# DUTY OF HONEST PERFORMANCE: A TORT DRESSED IN CONTRACT CLOTHING

Anna SP Wong*

*In CM Callow Inc v Zollinger, the latest installment from the Supreme Court of Canada on the duty of honest performance, the Court insisted that it is a contractual duty rather than a tortious one. This article contends that the duty to act honestly, a welcome addition as it is to the realm of private-law obligations, represents an infusion of tort logic into contract law. To preserve the coherence of orthodox contract law as a distinct field of liability, the duty should be reclassified under tort. Its breach should be recognized as a tortious wrong, attracting compensation for reliance, not expectation, losses.*

*Dans l'affaire C.M. Callow Inc c Zollinger, le plus récent arrêt de la Cour suprême du Canada en matière d'obligation d'exécution honnête, la Cour a insisté sur le fait qu'il s'agit d'une obligation contractuelle plutôt que délictuelle. L'auteure soutient que l'obligation d'exécution honnête, ajout tout bienvenu qu'il est au domaine des obligations de droit privé, représente une perfusion de la logique délictuelle dans le droit des contrats. Pour préserver la cohérence du droit des contrats traditionnel en tant que domaine distinct de responsabilité, l'obligation devrait être reclassée dans la catégorie des délits. Sa violation devrait être reconnue comme une faute délictuelle, attirant des dommages-intérêts fondés sur les pertes de confiance, et non d'attente.*

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* MPhil candidate at the University of Oxford. Immediately before Oxford, the author was Lead Counsel of Professional Conduct at a Canadian regulatory body, and before that, a civil litigator in private practice in Toronto. She is most grateful to the anonymous reviewers for their helpful comments.

## 1. Introduction

In 1974, Grant Gilmore boldly declared that "Contract, like God, is dead."[1] *Death of Contract,* sounds the title of his monograph that captivated attention like a red dress in a sea of black. In prose that dazzles with style and verve, Gilmore makes the case that the assent-based, bargain model of contract, with consideration as the "balance-wheel of the great machine,"[2] was rapidly disintegrating as reliance assumed a larger role in determining liability. A reliance-based, tort-like model of contract would soon take over. Contract, as Gilmore vividly puts it, was about to be swallowed up by tort.[3]

Half a century later, while contract law has outlived the eulogy (and the eulogist), the boundaries between contract and tort have become more ambiguous than ever. This is so thanks to the Supreme Court of Canada's formulation of the new duty of honest performance as a contract doctrine, even though it is not easily reconciled with the law of contract in common law as it is classically understood. As the Court made clear in the case that established the duty, *Bhasin v Hrynew*,[4] the duty is not based on the agreement of the parties but imposed by law on all contracting parties. The duty requires that they not lie or mislead their counterparty with respect to matters linked to their contract. Should a party's dishonesty cause loss to be incurred, it will be liable to pay damages. More recently, in *CM Callow Inc v Zollinger*,[5] the second and latest installment from the Court on the duty of honesty, the majority of the Court explained that the non-consensual

1 Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974) at 10. Even though Gilmore had his eye on the American context, his book garnered frequent references in Canadian scholarship as well. More importantly, a legal revolution similar to the one he described, with consideration-based liability declining in importance, has been observed with respect to Canadian contract law as well. See also Shannon K O'Byrne, "More Promises to Keep: The Expansion of Contractual Liability Since 1921" (1996) 35:1 Alta L Rev 165.

2 Gilmore, *supra* note 1 at 18.

3 *Ibid* at 87–94.

4 2014 SCC 71 [*Bhasin*].

5 2020 SCC 45 [*Callow*].

duty could constrain the exercise of an otherwise unfettered right under a contract. The duty is said to be grounded in corrective justice, a concept which has hereinto only been judicially invoked in relation to tort law. Even so, the Court insisted that the duty "is not a tort."[6]

This article argues against that insistence and for reclassification of the duty of honest performance under tort. The duty, as it is currently conceived, entails the importation of tort logic into contract law—breach of it is in essence a tort dressed up as a contract claim. Rather than to let the duty further develop as a contract doctrine, it should be moved to the tort side of the historic divide. Its breach should accordingly be recognized as a tortious wrong. Unless this is done, the coherence of orthodox contract law and its vitality as a *sui generis* field of liability are in peril. And before long, the death that Gilmore crystal-balled might finally come.

The argument is developed over the three main parts of the article. Part 2 canvasses the facts and the key points of the decisions of *Bhasin* and *Callow*. The facts are important as they lay the groundwork for showing how the duty applies, and in turn, reveal its true nature. Part 3 explains the tort-like features of the duty of honest performance and why a cause of action based on its breach adheres more to the structure of tort liability than that of contract. Part 4 advocates for recasting the duty under tort, breach of which would be compensated for on the tort measure of reliance damages. Apart from preserving the coherence of contract law, reclassification will resolve the existing confusion over the assessment of damages.

## 2. Development of the Duty in *Bhasin* and *Callow*

### A) *Bhasin*

*Bhasin* involved a dealership agreement between the defendant Can-Am, which sells investment products through dealers, and the plaintiff Harish Bhasin, a long-time Can-Am dealer. The agreement provided for automatic renewal of the contract at the end of the three-year term unless one of the parties gave six months' written notice to the contrary. Bhasin ran a successful agency, having built up a strong sales force over the years.

The defendant Larry Hrynew was Bhasin's competitor. He operated the largest Can-Am agency in Alberta, and was eyeing the sector of the market Bhasin dominated. After being rebuffed by Bhasin in his efforts to merge their business, Hrynew approached Can-Am to force the merger.

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6 *Ibid* at para 66.

Can-Am agreed. However, rather than to tell Bhasin about its plan, it actively concealed it from him for over a year.

In September 1999, Can-Am appointed Hrynew as its provincial trading officer to audit Bhasin, which gave Hrynew access to Bhasin's confidential business records. Bhasin objected to being audited by a competitor. In response, Can-Am falsely blamed the Alberta Securities Commission for rejecting its proposal to have an external person fill the role. Can-Am also repeatedly assured Bhasin that Hrynew was obliged to treat the information he received as an auditor in confidence, when in fact there was no such requirement. In June 2000, Can-Am filed a restructuring plan with the Alberta Securities Commission showing Bhasin working under Hrynew. This was not conveyed to Bhasin. Instead, Can-Am equivocated when Bhasin asked in August 2000 whether the merger was a "done deal."[7] Cumulatively, its misrepresentations led Bhasin to do nothing to protect the value of his business in the event that the dealership agreement was not renewed. In May 2001, six months before the end of the term, Can-Am gave notice of non-renewal. Bhasin very quickly lost his business to Hrynew, who solicited most of Bhasin's sales agents to work for him. The merger was effectively achieved.

The factual narrative cries out for a legal remedy for Bhasin who, as Justice Cromwell, writing for a unanimous court, highlighted in his opening, "was misled and lost the value of his business as a result."[8] The difficulty though was that no extant legal doctrine could offer relief in the circumstances. The only way, then, was for the Court to create a new common law duty and that it did,[9] in the form of a new duty of honesty in contractual performance. The new duty is said to be a manifestation of an overarching principle of good faith. Imposed in a blanket fashion on all parties who are in a contractual relationship, it requires them "to perform their contractual duties honestly and reasonably and not capriciously or arbitrarily,"[10] and "not to lie or mislead the other party about one's contractual performance."[11] The parties are not free to contract out of its core requirements.[12] Conceptually, the new duty is to be regarded as a "contractual duty" operating as a "general doctrine of contract law."[13]

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7 *Bhasin*, *supra* note 4 at para 12.

8 *Ibid* at para 1.

9 *Ibid* at paras 72–73. In Justice Cromwell's words: "The key question before the Court, therefore, is whether we ought to create a new common law duty … In my view, we should."

10 *Ibid* at para 63.

11 *Ibid* at para 73.

12 *Ibid* at para 75.

13 *Ibid* at para 74.

Unsurprisingly, the Court found Can-Am to have violated the new duty in misleading Bhasin about its intentions regarding renewal. But for Can-Am's dishonesty, Bhasin could have taken steps to retain the value in his agency rather than to see it turned over to Hrynew. Of note is the Court's damages assessment. The Court stated that damages for breach of the duty should be determined according to the contract measure;[14] however, what was awarded aligns more with reliance loss than loss of bargain or expectancy. The bargain—viz, the contract made—only entitled Bhasin to six months' notice of non-renewal, which Can-Am had provided. Thus, Bhasin already received the benefit of the bargain. As for the expectation of contract renewal which Can-Am's dishonesty encouraged, if this expectation were to be given effect, Bhasin should be awarded the value of the profits he would have made during a renewed three-year term. That was not, however, awarded. Instead, Bhasin was awarded the value of his business around the time of non-renewal. Had Can-Am not lied and Bhasin not relied on those lies, he could have sold his business before the contract expired. This amounted to his reliance interest.

