

ROUGH JUSTICE: A THEORY OF RESTITUTION AND RELIANCE, CONTRACTS AND TORTS*

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* Copyright © 2001, Peter Linzer. By "rough justice" I mean justice that is driven more by general standards of fairness than by structured (or formal) systems of rules and neat categories, justice that is often untidy, that may be second-best where the best is unachievable. Some of my colleagues at the Wisconsin Contracts Conference thought I was advocating lynchings. I wasn't.

** Law Foundation Professor of Law, University of Houston Law Center. A.B., Cornell, 1960; J.D., Columbia, 1963. Stewart Schmella was a great finder of obscure cases. I thank the University of Houston Law Foundation for its help, specifically with this paper and generally over the years. I also want to thank Caroline Brown, who was preparing a comment on this paper, and Jonathan Judge, our great Symposium Editor, for their patience as I emulated Miss Lydgate, the unworldly Oxford don, doggedly making still another change while they, like Harriet Vane, tried to get the manuscript to the printer. ("I'm almost positive I heard a faint voice crying from the window about a footnote on page 97—but I pretended not to hear." DOROTHY L. SAYERS, *GAUDY NIGHT* 377 (Avon Books 1967) (1936).

In reading over this paper I realized that I had hardly mentioned Ian Macneil, without whose ideas this paper would not have existed. This was because Macneil's concept of relational contract, along with the empirical approach of Stewart Macaulay, has become almost universally accepted among academics, though less so by practitioners and courts. As Dean Scott has written, "We are all relationalists now. In that sense, Macneil and Macaulay have swept the field." Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852 (2000). Some years ago I explored both men's works and influence together with that of Grant Gilmore, in Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURVEY OF AM. L. 139. On Macneil in particular, see William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545; Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 390-97 (1986); and Symposium: *Relational Contract Theory: Unanswered Questions A Symposium in Honor of Ian R. Macneil*, 94 NW. U. L. REV. 735 (2000). See *infra* text accompanying notes 15-17 for discussion of Macneil in this article.

My lords, I have cited these instances so as to show that in one way or another the law has ensured that in this type of case a just result has been reached.

—Lord Devlin in *Hedley Byrne & Co. v. Heller & Partners*¹

Seventy-five years ago Samuel Williston and Arthur Corbin combined to create section 90 of the *Restatement of Contracts*, the most important event in twentieth century American contract law. That section made promises enforceable without consideration if there was substantial reliance on them by the promisee.² About ten years later, Warren Seavey and Austin W. Scott took a hodgepodge of related procedural devices, legal and equitable, and created the substantive law of restitution, in the *Restatement* of that name.³ Despite the impact of these achievements, a generation later Grant Gilmore, always the skeptic, suggested that

The two concepts were, indeed, twins It would seem, as a matter of jurisprudential economy, that both situations could have been dealt with under either slogan but the legal mind has always preferred multiplication to division⁴

I. BACKGROUND OF A THEORY

Like Gaul, all civil obligations can be divided into three parts. There are formal contracts negotiated between parties of roughly equal bargaining power.⁵ There are injuries to persons and property. And there

1. [1963] 2 All E.R. 575 (H.L.). See *infra* text accompanying notes 102-49 for discussion of *Hedley Byrne*.

2. "A promise which the promisor should reasonably expect to induce action or forbearance [of a definite and substantial character of] the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." The debate over section 90, then numbered 88, appears at 4 A.L.I. Proc. app. 85-114 (1926), reprinted in PETER LINZER, A CONTRACTS ANTHOLOGY 339 (2d ed. 1995). On the relationship between Williston and Corbin and the writing of section 90, see my note, "Section 90 and the First Restatement—The Gilmore Version and the Evidence From the Time," *id.* at 338. Section 90 of the *Second Restatement of Contracts* differs only in minor details.

3. See RESTATEMENT (THIRD) OF RESTITUTION reporter's introductory memorandum xv (Discussion Draft, March 31, 2000).

4. GRANT GILMORE, THE DEATH OF CONTRACT 97 (Ronald Collins, ed., Ohio State University Press 1995) (1974).

5. The term "formal contracts" is used in both restatements of contracts to refer to documents under seal and a few other contracts in which form rather than the underlying transaction is the key element, see RESTATEMENT (SECOND) OF CONTRACTS § 6 reporter's note to cmt. f (1979). (Section 6 of the Second Restatement lists contracts under seal, recognizances, negotiable instruments and documents and letters of credit.) The term "informal contracts" is used to include all other contracts, including those of the greatest sophistication and complexity, if they are not under seal. I have never met an American lawyer who uses the term "formal contract" in this way, and comment a to Section 6 says that the Second Restatement avoids the term because other types of contracts are also subject to formal requirements.

is everything else. I am interested in this "everything else." It ranges far and wide, including fairly obvious topics like reliance, restitution, "past consideration," moral obligations, and implied-in-fact contracts. But it also includes contracts of adhesion, the battle of the forms, "agreements to agree," business torts and duties imposed by law, custom or the parties' course of dealings. I am curious to see if there is anything that holds these things together, though at a conference at the University of Wisconsin, particularly one hosted by Stewart Macaulay, I am pessimistic about finding an elegant solution.⁶ Still, after fifteen or twenty years of looking at the borderlands of tort, contract, and property, hope continues to spring eternal in my breast that I can make some sense out of the chaos of obligations at the margin.

I see a continuum of dealings in which liability often can be analyzed under several different rubrics. Whether there was something akin to a promise or even a tacit understanding, whether there was some enrichment (or at least a "benefit") that might be deemed unjust or unfair, whether one party has relied on some sort of words or conduct or has unfairly been made poorer ("unjust impoverishment?"), the relationship between the parties, and—above all—basic fairness, are some of the factors that should affect the decision whether or not to find a legal obligation. The specific legal form used to find liability is not really as important jurisprudentially as the court's willingness or unwillingness to hold someone responsible in a marginal fact situation.

A. "Contracts" (Roughly) and "Torts" (Roughly)

We can see what I mean by marginal if we eliminate the two outside categories, negotiated contracts and physical or dignitary injuries. If two parties of roughly equal bargaining power⁷ negotiate an agreement, I would enforce their deal⁸ almost all the time, with rare situations of public

6. See Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977). The sponsors of the University of Wisconsin Law School Contracts Conference, among them Professor Macaulay, appended to the conference schedule this maxim from Rochefoucauld: "There is nothing more horrible than the murder of a beautiful theory by a gang of brutal facts."

7. Of course "roughly equal bargaining power" is a phrase that is filled with vagueness. The very nature of a market involves inequality—you hope that my need for what you offer is greater than your need for what I have to exchange and I hope the reverse. The great works on economic duress all acknowledge the paradox. See John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 254 (1947); John Dalzell, *Duress by Economic Pressure*, 20 N.C. L. REV. 237, 341 (1943); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). The Hale article is particularly lucid on this point.

8. Corbin's view of the parol evidence rule, allowing all extrinsic information to show the parties' intended meaning, and his attacks on judges who rely on their own understanding of words (i.e., the plain meaning rule) are ultimately based on respect for the contracting parties' actual bargain and antipathy to judges rewriting the contract. See

policy—like surrogate parenting agreements⁹—being the main exception. There are plenty of legal issues involved in truly negotiated contracts, but the basis of liability isn't one of them. The parties should be bound because it is a basic component of free will to be able to bind yourself legally, and the promise of the person binding himself is rendered valuable precisely because it can be enforced by the legal system. Enforcement against you of a truly negotiated contract is a matter of *your* liberty. The other end of the obligations spectrum, tort, also involves liberty. It is part of the security of all people that they and their property should be protected against injury. Whether that protection is limited to fault or is based more on an insurance model is a basic political question, but without the state's protection of individuals against physical and dignitary injury it's hard for me, at least, to see how they can be called free.¹⁰

The middle category, however, raises questions both of jurisprudence and political freedom. When people haven't agreed to anything and haven't done anything wrong, why should they be held to a legal obligation? Why should *he* have to pay money or *she* be put under a court order to do an unwelcome act? There are several possible answers, some closer to the free will justification for bargains, some closer to the protection from harm answer for torts, and some far away from both rationales. It is a continuum, but looking at the various fact situations may help us to find something more than random solutions to offbeat problems without forcing us into a series of pigeonholes based on the characterization of the obligation said to be involved.¹¹

3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 579 (1960).

9. In this, compare the contrasting views of feminism, exploitation, and contract in MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES (expanded ed. 1990) and Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297.

10. The classic discussion of "positive liberty" is ISAIAH BERLIN, *Two Types of Liberty*, in FOUR ESSAYS ON LIBERTY (1969).

11. I can further narrow the inquiry. While many observers would not include contracts of adhesion and the battle of the forms as examples of obligations without bargains, they of course are. I will limit myself to a conclusion: by definition, a contract of adhesion does not involve bargaining or negotiation and the apologetic that the market will deal with buried and often unintelligible terms is inane on its face. Similarly, the very nature of the battle of the forms—a high volume of routine transactions where it is impossible to have a lawyer review the terms in every order, acknowledgment or shipping document—also shows a necessary lack of bargaining and negotiation. Thus the only issue is whether the terms of an obligation should be set by the dominant party or by the legal system. To me, democracy calls for the legal system to take charge, whether by specifying terms or by setting a high standard of reasonable expectations. Since the non-price terms of many contracts, particularly consumer contracts and routine commercial contracts, cannot be negotiated and bargained for efficiently or practically, it is a reasonable response of the legal system to set up some form of default rules that can be supplanted only by actual and meaningful negotiation and bargain. In the absence of that real bargain, decision by the legal system is the second-best solution, the best—free

B. Restitution, Reliance, and Implied-in-Fact Contracts

Is there anything to Gilmore's claim that restitution and reliance are two sides of the same coin? On the surface they are almost opposites. We are often told that the essence of restitution is unjust enrichment of the defendant, who made no promise, while the essence of reliance (or promissory estoppel) is a promise that the plaintiff relied on to his detriment, regardless whether the defendant was enriched in any way. In addition, a commonplace of the Contracts class that there is a difference in kind between an implied-in-fact contract—an express and intended contract, actual but non-verbal—and the completely misnamed “implied-in-law contract,” which is an eighteenth and nineteenth century fiction for restitution. In fact, however, restitution, reliance, and implied-in-fact contracts often collapse into one another, and even when careful judges make craftsmanlike distinctions, their opinions show the overlap.

Gilmore gave his *Death of Contract* lectures in April of 1970 and they were published in 1974. It was *The Death* that popularized his tongue-in-cheek term “contorts,” which was supposed to represent the movement of mid-twentieth century law from classical contract and tort to a more romantic amalgam similar to the continental Civil Law's concept of civil obligations. And even those writers who were not taken with Gilmore's approach agreed that reliance seemed to be swallowing up bargain.¹² Implied terms and implied-in-fact contracts were increasingly used, particularly to combat the at-will employment rules, which after nearly a century were being vigorously, and successfully, attacked.¹³ At the same time, Ian Macneil had begun to put forth his relational contracts theory,¹⁴ which in many ways was paralleled and supported by the empirical arguments associated with Stewart Macaulay, Lawrence Friedman, and their colleagues at the University of Wisconsin.¹⁵ Though

bargain—being unavailable.

12. See Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903 n.11 (1985); see also Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981).

13. Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 336-37 (1986)

14. See generally Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974); Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980). The first two articles are the foundational works, and well worth reading, though somewhat difficult. The Northwestern article is perhaps the most accessible and the New Social Contract book, Macneil's Rosenthal Lectures, is his attempt at a more broad-based application.

15. See Stewart Macaulay, *Relational Contracts Floating On a Sea of Custom: Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775

Gilmore wrote *The Death of Contract* in part to refute the Wisconsin School, it was pretty clear to me in 1988 that his contorts actually fit in well with both the Wisconsin and relational approaches to make a strong case for a non-formal, pragmatic, and relational law of obligations.¹⁶

C. *The Tide Change in Contracts Scholarship*

But as we begin the twenty-first century, a tide of writing is roaring over the journals, telling us that the courts aren't buying all this, that they are increasingly formalistic and give more respect to classical contract law than we have seen since the Second World War.¹⁷ While some of these writers have an axe to grind, many do not. For instance, Charles L. Knapp, who had argued in 1981 for the dominance of promissory estoppel,¹⁸ recently wrote that "1980 may have been the high-water mark for promissory estoppel."¹⁹ Another illustration of this change is in employment cases, where the courts seem less willing to manipulate the rules of contract formation than in the past.²⁰

One of the most important examples of this more conservative, rule-based approach can be seen in the tentative overview of the *Restatement (Third) of Restitution*,²¹ which narrows the coverage of restitution by

(2000).

16. See Peter Linzer, *Uncontracts: Contorts, Context and the Relational Approach*, 1989 ANN. SURV. AM. L. 139; Peter Linzer, *Is Consent the Essence of Contract?—Replying to Four Critics*, 1989 ANN. SURV. AM. L. 213.

17. See Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1170-71 (1995); E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203 (1990). See generally THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed. 1999). The title is a parody of P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979), the landmark intellectual history of the breakdown of classical contract law.

18. See Knapp, *supra* note 12.

19. Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1192 (1998); see also Farnsworth, *supra* note 17, at 219-20; Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998); Phuong N. Pham, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263 (1994).

This pessimistic view is challenged, however, by Dean Eric Mills Holmes in his revision of Corbin's discussion of promissory estoppel:

[S]ome scholars in the 1990's are asserting that the doctrine is waning or dying or is dead. But these bold assertions are inaccurate as these new sections [in the revised treatise] evidence. . . . These new sections confirm that promissory estoppel is alive, vital and has been steadfastly evolving over five centuries in the common-law case-law tradition.

Eric Mills Holmes, 3 CORBIN ON CONTRACTS at v (Rev. ed. 1996). The "new sections," which include a fifty-state survey of promissory estoppel, appear at 35-237.

20. *Compare* *Asmus v. Pac. Bell*, 999 P.2d 71 (Cal. 2000), with the cases discussed in Linzer, *supra* note 13, at 386-90.

21. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Discussion Draft, March 31, 2000) ("RESTATEMENT (THIRD) OF RESTITUTION"). In fairness to him I should mention that the Reporter, Professor Andrew Kull of Emory University has made

avoiding a general notion of fairness and of values of "equity and good conscience."²² It seeks to accomplish this by equating unjust enrichment with a notion of "unjustified enrichment," described as: "enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights."²³ Thus, in place of "an open-ended and potentially unprincipled charter of liability," the new *Restatement* claims to offer a property-based standard that is "both predictable and objectively determined, because the justification in question is not moral but legal."²⁴

An obvious question is why this swing to the right has occurred. Some, of course, would say that the reason that it has occurred is because it is correct, that the Corbinesque result orientation that dominated the casebooks until recently is outmoded, a child of the sixties (or a grandchild of the thirties), and that just as the welfare legislation of the New Deal needed to be rethought, so did the basics of private law theory. Another explanation is the rise of more conservative academic thought, led by the law and economics movement. Still another is a more conservative political atmosphere throughout the country, and particularly the staffing of the federal courts with articulate, intelligent conservative judges who, despite their backers' rhetoric really are judicial activists. Many of these judges are quite willing to apply their views of private law to diversity cases despite the injunction of *Erie v. Tompkins*²⁵ that they are to follow the lead of the applicable state court and do their best not to make law.

The most important reason for the swing to the right, however, is simply the ebb and flow of intellectual history. Gilmore described it in a memorable paragraph written in 1970, at the peak of the anti-formalism of contract law, a passage that reminds us that Gilmore also had a Ph.D. from Yale in French Literature:²⁶

We have become used to the idea that, in literature and the arts, there are alternating rhythms of classicism and romanticism. During classical periods, which are, typically, of brief duration,

clear that the broad statements of principle in the early drafts of the *Restatement* are subject to rethinking when the project nears completion. At the same time, they reflect the point of view that he put forth in his 1995 article, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995).

22. RESTATEMENT (THIRD) OF RESTITUTION § 1, cmt b.

23. *Id.*

24. *Id.*

25. 304 U.S. 64 (1937). For illustrations of current revisionist judicial activism, using as a paradigm the parol evidence rule, see *A.M. Int'l v. Graphic Mgmt. Assocs.*, 44 F.3d 572 (7th Cir. 1995) (Posner, J.); *Hershon v. Gibraltar Bldg. & Loan Assocs.*, 864 F.2d 848 (D.C. Cir. 1989) (Buckley, J.); *Trident Ctr. v. Conn. Gen. Life Ins.*, 847 F.2d 564 (9th Cir. 1988) (dictum) (Kozinski, J.).

26. See generally Ronald K.L. Collins, *Gilmore's Grant (or The Life & Afterlife of Grant Gilmore & His Death)*, 90 NW. U. L. REV. 7, 9 (1995).

everything is neat, tidy and logical; theorists and critics reign supreme; formal rules of structure and composition are stated to the general acclaim. During classical periods, which are, among other things, extremely dull, it seems that nothing interesting is ever going to happen again. But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony. The romantics spurn the exquisitely stated rules of the preceding period; they experiment, they improvise; they deny the existence of any rules; they churn around in an ecstasy of self-expression. At the height of a romantic period, everything is confused, sprawling, formless and chaotic—as well as, frequently, extremely interesting. Then, the romantic energy having spent itself, there is a new classical reformulation—and so the rhythms continue.²⁷

The closely organized, architectural structure of late nineteenth century classical contract law shows an obvious similarity to the academic art that the Impressionists rebelled against, to Marx's "scientific" organization of history, to Freud's brilliant but rigid explanation of the unconscious, to Frederick Jackson Turner's thesis of American western migration, to classical economics, and above all, to their intellectual ancestors, Isaac Newton and Charles Darwin. The more flexible approaches to law that led to reliance-based contracts, strict products liability, and no-fault divorce had obvious parallels in the welfare state, the civil rights movement, changes in dress and life style, relativity and quantum mechanics, and more adventurous music and art, both classical and popular. Today our art is more representational than the abstract expressionism of the sixties, our music tonal and more accessible than the music of Milton Babbitt or John Cage. 'N Sync has replaced Frank Zappa, and our courts seem nostalgic for the plain meaning rule and formal offer and acceptance.

We should remember that Gilmore predicted a swing back to classical contract law in his famous Easter metaphor at the end of his April 1970 *Death of Contract* lectures:

Perhaps we should admit the possibility of such alternating rhythms in the process of the law. We have witnessed the dismantling of the formal system of the classical theorists. We have gone through our romantic agony—an experience peculiarly unsettling to people intellectually trained and conditioned as lawyers are. It may be that, in this centennial year [of C.C. Langdell's 1870 contracts casebook], some new Langdell is already waiting in the wings to summon us back to

27. GILMORE, *supra* note 4, at 111-12.

the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead—but who knows what unlikely resurrection the Easter-tide may bring?²⁸

Of course we now know that the new Langdell, standing in the wings, was Gilmore's then-colleague at the University of Chicago, Richard Posner, now Chief Judge of the Seventh Circuit. Posner at the time was primarily concerned with torts, where in Gilmore's words, he felt "that nineteenth century negligence theory was economically as well as legally sound and that the gradual erosion of the theory in this century is to be deplored." Gilmore continued, prophetically, "If he turns his attention to contract, his conclusions will no doubt be the same."²⁹

If it were my role merely to describe what is going on in the courts, I would have very little to say here, since many if not most current judges would reject the approach I will put forth. But I have no embarrassment in saying what I think the law should be, and in giving examples, both from decisions that support me and from those that I think are wrong. If Gilmore is right, we should soon be in the middle of another jurisprudential shift, and I'd like to be among those at the beginning of the line.

II. SOME GRIST FOR A THEORY

A. Inducing the General from the Specific

I believe that we can look at some specialized or even idiosyncratic fact situations and from them derive some more general principles. This is sort of backwards according to what we've learned in the past from our hosts at this conference. A basic part of the Wisconsin School's thesis was that general contract law was being replaced by specialized substantive areas like labor and family law. Undoubtedly this has been true, but as new fact situations have arisen, the courts have once again had to look to contract and related areas of general private law to resolve disputes that fall between the cracks of developed or developing specializations. I believe that we can learn from some of their solutions to create principles that can be applied generally to dealings that don't fit into a neat system of rules but nonetheless call out for a fair and just solution.

28. *Id.* at 112.

29. *Id.* at 104 n.247. The resurrection theme seems to make Posner into John the Baptist. There are certainly many critics who would like to see his head on a platter, whether or not to Richard Strauss's music.

B. Cohabitation Cases As an Unexpected Paradigm

A wonderful starting point is litigation between non-marital cohabitants, beginning with a well-known Wisconsin case, *In the Matter of Estate of Steffes*,³⁰ written by one of America's best judges, Justice Shirley S. Abrahamson. *Steffes* involved a suit for compensation for household services brought by Mary Lou Brooks against the estate of Virgil Steffes, an older man she lived with for several years after leaving her husband and children and giving up her job as a cocktail waitress. Ms. Brooks had received about \$10,000 in cash from Steffes as well as room and board, and there was no doubt that they had had sexual relations until Steffes developed a brain tumor. But it was also clear that she had performed a wide variety of services for him, and that she stayed with him after he became seriously ill, and in fact nursed him faithfully up to his death. There was also some evidence that Steffes had stated to mutual friends "that he wanted to provide for the plaintiff and that he wanted her to have the house and farm on his death."³¹ However, Steffes failed to make a will and sold part of the farm without giving the money to Brooks.³² To avoid the case law that refused to give general family law rights to unmarried partners, Ms. Brooks's lawyers made an essentially commercial argument, based on her hard work and not the intimate relationship. The trial court found both a contract implied-in-fact and a right to recover in restitution, and awarded Brooks \$14,700, figured as \$2 per hour, ten hours per day, seven days a week for the last two years of Steffes' life. The Wisconsin Supreme Court affirmed on a theory of implied-in-fact contract, and did not quite reach the restitution issue.

Judge Abrahamson knows the difference between an implied-in-fact contract and restitution, and in fact described the difference in a footnote, quoting from the well-known *Calimari and Perrillo* hornbook.³³ Nonetheless, I am struck by the overlap of the two approaches throughout her opinion, and a sense that any other result would have been unfair to Mary Lou Brooks. Justice Abrahamson noted that the trial court concluded "that a contract for services can be implied from the facts and can also be implied in law (quasi-contract) on the ground of unjust enrichment and that plaintiff can recover the reasonable value of services rendered to the deceased."³⁴ Although the Supreme Court's opinion isn't

30. 95 Wis. 2d 490, 290 N.W.2d 697 (1980).

31. 95 Wis. 2d at 496, 290 N.W.2d at 700.

32. *Id.*

33. When the parties express their agreement by words the contract is said to be express. When it is manifested by conduct it is said to be implied-in-fact A contract implied in law is not a contract at all but an obligation imposed by law to do justice [i.e., restitution] even though it is clear that no promise was ever made or intended. *Id.* at 497 n.4, 290 N.W.2d at 701 n.4.

