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Articles

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Consideration and Estoppel: Problem and Panacea

In his book, The *History of the Common Law of Contract,* A.W.B. Simpson demonstrates that consideration originally seems to have meant the "matter of inducement" – the "why" of entering a promise.[1] He writes: "The essence of the doctrine of consideration, then, is the adoption by the common law of the idea that the legal effect of a promise should depend upon the factor or factors which motivated the promise. To decide whether a promise to do X is binding, you need to know why the promise was made."[2] In modern terms, according to Simpson, a promise which lacks any adequate motive cannot have been serious and therefore ought not to be taken seriously. There could have been other reasons for enforcing a promise, such as induced reliance and detriment, but these reasons were subsumed into one test for the actionability of all promises: the requirement of good consideration. Consideration was simply a reason to enforce an obligation or a promise. It was a moral justification or legitimisation for enforcing an obligation: Why it was *right* that it should be enforced.

This paper examines how our conception of consideration has become much less fluid than this original, simple approach. The paper proceeds to look at how the rigidity of consideration has resulted in a corresponding inability of contract law to adapt to accomodate many obligation-creating situations. One result has been a phenomenal growth in the use and scope of equitable estoppel, to the point where recent Australian jurisprudence contemplates its use as a means of generating future obligations. It will be submitted that a better approach would be to allow the doctrine of consideration to return to something close to its original justification, thus permitting the law of contract to deal with most of the situations now being treated as solvable only by estoppel. At the same time, courts should acknowledge and elaborate on their role in making contracts, in imposing obligations for the future on parties where, in the view of the court, the balancing of interests justifies such a result.

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1. See Simpson, *The History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Oxford University Press, 1975) at p. 320. See also: P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).
2. *Ibid.*, at p. 321.

I. *Consideration: Justifications and Problems*

Since its origin as a moral justification for recognising obligations, other supposedly amoral justifications for the doctrine of consideration have been developed. One obvious one is the limit that a requirement of consideration places on the number of cases related to promises and reliance that might otherwise come before the court. A gratuitous promise will not be enforced in the absence of consideration so there is little point in litigating. Trivial or casual promises are thus excluded from the law of contract, as are promises involving friends or family. [3]

Another justification for consideration is that it promotes the notion of the bargain as being central to the enforcement of obligations. The idea that someone could enforce an obligation of another to deliver or do something without giving anything in return is trivialised as unworthy of the attention of the courts. Because consideration must flow from the promisee, it supports the notion that one has to work oneself in order to obtain a benefit.

A related justification for consideration is the role it can play in ensuring fair dealing between parties. A person must get something new in return for being forced to give or do something. Past consideration is not sufficient by itself.[4] A result is that a person will not be forced to be eternally grateful by making continued future promises on the basis of one good deed in the past. One effect of this "rule" is the encouragement of the generation of new activity, goods and wealth.

The fact that a court will not look at the sufficiency of consideration[5] means that parties are treated as independent actors capable of determining value on their own. This approach, based on the idea of formal equality, supports the idea of the independent will and value of the individual and encourages the use of the market rather than the courts to determine the fairness of a deal.

Finally, there is the notion that consideration is somehow a replacement for a formal act. Consideration can be seen as a substitute for a seal. Gratuitous promises are easily and hastily given – often to be regretted afterwards. Ensuring that there is an exchange introduces a formality into the transaction, preventing enforcement of promises hastily given and later repented.

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3. *E.g. Eastwood* v *Kenyon* (1840), 11 Ad. & E. 438, 113 E.R. 482; *Balfour* v *Balfour*, [1919] 2 K.B. 571 (C.A.); *Jones* v *Padavatton*, [1969] 2 All E.R. 616 (C.A.). See generally on this matter Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass.: Harvard University Press, 1981).
4. *Eastwood* v *Kenyon, supra*, note 3; *Dent* v *Bennett* (1839), 4 My. & Cr. 269; 41 E.R. 105.
5. *Mountford* v *Scott*, [1974] 1 All E.R. 248, aff'd [1975] 1 All E.R. 198 (C.A.); *Bolton* v *Madden* (1873), LR 9 QB 55.

Far from being amoral, these justifications or rationalisations for the doctrine of consideration reflect a view of society as an organisation where individuals must pay their way and stand on their own feet. This is a type of morality, a sort of laisser-faire or free-market morality, even though the exponents of this vision of consideration may not see it as moralistic at all. If the present justifications of consideration are viewed as simply a manifestation of "community morality" in the law of contract, it would be much easier to redefine the scope or nature of consideration to meet today's changed community (or social or commercial) morality.[6] This has certainly happened elsewhere in the law of obligations, even in the law of contract. [7]

Given the insistence on the existence of consideration before an obligation will be contractually binding,[8] it is somewhat surprising that courts find so many ways around the requirement. Or, perhaps, it is because of the rigid formalism of the requirement of consideration that it is necessary that courts find methods of circumvention. Many "refinements" on consideration are better seen as methods to circumvent its requirement. The notion that past consideration can be valid consideration, so long as it was given at the request of the promisor who expects to give something in exchange in the future,[9] can be seen as a way to minimise the impact that the rule against past consideration will have. While the modification does facilitate transactions spread over time, it also undermines the notion that something new should be given in exchange for a fresh promise. The rule that a court does not look to the adequacy of consideration further substantiates the view that consideration

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6. See also D. Kennedy, "Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982), 41 Maryland Law Rev. 563; and A. A. Leff, "Unconscionability and the Code–The Emperor's New Clause" (1967), 115 U. Pa. L. Rev. 485.