To all appearances, the new duty undermines contractual freedom and the bargain premise of contract law. It trumped and diminished Can-Am's right under the contract to avoid an automatic renewal upon giving six months' notice—a right that was bargained for and purchased with consideration. Can-Am could not take full advantage of that right if it had been dishonest, as was the case, and would have had to disclose its plans to terminate before the six-month mark. The duty of honest performance therefore has the effect of constraining a party's exercise of a bargained-for right. Despite this, Justice Cromwell maintained that the fundamental commitments of contract law remain unchanged by the duty.[15] As he asserts, "the duty of honest performance interferes very little with freedom of contract."[16] "Any interference by the duty of honest performance with freedom of contract," he adds, "is more theoretical than real."[17]

### B) *Callow*

The plaintiff Callow is a maintenance service company that provided landscaping and snow removal services to the defendant group of condominium corporations, Baycrest, pursuant to a summer contract and a winter contract. The summer contract was set to expire in October 2013. The winter contract, whose term ends in April 2014, contained a

14 *Ibid* at para 88.
15 *Ibid* at para 70.
16 *Ibid* at para 76.
17 *Ibid* at para 81.

provision that allowed Baycrest to terminate the contract at any time for any reason on 10 days' notice.

In March or April 2013, Baycrest decided to terminate the winter contract due to some concerns over the quality of work provided. It decided not to notify Callow until September, so as not to jeopardize Callow's performance under the summer contract. Callow did not anticipate Baycrest would be terminating their relationship. Quite the contrary, it was made to believe that the winter contract would likely be renewed. The parties discussed the possibility of renewal. During the summer, Baycrest gladly accepted the "freebie" work Callow did as an incentive for Baycrest to award it another contract. Callow had opportunities to bid on other contracts for the upcoming winter, but passed them up as it understood its relationship with Baycrest to be secure. It was taken by surprise when Baycrest finally gave its 10-day termination notice in September.

At trial, Baycrest was found to have "actively deceived" Callow from the time the termination decision was made to the time when notice was given.[18] The argument that it had no duty to disclose its intention to terminate beyond giving 10 days' notice pursuant to the contract fell flat with the trial judge.[19] According to Justice O'Bonsawin, Baycrest intentionally withheld the fact that the contract was in danger of termination when it knew that Callow was performing free work to bolster the chances of the contract being extended. "The minimum standard of honesty," she wrote, "would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period."[20]

The Court of Appeal disagreed. It stressed that *Bhasin* indicated the duty of honest performance was a "modest, incremental step," and "does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract."[21] Ten days' notice as stipulated in the contract was what Callow had bargained for, and all that it was entitled to.[22] Moreover, the duty of honest performance obliges parties to be honest with each other with respect to an existing contract, not a future one. Unlike the contract at issue in *Bhasin,* the contract here did not provide for automatic renewal. Any deception in Baycrest's communication related to

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18 *CM Callow Inc v Zollinger*, 2017 ONSC 7095 at para 65 [*Callow* (SCJ)].

19 *Ibid* at para 66.

20 *Ibid* at para 67.

21 *CM Callow Inc v Zollinger*, 2018 ONCA 896 at para 13, citing *Bhasin*, *supra* note 4 at para 73 [*Callow* (ONCA)].

22 *Callow* (ONCA), *supra* note 21 at para 17.

the prospect of entering into a new winter contract, a contract not yet in existence, and so, does not fall within the duty's remit.[23]

According to eight of the nine judges of the Supreme Court of Canada,[24] Baycrest breached its duty of honest performance. It knowingly misled Callow into thinking that the termination clause of the contract would not be exercised. More specifically, Baycrest was dishonest in its "active communications" (1) suggesting to Callow that it was satisfied with its services and renewal was likely, and (2) accepting the freebie work Callow offered in the summer of 2013.[25] As Justice Kasirer explained, "If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early."[26] While the duty of honesty did not require Baycrest to address the alleged performance issues and to provide prompt notice, Baycrest had to refrain from misrepresenting its intentions.[27] In addition, it ought to have clarified the matter with Callow once it knew Callow misunderstood its intentions.[28] Having acted dishonestly, Baycrest was liable for "damages [that] flow for the consequential loss of opportunity."[29]

The Court extended the concept of "actively misleading" for the purposes of the duty of honest performance beyond what was envisioned in *Bhasin*. Not only lies, but also "half-truths, omissions, and even silence, depending on the circumstances" are captured.[30] One can mislead through action, by saying something directly to its counterparty, as well as through inaction, by failing to correct a misapprehension to which one has contributed. By widening the range of conduct and omission barred by the duty of honest performance, the ambit—and application—of the duty is expanded.

## 3. Duty of Honest Performance is Tort-Like

The Supreme Court of Canada introduced the duty to act honestly in *Bhasin* as a contract doctrine. It reiterated that message in *Callow*,

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23 *Ibid* at para 18.

24 Justice Kasirer penned the judgment of a five-member majority of the Court. Justice Brown penned the concurring judgment which was joined by two others. Justice Côté dissented.

25 *Callow*, *supra* note 5 at paras 95–97.

26 *Ibid* at para 37.

27 *Ibid* at para 104.

28 *Ibid* at para 99.

29 *Ibid* at para 104.

30 *Ibid* at para 91.

calling it a "contractual duty."[31] Breach of it, the majority emphasized with repetition, constitutes a "breach of contract"[32] calling for "damages according to the ordinary contractual measure."[33]

Despite the contractual label, the duty is tort-like. Two features of the duty give away its tortious character:

1. The duty arises involuntarily, not from the consent of contracting parties;

2. It does not protect the parties' bargain, but protects detrimental reliance on extra-contractual representations.

## A) The Duty of Honest Performance Is Involuntarily Imposed

A central tenet of classical contract law is that obligations arise from voluntary agreement. Put another way, a "consensual bargain" is key to their genesis.[34] Through the voluntary making of an offer, the voluntary accepting of that offer and the voluntary exchange of consideration, parties acquire legal rights against each other and legal duties towards each other. There must be *consensus ad idem*, a meeting of the minds. What makes an obligation distinctly contractual has been explained as follows: "A person's acquisition of contractual rights is normatively justified by the bilateral consent of the parties to the relationship. When a person incurs a contractual obligation to perform a specific act, he does so only because he consents to perform that act."[35]

The Supreme Court has time and again characterized contractual liability as voluntarily assumed liability. "The supposition of contract law is that two parties agree or consent to a particular course of action," writes Justice La Forest in *Norberg v Wynrib*.[36] Justice Arbour put it even more succinctly in *Hamilton v Open Window Bakery Ltd*: "Contractual obligations are voluntarily assumed by parties."[37] It should be added that not all voluntary promises or undertakings will have legal sanction

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31 *Ibid* at paras 47, 48.

32 *Ibid* at para 40, 47, 50, 51, 57, 75, 81, 83, 87, 103, 104.

33 *Ibid* at para 106.

34 See *Greater Fredericton Airport Authority Inc v NAV Canada*, 2008 NBCA 28 at para 19. See also *McKinney v University of Guelph,* [1990] 3 SCR 229 at 409–10, 76 DLR (4th) 545 ("bargaining is seen as a wholly consensual activity").

35 Anthony Robert Sangiuliano, "A Corrective Justice Account of Disgorgement for Breach of Contract by Analogy to Fiduciary Remedies" (2016) 29:1 Can JL & Jur 149 at 182.

36 [1992] 2 SCR 226 at 247, 92 DLR (4th) 449.

37 2004 SCC 9 at para 15.

attached to their breach. Only promises supported by valid consideration, and thus deemed to be part of a bargain, are underwritten by contract law.[38]

In contrast, there is nothing voluntary about tort obligations. The will of the state, rather than the will of the parties, gives rise to their conception.[39] Duties in tort are imposed by law irrespective of the intention or consent of the individuals involved, and even over their objection.[40] They come into existence automatically as a consequence of individuals entering into certain relationships of proximity. Unlike contractual duties and rights, they are not negotiated or bargained for, nor can they be waived in their entirety.[41] This difference is what marks the boundary between contract and tort as distinct modes of legal ordering. Justice Sharpe explains: "Tort claims rest upon legally imposed duties; contractual obligations depend upon the mutual consent of the parties."[42] The failure to perform a promised positive obligation in contract law is therefore conceptually distinct from the breach of an unpromised negative obligation to not harm another's interests in tort law.

