

# TORT IN A CONTRACTUAL MATRIX

John Fleming

*Professor of Law, Emeritus  
Boalt Hall School of Law, University of California*

Our esteemed moderator sought to divide our discussion on the intersection between contract and tort, by allocating to me what he described as the tort lawyer's view point. I found this puzzling at first but eventually concluded that he sought to confine my comment on the way tort law has been affected, whether by extending or contracting its reach, by a "contractual matrix",<sup>1</sup> by "the parties com[ing] together against a contractual structure."<sup>2</sup> My role thus defined guards me against the possible charge of harbouring a preference for tort solutions at the intersection between contract and tort; indeed, far from this being the case, my preference for the contract solution in, for example, overcoming the "privity gap" is firmly based on the conviction that not only would it spare us collateral problems (such as the applicability of limitation clauses), but that the difficulty stems from a flaw of our contract law which can, and should, be more expeditiously remedied on its own rather than by resort to tort.

But first, a preliminary observation. It is no exaggeration to say that the tort law of the last twenty five years has been virtually obsessed with the question of negligent economic loss. That exclusive focus tended to obscure that the defining element in many of these cases was the contractual matrix in which the loss occurred. Latterly, however, the contractual context has moved into the foreground of discussion and helped to elucidate the real crux of the problem. That the situations most frequently involving economic loss have their counterpart also in cases of property damage only went to confirm that thesis. Thus in one of the construction cases, to be presently discussed, concerning a claim by the owner against a subcontractor, the loss incurred was not, as in most such cases, the cost of repairing the defect, but damage to adjacent property.<sup>3</sup> Another, somewhat similar, recent case also involved damage to tangible property when a bailee's servants caused structural damage to a warehoused transformer.<sup>4</sup> In both cases the question was whether the prima facie duty of *Donoghue v Stevenson*<sup>5</sup> was negated by the contractual matrix in which the relation between plaintiff and defendant originated.

As an introduction to these "contort"<sup>6</sup> problems, the basic "concurrency" question should first be briefly addressed. English law, in contrast to the French,<sup>7</sup> has more recently taken the view that a contractual obligation between the parties does not preclude the concurrence of a tort duty in the same respect, so as to give the injured party an option between pursuing a contractual or tortious remedy. At first mainly encountered in relation to claims for personal injury and property damage, application of this principle

1 I take this term from the judgment of La Forest J in *London Drugs v Kuehne & Nagel* [1992] 3 SCR 299, 327.

2 Purchas LJ in *Pacific Associates v Baxter* [1990] 1 QB 993, 1023. Blom speaks of the "Interface between Tort and Contract" in *The Paisley Papers* (1991) 139.

3 *Norwich City Council v Harvey* [1989] 1 WLR 828 (CA).

4 *London Drugs Ltd v Kuehne & Nagel* [1992] 3 SCR 299.

5 [1932] AC 562.

6 The term was coined by Gilmore, *The Death of Contract* 90 (1974).

7 See Weir, *International Encyclopedia of Comparative Law* XI/2 ch 12.

has been greatly increased by the contemporaneous expansion of negligence liability for economic loss, especially in its application to professional services by accountants, bankers and lawyers.<sup>8</sup> The motivation behind this development seems to have been to make available to the claimant procedural and other advantages of tort, such as contribution or a more favourable starting point for the period of limitation, rather than some more profound doctrinal conviction.<sup>9</sup> But such tort duty is subject to any contractual modification, like a lower standard of care or limitation of liability, in deference to the belief in the primacy of private ordering.<sup>10</sup> In short, the starting point for tort in a contractual matrix is that “contract trumps tort” (to borrow Peter Cane’s pithy axiom).<sup>11</sup>

The attraction of tort remedies has occasionally lured courts into more extreme ventures, as in the one-time suggestion in California of treating all malicious breaches of contract as tortious, so as entitle the aggrieved party to general damages for mental distress or even punitive damages.<sup>12</sup> But this “tortification” was later confined to bad-faith refusals by insurers to settle claims against their clients.<sup>13</sup> So limited, it has even persuaded a New South Wales judge that it was proof against summary dismissal.<sup>14</sup>

#### LIMITATION CLAUSES

Much more complex is the “triangular” situation: the effect, if any, of a contract upon the possible tort remedy of or against an outsider. None less than *Donoghue v Stevenson* seems to teach that the days have gone when a contract duty to A precluded a tort duty to B in the same matter. The manufacturer’s contractual promise to his buyer regarding the quality of the product no longer pre-empts an obligation to the ultimate consumer in tort. It is the universality of this principle which was being questioned in the two above-mentioned cases, to which we must now return.

