

# Voluntary Assumption of Tort Liability in English Law: a Paradox?

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*'All contractual liability [is] voluntarily undertaken'*<sup>1</sup>

### ***Abstract***

*Voluntary assumption of liability is an idea that naturally belongs to the province of the law of Contract. It is the obvious basis of contractual liability. It is not an obvious basis of liability in Tort or Delict, where traditionally obligations have been seen as imposed ex lege. This paper examines recent developments in the English law of negligence that have placed this idea at the centre of tortious liability, analyses this concept and considers the implications of these developments for the future of both Tort and Contract.*

*Keywords:* Tort Liability, Voluntary Assumption of Liability

### ***Summary***

- 1. Falling through the boundary between contract and tort**
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<sup>1</sup> Lord Hoffmann in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, *Times*, July 10, 2008, where he said, stating, perhaps, the obvious, that liability for damages in contract had to be founded on the intention of the parties, objectively ascertained, because all contractual liability was voluntarily undertaken.

### 1. *Falling through the boundary between contract and tort*

Voluntary assumption of liability is an idea that naturally belongs to the province of the law of Contract<sup>2</sup>. It is the obvious basis of contractual liability, protected in modern legal systems from unconscionable restrictions of the freedom of Contract, imposed by a party's unequal bargaining power. But whereas it is obvious that there should be, in principle, no Contract<sup>3</sup> without an assumption of liability by the parties, the reverse is not obvious: namely, that the law should only give effect to an assumption of liability if there is a valid Contract between the parties. This may be so because:

1. The parameters of the formation of a valid Contract are too narrowly defined in a legal system (such as in the English, under the rules of the Doctrine of Consideration). These parameters may be kept narrowly defined for wider policy reasons, that do not satisfy the legal system's developing judgment as to what is just, fair and reasonable, in certain situations of direct dealings between two parties. Allowing for an (objective) assumption of liability to operate as the basis of extra-contractual liability can remedy the injustice, avoiding an interference with the (valued) narrow definition of a valid Contract.

2. Although the parameters of the formation of a valid Contract are reasonably wide, restrictions imposed in a legal system on liability in Tort (i.e. limitation of claims in time, narrowly defined vicarious liability and heads and size of damages) may not allow the fair treatment of claims arising out of direct dealings between the parties, in situations in which a valid Contract cannot be inferred, the generous conditions of formation of Contracts, recognised by the legal system, notwithstanding (this is the case, for example, in German law).

3. Finally, assumption of liability may be used as the basis of extra-contractual liability in order to provide a means of limitation of liability for difficult types of negligent harm. Indeed, the idea of assumption of responsibility as the basis of extra-contractual liability first came into existence in English law in connection with claims for the compensation of types of *non-intentional* harm other than physical personal injury, notably, psychological and psychiatric harm, nervous shock and pure economic loss.

These types of harm are difficult to compensate. The main difficulty lies in the severe policy objections to their compensation, based on their potential of being large in extent and wide-spread, creating a risk of liability far wider than what the courts can realistically impose on the defendant and society at large that will, one way or another, have to absorb the losses (e.g. by insurance or

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<sup>2</sup> See, e.g., *Jennings v Forestry Commission* 2008 WL 2148122 (CA (Civ Div)), [2008] EWCA Civ 581 (no assumption of responsibility by employer to an independent contractor for injuries sustained during the performance of a contract of service); *Dunlop Haywards (DHL) Ltd (formerly Dunlop Heywood Lorenz Ltd) v Erinaceous Insurance Services Ltd (formerly Hanover Park Commercial Ltd)* [2008] EWHC 520 (Comm).

<sup>3</sup> Subject, of course, to recognised restrictions of the freedom of Contract.

other market mechanisms). A blanket denial of liability is, however, unacceptable, and the law is engaged in a search of a new basis of realistic, limited liability in tort, for such losses. In doing this, English law is seeking ways of limiting liability in Negligence which, under the original design of this tort<sup>4</sup>, would only depend on proof of foreseeable harm. In English law the idea of assumption of liability is now expressly used as an autonomous basis of a Duty of Care in Negligence, and is also lurking behind two other techniques, known as the three-fold test of the Duty of Care, and the incremental approach to expanding liability, both of which are considered later on in this paper.

In an important legislative intervention, the well-known restricted conception of Contract and Contractual liability under English law was enlarged. The legislative intervention in question was the Contracts (Rights of Third Parties) Act 1999. The Act reformed the rule of Privity of contract under which a person can only enforce a contract if she is a party to it. Moreover, the Act provided<sup>5</sup> that, where a third party has a right under the contract, the contracting parties may not, by agreement, rescind or vary the contract in a way which affects the third party's right without her consent. This section uses the term variation in its legal sense, i.e. a variation of the terms of an agreement, by further agreement between the parties to the original agreement. It does not, for example, affect the possibility of a construction of contract which could allow one of the parties unilaterally to alter, or "vary", the details of performance; such a variation is not to the contract but only to the mode of performance<sup>6</sup>.

This Act has largely removed the blocking effect of the doctrine of Privity of Contract on third party *rights*, but the doctrine still applies, albeit now to a limited extent, with regard to third party *liabilities*. For, as the Law Commission for England and Wales, the proposals of which are enacted in the new legislation, emphasised in its report on this subject, the proposed abolition of the doctrine of Privity should not affect the self-evident principle that strangers should not have obligations forced upon them by a contract between others<sup>7</sup>. Significantly, the Act ensures<sup>8</sup> that references in its sections such as "if the third party had been a party to the contract" are not to be interpreted as meaning that the third party should be treated as a party to the contract for the purposes of any other enactment.

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<sup>4</sup> In *Donoghue v Stevenson* [1932] A. C. 562.

<sup>5</sup> Section 2 (1).

<sup>6</sup> But, Section 2 (3) provides that subsection (1) is subject to an express term of the contract, that the contract can by agreement be rescinded or varied without the third party's consent or that the third party's consent is to be required in specified circumstances different to those which are set out in subsection (1). And Subsections (4) and (5) give the court or arbitral tribunal the power to dispense with the requirement for the third party's consent where it cannot be obtained because his whereabouts are unknown or he is mentally incapable of giving his consent or where it cannot reasonably be ascertained whether he has in fact relied on the contractual term.

<sup>7</sup>It would be an unwarranted infringement of a third party's liberty if contracting parties were able, as a matter of course, to impose burdens on a third party without his or her consent. Our proposed reforms do not, therefore, seek to change the 'burden' aspect of the Privity doctrine or the exceptions to it': Law Commission Report No 242, Contracts for the Benefit of Third Parties (<http://www.lawcom.gov.uk/docs/lc242.pdf>).

