THE CONVERGENCE OF TORT AND CONTRACT: A RETURN TO MORE VENERABLE WISDOM?

John P.S. McLaren*
Victoria

This article takes as its point of departure the recent convergence of tort and contract in the Common Law. The author argues that this movement represents a return to more generalized notions of civil obligation which were accepted before the nineteenth century, especially in the context of relationships in which reliance was a crucial element in founding liability. This tradition tended to be submerged with the attempt of judges during the nineteenth century to reconstruct and limit the ambit of contract theory to accommodate the executory contract, and in the myopic view of the history of the Common Law of contracts entertained by some of their twentieth century successors. It has reemerged with the greater recognition by late twentieth century courts of the extent to which the purchasers and recipients of goods and service in our society rely on the skill, competence and good faith of those who provide them.

Dans cet article l'auteur prend comme point de départ le rapprochement récent du droit des contrats et du droit des délits. Selon lui ce mouvement représente le retour à des notions plus généralisées d'obligation civile telles qu'on les concevait avant le dix-neuvième siècle, en particulier quand il s'agissait de rapports où la responsabilité dépendait surtout de ce à quoi se fiaient les parties. Quand, au dix-neuvième siècle, les juges tentèrent de définir et de délimiter la théorie des contrats pour faire face au contrat exécutoire et que certains de leurs successeurs au vingtième siècle donnèrent une interprétation extrêmement étroite de l'histoire de la common law, cette tradition tendit à disparaître. Elle a réapparu à la fin du vingtième siècle quand les tribunaux se sont plus facilement ouverts à l'idée que les personnes qui, dans notre société, achètent et reçoivent des marchandises ou des services, se fient au savoir-faire, à la compétence et à l'honnêteté de ceux qui les leur fournissent.

An appreciation of the historical development of civil liability in the Common Law is essential to an understanding of the modern relationship between contract and tort, and of the debate which currently surrounds that relationship. Only with a historical perspective does the realization emerge that the divergence between these two forms of liability, which seemed so entrenched until recently, was the product of a process of judicial reasoning which began only in the mid-nineteenth century and was in no way reflective of the earlier history of their relationship. In turn a grasp of the historical evolution of these actions may remove

* John P.S. McLaren, Lansdowne Professor of Law, Faculty of Law, University of Victoria, Victoria, British Columbia.

some of the discomfort which has been expressed at the contemporary convergence of the two areas of liability.

The medieval common lawyer would not have recognized the terms tort and contract in the general classificatory sense in which we use them.[1] The development of the substantive law depended during the medieval period and for some time thereafter not upon the scholarly elaboration of principle and concept, but upon the pragmatic response of royal bureaucrats to pressure brought by litigants seeking redress in the royal courts. The normal, but not exclusive, route to justice in the King's courts was by a writ, a form devised by a group of civil servants known as Chancery clerks. Apart from direct royal initiative in the form of legislation, actionability depended upon whether an existing form embraced the facts of the plaintiff's case; could be expanded to accommodate the facts of the particular claim; or whether in the absence of either a clerk was ready to use his creativity in devising a new one. The medieval configuration of what we characterize as contracts and torts comprised a series of largely independent actions which had tortious or contractual features, or elements of both. Moreover, some of these actions even transcended those boundaries because they also possessed criminal and proprietary aspects. The conceptualization with which we are familiar in the modern law, for example in elements such as offer and acceptance, consideration, negligence and the like, were either non-existent or only hazily perceived.

The earliest forerunners of the modern contract action were the actions in *covenant* which involved a formal undertaking by the promisor to answer in damages in the future for his failure to carry through his promise,[2] and the action in *debt*, a recuperatory action, which embraced both formal and informal undertakings by debtors to pay specific amounts of money to creditors.[3] Despite the ostensibly limited nature of the arrangements which underlay these actions, they were less restricted in practice. The action in debt, in particular, supported the device of the mutual conditioned bond in which each party undertook to pay a penalty to the other, if he failed to carry through his undertaking in accordance with the terms of the bond. Simpson reveals that this device was widely used in commercial relations, and that the bond was in fact the paradigm commercial contract of the era.[4] It seemed to satisfy the needs of the medieval commercial community.

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[1] On the writ system in general, see J.H. Baker, An Introduction to English Legal History (2nd ed., 1979), pp. 49-52. On the formulary system in contract, see A.W.B. Simpson, A History of the Common Law of Contract (1975), pp. 5-6.

[2] Baker, *ibid.*, pp. 264-266; S.F.C. Milsom, Historical Foundations of the Common Law (2nd ed., 1981), pp. 246-250.

[3] Baker, *ibid.*, pp. 266-271; Milsom, *ibid.*, pp. 250-262.

[4] Simpson, *op. cit.*, footnote 1, pp. 112-113.

The weaknesses of both actions flowed less from the nature of the substantive undertakings and more from their evidentiary or procedural requirements. The action for covenant required the formality of a deed under seal, which excluded a wide range of parole and informal contracts.[5] These were, it is true, actionable in the local courts. However, this avenue of redress became less attractive during the later medieval period as the status of these courts waned, and in particular as inflation encroached upon the forty shilling limit on their jurisdiction.[6] With debt the problem was the normal mode of proof which was wager of law or compurgation.[7] This method of testing the veracity and reputation of the defendant by collecting a group of individuals ready to swear to them, which had merit in a context in which the compurgators as fellow members of the community knew the defendant, had in the course of time been corrupted by the substitution of paid oath sayers who were pulled in from the streets.[8] Not surprisingly the deterioration of this form of proof meant that the plaintiffs were far more attracted to the alternative of jury trial. An additional drawback with the action for debt was that it only lay for liquidated damages, and therefore provided no redress in situations in which the parties lacked a prior appreciation of the value of the undertaking.[9]

In the case of the bond, challenges were increasingly made to the penal character of the remedy for its breach, in particular by the grant of relief against forfeiture by the Court of Chancery.[10] This development reflected the growing opinion that the remedies for broken undertakings should be compensatory rather than penal in nature.[11]

With these limitations there were inherent obstacles to further expansion of the writs and, therefore, little prospect of either the Chancery clerks or the royal courts utilizing them to develop a more general notion of contract. The impasse was to be remedied by developments in what we would now call tort law.

The seminal action in tort in the early common law was *trespass*. This writ which seems to have developed as a means of distinguishing a range of more modest offences from the serious felonies had both a criminal and a civil side.[12] A trespass could be prosecuted as a Plea of the Crown, or form the basis of a civil action for damages. That there was no clear division between these elements is shown by the fact that

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[5] Baker, *op. cit.*, footnote 1, pp. 265-266; Milsom, *op. cit.*, footnote 2, pp. 247-249.

[6] Milsom, *ibid.*, p. 246.

[7] Simpson, *op. cit.*, footnote 1, pp. 137-138.

[8] Milsom, *op. cit.*, footnote 2, p. 246.

[9] Baker, *op. cit.*, footnote 1, p. 271.

[10] Simpson, *ibid.*, pp. 118-122.

[11] Simpson, *ibid.*, pp. 123-125.

[12] Baker, *op. cit.*, footnote 1, pp. 413-414; Milson, *op. cit.*, footnote 2, p. 285.

one found guilty of trespass in a civil action could not only be mulcted in damages, but also compelled to pay a fine to the King.

Originally the concern of the royal courts with trespass was confined to those transgressions which were seen as contravening or threatening the King's peace, and which involved the use of force to interfere with the person, chattels or land of the plaintiff. By definition the action covered positive acts of a disruptive or violent nature. Unlike the writs mentioned earlier, which were designed to put right a breach of a promise or undertaking through specific recovery or performance, the trespass writs were developed to compel a wrongdoer to *compensate* a victim for the adverse effects of injurious conduct which could no longer be put right.[13]

Transgressions or wrongs which lacked the distinctive features of disruption or violence had for long been addressed in the county and local courts. In the fourteenth century, however, in response to greater pressure from litigants and the willingness of the Chancery clerks to issue writs the royal courts began hearing trespass cases which lacked both the elements of a disturbance of the King's peace and violence towards the plaintiff, but did involve conduct on the part of the defendant in the context of carrying out an undertaking to provide some service to the plaintiff which caused harm to the latter or to his property.[14] Thus, in 1348, in the celebrated *Humber Ferryman*'s case[15] the action in trespass was held to be available in a suit by the owner of a mare which had perished by drowning because the defendant ferryman had overloaded his boat. The incident was hardly one to concern the King. Moreover, except in a very indirect sense, there was no element of violence involved.

This attempt to expand the application of trespass to non-violent wrongs was short-lived, presumably because there was a limit to what the courts would countenance in the way of dishonesty in pleading.[16] The solution was for the courts to recognize a special form of trespass writ in which, rather than alleging a breach of the King's peace and trespass by force and arms, the plaintiff was allowed to set out the details of his complaint, in other words his case. The case of *Waldon* v. *Marshall*[17] in 1370 is instructive in this regard. In that case the plaintiff alleged that the defendant, a veterinarian, had undertaken to cure his horse, but through his negligence had caused the horse to die. The first

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[13] Simpson, *op. cit.*, footnote 1, p. 200.

[14] Milsom, *op. cit.*, footnote 2, pp. 288-289.

[15] More correctly described as *Bukton* v. *Townsend* (1348), Lib. Ass. 22 ed., p. 41; translated in Simpson, *op. cit.*, footnote 1, pp. 623-624.