34. *Id.* at 497, 290 N.W.2d at 701. The footnote describing the difference in the concepts is appended to this sentence.

completely clear on this point, it pretty clearly relies only on the implied-in-fact contract. Nonetheless, without a notion of unjust enrichment—or at least fairness—the evidence the court uses to find the implied-in-fact contract would be equally compatible with a finding that Steffes didn't feel a contractual obligation at all, and merely promised Mary Lou Brooks a gift. In fact the dissenting justice reached just this conclusion:

Out of a misguided sense of fairness, the author of the majority opinion implies a promise to pay from the “circumstances relating to the plaintiff's entry into and her stay in the Steffes household.” I have examined the circumstances cited and can only reach the conclusion that sexual intimacy, in violation of their marriage vows, was the underlying motivation for Mrs. Brooks' entry into and stay in the home of the deceased In this case, Mrs. Brooks did not expect to be paid, although it should be pointed out that Mrs. Brooks did not go uncompensated She expected the deceased to leave her the farm, but he sold it before his death and did not leave her the proceeds. Of this fact she was well aware, but still did not leave and return to her husband and children she had abandoned. Now the majority gives her money compensation she never expected as a consolation prize.³⁵

Of course what most comes through from the dissent is its overwhelming misanthropy, or at least misogyny. But that leads us to the real point of both opinions. Each really focuses on the relationship between Virgil Steffes and Mary Lou Brooks, not on the transactional dealings between them. The dissenter, of course, strongly disapproves, and in the process finds many reasons not to compensate Ms. Brooks. The majority does no more than take a neutral position, but it is forced to examine the relationship openly because of two legal rules that the estate administrator (Virgil's son) relied on with great vigor: a public policy against contracts based on a “meretricious relationship” and a presumption that services within a household are given gratuitously.

One thing that should be apparent, but isn't to many people is that both these rules are heavily loaded against women: women usually provide services within a household, and the “meretricious relationship” ban will almost always leave a man with happy memories and a woman with nothing. Justice Abrahamson was never strident, but she made this point with respect to the meretricious relationship argument by quoting the Washington Supreme Court: “[t]he rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of

35. *Id.* at 516, 518, 290 N.W.2d at 711 (Coffey, J., dissenting).

the property, or title to it in their names, at the end of a so-called meretricious relationship.”³⁶

The presumption that services within the household are gratuitous was more difficult to deal with. On the whole, the presumption makes some sense: parents shouldn’t have to pay their children for showing up for a Sunday visit, however inconvenient, and children shouldn’t be able to collect for washing the dishes.³⁷ The problem, though, is that there are some circumstances where the presumption operates very harshly. Justice Abrahamson began by juxtaposing against it another presumption: people expect to get paid for their services.³⁸ She then reviewed a number of cases to show that the gratuitous services presumption could be rebutted by the circumstances of the relationship.³⁹ The upshot of the review seems to have been that the burden was on the claimant, but that if she could meet it sufficiently to create an obligation, she would also rebut the presumption of gratuitousness. Since plaintiffs normally have the burden of proof, this pretty much eliminated the entire presumption, except as a common sense gauge within the household.⁴⁰

A 1931 Wisconsin case, *Estate of Goltz*,⁴¹ had held that an express contract was required to overcome the presumption of gratuitousness, but Justice Abrahamson said that in the years following *Goltz* the court had “upheld judgments awarding compensation on the basis of a contract implied-in-fact even though the claimant was related to the decedent by blood or marriage.”⁴² Thus, regardless of which presumption was applied, “the final determination of whether the services were to be compensated depends on the circumstances relating to the plaintiff’s entry into and her stay in the Steffes household.”⁴³

In fact, however, the cases that the court cited either didn’t find the presumption rebutted⁴⁴ or involved not contracts implied-in-fact but

36. *Id.* at 513 n.17, 290 N.W.2d at 708 n. 17 (quoting *West v. Knowles*, 311 P.2d 689, 693 (Wash. 1957)). The trial judge made a similar argument without directly referring to the gender issue.

37. This is well illustrated by *Estate of Grossman*, 250 Wis. 457, 27 N.W.2d 365 (1947), discussed below in text accompanying note 299, *infra*.

38. “We start with the principle well-grounded in human experience that where one renders valuable services for another payment is expected.” 95 Wis. 2d at 500, 290 N.W.2d at 702.

39. The court did not comment on the irony of Virgil’s son simultaneously arguing that his father’s relationship with Mary Lou was meretricious and that she gave him services without charge because she was a member of his household.

40. Immediately after the words quoted in note 38, the court quoted an old Wisconsin case to the effect that proof that services were rendered shifted the burden of proof to the recipient. Since the gratuitousness presumption prevents this shift, it has a small impact, but the effect of *Steffes* is to remove it as the giant roadblock that it had traditionally been in family cases.

41. 205 Wis. 590, 238 N.W. 374 (1931).

42. 95 Wis. 2d at 503, 290 N.W.2d at 703.

43. *Id.*

44. The *Steffes* court quoted dictum from *Estate of Detjen*, 34 Wis. 2d 46, 53, 148

quantum meruit, that is, restitution.⁴⁵ The fact that restitution and not implied-in-fact contract was used to rebut the presumption of gratuitousness is much more than a technical matter. The presumption involves parties' expectations—their state of mind. The evidence necessary to prove an implied-in-fact contract that the woman was to be paid for her services is identical to what was needed to rebut the presumption that she was working for free—what the parties actually intended. Restitution (or quantum meruit), however, is not based on the parties' intentions but upon fairness or unjust enrichment, and even if the defendant had neither desire nor intention to pay for the services, he could be held liable. Thus, the presumption of gratuitousness could be defeated by a sense of fairness, even though no agreement, even tacit, could be shown. That Justice Abrahamson made no distinction between the two bases of liability in this context, despite fully understanding their differences, shows how vague the boundary is between them.

This was made even clearer a few years later in *Watts v. Watts*,⁴⁶ also an Abrahamson opinion. Sue Ann Evans Watts and James Watts lived together for twelve years and had two children without getting married, though she took his name, they filed joint tax returns, kept joint bank accounts and generally held themselves out as married. In fact, they would have had a perfect common law marriage if Wisconsin hadn't abolished the concept in 1917. After the Wattses broke up, Sue Ann sued for an accounting and division of assets. The case came up on a successful motion to dismiss, so the facts alleged had to be taken as true and construed under Wisconsin's liberal pleading rules. Ms. Watts had tried to apply the marriage provisions of the Wisconsin Family Code to the non-marriage, but the Supreme Court refused to go along. It did, however, reinstate her claims based on both contract and unjust enrichment.

N.W.2d 745, 748 (1967), saying that the presumption could be rebutted by a promise "implied-in-fact, that the services were to be paid for," but in fact, *Detjen* found that no such contract had been proven. *Steffes* also cited *Kramer v. Bins*, 205 Wis. 562, 238 N.W. 407 (1931) for the proposition that the trier of fact should determine the expectation of compensation; Justice Abrahamson conceded that in *Kramer* the jury found that the parties had agreed that no compensation would be paid. *Steffes*, 95 Wis. 2d at 498-99, 290 N.W.2d at 701-02.

45. *Estate of Voss*, 20 Wis. 2d 238, 121 N.W.2d 744 (1963), involving a woman who answered an ad for a housekeeper but ended up working without pay while expecting to get married, was decided on a quantum meruit basis, though the court is a bit vague on the difference between that and an implied-in-fact contract. *Estate of Anderson*, 242 Wis. 272, 7 N.W.2d 823 (1943), in which a man moved back in with his ex-wife two days after their divorce became final, but did not pay her for her services or leave her anything in his will, also is pretty clearly based on quantum meruit, though the court is again not that clear. *Estate of Grossman*, 250 Wis. 457, 27 N.W.2d 365, in which a daughter made hundred mile trips to care for her ailing father and mother, is clearly a quantum meruit case; the court cites no words from the father asking her to care for him.

46. 137 Wis. 2d 506, 405 N.W.2d 303 (1987).

A good portion of the court's opinion is devoted to explaining its refusal either to apply the Wisconsin Family Code's provisions on property division to non-marital relationship or to hold Mr. Watts estopped to deny that the parties were married. These arguments raise enticing family law issues, but the fact that the court took a rather conservative position on them and still found Ms. Watts's contract and restitution claims well stated shows me that *Watts*, like *Steffes*, is of interest to the law of obligations at least as much as it is to that of family and feminism.⁴⁷

As far as the contract claims went, the facts had not yet been fully developed. The case involved a motion to dismiss and the pleading rules did not subject the allegations of the complaint to much scrutiny. The court limited its discussion of their sufficiency to the statement that "[i]n this case, the plaintiff has alleged many facts independent from the parties' physical relationship which, if proven, would establish an express contract or an implied-in-fact contract that the parties agreed to share the property accumulated during the relationship."⁴⁸ Nonetheless, the allegations described in the *Watts* opinion suggest that the court was quite generous in this conclusion. As far as an express contract is concerned, the only allegations that I can find are that "[a]ccording to the amended complaint, the defendant 'indicated' to the plaintiff that he would provide for her,"⁴⁹ and that "the defendant indicated to the plaintiff both orally and through his conduct that he considered her to be his wife and that she would share equally in the increased wealth."⁵⁰ A more rigorous reading could have held that oral "indications" that "he would provide for her" and that "she would share equally in the increased wealth" were not enough to plead an express contract. Indeed, that the court put inverted commas around "indicated" suggests that it was well aware of the weakness of the allegation and that Ms. Watts might have trouble proving an express contract if the case went past the pleading stage.

To me, Ms. Watts made out a fairly good case for an implied-in-fact contract, given the joint returns, joint bank accounts, purchases of real and personal property as husband and wife, James's taking out a life insurance policy on Sue Ann with himself as beneficiary, and her cosigning promissory notes for him as his wife.⁵¹ The court cited an Oregon case

47. Without suggesting at all that the "contract" or "transactional" aspects are unrelated to family law and feminism, I make the reverse argument: we can learn about how to treat obligations in no way connected with sex, children or marriage by looking at cohabitation cases. See Patricia A. Tidwell & Peter Linzer, *The Flesh Colored Band-Aid: Contracts, Feminism, Dialogue and Norms*, 28 Hous. L. Rev. 791 (1991); Peter Linzer & Patricia A. Tidwell, *Letter to David Dow—Friendly Critic and Critical Friend*, 28 Hous. L. Rev. 861 (1991).

48. 137 Wis. 2d at 527, 405 N.W.2d at 312.

49. *Id.* at 513, 405 N.W.2d at 306.

50. *Id.* at 514, 405 N.W.2d at 307.

51. *Id.* at 513, 405 N.W.2d at 306.

that had held that “such a relationship and ‘joint acts of a financial nature can give rise to an inference that the parties intended to share equally,’”⁵² and that makes sense to me. But I find more intriguing the court’s earlier comment based on the fact that Ms. Watts had quit her job and abandoned her plans to become a nurse: “[a] change in one party’s circumstances in the performance of the agreement may imply an agreement between the parties.”⁵³ A change in circumstances may well justify an inference of an implied-in-fact contract, but it could equally support a finding of unjust enrichment or reliance and thus lead to liability based either on restitution or promissory estoppel.

The factual overlap was further shown when the court finally faced the issue it ducked in *Steffes*, whether unjust enrichment could be claimed in non-marital cohabitation cases. Ms. Watts had made an unjust enrichment claim on top of her contract claims, and Mr. Watts had trotted out the usual meretricious relationship arguments against it,⁵⁴ though his lawyer had shown some embarrassment in making similar arguments against the express and implied contract claims and had largely abandoned them at oral argument.⁵⁵ The court rejected the meretriciousness argument and expressly held that unmarried cohabitants could raise claims based on unjust enrichment, citing *Steffes*. It said that although *Steffes* had been decided on the implied-in-fact contract ground, it had cited with approval the trial judge’s question why *Steffes*’s estate should be enriched when he had been as much a part of the illicit relationship as Mary Lou Brooks.⁵⁶

In deciding that the complaint did state a claim for unjust enrichment the court recognized that Ms. Watts had alleged that she had contributed both property and services to the parties’ relationship and had not been compensated for her role in increasing their total assets. The court continued:

52. *Id.* at 529, 405 N.W.2d at 313 (quoting *Beal v. Beal*, 577 P.2d 507, 510 (Or. 1978)). In the same passage the *Watts* court cited *Warden v. Warden*, 676 P.2d 1037, 1038 (Wash. Ct. App. 1984) for the proposition that joint financial undertakings strongly implied an intention to have a “joint enterprise, financially as well as personally.” It should be noted that the *Watts* court had earlier rejected *Warden*’s application of Washington’s statutory marital property division guidelines to non-marital cohabitation. 137 Wis. 2d at 516-17, 405 N.W.2d at 307-08.

53. 137 Wis. 2d at 528, 405 N.W.2d at 312. The court cited *Steffes* to support this proposition, but I find nothing on the page cited to that effect. I must also point out that I have no idea what the words “in the performance of the agreement” mean here, since the agreement is what is at issue. Both points are quibbles; we may simply excise the phrase and ignore the question of precedents to go straight to the major point, which is discussed in the text.

54. “As part of his general argument, the defendant claims that the court should leave the parties to an illicit relationship such as the one in this case essentially as they are found, providing no relief at all to either party.” 137 Wis. 2d at 532, 405 N.W. 2d at 314.

55. *Id.* at 524-25, 405 N.W.2d at 311.

56. *Id.* at 531-32, 405 N.W.2d at 314. In fact, the “approval” in *Steffes* was more implicit than express.

She further alleges that the defendant, knowing that the plaintiff expected to share in the property accumulated, "accepted the services rendered to him by the plaintiff" and that it would be unfair under the circumstances to allow him to retain everything while she receives nothing. We conclude that the facts alleged are sufficient to state a claim for recovery based on unjust enrichment.⁵⁷

The court also held that the complaint stated claims for the imposition of a constructive trust and for partition. A constructive trust required unjust enrichment and abuse of a confidential relationship and partition was justified when the parties had entered into a joint venture or partnership intending to share the assets, to which the plaintiff had contributed.⁵⁸

Although it has to be remembered that *Watts* involved only the sufficiency of a complaint and not an assessment of evidence,⁵⁹ it does make clear what seemed to be true in *Steffes*: the facts in a cohabitation case can as easily support a restitution claim and related remedies as they can an implied-in-fact contract. There was no clear promise in either *Watts* ("the defendant 'indicated' to the plaintiff that he would provide for her"⁶⁰) or *Steffes* (Virgil had said that "he wanted to provide for the plaintiff and that he wanted her to have the house and farm on his death"⁶¹). The promises found or alleged were based primarily on the fact that the man had benefited from the woman's services knowing that she wanted compensation, which sounds an awful lot like what is needed to make out an unjust enrichment case. In addition, in *Watts* the court said that Sue Ann had alleged that she had quit her job and abandoned her career training "upon the defendant's promise to take care of her," and continued, "[a] change in one party's circumstances in performance of the agreement may imply an agreement between the parties."⁶² This seems to be using reliance to prove a promise, and it's hard to see, despite the circularity, why both Mary Lou Brooks and Sue Ann Watts couldn't also

57. *Id.* at 533, 405 N.W.2d at 314.

58. *Id.* at 533-37, 405 N.W.2d at 314-16.

59. On remand Ms. Watts was awarded \$113,090.08 for unjust enrichment, which was about ten percent of the increase in Mr. Watts's net worth over the eleven or twelve years that they lived together. The jury also found a breach of contract but awarded no damages for that. The unjust enrichment award was affirmed on appeal, but the case was remanded for a new trial on contract damages. *Watts v. Watts*, 152 Wis. 2d 370, 448 N.W.2d 292 (Wis. Ct. App. 1989). I am informed by David Walsh, Ms. Watts's lawyer, that the case was then settled for about \$250,000, which seems a good example of rough justice.

60. See *supra* text accompanying note 49.

61. See *supra* text accompanying note 31.

62. 137 Wis. 2d at 528, 405 N.W.2d at 312.

claim promissory estoppel, based on their reliance on their partner's promises, whether express or implied.

Promissory estoppel was actually used in an intriguing Australian case, *W. v. G.*,⁶³ in which a woman was held liable for child support for her lesbian lover's two children because of

the creation or encouragement by the defendant in the plaintiff of an assumption that a promise by the defendant would be performed, namely a promise that the defendant would act with the plaintiff as parents of the two children, and would assist and contribute to the raising of these children for as long as this was necessary,⁶⁴

together with reliance by the lover in having the children. This alone isn't particularly remarkable, but it becomes more interesting when we examine the case closely to see exactly what facts the Supreme Court of New South Wales, with Hodgson, J., sitting as trier of fact,⁶⁵ relied on to find the promise.

"W" and "G" were involved in a tempestuous relationship (I've tried to find a less clichéd adjective, but none comes to mind) for nearly nine years, with several breakups, accusations of infidelity, and violent confrontations together with expressions of concern and caring. The barrister for G described it as "just crazy all the time."⁶⁶ Despite the problems, the court concluded that there had been a "close and loving

63. (1996) 20 AUSTL. FAM. L.R. 4, 9 (Sup. Ct. New South Wales), available at <http://www.austlii.edu.au>. The actual term used in the opinion is "equitable estoppel," but in Australia that term includes what we know as "promissory" estoppel. See ELIZABETH COOKE, *THE MODERN LAW OF ESTOPPEL* 35 n.143, 52, 57-60, 69 (2000). In fact, the very case cited by the New South Wales court as having laid down "the principles of equitable estoppel," *Walton Stores (Interstate) Ltd. v. Maher*, (1988) 164 CLR 387 (Austr.), is cited by Cooke one of the cases that had "led to an extensive discussion of the possibility of a unified doctrine of estoppel in Australia." COOKE, *supra*, at n.24.

64. 20 FAM. L.R. at 49.

65. The procedural stance of the case is rather confusing to an American. The establishment by Britain of the Supreme Court of New South Wales was an important point in Australian history, and perhaps for that reason, the name is used to denote the court of first instance, much like the New York State Supreme Court. A single judge of the Supreme Court may sit as a trial court with appeal from his decision to the New South Wales Court of Appeal. Further appeal is possible, by permission, to the High Court of Australia, which is the highest court in the nation, even though the case involves a matter of state law, in this case the law of New South Wales. As far as I can learn, there was no further appeal in *W. v. G.* The case has been discussed in several law review articles in Australia and Britain and seems to be given more attention than we would likely give to the opinion of a state court of first instance. For information on the Supreme Court of New South Wales, see its web site at http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/whowcare_index (last visited May 18, 2001). I am informed that Justice Hodgson, who is a published writer of serious philosophy, has a very favorable judicial reputation and has recently become a Justice of the New South Wales Court of Appeal.

66. *Id.* at 66.

relationship" between the two. It is tempting, though unfair, to romanticize them as a sort of Thelma and Louise.⁶⁷

They met in early 1986, when they were both twenty-three. Neither seems to have had a regular line of work and each was unemployed on occasion. *W*, the plaintiff, comes through the opinion as rather passive, and possibly manipulative, while *G*, the defendant, was emotionally unstable, with a long history of drinking and some violence. Though *G* was often unemployed, she came from a wealthy family and contributed most of the cost of acquiring several pieces of real property and some cars. *W* was more regularly employed, though at low-paying jobs, and apparently contributed toward the couple's general living expenses. About three years into the relationship, after one of the separations, *W* and *G* discussed the idea of *W* having a child by means of artificial insemination. In the winter of 1988-89, arrangements were made with a man who provided semen on the condition "that he have no involvement with or responsibility for the child."⁶⁸

[H]e provided semen which was injected into the plaintiff's vagina. According to the plaintiff, it was the defendant who performed these injections. The defendant denies this but she admits to participating, at least to the extent of bringing the sterilised container with the semen to the plaintiff keeping it warm under her arm.⁶⁹

In November of 1989 *W* gave birth to a boy. Under Australian law she was entitled to a "supporting parents benefit," but in applying for it she lied about the father, claiming he had been a male on holidays from New Zealand. In January of 1992, *W* had a second child, this time, a girl. The court described the circumstances leading up to this conception as follows:

In late 1990 and early 1991, there were discussions about the plaintiff having another child. In March and April 1991, the plaintiff went to an acquaintance's house in Sydney. The man who had previously provided semen came to the house on a number of days in each month and again provided semen.

67. Putting aside the facts that Thelma and Louise weren't gay and that there is no road trip involved in *W. v. G.* In an otherwise excellent article, Jenni Millbank gave the parties the made-up names of Wendy and Grace "for the sake of readability and to resist a tendency to dehumanise lesbians in legal (and other) discourses." See Jenni Millbank, *An Implied Promise to Parent: Lesbian Families, Litigation and W. v. G.*, 10 AUSTL. J. FAM. L. 112, 112 n.2 (1996). While Millbank's motives are justifiable, to me this smacks of the New Journalism of the 1970s, where reporters would tamper with the facts to create what they saw as a truer reality.

68. 20 FAM. L.R. at 52.

69. *Id.*

According to the plaintiff, the defendant came with her in March but not in April. The defendant denied coming to this house on either occasion. Again it appears that the plaintiff became pregnant as a result of the artificial conception procedures.⁷⁰

Again, *W* lied to the authorities about the circumstances of the conception.

From several of *G*'s words and acts after the children were born, it seems clear that the children, and *W*, meant a great deal to her, at least for a while. *G* made a will leaving all her estate to *W* or to the children if *W* died before her, though she later reduced the gifts to ten thousand Australian dollars apiece and then cut *W* and the children out of her will entirely. At various times in 1993 and 1994 *G* told *W*'s mother that if anything happened to *G* the children would be well provided for, told two neighbors that she would get *W* a house, and told *W* that she would never see the children go without.⁷¹ In March of 1993 *G* consulted a doctor whose notes were described by the court as showing that *G* was depressed and suicidal because two months earlier "a 'lesbian relationship' with the plaintiff and two children had ended." During that separation, according to *W*, *G* sent her a card reading:

Today we are friends.
And thats [sic] fine with me.
But I hope one day
That you'Will [sic] see
That all these years
I never realy [sic] knew
Just how much
I honestly do love you
For so long I've been such a fool
And I'm so sorry
For all the pain and hurt
I have caused you
Night after night
I set here alone
Praying to God that
One day my family will come back home
Only God knows
What will be for the best
Most of all I pray
That you'll find peace and happiness
All my love⁷²

70. *Id.* at 53.

71. *Id.* at 60.

72. *Id.* at 53-54 (the "sics" are the court's).

While *G* denied sending the card, the court found that she had.⁷³

In 1994 the two women broke up for the last time. In late 1994, when *G* returned to Australia from Canada, where she had moved with a new lover, *W* had her arrested on a gun charge and told the police that *G* had said that she would put a bullet in *W*'s head. *G* said that *W* shouted at her "You are going to jail for 10 years for the gun, bitch. There goes your immigration. Let's see who gets the house now."⁷⁴ Eventually, the gun charge was dismissed, but Judge Hodgson concluded, over each woman's denial, that both women had said the words charged.⁷⁵ The lawsuit followed soon after the final breakup.

W sought to have a constructive trust placed on a house, to get title to a four-wheel drive Toyota and to be awarded a lump sum for maintenance of the children. The court refused the constructive trust and found that *W* had no right to the vehicle, but granted her \$151,125 in lump sum child support.⁷⁶

Judge Hodgson carefully considered the parties' relative contributions to their living expenses and to the property that they had bought, and found that "in circumstances where accommodation was almost entirely provided by the defendant, the plaintiff's somewhat greater contribution to living expenses does not suggest any inequity, much less provide any basis for constructive trust; . . . nor does plaintiff's contribution in looking after the children."⁷⁷ In addition, he found that *W* had contributed only a minimal amount to the real property that had been bought. He found no ground for a constructive trust and said that he would take *W*'s contributions into account when considering child support.⁷⁸ I rather agree with Judge Hodgson on the property question.

73. *Id.* at 54, 58.

74. *Id.* at 56.

75. *Id.* at 58.

76. Much of the opinion of the New South Wales Supreme Court is devoted to whether the sperm donor should be liable for child support, in part because the procedures prescribed by statutes dealing with artificial conception had not been followed. The court found that the sperm donor was not liable under the statutes and also rejected a series of public policy arguments put forth by *G*'s barrister to the effect that the sperm donor should be liable for child support rather than *G* either because of *W*'s unclean hands in concealing the donor's identity from the government or because the courts should discourage lesbian raising of children so as to promote stable marriages. The court rejected these arguments rather dismissively. *Id.* at 62-66.