The duty of honest performance sits glaringly out of place on the contract side of the accepted line of separation. Missing is the contractual hallmark of being voluntarily assumed. The duty is not created by contracting parties. It is laid on them by the law regardless of their intentions, and without reference to the explicit provisions of the contract. Not only does it exist independent of what the parties agreed, it can supersede their agreement, which is what happened in *Bhasin* and *Callow*. The defendant in *Bhasin*, if one recalls, had fully complied with the terms of the contract in terminating the relationship; still, it was found to have wronged the plaintiff. Likewise, the defendant in *Callow* had an "unfettered right"[43] pursuant to the termination clause to terminate the contract on 10 days' notice. Operation of the duty of honest performance

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38 See *Meade v Demerchant*, 2011 NBQB 172 at para 16, quoting J Swan, *Canadian Contract Law* (Markham, ON: LexisNexis Butterworths, 2006) at 18; *Canada v John Doe*, 2016 FCA 191 at para 46 ("[f]or there to be a contract, there has to be an exchange of promises backed by valuable consideration").

39 See Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41:4 Md L Rev 563 at 591; RFV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts*, 20th ed (London: Sweet & Maxwell, 1992) at 11.

40 See Randy E Barnett, "Contracts is Not Promise; Contract is Consent" (2012) 45:3 Suffolk UL Rev 647 at 650 ("in tort, the source of the obligation or 'duty' is the law").

41 See Kennedy, *supra* note 39 at 590-91.

42 *AL v Ontario (Minister of Community and Social Services)* (2006), 274 DLR (4th) 431 at para 19, 83 OR (3d) 512 (CA).

43 *Callow, supra* note 5 at para 37.

in both cases effectively fetters, or qualifies, the defendants' contractual rights—rights that the plaintiffs had voluntarily agreed to as part of the bargain.

Apart from being extra-contractually imposed, the duty of honest performance is non-derogable. "[T]he parties are not free to exclude it,"[44] writes Justice Cromwell in *Bhasin*. It is not, as he stressed, an implied term of contract, overriding the trial judge's choice of analytical device.[45] Parties are not at liberty to wholly disclaim the duty by inserting into their contract an express provision waiving it. Justice Cromwell claimed that the duty is still contractual despite its non-excludability by analogizing it to the doctrine of unconscionability which applies irrespective of the consent of the parties.[46] The analogy is unconvincing however, if not altogether misplaced, because unconscionability is not a duty at all, but a *defence* to contract enforcement. Unconscionability operates to set aside contracts whereas the duty of honest performance dictates how parties are to act for the duration of the contract. The latter limits the exercise of certain contractual powers and attracts damages when a party has engaged in, to use Justice Cromwell's words, "wrongful behaviour."[47] Breach of the duty differs from unconscionability because it does not involve finding anything wrong with, or unjust about, the contract. It differs from breach of contract generally because liability flows even though the contract has been faithfully observed.

The duty of honest performance constitutes judicial imposition of external norms—being honesty, cooperation, and fair dealing[48]—on all contractual relationships. Much like the logic of tort law, the norms imposed come not from the subject parties, but are social norms extraneous to the contract. Such norms find their normative basis in the notion that the economy thrives best when parties who do business together can trust each other. Honesty is what sustains trust. Therefore, as Justice Cromwell put it in *Bhasin*, "a basic level of honest conduct is necessary to the proper functioning of commerce."[49] It follows that community standards of honesty, reasonableness and fairness,[50] rather than the standards agreed upon by the parties as reflected in their contract, form the benchmark

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44 *Supra* note 4 at para 75.

45 *Ibid* at para 74. See also *Callow*, *supra* note 5 at para 84.

46 See *Bhasin*, *supra* note 4 paras 74–75.

47 *Ibid* at para 137.

48 *Ibid* at paras 57 (citing *Yam Seng Pte Ltd v International Trade Corporation Ltd*, [2013] EWHC 111 at para 135) and 60.

49 *Bhasin, supra* note 4 at para 60.

50 See *ibid* at para 38, citing *Gateway Realty Ltd v Arton Holdings Ltd* (1991), 106 NSR (2d) 180 at para 38, 1991 CanLII 2707 (SC (TD)).

against which a defendant's conduct is judged in assessing liability for breach of the duty.

Every tort duty, it may be said, requires the presence of a special type of relationship. In the case of the duty of honest performance, the existence of a contract between a plaintiff and the defendant gives rise to the requisite 'special relationship' or proximity to justify imposition of the duty. Yet the duty itself arises independently of the contract. *Callow* has left us no room to doubt its nonconsensual, extra-contractual nature; as Justice Kasirer proclaims, "the duty is one of mandatory law."[51] With this in mind, what the Supreme Court of Canada confirmed in *Central Trust Co v Rafuse* is apt here: "where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract."[52] The fact that the law prohibits the parties from disclaiming the duty of honest performance is further evidence of its tortious character. It is meant to protect interests that tort law protects—that is, interests acquired outside the bargaining process, which have not been purchased with consideration.

### B) It Is Not About the Bargain, But About Detrimental Reliance

A perennial concern of tort law is detrimental reliance. It is said to be a "tort principle,"[53] the very "touchstone of liability" in tort.[54] Tellingly, courts refer to damages in tort as "reliance damages."[55] The wrongful harm sought to be corrected stems from the plaintiff's detrimental reliance. Consider the tort of negligent misrepresentation and the tort of fraudulent misrepresentation (or deceit as it is sometimes called[56]), both

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51 *Callow*, *supra* note 5 at para 83.

52 *Central Trust Co v Rafuse,* [1986] 2 SCR 147 at 170, 31 DLR (4th) 481, citing Lord Justice Green in *Jarvis v Moy, Davies, Smith, Vandervell & Co*, [1936] 1 KB 399 at 405 (UK).

53 George K Gardner, "An Inquiry into the Principles of the Law of Contracts" (1932) 46:1 Harv L Rev 1 at 22. See also Duncan Kennedy, "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form" (2000) 100:1 Colum L Rev 94 at 107 (describing reliance as a "tort concept").

54 Russell Brown, "Assumption of Responsibility and Loss of Bargain in Tort Law" (2006) 29:2 Dalhousie LJ 345 at 349.

55 *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 40, 99 DLR (4th) 577.

56 Deceit and fraudulent misrepresentation are practically identical, but see Bruce MacDougall, *Misrepresentation and (Dis)honest Performance in Contracts*, 2d ed (Toronto: LexisNexis, 2021) at §5.13, 5.24 for the fine distinction between the two.

of which bear a close resemblance to the duty of honest performance. It is an element of both torts that the plaintiff suffered harm from having reasonably relied on the defendant's misstatement.[57] The plaintiff's reliance is the causal link between the loss and the defendant's misconduct and thus what justifies shifting the burden of the loss that plaintiff suffered to the defendant.

While it may not be immediately obvious, reliance is a constitutive element of the breach of the duty of honest performance as a claim. Lies, half-truths and misleading silences, however morally wrong and offensive to the court's sense of decency, are not on their own sufficient to trigger a remedy. The dishonest statement or conduct must have been relied upon by the plaintiff, and loss must have incurred as a result of the reliance. What transpired in *Bhasin* and *Callow* makes this clear. In Bhasin's case, the harm that befell him flowed from his reliance on Can-Am's deceptive representation that a merger was not a done deal, a representation that lulled him into inaction until he received notice of non-renewal nine months later, by which time it was too late for him to make alternative arrangements.[58] But for his reliance, the loss he incurred presumably would have been avoided.

In *Callow*, the plaintiff acted—or more precisely, refrained from acting—in reliance on the illusory carrot dangled by the defendant that the contract would likely be renewed after the current one ran its course. Under the false sense of security which the defendant helped instill, the plaintiff did not bid on tenders for other winter maintenance work in the summer of 2013 when the opportunities arose. Those opportunities had

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[57] With respect to the tort of negligent misrepresentation, see *Queen v Cognos Inc*, [1993] 1 SCR 87 at 110, 99 DLR (4th) 626 ("[the tort has] five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted."). With respect to the tort of fraudulent misrepresentation, see *Midland Resources Holding Limited v Shtaif,* 2017 ONCA 320 at para 162 ("[f]raudulent misrepresentation is established where there are the following five elements: (i) a false representation of fact by the defendant to the plaintiff; (ii) knowledge the representation was false, absence of belief in its truth, or recklessness as to its truth; (iii) an intention the plaintiff act in reliance on the representation; (iv) the plaintiff acts on the representation; and (v) the plaintiff suffers a loss in doing so").

