Roaming in the Gloaming: the Liability of Professionals

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I. Introduction

Dean Prosser, with his acute eye for synthesis and generalisation,[1] in 1953 wrote a fine but ultimately frustrating article entitled "The Borderland of Tort and Contract". It was ultimately frustrating because Dean Prosser helps the inquirer little when he concludes, quite accurately it may be added, that the "borderland of tort and contract, and the nature and limitations of the tort action arising out of a breach of contract, are poorly defined".[2] Drawing on Maitland,[3] he envisaged this borderland as inhabited by the ghosts of case and *assumpsit* who walk hand-in-hand at midnight and conveniently lose themselves. It has been the case that in practice the tort/contract characterisation was handled flexibly and quietly by the courts. But this was before the law of negligence exhibited its muscle. The case (tort) ghosts, now the heavyweights for reasons discussed later, rather than walking hand in hand with their *assumpsit* (contract) brethren, are now engaged in a one-sided wrestling match. That bulk and dominance can be seen in the law relating to professional liability. So the pleasant atmosphere of a roam in the gloaming when considering professionals' liability has now evaporated. How we come out on the issue of tort and contract now matters. In this paper, I explain why negligence has become so dominant and give reasons why we should look at liability from a different angle. I suggest that liability rules facilitate professional and client contracting. To the extent that negligence liability has come to dominate by importing liability concepts from the protection of bodily integrity, it interferes with the nuanced role of liability rules in professional/client relationships.

In Section II, I undertake an analysis of the changing scope and interaction of tort, contract and equity in professional relationships. In Section III, I discern three situations or models where tort liability has assumed major importance. In each, I show that tort liability, when confined, was justifiable; the ghosts walked hand in hand. When infected by wide negligence concepts, the importation of tort is destructive of the professional/client relationship.

Section IV stresses that the mainstream of negligence liability is tied to public goals. The scope of liability is driven by a broad multifactored calculus

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1 See White, G E, *Tort Law in America* (1980).

2 Prosser, W L, "The Borderland of Tort and Contract" in *Selected Topics on the Law of Torts* (1953) 380 at 452. Recent scholarship provides little advance from Prosser's prognostications. For a thorough and incisive article on these pages, see eg, Swanton, J, "The Convergence of Tort and Contract" (1989) 12 *SydLR* 40.

3 Maitland, F, *Forms of Action at Common Law* (1936).

that appeals to the redistributive effects of liability. I urge a redirection to private goals of the parties in the contract for professional services. These goals turn on straightforward rules crafted to encourage cooperative behaviour.

Section V of the paper brings us around to a long-delayed discussion. What are the reasons for liability rules in the setting of this paper? I propose a thesis that draws upon a large and growing body of work on relational contracts. In Section VI, I plead for a refocusing upon these ghosts for the benefit of professional/client relationships. I suggest we exorcise the now fashionable public notions of professionals' liability and restore the natural order by emphasising preconditions for effective private ordering. I conclude by suggesting appropriate liability rules.

II. The Realms of Tort, Contract and Equity

All professionals face liability rules that stem from either tort, contract or equity.[4] Equitable obligations arise from the fiduciary relationships that professionals establish with those with whom they deal in the course of professional dealings. Professionals are quintessential fiduciaries since they enter relationships where they are invested with great discretion in acting on behalf of others.[5] The fiduciary obligations of professionals have been relatively unexplored except by Professor Finn.[6] They are often misunderstood and confused with tort liability.[7]

It is entirely possible that the fiduciary concept may be appropriated by courts in order to impose a range of obligations on professionals. For example, it is suggested that the informed consent doctrine should be seen as a manifestation of the fiduciary obligation of physicians to disclose information as an incident of discharging their obligation to their patients not to allow duty and interest to conflict.[8]

Despite the recent use of the fiduciary concept and the importance of the duty of confidentiality in equity,[9] most attention has been riveted upon tort

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4 *Nocton v Lord Ashburton* [1914] AC 932.

5 *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41; in the American context see DeMott, D A, "Beyond Metaphor: An Analysis of Fiduciary Obligation" [1988] *Duke LJ* 879 at 915. For some colourful examples where fiduciary obligations have been urged with mixed success, see *Don King Productions v Douglas*, 742 F Supp 741 (SDNY 1990), cf *Mellencamp v Riva Music*, 698 F Supp 1154 (SDNY 1988). For a thorough analysis see Flannigan, R, "The Fiduciary Obligation" (1989) 9 *Oxf J Legal Studies* 285; Finn, P, "Contract and the Fiduciary Principle" (1989) 12 *UNSWLJ* 76.

6 Finn, P D, "The Fiduciary Principle" in Youdan, T M, (ed) *Equity, Fiduciaries and Trusts* (1989).

7 The notion of fiduciary obligation has been urged, unsuccessfully, to oblige a lawyer to refrain from engaging in sexual intercourse with his or her clients, see *Suppressed v Suppressed*, 565 NE 2d 101 (Ill App 1990). Less audaciously, the Canadian courts have casually accepted the false notion that a professional may have a fiduciary duty to take care; see Partlett, D F, *Professional Negligence* (1985) at 120.

8 Shultz, M M, "From Informed Consent to Patient Choice: A New Protected Interest" (1985) 95 *Yale LJ* 219.

9 Gurry, F, *Breach of Confidence* (1984) at 143-62.

and contract as the source of professionals' liabilities.[10] It is in the interaction of doctrines and received understandings derived from tort and contract where liability rules are subject to dramatic transformation.

The history of professionals' liability entwines tort and contract. A little over 200 hundred years ago, in *Shiells v Blackburne* (1789), we find a recognition that liability could be imposed outside contract.[11] This was before the nineteenth century primacy of contract or the twentieth century growth of negligence. Contract law, in the nineteenth century vein, was seen as the regulator of professional's duties. Professionals are private actors entering private and voluntary arrangements.[12] In most instances, the interests at stake are economic.[13] Those interests, except in the case of fraud, were the bailiwick of contract. Tort law, growing rapidly after the wide foundation of negligence in *Donoghue v Stevenson*,[14] was concerned with the protection of bodily integrity.

The law of negligence had assumed the role of a remedial engine.[15] In particular, the strength of negligence was to strike, even in its protection of physical integrity, at the vitals of contract. The nineteenth century decision of *Winterbottom v Wright*[16] was taken to state the supremacy of contract over tort.[17] Liability should be confined by privity of contract. This doctrine stood in the way of the law awarding compensation and deterring negligent conduct in the context of a modern marketplace.[18] Consumers could not, it was assumed, protect themselves. The market failed. Resort to the argument that contract remedies were sufficient immediately became suspect: the doctrine was branded a shibboleth. We mocked those deluded Law Lords who feared

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10 The bulk of most books on the topic are devoted to tort and contract, see Dugdale, A M, & Stanton, K M, *Professional Negligence* (1989); Partlett above n7.

11 Partlett, id at 25-26.

12 As we shall see, this focus on private actors in private ordering is disputed as the public function and responsibilities of professions are stressed as a basis for wider liability rules, see below n77.

13 Many of the professions grew with the burgeoning of commerce in the nineteenth century. Even the "old" professions became organised at this time; the modern law firm grew from this time. Galanter, M, & Palay, T, *Tournament of Lawyers* (1991) at 4-19. See also Auerbach, J, *Unequal Justice: Lawyers and Social Change in Modern America* (1976).

14 [1932] AC 562.

15 The remedial function of tort law has been applauded even in the context of complaints about the crisis it has precipitated; see Galanter, M, "The Day After the Litigation Explosion" (1986) 46 *Maryland LR* 3. But sworn enemies to the tort system, especially product liability, abound, see Huber, P, *Liability: The Legal Revolution and Its Consequences* (1988).

16 (1842) 10 M&W 109, 152 ER 402.

17 Scholars have pointed out that *Winterbottom* has received a "bum rap". The case itself assumed no duty from any relationship between the parties outside contract. It then concluded that contract alone could not generate the duty. The case did not stand for the proposition that privity confines any duty otherwise obtaining. For the most recent discussion of this point, see, Stapleton, J, "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 *LQR* 249 at 250; the point was originally made by Bohlen, F H, "The Basis of Affirmative Obligations in the Law of Torts" (1905) 44 *Am L Reg NS* 209 at 280-85, 289-310.

18 *MacPherson v Buick Motor Co*, 217 NY 382, 111 NE 1050 (1916). The foundational case in American tort law is explicit about the need for manufacturers to recognise the exigencies of the modern marketplace.

the opening up of liability. They were timorous souls, we were bold and believed in negligence.[19] In mocking, we failed to properly analyse, and moreover, sadly accepted the general invalidity of the floodgates argument.[20]

In the *Donoghue v Stevenson* context, it was appropriate to extend the duty of care to ultimate consumers of products. Consumers are ill-equipped in most instances to take cost-effective precautions against latent dangers of personal injury posed by defective products. Provided the product is put to an intended use and handled in a safe manner, liability should extend.[21] The fear underlying the *Winterbottom* line of cases was that manufacturers and others similarly placed could not rely upon contractual expectations and understandings of the contracting parties.[22] This uncertainty is costly. If consumers had adequate information to take precautions and insure against accidents, the *Winterbottom* rule is fully justified.[23] However, in the presence of information disparity, where typically, the manufacturer is in a superior position, and provided liability does not go too far, the cost imposed on manufacturers is more than offset by the benefits of deterrence and compensation.[24]

The reasoning underlying *Winterbottom* and the nineteenth century tradition turns on the costs engendered when contractual understandings and expectations are put aside for wider goals.[25] The nature of those wider goals is different once the interests at stake are changed from bodily integrity to economic interests. It followed that negligence liability was much more constrained when economic interests were threatened.[26] Even the champion

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19 Lord Denning MR stated the faith in his influential dissenting opinion in *Candler v Crane, Christmas & Co* [1951] 2 KB 164.

