

The Curious Incident of the Dog that did Bark in the Night-Time: What Mischief does *Hedley Byrne* *v Heller* Correct?

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[S]uffering and evil are nature's admonitions; they cannot be got rid of; and the impatient attempts of benevolence to banish them from the world by legislation, before benevolence has learned their object and their end, have always been productive of more evil than good.¹

I. Introduction

It is unarguable that the creation of tort liability for negligent misstatement by the 1963 House of Lords' decision in *Hedley Byrne and Co Ltd v Heller and Partners Ltd*² has, I

*I am grateful to Allan Beever and Paul Mitchell for their comments.

¹ Editorial, 'Administration of Towns' (13 May 1848) 246 *The Economist* 536.

² *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC 465 (HL) ('*Hedley Byrne*'). The Court of Appeal decision is reported at [1962] 1 QB 396 (CA). The transcript of the unreported High Court judgment of McNair J, handed down on 20 December 1960, is held in the House of Lords' Library. The reference code by which it most conveniently may be found by searching the Parliamentary Archives database (Portcullis) is HL/PO/JUU/4/3/1107. The transcript can be found in the Appendix to this volume. I am grateful to Paul Mitchell and Ms Jennie Lynch of the Parliamentary Archives for help in obtaining this transcript. Due to Ms Lynch's efforts, the entire House of Lords Library file of *Hedley Byrne* case papers is now open.

would say in a somewhat supererogatory fashion even at the time,³ and far more so when the position is assessed now, as in this volume, very substantially added to the difficulties of the doctrinal formulation and the practical application of the law of negligence. It was also a first⁴ jab at the coherence of the contractual doctrine of misrepresentation, prior to the knockout blow landed by the Misrepresentation Act 1967 ss 1–2,⁵ but so far as possible I shall avoid the detail of contractual misrepresentation as I wish to focus specifically on tort liability outside of contract. The state of the current law in respect of such liability is perhaps best captured in the way that Professor Beever has gone so far as to argue that ‘the negligence model of negligent misrepresentation is irreparably flawed at its base’, with the compelling implication ‘that “negligent misstatement” is a misleading name for the cause of action’.⁶ Though Beever generally defends the assumption of responsibility model as an alternative justification of *Donoghue v Stevenson*⁷ liability,⁸ this is so in regard of *Hedley Byrne* liability only because he has formerly understood assumption of responsibility sufficiently widely as to include assumption in contract, and, as he makes clear in his chapter in this volume, which

³ The incident that led to *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) occurred on the night of 21–22 September 1962 and the writ was issued on 6 February 1965.

⁴ This is not strictly correct. The Report that led to the Act was published in 1962: Law Reform Committee, *Tenth Report: Innocent Misrepresentation* (Cmnd 1782, 1962).

⁵ Misrepresentation Act 1967 (UK). This most unfortunate statute was immediately subjected to an unforgettably thorough exposure of its inadequacies: PS Atiyah and GH Treitel, ‘Misrepresentation Act 1967’ (1967) 30 *MLR* 369.

⁶ A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) 282, 283.

⁷ *Donoghue v Stevenson* [1932] AC 562 (HL).

⁸ Beever (n 6) 304–10, replying to K Barker, ‘Unreliable Assumptions in the Modern Law of Negligence’ (1993) 103 *LQR* 461.

identifies assumption of responsibility with contract, this is an entirely different matter to what we shall see it is quite wrong to call assumption of responsibility in tort.

In this chapter, I will argue that, putting fraud and ‘particular’ ‘special relationships’ to one side, contract is the only legitimate basis of liability for negligent misstatement, but I will do so in a way which, as our understandings of consideration and contract (and indeed *Donoghue* liability) are by no means congruent, and as I confine the meaning of ‘assumption of responsibility’ to the claimed justification of tortious liability,⁹ significantly differs from Beever’s. Though I will say something about both the negligence and the assumption of responsibility models, and give, I trust, a novel statement of the reason why the latter signally fails to ground negligent misstatement, I will not enter into the detail of the case law or the academic literature after *Hedley Byrne*. I write this chapter to argue that, as nothing of value has been gained by the creation of the tort of negligent misstatement, the best way to avoid the difficulties it has generated is not to try to make it reasonably justiciable but to abolish it.

I am generally inclined to abolish the tort of negligence as it has been given shape by *Donoghue*, and in particular I am convinced that the personal injury system should be abolished.¹⁰ But the personal injury system at least addresses, however inadequately, the undoubted mischief of injury inflicted on a claimant who (let us allow for the purposes of

⁹ I put to one side the way that *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2009] 1 AC 61 (HL) has unarguably brought tortious assumption of responsibility into the core of the law of contract, with results which we are in the process of finding out, but as should have been clear from the start, are, with respect, most unwelcome.

¹⁰ D Harris, D Campbell and R Halson, *Remedies in Contract and Tort*, 2nd edn (Cambridge, Cambridge University Press, 2005) ch 24 and D Campbell, ‘Interpersonal Justice and Actual Choice as Ways of Determining Personal Injury Law and Policy’ (forthcoming 2015) *Legal Studies*.

argument) played no part other than that of passive victim.¹¹ In contrast, the negligent misstatement claimant played an essential active part in causing the loss by voluntarily relying on the statement in order to gain an economic benefit, and as her reliance on the statement being non-negligent is completely unjustifiable by the standard which we normally use to decide whether an economic benefit has been legitimately obtained, which is that it has been paid for, there is normally no possibility of ‘reasonable reliance’ on a negligent misstatement.

In *Silver Blaze*, one of the most successful of the Sherlock Holmes stories, in which a dog did not bark at a man with criminal intent who by night entered premises the dog was guarding is recognised by Holmes as a ‘curious incident’ which is the key to unravelling the crime.¹² The dog should have barked but didn’t. *Hedley Byrne* is an incident which gives rise to a curiosity of an opposite sort. There would not merely have been nothing wrong in leaving Hedley Byrne and Co to bear its loss, but it would have entirely been right to do so. To those, like myself, who believe that voluntary exchange should prima facie be the means of obtaining economic goods, there appears to be no good general reason not to use the law of contract to determine the extent of the legal protection of reliance on others’ statements. Certainly the law after *Hedley Byrne* discloses no such reason. *Hedley Byrne* itself addressed no actual mischief, and that it was from the outset worse than pointless has rendered the law of negligent misstatement particularly open to incoherent judicial legislation, whether that

¹¹ I put to one side the specific issues of liability for negligent misstatement leading to personal injury: *Phelps v Hillingdon LBC* [2001] 2 AC 619 (HL).

¹² I am not the first to attempt to put Holmes’ reasoning here to theoretical use. I am aware that I follow in the footsteps of the late Ronald Coase: RH Coase, *The Firm, the Market and the Law* (Chicago Ill., University of Chicago Press, 1986) 58. No doubt there are other precursors of whom I am unaware.

legislation is analysed using the negligence or the assumption of responsibility models. *Hedley Byrne* is a curious incident of a dog barking when there was nothing to bark about. And, as anyone who has a dog knows, there is very little that is more annoying.

I must confess that I cannot claim much originality for my criticism of *Hedley Byrne* itself. Leaving aside the contributions of numerous others, before *Hedley Byrne* had even appeared in *The Law Reports*, the essence of what I will say had been said by the late Mr Weir in the first of those casenotes which established his mastery of the form.¹³ But I do hope to explain why the House of Lords barked when it had no need to do so, and to sort out the misunderstandings about the nature of economic action that evidently still continue to confound our evaluation of *Hedley Byrne*.

II. The Mischief in *Hedley Byrne*

Though I have in a sense done so, it is wrong to say that *Hedley Byrne* created liability for negligent misstatement. Rather, it expanded such liability beyond the bounds identified with *Derry v Peek*,¹⁴ which had been felt to be excessively constraining in a number of cases, the most important of which was *Candler v Crane, Christmas and Co.*¹⁵ It was, of course, perfectly possible at the time of *Derry v Peek* that making an incorrect statement could lead to legal liability. I will return to the issue of what the bounds identified with *Derry v Peek*

¹³ AJ Weir, 'Liability for Syntax' [1963] *CLJ* 216.

