequately to identify vitiated intent as the unifying factor which itself made the enrichment unjust.

¹⁴⁹[1980] QB 667, 695.

¹⁵⁰[2005] QB 303. See also *Nurdin & Peacock plc v D B Ramsden & Co Ltd* [1999] 1 WLR 1249.

¹⁵¹(1841) 152 ER 24.

¹⁵²(1841) 152 ER 24, 27.

The civil law approach, favoured by the late Professor Birks, concerns enrichment *sine causa*, or enrichment without basis. Any enrichment, so the argument runs, must have an explanatory basis known to the law, be it discharging a contractual obligation, satisfying a debt, making a gift, etc. The number of explanations known to the law is finite: ‘an enrichment which turns out to have no such explanation is inexplicable and cannot be retained.’¹⁵³ This is a more elegant approach than the common law’s approach, not least because it immediately speaks to the philosophical foundations of the law of unjust enrichment.

The trenchant observer may at this point note that the *sine causa* approach does not actually meet the criticism of the common law approach, i.e. that it failed to unify under the banner of vitiated intent. Prima facie, this is correct: legal explicability would appear to have nothing to say about the value of intent. However, as Birks has rightly argued, the bond with intent is actually far stronger. The underlying assumption ‘is that if the claimant consciously made a transfer he must have intended the enrichment to have one of the finite number of explanatory outcomes. If he intended none of them, he cannot have intended the enrichment.’¹⁵⁴ Similarly, if he did intend the enrichment to have one of the explanatory outcomes, the enrichment was dependent on that basis following, i.e. every transfer is made with qualified intent, ‘conditional on the achievement of one of the explanatory outcomes.’¹⁵⁵ Viewed in this way, we can see more clearly the bond between intention

¹⁵³P Birks, *Unjust Enrichment* (OUP 2003) 89.

¹⁵⁴*ibid* 90.

¹⁵⁵*ibid*.

and basis: if I pay money to you under an obligation, and there is in fact no obligation, then the condition for my intention has failed and your enrichment is thus unjust.

The second criticism may be that advocating the civil law's approach to unjust enrichment does little to help unify our own law. Hopefully it will be seen that this criticism is without basis: the purpose of this section has been to show that they are, in fact, one-in-the-same approach, but the Birksian approach has successfully identified the factor that unifies the many tests in the common law.

Therefore, in both approaches to unjust enrichment, support for the transfer or for its restitution hangs on the very question of intent. This is surely the point: to argue that intent is only relevant when the condition of a transfer fails—but in an otherwise persisting contract is irrelevant—is clearly absurd. Put another way, intention, if it is to have primacy in the law of unjust enrichment, must logically have primacy in the law of contract.

Conclusion

The purpose of this chapter was to explain the remedial relationship, to demonstrate that the remedy finds its justification and its limit in the right that it serves to dignify. This is true both in negligence and in private law more generally. Negligence poses an especial problem in determining the defendant because, unlike the contractual counter-party or the recipient of an unjust gain, the nexus is more diffuse: as has been shown, the defendant must have been not only a cause of the infringement of right, but there must be a further reason why he or she is to be regarded as a *relevant* cause for the purposes of providing a remedy for that infringement. Indeed,

duty cannot only mean the obligation not to infringe the right—it is more than the analytic reflex. The focus of our inquiry also shifted towards waiver of right, i.e. whether the claimant has waived his right with regard to specific action. It is almost true by definition that the claimant would not waive his right with regard to actions that were not reasonable (and therefore not foreseeable). Given the primacy of right, however, we must recognise the agent's own ability to limit their rights. Lastly, we considered the importance of intention and donative intent in private law, the relevance of which will become evident in the next part, for it will form much of our understanding of *Hedley Byrne* liability.

Part 2

Negligent Misstatement

CHAPTER 3

Delineating Negligent Misstatement

ONE OF THE CORE UNDERTAKINGS in negligent misstatement theory—if we suppose that the legal relationship in a claim in negligence constitutes an infringement of a right, on the one part—is to define exactly what rights we are infringing when we make a negligent misstatement. It will be recalled from the previous part that a duty *per se* creates no corresponding right to damages on the part of the claimant, and its breach is not a rights-generating event in remedial terms but instead the reason to regard the defendant as causally relevant in the infringement of the claimant’s right; ‘damage is the gist of negligence[. . .]it can never be enough to show that the defendant has been negligent.’¹ Further, the remedy afforded by an action in private law is, in effect (albeit not strictly a *vindicatio*), the vindication of a right, whereby ‘the remedy is merely the continuation of the right; together they make up a single unbroken juridical sequence.’² Identifying the infringed right is thus vital if the remedy is to have any justification; it is the explanatory force. The wrong, on the other hand, completes the legal nexus between the parties, providing justification for why it is—why it must be—the defendant who is liable to provide the remedy; among the manifold causes of an event, which include the defendant’s act, the wrongness of that act allows us to identify the defendant as being the legal cause. The purpose of this chapter, therefore, is to consider the first limb, viz. the

¹*Gregg v Scott* [2005] 2 AC 176, 231–232(HL) (Baroness Hale).

²E Weinrib, *Corrective Justice* (OUP 2012) 84.

infringement of right. The elements constituting the wrong will be considered in more detail in the next.

This chapter will not consider every right that may possibly be infringed by a misstatement. Though many of these will, of course, be considered through this part, the purpose of this chapter is to consider this question more generally—that is to say, where it is in the taxonomy of private law that negligent misstatement sits, and the questions of liability to which it may be directed. Thus, we are not—for the moment at least—considering the substantive nature of negligent misstatement, beyond considering the way in which a negligent misstatement *may* infringe a right, and whether those rights are unique to negligent misstatement or find their substance elsewhere. In order to do this, it will be necessary to turn our attention to certain questions. The first is to consider whether negligent misstatement actually protects rights unique unto itself—is it, for example, taxonomically akin to defamation (which protects reputation)—and, if not, how then it can be used to vindicate certain rights.

Although the first proposition—that the misstatement *per se* constitutes an infringement of a right, that we are possessed of a right not to be misled, or to make informed choices—may have intuitive appeal, the argument presented in this chapter is that such a proposition has little basis in law. It will consider the putative ‘right’ to be informed in relation to *Chester v Afshar*³ and *ABC v St George’s Healthcare NHS Trust & Ors*,⁴ which will demonstrate the difficulties in assuming that the breach of a notional duty to inform exists in some reflexive relationship with a right to be informed. Having dispatched with the notion that negligent misstatement protects but

³[2004] UKHL 41.

⁴[2017] EWCA Civ 336.

one individuated right, the argument proceeds on the basis that negligent misstatement, as with negligence, must somehow sit apart from the rights it protects, that the misleading nature of the statement only infringes our right indirectly by causing some other harm, that other harm being the manifestation of the infringement. In doing so, we shall consider its relationship with defamation as an exemplar—by reference to *Spring v Guardian Assurance*—and briefly counter the notion that permitting claims for pure economic loss may somehow corrupt a rights-oriented thesis.

1. A right to accurate information?

1.1. *Chester v Afshar*. There can be few fields of endeavour that would seem to lend themselves more to the suggestion that one has a right to accurate information than the field of surgery, not least because of the acute potential for even non-negligently caused harm, and because of the extreme informational imbalance. Thus, if there exists a right to accurate information at all, this is surely where it is to be found. The notion, unfortunately, has some judicial pedigree, and cases normally involve a patient who has not been informed of unavoidable risks attendant to surgery and, concomitantly (so the argument goes), has effectively been deprived of her ‘right’ to choose.

Under the normal analysis, if:

- (a) I fail to warn you of an objectively abstruse, non-trivial risk inherent in surgery;
- (b) you would not have consented to surgery had you been so aware;
- (c) in ignorance of that same risk you choose to undergo the surgery; and

(d) that inherent risk materialises,⁵

then it is fair to conclude that, but-for your failure to warn, I would not have suffered the now extant harm.

This was the case in *Chester v Afshar*.⁶ The defendant, Fari Afshar, was a neurosurgeon to whom the claimant, Carole Chester, had been referred. On the advice of the defendant, the claimant agreed to undergo an operation in order to alleviate her back pain. Even if expertly performed, there was an innate risk (found to be c.1p.c. - 2p.c.) that the operation could effect serious adverse consequences (in this case, *cauda equina* syndrome, leading to paralysis), and that risk materialised. The trial judge found that the defendant had failed to warn Miss Chester of the risk, and that Miss Chester would not have undergone the operation had she been warned of this risk. Both the Court of Appeal and the House of Lords were satisfied (indeed, such didn't seem to be in question) that, by failing to warn the claimant of the risk, Mr Afshar was in breach of his common law duty of care.⁷ The problem was one of causation: Miss Chester could not show that, on the balance of probability, she would not have undergone surgery at a later date (only that, had she been warned, she would have postponed judgement pending further advice). The question before the House was, therefore:

‘whether it was sufficient for Miss Chester to prove that, if properly warned, she would not have consented to the operation which was in fact

⁵It is actually not at all clear that the law ought to require the failure to warn and the injury to be united in the same risk. On the one hand, a patient's claim that they would not have succumbed to injury X had they been warned of risk Y may be defeated on the basis that they nonetheless consented to X, but it is similarly tempting to conclude that their consent to the operation was vitiated by the failure to warn; to what extent is the consent divisible?

⁶[2004] UKHL 41.

⁷See, for example, *Chester* at [48]–[58] (Lord Hope of Craighead). See also *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643; [1985] AC 871.

performed and which resulted in the injury, or whether it was necessary for her to prove also that she would never have had that operation.’⁸

Their Lordships seemed broadly to agree that orthodox principles of causation would require the claimant to show that the wrong had increased the risk of injury—that ‘to expose someone to a risk to which that person is exposed anyhow is not to cause anything’⁹—but the majority considered that the orthodox principles would leave ‘an honest claimant finding herself without a remedy in circumstances where the surgeon had failed his professional duty’¹⁰, and that, therefore, Miss Chester’s ‘right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles.’¹¹

Whether their Lordships were correct in departing from the established principles of causation is, for our purposes at least, inconsequential.¹² The interesting question is whether they needed to debate the issue of causation at all. The analysis was doomed *ab initio* because it was assumed that the locus of liability was to be found in the breach of the duty, a wrong that did not contribute (on normal principles of causation) to the harm suffered. But what if the locus of liability was to be found in breach of right? Here, we return to the question posed at the beginning: is that right a right not to be misled (generally speaking), or a right that is only indirectly infringed by the misstatement?

⁸[2004] UKHL 41 at [40] (Lord Hope of Craighead).

⁹*ibid* [81] (Lord Hope of Craighead).

¹⁰*ibid* [101] (Lord Walker of Gestingthorpe).

¹¹*ibid* [24] (Lord Steyn).

¹²For discussion of the causation issue, see, for example, R Stevens, *Torts and Rights* (OUP 2007), *contra* J Stapleton ‘Occam’s Razor Reveals an Orthodox Basis for *Chester v Afshar*’ (2006) 122 LQR 26.

Their Lordships spoke at some length about the patient's right to be informed; this is why the former analysis seems intuitively appealing. Convention weighed heavy on their thoughts, praxis demanding that such a right be protected through the recognition of a corresponding duty. Without recognising a duty—so the argument goes—there can be no legal recourse. We have already discussed at length why the recognition of the duty is, in a sense, logically subsequent to the recognition of a right; an unwaived right can be infringed in a practical sense, and this generates a legal wrong where there was a corresponding breach of duty that caused the infringement. But the influence of duty-based thought had an impact beyond the recognition of a duty to protect the right to be informed: the right to be informed is itself the manifestation of a duty, for such a right is, in effect, affirming no more than my ability to determine for myself the extent to which I shall waive my rights (the 'right' to self-determination). Consider this:

- (a) I have various rights, and various types of rights (a proprietary right being different from, say, the right to bodily integrity);
- (b) I am able to waive these rights or limit these rights or, in certain cases, dispose of these rights by various legally-recognised means;¹³
- (c) I am possessed of the right to bodily integrity;
- (d) therefore I am entitled to waive my rights to bodily integrity through legally-recognised means.

The analysis is coarsely simplistic, perhaps, though at fundament it is nonetheless true. Now, if I am entitled to waive or uphold my right to bodily integrity—either my body is inviolable or I am to define in what manner it is violable—then the law

¹³I am going to avoid discussion of the right to life for these purposes, though that is the only exception.

must recognise the autonomy of the self in determining the extent of the waiver. There could be no sense in which it were *my* right if it were to be waived at the whim of another. Put at its most basic, I have to be regarded as having waived the right myself (even if this is a mixed subjective-objective test), and I cannot be seen to have waived a right in respect of risks of which I was reasonably and entirely unaware.

It does not logically follow, however, that I must have a right to be made aware of those risks. One needn't deny that such a right *could* exist, were the state to wish it, but the effect of such a right would be markedly different from the law that currently exists. What we are saying, then, is that the burden of notice falls on doctors to inform us of risks in surgery (or on councils to warn us of high-voltage substations, or on building contractors to warn us of building works, *etc*), because, if they don't, and those risks were not otherwise reasonably ascertainable, then we cannot be said to have waived our rights with respect to infringement contingent on those risks.

This conclusion—that the law does not protect some broad right to information (and, by extension, a general right not to be misled)—means that *Chester* was correctly decided, but for the wrong reasons. So long as the risk (i) was not reasonably foreseeable to Miss Chester; (ii) was one of which the doctor was under a duty to warn Miss Chester;¹⁴ and (iii) did in fact materialise; then Miss Chester could not be seen to have waived her right to injuries contingent on the development of that risk and the doctor would be liable to compensate for that violation.

¹⁴There may conceivably be instances where the doctor was not under a duty to warn of specific risks, on the basis of the patient's best interests—the therapeutic privilege defence, most recently contemplated in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11—but this is the defendant-focussed notion of duty, as against the claimant-focussed question of right.

The interesting converse of this conclusion, however, is that the development of an altogether unrelated risk would render the claim void. It would not be enough for Miss Chester to argue that a risk materialised *of which she had been warned*, but that she would not have had the operation at all had she been warned of a different risk that did not, in fact, materialise. The reason for this is that she had waived her rights with respect to the risk that caused her loss, and, although she had not waived her right with respect to the unknown risk, that unknown risk did not manifest itself as an infringement of her right. We saw similar reasoning in the recent Australian case of *Wallace v Kam*.¹⁵ The question before the court was: if a doctor fails to inform a patient about two material risks inherent in an operation, is the patient entitled to compensation if harmed by the materialisation of the risk to which she would have consented, on the basis that she wouldn't have consented to the operation at all had she been informed of the other risk? The High Court of Australia divided the omissions into two negligent acts, thus concluding that causation could not be established (because, on the one hand, the patient would have consented to harm, and on the other, because the risk didn't materialise).

It is tempting, on the face of it, to frame this alternatively as a more general vitiating of consent to the operation: the decision to waive her rights with respect to risk A was vitiated on the basis of insufficient information regarding risk B (i.e. consent is general rather than divisible). However, this reasoning becomes problematic. There are many factors that may influence our decision-making process, and we may be unaware of many factors that may render our consent defective in a theoretical sense, but that should not mean that our consent is vitiated in a legal sense. If I buy

¹⁵[2013] HCA 19.

a bunch of bananas unaware that there is a very real risk that they might contain a nest of Brazilian wandering spiders—albeit that, in fact, they do not—then it is of no benefit to any attempts to return the bananas to argue (genuinely) that I would never have bought them had I been so aware. I can't return a perfectly acceptable bunch of bananas that conform entirely with what I had wanted simply because, at the time that I bought them, I was unaware of the risk that they might not. To put it another way, I didn't wish to assume the risk of death, I didn't knowingly assume the risk of death, and I am not now in actuality at risk of death.

Even if the shop assistant knew of the risk and negligently failed to warn me, it is still not clear exactly what right has been infringed given that I have the very thing I wanted. The case of *Bacciottini & Anor v Gotelee & Goldsmith (a firm)*¹⁶ is illustrative in this respect. The appellants sought to buy a house and so engaged the services of the respondent firm of solicitors. The solicitors negligently failed to advise Mr Bacciottini of a planning restriction over the property. Unaware of the restriction, the appellants purchased the property for £600,000. The following year, the planning restriction was discovered, and the appellants thus applied to lift the restriction. The application was granted. The appellants claimed £100,000 to reflect the diminution value (the value paid less the price they would have paid for the property had they known of the restriction). The argument was that, the application to lift the planning restriction having been granted, the appellants failed to realise a capital gain that would otherwise have been made.

In his judgment on the case, Davis LJ cited¹⁷ with approval the principle established in *British Westinghouse Electric & Manufacturing Co Ltd v Underground*

¹⁶[2016] EWCA Civ 170.

¹⁷*ibid* [60].