20 Smith, J C, and Burns, P, "*Donoghue v Stevenson* — The Not So Golden Anniversary" (1983) 46 *MLR* 147; see also Stapleton, J, above n17 (accepting the need for an appreciation of the floodgates argument in crafting liability rules).

21 This reasoning was later to justify the American courts strict liability revolution under the aegis of 402A of the *Restatement (Second) of Torts* (1965). *Henningsen v Bloomfield Motors* 32 NJ 358, 161 A2d 69 (1960); *Greenman v Yuba Power* 59 Cal2d 57, 377 P2d 897 (1962). Note that the conditions of proper use and due care attempt to delimit liability to those defects in respect of which the consumer may be the better avoider of the accident.

22 *Huset v J I Case Threshing Machine* 120 F 865 at 867-71 (8th Cir 1903).

23 The demolition of the privity barrier led to the rapid growth of tort law, now criticised: eg Litan, R E, and Huber, P W, *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (1991). For a comprehensive coverage of the place, function, and future of tort law for personal injuries, see *Enterprise Responsibility for Personal Injury*, ALI Reporters' study, Vol 1 & 2, 15 April 1991.

24 For recent summation see Cooter, R D, "Economic Theories of Legal Liability" (1991) 5 *J Econ Persp* 11.

25 The goals of tort law were rarely judicially articulated; ideas of moral fault and justice sufficed, *Donoghue v Stevenson*. But gradually Anglo/Australian courts began to dig deeper and to justify liability by direct reference to policy. Loss distribution, compensation and deterrence were external goals. They went beyond the interests of the two interacting parties to their ramifications on reaching those external goals.

26 The case law and the scholarship on this topic are mountainous. Some of the mountain is conveniently cited by Swanton, above n2 at 44. The most insightful comment on this area was recently written by Victor Goldberg who notes that "[t]ort law is under constant pressure to extend the boundaries of what constitutes a compensable injury" and argues that *Robins* is inapposite in many contexts in which it has been employed. He finds a

of negligence in America, Benjamin Cardozo, saw that the principles he had so forcefully enunciated for defective product liability should not be applied where the "product" was information causing economic loss.[27] Cardozo CJ was wise enough to see that the floodgates argument had a proper application where an auditor's liability was in question.[28] Yet, Cardozo CJ is usually branded a fuddy-duddy for his *Ultramares* decision. Some see his decision as a strange aberration — perhaps he became conservative as he aged? Now, Cardozo CJ's approach has been widely repudiated in favour of a broad duty of care bounded only by the reasonable foreseeability test.[29]

The law of negligence invites a remedy for many kinds of losses. Its test of reasonable foreseeability is in itself meaningless and hence a great intellectual effort has been mustered to provide core reasons or policies for extending liability. The story of negligence has been one of expansion[30] as the courts have perceived the need to compensate the victims of accidents[31] and to deter

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requirement for "some intellectual apparatus for evaluating the myriad of claims for recovery of mere economic loss". Goldberg, V, "Recovery for Pure Economic Loss in Tort: Another Look at *Robins Dry Dock v Flint*" (1991) 20 *J Legal Studies* 249. This protean task has much to commend it, as Brennan J realises in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 cited with approval in *Caparo v Dickman* [1990] 2 AC 605 at 627 per Lord Bridge, 633-34 per Lord Oliver. The danger is that the duty may be framed in such a particularistic way that it is confined to the case before the court, generalisations are hazardous, and hence the rule provides a poor guide for future decision making.

27 As Cardozo CJ perceived in *Ultramares Corp v Touche, 255 NY 170, 174 NE 441* (1931) information is a peculiar commodity. Once produced, it may flow costlessly to many persons, thus raising the spectre of multiplying liability. The ease of information transmission interferes with the producer's ability to fully garner the benefits of its production. This barrier to information production militates against a broad rule; for articulation of this argument see Partlett, above n7 at 99. See also MacKay, E, "Economic Incentives in Markets for Information and Innovation" (1990) 13 *Harv JL Pub Pol'y* 867.

28 *Ultramares.*

29 See for example, *Citizens State Bank v Timm, Schmidt*, 113 Wis 2d 376, 335 NW 2d 361 (1983) ("accountant's liability should be determined under the accepted principles of Wisconsin negligence law".); *International Mortgage Company v Butler*, 223 Cal Rptr 218 (1986) ("liability should be delimited only by the concept of foreseeability and we refuse to accept the premise that absent duty a person is free to be as negligent as they (sic) choose"). In conformity with the New Jersey Supreme Court's activist stance in tort law, that court decided on an expansive duty of care in *Rosenblum v Adler* 461 A2d 138 (1983). See also *Guenther v Cooper Life Sciences* 759 F Supp 1437 (1990); *Security Pacific v Peat Marwick Main* 569 NYS 2d 57 (1991); *In re Rospatch Securities Litigation* 760 F Supp 1239 (1991). In contrast other courts have been slow to expand the scope of liability beyond a close nexus of knowledge and reliance: *Credit Alliance v Arthur Andersen*, 65 NY 2d 536, 483 NE 2d 110 (1985) explaining the modern day rule based upon *Ultramares*; yet others have refused to find any duty: *Citizens National Bank of Wisner v Kennedy & Coe*, 441 NW 2d 180 (1989). The current law is discussed by Gossman, T L, "An Examination of the Emerging Tort Theory Expanding the Liability of Certified Public Accountants for Negligent Misrepresentation" (1987) 4 *Cooley LR* 301; for endorsement of the reasonable foreseeability test see Note, "Common Law Malpractice Liability of Accountants and Third Parties" (1987) 44 *Wash & Lee LR* 187. Note the supercilious flourish with which Lord Bridges dismisses American law in *Caparo v Dickman*, above n26 at 623.

30 Landes, W M, and Posner, R A, *The Economic Structure of Tort Law* (1987) at 3.

31 This perspective has dominated Anglo-American debate; see eg Stapleton J, above n17 at 252 describing the law's protectionism.

negligent conduct.[32] It became increasingly attractive to assume that industry could act as a source of compensation with its deep insurable pockets and, at the same time, the costs of accidents could be internalised, thus imposing on industry the costs of its injuries. This trend found its apotheosis in American product liability law.[33]

The force of the rhetoric of negligence obliterated rules restricting liability by more precise limits, as in occupiers' liability and liability for nervous shock. It has been pitched against pure economic interests where contract has traditionally governed liability. This is not the place to investigate generally the inroads of negligence. Most courts have been reluctant to allow negligence principles full rein. But their enunciated rules are unclear and inconsistent and their reasons quite bewildering.[34] Nevertheless, the presence of negligence (at the castle gate as it were) has prompted a shift in the form of analysis in the law. Once, when liability was governed certainly by contract, fairly precise formal liability rules predominated. Liability was reflexive to those rules. In contrast, the gravitational pull of negligence[35] immediately imposes a strong policy element. Contract rules are no longer justifiable merely because they have stood judicial testing and are internally consistent. Rather, they must be examined in light of the policy perspectives wing sitting beneath the aegis of negligence. Reflexive application of rules is replaced by judicial decision-making weighing factors dictated by policy goals. The form of analysis encourages the infiltration of policies that promote public distributional goals — enterprise liability. This change of form is inevitable, but it should alert us to the complex and difficult task of gauging the appropriateness of policy goals whether in tort or contract.

I wish now to turn to three situations in which tort has played a role in what were purely contractual professional arrangements.[36] In these

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32 Landes and Posner, above n30 at 85-122.

33 Priest, G L, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law", (1985) 14 *J Legal Studies* 461; but cf the deliberately non-consequentialist reasoning of Stephen J in *Caltex Oil (Aust) v The Dredge "Willemstad"* (1976) 136 CLR 529 at 568-69.

34 For a useful airing of reasons for denying or accepting negligence in the protection of pure economic loss see the majority and dissenting opinions in *State of Louisiana ex rel Guste v M/V Testbank*, 752 F2d 1019 (5th Cir, 1985); for the limits in product liability — compounded by strict liability see *Two Rivers Co v Curtiss Breeding*, 624 F2d 1242 (5th Cir 1981); the Supreme Court has affirmed the dominant role of contract in admiralty: *East River SS Corp v Transamerica Delaval*, 476 US 858 (1986). See also Stapleton, above n17, for a recent attempt to analyse the law and propose principled policy oriented guidelines for liability.

35 Inter alia see Mason, K, "Contract and Tort: Looking Across The Boundary from the Side of Contract", (1987) 61 *ALJ* 228 at 240.

36 I have omitted a fourth situation. Construction professionals eg architects, engineers, surveyors, etc, may undertake and complete professional work which hazards personal injuries or property loss not only to clients but to others. For personal injuries so sustained they are liable according to the usual rules in negligence. See *Voli v Inglewood Shire* (1963) 110 CLR 74. If the damage were purely economic they would not be liable in negligence. But cf *Junior Books v Veitchi Co* [1983] 1 AC 520. The problem arises in how one defines "economic loss". If a building develops cracks due to poor design is this to be labelled economic loss or property damage? The cognoscenti will immediately see that this involves the *Anns v Merton LBC* [1978] AC 728 case and its progeny. I have criticised

situations, tort may play a valuable role in filling gaps left void by contract law.[37] But negligence is unruly; by its nature it is expansive. The danger is that professional contractual or relational understandings may be undermined if, in crafting the role of tort liability, limits dictated by appropriate policy goals are not carefully applied.