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

¹⁵ *Candler v Crane, Christmas and Co* [1951] 2 KB 164 (CA).

actually were, but for now let us just take them to be fraud, contract,¹⁶ a fiduciary relationship derived from a contract, or a non-contractual ‘special relationship’ found by the courts to exist ‘in particular cases’.¹⁷ Though I do not purport to give anything like a complete account of the doctrinal background of *Hedley Byrne*, I propose to begin by turning, not to the case itself, but to the dissent of Denning LJ in *Candler*,¹⁸ which *Hedley Byrne* effectively made into law.¹⁹

In *Candler*, the claimant invested £2,000 (now circa £75,000) in a mine in reliance on a statement of the mine’s accounts by its owner’s accountants, the defendant. The investment proved disastrous and the £2,000, as well as other subsequent investments of money and labour by the claimant, were lost. There was no question that the accounts were prepared negligently and there was no question of proximity, for an employee of the defendant, at the mine owner’s request, discussed the matter with the claimant and the mine owner.²⁰ The case focused on whether the defendant had been fraudulent, and so liable under

¹⁶ At the cost of stating what should be obvious, let me point out that negligently making a statement would breach the duty to take reasonable care which is of the essence of a contract to provide professional advice and the like now codified under the Supply of Goods and Services Act 1982 (UK) s 13. Exclusion of this liability is now regulated under s 16 and, behind this, the Unfair Contract Terms Act 1977 (UK) and the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/3159 (UK). It is, of course, possible to contract for strict liability for a statement’s being incorrect, but it is extremely difficult to conceive of a party making a statement on this basis.

¹⁷ See the text accompanying n 73 below. I again put to one side specific issues arising from the recognition of liability for negligent misstatement leading to physical harm.

¹⁸ *Candler* (n 15) 174–85.

¹⁹ Lord Denning, *The Discipline of Law* (London, Butterworths, 1979) 237: ‘Fourteen years later my dissent in *Candler v Crane Christmas* was approved by the House of Lords’.

²⁰ Issues surrounding the employee’s capacity to bind his employer were discussed.

Derry v Peek, or negligent, and so not liable, on the same authority as interpreted in *Le Lievre v Gould*.²¹

The problem in *Candler* was caused by the mine owner, who was a scoundrel who both harried and misled his accountants (their negligence in the preparation of the accounts was nevertheless unquestionable) and badly mismanaged the mine, including misusing the £2,000. Both the mine company and the owner personally became insolvent, so the claimant turned to the defendant, establishing that he would not have made his investment were it not for the negligent accounts. In the absence of fraud by the defendant or a contractual relationship between it and the claimant, Cohen and Asquith LJ found for the defendant. But they were perfectly conscious that, proximity being no issue at all, their doing so ran against the climate established by *Donoghue*, and Denning LJ was invited to read his dissenting judgment first. Behind the ‘point of law of much importance’,²² whether there was a duty of care, Denning LJ saw adopting liability on the *Donoghue* basis as the correction of an ‘error ... which appears time and time again in nineteenth century thought, namely, that no one who is not a party to a contract can sue on it or on anything arising out of it’.²³ This error led to injustice which was a denial of civilisation:

Now I come to the great question in the case: did the accountants owe a duty of care to the plaintiff? If the matter were free from authority, I should have said that they clearly did owe a duty of care to him. They were professional accountants who prepared and put before him these accounts, knowing that he was going to be guided by them in making an investment in

²¹ *Le Lievre v Gould* [1893] 1 QB 491 (CA).

²² *Candler* (n 15) 174.

²³ *ibid* 177.

the company. On the faith of those accounts he did make the investment, whereas if the accounts had been carefully prepared, he would not have made the investment at all. The result is that he has lost his money. In the circumstances, had he not every right to rely on the accounts being prepared with proper care; and is he not entitled to redress from the accountants on whom he relied? I say that he is, and I would apply to this case the words of Knight Bruce LJ in an analogous case ninety years ago: ‘A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilisation’.²⁴

Before turning to *Hedley Byrne*, I wish to stress what I would call the tendentiousness of Denning LJ’s approach. It is all a matter of the claimant, self-evidently from the answer to the rhetorical question asked, having a ‘right’ which ‘entitled’ him to ‘redress’, and therefore of the defendant’s corollary duty to provide the redress. There is no question of anything that the claimant had to do to be owed the duty, other than suffer a loss. This approach, and indeed unconsciously its tendentiousness, was overwhelmingly warmly welcomed in commentary on *Candler*, with the majority decision itself coming in for strong criticism. Aubrey Diamond, then Reader in Law at the London School of Economics, saw it as ‘an unrealistic decision’ preserving an outmoded reluctance to compensate ‘pecuniary [ie pure economic] loss’.²⁵ Diamond concluded that ‘the dissenting judgment of Lord Justice Denning should be established as the true legal rule’.²⁶

²⁴ *ibid* 176, quoting *Slim v Croucher* (1860) 1 De GF & J 518, 527; 45 ER 462, 466.

²⁵ A Diamond, ‘The Law of Contract and Tort’ in G Gardiner and A Martin (eds), *Law Reform NOW* (London, Victor Gollancz, 1963) 74–75. See further the text accompanying n 60.

²⁶ *ibid*.

I will be extremely brief about the facts of *Hedley Byrne*, which will be thoroughly well known to any reader of this chapter. When considering whether to undertake advertising work for a manufacturer which put it at a particular financial risk of up to £9,000 (now circa £175,000), the claimant advertising agency sought a credit reference from its bank. The bank made inquiry of the defendants, the manufacturer's bank, and was given what it understood to be a satisfactory reference,²⁷ the substance of which it communicated to the claimant. When the manufacturer shortly thereafter went into liquidation, leaving the claimant with the loss it feared, the claimant brought the action in what was to become negligent misstatement against the defendant.

These facts are, of course, on a first look, similar to those of *Candler*, but they were significantly different, especially as regards two important points. First, though it was found to be so,²⁸ the balanced way in which it gave the credit reference raises, in my opinion, a serious question whether the defendant was negligent at all, and, however this is, it certainly was less culpable than the defendant in *Candler*. Secondly, the claimant's bank sought the reference on the basis that it would be given 'without responsibility on [the defendant's]

²⁷ I myself do not understand, on the basis of the reported facts, the conduct of the claimant's bank, or, more accurately, how that conduct escaped criticism.

²⁸ Lord Devlin described 'a reference which was so carelessly phrased that it led the [claimant] to believe the traders to be creditworthy when in fact they were not': *Hedley Byrne* (HL) (n 2) 515. As will emerge, I cannot agree with this. The text of the reference is given in the statements of the facts in the Court of Appeal and House of Lords reports. I can confirm this text almost exactly reproduces accepted testimony before McNair J. Though I will not advance a close examination of a document which previously has effectively not been publicly available, the discussion of the matter before McNair J is very helpfully more extensive. The defendant argued that the reference was very guarded and indeed contained 'red lights' about the manufacturer. McNair J rejected this and saw the reference as 'a favourable reference without any real qualification'. This involved him placing little or no weight on evidence about the way the reference would be understood by bankers, nor, strikingly, on evidence that the claimant's Company Secretary summarised the telephone conversation thus: 'phoned Bank who gave a fair but guarded report'!

part’,²⁹ and it was so given. I shall return to both of these points. But for present purposes we should note that, given the disclaimer, the Lords were not going to find liability in *Hedley Byrne* itself,³⁰ although in their anxiety to create tortious liability for negligent misstatement in the future they nevertheless somewhat desperately seized on the case, and this desperation is one reason why *Hedley Byrne* is so unsatisfactory.³¹ Its facts were not nearly so compelling as those in *Candler*, and using them as the pretext for this major judicial legislation does seem particularly unwise: ‘travelling to the village church via the moon’ as Honoré unforgettably put it.³²

In regard of the issue I want to address, the reason these pains were taken emerges most clearly from the speech of Lord Devlin, who thought:

[T]hat the law, if settled as [the majority in *Candler* settled it], would be defective. As well as being defective in the sense that it would leave a man without a remedy where he ought to have one and where it is well within the scope of the law to give him one, it would also be profoundly illogical. The [defendants] in this case cannot deny that they were performing a service. Their sheet anchor is that they were performing it gratuitously and therefore no liability for its performance can arise. My Lords, in my opinion this is not the law. A promise

²⁹ *Hedley Byrne* (HL) (n 2) 198.