*Electric Railways Co of London Ltd*¹⁸ that, where loss was in fact avoided or mitigated, a plaintiff cannot recover for the loss thereby avoided or mitigated. Of course, such a position sits neatly with our discussion above: it is perhaps easy to argue that, in hindsight, the consent was vitiated in the sense that it was predicated on a false statement, but it doesn't alter the fact that there was no loss in actuality. They wanted a house absent the relevant planning restriction and that is exactly what they have. The putative loss, being entirely counterfactual, cannot be regarded as something over which they had any right.

Importantly, what we have seen is that there is no claim simply on the basis of misleading or missing information; harm to a specific right is required.

1.2. *ABC v St George's Healthcare NHS Trust & Ors.* The general submission that there is no right to information appeared to receive something of a body-blow in May 2017 in *ABC v St George's Healthcare NHS Trust & Ors.*¹⁹ Irwin LJ allowed an appeal by the appellant that, despite not being in the care of the respondent NHS Trusts, she was entitled to be informed of the risk that she had inherited Huntington's Disease.

The facts, in brief, are these.²⁰ In 2007, the appellant's father had shot and killed his wife—the appellant's mother—and was convicted of manslaughter on the grounds of diminished responsibility. He was sentenced to a hospital order and a restriction order under ss37 and 41 of the Mental Health Act 1983 and was, at various times and for various reasons, under the care of the respondent Trusts.

¹⁸[1912] AC 673.

¹⁹[2017] EWCA Civ 336.

²⁰*ibid* [4]–[14] (Irwin LJ).

By early 2009, the respondents suspected that the father was suffering from Huntington's Disease—an incurable, progressive, and fatal disease. This was confirmed in mid-2009. The chance of inheriting the disease is 50 per cent, thus there was a risk that the appellant had inherited the disease. The father refused to consent to the information of his condition being passed to appellant.

The appellant became pregnant and, in 2010, gave birth to a daughter. Later that year, despite the father's refusal of consent, the appellant was accidentally informed of her father's condition. She underwent testing, and was later confirmed to be suffering from Huntington's Disease.

Of course, the appellant had already inherited Huntington's Disease, and this situation would not have been altered by the provision of information. Her contention, however, is that she would not have chosen to have a child had she been aware: she was a single parent, and would not have wanted to raise a child as a terminally ill single parent, nor risk passing on a fatal disease to a child. It was accepted that she would have terminated the pregnancy had her diagnosis been *confirmed*.²¹ The question before the court was therefore whether the appellant had a right to be informed and, apparently synonymously, whether the respondents had breached their duty of care to the appellant. The question over the existence of the right was conflated with the question of the existence of a duty of care.

²¹ibid [15] (Irwin LJ). There did not seem to be a question as to whether this works as a matter of causation: assuming the appellant gave birth at full term, the time limit for termination would have been c.Dec 2009; the earliest she could have been told of the risk would have been when her father was told of the risk, being 'early' 2009, so less than one year. In the event, it was nearly two and a half years in between the appellant being informed of the risk (now higher, because her father's diagnosis had now been confirmed) and her diagnosis being confirmed. Question, then, whether the birth would have occurred anyway despite timely information of risk. Regardless, this is of lesser relevance for our purposes.

It is perhaps not difficult to see how the court conflated the concepts: if one recognises a positive duty or obligation to inform, then this creates a reflexive right. The same is true of the alternative formulation: if you can demonstrate a right to be informed, then it is no great leap of logic to expect positive performance from those with the information. The problem with this reasoning is that, absent the birth, there would have been no harm and thus no claim; had the appellant simply been unaware of her disease—even if the doctors had been aware that there was a chance she had inherited the disease—she would not have been able to identify harm flowing from an infringed right. The infringed right inherent in the wrongful birth claim is not simply that the parent was denied the opportunity to make an informed choice about whether to conceive, but, further, that there was actually a birth. This is essentially birth predicated on vitiated consent, and thus the birth is wrongful; vitiated consent simpliciter is not a stand-alone claim.

It is equally problematic to cast the right as a reflex of some duty to inform: the obligation of the respondents to patient confidentiality has to be balanced against any putative obligation to inform, and thus it would be a strange right indeed that existed only when circumstances were such as to allow a more general obligation to confidentiality to be rebutted.

Nonetheless, given that there was a birth—and thus we accept the harm element—the doctors would have been under no general duty to assist. It is important to recall that they were not the appellant's doctors, and thus this would appear to be an omission or failure to rescue. Whilst we may have some moral qualms about the omission (though, given their positive duty of confidentiality, this is hardly black-and-white), UK law has made clear that there is no positive duty to rescue 'simply because one

party is a doctor and the other has a medical problem which may be of interest to both.²² It is necessary that the defendant's positive actions in such cases have some negative impact on the claimant, such as causing the claimant to apprehend that help would be forthcoming such that the claimant ceases to take mitigating action,²³ or where 'the defendant's conduct had excluded others from having the opportunity to assist the plaintiff.'²⁴ Under normal common law principles, then, it is not clear that the doctor comes under a duty to inform *even absent* a prior duty of confidentiality.

This must cause us to question why the parties in *ABC v St George's* accepted that proximity under the *Caparo v Dickman*²⁵ tripartite test would be made out. The law, in the UK at least, has hitherto been at pains to note that proximity is *not* made out.²⁶ Although *White v Jones*²⁷ was not considered by the Court of Appeal in this case, it is tempting to conclude that the proximity concession was, in part, a product of *White v Jones* reasoning rather than rescuer reasoning.

In *White v Jones*, it was held that a solicitor owed a duty of care to the intended beneficiaries of a will in respect of economic loss they suffered as a result of the solicitor's failure to carry out the testator's instructions. Normally, the solicitor would not have owed such duties to third parties, but the majority held that the assumption of responsibility principle in *Hedley Byrne*²⁸ could be extended to those

²²*Capital & Counties plc v Hampshire County Council* [1997] EWCA Civ 3091 [50], [1997] QB 1004, 1035 (Stuart-Smith LJ).

²³*Kent v Griffiths* [2001] 1 QB 36; *Densmore v City of Whitehorse* (Supreme Court of the Yukon Territory, 10 July 1986).

²⁴A Robertson and J Wang, 'The Assumption of Responsibility' in K Barker, R Grantham and W Swain (eds) *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford, Hart Publishing 2015) 70.

²⁵[1992] AC 605 (HL).

²⁶Robertson and Wang (n 24) 71.

²⁷[1995] UKHL 5, [1995] 2 AC 207.

²⁸*Hedley Byrne & Co v Heller & Partners* [1964] AC 465 (HL). Not that this author accepts such a principle is to be found in *Hedley Byrne*.

beneficiaries whom the solicitor may reasonably foresee would be affected by his negligence.²⁹ The problem with such reasoning, as noted in earlier chapters, is that it makes entirely possible the decision in *Dean v Allin & Watts*,³⁰ which extended the duty of care of a firm of solicitors to cover the economic losses of the opposing party of their client ‘in what ostensibly was an arm’s length business transaction.’³¹ The solicitor thus owed a duty not only to his client, but also to a party whose interests were, as Christian Witting notes, ‘irreconcilably in conflict.’³²

If the court had wished, as it claimed, ‘to do practical justice’,³³ then the more elegant solution would almost certainly have been to do *practical* justice rather than significantly to expand tortious liability. The problem with the reasoning is that the facts which the House of Lords assumed made *White* unique—the fact that the rights-holder had suffered no loss whereas the losing party had no rights—are nothing of the sort. We see this problem regularly. As Robert Stevens argues, *Caparo v Dickman*³⁴ is just such a case:

[...]the parties who will suffer loss as a result of a carelessly prepared auditors’ report prepared on behalf of a company will generally be third party investors who rely upon it as accurate. The company itself will usually suffer no loss at all, as it will not invest in itself on the basis of the report.³⁵

And this is the crucial point:

²⁹*White v Jones* (n 27) 268 (Lord Goff of Chieveley).

³⁰[2001] 2 Lloyd’s Rep 249 (CA).

³¹C Witting, *Liability for Negligent Misstatements* (OUP 2004) 11.18.

³²*ibid.*

³³*White v Jones* (n 27) 259.

³⁴*ibid* (n 25).

³⁵R Stevens, *Torts and Rights* (OUP 2007) 179.

That the rights-holder suffers no loss whilst a third party does is not a sufficient reason for giving a third party a claim.³⁶

Stevens thus argues that, rather than employing over-reaching theory, it would have been better to recognise simply that this was the only remaining vindication of the testator's contractual right that would achieve the 'next-best position to the wrong not having been committed in the first place.'³⁷ The peculiarity of *White* was thus not the disunion of right and loss: it was of pivotal relevance that the testator had died.

That the right flows from contract and not from extension of tortious liability is evident when we consider the effect of disclaimer. Let us assume that, in the contract, the solicitor had somehow disclaimed all liability and that the clause was effective: the testator would have no claim. It is bizarre to entertain the notion that the death of the testator could give rise to a third party claim in tort that would have been unavailable to the testator in life. The existence or otherwise of the third parties' claim is predicated on and limited by the original contract. Stevens makes a similar argument in respect of *Cancer Research Campaign v Ernest Brown*.³⁸ The claimants (legatee charities) alleged that the defendant firm of solicitors had negligently failed to advise the testator with respect to the mitigation of inheritance tax liabilities. The claim failed because the defendant solicitors were not engaged to advise on IHT; they were simply retained to ensure the bequest. Thus it is evident, Stevens notes, that 'the solicitor's liability to the beneficiary goes no further than the right the testator has against him.'³⁹

³⁶ibid.

³⁷ibid 180.

³⁸[1998] PNLR 592.

³⁹*Stevens* (n 35) 180.

It is thus very difficult to regard *ABC v St George's* as anything other than a significant expansion of liability in the realm of statements, further entrenching the very problematic rendering of *White v Jones* as a case generating liability for foreseeable harm. However, because the issue of proximity was not even considered judicially, it is questionable how persuasive this decision will be in anything but similar-fact cases.

What this section has demonstrated is the conceptual problems with basing liability for misstatements on some right to be informed. Rather, misstatement liability reflects the general negligence liability described in the first part: the recognition of rights and the duty to inform are two discrete questions, and not reflexive. This is an important taxonomic point, one that begins to make clear the role of negligent misstatement. One must bear it in mind, because later discussion on matters such as advice from third parties may tempt the unwary into thinking that negligent misstatement exists purely to preserve a 'right' to accurate information; this is not the case.

2. Different taxonomic plains: negligent infringement of a right

What we are beginning to see, then, is that specific protected rights and negligent misstatement are perhaps not taxonomic bedfellows (to reiterate the point that is being developed throughout this chapter: negligent misstatement does not *ipso facto* concern itself with the infringement of any particular right, whereas defamation, say, arguably does). The relationship between negligent misstatement and a specific right was discussed at length by the House of Lords in *Spring v Guardian Assurance plc*.⁴⁰ The main issue in the appeal concerned the relationship between negligent

⁴⁰[1995] 2 AC 296 (HL).

misstatement and defamation: the claimant was unable to claim in defamation owing to a defence of qualified privilege, so the matter in appeal was whether the claim could be brought under the rules pertaining to negligent misstatement (thus avoiding the qualified privilege obstacle), a claim that can be founded on similar means to defamation (an untruth that causes ‘loss’, in the broadest sense). This case, and its specific concern with defamation rather than other instances of protected right, is particularly useful for our purposes, because it is important therefore to ask: if it smells like negligent misstatement and tastes like negligent misstatement, on what basis could it be viewed as being different? Some may disagree that defamation is assimilable to a particular right but, regardless, it should at least be evident that defamation is doing something different—taxonomically speaking—from negligent misstatement. The juxtaposition in the following subsections will make clearer the role of negligent misstatement.

2.1. Defamation as a creature of right. Before analysing the case in detail, it is worth considering the taxonomic nature of defamation. The wary may, at this point, note that defamation is not an instance of a ‘right’ as such, and superficially they would be correct. However, and even despite the recent change in the law,⁴¹ the legal nexus between claimant and defendant is relatively clear from the name itself (which cannot be said for all tortious claims). From the Latin verb *diffamare*—‘to spread evil report’—defamation is clearly a defendant-centric noun, though crucially it is one that makes manifest the right that is being infringed: that is to say, the ‘evil report’ implies a subject, for one cannot spread evil report about a nothing. The report must have subject matter if it is to have meaning. That the right is

⁴¹Defamation Act 2013.

made manifest is not a universal feature of torts, and is the author of their downfall. Defamation, however, is a description that clearly links the doer and the sufferer of harm. Just to make the point clear, were it not already, ‘negligence’, by comparison, does not, in and of itself, make this link clear. All negligence suggests—even under accepted law—is that the relevant party has fallen below a standard of care.

The view that defamation is an instance of right has rather more to recommend it than mere linguistic accuracy: under the old common law, it was defined as ‘the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society[. ..]’;⁴² the law itself therefore makes general reference to a right infringed (their reputation) and to the act infringing the right (the imputation), and thus mirrors the Weinribian view that the claimant and defendant are united as doer and sufferer of the same harm.

But what, in actuality, is that right? Is it as simple as a right to reputation? Professor Stevens argues that it is, and that your right to your reputation is ‘good against the rest of the world and is also [as with bodily safety] acquired at birth.’⁴³ What Stevens presents is a conception of the right to reputation that is somehow discrete from the subject matter of that reputation (that is to say, we all have different reputations, and those reputations ‘can be acquired, and lost, throughout our lives’,⁴⁴ but that difference does not suggest our rights themselves differ). This conception does beg a fundamental question, however: if our reputation can be good or bad, acquired and lost, then in what sense can our right to it be infringed? The only possible answer, if the subject matter of the reputation is not in issue, would be

⁴²W V H Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) 570.

⁴³R Stevens, *Torts and Rights* (OUP 2007) 8.

⁴⁴*ibid.*

that you could try to deprive me of my right to have any reputation at all (just as my bodily privacy is either infringed or it is not), but it is very hard to see how this could manifest itself in reality (or in what sense it has any bearing on defamation). Even Stevens concedes that ‘it is probably impossible to have no reputation at all.’⁴⁵ The subject matter, then, rather than being separate from the right, must lie at the heart of it; reputation is not as tangible as, say, bodily integrity, because it only exists in the context of a society, and is not attendant to an individual’s mere existence. Put another way, we cannot own a specific reputation that is somehow distinct from one as perceived by another. Therefore, to say that we have a right to a particular reputation, as if that reputation were our property to choose, alter, or dispose of as we saw fit, would appear to be invoking a fiction (though, of course, in keeping with the waiver thesis, one would obviously be at liberty to alter their *right* as they see fit). As Allan Beever notes, ‘[t]he wrong A does to B is not changing C’s opinion of B *simpliciter*. B has no right to that whatsoever.’⁴⁶ This may seem odd, as the reputation is undoubtedly ‘ours’ in the loose sense, but this is what we must conclude. Indeed, when one considers the societal function of reputations, this conclusion is actually obvious: a corrupt politician is no more able to exercise complete control over their negative reputation—no matter how much they may want to—than a good samaritan is able humbly to negate their good reputation.

Thus, we are presented with what appears to be a dilemma: it makes no sense to conceive of the right to reputation devoid of subject matter, but we also cannot say that we have a right to a reputation of particular subject matter. Is the subject matter then arbitrary? Clearly not, for defamation would make no sense, and the

⁴⁵ *ibid.*

⁴⁶ A Beever, ‘What Does Tort Law Protect?’ (2015) 27 SAclJ 626 [10].

right would be pointless, if all the right entailed was the right to a reputation, the subject matter of which was entirely random. So then, what we want to say is that we have a right to a reputation that is at least *accurate* or at least within our control. Our control of our reputations is limited to what we do in fact, such that the corrupt politician can avoid a negative reputation by avoiding the negative act. My right is therefore infringed when these actions⁴⁷ are misrepresented.

Perhaps, then, as Allan Beever submits, the right lies not in the reputation itself but in the ‘control’ of that reputation.

[. . .]the wrong involved in defamation is not damaging reputation *per se*, but gaining a kind of control over an important area of the plaintiff’s life (or causing the plaintiff to lose control over that area of her life) by getting third parties to think ill of that person.[. . .]it is natural to think of my statement as coercive. The point is not that my statement will cause loss to you, though it may well do so. The point is rather that in making the statement I exercise control over you through others.⁴⁸

A similar line of reasoning, that places the right within notions of control rather than within a right of specific content, has actually been advanced within the literature on rape. There are obvious differences, of course, and the author is not suggesting that defamation is always comparable to rape in terms of harm. Nonetheless, rape law’s refusal to punish sex-by-deception causes us to question the traditional consensus that the wrong lies in acting contrary to the consent of the victim: if consent were the lodestone of rape, then sex-by-deception must be rape, which it isn’t (and nor ought it to be). Jed Rubenfeld argues that the wrongness of rape does not lie in

⁴⁷Or beliefs, or intentions, *etc.*

⁴⁸A Beever, ‘What Does Tort Law Protect?’ (2015) 27 *Singapore Academy of Law Journal* 626, 631 [17].

some right to *sexual* autonomy *per se*, but rather in the control or possession taken over the victim's body.⁴⁹ We don't have to recognise a specific right to 'smoking autonomy' in order to recognise that forcing someone to smoke a cigarette against their will is wrong.⁵⁰ The act of control or possession is sufficient. Of course, the nature of the control is different in defamation: it is not control or possession of the body but of reputation. The interesting similarity, however, lies in the notion of the wrongness of the defendant's act of taking control or appropriation of something over which we lack perfect control in the first place.