In the construction cases the building owner contracts with a head contractor for the work to be performed. A subcontractor causes damage or other loss to the structure, for which the owner is seeking recovery from him. Paradigmatically, the subcontractor is under contract with the head contractor, but not with the owner who suffered the loss. The reason why the owner does not address his complaint to his contractual partner, the head contractor, may be the latter’s impecuniosity (or bankruptcy), a common feature in a lightweight industry. Most of the recent cases have categorically denied any duty of care between these parties on the ground that the loss is purely economic when the claim relates to a deficiency in

8 *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384 (solicitor); *Esso Petroleum Co v Mardon* [1976] QB 801 (landlord); *Mouat v Clark Boyce* [1992] 2 NZLR 559; *Central Trust v Rafuse* [1986] 2 SCR 147. In England, the question of concurrence is now arguable only in the House of Lords: *Nitrigin Eireann Teoranta v Inco Alloys* [1992] 1 All ER 854, 859.

9 Mustill LJ recently described differing periods of limitation as “offend[ing] common sense”: *Société Commerciale de Réassurance v ERAS* [1992] 2 All ER 82, 85. Compare Lord Scarman’s discouraging statement in *Tai Hing Cotton Mill v Liu Chong Hing Bank* [1986] AC 80, 107: “Their Lordships do not believe that there is anything to the advantage of the law’s development in search for a liability in tort where the parties are in a contractual relationship.” It occurred in a case denying a tort duty of care after the same duty had been rejected as an implied term of the contract. See generally Cane, *Tort Law and Economic Interests* 336–344 (1991).

10 See *Central & Eastern Trust Co v Rafuse* [1986] 2 SCR 147; *British Columbia Hydro and Power Authority v BG Checo International Ltd* [1993] 1 SCR; 99 DLR (4th) 577.

11 Cane, *op cit*.

12 *Seaman’s Direct Buying Service v Standard Oil Co* (1984) 36 Cal 3d 752.

13 *Foley v Interactive Data Corp*, 47 Cal 2d 654 (1988).

14 *Gibson v The Parkes District Hospital* (1991) 26 NSWLR 9. See my comment in (1992) 108 LQR 357; also Handford, (1993) 1 Tort L Rev 87.

the work done.<sup>15</sup> That generalization is foreign to my topic except to the extent that it may rest, in this context, on the residuary argument (to be discussed in the second part of this paper) that the plaintiff could have planned in advance to shift the risk by contract. Here I am concerned more specifically with cases where the contract between the building owner and the head contractor,<sup>16</sup> or between the head and subcontractor,<sup>17</sup> purported to exclude or limit liability. This situation is by no means limited to claims for purely economic loss, but can as well arise, as one case has already shown,<sup>18</sup> in relation to property damage — where, in other words, “duty” is prima facie governed by *Donoghue v Stevenson* rather than by any overriding constraints against recovery for negligent economic loss.

Can the building owner sidestep such a limitation clause by suing the subcontractor in tort? It would be unrealistic to reject such a claim outright on the ground that there is no “proximity”, the currently fashionable touchstone of “duty”, between the parties. The employment of subcontractors was clearly contemplated, and the risk of their negligence and its effect on the owner’s interests was obvious. But was it “just and reasonable” (to use another favoured test of duty) to subject the subcontractor to liability in these circumstances, which included the contractual background against which he had agreed to perform his services? Negating a tort duty can be squared with conventional analysis as an illustration of the principle of voluntary assumption of risk: in as much as the owner had agreed with the head contractor to assume the risk of defective performance above the stipulated sum, he assumed the risk of loss from negligence by the contractor and those whom the latter deputed to perform the work. If, instead, the limitation clause was in the contract between the subcontractor and the head contractor, it signified all the more the subcontractor’s unwillingness to do the job otherwise than subject to the limitation. At any rate, if known to the owner, the latter’s acquiescence can be deemed an acceptance of the terms under which the subcontractor is alone prepared to enter into a relationship defining his duty with the owner.

But could a tort duty be recognised subject to the limitation clause in the contract? This baffled the judges. In *The Aliakmon*,<sup>19</sup> where the consignee of cargo sued the shipowner who had contracted with the consignor subject to the Hague–Visby Rules, Donaldson M R gave it as his principal reason for denying a tort duty, and Oliver L J as an alternative reason, that a tort duty would be “original” (not derivative) and as such could not be subject to the limitation clause in the bill of lading. Only Robert Goff L J was prepared to invoke the concept of “transferred loss” and thereby recognise a tort claim subject to the contractual limitation.<sup>20</sup> It comes as no surprise that this imaginative solution, following the German model of *Drittschadensliquidation*,<sup>21</sup> was promptly squashed by Lord Brandon in the

15 Based on *Murphy v Brentwood DC* [1991] AC 398, categorising such loss as economic. Such cases include *Simaan General Contracting v Pilkington Glass Co* [1988] QB 758 (CA) and *Greater Nottingham Co-op v Cementation Piling and Foundations* [1989] QB 993 (CA). Exceptional was *Junior Books v Veitchi Co* [1983] AC 520 which is now deemed aberrational.