³⁰ *ibid* 533 (Lord Devlin): ‘A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not’. It very arguably was the possibility of changing the law without effectively retrospectively legislating against the defendant that made *Hedley Byrne* seem so opportune an occasion for judicial legislation.

³¹ One cannot but wonder about how satisfactory the claimants found *Hedley Byrne* when it became clear that law reform had been funded by their taking an action they had tantamount to no hope of winning so far as the Lords! As private litigation, an aspect from which it is almost never viewed, *Hedley Byrne* is quite surreal.

³² AM Honoré, ‘*Hedley Byrne and Co Ltd v Heller and Partners Ltd*’ (1965) 8 *Journal of the Society of Public Teachers of Law* NS 284, 291.

given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort ... it is true that this principle of law has not yet been clearly applied to a case where the service which the defendant undertakes to perform is or includes the obtaining and imparting of information. But I cannot see why it should not be; there is ample authority to justify ... saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which ... are 'equivalent to contract', that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.³³

I want to add only the observation I made about *Candler*: all this is tendentiously addressed just to the duty of the defendant and nothing is said about anything the claimant has to do to obtain the benefit of that duty.

The problem that, of course, immediately arises from this, the discussion of which surely would now form a substantial library, is that, by going beyond contract and consideration one goes beyond privity, and having got rid of contractual boundaries to liability, one has to set tortious boundaries. I will simply say without argument that setting those boundaries on the basis of proximity understood as reasonable foreseeability, however this is in its turn understood, manifestly cannot work in respect of a tort which will have its

³³ *Hedley Byrne* (HL) (n 2) 516, 526, 528–29. As is universally known but as I shall discuss, Lord Devlin derived the phrase 'equivalent to contract' from the speech of Lord Shaw in *Nocton v Lord Ashburton* [1914] AC 932 (HL) 972. Lord Shaw, *ibid*, 971, had himself noted the use of the phrase 'equivalent to a contract' in the argument of Sir Roundell Palmer QC in *Peek v Gurney* (1871–72) LR 13 Eq 79 (Ch) 97. By this route, Chancery pleadings seeking to avoid liability for what, in a normal contractual situation, was a blatant intentional misrepresentation made in the wake of the Overend Gurney scandal, have become a pillar of the English law of expanded, non-contractual liability for negligent misstatement. See the text accompanying n 81.

main application in cases of pure economic loss.³⁴ Other than to disavow any impression I may just have given that I believe that reasonable foreseeability is generally workable in respect of other forms of negligently caused loss, I have nothing more to say about the negligence model of liability for misstatement, and I turn to the additional ‘special relationship’ that has almost always been thought necessary to limit the reach of such liability,³⁵ sometimes to the point it entirely displaces it, and specifically to the assumption of responsibility model of that relationship.

How can a party legitimately come to rely on another party’s assumption of legal responsibility for a negligently made statement? It should contract.³⁶ If a party contractually agrees to provide professional advice or the like, the justification for then holding it responsible in this way is that it actually has voluntarily undertaken the responsibility. One might say that the mark of this is that the party has received a consideration, but one must understand that consideration at least purports to be the mark of the actual reason the party has undertaken that responsibility, which is, not gratuitously to benefit the other party, but to obtain a bargained-for benefit through exchange. The reach of contractual liability will not be confined to the theoretical paradigm of a bilateral express bargain supported by a discrete payment. The doctrines of consideration and privity have never showed such inflexibility,³⁷

³⁴ NJ McBride and A Hughes, ‘*Hedley Byrne* in the House of Lords: An Interpretation’ (1995) 15 *Legal Studies* 376.

³⁵ I put to one side all the ratiocination involved in attempting to work the special relationship back into the core of proximity as reasonable foreseeability.

³⁶ MP Gergen, ‘Negligent Misrepresentation as Contract’ (2013) 101 *California Law Review* 953.

³⁷ An instructive example of a ‘contractual structure’ may be found in *Norwich City Council v Harvey* [1989] 1 WLR 828 (CA). I fully acknowledge that the recognition of an implicit intention to create a third party

and this was recognised by *Derry v Peek*, not to speak of *Hedley Byrne*, unproblematically including ‘fiduciary relationships’ among the grounds of liability.

Now, even in a contractual context the categories of fiduciary relationships are not closed, and indeed their proliferation has on occasions proven hard to keep in check, but when they arise from contracts, fiduciary relationships do (or should) partake of the essential quality of being paid for. But the whole point of *Hedley Byrne* was to move beyond contractual liability. One way in which this was bound to happen was that the understanding of ‘fiduciary’ as it related to negligence would be expanded so that its connection with contract was broken.³⁸ But, more importantly, this was merely a subordinate part of what was essential to the assumption of responsibility model, which is that it is used to describe situations about which the last thing that could be said was that there actually was an assumption of responsibility.

Lord Devlin’s identification of a category of ‘relationships which ... are “equivalent to contract”, that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract’,³⁹ was intended ‘to settle the law so that the presence or absence of consideration makes no difference’.⁴⁰ But a contract without consideration is not a contract, and by ‘equivalent to contract’ Lord Devlin meant something entirely different to contract. This, with the greatest respect but one has to say,

beneficiary in the Contracts (Rights of Third Parties Act) 1999 (UK), s 1(1)(b) has substantially improved the contractual position with regard to *Hedley Byrne* situations.

³⁸ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 205 (Lord Browne-Wilkinson).

³⁹ *Hedley Byrne* (HL) (n 2) 529.

⁴⁰ *ibid* 532.

very unhelpful equivocation was at the heart of the assumption of responsibility model from the outset.

Summarising the speeches of his brethren in *Hedley Byrne*, Lord Devlin said: ‘I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken’.⁴¹ I can neither interpret this as a flat inability to understand the issue, which I find hard to attribute to this most intellectually gifted of judges, nor as ratiocination aimed at unscrupulously getting one’s way, which I find almost as hard to attribute to this most decent of legal professional men. I will try to explain how Lord Devlin came to see things this way below. But, however this is, he avoided the basic issue. One can voluntarily make a statement and indeed intend it be relied upon, but whether one voluntarily assumes the indemnification of the reliance is a quite separate matter. This can be determined by assessing what the parties intended, which is a matter of contractual interpretation, or be determined by imposing the indemnification and then reading this back into the ‘voluntary’ assumption of responsibility. The more that the assumption of responsibility model is based on the *Henderson v Merrett* ‘objective’ assumption of responsibility,⁴² the more it departs from a voluntary assumption of responsibility, as was latent in *Hedley Byrne* from the outset.⁴³ It is not going far enough to say that, if one decouples ‘voluntary’ and ‘assumption’, one decouples ‘assumption’ from its legitimate meaning in a way of which only Humpty

⁴¹ *ibid* 530.

⁴² *Phelps* (n 11) 654 (Lord Slynn): ‘assumption of responsibility by the person concerned ... means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law’.

⁴³ I refer the reader back to *Barker* (n 8) and to the response in *Beever* (n 6) 304–10.