This fits well with our understanding of defamation. Unfortunately it doesn't fit nearly so well with the law, either past or current, though brief analysis of each will reveal the problems to be trivial. There are three points that should be addressed. The first problem relates to the threshold in law: under s1(1) Defamation Act 2013, a statement must have 'caused or be likely to cause *serious* harm to the reputation of the claimant'.⁵¹ This is in addition to the common law *Jameel* principle that required the tort to have been real and substantial.⁵² The statute appears to have raised the bar somewhat, though it is not immediately clear what difference this will have in practice. Despite the requirement of 'serious harm' appearing to abolish a conclusive presumption of loss, it is submitted that it would be enough for this requirement to establish that the damage to reputation alone (that is, without tangible loss) would suffice. Under the old slander laws, the damage to reputation needed to have caused harm to some other interest, such as an economic interest. As Dr

⁴⁹J Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 YLJ 1372.

⁵⁰*ibid* 1425.

⁵¹Emphasis added.

⁵²*Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75.

Descheemaeker noted about such instances, reputation is not compensated, but only those secondary injuries that ‘flow from an injury to reputation[. . .]The interest in reputation still stands in the foreground, but it is transparent.’⁵³ Peter Cane argues similarly: defamation compensates for the creation of a risk of harm, and is not compensated directly, *per se*.⁵⁴ It cannot be the case that the requirement of serious harm requires, in all instances of defamation, some secondary harm flowing from the reputational damage; such would be far too restrictive, and wouldn’t reflect that reality that private individuals can be seriously defamed without any tangible further loss.⁵⁵ The right to an accurate reputation must then be qualified, such that it is a right at least to a minimally accurate reputation over which we ought to be able to exercise some control. It is not a balloon that is popped at the first pin-prick, but rather a jelly that can absorb certain pressure before collapsing (or, casting wantonly around for another analogy, two countries separated by a demilitarised zone). The boundary is—unfortunately, it is submitted—blurred, but the rights-oriented thesis can survive so long as there is *a* boundary.

The second issue relates to s1(2), which claims that, for the purposes of for-profit organisations, harm to reputation can only amount to ‘serious harm’ if it has caused or is likely to cause serious financial loss. This is interesting. At first it is tempting to observe that, if the reputation can only really be quantified in financial terms, then to argue that compensation is somehow based on an infringed right to reputation is tenuous; the right is ultimately based in the financial, not reputation interest, and thus defamation starts to look more like a wrong act (like breach of duty) that may

⁵³E Descheemaeker, ‘Protecting Reputation: Defamation and Negligence’ (2009) 29 (4) OJLS 603, 617.

⁵⁴P Cane, *Responsibility in Law and Morality* (Oxford, Hart Publishing 2002) 203.

⁵⁵See *Lachaux v Independent Print Ltd and another* [2017] EWCA Civ 1334.

have many possible outcomes, rather than one protected right. Our first instincts would be wrong. It would be a mistake to assume that rights apply equally across all legal persons, be they human or otherwise. For example, the right to bodily integrity cannot apply—either equally or at all—to companies. Why then would we expect the right to reputation to apply equally? There may be many reasons that we recognise the right in humans, including, perhaps, the importance for mental wellbeing of self-esteem; these concerns do not apply to companies. Further, the reputation of the company is not automatically transferred to the reputation of its members (and, where the defamation of the company is transferred to the members, there is nothing to say that the members or officers would not have a claim as individuals, based on damage to their own reputation). So all the statute is doing here is making the point that the only manner in which reputational harm could *ever* manifest itself in companies *is through financial loss*. Any other aspect of harm to reputation would be a response of humans to that harm, not a response of the company. In this sense, the statute does nothing new.

The final issue relates to both the old and new laws. In either instance, ‘it is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true’.⁵⁶ Familiarity obscures the oddity: truth, here, is acting as a *defence*, just as *ex turpi causa* is a defence to an otherwise sound negligence claim. Theoretically, then, there is a legally sound, good claim in defamation regardless of whether or not the imputation was even false. However, the corrupting influence of this, too, can be overstated. Certainly a claimant does not have to prove falsehood, and, in the absence of any

⁵⁶s2(1) Defamation Act 2013.

proof as to its verity, he or she has a good claim. What this is not, however, is an admission by Parliament that any statement that affects our reputation is tantamount to defamation. Rather, it is a policy decision not to deny claims to those who are not able to prove the falsehood of an imputation (and, of course, there is a broader epistemic point that it is often not possible to prove a negative).

2.2. *Spring v Guardian Assurance plc.* We turn now to *Spring*, where the relationship between negligence and defamation was considered directly. The defendant companies, of whom Graham Spring had been a representative, provided references concerning Mr Spring to his potential employers, which included an allegation that he had been dishonest. These allegations, though not found to be malicious, had been made without a comprehensive investigation into their truth, and thus—so found the trial judge—they had failed to exercise reasonable care in this respect. As Lord Keith of Kinkel noted (albeit in an ultimately dissenting judgment), ‘there might be much to be said for the view that Mr Spring is entitled to succeed in his claim based on negligence, on the basis that it was reasonably foreseeable that damage to him would result if the reference were prepared without reasonable care and it thus incorrectly disparaged him[. . .]’⁵⁷

Were this a simple case of negligence, then no doubt Lord Keith would have been correct. However, the complication was that this clearly concerned damage to reputation, and so fell within the ambit of defamation; that being the case, it was therefore subject to a defence of qualified privilege. The main question was therefore whether a claim for damage to reputation could be sustained by a form of action other than defamation (viz. negligence), and, if so, whether the law of negligent

⁵⁷*Spring v Guardian Assurance Plc* [1995] 2 AC 296, 307H (Lord Keith of Kinkel).

misstatement could be used to negative the defence of qualified privilege that would otherwise apply to the action for defamation.⁵⁸

Lord Keith's dissenting judgment was that the two areas of law could not be merged. He cited with approval⁵⁹ a series of cases from the New Zealand Court of Appeal, including *Balfour v Attorney-General*⁶⁰—in which Hardie Boys J stated that the 'inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame'⁶¹—and *Mortensen v Laign*⁶² in which Sir Robin Cooke P said that

Qualified privilege can be defeated by proof of malice, but not by mere negligence. The suggested cause of action in negligence would therefore impose a greater restriction on freedom of speech than exists under the law worked out over many years to cover freedom of speech and its limitations. By a side-wind the law of defamation would be overthrown.⁶³

Lord Keith's conclusion, then, was not that the reference wasn't negligent *per se*, but that recognising a claim in negligence would necessarily negative the defence of qualified privilege (or the traditional limits thereon), and thus it could not be fair, just, or reasonable to recognise a duty of care in respect of the negligence claim.

With the greatest respect to his Lordship, and though one would stop short of suggesting that his fears were misplaced, the threat to the law of defamation (as

⁵⁸I should perhaps note at this point that these questions were not posed explicitly in this order, but this is fundamentally what the appeal amounted to.

⁵⁹'The process of reasoning which [these cases] contain is in my opinion entirely sound and apt to be followed and applied in the present case.' *Spring v Guardian Assurance Plc* [1995] 2 AC 296, 313G (Lord Keith of Kinkel).

⁶⁰[1991] 1 NZLR 519

⁶¹[1991] 1 NZLR 519, 529.

⁶²[1992] 2 NZLR 282.

⁶³*ibid* 302.

articulated by Sir Robin) was, perhaps, exaggerated. Firstly, *Spring* hardly counted as a side-wind: it was a House of Lords case that addressed the issue of negligence and qualified privilege head-on. That it wasn't a pure defamation case could not be a reason to ignore defamation issues (because, of course, the reason it wasn't a defamation case went to the heart of the problem). How else would the ambit of qualified privilege have been addressed? Certainly not in a case that obviously fell within it.

Secondly, one struggles wholly to sympathise with Lord Keith's concerns regarding the continued relevance of qualified privilege were the court to permit a claim in negligence. Citing Lord Templeman's speech in *Downsview Nominees Ltd v First City Corporation Ltd*,⁶⁴ Lord Keith concluded that the fear of a claim in negligence would prevent referees from voicing their suspicions about the subjects of those references, a position that clearly ran counter to the public interest. Now, clearly one requires a certain frankness from referees, and such is certainly in the public interest. It is not, however, at all clear why the requirement that such suspicions be reasonable—whether or not they are accurate—would so inhibit frank references, save for where those frank views were not reasonably held, in which case it is hard to see why it would be in the public interest for them to be expressed.⁶⁵ There is no claim in negligence merely because beliefs—otherwise reasonably held—turn out to be incorrect (as noted by Lord Lowry, reasonable care is not tantamount to a guarantee⁶⁶). Qualified privilege would thus still apply to prevent claims in defamation

⁶⁴[1993] AC 295, 316.

⁶⁵Indeed, one can go further, as Lord Woolf did in *Spring* (at 351H), and argue that it is in the public interest that expressed views are reasonably held.

⁶⁶[1995] 2 AC 296, 327C.

following the expression of reasonably held—but incorrect—views. For policy to negative an otherwise sound claim in negligence, there would have to be demonstrable and tangible harm to the public interest, and it is far from obvious that such harm would result from the requirement that referees act reasonably.

It is worth noting at this point that Lord Woolf dismissed the qualified privilege problem on an entirely different basis, (albeit that I do not subscribe to his analysis either): this being a negligence case, it did not concern the same type of damage as defamation, and thus one can't transfer a defence from defamation into negligence.⁶⁷ Specifically, at page 351A, he noted that a claim in negligence 'will be primarily interested in and largely limited to [the subject's] economic loss.' I confess that I fail to see why this must be the case. Admittedly, an action for defamation has never required a negligent act, because (as noted above) a statement is either defamatory in that it harms someone's reputation or it is not, so negligence, to that end, is irrelevant. Similarly, there has never been an action in negligence for harm to reputation, because you would simply bring an action in defamation. But it is not clear that such is *theoretically* impossible (for one can negligently harm a whole host of other rights), and arguably *Spring* provides the example where, actually, negligence does have a role to play in an action for 'mere' reputational damage.

Lord Woolf's further claim that the case was primarily one of economic loss and not reputational damage would seem to be invoking a fiction, at least as a means of trying to separate the torts. Certainly the claimant was deprived of the chance to secure employment, and thus out of context this appears to be pure economic loss, but it was contingent on reputational damage, and it would be drastically to limit

⁶⁷[1995] 2 AC 296, 351A–B.

the role of defamation to argue that damages could only ever compensate for the damage to reputation (whatever that even means in the isolated sense), rather than for contingent damage to, say, career.⁶⁸

Lords Woolf, Lowry, Slynn, and Goff ultimately based their decision in this matter on the fact that negligence and defamation are *different torts*.⁶⁹ There is a sense in which this is true, but it is not the sense in which their Lordships intended. The reality is that defamation and negligence do not exist like colliding continental plates, where occasionally one is subducted by the other. Rather, they exist at different levels on the taxonomic plain. Lord Woolf skirted this conclusion when he stated that ‘there is a fundamental difference between the torts. An action for defamation is founded upon the inaccurate terms of the reference itself. An action for negligence is based on the lack of care of the author of the reference.’⁷⁰ This is almost true, in that defamation concerns itself with a specific right whereas negligence concerns the extent to which two parties may be identified as doer and sufferer of a harm, but—as I have noted at some length previously—there is no action for mere lack of care; the lack of care must have infringed a right. Similarly, as noted in this chapter at 2.1 above, there is no action for a statement that is merely inaccurate. Defamation provided the meat of the claim—it identified the right infringed—whereas negligence established that Mr Spring had not waived his right in respect of the defamation, on the basis that the expression of the inaccurate views was unreasonable, and could

⁶⁸See, for example, *Cleese v Associated Newspapers* [2004] EMLR 3. Lawrence McNamara goes even further than this and argues that the value of reputation lies solely in the commercial and social opportunities it affords, rather than in any inherent value; L McNamara, *Reputation and Defamation* (OUP 2007) 41.

⁶⁹[1995] 2 AC 296, 324E (Lord Goff of Chieveley), 325F (Lord Lowry), 334E, G–H (Lord Slynn of Hadley), 347A, 351A (Lord Woolf).

⁷⁰[1995] 2 AC 296, 347A.

foreseeably have caused *him* loss. Thus, to regard this as a claim in negligence *rather than* a claim in defamation is taxonomically unsound. Any claim in negligence requires careful consideration of the right in question (or, in less accurate but more traditional terms, the ‘loss’ in question). Christian Witting was astute to note this point in *Liability for Negligent Misstatements*, which, aside from containing careful consideration of the constituent elements of the duty of care question, is organised by loss. The interaction between the right infringed and negligence is therefore not to be swept aside by claiming that they are ‘different torts’, but is of paramount importance in ascribing any meaning to negligence.

Although this chapter concerns the taxonomy of rights in negligent misstatement, *Spring* is also interesting to note in respect of duty, because the judgments (especially Lord Goff’s, which advocates explicitly in favour of the assumption of responsibility test⁷¹) raise important questions as to the interaction of the *Caparo* three-stage test and the ‘assumption of responsibility’ test from *Hedley Byrne v Heller*.⁷² It is also worth saying at this stage that these questions of duty are not to be ignored merely because this thesis is directed at the rights-based conception of negligence; not only does duty inform causation, but also many of the questions that concern duty of care will have bearing when considering whether and to what extent a claimant had waived their rights. However, this discussion is to be had in later chapters. For now, it suffices to note that the majority were probably right in *Spring*, but for the wrong reasons. Consistent taxonomy demands that we regard defamation and negligence as being different questions, but ones that necessarily—at times—inform the other.

⁷¹[1995] 2 AC 296, 316E.

⁷²[1964] AC 465 (HL).

3. Purely economic losses

In a chapter on rights, it would be remiss indeed to proceed without consideration of purely economic losses. Indeed, it is necessary to address this area in relation to our taxonomy argument, which has thus far proceeded on the basis of infringed rights, and specifically those which we are astute to recognise as legally defensible rights (such as, for example, defamation, or bodily integrity). One of the most important impacts of negligent misstatement theory is that it has permitted certain claims where otherwise the common law would have refused, such as where inadequately performed services (absent contract) have caused economic loss. The question that needs to be addressed, therefore, is whether this corrupts the thesis.

3.1. Dismissing the relevance of the floodgates argument. It is at first necessary to dismiss one of the more commonly-cited reasons for the refusal to permit claims for pure economic loss, which is what has become known as the *floodgates* argument: to wit, dismissing an otherwise sound claim because, were it to be permitted, the number of equivalent claims would be unmanageable in quantity, or the value of the claims excessively burdensome. In this form, we can see that it would challenge the rights thesis, because recognition of the right would depend *ab initio* on the consideration of societal impact or on the wealth of the defendant, neither of which pertain to the recognition of rights which we either all equally possess or are all, in law, equally capable of possessing (i.e. it looks more like distributive justice than corrective justice). However, we can dismiss this argument on two grounds: (i) the argument itself, if used to prevent recognition of claims *de iure* or *in posse*, is unsound and poorly articulated; and (ii) if used merely to *limit* recovery, then it is

a policy that relates to remedy, and does not impact on the rights of the party that, being infringed, generate remedies.

The first point requires some consideration. If this ‘opened floodgates’ effect was all that could be said in favour of such arguments, then it would not be going too far to suggest they were born of intellectual inadequacy or intellectual cowardice; one must sympathise with Professor Cane in dismissing the argument as wholly unjust, for it is surely a greater injustice to inhibit many sound claims rather than merely one.⁷³

The reality, of course, is that the argument is not founded purely on the floodgates effect. Rather, the floodgates effect is often cited to mean that the large number of resulting claims *ipso facto* suggest that there perhaps isn’t a sound claim *ab initio*, that this doesn’t feel like a right infringed. Consider *Ultramares Corporation v Touche*,⁷⁴ in which Cardozo CJ refused to permit a claim in negligent misstatement against the negligent auditors (Touche Niven) of a company (Fred Stern) to whom Ultramares had lent (and subsequently lost) money. Cardozo CJ’s argument was that permitting the claim ‘may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class’.⁷⁵ Behind this statement of what he perceived as the effect of a favourable judgment was a general fear that the law had, for some time, been pursuing ‘an assault upon the citadel of privity’. Unable to define clearly the basis upon which the auditors had assumed liability (e.g. some sort of warranty), and the purview of that liability, Cardozo CJ concluded that a favourable judgment would therefore allow claims against accountants from anyone

⁷³P Cane, *Tort Law and Economic Interests* (2nd edn, Clarendon Press 1996) 456.