<sup>8</sup> Section 8 (4).

One example is section 3 of the Unfair Contract Terms Act 1977 which applies “as between contracting parties where one of them deals as a consumer or on the other's written standard terms of business”. The new Act makes it clear that nothing in its provisions means that “contracting parties” in section 3 of the 1977 Act includes a third party with a right enforceable under this Act. This shows that, even after this new legislation came into force, it remains in principle unjustifiable, being an infringement of individual autonomy and voluntary assumption of liability as foundations of contractual responsibility, for a third party to be charged with the burden of the negative effect of a Contract between others on his liabilities. But the Act has largely removed the obstacle of lack of consideration and Privity for a third party to receive the benefit of the positive effect of a Contract between others on his liabilities.

These limitations of this new statute, and the Doctrine of Consideration which remains unaffected, have led the courts to a development of remedies in Tort, in cases in which losses that would otherwise qualify as caused by a breach of Contract are left uncompensated. These remedies come under the umbrella of the new idea of voluntary assumption of responsibility, an idea that is strongly reminiscent of the basis of contractual liability itself, which is, of course, the assumption of obligations by agreement between the parties.

## ***2. The rise of voluntary assumption of liability in tort***

The idea of voluntary assumption of responsibility outside a Contract<sup>9</sup> made its first appearance in English law in connection with claims for the compensation of economic loss<sup>10</sup>, and in the seminal decision of the House of Lords in *Hedley Byrne v Heller*<sup>11</sup>, where it was decided that a Bank can be liable for a negligent information supplied without consideration to a regular client. In the more recent case of *Henderson v Merrett Syndicate Ltd*<sup>12</sup>, Lord Goff, in looking for the principle which underlay the decision in *Hedley Byrne*, referred to passages in the speeches of Lord Morris and Lord Devlin in that case including a passage in the speech of Lord Devlin where he considered the sort of relationship which gave rise to a responsibility towards those who act upon information or advice, and thus created a Duty of Care towards the person so acting. Lord Devlin had said:

“I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.”

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<sup>9</sup> E. K. BANAKAS (2000).

<sup>10</sup> E.K. BANAKAS (1999), E.K. BANAKAS (1998), E.K. BANAKAS (1996), E.K. BANAKAS (1989).

<sup>11</sup> [1964] A C 465 (H.L.).

<sup>12</sup> [1995] 2 AC 145, [1994] 3 All ER 506.

Lord Goff added in *Henderson* :

“From these statements, and from their application in *Hedley Byrne*, we can derive some understanding of the breadth of the principle underlying the case. We can see that it rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other.”

In *White v Jones*<sup>13</sup> (see *infra*) Lord Goff stated again that the Hedley Byrne principle was “founded upon an assumption of responsibility.” In *Galoo Ltd (In liq) & Others v Bright Grahame Murray (a firm) and another*<sup>14</sup> the Court of Appeal set out to identify the difference between the facts there and those in its previous decision in *Morgan Crucible Co Plc v Hill Samuel Bank Ltd*<sup>15</sup>, that allowed the recovery of an economic loss. The question was when is an adviser, e.g. in this case, an auditor, in close proximity with a person suffering loss by relying on his negligently false advice or information? The answer given by the Court of Appeal in *Galoo* was, when the auditor 'intends' that the third party, a particular identified person, will rely on it<sup>16</sup>. Thus the bidder relying on the auditor's accounts of the target company in *Galoo* had his claim dismissed, because, although he was personally known to the auditor, it was not 'intended' by the latter that he should rely on his accounts. The leading judgment of Glidewell L. J. relied on Lord Denning's so-called 'classic statement' in *Chandler v Crane Christmas & Co.*<sup>17</sup>. The auditor's 'intention' was meant as referring to his knowledge, and willingness, of the reliance of the plaintiff, not any willingness to inflict on him financial injury through such false information. It must be noted here that a professional making a false statement in the course of doing his every day job, on the subject-matter of his expertise, will find it hard to shift a presumption of negligence in the error. The idea of a 'voluntary assumption of responsibility' was used to explain the importance of 'intended reliance', and in *Galoo* it was turned into a new concept of a 'voluntary inter-personal' relationship, said to fall short of being a contract only because of lack of consideration proceeding from the plaintiff to the defendant in return for the advice or information<sup>18</sup>. In *Coulthard and others v Neville Russell (a firm)*<sup>19</sup>, the Court of Appeal, in another case concerning the civil liability

<sup>13</sup> [1995] 2 AC 207, [1995] 1 All ER 691.

<sup>14</sup> [1995] 1 All ER 16 (CA).

<sup>15</sup> [1991] Ch. 295.

<sup>16</sup> See [1995] 1 All ER 16, 37 *per* Glidewell L. J.; 43-44 *per* Evans L. J.

<sup>17</sup> [1951] 2 KB 164, at 179-184, see *supra*.

<sup>18</sup> [1995] 1 All ER 16, 44 *per* Evans L.J.

<sup>19</sup> [1998] 1 BCLC 143. The facts were as follows: A company acquired the shares of another company of which the plaintiffs were directors. The defendant firm of accountants were appointed auditors of the second company. The first company had borrowed money to purchase the shares of the second and originally it was planned to repay the loan out of dividends declared by the second company. Subsequently, in order to maintain the appearance of capital adequacy in the accounts of the second company, it was suggested that the second company would make a number of loans to the first company to enable it to pay off its loan made in order to acquire it. In fact, these loans by the second

of accountants acting as auditors, considered the issue whether in their function as auditors accountants owed a duty of care to the directors of the audited company to warn on unlawful financial conduct. The Court of Appeal held that the liability of professional advisers for failure to give correct advice or accurate information was in a state of development. It was not possible to say that the present claim was bound to fail and therefore the appeal of the auditors should be dismissed. This was an area

“...in which the law is developing pragmatically and incrementally. It is pre-eminently an area in which the legal result is sensitive to the facts”.

In *Spring v Guardian Assurance plc & others*<sup>20</sup>, the plaintiff had applied for work in the financial services industry and sought a personal reference letter from his former employers, a leading insurance firm. The employment rules of the financial services industry required that such a reference be sought and given. It was given, but it was unfavourable, and was found by the trial judge to constitute a negligent misstatement.

In the House of Lords it had to be considered whether a duty of care was owed to the plaintiff. Lord Goff reached an affirmative conclusion on the basis of *Hedley Byrne*. He said:

“Where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct”.