Several writers have noted that because gay and lesbian relationships have little statutory support their members are forced to use private law remedies and often end up attacking the relationship itself, to the detriment both of their self-esteem and gay rights generally. Millbank quoted one writer: "As Susan Boyd has commented, in relation to Canadian developments, 'Oh goodie, now we get to sue one another!' How radical a gesture can this be in the struggle to obtain respect and equality for lesbians and gay men?" See Millbank, *supra* note 67, at 124.

77. 20 FAM. L.R. at 61.

78. *Id.* at 60-61.

W's contribution appears to have been less than that of Mary Lou Brooks in *Steffes* or Sue Ellen Watts in *Watts*.

The child support question appeared quite different to Judge Hodgson. He found a promise by *G* to help support the children and reliance by *W* in having them and obligating herself to provide for them, and further found that it would be "unconscionable for the defendant now to seek to make no contribution whatsoever to the upbringing of the children."⁷⁹ I agree about *W*'s reliance and that it would be unconscionable for *G* to renege on her promise—if she in fact made the promise. But I have a hard time finding it. If we are really talking about estoppel, we can only be concerned with promises that were made before *G* had the two children, since she could only rely on promises already existing.⁸⁰ There was a lot of evidence that *G* had shown concern for the children after they were born and had made promises about them and spoken of them and *W* as her family, but there was very little of that before their birth. Judge Hodgson acknowledged the absence of a focused promise:

As regards the circumstances in which the children were conceived, I accept that the initiative for this came very much from the plaintiff and it may be that the plaintiff has to some extent exaggerated the enthusiasm of the defendant for her having children. *I cannot find the exact conversations but I think the plaintiff's version is closer to the truth than the defendant's.* The defendant did not say words to the effect that the plaintiff would or could be on her own in relation to the children or that the relationship was not permanent but the defendant did say words to the effect that the first child (at least) would be "our baby" and that the plaintiff and the defendant and the child would be "a family." The defendant did participate in the artificial conception procedure, at least to the extent of using her body to keep the sperm warm while being taken to the plaintiff. I am not able to be sure whether the defendant did go to Sydney in connection with the conception of the second child but I am satisfied that the defendant did agree to the plaintiff having a second child *in circumstances such as to indicate* that the defendant's relationship with this child would be the same as with the first child.⁸¹

79. *Id.* at 66. It is a standard provision of the English and Australian forms of promissory estoppel to find that it would be unconscionable for the promisor not to perform. COOKE, *supra* note 63, at 63-64, 84-117, 159-61.

80. It's funny how much that sounds like reliance theory's arch-enemy, bargain, specifically the past consideration cases like *Mills v. Wyman*, 20 Mass. 207 (1825); and *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935), *cert. denied*, 168 So. 199 (Ala. 1936).

81. 20 FAM. L.R. at 60 (emphasis added).

Maybe this is enough for promissory estoppel, maybe not. Two writers on *W. v. G.*, both sympathetic to *W* getting child support, had their doubts about the promise. John Wightman of the University of Kent in Canterbury, England wrote that while promissory estoppel avoids the need to find a bargain in an intimate relationship, “the charge of artificiality can still be leveled at the use of estoppel in cases like *W. v. G.* because there is still the need to construct an implied promise which precedes some act of reliance”⁸² Jenni Millbank, of the University of Sydney Law School, spoke of the court “eventually holding, somewhat ambiguously that Grace ‘did say words to the effect that the first child (at least) would be “our baby”’ and ‘did participate . . . at least to the extent of using her body to keep the sperm warm while being taken to [Wendy]”⁸³ As to the court using remarks *G* made after the children were born,

To fall within the bounds of promissory estoppel this evidence must have been used to prove a retrospective intent, because promises following the births betray the necessary element of detrimental reliance. (Alternately, one could argue the legal realist position that the use of promissory estoppel was simply a ruse for doing what seemed fair in the circumstances.)⁸⁴

Millbank decried the need to treat the matter as a business deal rather than as a matter of family and parenting:

The limitations of an equitable framework show themselves, as the lived reality of four people as a family (or not) don’t really matter in coming to a conclusion. The focus on insemination (the point of promise) rather than on a functional familial relationship also draws lesbian parents into an uncomfortable and perhaps ill-fitting heterosexual analogy. Did Grace, or didn’t she, inject the sperm with her own hand? As though it is this likeness with procreative intercourse, and not six years as a co-mother, that makes her, ah-hem, a Dad.⁸⁵

Millbank is not criticizing Judge Hodgson, who did a sensitive job with limited legal resources. Millbank’s complaint is with the legal

82. John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST L. REV. 93, 98 (2000).

83. Millbank, *supra* note 67, at 115. On Millbank’s making up names for *W* and *G*, see note 67.

84. *Id.* at 116.

85. *Id.*

system, which ignores homosexual families, and so reduces a child support dispute to a contract argument. Indeed, her conclusion is that

The judgment in *W. v. G.* is in many ways an evenhanded and careful attempt to validate a lesbian family, and as such stands as a landmark in this country's legal history. . . . This article has argued, however, that the tools at the court's disposal were fashioned in response to very different circumstances, and as such could not necessarily cope with the many complex issues facing it. Likewise, the court could only do equity with the individual issues put to it—and the wider context of legal omission and discrimination against lesbians in general and lesbian co-mothers in particular was not, and perhaps could not, be addressed. When that wider context is examined, however, it is harder to see the case as an unequivocal improvement in the legal recognition of lesbian families.⁸⁶

I'm quite willing to agree with Millbank that the problem of marginalization of groups such as lesbians can better be handled by legislation, but *W. v. G.* shows that the common law, particularly these more or less contractual devices that I've been exploring, can deal with relationships that just don't fit the mold and are covered neither by a positive statute nor by a negotiated and well-drafted contract. Actually, in its finding of a promise from ambiguous circumstances, the case that *W. v. G.* most reminds me of is not a family law case at all. It is that perennial of the contracts course (and source of endless debates by contracts professors), *Hoffman v. Red Owl Stores*.⁸⁷

C. Busted Deals: Promissory Estoppel and Business Torts

Should there be anyone on earth who does not know the facts of *Red Owl*, it can be summarized quickly: Joseph Hoffman, a young man who ran a bakery in Wautoma, Wisconsin, wanted to get a franchise to operate a Red Owl supermarket. Most of his dealings were with Edward Lukowitz, Red Owl's divisional manager, who was in charge of eighty-four stores in Upper Michigan and Wisconsin. Initially, Hoffman said

86. *Id.* at 126. Millbank points out that *G* was socked for \$150,000 in child support but given no visitation or custody rights, or, for that matter, any rights as a parent. The issue, after all, was only over her alleged promise to pay towards the children's upkeep, and the chances of a lesbian "co-mother" being granted any parental status as a matter of Australian family law were rather poor. *Id.* at 27-29. For an extraordinarily sensitive group of opinions dealing with the issues raised by custody and visitation battles between "psychological" and biological parents, including but not limited to same-sex partners, see *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), *aff'g* 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999).

87. 26 Wis. 2d 683, 133 N.W.2d 267 (Wis. 1965).

that all he had to invest was \$18,000, and, in the Wisconsin Supreme Court's words he "was repeatedly assured that this would be sufficient to set him up in business as a Red Owl store."⁸⁸ At Lukowitz's suggestion, Hoffman changed his business several times and ended up moving all around Lake Winnebago. He bought a small grocery store in Wautoma and operated it for a few months to gain experience. In June, just before the tourist season, Hoffman sold the grocery on Lukowitz's advice, based on an assurance that he would be operating in a new location by fall and needed to sell the grocery if he wanted a bigger store. In early fall, "[o]n Lukowitz's assurance that everything was all set"⁸⁹ Hoffman put a down payment on a lot in Chilton. A couple of weeks later Lukowitz told Hoffman that "everything is ready to go. Get your money together and we are set."⁹⁰ Hoffman then sold the bakery building on Lukowitz's direction, and took a night job in an Appleton bakery.

While these negotiations were going on, however, Red Owl's home office started having concerns about Hoffman's financing, and the amount Red Owl projected as his investment started creeping up. By early December the home office wanted a \$26,000 investment, and when Hoffman's father-in-law came up with half, the home office insisted that he subordinate the investment to creditors and sign an statement that the \$13,000 was an outright gift. There was further haggling over the terms and the deal fell through, with Hoffman and his wife suing Red Owl. After a jury had decided in the Hoffmans' favor, the Wisconsin Supreme Court upheld the verdict (though reversing on the amount of damages), saying that "[t]he record here discloses a number of promises and assurances given to Hoffman by Lukowitz in behalf of Red Owl upon which plaintiffs relied and acted upon to their detriment,"⁹¹ and that "injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment."⁹²

Just what were the "number of promises and assurances"? When I was a lad, I helped out with putting the *Second Restatement of Contracts* into final form, and my bosses, Judge Robert Braucher and Professor E. Allan Farnsworth directed me to write an illustration to section 90 based on *Red Owl*. I think what they had in mind was something like "A makes assurances to B that he will get a grocery franchise, based on which B expends funds and moves. . . ." When I looked at *Red Owl*, however, I had trouble figuring out what those assurances actually were and felt obliged to list chapter and verse from the opinion, producing what

88. 26 Wis. 2d at 688, 133 N.W.2d at 269.

89. *Id.* at 688, 133 N.W.2d at 270.

90. *Id.* at 688, 133 N.W.2d at 270.

91. *Id.* at 696-97, 133 N.W.2d at 274.

92. *Id.* at 699, 133 N.W.2d at 275.

is probably the longest illustration in Restatement history.⁹³ My reason was a somewhat inarticulate feeling that the supposed promises and assurances could only be assessed in light of the dealings between the parties. While the court referred to Red Owl's assurances several times as promises sufficient to trigger liability under section 90, they are far removed from the clear promises of gifts that were Williston's original target: "Johnny says, 'I want to buy a Buick car.' Uncle says, 'Well, I will give you \$1000,'"⁹⁴ or even the business promise that led to liability in the well-known Texas case of *Wheeler v. White*.⁹⁵

I don't believe that I had read Ian Macneil when I had those doubts about what *Red Owl* was about, but now I see it as a case that is less about reliance on a promise than it is about reliance on a relationship. True, it was a very different relationship from that in *W. v. G.*, but that is the point. Depending on the nature of a relationship, what one party says to another may or may not be enough to trigger liability, regardless whether it can properly be called a promise. Many observers of *Red Owl* have tried to base liability on a bait and switch, since the price kept going up and up,⁹⁶ but the Wisconsin Supreme Court expressly stated that "there is no evidence that would support a finding that Lukowitz made any of the promises, upon which plaintiffs' complaint is predicated, in bad faith with any present intent that they would not be fulfilled by Red Owl."⁹⁷

To me, Lukowitz was a typical salesman, and just got carried away until the green eyeshades in the home office reeled him in. Lukowitz, I think, honestly wanted Hoffman to get the franchise and thought that he was adequately financed, but came to realize that the credit people in the

93. See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d, illus. 10. Chuck Knapp later wrote of this illustration that as a student brief of *Red Owl* it was fine, but that it did nothing to give guidance in any situation other than *Red Owl* itself. Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 57-58 (1981). When I told him that I was in fact its author, Chuck, always the gentleman, was embarrassed. I assured him that far from taking offense, I agreed with him, but had written the illustration with my eyes open. Ironically, Illustration 10 is printed out in full and heavily relied upon in the recent New Jersey case of *Pop's Cones, Inc. v. Resorts International Hotel*, 704 A.2d 1321, 1325 (N.J. App. Div. 1998), discussed *infra*, notes 183-204, and Chuck and his colleagues reprint the whole illustration in their edited version of *Pop's Cones* in the latest edition of CHARLES L. KNAPP, NATHAN L. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 265, 270 (4th ed. 1999). All this shows how fact-specific *Red Owl* and its progeny necessarily are.

94. See 4 A.L.I. Proc. app. 85 (1926), reprinted in PETER LINZER, A CONTRACTS ANTHOLOGY 339, 340 (2d ed. 1995).

95. 398 S.W.2d 93 (Tex. 1965). In *Wheeler v. White*, White promised Wheeler that he would either obtain or make a loan to develop a parcel that Wheeler owned, and later advised Wheeler to go ahead and demolish the existing buildings on land. The loan never materialized and the Texas court found that White was liable to Wheeler for Wheeler's reliance damages.

96. See, e.g., W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 225 (1990) ("overpromising").

97. *Hoffmann*, 26 Wis. 2d at 695, 133 N.W.2d at 273.

home office were skeptical. Lukowitz tried to broker the deal, and even tried to slip parts of the deal past his bosses: "Lukowitz told Hoffman the partnership arrangement [with his father-in-law] 'sounds fine' and that Hoffman should not go into the partnership arrangement with the 'front office.'"⁹⁸ To me, the best justification for holding Red Owl liable for Hoffman's losses was that it owed Hoffman a duty to control its agent more closely, a duty that came into existence because of the relationship of trust that had developed over the months. On that reading *Red Owl* could be seen as closer to a negligence case—a business tort—than to a contract,⁹⁹ but I think that, like many of the cases I have discussed, it is best seen as a relational case. It is wiser to spend less time labeling it tort or contract, or searching for promises on which to hang reliance, than on deciding if the relationship justifies finding that Red Owl should have realized that Hoffman was putting a lot of weight on Lukowitz's advice and that it owed Hoffman a duty to keep Lukowitz from getting carried away. This is not to say that promises or assurances on the one hand, and concepts of unjust enrichment on the other are irrelevant. They aren't, but they take on meaning from the relationship itself.

Thus, the possibility also exists of finding tort liability rather than one based on an agreement, reliance, or restitution. But, as we have seen, these concepts often dovetail. And when we speak of economic torts, we are likely to ask where the duty comes from if there has been no mutual consent, promise, or unjust enrichment.

98. *Id.* at 690, 133 N.W.2d at 270.

99. That reasoning seems to support the Second Restatement's view that damages for promissory estoppel should be limited to reliance expenses and not the lost expectation. See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d illus. 10. That illustration, which I discussed in note 93, uses *Red Owl* to justify this approach, but the *Red Owl* opinion is actually ambiguous on the point, citing authorities going both ways and concluding only that it would not be unjust under the circumstances of the case to limit Hoffman's damages to his losses. 26 Wis. 2d at 699-703, 133 N.W.2d at 276-77. *Wheeler v. White*, 398 S.W.2d 93, is actually a clearer authority. The Restatement position has been attacked by many writers who have argued that the courts do not follow the Restatement on this issue. See, e.g., Slawson, *supra* note 96; Farber & Matheson, *supra* note 12; Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

In my mind, the particulars of the transaction must dictate the measure of damages. The closer a case is to a clear promise, the more likely it is that expectation will be appropriate, but at other times the plaintiff's out of pocket loss may make the most sense and at still others, the benefit to the defendant (which is neither expectation nor reliance-based) may be best. Despite what the courts say, the remedies in the cases discussed in text don't quite fit any of these categories. In *W. v. G.*, although the court nominally was using an expectation measure, it based the high award on an objective test (the "Lee Scale") based on *G*'s worth at the time of suit rather than what *W* could have expected when the alleged promise was made. See Millbank, *supra* note 69. In *Estate of Steffes*, the award to Mary Lou Brooks, though ostensibly based on implied-in-fact contract and thus properly an expectation measure, sounds a lot like the fair value of her services, which would fit with restitution, although it might also work for implied-in-fact contract.

The notion of a duty of care arising out of something other than contract is, of course, nothing new. Cardozo made a memorable statement in the foundation case of modern products liability, *MacPherson v. Buick Motor Company*, when he wrote:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.¹⁰⁰

In many situations the duty is pretty basic and obvious from the nature of a society seeking some amount of tranquility: you have a duty to use reasonable care to avoid hurting those upon whom your activities may have a physical impact. But when only words are involved and we are not talking of fraud or dishonesty, the duty is more controversial and its justification more elusive. Yet in many cases, there is an argument that the relationship, often a business relationship, itself has imposed a duty on one party to use care in what he says, or to have to disclose information that he would prefer to keep to himself. The leading British case, *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.*,¹⁰¹ a watershed 1963 decision by the House of Lords, was summed up by the reporter as showing "that a duty to exercise proper care may arise either out of a special relationship of general character, e.g., the relation of solicitor and client or of banker and customer, or out of a particular relationship created ad hoc . . ."¹⁰² In getting to that apparent rule,¹⁰³ the Law Lords gave great thought to the issues raised and their speeches are very helpful to our inquiry.

Before discussing the case, I must note that several aspects of English¹⁰⁴ practice make *Hedley Byrne* odd to an American eye. First is the custom, now beginning to be abandoned, of seriatim judicial speeches, each judge speaking for himself with no opinion of the court. Second is the then-existing practice of the courts not overruling their own precedents; thus, even the House of Lords, the highest court in Great Britain, felt bound by its prior decisions. Finally, and oddest of all, is the fact that all of the opinions in *Hedley Byrne* are dicta.

100. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

101. [1963] 2 All E.R. 575 (H.L.).

102. *Id.* at 576.

103. For reasons shown below, the actual "rule" in *Hedley Byrne* is not self-evident. See the reporter's rather apologetic Editorial Note, *id.* at 576.

104. England and Scotland have different legal systems, both in court structure and in substance, the Scottish system being closer to continental civil law. The House of Lords sits as the final appellate court of both the English and Scottish systems, and its decisions are properly called British, but its procedure is essentially that of the English courts, though in form it is simply a committee of the full House of Lords.

Hedley Byrne & Co. was an advertising agency that had obtained a new client, Easipower, Ltd. Since Hedley Byrne would be liable for any advertising that it bought on Easipower's behalf, it asked its banker, National Provincial Bank, to inquire of Easipower's bank, Heller & Partners, as to Easipower's "respectability and standing." National Provincial did so, without revealing its client's name, and on two occasions Heller & Partners responded, both times stating that it was doing so "without responsibility" on its part. National Provincial passed on Heller's comments to Hedley Byrne without identifying the bank by name. (Thus, neither Heller nor Hedley Byrne knew the other's name, but both understood that Easipower's banker was giving an opinion to Easipower's potential creditor.) Heller's assessment of Easipower used language that made it sound more favorable than Heller intended,¹⁰⁵ Easipower eventually went into liquidation, and Hedley Byrne lost over £17,000, the equivalent of over \$500,000 today.

We may well assume that an American court would have said something like "assuming arguendo that there was a duty of care, Heller & Partners effectively disclaimed liability," and then dismissed the case. Each of the Law Lords agreed that the disclaimer was effective, but among them they wrote forty pages on the question of the existence of the duty of care. The lead speech, by Lord Reid, spent much of its time explaining why the Lords were not bound by their famous 1889 decision in the negligent misrepresentation case of *Derry v. Peek*.¹⁰⁶ In *Derry*, directors of a company were held not liable to investors who relied on false statements in a prospectus. The action had been brought for deceit, and after a finding that the directors had honestly but unreasonably believed the prospectus to be true, the House of Lords held that no action could lie for their negligent misrepresentation, and one of the Lords, Lord Bramwell, had written that "to found an action for damages there must be a contract and breach, or fraud."¹⁰⁷ Since in 1963 the House of Lords took the position that it could not overrule its own precedents, Lord Reid was forced to write an elaborate opinion to show that Lord Bramwell's dictum had not been the law of the case and that *Derry* only applied to

105. National Provincial Bank had first asked if Easipower would be good for an advertising account of £8,000 to £9,000, and Heller had said that "we believe that the company would not undertake any commitment they are unable to fulfil." Some months later National Provincial asked Heller to state "whether you consider them trustworthy, in the way of business, to the extent of £100,000 per annum, advertising contract." Heller replied, "[f]or your private use and without responsibility on the part of the bank or its officials," that Easipower was a "[r]espectably constituted company, considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see." *Id.* at 579. For assessments of Heller's reference, see *id.* at 584 (Lord Reid) and 601 (Lord Devlin). One hundred thousand pounds in 1958 Britain was the equivalent of several million dollars today.

106. [1889] 14 App Cas. 337 (H.L.).

107. *Id.* at 347.

cases brought as fraud or deceit actions, not generally to claims based on negligence in using words.

Lord Reid relied heavily on a great English judge of the World War I era, Viscount Haldane, who in two important cases¹⁰⁸ had both distinguished *Derry* and put forth the thesis that a duty of care in using words arose from the nature of a business relationship. In the second of these cases, *Robinson v. Bank of Scotland*, Lord Haldane said that

[t]he whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the courts may find to exist in particular cases, still remains, and I should be very sorry if any word fell from me which should suggest that the courts are in any way hampered in recognising that the duty of care may be established when such cases really occur.¹⁰⁹

Lord Reid commented that the passage made clear that Lord Haldane was not speaking of fiduciary relationships in a narrow sense:

He speaks of other special relationships, and I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.¹¹⁰

Based on these cases and some later ones Lord Reid found that a duty of care could certainly exist when one expressed an opinion to another.

The question remained how to arrive at the limits of this duty of care. Like several of his colleagues, Lord Reid distinguished negligence by words from negligence by acts. "Quite careful people often express definite opinions on social or informal occasions, even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally, or in a business connexion."¹¹¹ In addition, words can be repeated and broadcast to others never intended to hear the remarks.¹¹²

108. See *Nocton v. Lord Ashburton*, [1914-15] All E.R. Rep. 45, [1914] A.C. 932 (H.L.); *Robinson v. Bank of Scotland*, 1916 Sess. Cas. 154 (H.L.).

109. *Robinson*, 1916 S.C. at 157.

110. *Hedley Byrne*, [1963] 2 All E.R. at 583.

111. *Id.* at 580.

112. *Id.* at 581. In the context of third-party liability Lord Reid later discussed two well-known Cardozo opinions, *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922) (holding a weigher of beans liable to a buyer who relied on the weigher's incorrect certificate, even

The question then became the "proximity" between the parties, and that, in Lord Reid's view, turned on whether one could infer that the speaker had undertaken a duty to be careful. Given the disclaimer of responsibility by Heller, Lord Reid found that no such inference could be supported, and therefore that Heller owed no duty of care to Hedley Byrne.¹¹³

Lord Morris of Borth-y-Gest also focused on the presence or absence of a duty of care when there is neither a contract nor a fiduciary relationship. After canvassing the authorities, he concluded that "[i]ndependently of contract there may be circumstances where information is given or when advice is given which establish a relationship which creates a duty not only to be honest but also to be careful,"¹¹⁴ and thus, that the inquiry must be "whether there was a relationship between the parties which created a duty and if so whether such duty included a duty of care."¹¹⁵ Lord Morris agreed that the bank had acted out of its own business interest in giving the reference, but also commented that if a banker does not appear to have committed himself to do a detailed study as opposed to giving a brief statement of credit-worthiness, "[t]here is much to be said . . . for the view that he does not accept, and there is not expected from him, any higher duty than that of giving an honest answer."¹¹⁶ Given Heller's disclaimer, Lord Morris easily found that it had not taken on any higher duty.

A third member of the panel, Lord Hodson, had no problem finding that this type of case could fall within the concept of negligence; the question was whether the relationship between the parties gave rise to a duty to take care.¹¹⁷ English tort law has long made use of the "neighbour" or "proximity" doctrine, which in one formulation, states that "if one man is near to another or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."¹¹⁸ Lord Hodson rejected earlier arguments that the neighbour doctrine was limited to physical acts: "I cannot see that there is any valid distinction in this field between a negligent statement, e.g., an incorrect label on a bottle, which leads to injury and a negligent compounding of ingredients which leads to the

though the weigher's contract was with the seller) and *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) (finding no liability for negligence to investors who relied on balance sheets certified to a corporation by the defendant accountants).