Dumpty could approve. One is, in fact, calling an imposition an assumption in a Newspeak fashion of which only Minitrue could approve.⁴⁴

I would hope to be allowed to claim, on the basis of previous work, that I am not insensitive to the shortcomings of the law of contract in general or the doctrine of consideration in particular. But I nevertheless can clearly recall the incredulity with which I read the following 1998 dicta of Lord Steyn in *Williams v Natural Life Health Foods Ltd*:

[T]he restricted conception of contract in English law, resulting from the combined effect of the principles of consideration and privity of contract, was the backcloth against which *Hedley Byrne* was decided and the principle developed in *Henderson's* case ... while the present structure of English contract law remains intact the law of tort, as the general law, has to fulfil an essential gap-filling role. In these circumstances there was, and is, no better rationalisation for the relevant head of tort liability than assumption of responsibility.⁴⁵

Was Lord Steyn really saying that defects in the law of contract meant that we should turn to negligence? I thought it significant that, if this was his position, he seemed unaware that it repeated the argument made by Professor Markesinis a decade earlier that an 'expanding tort law' was 'the price of a rigid contract law'.⁴⁶ This argument was an encomium to the House of Lords' decision in *Junior Books Ltd v Veitchi Co Ltd*,⁴⁷ of which our appellate judges had

⁴⁴ *Smith v Eric S Bush* [1990] 1 AC 831 (HL) 839D: 'If, and to the extent that, an assumption of responsibility is essential for the recovery of pure economic loss in damages there is no logical reason why such assumption of responsibility has to be voluntary if the relationship between the parties or the nature of the service provided is such that an assumption of responsibility can be deemed or inferred or imposed by the law'.

⁴⁵ *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL) 837D-F.

⁴⁶ BS Markesinis, 'An Expanding Tort Law: The Price of a Rigid Contract Law' (1987) 103 *LQR* 354.

⁴⁷ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 (HL). In the haste to advance negligence, the possibility of contractual liability in *Junior Books* was never, in my opinion, properly considered. *Junior Books* was

in that intervening decade become so ashamed that they tried to airbrush it from legal history in a manner most unusual if not unique, effectively overruling it in the Court of Appeal.⁴⁸ One immediately thinks that Lord Steyn proposed to jump from the frying pan into the fire, but this is not enough. He proposed to jump from a sometimes uncomfortably hot bath into a ladle of molten metal. Though Lord Steyn simply discounted it,⁴⁹ I have nothing to add to Professor Hepple's conclusion, based on a compelling comparative assessment of the ways the law has been advanced in contract and in negligence, that 'The way to create liability in situations "equivalent to contract" was surely to broaden the conception of contract'.⁵⁰

What I might add to Hepple, however, is to say that Lord Steyn did not really have specific *defects* in the law of contract in mind. He had it in mind that contract was defective *tout court*.⁵¹ He found it unacceptable that contract could place limits on the indemnification of a claimant when the defendant objectively had assumed responsibility. This position is

influentially analysed as turning on an assumption of responsibility akin to *Hedley Byrne: Yuen Kun Yeu v AG of Hong Kong* [1988] 1 AC 175 (PC) 196E–97C.

⁴⁸ *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758 (CA) 784 (Dillon LJ). I do not deny that *Junior Books* still haunts the current law as an instance of the very attitude which it is the purpose of this chapter to criticise: eg *Plant Construction plc v Clive Adam Associates (a firm) (Ford Motor Co, Third Party)* (1997) 55 *Construction Law Reports* 41 (CA), an unsuccessful attempt to revive something akin to *Junior Books* liability in the wake of *Henderson v Merrett*.

⁴⁹ *Williams* (n 45) 837D.

⁵⁰ B Hepple, 'Negligence: The Search for Coherence' (1997) 50 *Current Legal Problems* 67, 88. The essence of Hepple's argument had been made with reference to *Junior Books* as well as *Hedley Byrne* in JG Fleming, 'Comparative Law of Torts' (1984) 4 *OJLS* 235, 240–1.

⁵¹ His chilling threat in *Williams* (n 45) 837F, that the Lords might find it 'necessary ... to re-examine the principles of consideration and privity of contract' has not been carried out, but that the threat was made is indicative of a cast of mind. However, one is pleased to say that Lord Steyn's principal contractual innovation, formal acknowledgement of reasonable expectations, has so far been on balance a clear benefit, but this is because it is in best part a formalisation and not really an innovation at all.

tenable only if one has a complete lack of sympathy with the core value of liberal economics, which is the autonomy of economic actors institutionalised in freedom of choice or contract.

It overwhelmingly is the case that such consideration as economics occasionally receives from those whose strength is in law is framed in terms of evaluating the efficiency with which, as it is very tellingly put, 'society's resources' are utilised. It is undeniable that the law of negligent misstatement, indeed of negligence and much other rights discourse, has proceeded in blithe ignorance or disregard of the fact that the creation of rights imposes costs as well as confers benefits. But even when it is realised that taking a decision to indemnify reliance on a statement imposes costs, the issue is viewed from the theoretical perspective of a planner who is able to determine whether the contractual outcome or the tortious outcome is superior. This implies that the planner, speaking on behalf of 'society', is cognisant of an optimal use of society's resources and can decide which outcome best approximates to it.⁵²

The criticism I have so far made on Hepple's authority is one of lack of computational competence. How can the thinking Lord Steyn express dare to claim that it can identify an optimal use and assess an outcome's proximity to it? It can't. But this is not the main point, which is that it shouldn't. When an economic actor chooses to rely on a statement, then, as the statement could be wrong, the actor creates and bears a risk. Whether and to what extent the actor nevertheless chooses to rely is, in the first instance, a personal matter. But it is no longer a personal matter if reliance includes indemnification of the risk that the statement is wrong, for this requires the actor to obtain the good of indemnification

⁵² Weir has the House of Lords in *Hedley Byrne* 'on a trip to Mount Olympus', but I fear his criticism, of something done in the swinging sixties, is not confined to the point I am trying to make: T Weir, '*Errare Humanum Est*' in P Birks (ed), *Frontiers of Liability*, vol 2 (Oxford, Oxford University Press, 1994) 105 n 12.

from another. Putting aside direct indemnification by the government, indemnification may be bought from the party making the statement (or from an insurer, a situation I shall put to one side). How much, if any, indemnification should an actor buy? If the economy is one which respects the actor's choice, then no one can know other than the actor herself. The choice is a function of both the situation the actor faces and her capacity to decide, and that capacity to decide is, precisely, hers, expressing her status as an autonomous actor. In advance of the buyer 'revealing' her preferences by her choice, it is senseless to talk of having the information by which the optimum can be determined and so approximations to that optimum assessed, for the optimum is derived from the choice, and if an optimum is chosen by someone other than the actor, it is not an optimum.

Liberal democratic society's basic claim to legitimacy rests not on the moral value of particular social goals set by that society, but on the extent of the freedom of its citizens to set their own goals. One may say that the goal of liberal democratic society should be to eschew the pursuit of particular social goals and to maintain neutrality between the goals set by its citizens. In particular, the claim that the market economy is efficient is not a claim that that economy efficiently produces a particular set of morally valued goods but that goods are produced according to the choices of economic actors.

In the rather formal, but I think helpful to those who I anticipate might read this chapter, terms of neo-classical economics, the first theorem of welfare economics, Pareto optimality, identifies a perfectly efficient distribution of goods as an equilibrium established under conditions of general competition in which mutually beneficial exchanges have taken place in complete accordance with the voluntary choices of economic actors. Under general competition, goods will be exchanged up to the point where the increase in one actor's

utilities achieved by further exchange would be more than offset by the diminution in the sum of another actor's. At this point, the market is in equilibrium because there are no further mutually beneficial exchange opportunities and, vitally importantly, it has been brought there by the uncoordinated working out of voluntary exchanges, which automatically identify the point of Pareto optimality by reaching equilibrium. The beautiful symmetry of the model lies in its being driven by voluntary exchange and working only because it is so driven. This is the source of the power of the rejection of 'patterned principles' of distribution in favour of the 'pure procedure' of the market in liberal political philosophy, for any state imposition of a 'fair' distribution of goods *must* prevent the perfectly efficient distribution which would be voluntarily reached at general competitive equilibrium. Efficiency, in sum, is not a matter of the achievement of an objectively determined optimum but the actualisation of a procedure in which the optimum is identified by the voluntary choices of economic actors.