But both Lord Goff and Lord Woolf approved in *Spring* the decision of the New Zealand Court of Appeal in *South Pacific Manufacturing Company Limited v New Zealand Security Consultants and investigations Ltd*<sup>21</sup>, where it was held that an investigator reporting on the causes of a fire to an insurance company owed no duty of care to the insured whose claim was rejected because of the allegedly inaccurate report. Lord Goff found that there had been no assumption of responsibility by the investigator to the insured in that case, and Lord Woolf said that the report of the investigator was made pursuant to their contractual duty to the insurer.

Another, recent, example of similar type is *Baker v Kaye*<sup>22</sup>. The High Court held that a medical

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company to the first constituted a breach of s 151 of the Companies Act 1985. The second company's Directors were, as a consequence, disqualified under the relevant legislation. They were now suing the auditors of the company alleging that they owed them a duty of care to warn them that the loans were unlawful. They claimed damages for the loss caused to them by the disqualification proceedings which had been brought against them.

<sup>20</sup> [1995] 2 AC 296.

<sup>21</sup> [1992] 2 NZLR 282.

<sup>22</sup> [1997] IRLR 219 (Q.B.). Mr Baker was a television sales executive. On 28 January 1991, he took up employment with Guild Television Ltd. Three weeks later, however, he was offered a lucrative employment by NBC Europe, a subsidiary of the American giant General Electric, as director of international sales. The offer, which was contained in a letter from GE's human resources manager, was to take effect from 1 March, subject to a satisfactory medical report from the company doctor, Dr Kaye. When the doctor advised GE that a blood test on the plaintiff revealed the

practitioner retained by a company to carry out pre-employment medical assessments of its prospective employees owes a duty of care to those whom he assesses in carrying out his assessment and in reporting his conclusion. The defendant medical practitioner was, therefore, under a duty to the plaintiff to take reasonable care in carrying out the medical assessment in connection with the job offer, and in making a judgment as to the plaintiff's suitability for employment by reference to the employers' requirements. It was held to be a duty of care that fulfilled all the legal requirements: namely, foreseeability of economic loss, the necessary degree of proximity between the parties and the proviso that it should be just, fair and reasonable in all the circumstances for a duty to be imposed. Not only was it clear that economic loss was a foreseeable consequence of a breach of the duty, but there was also sufficient proximity between the parties to give rise to a duty of care, as the defendant knew that the plaintiff's employment by the company depended solely on the assessment and that to make a non-recommendation could have serious financial consequences. Finally, it was just, fair and reasonable for such a duty to be imposed; there was no conflict between the proper discharge of the defendant's contractual duty to the prospective employers and any duty to the plaintiff, and the plaintiff was dependent upon the medical assessment made by the defendant. The latter was, however, found not liable, as it was not shown that he had breached his duty of care in his assessment of the plaintiff's fitness for the job.

But in *Kapfunde v Abbey National Plc and another*<sup>23</sup>, the Court of Appeal, in considering the same question, i.e. the question whether in assessing the appellant's suitability for employment by Abbey National Plc, a medical practitioner, employed by Abbey National for that purpose, owed her a duty of care, reached a negative conclusion. The Court held that a duty of care will generally be owed to the person to whom a statement is made and who relies on it. In the case of a bank reference or medical report, this is normally the person who asks for it or commissions it. A reference by an employer, however, is likely to be regarded as provided to the former employee, who is the subject of the reference, for his use 'as a passport to future employment', rather than as a service to any particular prospective new employer. The Court disapproved of the Judge's conclusion as to the existence of a duty of care in *Baker v Kaye (supra)*. The doctor's advice is given to the employer or insurer and not to the applicant for a job, who is a patient only in the sense that he is the subject of the examination and advice. The doctor is, therefore, taken to assume responsibility for his advice only to the employer or insurer who commissioned it, and not to the patient.

*White and another v Jones and others*<sup>24</sup>, is a case where a solicitor was found liable to the intended beneficiaries of his client, the testator, who died before the solicitor came round to drawing up a will under instructions to confer a benefit on them. The House of Lords (Lord Keith and Lord Mustill dissenting) held that where a solicitor accepted instructions to draw up a will and as a result of his

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possibility of excess social consumption of alcohol, the offer of employment was withdrawn. The plaintiff sued the doctor, alleging negligence in his performance and analysis of the test and his conclusions in his medical report to the company.

<sup>23</sup> [1998] WL 1044284 (CA (Civ Div)).

<sup>24</sup> [1995] 2 AC 207.



negligence an intended beneficiary under the will was deprived of a legacy, the solicitor was liable for the loss of the legacy. Lord Goff and Lord Nolan based their decision on extending the assumption of responsibility by the solicitor towards his client in law to an intended beneficiary. But they made it clear that this assumption of responsibility existed only if the loss of the beneficiary was foreseeable to the solicitor, and if the circumstances of the situation were that there was no confidential or fiduciary relationship between the parties, and neither the testator nor his estate had a remedy against the solicitor. Tort liability was appropriate in such circumstances only because otherwise an injustice would occur, as a result of a lacuna in the law and there would be no remedy for the loss caused by the solicitor's negligence to the beneficiary. Lord Browne-Wilkinson and Lord Nolan held that the principle of assumption of responsibility should be extended to a solicitor who accepted instructions to draw up a will, holding him to be in a special relationship with those intended to benefit under it.

*White v Jones* extended in law the expert adviser's assumption of responsibility to his client's beneficiaries. This has given rise to the question of whether an expert advising trustees owes a duty of care to the beneficiaries of the trust. In the case of *Royal Brunei Airlines v Tan*<sup>25</sup>, Lord Nicholls, giving the judgment of the Privy Council, said<sup>26</sup>:

“... it is difficult to identify a compelling reason why, in addition to the duty of skill and care vis-a-vis the trustees which the third parties have accepted, or which the law has imposed upon them, third parties should also owe a duty of care directly to the beneficiaries”.