7. See *Harry* v *Kreutziger* (1978), 9 B.C.L.R. 166 (C.A.); *Tilden Rent-a-Car* v *Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont. C.A.). Classifications are essential in the law, including the law of contract. However, those classifications must remain flexible. See Arthur Allen Leff, "Contract as Thing" (1970), 19 Am. U. L. Rev. 131.

8. See, *e.g.*, the textwriters Treitel, *Law of Contract*, 7th ed., (London: Stevens, 1987), ch. 3; Lindgren, Carter and Harland, *Contract Law in Australia* (Sydney: Butterworths, 1986); Fridman, *Law of Contract* (Toronto: Carswell, 1986), ch. 3; John Swan, "Consideration of the Reasons for Enforcing Contracts" in Reiter and Swan, *Studies in Contract Law* (Toronto: Butterworths, 1980); *Gilbert Steel Ltd.* v *University Construction Ltd.* (1976), 67 D.L.R. (3d) 606 (Ont. C.A.); *Combe* v *Combe*, [1951] 2 K.B. 215 (C.A.).

9. *Lampleigh* v *Brathwaite* (1615) Hob. 105; 80 E.R. 255; *Re Casey's Patents, Stewart* v *Casey*, [1892] 1 Ch. 104, per Bowen LJ at pp. 115-116.

is a mere formality – to be got round. If a peppercorn can truly be said to be valuable consideration, then the notion of consideration as a thing of value given in exchange for another thing or promise of value is surely untenable.[10] The peppercorn is merely a demonstration of the sincerity of the promisee (and, indeed, of the promisor). The fact that there is a duty owed to a third party can also, it seems, amount to consideration.[11] Here again the idea of consideration being something of substantial economic value is made a mockery. In such a situation, there is no new benefit or detriment – there is nothing new given in exchange. The courts are simply recognising another situation in which it is right or appropriate that a promise be enforced. Consideration is given a legal value devoid of any requirement of actual economic value.

There are cases that say that a modified promise will be enforceable if something new is given in exchange for the modification.[12] That "something new" can take the form of the old consideration being modified in some way. So, for example, in *Foot* v. *Rawlings*,[13] the Supreme Court of Canada accepted the view that payment by postdated cheque was sufficiently different from an obligation to pay generally that it could constitute new consideration for a modified promise. This technical or artificial approach discredits the existing law of consideration and indicates an unwillingness to face the issue of why consideration is required in the first place. Legislators in many jurisdictions have stepped in to do what judges refuse to do and have removed in some circumstances the requirement that consideration not be past.[14]

The development of the notion of the wholly executory contract necessitated more qualifications to the doctrine of consideration. A promise is sufficient to enforce another promise when there is nothing tangible exchanged, just expectations. If this expectation is adequate consideration then consideration must simply be a method for establishing when and what expectations ought to be fulfilled. Any tangible exchange element or benefit or detriment is in the future and must be of secondary concern.

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10. Handley JA uses the ability of a single peppercorn to constitute consideration as a way to distinguish it from the way in which estoppel can work: *Hawker Pacific Pty. Ltd.* v *Helicopter Charter Pty. Ltd.* (1991), 22 NSWLR 298 (C.A.).

11. *Pao On* v *Lau Yiu Long*, [1979] 3 All E.R. 65 (P.C.).

12. *Foot* v *Rawlings*, [1963] SCR 197 (SCC); *Williams* v *Roffey Bros. & Nicholls (Contractors) Ltd.*, [1990] 1 All E.R. 512 (C.A.).

13. *Supra*, note 12.

14. *Judicature Act*, R.S.A. 1980, c. J-1, s. 13(1); *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 40; *Mercantile Law Amendment Act*, R.S.M. 1987, c. M-120, s. 6; *Mercantile Law Amendment Act*, R.S.O. 1980, c. 265, s. 16; *Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45(7); *Judicature Ordinance*, R.O.Y.T. 1976, c. J-1, s. 10(g); *Judicature Ordinance*, R.O.N.W.T. 1974, c. J-1, s. 19(g).

These are ways around consideration that operate *within* the doctrine itself. These are ways in which courts have qualified the orthodox doctrine of consideration without having to undertake a more profound re-assessment of the doctrine. However, many of these "qualifications" seriously undermine the accepted notion of what consideration is.

The artificiality of consideration and the intricate rules that have come into being to qualify it not only make a mockery of the doctrine of consideration but also hold back the development of the law of contract as a whole. Contract has come to mean a thing which parties create; they can only "make" a contract by using the correct ingredients, one of which is consideration. Once created it is only possible to restructure the thing by building another agreement or contract using the same list of ingredients. This approach to contract makes it a relatively easy concept to analyse or even to teach. One mixes the correct ingredients, examines the contents and the structure, criticises any defects and then studies how it works or what happens when it does not function properly. On this view, a contract is something which one can point to and say: "*There* is a contract." [15]

But what happens when one of the ingredients (for example consideration) is not present? If there appears to be an agreement why does it matter if one of the usual ingredients is missing or does not take its usual form? If the parties involved agree on their roles, appear sincere about their putative obligations, and actually respond on the assumption that there is an agreement, why should the lack of consideration matter? Is not the element of sincerity sufficient? Is sincerity not really the true basis of consideration in any event?