16 *Southern Water Authority v Carey* [1955] 2 All ER 1077 (CA).

17 *Norwich City Council v Harvey* [1989] 1 WLR 828 (CA).

18 *Norwich City Council v Harvey*, supra.

19 [1985] QB 350.

20 The same result had earlier been contemplated by Lord Roskill in the controverted case of *Junior Books v Veitchi Co* [1983] 1 AC 520, 546. The precise problem in *The Aliakmon*, the position of a buyer whose seller retained title at the time of the damage, has since, with Lord Goff’s blessing, been removed by giving him a right to sue under the Bill of Lading Act 1992. See Bradgate & White, (1993) 56 Mod L Rev 188.

21 See Markesinis, “An Expanding Tort law - The Price of A Rigid Contract Law”, (1987) 103 LQR 354, 387 ff (1987).

House of Lords.<sup>22</sup> It does, however, still enjoy apparent support in Canada.<sup>23</sup> Whichever alternative, its significance is linked to the view that the operation of tort law in the context of a planned transaction calls for a modification of the rules familiar in the "classic" non-consensual situations like the typical traffic accident.

Less problematical, no doubt, would be a contractual solution. This is preferred by American courts, either on a theory of assignment or third-party beneficiaries, for claims against subcontractors and the like.<sup>24</sup> It neatly disposes of the problem of limitation clauses by respecting the contractual allocation of benefits and burdens. At present, however, this solution is blocked for British courts by the rigidity of the privity doctrine. Its adoption is strongly recommended in the academic literature.<sup>25</sup>

The other, previously mentioned illustration of a tort duty modified by a contractual matrix comes from the important pronouncement of the Supreme Court of Canada in *London Drugs v Kuehne & Nagel*.<sup>26</sup> The plaintiff had delivered a transformer to a warehouse company for storage under a standard form contract which stipulated a limitation of liability on any package to \$40. Two employees while trying to move the transformer with forklift trucks caused it to fall, resulting in severe damage. Could the plaintiff circumvent the limitation clause by suing the employees in tort?

Unlike the preceding cases against subcontractors who, presumably, were at least covered by liability insurance, to permit a claim against employees would seem at first glance particularly unfair, if not indeed incongruous with modern understanding of labour relations. The cost of accidents, it is generally believed, is a charge on the employer, since he, unlike the employee, is able to plan against, and absorb, it as an overhead of his operations. Nor is it surprising that so few cases have actually raised the tort liability of employees because they are rarely worth suing. It would only be in exceptional circumstances that employees have insurance of their own (eg on their own car) or otherwise command sufficient financial resources to answer a judgment. Thus the argument that it would be unfair to deny the injured plaintiff redress against the guilty employee misses the target, since he could not count on the employee's ability to answer for the damage. The rare case, like presumably the present, where the employer's insurance policy also covered his employees, does not justify a contrary conclusion.

<sup>22</sup> [1986] AC 785.

<sup>23</sup> *BC Hydro & Power Authority v ND Lea & Associates* (1992) 92 DLR (4th) 403, 438-9, noting the apparent consensus of the Court of Appeal in *London Drugs* (1990) 70 DR (4th) 51 that contractual terms may limit the tort duties of persons who are not parties to the contract. This view was restated by McLachlin J in the Supreme Court (see *infra* p 273). It is beyond doubt that contractual terms bind parties in cases of concurrent contract/tort liability (*supra* at n 11).

<sup>24</sup> See William K Jones, "Economic Losses Caused by Construction Deficiencies: The Competing Regimes of Contract and Tort" 59 *Cin L Rev* 1051, 1077-1101 (1991); Eisenberg, "Third-Party Beneficiaries", 92 *Col L Rev* 1358, 1402-6 (1993). The tort solution is generally, though not uniformly, rejected on the ground that the loss is economic.

The Supreme Court of Canada affirmed an "obligation pour autrui" in Quebec law: *Demers v Dufresne Engineering* [1979] SCR 146, though that is more doubtful in French law: Wallace, *Construction Contracts* 5-22 to 5-26 (1986). Markesinis, *The German Law of Torts* (2d edn 1990) adds that "it has never been doubted in German law that the contractual debtor can oppose against the third party/plaintiff all defences etc he may have against the contractual creditor."