In another case, *Hogg Robinson Trustees Ltd. and others v J. Alford Pensions Trustees Ltd. and others*<sup>27</sup>, there is further evidence of the Courts being unwilling to generally recognise third-party liability for economic loss to beneficiaries, in the absence of a lacuna in the law, similar to that which gave ground to the House of Lords to accept the claim of the testator's beneficiaries in *White v Jones*. A fiduciary relationship (and, therefore, also a special relationship) will, normally, exist only between third parties and trustees, and, of course, trustees and beneficiaries. In *Hemmens v Wilson Browne*<sup>28</sup>, a settlor instructed a solicitor to draft a document giving the plaintiff an immediately enforceable right to call at a future date for a sum of 110,000 pounds. After the settlor had executed a document drafted by the solicitor, the latter told the plaintiff that the effect of the document was “akin to a trust” but advised her to consult her own solicitors if she had any doubt in the matter. It ought to have been known to the solicitor that the document failed to give the plaintiff any enforceable right. When the plaintiff called on the settlor to perform his promise he was no longer willing to do so and declined to pay her the promised sum. The plaintiff claimed damages for negligence against the solicitor. The court held that a solicitor might be held to owe a duty of care to the intended beneficiary of an *inter vivos* transaction who had suffered damage which it was beyond the power

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<sup>25</sup> [1995] 2 AC 378 (P.C.).

<sup>26</sup> at p. 391.

<sup>27</sup> High Court, Chancery Division, Lindsay J., signed judgment handed down on 19 March 1997.

<sup>28</sup> [1995] Ch 223.

of the settlor to put right, but such a duty of care could not be said to exist in all cases of *inter vivos* transactions. Although it was foreseeable that by failing to exercise due care the defendant might cause the plaintiff loss, and although there was a sufficient degree of proximity between them, it was not “fair, just or reasonable” to give her a remedy against him since the settlor remained capable of fulfilling his original intention and retained a remedy in contract against the solicitor if he chose to exercise it (no lacuna in the law as in *White v Jones*). If the solicitor’s client is alive, the client can sue the solicitor for his negligence to confer his benefit on the beneficiary, and this takes care of the need to give the beneficiary an independent action in tort<sup>29</sup>. But the liability of solicitors was extended later in *Carr-Glynn v Frearsons (a firm)*,<sup>30</sup> in a case where they had negligently failed to sever a joint tenancy and thus confer a benefit in their client’s will to her niece, on the basis of an assumption of responsibility towards the latter (with whom the solicitors had no contract). And in the later case of *Johnson v Woods & Co*<sup>31</sup>, the court upheld the possibility of a similar assumption of responsibility of solicitors towards a company shareholder for his personal loss, although there was no lacuna in the law as suggested by *White v Jones*.

### 3. Concurrence of contract and tort duties

In *Henderson v Merrett Syndicates Ltd*, Lord Goff said<sup>32</sup>:

“an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be most advantageous”.

The defendants in that case were the providers of services as managers of underwriting syndicates. Lord Goff also said<sup>33</sup>:

“It is however my understanding that by the law in this country contracts for services do contain an implied promise to exercise reasonable care (and skill) in the performance of the relevant services...”

And:

“Attempts have been made to explain how doctors and dentists may be concurrently liable in tort while other professional men may not be so liable, on the basis that the former cause

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<sup>29</sup> But in *McCullagh v Lane Fox & Partners Ltd* [1196] 18 EG 104, the Court of Appeal held that an estate agent acting for a vendor owes a duty of care to the purchaser of property, although not on the facts of that case.

<sup>30</sup> [1998] 4 All E R 225 (C A).

<sup>31</sup> [1998] WL 1043972 (CA (Civ Div)).

<sup>32</sup> [1995] 2 AC145 at p. 194.

<sup>33</sup> at p. 193.

physical damage whereas the latter cause pure economic loss . . . But this explanation is not acceptable, if only because some professional men, such as architects, may also be responsible for physical damage. As a matter of principle, it is difficult to see why concurrent remedies in tort and contract, if available against the medical profession, should also not be available against members of other professions, whatever form the relevant damage may take.”<sup>34</sup>

And in *Holt and another v Payne Skillington and another*<sup>35</sup> the Court of Appeal confirmed that where there are concurrent claims in contract and tort for professional negligence, it is possible that the scope of the duty in tort may be wider than that in contract.

The existence of a contract between plaintiff and defendant may, however, also provide undisputable proof of an assumption of a duty of care by the latter to the former; and the recognition of the concurrence of contractual and tortious remedies by English law is hardly surprising, in the light of the narrow scope of contractual liability. The interesting question, when there is such a concurrence, is whether the terms of the contract can be allowed to circumscribe the scope of the duty in tort. This would be unacceptable, if the latter is to be seen as arising *ex lege* (as it normally is). But not so, perhaps, if the Tort duty is founded on a voluntary assumption of liability. Voluntary assumption of liability in Tort is, however, as we shall now see, a troubled concept.

#### 4. How ‘voluntary’ is voluntary assumption of liability?

It is clear from the reasoning in the majority of the leading authorities that voluntary assumption of liability in Tort is ‘objective’, meaning that it does not depend on the real will or knowledge of the defendant. To that extent, the tort duty that comes from it can be, and is, independent from the will of the parties as expressed in any concurrent contract that embodies the assumption of responsibility (subject to lawful limitation or exclusion of liability).<sup>36</sup>

A first important authority is the case of *Williams and another v Natural Life Health Foods Ltd and Mistlin*<sup>37</sup>. The main question in this case was whether a director of a franchisor company is personally liable to franchisees for loss which they suffered as a result of negligent advice given to them by his company, at the time of the sale of the franchise. At first instance Langley J.<sup>38</sup> answered

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<sup>34</sup> at p. 190.

<sup>35</sup> [1996] 49 Con LR 99.

<sup>36</sup> The present state of English law in the area of liability for negligent statements has been the subject of considerable debate and criticism. Writers have criticized the principle of ‘assumption of responsibility’ as resting on a fiction used to justify a conclusion that a duty of care exists: see BARKER (1993), HEPPLER (1997), CANE (1996).

<sup>37</sup> [1998] 2 All ER 577.

<sup>38</sup> [1996] BCLC 288.

that question in the affirmative, and the majority of the Court of Appeal<sup>39</sup> upheld this conclusion and dismissed the defendant's appeal. The dispute arose in the context of a marketing system known as business format franchising. This franchising involves a contractual licence under which the franchisor permits a franchisee to carry on business under a trade name belonging to the franchisor. The franchisor provides advice and assistance to the franchisee about the manner in which the franchisee does business and exercises some control over it. In return the franchisee pays stipulated fees to the franchisor. Encouraged by a brochure and a prospectus supplied to them by the appellant-defendant, the respondents-plaintiffs had entered into a franchise agreement with the defendant's company. The respondents took a lease of shop premises and set up business. The turnover proved substantially less than predicted by the defendant's company. The plaintiffs' business traded at a loss over several months and then ceased trading. In the House of Lords, all judges concurred with Lord Steyn's speech, allowing the defendant's appeal.