More important, why must contract be seen as something that is constructed? That model does not really fit many ordinary "contracts" – such as vending machine or department store purchases. In those situations, surely the most common of contracts, the parties involved can hardly be said to be building a "thing" with their straightforward transaction. The contract-as-construction is central to the simple business contract negotiated between commercial parties of equal bargaining strength. It is not very useful for analysing adhesion contracts or even complicated business transactions.[16] Nor is it terribly applicable where, as often happens, parties begin to perform obligations without there being a legally complete contract in existence. It is not very useful, in other words, where it is difficult or impossible to pinpoint when the elements of contract can be said to have been created – ie: what is the offer, what

15. See A. A. Leff, "Contract as Thing", *supra*, note 7.
16. *Ibid.*

is the acceptance and where is the consideration. If there is a requirement that all these elements be met absolutely before there is a contractually binding obligation, then contract is a most formalistic creation. In order to satisfy such pre-requisites, in many situations courts will engineer the satisfaction of these requirements or bend the facts so they can fit the requirement.[17]

The law of contract has proved to be remarkably adept at recognising a wide variety of obligations.[18] It has been capable of shaping or absorbing or accomodating very adaptable and flexible remedies.[19] In light of this extraordinary catholicism of contract it is peculiar that there is an initial rigidity in the formation of contracts, in particular in the requirement and nature of consideration.

The inability of contract to take into its ambit new situations because of formalistic difficulties has given impetus to the development of other legal doctrines that are more flexible and capable of being employed where a contract is unable to be created, imposed or simply found – or at least where this impression is given.[20] One has only to look to the enormous growth in the law of tort, fiduciary obligations and estoppel for examples of doctrines profiting because of the inability of the law of contract to grow.[21]

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17. Even a writer as distinguished and orthodox as Professor Treitel acknowledges the existence of "invented consideration": *Law of Contract, supra,* note 8, at p. 56. In some cases consideration may not be required, for example for a gratuitous promise, performance of which has been undertaken, or a gratuitous bailment. See M.A. Hickling, "Labouring with Promissory Estoppel: A Well-Worked Doctrine Working Well?" (1983), 17 U.B.C. L. Rev. 183.

18. There is little that cannot be achieved by a contract. Many formerly illegal or immoral contracts might now be permissible. Most regulation of contract now deals with ensuring fair play.

19. *E.g.* damages, specific performance, rescission, rectification, and arguably restitution.

20. Among those who argue against this fragmentation of the law of obligations is P.S. Atiyah. See, for example, his comments, *passim,* in *Essays on the Law of Contract* (Oxford: Oxford University Press, 1986).

21. See B. Reiter, "Contracts, Torts, Relations and Reliance" in Reiter and Swan, *Studies in Contract Law, supra,* note 8; P. Finn, "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76; J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981); P.D. Finn, *Fiduciary Obligations* (Sydney: Law Book Co., 1977); Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (Sydney, Butterworths, 1984) ch. 5; J. Carter, "Contract, Restitution and Promissory Estoppel" (1989), 12 U.N.S.W.L.J. 30; P. Birks, *An Introduction to the Law of Restitution* (Oxford: Oxford University Press, 1985.)

II. *Estoppel*

This section of the paper examines estoppel as a device used to circumvent the rigid requirements of consideration and the implications of that use.[22] Estoppel can be a difficult subject because of the great variety of opinions as to its nature, its scope, and its permitted uses. There are few other doctrines in the law which have such convoluted problems of nomenclature.[23] It can be agreed that an estoppel amounts to a prevention of one party from denying the truth or validity of a particular state of facts or law or both.[24]

Estoppel is sometimes divided into common law estoppel and equitable estoppel.[25] Common law estoppel amounts to a representation or assertion of an existing or past state of facts and performs an evidentiary function. Equitable estoppel has been, appropriately enough for an equitable doctrine, more amorphous. It tends to relate to the future and can affect substantive obligations. The two types of estoppels usually identified as equitable are proprietary estoppel and promissory estoppel. The following part of the paper sets out some of the development of estoppel, in particular equitable estoppel. This discussion will provide a background to the discussion of recent English, Australian and Canadian cases which represent a major development in equitable estoppel and also raise profound questions about the existence and scope of the requirement of consideration in a contract.

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22. On Estoppel, see other writers: P.S. Atiyah, *The Rise and Fall of Freedom of Contract, supra*, note 1, p. 778; P. S. Atiyah, *An Introduction to the Law of Contract*, 4th ed. (Oxford: Oxford University Press, 1989), pp. 153-156; G.H. Treitel, *The Law of Contract, supra*, note 8, pp. 113-114; G.H. Fridman, *The Law of Contract*, 2nd ed., *supra*, note 8, pp. 513-515. In the United States, s. 90 of the *Restatement* uses estoppel actions to supplement the law of contract, by allowing contracts to be created where there was no consideration, classically defined, but only detriment. Grant Gilmore, in *The Death of Contract* (Columbus, Ohio: Ohio State University Press, 1974), concludes that s. 90 has swallowed up the bargain principle of s. 75, *i.e.* estoppel has swallowed up classical contract: p. 72.

23. A good and practical treatment of the various types of estoppel is found in A. Leopold, "Estoppel: A Practical Appraisal of Recent Developments" (1991), 7 Aust. Bar Rev. 47; See also Keven Lindgren, "Estoppel in Contract" (1989), 12 U.N.S.W.L.J. 153.

24. The standard work on estoppel is Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (London: Butterworths, 1977), a work now quite out of date and never particularly good for Canadian jurisprudence in any event.