[58] Can-Am also lied to Bhasin about Hrynew's obligations as its provincial trading officer and the reasons he appointed to the role, though these lies are inconsequential for the purposes of determining recovery since Bhasin never relied on them to his detriment. Instead, he stood firm in refusing to give Hrynew access to his confidential business records.

vanished by September when the defendant gave notice of termination. The plaintiff lost out on the profits it would have made in upcoming winters; at the very least, in the next winter. Had the plaintiff not relied on the defendant's dishonest act, a cause of action based on the duty would not have been made out. Justice Brown's concurring judgment in *Callow* illuminates. He writes: "If a plaintiff *suffers loss in reliance* on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole."[59] Liability rests on detrimental reliance, not on some notion of an exchange bargain. Not only that, the duty can operate to undercut the terms of the bargain struck by the parties.

It is worth noting that the detriment associated with reliance in both *Bhasin* and *Callow* was factually speculative. Consider the loss of business value that was awarded in *Bhasin*. There was a strong likelihood that Bhasin would have incurred the loss even if he had realized nine months sooner that his future with Can-Am was in jeopardy. Under the dealership agreement, Can-Am had substantial control over Bhasin's agency; it owned his client list as well as the licences that his sale representatives needed to work.[60] It would have been difficult to find a third-party buyer given these terms. Accordingly, it was far from certain that had there been no lies and no reliance on such lies, Bhasin would have been able to sell before the dealership agreement expired to avoid losing the value of his business. It was much the same with the plaintiff in *Callow*. While there were maintenance contracts for the upcoming winter that Callow could have bid on, it was completely conjectural that he would have won any of them, and if he did, that he would have made as much profit as he would have on the contract with Baycrest.

It is more accurate, then, to say that the detriment suffered by the plaintiff is presumed to have occurred. Indeed, the Court in *Callow* signaled that a legal presumption is at work. In discussing proof of loss, Justice Kasirer for the majority notes: "even if I were to conclude that the trial judge did not make an explicit finding as to whether Callow lost an opportunity, *it may be presumed as a matter of law that it did*."[61] A presumption of law is a rule of substantive law which prescribes a certain legal consequence upon proof of a basic fact and in the absence of counter evidence.[62] It operates as follows: When fact X has been established, the trier of fact must infer that fact Y exists unless the party against whom the presumption operates adduces evidence to rebut the existence of Y. In the context of the duty of honest performance, it is the aggrieved party, i.e.,

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59 *Callow*, *supra* note 5 at para 130 [emphasis added].

60 See *Bhasin (Bhasin & Associates) v Hrynew*, 2011 ABQB 637.

61 *Bhasin*, *supra* note 4 at para 116 [emphasis added].

62 See John Sopinka, Sidney N Lederman and Alan W Bryant, *The Law of Evidence in Canada*, 2nd ed, (Toronto: Butterworths, 1999) at ss 4.23-4.26.

plaintiff, who has the benefit of the presumption. Once it is established that (1) the defendant made a misleading statement or behaved dishonestly and (2) the plaintiff acted in reliance on the dishonest representation, it is presumed to be true that the dishonest conduct is what put the plaintiff in financial harm's way.

Importantly, what is detrimentally relied upon is not a bargained-for promise as embodied in the contract, but an *extra-contractual* representation. Recall that in both *Bhasin* and *Callow* the defendant's dishonest representations on which the plaintiff relied were made outside the contract. The right to rely on the representations was not bargained for, which is to say, no consideration was furnished by the plaintiff for it. In the absence of consideration, the plaintiff's reliance is not part of the bargain struck between the parties. As a matter of fact, had the plaintiff relied on what was bargained for (i.e., the contract) instead, it likely would have acted differently and avoided the consequential loss.

Detrimental reliance is crucial in one final respect: damages recoverable for breach of the duty are limited by the extent of the plaintiff's detrimental reliance. While *Bhasin* and the majority in *Callow* insisted that expectation damages are appropriate, the damages actually awarded more closely resemble damages on the reliance basis. A brief explanation of the distinction is due. Reliance damages are the ordinary measure of damages in tort. They aim to put the aggrieved party in the position it would have been in if the wrong had not been committed.[63] Expectation damages are the ordinary measure of damages in contract. They aim to give the aggrieved party "the benefit of the bargain"[64]—that is, "the value which the plaintiff would have received *if the contract had been performed*", or more succinctly "the value of the promised performance."[65] By this description, expectation damages ill-fit breach of the duty of honest performance given that loss accrued despite perfect adherence to the contract by both sides. There is no foiled bargain, nor is there necessarily any performance promised in the contractual sense which has not been fulfilled. Moreover, the duty is not a term implied into all contracts by law or as a matter of

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63 *PreMD Inc v Ogilvy Renault LLP*, 2013 ONCA 412, at para 65; *Ramey v Wilder Mobility Ltd*, 2004 CanLII 22698, [2004] OJ No 2674 (SC) at paras 55–56.

64 *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at para 28.

65 *Ibid* at paras 25–26, citing SM Waddams, *The Law of Damages*, 3rd ed (Aurora, ON: Canada Law Book, 1997) at 267 [emphasis added]. The *locus classicus* of the rule of damages for breach of contract is the judgment of Baron Parke in *Robinson v Harman* (1848), 1 Ex 850 at 855. For a discussion of the difference between expectation and reliance damages, and why expectation damages are not truly compensatory in the sense of restoring loss, see Melvin A Eisenberg, *Foundational Principles of Contract Law* (New York: Oxford University Press, 2018) at 180–83.

fact, as the Court made emphatic in *Bhasin*.[66] If the duty is not an implied term of the parties' contract, and is clearly not an express one, it is not part of the contract. Its breach, then, is not a breach of a given contract from which damages on the expectation measure might be said to logically flow.

What was awarded in *Bhasin* is certainly not the value of any promised performance.[67] Though Can-Am did not make any firm promises—other than those incorporated into the contract, which were honoured—in equivocating when asked about the merger, it tacitly promised to let the status quo continue, with the result that the dealership agreement would roll over for another three-year term. Had the value of this promise been awarded in accordance with expectation damages, Can-Am would have been required to pay Bhasin the profits he expected to make under the dealership agreement for three more years. This would make good the expectation which Cam-Am's dishonesty created. Instead, in line with protecting his reliance interest, the Court granted Bhasin the estimated value of his business at the time of non-renewal,[68] representing the difference between Bhasin's actual position and the position he would have occupied if no misrepresentations were made. The award reflects the losses Bhasin suffered in reliance on Can-Am misrepresentations, not the gains he would have obtained had the representations been true.[69]

On the facts of *Callow*, the reliance and expectation measures yield the same quantum. Baycrest, one will recall, misled Callow into believing that it was satisfied with the work done and it would not prematurely terminate the winter contract. The Court awarded Callow damages equal to the profits it would have made on the year remaining on the winter contract. This amount achieves the goal of protecting expectation interest; it puts Callow in the economic position it would have been in

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66 See *supra* note 4 at para 74.

67 See Krish Maharaj, "An Action on the Equities: Re-Characterizing Bhasin as Equitable Estoppel" (2017) 55:1 Alta L Rev 199 at 215. See also *Callow*, *supra* note 5 at paras 140–45. Per Justice Brown, explaining how the damages assessed in *Bhasin*, *supra* note 4, is not based on expected performance.

68 It has been argued that the Court's assessment is suspect because there were no findings made by the trial judge as to the value of the business at the time of non-renewal: see Joseph T Robertson, "Good Faith as an Organizing Principle in Contract Law: *Bhasin v Hrynew*–Two Steps Forward and One Look Back" (2015) 93:3 Can Bar Rev 809 at 863.