III. Three Models

A. Reliance

Professionals may proffer advice to persons in many different circumstances. Usually, they are paid by the person receiving the advice and thus, a contractual professional relationship arises. In contrast, a professional may give gratuitous advice to a friend at a party. In the middle lies advice which is given in a serious business context to a person whom the professional knows will rely upon it. Because this advice is not paid for by the person relying on it, he has no contract action. Before 1964, in the absence of a fiduciary relationship or fraud on the professional's part, no other liability would subsist. Since 1964, *Hedley Byrne v Heller*[38] allows the advice recipient to argue that he was in a special relationship with the professional sufficient to give rise to a duty of care in negligence.[39] The metes and bounds of this duty have been debated at length.[40] The most important aspect of the decision, in exact duplication of Cardozo CJ's reasoning,[41] was to extend liability beyond the limits of contract, but *not far beyond contract.* The House of Lords recognised that the duty was founded upon an assumption of responsibility by

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Anns and now observe that it is fashionable to do so. The House of Lords performed fairly convincing burial rights in *Caparo v Dickman* above n26 (see especially Lord Oliver at 647, describing Lord Wilberforce's observations in *Anns* as having been "severely qualified by subsequent decisions of this House"). See Partlett above n7 Ch 11 and Ch 14. The reasoning in this paper can be extended to this fourth situation. The characterisation problem surrounds the limitation period issue in like cases, see *Pirelli Cable Works v Oscar Faber* [1983] 2 AC 1.

37 The gap-filling function of tort has been commented on by others, see Markesinis, B S, "An Expanding Tort Law — The Price of a Rigid Contract Law" [1987] 103 *LQR* 354; Harris, D, and Veljanovski, C, "Liability for Economic Loss in Tort", Furmston, M, (ed) *The Law of Tort Policies and Trends in Liability for Damage to Property and Economic Loss* (1986) at 59.

38 [1964] AC 465.

39 *The Restatement (Second) of Torts*, sub 552.

40 See Partlett, above n7 at 58-70; the House of Lords in *Caparo v Dickman*, above n26, firmly confines the scope of liability by reference to the professional's knowledge of the person in reliance and the purpose to which the information was to be put. The central place of knowledge of purpose is remarked on in *Al-Nakib Investments (Jersey) v Lancroft* [1990] 1 WLR 1390.

41 In *Ultramares*, above n27 at 182-83, Cardozo CJ found liability where the "bond was so close as to approach that of privity, if not completely one with it". For applications of this reasoning by modern courts, see *Vereins-und Westbank v Carter*, 691 F Supp 704 (1988) attorneys were liable on opinion letter where they drafted the letter for a client but with reliance of the plaintiff in mind; *Citytrust v Atlas Capital Corp*, 570 NYS 2d 275 (1991) requiring the "functional equivalent" of privity to establish a relationship.

the giver of the advice and reasonable reliance by the recipient.[42] The conditions of liability all point, as Lord Devlin put it, to relationships which are "equivalent to contract". To find a professional relationship and not merely a social relationship is critical.[43] Reinforcing the contractual nature of the duty, Lord Devlin opined that reward, even in an indirect way, would be material in finding a special relationship.

Clearly the House of Lords, as Cardozo CJ had before it, is taking a small step. Tort law is employed to ameliorate the rigour of contract law. In this process, liability in negligence is to be subservient to private orderings and understandings of the parties. In strict conformity with this role, a duty could be forsworn by disclaiming responsibility.[44] The rule makes advice more reliable but avoids the obverse vice of discouraging the dissemination of information since it requires that professionals be rewarded for its production in a context where they can calculate the risk posed by its production and dissemination.

Nevertheless, the story of liability in negligence for misstatements has been one of distancing from this contractual or private ordering basis. This can best be observed in the auditor liability cases where some courts do not stress the "close to contract" limits of the tort but rather take as a starting point the social and economic role of auditors.[45] From here some courts have

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42 In Australia, Barwick CJ, in *MLC v Evatt* (1968) 122 CLR 556, placed greater emphasis on the reasonable reliance of the recipient of the information; an earlier step away from the idea of the consensual nature of the liability. At the same time, the place of the disclaimer was put in doubt. The distrust of the consensual nature of the relationship under voluntary assumption of responsibility is carried through into recent authorities, see *Harris v Wyre Forest D C* [1990] 1 AC 831 at 862 per Lord Griffiths, see below n44. For recent analysis, see Nicholson, K, "Third Party Reliance on Negligent Advice" (1991) 40 *Int'l Comp LQ* 551.

43 See *Hedley Byrne*, above n38 at 539 per Lord Pearce.

44 The courts, either because of statutory intervention or their own suspicion of disclaimers, have stepped back from the clear principle enunciated in *Hedley Byrne*. For a thorough examination see Jackson J, "Tortious Disclaimers and Negligent Misstatement: Reasonableness and Unconscionability" (1991) 65 *ALJ* 507 discussing *Harris v Wyre Forest D C* [1990] 1 AC 831. In the United States, see *Seed Kem, Inc v Safrane*, 466 F Supp 340, 344-45 (D Neb 1979); *Stephens Indus Inc v Haskins & Sells*, 438 F2d 357 (10th Cir 1971). For commentary, see Bagby and Ruhnka, "The Controversy Over Third Party Rights: Toward More Predictable Parameters of Auditor Liability", (1987) 22 *Ga LR* 149 at 177. The American literature often dubs liability rules, whether contract or tort, as default rules. These rules may be viewed as directed toward cooperative risk reduction. As a cautionary matter the "state should attach no presumptive moral weight to its chosen default terms. Its job is supplementation, not dictation . . . There should be no implicit legislative or judicial limitation on contracting out." Scott, R E, "A Relational Theory of Default Rules for Commercial Contracts" (1990) 19 *J Legal Studies* 597 at 608.

45 See *Haig v Bamford* (1976) 72 DLR (3d) 68 at 74. Cf *Yianni v Edwin Evans & Sons* [1982] QB 438 at 454 per Park J (nature of status as "surveyors and valuers"). The modern role of solicitors was employed as a foundation upon which to impose liability in *Gartside v Sheffield, Young & Ellis* (1983) NZLR 37. The New Zealand courts have been forthright in employing broad public oriented policies to ground the liability of professionals, see *Scott Group v McFarlane* [1978] 1 NZLR 553 per Woodhouse J at 575-76; *Meates v A-G* [1983] NZLR 308 at 334-35 per Woodhouse P and Ongley J, at 378 per Cooke J.
This emphasis on the public role and responsibilities is reflected in American case law, see *Rosenblum v Adler*, 461 A 2d 138 (1983) at 142, ("the auditor should bear [the duty] to best serve the public interest in light of the role of the auditor in today's economy");

translated the policies of tort law in the personal injury arena. Thus auditors are spoken of as appropriate spreaders of risk through the use of liability insurance and liability is seen as necessary to deter negligent behaviour.[46] Furthermore, the courts have employed the open-ended factor balancing test imported from negligence. The fragility of the professional client/relationship receives scant attention once such public policies embedded in a broad calculus are imported from enterprise liability, employed by courts in the product liability arena.[47] To argue to the contrary is to risk being branded, along with the *Winterbottom* Law Lords, a timorous soul.[48] To be sure, signs of a judicial retreat led by the House of Lords abound. Lord Oliver in *Caparo* saw a foreseeability test as opening up "a limitless vision of uninsurable risk for the professional man".[49] Curiously however, the House of Lords has consciously moved away from liability based upon a consensual notion.[50]

B. Third Party-Will Cases

In tort discussions, commentators often point to the inroads of tort law stemming from *Hedley Byrne* and include a group of cases that mainly concern, but are not limited to, wills. In these cases, a solicitor negligently prepares a will or fails to attend reasonably to the formalities of its execution. A gift to a beneficiary thereby fails. Has the disappointed beneficiary a good cause of action? Obviously, there is none in contract because the solicitor and the disappointed beneficiary were not in privity of contract. In a well-settled line of cases the courts have found that the solicitor owes a duty of care to the disappointedbeneficiary.[51] In these cases, the elements of *Hedley Byrne* are absent. Negligence liability, however, is used for the same purpose as in *Hedley Byrne* context — to overcome the shortcomings of contract law.[52]

International Mortgage v Butler, 223 Cal Rptr 218 (1986) at 225 ("the independent auditor assumes a *public* responsibility transcending any employment relationship with the client.").

46 *Citizens State Bank v Timm, Schmidt & Co*, 113 Wis 2d 376, 335 NW 2d 361 (1983); but cf *Caparo Industries v Dickman*; *Al-Nakib Investments (Jersey) v Longcroft* [1990] 1 WLR 1390; *James McNaughton Paper Group v Hicks Anderson & Co* [1991] 2 QB 113.

47 The courts provide a checklist of factors some of which are sensitive to the parties' relationship, others of which draw on external goals such as deterrence and insurability: see *Biakanja v Irving*, 320 P2d 16 (1958); *Heyer v Flaig*, 74 Cal Rptr 225 (1969); *Goodman v Kennedy*, 134 Cal Rptr 375 (1967). The balancing test has been widely adopted in the United States, see Mallen, R E and Smith, J M, *Legal Malpractice* (1989) at 382-84.

48 Doctrines in contract were difficult to sustain when the alluring negligence principle was brought to bear, see *Esso v Mardon* [1975] QB 819 (applying *Hedley Byrne* to pre-contractual negotiations). To be sure the House of Lords is at some pains in *Caparo* to distance itself from broad liability.

49 *Caparo*, above n26 at 643.