⁷⁴174 NE 441 (1932).

⁷⁵*ibid* 444.

who happened to have lost money through reliance on any aspect of their report. The inadequacy of the judgment, framed in these terms, becomes immediately apparent: it behoves the court to discover the basis and purview of liability, for otherwise unjustified claims would certainly be permitted. To argue that we can't allow a seemingly justifiable claim because we are unable to distinguish it from claims that may be less justifiable is a meagre argument indeed.

Of course, the courts have been astute in dealing with this problem, and negligent misstatement theory has moved on apace in order to determine the bases and bounds of liability, but this discussion has largely proceeded upon duty/assumption of responsibility bases, so some consideration needs to be committed to the question of whether resulting economic loss, absent a clear legal right to those monies, can fit within the rights-oriented thesis. The traditional approach, in which claims were limited to those who could demonstrate economic loss flowing from damage to property which they owned or had in their possession, falls to be considered first, following which it will be necessary to consider those instances where such has not been a requirement.

3.2. The traditional view: property rights. The traditional view of the law, articulated with little ambiguity by Lord Brandon of Oakbrook in *Leigh and Silavan Ltd v Aliakmon Shipping Ltd, The Aliakmon*,⁷⁶ is that:

[...]in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him

⁷⁶[1986] 1 AC 785 (HL).

to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.⁷⁷

Of course, such a conclusion does not fall outwith the long line of English judicial reasoning. Recall the discussion in chapter 2: in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*,⁷⁸ the plaintiffs were able to recover for the damage to material in their furnaces, but not for profits lost as a result of not being able to melt other material.⁷⁹ The point had been discussed previously by the Court of Appeal in *Elliott Steam Tug Co Ltd v Shipping Controller*,⁸⁰ in which Scrutton LJ noted that ‘in case of a wrong done to a chattel the common law does not recognise a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel.’⁸¹ Scrutton LJ was actually delivering a dissenting judgment, but it is important to note that the majority (Bankes and Warrington LLJ) only found in favour of recognising a claim for the loss on the basis of s2 Indemnity Act 1920, both conceding that the loss would not otherwise be recoverable. Neither is this a purely English rationale: Viscount Simonds, in *Attorney-General for New South Wales v Perpetual Trustee Co Ltd*,⁸² said ‘[i]t is fundamental[. . .] that the mere fact that an injury to A prevents a third party from getting from A a benefit which he would otherwise have obtained, does not invest the third party with a right of action against the wrongdoer[. . .]’.

⁷⁷[1986] 1 AC 785, 809E–F (Lord Brandon of Oakbrook).

⁷⁸[1973] 1 QB 27 (CA).

⁷⁹see also *Cattle v The Stockton Waterworks Co* (1875) LR 10 QB 453; *Anglo-Algerian Steamship Co Ltd v The Houlder Line Ltd* [1908] 1 KB 659; *La Société Anonyme de Remorquage à Hélice v Bennets* [1911] 1 KB 243.

⁸⁰[1922] 1 KB 127 (CA).

⁸¹[1922] 1 KB 127, 139 (Scrutton LJ).

⁸²[1955] 1 AC 457, 484 (HCA).

This, in effect, would be the conclusion based on a simple reading of the current thesis: to wit, there is no legally actionable loss if there is not otherwise a right to the subject matter of that loss. And, of course, what is really meant by *right* here is some kind of property right—that is to say, damage to or loss of something we *own*, rather than something we are *owed*, two concepts ‘located on opposite sides of a very deep divide.’⁸³

3.3. *Hedley Byrne liability.* The situation in *Hedley Byrne & Co v Heller & Partners*⁸⁴ appeared quite different—a step away from the rights-oriented discourse. The facts are well known but bear repetition. Hedley Byrne was a firm of advertising agents who had purchased advertising space on behalf of a company, Easipower Ltd. Hedley Byrne engaged its bankers (National Provincial Bank, Ltd) to make inquiries of Easipower’s bank—Heller & Partners—as to Easipower’s creditworthiness (specifically as to whether the Easipower was trustworthy to the extent of a £100,000pa advertising contract). The answering bank, Heller, opined that Easipower was ‘considered good for its ordinary business engagements’, albeit that the ‘figures are larger than we are accustomed to see.’⁸⁵ Easipower ultimately became insolvent, and was thus unable to fund the £17,661 of advertising space that Hedley Byrne had purchased. At trial, McNair J held that the bank’s reference was negligent in that it created a false impression of creditworthiness and that Mr Heller ought to have realised this.⁸⁶ The question before the House of Lords was whether there was

⁸³P Cane, *Tort Law and Economic Interests* (2nd edn, Clarendon Press 1996) 106.

⁸⁴[1964] AC 465; [1963] 2 All ER 575 (HL).

⁸⁵[1963] 2 All ER 575, 579F.

⁸⁶Having decided that the appeal would fail regardless of Heller’s negligence, their Lordships invited no further comment on this specific question. Without the evidence it is difficult to question the trial judge’s findings, though I would submit that, on the facts presented, the judgment is surprising: the statement was true, and hardly a glowing endorsement of the proposed transaction (admittedly

a relationship between the advertising agents and the answering bank such that the answering bank would be liable for the losses. Put another way, *per* Lord Hodson, ‘the underlying question is whether the respondent bankers[...]ever assumed any duty at all.’⁸⁷

3.3.1. *What was the infringed right?* Interestingly, the question of whether the type of loss suffered was recoverable at all was never really considered.⁸⁸ Why is this interesting? Well, for a start, the loss was purely economic, in that it was not contingent on any damage to property, so one would have assumed that the judiciary’s knee-jerk scepticism in matters of economic loss would have warranted direct discussion. One of the reasons for this may well have been that the nature of the facts (*viz.* misinformation occasioning economic loss) more naturally precipitated discussion of fraud, under *Derry v Peek*,⁸⁹ and fiduciary duty or contract, rather than negligence. Negligent misstatement was seen as a novel alternative to these traditional relationships, and thus was considered in relation to them, rather than in relation to traditional negligence.

When we talk of recovery for pure economic loss, what is meant in this thesis is recovery for those losses flowing from an infringed right where those losses happen to be economic in nature. It is not a separate category of right: there is no ‘right’ not to suffer economic loss, in the same sense that there is no right not to suffer loss generally. As both Robert Stevens and Donal Nolan have argued, a right not

they do not condemn the transaction outright, but the formulation [(a) they are good for their ordinary business engagements; (b) this engagement is not ordinary] does at least invite conclusion (c), namely, we cannot confirm that they are good for this business engagement).

⁸⁷[1963] 2 All ER 575, 595F.

⁸⁸C Witting, *Liability for Negligent Misstatements* (OUP 2004) 8.29.

⁸⁹(1889) 1 App Cas 337 (HL).

to be caused loss is a conceptual impossibility.⁹⁰ There is a distinction to be drawn between the damage or injury to the right, at which point the wrong is conceptually complete, and the loss (in the sense of being factually worse off) flowing therefrom. You cannot point to loss in the abstract and claim that you have a right not to be caused that loss without a preceding concept of the right from which the defendant had subtracted. As both Nolan and Stevens argue, the legal wrong of damage or injury to right occurs at a moment in time: loss does not. You can pinpoint the moment that an action arises when you focus on right, whereas you cannot pinpoint the moment an action arises if you focus on losses. Loss is an important factor when determining quantum, but not when determining the existence of a claim. The example Nolan offers is that of a nineteenth-century landscape painting that is daubed with paint by a graffiti artist. To elide the concept of damage to the right with the concept of loss means that we cannot definitively say at any point that the owner's rights have been infringed. The damage to value is latent and may, indeed, fluctuate. If the graffiti artist were sufficiently famous, the value may even increase. However, even in such cases it must surely be beyond dispute that the owner's right to the painting has been damaged, regardless of the future fluctuations in value.

Thus, in considering a claim for 'pure economic loss', we need to identify the underlying right. Absent an underlying right, there is no claim. However, we know, as discussed previously, that pure economic loss has not traditionally been recoverable in negligence. The rule is predicated on a fear that the scope of liability in such cases would generally be too great (recall Cardozo J's famous dictum in *Ultramares* above). So whereas physical damage flowing from a single negligent act is unlikely to

⁹⁰D Nolan, 'Rights, Damage and Loss' (2017) 37(2) OJLS 255, 267; R Stevens, 'Rights and Other Things' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 119.

be wide-ranging—so the argument proceeds—an act of negligence ‘can easily cause pure economic loss of great magnitude to many people’.⁹¹

Two difficulties may be observed in this analysis. The first, as Peel and Goudkamp are astute to note, is that the rule applies regardless of the actual possibility or causation of wide-ranging damage⁹²: in *Spartan Steel* itself, the only power supply that appeared to be interrupted was that to the factory, which hardly seems to carry with it the potential for wide-ranging damage. This is to be contrasted with the interruption of the power supply to more than a *million* homes in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*.⁹³ Indeed, the converse is also true: the rule does not seem to apply—at least not automatically—in cases of physical damage where damage is widespread, such as *The Grandcamp* where an explosion on board the ship spread to adjacent industrial areas, further destroying thousands of homes and causing over 500 deaths and a further 3,000 personal injuries.⁹⁴

The second difficulty, not wholly unconnected to the first, is that a general rule has been imposed concerning the *scope of responsibility* or *liability* by reference solely to the category of right or harm. On first inspection, this does not appear so troubling: we have seen in cases such as *Alcock v Chief Constable of South Yorkshire Police*⁹⁵—concerning pure psychiatric harm (psychiatric harm not contingent on physical injury)—that, in determining the existence or scope of a duty, special

⁹¹W E Peel and J Goudkamp, *Winfield & Jolowicz on Tort* (19th edn, London, Sweet & Maxwell 2014) 5-059.

⁹²*ibid* 5-064.

⁹³[2003] VSC 27.

⁹⁴*The Grandcamp* [1961] 1 Lloyd’s Rep 504.

⁹⁵[1991] UKHL 5; [1991] 1 AC 310.

consideration must be paid to certain factors in order to establish sufficient proximity between the claimant and defendant.⁹⁶ However, these cases stop far short of denying liability based purely on the nature of the harm (i.e. the underlying right, in this case a right to psychological privacy). What *Alcock* recognises is that it will be more difficult to establish proximity where the potential for harm prior to the failure to take care is more diffuse; a scene may be witnessed—and indeed was witnessed in *Alcock*—by a great many people at various stages of remove. This is not the same as saying that proximity can never be established in respect of psychiatric harm, but only that it is more difficult to establish those persons so closely connected to our act that we ought reasonably to have had them in our contemplation.⁹⁷ Lord Denning MR, in arguing against a blanket ban on recovery for pure economic loss in *Spartan Steel*, called upon similar reasoning: in some cases where recovery for pure economic loss has been refused it is because of a want of duty, in other it is because there was a duty but the economic loss was too remote.⁹⁸ In other cases, such as *Morrison Steamship Co Ltd v Steamship Greystoke Castle (Owners of cargo lately laden on)*⁹⁹—and, indeed, in *Hedley Byrne*—it will be clear that there was both a duty of care in respect of pure economic loss, and that the loss was not too remote.

Therefore, if our reasons for denying liability in cases of pure economic loss relate to the potential for wide-ranging liability, then there is no reason for a universal ban rather than framing the attribution of responsibility in terms of proximity, i.e.

⁹⁶I am of the opinion that in addition to reasonable foreseeability liability for injury in the particular form of psychiatric illness must depend in addition upon a requisite relationship of proximity', *ibid* 396H (Lord Keith of Kinkel).

⁹⁷The reader will recognise the paraphrase of Lord Atkin's dictum in *Donoghue v Stevenson* [1932] AC 562, 580.

⁹⁸*Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 All ER 556 (CA), 561–562 (Lord Denning MR).

⁹⁹[1946] 2 All ER 696, [1947] AC 265.

recognise the interference in an underlying right (e.g. a chose in action) and ask if there exists a negligent party in a sufficiently proximate relationship with the claimant that the injury to the claimant's right falls within the scope of that party's responsibility. The questions of right and of duty are two separate questions. This was the foundational principle upon which their Lordships based their decision in *Hedley Byrne*. The respondents' argument was that there could be no liability for performance of a service where that service had been performed gratuitously. What this argument amounts to is an assertion that the only relevant right with respect to the performance of a service is a contractual right and, absent contract, no action can lie. The House of Lords rejected this proposition by focussing their analysis on the types of relationship beyond contract in which a duty to take care can arise.¹⁰⁰ This is not a question of underlying right, but one of proximity: in what type of social or professional relationship can I claim for loss? As Lord Goff of Chievely stated in his speech in *Henderson v Merrett Syndicates Ltd*, '[i]n subsequent cases concerned with liability under the *Hedley Byrne* principle in respect of negligent misstatements, the question has frequently arisen whether the plaintiff falls within the category of persons to whom the maker of the statement owes a duty of care.'¹⁰¹ Crucially, Lord Goff separates in his analysis the question of the duty of care (which he frames in terms of an assumption of responsibility, but this matter is considered in the following chapter) and of the underlying economic loss: having recognised the economic loss and having then established a duty of care owed by the defendant to

¹⁰⁰See, for example, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 528–529 (Lord Devlin).

¹⁰¹[1994] 2 AC 145, 180H.

the claimant, ‘there is no reason why he should not be liable in damages[. . .]in respect of economic loss which flows from the negligent performance of those services.’¹⁰²

It being the case that liability for pure economic loss following misstatements can be established in much the same way as negligence generally (at least in general terms, viz. what right of mine has been infringed and whom are we to hold liable for that infringement?), it is necessary to consider these underlying rights in some detail. The standard *Hedley Byrne* actions will normally involve the transfer of money from a bank account. This section will consider this first, general scenario (and those similar thereto): what rights of mine have been infringed if I pay money pursuant to a negligent misstatement? The second scenario, which will be considered in detail in the following chapter, concerns what right of mine is infringed if I have entered into a contract pursuant to a negligent misstatement but have yet to pay out money under that contract, i.e. I have yet to make good on the financial obligation.

By way of brief summary of the second scenario, before we consider the first, the complication is immediately apparent: any loss at the moment is latent, dependent on various choses in action (my right against the bank, and the third party’s right against me). We are faced with a choice. If the argument is that I entered into a contract with a third party on the basis of a negligent misstatement upon which I reasonably relied, then one legally coherent outcome might be that the contract is voidable: I entered into the contract on the basis of defective consent. Alternatively we say that I am owed money by the defendant to reflect the diminution in value of my contractual right against my bank (the diminution in value being the further legal obligation to which it is now subject). In chapter 4, it is submitted that it is

¹⁰²ibid 181c.

entirely fair that we recognise the predicate right as being the diminution in value of my chose in action against my bank, rather than cause an innocent third party to become the victim of negligence that is necessarily at some remove from their contractual dealings with me.¹⁰³

As to the first scenario, money that we hold in a bank is part of our personal property—albeit not tangible property—that exists as a personal right of action. In the course of his judgment in *Torkington v Magee*,¹⁰⁴ Channell J noted that the term chose in action ‘is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action.’¹⁰⁵ The chose in action, then, is part of our personal property; physical money, once paid into the bank, is not. The relationship between the bank and the customer thus exists as debtor–creditor¹⁰⁶ since, rather than the bank owing the customer specific, corporeal property, the customer has an enforceable action against the bank.¹⁰⁷ Thus, money in a bank account is one of many choses in action that the law recognises and protects as a form of proprietary right. This is equally true of an agreed overdraft facility within a bank: being an obligation from the bank allowing the customer to draw funds, it is a personal right that can be secured through the courts. As held by Sir John Donaldson P in *Eckman v Midland Bank Ltd*¹⁰⁸:

¹⁰³See chapter 4, section 2, ‘The Justification for Hedley Byrne Liability’.

¹⁰⁴[1902] 2 KB 427 (DC).

¹⁰⁵*ibid* 430.

¹⁰⁶*Foley v Hill* (1848) 2 HLC 28, 36 (HL). ‘Money, when paid into a bank, ceases altogether to be the money of the customer; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it[. . .][T]he banker is not an agent or factor, but he is a debtor.’ (Lord Cottenham LC).

¹⁰⁷*Miller v Race* (1978) 1 Burr 452.

¹⁰⁸[1973] QB 519.

If, however, a bank has contracted with the contemnor in terms which entitle him to draw on the bank up to a limit, and that limit has not been reached, this facility is part of the property of the contemnor[. . .].¹⁰⁹

Similarly, Geoffrey Lane LJ in *R v Kohn*¹¹⁰ (in confirming that an overdraft facility was property which could be the subject of a charge of theft):

If the account is in credit, there is an obligation to honour the cheque. If the account is within the agreed limits of the overdraft facilities, there is an obligation to meet the cheque. In either case it is an obligation which can only be enforced by action[. . .][I]f they have agreed to give an overdraft they cannot refuse to honour cheques or drafts[. . .]which have been drawn or put into circulation[. . .].¹¹¹

The same is true for loan agreements generally. In reaching his conclusion that a right to draw down funds under a loan agreement amounted to an asset for the purposes of an extended freezing order, Lord Clarke noted that ‘there is no real doubt that a right to draw down moneys under a loan agreement could be construed as an asset.’¹¹² Lord Clarke held further that, absent the bank cancelling the loan agreement (even if it were at the bank’s discretion so to do), the borrower ‘has his rights as borrower under the agreement, which[. . .]expressly constitute legal obligations binding on the

¹⁰⁹ibid 529.