113. [1963] 2 All E.R. at 586-87.

114. *Id.* at 593.

115. *Id.*

116. *Id.* at 594-95.

117. *Id.* quoting *M'alister (or Donoghue) v. Stevenson*, [1932] All E.R. Rep. 1, 30 (MacMillan, L.J.).

118. *Le Lievre v. Gould*, [1893] 1 Q.B. 491, 497 (Esher, M.R.). Lord Esher created the doctrine in *Heaven v. Pender*, [1883] 11 Q.B.D. 503, 509.

same result.”¹¹⁹ But that still left the question of how to find proximity, and for that Hodson, too, went back to Viscount Haldane, who had said that “a special duty may arise from the circumstances and relations of the parties.”¹²⁰ He suggested that when a person holds himself out as having a special skill, even in the absence of a fiduciary relationship or contract, a “special relationship” exists, imposing a duty of care on him. Given the disclaimer and several Court of Appeal cases saying that bankers’ references did not have to meet a duty of care, and the burden that such a duty would impose on bankers, Hodson said that in the ordinary course of business a banker should not be under any duty other than telling the truth, barring some special features making the relationship different from the ordinary (and thus “special”).¹²¹ As to what the special features would be, he said it was impossible to catalog them, but added that he agreed with Lord Morris that when a person had a special skill and knew that his opinion would be relied on by third parties a duty of care would arise.¹²²

Lord Pearce also used the “good neighbour” approach, and applied it to special relationships: “There is also in my opinion a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded.”¹²³ Was such a special relationship present here?

The answer depends on the circumstances of the transaction. If, for instance, they disclose a casual social approach to the inquiry no such special relationship or duty of care would be assumed To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer.¹²⁴

Like his colleagues, Lord Pearce found the disclaimer a sufficient defense. It might well have been enough to exclude liability even if the parties were in an existing contractual relationship, but here, where they were not, the words used clearly prevented a special relationship from arising. “They are part of the material from which one deduces whether a duty of care and a liability for negligence was assumed. If both parties say expressly (in a case where neither is deliberately taking advantage of

119. [1963] 2 All E.R. at 597.

120. *Nocton v. Lord Ashburton*, [1914-15] All E.R. at 53, [1914] A.C. at 955-56.

121. [1963] 2 All E.R. at 599-601.

122. *Id.* at 601.

123. *Id.* at 617. Like Lord Reid, Lord Pearce discussed the two New York Court of Appeals opinions of *Glanzer v. Shepard* and *Ultramares v. Touche*, both by Cardozo. See *supra* note 112.

124. *Id.*

the other) that there shall be no liability, I do not find it possible to say that a liability was assumed."¹²⁵

The best opinion by far was by Lord Devlin. Lord Devlin is probably best known in the United States for his conservative stance against homosexuality in his famous debate with H.L.A. Hart.¹²⁶ Regardless of his politics, Devlin was a first-rate judge and his opinion in *Hedley Byrne* shows it. Like the others Lord Devlin distinguished *Derry v. Peek* and discussed several of the earlier House of Lords cases on liability for words. And like them he focused on the relationship between the parties:

What LORD ATKIN called a "general conception of relations giving rise to a duty of care" is now often referred to as the principle of proximity. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question.¹²⁷

He later restated the question: "[i]s the relationship between the parties in this case such that it can be brought within a category giving rise to a special duty?"¹²⁸

Devlin's emphasis on categories has a sound of formalism, but at this point he went beyond categories to look at the interplay between tort and contract. He said that the problem of negligent assurances "is a by-product of the doctrine of consideration."¹²⁹ If Heller and Partners had made a nominal charge for the reference or if consideration were not needed (as in Scottish law),¹³⁰ there would have been no difficulty. "[T]he question would be, not whether on the facts of the case there was a special relationship, but whether on the facts of the case there was a contract."¹³¹ In the case at hand, Devlin said, Heller argued that it was performing gratuitously and that because of this no liability for its performance could arise. "My lords, in my opinion this is not the law. A promise given without consideration to perform a service cannot be enforced as a contract by the promisee, but if the service is in fact performed and done negligently, the promisee can recover in an action in

125. *Id.* at 618.

126. H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963); LORD PATRICK DEVLIN, *ENFORCEMENT OF MORALS* (1968).

127. *Hedley Byrne*, [1963] All E.R. at 607.

128. *Id.* at 608.

129. *Id.*

130. *See id.* at 586 (Reid, L.J.).

131. *Id.* at 608.

tort.”¹³² Lord Devlin cited the 1703 gratuitous bailment case of *Coggs v. Bernard*,¹³³ in which a bailee spilled a quantity of brandy. His claim that he was alleged neither to have been a common porter (and thus to have been liable from his status) nor to have been paid (and thus liable in contract) was held no defense. In *Coggs* one judge had relied on the trust reposed on the defendant,¹³⁴ while another, Chief Justice Holt, had found this trust sufficient not only in negligence but also a sufficient consideration to support a contract.¹³⁵ Devlin cited a number of cases either using a tort analysis where someone had offered to do some economic act without compensation and done the job badly or using a forced concept of consideration to reach the same result through contract. It was at this point that he used the words that I quoted at the start of this paper, “My lords, I have cited these instances so as to show that in one way or another the law has ensured that in this type of case a just result has been reached.” He continued, “But I think that today the result can and should be achieved by the application of the law of negligence and that it is unnecessary and undesirable to construct an artificial consideration,”¹³⁶ and quoted Sir Frederick Pollack as saying that “the cause of action is better regarded as arising from default in the performance of a voluntary undertaking independent of contract.”¹³⁷

From these cases Lord Devlin concluded that the doctrine was properly extended to cases involving the voluntary giving of information, and that the real question in deciding whether a special relationship existed was whether the relationship was “equivalent to contract.”¹³⁸ Devlin mentioned that he had read each of his colleagues’ speeches in advance. “I do not understand any of your lordships to hold that it is a responsibility imposed by law on 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.”¹³⁹ Thus, under the proper circumstances, there was a duty of care in giving information gratuitously, but under the particulars of the present case, especially Heller’s disclaimer, it was appropriate to find no liability.¹⁴⁰

132. *Id.*

133. [1703] 2 Ld. Raymond 909.

134. *Hedley Byrne*, [1963] 2 All E.R. at 608.

135. *Id.* at 609.

136. *Id.* at 610.

137. *Id.* (quoting POLLACK ON CONTRACT 140 n.31 (13th ed. 1906) (discussing *De la Bere v. Pearson, Ltd.*, [1904-07] All E.R. Rep. 755, [1908] 1 K.B. 280).

138. *Hedley Byrne*, [1963] 2 All E.R. at 610 (quoting *Nocton v. Lord Ashburton*, [1914] A.C. at 972, the case which every member of the *Hedley Byrne* court had cited and quoted from the speech of the Lord Chancellor, Viscount Haldane.

139. *Hedley Byrne*, [1963] 2 All E.R. at 610-11.

140. *Id.* at 611-13.

I have spent all this time on *Hedley Byrne* both because it is the leading English case on negligence as a business tort and because of the richness of the contract and tort analysis in the various law lords' speeches, especially Lord Devlin's. I am particularly struck by the fact that in many of the fact situations discussed, an American court would have been likely to find promissory estoppel liability under section 90 of the *Restatement of Contracts*, a topic only slightly alluded to in the speeches. (Both Lord Devlin and Lord Pearce cited the *Restatement*, and though the Reporter's citations are somewhat garbled, it is pretty clear they are referring to section 90.)¹⁴¹ The *Coggs v. Bernard* gratuitous bailment situation reminds me of the famous New York case of *Siegel v. Spear*,¹⁴² often referred to as a way station on the road to promissory estoppel.¹⁴³ Lord Devlin also had cited a 1789 case finding tort liability for the failure to carry out a gratuitous promise to buy insurance,¹⁴⁴ a fact situation that is a commonplace example of promissory estoppel in the United States.¹⁴⁵ In his discussion of *Hedley Byrne* in the eleventh edition of *Cheshire, Fifoot and Furmston*, M.P. Furmston puts forth a hypothetical in which he finds tort liability for a negligently prepared subcontractor's bid that causes loss to a general contractor.¹⁴⁶ This, of course, is exactly the fact situation in the paradigm American case on commercial promissory estoppel, Roger Traynor's California opinion in *Drennan v. Star Paving Co.*¹⁴⁷

The explanation why the English cases have used negligence where we would use reliance and promissory estoppel is that England has still not fully accepted promissory estoppel as a sword, allowing an affirmative action for damages rather than as a response to an affirmative defense of no consideration.¹⁴⁸ But *Hedley Byrne* shows that the distance between the promissory estoppel of *W. v. G.* or *Hoffman v. Red Owl Stores* and the tort liability of *Hedley Byrne* is small indeed.

Hedley Byrne was applied to representations that preceded a written contract in the 1976 Court of Appeal case of *Esso Petroleum Co. v.*

141. *Id.* at 611-12 & n. 206 (Devlin, L.J.); *id.* at 617 & n. 246 (Pearce, L.J.).

142. 138 N.E. 414 (N.Y. 1923) (gratuitous bailee who promised to get fire insurance but failed to do so, held liable despite requirement of gross negligence in gratuitous bailments).

143. See *Alleghany Coll. v. Nat'l Chautauqua Bank*, 159 N.E. 173, 175 (N.Y. 1927) ("sign post") (Cardozo, J.).

144. *Wilkinson v. Coverdale*, [1789] 1 Hy. B. 158.

145. See RESTATEMENT (SECOND) OF CONTRACTS § 90, cmt. e., illus. 13; *Shoemaker v. Commonwealth Bank*, 700 A.2d 1003 (1997).

146. M.P. FURMSTON, *CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT* 270 (11th ed. 1986).

147. 333 P.2d 757 (1958). At the close of his opinion, Justice Traynor suggested that *Star Paving* may in fact have been liable for negligence as well. See 333 P.2d at 761.

148. See COOKE, *supra* note 63, at 118. The law is slowly changing in England but the general rule is still that promissory, as opposed to proprietary estoppel, can only be a defense. The rule is different in Australia, as *W. v. G.* shows.

Mardon,¹⁴⁹ with the lead opinion by the great Lord Denning, Master of the Rolls.¹⁵⁰ In *Mardon*, Esso wanted to have a filling station fronting on Eastbank Street, a busy street in Southport. It picked out a site and before buying it made a careful estimate of the expected volume, figuring that the proposed station would sell 200,000 gallons a year by the third year of operation. It then went ahead and bought the site. The local planning authority, however, refused to allow the gasoline pumps fronting on Eastbank Street and Esso was forced to build the station, at a cost of £40,000, "back to front," with the forecourt and gas pumps accessible only from a side street. Esso did not revise its estimate of sales volume, and went ahead looking for a tenant. They found Phillip Mardon, described by Lord Denning as "an excellent man,"¹⁵¹ but Mardon was skeptical about the volume estimate. Nonetheless, Esso's representatives persisted in their estimate and Mardon agreed to the proposed terms. The station never came close to the estimates and Mardon gave notice to quit. Esso, realizing that it could not find a substitute tenant of Mardon's quality, agreed to a downward modification of the lease. Lord Denning described what happened then:

Again Mr. Mardon tried hard to make a success of the service station: but again he failed. It was not his fault. The site was simply not good enough to have a throughput of more than 60,000 to 70,000 gallons. He lost more and more money over it. In order to help him, Esso tried to get another site for him—a "cream" site—so that he could run the two sites in conjunction to offset his losses. But they never found him one. Eventually on January 1, 1966, he wrote to Esso appealing to them to find a solution. He consulted solicitors who wrote on his behalf. But Esso did nothing to help. Quite the contrary. They insisted on

149. [1976] 1 Q.B. 801.

150. Lord Denning (1899-1999) was the best known, and to many the greatest, English judge of the twentieth century. In his impact—and his tart tongue and complex combination of conservatism and revolution—he reminds me of Lord Mansfield. His most famous opinion, written when he was simply Denning, J., and a trial level judge, was in the 1947 case of *Central London Property Trust Limited v. High Trees House Limited*, [1947] K.B. 130, the seminal English case on promissory estoppel. On *High Trees* see COOKE, *supra* note 63, 32-42 and *passim*. His dissenting Court of Appeal opinion in *Candler v. Crane, Christmas & Co.*, [1951] 1 All E.R. 426, was an important influence on all the Law Lords in *Hedley Byrne*. He was an active judge for thirty-eight years. After serving as a judge of the first instance, Denning went to the Court of Appeal and then the House of Lords, where he was usually in dissent. In 1962 he took the unusual step of going back to the intermediate Court of Appeal as Master of the Rolls, the equivalent of chief justice of that influential court. He remained Master of the Rolls for twenty years, retiring at eighty-three. He played a powerful role in the development of many areas of English law. He was widely mourned at his death at 100, and it seemed that every barrister in England, up to the Prime Minister himself, had a Lord Denning story.

151. *Mardon*, [1996] 1 Q.B. at 815.

the petrol being paid for every day on delivery. On August 28, 1966 (by some mistake or misunderstanding while Mr. Mardon was away), they came and drained his tanks of petrol and cut off his supplies. That put him out of business as a petrol station. He carried on as best he could with odd jobs for customers, like washing cars. Esso had no pity for him. On December 1, 1966, they issued a writ against him claiming possession and £1,133 13s. 9d. for petrol supplied. This defeated him. On March 7, 1967, he gave up the site. He had tried for four years to make a success of it. It was all wasted endeavour. He had lost all his capital and had incurred a large overdraft. It was a financial disaster.¹⁵²

Mardon counterclaimed for losses of more than £16,000 of capital plus lost profits, on the alternative grounds of collateral warranty and negligent misrepresentation. (A statutory action under the Misrepresentation Act of 1967 was unavailable because the Act had not yet taken effect.) The trial judge rejected the warranty claim but found for Mardon on the negligence theory, though he gave him only limited damages. Both side appealed to the Court of Appeal.

Despite his harsh words about Esso neither Lord Denning nor his fellow judges found bad faith or deliberate misrepresentation by Esso.¹⁵³ Esso argued that the estimate was just that and not a guarantee that the station would reach a throughput of 200,000 gallons, a position with which the trial judge agreed, but all of the appellate judges voted to reverse. Throughout their opinions runs the idea that while Esso was not guaranteeing a number, it was putting forth its own expertise and market experience to state the station's potential, with the intention of inducing Mardon to enter into a lease with it. As Shaw, L.J., put it,

Mr. Mardon was not merely becoming a tenant of Esso. He was committing himself to further their commercial interest by the use of his capital as well as by the application of his energy and effort. Esso could hardly have expected that they could procure any man with a modicum of business sense to put all his capital as well as his future at risk for a nebulous prospect based on a mere opinion which is casually given and for the rightness of which all responsibility is disclaimed.¹⁵⁴

152. *Id.* at 816-17.

153. I would not have been so generous. The original estimate seems to have been done in good faith, but had Esso projected a much lower throughput after the redesign, it would not have been able to charge the rent it did and probably would not have got Mardon as a tenant. In fact, Esso's own witness testified that "[h]ad it been an estimated throughput of 100,000 gallons, they [Esso] would not have bought it in the first place." *Id.* at 815.

154. *Id.* at 831.

Esso also argued that the principle of *Hedley Byrne* could not apply if the parties had subsequently entered into a contract. “[O]nce parties enter into a contract their rights are defined in the contract and pre-contractual promises merge in the contract.”¹⁵⁵ The Court of Appeal judges all rejected this. In Lord Denning’s words:

It seems to me that *Hedley Byrne* . . . properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another—be it advice, information or opinion—with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages.¹⁵⁶

We can see in *Mardon* a coalescing of contract, tort, and reliance notions. A year or so later, the same court, with two out the same three judges sitting, and by a 2-1 vote, allowed a dredging company to recover sizable damages based on what all agreed was an extremely innocent misrepresentation, with each judge having a different theory of the case, and with Lord Denning arguing for no liability. In that case, *Howard Marine and Dredging Co. Ltd. v. A. Ogden & Sons (Excavations) Ltd.*,¹⁵⁷ the defendant, Ogdens, had a contract to remove earth from a large construction project and tow it out to sea. It chartered two barges from Howard Marine after a representative of Howards, Mr. O’Loughlin, gave them an estimate of the capacity of the barges. Because Howards had only recently bought the barges and the barges’ documents were in German, O’Loughlin, instead of checking his company’s records, relied on Lloyd’s Register, the “Bible” of the shipping industry and an authority with a very high reputation for accuracy. In this case, however, Lloyd’s was incorrect and as a result, Ogdens was not able to perform its duties. Ogdens refused to pay for the barges, Howards withdrew them, the project was delayed, and Ogdens hired substitute barges to complete its work. Howards sued for the balance of the charter fee, some £93,000 and Ogdens counterclaimed for £600,000 damages from Howard’s misstatement of the cargo-carrying capacity of the barges.

At trial Ogdens had argued that there was no express contract in the case. Lord Denning pointed to a letter that Howards had sent five months

155. *Id.* at 813 (argument of counsel).

156. *Id.* at 820.

157. [1978]1 Q.B. 574.

before the barges were delivered in which it had offered to lease the barges at £1800 per week "subject to availability and charterparty," a letter that was never agreed to by Ogdens. In the end, Howards reduced the charter fee considerably and no charterparty was signed, but Lord Denning, noting that Ogdens had abandoned the no-contract argument, said that "[i]t is plain that when the barges were delivered and accepted there was a concluded contract on the terms of the charterparty."¹⁵⁸

Ogdens had counterclaims based on a collateral warranty, common law misrepresentation, and the Misrepresentation Act of 1967, which now applied. Lord Denning rejected all three claims. As to the oral warranties, he required that the speaker intended them to be binding, and here found that too much time had passed during which a survey had taken place and drafts of the (never signed) charterparty had been exchanged without any reference to capacity.¹⁵⁹ As to common law negligence, Denning looked to *Hedley Byrne* and its progeny, including *Mardon* and argued that the cases required that the court look to "the 'gravity of the inquiry' and the seeking 'considered advice'" as opposed to more casual "off the cuff" comments.¹⁶⁰ "To put it more generally, the duty is one of honesty and no more whenever the opinion, information or advice is given in circumstances in which it appears that it is unconsidered and it would not be reasonable for the recipient to act on it without taking further steps to check it."¹⁶¹ Ogdens ought to have gotten Howard's statement in writing or to have got expert advice on their own. Thus, according to Lord Denning, no common law misrepresentation took place.

As to the statutory claim, the statute essentially reversed the burden of proof as to non-fraudulent misrepresentations. The speaker was liable "unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."¹⁶² Although the trial judge had asked himself¹⁶³ whether Mr. O'Loughlin had been negligent, rather than whether he had a reasonable ground to believe his statement about capacity was true, Lord Denning found criticism of this to be nitpicking. "Viewing it fairly, the judge (who had section 2 (1) in front of him) must have been of opinion that the burden of proof was discharged."¹⁶⁴

Finally, and notably, Lord Denning cited an "exception clause" in the charterparty, which provided that the charterers' acceptance of the vessel "shall be conclusive that [she is] . . . in all respects fit for the

158. *Id.* at 590 (citing *Brogden v. Metro. Ry. Co.*, [1877] 2 App. Cas. 666).

159. *Howard Marine*, [1978] 1 Q.B. at 590-91.

160. *Id.* at 591-92.

161. *Id.* at 592.

162. *Id.* (quoting Misrepresentation Act, 1967, § 2).

163. We must remember that there are no juries in English civil cases.

164. *Id.* at 593

intended and contemplated use by the charterers.”¹⁶⁵ I find this notable since Ogdens never signed the charterparty, but Lord Denning said that it was “included throughout all the negotiations: and no objection was ever taken to it.”¹⁶⁶ Denning said that “[i]n the old days we used to construe such an exception clause strictly against the party relying on it,”¹⁶⁷ but there was no longer any need because the Misrepresentation Act gave the courts discretion to decide not whether the clause was reasonable, but whether reliance on it was “fair and reasonable in the circumstances of the case.”¹⁶⁸ Here, he felt, it was. Exactly what had been said had not been written down; there were two phone conversations and one interview, “as to which there is an acute conflict of evidence. It is just such conflicts which commercial men seek to avoid by such a clause as this. I would do nothing to impair its efficacy. I would allow Howards to rely on it.”¹⁶⁹

Lord Denning, however, did not prevail. His colleagues Bridge, L.J., and Shaw, L.J., voted to uphold Ogdens’s claim, but on somewhat different grounds. Lord Justice Bridge agreed with Lord Denning that there was no warranty. “Considering the whole of the evidence of the negotiations between the parties from the initial exchange of letters through to the eventual conclusion of a contract on the terms of the charterparty and setting the Otley interview in that context it does not appear to me that Howards ever intended to bind themselves by such a collateral warranty.”¹⁷⁰ Lord Justice Shaw said that he had initially leaned towards the collateral warranty argument, but having read his colleagues’ judgments, “I have ultimately come to the conclusion that in the circumstance in which the answer was given the basis for a collateral warranty is perhaps too tenuous to support it.”¹⁷¹

On the statutory ground, however, both Bridge and Shaw found for Ogdens. Bridge, L.J., explained that the Misrepresentation Act obviated the need to find a duty of care. If someone made a non-fraudulent misrepresentation that led to a contract, the burden was on him to show that he had a reasonable belief in the truth of the facts represented. O’Loughlin had looked at his company’s records of the barges. The records, which were in German, showed the barges’ freshwater deadweight capacity as 1050 tons, but he had disregarded the figures because the Ogdens contract would involve saltwater. But the difference in carrying capacity in fresh and saltwater was only twenty-five or thirty tons, and the Lloyd’s Register figure of 1800 tons deadweight capacity was so far away from the German figures that Justice Bridge held that this

165. *Id.* at 593-94.

166. *Id.* at 593.

167. *Id.* at 594.

168. *Id.* (quoting Misrepresentation Act, 1967, § 3).

169. *Id.* at 594.

170. *Id.* at 595.

171. *Id.* at 600.

did not constitute reasonable grounds for O'Loughlin to have believed the Lloyds figure. Having ruled on the statutory ground, Justice Bridge said he did not have to reach the question of common law misrepresentation, but said in dictum that he doubted that the somewhat casual circumstances of the face-to-face meeting where O'Loughlin gave the assurance were "such as to impose on Howards a common law duty of care for the accuracy of the statement"¹⁷² or that the circumstances established a breach of that duty.

Lord Justice Shaw relied on Bridge's statutory analysis, but "with considerable diffidence"¹⁷³ disagreed with his colleagues and found a common law duty of care and negligence. The carrying capacity of the barges was of critical importance to Ogden's contract and "this must have been apparent to any man of business, let alone Mr. O'Loughlin." Ogdens had no easy way of checking O'Loughlin's figures, while all O'Loughlin had to do was look at the documents in his company's possession and read them accurately. "That he chose to answer an important question from mere recollection 'off the cuff' does not in my view diminish, if I may adopt the language of Lord Pearce [in *Hedley Byrne*], the 'gravity of the inquiry or the importance and influence attached to the answer.'"¹⁷⁴

Howard Marine thus involves warranty, common law negligence, and a statutory basis, in circumstances where we might also find a reliance issue, and where some courts might find a parol evidence rule question.¹⁷⁵ It point up the striking thing about these business tort cases, which is how many different theories are available. They should be considered as interacting with one another rather than as separate and hermetic categories.¹⁷⁶

D. Incomplete Contracts (Letters of Intent)

The cohabitation and other family cases almost always involve people who aren't thinking like lawyers, precisely because we don't want to think like lawyers when we are dealing with loved ones, and even in

172. *Id.*

173. *Id.* at 601.