Under general competition, transacting is costless and so economic actors' choices are made with perfect information and are perfectly well expressed in the actors' negotiations. Such general competition is, of course, purely theoretical, and the concept of Pareto optimality is akin to what Kant called a 'regulative' idea or principle. It states an end which is of great value in ordering our thought and action, though it is not vouchsafed to us to realise that end. Pareto optimality allows us to understand the nature of autonomous economic action, but it is of no direct value at all to the analysis of any empirical process of Pareto optimisation, of which the complete satisfaction of voluntary choices is the unrealisable but nevertheless essential goal. Under all empirical conditions of choice, with information and negotiation costly and imperfect, risk is universal, and the way one handles this risk is a most important part of one's qualities as an autonomous economic actor.

It makes no sense whatsoever to speak of handling only the upside of risk. Unless there is a possibility of suffering the consequences of one's mistakes, one cannot make an economic choice. There is a very compelling argument that the possibilities both of making a gain and of suffering a loss provide the best incentives to rational economic action. But it is much more important to acknowledge that autonomous economic choice cannot exist without the possibility of success and failure. If the government intervenes to prevent or limit either or both by means backed by its monopoly of violence, this is a coercive overriding of autonomy, and the political justification of such intervention is possible only if this is acknowledged at the outset. As Kant himself somewhat imperfectly understood, autonomy is by no means the only value which a system of (social) justice, as opposed to a system of (personal) morality, must respect, and such justification is entirely possible. Practical welfare economics have to contemplate many second, not first, best choices which are given effect by coercive transfers, the principle of which runs entirely counter to Pareto optimality. Nevertheless, the technicalities of neo-classical economics are expressive of fundamental moral rights and duties which emerge from acknowledging the autonomy, and therefore responsibility, of economic actors.

It is, as a normal case, economically irrational and, what is the same thing, morally unjust that one's choice to rely on a statement is legally indemnified without one having to pay for the benefit of the indemnification. Exactly the wrong position about this was established by *Hedley Byrne* and then adopted, and of course extended, in the cases which have found liability on the basis of it. The process, one trusts, reached its doctrinal culmination in *Henderson v Merrett*, which, in its opening of the possibility of indemnification, effectively by everyone who ultimately pays the costs of insurance, of

certain claimants who categorically should in private law have suffered the consequences of their contractual position,⁵³ is the second most unjustifiable modern case I can recall in almost 40 years of study of English private law.⁵⁴ That the finding of tort liability extended the limitation period to the advantage of the claimants seems to have been treated as the justification of that finding,⁵⁵ a deplorable *petitio principii* wholly expressive of the tendentiousness of *Hedley Byrne* reasoning.

I hope I am not putting words in his mouth if I say that, in the casenote on *Hedley Byrne* I have mentioned, Weir said all that I would like to say about what was done in that case, and I will quote him by way of conclusion of this section of this chapter:

Now a law journal is no place for considerations of justice, but a glance at the plaintiffs in [the] line of cases [culminating in *Hedley Byrne*] reveals that their claims to redress are not indisputably high. They made bad business deals, having taken only a free opinion before hazarding their wealth in the hope of profit, no part of which, had it eventuated, would they have transferred to the honest person whom they now seek to saddle with their loss. The defectiveness of a system which refuses in such a case to sever the risk of loss from the chance of profit is not obvious. It would admittedly be defective if it were made impossible for the

⁵³ There were, of course, numerous distinguishable classes of claimants, whose specific positions turned on various issues, in this case and in all the associated litigation, and I intend my remarks to apply only to the limitation issue. I put it to one side that the plight of these claimants was itself substantially caused by preposterous negligence litigation.

⁵⁴ The most unjustifiable is *Tito v Waddell (No 2)* [1977] Ch 106 (Ch). This is an impeccable contract judgment by one of the greatest equity judges of recent times, but it was an occasion of national and international disgrace that the matter was treated as one of private law at all.

⁵⁵ *Henderson* (n 38) 194A (Lord Goff): ‘I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him’. The qualification which Lord Goff immediately goes on to make to this is, with respect, precisely what it is the burden of his speech to completely undermine.

investor to share the risk, but ... the plaintiffs here could have found a credit investigation agency; had they done so, the system would have afforded them a remedy, through the appropriately commercial institution of contract, against such of their advisers as were careless; the risk on the adviser would be justified by the fee. One can hope, perhaps, that in most cases it will continue to be 'reasonable' to rely only on a word one has bought ... A free tip is relevantly distinguishable from a remunerated opinion.⁵⁶

III. Why Was Contract Thought Not To Be Good Enough?

I want briefly to add to what I have just said, which focused on the position of the claimant, by reversing the focus and looking at the position of the defendant. What I want to say conveniently emerges from the following hypothetical example given by Lord Devlin:

If a defendant says to a plaintiff: 'Let me do this for you; do not waste your money in employing a professional, I will do it for nothing and you can rely on me', I do not think he could escape liability simply because he belonged to no profession or calling, had no qualifications or special skill and did not hold himself out as having any. The relevance of these factors is to show the unlikelihood of a defendant in such circumstances assuming a legal responsibility, and as such they may often be decisive. But they are not theoretically conclusive and so cannot be the subject of definition. It would be unfortunate if they were.⁵⁷

The process of contractual negotiation gives the party making the statement the opportunity to determine the extent of its own liability with precision according to its own preferences. One possibility is that it could agree to indemnify the statement gratuitously, but this could

⁵⁶ Weir (n 13) 218–19. See further n 72.

⁵⁷ *Hedley Byrne* (HL) (n 2) 531.

only be done by the clearest words and would best be done backed by nominal consideration, a device which has been subject to much undeserved (as well as much deserved) criticism.⁵⁸

Can liability for negligent misstatement based on an assumption of responsibility which it is simply a pretence to say is voluntary, and so cannot be as fine grained as contract and must, when appellate courts shift the boundaries of negligence, periodically spring surprises of a sort the general principles of the common law of contract are an attempt to avoid, be thought to be superior to this?

The best possible justification of *Hedley Byrne* would be that it was a response by the law of tort to a situation in which the law of contract had proven to work unacceptably badly; an instance of, to use the welfare economics term, market failure.⁵⁹ But the comments I have made on Lord Steyn's position in *Williams v Natural Life Health Foods Ltd* apply equally to Denning LJ in *Candler* and the House of Lords in *Hedley Byrne*. They did not seek to identify defects in the law of contract. Their views were too blunt to explore the possibilities of market failure in any detailed sense, but this was as well as it would be

⁵⁸ Even in *Weir* (n 13) 219.

⁵⁹ Neoclassical economics by no means claim that the establishment of a Pareto optimal equilibrium conveys approval of the moral or political substance of that equilibrium. An equilibrium produced by the voluntary choices of consumers of pornography is not morally justified because it is produced by voluntary choices. Nor does an equilibrium's being efficient carry any connotation that it is just, for it is efficient based on the underlying distribution of endowment, and this may be unjust. So an intervention, such as extending free indemnification in the circumstances of *Yianni v Edwin Evans and Sons* [1982] QB 483 (QB); approved in *Smith* (n 44), might be claimed to be a justified redistribution. The difficulties of the justification are, of course, as nothing to appellate courts which believe themselves to know and to be able to give effect to the 'notions of distributive justice' of 'the ordinary person': *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 (HL) 510E. But for those unable to make this assumption, Herculean in Dworkin's sense, this is, I am afraid, the statement not of a solution, but of a very profound problem indeed. If one had sat down to write an examination problem requiring appreciation of this, one could not have done better than raise the issues considered so wisely, but unavailingly, in the dissent of Aldous LJ in the deplorable *Merrett v Babb* [2001] QB 1174 (CA) [65]–[87].

preposterous to maintain that the claimants in those cases were, or in the typical *Hedley Byrne* case are, 'vulnerable' or anything other than contractually competent. This bluntness was thought good enough because it was believed that the law of contract *tout court* had failed. My argument has been that there is no mischief addressed in *Hedley Byrne*. The dog barked when there was nothing to bark at. But, of course, it was believed that there was a mischief. It was the law of contract itself.