¹¹⁰*R v David James Kohn* (1979) 69 Cr App R 395.

¹¹¹ibid 407.

¹¹²*JSC BTA Bank v Ablyazov* [2016] 1 All ER 608 (HL); [2015] UKSC 64 at [37] (Lord Clarke). The question for the court was essentially one of definition: though choses in action were regarded as property within the law, could a loan agreement be classed as an ‘asset’ for the purposes of a freezing order? On the wording of the freezing order in question, it was held that they could, but the word ‘asset’ is context-dependent.

lender'¹¹³ such that 'an instruction to the lender to pay the lender's money[...][to a third party is dealing with the lender's assets as if they were his own.'¹¹⁴

This last sentence is interesting, revealing something about the nature of moneys held in a bank account (whether by credit or loan). For choses in action though they may be, and thus intangible personal property, bank accounts share some aspects of tangible property. We exercise significant control over this property and, for the most part, can do with it what we wish, when we wish. We deal with these assets as if they were our own tangible property. Our decision in a shop to pay with card or with cash is unlikely to be informed by reference to categories of personal property. Nevertheless, such an observation is not necessary for the purposes of explaining *Hedley Byrne*.

What is necessary for explaining *Hedley Byrne* liability is to understand that, when I pay out money in reliance on a negligent misstatement, I have divested myself of a right over property. In the case of the bank account, the value of my chose in action against the bank will have been diminished, so synonymously my personal property has been diminished. This is so just as it was in *Kohn* when the defendant drew cheques on his employer's bank account, so diminishing the employer's chose in action against their bank. *Hedley Byrne & Co* purchased advertising space in reliance on the reference provided by *Heller & Partners*, and *Heller* were aware that this was the purpose for which the reference was sought. Being so aware, and having provided the reference specifically to *Hedley Byrne*, there was both foreseeability with respect to the harm and sufficient proximity between the parties, i.e. a clear pathway to harm. The infringed right, in the form of a diminution in personal property,

¹¹³ibid [42].

¹¹⁴ibid [40].

grounded the scope of Heller & Partners' responsibility. Heller would not have been liable for, say, a subsequent breach of the contract between Hedley Byrne and those with whom the advertising space was booked; this is a breach of Hedley Byrne's contractual right, to be sure, but it is of no relevance to Heller. As emphasised by Lord Bridge of Harwich in *Caparo Industries plc v Dickman*, the scope of the duty is to be determined by reference to the kind of damage.¹¹⁵

To demonstrate what is meant by the latter point, it is worth considering *Swingcastle Ltd v Alastair Gibson (a firm)*.¹¹⁶ A bank sought a valuation of a property which was to form the security for a mortgage. The surveyor negligently overvalued the property (by some 50 per cent). Soon after the loan was drawn down, the borrowers fell into arrears. The lenders were forced to take possession of the property and it sold at a value significantly below the recent valuation. The bank tried to claim from the negligent surveyor both the moneys they had lent—on the basis that they would have made no loan at all had the true value been known—and the moneys they were owed by the borrowers in missed interest payments (which was at a significantly higher rate than statutory interest). The lenders were able to claim the shortfall of the money they had lent on the basis this was their property of which, but for the negligent misstatement, they would not have divested themselves. However, they were not able to claim from the surveyor the borrower's missed interest payments. As per Lord Lowry:

The security for the loan was the property but the lenders did not have a further security consisting of a guarantee by the valuer that the borrowers would pay everything, or indeed anything, that was due to the

¹¹⁵[1990] 2 AC 605, 627.

¹¹⁶[1991] 2 All ER 353; [1991] 2 AC 223.

lenders[. . .]. The fallacy of the lenders' case is that they have been trying to obtain from the valuer compensation for the borrowers' failure and not the proper damages for the valuer's negligence.¹¹⁷

The right that the valuer infringed was their right in the money which they lent on the purchase of the property: there was no interference in the different, contractual right of the lenders to be paid interest by the borrowers. Right grounds the liability. As I note in section 1.2 of the following chapter, the damages exist to correct the effect of the wrong, the effect being that the lenders entered a transaction that they would not otherwise have entered. Making good on the failure of that transaction to afford further profit is not consistent with the conceit that they would not have entered the transaction.

However, had they framed the argument differently, and had the evidence been favourable, the House of Lords (and the Court of Appeal before them) considered that they might have been able to recover interest at their lending rate rather than the statutory rate on the basis that the money of which they had divested themselves would have been put to an alternative use (e.g. a non-defaulting loan). This was a possibility considered by Lord Lowry¹¹⁸ and echoed by Behrens J in *Mortgage Express v Countrywide Surveyors Limited*.¹¹⁹ However, both were clear that specific evidence would need to be adduced confirming that the money paid out would have been put to an alternative use, chiefly by demonstrating that there was a funding shortfall such that the lenders were unable to meet a demand for loans (which neither of the claimants in the two cases demonstrated). This is a subtly different argument.

¹¹⁷ibid 365.

¹¹⁸ibid 230C–231A.

¹¹⁹[2016] EWHC 1830 (Ch) at [53].

It is entirely foreseeable that money may be put to various uses and, if your negligence prevents me from putting my money to a use which would have earned profit, that negligence has caused me loss (an expectation loss, in contract terms). So, as Swingcastle might have argued, Gibson's negligence not only caused them to part with their property when, but for his negligence, they would not have done, but also prevented them from investing that money in such a way as would earn interest.

With all due respect to Lord Lowry, this is a more problematic argument than even he envisaged. Unless it is clear that the lender withdrew from a very specific transaction (so giving up their chose in action against a third party) that would have been a *successful* transaction, this argument has much the same effect as the 'guarantee' argument, in that it passes to the negligent valuer all of the risks of the transaction. All commercial transactions carry risk, which includes (in the case of lending) the risk of the borrower defaulting on interest payments. To award damages reflecting the lost expectation of a hypothetical (even if highly likely) alternative transaction converts into risk-free reality a profit that was otherwise speculative. This observation goes beyond mere policy concerns, however: if we are to take seriously the axiom that right grounds the duty, then we must be careful to recognise the implication of Lord Bridge's dictum in *Caparo*. What right of the lender was infringed *as a consequence of the incorrect valuation*? Was the right to interest on the extant loan infringed by the surveyor? No. That was a breach by the borrowers, and their ability to meet the interest payments or otherwise is not by necessity anything to do with the value of the security: these are two largely discrete calculations, and the negligence of the surveyor does not make more likely the subsequent breach of contract. Was the right to interest on an alternative loan infringed by the surveyor?

Again, not necessarily. It of course remains open to the lender to prove the point, but recognising hypothetical infringements of rights rather than real places a very high burden on a surveyor who is contracted to do but one job, advising a complex lending decision in but one capacity. The surveyor is liable only for those kinds of loss that were the foreseeable consequence of an incorrect valuation (given that the provision of a valuation is the basis—and sole basis—of proximity).

This latter point was emphasised by Lord Hoffman in *South Australia Asset Management Corporation v York Montague Ltd* (the *SAAMCo* litigation)¹²⁰ and subsequently by Lord Nicholls in the related appeal in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd*.¹²¹ This approach was confirmed by Lord Sumption (who had acted as counsel for York Montague Ltd), with whom all other justices agreed, in *BPE Solicitors v Hughes-Holland*: the question posed by *SAAMCo* is ‘whether the loss flowed from the right thing, ie from the particular feature of the defendant’s conduct which made it wrongful.’¹²² And this makes sense from a rights-based perspective. If we start by asking whether D is liable and then, only afterwards, ask for what damage he is liable, the result would be a negligence system where liability was based primarily on act and not on consequence: liability in the air.¹²³ So we start by identifying the relevant right that is the subject-matter of the loss and then ask within whose scope of responsibility and liability that loss falls. If the justification for a finding of proximity is that there was a clear purpose for which a statement was provided (e.g. providing a valuation for a loan security), then only

¹²⁰[1996] UKHL 10; [1997] AC 191 at [23] and [40], *inter alia*.

¹²¹[1997] 1 WLR 1627, 1631.

¹²²*BPE Solicitors and anor v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21.

¹²³*Overseas Tankership (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388, 425 (Viscount Simonds).

that part of the infringed right that was the consequence of that particular wrongful conduct can be recovered. This echoes the argument in relation to *Chester v Afshar*¹²⁴ in the first section of this chapter: the mere fact of Mr Afshar having been negligent does not allow us to attribute all losses to him, but only those that have a sufficient connection with the subject matter of the breach of duty. In that case, the risk of which Afshar failed to warn was not a risk that materialised, and other risks had been assumed by Miss Chester.

3.3.2. *Procuring or inducing breach of contract.* It shall be noted that this is not the same as procuring or inducing breach of contract. To this extent, the defendant has not interfered with a contractual relationship. The argument instead is that a genuine right (albeit perhaps a chose in action) has been diminished or dispossessed as a result of entering into a contract that, but for the negligent misstatement, the claimant would not have entered. *OBG Ltd v Allan*,¹²⁵ concerned as it is with instances where there has been a breach of contract to which D has intentionally been an accessory, is not authoritative on matters of misstatement and *defective* contracts. To the extent that the discussion of conversion in *OBG* is relevant here—which, for the same reasons as the unlawful interference point—it isn't, sympathy must be had with Lord Nicholls' *dictum* that the time has come 'to recognise that the tort of conversion applies to contractual rights irrespective of whether they are embodied or recorded in writing.'¹²⁶ The limitation of conversion to conversion of chattels is a ghost of the old forms of action—ghosts of apparently sufficient authority that the majority considered that an extension of liability 'would involve too drastic

¹²⁴[2004] UKHL 41.

¹²⁵[2007] UKHL 21.

¹²⁶*ibid* [233] (Lord Nicholls).

a reshaping of this area of the law of tort.¹²⁷ But the reality is that English law already provides a remedy for the conversion of some intangible rights, and that ‘the rights protected in this way are contractual rights. No principled reason is apparent for attempting[...]to distinguish between different kinds of contractual rights.’¹²⁸

In any case, the mere fact that the underlying right in an action in negligence is merely a chose in action rather than a tangible property right should not, *ipso facto*, preclude recovery for negligent misstatements. It is clear that a chose in action is a property right that can be worthy of protection under negligence.

3.3.3. *Duty remains important.* Any fears that recognising pure economic rights or choses in action may constitute a significant expansion of liability should be tempered by the understanding that the defendant still needs to exist in a proximate relationship with the claimant if we are to regard the defendant as a legally relevant cause of the infringement of the claimant’s right. It may well be that a claimant can identify an underlying right, even if it is a chose in action, but it is important to recall that there may still be good reasons to deny that the claimant is under a legal liability to remedy that right. It may be initially tempting to question the preceding analysis by reference to *Caparo Industries plc v Dickman*¹²⁹ on the basis that recovery was denied in respect of the shares purchased in reliance on the negligent misstatement. However, the decision was not made on the basis of a rights-based analysis. In any case, it is not clear that a rights-based analysis would have changed the outcome: the auditors simply didn’t owe a duty in respect of these new shares. Whilst an argument is tenable, at least in theory, that a duty of care might be owed

¹²⁷ibid [271] (Lord Walker of Gestingthorpe).

¹²⁸ibid [232] (Lord Nicholls).

¹²⁹[1990] 2 AC 605 (HL).

by the auditors to shareholders in respect of their *existing* shareholding, the purchase of additional shares is a wholly independent transaction and, as such, beyond the scope of the auditor's duty to existing shareholders. It is never enough simply to ask whether A owes B a duty of care; one must also ask about the scope of the duty. 'As a purchaser of additional shares in reliance on the auditor's report, Caparo stands in no different position from any other investing member of the public to whom the auditor owes no duty'.¹³⁰

The Court of Appeal in *Morgan Crucible Co plc v Hill Samuel & Co Ltd*¹³¹ considered that the defendant may well have owed a duty of care in respect of pure economic loss suffered by the claimant (the claimant had entered into a contract for the purchase of shares on the basis of inaccurate profit forecasts). What distinguishes *Morgan* from *Caparo* is the proximity: in *Morgan* it was clear that the documents had been prepared in full cognisance of the claimant's intention to rely on those documents in making the bid.¹³²

The emphasis on proximity in the above—somewhat lacking in specificity though the test may be—is of value, certainly when compared with 'policy' considerations. It is in the nature of corrective justice that complete deference to community concerns over and above the equal freedom to interact with each other as holders of right is to be avoided. No serious author proposes such indifference to individual freedoms, of course, but the tendency among some authors¹³³ to regard the duty inquiry as being at least *primarily* normative or policy-based risks undermining the equal application

¹³⁰ibid 626–627 (Lord Bridge).

¹³¹[1991] Ch 295 (CA).

¹³²ibid 319–320 (Slade LJ).

¹³³See, for example, J Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Honour of John Fleming* (Oxford, Clarendon Press 1998) ch4.

of the law. Further, for so long as the policy limb is community-focussed rather than focussed on justice between the parties where rights conflict,¹³⁴ the less obvious is the link between the right infringed and the remedy—and the infringed right is the reason for, the justification for, the parties appearing before the court. Proximity asks how one party was situated with respect to the other, and as such respects that articulated unity of infringed right and breached duty.

Nonetheless, we view the liability relationship and the right infringed as related but distinct inquiries. That is to say, the question of how the negligent party can be normatively causally linked to the infringement of a right (for this is, in effect, the liability relationship) is not directly concerned with the nature of the right infringed. The fears over erosion of the privity principle concern the recognition of liability as between two parties absent contract. But it is not a ‘breach’ of this relationship, like breach of contract, which generates the right to recovery. It is the infringement of right; that is to say, because of the proximity and nature of our relationship, I have brought about a series of events whereby you parted with your money (in which you had a possessory interest) in circumstances where, but for my assertions, you would not have parted from your money.

To summarise the point, the traditional limits on recovery for pure economic loss do not corrupt the rights-oriented thesis, because it is not the relationship that defines the loss, but the infringement of a right. Negligent misstatement differs from the broader field of negligence only inasmuch the chain of causation between misstatement and loss is not as clear as that between bullet and death.

¹³⁴See Andrew Robertson on the different categories of policy consideration under *Caparo*, being, first, justice between the parties and, secondly, wider systemic concerns: A Robertson, ‘Justice, Community Welfare and the Duty of Care’ (2011) 127 LQR 370.

4. Further protected rights

What this thesis presents, *inter alia*, is a framework for understanding negligence: for understanding the implications of recognising and taking seriously rights as an *a priori* structure. The specific rights that we recognise may—indeed probably will—change with time. The developing law in relation to personal data, for example, may mean that we recognise such a right that exists—beyond the traditional taxonomy of private law—that is compensable in damages. Indeed, legislation introduces new rights all the time (albeit perhaps not to the extent of new categories of private law). The Consumer Rights Act 2015, for example, implies terms into contracts such that purchasers who rely on pre-sale statements to their detriment are afforded protection. Now, of course, this is not really a new *category* of right: one could argue that it is still at fundament a contractual right—but it is a contractual right born of statute, not of agreement, and to that extent it is a different sort of right. The category of rights is never closed.

We have, in this section and in others, considered the protection afforded to pure economic loss inasmuch as it relates to a right (albeit perhaps a chose in action). We have also considered defamation as a creature of right. We have already dismissed the notion that there is right to accurate information *per se*, and the following chapter will make clear that no right arises out of a quasi-contract based on an assumption of responsibility. Before we move on to the fourth chapter, however, it is worth taking further stock of some of the other rights that feature in negligent misstatement.

4.1. Physical injury. We have considered at some length the protection that the law affords to our own bodies and the right generally to determine what shall

be done with our bodies.¹³⁵ We need not develop the point in much more detail. However, discussion of this right has so far been generally limited to instances of physical interference. The statement-maker does not by necessity also have to be the knife-wielder in order to have infringed the right. Two cases illustrate the point well. The claimant in *Clay v AJ Crump and Sons Ltd*¹³⁶ was injured by a wall that collapsed onto a workers' hut. This was a result of negligent advice from the architect that the wall could be left standing. *Perrett v Collins*¹³⁷ concerned the negligent approval of airworthiness that resulted in the relevant aircraft crashing, injuring the claimant. The defendant's interference with the right is a question of duty, and the proximity was established by the extent of the control exercised over the construction of the aircraft, *inter alia*.¹³⁸ What is interesting for our purposes, beyond the recognition of the underlying right to physical integrity (which was never really in doubt), is that the court recognised that the statement-maker could, by virtue of a negligent statement alone, be liable for 'direct physical damage.'¹³⁹

4.2. Psychiatric injury. There is some case law to support the assertion that negligent misstatement protects purely psychiatric rights. The difficulty in these cases has always been the determination of duty. The courts have been reluctant to permit that the mere fact of communicating accurate information, howsoever carelessly and distressingly, should prompt liability.