[16] Milsom, *op. cit.*, footnote 2, pp. 289-290; Simpson, *ibid.*, pp. 202-203.

[17] (1370), Y.B. Mich., 43 Ed., III, f. 33, pl. 38; translated in C.M.S. Fifoot, History and Sources of the Common Law (1949), p. 81.

line of argument used by counsel for the defence was that the covenant was the only appropriate action here. On the facts its invocation was impossible because there was no deed. His second line of attack was that the appropriate action was trespass, because the veterinarian had killed the horse. Counsel for the plaintiff, who clearly recognized the difficulties in extending trespass to this type of case, argued that the only way to proceed was with a special writ according to the case. In the result the writ of trespass on the case was adjuged by the court to be good in the circumstances. The propriety of utilizing this action in situations which involved bungled undertakings was affirmed in other factual contexts, for example, the conduct of a doctor who negligently treated a patient,[18] and the work of a farrier who lamed a horse which had been committed to his charge.[19]

The new action was, by its very nature, inherently flexible. As Simpson[20] has observed:

> Instead of rehearsing what the defendant had done, adding that he did it forcibly and against peace, the plaintiff was required to substantiate his claim by including in his writ special matter which showed that the defendant had done wrong.

The result was that a wide range of complaints formerly outside the purview of the royal courts were now addressed by the King's judges.

The action on the case had an interesting hybrid quality to it. Insofar as it emphasized the element of wrongdoing, it possessed a distinctively tortious character. However, as the facts of the earliest cases suggest, an important feature of actionability was the existence of a pre-existing relationship between the parties, and the assumption of a duty or undertaking by the defendant towards the plaintiff, upon which the latter relied. As in the case of the veterinarian who negligently treated the horse, liability flowed not only from the fact that he had acted carelessly, but also from the fact that he had failed to carry through an undertaking to treat the horse carefully. The same was true of the smith. In the case of the ferryman the obligation resulted not from the agreement between the parties, but from the special status of the defendant who was charged on pain of penalty to provide the service of river transport. In essence the plaintiff's complaint was as much that the defendant had not done what he ought to have done, as it was that he had done what he ought not to have done.[21] In the parlance of the modern lawyer the defendant had breached a duty, whether arising from an under-

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[18] *The Surgeon's Case* (1375), Y.B. Hil., 48 Ed. III, f. 6, pl. 11; translated in Fifoot, *ibid.*, pp. 82-83.

[19] *The Farrier's Case* (1373), Y.B. Trin., 46 Ed. III, f. 19, pl. 19; translated in Fifoot, *ibid.*, pp. 81-82.

[20] Simpson, *op. cit.*, footnote 1, p. 203.

[21] *Ibid.*, p. 204.

taking or an agreement, or from a more general legal responsibility imposed on him.[22]

In the earliest period of the application of the action on the case (the mid to late fourteenth century), the pre-existing transaction was mentioned but not emphasized.[23] To have done so would have been to have encouraged the defence to argue that covenant and not case was the appropriate action. However, with the gradual acceptance of case as a separate action in its own right, the element of an assumption of responsibility or a promise by the defendant became more evident. The earliest allegation of an assumpsit came in 1387 in a case brought against a leech who, it was alleged, undertook (*assumpsiset*) in return for payment to cure the plaintiff of ringworm.[24] Thereafter, assumpsit came to be used commonly in such actions. It also became settled that the method of trial in these cases was by jury, rather than the older and by then increasingly anomalous wager of law.[25]

Assumpsit in its original incarnation was then a mixed action which depended upon the existence of damage or injury flowing from a positive act on the part of the defendant (tort) in the context of an undertaking to take care of the plaintiff or his chattels (contract). The cases normally involved a defendant who exercised a skill or craft, held himself out as such, or who provided commercial services. Moreover, usually the defendant had been paid or was entitled to remuneration for his services.

Although the lawyers of the fourteenth and fifteenth centuries were not as troubled as their modern counterparts by theoretical distinctions between contract and tort, they were faced with pragmatic questions in individual cases of the relationship between the two basic elements.[26] For example, was it essential to an action on the case for professional negligence that an assumpsit be alleged, or might the responsibility exist by operation of law? Furthermore, what was the link between assumpsit and remuneration? Obviously there were two ways in which the position of defendants in these cases could be viewed. For example, in the case of a doctor the situation could be characterized as one in which the transaction and the undertaking by the doctor under that agreement were crucial; alternatively, it could be alleged that the source of the doctor's

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[22] As to the relative importance of the two sources of obligation Simpson, (*ibid.*, pp. 206-207) suggests that, while there were examples of duty arising by virtue of general law, the innkeeper's responsibility under the general custom of the realm being the primary example, in most of the early cases the action on the case flowed from an informal transaction between the parties made prior to the defendant's "default".

[23] Simpson, *ibid.*, pp. 207-210.

[24] *Skyrne* v. *Butolf* (1387), Y.B. 77 Ric. II (A.S.), p. 223.

[25] Simpson, *op. cit.*, footnote 1, pp. 219-220.

[26] Simpson, *ibid.*, pp. 227-229.

obligation was a general duty of care under law which he owed in treating patients. Although it has been argued by older generations of legal historians that there was already by this time a clear conception in the law of a general theory of legal responsibility owed to others,[27] more recent writers like Simpson doubt this.[28] It is of course recognized that there were certain functions in society, such as that of the innkeeper and common carrier (often described as the common callings), in which legal obligation and responsibility flowed from the law rather than from any specific undertaking. However, the most recent wisdom is that these functions were so diverse in character and in the origin of the obligation that it is impossible to erect a general underlying principle. Simpson in particular argues that all that can be claimed is that in the case of those with professional skills (artificers) the skill was relevant to both the issue of legal responsibility, and to the standard of conduct to be expected of them.[29]

While the question of whether the basis of liability was the transaction or the wrong was of some practical importance in cases involving pleading (was *non assumpsit* or *non culpabilis* the correct plea for the defendant?) or jurisdiction (what was the appropriate venue when the undertaking was made in one county, and the misfeasance occurred in another?) the issue was not seen, then, as it would be today, as a contract/tort distinction. Despite the fact that in so many cases the context was a transaction there was no doubt entertained that the action on the case was one for a wrong. As Simpson argues, "the question raised was internal to the law of wrongs or torts".[30] The courts refused to be drawn into giving a definite answer of whether the basis of liability was the transaction or the fault. Both were given emphasis, and flexibility was thereby achieved both in the matter of pleading and jurisdiction.[31]

The issue of whether the remuneration was a necessary adjunct of assumpsit was somewhat more problematic.[32] Reference to remuneration for service, either actual or potential, was almost always referred to in the pleadings. Doubt about whether an action could proceed in the absence of an agreement for remuneration expressed in the *Marshal's Case*[33] in

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[27] As early as 1534 the author of Fitzherbert's New Natura Brevium stated: "It is the duty of every artificier to exercise his act rightly and truly as he ought" (F.N.B., 94 D).

[28] Simpson, *op. cit.*, footnote 1, pp. 232-233.

[29] *Ibid.*, pp. 233-234. Simpson reports that the only clear examples of cases in which duty is seen as arising from the pursuit of the skill were cases involving farriers.

[30] *Ibid.*, p. 235.

[31] *Ibid.*, p. 236.

[32] *Ibid.*, pp. 236-238.

[33] (1441), Y.B. 19 Hen. VI, H.F. 49, pl. 5; translated in Fifoot, *op. cit.*, footnote 17, pp. 345-347.

1441 was probably not so intended, and Simpson argues that the evidence is inconclusive.[34] What is clear is that by the end of the sixteenth century, when the doctrine of consideration was known, it was decided that consideration was not necessary in actions for negligent misfeasance.[35]

There existed another important strand in the development of the action on the case for negligent misfeasance in the context of undertakings; the action for *deceit*. Although actions for deceit were numerous in medieval law and defied classification in terms of underlying common principle, an action for deceit was recognized as early as the reign of Richard II as the basis for a plaintiff suing successfully a defendant who, in a sales contract, warranted the quality of the goods sold which turned out to be unfit.[36] The resort to what was a tort action was made necessary by the limits inherent in the action of debt and its twin *detinue* which lay for the recovery of chattels rather than of money. These actions were good only to enforce the primary obligation of buyer and seller under their contract, that is to pay money and deliver goods. They did not address the issue of quality of the goods. To fill this obvious gap the sales transaction was seen by the courts as having two separate elements; the agreement of sale (contract) and the warranty or representation (the basis for a tort action).[37] That the latter existed in its own right is seen in the courts' refusal to deny the action on the ground that no covenant existed.[38] Unfortunately, it is not possible to determine what amounted to warranties in medieval practice, because in common with so many substantive elements of the law the nature of the undertaking was shrouded by the forms of pleading, and by its determination by juries.[39] With the exception of the sale of bad food which was actionable without warranty, it does seem that an express statement had to be made as to quality which the vendor knew to be false. Later in the sixteenth century the notion of deceit was extended to impose a more stringent form of liability, but the medieval law seems to have been that an express warranty was essential to the action. Furthermore, it appears that the action only lay for latent defects.

The point with warranty law as with the more general developments through the action on the case is that there was no evident discomfort with treating the same relationship as having both a contractual and tortious character, and of allowing a tort action where the defen-

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[34] Simpson, *op. cit.*, footnote 1, p. 238.