<sup>25</sup> Markesinis, "Eternal and Troublesome Triangles, 106 *LQR* 556 (1990); Beyleveld & Brownsword, *Privity, Transitivity and Rationality*" 54 *Mod L Rev* 48 (1991). The French theory of "groupes de contrats", in effect advocated by the latter, has however since been dismantled by the *Cour de Cass.* (Ass plen) 12 July 1991 (Rec Dalloz D) 1991, 549; 1993 *ZEuP* 592.

<sup>26</sup> *supra*, n 1.

Likewise, from the employer's point of view — he cannot be expected to bail out the employee in the circumstances. His contract with the owner of the transformer, limiting his liability to \$40, meant that it was up to the latter, not himself, to procure excess insurance. It would thus upset the whole pattern of the warehouse agreement for the employer, after all, to be saddled with the cost of the accident.

Nor, finally, would it be defeating the plaintiff's expectations to be limited to \$40. Obviously, the warehouse contract envisaged the participation of employees, and it would be quite unrealistic to suppose that the plaintiff, while assuming the risk of loss in excess of \$40 vis-à-vis the warehouseman, reserved recourse against the latter's employees. Indeed, the benefit of such a manoeuvre, were it to succeed, would enure not for him, but for his insurer, who would be subrogated to his claim against the hapless employee. Thus, once again, the intendment of the whole planned arrangement would be frustrated, not even for the benefit of the tort victim but for *his* insurer who would gain a windfall by being enabled to shift to another party a loss which he had contracted to underwrite. From every functional point of view, then, the claim against the employees should fail, at least in excess of \$40, if not altogether.

And so it did. But how?<sup>27</sup> The majority adopted the contract approach by facing down the privity rule and allowing a limited *jus tertii* to the employees. They should be entitled to invoke a limitation clause in the contract between their employer and the plaintiff if (1) that clause expressly or *impliedly* extends its benefits to employees seeking to rely on it; and (2) the employees acted in the course of their employment and in the performance of the very services provided for in the contract when the loss occurred. The remaining three justices preferred the tort approach. One justice (McLachlin J) expressed her unease, not so much with modification of the privity doctrine as with the finding of the majority that the employees were implied beneficiaries of the limitation clause, seeing that they had not been so much as mentioned in the contract. To give them the benefit of such a clause was to travel far beyond the so-called Himalaya clauses, which had eventually gained recognition by the Privy Council,<sup>28</sup> and could most probably not have been accomplished even under statutes (such as New Zealand's Contracts (Privity) Act 1982) giving the benefit of contract promises to "intended beneficiaries". She preferred the "duty" approach from the above mentioned English cases. Essentially based on voluntary assumption of risk, it recognised, however, that a duty of care can be waived or qualified in the light of the contractual matrix. By agreeing to the limitation clause, the customer had accepted that the risk of damage in the performance of the contract was to be his, and his alone.

The most drastic departure from orthodoxy was La Forest J's challenge of the putative liability of employees for torts committed in performing their employer's contractual obligations. In cases like the present, involving a planned transaction with the employer, the plaintiff can be considered to have chosen to deal with a company. The employees were not given to understand that the plaintiff was relying on them for compensation. Placing liability exclusively on the employer places liability on a party that is easily

<sup>27</sup> For more extensive treatment see my Comment on *London Drugs* in 13 OJLS 430 (1993); also Huscroft & Manning, 1993 N Z Recent Law 210 (1993).

<sup>28</sup> *NZ Shipping Co v Satterthwaite (The Eurymedon)* [1975] AC154; *Port Jackson Stevedoring Co v Salmond* [1981] 1 WLR 138; 144 CLR 300; *ITO—International Terminal Operators v Miida Electronics* [1986] 1 SCR 752.

able to modify its exposure by contractual stipulation. In contrast, its employees had no real opportunity to decline the risk, nor could their union be expected to bargain over an issue that so rarely assumes practical significance. La Forest J sympathized with the position of several legal systems, including statutes in New South Wales, South Australia and the Northern Territory, which have totally abrogated the tort liability of employees, but he prudently confined his holding, within the parameters of the case before him, to what he called “contractual vicarious liability”, ie cases within a contractual matrix.

La Forest J’s reasoning led him into dissent from the conclusion of the rest of the Court that the defendants were liable but only for \$40 per package. His view of the employees’ tort immunity, based on policy rather than derived from the contract itself, meant that the employees were not liable at all. In other words, they were not pro hac vice identified with their employer any more than with his contract. This conclusion more nearly reflects the commonly held impression, reinforced by the public policy behind vicarious liability, that employees should not incur any liability at all for the torts committed by them in the course of employment but be subject merely to disciplinary sanction by their employer. On that view, the contractual setting should be irrelevant; in which case, neither the majority’s preference for a *jus quaesitum tertio* nor La Forest J’s limitation of employees’ tort immunity to a contractual context looks the ideal long-term solution; the latter proves acceptable only as a step in the right direction.