¹³⁵And the right is hardly restricted to English law. See *Schloendorff v Society of New York Hospital* 105 NE 92 (NYCA 1914) at [93] (Cardozo CJ): '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.'

¹³⁶[1964] 1 QB 533 (CA).

¹³⁷[1998] 2 Lloyd's Rep 255 (CA).

¹³⁸*ibid* 261–262 (Hobhouse LJ).

¹³⁹*ibid* 274 (Buxton LJ).

It seems from *W v Essex County Council*¹⁴⁰ that the courts are at least willing to recognise claims for pure psychiatric harm predicated on misstatements. In the instant case, the defendant council had provided assurances to foster parents that the foster child they were taking into their home had no history of sexually abusing others. This was not so: the child did have a history of abusing others. The parents already had three foster children, who suffered sexual abuse and psychiatric harm as a result. The court held that the psychiatric harm of the children fell within the scope of the duty owed by the council. The Court of Appeal struck out the parents' claim for psychiatric harm, though this decision was overturned on appeal by the House of Lords.¹⁴¹ Christian Witting is astute to note, however, that the difficulty with relying exclusively on this case as authority for misstatement and psychiatric injury is that there are other reasons beyond the statement for finding a duty by the council: the council 'had arranged a fostering agreement and had introduced an abusive child into the family home.'¹⁴²

Similarly, claims have been permitted where distressing and *inaccurate* information has been communicated causing psychiatric harm. Bursell J permitted a claim for psychiatric harm in *Farrell v Avon Health Authority*¹⁴³ on the basis that a father, who had been negligently and incorrectly told that his newborn child had died, was a primary victim. Having been handed the corpse of a child (though not, of course, his child), he had been 'physically involved in the incident.'¹⁴⁴ It is, perhaps, unfortunate, that the judge chose to pursue a slightly strained analysis based on primary

¹⁴⁰[1998] 3 WLR 534 (CA).

¹⁴¹*W v Essex County Council* [2001] 2 AC 592 (HL).

¹⁴²C Witting, *Liability for Negligent Misstatements* (Oxford, OUP 2004) 6.16.

¹⁴³[2001] Lloyd's Rep Med 458.

¹⁴⁴*ibid* 471 (Bursell J).

victims: the father was never at risk of physical injury himself. What is more unfortunate, however, is that it is not clear to what extent the touchstone of liability lay in the inaccuracy of the communication.

Interestingly, on this point, it is not so clear that the careless communication of otherwise accurate information would ground a claim. Windeyer J stated in the Australian case of *Mount Isa Mines Ltd v Pusey*¹⁴⁵ (cited by Witting¹⁴⁶) that ‘nervous shock resulting simply from hearing distressing news does not sound in damages in the same way as does witnessing distressing events.’¹⁴⁷ Of course, this fits well with our understanding of the *Alcock* control mechanisms for secondary victims.¹⁴⁸ Generally no action lies against someone who merely informs a party of distressing news, even if negligently.¹⁴⁹

So it seems that a claim in misstatement can proceed on the basis of purely psychiatric rights, but only to the extent that the statement-maker was negligent as to *content* rather than merely delivery.

4.3. Consequential economic loss. To the extent that rights in respect of physical injury are recognised in misstatement, so too are the losses flowing from those infringements. Of course, those losses too need to be identified as rights (or an infringement thereof)—see chapter 2, 1.2 above. The complication caused by the choses in action that we see in pure economic loss is not present here: contractual rights and other choses in action are recognised where they are contingent on

¹⁴⁵(1971) 125 CLR 383 (HCA).

¹⁴⁶Witting (n 142) 6.18.

¹⁴⁷*Mount Isa Mines* 407 (Windeyer J). See also *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317, 395 (HCA): ‘There can be no legal duty to break news gently.’

¹⁴⁸*Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL).

¹⁴⁹*ibid* 398 (Lord Keith).

physical damage. For example, in *McFarlane v Tayside Health Board*¹⁵⁰ a father was negligently and incorrectly informed that, following his vasectomy procedure, his sperm count was negative. The mother subsequently gave birth to a healthy child, albeit a child the parents had not wanted. The first question to address is whether this constituted physical ‘damage’. Their Lordships seemed content that it was physical damage, though were at pains to note that it wasn’t normal ‘harm’ or ‘injury’.¹⁵¹ Such reservations were probably underserved: the severe effects of pregnancy and childbirth clearly engage the right over our own bodies and, while ‘injury’ or ‘harm’ may often be a neat shorthand for cases where our rights over our bodies are infringed, this was a case where such phrases were misleading. Nonetheless, the physical damage having been accepted, the parents were also awarded damages for their loss of earnings (interference with a third party contract), and expenses (diminution value of chose of action against bank) covering medical bills and clothes. The court did not consider that the cost of raising the child was recoverable *because it was outwith the scope of the doctor’s duty*.¹⁵² There is nothing about such costs which render them irrecoverable *per se*; if, on the facts, there is sufficient proximity between the parties, there would appear to be no reason why these costs should be denuded of their status as a product of infringed rights.

Conclusion

This chapter has been concerned with locating negligent misstatement within our concept of rights. At the core of this chapter is the assertion that misstatement—and negligence more generally—concerns the infringement of a right (and not merely

¹⁵⁰[2000] 2 AC 59 (HL).

¹⁵¹ibid 74 (Lord Slynn).

¹⁵²ibid 76 (Lord Slynn).

the right to be informed), cannot exist without recognition of that specific right, and thus exists at a different level of taxonomy. Following *Hedley Byrne*, negligent misstatement theory, in its preoccupation with defining the ‘duty’ relationship, appears to have elevated that relationship to the status of quasi-contractual right, a thing which can be breached in and of itself (albeit that it’s not actionable *per se*). This way of thinking was seen in *Chester* and *ABC v St George’s* and associated cases (recognising, for example a duty to inform or a right to be informed). Instead, rather than recognising a duty to inform or to be informed, we need to start with the question of whether we possess a right to the subject matter of the loss, and whether we waived that right to some extent. The example employed in this chapter, *Spring v Guardian Assurance*, showed that protected rights and negligence exist at different levels of generality: in that case, defamation and negligence were not simply different torts on the same taxonomic plain, but fundamentally different. Finally, this chapter has shown that the economic loss discourse still, at fundament, concerns the breach of legally recognisable rights, even in matters of negligent misstatement. This chapter has surveyed a range of rights that can and should be afforded protection under negligent misstatement, and this includes purely economic rights and choses in action.

The following two chapters will deal in detail with crucial elements that have been touched upon in this chapter: firstly, the assumption of responsibility thesis—the quasi-contractual model of misstatement—is categorically denied in favour of a negligence model; secondly, the justification for *Hedley Byrne* liability, as considered briefly at the end of this chapter, is clarified.

CHAPTER 4

The Justification for Liability

THE PURPOSE OF THIS CHAPTER is twofold: firstly it will deny that an assumption of responsibility is or can be the touchstone of *Hedley Byrne* liability. Secondly, it will offer an account of such liability that remains predicated on the infringement of right. It will be noted that this right does not arise *ex contractu* or out of some quasi contract—such is the realm of the assumption of responsibility thesis.¹ Negligent misstatement is thus a creature of negligence; whilst we may not agree on the merits or demerits of the corrective justice model, Christian Witting and I are here in agreement: ‘it would be a mistake to treat misstatement liability as different and apart from the law of negligence’.²

1. Assumption of Responsibility

Responsibility for loss that is assumed before the fact may sound rather more like the law of contract than it does the law of negligence, but this has done little to prevent assumption of responsibility becoming a dominant theory underpinning *Hedley Byrne* liability.³ The foremost advocate of the assumption of responsibility thesis (hereafter

¹Allan Beever notes ‘[. . .]the clear superiority of the contract model over its rival.’ A Beever, ‘The Basis of the *Hedley Byrne* Action’ in K Barker, R Grantham and W Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford, Hart Publishing 2015) 84.

²C Witting, ‘What are We Doing Here? The Relationship Between Negligence in General and Misstatements in English Law’ in Barker, Grantham and Swain (n 1) 224.

³See, for example, *Playboy Club London Limited & Ors v Banca Nazionale del Lavoro SpA* [2016] EWCA Civ 457 at [17]–[18], in which Longmore LJ seems to adopt unquestioningly the assumption of responsibility thesis (and without challenge from Laws and David Richards LLJ). This approach

the *contract model*) is Allan Beever. He argues that the right to rely on information provided by the defendant is afforded by the defendant's assumption of responsibility to the claimant.⁴ Thus, modulo issues of consideration, Beever reasons that *Hedley Byrne* liability is contract-like, rather than negligence-like.

There are significant problems with such a model. Firstly, it is not at all clear that the 'assumption' is analytically discrete from normal negligence analysis: numerous cases have shown that liability for negligent misstatement rarely arises from *voluntarily* assumed obligations.⁵ To argue that the legal liability is voluntary requires an argument that voluntary consent to an act carries with it an implicit consent to be liable for resultant losses. We know that this is not the case (we are not so liable in everything that we do), so the legal liability, if not explicitly assumed, must be imposed. Secondly, the contract model does not necessitate a particular realm of responsibility. If the assumption of responsibility is predicated—as it must be—on an implicitly assumed legal obligation, why is it that the responsibility must be as to the reasonable care and skill in the presentation of information (as Beever argues is the case⁶) rather than, say, an obligation to perform the task? As I have noted before, to 'imply terms of reasonable care and skill into implied contracts is a multiplication of implications, which is surely the very thing consensual internal ordering of the law seeks to avoid.'⁷ Even if one accepts that the former implication is a necessary corollary of the latter (which, as regards legal liability, is denied), it does not change

was confirmed by Lord Sumption when the case was appealed the Supreme Court: *Banca Nazionale del Lavoro SpA v Playboy Club London Limited and others* [2018] UKSC 43 at [7].

⁴A Beever, 'The Basis of the *Hedley Byrne* Action' in Barker, Grantham and Swain (n 1) 110.

⁵See A Robertson and J Wang, 'The Assumption of Responsibility' in Barker, Grantham and Swain (n 1).

⁶Beever (n 1) 104–105.

⁷N Hoggard, Book Review (2016) 32(2) JPN 178, 181.

the fact that the result of an implied term of reasonable care and skill is that the analysis collapses into one of negligence.

1.1. Assumptions and impositions. At the heart of the contract model lies the assertion that legal obligations can be assumed absent consideration, and that *Hedley Byrne* liability arises as a result of such consent, rather than by imposition of law.

In order to understand the implications of this argument, we need first to understand what is meant by the assumption–imposition dichotomy. Despite resting his contract model thesis on the assertion that *Hedley Byrne* liability is assumed, Beever nonetheless contends that ‘a great deal of liability in tort results from obligations that are assumed’, and that ‘[t]here is nothing to be gained from insisting that obligations in tort are imposed rather than assumed.’⁸ Discussion of the potential contradiction in this reasoning—why is tort not the appropriate category for negligent misstatement if tortious obligations are rarely imposed—can be saved for the following section; for now, it suffices that we can follow Beever’s argument.

The argument is this. There are numerous instances of liability—including normal negligence liability—in which obligations arise solely as a result of voluntary actions. In the same way that contractual liability arises as a result of consent, so too can tortious liability.⁹ In order to substantiate this point, Beever considers two cases: *Depue v Flatau*¹⁰ from the Supreme Court of Minnesota, and *obiter* remarks from *Horsley v MacLaren*¹¹ from the Supreme Court of Canada. In the former, the

⁸Beever (n 1) 98.

⁹Beever (n 1) 96.

¹⁰*Depue v Flatau* 111 NW 1 (MN Minn SC 1907).

¹¹*Horsley v MacLaren* [1972] SCR 441.

defendant became liable for the wellbeing of his guest by virtue of having invited him into his house; though he would have been entitled to turn the plaintiff away, having accepted him into his house, the law demanded that he not then be ‘exposed in his helpless condition to the merciless elements.’¹² As Beever notes, the ‘defendant in *Depue v Flateau* [sic.][. . .]became responsible for him in a way he was not previously responsible[. . .]The obligation arose because of the defendant’s invitation to the plaintiff. It did not exist before that invitation.’¹³

In the latter, the Supreme Court of Canada held that the defendant boat owner owed a duty of care in respect of invited passengers (‘albeit as social or gratuitous passengers’¹⁴), notwithstanding that he did not, on the facts, fall below the standard of care required of that duty.

Beever’s contention, then, is that the legal liability arises purely as a function of a voluntary act—in these cases, by inviting people onto your property. Neither was under any antecedent obligation to do so, and to describe the resultant obligations flowing from the voluntary acts as *imposed* would be tautological: we do not regard contractual obligations as a manifestation of a legal imposition separate to but flowing from a consensual act. Rather, the consent and the obligation are reflexive: if we are happy to accept this in contract law (so the argument runs), why can we not accept it in tort?¹⁵

This does beg the question, viz. what legal obligations Beever considers to be imposed. It is not a matter he addresses directly. If voluntary action is the touchstone of assumed liability, then are we to assume that imposed liability exists solely within

¹²*Depue* (n 10) 3.

¹³Beever (n 1) 96.

¹⁴*Horsley* (n 11) 461.

¹⁵Beever (n 1) fn 35.

the realm of involuntary actions? If that is true, then one may struggle to recall any instance of liability that has arisen out of genuinely involuntary action. But this must be the conclusion that we draw from Beaver's reasoning: I was under no obligation to invite someone into my house, but I did so, and so I came under a voluntarily assumed obligation. I was under no obligation to drive my car, but I did so, and so I came under a voluntarily assumed obligation. I was under no obligation to employ a clerk, but I did so, and so I came under a voluntarily assumed obligation. The potential examples are almost infinite. So in what instances of the human experience do we place imposed obligations?

Perhaps one could argue that, as a primary school teacher, one is bound to exercise a duty of care over your pupils (whom, of course, you are bound by law to accept). However, you are not bound to be a teacher; this is a responsibility you assumed when you voluntarily became a teacher. This is in the same way that one would not become an airline pilot if you did not want to assume responsibility for passengers. If duty is assumed by virtue of the voluntary nature of the act, then there is no reason to suppose that all duties attendant to that act are not assumed. Thus, it is genuinely hard to see what role remains for imposed liability if the simple act of a voluntary undertaking is sufficient to define contract-like assumption of responsibility.

These examples differ from Beaver's to the extent that the liability arises at some remove from the voluntary act: there are numerous obligations that are assumed upon becoming a teacher or a pilot—some contractual, some tortious, *etc*—so perhaps it is too much to consider that they voluntarily assumed any particular one of those obligations. However, there is nothing about Beaver's reasoning that should

prevent us so considering: inviting someone into my house also seems at some remove from my duty not to expose them to the cold (surely I would have many prior duties, such as ensuring my property would not unreasonably expose them to harm *etc*). More fundamentally, however, such a hypothetical criticism of my argument does not follow as a matter of logical necessity from Beever's actual argument: why can we permit the assumption of one voluntarily assumed duty but no more than one? So long as the act was voluntary, then Beever invites us to consider that the attendant obligations should be regarded as voluntary. That there were many obligations rather than one obligation does not seem to present an obstacle to the argument.

Conversely, one may choose to argue that, while my being a teacher or pilot is generally voluntary, aspects of the professions are not voluntary. This withstands a sort of common sense scrutiny, but this is a truism applicable to almost everything we do: I choose to fly, but I must subject myself to tedious airport security; a friend accepts an invitation to dinner at my house, but must subject himself to tedious conversation; I choose to live in the UK, but accept that I am subject to a capricious and generally damp climate...there are countless examples. At what point can we so disentangle these (unwelcome) obligations from the voluntary undertaking that they can be regarded as imposed rather than a corollary of the undertaking and thus assumed? It is very far from clear.

Thus, we must again conclude that Beever's argument necessarily causes us to abandon a private law category of imposed obligation. This may or may not present a fundamental jurisprudential problem—though, as noted above, Beever seems happy to accept a moderated version of it as a possibility—but it does rather beg the question: why, if all legal obligations can be regarded as voluntarily assumed, is

negligent misstatement necessarily a creature of the contract model rather than the tort model? This is, of course, a contradiction in Beever's own reasoning; the argument presented in this chapter remains that *Hedley Byrne* liability is not predicated on assumed legal responsibility. Indeed, as Peter Cane notes, the fact that non-contractual disclaimers of legal liability are subject to the Unfair Contract Terms Act 1977—such that even explicit unwillingness to assume legal responsibility can fail to limit such responsibility—is surely demonstrative of the problems with basing *Hedley Byrne* liability on assumption-based models.¹⁶ Assumed legal liability requires explicit assumption of liability, rather than deemed assumption based on voluntary action. This will be considered in later sections.