69 Note that this measure of damages is consistent with the measure of damages used for the tort of fraudulent misrepresentation: see e.g., *Parna v G & S Properties Ltd*, [1969] 2 OR 346, 5 DLR (3d) 315 (CA), rev'd but not on this point, [1971] SCR 306, 15 DLR (3d) 336; *CRF Holdings Ltd v Fundy Chemical International Ltd* (1981), [1982] 2 WWR 385, 33 BCLR 291 (CA) at para 17; *Forbes v Morrison*, 2014 SKQB 40 at para 81.

had the expectation which Baycrest's dishonesty created been fulfilled.[70] The amount also represents the best approximate of what is required to protect reliance interest. It is the best approximate since it is impossible to determine, with certainty and precision, what Callow's position would have been had it not relied on Baycrest's dishonest conduct, but it is reasonable to infer, based on the record, that Callow would have bid on and secured another contract of similar value for the upcoming winter.[71]

That the two measures of damages converge in *Callow* does not render the distinction any less fundamental. Indeed, despite computing to the same value, the majority and concurrence disagreed over which measure is being applied. Although Justice Kasirer for the majority maintains that expectation damages are awarded, he nonetheless states that damages for breach of the duty seek to "repair" and "set matters right on the usual measure of corrective justice."[72] Recovery on the basis of corrective justice is recovery on the tortious basis.[73] The concurring judgment penned by Justice Brown skips the pretense that the contractual (expectation) measure is engaged. As he notes, the interest that the duty protects is detriment reliance *outside the contract*, and so, the usual measure of contract damages is not appropriate. Instead, damages are awarded for the purposes of undoing the harm which the plaintiff's reliance on the defendant's dishonest statement has caused. In Justice Brown's own words:

> the justification for awarding expectation damages does not apply to breach of the duty of honest performance. In such cases, the issue is not that the defendant

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70 Note that Justice Kasirer explained the application of the expectation (contract) measure differently, as damages to place the plaintiff in the same position as if "the breach of contract" had not occurred, which is to say, "had the duty been performed": *Callow*, *supra* note 5 at paras 106–107. This arguably misconstrues what the expectation measure requires. Let us return to first principles: "In the case of a misrepresentation which is held to constitute a breach of contract, *prima facie* the measure of damages is the difference between the value of what the representee received and *what he would have received if the representation had been true*." DW McLaughlan, "Assessment of Damages for Misrepresentation Inducing Contracts" (1987) 6:3 Otago L Rev 370 at 374 [emphasis added]. Applying this, there is no doubt that a misrepresentation is involved when the duty of honesty is breached, and were such a breach to constitute a breach of contract per Justice Kasirer, then Callow ought to be awarded whatever gains he would have obtained had the misrepresentation been true rather than what was actually awarded to him. More fundamentally, as argued above, the duty of honesty is not a term of the contract; thus, breaching it does not involve a "breach of contract" as Justice Kasirer considers there to be.

71 See *Callow*, *supra* note 5 at para 149.

72 *Ibid* at para 103.

73 See *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 34 ("corrective justice [is] the basis for recovery in tort") [*Babstock*]; *Clements v Clements*, 2012 SCC 32 at para 7 (the basis for recovery in negligence is corrective justice) [*Clements*].

> has failed to perform the contract, thereby defeating the plaintiff's expectations. It is, rather, that the defendant has performed the contract, but has also caused the plaintiff loss by making dishonest extracontractual misrepresentations concerning that performance, *upon which the plaintiff relied* to its detriment. In short, the plaintiff's complaint is not lost value of performance, but detrimental reliance on dishonest misrepresentations. The interest being protected is not an expectation interest, but a reliance interest.[74]

## 4. Duty Should be Characterized as Tortious

Justice Brown's comments above bring into focus the tortious nature of the duty of honest performance. The duty as a legal doctrine is less concerned with the parties' bargain contract and much more so with extra-contractual misrepresentations made by one contracting party to the other that cause the latter to suffer a loss. Such consequential loss is what the duty seeks to prevent and to redress when it is occasioned. The wrong that attracts liability, it bears emphasizing, is not contractual. The right to a remedy, too, is not contractual, but arises by way of legal prescription; it is a right inalienable even by the will of the parties. Taken together, the nature of the duty demands recognition of its breach as a tort. It also demands compensation for the breach to be assessed on a tort basis. Ernest Weinrib's observation is salient:

> The difference between tort law and contract law lies in the origin of the right. In tort law the right exists independently of the defendant's action; the damage award therefore aims at eliminating the effects on the plaintiff of the defendant's wrong. In contract law, the parties themselves create the plaintiff's right to the defendant's performance of the promised act; the damage award therefore gives the plaintiff the value of that performance.[75]

### A) Tort Damages Are Appropriate

Not only does characterizing the duty as tortious better reflect its essential nature, it will eliminate the confusion evident in *Callow* over the appropriate measure of damages. As with other torts, damages for breach of the duty should be determined using the tort approach of rectifying reliance loss. The plaintiff is recompensed for the fact, and to the extent, that the defendant's misrepresentation has left her worse off having relied on it. The case for protecting expectation interest is weak given that the wrong traces to an extra-contractual misrepresentation, and not to the contract. The defendant is not necessarily promising anything in his

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74 *Callow*, *supra* note 5 at para 142 [emphasis in original].

75 Ernest Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995) at 136.

misrepresentation;[76] thus, there might not be a promise per se, not even an unbargained one, against which expectation interest can be properly gauged.

Awarding reliance rather than expectation damages when the duty is breached also makes for sound policy. A defendant who has made a dishonest misrepresentation in contravention of the duty should be treated no differently than a defendant found to have made either a fraudulent or negligent misrepresentation to a plaintiff with whom he is in a contractual relationship. Essentially the same underlying wrong, that of misleading the person on the other side of a contract, is involved. The law is clear that a defendant who made a fraudulent or negligent misrepresentation, liable as a tortfeasor, has to pay damages on the reliance measure: "The plaintiff should be awarded an amount necessary to put them in the position they would have occupied had the misrepresentation not been made," as opposed to the position they would have occupied if the misrepresentation were true.[77]

Whether the duty is conceived of as tortious or contractual is no mere theoretical pedantry because damages in tort and damages in contract do not always coincide. In many situations the two will be the same,[78] but they can and do diverge. An example helps explain. Suppose A and B have a contract for A to supply B with widgets at the market price for widgets plus a handling fee. The market price is $1,000. A lies, telling B that the market price is $2,000. B pays $2,000. Damages on the tort measure would give B the difference between what she has paid in reliance on A's dishonest statement and what she has received in return: $2,000–$1,000 = $1,000. Damages on the contract measure would give B the difference between the value of what she expected to receive and what she actually received: $2,000–$1,000 = $1,000. So far damages in tort resemble the damages in contract. Let us now imagine that instead of paying $2,000, B successfully negotiates to pay $1,500, a price below what she was misled to think is the market price. According to the contract measure, B would still receive $1,000 since the price actually paid, or how she changed her position, is irrelevant. However, according to the reliance measure, which takes into account the price paid, B would only get $500 ($1,500–$1,000 = $500). Even though A's dishonesty has resulted in B expecting the market

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76 In *Callow*, *supra* note 5, for example, the defendant's dishonesty did not amount to a promise to do anything or to refrain from doing anything, nor was it a promise about a certain future state. The defendant was simply dishonest about the *possibility*—not certainty—that the contract might be renewed next year.

77 *Ban v Keleher*, 2017 BCSC 1132 at para 70.

78 See *VK Mason Construction Ltd v Bank of Nova Scotia,* [1985] 1 SCR 271 at 285, 16 DLR (4th) 598.

price to be $2,000, B only changed her position in reliance on it to the point of losing $500.

### B) Duty Is at Odds with Theoretical Foundation of Classical Contract Law

The duty of honesty fits the classical contract model like a square peg in a round hole. A brief overview of the orthodox position will make this obvious.

The law of contract as we know it is driven by commitments to personal autonomy and freedom of contract.[79] It promises individuals the right to determine for themselves what obligations they will assume vis-à-vis their contracting partner. In keeping with *laissez-faire* ideals,[80] the classical scheme takes for granted four important assumptions. First, all parties are taken to be rational maximizers of self-interest who are able to bargain freely and advance their own interests in an exchange.[81] Not only that, but they deal with each other "at arm's length," in the legal sense.[82] Second, bargaining takes place in earnest. The two sides negotiate; offers are extended and are accepted, rejected, or countered.[83] Third, neither party owes any duty to the other until a deal is struck, nor—critically—is there "any duty to volunteer information to the other."[84] Fourth, it is entirely up to the parties to decide what risks they will accept, and on what terms; to wit, "the content of a contractual obligation is a matter for the parties, not the law."[85]

With these conditions assumed to be in place, it makes sense that the resultant bargain should have the weight of the law behind it.[86] The role of the courts, then, is simply to give effect to the bargain that the parties have made. They are not to strike down a bargain because it seems lopsided, or to impose extra-contractual obligations on a party to do justice by their own standard. Nor are they to protect a party's reliance, except when the plain terms of the contract provide for it. As Sir George Jessel, Master of the Rolls, stated in a passage that has been widely cited by Canadian

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79 See Alan Brudner, "Reconstructing Contracts" (1993) 43:1 UTLJ 1 at 3.