#### DEFENSIVE CONTRACTS

I come now to a second situation relevant to defining the scope of tort in the light of contract.

A powerful argument, heard of late, purports to deny a duty of care, particularly a duty to avoid pure economic loss, if the claimant should have exercised his ability to guard against the risk by self-protective measures such as by contract or insurance. It was first voiced in *The Aliakmon*,<sup>29</sup> in support of the decision by the House of Lords (it will be recalled) to deny a tort remedy against a negligent carrier to a consignee to whom the risk but not the property in the goods had passed at the relevant time. Lord Brandon offered the buyers the gratuitous advice that they should have contracted with the sellers to exercise the right to sue the carrier for their account or assign such right to them.<sup>30</sup>

Lord Brandon’s suggestion has struck a responsive chord in later cases. It has, for example, played a role in the construction area, in denying tort recovery to a building owner against a subcontractor or to a contractor against the owner’s supervising engineer<sup>31</sup> on the reasoning that the claimant could have contracted with the defendant for added protection; indeed his failure to do so implied an unwillingness to enter into formal relations

29 *Leigh & Silavan Ltd v Aliakmon Shipping Co* [1986] AC 785, 819. See Cane, op cit at 345–8, with citation of literature.

30 But this advice stopped short of recognising an equitable *duty* to sue on behalf of the consignee, perhaps in deference to an obiter remark by Lord Diplock in *The Albazero* [1977] AC 774, 845. Arguing in favour of such a duty is Goode, “Ownership and Obligation in Commercial Transactions” 103 LQR 433, 453 ff.

On the measure of damages in a suit by the consignor see *GUS Property Management v Littlewoods*, [1982] SLT 533 (HL); *Linden Gardens Trust v Lenesta Ltd* [1993] 3 WLR 408 (HL).

31 *Simaan v Pilkington* [1988] QB 758 (CA); *Pacific Associates v Baxter* [1990] 1 QB 993 (CA).

with him.<sup>32</sup> So, accountants have been absolved from liability to investors and even to existing shareholders on the ground, among others, that such plaintiffs should have procured independent advice.<sup>33</sup> The argument is also encountered in its negative form, namely that the plaintiff's inability to plan against the contingency of loss favours recognition of a duty of care by the defendant. Hence the solicitor's liability in tort to the testator's intended beneficiary, where the latter's inability to guard against the loss reinforced the desirability of furnishing a sanction against professional negligence.<sup>34</sup> Also in the remarkable decision of *Smith v Bush*<sup>35</sup> where a mortgagee's valuer was exceptionally held liable to the purchaser of a "modest" home for an overvaluation, in view of her unfamiliarity with business matters which excused her failure to contract for independent advice such as one would have expected from a business person.

Yet despite its evident appeal, the argument proves too much. For one thing, it does not explain why it was not invoked in *Hedley Byrne v Heller*<sup>36</sup> or at least subsequently added as a defining element of liability for negligent misrepresentation.<sup>37</sup> Where it did surface, as in *Caparo*,<sup>38</sup> it was just a make-weight to reinforce the principal ground, which was that the plaintiffs constituted too undefined a class to satisfy the element of "proximity". Nor was it confronted in the *Norsk* case,<sup>39</sup> a true instance of a tort claim in a contractual matrix. The defendants, negligently navigating a barge, collided in heavy fog with a bridge owned and operated by a public authority. The plaintiffs, under license from that authority, were the principal users of the bridge, who sued for their loss caused by the disruption of its use. A majority of the Supreme Court of Canada, casting aside prior English authority, allowed the tort claim against the bargees, notwithstanding the availability of contractual planning against that risk with their contractual partner, the owner of the bridge. Yet, as the dissent pointed out, the plaintiffs were in a much better position to assess that risk than were the defendants, and could easily have shifted it to the bridge owner.

Moreover, the postulate is difficult to reconcile with there being no rule, certainly no general rule, that even the existence of an alternative cause of action militates against, let alone precludes, recognition of a tort duty by a remoter party.<sup>40</sup> The "ultimate consumer" does not forfeit his tort claim against a negligent manufacturer by having a cause of action for breach of warranty against the retailer. It is precisely because such an alternative remedy is ineffective (eg because of bankruptcy) or to avoid circuity of actions that a plaintiff seeks recovery from the remoter tort defendant, and is allowed to do so.<sup>41</sup> While it is arguable that "a linear arrangement of

32 A fortiori, if there was a contract between plaintiff and defendant, which however dealt with extraneous matters, as in *Greater Nottingham Cooperative Society v Cementation Pilings and Foundations* [1989] QB 71.