25. A more usual historical division is into estoppel by record, estoppel by deed and estoppel *in pais*. For a treatment of the development of estoppel more detailed than is possible here, see chapter 11 of P. Perell's book, *The Fusion of Law and Equity* (Toronto: Butterworths, 1990). On estoppel by convention see T. Brettel Dawson, "Estoppel and Obligation: the modern role of estoppel by convention" (1989), 9 Legal Stud. 16. See, generally, M. Dorney, "The New Estoppel" (1991), 7 Aust. Bar Rev. 19.

1. *The English Development of Estoppel*

The source of many of the ideas about estoppel (and its relation to contract), both traditional and reformist, is *Jorden* v. *Money*[26]. There, the question arose of whether one party could be held to her stated intention not to claim on a bond and warrant of authority against another party. The majority of the House of Lords found that she could not.

The Lord Chancellor agreed with the submission that there was "a principle equally of law and of equity" that "if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. That is a principle of universal application..."[27] The Lord Chancellor added that it was not necessary that the party making the representation should know that it was false. Then, and this was crucial in the subsequent development of estoppel, the Lord Chancellor added: "I am bound to state my view of the case; I think that that doctrine does not apply to a case where the representation is not a representation of fact, but a statement of something which the party intends or does not intend to do."[28] The Lord Chancellor said that "...in the case of what is something future, there is no reason for the application of the rule, because the parties have only to say, 'Enter into a contract,' and then all difficulty is removed."[29]

Lord St. Leonards[30] agreed that the arrangement in the case was not "a contract in the proper sense of the word."[31] He disagreed, however, with the majority of the court that in order for a person to avail himself of any statement "in a case like the present" there must be involved a misrepresentation of fact: "It is my misfortune not to agree in that view of the matter. I do not consider that that can be the case. I think it is utterly immaterial whether it is a misrepresentation of fact, as it actually existed, or a misrepresentation of intention to do, or to abstain from doing, an act

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26. (1854), 5 H.L.C. 185; 10 E.R. 868.
27. *Ibid.*, p. 210.
28. *Ibid.*, pp. 214-215.
29. *Ibid.*, p. 216. The doctrine of estoppel by representation is to a large extent traceable to *Jorden* v *Money*. See M. Dorney, "The New Estoppel", *supra*, note 25. Lord Brougham came to the same conclusion as Lord Chancellor but only after admitting that "this case has given me, as I believe it has the rest of your Lordships, no small anxiety in the course of the argument..."
30. According to Gareth H. Jones' item on Edward Sugden (Baron St. Leonards) in A.W.B. Simpson, ed, *Biographical Dictionary of Common Law*, (London: Butterworths, 1984), "A bon mot of Sugden on BROUGHAM has survived: 'If the Lord Chancellor only knew a *little* law, he would know a little of everything!'." (p. 496).
31. *Jorden* v *Money, supra*, note 26, p. 240.

which would lead to the damage of the party whom you thereby induced to deal in marriage or in purchase, or in anything of that sort, upon the faith of that representation."[32] Lord St. Leonards said that the principle was simply that a person should not be allowed, either in a court of equity or in a court of law, to misrepresent the stated circumstances in which property exists so as to deceive parties and induce them to rely upon the person's statement.

Since *Jorden* v. *Money*, there has been a gradual re-emergence of primacy for the views of Lord St. Leonards by use of other types of estoppel than estoppel by representation. What has developed at the same time is a concern and deference for the sanctity of contract, in particular for the doctrine of consideration. The problem has been how to preserve the role of consideration and contract and at the same time reach the logic of Lord St. Leonards that misrepresentation of intention, when relied upon, should not be tolerated.[33]

One area where statements or assertions about intention can be enforced or reliance protected outside of situations where the requirements for a contract have been fully satisfied is in the cases now grouped under the name proprietary estoppel. There, one party is under the impression created by the second party, that the second party has agreed to give the first an interest of some kind in real property belonging to the second. If the first party relies on that belief to the knowledge of the second and to the detriment of the first, the second will be estopped or prevented from denying the validity of the belief of the first party. The mechanism for achieving this result can be the giving by the court of a property interest of the second party to the first. [34]

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32. *Ibid.*, p. 248.

33. Of course this raises the question of whether contract is even about intention at all or whether it is a means of protecting induced reliance. The failure to view contract as meaning the latter may be seen as another reason for the need for and rise of equitable estoppel. If contract is merely about guaranteeing intention, then its focus is the promise – and reliance is only of peripheral importance. See P.S. Atiyah, "Contracts, Promises and the Law of Obligations", ch. 3 of *Essays on Contract, supra*, note 20.

34. The principle of proprietary estoppel was clearly stated (though not named) in *Dillwyn* v *Llewelyn* (1862), 4 DeGF&J 517; 45 ER 1285. John Swan suggests that cases like *Dillwyn* v *Llewelyn* must be analysed in terms of estoppel only if one thinks it is necessary to find exceptions to the doctrine of consideration to solve all problems that can arise. That is true if *Dillwyn* v *Llewelyn* were decided today, but its significance is now only as a historical marker in the development of estoppel (whatever the judges at the time may have thought). See also *Ramsden* v *Dyson* (1866), L.R.1 H.L. 129.