50 Ibid, and see n42 and n44 for commentary.

51 Partlett, above n7 at 277-94.

52 Not all courts recognise this and often test these cases as a species of *Hedley Byrne* type cases. Hence, they are falsely cited as examples of the breakdown in the narrow confines of *Hedley Byrne*. For example, in *Caparo v Dickman*, Lord Oliver cites *Ross v Caunters* as a case not easily fitted into defined categories, above n26.

In the will case there is a failure in the incentives established by the law of contract. In the absence of an action by the disappointed beneficiary, the solicitor is faced with a less than optimal incentive to perform the terms of the contract entered into with the testator. The dead enforce no contracts. The only party with an interest to enforce the original contract is the disappointed beneficiary. The courts have once again chosen tort law to provide the remedy rather than manipulate the rules of contract.[53]

The law of torts has come to the rescue of contract.[54] It is for this reason that Megarry VC in *Ross v Caunters*[55] warns that the underlying contract must be respected. Accordingly, if the contract for the services apportions risks in a particular way, the duty of care should not be allowed to alter it and, in particular, it should not interfere with the professional duty owed by the lawyer to his client. In the usual case, this causes no problem. What would courts do, however, if solicitors agreed to prepare wills on condition that they should not be liable for any damages or for only limited damages? Here the danger is that the remedial rationale may be forgotten and the policy perspectives from enterprise liability will be imported.[56] Fuelling the danger is a contemporary hostility to enforcing contractual terms in the face of unequal bargaining power.[57] Furthermore, the courts often overlook the fact that this category of cases should be distinguished from the previous category. The failure to make the distinction invites the considerations of public obligation that may be seen in the auditor cases.

C. Concurrent Tort and Contract Liability

Despite a mixed pedigree, the liability of a professional toward a client was regarded as resting exclusively in contract.[58] This confirmed the fact that the arrangement was private and obligations were assumed voluntarily through private ordering. No duty could arise before the relationship was established and the relationship was constituted by the retainer. From time to time, it was urged that the relationship should also give rise to tortious obligations. The

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53 The immediate problem in wills could be solved by reforming the law of wills. The desirability of any approach must depend upon the extent of disruption the change would have upon that body of law. It may be that the consequences of change in negligence law do less violence to that body of laws because of its great flexibility than would a change in probate law, where certainty via formal rules is paramount.

54 Lord Goff's test in *Leigh and Sillivan Ltd v Aliakmon Shipping Co (The Aliakmon)* [1985] QB 350 at 399 represents a precisely crafted liability rule that underpins the contractual understandings of the parties. However, Lord Goff's approach is rejected by the House of Lords in a later disposition of *The Aliakman* [1986] AC 785 at 820 per Lord Brandon.

55 See n52 at 322, per Megarry VC ("the duty . . . far from diluting the solicitor's duty to his client, marches with it, and, if anything, strengthens it").

56 Cf *Biakanja v Irving*, 49 Cal 2d 649, 320 P2d 16 (1958).

57 *Codelfa Construction v State Rail Authority of NSW* (1982) 149 CLR 337: reluctance to imply term to accommodate changes; lack of bargaining relevant. Inequality alone does not make a contract unconscionable under the *Uniform Commercial Code* UCC 2-302 comment 1 and 208 comment (d). Cf Eisenberg, M, "The Bargain Principle and Its Limits" 95 *Harv LR* 741. But see Stapleton, n17 at 292, urging the relevance of inequality of bargaining power.

58 See Prosser, above n2. But cf those professions whose tasks implicated physical harm, eg medical practitioners, dentists, etc.

seminal case was *Groom v Crocker*,[59] where it was argued that emotional distress damages should be available in the case of clients suing their solicitor. The court simply stated that breach of contract was the exclusive remedy and mental distress damages were not recoverable thereunder. Tort remedies had advantages over contract — the range of damages and remoteness of damage rules were more liberal. In tort, the limitation period may in certain cases also be more advantageous to the aggrieved plaintiff; the defence of contributory negligence was available, and contribution could be claimed from other concurrent tortfeasors. As elsewhere, to limit remedies by reference to contract law seemed pusillanimous. It was highly predictable that the courts would accept concurrent liability of professionals in contract and tort.[60] Groom is now mocked and Australian law accepts that solicitors may be liable to their clients in tort as well as contract.[61] *Hawkins v Clayton*[62] establishes the rule.

In this case, Clayton Utz, Solicitors, were sued by the executor and residuary beneficiary under the will of Mrs Brasier. The action was for damages stemming from the alleged failure of the solicitors to inform the executor of his interest under the will until some six years after the death of Mrs Brasier. The issue was whether any duty was imposed upon the solicitors to seek out the executor and inform him of his interest in the will. A secondary issue was whether the limitation period barred the plaintiff's action. Both issues necessarily raised the question of whether liability arose in tort. The court was not willing to imply a retainer that imposed a duty to inform.[63] Any duty then had to spring from negligence or from a *sui generis* tort duty. Deane and Gaudron JJ found a duty of care in negligence and Brennan J a duty to disclose tailored to the specific facts of the case.

Deane J's judgment has been influential although it may not be part of the ratio decidendi of the case. He dismissed Groom as old-fashioned. He stated:

> The clear trend of modern authority is to support the approach that the duty of care owed by a solicitor to a client in respect of professional work prima facie transcends that contained in the express or implied terms of the contract between them and includes the ordinary duty of care arising under the common law of negligence.[64]

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59 [1939] 1 KB 194; see Kaye, J M, "The Liability of Solicitors in Tort" (1984) 100 *LQR* 680 justifying the *Groom* rule and criticising later law; *Midland Bank Trust v Hett, Stubbs & Kemp* [1979] Ch 384 was influential in putting *Groom* to death.

60 Prosser, above n2 at 429-50 suggesting a division on misfeasance/nonfeasance but finding "little consistency". But cf *Collins v Reynard*, 1991 Ill Lexis 104 (Illinois Supreme Court) holding that in the case of economic loss, an attorney may be sued solely in breach of contract. For a discussion of the tort doctrines translated into contract and the degree of merging see Mason, above n35.

61 In a decision that ransacks Commonwealth and American case law, the Canadian Supreme Court in *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481 held that solicitors could be concurrently liable in tort and contract.

62 (1988) 164 CLR 539.

63 Id at 543-547 per Mason CJ and Wilson J.

64 Id at 574.

As is well-known, Deane J has been an avid promoter of the proximity thesis.[65] So the question in this case was whether the relationship between the client, Mrs Brasier, and her representative at death, the firm, and the plaintiff "possessed the requisite element of proximity with respect to economic loss of the kind sustained . . ."[66] He found this to be the case. Indeed, he argued that contract should not be extended by use of implied terms when the law of negligence provides a duty of care.[67]

Deane J determined that proximity existed by reference to the professional function and the acceptance of responsibility by keeping custody of the will. Furthermore, it was obvious that, with the defendant solicitors' lack of action, the client's testamentary intentions were likely to be frustrated.[68] Referring to the usual requirements of assumption of responsibility and reliance, he says of this professional relationship:

> It is a relationship of proximity of a kind which may well give rise to a duty of care on the part of the solicitor which requires the taking of positive steps, beyond the specifically agreed professional task or function, to avoid a real and foreseeable risk of economic loss being sustained by the client . . . the taking of such positive steps will depend upon the nature of the particular professional task or function which is involved and the circumstances of the case.[69]

The courts have had some opportunity to wrestle with *Clayton*.[70] Kirby P in two subsequent decisions has adopted Deane J's approach. [71] He affirmed that this was his view of *Clayton* in *Cousins v Cousins* (Unreported, 18 December 1990). Here, Kirby P found that the solicitor's duty to his client ranged beyond his retainer. A duty was imposed to show reasonable care, skill and attention in protecting the legitimate interests of clients.

Thus, as elsewhere, a view is emerging that contractual expectations are but a factor within a broad calculus in determining the liability of professionals. Deane J stated that the duty of care owed to a client may be excluded or modified by the terms of a contract between them, but subject to "overriding policy considerations or statutory provisions".[72] Also recognising the place of contract, Kirby P in *Cousins* recognises the "undesirability" of imposing burdens far beyond their retainer. "To do so", he says, "would be to impose financial burdens on solicitors, and, through their

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65 *Jaensch v Coffey* (1984) 155 CLR 585; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Cook v Cook* (1986) 162 CLR 376. Deane J seems to be gathering adherents to his proximity thesis, see *Gala v Preston* (1991) 65 ALJR 366. Here Mason CJ, Gaudron and McHugh JJ joined Deane J in enunciating the proximity test. Brennan J, however, continues to be unconvinced, *Gala* 65 ALJR at 371.

66 *Jaensch* (1984) 155 CLR 549 at 578.

67 Id at 572-73; in *Kleinwort Benson v Armitage* (S Ct NSW, 26 April 1989) per Cole J and Deane J was taken to mean that any implied term must be sustained within the criteria.

68 Above n66 at 579.

69 Ibid.

70 See *Kleinwort Benson v Armitage*, above n67.

71 *Waimond v Byrne* (1989) 18 NSWLR 642 at 652.

72 Above n62 at 582.

insurances, on the conduct of legal practice generally".[73] The demise of contractual expectations is not, however, monolithic. The English courts, perhaps because of their distasteful experience with *Anns*,[74] have reasserted that contract should rule, particularly in a commercial setting.[75] Although the professional and client relationship is probably not such a commercial setting, Lord Bridge in *Caparo v Dickman* had no hesitation in announcing that the "professional man owes a duty . . . and will be liable both in contract and in tort for all losses which his client may suffer by reason of any breach of that duty".[76]

The way is clear for the courts to impose liability according to their conception of the public role of professionals. Consistent with Deane J's reasoning is the proposition that professionals, like solicitors, in our modern complex society have a central role to play in guiding clients through the thickets of regulation, information explosion, and heavy risk. Professionals oil the wheels of our society, they assume a public function and in return are given special privilege. Their liability should be commensurate with their declared public obligations.[77] The weight of this argument eclipses ideas of private ordering. Public policy may trump contractual arrangements. This, it will be recalled, parallels the development of auditor liability. The question in this category, as in the former two, is how far professional contractual expectations and understandings will be respected in the face of negligence liability that imports publicly oriented multifaceted policy perspectives.