174. *Id.* Both Bridge and Shaw found reason not to allow Howards a defense based on the exception clause. See *id.* at 599, 601.

175. See 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 585 (1960). While England has a parol evidence rule, the courts' willingness to treat an oral side agreement as co-existing with the written document (we would say only partially integrated) is described by Furmston as having emasculated the Rule. FURMSTON, *supra* note 146, at 120. Of course in *Howard Marine* Ogdens never signed the charterparty, but all the judges considered the exception clause in the unsigned document.

176. I've always found it rather silly that we teach fraud and misrepresentation as a defense in Contracts and fraud and misrepresentation as an affirmative action in Torts. It seems to me that what we call business torts should be taught in Contracts.

some business situations, like *Red Owl*, we can understand why no lawyers were involved. Most of the business tort cases are the opposite, involving people who at least should have thought of speaking to a lawyer, though as Stewart Macaulay has taught us,¹⁷⁷ business people usually don't want to speak to lawyers, who, they feel, will muck up a common sense understanding. In both the family and the informal business situations, when things blow up, all we lawyers can say is I wish you'd called me earlier.

But there is another situation, where either lawyers or fairly sophisticated business people have put something on paper, something which may or may not have been an enforceable contract and which may or may not have a legal effect on the transaction that followed. *Howard Marine* was one of these cases: both companies were sizable and had exchanged documents that neither had formally agreed to. Though Odgens had not signed the charterparty proffered by Howards, all the judges of the Court of Appeal treated the case as stemming from the charterparty and thus one of express contract,¹⁷⁸ but they still spent most of their time on tort or statutory analyses. Indeed, if Lord Justices Shaw and Bridges hadn't assumed the existence of a contract they could not have applied the Misrepresentation Act, which by its terms only applied to misrepresentations that preceded parties entering into a contract. Though the court did not say this, it appears to have really been applying implied-in-fact contract analysis, but unlike *Steffes* and *Watts*, here it appears that there really was an unspoken but actual adoption of the unsigned charterparty. Thus, an unsigned express contract was applied, via implied contract reasoning, to make a pre-"contractual" misrepresentation actionable. In other cases, incomplete contracts may interact with reliance, good faith, or restitution analysis. The analysis can range from finding a promise that is virtually coextensive with the contract to analysis in which the contract is irrelevant.

The simple heads-contract-tails-reliance scenario is seen in the 1965 Texas case of *Wheeler v. White*.¹⁷⁹ The parties had signed a legalese-filled contract in which White had agreed either to lend Wheeler \$70,000 directly or via third parties, in exchange for a \$5000 finder's fee, with the money to be used to develop a parcel that Wheeler owned in Port Arthur, Texas.¹⁸⁰ Later, White urged Wheeler to tear down the existing buildings on the property, which Wheeler did. White then reneged and Wheeler sued. The Texas Supreme Court found that the written contract was too

177. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

178. See *supra* text accompanying notes 165-69 and 174-75 with respect to the exception clause in the unsigned charterparty.

179. 398 S.W.2d 93 (Tex. 1965).

180. See *id.* at 94 n.1.

indefinite to be enforceable,¹⁸¹ but upheld Wheeler's alternative reliance claim based on a pleading that put the promise both in the contract itself and in White's exhortations after the fact.¹⁸²

A more complicated set of facts was involved in *Pop's Cones, Inc. v. Resorts International Hotel*.¹⁸³ Pop's was a franchisee of TCBY, a large franchiser of frozen yogurt retail stores, while Resorts International is the giant hotel-resort-gambling conglomerate principally owned by Merv Griffin, former band singer and TV personality. Pop's had a store in Margate, New Jersey, close to Atlantic City where Resorts operated a large casino on the Boardwalk. In May or June of 1994 talks began between Pop's president, Brenda Taube, and Marlon Phoenix, Executive Director of Business Development and Sales for Resorts, about the possibility of Pop's moving into space owned by Resorts, referred to by the parties as "The Players Club" space.¹⁸⁴ At one point Phoenix assured Taube that Resorts's management and Merv Griffin personally were "very anxious to have Pop's as a tenant" and that "financial issues . . . could easily be resolved, such as through a percentage of gross revenue."¹⁸⁵

To test profitability Phoenix offered to let Pop's test the traffic flow by operating a vending cart within the hotel complex free of charge during the summer of 1994, and Pop's did this, beginning in July. Later that summer TCBY representatives visited the Player's Club site, and in August Taube drafted a proposal, which she hand delivered to Phoenix. About a month later, in mid-September, Taube told Phoenix that Pop's had an option to renew its Margate lease and had to give notice no later than October 1, 1994. Later in September she asked Phoenix if Pop's proposal "was in the ballpark of what Resorts was looking for."¹⁸⁶ He responded that it was and that "we are 95% there, we just need Belisle's signature on the deal."¹⁸⁷ Belisle was the Chief Operating Officer and while Phoenix told Taube that Belisle had the ultimate responsibility for the deal, he also "assured [her] that Mr. Belisle would follow his recommendation, which was to approve the deal, and that [Phoenix] did not anticipate any difficulties."¹⁸⁸ During the same conversation Taube again mentioned the October 1 date for notifying Pop's landlord, and later stated that "Mr. Phoenix assured me that we would have little difficulty in concluding an agreement and advised [me] to give notice that [Pop's]

181. Justice Greenhill concurred in result because he thought the contract was definite enough for damages, if not specific performance. *See id.* at 98.

182. *Id.* at 95 and n.2.

183. 704 A.2d 1321 (N.J. Super. Ct. App. Div. 1998).

184. *Id.* at 1321-22. The record was unclear who had initiated the negotiations. *Id.* at 1322 n.1.

185. *Id.* at 1322.

186. *Id.*

187. *Id.*

188. *Id.*

would not be extending [its] Margate lease and 'to pack up the Margate store and plan on moving.'"¹⁸⁹ Relying on what Pop's described as Phoenix's "advice and assurances," Taube gave notice to Pop's landlord that it would not renew the Margate lease, and began preparation for the new site, including hiring a lawyer to work out the details of the lease with Resorts International.¹⁹⁰

On November 1, 1994 Resorts' general counsel sent Pop's a proposed form of lease for the Players Club site, and followed up a month later with a letter and some changes in the form lease. The letter concluded:

*This letter is not intended to be binding upon Resorts. It is intended to set forth the basic terms and conditions upon which Resorts would be willing to negotiate a lease and is subject to those negotiations and the execution of a definitive agreement [W]e think TCBY will be successful at the Boardwalk location based upon the terms we propose. We look forward to having your client as part of . . . Resorts family of customer service providers and believe TCBY will benefit greatly from some of the dynamic changes we plan. . . . [W]e would be pleased . . . to discuss this proposal in greater detail.*¹⁹¹

During December, Taube and her lawyer met with representatives of Resorts, and then Resorts put off the meeting to "finalize" the lease until after the first of the year, but reassured Taube that the lease terms would be worked out and that Resorts wanted TCBY on the Boardwalk the following season. Throughout January, however, Taube and her lawyer were unable to make contact with Resorts' representatives and on January 30, 1995, her lawyer received a letter saying that "Resorts is withdrawing its December 1, 1994 offer to lease space to your client, TCBY."¹⁹² It later turned out that Resorts had spent January 1995 negotiating with a rival TCBY franchisee, Host Marriot, which later was given the lease of the Players site.¹⁹³

Pop's was unable to get its old location back and was out of business until July of 1996. It sued on a reliance theory, seeking its lost profits for the summer of 1995 and its out of pocket expenses for the abortive arrangement with Resorts and the costs of finding a substitute lease.¹⁹⁴ After discovery, Resorts moved for summary judgment, which was granted on the ground that "there was no clear and definite promise ever

189. *Id.*

190. *Id.* at 1322-23

191. *Id.* at 1323.

192. *Id.*

193. *Id.* at 1323 n.4.

194. *Id.* at 1323-24.

made to plaintiff; and, therefore, any reliance on the part of plaintiff upon the statements of the Resorts agent were not reasonable.”¹⁹⁵ The judge found that the terms of the lease had so many gaps that Pop’s “didn’t have a lease; they would still have to work out the terms of the lease. It was not in existence at the time.”¹⁹⁶

On appeal, the New Jersey Appellate Division reversed, saying that “[i]t seems quite clear from plaintiff’s complaint that plaintiff was not seeking damages relating to a lease of the boardwalk property, but rather was seeking damages flowing from its reliance upon promises made to it prior to October 1, 1994, when it failed to renew its lease for its Margate location.”¹⁹⁷ The lower court judge had based his decision on earlier New Jersey cases that required a “clear and definite promise,” as well as foreseeable detrimental reliance on it, but the Appellate Division found that the strict formula “is being eroded by a more equitable analysis designed to avoid injustice,”¹⁹⁸ relying heavily on case law from around the country as well as the commentary and text of section 90 in the Second *Restatement of Contracts*, particularly its Illustration 10, based on *Red Owl*.¹⁹⁹ The court particularly noted *Restatement* comment b’s description of the character of reliance protected by section 90:

The principle of this Section is flexible. The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee’s reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant²⁰⁰

In reaching its conclusion that the summary judgment against Pop’s had to be reversed, the court, significantly, spoke of “assurances” rather than “promises”: “That plaintiff . . . relied to its detriment on defendant’s assurances seems unquestionable; the facts clearly at least raise a jury question.”²⁰¹ The same applied to the questions of the reasonableness and foreseeability of the reliance. They too were jury questions.

195. *Id.* at 1324.

196. *Id.*

197. *Id.*

198. *Id.* at 1325-26.

199. *Id.*; see *supra* text accompanying note 93 on Illustration 10 to § 90.

200. *Id.* at 1327.

201. *Id.* at 1326.

Plaintiff's complaint neither seeks enforcement of the lease nor speculative lost profits which it might have earned had the lease been fully and successfully negotiated. Plaintiff merely seeks to recoup damages it incurred, including the loss of its Margate leasehold, in reasonably relying to its detriment upon defendant's promise. Affording plaintiff all favorable inferences, its equitable claim raised a jury question Plaintiff's complaint, therefore, should not have been summarily dismissed.²⁰²

Pop's Cones seems like an easy case, but we must remember that the lower court had dismissed the complaint. The Appellate Division moved away from a formal requirement of a clear and definite promise to a more equitable (in the non-technical sense) principle stressing fairness about "assurances" over clarity of the promise. At the same time, it largely ignored Resorts' disclaimer in its December 1 letter: "*This letter is not intended to be binding upon Resorts.*"²⁰³ Essentially, it accepted the letter as not being an offer (though Resorts in its January 30, 1995 letter spoke of withdrawing its offer), and still found the assurances enough to trigger liability in promissory estoppel. Unlike the earlier cases that had required a clear promise, the New Jersey Appellate Division in *Pop's Cones*, like the Wisconsin Supreme Court in *Red Owl*, cared less about literal promises, and more about reasonable reliance where a relationship justified the reliance.

One approach that the court did not consider was to treat Resorts' December 1 letter as a letter of intent which put it under a good faith duty not to back out of the deal by negotiating with another lessee. Charles Knapp, in a famous article,²⁰⁴ divided preliminary agreements into two categories, agreements to agree, where the parties' agreement is to keep bargaining, and agreements with a formal contract contemplated, where the deal is essentially done, but the formal signing remains. In each of these categories the liability can vary depending on the implicit understanding of the parties. In some situations neither party has any liability until the final documents are signed. In others, the parties are completely bound, either because missing terms can be filled in by an arbitrator or from some standard list or because the formal contract contemplated has no significant open terms. But each category has a middle ground where the parties are not fully bound, but have a duty to bargain in good faith and not to torpedo the deal for strategic reasons such as trying to undo parts already agreed to or finding a more attractive

202. *Id.* at 1327.

203. *Id.* at 1323; see *supra* text accompanying note 191.

204. Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969).

suitor. That seems to be what was involved in *Pop's Cones*. Resorts was not bound, but it arguably had an obligation not to back out just because it had found a bigger TCBY franchisee for the Players Club site. On that argument, Pop's might have been able to get damages for its expectation of future lost profits instead of the reliance damages that it sought. Since it apparently hadn't raised this argument and definitely hadn't sought expectation damages, the court did not have to consider this approach.

Many of these issues did come up in *Quake Construction v. American Airlines*,²⁰⁵ an interesting Illinois case in which a letter of intent proved to have potent legal force. *Quake* involved a construction project at O'Hare Airport. American Airlines, which was upgrading its facilities, had hired Jones Brothers Construction Corporation ("Jones") to administer the program, by preparing specifications, accepting bids, and awarding the contract. In April 1985, Quake bid on part of the project involving the upgrade of employee facilities and a maintenance shop, and was orally informed by Jones that it had been awarded the contract. Jones asked Quake to provide it with the license numbers of the subcontractors Quake was planning to use on the job, but Quake refused, saying that its subs would not allow their numbers to be used until they received a signed subcontract. Jones told Quake that Quake would shortly receive a written contract and asked Quake to go ahead with the subcontracts and get the numbers for Jones.²⁰⁶ To induce Quake to do this, Jones sent Quake the following letter on April 18, 1985:

We have elected to award the contract for the subject project to your firm as we discussed on April 15, 1985. A contract agreement outlining the detailed terms and conditions is being prepared and will be available for your signature shortly. Your scope of work as the general contractor includes the complete installation of expanded lunchroom, restroom and locker facilities for American Airlines employees as well as an expansion of American Airlines existing Automotive Maintenance Shop. The project is located on the lower level of 'K' Concourse. A sixty (60) calendar day period shall be allowed for the construction of the locker room, lunchroom, and restroom area beginning the week of April 22, 1985. The entire project shall be complete by August 15, 1985. Subject to negotiated modifications for exterior hollow metal doors and interior ceramic floor tile material as discussed, this notice of award authorizes the work set forth in the following documents at a lump sum price of \$1,060,568.00.

205. 565 N.E.2d 990 (Ill. 1990).

206. *Id.* at 992.

- a) Jones Brothers Invitation to Bid dated March 19, 1985.
- b) Specifications as listed in the Invitation to Bid.
- c) Drawings as listed in the Invitation to Bid.
- d) Bid Addendum # 1 dated March 29, 1985.

Quake Construction Inc. shall provide evidence of liability insurance in the amount of \$5,000,000 umbrella coverage and 100% performance and payment bond to Jones Brothers Construction Corporation before commencement of the work. The contract shall include MBE, WBE and EEO goals as established by your bid proposal. Accomplishment of the City of Chicago's residency goals as cited in the Invitation to Bid is also required. As agreed, certificates of commitment from those MBE firms designated on your proposal modification submitted April 13, 1985, shall be provided to Jones Brothers Construction Corporation.

*Jones Brothers Construction Corporation reserves the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract agreement.*²⁰⁷

Quake and Jones then made modifications of a form contract and Jones told Quake that it would prepare and send the written contract for Quake's signature. In the court's words, "[n]o such formal written contract, however, was entered into by the parties."²⁰⁸ A week later, on April 25, Jones told a pre-construction meeting involving Quake, Quake's subcontractors and government officials that Quake was the general contractor for the project. Immediately after the meeting, however, American Airlines informed Quake that Quake's involvement with the project was terminated, and Jones confirmed this on the same day in writing.²⁰⁹

Quake sued American for its procurement and preparation costs and for its lost profits, raising both contract and reliance theories. The trial court dismissed all the claims²¹⁰ but the Illinois Appellate Court reversed

207. *Id.* at 992-93 (emphasis added). "MBE," "WBE," and "EEO" refer to various affirmative action diversity goals. Quake was described as general contractor in the first paragraph but the critical third paragraph referred to a subcontract agreement. This caused some confusion, but the parties agreed at oral argument that in fact Jones was the overall general contractor and the subcontract referred to in the third paragraph meant a contract between Jones and Quake as subcontractor for the job described in the letter of intent. *Id.* at 995.

208. *Id.* at 993.

209. *Id.* at 993.

210. There were actually two other claims, for waiver of a condition precedent and for impossibility of performance. Quake was held to have abandoned the impossibility claim on appeal and the waiver claim was reinstated by the Appellate Court whose action

and reinstated them. The Illinois Supreme Court affirmed, and remanded the case for trial on the merits. Most of the court's opinion concerned itself with whether the letter of intent formed an actionable contract, but it also made some important comments on the reliance claim.

The Illinois Supreme Court opinion is a funny combination of rather formalistic rules applied pragmatically and flexibly. As to the contract claim based on the letter of intent, the court applied the parol evidence rule, despite the absence of a merger clause, the reference to an earlier oral conversation, and the confusion of Quake as both general and subcontractor. It also seemed to require an ambiguity on the face of the document as a prerequisite to allowing extrinsic evidence.²¹¹ Nonetheless, it found that the disclaimer at the end, "Jones Brothers Construction Corporation reserves the right to cancel this letter of intent if the parties cannot agree on a fully executed subcontract agreement," was, indeed, ambiguous, and thus required a trial on the parties' intent as to whether the letter was itself a binding contract.²¹² The concurring justice found the ambiguity unlikely but just plausible enough to survive a motion to dismiss,²¹³ and thought that the letter of intent really was meant to be a contract to negotiate in good faith.²¹⁴

The *Quake* court reached the right result with respect to the letter of intent as a contract, but the rules it put forth were simplistic. It emphasized the role of the parties' intent in finding the legal force of the letter, and while that obviously makes sense, we should realize that contractual intent involves at least two parties (maybe more here, considering the relationship between Jones and American). That intent is not always fully communicated, and the other party's understanding and its reliance on that understanding should also be considered. It may well be that Jones thought of the letter as a stopgap, designed to get the job going while the details were worked out while Quake thought it had a firm deal with only formalities remaining. Or Jones may have thought that there was no deal at all, though how it could expect Quake to begin work (and presumably commit itself to subcontractors) without a deal is hard to imagine. In any event, besides the parties' intent how they communicated it and how the other party understood that communication are at least as important. Just as quantum mechanics has taught us that a physical entity can be both a wave and a particle at the same time, we must realize that reliance is part of bargain, along with the parties' intent.

was affirmed by the Supreme Court. *Id.* at 1004-05.

211. "If no ambiguity exists in the writing, the parties' intent must be derived by the circuit court, as a matter of law, solely from the writing itself." *Id.* at 994.

212. *Id.* at 994, 1004.

213. *Id.* at 1005-06 (Stamos, J., concurring).

214. *Id.* at 1007 (citing Knapp, *supra* note 93, and E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987)).

The two concepts aren't a dichotomy: they go together.²¹⁵ Thus, even a formal contract claim may involve reliance, not as a substitute for bargain, but as part of it.

Here, however, the court had a separate reliance claim before it. *Quake*, of course, had begun preparations for the job, though it had not actually started work when American pulled the plug and made a claim based on detrimental reliance. The Supreme Court reversed the dismissal of that claim as well. Again, however, it stated what sounds like a strict rule but applied it much more flexibly. It said that:

“To establish a claim based on promissory estoppel, plaintiff must allege and prove that (1) defendants made an *unambiguous* promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was *expected* and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment.”²¹⁶

The words that I have italicized make the Illinois reliance standard sound much more rigid than, say, that of the *Restatement (Second) of Contracts*, which has no requirement of lack of ambiguity, allows a promise to be derived from conduct²¹⁷ and does not require actual expectation by the promisor when reliance by another party is foreseeable.²¹⁸ But in *Quake* the court actually ignored the standard that it set out, and focused instead on the right factors: “[t]he elements of promissory estoppel, namely, whether plaintiff could have reasonably relied on the promise and whether defendants could have foreseen that plaintiff would so rely.”²¹⁹ It said nothing more about the promise having to be unambiguous, which was understandable since it had just held that the letter was in fact ambiguous enough to require a remand and trial about its meaning.

While American Airlines is a very large corporation, the real actors in *Quake*, Jones and Quake, appear to have been mid-sized construction companies, not Mom and Pop, but not giants either. In contrast, *British Steel Corp. v. Cleveland Bridge & Engineering Co. Ltd.*,²²⁰ brought together parties that were big: the Forges, Foundries and Engineering Group of British Steel Corporation (BSC), the then-government owned British steel giant, and Cleveland Bridge and Engineering (CBE), a steel

215. I take this to be a major underpinning of the famous Fuller and Perdue article, Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest In Contract Damages* (Part I), 46 YALE L.J. 52 (1936).

216. 565 N.E.2d at 1004 (emphasis added).

217. See RESTATEMENT (SECOND) OF CONTRACTS, § 2 cmt. a (1981).

218. See *id.* cmt. b; *id.* § 90 cmt. b (“The promisor is affected only by reliance which he does or should foresee.”)

219. 565 N.E.2d at 1005.

220. [1984] 1 All E.R. 504.

fabricating company owned by Trafalgar House, an international construction conglomerate. CBE was working with a related Saudi Arabian company on the construction of a bank in Dammam, Saudi Arabia. The design of the bank was unusual and called for 137 cast-steel nodes from which diagonal steel beams would join a latticework frame on the surface of the building. BSC supplied the nodes and later sued for their value, which was £229,832.70. CBE claimed damages from delay totaling £867,735.68, leaving it, after setoff, with a net counterclaim of almost two-thirds of a million pounds. The trial judge in the Queens' Bench Division Commercial Court was Robert Goff, later Lord Goff of Chieveley, the coauthor of the leading British treatise on restitution, *Goff and Jones*.²²¹

The case turned on whether the parties had entered into a contract at all.²²² As then-Justice Goff described the case,

This is a case in which there is no doubt that BSC did in fact manufacture the 137 cast-steel nodes in question at the request of CBE, and did deliver them to CBE. But, despite protracted negotiations between the parties, no formal contract was ever entered into between them. CBE complained that BSC were late in delivering the nodes, and that the causes of delay were (with one minor exception) all within the control of BSC: they also complained that BSC failed to deliver the nodes in the sequence requested by CBE. In these circumstances, two main areas of dispute developed between the parties. First, was there any binding contract between the parties at all, under which the nodes were delivered? CBE contended that there was such a contract, which was to be found in certain documents (including a letter of intent issued by CBE dated 21 February 1979) and the conduct of BSC in proceeding with the manufacture of the nodes. BSC's primary contention was that no binding contract was ever entered into, and that they were entitled to be paid a reasonable sum for the nodes on a quantum meruit, a claim

221. LORD GOFF OF CHIEVELEY & GARETH H. JONES, *THE LAW OF RESTITUTION* (5th ed. 1998). The first edition in 1966 is described by David Ibbetson as "the ground-breaking work" in the field, DAVID IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 289 n.158 (1999), and Lord Rodger of Earlsferry, the Lord Justice General of Scotland, wrote that "'Goff and Jones' are the Romulus and Remus of the English law of restitution: out of a few weak and scattered settlements they founded a powerful city whose hegemony now extends far and wide." Alan Rodger, *Recovering Payments under Void Contracts in Scots Law in THE SEARCH FOR PRINCIPLE, ESSAYS IN HONOUR OF LORD GOFF OF CHIEVELEY* 1 (William Swadling & Gareth Jones eds., 1999) [hereinafter *Goff Festschrift*].