The case that heralded an even greater role for estoppel was *Central London Property Trust Ltd.* v. *High Trees House Ltd.*,[35] where Denning J. used the hitherto little known cases of *Hughes* v. *Metropolitan Railway Co.*[36] and *Birmingham and District Land Company* v. *London and North Western Railway Co.*[37] to formulate a doctrine which has become known as promissory estoppel.[38] In the *High Trees* case, where the question arose as to the enforceability of a promise by a lessor that the lessee could pay a reduced rent, Denning J. said that *Jorden* v. *Money* was no longer a complete statement of the law. The law had not been "standing still" since *Jorden* v. *Money*. Denning J. pointed to "a series of decisions" wherein a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases, according to Denning J., the courts said that the promise must be honoured. In the cases to which Denning J. referred, "the court held the promise to be binding on the party making it even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it."[39]

Denning J. raised the issue of the conflict with consideration and contract. The difference, according to Denning J. was that there was no cause of action in damages for breach of the obligation established by estoppel. It is not clear whether at this stage Denning J. meant that there was no cause of action at all or if it was just damages that were precluded.

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35. [1947] 1 K.B. 130.
36. (1877), 2 App. Cas. 439.
37. (1888), 40 Ch. D. 268.
38. On this development, see M.P. Thompson, "From Representation to Expectation: Estoppel as a Cause of Action", [1983] *C.L.J.* 257; and H. K. Lucke, "Non-Contractual Arrangements For the Modification of Performance: Forbearance, Waiver and Equitable Estoppel" (1991), 21 Western Aust. L.R. 149.
In *Hughes* v *Metropolitan Railway, supra*, note 36, Lord Cairns LC set out the since oft-quoted view that:

> "... the first principle upon which all Courts of Equity proceed, [is] that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have then taken place between the parties." (p. 448)

In *Birmingham and District Land Company* v *London and North Western Railway Co., supra*, note 37, the Court of Appeal expanded this principle beyond cases of forfeiture and applied it to all situations where there is a modification of contractual rights.
39. *Central London Property Trust Ltd.* v *High Trees House Ltd., supra*, note 35, p. 134.

The matter seemed to be clarified in *Combe* v. *Combe*,[40] where a wife brought an action on a promise made by the husband before their divorce to allow the wife £100 free of tax. Denning L.J. rejected the view that *High Trees* could be applied to support the wife's claim. He said "That principle [in *High Trees*] does not create causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties."[41] Denning L.J. conceded that the estoppel could be a part of a cause of action, but not be the cause of action itself. The concern was clearly that the doctrine of consideration not be undermined. "Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge."[42] Denning J. did not specify how large a "part" of a cause of action estoppel could be. There seems to be nothing to prevent its being a large part. Why, it must be asked, can estoppel form the bulk of a cause of action, but there still be a requirement of contract for the sake of form? [43]

Lord Denning MR emphasised the importance of equitable notions in estoppel in his judgment in *Crabb* v. *Arun District Council*.[44] In that case, the plaintiff sold off the part of its land having access to a road only after assurances from the defendant council that the plaintiff would be entitled to continue to gain access to the road by using the council's property, which bordered the land the plaintiff was to retain. The Court of Appeal held that the council was estopped from denying the plaintiff continued access across its property. Lord Denning MR said that estoppel was just a method of preventing someone from insisting on otherwise strict legal rights. An estoppel could arise because of an agreement, words or conduct. Lord Denning made it clear that the prevention of insistence on strict legal rights could occur because of a contract or, in the absence of contract, by estoppel. Thus contract and estoppel were set together as alternative means to reach the same result.

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40. [1951] 2 K.B. 215 (C.A.).
41. *Ibid.*, p. 219.
42. *Ibid.*, p. 220.
43. The effect of the decision in *Combe* v *Combe* was to take the law on promissory estoppel back to the clear statement of Bowen LJ in *Low* v *Bouverie*, [1891] 3 Ch. D. 82, that: "Estoppel is only a rule of evidence; you cannot found an action upon estoppel." (p. 105).
44. [1976] 1 Ch. 179 (C.A.).

Scarman L.J. in *Crabb* went even further and said that "... I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance."[45] Since proprietary estoppel can give rise to a cause of action, it would seem that Scarman L.J. would accept promissory estoppel also giving rise to a cause of action in some cases. Scarman L.J. accepted *Ramsden* v. *Dyson* as the starting point of modern equitable estoppel and agreed with Lord Denning MR that the dissenting speech there of Lord Kingsdown is to be preferred where it was said that a valid agreement was not necessary – an expectation created or encouraged would suffice.[46] Scarman L.J. also emphasised the importance of unconscionability – an important feature in recent Australia cases.[47]

English courts have come some long way to Lord St. Leonards' position in *Jorden* v. *Money* that intention for the future can be guaranteed other than by means of a contract.[48] Obligations will not be left solely for parties to frame, as sturdy independent actors, by making a contract. The court will sometimes take a more interventionist role and recognise other means of ensuring that an expression of future intention can be guaranteed. What is new and different from Lord St. Leonards' concerns is the solicitude expressed to protect the law of contract – and the doctrine of consideration in particular. Strangely, it is not contemplated that perhaps contract and consideration could be altered to encompass the new concerns. They are spoken of only in terms of being "undermined".[49]

