

Professional Negligence

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The Law of Misstatements: 50 years on from Hedley Byrne v Heller

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Subject: Negligence

***P.N. 178** At the boundaries of most legal categories can be found noise or ambiguity: does consideration define the membership of the contract law set, for example, or should the set of negligence exclude intentional wrongdoing? Often these ambiguities afford no reason to question the core categorisations¹; occasionally, however, they do just that. The decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*² was such an instance.

Until this point - certainly for much of the twentieth century - negligence had sat, with varying degrees of comfort, within a conception of civil wrongdoing that identified the defendant as the relevant cause of the claimant's loss because he or she had done something that could be regarded as wrong (beyond, of course, the actual causation of loss, for such would not determine the basis upon which we define the defendant as being of greater causal relevance than any other element of the chain of causation). Well-known cases such as *Donoghue v Stevenson*³ and *Caparo Industries Plc v Dickman*⁴ defined that wrongdoing in terms of the extent to which the defendant ought reasonably to have foreseen the harm arising from his or her actions, as well as whether, in the relative positioning of the parties, there existed "the substantial potential for the causation of harm."⁵ Thus, reasonable foreseeability, moderated by proximity between the defendant and the claimant (or persons situated similarly thereto), came broadly to define *wrongdoing* in negligence.

Hedley Byrne proved problematic for such defendant-centric thinking: in cases of negligent misstatement, the claimant - rather than being the misfortunate coda to a chain of causation - became a necessary link in that chain. Self-evidently, the misstatement found its potency only in the reliance. Yet, further, *Hedley Byrne* did not obviously lend itself to a *rights*-based analysis: the claimant was responsible for the disposition of that to which they had a right, be it money, or chattels, or physical integrity, etc; such rights were not so directly violated by the defendant as they were in traditional cases of negligently inflicted harm. Indeed, reliance and volition, in becoming necessary congeners to the defendant's negligence, meant that one act of negligence could generate a multiplicity of causal nexus. If there are to be doctrinal limits to this liability, then we must question whether *Hedley Byrne* liability is really negligence *qua* Negligence, or - if it is to fall within the set of negligence - ***P.N. 179** whether we have adequately understood what that term even means.

The Law of Misstatements goes a very long way in presenting a corpus of answers to this problem by prominent private lawyers, and in so doing offers numerous points of comparison from common law jurisdictions the world over. Despite the significance of the decision in *Hedley Byrne*, the most significant work on the subject - Christian Witting's *Liability for Negligent Misstatements*⁶ - is now over a decade old, and so the submissions in this edited volume afford sore-needed opportunity for private lawyers to take stock, to consider the direction of travel. The ramifications of *Hedley Byrne* - and, by extension the importance of this task - are noted early in the volume by Warren Swain, who presents not only an important historical context but also notes the significant impact of *Hedley Byrne* on liability for pure economic loss in Australia; the ripples have been - are being - felt well beyond misstatement. Of course, it is perhaps in the nature of an offering of such diverse submissions that the residual feeling is one of decided unease, rather than clear resolve; the weary traveller will find cold comfort in the unifying theme of this volume, that whatever the correct direction of travel ought to be, the current direction is certainly wrong.

Perhaps the most compelling dissonance within the volume concerns the defendant's assumption of responsibility, and the extent to which this does or should found liability for misstatements. Such a proposition goes to the very core of our understanding not only of misstatements, but also of negligence, and serves as ground zero for the ongoing conflict between welfarist and corrective justice approaches to negligence. The developing and important rights-based school of thought in current negligence theory - that regards liability as flowing primarily from breach of the claimant's right, and that the function of the law is to correct such - has sought a taxonomic rationalisation of tort law along the same lines as the Burksian rationalisation of unjust enrichment, and the identification of a clear legal nexus that holds a particular defendant liable to a particular claimant. Such taxonomic reasoning eschews analyses predicated on court-imposed proxies such as breach of duty and its abstruse, ex post facto labels such as proximity, or unbounded appeals to policy.⁷