IV. Public and Private Goals

The courts in differing circumstances have altered the incidence of liability on professionals. The earlier model was one of private ordering through contract; the later model is one of imposition of liability through tort reinforcing public expectations of the professional. Just as society was prepared to impose public duties on manufacturers, it may be justifiable to impose public duties

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73 *Cousins v Cousins* at 12. Note that Priestly JA was not so ready to adopt the Deane J thesis noting that the other High Court justices had not accepted it; but he sees it as the "trend".

74 *Anns v Merton LBC* [1978] AC 728; *Junior Books v Veitchi* [1983] 1 AC 520 can also be considered another wrong turning for the House of Lords. See discussion above n36.

75 See *Tai Hing Cotton Mill v Liu Chong Hing Bank* [1986] AC 80 at 107 (PC) per Lord Scarman stated. The principle has been followed in recent decisions, including *National Bank of Greece SA v Pinios Shipping Co (No 1)* (1989) 1 All ER 213; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Burmuda) Ltd* (1989) 3 All ER 628; *Banque Financière de la Citè SA v Westgate Insurance Co* [1990] 2 All ER 947; *Murphy v Brentwood DC* [1990] 2 All ER 943. But cf Mason, above n35, discounting Lord Scarman's dictum.

76 *Caparo v Dickman*, above n26 at 619 per Lord Bridge.

77 The professions have always had a public dimension; public responsibility is a price for professional privilege. This aspect of professionalism is emphasised in sociological studies of professionals. The changing role of the legal profession in face of modern challenges is discussed in Partlett, D, & Szweda, E, "An Embattled Profession: The Role of Lawyers in the Regulatory State" (1991) 14 *UNSWLR* 8. The public place of professionals in this literature is captured by Perkin, H, *The Rise of Professional Society: England Since 1880* (1989) at 2. The goals of public service of the professions is happily stated by O'Connor J in *Shapero v Kentucky Bar Assoc*, 486 US 466 at 488-89 (1988) (O'Connor J, dissenting).

on professionals unrestricted by private arrangements.[78] If this is the wave of the future, prudence dictates a pause for further consideration.

The paper thus far has spoken vaguely of professional contractual understandings and expectations. It has been suggested that if tort obligations are implied, some violence may be done to these understandings and expectations.

Deane J is plainly correct in his opinion that too much is put in the artificial distinctions between tort and contract — those old ghosts of the forms of action.[79] But this is not to say that tort concepts of proximity drawn from personal injury should be permitted to mingle indiscriminately with the liability of professionals for economic loss. Negligence appropriately tamed, like deceit, has a place in professional liability because it enhances private ordering; it fills the gaps in contract.[80] Liability rules, whether tort or contract, should function to promote and maintain professional relationships. Beyond the boundaries of upholding the expectations of the relationship, efforts to attain public goals may be unduly burdensome in discouraging and destroying professional relationships.

Deane J is careful to avoid commingling of factors from wider tort liability in his proximity test in *Hawkins v Clayton*. He distinguishes between a professional whose function implicates risk to life, limb or property from those that risk pure economic loss.[81] In the latter,

> [T]he elements of assumption of responsibility and of reliance combine with that of the foreseeability of a real risk of economic loss to give the relationship between a solicitor and his client the character of one of proximity with respect to foreseeable economic loss.[82]

For Deane J, proximity will depend upon a variety of factors that will be generated over time as cases are decided. This approach sacrifices the precision that may be derived from a certain rule. It substitutes an approach to judicial decision-making that is designed to respond more acutely to the demands of particular categories of cases. The process is familiar to all observers of the law: from pre-set rules the law changes to multifactorial factor balancing. In the law of torts, the transformation can be noted in liability for emotional distress and occupiers' liability.[83]

The transformation has elicited a great degree of commentary. Some commentators bemoan the disappearance of rules from the viewpoint of

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78 See Priest, "The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform" (1991) 5 *J Econ Persp* 31.

79 Above n62 at 584.

80 See Ayers, I and Gertner, R, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" 99 *Yale LJ* 87; I argue in, "From Victorian Opera to Rock & Rap: Inducement of Breach of Contract in the Music Industry" (1992) 66 *Tulane LR* 771, that tort plays a part in reducing agency costs faced by artists and record companies when contracting. See also BeVier, L R, "Reconsidering Inducement" (1990) 76 *Va LR* 877.

81 Above n79 at 578.

82 Ibid.

83 Above n66.

fairness[84] and economic efficiency.[85] Whether this change is inevitable or cyclical and its ramifications in the way the law functions are debatable.[86] In professional liability, the parties are in a bargaining mode, unlike the circumstances prevailing when most tort liability rules are imposed. Tort liability may be seen to apply usually where the interacting parties may not realistically bargain with one another. Usually it is taken as axiomatic that clear, categorical property rules promote efficiency in distribution and production by facilitating private exchange.[87] Clear liability rules operate similarly except that a party may compulsorily purchase a right defined by a liability rule upon payment of damages.[88] If a rule is clear but not suitable for parties within the exchange, they may agree to waive compliance with it. An unclear rule impedes bargaining because the parties will remain uncertain as to whether a court *ex post* will decide for a number of yet unarticulated reasons that the parties' allocation should not be respected. Thus the benefits of exchange are forfeited. Sometimes, the courts decide that the cost of unconsummated relationships is worthwhile for public policy reasons. Hence, where a hospital or physician attempts to contract out of the usual incidents of negligence liability, the court will not enforce the contract for paternalistic reasons.[89] It is difficult to justify discouragement of exchange, however, in most professional contexts where economic interests alone are at stake.

Despite this compelling argument in some situations, of which professional liability is a sub-set, a liability rule subject to later *ex post* court evaluation may promote exchange because it assures the promisee (the client) that the promisor (the professional) will not stand on the strict contours of the bargain in the event that circumstances may arise where positive actions by the promisor (professional) may guard the promisee (client) from foreseeable loss. Such a rule is appropriate if the promisee (client) has an informational disadvantage. This rule reflects the law where the courts implied a term in the contract and is close to that enunciated by Deane J. The rule depends upon the notion of relational contracts. The danger, then, is not so much the reach of the rule beyond the express retainer but the tolerance of the rule to allow

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84 Scalia J has emerged as an advocate of formal judicial rule making, see Scalia, A, "The Rule of Law as a Law of Rules" (1989) 56 *U Chi LR* 1175. The debate is an aspect of the present jurisprudential firestorm on "formalism". I discuss aspects of this in a review article, Partlett, "Book Review", (1990) 43 *Vand LR* 1401. Reviewing Atiyah, S and Summers, R S, *The Common Law As Cricket: A Review Essay of Form and Substance in Anglo-American Law* (1987). For a recent articulation of the formalist stance see Schauer, F, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991).

85 Ehrlich, I and Posner, R, "An Economic Analysis of Legal Rulemaking" (1974) 3 *J Legal Studies* 257; Epstein, R A, *Modern Products Liability Law* (1980) 14-15; Huber, P W, and Litan, R E, *The Liability Maze*, n23 at 9 noting the need for predictability if a rule is to act as an efficient deterrent to harm producing activity.

86 Johnston, J S, "Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form" (1991) 76 *Cornell LR* 341.

87 Id at 397.

88 See Calabresi, G and Melamed, A D, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 *Harv LR* 1089; Landes and Posner, above n30 at 29-53.

89 *Tunkl v Regents of University of California*, 60 Cal 2d 92, 383 P2d 441 (1963).

courts to consider factors alien to contractual exchange. If, for example, the courts were to consider the capacity of lawyers to be insurers this would be irrelevant to the exchange issue. Matters such as insurance, distribution of loss, and compensatory justice are public matters well ensconced in mainstream tort law that should find no place in the liability of professionals for economic losses.

At this point it is necessary to elaborate on the idea of relational contracts that will provide a better grounding of the policies that properly belong to the formulation of professional liability rules.

V. The Relational Contract

Professional and client contracts are quintessentially relational in character. They are not like a contract for the sale and purchase of an apple, which may be described as "clear in clear out".[90] Rather, a person, in retaining a professional, appoints an agent to carry out a task which often involves a wide variety of discretionary tasks and provides the professional with an opportunity to exploit his agency position. Because clients (principals) have problems monitoring professionals' behaviour, the professionals may pad bills, slack or shirk on the job, or use their positions to take for themselves opportunities that come their way because of the general tasks they have been retained to do. Their behaviour may be called opportunistic behaviour, and it occurs wherever *A* retains *B* to do a job on *A*'s behalf. *A* has less information than *B* about the proper carriage of the task.[91] Thus *B* may engage in hidden action. The other danger is that *B* is dishonest or incompetent; here *B* has hidden information. These are simply examples of moral hazard, a phenomenon best known in the insurance area.

Another problem in the professional area (or in any agency relationship) is adverse selection. This is a problem for the client who must select a competent and honest professional. Dishonest and/or incompetent professionals are encouraged to enter and exploit the opportunities presented.[92] At the same time, but more rarely, professionals may face adverse selection problems if clients seek them out for illegitimate purposes.