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45. *Combe* v *Combe, supra,* note 40, p. 193.
46. *Ibid.*, p. 194.
47. The impact of *Crabb* v *Arun* was recognized by Oliver J. in *Taylor's Fashions Ltd.* v *Liverpool Trustees Co.*, [1982] 1 Q.B. 133, a case that was heard in the Chancery Division in 1979. Oliver J. noted that one of the "particularly interesting features" of *Crabb* was "the virtual equation of promissory estoppel and proprietary estoppel or estoppel by acquiescence as mere facets of the same principle." Oliver J. also noted the importance of unconscionability in deciding whether one party should be estopped.
48. See, *e.g.*, the Privy Council in *Ajayi* v *R. T. Briscoe (Nigeria) Ltd.*, [1964] 1 W.L.R. 1326.
49. Lord Denning MR recognised that there need not be a contract in order to establish a promissory estoppel in *Evenden* v *Guildford City AFC Ltd.*, [1975] 1 Q.B. 917, 924 (C.A.). However, Lord Denning MR did not expressly say that the estoppel could be the cause of action. The English courts discussed the larger picture of the different categories of estoppel and recent Australian developments in *Moorgate Mercantile Co. Ltd.* v *Twitchings*, [1976] 1 Q.B. 225 (C.A.). Lord Denning gave his opinion on estoppel generally – not, it would appear, confined to estoppel by conduct which was argued in the case. He said that: "Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this: when a man, by his word or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust and inequitable for him to do so."(at p. 244) The judgment is also very significant as an attempt 1) to incorporate the Australian jurisprudence on estoppel and 2) as an attempt to make generalised statements about estoppel and not distinguish one type of estoppel from another.

Although the most significant recent developments in promissory estoppel come from Australia, the impetus for change began in England in *Amalgamated Investment & Proprietary Co. Ltd.* v. *Texas Commerce International Bank Ltd.*[50] Of particular interest is the decision by Robert Goff J. at the Queen's Bench level. The case concerned the issue of whether a parent company could be estopped from denying that it would not cover liability of its subsidiary company in respect of a loan made to the subsidiary by a bank. Both the Queen's Bench and the Court of Appeal held that the parent company was estopped from denying its liability. Robert Goff J. thought that "Of all doctrines, equitable estoppel is surely one of the most flexible."[51] He said that he saw no reason, in logic or in authority, why the cause of action assisted by the estoppel should not consist of a contractual right.[52] He went on to say that there were three categories of cases where it was not true that a cause of action in contract could not be created by estoppel:

a) where fraud would be created otherwise, as where one party has encouraged another to expend money on land in the expectation of receiving an interest in the land,

b) promissory estoppel – where one says one will not enforce contractual rights,

c) where one party represents to another that a transaction has an effect which in law it does not have.

So, Robert Goff J. was clear that estoppel could affect the requirement of consideration, but not necessarily the need for contract. What he seemed to be imagining was a contract or enforceable contractual obligations without the requirement of consideration, at least consideration as it is usually envisaged.

The judges in the Court of Appeal did not add a great deal to the topic in their judgments. Lord Denning M.R. did not think it was necessary to go through all the cases on estoppel. He simply thought all the statements on estoppel "can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow

50. [1982] 1 Q.B. 84 (Q.B. and C.A.).
51. *Ibid.*, p. 103.
52. He cited *Spiro* v *Lintern*, [1973] 1 W.L.R. 1002 as authority.

him to do so."[53] Brandon L.J. said that the true proposition of law was that "...while a party cannot in terms found a cause of action on estoppel, he may, as result of being able to rely on estoppel succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed."[54]

2. *Australian Developments*

There is a recent trio of cases from the High Court of Australia[55] that forces a rethinking of promissory estoppel. Certainly the cases have transformed thinking about the law of obligations in Australia.[56] These Australian cases are disparate in terms of what the judges say and the language they use. The judges recognize that they are making profound changes in the law, but they tend to inject cautionary notes to the effect that their pronouncements are in accord with existing learning.

There is some continuity in the judges involved in the Australian cases. This section examines the views of the three judges who wrote in all three cases and made significant contributions to the discussion on estoppel. Rather than dealing with each case in turn, it is more valuable to treat each judge in turn, looking at how his views developed over the three judgments. First the facts of the three cases will be set out.[57]

The first case was *Waltons Stores* v. *Maher*.[58] The facts in that case were fairly straightforward. Waltons Stores' solicitors led the Mahers to believe that a deal would be concluded whereby Waltons Stores would lease the Mahers' property if only the Mahers would build a new building on it. The Mahers' solicitor forwarded to Waltons Stores' solicitor an executed lease "by way of exchange". Nothing further was heard from the Waltons side for two months. In the meantime, the Mahers began their

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53. *Amalgamated Investment & Property Co. Ltd.* v *Texas Commerce International Bank Ltd.*, *supra*, note 50, p. 122.
54. *Ibid.*, pp. 131-132.
55. *Waltons Stores (Interstate) Ltd.* v *Maher*, (1988), 164 C.L.R. 387; *Foran* v *Wight* (1989), 88 A.L.R. 413; *Commonwealth of Australia* v *Verwayen* (1990), 95 A.L.R. 321.
56. See, *e.g.*, *Silovi Pty Ltd.* v *Barbaro* (1988), 13 N.S.W.L.R. 466 (C.A.); *Austotel Pty Ltd.* v *Franklins Selfserve Pty Ltd.* (1989), 16 N.S.W.L.R. 582 (C.A.); *Hawker Pacific Pty Ltd.* v *Helicopter Charter Pty Ltd.* (1991), 22 N.S.W.L.R. 298 (C.A.).
57. Many of the other judges who sat to hear the cases said nothing about the doctrine of estoppel, or at least said very little. It is not necessary for the purposes of this paper to deal with those judges, except to note that there were other ways that the court might have reached the same results without employing the doctrine of estoppel, at least in the opinion of some of the judges. (*E.g.* in *Verwayen*, Toohey J used waiver and Gaudron J used a doctrine of detrimental change of position. In *Foran* v *Wight*, Gaudron J used waiver.) See, also, M. Dorney, "The New Estoppel", *supra*, note 25; A. Leopold, "Estoppel: A Practical Appraisal of Recent Developments", *supra*, note 23; M. Spence, "Estoppel and Limitation" (1991), 107 LQR 221.
58. *Supra*, note 55.