This is most apparent, of course, in those cases of concurrent liability such as *Henderson v Merrett* where negligence sets aside contractual limitations. I am conscious that I have not paid sufficient attention to the fact that Heller and Partners Ltd was not actually found liable. However, I do not propose to discuss the detailed relationship of contract and tortious liabilities as it has been developed after *Hedley Byrne*, for though that detail is of the greatest importance to parties in situations at wherever the boundary of negligence liability currently is drawn, it is the basic overriding of contract by tort that is of relevance here. It perhaps shows that *Hedley Byrne* was heard prior to *Dorset Yacht* that we have seen that Lord Devlin feared that it would have stretched credulity to have claimed that the defendant had voluntarily assumed responsibility for a statement which was given with a categorical express disclaimer. But, of course, the possibility of tort trumping even a crystal clear expression of contractual intention was always latent in *Hedley Byrne*. It was not the ratio of the case, but it was, if I can put it this way, its principle. Though it is a principle which is, with respect, impossible to justify in economic terms, and, once the nature of economic action is properly understood, is therefore also unjustifiable in moral and legal terms, I think I know why that principle was advanced.

I have earlier cited Diamond's views as an illustration of the general criticism of the majority decision in *Candler*.⁶⁰ I was led to these views by Professor Paul Mitchell's excellent chapter on *Hedley Byrne* in *Landmark Cases in the Law of Tort*,⁶¹ on which I have relied heavily. Those views were particularly interesting given Diamond's general stance, but also, as Mitchell leads one to realise, particularly politically influential, not only because of Diamond's own eminence, but because they were the commentary on contract and tort in a very influential collection published in 1963 under the auspices of the Society of Labour Lawyers: *Law Reform NOW*.⁶² One of the editors of the collection, Gerald Gardiner QC, had led for the claimants in the Lords and was shortly to become Lord Chancellor in the Wilson Government of 1964–70, and so was the Chancellor under whom the Misrepresentation Act was passed.

This Government was the last British government of the post-war 'Golden Age of capitalism', a historically unprecedented period of continued economic success on growth, employment *and* inflation measures that led to a confidence about state direction of economic and social policy which now seems so extraordinary that it is difficult even to adequately understand it in the sociological sense of 'recapturing an experience'.⁶³ The political

⁶⁰ See the text accompanying n 25.

⁶¹ P Mitchell, '*Hedley Byrne and Co Ltd v Heller and Partners Ltd* (1963)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (Oxford, Hart Publishing, 2010) 171, 182.

⁶² In a brief introduction to a 1983 attempt to repeat the success of *Law Reform NOW*, Lord Gardiner told us that 'The book was of undoubted assistance to those of us who were concerned with the major measures of law reform carried out by the Government which was elected in October 1964': Lord Gardiner, 'Introduction' in A Martin and P Archer (eds), *More Law Reform NOW* (Chichester: Barry Rose, 1983) ix.

⁶³ Chapters 7-13 of John Campbell's recent biography of Roy Jenkins capture the atmosphere engendered by a 'most optimistic assumption of ever increasing growth and future material abundance' on which the Golden Age Labour Party formed its policies: J Campbell, *Roy Jenkins, A Well-rounded Life* (London: Jonathan Cape, 2014) 181.

aspiration of this Government remains identified with the speech, his first Conference speech as Leader of the Opposition, that Wilson had given to the 1963 Labour Party Conference, in which he saw his Party engaged ‘in redefining and ... restating ... Socialism in terms of the scientific revolution’, in order to make that socialism adequate for ‘The Britain that is going to be forged in the white heat of [that] revolution’.⁶⁴ At a more general and profound level, that aspiration was given theoretical expression by the Labour intellectual and senior politician Tony Crosland, who held various offices as a Cabinet colleague of Lord Gardiner under Wilson. Crosland’s representative and at the time extremely influential views turned on his belief, as stated in 1956, that ‘the political authority has emerged as the final arbiter of economic life [and the] era of unfettered market relations is over’, and so competent was this authority’s economic management that ‘questions of economic efficiency’ were no longer ‘of primary importance’ in a Britain which stood ‘on the threshold of mass abundance’.⁶⁵ Were he then to have been asked whether the UK continued to be ‘capitalist’, Crosland would have answered ‘no’.⁶⁶ Though, so far as I am aware, Crosland did not directly refer to this most famous expression of post-capitalist belief within British economic thought, his views were entirely framed within Keynes’ claim that ‘the economic problem’ was in the process of being solved.⁶⁷

⁶⁴ H Wilson, *Labour’s Plan for Science*, speech given to the Annual Conference of the Labour Party (1 October 1963): <http://nottspolitics.org/wp-content/uploads/2013/06/Labours-Plan-for-science.pdf>.

⁶⁵ CAR Crosland, *The Future of Socialism* (London, Jonathan Cape, 1956) 73, 515.

⁶⁶ *ibid* 76.

⁶⁷ JM Keynes, ‘Essays in Persuasion’ in *Collected Writings*, vol 9 (London, Macmillan, 1971) 325–26. Crosland (n 64) 528 quotes a different passage from the ‘Essays’ *ibid* 529 to similar effect, and also quotes at 377 a passage from ‘The General Theory’ which, though directly addressing returns on capital, famously

This belief lies behind *Hedley Byrne*, albeit, I admit, at some considerable remove. In *Hedley Byrne* itself and in the cases such as *Candler* which led up to it, the appellate courts were conscious of law and convention, which highly constrained judicial legislation, but the Lords in *Hedley Byrne* nevertheless did as they did, and others have certainly enlarged upon their work.⁶⁸ They took this step because they felt compelled to extend compensation, right, justice, etc beyond the economic limitations which give the law of contract what they saw as its inherently defective shape, effectively regarding the huge possibilities of judicial legislation opened to the law of negligence by *Donoghue* as imposing a duty upon those who know what is right and have the power to correct what is wrong to take such steps. A process of disillusion, which can be argued to have first been manifested in the UK in the precipitous decline in the fortunes, reputation and morale of the 1964–70 Government,⁶⁹ now means that we rarely speak in such high-flown terms as Denning LJ’s furthering of civilisation,⁷⁰ but the motivation of current appellate reasoning about negligence is not substantially different from Denning LJ’s in 1951 or Lord Devlin’s in 1964. In all of this, ‘assumption of responsibility’ has been used to misdescribe ‘imposition of liability’, and it is disturbing that what it seems most apt to describe as a trick can be traced to one of the standing of Lord Devlin. Such a

contemplated a post-capitalist situation: JM Keynes, ‘The General Theory of Employment, Interest and Money’ in *Collected Writings*, vol 7 (London, Macmillan, 1973) 221.

⁶⁸ R Buxton, ‘How the Common Law Gets Made: *Hedley Byrne* and Other Cautionary Tales’ (2009) 125 *LQR* 60.

⁶⁹ Even as regards the scientific revolution which was Wilson’s particular focus, his Government quickly came to be seen as a rather dismal failure: D Edgerton, ‘The “White Heat” Revisited: The British Government and Technology in the 1960s’ (1996) 7 *Twentieth Century British History* 53.