222. Since there are no civil juries in England, Justice Goff was the trier of fact, and his legal conclusions were quite fact-specific. Unfortunately, the reporter summarized Justice Goff's findings of fact in places without giving all his reasoning process.

sounding not in contract but in quasi contract. The motives of the parties in putting their cases in these different ways lay primarily in the fact that, unless there was a binding contract between the parties there was no legal basis for CBE's counterclaim for damages in respect of late delivery or delivery out of sequence.²²³

As Justice Goff found the facts, CBE learned that BSC was working on cast-steel nodes and approached it about supplying them for the Dammam job. Discussions took place "with a view to a contract being entered into," and BSC, working from incomplete information, prepared an estimate, and on February 9, 1979 BSC sent a detailed telex to CBE with proposed prices for the various items and some technical specifications.²²⁴ After further discussions, CBE sent a letter of intent dated February 21, beginning "We are pleased to advise you that it is the intention of Cleveland Bridge & Engineering Co. Ltd. to enter into a Sub-Contract with your company, for the supply and delivery of the steel casting which form the roof nodes on this project. The price will be as quoted in your telex (Mr. Dorrance to Mr. Roberts) dated 9th February '79 which is as follows . . ."²²⁵ After tracking the pricing from the BSC telex, CSE continued, "[t]he form of Sub-Contract to be entered into will be our standard form of sub-contract for use in conjunction with the ICE General Conditions of Contract, a copy of which is enclosed for your consideration."²²⁶ CSE also enclosed some specifications and said that it understood that BSC already had a set of detail drawings (which was not, in fact, the case), and requested "that you proceed immediately with the works pending the preparation and issuing to you of the official form of sub-contract."²²⁷ BSC did not reply, since it expected to get the subcontract shortly, and according to Justice Goff, would not have agreed to the ICE conditions, which provided for unlimited liability for consequential loss arising from late delivery.²²⁸ BSC intended to submit a formal set of price quotations when it had a full set of documents. In the mean time it treated CBE's letter as an order and began preparations so as not to delay final deliveries.

On February 27, 1979 CBE sent a telex with details about required testing and also the sequence in which the delivery of nodes was required. Goff found that this was the first intimation that BSC had about a requirement that the nodes be delivered in a particular sequence.²²⁹

223. [1984] 1 All E.R. at 506.

224. *Id.* at 507.

225. *Id.*

226. *Id.* at 507-08.

227. *Id.* at 508.

228. *Id.*

229. *Id.*

Things kept going back and forth until April 4, when BSC's works manager sent a telex to CBE saying "There are far too many unresolved queries . . . We are very concerned that this could result in increased cost and delays at later stages during manufacture. We are therefore not prepared to proceed with this contract until we have an agreed specification covering all these points which has been ratified by Cleveland Bridge."²³⁰ In fact, the parties kept talking, and although a number of matters were unresolved it was agreed that BSC would go forward and manufacture the first cast.

It did so, but the first nodes cast were unsatisfactory and CBE required extensive changes. The parties met on May 15 and apparently agreed on a further revision of the draft specifications. The next day, May 16, BSC sent a formal quotation on its standard form, but the price was considerably higher than in its February 9 telex. CBE refused to accept the increased price, and BSC offered a partial reduction and kept working on the project, in fact trying to make up time lost due to CBE's rejection of the first cast. CBE continued to question the price increase and also raised questions about specifications. The parties had a "heated meeting" on July 6 with each side trying to get the other to sign its form contract at its prices. Nonetheless, "BSC went ahead with the casting and delivery of nodes in stages in an effort to comply with CBE's requirements for delivery."²³¹ On August 1 the parties finally reached a provisional agreement on price, accepting BSC's quotation of May 16, but they could not agree on other terms, especially those relating to consequential damages and a performance bond. BSC agreed, however, to submit a revised delivery schedule and to try to speed up delivery of the nodes.²³²

There were further delays caused by labor problems and technical difficulties, but these were overcome. Deliveries continued even though the parties had not agreed on a contract, especially the mode of payment, and despite the fact that CBE had not made any interim payment. In April of 1980 the last node was delivered and also in April, apparently after the delivery was complete, CBE made a written claim for late delivery, with damages four times as large as the price of the nodes. BSC then sued.

CBE claimed that an agreement was formed by the combination of CBE's request in the February 21 letter of intent that BSC proceed to manufacture the nodes, the notification by CBE to BSC in its telex dated 27 February 1979 of the sequence in which delivery of the nodes was required, and the conduct of BSC in proceeding with the manufacture of the nodes.²³³ As Justice Goff commented:

230. *Id.*

231. *Id.*

232. *Id.* at 509.

233. *Id.* at 509

Now the question whether in a case such as the present any contract has come into existence must depend on a true construction of the relevant communications which have passed between the parties and the effect (if any) of their actions pursuant to those communications. There can be no hard and fast answer to the question whether a letter of intent will give rise to a binding agreement: everything must depend on the circumstances of the particular case.²³⁴

He then made a remark that seems strange to an American lawyer. He said that in most cases where work is done pursuant to a request in a letter of intent it won't really matter whether or not a contract came into existence because the claim

will usually be based on a quantum meruit, and it will make no difference whether that claim is contractual or quasi-contractual. Of course, a quantum meruit claim (like the old actions for money had and received and for money paid) straddles the boundaries of what we now call contract and restitution, so the mere framing of a claim as a quantum meruit claim, or a claim for a reasonable sum, does not assist in classifying the claim as contractual or quasi contractual.²³⁵

This seems strange, because the very notion of quantum meruit seems to involve the absence of contract. It is one thing to acknowledge that quantum meruit and its predecessors are action at law and not equitable proceedings. It is another to say that it may arise out of contract. To most of us, quantum meruit is just another name for restitution. But Lord Goff, who of course knows his stuff, helps us to remember that restitution is an umbrella covering a number of procedures, some of which, like the writ of indebitatus assumpsit (one of quantum meruit's ancestors) had one foot planted pretty firmly on contract, but another planted on a "implied" promise to pay.²³⁶ Thus, history further blurs the lines.

234. *Id.*

235. *Id.*

236. See C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 360-61 (1949):

Before the seventeenth century the common law afforded no remedy where services were rendered or goods delivered by one person to another in circumstances which raised a presumption that they were to be paid for; but where no precise sum had been fixed by the parties But during the first quarter of the seventeenth century Assumpsit was extended to meet the situation through an implied undertaking to pay a reasonable sum. The inference was easily drawn in the case of the "common callings" [such as innkeepers]. As the law imposed on the one party a certain standard of

Here, however, since CSE was counterclaiming for breach of contract, the existence or not of a contract became crucial, and the resolution turned on whether the letter of intent was binding. CSE had requested BSC to proceed with the work "pending the preparation and issuing to you of the official form of sub-contract," and major items like price, delivery dates and terms and conditions were still in negotiation.

I find myself quite unable to conclude that, by starting work in these circumstances, BSC bound themselves to complete the work. In the course of argument, I put to counsel for CBE the question whether BSC were free at any time, after starting work, to cease work. His submission was that they were not free to do so, even if negotiations on the terms of the formal contract broke down completely. I find this submission to be so repugnant to common sense and the commercial realities that I am unable to accept it. It is perhaps revealing that, on 4 April 1979, BSC did indeed state that they were not prepared to proceed with the contract until they had an agreed specification, a reaction which, in my judgment, reflected not only the commercial, but also the legal, realities of the situation.²³⁷

There remained another possibility, what Goff called an "if" contract, essentially treating the letter of intent as an offer of a unilateral contract that BSC would be paid reasonable remuneration if it completed the work described in the letter. He said that initially he found the alternative attractive as a way of imposing some contractual obligations on BSC, but eventually he rejected it, since it would have left BSC with obligations (such as liability for consequential damages) that it surely would have refused to undertake if a formal contract had been signed. "It

conduct, so it might require from the other the discharge of all proper expenses. . . . It is to be observed that the claim was already regarded as normal even outside the common callings; and within the next twenty year successful actions were brought to recover *tantum quantum meruit* [as much as might be deserved] by professional men and tradesmen and even by plaintiffs who, though not carrying on any business, had undertaken a particular service for the defendant.

Id.; see also IBBETSON, *supra* note 221, at 270:

While from an analytical point of view the basis of liability in these cases was wholly distinct from contract, its characterization as "quasi-contractual" was not completely inapt. As a matter of pleading the *quantum meruit* action was unequivocally contractual. Sometimes there had been an explicit agreement, sometimes an agreement inferable from the circumstance, sometimes an agreement erected by the law in order to reach a desired result. It was only when the lawyers treated the third of these as genuinely contractual, losing sight of the fact that the contract was a fictitious construct of their own making, that problems arose.

Id.

237. [1984] 1 All E.R. at 510.

would be an extraordinary result if, by acting on such a request in such circumstances, the buyer were to assume an unlimited liability for his contractual performance, when he would never assume such liability under any contract which he entered into."²³⁸

Thus, Justice Goff rejected both forms of contractual liability. Both parties expected to have a formal contract. But when:

contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution. Consistently with that solution, the party making the request may find himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence, e.g. preparatory work which will, if the contract is made, be allowed for in the price of the finished work²³⁹

Thus, BSC could recover in quantum meruit. Justice Goff found that BSC had no obligation even to complete the work, much less complete it in a reasonable time, and further found that if delivery within a reasonable time was required, BSC complied with the requirement.²⁴⁰ In that discussion he made the following comment about the most key issue of CSE's claim: "In this part of my judgment, I do not propose to consider any question of delivery out of sequence; an obligation to deliver in a certain sequence could only have arisen from an express term in a contract between the parties, and I am satisfied that no such express term can possibly be said to have been agreed in the present case"²⁴¹ That took care of CSE's entire counterclaim, and the judgment was that BSC recover its full claim of some £230,000, and CSE's counterclaim be dismissed.

In assessing *British Steel*, we are handicapped because Justice Goff's findings of fact are apparently summarized by the reporter, leaving us

238. *Id.* at 511. Justice Goff later wrote that if he had found such an "if" contract "then I would still have concluded that there was no obligation under that contract on the part of BSC to continue with or complete the contract work, and therefore no obligation on their part to complete the work within a reasonable time." *Id.* He also found that if BSC had an obligation to complete the work within a reasonable time, it did so. *Id.* at 512.

239. *Id.* at 511. This is precisely the conundrum that Justice Goff had cited in refusing to find an "if" contract binding BSC. See *supra* text accompanying note 238.

240. *Id.* at 511-12. It is not completely clear that Justice Goff is talking about the quantum meruit claim when he discusses the reasonableness of BSC's deliveries, but from the context, he appears to be. Compare *supra* note 236.

241. *Id.* at 512.

with gaps both in the stating of key facts and in Lord Goff's process of assessment. It is clear that he has a rather conservative, if not old-fashioned attitude toward letters of intent, generalizing to give them less legal force on the whole than some would. On the other hand, he seems completely correct in finding that BSE never agreed to any obligation, and in characterizing its claim as one in restitution. It also is right that under these circumstances, CSE should be found to have no affirmative claim for delay or delivery out of sequence, a claim that sounds rather disingenuous on Goff's telling of the facts, since it seems to have been raised only after the last node was delivered to Saudi Arabia.

But to my mind, there are questions whether the delivery sequence should have been taken into account in determining the fair value of BSC's performance. Goff says that the sequence could only be relevant if a contract was formed, but should not the negotiations have put BSC on notice that a sequence was part of proper performance? Weren't the negotiations between CSE and BSC, even though they did not become a contract, part of the restitutionary context? Shouldn't BSC's knowledge of CSE's needs have affected the value of its performance? Or, should BSC's commencing of production be viewed as an implied promise *on its part* to meet a reasonable delivery schedule, an implied promise that CSE relied on? That would have given CSE at least a promissory estoppel defense. Of course, we don't know a lot of key facts. Goff only gives one instance of CSE mentioning the delivery sequence, in the February 27, 1979 telex, though he does later say that in July and August of 1979 BSE took actions in an attempt to meet CSE's delivery schedule.²⁴² Did CSE make other references to the delivery sequence? How clear was it about the importance of the different nodes being delivered at different times? What was the impact of the delivery out of sequence? What, in fact, is a cast steel node? All these questions are relevant to the restitution recovery, even assuming that there was no contract and that BSC had no duty to deliver in a particular sequence. I hesitate to tell Lord Goff anything about restitution, but it does appear to me that a much subtler analysis is needed here than his judgment that either there is a contract or there is no obligation to deliver in sequence. The letter of intent, and especially the parties' dealings over a fifteen-month period, were relevant to the quantum meruit/restitution claim, or a possible promissory estoppel defense, even if they did not create any contract or tort liability on BSC's part.

E. Relationships Terminable at Will

I have so far discussed cohabitation, business torts, particularly innocent misrepresentations, and incomplete business agreements as areas

242. *Id.* at 508, 509; see *supra* text accompanying notes 229 and 231-32.

that aid us to see how courts deal with these obligations at the margins of contract, tort, and even property. Also at the margins are the many areas where the parties are clearly in some sort of legal relationship, but are said to be free to end it with little or no obligation. The most obvious example of this is employment, where for many years the courts followed the so-called Wood's Rule, that either party could end the relationship for any reason, good, bad, or indifferent. In modern times courts have used many different legal theories to achieve justice in at-will employment.²⁴³ Courts have found promises of employment security from casual remarks that an employee would always have a job with the company.²⁴⁴ Often they enforce employment handbooks by finding offers of unilateral contracts or reliance in dubious circumstances.²⁴⁵ Sometimes they dispense with both consideration and reliance.²⁴⁶ And in at least one case, a federal district court held an employer liable in negligence for not making completely clear to a long-time employee who had turned into something of a burnt-out case that his job was really on the line.²⁴⁷ The court found the employee's damages to be about \$360,000, but found him to have been 83% contributorily negligent (!) and awarded him 17% of the total, or \$61,354.02,²⁴⁸ which was pretty apparently what the court felt was a reasonable severance pay for a long-term employee. Often there is a tone of unjust enrichment in the cases, even though in many (as in *Red Owl*) the defendant not only wasn't enriched, it undoubtedly lost money on the deal.

A related area, where courts have intervened using an attenuated contract approach, is students' rights, particularly when dealing with private colleges and universities. In the well-known case of *Steinberg v. Chicago Medical School*,²⁴⁹ the Illinois Supreme Court found a contract claim to be stated by a rejected applicant to a medical school based on a brochure saying that the school selected applicants "on the basis of

243. I discussed this at great length in Peter Linzer, *The Decline of Assent: At-Will Employment As A Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986), and will only summarize the phenomenon here. In accordance with the swing back to conservatism that I described earlier, see text accompanying notes 17-24, recent cases seem to be favoring employers more, though we are nowhere near the abysmal situation that existed before the late 1950s.

244. *Pugh v. See's Candies*, 171 Cal. Rptr. 917, 927 (Ct. App. 1981).

245. See Linzer, *supra* note 13, at 386-90. An example of a recent case refusing to enforce an employee handbook is *Asmus v. Pacific Bell Telephone Co.*, 999 P.2d 71 (Cal. 2000), but that case, decided by a 4-3 vote, was resolved on factual grounds and the majority did not deny that employee handbooks could sometimes bind the employer contractually.

246. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 812-93 (Mich. 1980).

247. *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067, 1081 (N.D. Mich. 1982).

248. *Id.* at 1083-84.

249. 371 N.E.2d 634 (Ill. 1977).

scholarship, character, and motivation,” and “academic achievement.”²⁵⁰ The statements in the brochure were deemed incorporated into an offer and acceptance consisting of an admission application and a \$15 fee. More recently, an Indiana federal district court, though it dismissed a contract claim against a public elementary school based on a student handbook, said in dictum that a student handbook might create a contract claim against a private school or university,²⁵¹ and might even create a restitution claim against a private educational body.²⁵²

A last area of at-will contracts that show the courts bending the rules to achieve justice is that of closely held corporations. Most people probably would not think of this as an area of at-will contract, but it has similarities. In theory, a minority shareholder in a closely held corporation has relatively few rights: he may try to sell his stock or he must abide the majority rule, absent fraud or other really egregious conduct. In practice, however, the courts manipulate concepts in the interest of fairness.²⁵³ As just one illustration, consider *Jordan v. Duff & Phelps*,²⁵⁴ a Seventh Circuit decision involving a minority shareholder who was also an at-will employee, a high-level participant in a startup company.²⁵⁵ The terms of Jordan's stock ownership required him to tender it back to the company if he left its employ. He resigned voluntarily to take a better position and his resignation and tender of stock were graciously accepted—without his being told that the company was about to take part in a merger that would increase the value of the stock by a factor of twenty. Jordan sued, and the Seventh Circuit, in Frank Easterbrook opinion—over a Richard Posner dissent, held that the company had violated its duty of good faith toward Jordan, despite the fact that his employment was terminable at will, he was resigning voluntarily to take a better job, and the company had no obligation to tell a shareholder about impending actions that could affect the value of his stock. He had no contract claim, he had no status claim, yet he won. While the Easterbrook opinion is gussied up in the ex ante language of Chicago School economics, its real thrust is simply that it was unfair not

250. *Id.* at 638-40.

251. *Higginbottom v. Keithley*, 103 F. Supp. 2d 1075, 1081 (S.D. Ind. 2000). I don't want to make more of this dictum than it deserves. The court was very critical of the way the cross-motions for summary judgment had been presented and further pointed out that Indiana had not allowed employee handbooks to be used to create contract claims against employers. *See id.* at 1080.

252. *Id.* at 1084. Again, the court sounded rather skeptical.

253. My colleague Douglas H. Moll will soon publish a comprehensive study of this area and I will defer to him and advise readers to keep their eyes peeled for Professor Moll's article, forthcoming in the Boston College Law Review, which will clarify a muddled area.

254. 815 F.2d 429 (7th Cir. 1987).

255. *Id.* at 432.

to give a shareholder-employee the information he needed to make an informed decision about his investment and his future.

F. Crabb v. Arun District Council

Presumably I could find still other types of relationships and transactions to illustrate how the courts achieve justice through general principles of fairness when the strict application of rules will not work, but I think we've had enough. I will finish my tour of the case law with a simple land dispute, *Crabb v. Arun District Council*,²⁵⁶ which produced another opinion of the English Court of Appeal, with the leading speech again by Lord Denning. Lord Denning's speech begins like a Jane Austen (or at least a Miss Marple) novel: "Near Bognor Regis there is a village called Pagham. There is a road there called Hook Lane running east and west. On the south side of that road there is an area of land called Windmill Park. In 1946 a Mr. Alford bought 5½ acres of it."²⁵⁷ Mr. Alford's property formed a big square field with its north side fronting on Hook Lane. It was divided into two parts by a north-south line, with 3½ acres on the west side, which Alford left undeveloped and two acres on the east side that he divided horizontally into two one-acre lots, with only the front lot having access to Hook Lane. Since Alford owned both of the eastern lots he built a road connecting the back portion with the front.

In 1962 Mr. Alford died and his executors decided to develop the western parcel for housing. In connection with this plan there was to be a new road created, just west of the boundary between the eastern and western parcels, called Mill Park Road, with a five foot six inch fence dividing the parcels. The eastern parcel was to have access to Mill Park Road at one location, point *A*, in the front lot; since the front lot's existing access point to Hook Lane was to be closed, point *A* would be the only way to get from the eastern parcel to the public road. Eventually, the executors abandoned the plan, but it was taken up by the Chichester Rural Council (later known as the Arun District Council), and in 1965 the executors sold the western parcel to them and the eastern parcel to the plaintiff, Mr. Crabb. As part of the conveyance the executors reserved a right of access to Mill Park Road for Mr. Crabb at point *A*, where there was to be a twenty-foot gap in the fence.²⁵⁸

In 1967 Mr. Crabb decided to sell the two eastern lots as separate properties. Since the occupants of the back lot would no longer be able to use the road through the front lot to get to point *A*, Crabb needed to make a new arrangement with the Council to get access to Hook Lane. Mr. Crabb hired the late Mr. Alford's son, who was an architect, to handle the

256. [1976] Ch. 179 (Ch. App.).

257. *Id.* at 183.

258. *Id.* at 184.

arrangements with the Council, and on July 26, 1967 Crabb and the younger Mr. Alford met with a representative of the Council. While the evidence was not completely clear, Lord Denning said that there was no doubt that the parties agreed on the line of the fence. He continued:

There is also no doubt that there was an agreement in principle that the plaintiff should have, not only the access at point *A*, but also an additional access at point *B* [located in the back lot], so as to give access from the back portion of his land on to the new estate road. The plaintiff said that the defendants' representative made a firm commitment for a second access at *B*: but the judge said that the plaintiff was rather over sanguine. The judge preferred the evidence of Mr. Alford who was rather more cautious. Mr. Alford said: "I thought we had got final agreement in that there was to be access at point *B*, but I saw further processes beyond the meeting." He foresaw, no doubt, that there might have to be a document drawn up between the solicitors.²⁵⁹

Mr. Alford said that while normally some consideration would be demanded, no such request was made. "My strong feeling is we would not be asked to pay that consideration when talking to the defendants in 1967."²⁶⁰

Sir John Pennycuik, V.C., the trial judge, had found that there was an agreement in principle that Mr. Crabb would have access at point *B* because it was understood that he was selling the two lots separately, "[b]ut the judge found there was no definite assurance to that effect, and, even if there had been, it would not have been binding in the absence of either writing or consideration. In order to be binding, there would have to be the legal processes foreseen by Mr. Alford."²⁶¹

In fact, however, there were no legal processes. The Council never made a grant of access to Mr. Crabb, but it proceeded as if he had the right of access. The Council built the fence with gaps at points *A* and *B*, and these gaps were used by trucks involved in the construction of the housing estates that were being built on the western parcel. The trucks, however, made a mess and generally were a disturbance, and when Mr. Crabb protested, the Council agreed to tidy up the operation. As part of this tidying up, in February of 1968 the Council put up expensive gates in the gaps. "The gate-posts were set firmly in concrete at points *A* and *B*, and were clearly intended to be permanent."²⁶²

259. *Id.* at 185.

260. *Id.*

261. *Id.* at 185-86.

262. *Id.* at 186.

In the autumn of 1968 Mr. Crabb sold the front lot and assigned the right of access at point *A* to the purchaser. Since he believed that he would continue to have access from the rear lot at point *B*, Crabb did not reserve a right to enter the front lot to use the gate at point *A*. A few months later, however, Crabb put a padlock on the inside of the gate at point *B*.

The defendants were incensed by this. But they did not say a word to the plaintiff. They went on to his land. They took down the gates at point *B*. They pulled them out of the concrete. They took them away and filled the gap with extra posts and a close-boarded fence to match the existing fence. In short, they shut up the access at point *B*. The [trial] judge said: "The council gave no notice to Mr. Crabb of its intention to take this step; it seems to me that it was a discourteous and high-handed act" ²⁶³

When Crabb protested the Council indicated that it was willing to give him the access at point *B* and an easement to serve the back lot, but wanted £3000. Mr. Crabb was unwilling to pay this much and his land was rendered useless—sterilized, as the court put it. The lawsuit followed. The Vice-Chancellor held that Mr. Crabb could not claim an estoppel: "In the absence of a definite assurance by the representative of the council, no question of estoppel can arise, and that really concludes the action." ²⁶⁴ Crabb appealed to the Court of Appeal.

As I mentioned earlier, in England estoppel is a complex concept with many variants, and promissory estoppel is generally said to be a shield and not a sword, incapable of sustaining an affirmative lawsuit as opposed to a defense. On the other hand, English law also has a concept called proprietary estoppel. Proprietary estoppel is distinguished in several ways: it usually (but not always) involves real estate, its requirements are a bit stricter, it does permit an affirmative claim, and there are those who think the distinction between it and promissory estoppel is nonsense. ²⁶⁵ Mr. Crabb's barrister, P.J. Millett, Q.C., argued both ways, pushing proprietary estoppel but also arguing that it was fortuitous that Mr. Crabb was a plaintiff; had he used self help, the District might have sued him and then he would have been permitted to raise a promissory estoppel as a defense. ²⁶⁶ Gavin Lightman, arguing for

263. *Id.* at 186-87.