part of the bargain they thought had been struck by tearing down the building on the site and beginning the new construction. Waltons Stores began to have second thoughts about the new location and so told the solicitors to "go slow". Two months after the Mahers had sent their executed lease, the building was forty per cent complete. Then the Mahers were informed that Waltons Stores did not want to complete. It was found as a fact that Waltons knew of the demolition and beginning of construction. The different judges in the High Court all reached the conclusion that there was no contract concluded, but held that on the basis of estoppel the Mahers could get the benefit they would have received if there had been a contract.

The next case was *Foran* v. *Wight*[59] This case again dealt with land. The question here was whether one party could recover its deposit when that party committed anticipatory breach of its contract to sell land. There was some doubt as to whether the innocent party would have itself been ready and able to complete. In that context the question arose of whether the vendor was estopped from denying that it would not require the purchaser to show that it would have been ready and able to complete on the date set for closing, in light of the statement by the vendor that the vendor would not be able to close. The court held by a majority that the purchasers were entitled to rescind and to recover their deposit.

The most recent case is *Commonwealth of Australia* v. *Verwayen*.[60] This was a case about an Australian sailor who wanted to sue the government as a result of injuries caused by a collision between two Royal Australian Navy vessels. The collision occurred in 1964 but no Statement of Claim was issued until 1984. The Commonwealth had stated that it did not contest liability and that its policy was not to raise the *Limitation Act* in such cases. Then the Commonwealth changed its mind and argued that the claim of the sailor was barred by the expiration of the limitation period. The sailor argued that the Commonwealth was estopped from denying that it was obliged to compensate the sailor. The majority of the High Court agreed with the sailor.[61]

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59. *Ibid.*

60. *Ibid.*

61. There are Canadian cases which resist the notion that estoppel could affect a limitation period: *e.g. Viau* v *Savard* (1984), 31 Alta. LR (2d) 150 (Q.B.); *Cohen* v *Minister of National Revenue* (1991), 40 F.T.R. 225 (T.D.); *Re Apple Meadows Ltd and Government of Manitoba* (1985), 18 D.L.R. (4th) 58 (Man. CA). These cases appear to fit into the notion that estoppel should not affect a rule set down by statute. This reluctance seems to have been disapproved by the Supreme Court of Canada in *Maracle* v *Travellers Indemnity Co.* (1991), 125 N.R. 294 (S.C.C.); and *Marichischuk* v *Dominion Industrial Supplies* (1991), 125 N.R. 306 (S.C.C.). However, The Supreme Court of Canada set out a very orthodox interpretation of promissory estoppel in those cases.

It is worth noting that none of the three cases was what might be called a typical contract case. The *Verwayen* case had most to do with procedure. The *Foran* case was mainly about the recovery of deposits. The *Waltons Stores* case was about obligations in a situation where the writing requirements had not been met. Nonetheless the judges in all three cases, to the extent they addressed the issues of estoppel and contract, did not limit their comments on the basis that the cases in front of them were not usual, though they did limit them for other reasons.

(i) *Mason C. J.*

Mason C.J. wrote a joint judgment with Wilson J. in *Waltons Stores*. Mason C.J. could find no basis in *Waltons* for a common law estoppel by representation because of his view that the respondents assured the appellants that an exchange of contract *would* take place, not that it *had* taken place. Mason C.J. thought it unwise to change the law that common law estoppel does not act with reference to future actions and facts. Even a change affecting only estoppel by representation was deemed unwise because "...the result would be to fragment the unity of the common law conception of estoppel and to confine the troublesome distinction at the price of introducing another which is equally artificial."[62]

So, Mason C.J. turned to promissory estoppel. He said that the doctrine had been mainly confined to precluding departure from a representation by a person in a pre-existing contractual relationship that he would not enforce his contractual rights, whether they were pre-existing or rights to be acquired as a result of the representation.[63] The only way that promissory estoppel could be used by the Mahers was if the court went one step further and enforced directly, in the absence of a pre-existing relationship of any kind, a non-contractual promise on which the Mahers had relied to their detriment Thereby a new legal relationship would be created by promissory estoppel.[64]

Unconscionability was the key sought by Mason C.J. to determine when it might be appropriate to hold that an obligation would be enforced

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62. *Waltons Stores* v *Maher, supra,* note 55, p. 399.
63. *Ibid.*
64. Mason C.J. noted that the United States had reached this position in section 90 of the *Restatement on Contracts 2d.* He said however that the developments in the U.S. should be viewed "with some caution". "There promissory estoppel developed partly in response to the limiting effects of the adoption of the bargain theory of consideration which has not been expressly adopted in Australia or England."(p. 402) Mason C.J. did not make much of an argument to support his conclusion and did not really say why the different historical origins were relevant anyway.

in the absence of a contract or other pre-existing legal relationship. Mason C.J. reviewed the cases and said:

> "One may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to transaction has 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it'..."[65]

It was the Chief Justice's view that holding the representor to his representation was merely one way of doing justice between the parties.[66] A mere failure to fulfill a promise was not in itself unconscionable – something more would be required. "*Humphrey's Estate*[67] suggests that this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party."[68]

Mason C.J. put forward a relatively clear view of what he was doing in *Waltons Stores*. He purported to base his decision on authority. Though there was some case support for what he was doing, it would have been more forthright to state that he was deviating from orthodoxy as to promissory estoppel. Mason C.J. kept the old requirements as to estoppel but rejected the requirement that there had to be a pre-existing relationship for promissory estoppel to work. The Chief Justice's assessment of unconscionability was simply a reworking of the notion that there be reliance and detriment suffered in order to establish an estoppel. There is some circularity involved here: there will be estoppel when there is unconscionability and unconscionability will be found when the requirements of estoppel are met.