[35] See *Powtuary* v. *Walton* (1598), 1 Rolle Abr., f. 10, pl. 5.

[36] Simpson, *op. cit.*, footnote 1, pp. 240-242; Milsom, *op. cit.*, footnote 2, pp. 320-321.

[37] Simpson, *ibid.*, pp. 242-243; Milsom, *ibid.*, pp. 321-322.

[38] Simpson, *ibid.*, pp. 244-245.

[39] *Ibid.*, pp. 245-247.

dant's conduct had breached the agreement or offended the undertaking. The situation in the fifteenth century was, as Milsom[40] has described it, that:

> Trespass actions, actions for wrongs, were doing a range of work which we should call contractual and which lawyers at the time recognized as having affinities with covenant. The bad performance of a promise was remedied, not as a breach of it but as a negligent wrong. A false warranty, eventually to be treated as a promise in itself, was remedied as a deceit inducing the purchase.

As long as the action for assumpsit lay primarily for misfeasance the tortious element in it remained strong, even predominant. Indeed, it is in these early cases of the negligent performance of undertakings that may be found one of the two strands which much later coalesced to produce the modern tort of negligence.[41] However, the evolution of the action was not to stop there. Litigants and their lawyers began to challenge the Chancery clerks and the courts to extend the action to cover breaches of promises involving failure to act (non-feasance). Initially the courts were disinclined to move in this direction as a matter of general policy, because of the concern that to do so would undercut the older actions and especially covenant.[42] So in 1410 where a writ on the case was brought against a carpenter who had failed to carry through a promise to build a house, the objection was successfully raised that covenant was the appropriate action, but that it could not lie here because there was no deed.[43] However, exceptions were recognized. Particularly important was the readiness of the courts to enforce a promise where some element of deceit was involved.[44] This happened first in a series of cases beginning in 1433 in which lawyers were held liable because, instead of carrying through undertakings to represent the interest of clients, they subverted that interest in favour of third parties. In *Somerton's Case*[45] the defendant agreed to procure a manor for Somerton, only to procure it for Blunt. Although Babington C.J. pointed to the general lack of an action on the case for breach of promise, he asserted that an action did lie where the lawyer "betrays his counsel and becomes of counsel for another". The latter in the minds of the Chief Justice and one of his colleagues amounted to deceit. It was also accepted that, if a

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[40] Milsom, *op. cit.*, footnote 2, p. 322.

[41] See Baker, *op. cit.*, footnote 1, pp. 337-340; Milsom, *ibid.*, pp. 393-394.

[42] Simpson, *op. cit.*, footnote 1, pp. 247-253; A.K.R. Kiralfy (ed.), Potter's Historical Introduction to English Law and Its Institutions (4th ed., 1958), p. 462.

[43] Y.B. 11, Hen. IV, Mich., f. 33, pl. 60; translated in Fifoot, *op. cit.*, footnote 17, pp. 340-341.

[44] Kiralfy, *op. cit.*, footnote 42, pp. 462-464.

[45] (1433), Y.B. 71 Hen. VI, H1., pl. 10; translated in Fifoot, *op. cit.*, footnote 17, pp. 343-344. See also Simpson, *op. cit.*, footnote 1, pp. 253-255. Another leading decision is *Doige's Case* (1442), Y.B., Trin., 20 Hen. 6, f. 34, pl. 4; translated in Fifoot, *ibid.*, pp. 347-349.

person promising to do something actually began the undertaking, albeit voluntarily, it was wrong to allow him to desist from his purpose. So in 1486 a defendant was found liable for injury to sheep committed to his care as "he had undertaken and executed his bargain".[46] From those exceptions the courts proceeded in the course of the sixteenth century to recognize the action on the case as extending to breaches of promises in general. Thus, by 1558, in the case of *Norwood* v. *Read*,[47] the Court of King's Bench was able to hold that the executors of the defendant deceased were liable for his failure to supply a quantity of wheat on the ground that "every contract executory is an assumpsit in itself".

With the emergence of a general theory of the actionability of promises, the action for assumpsit had plainly taken on a new character. It had shed some of its tortious features, developing into an action in which the mutuality of promises became important, and in which the agreement rather than wrong was stressed. Tied in with the acceptance of a general action for the enforcement of promises was the emergence of a doctrine of consideration. In its pristine form the doctrine addressed the simple but fundamental question of the basis on which promises should be enforced. The ambit of the doctrine was broad.[48] It clearly embraced the mutual exchange of promises; situations which involved detrimental reliance by one person on the undertaking of another; some elements of moral obligation; and, with the acceptance of the application of the assumpsit action to debts (indebitatus assumpsit) in *Slade's Case*,[49] the much earlier notion of *quid pro quo*.

The growth of a distinctive doctrine requiring a "legal reason" for a contract further strengthened the status of assumpsit as an action in which the basis of liability was the agreement of the parties. However, despite this further refinement of the contract action, there is no evidence that the consequence was a substantive divergence of contract and tort. Indeed, the record of the seventeenth and eighteenth centuries suggests that assumpsit and the other species of the action on the case, especially those relating to negligent misfeasance, co-existed quite comfortably.[50] Moreover, there seems to have been no obvious distress in characterizing certain borderline relationships as either capable of accommodation by assumpsit or as *sui generis*. The explanation of this absence

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[46] *The Shepherd's Case*, Y.B. 2 Hen. VII, H1., f. 11, pl. 9; translated in Fifoot, *ibid.*, pp. 86-87.

[47] (1558), 1 Plow. 180 (K.B.). For a detailed discussion of this evolution, see Simpson, *op. cit.*, footnote 1, pp. 248-280.

[48] The origins of the doctrine are still the subject of debate, although Simpson has suggested very plausibly that a significant influence must have been the developed notion of consideration in the law of uses (*ibid.*, pp. 327-374). On the ambit of the doctrine, see *ibid.*, pp. 406-445.

[49] (1602), 4 Coke. 91a; reproduced in Fifoot, *op. cit.*, footnote 17, pp. 371-374.

[50] P. Atiyah, The Rise and Fall of Freedom of Contract (1979), pp. 139-193.

of classifactory rigidity is threefold. In the first place, although assumpsit had by the end of the sixteenth century become established as a distinctive basis for enforcing contracts, the courts were still willing to apply it in a flexible fashion to relationships which on the facts had little to do with express agreements. Secondly, the doctrine of consideration in its virgin form was much more tensile in quality than it later became. Thirdly, even where the application of assumpsit appeared artificial there were certain relationships which, because of their venerability, could be rationalized in other ways, for example, that status imported the obligation regardless of any agreement. In this respect tortious notions continued to play an ancillary, but nevertheless important role.

Slade's Case, in removing the requirement that if a debt was to be sued on in case there must be a promise by the debtor over and above the existence of the debt itself, opened up the possibility that the courts could find assumpsit in other situations in which a pre-existing undertaking or relationship existed. This promise in the action was in fact fulfilled, because *indebitatus assumpsit* was progressively extended in the course of the seventeenth and eighteenth centuries to embrace a series of restitutionary situations in which liability depended not upon express agreements, but upon implied undertakings, status relationships or the unabashed application of equitable principles to prevent unjust enrichment.[51]

As we have seen, there was a strong element of reliance in the early common law of civil obligations. The undertaking by a person of a task, the provision of a service or the giving of advice in circumstances in which the plaintiff trusted him to carry out the obligation competently was at the centre of liability. While the importance of this element in the law may have been shrouded by the emphasis in assumpsit on the mutual exchange of promises, it was not submerged. Undertaking and reliance continued to be accepted as one of the ways in which a contract could be established. The doctrine of consideration in its pristine form was expansive enough to cover a range of reasons for enforcing a contract. Thus, far from denying the element of reliance as a basis of contractual obligation, the early doctrine of consideration incorporated it.[52] Given this degree of flexibility, even special status relationships, such as the common callings, could be accommodated. As Atiyah[53] has observed:

> To entrust your goods to someone who exercised one of the common callings was to act in reliance on him: by virtue of his status he owed duties to those who sought his services.

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[51] M. Bridge, The Overlap of Contract and Tort (1982), 27 McGill L.J. 872, at pp. 878-879. Professor Bridge points out that this identification of "implied" and "imputed" promises was to prevent the development of refinement of a mature body of restitutionary principles in English common law. See also Simpson, *op. cit.*, footnote 1, pp. 489-505.

[52] Atiyah, *op. cit.*, footnote 50, pp. 184-189; Simpson, *ibid.*, pp. 323-325, 426-434.

[53] Atiyah, *ibid.*, p. 186.

Despite the importance of assumpsit as the contractual paradigm and its expansive qualities, it did not completely absorb the long standing status relationships recognized by the common law. The common callings, especially those of the common carrier and the innkeeper, had their roots not in the notion of agreement but in the custom of the realm.[54] Bailment, a more general and pervasive relationship than the common callings, derived from agreements or undertakings by individuals to exercise custody over goods belonging to others. As a legally recognized relationship which antedated *assumpsit* and which was proprietary in origin (the obligation of the bailee to the bailor arose from custody of the goods), it had no inherent contractual qualities.[55] Until the seventeenth century the primary action available to the bailor against the bailee was that of detinue which was designed to force the bailee to return the goods to the bailor. It did not provide a remedy for damage done to the goods while in the hands of the bailee, whether the damage was the result of the negligence of the bailee or of a third party. There was therefore no viable basis for suing the bailee when the goods were returned damaged. Accordingly, where the consequence of the negligence was the effective destruction of the goods, thus preventing their return, a successful action in detinue was very much a pyrrhic victory for the bailor. The action on the case was to fill these gaps, by stressing that the bailee had a legal responsibility which transcended the mere custody of the goods, and extended to their careful stewardship.