Lord Steyn began with 'the extended *Hedley Byrne* principle', applicable in cases of professional liability for the supply of negligent services:

"[t]he governing principles are stated in the leading speech of Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd*<sup>40</sup>. First, in *Henderson's* case it was settled that the assumption of responsibility principle enunciated in *Hedley Byrne* ... is not confined to statements but may apply to any assumption of responsibility for the provision of services. The extended Hedley Byrne principle is the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services. Secondly, it was established that once a case is identified as falling within the extended Hedley Byrne principle, there is no need to embark on any further inquiry whether it is "fair, just and reasonable" to impose liability for economic loss...Thirdly, and applying Hedley Byrne, it was made clear that «reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect). . . ". Fourthly, it was held that the existence of a contractual duty of care between the parties does not preclude the concurrence of a tort duty in the same respect".

Lord Steyn went on to explain what he called 'the practical application of the extended *Hedley Byrne* principle'. This was firmly based on the idea of assumption of responsibility, itself indicating an assumption of the risk of financial loss by the issuer of a statement or advice:

"Two matters require consideration. First, there is the approach to be adopted as to what may in law amount to an assumption of risk. This point was elucidated in *Henderson's* case by Lord Goff of Chieveley. He observed, at p.181: "especially in a context concerned with a liability which may arise under a contract or in a situation 'equivalent to contract,' it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff: . . .".

Lord Steyn pointed out that, also in his view, the basis of liability is not the state of mind of the defendant. The test is *objective*; this means that the primary focus must be on things said or done by

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<sup>39</sup> [1997] 1 BCLC 131.

<sup>40</sup> [1995] 2 AC 145, [1994] 3 All ER 506.

the defendant or on his behalf in dealings with the plaintiff. What was crucial for his Lordship, however, was that the assumption of responsibility should have occurred *directly*, in a bi-lateral relationship between defendant and plaintiff. But in the present case there was a *triangular* position: the prospective franchisees, the franchisor company, and the director-defendant. In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. 'The inquiry must be', said Lord Steyn, 'whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees'.

But if personal assumption of responsibility is the basis of liability, reliance by the plaintiff on the advice or information given is also necessary to establish the causal link between the assumption of responsibility and the loss. The test is not, however, simply *reliance in fact*. 'The test is', said Lord Steyn, 'whether the plaintiff could reasonably rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company'. In plain words, whether the plaintiff relied in fact or not on the defendant's assumption of responsibility has nothing to do with it; what matters is if, in law, he is *entitled* to so rely, whether, as the *mantra* of recent judicial pronouncements goes, 'it is just, fair and reasonable' for him to so rely.<sup>41</sup>

Both assumption of responsibility and reasonable reliance are, therefore, normative devices serving legal policy; neither rules of law, nor matters of fact. But as Lord Steyn said:

'Coherence must sometimes yield to practical justice. In any event, the restricted conception of contract in English law, resulting from the combined effect of the principles of consideration and Privity of contract, was the backcloth against which *Hedley Byrne* was decided and the principle developed in *Henderson*. In *The Pioneer Container* [1994] 2 AC 324, [1994] 2 All ER 250 at p 335 of the former report, Lord Goff of Chieveley (giving the judgment of the Privy Council in a Hong Kong appeal) said that it was open to question how long the principles of consideration and Privity of contract will continue to be maintained. It may become necessary for the House of Lords to re-examine the principles of consideration and Privity of contract. But while the present structure of English contract law remains intact the law of tort, as the general law, has to fulfil an essential gap-filling role. In these circumstances there was, and is, no better rationalisation for the relevant head of tort liability than assumption of responsibility'.

A second important authority is the case of *Customs and Excise Commissioners v Barclays Bank Plc*<sup>42</sup>, decided last year. The House of Lords took the opportunity in this case to make important pronouncements on the principle of voluntary assumption of liability. In this case, the appellant bank Barclays, appealed against the decision of the Court of Appeal<sup>43</sup> that it owed a duty of care to the respondent Customs and Excise to take reasonable care to ensure that no payments were made out of customer accounts that were subject to freezing injunctions for owing Customs money. Customs and

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<sup>41</sup> See more on this in BANAKAS, 'Tender is the Night: Economic Loss-The Issues', in E. K. BANAKAS, Ed. (1996).

<sup>42</sup> [2007] 1 A.C. 181, [2006] UKHL 28; Gerald BYRNE (2008).

<sup>43</sup> ([2004] EWCA Civ 1555, [2005] 1 W.L.R. 2082).

Excise had intended to bring proceedings for payment of outstanding VAT tax against two companies that held these accounts with Barclays Bank. The accounts had been substantially in credit. Customs had obtained the freezing injunctions over the accounts specifically prohibiting disposal of any of the debtor companies' assets up to a stated amount and had notified Barclays of the injunctions by faxing to the Bank copies of the freezing orders. Hours afterwards, Barclays had authorised from the bank's payment centre, not from the branches where the accounts were held, transfers of substantial sums from the accounts. After obtaining judgments against the debtors who defaulted, Customs and Excise claimed damages against Barclays in the sums paid out in breach of the injunctions. The House of Lords allowed the Bank's appeal. Reflecting on the Bank's Duty of Care to Customs and Excise, the House of Lords held that the presence or absence of a voluntary assumption of responsibility did not necessarily provide the answer in all cases, although it might be decisive in many situations. In the absence of any single touchstone of liability and where a court was faced with a novel situation, the court had to apply the threefold test in *Caparo Industries Plc v Dickman*<sup>44</sup>. This test required three conditions to be satisfied, before a Duty of care could be found to exist: That the claimant's loss had been foreseeable to the defendant, that there was sufficient proximity between them, and that it was 'fair and reasonable' to impose a duty on the defendant. According to the House of Lords, when a lower court granted Customs' applications for freezing injunctions against assets of their debtors, their purpose was to protect Customs by preventing the debtor companies from parting with their assets. The freezing injunctions were directed at the two debtor companies. Barclays Bank, a third party, would be in contempt of court only if it knowingly failed to freeze customer accounts subject to the freezing injunctions and authorised transfers of sums from the accounts after being notified of the court orders. The failure to operate a system for freezing accounts did not mean that Barclays was liable to Customs who had obtained the orders. Notification by Customs of the freezing orders imposed a duty on Barclays to respect the order of the court but did not of itself generate a Duty of Care to Customs<sup>45</sup>. More significantly, the House of Lords held that there was nothing that could be regarded as a voluntary assumption of responsibility by Barclays Bank for the way in which it would go about freezing the debtor companies' accounts, and there was nothing that involved Barclays in entering into any kind of relationship with Customs that required it to exercise appropriate care. Furthermore, the House of Lords found that Customs and Excise were not entitled to rely on the Bank taking care of their interests, reliance that, under the formulation of the principle of assumption of responsibility in *Williams and another* as analysed in this paper, is necessary for the principle to apply. The House of Lords also pointed out that the parties, Barclays and Customs and Excise, were about as far from being in a relationship "equivalent to contract" as they could be, and held, applying the *Caparo* test, that in the circumstances, the parties were not in a relationship of proximity and it would not be fair, just and reasonable to hold that Barclays Bank owed a duty of care to Customs and Excise.