⁷⁰ The sophisticated are, indeed, ritually guarded in the claims they make: D Campbell, ‘Of Coase and Corn: A (Sort of) Defence of Private Nuisance’ (2000) 63 *MLR* 197, 203–05.

figure can act in such a way only when motivated by what one of the two greatest of modern philosophers has long shown to be a dreadfully deceptive lure: militant virtue.⁷¹

IV. What Did *Derry v Peek* Decide?

Though it is tangential to my argument, I want briefly to say something about the way that *Derry v Peek*, regarded as the ultimate culprit when accounting for the inadequate reach of liability prior to *Hedley Byrne* and the Misrepresentation Act, has been interpreted. I again do not purport to engage in detail with the relevant law.⁷² I will flatly make some claims about *Derry v Peek* and then apply what I have said to *Candler* and *Hedley Byrne*.

Derry v Peek did not confine liability for misrepresentation to fraud. One element of its ratio was that liability in the tort of deceit had to be based on proof of ‘actual fraud’.⁷³ Another element was that liability for negligence normally had to be grounded in contract,

⁷¹ GWF Hegel, *The Philosophy of History* (New York, NY, Dover, 1956) 450: ‘Robespierre set up the principle of Virtue as supreme, and it may be said that with this man Virtue was an earnest matter’.

⁷² In particular, I have, when quoting a passage from Weir in the text accompanying n 56, omitted his references to *Cann v Willson* (1888) 39 Ch D 39 (Ch) and *Woods v Martins Bank* [1959] 1 QB 55 (Leeds Assizes). Subject to the note of caution I am about to enter about the way we should approach the statements of the meaning of fraud and related concepts in nineteenth-century cases, I regard these cases as amenable to the analysis of *Candler* I am about to put forward, and I have not come across a case which I regard as outright contradicting my views, including *Le Lievre* (n 21).

⁷³ As was confirmed by Lord Haldane LC in *Nocton* (n 33) 947. What actual fraud was is, one has to acknowledge, very unclear even in this purportedly clarifying statement. It certainly was more than intent to defraud. But this is not easy to reconcile with *Derry v Peek* itself.

but contract, ‘implied as well as express’,⁷⁴ could incorporate fiduciary relationships.⁷⁵ Other non-contractual ‘special relationships’ could be and had been found by the courts ‘to exist in particular cases’.⁷⁶ All this was, of course, wholly arguable, and the initially residual category of special relationship has come to dominate the law of negligent misstatement in response to the perceived shortcomings of contract *tout court*.⁷⁷ But, putting aside the general inaccuracy of this perception, it is even wrong to say that *Derry v Peek* meant that contract could not flexibly generate negligence liability. However, for this to work properly, such liability has to be seen alongside fraud, and this is precisely what has not happened in many decisions believed to be constrained by *Derry v Peek*.

In *Derry v Peek*, a prospectus drawn up by directors seeking to encourage investment in their limited company included a seriously misleading statement about a very important aspect of the legal position of the company. This was found to have induced the claimant’s disastrous investment,⁷⁸ but, given the finding that the statement was not made fraudulently, it was right that the claimant investor had no remedy. His investment took the form of a purchase of equity and, to point out the obvious, the reason he had recourse to litigation was that his holding was rendered worthless when the company was wound up. An action brought

⁷⁴ This is taken from the attempt by Lord Haldane LC to correct ‘the great mistake’ of taking an ‘exaggerated view ... of the scope of the decision in *Derry v Peek*’ in *Robinson v National Bank of Scotland Ltd* [1916] SC (HL) 154, 157, expressly repeating the warning he had given about this in *Nocton* (n 33) 946–49.

⁷⁵ *Robinson* (n 73) 157.

⁷⁶ *ibid.*

⁷⁷ A very perceptive (if, in terms of the position taken in this chapter, quite wrong) casenote on the Court of Appeal’s judgment in *Hedley Byrne* clearly grasped the potential of the gap between ‘fiduciary’ and ‘special’: G Dworkin, ‘The Value of a Banker’s Reference’ (1962) 25 *MLR* 246, 247.

⁷⁸ Some suspicion about whether this was the case clearly influenced the result reached in the case: *Derry* (n 14) 344.

against the directors personally failed, but this was the result of the working of incorporation and limited liability, not of the law of contract. One may deplore this, as I myself do,⁷⁹ but one cannot base company law, including investment in shares, on limited liability and then just pierce the veil when it suits.⁸⁰

It is of course entirely right that the veil is pierced when fraud is found, but it is clear that in *Derry v Peek* and a great number of similar cases of the period an enthusiasm to encourage entrepreneurship which the contemporary sensibility finds so extreme that it cannot be of any relevance to the development of current law lay behind the high threshold placed on a finding of actual fraud. In *Peek v Gurney*, the defendants did not even deny that they had intentionally misled the claimant investor in the most serious way, but they did so thinking it was best for all concerned, including the investor, that he (and the entire public) should be kept in the dark so that the company could flourish to the benefit of all. It was only after it had been given extensive consideration that a defence that the crucial information had been, as the Master of the Rolls who heard the case put it, ‘honestly concealed from the public’,⁸¹ was rejected.⁸² Though *Derry v Peek* was right to set the threshold of fraud high, it must be understood in the context of Victorian understandings of entrepreneurship which are an outright barrier to its being in this respect a useful source of law today. Trying to do

⁷⁹ D Campbell and S Griffin, ‘Enron and the End of Corporate Governance’ in S MacLeod (ed), *Global Governance and the Quest for Justice*, vol 2, *Corporate Governance* (Oxford, Hart Publishing, 2006).

⁸⁰ As Lord Haldane LC pointed out in *Nocton* (n 33) 949, statutory regulation of the issuing of prospectuses which sought to respond to *Derry v Peek* was passed shortly after the Lords’ decision.

⁸¹ *Peek* (n 33) 107 (Lord Romilly MR); affd on this point *Peek v Gurney* (1873) LR 6 HL 377 (HL).

⁸² I am given to understand that possible ‘defences’ of this sort have been eliminated from the definition of fraud by false representation under the Fraud Act 2006 (UK) s 2.

otherwise is like basing contemporary views of the responsibilities of a woman on reading *The Old Curiosity Shop*, long after Wilde had passed the modern judgement on the character and conduct of Little Nell.⁸³

The finding in *Candler* that the advice was drawn up merely negligently but not fraudulently is questionable. But, accepting it, I still remain at a loss to understand why fraud was nevertheless not found in that case. In the contractual law of misrepresentation, a statement of opinion is not actionable. Liability has been found, however, in cases such as *Smith v Land and House Property Corp*,⁸⁴ which are now of indisputable authority, because a party stating an opinion makes an implicit statement of fact that she honestly and reasonably believes the opinion. Recalling the facts of *Candler*, it is inconceivable that the defendant's employee honestly believed that his advice, drawn up under pressure in extreme haste, which made proper checking impossible, would have been thought sound by the claimant if the claimant had known of these circumstances. This, I am sure, is, and I submit was, fraud. The defendant's employee might have honestly believed what he stated was true. He could not possibly have honestly believed that what he stated was not negligent.

Hedley Byrne was quite different and I regretfully must return to just how very bad a case it was to explain this aspect of it. It is in my view most implausible to think the advice given was negligent. If it was negligent, then it would have been fraudulent to represent it as

⁸³ I think that what I am about to say goes a long way to explaining the judgment actually reached by the Court of Appeal in *Peek v Derry* (1887) 37 Ch D 541 (CA) 565–94. But I will not pursue this as my position is that these are now matters for legal history, not legal argument.

⁸⁴ *Smith v Land and House Property Corp* (1885) 28 Ch D 7 (CA).

good advice. The steps taken in *Hedley Byrne* were taken because there was no fraud. But there was no fraud because there was no negligence!