That these older status relationships could overlap with assumpsit without being totally absorbed by it is illustrated by the treatment of bailment by the courts in the seventeenth and eighteenth centuries. During the sixteenth century, when the action on the case was invoked in bailment situations, the courts began demanding evidence of an express agreement between the parties, except where a common calling was involved. With the decision in *Slade's Case* an implied undertaking was recognized as sufficient to found the obligation.[56] Shortly thereafter a gratuitous bailment was granted legal recognition.[57] Both these developments took place within the expansive notion of assumpsit. However, the judges do not seem to have lost sight of the traditional roots of the relationship. That liability in bailment for the negligence of the bailee could still be rationalized comfortably in terms of contractual obligation *or* a duty flowing from a status importing legal responsibility is seen in the decision of the Court of King's Bench in the celebrated case of

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[54] Bridge, *loc. cit.*, footnote 51, at p. 880.

[55] Fifoot, *op. cit.*, footnote 17, pp. 24-25.

[56] Bridge, *loc. cit.*, footnote 51, at p. 880.

[57] For the origin of gratuitous bailment, see *Wheatley* v. *Low* (1623), Cro. Jac. 668, 79 E.R. 578 (K.B.).

Coggs v. *Bernard*[58] in 1703. In that case the defendant undertook gratuitously to transport several hogsheads of brandy from one cellar to another on the plaintiff's behalf. In the process one of the casks was "staved" with the result that a great amount of brandy was spilled. The plaintiff sued, alleging the negligence of the defendant and his servants. Notwithstanding the lack of valuable consideration the action was brought in assumpsit, and considered by the court in that light. That the need to establish the exact character of the action was not considered important by the judges is reflected in the fact that they all came to the same conclusion on the existence of liability, adducing three different rationales.

Holt C.J., for his part, considered the objection that there was no consideration to support the promise. Premising his reasoning on the existence of a contract he said:[59]

> But to this I answer, that the owners trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but, in such a case as this, it signifies an actual entry upon the thing and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing.

In finding the defendant liable in negligence he had no problem in founding liability on the nature of the undertaking and reliance, and ignoring the absence of valuable consideration or a fee for the service provided by the bailee.

Gould J. felt that the bailee could be charged by virtue of his simple undertaking, because the goods were entrusted to him on the strength of that undertaking.[60] For Powell J., the bailee's undertaking was a warranty which could be sued on by the plaintiff in the absence of consideration, as long as the plaintiff reposed a trust in the undertaking.[61] For the former assumpsit extended to bailment as a status relationship. For the latter the defendant had made an undertaking which existed independently of any agreement between the parties, and was liable for the wrong or tort he had done in breaking that undertaking.

Had this flexible view of detrimental reliance survived as a basis for upholding an undertaking as an assumpsit, or had the status relationships continued to be recognized as an independent and entirely valid bias for importing obligations, it is doubtful whether anyone would have seen any necessity for separating contract and tort. The combination of undertaking, justifiable reliance and detriment would have supported lia-

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[58] (1703), 2 Ld. Raymond 909, 92 E.R. 107 (Q.B.).

[59] *Ibid.*, at pp. 919 (Ld. Raymond), 113 (E.R.).

[60] *Ibid.*, at pp. 909-910 (Ld. Raymond), 107-108 (E.R.).

[61] *Ibid.*, at pp. 910-912 (Ld. Raymond), 108-109 (E.R.).

bility with little debate on the nature of the action, and the relative importance of the various elements. This, however, was not to be.

At the end of the eighteenth and into the nineteenth century the courts' treatment of contract law underwent a significant change. The most important feature of this new development was the gradual acceptance of the executory contract as the paradigm of contract law.[62] Although recognized much earlier, as we have seen, the executory contract does not appear to have assumed dominance prior to this date and co-existed with executed contracts, for example involving debts, and reliance based contracts.[63] Atiyah sees the courts' increasing emphasis on contract as the product of the application of two independent and therefore free wills, as the legal analogue of contemporaneous ideas on political economy, and similarly rooted in a philosophy relevant to the tremendous economic growth associated with the Industrial Revolution.[64] The classical political economists beginning with Adam Smith were strongly of the opinion that the market and its operation constituted the self-regulating motor of the socio-economic system.[65] The market was a product of the initiative of individuals. It provided the point of contact and fusion between enlightened self-interest and the public welfare, and its smooth operation ensured both profit to the promoter and an increase in the wealth of society. Enlightened self-interest was for those thinkers an important facet of the natural state of mankind, and anything which curbed or restrained it was potentially detrimental to the natural law. Intervention by the law, whereby the courts or the legislature attempted to regulate individual initiative and the market in particular, was accordingly to be deprecated as undermining that natural order. There is little doubt that the judges, who were increasingly open to the influence of the classical political economists, as well as to the utilitarian views of Jeremy Bentham and his followers, felt increasing discomfort with the older paternalistic notions of contract law like that of "fair bargain" inherited from the medieval period.[66] These notions which had demonstrated remarkable tenacity over the centuries represented an undesirable constraint on individual initiative. To be preferred was a contract theory which recognized and encouraged the operation of market forces, and which allowed a large degree of autonomy to those engaged in developing the industrial and commercial wealth of the nation.[67]

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[62] Atiyah, *op. cit.*, footnote 52, pp. 194-216, 419-448.

[63] *Ibid.*, pp. 181-189.

[64] *Ibid.*, pp. 292-321.

[65] See, in particular, Atiyah's discussion of Adam Smith's views, *ibid.*, pp. 294-304.

[66] See Atiyah, *ibid.*, pp. 368-383, for details of the impact of the political economists and Bentham on judicial thinking.

[67] *Ibid.*, pp. 398-419.

However direct or indirect these intellectual influences, they were reflected in the law. In the early nineteenth century cases the trend towards freedom of contract is clear. The contractual obligations were seen more and more as flowing not from any notion of benefit or detriment, but from the intention of the parties.[68] Accordingly, notions which interfered with the doctrine of freedom of contract and the primacy of the parties' intentions were to be discounted. Furthermore, the underlying principle of freedom of contract was seen as applying to all contracts whatever their social function or context. Marriage contracts were subject to this basic truth as were commercial contracts.[69]

Substituted for the flexible quality of views on contract which had existed previously was a model of contractual organization and purpose which admitted few exceptions, and which rested firmly upon the intention of the parties. Atiyah notes six major characteristics of this new view of contractual relations.[70] In the first place the parties were considered to deal with each other at arm's length, with each relying on his own skill and judgment and without any fiduciary obligations to the other. Secondly, the parties were the masters of the bargain, free to negotiate and chaffer, and under no obligation until the contract was finally struck. Thirdly, there was no duty to volunteer information. Each party had the responsibility to make his own investigations and judgments, and was not entitled to rely on the conduct of the other, unless it amounted to a misrepresentation of fact or fraud. Fourthly, the deal was considered to be struck when final agreement was reached or when the parties indicated agreement. Only wholly exceptional pressures which could be construed as interfering with the freedom of contract were sufficient to alter this. Fifthly, the terms, price and subject matter were entirely for the parties to settle. They were considered to be the best judges of their own interest, and taken to have balanced the risks involved. Accordingly, it was not legitimate to raise any question about the unfairness of the price. Finally, the parties having agreed were held to be bound, and must therefore perform or be mulcted in damages.

The impact of this theory on the courts was to reduce them to arbiters of procedural fair play.[71] It was considered to be an abuse of the judicial function to determine whether the bargain itself was fair. That was for the market to deal with. Accordingly, a court had no latitude to apply its own sense of justice to the circumstances before it.

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[68] *Ibid.*, pp. 419-448.

[69] See *Hall* v. *Wright* (1858), E. Bl. & E. 747, 120 E.R. 688 (Q.B.), and on appeal (1860), E. Bl. & E. 765, 120 E.R. 695 (Exch. Ch.). Also Atiyah, *ibid.*, pp. 401-402. Atiyah notes that this development took place not without questions on the part of some judges.

[70] Atiyah, *ibid.*, pp. 402-403.

[71] *Ibid.*, p. 404.

The move towards more rigid conceptualization of the basic notion of contract was attended by the development of a series of sub-concepts unknown in previous centuries, which further accentuated the exclusiveness of contract law.

The growth of the concept of offer and acceptance in the late eighteenth and early nineteenth centuries was one reflection of the mutuality inherent in the new contract theory. Its effect was to undercut the notion of a continuing relationship between the parties. As Bridge[72] has commented:

> The introduction of offer and acceptance analysis in the formation of contracts encouraged the belief that the contract was an integrated and separate entity springing into existence at a definite moment and transfiguring the parties' relationship when acceptance matched offer, rather than a legal inference drawn from a continuum and making no absolute distinction between the legally relevant and irrelevant.