80 See PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, UK: Clarendon Press, 1979) at 232.

81 See Jay M Feinman, "The Significance of Contract Theory" (1990) 58:4 U Cin L Rev 1283 at 1286.

82 Atiyah, *supra* note 80 at 402.

83 *Ibid* at 403.

84 *Ibid*.

85 Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 59 [emphasis removed]. See also Atiyah, *supra* note 80 at 403.

86 See Atiyah, *supra* note 80 at 139, 146–48.

courts, "men of full age and competent understanding shall have the utmost liberty of contracting, and [] their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."[87]

Such judicial commentary reflects a central tenet of liberalism—the supremacy of the individual[88] and his "liberty to bind himself."[89] Each person is deemed to be the best judge of his own interests and responsible for looking after himself. With that in mind and given that contracting is a means for people to allocate risks between themselves as they see fit, when the law affords them the opportunity to freely contract, they will naturally enter into bargains that improve their welfare. If everyone does the same, we are collectively better off. Thus, apart from the supposed inherent fairness of enforcing bargains,[90] their enforcement is for the good of society as a whole.[91]

It is the presence of a bargain, as evidenced by an exchange of consideration, rather than a party's reliance on it, that triggers contractual liability.[92] A's reliance on B's statement that it will do something for A does not provide A with a basis for recovery under contract law unless it is bargained for—viz, backed by consideration. It generally matters not

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87 *Printing and Numerical Registering Company v Sampson* (1875), LR 19 Eq 462 at 465 (UK).

88 See Anat Rosenberg, "Contract's Meaning and the Histories of Classical Contract Law" (2013) 59:1 McGill LJ 165 at 197.

89 *Hofer et al v Hofer et al*, [1970] SCR 958 at 963, 13 DLR (3d) 1.

90 See Morton J Horwitz, "The Historical Foundations of Modern Contract Law" (1974) 87:5 Harv L Rev 917 at 917. Horwitz notes that there was a long-standing belief, current until the nineteenth century, that "the justification of contractual obligation is derived from the inherent justice or fairness of an exchange." This is in keeping with the medieval tradition of substantive justice. According to Horwitz, once this belief was jettisoned, contracts were seen as a product of a meeting of the will of the parties and deserving of enforcement as such. For a critique of Horwitz's account, see AWB Simpson, "The Horwitz Thesis and the History of Contracts" (1979) 46:3 U Chi L Rev 533.

91 See Brudner, *supra* note 79 at 3. This sentiment is aptly captured in the American *Restatement (Second) of Contracts*, § 72 comment b (1981): "Bargains are widely believed to be beneficial to the community in the provision of opportunities for freedom of individual action and exercise of judgment and as a means by which productive energy and product are apportioned in the economy. The enforcement of bargains rests in part on the common belief that enforcement enhances that utility."

92 See Charles M Gray, "The Ages of Classical Contract Law" (1980) 90:1 Yale LJ 216 at 218: "In classical doctrine, the bargain, or expectation, interest in contracts is recognized as real, and it predominates over the reliance and benefit, or restitution, interests, which are also woven into the historic texture of contract law. The latter interests tend not to be recognized by the classical theory when no proper contract stands behind an act of reliance or the receipt of a benefit."

that the reliance was invited by B and A was worse off for it. Rectifying detrimental reliance is conventionally a concern of tort, not of contract. As Alan Brudner puts it, "there can be no legitimate enforcement of a promise in the absence of a bargain. The fact that the promisee has relied to his detriment may be a ground for my compensating him in tort to the extent of his reliance."[93]

In view of the foregoing, it is hard not to see that the duty of honest performance sits uneasily with contract law. The common law of contract, the Court in *Bhasin* maintains, "places great weight on the freedom of contracting parties to pursue their individual self-interest."[94] However, the duty to act honestly does not derive its normative purchase from facilitating party autonomy and freedom of contract, but from observing norms of honesty and good faith. In fact, the duty, which operates irrespective of the consent of the parties, short-circuits contractual freedom. Consideration is not part of the calculus; none is given in exchange for the right to claim damages in relation to a dishonest representation. Moreover, the duty, devised as a "doctrine of contract law,"[95] is unlike any extant contract doctrine. Breach of the duty is in itself a cause of action, but the same cannot be said of unconscionability and promissory estoppel, two extant doctrines referenced in *Bhasin* as comparisons.

Introduction of the duty as a contract doctrine plunges the whole of contract law into conceptual turmoil. At its core, contract law seeks to give effect to the parties' agreement as to the allocation of risks between them.[96] Making A liable for B's loss even though B had voluntarily agreed to bear the risk of that loss, as a claim based on the duty does, is a striking departure from contract law's basic stance. Signs of disorientation are apparent in *Bhasin*, a decision backed by the full Court, no less. There, the Court insists that "the duty of honest performance interferes very little with freedom of contract"[97] while also stipulating that "the parties are *not free* to exclude it."[98] Contracting parties are instructed to "have appropriate regard to the legitimate contractual interests of the contracting partner."[99] And yet, "a party may sometimes cause loss to another—*even intentionally*—in the legitimate pursuit of economic self-interest. Doing so is not necessarily

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93 See Brudner, *supra* note 79 at 42.

94 *Bhasin*, *supra* note 4 at 70.

95 *Bhasin*, *supra* note 4 at paras 74–75.

96 See Joost Blom, "Remedies in Tort and Contract: Where is the Difference?" in Jeffrey Berryman, ed, *Remedies: Issues and Perspectives* (Scarborough: Carswell, 1991) 395 at 397.

97 *Bhasin*, *supra* note 4 at 76.

98 *Ibid* at para 75 [emphasis added].

99 *Ibid* at para 65.

contrary to good faith."[100] In these hard-to-reconcile statements lies a fundamental contradiction, that between the individualism of classical contract law and the relational values espoused by the compulsory duty to act honestly. The Court's desire to save the old logic and champion a new one threatens to give contract law a split personality, of being contract and tort.

The view advanced by Gilmore that a tort-like, reliance-based conception of contract liability would displace the prevailing consent-based conception[101] seems more likely than ever. Breach of the duty of honest performance, as explained above, is coextensive with detrimental reliance. Certainly, this does not render all cases of harm resulting from reliance on the word or act of a contractual counterparty actionable. Nonetheless, there is no doubt that the duty of honest performance greatly expands the basis of reliance-based liability, at the expense of diminishing what contract law aims to protect—the benefit of the bargain. With the distinction between tort and contract being blurred by the duty of honest performance, the law of contract is now moving deeper into the field of protecting unbargained-for reliance.

### C) Even if the Duty Is Animated by Corrective Justice, It Does Not Make It Contractual

The majority in *Callow* trotted out corrective justice, a principle commonly invoked in relation to tort law, to explain the duty and contract law more generally. Linking corrective justice with contract law was a first for a Canadian court. "Corrective justice", writes Justice Kasirer, is a "contractual ideal"[102] and "[t]he duty of honest performance is but an exemplification of this ideal."[103] He elaborates further: "requiring that a party exercise a right under the contract in keeping with this minimum standard [set by the duty of honesty] only precludes the commission of a wrong and thus repairing that breach, where damage resulted, may be thought of as consonant with the principles of corrective justice."[104]

Corrective justice is concerned with injustice that arises between individuals and explains liability as rectification of such injustice. An interpersonal injustice occurs when one person inflicts a "wrong" on

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100 *Ibid* at para 70 [emphasis added].

101 Another prominent contract scholar who made a similar contention is PS Atiyah. See Atiyah, *supra* note 80 at 716–79, and PS Atiyah, "Chapter 2: Contracts, Promises and the Law of Obligations" in *Essays on Contract* (Oxford, UK: Clarendon Press, 1986) 10 at 42-43, 54-56.

102 *Callow*, *supra* note 5 at para 47.

103 *Ibid* at para 47. See also *ibid* at para 86.