1.2. Absence of consideration. The next element of Beever's analysis requires him to abandon consideration as the touchstone of contract-like liability (because, evidently, *Hedley Byrne* liability arises absent a relevant contract). This he does by arguing that consideration is no more than a defective proxy for what really matters, namely intention.¹⁷ Sensibly, Beever is at pains to note that not all gratuitous promises should be enforced. But, he maintains, the supposition that promises can only be enforceable if they are supported by consideration—no matter how trivial—is 'silly.'¹⁸ Thus, Beever suggests that the doctrine of consideration be replaced with something more akin to civil law systems' requirements for formalities (in the case of gratuitous promises) or a bilateral reciprocal undertaking.

¹⁶P Cane, *Tort Law and Economic Interests* (Oxford, Clarendon Press 1996) 177. See also *Smith v Eric S Bush* [1990] 1 AC 831.

¹⁷Beever (n 1) 100.

¹⁸*ibid* 99.

Mindy Chen-Wishart submits that the civil law requirements are ‘simply a mirror image of the common law proposition that an enforceable promise must be supported by consideration unless it is accompanied by the requisite formality.’¹⁹ It is easy to have sympathy with this view. Consideration is no more than the requirement for reciprocity. That it can take the form of a peppercorn or other such trivial matter is no more than a product of the courts’ understandable refusal to be drawn into potentially irrelevant questions of value (especially given that the parties ostensibly agreed to the exchange), lest they suddenly find themselves the arbiters of all economic exchange.

Beever does not support this view. He argues that the civil law ‘insists on formality requirements because it means to ensure that promises made where there was no intention for them to be enforceable do not rise to the level of contracts.’²⁰

To be fair, Beever’s contribution to *The Law of Misstatements* was not, nor intended to be, a treatise on consideration. However, it does not adequately propose an alternative for determining those promises that are to be enforced and those that are not, unless we are to suppose either that the civil law ‘alternative’ is actually a categorically distinct alternative—which is denied—or that intention is to be the sole determining factor, howsoever evidenced. If the latter is true, then we must allow for the possibility that any undertaking can become legally enforceable provided that the obligor intended to be bound and the obligee intended that the obligor be so bound (and absent the formalities required of deeds). There are two things to be noted about this proposition: (a) this really is not contract law as we know it,

¹⁹M Chen-Wishart, ‘In Defence of Consideration’ (2013) 13 *Oxford University Commonwealth Law Journal* 209.

²⁰Beever (n 1) 101.

and thus Beever has equated *Hedley Byrne* liability with contract only by arguing (insufficiently, given the magnitude of the claim) that contract is actually not like contract; and, (b) more fundamentally, it fails to distinguish at all between intention giving rise to contract-like liability, in which you can be made liable for failure to perform, and negligence-like liability, in which you can only be liable for losses caused by failure to adhere to a standard of care.

To demonstrate the latter point, it is worth considering one of Beever's own examples. Let us assume that

you tell me that you are considering investing in a company. In response, I agree to find out what I can about the company and to provide you with a report. In this report, I tell you that I guarantee that I have accurate information regarding the company's financial position and that in my view you ought to invest. Imagine that I am so confident that I say 'if you invest, I guarantee you will double your money in five years.' But[. . .]the company is in fact in poor shape and[. . .]you suffer significant loss as a result of your subsequent decision to invest.²¹

Beever insists that there would be a *Hedley Byrne* action in this case in respect of my guarantee that the investment 'was a good one.'²² If by this Beever means that *Hedley Byrne* could be used to claim lost profit—i.e. not just loss of the original investment, but failure to double the investment over five years—then he is almost certainly incorrect. Such a guarantee does not exist (and, even if that were the case, it is unlikely that these '*Hedley Byrne*' actions would be permitted to side-step the Statute of Frauds 1677). If, instead, we suppose that it is an *indemnity* against lost

²¹Beever (n 1) 104–105.

²²*ibid.*

profits, then this bears almost no relation to *Hedley Byrne* liability. Rather than the claim being the loss consequent on entering a financial transaction that, *but for the negligent misrepresentation, you would not have entered*,²³ we are instead claiming that we intended that I should be liable for my freely-assumed guarantee that you would make money. Does Beever really mean to suggest that such liability can arise absent reciprocal undertakings or formalities? This would be an extreme departure from the understood law on either tort or contract.

In the alternative—and this is perhaps the more likely interpretation—we could take Beever’s assertion to mean that I have, by my ostensible guarantee, consented to indemnify you for actual loss (negative return on investment), rather than failure to realise expected profits.²⁴ The reasoning, however, is difficult to follow and, inasmuch as it can be followed, is somewhat circular. Beever argues that there must be liability only for the guarantee, because the guarantee manifests the consent. But the liability does not match the explicit terms of the consent—already, then, there must surely be some element of legal imposition here. If I am being made liable for something other than that to which I expressly consented, then it is self-evident that consent does not define the liability.

Further, Beever argues that the obligation extends only to a standard of care in preparing the report, but not to the provision of the report. This, we are left to assume, is because such is the nature of *Hedley Byrne* liability (which, of course,

²³Thus, the damages exist to correct the effect of the wrong, the effect being that you entered a transaction that you would not otherwise have entered. Making good on the failures of that transaction to afford further profit is not consistent with the conceit that you would not have entered the transaction.

²⁴I say ‘the more likely interpretation’ in part because it requires a somewhat less extreme reading of contract law, and also because Beever’s example states that you did actually suffer a loss—albeit, of course, that such a fact does not preclude the former interpretation.

it is). The problem here is that Beever seeks to differentiate *Hedley Byrne* liability from contractual liability by little more than an unsubstantiated appeal to *Hedley Byrne*. It is not clear on what basis we are to differentiate the consent to perform an act, which does not found an obligation, from the consent to perform that act with due care and skill, which does.

I should be clear at this point that I have no objection to the argument that one may not be obliged to undertake a task but, having done so, may then fall under an obligation to perform it well. The argument is that it is not obvious how the existence of an obligation in one instance and the non-existence of the same in another can be explained by appeals to consent, when consent operates equally in each case. Unless, of course, you argue that the difference is down to the operation of *Hedley Byrne*—except you cannot define *Hedley Byrne* liability by using itself as the definition, just as I cannot provide a definition of a cat by using the word ‘cat’. The argument is circular.

Further evidence of the flaw in the reasoning is provided by Beever’s own example of the babysitter:

[...] imagine that I agree to babysit your children while you have an evening out. Coming home, you are astonished to see your sons drunk having helped themselves to a large portion of your liquor cabinet and even more shocked to find me playing strip poker and smoking crack with your daughter. I respond to your amazed expressions by saying ‘What’s the problem? You asked me to babysit your kids. None of us ever said anything about drinking, smoking or playing strip poker. I’ve kept my promise’. My response is ridiculous.²⁵

²⁵Beever (n 1) 106.

And, of course, the response is ridiculous. Except, absent harm, it does not actually generate private law liability (we need not consider the very obvious criminal liability). There is no mention of consideration, here, so we can assume there was no contractual liability (in the accepted sense of contract). And, of course, if there was harm, in no sense could it be described as purely economic. One may assume that it was psychiatric harm or physical harm, instead. Thus, any private law liability that arises can be explained on the basis of normal negligence/duty of care principles, and certainly does not arise merely because I consented to babysit; I would be equally liable had I met the son or daughter in another place and conducted the same activities. To describe my liability as arising by consent in this latter scenario would be tendentious in the extreme. Thus, Beever's example is either of a scenario in which liability *does not* arise, which hardly assists his cause, or it is of a scenario in which consent cannot be said to occasion liability (and here we echo much of the discussion in the previous subsection concerning the relationship between consent to act and consent to specific liability).

1.3. A more limited liability? We have so far argued that Beever's contract model fails on its own terms to distinguish *Hedley Byrne* liability from traditional negligence in that the argument necessitates a conclusion that *all* liability is assumed. We have further argued that it is not clear from Beever's logic why economic loss should be recoverable for a gratuitous promise that a statement was accurate, but not for all other types of gratuitous promise. Further, *Hedley Byrne* liability—for which you can be made liable for failing to take reasonable care but not for failure to perform at all—cannot be explained by Beever's argument except by reference to

Hedley Byrne itself, an approach that seeks to explain the result simply by saying that it was the result.

An alternative argument for basing liability on an assumption of responsibility was advanced by Robert Stevens in *Torts and Rights*.²⁶ The argument is that an assumption of responsibility is a rights-creating event, but need not exist within a contractual analysis. Unlike Beever, Stevens is quick to deny that liability can arise by deemed assumption of responsibility, for a ‘fictional assumption of responsibility is of no practical utility.’²⁷ Somewhat confusingly, Stevens does also argue that rights can be triggered by an ‘objective manifestation of consent’,²⁸ which leads us perilously close to deemed assumption of responsibility. This is especially true if, by ‘objective’, Stevens means to imply that it ‘is not so much that responsibility is assumed as that it is recognised or imposed by the law.’²⁹ However, if we take Stevens’ argument in its most favourable light, in the sense that the objective manifestation of consent requires no more than sufficient evidence to satisfy the court that the defendant did actually consent to the duty of care (and this would seem to accord with his denial of deemed assumption), then this certainly avoids the first of the problems identified in Beever’s model. Stevens argues, for example, that cases such as *White v Jones*³⁰ cannot be explained on the basis of an assumption of responsibility, because the defendant can ‘only be said to be assuming responsibility to take care to the immediate beneficiary’ which, in the case of a solicitor’s contractual promise to his client, is ‘to his client for the client’s benefit, not for the benefit of the beneficiaries.’³¹

²⁶R Stevens, *Torts and Rights* (OUP 2007).

²⁷*ibid* 35–36.

²⁸*ibid* 10–11.

²⁹*Phelps v Hillingdon LBC* [2001] 2 AC 619, 654 (HL) (Lord Slynn).

³⁰[1995] 2 AC 207 (HL).

³¹Stevens (n 26) 178.

This moderated version of assumed responsibility does appear, *prima facie*, to define a unique head of liability: here we have a category of cases in which an obligation to take care has been explicitly assumed absent consideration. Such cases would be outwith the set of contract, and outwith the set of negligence, *inter alia*. Stevens also notes that contract is not—and has never been—the only category of promise having legal effect.³² To this argument he brings, amongst others, *Coggs v Bernard*³³ concerning gratuitous bailment, and *Wilkinson v Coverdale*³⁴ concerning a claim in economic loss on the basis of a negligently effected promise to arrange a fire insurance policy. Michael Bridge has similarly identified these categories of undertaking as those residual categories that were unable to fit within the emerging economic conception of contract in the 19th century.³⁵

As a way of *explaining* the decision in *Hedley Byrne*, this—like Beever’s analysis—is of limited utility. As Andrew Robertson and Julia Wang describe Stevens’ argument, ‘undertakings create rights and correlative obligations that do not and cannot otherwise exist’.³⁶ This does not explain or justify *Hedley Byrne*; what it does is establish a framework of rights in which it is possible for liability for economic loss to exist. On this analysis, their Lordships in *Hedley Byrne* simply created an entirely new right or rights-creating event—which, of course, would render the decision far more controversial than perhaps Stevens recognised. If consistent internal ordering of the law is our objective, then we should be wary of analyses predicated on the creation of entirely new rights to justify a single decision.

³²*ibid* 33.

³³(1703) 2 Ld Raym 909, 92 ER 107 (QB).

³⁴(1793) 1 Esp 75, 170 ER 284.

³⁵M Bridge, ‘The Overlap of Tort and Contract’ (1982) 27 McGill LJ 872, 881–884.

³⁶Robertson and Wang (n 5) 56.

David Campbell similarly recognises that the House of Lords created what was in essence a new right, as the claimant has obtained the benefit of a new duty, whilst ‘nothing is said about anything the claimant has to do to obtain the benefit of that duty.’³⁷ Campbell argues—not entirely unconvincingly—that there is no reason to suppose that the law of contract had failed in *Hedley Byrne*: ‘it would be preposterous to maintain that the claimants in[...][the typical *Hedley Byrne* case are ‘vulnerable’ or anything other than contractually competent.’³⁸ Indemnification should be borne of contract—that is to say, it should form part of the bargain—because reliance by the claimant creates a risk; if the claimant wishes to be indemnified for their reliance, to pass on the risk to the statement-maker, then the claimant should pay for it. To receive such a benefit without having to bargain for it, so Campbell argues, is ‘economically irrational and, what is the same thing, morally unjust’.³⁹

This is not, it shall be noted, the position assumed in this thesis. Campbell’s argument is certainly important: the moral justification for contract law lies in the respect it affords to free and knowing consent⁴⁰ (and, as Campbell himself notes in denying the merits of the ‘objective’ assumption of responsibility theses, ‘if one decouples “voluntary” and “assumption”, one decouples “assumption” from its legitimate meaning in a way of which only Humpty Dumpty could approve’⁴¹). However, the argument supposes that there are no instances wherein it would be reasonable to rely unquestioningly on the representations of another. For example, it is one

³⁷D Campbell, ‘What Mischief does *Hedley Byrne v Heller* Correct?’ in K Barker, R Grantham and W Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford, Hart Publishing 2015) 117.

³⁸*ibid* 125.

³⁹*ibid* 123.

⁴⁰A matter that shall be addressed in greater detail in the following chapter.

⁴¹*ibid* 119.

thing to request contractual arrangements where you are aware that there is a risk the representation may be incorrect, or where you are aware that the losses resulting from incorrect information would be significant. It would be quite another if you were reasonably and completely unaware of the risk or the extent of possible losses. If the statement on which you were relying was silence (non-statement) as to the existence of a risk—such as may be the case between a negligent surgeon and a patient—then on what basis would you decide to contract? Even if you did, how much would you pay for the indemnity? Remember, in this context you don't know what the risks are, and you can't be expected to know what the risks are.⁴² What if, to take another example, the statement has already been made? If it were reasonable to rely on such a statement—and I concede it may not always be—then are we to agree an indemnity after the fact? Who would assume such liability if they didn't have to, or if it didn't form part of a broader set of negotiations (in which case it is inconceivable that the representation would not become a term of the resulting contract)?

It is sufficient to conclude the first part of this chapter by noting that the assumption of responsibility model is of no practical utility, and the inquiry essentially collapses into one of negligence. The argument that we voluntarily assume liability for tasks simply by virtue of voluntarily undertaking those tasks is meaningless: as to liability for what and to whom, it tells us nothing. As to standard of care, it tells us nothing.

⁴²We know, of course, that silence does not constitute a misrepresentation (see *Keates v Lord Cadogan* (1851) 10 CB 591), but there is no reason to suppose that it cannot and should not constitute a negligent misstatement.

2. The Justification for *Hedley Byrne* Liability

The previous chapters have considered the value of a corrective justice analysis of private law, and considered a framework of rights in relation to negligence. It has also been argued that, whilst a rights-based analysis necessitates the identification of a specific right or realm of rights that are affected by negligent misstatements, the right on which the claimant must rely is not one that arises *quasi ex contractu* by an assumed responsibility. We turn, now, to the right upon which the claimant must rely, and in turn provide a justification for the *Hedley Byrne* claim.

Rather than tackling negligent misstatement directly, it is necessary to turn first to unjust enrichment. Of course, unjust enrichment, being concerned with the adjustment of gains, cannot explain liability for consequential loss.⁴³ However, unjust enrichment scholarship necessarily considers in detail the basis for transactions (or the lack thereof), and it will become apparent that the rights-based analysis in tort has failed to consider sufficiently or at all the effect of misstatements upon the subsequent transactions, and this is largely the result of our tendency to focus the analysis on blameworthy action, or wrongs, rather than on rights simpliciter.

This chapter will thus follow the schema of negligence as outlined in the previous part: first we must recognise in what way a right has been infringed, and secondly there must be a reason why the defendant can be particularised as a legally relevant cause of that infringement.

2.1. The dispossession of the right.

2.1.1. *Deficient consent and the fatal vitium.* The central proposition of unjust enrichment scholarship is that enrichments that lack legal basis must be given up;

⁴³P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 178.

either an enrichment can be explained in legal terms (by contract, deed, gift, *etc*), or it cannot.⁴⁴ A restitutionary right to the unjust gain immediately follows the latter scenario.⁴⁵

This, of course, is the explanatory basis for the legal effect of misrepresentation. A misrepresentation is not a *wrong*, in the sense that negligence or intentional wrongdoing by the defendant generates a right that the claimant may claim for subsequent loss; rather, the effect of a misrepresentation is that it renders a contract voidable because the intention or consent—upon which the contractual negotiations (and allocations of risk *etc*) were based—was defective. The claimant, assuming he or she does not acquiesce (and instead sue for breach of contract), is arguing in essence that the misrepresentation had imparted a fatal vitium in the contract, undermining its very existence.⁴⁶ Contract is the ultimate manifestation of consent, so it is axiomatic that defective or deficient consent cannot found a contract. Thus, enrichments dependant on the existence of a contract for their explanation are rendered unjust in the face of non-existence. The claimant, on the other hand, acquires an immediate right to the value of the enrichment at the point of the defendant's receipt.⁴⁷ And it *is* an immediate right: the fact that the contract is voidable should not disguise this fact, for it is voidable *ab initio*. It is this very voidability 'which shows that

⁴⁴It is interesting to note that the French contractual element of *cause*—a particularly broad version of consideration—includes 'donative intent': where such intent is lacking, then, as with English law, a gift will fail. See eg, C Valcke, 'Contractual Interpretation at Common and Civil Law: An Exercise in Comparative Legal Rhetoric' in J W Neyers, R Bronaugh and S G A Pitel (eds), *Exploring Contract Law* (Oxford, Hart Publishing 2009) 84.