33 *Caparo Industries plc v Dickman* [1990] 2 AC 605.

34 *White v Stone* [1993] NLJ 473 (CA); *Ross v Caunters* [1980] Ch 297. See my note, (1993) 109 LQR 344.

35 [1990] 1 AC 831.

36 [1964] AC 465. Cf Stapleton, "The Duty of Care and Economic Loss: A Wider Agenda" 107 LQR 249, 259 (1991): "So, far from correcting a 'wrong turning', *Hedley Byrne* judged by today's standards may have been one itself."

37 Or does it lurk in the requirement that reliance be reasonable?

38 *supra*, n 33.

39 *Norsk Pacific Steamship Co v Canadian National Railway* [1992] 1 SCR 1021. See my comment at (1993) 1 Tort L Rev 68. Nor, it might be added for the Australian reader, in *Caltex Oil v The Dredge "Willemstad"* (1976) 136 CLR 529.

40 Nor does a contractual remedy preclude an alternative tort cause of action for breach of the same obligation against the same defendant: *supra*, at n 8.

41 If such a remedy against a contractual partner is actually available and would be the appropriate

obligations is preferable in order, for example, to shield peripheral deep-pocketed parties and/or to control the problem of multiple causation,<sup>42</sup> this is an agenda to which many concerned with plaintiffs' rights would take staunch objection.

Perplexing also is how to square the "Brandon argument" with the justification for recognising a tort duty on the ground that the relation between the parties was "akin to contract". For if that was the case, why didn't they "go the extra mile" and contract?

In *Hedley Byrne*, for example, the relationship between the defendant bank and the plaintiff to whom the former had furnished, through his own bank's mediation, a credit report, was described as "the equivalent to contract".<sup>43</sup> In the controversial decision of *Junior Books v Veitchi Co*,<sup>44</sup> allowing an owner to sue a subcontractor in tort for applying defective floor finish which subsequently needed replacement, the relation between the parties was described as "only just short of direct contractual relationship." And though that decision has been widely disparaged in later cases,<sup>45</sup> the argument was heard again in *Smith v Bush*<sup>46</sup> where the purchaser of the modest home was deemed to be in a relation "akin to contract" with the valuer employed by the prospective mortgagee. Admittedly, the fact that the cost of the valuation was debited to her account confirmed the reality of that description. In none of these cases was it so much as hinted that the plaintiff could have availed himself of the opportunity to protect himself by contract.

Again, why has the "Brandon argument" been confined in the main to claims for economic loss? Is it not just a cover-up for a preemptory policy against negligent economic loss? It is no doubt true that in most cases of personal injury the victim is in no position to protect himself in advance by contract, except in the unacceptable sense of procuring general accident assurance. Self-protection is germane principally to the context of planned transactions, which rarely involve personal injury. It can, however, arise in relation to property damage, as illustrated by the following variant of the "Himalaya clause" cases.<sup>47</sup> A carrier contracting with the consignor of goods to be shipped by sea stipulates in the bill of lading for limited liability. The cargo is damaged due to the negligence of a stevedore. Can the consignee sue the stevedore? The stevedore's duty in tort certainly arose

one to deal with the matter, *South Pacific Manufacturing Co v NZ Security Consultants* [1991] 2 NZLR 282 suggests this as a factor militating against a tort duty by a third party. The CA disallowed a tort action against an investigator, employed by the plaintiff's insurance company, who had incriminated the plaintiff of arson. Only Richardson J went so far as to say that "if the insured have a remedy in contract against the insurer they should exercise that remedy. If they do not have an adequate remedy that is because they only paid a premium which gave them that lesser protection. In that situation I cannot see any justification for allowing them a greater recovery through tort than they were prepared to pay for in contract" (at 308). In another case, *Gran Gelato v Richcliffe Group* [1992] 1 All ER 865 the Vice-Chancellor went even further in denying a remedy against a seller's solicitor who had made a direct misrepresentation to the purchaser on the ground that the latter had a contractual remedy against the vendor (who however was bankrupt). The decision has been castigated by Cane, 109 LQR 539 (1992); and Hirst J in *The Nicholas H* [1993] 2 Lloyd's Rep 481, 497 considered that the Vice-Chancellor had not intended to "lay down any general principle."

42 Stapleton, "The Condition of the Law of Tort" (a yet unpublished lecture delivered at All Souls College, Oxford on 5 July 1993) 33. The author advocates this among several other countervailing factors against the imposition of tort liability.

43 *Hedley Byrne v Heller* [1964] AC 465, 530.