104 *Ibid* at para 83.

another person—that is to say, interferes with their rights—and causes injury to the person.[105] The law responds to this injustice by providing a remedy that aims to undo the wrong and, as far as possible, make the injured party whole. The remedy is correlative: the plaintiff recovers exactly what the defendant is made to surrender or as Weinrib puts it, "the doer of injustice becomes the sufferer of the law's remedy."[106] In practical terms, the quantum of damages that a court would award should be equivalent to the harm wrongfully caused. If a defendant perpetuated a wrong that caused $100 worth of loss to the plaintiff, then corrective justice demands that the defendant be liable to the plaintiff for $100. To require the defendant to pay the plaintiff more than $100 would be asking him to do more than correct his wrong to the plaintiff. Thus, there can be no reasons in corrective justice to have the defendant pay more—or less—than $100.[107] The role of corrective justice is limited to repairing wrongful losses by restoring the original equality between the parties; punishment is of no direct concern.[108]

Over the last four decades, corrective justice has enjoyed the limelight as a unifying theory of tort law. The works of Weinrib,[109] Jules

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[105] A "wrong", according to Jules Coleman, is a combination of (1) a wrongdoing as unjustified action, and (2) commitment a wrong in the sense of justifiably infringing a right: See Jules Coleman, *Risks and Wrongs* (Cambridge, UK: Cambridge University Press, 1992) at 361 [Coleman, *Risks and Wrongs*]. See also *Palsgraf v Long Island Railroad Co*, 248 NY 339 at 345 (CA) per Chief Justice Cardozo ("the commission of a wrong imports the violation of a right"); Allan Beever, *Rediscovering the Law of Negligence* (Oxford, UK: Hart Publishing, 2007) at 45.

[106] Ernest J Weinrib, "Corrective Justice in a Nutshell" (2002) 52:4 UTLJ 349 at 350; Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 17 [Weinrib, *Corrective Justice*]. See also Ernest J. Weinrib, "The Monsanto Lectures: Understanding Tort Law" (1989) 23:3 Val U L Rev 485.

[107] This example is attributable to Beever, *supra* note 105 at 46.

[108] See Gerald J Postema, "Review: Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice" (1993) 103:3 Yale LJ 861 at 875; Ernest J. Weinrib, "Punishment and Disgorgement as Contract Remedies" (2003) 78:1 Chicago-Kent L Rev 55 at 86 [Weinrib, "Punishment"].

[109] See Weinrib, "Punishment", *supra* note 108 and the works cited in *supra* note 75 and *supra* note 106. In Ernest J Weinrib, "The Special Morality of Tort Law" (1989) 34 McGill LJ 403 at 413, Weinrib describes "corrective justice [as] the justificatory structure that renders tort law intelligible from within."

Coleman,[110] Stephen Perry,[111] Allan Beever,[112] George Fletcher,[113] and Richard Epstein,[114] among others, may be credited for catapulting it to fame. In slightly different ways, they make use of corrective justice to illuminate the inner logic of tort law. Tort law asks the question of who is responsible for a wrong done and shifts the loss borne by a wrong-sufferer to the wrongdoer (or doers) via a damages award equal to the value of the loss. The objective is to reinstate the status quo ante. For some, notably Coleman, corrective justice is the *only* point of tort law and what distinguishes it from other branches of law, including contract law, which is designed to facilitate market transactions by minimizing uncertainty.[115] "Tort law implements corrective justice," writes Coleman, who goes on to note: "The central concepts of tort law—harm, cause, repair, fault, and the like—hang together in a set of inferential relations that reflect a principle of corrective justice."[116] A corrective-justice account of tort law has been definitively embraced by the Supreme Court of Canada. In *Clements v Clements*, the Court described corrective justice as tort law's "anchor"[117] and "underlying theory."[118] "Corrective justice," wrote then Chief Justice McLachlin, "assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm";[119] "the

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110 See Coleman, *Risks and Wrongs*, *supra* note 105; Jules Coleman, "Part One: Tort Law and Corrective Justice" in *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001) 226 [Coleman, *Tort Law*].

111 See Stephen R Perry, "Responsibility for Outcomes, Risk and the Law of Torts" in Gerald J Postema, ed, *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001) 72. Note that Perry does not rule out that tort law may be explained by principles other than corrective justice, though he does not argue for it: see Stephen R Perry, "The Moral Foundations of Tort Law" (1992) 77:2 Iowa L Rev 449 at 450 [Perry, "Moral Foundation"].

112 See Beever, *supra* note105, at ch 2; Allan Beever, "Corrective Justice and Personal Responsibility in Tort Law" (2008) 28:3 Oxford J Leg Stud 475.

113 See George P Fletcher, "Fairness and Utility in Tort Theory" (1972) 85:3 Harv L Rev 537; George P Fletcher, *Basic Concepts of Legal Thought* (Oxford: Oxford University Press, 1996).

114 See Richard A Epstein, "A Theory of Strict Liability" (1973) 2:1 J Leg Stud 151; Richard A Epstein, "Defenses and Subsequent Pleas in a System of Strict Liability" (1974) 3:1 J Leg Stud 165.

115 Coleman, *Risks and Wrongs supra* note 105 at 105, 197. According to Coleman, contract law minimizes uncertainty by assuring parties in advance that in the event of dispute, the terms to which the parties would have agreed to, as opposed to terms that the court thinks is distributively just, will be enforced (at 181–82).

116 Coleman, *Tort Law*, *supra* note 110 at 9–10.

117 *Clements*, *supra* note 73 at para 37.

118 *Ibid* at para 13. See also *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 152; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 189.

119 *Clements*, *supra* note 73 at para 7.

law 'corrects' the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered."[120] The Court recently affirmed this stance, remarking that corrective justice is the "foundational principle of tort law" and "the basis for recovery in tort".[121]

Corrective justice, on the reparative view that the Supreme Court of Canada has endorsed prior to *Callow*, does not lend a full explanation of contract law. The justice dispensed by courts is corrective in that, as Justice Karakatsanis explains, it is "based on compensation for harm *that results from* the defendant's unreasonable creation of the risk of that harm."[122] Liability for breach of contract is not in all instances in line with this view of corrective justice given that, in contrast to a claim in tort, "loss is not an essential element of a cause of action for breach of contract."[123] When no loss has been incurred, there is nothing for corrective justice to repair, as it were. Moreover, the standard measure of damages for breach of contract, the expectation measure, does not have a corrective-justice orientation since it seeks to put the plaintiff in the position she would have occupied if the contract had been performed regardless of whether that amount exceeds the expenses she actually incurred, if any, in relying on the contract. The plaintiff is given something she did not yet have prior to breach. As Lon Fuller and William Purdue argued in one of the most cited law review articles of all times, contract law, in compensating for loss of expectancy, is guided by distributive justice, not corrective justice.[124] "The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation"[125] in order to penalize the breaching party.[126] Still, even if its explanatory power falls short in relation to other aspects of contract law, corrective justice can fully account for the duty of honest performance. Correlatively structured, the duty requires a contracting party whose wrongful, dishonest act inflicts a loss on the other party to

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120 *Ibid*.

121 *Babstock*, *supra* note 73 at para 34.

122 *Rankin (Rankin's Garage & Sales) v JJ*, 2018 SCC 19 at para 63 [emphasis added].

123 *Babstock*, *supra* note 73 at para 104.

124 See LL Fuller & William R Perdue Jr, "Reliance Interest in Contract Damages: 1" (1936) 46:1 Yale LJ 52 at 56 [Fuller & Perdue, "1"]. See also the second installment of the article: LL Fuller & William R Perdue Jr, "The Reliance Interest in Contract Damages: 2" (1937) 46:3 Yale LJ 373. For a slightly different objection to a corrective-justice account of contract law, see Richard Craswell, "Against Fuller and Perdue" (2000) 67:1 U Chicago L Rev 99. For Craswell, corrective justice presupposes that the plaintiff has an entitlement vis-à-vis the defendant but cannot explain the conception of the entitlement without recourse to other theories.

125 Fuller & Perdue, "1", *supra* note 124 at 56 [emphasis added].

126 *Ibid* at 61.

repair the loss.[127] It is perfectly just, in correct justice terms, to have the breaching party pay the injured party the equivalent of the loss suffered.