Also important in creating a rigid line between contract and other forms of civil liability was the transformation which consideration underwent in the context of this new view of contract. During the last third of the eighteenth century Lord Mansfield C.J. had attempted to diminish the importance of consideration in contractual agreements. His success was short lived. His efforts to reduce the character of consideration to mere evidential significance was quickly aborted by the House of Lords in *Rann* v. *Hughes*.[73] Lord Mansfield, undaunted by this rebuff, began to stress the elements of moral obligation involved in consideration. That consideration extended to moral obligations was certainly not new. What Lord Mansfield did was to suggest that it provided a flexible instrument for bringing a variety of informal relationships under the rubric of contract. More particularly, it meant that gratuitous promises might be upheld in a fairly wide range of circumstances. This notion of moral obligation as a basis of consideration survived somewhat longer. However, towards the middle of the nineteenth century doubts began to be expressed about it, the doubts reflecting that new philosophy of contractual relations and its central theme of "buying a promise". In *Eastwood* v. *Kenyon*[74] Lord Mansfield's theory was refuted. Lord Denman C.J. made it clear that a promisor's moral obligation was no longer adequate as consideration for the promise.[75] This decision was followed soon after by the judgment in *Thomas* v. *Thomas*[76] in which the important corollary was added that consideration must be something of value. With the latter decision went any notion that reliance on a gratuitous undertaking was sufficient as a basis for recognizing a contractual obligation.[77]

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[72] Bridge, *loc. cit.*, footnote 51, at p. 882.

[73] (1778), 4 Brown P.C. 27, 7 T.R. 350n (H.L.).

[74] (1840), 11 Ad. & E. 438, 113 E.R. 482 (Q.B.)

[75] *Ibid.*, at pp. 447-452 (Ad. & E.), 485-487 (E.R.).

[76] (1842), 2 Q.B. 851, 114 E.R. 330 (Q.B.).

[77] Unless, of course, some artificial consideration be found. See *De la Bere* v. *Pearson*, [1908] 1 K.B. 280 (C.A.)—contract found between a newspaper which offered

A third doctrine which caused contract to stand in the way of the growth of broader notions of liability was privity which, as Bridge has observed, "gave an exclusive definition of the parties to a contract".[78] Although the doctrine did not fully crystallize until the latter decades of the nineteenth century, several cases at mid-century, including *Price* v. *Easton*[79] and *Winterbottom* v. *Wright*,[80] paved the way by rejecting liability in actions by plaintiffs who were outside the ambit of contractual obligation.

These doctrinal outcrops of the new contract theory in combination had the effect of forcing courts to become self-conscious for the first time about divisions and categories in the field of civil liability. Contract was now viewed as the dominant basis of obligation. This self-consciousness was understandable, given the concern of the judges to confirm the importance of and to rationalize the executory contract and the notion of expectation damages which was its corollary. Unfortunately, the courts tended to be myopic in their desire to work out the functional and conceptual implications of the new wisdom. Contract was no longer seen as a flexible and expansive umbrella covering a variety of relationships, some the product of express or implied agreement, but others the results of external legal obligation. The dominance of contract was aggravated by the fact that there was for the time being little in the way of competition in terms of obligation theory. The law of torts, in particular, which still awaited serious scholarly rationalization, was very much a "ragbag" of disparate actions, the product of several centuries of haphazard development without much in the way of underlying theme or principle.[81] The notion of negligence which, prior to the nineteenth century, had a visible role only as a formal description of certain forms of action, and the substantive character of which had been largely shrouded by the realities of jury trial, had yet to begin its period of "epic growth".[82] Indeed, insofar as attempts were being made to utilize it, it was used in much the same way as the new theory of contract; to limit liability in an expansive, entrepreneurial age, the judges viewing the older causally oriented and demanding tort of trespass as unnecessarily restrictive of beneficial economic, and especially industrial, activity.[83]

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negligent advice and the inquirer seeking it who relied on the advice to his financial detriment. Consideration existed either in the plaintiff's consent to publication, or in addressing the inquiry as invited.

[78] Bridge, *loc. cit.*, footnote 51, at p. 883.

[79] (1833), 4 B. & Ad. 433, 110 E.R. 518 (K.B.).

[80] (1842), 10 M. & W. 109, 152 E.R. 402 (Exch.).

[81] The first significant text on the law of torts, C.G. Addison, A Treatise on the Law of Torts, was not published until 1860.

[82] For the earlier development of negligence, see Milsom, *op. cit.*, footnote 2, pp. 392-400; Baker, *op. cit.*, footnote 1, pp. 336-350.

[83] See Fifoot, *op. cit.*, footnote 17, pp. 154-166.

The specific consequences for the law of civil liability were twofold. In the first place the courts were generally opposed to using other forms of liability, especially tortious concepts, to fill gaps left by the "trimmed down" concept of contract. Secondly, they had some difficulty in dealing with and rationalizing their position in situations in which contractual and tortious liability had for long been seen as overlapping. The result was a strangely stunted and monistic concept of civil liability, the ghosts of which have only been gradually exorcised in this century.

The initial, and in retrospect, crucial road block to the healthy development of a parallel form of liability outside contract was the decision of the Court of Exchequer in *Winterbottom* v. *Wright*.[84] In that case the plaintiff, a coach driver employed by a firm which had undertaken by contract with the Postmaster-General to supply drivers for mail coaches, alleged that he had been injured because the coach supplied under another contract between the defendant and the Postmaster-General was defective. The plaintiff in pursuing his action took pains to suggest that he was entitled to rely upon, and take the benefit of the contractual obligation undertaken by the defendant to keep the coaches in a "fit, proper safe and secure state"; furthermore, that it must have been in the contemplation of the defendant that the vehicle would be driven by a coachman, and so any duty owed by the former would necessarily extend to him.[85] The plaintiff's pleadings suggested some ambivalence over whether the basis for suit was the contract or a general obligation on the part of the defendant to take care. The three judges of the Court of Exchequer responded in similar vein.[86] They rejected, as far too expansive and uncertain in extent, the notion that one injured by the negligent performance of a contract with another had a right of action against the performer, whether the action was founded on the contract itself or upon a more general notion of duty to others. The court, in expressly invoking the "floodgates" argument, distinguished its earlier decision in *Levy* v. *Langridge*.[87] There it had reached the opposite conclusion in the case of a retailer who had sold a gun to a father for the use of his son. The court in *Winterbottom* determined that in the earlier case the retailer was fully aware of who was to make use of the product, and was guilty of fraudulent misrepresentation to boot.

The notion that the plaintiff was barred from founding on a contract to which he was not a party, especially when it was not specifically for his benefit, was unexceptional. The broader proposition was potentially

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[84] *Supra*, footnote 80.

[85] *Ibid.*, at pp. 109-110 (M. & W.), 402-403 (E.R.).

[86] See Lord Abinger C.B., at pp. 113-115 (M. & W.), 404-405 (E.R.); Alderson B., at pp. 115-116 (M. & W.), 405 (E.R.); Rolfe B., at pp. 116 (M. & W.), 405-406 (E.R.).

[87] (1837), 2 M. & W. 519, 150 E.R. 836 (Exch.).

deadening. Indeed, for the next eighty or so years, until courts in a number of common law jurisdictions cut through the knot of rigid contractualism,[88] adherence to this proposition was to prevent any systematic development of a general law of product liability. Unless the plaintiff was a party to the contract, could point to fraud on the part of the manufacturer or seller, or characterize the product as inherently dangerous, he had no basis for suit, even though well within the contemplation of the defendant.[89]

There were decisions and judgments which flew in the face of this blinkered thinking, such as the famous hairwash case of *George* v. *Skivington*[90] and Lord Esher M.R.'s brave attempt in *Heaven* v. *Pender*[91] to adumbrate a general principle of reasonable care. However, until later resurrected or rehabilitated, these were for long considered to be strange aberrations in judicial thinking. If the courts were opposed to opening up an alternative form of liability in cases involving personal injury or property damage, they were even more adamant in the case of economic loss. This was after all the particular preserve of contract law. Here opposition manifested itself in two situations. The first was the circumstance in which the plaintiff suffered economic loss indirectly because the defendant damaged property belonging to a third party which was the object of or necessary to a contract of the latter with the plaintiff. In the case of *Cattle* v. *Stockton Waterworks*,[92] in which the plaintiff contractor had suffered financial loss when the waterpipes maintained by the defendant waterworks company sprang a leak flooding the land of a third party for whom the plaintiff was building a tunnel under contract, the court rejected the action on the ground that its acceptance would extend the ambit of actionability much too widely.[93]

The second instance involved economic loss caused by the reliance of the plaintiff on advice given or a representation made by the defendant where no valuable consideration passed from the obligee to obligor. Notwithstanding an attempt by Chitty J. in *Cann* v. *Willson*,[94] analogizing from *George* v. *Skivington*, to erect a principle of negligent misrepresentation or misstatement which transcended the contractual nexus in

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[88] In the United Kingdom the epic decision was *Donoghue* v. *Stevenson*, [1932] A.C. 562 (H.L. Scot.). The parallel decisions in the United States and Canada were earlier: see *MacPherson* v. *Buick Motor Co.*, 217 N.Y. Supp. 382, 111 N.E. 1050 (N.Y.C.A., 1916); *Ross* v. *Dunstall* (1921), 62 S.C.R. 393, per Duff J.

[89] See R. Heuston, *Donoghue* v. *Stevenson* in Retrospect (1957), 20 Mod. L. Rev. 1.

[90] (1869), L.R. 5 Exch. 1.

[91] (1883), 11 Q.B.D. 503 (C.A.).

[92] (1875), L.R. 10 Q.B. 453.

[93] *Ibid.*, per Blackburn J., at p. 457.