In their concern about extending liability for professional negligence too far, the House of Lords have

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<sup>44</sup> [1990] 2 A.C. 605 HL.

<sup>45</sup> Interestingly, but not directly for the purposes of this paper, the Law Lords reflected on the wider issue of a common law duty of care arising from a judicially created legal duty, in comparison with a common law duty of care arising from legal duty created by statute.

in this case potentially added a subjective gloss to the principle of assumption of responsibility that distorts substantially the clarity of its objective formulation in *Williams and another (supra)*, by Lord Steyn. It must be true that Barclays Bank could not be seen as having assumed responsibility voluntarily (the parties were, as the Court held, ‘..about as far from being in a relationship “equivalent to contract” as they could be..’), having only been obliged by the freezing orders to block the debtors’ accounts in an action in which the Bank had no material interest, other than avoiding being potentially criminally liable for contempt of Court, if intentionally violating the orders. I submit, however, that it is not necessary to see the judgment in this case as introducing a subjective, voluntary, element to the concept of assumption of responsibility, except to the extent that, as already implied in *Galoo (supra)*, such an assumption is based on the presence of a material interest that the defendant had in acting or making a statement to the claimant. The presence of such an interest makes assumption of responsibility in the act or statement ‘voluntary’ only in the sense that the pursuit of the interest itself is ‘voluntary’<sup>46</sup>. But the defendant should not be able to deny the implication of an assumption of responsibility in cases where such an interest is present, unless she has, expressly and validly, excluded responsibility. This, it is further submitted, is the proper way to interpret the impact of the judgment in *Customs and Excise v Barclays Bank*, taking due account of the need to control the scope of liability for professional negligence and sanction claims arising in circumstances where it is clear that the defendant had been pursuing a material interest with the claimant in causing loss to the claimant by his negligence<sup>47</sup>.

### ***5. Voluntary assumption of liability in tort beyond economic loss***

Most interestingly, the courts have been developing the idea of assumption of responsibility as a general basis of tort liability, on which the existence of a Duty of Care will from now on depend.

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<sup>46</sup> This can explain the apparent contradiction in the Chancery Court’s reasoning in *Calvert v William Hill Credit Ltd* [2008] EWHC 454 (Ch) (2008) 105(14) L.S.G. 28, decided after *Customs and Excise Commissioners v Barclays*, that the relevant principles derived from *Barclays* were that the voluntary assumption test was most influential where the parties’ relationship had the indicia of contract save for consideration, the test was objective and that something was no less voluntary because it had been done pursuant to a perceived statutory duty or code of conduct.

<sup>47</sup> It is worth noting that the popularity of the notion of voluntary assumption of responsibility among claimants as a basis for arguing the existence of a Duty of Care continues undiminished, across the country and across levels of jurisdiction, despite a general lack of success on the facts: see, among recent cases, *Matthews v Hunter & Robertson Ltd* (OH) Court of Session (Outer House) 2008 S.L.T. 634, [2008] CSOH 88 (Solicitors failing to evacuate survivorship clause in disposition had assumed no responsibility and owed no duty of care to executor nominate); *Newby v Leeds City Council* 2008 WL 2696981 (CC) (local authority responsible for assessing a person’s means so as to decide if she would have to contribute to the cost of her residential care was advising claimants within the context of its statutory function and there was no special relationship from which a voluntary assumption of responsibility could be inferred); *Whitehead v Searle* [2008] EWCA Civ 285 (solicitors’ breach of duty of care to deceased client was not enough to entitle the claimant, the deceased’s partner, in his capacity as an administrator of the estate of his partner, to damages in his own right, as the defendant had at no stage proffered to shoulder any task, or undertake any duty, had assumed no responsibility and, thus, in all the circumstances it was not fair, just and reasonable to impose a duty of care).

Besides the well-established general principle that a voluntary assumption of responsibility may give rise to a Duty of Care to protect from physical harm<sup>48</sup>, two important cases have applied this idea in relation to claims other than a purely economic loss; first, in a case involving psychiatric injury, and second, a case involving a physical handicap (dyslexia), both cases of public authority liability, in itself a thorny issue under English law.

In *Leach v Chief Constable of Gloucestershire*<sup>49</sup>, the Court of Appeal accepted that voluntary assumption of responsibility could create a duty of care to protect from psychiatric harm. The plaintiff had asked by the police to assist in the interrogation of a serial killer, by being present as 'an appropriate adult', during police interviews and also in the police cell where he was kept, as required by the practice code of the police; she suffered severe psychological trauma while listening to him confessing gruesome details of his murders, often in the middle of the night, but was at no point either offered, or advised to get, expert help or counselling. The Court refused to strike out her claim as one disclosing no action in law, pointing out that there should be no difference between physical and psychiatric harm when an assumption of responsibility is concerned. Such an assumption of responsibility, leading to the creation of a Duty of Care to advise the claimant to seek proper counselling support while assisting the police, was to be objectively recognised by the law in a case like this, where the defendant police force was deriving for free, without any consideration paid by them in return, the benefit of the plaintiff's assistance in their inquiries.

The second case was concerned more directly with the difficult question of the extent of public authority liability in Tort for failures in the provision of statutory services. In four judgments<sup>50</sup>, often referred to by the name of one of the parties in one of them, *Phelps*, on related appeals issues, the House of Lords held that a person exercising a particular skill or profession might owe a duty of care in its performance to those who might foreseeable be injured if due care and skill were not exercised. Such duty did not depend on the existence of a contractual relationship between the person causing and the person suffering the damage. In *Phelps*, an educational psychologist was held to be a person owing such a duty of care and the fact that she owed duties to the local education authority who employed her did not mean that she did not also owe a duty to a child she was asked to assess, especially when the educational psychologist was specifically asked to advice as to the assessment of and future provision for a child and it was clear that the child's parents and teachers would follow that advice. The House of Lords held in such circumstances a duty of care prima facie arose. As a result, the local education authority was also prima facie vicariously liable for a breach of that duty, notwithstanding that the breach had occurred in the course of the performance of a statutory duty and that a breach of the authority's duty under the relevant legislation<sup>51</sup> did not itself create a right of

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<sup>48</sup> On which see Winfield & Jolowicz TORT, 17<sup>th</sup> edition by W V H Rogers, London 2006, pp. 170 f.