Admittedly there is another conception of corrective justice that regards contract law—indeed, the whole of private law[128]—as an expression of it. As a highly abstracted enterprise, corrective justice does not make any distinction between different categories of liability. It cares only that a relational wrong is rectified by a relational remedy. Much like tort law, contract law adheres to a relational structure of reasoning: it inquires whether one party has caused, and the other has suffered, a transactional injustice. Breach of contract is such an injustice that calls for correction. As for the difficulty corrective justice seems to run into in trying to justify contract remedies, particularly expectation damages, there is in fact no difficulty, as Weinrib and Peter Benson have separately argued. A contracting party has something that is already theirs and to which she is deprived when there is a breach. For Weinrib, that something is the right to performance against the promisor. In breaching the contract, the promisor unjustly denies the promisee that right and contract law undoes that injustice by awarding either specific performance or expectation damages reflecting the value of performance.[129] For Benson, the promisee has a quasi-property ownership right in the thing or service bargained for.[130] Actual reliance is beside the point because the promisee's pre-reliance position already sets a baseline as between the parties which the promisor must not transgress by breaching the contract.[131] As a basis of liability, reliance has no place in contract law. Flowing from this, and notably, Benson contends that a reliance-based action for breach of promise, which is in essence what breach of the duty of honesty is, ought

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127 The majority and concurrence of *Callow*, *supra* note 5, agree that breach of the duty of honest performance only warrants a remedy "where damage resulted" (at para 83). For the concurring judgment, see para 130 ("[i]f a plaintiff *suffers loss* in reliance on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole" [emphasis added]).

128 Private law consists of tort, contract and unjust enrichment. The term corrective justice has been interpreted in different ways in the scholarship. For our purposes, the different understandings of corrective justice can be divided into two camps: the first limits its meaning to principles of reparation underpinning tort law; the other extends its meaning to include principles of contract and restitution. See Perry, "Moral Foundation", *supra* note 111 at 452.

129 Weinrib, *Corrective Justice*, *supra* note 106 at 153–54.

130 Peter Benson, "The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue" (2001) 1:1 Issues Leg Scholarship article 5 at 35–41 [Benson, "Reply"]; Peter Benson, "The Philosophy of Property Law" in Jules L Coleman and Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 752 at 782–83.

131 Peter Benson, "Contract as a Transfer of Ownership" (2007) 48:5 Wm & Mary L Rev 1673 at 1679–1680.

to be classified under tort, not contract. He states: "a reliance-based action for breach of promise should be recognized and approached as one variant of tort liability for negligent statements or representations."[132]

## 5. Conclusion

Breach of the duty of honest performance bears the signs of a tort. First, the duty itself arises by compulsion of law, independently of the will of the parties and irrespective of their consent. Second, the misrepresentation that grounds liability is extra-contractual. And third, detrimental reliance is required to recover damages, which are in fact awarded for reliance loss rather than for expectancy or loss of bargain. Taken together, an action based on the duty to act honestly is best understood as a tort claim clothed in contractual dress, or to use the portmanteau that Gilmore coined, "contort."[133] Allowing the duty to develop further under contract law will only accelerate contract's merger with tort, eroding its distinctiveness as a legal field. The duty should be reclassified to reflect its true nature.

To peg the duty of honesty as contractual is to miss the roots for the leaves. The existence of contractual relations is a necessary condition to be sure; however, liability is imposed not for how a contractual right is exercised, or for breach of a term of the contract, but for misrepresentations made outside of the contract. This being the crux of the wrong sets it apart from abuse of rights (l'abus des droits), the civilian concept referenced in both *Bhasin* and *Callow* as a source of inspiration,[134] even though it has no common-law equivalent.[135] Civilian abuse of contractual rights is concerned only with the wrongful manner in which a right conferred by contract is exercised; in view of the doctrine's singularly contractual focus, it is said to give rise to contractual, not delictual, liability.[136] By contrast, a claim based on the duty to act honestly is rooted in extra-contractual deception. Granted, the lies in question have to be connected in some way

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132 Benson, "Reply", *supra* note 130 at 61.

133 Gilmore, *supra* note 1 at 90.

134 See *Bhasin*, *supra* note 4 at para 83; *Callow*, *supra* note 5 at para 60. While the majority in *Callow* looked to the civilian doctrine of abuse of rights, it also cautioned against conflating it with the common-law duty of honesty: *Callow*, *supra* note 5 at paras 70–71. Justice Brown, in his concurring reasons, was strongly opposed to drawing on the civilian doctrine, even as a source of inspiration, given how different it is from the common-law duty: *Callow*, *supra* note 5 at paras 152–75.

135 The rejection of any such common law doctrine is commonly traced to *The Mayor, Aldermen and Burgesses of the Borough of Bradford v Pickles*, [1895] AC 587 at 600 and *Allen v Flood*, [1898] AC 1 at 46.

136 See *Houle v Canadian National Bank*, [1990] 3 SCR 122, 74 DLR (4th) 577 [cited to SCR]. Even in the civilian tradition, notable writers and jurists have considered abuse of contractual rights to be grounded in delict: see *Houle v Canadian National Bank* at 159–64.

to an existing contract, but an inferential connection will do. Recall that the misrepresentations in *Callow* were about a future contract, one not yet formed, from which it was *inferred* that the defendant would exercise its rights under the existing contract a certain way.[137]

Some might protest that reclassification is unnecessary, for to fuss over how the duty is characterized is to attach too much importance to the distinction between tort and contract. That the duty ill-fits the law of contract may be a nuisance for scholars, but not so much for practitioners, who simply care to know what obligations arise in what circumstances and what those obligations entail. This line of objection, plausible as it is, is misguided. Properly construing the nature of a legal duty and labeling it correctly is not an indulgence in academic curiosity. The intelligibility and future development of the law of obligations hinge on it. Contract is set apart from tort for a reason: it serves to keep distinct the different policies that lie at their base as well as the different interests that they protect. Contract law seeks to enforce agreements and to safeguard expectation interest, tort law does not. Instead, it is focused on the reparation of wrongs and protection of reliance interest.[138] How a particular obligation is classified will determine which set of underlying policies will animate its interpretation and development. The distinction between tort and contract also has practical implications. Whether breach of the duty of honest performance is considered a tortious or contractual claim could take a proceeding in separate directions in a case involving a conflict of laws, for instance. If the duty is treated as a breach of contract, as it is at the moment, the claim will be governed by the proper law of the contract. Treated as a tort, the claim will be governed by the *lex loci delicti*, which could differ from the proper law of the contract, particularly when the parties have selected a unique law to govern their relationship through insertion of a choice-of-law clause in their contract.

On a final note, my concern about the duty being a misfit within the contractual framework should not detract from the fact that it is a welcome addition to the law of obligations generally. It fills a lacuna in the common law which left losses caused by a contracting party's dishonest conduct unaccounted for. In addition, it highlights the relational dimension of contract and the norms that hold contractual relations together. Research in the past few decades has shown that parties in a contractual relationship, more so than in a one-off transaction, value reciprocal

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137 See *Callow*, *supra* note 5 at paras 37, 99.

138 On the different aims of tort and contract law, see *Hall v Hebert*, [1993] 2 SCR 159 at 208, 101 DLR (4th) 129.

fairness—they expect honesty and good faith from the other side.[139] So solid is the evidence that by the turn of the twenty-first century it was already "a well-established fact that the practice of voluntary obligations is a cooperative practice depending on mutual *trust*."[140] Imposition of the duty, or something like it, was a long time coming, if not overdue. That said, much as its potential to facilitate just outcomes is desired, its classification under contract is not. A non-promissory duty which is never incorporated into the contract, not by implication of law or of fact, is more tort- than contract-like. Importing tort logic into the law of contract is a hazardous and unwelcome venture for doing so will in time erode the coherence of both tort and contract law.

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[139] See Ernst Fehr and Simon Gächter, "Fairness and Retaliation: The Economics of Reciprocity" (2000) 14:3 J Economic Perspectives 159; Robert E Scott, "A Theory of Self-Enforcing Indefinite Agreements" (2003) 103:7 Colum L Rev 1641; Ernst Fehr and Klaus Schmidt, "A Theory of Fairness, Competition and Cooperation" (1999) 114:3 QJ Economics 817 at 836; Arlen Duke, "A Universal Duty of Good Faith: An Economic Perspective" (2007) 33:2 Monash UL Rev 182 at 184-86; Anthony Gray, "Incomplete Legal Transplant—Good Faith and the Common Law" in Vito Breda, ed, *Legal Transplants in East Asia and Oceania* (Cambridge: Cambridge University Press, 2019) 111 at 113; Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Oxford: Hart Publishing, 2013) at 265–66; David Campbell & Donald Harris, "Flexibility in Long-Term Contractual Relationships: The Role of Co-operation" (1993) 20:2 JL & Soc'y 166. See also the extensive and pioneering scholarship of socio-legal scholar Stewart Macaulay. For his selected works, see David Campbell, ed, *Stewart Macaulay: Selected Works* (New York, NY: Springer, 2020).

[140] Hanoch Sheinman, "Contractual Liability and Voluntary Undertakings" (2000) 20:2 Oxford J Leg Stud 205 at 217 [emphasis in original].