[94] (1888), 39 Ch. D. 39 (Ch. D.).

economic loss cases, the House of Lords in dicta in *Derry* v. *Peek*,[95] and the Court of Appeal directly in *Le Lievre* v. *Gould*,[96] quickly put paid to that heresy. In the view of the two courts, in the absence of a contract or fraud no liability existed for misrepresentations at common law.

The artificiality of the contractual barrier is particularly strong in the *Le Lievre* case. In that case, to the knowledge of the defendant surveyor, his certificate on the progress of a house in construction, which was negligently prepared, was shown by the builder to a mortgagee, who turned out to be the plaintiff. On the basis of the certificate the latter advanced money to the builder to his subsequent loss. It was clear to the defendant that his certificate was to be relied upon for a specific purpose, and it was. However, the absence of anything valuable, even the proverbial peppercorn, passing from the plaintiff consigned the relationship to legal limbo.

On the issue of what to do about situations in which there had traditionally been an overlap of contract and tort notions the courts were not as ready, and perhaps not as free to dispense with earlier wisdom. Clearly, a theory of contract which focused on the mutual exchange of promises did not sit well with the notion of obligation generated simply by the status of or an undertaking by the obligor. However, the notion of implied agreement which had provided a basis for an expansive concept of assumpsit in an earlier era, could be and was employed to rationalize liability in these cases in tune with the new theory of contract.[97] Consideration in most cases would not be a problem because payment would be expected and made for the service provided. This would be true of both those who professed "common callings" in the strict sense, for example common carriers and inkeepers, as well as those who undertook on a more general basis to care for the goods of others, the bailees. Furthermore, even if the new restrictive elements of contract prevented recognition of liability under that head the action on the case might still be available to the plaintiff.

As the record shows the nineteenth century courts by and large do not seem to have had a great deal of trouble recognizing that in common calling situations the plaintiff could plead in the alternative and rely upon the action which benefitted him more. Thus, early in the century in *Govett* v. *Radnidge*[98] it was accepted that an action on the case lay against a common carrier, who claimed that he was shielded from an action in breach of contract because co-contractors had been freed of liability. Similarly, at mid-century it was held to be no bar to an action

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[95] (1889), 14 App. Cas. 337 (H.L.).

[96] [1893] 1 Q.B. 491 (C.A.).

[97] Bridge, *loc. cit.*, footnote 51, at pp. 887-888.

[98] (1802), 3 East. 62, 102 E.R. 520 (K.B.).

on the case against a common carrier for loss of luggage that the plaintiff's employer had bought the ticket for the journey.[99] In the latter instance it was made clear by the court that privity of contract had no reference to duties imposed by the custom of the realm.

The continued acceptance of the notion that actions in contract and on the case for "imposed duty" might co-exist was not without its problems. These problems were, however, less the consequence of adherence by the courts to a doctrinaire view of contract theory than the result of shallow judicial explication. Despite the growing sense of formalism amongst the nineteenth century judges on liability issues, they were on occasion capable of remarkably liberal statements. Thus, in the case of *Brown* v. *Boorman*[100] in 1844, in which an action on the case was brought against a broker for negligently failing to abide by his instructions, the House of Lords not only rejected the defendant's claim that the plaintiff was barred from succeeding in the circumstances because he had not pleaded *assumpsit*, but also a majority of the court opined that case would lie wherever there was a breach of duty under an express contract.[101] This statement, which was a far cry from the proposition that *assumpsit* and case overlapped in certain defined circumstances, was obviously a cause of some embarrassment, and encouraged other judges to counteract it with language which at least suggested that for the actions to co-exist there must be an independently valid basis for each in the circumstances.[102]

The unlikely context for the courts' treatment of the issue of overlap was a series of cases relating to costs. As Parliament had set a costs formula which in certain cases favoured the plaintiff who could sue in tort, rather than in contract, courts were required to characterize the actions in these cases.[103] In addressing this relatively insignificant procedural issue the reasoning of the courts was often shallow in quality, especially in explaining the rationale for choosing one action rather than the other.

The courts had no difficulty in accepting that in certain contexts a contract and a tort action were both available. When it came to determining which applied to the costs issue a majority, without explaining why, opted for the tort action.[104] The earliest cases involved straight-

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[99] *Marshall* v. *York, Newcastle & Berwick Rly. Co.* (1851), 11 C.B. 655, 138 E.R. 632 (C.P.).

[100] (1844), 11 Cl. & Fin. 1, 8 E.R. 1003 (H.L.).

[101] See Lord Campbell, at pp. 42-44 (Cl. & F.), 1018-1019 (E.R.); Lord Cottenham, at pp. 42 (Cl. & F.), 1018 (E.R.).

[102] See especially *Legge* v. *Tucker* (1856), 1 H. & N. 500, at p. 502, 156 E.R. 1298, at p. 1299 (Exch.), per Watson B.

[103] This was the result of the Small Debt Act, 9 & 10 Vict., c. 95.

[104] Bridge, *loc. cit.*, footnote 51, at p. 892.

forward situations in which a person exercising a common calling, for example that of common carrier, breached his duty of care. In these cases, although there was typically a contract between the parties, the judges were ready to recognize that the source of the obligation was external, the custom of the realm. This was the response, for instance, in *Tattan* v. *Great Western Railway*[105] in which the carrier lost a bale of canvas entrusted to him. Later on in the century, as tort law and more generalizable duties embraced by it began to be recognized in their own right, similar conclusions were reached without any specific reference to the substance or nature of the duty. Thus the courts were ready to characterize actions by passengers against railway companies for personal injuries caused by their negligent servants as tortious, even where the pleadings suggested otherwise.[106] The conclusions reached were unexceptional. The problem, as Bridge has pointed out, was that "by virtue of their elliptical reasoning, they fostered the attitude that if a cause of action was located in tort it could not also be contractual and *vice versa*".[107]

A minority of these costs cases took the line that if a contract governed the relationship between the parties, it determined the disposition of the case, even though a broader duty upon the defendant might also exist.[108] Although these decisions may be explained by the fact that the pleadings mentioned only contract, their reliance on what appear to be statements of principle favouring the dominance of contract in earlier cases suggests that the real reason was more substantial.[109] In any event, as with the torts cases, no attempt was made to justify the notion of paramountcy.

One area of traditional overlap between contract and tort, the law relating to warranties, had undergone change prior to the nineteenth century which has resulted in divergence. Although the development of the classical nineteenth century notion of contract was not responsible for this, it certainly underlined the distinctions between the relative ambits of contract and tort.

As we have seen, the medieval view of a representation relating to the quality of goods was that no contractual or proprietary action extended that far.[110] Accordingly, the action for deceit, a tort action, was available to a purchaser who had relied to his detriment upon a representation by

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[105] (1860), 2 E. & E. 844, 121 E.R. 315 (Q.B.).

[106] See *Taylor* v. *Manchester, Sheffield & Lincolnshire Rly. Co.*, [1895] 1 Q.B. 134 (C.A.); *Kelly* v. *Metropolitan Rly. Co.*, [1895] 1 Q.B. 944 (C.A.).

[107] Bridge, *loc. cit.*, footnote 51, at p. 894.

[108] See *Baylis* v. *Lintott* (1873), L.R. 8 C.P. 345; *Fleming* v. *Manchester, Sheffield & Lincolnshire Rly. Co.* (1878), 4 Q.B.D. 81 (C.A.).

[109] Bridge, *loc. cit.*, footnote 51, at p. 897. See, in particular, the reliance on *Alton* v. *Midland Rly. Co.* (1865), 19 C.B. (N.S.) 213, 144 E.R. 768 (C.P.).

[110] *Supra*, p. 37.

the vendor that the goods were sound. The availability of the action assumed that an express representation had been made, and related to a matter of fact, rather than of opinion. In the absence of an express warranty or of a rule of wholesomeness, as in the case of food, the principle of *caveat emptor* applied.

In the course of time, with the growth and expansion of assumpsit, the distinction between the contractual action for a promise and the action in deceit on a warranty came to be seen as artificial. The courts' response during the seventeenth and eighteenth centuries was to draw the law of warranties more and more within the ambit of contract law.[111] At a purely pragmatic level this assisted in pleading, as it made it possible to join a warranty action with one for recovery back of the price on a total failure of consideration. On a more theoretical plane, it tied in well with the developing view, which received its clearest articulation in the judgments of Lord Mansfield C.J., that contracts in the commercial world were matters of agreement, and that the parties should only be bound to what they had agreed upon and embodied in the contractual document.[112]

The results of this shift in thinking about warranties were that by the end of the eighteenth century they had become firmly associated with the action in contract, and the action for deceit was recast as a tort action which addressed the far more limited problem of fraudulent misrepresentation.[113] The contractual stem allowed actions for both "affirmative warranties" based on representations of fact, and "promissory warranties" which covered promises, including matters of opinion. The tort action which was recognized for the first time in the case of *Pasley* v. *Freeman*[114] allowed an action for fraud to a plaintiff who relied to his detriment, usually in a contract with a third party, upon the deceitful representation of the defendant.

Although this process of divergence was established by the time of the full flowering of classical contract theory, the resulting cleavage was accentuated by the new wisdom. In the first place, the strong belief that a person should not be bound to anything to which he had not expressly agreed, and its corollary that the purchaser was the guardian of his own interest in matters of quality, left no obvious room for considerations of fairness. Secondly, any potential for expansion in the new tort of deceit was curbed by its limitation to representations of fact, and the requirement that the defendant must have said or done something positive which was calculated to mislead.[115] Thirdly, the resistance of the courts to the

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[111] Baker, *op. cit.*, footnote 1, pp. 294-295.