It would be absurd to maintain that *Derry v Peek* has not led to a great many problems, which persist.⁸⁵ Proof of fraudulent intent is very difficult and civil proceedings are not really the best place to try to deal with such difficulty. One cannot, however, entirely regret this as a successful proof leads to liability to the remedies for deceit, and by far the best possible description of the law on this point is simply to say that it throws the book at the defendant. In my opinion, the issue fundamentally is one of drawing the boundary between criminal and civil liability which was canvassed in *Rookes v Barnard*,⁸⁶ and since that case we have done no more to improve the law of deceit in this respect than we have improved the law of exemplary damages.⁸⁷ But if we put this to one side, then I submit that the criticism of *Derry v Peek* that underlies *Hedley Byrne* is much overdone. Even with all its defects, the law of fraud and contractual liability in *Derry v Peek* could have provided a perfectly satisfactory way of dealing with *Candler* and with *Hedley Byrne* itself. It would not, however, have been the way those who thought the law of contract was itself the problem would have wished. In

⁸⁵ They are the background to the less satisfactory aspects of the important recent judgment of Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111, 1 All ER (Comm) 1321 (QB). See D Campbell, 'Good Faith and the Ubiquity of the "Relational" Contract' (2014) 77 *MLR* 475. Limitations of space meant that I was unable in this comment to draw attention to how far Lord Haldane had, in *Nocton v Lord Ashburton* and in *Robinson v National Bank of Scotland Ltd*, himself stressed a general duty of honesty.

⁸⁶ *Rookes v Barnard* [1964] AC 1129 (HL). Lord Devlin, Lord Hodson, Lord Pearce and Lord Reid heard both this case and *Hedley Byrne*. The atmosphere of the civil proceedings in the tranche of cases around *Peek v Gurney* and *Derry v Peek* was very heavily influenced by the (threat of) criminal prosecution of the defendants.

⁸⁷ I am conscious of my shortcomings in having no idea of how to pursue what seem to be the possibilities of doing this, which are opened by the availability of a compensation order under the Powers of the Criminal Courts (Sentencing) Act 2000 (UK), s 130 following conviction under the Fraud Act 2006, s 1.

Hedley Byrne, it would have been its opposite, and it was this entirely correct outcome that was thought a mischief in *Hedley Byrne*.

V. Conclusion

I want to try to make my argument in this chapter as clear as possible by concluding on a personal note rightly found rare in academic writing and for which I apologise. I have nevertheless been led to do this because of criticisms of previous statements of my views. If I knew another way to achieve this clarification, I would take it.

I am a socialist whose political views are, I hope, a not unmediated but certainly clear enough, reflection of his having been born in 1958 into a working class, mining community in the north-east of England. My family, most of the friends of my childhood and adolescence, and myself have been greatly enriched by the British welfare state. A necessary condition of my now being an academic writing this chapter was my being provided with a very heavily subsidised grammar school, undergraduate and postgraduate education by the welfare state. In all my work, including this chapter, I wish to defend the welfare state. But the contemporary welfare state extends far beyond the essentially Beveridgean bounds within which it is legitimate, and it is now besmirched, one might even say characterised, by interventions based on utterly slovenly economic and political arguments. These are given effect by government action which cannot respect legality otherwise it could not give them effect, and they require coercive transfers at a scale which is unacceptably restrictive of the economic freedom of common citizens. The way to defend such a welfare state is to shrink it. I believe that the compensation culture is the major obstacle to doing this. One constituent of

the compensation culture is selfishness, but by far the more problematic constituent is the impulse to do good in the sense of conferring benefits on others without properly considering the cost of doing so. The compensation culture does not arise from a bilateral relationship between the claimant and those who ultimately must pay. It is a trilateral relationship in which the claimant's claim is made possible by gatekeepers who, by use of state power, command private and public funds derived from those ultimate payers.

The quality of the appellate reasoning following *Hedley Byrne* is abysmal. I have feared for as long as I have believed I have been able to form a judgement about this, perhaps now some 30 years, that teaching students legal reasoning by taking them through this stuff as if it was law is bound to lead to disrespect of the value of legality.⁸⁸ I continue to believe it does, though, of course, there are far worse culprits at work in contemporary law schools. But what the law of negligence and these other culprits make clear is that in the maximalist welfare state the, as it were, prohibitory function of respect for legality has been very much diminished.⁸⁹ The great sense in Dicey is that there are some improving government actions that can be done only at such a cost to legality that they should not be done. Dicey has had to be ridiculed in order to allow the administrative law of the welfare state to greenlight precisely actions of that sort.⁹⁰ The public/private hybrid of the tort of negligence is judicial

⁸⁸ Rather than teach this as law, it would be better to ask students to determine how many of Fuller's ways of failing to make law are demonstrated in *Hedley Byrne* cases.

⁸⁹ I adopt the term maximalist from Norman Barry: N Barry, *Welfare* (Milton Keynes, Open University Press, 1990) 105. Of the practice of law in the maximalist welfare state, Barry tells us that 'lawyers have become ... less concerned with the *adjudication* of cases and more with the implementation of what they believe are socially acceptable values'; N Barry, 'The Classical Theory of Law' (1988) 73 *Cornell Law Review* 283, 291.

⁹⁰ D Campbell, 'Gathering the Water: Abuse of Rights after the Recognition of Government Failure' (2010) 7 *The Journal Jurisprudence* 487, 507–31.

lawmaking by the courts which is the equivalent of much administrative lawmaking by the government, that is to say, in an important sense, not the making of law at all, except that, because it is legislated in court, negligence achieves what one would have thought very difficult by being generally much poorer, despite the normally infinitely higher quality of those doing the lawmaking. It is here that I am pleased to be in fundamental agreement with Beever, of some of whose views I have implicitly been critical: negligence as it now is goes far beyond what is possible if the regulation of the relevant relationships, inevitably ultimately a matter of coercion by the state, is, as it should be, a matter of lawful⁹¹ institutionalisation of fundamental private rights.⁹²

But, without going further into the matter, Beever's approach is based on severing legal right from economic reasoning, and this fails to capture the intimate intertwining of economy and law in 'the system of natural liberty' that is the basis of the legitimacy of liberal democratic society and which it should be our general aim to actualise.⁹³ The policy behind *Hedley Byrne* is economically irrational, and it is for this reason that it is morally wrong and the law of the attempt to give it effect is absurd. It is only because most of those involved in pleading, deciding and commenting upon negligent misstatement are so keen to do good that they do not appreciate the economic and legal costs of doing so until they absolutely must that we are in the position we are in. The fundamental problem of the compensation culture is

⁹¹ Beever (n 6) 512–15.

⁹² A Beever, 'Our Most Fundamental Rights' in D Noland and A Robertson (eds), *Rights and Private Law* (Oxford, Hart Publishing, 2011) 64.

⁹³ A Smith, *The Wealth of Nations*, 2 vols (Oxford, Clarendon Press, 1976) 687. I believe that the only possible justification of socialism is that it is necessary, as Orwell put it, 'to preserve and even enlarge the atmosphere of liberalism': G Orwell, 'Inside the Whale' in *Complete Works*, vol 12, *A Patriot After All* (London, Secker and Warburg, 2001) 110.

not the ugly demands of those who directly gain from it but the beautiful complaisance of the Ladies Bountiful who bestow its riches,⁹⁴ their reward in this world being the pleasure derived from the consciousness of spending others' money better than they would themselves.

⁹⁴ At least Farquhar's Lady Bountiful expended her own fortune in order to perform the 'Miracles' she believed herself 'to have done ... about the Country here', and it was the happiness of her own daughter that she (inadvertently) put at risk when, partly because of the generosity of her nature but also partly in response to flattery of her 'Charity, Goodness, Benevolence, Skill and Ability', she allowed the designing Aimwell and Archer into her household: G Farquhar, 'The Beaux Stratagem' in Shirley Strum Kenny (ed), *The Works of George Farquhar*, vol 2 (Oxford, Clarendon Press, 1988) 206.