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90 For a sampling of the literature see Macneil, I R, "The Many Futures of Contracts" (1974) 47 *S Cal LR* 691; Goetz, C J and Scott, R E, "Principles of Relational Contracts" (1981) 67 *Va LR* 1089; Macneil, I R, "Relational Contract: What We Do and Do Not Know" (1985) *Wis LR* 483; Macneil, I R, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980); Scott, R E, "Conflict and Cooperation in Long Term Contracts" (1987) 75 *Cal LR* 2005 at 2044.

91 See Rasmusen, E, *Games and Information: An Introduction to Game Theory* (1989) at 133-36 (discussing the problem of moral hazard in different asymmetric information models).

92 In the insurance market an example of adverse selection is the AIDS sufferer who seeks out health insurance. This also explains why second-hand cars drastically lose value: once driven out of the showroom they join a class where a number will be lemons. Despite attempts to differentiate the good from the lemons, the problem persists and the price for all cars in the class is depressed; see Akerlof, "The Market for Lemons: Quality Uncertainty and the Market Mechanism" (1970) 84 *Q J Econ* 488.

This occurs where, for example, criminals seek to retain lawyers so that they may hide information from the police by claiming lawyer/client privilege.[93]

Moral hazard and adverse selection present formidable barriers to persons wishing to engage in mutually advantageous cooperative relationships. A range of strategies is available that will reduce moral hazard and adverse selection, or agency costs as they are sometimes described.[94] To the extent that these costs can be reduced, parties wishing to enter these relationships will be better off. Some strategies are as follows:

(i) Monitoring. Principals may attempt to keep tabs on their agents, and agents will expose themselves to such scrutiny. For example, auditors are appointed to reduce the opportunistic behaviour of company managers (agents) on behalf of their principals — the shareholders. Even without companies, legislation mandating the appointment of auditors, corporations would have an interest in voluntarily appointing auditors.[95] Architects and like professionals are often appointed to report on progress in building projects. The release of staged payments may depend on satisfactory reports.

Another way that monitoring can occur is for clients/principals to retain a number of professionals and compare work quality and production. Thus large corporations spread their work among a number of law firms.[96] They may also employ in-house counsel who will monitor, amongst other functions, performance of outside counsel.[97]

(ii) Efficiency Wages. This strategy has a nice application to professionals and may explain (justify?) high (above market) remuneration. It has been suggested that to induce workers (agents) not to shirk, firms could offer them salaries over market clearing wages. This would impose a significant penalty for shirking.[98] Now all salaries would rise and the penalty for shirking would

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93 A recent notorious example is *Menendez v Superior Court*, 279 Cal Rptr 521 (1991) exploring the extent to which a psychotherapist may disclose confessions of murderers uttered while in a psychotherapist-patient relationship.

94 Jensen and Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3 *J Fin Econ* 305. For a book-length discussion, see Williamson, E O, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (1985).

95 Prior to any mandatory auditing under legislation, companies voluntarily appointed auditors to reduce agency costs and thus attract investors. The Law Society's spot audits of solicitor's trust funds is another example. Mandatory disclosure rules in relation to securities may be similarly justified. Easterbrook, F H and Fischel, D R, "Mandatory Disclosure and Protection of Investors" (1984) 70 *Va LR* 669. Much recent scholarship on corporate governance has drawn on the relational contract model.

96 Galanter, M and Palay, T, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991) at 53-54 describing how competition between firms has increased, in a setting where corporations are inclined to divide their custom among several law firms.

97 Carr, J and Mathewson, F, "The Economics of Law Firms: A Study in the Legal Organization of the Firm" (1990) 33 *JL Econ* 307 finding that for large corporate clients it may pay to have in-house counsel monitor outside counsel performance; this has the effect, inter alia, of reducing the incentive to "invest in brand name capital" (ie reputation).

98 Adam Smith had the idea first. Smith, A, *Wealth of Nations* (Penguin edn, 1982) at 186. Elsewhere in the *Wealth of Nations*, Adam Smith explains the "extravagant fees of counsellors at law" by the fact that by entering the profession you engage in a lottery where your chances of a successful career are less than twenty to one, id at 208. I don't

disappear. But as the salaries rise, market demand falls, creating unemployment and thus the penalty for shirking is reinstated. So in the professional market, where trustworthiness and competence are paramount, seekers of such services will want to pay a premium. The penalty of a lost client will fall harder if the professional loses a premium. Perhaps this explains also why the market for professional services pays highly for seemingly mundane tasks. These tasks are fraught with moral hazard and thus clients pay to alleviate it.[99]

(iii) Reputation. Of great significance in reducing agency costs is the exhibiting of a reputation for honesty and competence. Clients seek out firms with reputations and firms invest heavily in establishing and maintaining a reputation.[100] In the context of lawyers, the role of reputation has been expressed as a way a lawyer disseminates information to clients and other lawyers about her/his "qualifications, skills, temperament, legal philosophy, honesty and integrity."[101] Reputation acts as a signal of service quality that a client may expect. The investment and heavy dependence upon reputation bonds her/his further professional conduct. The cost of its loss or diminution can be great, witness the crisis at Salomon Brothers, Inc. when that brokerage house was caught attempting to manipulate the market for treasury notes.[102]

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know whether this explanation holds true today, but I doubt the contemporary validity of his explanation of the "exorbitant rewards of players, opera-singers, opera-dancers, etc." He explains it by the "rarity and beauty of the talents and the discredit of the employment — a kind of 'public prostitution'", id at 209. The former holds true, but I am less sure of the latter. Perhaps public adulation of top sports persons does demean them, justifying a premium for engaging in the activity. I would like to ask Rod Laver.

99 This strategy is similar to another often noted — asset specificity and hostage keeping. See Williamson, above n94 at 163-205 and Cooter, R, and Ulan, T, *Law and Economics* (1988) at 245. An agent may structure a business so it is highly dependent on the principal's continued custom so that an investment in capital becomes highly specific to the joint enterprise, rendering the agent a hostage. Cooter and Ulan cite the following: Ford buys components from suppliers but often owns the specialised equipment to make those components. This will assure the principal, Ford, heavily dependent on sure supplies, of faithful, non-exploitative service and thus lower agency costs. This may apply in the professional context where firms become dependent on the work of a few large corporations because the firm's capital becomes highly specific, they are hostage to the corporations. This will make them faithful servants, but there are costs: (i) corporations may be restricted in shopping around; (ii) the diversity of the firm may be compromised; and (iii) it may be exploited by the corporation.

100 Cf Arrow, "Uncertainty and the Welfare Economics of Medical Care" (1963) 53 *Am Econ Rev* 941, explaining the nonmarket social institutions of the medical profession as a response to the failure of market forces. But see Starr, *The Social Transformation of American Medicine* at 226-7.

101 Galanter and Palay, op cit above n96 at 90. For a formal model examining the effect of reputation on parties' incentives not to breach contracts, see Klein, B and Leffler, B, "The Role of Market Forces in Assuring Contractual Performance" (1981) 89 *J Pol Econ* 615.

102 Salomon Brothers loss of reputation has had an immediate impact in its standing in the market, leading to bank reluctance to extend credit lines to the extent it formerly enjoyed, see Lipin, "Salomon Reduces Bank Credit Line" *Wall St J* 23 September 1991, at C1. The firm has stumbled in its competition for underwriting stocks and bonds, see Power, "Merrill Strengthens Underwriting Lead, As Salomon Stumbles in the Rankings" *Wall St J* 1 October 1991 at C1.

The importance of reputation may also explain the conservativeness of professionals, who strive to look like their reliable predecessors. The psychology of impressive offices and quaint barrister's rules of etiquette may be explained as conveying an image of continuity and solidity. Newcomers invest heavily in these trappings that signal the right qualities. A reputation earned over time will outweigh external indicia that can be acquired by the unscrupulous, thus mitigating a problem of adverse selection. In other words, the indicia of reputation that are easily fabricated are discounted while those that cannot be bought, like service over a number of years, are favoured. Thus seniority is given great weight and rewarded, much to the chagrin of bright young professionals who feel they have the ideas and zeal.[103] The rents obtained by partners are also justified because it is they who put the reputational capital of the firm on the line and who suffer in the event of poor quality work. This gives partners an incentive to monitor their employees.[104]

(iv) Ethics. This goes hand in glove with reputation. The acceptance of ethical codes establishes professionalism. The ethos of which the ethics code is part may contain self-seeking behaviour. The profession's commitment to non-market values — like charitable, community, or *pro bono* work — helps inculcate a sense of trust in clients. (In the case of lawyers it helps fight a societal distrust.) Bad apples may enter by mouthing ethical platitudes and by faking adherence. Enforcement by the profession is also likely to be haphazard. So it is that penalties for ethical violations need to be severe.[105] As a casual observation, it seems consistent with this thesis that as general reputation is diminished formal ethical codes are promulgated in an attempt to redress the harm.

(v) Educational Requirements. Values may be instilled through an educational process. Perhaps less than was formerly the case, the traditions and rituals of legal education, its teachers, even its selectivity, may be seen as ways of reducing agency costs. Those dealing with professionals are assured that the process of education has modified competitive and commercial instincts. The less the process is regarded like induction into the priesthood, the more professional values will be shed. It may be that in the name of egalitarianism the professions will be obliged to forgo this strategy in reducing agency costs.[106] Indeed this may be a small sacrifice to deflect the

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103 There is a potentially fertile field of study in the behavioural patterns of professionals. Memberships in clubs were once vital to assure professional success. Membership allowed, I presume, fellow professionals and clients to feel confident that the professional shared their value system and would conduct herself/himself as to maximise the welfare of a fellow member in order to avoid embarrassment at the club.