[112] Atiyah, *op. cit.*, footnote 52, p. 180.

[113] Baker, *op. cit.*, footnote 1, p. 295.

[114] (1789), 3 Term. Rep. 51, 100 E.R. 450 (K.B.).

[115] Atiyah, *op. cit.*, footnote 52, pp. 468-469.

notion that there was any place for an action transcending the contractual nexus based upon the negligence of a defendant meant that the law was unable to deal with the serious gap left between the contractual view of warranty on the one hand and the tort of deceit on the other. As we have seen the courts dealt swiftly, decisively and negatively with any attempt to insinuate a third option into the law.[116]

The restrictive approach taken by the courts in the nineteenth century towards civil liability and their emphasis on agreement as the touchstone of liability have only been relaxed with difficulty in the twentieth century. The growth of formalistic jurisprudence and its linchpin, the doctrine of *stare decisis,* and the emergence of a professional judiciary increasingly removed from new political, economic and social thought from the latter half of the nineteenth century was to stifle any significant creative thought on these matters well into the present century.[117] Prior to the 1960s judicial innovation in the area of civil liability was rare, especially in England and those common law jurisdictions which tended to take their cue from the law of that country.[118] This is not to say that advances were unknown. The modern law of torts, especially the law of negligence, was to show itself increasingly tensile in quality during the period. Moreover, older notions of liability, for example those generated by status and reliance were not entirely dead, and indeed received approval from time to time. The process of expansion was, however, slow and fitful, and often stalled by vigorous rear-guard actions by judges still committed to the contractualist view of the legal universe. The most significant development during the first half of this century has been the burying of the notion enunciated in *Winterbottom* v. *Wright*[119] that there was no room in the common law for an action by one outside the framework of a contract for injury or damage caused to him by defective products, or faulty services applied to products. The breaking of the contractual nexus in order to afford protection to the "ultimate consumer", which was achieved in the United States and Canada in the first quarter of the century, received its most eloquent rationalization in the Scottish case of *Donoghue* v. *Stevenson,*[120] decided by the House of Lords in 1932. In the judgment of Lord Atkin in particular can be found that unique blend of policy thinking and flexible conceptualism that characterizes the landmark decision in the common law. Not content with merely recognizing a duty of care tailor-made to the facts of the case

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[116] *Supra*, pp. 48-49.

[117] The factors responsible for the growth and maintenance of formalistic jurisprudence are investigated at length in R. Stevens, Law and Politics: The House of Lords as a Judicial Body 1800-1976 (1978), pp. 37-104, 185-216.

[118] See R. Stevens, *Hedley Byrne* v. *Heller*: Judicial Creativity and Doctrinal Possibility (1964), 27 Mod. L. Rev. 121, at pp. 126-130.

[119] *Supra*, footnote 80.

[120] *Supra*, footnote 88.

before him, Lord Atkin went the further step of stating an underlying principle, the "neighbour test", which because of its level of abstraction constituted a tantalizing invitation to other judges to extend the parameters of negligence liability to new situations and relationships.[121]

The effect of Lord Atkin's test was to be felt in time throughout the length and breadth of civil liability for faulty conduct. However, advances were often only achieved after stiff resistance. Initially, the test was used progressively to extend liability to third parties in cases involving the manufacture, servicing and repair of a wide range of goods. Courts found little difficulty in making the analogy with the *Donoghue* case, even in situations where the plaintiff's complaint related to damage to personal property rather than personal injury.[122] Far more difficulty was experienced with attempts to extend the Atkin principle to the sale and lease of defective real estate. This was an area of immunity from liability which had been firmly established in the course of the nineteenth century on the ground that the risks flowing from such a transaction could only lie on the purchaser or lessee who had the ability by viewing the property to take care of his own interest.[123] Only with the newly found judicial creativity of the 1960s has this island of immunity undergone some erosion by the analogizing of the vendor-builder with the manufacturer of goods.[124]

If resistance proved vigorous in the case of damage to real estate, it was even more resolute in the case of economic loss. Here the hold of contractualism was particularly strong because contract was seen as the exclusive vehicle in which the economic interests of individuals or corporations were to be organized or mediated. To hold a person to a broader range of legal responsibility was viewed as economically stultifying, legally unfair and pragmatically unworkable.

In the area of pure economic loss caused to third parties the conventional attitude has been to argue that the Atkin principle was never meant to extend to such situations, or that, even if it does in theory, the central notion of reasonable foreseeability cannot accommodate such indirect or unanticipated consequences.[125] Only in recent years has the "neigh-

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[121] However, as Heuston, *loc. cit.*, footnote 89, points out, its value has been to open up the debate on the extent of liability, rather than to dictate a particular answer.

[122] See, for example, *Pack* v. *County of Warner* (1964), 44 D.L.R. (2d) 215 (Alta. C.A.).

[123] See, for example, *Otto* v. *Bolton*, [1936] 2 K.B. 46 (K.B.D.), following *Bottomley* v. *Bannister*, [1932] 1 K.B. 458 (C.A.), which relied on nineteenth century authority.

[124] See *Lock* v. *Stibor*, [1962] O.R. 963 (Ont. H.C.); *Dutton* v. *Bognor Regis Urban District Council*, [1972] 1 Q.B. 373, at pp. 392-394 (C.A.), per Denning M.R.; *Anns* v. *Borough of Merton*, [1978] A.C. 728 (H.L.).

[125] See, for example, *Weller & Co.* v. *Foot & Mouth Disease Research Institute*, [1966] 1 Q.B. 569 (Q.B.D.). See also R. Solomon and B. Feldthusen, Recovery for

bour test'' begun to make inroads, assisted both by its inherent tenacity and the working out of the full implications of the House of Lords decision in *Hedley Byrne* v. *Heller Partners Ltd.*[126] A process of gradual expansion of liability in tort for economic loss has been assisted by the acceptance of the notion, championed by Lord Wilberforce in his judgment in *Anns* v. *The Borough of Merton*,[127] that a duty of care should be assumed if the parties are proximate, and the duty dislodged or limited only if there are sound reasons of policy for doing so. In the less than considered decision of the House of Lords in *Junior Books Ltd.* v. *Veitchi*[128] the Wilberforce doctrine was invoked to allow recovery in tort for economic loss (the cost of repair) where the parties were as proximate as they could be (the owner of a building and a sub-contractor) without being in a contractual relationship. In the area of pure economic loss there are justifiable concerns about the utilization of tort theory to ground actions which may subvert a set of contractual relations (in this context between owner and contractor, and contractor and subcontractor) which have been employed to determine relative rights and obligations and to allocate risks among those involved in a co-operative enterprise. Whether or not that fear will be realized, it has already produced some second sober thought about using the law of torts to expand liability for pure economic loss to the detriment of contractual theory, a process of re-assessment which draws some strength from more recent judicial doubts in several decisions of the House of Lords and Privy Council about the wisdom of the broad formulation of duty in the *Anns* decision.[129]

Similar resistance to that applied to arguments favouring recovery under the rubric of torts for economic loss in general was experienced until the nineteen sixties with economic loss flowing from negligent representation or statements. The rigid contractual thinking embodied in the late nineteenth century case of *Le Lievre* v. *Gould*[130] was reiterated

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Pure Economic Loss: The Exclusionary Rule, in Lewis Klar (ed.), Studies in Canadian Tort Law (1977), pp. 167-168.

[126] [1964] A.C. 465 (H.L.). For recent trends see, in particular, *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors Ltd.)*, [1973] Q.B. 27 (C.A.); *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] S.C.R. 1189; *Caltex Oil (Aust.) Property Ltd.* v. *The Dredge ''Willemstadt''* (1976), 11 A.L.R. 227 (Aust. H.C.).

[127] [1978] A.C. 728, at pp. 751-752 (H.L. Scot.).

[128] [1983] 1 A.C. 520 (H.L.).

[129] For an extensive and thoughtful critique of the *Junior Books* decision, see D. Cohen, Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords (1984), 18 U.B.C. Law Rev. 289. For recent decisions which question the Wilberforce duty formulation, see, for example, *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.*, [1985] A.C. 210 (H.L.); *Curran* v. *Northern Ireland Co-ownership Housing Assoc. Ltd.*, [1987] A.C. 718 (H.L., N. Ireland); *Yuen Kun Yeu* v. *The Attorney General*, [1987] 3 W.L.R. 776 (P.C., Singapore); *Rowling* v. *Takaro Properties Ltd.*, [1988] 1 All E.R. 163 (P.C., N.Z.).