264. *Id.* at 187.

265. See COOKE, *supra* note 63, 42-64 (2000). The favored treatment of real property seems attributable to England's tiny area and the resultant scarcity of land throughout its history. On the question of property and restitution, see Craig Rotherham, *Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies*, in 1 THEORETICAL INQUIRIES IN LAW 205 (2000). Curiously, Rotherham does not even mention proprietary estoppel in his rather critical assessment of English law. See also the discussion of "proprietary liability" in Peter Birks, *The Role of Fault in the Law of Unjust Enrichment* in *Goff Festschrift*, *supra* note 221, at 235, 270-74.

266. [1976] 1 Ch. at 181-83.

the Council, stressed the defensive nature of promissory estoppel and what he put as requirements of proprietary estoppel: that there must be a relevant legal, though not necessarily contractual relationship between the parties and that "[t]he assurance given must be clear and unambiguous."²⁶⁷

Lord Denning, who virtually invented English promissory estoppel with his famous *High Trees* decision of 1947,²⁶⁸ had nonetheless played a role in its limitation to a defensive posture, though he showed characteristic flexibility in applying it.²⁶⁹ In *Crabb* he commented that

When Mr. Millett, for the plaintiff, said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action.²⁷⁰

He continued with what to me was a point of importance:

The basis of this proprietary estoppel—as indeed of promissory estoppel—is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as “estoppel.” They spoke of it as “raising an equity.” If I may expand what Lord Cairns L.C. said . . . : ‘it is the first principle upon which all courts of equity proceed,’ that it will prevent a person from insisting on his strict legal rights—whether arising under a contract, or on his title deeds, or by statute—when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. . . . The cases show that this equity does not depend on agreement but on words or conduct.²⁷¹

A moment later he restated the issue: “The question then is: were the circumstances here such as to raise an equity in favour of the plaintiff?”²⁷²

In looking at the circumstances, Lord Denning focused not just on the “agreement in principle” at the July 26, 1967 meeting, which he accepted as requiring, in the younger Mr. Alford’s words, that “some

267. *Id.* at 182.

268. *Cent. London Prop. Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130; see *supra* note 151.

269. See COOKE, *supra* note 63, at 36-42.

270. [1976] 1 Ch. at 187.

271. *Id.* at 187-88 (quoting *Hughes v. Metro. Railway Co.*, 2 App. Cas. 439, 448).

272. [1976] 1 Ch. at 188.

further processes” had to be gone through, but also on the Council’s later conduct, particularly its putting up the gates at considerable expense.²⁷³ “That certainly led the plaintiff to believe that they agreed that he should have the right of access through point *B* without more ado.”²⁷⁴ Though Mr. Crabb did not inform the Council before he actually sold the front lot without reserving an easement, the Council knew he was planning to sell the lots separately and would need access at point *B*. “Seeing that they knew of his intention—and they did nothing to disabuse him but rather confirmed it by erecting gates at point *B*—it was their conduct which led him to act as he did: and this raises an equity in his favour against them.”²⁷⁵ Lord Denning said that under these circumstances it seemed to him inequitable for the Council to “insist on their strict title as they did; and to take the high-handed action of pulling down the gates without a word of warning; and to demand of the plaintiff £3000 as the price for the easement.”²⁷⁶ Though it would have been quite reasonable for the Council to insist that Mr. Crabb pay something for the access at point *B*, “perhaps—and I am guessing—some hundreds of pounds,”²⁷⁷ since the land had been sterile and useless for five or six years, this loss could be taken into account. In order to satisfy the equity, it was right that Mr. Crabb get access at point *B* without paying anything for it.²⁷⁸

Lord Justice Lawton reasoned quite similarly to Lord Denning. He found a firm undertaking at the meeting of July 26, 1967, reinforced by the Council’s conduct in putting up the gates at considerable expense to the taxpayers without bothering to ask Mr. Crabb if he wanted them and was willing to pay for them. (“They did not write: they made no inquiries. They erected the gates. If they were behaving responsibly, the inference is that they put the gates where they did because they knew that there had been an undertaking that they would put them there.”²⁷⁹) Then the Council allowed Crabb to sell the front lot and then “behaved in a manner which the judge described in restrained terms as high-handed and discourteous. I am surprised that a local authority should have behaved in the way this local authority did.”²⁸⁰ Since the Council’s actions left Mr. Crabb “with a useless piece of land from which there was no exit,”²⁸¹ Lawson concurred with Lord Denning on the remedy: the right of way at no charge. He then showed that he saw the dispute as not a strictly private matter:

273. *Id.* at 189.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 189-90.

279. *Id.* at 191.

280. *Id.* at 191.

281. *Id.* at 192.

In conclusion I should add this: as the result of the defendants resiling from their undertaking, this piece of land which is designated for light industry has stood useless. It might well have been profitable not only to the plaintiff but to other people living nearby. In an area where employment for the young is not always easy to find, we have the spectacle of this piece of land next door to a housing estate being rendered useless at a time when it could have been of value to the community. For that the defendants are solely to blame.²⁸²

The third judge, Scarman, L.J., in what became a much-quoted dictum, said that he did not find the distinction between proprietary and promissory estoppel helpful. "This distinction may indeed be valuable to those who have to teach or expound the law; but I don't think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance."²⁸³ What he, instead, looked for was "an equity arising out of the conduct and relationship of the parties."²⁸⁴ Looking back to several nineteenth century opinions, Scarman put the inquiry as whether the Council, either by words or conduct, encouraged a belief in Mr. Crabb that he had an agreement from them giving him access at point *B*. He found that the Council had encouraged such a belief, both directly by putting up the gates, and indirectly by never telling either Crabb or Alford that it was standing on its rights.²⁸⁵ "[O]ne has to look at the whole conduct of the parties and the developing relationship between them."²⁸⁶ Doing so, Scarman agreed with his colleagues that "nothing should now be paid by the plaintiff and that he should receive at the hands of the court the belated protection of the equity that he has established."²⁸⁷

I find *Crabb* a valuable case because while the justices fully understood the vagaries of the law of estoppel, they really focused on right and wrong: was an equity raised in Mr. Crabb's favor by the District's words and conduct that encouraged him to act to his detriment in light of the relationship between the parties? Rather than trying to fit the case into fine categories, the task was, in Scarman, L.J.'s words, to solve the particular problem raised by the particular case.²⁸⁸

282. *Id.*

283. *Id.* at 193.

284. *Id.* at 192.

285. *Id.* at 197.

286. *Id.* at 198.

287. *Id.* at 199.

288. The theory of the case was the subject of an exchange the following year in the LAW QUARTERLY REVIEW. Oxford's Patrick Atiyah published a note entitled *When is an Enforceable Agreement Not a Contract? Answer: When it is an Equity*, 92 L.Q. Rev. 174, 177 (1976), in which he argued that a contract should have been found, based on a broad view of consideration, involving Mr. Crabb's detriment. ("The standard doctrine is

III. A THEORY OF ROUGH JUSTICE

We are dealing with sloppy dealings. Almost always a lawyer could, or should have structured the transaction in a way that would have been clearer and either would have given the plaintiff a clearly enforceable contract claim or would have alerted him to stay out or proceed at his peril.²⁸⁹ But human beings don't always work that way, and often no one meant to do anyone harm. Whether the cases involved big transactions like *Hedley Byrne*, *Howard Marine*, *British Steel* and *Quake*, or smaller matters that were big to the person who got burned like *Wheeler v. White*, *Pop's Cones*, *Esso v. Mardon*, and *Crabb*, or loving relationships that turned sour, like *Steffes*, *Watts*, and *W. v. G.*, either the parties didn't think in terms of lawyers or they made mistakes or the proper lawyering—and a full-fledged contract—just didn't get done. The traditional rules of restitution and promissory estoppel work when the facts fit, that is, when there is a clear unjust enrichment or a clear promise clearly relied upon.

clear enough: consideration does not have to be a benefit to the promisor, it is enough that there is a detriment to the promisee.”) (On the benefit-detriment view of consideration, used more in England than the United States, see Peter Linzer, *Consider Consideration*, 44 ST. LOUIS L.J. 1317, 1320-23 (2000). Professor Atiyah concluded that

It seems clear then that the problem of what is, in any given case, a sufficient action in reliance to justify holding a party bound by an undertaking or promise or expectation he has created, cannot be magically waived away by calling the case estoppel instead of contract. The problem is inescapably there, and it is the *same* solution, whether the case is called estoppel or contract.

Id. at 178. P.J. Millett, the barrister who successfully argued the case for *Crabb*, countered in the next issue of the L.Q.R. that *Crabb's* lawyers had consciously chosen estoppel because the law of strict contract would have supported four defenses raised by the Council: that there was in fact no agreement, and that if there was an agreement it was unsupported by consideration, it was unenforceable under the Statute of Frauds and the negotiators for the Council lacked authority to bind the Council into a formal contract, but could make assurances sufficient to estop it from not carrying them out. P.J. Millett, *Crabb v. Arun District Council—A Ripost*, 92 L.Q. REV. 342, 343 (1976).

Professor Caroline Brown, in her comment on this article, also finds consideration a useful tool. See Caroline Brown, *Comments on Peter Linzer's Rough Justice*, 2001 WIS. L. REV. 777, 787-88. I agree with Professors Atiyah and Brown that at times a broader view of contract may suffice, but as I think I have shown, that approach often involves rather attenuated views of both consideration and implied contract, and is really a cosmetic surrogate for a rough justice approach.

289. I have always found it appalling that the unions and municipalities that got burned by runaway shops didn't put what they thought were serious bargains with big corporations on paper, instead of taking the owners at their word. See *United States Steel Workers, Local 1330 v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980) (U.S. Steel held not bound by Chairman's public assurances that if a plant operated at a profit after the workers took a large pay cut, it would not be closed); *Charter Township of Ypsilanti v. Gen. Motors Corp.*, 506 N.W.2d 556 (Mich. Ct. App. 1993) (municipality unable to keep General Motors from closing Willow Run Plant despite giving it large tax incentives).

The problem is how to decide if an obligation exists when there is not a negotiated and well-drafted contract, nor an explicit promise that was foreseeably relied upon nor a clearly unjust act that enriched the defendant at the plaintiff's expense.

I think that the best we can hope for is some amount of rough justice. That a claim doesn't fit the rules of promissory estoppel or the rules of restitution should not end the matter, though it may make us ask that the plaintiff show us something else. I would start by looking at the relationship between the parties. Of course everything is a relationship; the word is not magic. Relationships can be good or bad—or some of both. They can be very formal. They can be paternalistic. They can be exploitative. And they can be indifferent, a relationship where there is no relationship.

Focusing on the relationship does, however, lead us to ask important questions that suggest responses: Were the parties involved emotionally or were they members of a family? While that might lead us to doubt that either contemplated a binding legal obligation, it also warns us that they were unlikely to sign a contract or even to spell out rights and duties in any detail. Were they strangers, dealing at arm's length? That cuts more toward requiring a contract or a clear obligation. But did that relationship turn into one of advice and trust? Did one party become dutch uncle to the other (as in *Red Owl*, *Pop's Cones*, and *Mardon*)? Even when very large companies were involved, did one rely on the expertise of the other (*Hedley Byrne*, *Howard Marine*) and was that reliance justifiable? Above all, did the relationship itself give the words or actions of one party an impact that legitimately caused the other party to act to his detriment?

Consider at-will employment. While the law is generally clear that the employer has great discretion in hiring and firing, employers often make statements or do acts that give an impression of job security. Other, more relational factors can color those assurances. How long had the employee worked there? To me this is a marker toward more informality and trust. Was there a union involved?²⁹⁰ Given the common antagonism between unions and employers, this may justify requiring more formality. What is the nature of the industry? Throughout Silicon Valley even cutthroat marketers preach a family atmosphere at work, while in the smokestack industries the legacy of the bad old days is still present.

Even if we think about a purely business relationship (and what does "purely" mean?), there are many relational issues. For how many years have the parties been dealing, and do they expect their interests to be intertwined in the future? Are there trade customs, courses of dealing and

290. Normally, union contracts provide for grievance procedures and employment under them is not terminable at will. Nonetheless, individual employees may rely on some assurance, or the union itself may negotiate informally over items like factory closings, as in the cases discussed in note 289, *supra*.

performance or persistent waivers of rights that arguably have come to be taken for granted, at least by one of the parties? Did one party do something (like the Arun District Council's putting in of expensive gates) that justified reliance?

The nature of the relationship should affect what we call a promise. The English legal writer John Wightman, in an excellent article applying Ian Macneil's relational contract theory to cases like *W. v. G.*,²⁹¹ made the important point that there can be incomplete assent particularly in emotional relationships, not lack of assent as much as vague and informal senses of tacit understanding or even not fully thought out assumptions about the other that are justifiable given the nature of the bond between the parties. Wightman gave this phenomenon the happy name of "incremental assent," a valuable term. Just as Wightman applied Macneil's views of primarily business relationships to intimate ones, I believe that we can apply Wightman's insights generally.

The question is whether there is something between the parties that justifies one of them relying on something the other did or said, and whether this justifies a court's enforcement of the "promise" implicit in that something. As *Crabb*, *W. v. G.*, and *Red Owl* show us, what courts sometimes call promises really become the sum total of actions or inactions that might have led a person *in a given relationship* to understand—or misunderstand—that the other was obligating himself to do something or not to do something. The more informal and intimate the relationship, the less formal we should expect the "promise" to be, and the more businesslike the dealings, the more we should look for explicitness. Thus, in the bidding for a government contract, a subcontractor's bid should be read pretty literally (in light of trade usages, etc.), while in an intense emotional roller coaster like that in *W. v. G.* much more ambiguous action can legitimately be relied upon. Yet we must not turn these common sense approaches into litmus tests or black letter rules. Even in more commercial dealings parties act sloppily, as in *British Steel*, or get to know each other and become dependent upon each other's advice and judgment, as we could see in *Howard Marine* and *Esso v. Mardon*. That should lead to more willingness to tolerate informality. On the other side of the coin, I can conceive of very intimate and sexual relationships in which the parties acted with their eyes wide open and made careful efforts to spell out each other's rights and obligations, or business dealings where at least one party tried hard to make clear that it wanted no liability, as in *Hedley Byrne* itself. If the parties seemed to be dealing with each other on a basis of equality and formality, their dealings should be treated more like a formal contract with less toleration for assumptions and claims of unstated understandings. The question of a

291. Wightman, *supra* note 82.

promise should not be viewed as a sterile definitional question for the court, but a complex fact question for the jury.²⁹²

Aside from promises—or tangled in among them—is the matter of fairness. Two hundred forty years ago, in *Moses v. Macferlan*,²⁹³ Lord Mansfield made his famous statement about what he denominated quasi-contract: “[i]n one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.” It is fashionable to sneer at Mansfield’s words as either meaningless or sentimental, but I have always felt that they are the essence of restitution, even if “the ties of natural justice and equity” obviously cannot function as a detailed testing standard. As Williston himself, put it, “There is no way in the law to get rid of some of these questions where mathematics will not help.”²⁹⁴

The *Restatement (Third) of Restitution*, which is still in its early stages, contains a fair discussion of *Moses*:

Explaining restitution as the embodiment of natural justice and equity gives the subject an undoubted versatility, an adaptability into new situations, and—in the eyes of many observers—a particular moral attractiveness. . . .

At the same time, the purely equitable account of the subject is open to substantial objections. Saying that liability in restitution is imposed to avoid unjust enrichment effectively postpones the real work of definition, leaving to a separate inquiry the question whether a particular transaction is productive of unjust enrichment or not.²⁹⁵

It continues, however, with what I think is a crabbed view of restitution:

The concern of restitution is not, in fact, with unjust enrichment in this broad sense, but with a narrower set of circumstances giving rise to what is more appropriately called *unjustified enrichment*. . . . Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights. . . . [T]he concern of restitution is predictably with those

292. Yes, this is likely to lead to more jury questions and yes, contract law, unlike tort law, has always been afraid of juries. But juries have done a good job in tort litigation and are not as pro-plaintiff as we are often led to believe. (Think how many years it took to get a plaintiff’s verdict against the tobacco companies.)

293. [1760] Eng. Rep. 676, 681 (K.B.).

294. 4 A.L.I. Proc. app. 85 (1926) (debate over section 88 (later section 90) of the RESTATEMENT OF CONTRACTS, *supra* note 2).

295. RESTATEMENT (THIRD) OF RESTITUTION § 1, cmt. b, at 2 (Discussion Draft, March 31, 2000).

anomalous transfers that cannot be justified by the terms of a valid and enforceable exchange transaction; by the intention of the transferor to make a gift; or by the existence of a legal duty to the transferee. . . .

[N]otwithstanding the potential reach of the words, and Lord Mansfield's confident reference to "natural justice"—the circumstances in which American law has in fact identified *unjust enrichment* resulting in legal liability have been those and only those in which there might also be said to be *unjustified enrichment*, meaning the transfer of a benefit without adequate legal ground.²⁹⁶

We do not yet have concrete examples of where the Reporter will draw the line on the adjectives "unjust" or "unjustified" or the noun "enrichment," but in contrast with the statements quoted, we can look to the *Second Restatement of Contracts*. That Restatement devotes a portion of its Remedies Chapter to restitution in connection with contracts, particularly contracts that have failed or been excused. It includes as enrichments benefits that were almost immediately destroyed and pays almost no attention to what constitutes unjustness.²⁹⁷ That is consistent with the Massachusetts line of "wrought into" cases, in which a contractor was allowed to collect, after a contract had been discharged because of impracticability, for all he had "wrought into" the now-worthless project. In most cases, there is no wrongdoing by either party. The doctrine does rough justice between two innocent parties, a fair result, but hardly one dictated by an unjust or unjustified enrichment of the defendant.²⁹⁸ And while I haven't done a systematic survey, I have noticed an awful lot of cases from around the country in which the courts speak of "unfairness" as the essence of unjust enrichment, not a tightly bound notion of transfers of property that don't satisfy black letter rules.

Consider *Estate of Grossman*,²⁹⁹ a Wisconsin case, in which a father had asked his adult daughter to drive 100 miles or so to take care of her ailing mother, but after the mother died had never asked the daughter to do the same for himself. The daughter, who had a job and an apartment in Milwaukee, came for several extended visits and took good care of her father. After he died, she sought recovery from his estate for her services to him. The Supreme Court found that she was entitled to compensation

296. *Id.* at 3-4 (emphasis in the original).

297. See RESTATEMENT (SECOND) OF CONTRACTS § 377, cmt. a; *id.* § 370, cmt. a ("The requirement of the Section is generally satisfied if a benefit has been conferred, and it is immaterial that it was later lost, destroyed or squandered."); *id.* § 377.

298. See *Young v. City of Chicopee*, 72 N.E. 63 (Mass. 1904); *Angus v. Scully*, 57 N.E. 674 (Mass. 1900).

299. See *supra* note 37.

for the extended stays, but not for shorter, more social visits, even though they still involved the long drive. The court pointed to no request or promise by the father, and it is hard for me to see an unjustified enrichment of the estate as the *Third Restatement of Restitution* seems to be using the term. It reached a fair result that avoided dumping all the costs on the daughter, but it still drew lines, based on common sense and fairness.

When there is a negotiated contract between rough equals, it should be enforced as the parties intended. When there is no bargain but a clear promise clearly relied upon, it should be enforced. And when there is a clearly wrongful act that enriched the actor at the expense of the plaintiff, the plaintiff should be made whole. But there are many dealings that don't quite fit any of these situations, that involve more unjust impoverishment than either unjust enrichment or detrimental reliance on an explicit promise. It is in these situations that the best the courts can do is rough justice. But rough justice is infinitely better than no justice.

IV. HAIM SHORE'S CASE AGAINST MOTOROLA

I would like to test my relational/rough justice approach by looking at *Shore v. Motorola, Inc.*³⁰⁰ an unpublished case from the Seventh Circuit that involved a business deal gone sour between two parties thousands of miles apart who never set eyes on each other, a case in which there was little enrichment but lots of impoverishment, lots of assurances, but not quite promises. Great promises, great bitterness, and no recovery.

Haim Shore is a quality engineer who in 1991 was an untenured senior lecturer in Industrial Engineering at the Tel-Aviv University. At that time he read an ad that Motorola had placed in professional journals announcing that it had "embarked on a bold new venture . . . The Six Sigma Research Institute. The Institute's mission is to research and develop the theoretical framework and supporting tools necessary to

300. The case is unreported. See 210 F.3d 376 (7th Cir. 2000). The unpublished opinion of the Seventh Circuit appears at 2000 WL 51143 and 2000 U.S. App. Lexis 2042. It affirmed No. 94 C 5890 (unreported memorandum decision of N.D. Ill., Nov. 23, 1998, approving and adopting Report and Recommendation of Rebecca R. Pallmeyer, Magistrate Judge, February 5, 1997) [hereinafter Magistrate's Report].

I must disclose that *Shore v. Motorola* was the last case handled by Jackie Macaulay, our host Stewart Macaulay's beloved late wife; in fact, the decision of the Seventh Circuit came down two weeks after Jackie's death. I don't believe I ever met Jackie, though I had a memorable telephone conversation with her a few years ago in which she was very helpful to my wife, Rhea Stevens, and me in a rather nasty fee suit over litigation involving a champion show dog. Jackie invested her heart, her health, and a lot of uncompensated lawyer time in the *Shore* case, and it was a bitter defeat. As I will show, I have my doubts that her client should have won on the contract ground she put most of her efforts into, and I doubt that the proper damages would have been enough to compensate either Dr. Shore or Jackie. Nonetheless, I think his case makes an excellent example of one in which rough justice should have been done, but wasn't.

accelerate the achievement of *Six Sigma Quality* [the highest degree of quality control, with only 3.4 errors in one million parts], and to facilitate the subsequent transfer of such knowledge and skills to technical and managerial communities.”³⁰¹ The ad went on to explain that among the Institute’s major products would be the Six Sigma Encyclopedia of Statistical Tools, “a comprehensive collection of step-by-step instructions on the nature and usage of advanced statistical tools,” and that “[t]o create this multi-volume work, the Institute is inviting technical experts—Motorola’s customers, partners and suppliers, as well as those who are not directly associated with Motorola—to participate in the authoring process. To this end, we are issuing a *call for best-in-class contributing authors* for the following statistical tool and case study topics”³⁰² The ad contained a picture of what looks like a large looseleaf volume bearing the name “Six Sigma Research Institute Encyclopedia of Statistical Tools” and showing the publisher as the “Motorola University Press.”

At the bottom of the page was a “Call for Authors”:

Don’t miss this once in a career opportunity! If you would like to be considered as a *contributing author to this world-class set of materials*, please call us for the application details, or send your name, company, address, and phone number to:

Attn: Manager, Research & Development
The Six Sigma Research Institute

³⁰³

....

Shore wrote to Motorola expressing interest and received back from Jack Prins, the Manager of Research and Development a letter dated December 10, 1991 outlining the procedure for applying and enclosing an “Author Kit” bearing the logos of the Six Sigma Research Institute and Motorola University, another division of Motorola, Inc. Prins’s letter urged Shore to fax or phone in his choice of topics. The Author Kit described the project: “In essence, the SSRI will be compiling a major

301. The ad appeared in *QUALITY PROGRESS* for November of 1991. This and subsequent quotations are from documents disclosed during discovery in the case. All italics and underlining in this and the other documents quoted were in the originals. For a rather skeptical discussion, describing “Six Sigma and a couple of similar-looking knockoffs” as “nothing short of a full-on corporate fad,” see Lee Clifford, *Why You Can Safely Ignore Six Sigma*, *FORTUNE*, Jan. 22, 2001, at 140. The name comes from the use of the Greek letter to represent deviation from perfection, in this usage, no deviation until you get to six decimal places. In the same issue of *Fortune*, Microsoft took out a two-page add with the legend, “The mythical five nines. 99.999%. As close to perfection as you can get without breaking some law of nature.” *Id.* at 34-35.