Allan Beever, one of the foremost rights-based theorists, offers here an analysis that places *Hedley Byrne* liability firmly outwith negligence, on the basis that liability in such cases is assumed voluntarily by virtue of the undertaking to provide advice. This creates a contract-like privity (albeit absent consideration) that, Beever argues, explains far better the relationship between claimant and defendant than negligence models that "are best explained as defective proxies for assumption of responsibility."⁸ Beever reasons that the negligence analysis, in imposing a standard of care upon voluntarily assumed actions, duplicates what should already be implicit: an agreement to undertake any activity would be meaningless were it not accompanied by an implicit undertaking to take appropriate care in exercising that task.⁹ It therefore makes far greater taxonomic sense to place *Hedley Byrne* liability within contract, for contract law is more capable of - and better suited to - gathering within its bounds those obligations that are voluntarily assumed. Bruce Feldthusen argues similarly that "the **P.N. 180* right to sue for detrimental reliance loss in misrepresentation must be granted by the defendant's assumption of responsibility',¹⁰ albeit that he does not abandon negligence to the extent of Beever. Jay M Feinman notes two US cases that have similar contract-like approaches to misstatement liability: the first, *Credit Alliance Corp v Arthur Anderson & Co*¹¹, includes in its test for liability a requirement that there was conduct linking the defendant to the claimant and evincing understanding of

the claimant's reliance; the second, *Bily v Arthur Young & Co*, included an objective test as to whether the defendant had "undertaken to inform and guide a party with respect to an identified transaction or type of transaction."¹²

David Campbell lends indirect support to these arguments, at least to the extent that rights are not imposed, though for very different reasons. Campbell's fierce submission - born of commitment to the pragmatic and moral superiority of individual economic choice¹³ - is that the courts and, ultimately, the defendant should not underwrite risk freely assumed by the claimant. If the claimant demands protection, so the argument goes, then morality demands that the claimant should pay for it, because in the exercise of such individual choice lies "[l]iberal democracy's basic claim to legitimacy".¹⁴

Such appeals to assumed responsibility are not without their detractors. The essays by Christian Witting, Andrew Robertson and Julia Wang, and Kit Barker all challenge the notion that an objectively regarded assumption of responsibility withstands any meaningful scrutiny, for an assumption of responsibility that was not explicit and thus had to be implied is not analytically discrete from proximity¹⁵ or other "more detailed"¹⁶ factors such as the state of the defendant's knowledge of the prospects of harm and the reasonableness of the claimant's use of information; such deemed assumption of responsibility requires the courts to consider factors that allow them to regard the defendant as having assumed responsibility when they have not, in fact, explicitly done so, and thus is imposed. Robertson and Wang present a formidable essay on the limits of the assumption of responsibility "test" across a significant body of case law both within and without misstatement, and the essay dovetails well with Witting's argument that the touchstone of liability lies in the "*pathways to harm* as between parties to an injurious interaction"¹⁷ (the proximity factor). They together form a significant challenge to Beever's thesis. It is submitted that this challenge is ill met by the examples Beever offers to support his core argument, wherein the obligation and the lack of care are so obvious (such as giving a friend's children drugs and alcohol having agreed to babysit) as to be wholly unrevealing with regard to the traditional role of negligence in determining the **P.N. 181* extent and standard of a duty. It is also not clear that appeals to contract law would have assisted in determining whether the defendants in *Hedley Byrne* had failed to exercise due care and skill, especially if all that was required for Beever's contract-like liability was a bald agreement to undertake a task. To reiterate a point that may have appeared trite at the beginning of this review, a crucial element of negligence analysis lies in determining the wrong. To imply terms of reasonable care and skill into implied contracts would seem to be a multiplication of implications, which is surely the very thing consensual internal ordering of the law seeks to avoid.

It is possible to make a number of further objections to the assumption of responsibility thesis, though this is not the appropriate forum; suffice to say, it would do these counterpoints a disservice to pretend that they were all merely a product of the corrective justice-welfarist dichotomy; while a welfarist reading of tort law can clearly permit imposed duties, it is submitted that we must not allow ourselves to assume that welfarism holds the monopoly thereon. It is something of a leitmotif of the volume that corrective justice must stand or fall with the assumption of responsibility test, and it is not at all clear that such is necessarily the case.