<sup>49</sup> [1999] 1 All E.R. 215 (CA).

<sup>50</sup> *Phelps v Hillington L B C*; *Anderton v Clwyd CC*; *G (A Minor) v Bromley L B C*; *Jarvis v Hampshire C C*, [2000] 4 All ER 504 (HL). But see also *DN v Greenwich LBC* [2004] EWCA Civ 1659; [2005] 1 F.C.R. 112 (CA (Civ Div)), where the Court of Appeal showed some concern about the possible scope of *Phelps*, on which see now Donal NOLAN (2007).

<sup>51</sup> The Education Acts 1944 and 1981.



damages. The relationship between the child plaintiff and the educational psychologist employed by the defendant authority and the task she had been doing had created the necessary nexus to place the psychologist under a duty of care to the plaintiff. The House of Lords further held that the trial judge had been entitled to hold her in breach of that duty and that the authority was vicariously liable for that breach. Interestingly, the House of Lords also held that a failure to mitigate the adverse consequences of a congenital defect such as dyslexia was capable of constituting “personal injuries to a person”<sup>52</sup>.

Other judgments in the same bundle of cases reported together with *Phelps* went on to affirm that teachers owed a duty at common law to exercise the skill and care of reasonable teachers in providing education for their pupils in relation to their needs. This duty, of all those concerned, arose out of a voluntary assumption of responsibility in their professional actions.

These judgments have created controversy. Voluntary assumption of responsibility has been seen as a basis on which public authority liability can be taken too far. Although they anticipated at the time the Human Rights Act 2000, which came into force on the 2nd October 2000, introducing into English law statutory rights corresponding to those of the European Convention of Human Rights. New statutory rights, such the right to a fair trial, to health, and to private and family life, are now firmly embedded into UK law. These rights are generally seen by lawyers in the United Kingdom as signalling an unavoidable expansion of public authority liability in all areas of defective public services or negligence in the exercise of powers. But concern on public authority liability finally produced a backlash, especially as voluntary assumption of responsibility was used by the courts in considering claims for injuries in using leisure activities voluntarily offered free of charge to the public<sup>53</sup>, or in recreational or educational school trips, voluntarily organised by school staff for their pupils. A section of an Act of Parliament intended to restrict the scope of such Tort duties, a rare example of legislative intervention in the development of basic Tort principles by the courts, now provides that

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<sup>52</sup> For the purpose of section 33(2) of the Supreme Court Act 1981 which applies to personal injury claims.

<sup>53</sup> See *Tomlinson v Congleton BC* [2003] UKHL 47: Congleton Borough Council appealed against a decision of the Court of Appeal ([2002] EWCA Civ 309, [2003] 2 W.L.R. 1120) that, as the owner and occupier of a country park, it had owed a duty of care to Tomlinson, when he dived into the shallow water at the edge of a lake and struck his head on the bottom. Although the claimant’s claim was rejected on an adverse for the claimant’s case interpretation of the occupier’s duty to trespassers under the Occupiers’ Liability Act 1984 s. 1, the House of Lords was clearly concerned about the so-called ‘compensation culture’ hitting local authority services, noting, significantly, that Tomlinson was a person of full capacity who had voluntarily chosen to engage in an activity which had inherent dangers. The case can be criticized as an illustration of the wider iniquities of the ‘lottery of damages’ system operated by the fault principle, as Mr Tomlinson narrowly missed a substantial payout for an extremely severe personal injury and the resulting incapacity on policy grounds that were far wider than what the individual merits of his claim could have been under other circumstances, for example, in a car accident.

'A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might–

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity'<sup>54</sup>.

The Act is thus worded to acknowledge perceived public concern about the deterrent effect of expanding liability for activities with social utility, on the basis of a voluntary assumption of responsibility. This social utility has, however, been always a factor in the cost-benefit analysis on which breach of duty is decided in common law, so the Act, perhaps not surprisingly, adds nothing substantial to the common law in this section. But it can, nevertheless, be seen as a political declaration of the need for courts not to pursue an expansion of public authority liability in particular, under the influence of the idea of voluntary assumption of responsibility. This need is also keenly felt by some of the most influential senior judges in the UK. Lord Hoffmann, generally concerned with the expansion of negligence liability for all kinds of risks and injuries<sup>55</sup>, and more particularly concerned with protecting public authorities from a possible onslaught of claims under the Human Rights Act, has strongly criticised recently the potential scope of *Phelps*<sup>56</sup>

## 6. Voluntary assumption of liability- a new uniform field?

Could it be that English law is developing a substantial amount of jurisprudence of a *sui generis liability*, neither contractual nor based on the existence of a positive Duty of Care<sup>57</sup>, applied by law on grounds of general considerations of social utility? It is certainly a development with a relational vision of tort liability that blurs the boundaries of Contract and Tort, which I had the youthful arrogance to suggest in my doctoral thesis some twenty years ago<sup>58</sup> and which one of the examiners, Andre Tunc, had described at the time in the *viva voce* as 'péchés de jeunesse'. The assumption of responsibility is implied objectively by law in cases where the relationship between the parties, while falls short of contract, is seen as one of close proximity, in the light of the seriousness of the mutual interests of the parties that have brought them together and have exposed them to the risk of injury if due care is not shown. As stated at the beginning of this paper, English law needs the principle of

<sup>54</sup> Compensation Act 2006, Chapter 29, part 1, Standard of care, Section 1, 'Deterrent effect of potential liability'.

<sup>55</sup> As is also evident in his leading judgment in *Tomlinson v Congleton BC*, above.

<sup>56</sup> Lord Hoffmann said in delivering the annual FA Mann lecture of 2007: 'I do not think it is too much to say...that the decision in *Phelps* has been a disaster for public education...[I]t gives the young drug-addicted petty criminal the opportunity, at State expense, to blame the State education system for his entire failure in life, together with the outside chance of picking up about £40,000': see <http://www.telegraph.co.uk/news/1568007/Brief-encounters.html#continue> (last visited 3.7.2008).

<sup>57</sup> Nicholas J. MCBRIDE (2004).