[130] [1893] 1 Q.B. 491 (C.A.).

by the majority of the English Court of Appeal in *Candler* v. *Crane, Christmas & Co.*[131] in 1951, in exonerating an accountant who had negligently prepared a financial report on a company which he was aware would be used by a potential investor, the plaintiff, as a basis for investing in the company. Denning L.J. registered a spirited dissent, complaining of the heavy and anachronistic hand of nineteenth century contractualism, and using the "neighbour test" to embrace the defendant's deliquency. For the moment, however, the victory lay with the more "timorous souls".[132]

Despite this perpetuation of nineteenth century wisdom, two developments occurred during the period which raised some doubt about how firm this area of legal immunity was in fact. In the first place the courts, relying on respectable equitable tradition, had affirmed the existence of certain fiduciary relationships, the paradigm of course being that of trustee and beneficiary, which imported duties of care independent of contract. This duty of care, arising in effect from the status of the obligor, was recognized as extending to obvious fiduciaries such as solicitors and banks.[133] Moreover, in the House of Lords' decision in *Nocton* v. *Ashburton*[134] it was suggested that the rule might extend to other "special relationships" in which there was justifiable reliance on the skill or knowledge of another, regardless of whether or not a contract existed between the parties. Secondly, with the intrusion of the "neighbour principle" into the law of negligence, it became increasingly difficult to justify a different result in personal injury or personal property damage cases depending on whether the harm was the reasonably foreseeable consequence of action on the one hand, or words on the other. Accordingly, *Donoghue* v. *Stevenson*[135] was recognized as the basis for liability when a plaintiff justifiably relied upon the advice or statement of the defendant and suffered physical injury or harm to his chattels.[136]

The logical outcome of these developments and the trenchant criticism leveled at traditional thinking by Lord Denning was the recognition of a limited duty of care by the House of Lords in *Hedley Byrne* v. *Heller Partners Ltd.*[137] Although the court recognized the important cathar-

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[131] [1951] 2 K.B. 164 (C.A.).

[132] *Ibid.*, Denning L.J., at pp. 174-175; Asquith L.J., at pp. 185-195; Cohen L.J., at pp. 195-207.

[133] See *Nocton* v. *Ashburton*, [1914] A.C. 932 (H.L.); *Woods* v. *Martins Bank Ltd.*, [1959] 1 Q.B. 55 (Q.B.D.).

[134] *Ibid.*, at p. 947. See also *Robinson* v. *National Bank of Scotland*, [1916] S.C. 154, at p. 157, per Haldane L.C. (H.L. Scot.).

[135] *Supra*, footnote 88.

[136] See *Sharpe* v. *Avery*, [1938] 4 All E.R. 85 (C.A.); *Clayton* v. *Woodman & Son*, [1961] 3 All E.R. 249 (Q.B.D.), rev'd on facts, [1962] 2 All E.R. 33 (C.A.).

[137] *Supra*, footnote 126.

tic effect of *Donoghue* v. *Stevenson* in liberalizing judicial attitudes to negligence liability it chose to articulate a more restricted notion of duty related more clearly to the context of verbal or written communication than to conduct.[138]

Ironically it was in the cases in which the issue of overlap between contract and tort was raised, in which the nineteenth century decisions by and large preserved the flexibility of the earlier law, that positive retrogression set in. As we have seen, while a majority of nineteenth century decisions were ready to recognize the reality of overlapping liability where both tradition and the growth of tort law pointed in that direction, the elliptical quality of judicial comments justifying the choice of one action rather than the other in satisfying the costs issue made it appear that they had an exclusive quality.[139] This tendency not only continued in twentieth century cases, it led some judges to the conclusion that if a contract existed between the parties it alone governed the relationship. Remarkably, judges who were not willing or able to extend their knowledge of legal history back beyond the nineteenth century were content to found this restrictive view upon the shallow decisions in the costs cases. Particularly troubling in this regard is the decision of the English Court of Appeal in the 1939 case of *Groom* v. *Crocker*.[140] Relying on a nineteenth century case which had concluded that a contract action alone was possible by a client against solicitor where the result of the lawyer's negligence was financial loss, and ignoring both *Boorman* v. *Brown*[141] and *Nocton* v. *Ashburton*,[142] both of which accepted the notion of overlap or coexistence of the actions, the court concluded that the liability of solicitors was invariably contractual. This confident but historically unsound statement was followed in decisions in both England and Canada, including several in cases heard after the decision in *Hedley Byrne* v. *Heller Partners Ltd.* had raised doubts about the integrity of the bald statement in *Groom*.[143] The truncated view of history which attended these decisions is seen most clearly in the untypically sparse judgment of Diplock L.J. in *Bagot* v. *Stevens, Scanlan & Co.*[144] In characterizing an action by a client against an architect as contractual,

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[138] See Stevens, *loc. cit.*, footnote 118, at pp. 130-141.

[139] *Supra*, pp. 50-51.

[140] [1939] 1 K.B. 194 (C.A.).

[141] *Supra*, footnote 100.

[142] *Supra*, footnote 133.

[143] See *Clark* v. *Kirby-Smith*, [1964] Ch. 506 (Ch. D.); *Cook* v. *Swinfen*, [1967] 1 W.L.R. 457 (C.A.); *Heywood* v. *Wellers*, [1976] Q.B. 446 (C.A.); *Schwebel* v. *Telekes*, [1967] 1 O.R. 541 (C.A.). As Bridge, *loc. cit.*, footnote 51, at p. 900, points out, the courts in two of the English decisions "blunted the impact of the case by extending the scope of damages recovery in contract to something like the tortious range".

[144] [1966] 1 Q.B. 197 (Q.B.D.).

although nothing hung on the distinction between contract and tort in the case, the judge remarked:[145]

> I accept that there may be cases where a similar duty is owed both under the contract and independently of a contract. I think that upon examination all those will turn out to be cases where the law in the old days recognized either something in the nature of a status like a public calling (such as common carrier, common inkeeper, or a bailor and bailee) or the status of master and servant. . . I do not think that that principle applies to professional relationships of the kind with which I am concerned here, where someone undertakes to exercise by contract his professional skill. . .

As Bridge has correctly observed, "[t]his represents a clear attempt to fix the twentieth century division between contract and tort by reference to the nineteenth century boundaries of tortious liability and is a perfect example of the fallacious use of the historical method".[146]

Only since 1970, a period in which the courts have been challenged to take a second look at the full implications of *Hedley Byrne* v. *Heller Partners Ltd.*, have judges begun to look behind these facile offshoots of the costs cases, and, if not to engage in more sophisticated historical analysis, at least to substitute good functional argument for unsatisfactory potted history. As a result, there is a growing body of case law supporting concurrent liability in both tort and contract, especially in cases involving professional services.[147]

The bifurcation between the contractual notion of warranty and the tort of deceit which we observed earlier also proved tenacious. Although the absence of an action for damages for a negligent contractual misrepresentation came to seem more and more anomalous, the courts resisted any pressure to fill the gap.[148] Even the advent of *Hedley Byrne* made no initial impact, the courts arguing that its principle was confined exclusively to non-contractual situations. Again it is only in the wake of more careful consideration of the ambit of that decision that judges have begun to realize its potential in curing not only the defects in tort law, but also those in contract.[149]

What this historical analysis demonstrates is that there is in fact nothing preordained about or deep-rooted in the claim that the common law recognizes a fundamental division between the ambit of contract

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[145] *Ibid.*, at pp. 204-205.

[146] Bridge, *loc. cit.*, footnote 51, at p. 901.

[147] See, for example, *Dominion Chain Co.* v. *Eastern Construction Co.* (1976), 68 D.L.R. (3d) 385 (Ont. C.A.); *Midland Bank Trust Co.* v. *Hett, Stubbs & Kemp*, [1979] Ch. 384 (Ch. D.); *Ross* v. *Caunters*, [1980] Ch. 297 (Ch. D.); *Central & Eastern Trust Co.* v. *Rafuse*, [1986] 2 S.C.R. 147, (1986), 37 C.C.L.T. 117.

[148] Recission was, of course, available for an "innocent" misrepresentation not incorporated into the contract between the parties in limited circumstances. See Stevens, *loc. cit.*, footnote 118, at pp. 155-160.

[149] See, for example, *Esso Petroleum Co.* v. *Mardon*, [1976] Q.B. 801 (C.A.).

and other bases of civil liability, expecially tort liability. While it is not possible in the common law to talk as confidently about a more generalized law of obligations, as it is in civilian jurisdictions, the reality prior to the nineteenth century was not far removed from that. First, the action on the case, a species of which later became the distinct action of assumpsit, proved flexible enough to obviate any serious concern to categorize and contrast the various circumstances in which liability for breach of obligations could be found. Only when a doctrinaire and narrow view of contract intruded did it occur to anyone that that particular form of obligation should predominate, and that it was important to prevent contamination of contract by the adoption of more general and imposed notions of liability. The move away from this essentially artificial view of the world of obligations, which has received its most dramatic boost in Canada from the decision of the Supreme Court in *Central Trust Co.* v. *Rafuse*,[150] recognizing concurrent liability in the provision of services by lawyers to their clients, far from being revolutionary, represents a return to basic values. This is not to say, as Le Dain J. made clear in the case, that a plaintiff always has the choice of opting between a tort and contract action where the actions seem to coexist.[151] The contract will take precedence if it contains an exclusion clause or limitation of liability. Where, however, the contract uses or implies the generalized standard of reasonable care as the gauge of contractual obligation and makes no attempt to limit liability, the option will be available. To this extent there is a recognition, as there was in the pre-nineteenth century law, that the theories of contractual and tortious obligation overlap and may complement each other. That the acceptance of this reality in the modern law has evolved mainly in the context of negligent misstatements and professional relationships demonstrates the durability and unifying potential of the notion of reliance in the law of civil obligations and its central place in a transactional environment moulded by a mass production economy and an ever more complex division of labour in the provision of goods and services.

[150] *Supra*, footnote 147.

[151] *Ibid.*, at pp. 205-206 (S.C.R.), 165-166 (C.C.L.T.).