A further interesting theme within the volume concerns intersections and distributions of

liability. The relationship between the common law and statute is often fraught, the good intentions of the latter all-too-often corrupting the careful ordering of the former, a point made particularly well by David MacLauchlan in his account of New Zealand's legislation on pre-contractual misrepresentation¹⁸ and misleading practices.¹⁹ The chapter by Elise Bant and Jeannie Paterson offers a somewhat more positive foil to MacLauchlan's, reflecting on the symbiosis between statute and judicial reasoning; whether that relationship will be as mutually reflexive as they wish rather remains to be seen (a point they themselves note).²⁰ Paul Finn, by comparison, presents an intriguing essay on the role of equity within misstatement liability, following from the role equity has played in awarding compensation for economic loss. The historical analysis is scrupulous, and undoubtedly there is much to be said for equity's responsiveness to claimant vulnerabilities. Such a view does perhaps sit at an extreme wing of the welfarist camp, and may find little favour with those more committed to careful taxonomy.

Ultimately, though, this is a very important work on *Hedley Byrne* liability, whatever the exact nature of that liability may be. It is not the final word on the topic, though nor was it ever going to be. What it does demonstrate is the amount of work that still needs to be done, for it is very clear that - even amongst those positions that may one day be reconcilable (which is by no means all) - there are only the occasional points of agreement. What is most exciting about this volume is its demonstration of the broader debate on tort; in deconstructing one small element of tortious liability on the fringes of our accepted bounds of liability, it has rehearsed with new clarity the unrest and instability at the heart of tort jurisprudence.

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1. "Categories do not become incoherent or otherwise unsound merely because argument breaks out on their edges. Few would otherwise survive." P Birks *Unjust Enrichment* (2nd edn, Oxford, OUP, 2005) at p 10.
 2. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).
 3. *Donoghue v Stevenson* [1932] AC 562 (HL).
 4. *Caparo Industries Plc v Dickman* [1989] QB 653 (CA); [1990] 2 AC 605.
 5. C Witting, *Liability for Negligent Misstatements* (Oxford, OUP, 2004) para 9-10. This is Professor Witting's summary of his extensive articulation of the proximity requirement.
 6. Witting (n 5).
 7. See, for example, R Stevens *Torts and Rights* (Oxford, OUP, 2007).
 8. A Beever "The Basis of the *Hedley Byrne* Action' in Barker, Grantham, and Swain, *The Law of Misstatements* (2015) at p 106.
 9. *Ibid* pp 105-06.

- [10.](#) B Feldthusen "Hedley Byrne and the Supreme Court of Canada' in Barker, Grantham, and Swain, *The Law of Misstatements* (2015) at p 288.
- [11.](#) *Credit Alliance Corp v Arthur Anderson & Co* (1985) 483 NE2d 110 (NY).
- [12.](#) *Bily v Arthur Young & Co* (1992) 834 P2d 745 (Cal) at 769.
- [13.](#) "...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.' D Campbell "What Mischief does *Hedley Byrne v Heller* Correct?' in Barker, Grantham, and Swain, *The Law of Misstatements* (2015) at p 122.
- [14.](#) *Ibid* p 121.
- [15.](#) C Witting "What are We Doing Here? The Relationship Between Negligence in General and Misstatements in English Law' in Barker, Grantham, and Swain *The Law of Misstatements* (2015) at pp 237-38; A Robertson and J Wang "The Assumption of Responsibility' in Barker, Grantham, and Swain, *The Law of Misstatements* (2015) at p 82.
- [16.](#) K Barker "Negligent Misstatements in Australia' in Barker, Grantham, and Swain *The Law of Misstatements* (2015) at p 322.
- [17.](#) Witting (n 15) at p 240.
- [18.](#) Contractual Remedies Act 1979 (NZ).
- [19.](#) Fair Trading Act 1986 (NZ).
- [20.](#) E Bant and J Paterson "Limitation on Liability for Misleading or Deceptive Conduct' in Barker, Grantham, and Swain *The Law of Misstatements* (2015) at p 190.