44 [1983] 1 AC 520, 533.

45 Dillon LJ went so far as to say that "I find it difficult to see that future citation of the *Junior Books* case can ever serve any useful purpose" (*Simaan v Pilkington* [1988] QB 758, 784).

46 [1990] 1 AC 831, 796.

47 *supra*, at n 28.

in a contractual matrix and arguably should be modified by the consignee's ability to contract against the risk of loss. This supposition is strengthened if the carrier in the bill of lading actually stipulated the exemption for himself, his servants and agents. Regardless of whether the benefit of such a clause would bind the consignee in contract, should he not be defeated by the argument that he actually exercised his opportunity of dealing with the risk by waiving his tort rights against the negligent stevedore? This formulation returns us to the "assumption of risk" explanation for qualifying a duty of care in the light of an exemption clause to which the plaintiff was not privy.<sup>48</sup> Or, in Jane Stapleton's words, "a duty would not be allowed in circumvention of a positive arrangement regarding the allocation of risks which had been accepted by the plaintiff."<sup>49</sup>

Another difficulty with the "Brandon argument", as Peter Cane points out,<sup>50</sup> is the lack of definition in the supposition that the plaintiff was *able* to protect himself by contract. Is that formula not just as unstable as the once-touted factor of reliance?<sup>51</sup> This was a central issue in the House of Lords decision of *Smith v Bush*, previously mentioned,<sup>52</sup> in which a valuer, acting on behalf of a mortgagee, was held liable to a purchaser who had been shown and relied on the overvaluation. Special stress was laid on the transaction involving a "modest dwelling" and the fact that the woman could not be credited with familiarity with business affairs. While this approach is entirely praiseworthy for its sensitivity to social realities — and corresponds with the distinction drawn by legislation in England between the rights of subsequent buyers of homes and commercial property against the original builder<sup>53</sup> — it is difficult to reconcile with Lord Brandon's insistence on observing a "clear bright line" in cases of economic loss.<sup>54</sup>

Still less is there any justification for requiring the plaintiff to protect himself by contract, when the defendant had an equal opportunity of contracting for exemption. This was the situation in *Edgeworth Construction v Lea & Associates*<sup>55</sup> where a building contractor relied on faulty specifications supplied by the owner's design engineers. The latter could have placed a disclaimer on the documents, which *Hedley Byrne* teaches would have been effective vis-à-vis the contractor. There was even less reason, therefore, for requiring the latter to protect himself by contracting for protection with his own employer, the building owner. Nor did the fact that that contract disclaimed the employer's responsibility for the engineering specifications oust the engineer's duty because the contract — the contractual matrix — did not purport to define the engineer's obligations.

Jane Stapleton proposes to elevate the inadequacy of alternative means of protection to a necessary, but not sufficient pre-condition to liability for economic loss.<sup>56</sup> In view of the preceding list of reservations, such a generalisation strikes me as precarious. The "Brandon argument" makes its strongest appeal to those who believe in the primacy of private ordering, expressing the ideology of the free marketeers of the 80s. The law of torts,

48 *supra*, at p 271.

49 "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 LQR 249, at 296.

50 *Op cit* at 350-1.

51 See Stapleton, *supra*, n 49 at 283-4.

52 *supra*, n 35.

53 The Defective Premises Act 1972 creates a warranty for successive owners of dwellings, though subject to a short period of limitation. Only commercial buyers are affected by *Murphy v Brentwood DC* [1991] AC 398.

54 *The Aliakmon*, *supra* at 817, 820.

55 [1993] 3 SCR 206.

56 *supra*, n 49 at 295.

on the other hand, represents historically and functionally a counterstrain of public policy which on occasion overrides private agreement. A striking example is, of course, the voiding of exclusion or limitation clauses on grounds of public policy. *Donoghue v Stevenson* itself demonstrates how permeable and shifting is the frontier between contract and tort, culminating in the triumph of social policy (tort) over private ordering (contract). Despite occasional, temporary retreats (such as we have been witnessing in recent years in England), *that* has been the momentum of change in modern law, not the direction signalled by Lord Brandon.