302. Appellant’s Brief at 88 Ex. 2, *Shore v. Motorola*, 2000 WL 51143 (7th Cir. 2000) (No. 94 C 5890).

303. *Id.*

collection of Six Sigma oriented tools, case studies, and literature, ultimately culminating in the form of a comprehensive handbook. Although still in the design phase, the handbook has already been dubbed the '*Six Sigma Owner's Manual*.' To this end, *we are calling for a substantial number of 'best-in-class' contributing authors . . .*'³⁰⁴

The Author Kit listed twelve "process steps," the last two of which were "*Final page layout is submitted to Motorola University Press for publication,*" and "*Dissemination channels are activated.*"³⁰⁵ In the Author Kit was a "Dear Colleague" form letter from the Director of SSRI that gave another description of the project:

It is anticipated that this work will set a new standard in the applied statistical and engineering communities around the globe. The concept has already drawn the attention of several major universities and corporations. Since the handbook will be a "living document," it will be used by industry and universities for many years to come. Its flexibility is such that new tools, practices, case studies, and supporting materials can be added at any time. It is the intention of Motorola, Inc. to aggressively market this handbook as well as certain supporting software, instructional materials, informative videotapes, and world-class consulting services.

In order to realize this vision, it was determined that the handbook should be authored by "best-in-class" contributors, distinguished academicians, internationally recognized consultants, and established practitioners. Each author will be fully acknowledged at the beginning of his or her module and/or case study. In addition, a biographical sketch of each contributor will be featured in a special section of the handbook.

....

Sincerely,
Mikel J. Harry, Ph.D., *Director*
SIX SIGMA RESEARCH INSTITUTE
and Senior Member of Technical Staff
Motorola University
Motorola, Inc.³⁰⁶

The Author Kit also contained a copyright assignment form, in which the signer stated that "I . . . understand that there is no remuneration of any kind, including royalties, now or in the future, in exchange for this

304. *Id.* at 89 Ex. 5.

305. *Id.*

306. *Id.*

assignment. I understand that I will be fully credited as author of this work when it is published by SSRI.”³⁰⁷

Within three weeks through a series of faxes and letters Shore and SSRI agreed that he would write eight of the “modules,” all dealing with various testing methods. Between January and April of 1992 Shore wrote the eight modules, which were apparently highly technical and detailed works. After a review and revision process he submitted them to Motorola in late June, and on August 19, 1992 was informed that “your manuscript has been thoroughly reviewed and is *accepted by the SSRI Editorial Staff*. . . . We are submitting your manuscript to MU [Motorola University] Press (which has the final responsibility for publication).”³⁰⁸

So far, so good, but Shore heard nothing more. When Shore hadn’t received any further comments by late October, he inquired of SSRI and was informed that there was an additional player involved, Addison-Wesley Press, described by SSRI’s publications manager as “our publisher.” By late February of 1993, Shore was writing to both SSRI and Addison-Wesley to try to find out what was happening to his “modules,” and on March 31, 1993, an editorial assistant at Addison-Wesley sent him a memorandum saying that the project was “on hold.” This was followed by similar letters from an Addison-Wesley Associate Editor and the SSRI Publications Manager. Finally, on December 6, 1993, Vincent Serritella, Motorola’s Manager of Corporate Alliances, a new figure whom Shore had never met, wrote to Shore (“Dear Haim”) to tell him that Motorola had decided “to temporarily stop publication of the entire Six Sigma Research Institute series.” According to Serritella, over 200 manuscripts had been received for the encyclopedias, and some had been published as monographs. The sales of these monographs had been very disappointing, leading to the decision to scrub the entire project. Motorola never did publish the encyclopedia; it later offered to publish Shore’s modules separately or to return them to him, but he refused both offers on the ground that the modules were valuable only as part of the encyclopedia.

Shore came to the United States in the fall of 1993 on sabbatical, and while he was visiting at the University of Wisconsin, brought suit in the Wisconsin courts against Motorola on contract, reliance, and restitution grounds. Motorola removed the case to federal court and it was then transferred to a federal district court in Illinois. Eventually a federal magistrate judge, applying Illinois law, recommended granting summary judgment for Motorola, the district judge accepted the report, and a Seventh Circuit panel of Richard Posner, Frank Easterbrook, and Daniel Manion affirmed.

307. *Id.* at 94 Ex. 13.

308. Appellant’s Motion for Summary Judgment at Ex. 17, *Shore v. Motorola*, 2000 WL 51143 (7th Cir. 2000) (No. 94 C 5890).

Both the Magistrate and the Seventh Circuit found that no contract to publish the encyclopedia existed because the terms of the agreement between Shore and Motorola had too many uncertainties. Both courts relied heavily on *Academy Chicago Publishers v. Cheever*,³⁰⁹ an Illinois case involving the widow of the author John Cheever. Mrs. Cheever had signed a written contract with the plaintiff publisher to select some of Cheever's uncollected short stories for publication. Eventually disputes over editorial matters arose, Mrs. Cheever refused to deliver the manuscripts to the publisher, and the publisher sought specific performance. The Illinois Supreme Court found that the contract was too vague for specific performance in that it did not specify which stories would be published, a certain date of publication, the style, or manner in which the book would be published, or its sale price. The Magistrate applied these criteria to Shore's agreement with Motorola in some detail; the Court of Appeals noted only that *Cheever* required a promise to publish and a certain publication date and found that what it called "Motorola's recruitment literature and correspondence" did not express an unconditional promise to publish Shore's manuscript and made no reference to a publication date. Both courts also found Shore's claimed expectation damages speculative and thus had several reasons to reject his contract claim. With respect to his reliance claim, they reiterated their findings that Motorola had made no "unambiguous promise"³¹⁰ that it would publish Shore's work in the encyclopedia. As to the restitution argument, the Court of Appeals said that since Shore had claimed that the modules were now obsolete and the record indicated that Motorola would not have made money selling them in monograph form, Shore had not conferred a benefit on Motorola, so there could be no unjust enrichment.

I think that the *Cheever* case can be pretty easily distinguished, since the publisher was seeking specific performance, not damages, and the dispute there was over the overall editorial content and presentation of John Cheever's works, and the details of who would decide the issues weren't that clear. Here, while Shore's work had not been finally approved by the Motorola University Press or Addison-Wesley, there was no argument that it would not have been approved had the project gone forth. Shore wasn't contesting the way the book would be put together or its content. He had just wanted to see it published, and not getting that, now sought damages. The real issue is not whether Motorola promised to publish Shore's modules, but whether the paperwork between Shore and Motorola/SSRI included its promise to publish an encyclopedia that would include Shore's work if he submitted it and it was of sufficient

309. 578 N.E.2d 981 (Ill. 1991).

310. Both the Magistrate Judge and the Seventh Circuit cited *Quake Construction v. American Airlines*, 565 N.E.2d 990, 1004 (Ill. 1990), for this proposition, but as we have seen, *Quake*, while it states that rule, did not follow it. See *supra* text accompanying notes 216-19.

quality to justify inclusion. I think a pretty good case can be made for that position, but it is clear that no such promise was made explicitly.

Even more, Shore's expectation damages were speculative. He projected substantial consulting contracts, employment opportunities in the United States, royalties from books and research grants, but these appear, even to a sympathetic observer, to be mostly pie in the sky.³¹¹ Thus, at least under Illinois law, Shore's express contract claim doesn't look very strong, and, while there is an argument that the case should have gone to a jury, given the pro-defendant summary judgment rules now in effect in the federal courts,³¹² the dismissal of his contract claim is not surprising.

As far as the other two claims are concerned, we do have to recognize that Illinois on the whole seems to be more conservative in its contract and related case law than, say, Wisconsin, even though it was Illinois, not Wisconsin or some other bunch of wooly-headed liberals that decided that Mr. Steinberg had a claim against the Chicago Medical School based on some blurb in the application and a \$15 fee.³¹³ It is also true that in *Quake Construction, Inc. v. American Airlines*, which we discussed at length earlier, the Illinois Supreme Court stated that an "unambiguous promise" was one of the elements of reliance, but as I have shown, it did not really apply that rule.³¹⁴ In any event, there was nothing ambiguous about the assurances that Motorola gave. There might be a question whether these assurances were "promises," but certainly, a court like the ones in *Red Owl* or *W. v. G.* (and, it seems fair to say, the Illinois cases of *Steinberg* and *Quake*) would easily have found promises here. As to the benefit issue, there is considerable authority for the position that if you get what you ask for, you have received a benefit, even if it becomes worthless to you immediately afterwards.³¹⁵

But let us put aside the close case law. How ought the courts to decide a case like Shore's? In my mind, we should look first at the relationship between him and Motorola and its subsidiaries. By no means do all the relational factors favor Shore. His dealings with Motorola were at arm's length. He was a professional engineer and academic. It was a profit-making company. They dealt by letter and fax. But Motorola held itself out as a very responsible leader in quality engineering, often mentioning that it had won what it usually styled the "prestigious"

311. The claim for expectation damages was arguably supported by the same Seventh Circuit's opinion in *Mid-American Tablewares v. Mogi Trading Co.*, 100 F.3d 1353 (7th Cir. 1996), nominally applying Wisconsin law but in fact providing a strong argument for wide jury discretion in lost profit cases.

312. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

313. See *Steinberg v. Chi. Med. Sch.*, 371 N.E.2d 634 (Ill. 1977), discussed in text accompanying note 246, *supra*.

314. See *supra* text accompanying notes 216-19.

315. See *supra* text accompanying note 297-99.

Malcolm Baldrige National Quality Award. Its claims for the Six Sigma Research Institute and the encyclopedia were called “aspirational” or “puffery” by the courts, but coupled with its reputation these claims, made to professionals who were being asked to do a lot of work for no pay, could fairly and reasonably be taken seriously. The references, often italicized, to “this world-class set of materials” and “best-in-class contributing authors,” the call to “Join the Six Sigma Team!,” the warning not to miss “this once in a career opportunity!,” were made in a professional journal and were aimed at professionals. There was a very tight timetable, and in the first reply that Shore received he was urged to fax in his choice of topic “as soon as possible.”

The Authors Kit said that “[i]t is the intention of Motorola Inc. to aggressively market this handbook as well as . . . world-class consulting services.” The “Dear Colleague” letter, signed by the head of SSRI said, in bold type, that “[t]he purpose of this letter is to present you with a unique opportunity to participate in the aforementioned development process and subsequently share in the fruits of success.” The letter continued, “[i]n essence, the SSRI will be compiling a major collection of Six Sigma oriented tools, case studies, and literature, ultimately culminating in the form of a comprehensive handbook.” The closest thing to an ambiguity in the letter was “Although still in the design phase, the handbook has already been dubbed the ‘*Six Sigma Owner’s Manual*.’” That language would hardly appear to the recipient to mean “you’re doing this completely on spec. We may never publish this multi-volume ‘owner’s manual,’ and if we don’t you’ll get nothing for your trouble.” In fact, Motorola had put out an internal memorandum a few months earlier in which it was even more explicit about publication.³¹⁶ Shore did not see this document until after he finished his work,³¹⁷ but we saw the New South Wales court using later statements to buttress its finding of a

316. Motorola University & Six Sigma Research Institute, *Six Sigma Institute, Overview of the Project and Related Deliverables*, Presented to the Motorola Corporate Quality Council, May 20, 1991. The discussion of publication begins:

Motorola is currently negotiating with the highly respected firm of Addison-Wesley, for publication and distribution of all major SSRI documents, including:

A. *The Six Sigma Encyclopedia of Tools*, in approximately 12 volumes

B. *The Six Sigma Encyclopedia of Applications* (case studies), in 7+ volumes

C. *The Six Sigma Handbook of Methodologies*, in 1 volume.

. . . . The core contents will be produced in four phases, from now until the end of 1992

. . . . Distribution and sale to the world “at large” will not occur until Q3, 1993, at which time Addison-Wesley will consolidate, revise and re-format all materials into hardcover books.

Id. at 9.

317. He testified at a deposition that he received the document from Motorola-Israel after he delivered the finished modules and that it did not affect his “perception of the contributions.” Deposition of Haim Shore at 104-05, 106, 112, 312, 327, 534-35, *Shore v. Motorola*, 2000 WL 51143 (7th Cir. 2000) (No. 94 C 5890).

promise by *G* before *W* got pregnant,³¹⁸ and Lord Justice Scarman using the Arun District Council's expenditure of ratepayer funds to install expensive gates as proof of its belief that it had already committed itself to do so.³¹⁹ Even more, Motorola's confident internal predictions belie its argument that its assurances to its potential authors should be viewed as mere "aspirations."

Based on the totality of the atmosphere of collegiality that Motorola successfully created, by its "welcome to the club" comments, its assurances that the Six Sigma publications were going to be the leaders in the field of quality engineering, the fact that Shore worked on the modules for nearly six months, and, perhaps above all, Motorola's cavalier attitude toward Shore and 200 other authors, it seems fair to me that he recover something. Shore sought \$500,000 in damages based on a lost expectation of many consultations and speaking engagements coming from his increased prestige due to the encyclopedia. I agree with the courts that these damages were speculative if not fanciful, but Shore should have got something for the value of the time he spent on what turned out to be a fool's errand. Shore did not keep time sheets,³²⁰ but estimated that he worked twenty hours a week for seventeen weeks.³²¹ At some point in the production process Motorola paid its R&D Manager, Jack Prins, to write some modules at \$2000 per unit, which, even with the introduction that Shore wrote to his group of eight modules, would have brought him only \$18,000. On the other hand, Shore claimed a consulting rate of \$250 per hour, but he made no attempt to argue that he could have got that rate for each of the 340 hours he claimed to have spent on the project; even if he could have, that would have made his reliance damages a maximum of \$81,000.

If we attempted to give him restitution damages for the fair value of his work, the bottom figure would presumably be \$18,000, based on what Prins was paid. How much higher we could go would be hard to figure, since as far as I know, there is no market for hourly academic writers. But if Shore was correct in his estimate of the hours he spent, and we assume that it took about forty hours to write each module, Prins was being paid only about \$50 per hour. There could have been evidence taken from professional technical writers and preparers of professional seminars as to what the going rate for a professional writer on quality was in 1991. I would let a jury put these various items together and uphold any award from as low as \$18,000 to perhaps as much as \$81,000, though that seems high.

318. See *supra* text accompanying notes 81-85.

319. See *supra* text preceding and accompanying note 276.

320. That seems understandable and reasonable, since he didn't expect to be paid by the hour.

321. Magistrate's Report, *supra* note 300, at 8.

An award in the \$18-81,000 range would have been disappointing to Shore and a losing proposition to any lawyer representing him, but I think it would have been the fair result. My colleague Seth Chandler suggested that when liability is unclear because of the vague nature of the wrong we might want to find liability but lower the award. This idea appears, of course, in the *Second Restatement of Contracts* particularly in sections based on reliance and restitution. I think there is something to Professor Chandler's argument. I think we should be satisfied with second best here: in law as in many other areas the best is often the enemy of the good.

V. THE SEARCH FOR PRINCIPLE

Igoring the formal rules leads to a fair result in many of these marginal cases, but even observers who are quite kindred to my spirit have raised warning flags. Caroline Brown, in her comment on this Article,³²² suggests that my approach allows juries too much freedom, and Charles L. Knapp asked whether I really wanted to give that much power to judges, when the judges might not be to my liking. Even more striking are the words of the twenty-eight year old Stewart Macaulay more than forty years ago:

[R]estitution presents many of the favorite problems of realistic jurisprudence insofar as that brand of legal thought centers upon the tension between decision based on rule and decision based on reaction to individual cases.³²³

And, more pithily, "discretionary action can be arbitrary action."³²⁴

It doesn't take much imagination to picture the Seventh Circuit panel of Posner, Easterbrook, and Manion applying my rough justice standard to *Shore v. Motorola*. They would collectively shrug their shoulders and say "we're not moved by Haim Shore's sad story." It seems to me, however, that that is what they actually did in his case, despite the (rather thin) veneer of Illinois contract and promissory estoppel rules. All things considered, I'd rather they had to say outright that they were deciding the case viscerally.

The question, though, is whether we can come up with anything more than gut reactions. In 1983, Lord Goff gave a famous lecture

322. Brown, *supra* note 288, at 783-84.

323. Stewart Macaulay, Comment, *Restitution in Context*, 107 U. PA. L. REV. 1133, 1134 (1959). He was asked just to do a book review (of John Wade's restitution casebook), but, in the editors' words, "[t]he stimulating analysis that followed merits inclusion in the Articles section." *Id.* at 1133. As the title shows, he was thinking contextually even as an assistant professor.

324. *Id.* at 1137.

entitled "The Search for Principle,"³²⁵ in which he contrasted the roles of judges and "jurists," which in British English means legal intellectuals.³²⁶ According to Lord Goff, the judges deal with the particular, often in a rather unintellectual manner, while the jurists generalize, often without much attention to factual detail or practical realities. Of course, the better members of each group are sensitive to the approach of the other, and attempt to fuse the approaches to state legal principles. One of the pitfalls in that attempt was what Goff called, memorably, "the temptation of elegance."

This is a temptation that can attract us all, simply because a solution, if elegant, automatically carries a degree of credibility; and yet the law has to reflect life in all its untidy complexity, and we have constantly to be on our guard against stating principles in terms that do not allow for the possibility of qualifications or exceptions as yet imperceived.³²⁷

Goff said that he saw the law not as a seamless web, "but as a mosaic, and a mosaic that is kaleidoscopic in the sense that it is in a constant state of change in minute particulars."³²⁸ It was primarily the judges who manufactured "the tiny pieces of which the mosaic is formed, influenced very largely by their informed and experienced reactions to the facts of cases."³²⁹ The jurists "assess the quality of each piece so produced; they consider its place in the whole, and its likely effect in stimulating the production of new pieces, and the readjustment of others."³³⁰

In deciding any of the cases at the margin, we must keep the entire mosaic in mind—we simply can't give an award to everyone with an appealing story. But most of all, we must look closely at the details of the tile at hand. None of the cases that I have examined here fits easily into a black letter rule like money paid under mistake of law or the tracing of assets obtained through breach of trust. Thus, an attempt to treat the resolution as driven by an overarching rule of law will either produce unfairness or distort the facts to fit a supposed governing rule. What we must do in each case is look at the tile, and seek a result that works in light of the specifics of the case but will not distort the entire mosaic.

325. It is reprinted as an appendix to the *Goff Festschrift*, *supra* note 221, at 313. The *Festschrift* is also entitled "The Search for Principle."

326. Lord Goff has been both. Although in his youth he was an Oxford don, he spent twenty years as a practicing barrister and then twenty-three as a judge. But he combined this practical life with the co-authorship of the great Goff and Jones treatise on restitution. See *supra* note 221.

327. *Goff Festschrift*, *supra* note 221, at 318.

328. *Id.* at 328.

329. *Id.*

330. *Id.*

In another essay in the volume presented to Lord Goff, Peter Birks wrote forty penetrating pages on the role of fault in unjust enrichment, with the thesis, based on Lord Goff's judicial decisions, that unjust enrichment is a field of strict liability with fault playing a softening role by modifying defenses and adding weight in categories where liability is most in doubt.³³¹ Nowhere, however, did Professor Birks consider the paradox of strict liability in an area dependent on the adjective "unjust." How can liability be strict and still be based on unjustness? The paradox may be solved by a narrow and fixed view of restitution. One comes away from the Birks essay with a sense that he is using the term "unjust enrichment" much as the *Restatement (Third) of Restitution* uses "unjustifiable enrichment," a violation of fairly fixed rules dealing with the transfer of property, both real and personal. I have already stated my disenchantment with that approach, which works well in cases within conventional categories, but undermines the flexibility with new problems that is the essence of restitution.³³² With those cases, of which we have seen so many examples in earlier pages, there is no way to avoid the question of justice—including fault—in deciding whether an enrichment (or impoverishment) is or is not unjust.

In deciding on the basis of rough justice, it is necessary to look closely at the facts. But there are principles that can help. To begin, the normal stasis of the law is not to impose liability. Security and stability call for our not fearing that we will be forced to pay damages without some reason. Thus, the mere fact that a plaintiff has been harmed or that a defendant has been benefited is not ground enough to impose liability. But against this principle of stasis ought to be a countervailing one based on justice of the particular case. This, of course, is merely a retelling of *Moses v. Macferlan*.³³³ To apply it, we must look to the facts of the case, to what was said and done, to who the parties are and their relationship to each other, and to whatever reliance can be shown and the kind of reliance involved.

My theory of rough justice can, of course, be attacked as sentimental and soft. That phrase seems to be a code for "concerned with something other than certainty and observance of the rules." By focusing on fairness, the parties' implicit and communicated understandings, and their relationship, including its changing aspects, we have at least some means to decide whether it is justifiable to undermine certainty and to excuse the failure to follow the rules, that is, the parties' failure to set the arrangement out clearly and precisely. It is just the relational factors that lead people to trust each other, not to go to a lawyer, to infer rather than

331. Peter Birks, *The Role of Fault in the Law of Unjust Enrichment*, in *id.* at 235. The entire *Goff Festschrift*, with fourteen essays by some of the finest British, Commonwealth, and Continental minds, is worth considerable study.

332. See *supra* text accompanying notes 293-99.

333. See *supra* text accompanying notes 293-96.

cross-examine, to fail even to realize that there is not a clear understanding. A fact-specific approach focusing on the parties and their relationship is the diametric opposite to the universal but impersonal *As* and *Bs* of the Restatements. It permits emotional favoritism and appeals to jury passion. But it also permits the law to apply to real people in the real world, and real people often do things in ways that a lawyer-planner would not approve of. Some of those real people are small fry like the people in the cohabitation cases, like Haim Shore, Messrs. Hoffman, Mardon, and Crabb, and like Pop's Cones. But others are giants like British Steel Corporation, Motorola, Resorts International, and American Airlines. The formal rules of contract are easy to apply, though they sometimes (not, I think, often, but sometimes) lead to bad results for good and well-meaning people who didn't know about them, or didn't believe that they needed to follow them for self-protection, or didn't even think of the eventuality that destroyed what they thought was a happy arrangement. This is obvious in the emotional relationships like those in *Watts* and *W. v. G.*, but it was equally true in the "busted deal cases" like *Red Owl* and the several English cases that I discussed. It was also true in *Shore*, probably for Motorola as well as Haim Shore.

In effect, rough justice functions as a gap filler, not just of provisions in a contract, but of a contract at all. To make up for the lack of exchange, of planning, of careful drafting, we have fairness and justice, based on the people involved and their relationship and dealings with each other. To the inevitable argument that this can't make up for the lack of "legal" rights, I can only quote Lon Fuller, speaking of the past benefit cases:

In refutation of the notion of "moral consideration" it is sometimes said that a moral obligation plus a mere promise to perform that obligation can no more create legal liability than zero plus zero can have any other sum than zero. But a mathematical analogy at least equally appropriate is the proposition that one-half plus one-half equals one. . . .³³⁴

At times people will deal with each other in ways that don't fit the rules of bargain and exchange and equally don't satisfy tight rules of promissory estoppel or "unjustified" enrichment. But when we add to the defective dealings human interactions that give substance to what was said or done, the sum total of justice may be greater than the calculus of form.

334. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 822 (1941).

* * *