⁴⁵*Kleinwort Benson v Lincoln CC* [1999] 2 AC 349, 408 (HL) (Lord Hope of Craighead).

⁴⁶Such an interpretation of the effect of misrepresentation is widely accepted in the common law: *Jeffcoat v United States* (1998) 551 A2d 1301, 1304 (DC), 'To be valid, consent must be informed and not the product of trickery, fraud, or misrepresentation'; *United States v Sheard* (1972) 473 F2d 139, 152 (DC Cir), 'Moreover, under elementary principles of law consent obtained by misrepresentation is no consent at all.'

⁴⁷*Kleinwort Benson v Lincoln CC* [1999] 2 AC 349, 386, 409 (HL).

the basis of the enrichment has failed.⁴⁸ In this sense, to describe the contract as voidable is perhaps misleading: the contract can be affirmed by the claimant, but in the absence of such affirmation it lacks legal basis, and does so *ab initio*.⁴⁹

For the avoidance of doubt, this is not the same as subsequent failure of consideration. The argument is not that a valid contract existed but that the agreed consideration was not forthcoming—that is the realm of contractual right and remedy. Instead, the conceit is that a contract cannot have come into existence, because it was predicated on consent that turned out to have been illusory, predicated as it was on false information. The adjustment of gains following a claim in misrepresentation is a creature of unjust enrichment, not contract.

The reasoning is not limited to misrepresentation. Courts will refuse to recognise contracts brought about through duress, for example, on the basis that the assent or undertaking was not truly voluntary.⁵⁰ Even statute will strike out terms of certain contracts if they cannot reasonably be said to be voluntary: schedule 2 of UCTA 1977 contains guidelines to determine when an exclusion clause in a contract will be reasonable, and includes, among others:

- (a) the strength of the bargaining positions of the parties relative to each other[. . .];

⁴⁸Birks (n 1) 126.

⁴⁹On a given set of facts, it may of course be the case that restitution is not possible, or there may exist a bar to rescission (although if a bar such as affirmation is relevant, then the entire basis of the alleged nullifying effect of the misrepresentation is negated anyway). Nonetheless, this is the starting point—the ‘pure’ position, for want of a better term.

⁵⁰C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass., Harvard University Press 1981) 93.

- (b) whether the customer received an inducement to agree to the term, or[. ..]had the opportunity of entering into a similar contract with other persons, but without having a similar term;
- (c) whether the customer knew, or ought reasonably to have known, of the existence and extent of the term[. .].

Each of the above relates directly to the validity of the consent and the extent to which consent can be viewed as freely given. (It is perhaps worth noting, in passing, that the evident privilege afforded to free and knowing consent in contract further undermines Beever's contract model of misstatement, which states that certain obligations may be deemed to have been assumed).

Similarly, doctrinal consistency would seem to demand that unilateral mistakes, as with misrepresentations, 'can operate to prevent the consensus of the parties'.⁵¹ If we are happy to concede that consent can be vitiated where the consent was induced by false information from the contracting party, then there is little reason to suppose that consent is not similarly vitiated by false information from other sources. Consider this example:

I buy from you a kumquat, supposing it to be a tiny satsuma. In scenario A, my supposition was formed because that is what you told me it was and, absent reasonable means of testing it without either destroying the fruit or engaging the services of a scientist, I believe you. In scenario B, I am a jejune simpleton who, being ignorant of such exotica as kumquats, merely gave myself to the unquestioned supposition that the fruit was a satsuma.

⁵¹C MacMillan, *Mistakes in Contract Law* (Oxford, Hart Publishing 2010) 207 (albeit that MacMillan proceeds to explain why unilateral mistake rarely founds a claim).

Now, we have already said that misrepresentation is not a wrong: we cannot differentiate the two scenarios on the basis that you have done something vaguely reprehensible in A and nothing at all wrong in B. Indeed, as to the existence of a contract, the two scenarios—misrepresentation on the one hand, and unilateral mistake on the other—should be indistinguishable. A pure manifestation of Pothier-esque will theory would almost certainly recognise in each case that there is no consensus, and thus no contract: ‘the agreement will be void, because my error destroys my consent’.⁵² And, whilst they may not bear out the ideal in practice, even modern French jurists cling to the notion that such subjective intent—*l’autonomie de la volonté*—fosters ‘the consecrating purpose of contract law.’⁵³

2.1.2. *Equality between the parties.* However, it will be recalled from the first chapter that one of the fundamental tenets of corrective justice theory is that the parties be viewed as equals. In scenario B above, you would be entitled to assume that the contract was complete and not voidable. You may indeed rely on this fact, and use the profit to purchase further fruit. Whilst we may accept that my consent was not pure, and thus be tempted to regard the transaction as void, such a strict doctrinal interpretation privileges the consent of the careless over the genuine reliance of the innocent.

Some may argue that we have moved away from corrective justice entirely in punishing wrongdoing rather than respecting rights. This would be incorrect. It is not so much that I am being punished for some wrong, but rather that the effect of rescission would be to punish you despite your having acted entirely properly

⁵²R J Pothier, *A Treatise on the Law of Obligations or Contracts*, trs W D Evans (London, A Strahan 1806) pt I, ch I, s I, Art III, §1, para 18. Similarly, at para 17, ‘agreements can only be formed by the consent of the parties, and there can be no consent where the parties are in error’.

⁵³Valcke (n 44) 87.

(or at least not unreasonably). There is clearly a point in the purchase process at which I satisfy myself that the item I am considering purchasing is what I think it is. Beyond that, and absent any duty on your part or misrepresentations, I implicitly assume the risk that the item may not be what I think it is.⁵⁴ The law does not exist to provide a remedy for carelessness in the face of otherwise reasonable behaviour; if it did, it would be protecting my essentially waived right over and above your right, and thus we could not regard each other as equally situated before the law. The balance of the relationship only begins to shift when your behaviour can be regarded as somehow unacceptable when compared with my carelessness (hence the lower causative standard in fraudulent misrepresentation and duress than in innocent misrepresentation and economic duress).⁵⁵ To demonstrate the point, the same is true in the converse situation: the claimant's contributory negligence is irrelevant in the face of the defendant's deceit.⁵⁶

2.1.3. *Application in Hedley Byrne liability.* How, then, does this relate to *Hedley Byrne* liability? In situations where we have entered into contracts with third parties into which, absent reliance on a second party's negligently inaccurate statement, we would not have entered, we find ourselves bound to a contract despite our not having truly consented to it. This is a violation of our right, at the very least our right to the money with which we will have to part. As discussed above, this is a transfer that, had we not enforced the contract, would lack a legal explanation (for the explanation of consent is not available). The only way we can explain it is by the enforcement of a

⁵⁴J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (29th edn, OUP 2010) 256.

⁵⁵See G Spark, *Vitiating of Contracts: International Contractual Principles and English Law* (Cambridge University Press 2013) 20–21.

⁵⁶*Alliance & Leicester Building Society Ltd v Edgestop Ltd* [1993] 1 WLR 1462, 1477E (Mummery J).

contract that protects the contractual rights of the *more innocent* party. We should, of course, be wary of employing vague terms such as ‘more innocent’: the logic of the section above was that I should not be able to disadvantage your reasonable reliance on my promise by holding myself to a lower standard. However, where my decision to purchase was reasonable on the basis of information upon which I reasonably relied—that is to say, I had not knowingly assumed the risk that the relevant third party information was incorrect—it is not so obvious that I am being held to a lower standard than you. So, if I had been told by a scientist that the fruit was a satsuma (albeit that it wasn’t) and I purchased the fruit on that basis, then it is less clear at which point I assumed a risk that I was purchasing something other than I had intended. However, despite this fact, the contract and its congeners will be enforced. And so we must conclude that I have been forced to transfer property otherwise than in accordance with my true consent.

There is, then, nothing particularly troublesome about regarding this situation as an interference with my right. Neither our contrived satsuma scenario nor *Hedley Byrne* present particular difficulty in this respect because the argument is essentially binary: had the correct information been presented, the claimant would not have entered into a contract with a third party; it was not, so they did. The claim is therefore losses that arise as a result of that reliance.

It is worth considering briefly the position on reliance assumed by Lord Steyn in *Williams v Natural Life Health Foods Ltd and another*.⁵⁷ His Lordship is correct to note that the claimant’s reliance needs to have been reasonable (of course, reliance *in fact* does establish causation: as noted above, if I rely on your statement in no way

⁵⁷[1998] 2 All ER 577, 584B (Lord Steyn).

at all, then my consent has not been vitiated by your actions). However, inasmuch as this part of his speech deals with causation, by asserting that causation is established through *reasonable* reliance, His Lordship presents a misleadingly incomplete picture. As noted above, the question of reasonableness relates to equality between the parties, and less directly to causation.

That being said, Lord Steyn did articulate (albeit tacitly) an important truth about the relationship between reasonable reliance and the element of wrongdoing (albeit that he argued wrongdoing was predicated on an assumption of responsibility—which is, of course, refuted). It is difficult to imagine a relationship of sufficient proximity such that we can regard the defendant to have been under a duty of care where reliance was nonetheless unreasonable. Thus, the reasonableness of the reliance relates a fundamental element of the duty of care. Lord Steyn does not say this directly, of course—the language of assumption of responsibility muddies such clarity—but, as we shall see, the reasoning is not dissimilar.

At 583G, Lord Steyn cites with approval a case from the Canadian Supreme Court—*Edgeworth Construction Ltd v M D Lea & Associates Ltd*⁵⁸—in which La Forest J argued that

[The respondents] would expect that the appellant would place reliance on their firm's pocketbook and not theirs for indemnification[. . .]. Looked at the other way, the appellant could not reasonably rely for indemnification on the individual engineers[. . .]. It would seem quite unrealistic, as my colleague observes, to hold that the mere presence of an individual

⁵⁸[1993] 3 SCR 206.

engineer's seal was sufficient indication of personal reliance (or for that matter voluntary assumption of risk).⁵⁹

The reliance and the assumption here seem to be closely related. The respondent engineers reasonably assumed that the appellant's reliance would be as to the respondents' employer, and, further, not as to the respondents themselves in their personal capacity. It is presented as reflexively true that, both beliefs being reasonable, any reliance on the respondents would therefore not be reasonable. Therefore—and this is the crucial point—there is an important symbiosis between what we say about duty/proximity and what we say about reasonable reliance, and this goes beyond dispossession of the right. Where reliance is not reasonable, it becomes more difficult to say with any confidence that there is a clear pathway to harm *ex ante*.

Conclusion

What has been shown is that corrective justice can survive the repudiation of the assumption of responsibility test. The analysis is still grounded in rights. As with normal negligence claims, the claim in negligent misstatement can be explained on the basis of an infringed right whereby the doer of harm was causally relevant by being in a proximate relationship with the claimant and being negligent in the provision of information. The assumption of responsibility analysis adds nothing to this. To be of any practical utility, it would have to permit implied assumptions (rather than actual, quasi-contractual assumptions), and these implied assumptions can only be determined by reference to the same considerations as for the proximity test. In any case, the contractual analysis necessarily collapses back into one of negligence: absent clear terms, we must imply terms of reasonable care and skill, and ask what

⁵⁹ibid 212.

those terms might be. And we don't really lose anything by repudiating assumption language: we have seen that recovery for economic loss can largely be explained by reference to rights—and not rights that arose by an assumption. One of the most important arguments that has featured in different guises in this thesis is that there is no right to information: we corrupt the clear and reasonable understanding of rights if we denude them of their potency by pretending that they need protection by some further 'right' to information (and let us not forget that any such right, even if it did exist, is not actionable in any meaningful sense until we suffer some other loss). Our conclusion, then, is that we have stepped over party lines: the rights-based analyses must eschew assumption of responsibility and recognise that negligent misstatement, despite its causal complexities, is not fundamentally at odds with normal negligence analysis.

Conclusion

THE UNIFYING THEME IN THIS thesis has been a search for doctrinal consistency and simplicity. In defining liability—in describing what makes one person liable to another—we need to find a definition that encompasses that we wish to encompass and eschews that which is beyond those bounds. We should be wary of explaining difficult cases with analyses predicated on the creation of a new right created solely to justify that single decision. One of the great triumphs of corrective justice theory is that it locates the claim in an infringed right—rather than by reference to abstract duties—and vindicates that right through a remedy that acts as a continuation of that right. There is no right to information—we know we cannot claim for missing or misleading information absent some other harm (such as loss or breach of contract)—and, further, there is no need to locate a further right to information: such is the importance of consent or intention in determining the extent to which we waive our rights, the missing or misleading information means that we have not waived our rights, because our consent was vitiated, and thus cannot be said to have permitted whatever injury befalls us. Not all failures to provide information are negligent, of course, and the burden of the injury must not be allowed to fall on blameless parties lest we fall again into the trap of regarding the parties as something other than equal. Framing the liability in terms of rights to information

or quasi-contractual rights to information through an assumption of responsibility does nothing more than duplicate the hypothesis or, worse, defeat it.

It is hoped that, far from being a mere paean to logical consistency, this thesis and some of the cases highlighted herein demonstrate the importance of careful taxonomy. We have seen some of the problems that arise from attempts to do justice that do not consider broader taxonomic implication: in *Dean v Allin & Watts*,⁶⁰ we saw that the result of the *White v Jones*⁶¹ reasoning was that a solicitor must owe a duty of care in respect of a party with whose interests he was irreconcilably in conflict. In *ABC v St George's Healthcare NHS Trust & Ors*,⁶² the court appeared to sanction a patient's right to be informed of potential risks by doctors with whom she was in no (other) legal relationship, despite going against (without due consideration) a considerable amount of case law that would seem to suggest that such a duty did not exist; where will this leave the duty of rescuers? So there are real-life problems that can arise from careless expansion of liability, no matter how laudable the desire for practical justice.

But this thesis is about more than careful taxonomy. There is a considerable amount of judicial work that needs to be done in increasing our understanding of the proximity requirement as it relates to negligent misstatement. Witting has written at length on the proximity requirement, and this thesis did not challenge his finding that the relative positioning of the parties—the pathway to harm—is the foremost test in establishing a duty of care. However, for so long as the courts focus on assumption of responsibility reasoning, the ability to add detail and refinement to this reasoning

⁶⁰2 Lloyd's Rep 249 (CA).

⁶¹[1995] UKHL 5; [1995] 2 AC 207.

⁶²[2017] EWCA Civ 336.

is severely curtailed. Many of the arguments about implied assumptions amount to much the same thing as those relating to proximity (revealing, of course, the pointlessness of the endeavour), but inevitably they will do so with less focus and with less consistency. Assumption of responsibility arguments add nothing to our understanding—indeed, they obfuscate the reasoning—and so must be eschewed.

Rights-based theorists have, for the most part, been at pains to fit negligent misstatement theories within a framework of rights, but their argument that this necessitates quasi-contractual models outwith normal negligence is simply not true. If we are willing to accept that normal negligence can be predicated on the wrongful infringement of a right (recall the necessity that the defendant be morally particularised amongst the many causal elements), then it makes little sense to pretend that such an analysis cannot work for misstatement. Equally—and this thesis did not develop this argument particularly—it may hence be the case that *Hedley Byrne* reasoning is used to provide remedies for losses that were entirely nominal and not based in a right (be it proprietary or otherwise) at all. In such a situation, corrective justice theorists are best placed to argue against the expansion of liability by focussing the argument on a prior right rather than pretending that some agreement or duty on the part of the defendant has created a reflexive right on the part of the claimant.

The purpose of this thesis was to demonstrate, *inter alia*, that corrective justice necessitated a reading of negligent misstatement absent the assumption of responsibility thesis. It may be a limited aim, but if it can help to move the discussion beyond the confines of the proximity/assumption debate, then we permit ourselves the opportunity to begin to understand liability for misstatements. Both the academy and

the judiciary need to define the proximity relationship, which will inevitably happen over time as cases emerge and are analysed under proximity. But in order to do this, to do this well, we must be wary of theories that rely on multiple implications. We must be wary of remedies that do not rectify the right infringed. Indeed, we must be wary of denuding the rights discourse of its potency by talking of such things as 'rights to information' when it is clear that no claim lies for its infringement. We must be wary of poor taxonomy.

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