Stapleton's focus was on economic loss, attempting to narrow down to four the factors relevant to a delineation of negligence liability for economic loss. But whatever one's reservations to the generality of her thesis ("necessary though not sufficient") in that wider context, a much stronger case can be made for the importance of that factor in the setting of planned transactions, which she did not address. This for the obvious reason that in such a contractual matrix significance necessarily attaches to a party's opportunity to consider his own position with regard to the risks confronting him. Such were the building construction cases, like *Simaan v Pilkington*<sup>57</sup> and particularly *Pacific Associates v Baxter*.<sup>58</sup> In the latter case, the plaintiffs had contracted with their employer to carry out works to be supervised by the defendant engineers. That contract contained a disclaimer of liability by the defendants to the plaintiffs. In an action by the contractors against the engineers for their refusal to certify claims, the Court of Appeal ruled against any duty of care. The disclaimer clause showed that the defendants expressly declined to assume responsibility to the plaintiffs. Thus far from having availed themselves of the opportunity to shift the risk by contracting with either the employer or the engineer, the plaintiffs had actually expressly taken the risk unto themselves. Here then the role of contract, whether the plaintiff's or the defendant's with a third party, assumes a critical function in the formulation of "duty" to which the plaintiff is entitled for protection.

#### CONCLUSION

The history of tort in the matrix of contract stretches back to *Winterbottom v Wright*,<sup>59</sup> if not beyond. For a time it became accepted that a defendant's contractual undertaking pre-empted a corresponding tort duty not only to the contractual partner but also to third parties. *Donoghue v Stevenson*<sup>60</sup> exploded this "privity fallacy" in relation to claims for personal injury and damage to property. That the defendant owed a contractual obligation to A did not preclude his owing a tort duty in the same matter to B. But other constellations of the contract matrix raised new problems, mainly in the context of purely economic loss, once the barrier to such claims was slightly set ajar by *Hedley Byrne v Heller*.<sup>61</sup> A common feature is their setting in a planned transaction.

One such problem concerns the effect of a contractual limitation clause on the tort liability of a third party. This can be resolved either by expanding the reach of contract beyond privity or by "jumping the privity gap" in

<sup>57</sup> *supra*, n 31.

<sup>58</sup> *supra*, n 31.

<sup>59</sup> (1842) 10 M & W 109; 152 ER 402.

<sup>60</sup> *supra*, n 5.

<sup>61</sup> *supra*, n 36.

tort. The first part of this paper purported to deal with various attempts to follow the tort route. Whether this is preferable to the contract approach is quite another matter. It might be interesting to speculate why British courts adopted the one, while American and Canadian courts inclined to the other. The answer, I believe, lies in the comparative flexibility of their contract and tort rules, as respectively perceived. Whatever might be said in general about the adaptability of the modern law of contract to changing social demands,<sup>62</sup> the privity rule has, in British perspective, assumed a unique aura of solidity (stolidity) despite its relatively modern provenance. By contrast, tort law has become free-flowing despite occasional cyclical setbacks such as it is currently experiencing. Resort to tort is therefore seen as the only feasible avenue to the desired outcome, in much the same way as conversely German law has been forced into contract routines in order to escape the straitjacket of its outdated Code regime of tort. By contrast, American and Canadian courts have felt freer to choose between contract and tort without comparable doctrinal constraints. In the present context, their preference for the contract approach is undoubtedly due to the perception that it is the more germane and effective way of dealing with a matter that arises in a matrix of contract and does not call for a last resort remedy of tort.

The other problem in the context of a contract network we have considered is what effect to attribute to a plaintiff's failure to avail himself of an opportunity to protect himself in advance by contracting with the injurer or a third party. This raises an issue of a different order, not the more or less technical one of which road to travel to an agreed destination, but one of substantive policy whether to deny the protection of tort law to a person capable of advance planning against the risk. The emphasis on individual responsibility in the political and economic ideology of the recent past has given a lift to this argument, but its place in received doctrine must needs await further testing.

Both situations illustrate the weakening of the borders between contract and tort which were once so clearly delineated by the classical theorists of both disciplines. Twenty years ago Grant Gilmore presaged the *Death of Contract*,<sup>63</sup> noting the on-going absorption of contract into tort as the result, among others, of the socialisation of contract law, once the stronghold of private ordering free from intrusion by public policy. But that was, or is, only part of the story. In reality, the interaction has become reciprocal; if contract is being obliterated in some contexts, like concurrence, in others it has come to define the incidence of tort duties. This is especially so in the context of planned transactions, which until yesteryear fell within the exclusive domain of contract. As tort has expanded its reach into that sphere, it learnt to respect the important message of private ordering.

These developments surfaced at a time of growing judicial concern for ways to rein-in the expansive, indeed explosive, potential of tort liability, especially of the law of negligence. Indeed, my friend Jane Stapleton recently sounded a call for a change of approach: from the *Anns* strategy of, in effect, asking "Why not?" to focusing on the "countervailing factors which weigh against the assistance of tort."<sup>64</sup> This paper is a contribution to that debate.

62 A generally optimistic view was recently taken by McLachlan, "The 'New' Law of Contract in New Zealand" [1992] NZ Recent L Rev 436.

63 (1974).

64 *supra*, n 42 at 32.