104 For an indication of the disillusionment in lawyers see Johnson, A, "Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice" (1991) 64 *S Cal LR* 1231; Carr and Mathewson, above n97 at 328.

105 "Solicitation or Sympathy" 7 September 1991 *ABA Journal* at 34 reporting the punishment of an Alabama attorney alleged to have engaged in unethical practices to procure clients. Criminal law in North Carolina makes it a misdemeanor to solicit clients by phone or in person. A well-known "mass-disaster" lawyer has been charged with soliciting from a family of a victim of a chicken-processing fire in North Carolina that killed 25 people in September 1991 *Wall St J* 4 October 1991 at 88.

106 See Osiel, M J, "Lawyers as Monopolists, Aristocrats, and Entrepreneurs" (1990) 103 *Harv LR* 2009 arguing for a sociological inquiry into the institutional underpinnings of ethical conduct.

widespread criticisms that professions represent a class of elites that have bought from the government a monopoly right.[107] The mantle of noncommercialism is removed most painfully and reluctantly in those professions marked by intimate or personal relationships because these relationships invite significant agency costs. Lawyers, doctors, and the clergy are the outstanding examples. Abuse or opportunistic behaviour can be most costly, where private matters are revealed in a relationship.[108] In contrast, building professionals who do not deal with intimate personal or business matters are not expected to act uncommercially.

Educational achievement signals quality. Therefore a degree from a top American law school gives recipients a distinct advantage in the employment market. In this way law schools act like certifying or accrediting agencies to reduce moral hazard. Agency costs of hiring faced by law firms are lowered by a tournament conducted by law schools where the superior students rise to the top, and law schools vie for national recognition. This applies in other professional schools. In contrast a smaller market like Australia's does not face these agency costs. Closer personal links make possible more individualistic selection. Multiplying law schools will, however, exacerbate agency costs because more students and graduates will enter the market. Firms will likely begin to discriminate in perceived quality of law schools, and demand strong objective indicia of quality students.[109]

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107 See Perkin, above n77, arguing the transferring of professional services into property which could be rented was achieved through professional control of the market. The profession, Perkin argues, persuades the public and the state that it should have control of the market in a particular service whereby it may create an artificial scarcity, id at 6-7. This is the basis of Perkin's "hegemony of the professional ideal", id at 8. Abel, R, *American Lawyers* (1989) at 14-39 accepting a Weberian analysis that lawyers constructed their professional commodity (legal services) and sought to control their market and raise their collective status by regulating the production of and by producing and stimulating demand. Economists also have been skeptical seeing professions as the beneficiaries of occupational licensing, id at 321. But see Halliday, T C, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (1987) at 365-76 (role of legal profession in aiding state governance). Recent decades have stripped away some of the profession's privileges: they have had to fall, with business, under the general regime of competition legislation. Thus, with special treatment reduced, the need for a non-commercial environment has been discounted. Arrow, "Uncertainty and the Welfare Economics of Medical Care" in Arrow, K, (ed) *Essays in Theory of Risk Bearing* (1974) explains the non-competitive rationale. In America professional sports have also claimed a non-competitive environment and similar arguments are made: See Sobel, L S, "Emancipation of Professional Athletes", (1976) 3 *W St U LR* 185; Fleisher, A A, Shughart, W F and Tollison, R D, "Ownership Structure in Professional Sports" (1989) 12 *Res L & Econ* 71.

108 The legal profession is in transition, see Galanter and Palay, above n96 *passim* describing the rise of the large commercial law firm. The process is thoroughly discussed in Partlett and Szweda, above n77. The Australian profession clings to its noncommercial image, see Warrenminde, "People v lawyers v money" *The Bulletin* 11 June 1991 at 28. For a fine description of the transformation in medicine, see Starr, above n100.

109 The issue of affirmative action for minorities becomes a particularly vexed issue for professional schools because such treatment immediately muddies the signalling function of the law school process. Unfortunately a rational response by employers, in order to avoid moral hazard, is to assume across the board that minorities are less qualified than others. This fuels claims of racial discrimination.

(vi) Liability Rules. The ethical and institutional strategies described go part of the way to alleviate agency costs. The most familiar mechanism, however, is liability rules.[110] Tort, contract and fiduciary obligations are a mechanism by which clients (principals) are assured that their retained professionals (agents) will act competently and in good faith in carrying out tasks on behalf of clients. Professionals in this way *bond* themselves to performance and thus reduce the chance of opportunistic behaviour. Thus, clients (principals) are encouraged to engage professionals (agents). At the margin, therefore, more mutually cooperative relationships will be entered into. To the extent that the utility of the parties is enhanced, the sum of society's utility is advanced.[111] It follows that social resources — court time, judges expertise — are justifiably expended.[112]

Note this explanation for liability rules is at odds with the usual explanation that views them as externally *imposed* to deter certain types of conduct. In the agency cost version, professionals offer to be bound, recognising the impediments of agency costs. They bond themselves to competent performance and good faith.

An especial problem is professional bad faith. Consequently, fiduciary obligations are strict in application and draconian in penalty.[113] A high level of punctiliousness is required because breaches are difficult to detect via other strategies. For example, a client may be happy with the result and not be able to detect that the professional has enriched himself. The problem is exacerbated for the professional because in some professions, remuneration is on an hourly basis and thus, even if the result is a function of effort or honesty, the contract does not use the correlation to lower agency costs. Some contracts, like the contingency fee system in American tort litigation, attempt to reduce agency costs but provide no cure. A conflict of interest arises unless the contingency fee arrangement is sensitive to the extra effort required of attorneys if they are to push litigation beyond settlement negotiations to court.[114]

(vii) Liability Rules in Context. Two conclusions may be drawn about professional liability rules:

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110 Kornhauser, L A, "Reliance, Reputation and Breach of Contract" (1983) 26 *JL Econ* 691; Cooter, R, "Unity in Tort, Contract, and Property: The Model of Precaution" (1985) 73 *Cal LR 1.*

111 The agency relationship may be socially undesirable, eg a Mafia contract for a hit. Legal rules, criminal and civil, are available to proscribe such unwanted and antisocial behaviour.

112 These social resources are not always willingly expended. Accordingly, suggestions abound to reduce the expenditure by resorting to alternative dispute resolution. For a stimulating summary, see Garth, B, "Public and Private Justice: Issues in Ideology, Professional Interest, Information, and Private Governance", *ABA Working Paper Series* 1990 #9006; for a general treatment see Carbonneau, T, *Alternative Dispute Resolution* (1989). The theme has resonated in Australia, on 9 September 1991, the Legal and Constitutional Affairs Committee of the Australian Senate tabled a discussion paper on the methods of dispute resolution in conjunction with its inquiry into the cost of legal services and litigation.

113 The rule in equity derives from the old case of *Keech v Sandford* (1726) Cas t K 61.

114 Miller, G P, "Some Agency Problems in Settlement" (1987) 16 *J Legal Studies* 189.

(1) They should be viewed with other strategies as means of reducing agency costs; and
(2) They are accepted as mutually valuable to both professional and client.

It follows that if the courts extend liability rules, the desirability of the extension should be weighed with these two perspectives in mind.

A rule that imposes liability blind to the existence of other strategies and the private nature of the rules may exacerbate agency costs. Take a rule such as Deane J's in *Hawkins*. A positive duty is imposed beyond the perimeters of the retainer. A solicitor must take positive steps to protect a client's interest beyond the terms of the contract. As we have seen, this assures the client of the solicitor's vigilance and encourages engagement in the contract. However, this comes at some cost. The solicitor must attempt to price services to reflect any legal risk. An assurance under Deane J's rule simply reflects the superior position of the solicitor to take protective measures under changing circumstances that may be faced in the relationship. The rule recognises that clients are in a poor position to monitor a solicitor's performance and to protect their own interests under those changed circumstances. The assurance reduces the extent of moral hazard that clients face in engaging a solicitor for complex and lengthy professional tasks.

It is critical that Deane J's rule be interpreted to draw a distinction between these clients who can at less cost monitor their own needs — efficient self-monitors — and those who suffer an information disadvantage where the solicitor is in a superior position and is thus "reasonably relied upon" — reasonable reliers. In the absence of a rule sensitive to this distinction, or a contractual term shifting liability, the solicitor would charge a risk premium to cover her/his liability to both groups. The premium is likely to be flat since liability to both groups will be randomly distributed. (This supposes the solicitor does not have information that reveals that the efficient self-monitors are the more costly clients; a likely scenario because the distinction turns on relative monitoring ability that is unrelated to incidence of claims from both groups.) The former group of clients — the efficient self-monitors — would have no incentive to self-monitor; self-monitoring would be wasted expenditure for them. Their presence in the risk pool increases the cost of legal services, reducing at the margin the number of cooperative relationships formed. If the efficient self monitor can be placed outside the risk pool, the cost of legal services will fall with no violence to the assurance provided by the rule. The major concern then is that the rule be confined. It may be asked what would be the consequence if the rule went beyond this rationale? I explain this in terms of relational contracts.