<sup>58</sup> E.K. BANAKAS (1989).

assumption of responsibility because of a (still) narrow concept of Contractual liability. The principle offers a natural path to a novel kind of civil liability, besides the traditional two other paths of Contractual and Tortious liability, which shows in its construction elements of both of those other two. It is objective<sup>59</sup>, i.e. it does not depend on proof of an actual intention to assume responsibility by the defendant, and proof of absence of such an actual intention by the defendant is no defence<sup>60</sup>. It would, indeed, have been a paradox if voluntary assumption of responsibility in Tort were not to be objectively established, in view of the fact that even contractual undertakings are subject to objective judicial construction. So, in Tort, rather than the intention of the defendant, it is the circumstances of her relationship with the plaintiff, including, most importantly, any interest or benefit of the former in inducing the latter's conduct, that determine the existence of an assumption of responsibility in the eyes of the law. Tort liability arising from assumption of responsibility finds its most important application as an additional condition of the presence of a duty in cases of non-physical harm, whether economic or psychological/psychiatric harm. Non-physical harm, important as it might be, cannot be compensated on a simple principle of foreseeability, for reasons that concern both its potentially uncontrollable nature, and political and moral parameters imposed by the structure of western open-market societies on the legal system<sup>61</sup>. The idea of assumption of responsibility is obviously seen as offering the means of a measured and controllable response to the need for compensation in deserving cases. These are the cases where the defendant cannot be seen to escape the consequences of her negligence, because of her interest in the plaintiff's reliance on her. In these cases, and to borrow the formula consistently used by judges in all recent English cases, the defendant must be liable because it is 'fair, just and reasonable' that she should be. This formula implies that the actual circumstances of the case carry the harmful conduct of the defendant across the line of what fair play is in an open market society. 'Fair and just' must not only be that which is morally acceptable given the relative position of the parties, but, also, it seems (or it ought to be so), what is consistent with a healthy and efficient social and economic conduct. Thus, it is fair and reasonable in that sense that professional people do not escape liability in cases in which they act without a fee, if they have a strong personal interest in the plaintiff's reliance, and if, for the wider benefit of society and the market, this is a case of a kind in which third parties must be encouraged to rely on their skills. And it is fair and reasonable that professional people are not liable for acting without a fee when the plaintiff's interest in their action and the nature of its object clearly do not justify such a 'free lunch'. 'Reasonable' must be that which is, in the circumstances, practical. It may be practical to impose liability, because the defendant is, or could have easily been insured; and it may not be practical to impose liability because of the amount of risk involved and the actual conditions of the market (including the cost of insurance). An additional important practical consideration, must be that the imposition of liability does not interfere with other agreements or conventions binding on the parties, or contractual relations based on internationally agreed commercial contractual structures, as illustrated by the case of *Marc Rich & Co AG and others v Bishop*

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<sup>59</sup> Subject, of course, to what was said *supra* in relation to the judgment of the House of Lords in *Customs and Excise v Barclays Bank*.

<sup>60</sup> Thus, and in my reading of the tone of the case law, any exclusion or limitation of liability would be subject to the usual control, also in a consumer relationship.

<sup>61</sup> See more on this in BANAKAS, 'Tender is the Night: Economic Loss-The Issues', in E.K. BANAKAS, Ed. (1996).

*Rock Marine Co Ltd and others, (The Nicholas H)* <sup>62</sup>.

This paper started with a question: is it a paradox that voluntary assumption of responsibility is increasingly held as a foundation for Tort liability in Negligence? Further questions did arise: Does this imply that Tort liability comes even closer than ever to be based on the same premise as contractual liability, i.e. the willingness of a person to undertake the responsibility of their conduct? Does this mean that Tort liability, whether for intentional or non-intentional conduct, is becoming more relational, personal in its moral foundation, closer to the idea of personal moral responsibility than ever before? Where does that all leave the boundary between Contract and Tort?

The last question seems to be the easier to answer: the boundary between Contract and Tort becomes thinner. In one sense, lack of consideration will not be an insurmountable obstacle if, as argued in this paper, harm results from a voluntary assumption of responsibility, primarily evidenced in conduct in pursuit of a material interest in a direct two-party non-contractual relationship. In another sense, the province of Tort liability for unpremeditated harm regardless of such conduct, i.e. regardless of conduct that may be seen as arising from such a voluntary assumption of responsibility, appears to be shrieking. But all this does not necessarily mean that liability, contractual or tortious is becoming more voluntary in a subjective sense. As Lord Hoffmann reminded us recently in the case of *The Achilles* from which the opening quotation of this paper comes, the intention of the parties voluntarily undertaking contractual liability must be objectively ascertained. And voluntary assumption of liability in Tort is also clearly objectively ascertained, as said above, in the pursuit of a material interest, or the existence of a statutory duty or of code of conduct or, quite simply, on a purely normative basis that it would be 'just, fair and reasonable' to do so. It is worth repeating here, because the law is not as crystal clear as it should be about this, that it would be very strange indeed, if voluntary assumption of liability in Contract is objectively ascertained but not so in Tort. Can Tort liability ever be conceived to be more dependant on a person's subjective will than Contractual liability? Voluntary assumption of responsibility does not imply, therefore, a potential transformation of tortious liability into a kind of voluntary, subjective responsibility close to that traditionally associated with contractual undertakings. It is only to the extent that contractual undertakings are also ascertained objectively, that voluntary assumption of responsibility in Tort brings Contract and Tort closer together than ever before.

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<sup>62</sup>[1996] 1 AC 211, [1995] 3 All ER 307, [1995] 2 WLR 227, [1995] 2 Lloyd's Rep 299 (HL). In this case the question was whether a vessel classification society owed a duty of care to a third party, the owners of cargo laden on a vessel, arising from the careless performance of a survey of a damaged vessel by the surveyor of the classification society, which resulted in the vessel being allowed to sail and subsequently sinking. Lord Steyn, with whom the majority of the House of Lords agreed, concluded that the recognition of a duty of care would be unfair, unjust and unreasonable as against the ship owners who would ultimately have to bear the cost of holding classification societies liable, such consequence being at variance with the bargain between ship owners and cargo owners based on an internationally agreed contractual structure. It would also be unfair, unjust and unreasonable towards classification societies, notably because they act for the collective welfare and unlike ship owners they would not have the benefit of any limitation provisions. The then existing system provided cargo owners with the protection of the Hague Rules or Hague Visby Rules. That protection was limited but any shortfall was readily insurable, and this led the judge to hold that the 'lesser injustice is done by not recognising a duty of care'.

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