

COMMENTARY ON LORD WALKER'S PAPER

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by
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Lord Walker, Dr McPherson, and Colleagues,

The difficult questions of timing brilliantly surveyed in Lord Walker's paper are relatively novel issues – at least in the time frames of the common law. That is because they are largely a by-product of the imperial march of negligence into a previously foreign field, as well as the later enactment of the *Trade Practices Act*.¹ I will focus my comment on the cause of action in negligence.

The common law as it had developed before the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,² struck a balance between competing interests whereby a defendant's interest in the vigorous pursuit of his or her business was not to be subordinated to a plaintiff's interest in not being harmed by the defendant's activities, save where the defendant had promised for consideration to take care not to do so or acted by unlawful means intentionally to harm the plaintiff. Save for these cases, a defendant could act quite lawfully while taking no care as to his or her neighbour's financial interests.

These novel issues arise in a field of discourse which is still occupied by causes of action in contract and the economic torts. In this field, these latter causes of action held exclusive sway until only a few decades ago.

The causes of action in contract and the economic torts were tailor made to regulate the conduct of economic activity and to protect financial interests as distinct from interests in personal integrity or real or personal property.

By the economic torts, I mean the causes of action called deceit, duress, detinue, conversion, injurious falsehood, intimidation, conspiracy, inducing breach of contract and interference with trade.

All but the last of these tortious causes of action were well-established before the decision of *Donoghue v Stevenson*³ in 1932, and well before negligence established its claims to govern recovery for purely economic loss in the mid-1960s.

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¹ *Trade Practices Act 1974* (Cth).

² [1964] AC 465 (*Hedley Byrne*).

³ [1932] AC 562.

The success enjoyed by the cause of action in negligence as a source of compensation for economic loss has not been thought to mean that the economic torts have been rendered a dead letter. But the co-existence of the law of contract and of the economic torts and the tort of negligence in the same field, should alert us to a risk of incoherence in the application of these different theories of liability.

For example, is it not odd that in a *Hedley Byrne* type situation (without the crucial disclaimer of course) a cause of action in negligence, to recover loss suffered because of the defendant's failure to discharge a responsibility it has assumed to exercise with reasonable care, should survive longer than a cause of action for breach of contract, bearing in mind that time runs in contract from the date of breach? It does seem to be odd that the plaintiff in such a case, who has not given consideration for the defendant's assumption of responsibility, should be in a better position than a plaintiff who has.

And s 46 of the *Competition and Consumer Act*⁴ recognises that competition intended to harm a competitor may be lawful.

In the 1960s and 1970s, when negligence entered the field of regulation of economic interests, that development was driven by the unifying intuition that justice requires that all interests, of whatever kind, should be entitled to protection from unreasonable conduct which causes reasonably foreseeable damage. The force of that idea proved to be irresistible to the Courts in England, Australia, New Zealand and Canada.

But as Lord Walker's paper demonstrates, the protection of economic interests by the action in negligence has thrown up special challenges for the principled development of the law. That these challenges have proved to be so knotty might be thought to suggest that economic interests are indeed different, in ways that matter, from interests in property and personal integrity.

In this field, the central but indeterminate concept of reasonable foreseeability of harm to others, sheds little light on the problems of timing discussed by Lord Walker.

His Lordship identifies the distinction, drawn in the English and Australian cases between "a real contingency, [and]... a slim chance of some unexpected outcome", and his Lordship describes the limits of the application of the "ill-fitting mould of the analogy of damaged goods". The concept of reasonable foreseeability of harm to others affords no illumination either to the distinction or the description.

In contrast, we all know that a cause of action in contract is complete – and that time begins to run – from the moment of breach. And with the economic torts, time begins to run from the moment of the intentional infliction of harm on the plaintiff. In these cases the insidious emergence of damage over time does not present as a problem.

⁴ *Competition and Consumer Act 2010* (Cth).

And the problem of the emergence of loss over time can be quite acute because the emergence of loss may depend on the vagaries of the market and the response of the plaintiff to them.

One might speculate that the difficulties of analysis involved in distinguishing a “real contingency” from “a slim chance of an unexpected outcome” referred to by Lord Walker, are symptomatic of the underlying indeterminacy of the concept of reasonable foreseeability of harm.

This indeterminacy, unresolved by closer guidance in point of principle, seems to lie at the root of the difficulties in assigning, as between plaintiff and defendant, ongoing responsibility for a loss, the occurrence and the extent of which, may depend upon market movements and the adequacy of the plaintiff’s responses to those movements.

Whether or not the difficulties of timing discussed by Lord Walker should be seen as symptoms of the loss of coherence of which I spoke earlier, it can, I suggest, fairly be said that they reflect the broad scope for policy driven – rather than principled – decision making which is afforded by the open-textured conceptual framework built on the notion of reasonable foreseeability of harm.

His Lordship has identified the tendency of the English decisions to fix upon an earlier date for the accrual of a complete cause of action than the Australian decisions. It appears that this difference is explicable as reflecting a different attitude, as a matter of judicial policy rather than legal principle, to the desirability of terminating the defendant’s exposure to responsibility for the plaintiff’s loss.

The earlier a cause of action accrues, the sooner the limitation period expires and the sooner the defendant ceases to be responsible for the plaintiff’s loss. It seems that at a policy level the English (and American) courts, more in sympathy with the mercantile values of autonomy and self-reliance in commerce than Australian courts, are less disposed to keep open a remedy for a plaintiff whose only loss is economic. The longer the remedy is kept open for the plaintiff, the greater the defendant’s exposure to the burden of responsibility for economic loss against which the defendant, *ex hypothesi*, has not been paid to protect the plaintiff.

A clearer manifestation of a loss of coherence is afforded by cases like *Bryan v Maloney*.⁵ Lord Walker mentioned, but did not analyse, this decision. Emboldened by the High Court’s subsequent decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*,⁶ I will not be so polite.

⁵ (1995) 182 CLR 609.

⁶ (2003) 216 CLR 515 esp at [16]-[18]. See also *Owners Corporation Strata Plan 72535 v Brookfield* [2012] NSWSC 712.

In *Bryan v Maloney* a distinction was drawn between domestic and commercial purchases. This distinction is quite unstable: for example, does liability come and go as each purchaser changes his or her intended use of a building?⁷

Apparently, the Court considered that some such a distinction was necessary in order to vindicate the interests of a plaintiff purchaser, while at the same time putting put a brake on what would otherwise be a potentially limitless succession of liabilities to purchasers whose loss consists solely in not getting value for money at the time of their purchase in circumstances where the price paid did not reflect a warranty as to quality.

Putting these theoretical matters to one side, and turning to practical matters, one might suggest that the self-imposed pressure upon the judiciary to respond sympathetically to ongoing demands of the kind which drew negligence into the field of regulating economic activity, might be reduced by recognising that the courts are not the only institution of the state committed to ensuring that consumers and traders receive value for money and should be protected from heedless conduct where it is just and reasonable that they should.

Consumer protection and fair trading legislation and legislation based insurance schemes, for example those established to protect consumers who engage builders to build dwelling houses, come to mind.

Legislatures have demonstrated a willingness actively to address policy issues concerning consumer protection against shoddy building practices. An active legislature can ensure that consumers are protected against the sort of problems suffered by the plaintiff in *Bryan v Maloney* in a more nuanced and comprehensive way than judge made rules.

It can also ensure that the commercial community, and the law of tort, are protected against decisions like *Bryan v Maloney*.

⁷ *Zumpano v Montagnese* (1997) 2 VR 525.