In the first place public policy factors not directed to relative ability of the parties to monitor and guard against risks generated by changing circumstances will generate avoidable costs. The client will face no incentive to take precautions even though those precautions are less costly than the professional's measures. It follows that the number of mistakes made at client expense may increase.[115] The parties would rationally agree to shift the risk,

115 Priest, G L, "A Theory of Consumer Product Warranty" (1981) 90 *Yale LJ* 1297.

but this is practically foiled by the prevalent judicial attitude to, and the awkwardness of, overt bargaining.[116] The professional is forced to be an insurer in circumstances where he/she is a relatively poor insurer. This is exactly the phenomenon that Professor Priest has observed in product liability and which has led to an unravelling of the insurance market as the better risks drop out of the market.[117] The number of transactions will drop.[118]

Secondly, an adverse selection problem will exacerbate agency costs. To illustrate the point recall the famous case of *Derry v Peek*,[119] in which the House of Lords insisted on the *scienter* requirement for liability in deceit. Baron Bramwell, expressing his agreement for a narrow requirement rather than a negligence rule, pointed to the adverse selection problem that would follow the negligence rule. Bramwell thought that honest promoters would be driven from the area to be replaced by the dishonest.[120] If the world is made up of honest and dishonest company promoters, a rule that penalises the dishonest will assure those dealing with promoters that their promoters are honest. If the rule penalises the dishonest and the negligent alike for making an untrue statement,[121] the dishonest promoter is subject to the same penalty as other fellow honest promoters. It is entirely conceivable that the dishonest can obtain extraordinary returns (rents) from dishonesty, while the honest will not. But they are subject to similar penalties supposing that dishonest conduct is not more easily detected than honest loss producing activity. (Indeed, my hunch is that intentional dishonesty is more difficult to detect because of the devious cover-ups that will be engaged in.) Thus, dishonest promoters will be encouraged to enter into the market. This is a form of adverse selection. Courts may perceive the problem and devise means to differentiate again, by say, awarding punitive damages to those who suffer loss at the hands of the dishonest promoters. Still, the lack of clarity of the rules will militate against a solution of the adverse selection problem.

A similar adverse selection problem arises under Deane J's rule if sullied by wider public policy factors. Clients will not know whether the liability rule represents an assurance of quality of the work retained to do and further vigilance in changing circumstances or for a duty imposed by courts for public policy purposes, such as insurance cover, that have nothing to do with the relative ability of the parties to monitor clients' needs. This lack of knowledge diminishes the reliability of the signal that the liability rule gives for the professional work. Thus, relatively less competent solicitors will bond themselves to the same liability rule and clients will give less credence to the signal. The negligence rule is so open to variation that the competent may not have any greater chance than the incompetent to avoid liability. The less

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116 See the *Directive Concerning Liability for Defective Products*, 25 July 1985, European Community Council (851374/EEC) proscribing "contractual derogation" from liability.

117 Priest, G L, "The Current Insurance Crisis and Modern Tort Law" (1987) 96 *Yale LJ* 1521.

118 Winter, R A, "The Liability Insurance Market" 5 *J Econ Persp* (1991) 115 at 123.

119 (1889) 14 App Cas 337.

120 Id at 352. See Atiyah, P S, *Rise and Fall of Freedom of Contract* (1979) at 374-80 (describing Bramwell as having absorbed the economic learning of Adam Smith and Ricardo).

121 This was the old equitable rule: *Evans v Bicknell* (1801) 6 Ves 174 at 182.

competent will garner higher returns (rents) than their competent brethren supposing that competence is a function of effort and inherent quality. Thus the incompetent will crowd out the competent, as Baron Bramwell feared the dishonest would crowd out the honest.

Other strategies will be available to mitigate the adverse selection problem. For example, reputation may be enhanced or fee arrangements may be made more sensitive to competent performance. Contractual terms may clarify the signal by stipulating that the liability rule covers only matters within the retainer. As noted, judicial hostility to contractual waivers and the awkwardness of negotiating for risk allocation in professional relationships makes that solution problematic. Despite the possibility of offsetting strategies, agency costs, all other things being equal, will be aggravated.

If liability rules are viewed from this relational perspective, it may be that a public policy driven liability rule introduces unnecessary costs, because other agency cost strategies efficiently attain the goal. For example, wide liability rules imposed on auditors are often justified as imposing on auditors an incentive to take care in the certification of company accounts. This presupposes that no other mechanisms are in place to encourage an appropriate level of care. This is not true. First, auditors live and die by their reputations. If audits are negligently done, information rapidly enters the marketplace, especially since the market is concentrated in a relatively small number of competitive firms. Secondly, the company itself may sue its auditor, thus creating an incentive to take reasonable care in audit functions hazarding the risk of company litigation. Thirdly, auditors are regulated under company legislation. With the importance of reputation, liability to the company, and presence of regulation, the deterrence rationale for the liability rule is weak. In this way the rule becomes a compensation mechanism for those who suffer financial loss. It is highly problematical whether this is the most effective means of providing insurance for such losses.

On the other hand, the *Hedley Byrne* rule, as limited by the House of Lords or Cardozo CJ to "near contract" situations, does not incur the same costs. The reliability of the information is indirectly paid for, thus rewarding the provider of the information and encouraging its production. The provider will know the uses to which the information will be put and thus, be able to calibrate and charge for her/his assumption of risk accordingly. The rule improves the quality of information upon which decisions are made, while not discouraging its production.

VI. A Plea for the Private

All this suggests that the usual judicial injunction that the retainer, contract, or "near contract" consideration be kept central when crafting a liability rule needs to be taken seriously. The casual extension of liability rules, inspired by broad compensatory ideals of tort law, is contrary to the role of these rules in reducing agency costs. I do not want to suggest that the reduction of agency costs, and the consequent encouragement of cooperative relationships, should trump all other values.

The most that I ask for is that the private nature of the professional/client relationship needs to be appreciated. Liability rules can aid or hinder the

achievement of private goals. Tort in contract can perform a role of reducing agency costs. If we see it in this way, the limits of tort (negligence) liability rules are naturally circumscribed.

In the three categories identified above, the metes and bounds of liability are discernible:

(1) Under *Hedley Byrne*, the House of Lords admonition, is that liability is close to contract.
(2) Under the Will cases (*Ross v Caunters*), tort liability supplements the enforcement of the contract; and
(3) Under concurrent liability, the retainer usually should set the perimeters of liability.

Beyond these categories a liability rule may be soundly based upon reasonable reliance absent the conditions for a special relationship under *Hedley Byrne*.[122] If the relationship entered into between professional and client induces a reasonable reliance precluding the client from seeking advice that would have avoided the harm sustained, a duty of care is founded. Here, the client has reasonably relied upon the relationship to her/his detriment, and this ensures that the professional must reasonably maintain vigilance to protect the client's interests. Such a rule encourages persons to seek professional advice and stimulates professionals to carefully consider the expectations of the client, promoting information exchange about the professional task to be performed. It assures the client that the professional will be vigilant to protect the client where the professional has better information. Wider perspectives of a public nature have no place. We do not hold the professional responsible because we wish conformity with a public responsibility ideal. Rather, the touchstone is a private responsibility ideal.[123] As Mason CJ noted in *Hawkins*, no reasonable reliance was established, a conclusion stating that the defendant solicitor could not, because of the onerous nature of the proposed duty, be in a better position than the client to disclose to the executor interest in the will.[124]

The courts in playing the game of tort and contract categorisation, have often found liability in these reasonable reliance cases by discovering an implied term in the contract.[125] However, with the discarding of the categorisation game, reasonable reliance is a test much more certain in application, thus enhancing the purposes of the rule in reducing agency costs.

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122 Above n38.

123 Cf Note the long and insightful crusade by Mason CJ to instill the notion of "reasonable reliance" as central in fashioning a liability rule in this area: *Sutherland Shire Council v Heyman* at 579. But cf Stapleton, above n17 at 284 criticising the notion of reasonable reliance as a "mere rationalisation". Reasonable reliance no doubt is a convenient term that encapsulates a number of policy reasons that if used directly instead of under the rubric "reasonable reliance" would be difficult to put into practice.

124 Above n62 at 546.

125 Two cases may illustrate: *Ryan v Bank of New South Wales* [1978] VR 555 and *Sacca v Adam* (1983) 3 SASR 429. Both cases are based on reasonable reliance rather than artificial notions of implied terms yet do not invoke a duty of care in negligence. A similar American case in *Lama Holding Co v Shearman & Sterling*, 758 F Supp 159 (1991) failure on the part of attorneys to advise clients of changes in the tax laws some five years after tax scheme entered into.

It conforms with Deane J's narrow rule in *Hawkins v Clayton* that imposes a duty of vigilance where the solicitor is in a superior position to protect the interests of the client in respect of the task for which the solicitor was retained.

I conclude therefore that tort liability has a place in the liability of professionals. But I have described a lamb (a modest tort) in the tent; I do not want to invite in the camel (full tort) now its nose has appeared. However, tort liability brings in its train pressures from the rhetoric of negligence law that brands contractual limits as artificial and unnecessary; limits which are supported only by timorous souls. For all the mocking, a germ of validity persists. Floodgates are a significant problem because private ordering and attendant strategies designed to reduce agency costs may be thwarted by wide liability rules. The crafting of liability rules is a delicate task calling for an appreciation of the problems surrounding relational contracts.

A plea for the private is to recognise the professional/client relationship as a species of relational contract and to view liability rules as a mechanism to alleviate agency costs. No doubt, this sits uneasily with those who see the professions as a last citadel in the march of negligence to impose enterprise liability. No doubt, the adaptations of the professions to commercial life lend force to the full tortification of the professional/client relationship. It dovetails with the emphasis on the public role of the professions.[126]

However, by far the better way to achieve a public good is to create and nurture liability rules that encourage cooperative mutually beneficial professional/client relationships by reducing agency costs. Let the ghosts of case and *assumpsit* walk hand in hand at midnight, provided they know why they walk the borderland. Knowing their purpose, in the terms I suggest, does not create chaos but promises harmony on the borderland — a roaming in the gloaming.

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126 See Solomon, R L, "Five Crises or One: The Concept of Legal Professionalism, 1925-1960" *ABF Working Paper* (1991) No 9014 arguing that the rhetoric of non-commercialism is important in cementing the independence and special place of the bar. On the tension between commercialism and professionalism, see above n107.