In *Foran* v. *Wight*, Mason C.J. dissented in the result. It is significant that in *Foran* v. *Wight* Mason C.J. spoke of the doctrine of estoppel. Nowhere in Waltons was such a general term used – rather there was reference to "common law estoppel" and "the doctrine of promissory estoppel". The views of Deane J. in Waltons, which will be examined shortly, seem to have had an impact on Mason C.J. Mason C.J. said that he had decided *Waltons* by reference to promissory estoppel which, he said, "extends to representations or promises as to future conduct"[69]. Mason

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65. *Ibid.*, at p. 404, quoting Dixon J in *Grundt* v *Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641 at p. 675.
66. *Waltons Stores* v *Maher, supra*, note 55, p. 405.
67. *Attorney General (Hong Kong)* v *Humphreys Estate Ltd.*, [1987] 1 A.C. 114.
68. *Waltons Stores* v *Maher, supra*, note 55, p. 406.
69. *Foran* v *Wight, supra*, note 55, p. 430 .

C.J. implied that he did not address common law estoppel in Waltons because it had not been argued that *Jorden* v. *Money* should be reversed. But in *Foran* v. *Wight* Mason C.J. said:

> "On further reflection it seems to me that we should now recognise that a common law estoppel as well as an equitable estoppel may arise out of a representation or mistaken assumption as to future conduct. To do so would give greater unity and consistency to the general doctrine of estoppel. Moreover, the clear acceptance by the court in Waltons Stores of the doctrine of promissory estoppel makes this course inevitable. After all, it was the apprehension that representations as to future conduct, unsupported by consideration, would invade the territory of promises for valuable consideration that led to the confinement of common law estoppel to representations of existing fact. Given the recognition of promissory estoppel and the fact that the doctrine may include the enforcement of rights at least between parties in a pre-existing contractual relationship, the dam wall has fractured at its most critical point with the result we should accept that a representation or a mistaken assumption as to future conduct will in appropriate circumstances create a common law estoppel as well as an equitable estoppel." [70]

Mason C.J. said little more than this about estoppel in *Foran*. Mason C.J. did not elaborate on how the new common law estoppel differs from equitable estoppel, although he did not seem to envisage a complete merger or fusion of the two. In *Foran* itself it is not clear which estoppel Mason C.J. applied, although it was probably common law estoppel (which he found to be unavailable to the purchaser because of lack of detrimental consequences or reliance upon the representation). Mason C.J. alluded to the issue of an invasion of the territory of consideration, but simply concluded that it was no longer a problem. There was no discussion of how the law of contract would be affected by this expansion of estoppel. Nor was there any reference to a distinction between common law estoppel and equitable estoppel on the basis that one relates to evidence and the other to substance.

Mason C.J. also addressed the issue in *Verwayen*.[71] Mason C.J. went even further in this case in expressly adopting a single vision of estoppel. Promissory estoppel according to Mason C.J., "has undermined the idea that voluntary promises cannot be enforced in absence of consideration."[72] In Mason C.J.'s view, "...the consistent trend in the modern decisions

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70. *Ibid.*, pp. 430-431.

71. In *Verwayen* itself, Mason C.J. dissented in the result on the basis that to hold the Commonwealth to its representations, thereby depriving it of defences available by statute or general law, would be a disproportionate response to the detriment of the respondent suffered in reliance on the assumption that the defences would not be pleaded.

72. *Commonwealth of Australia* v *Verwayen, supra,* note 55, p. 331.

points inexorably towards the emergence of one overarching doctrine of estoppel rather than a series of independent rules..."[73] It was "anomálous and potentially unjust" for the two doctrines of estoppel, one common law and one equitable, "to inhabit the same territory and yet produce different results"[74] So, according to Mason C.J.: "There is no longer any purpose to be served in recognising in them an evidentiary form of estoppel operating in the same circumstances as the emergent rules of substantive estoppel."[75] There should be only one form of estoppel whose purpose is to prevent a person from suffering detriment because of induced reliance. A central element of the new unified doctrine was proportionality between the remedy and the detriment which was to be avoided.

Mason C.J. seemed to envisage the elimination of common law estoppel and a replacement of it by equitable estoppel, wherein a court should tailor the remedy to what is equitable and just. Does this mean that estoppel no longer has an evidentiary role? Mason C.J. does not say so and seems to indicate rather that the evidentiary role will no longer exist where there is an overlap with substance. It is not clear how it can be said that these two overlap so that at some point estoppel can no longer be said to have an evidentiary role. The ramifications are not specified or examined. The new unified estoppel of Mason C.J. seems to operate as to "assumptions". Mason C.J. did not elaborate on what constitutes an assumption. Is an expectation an assumption? To what extent does an assumption have to be the creation of both parties to the contract?

(ii) *Deane J.*

With the succeeding cases, it is clear that Deane J.'s views, the most radical in *Waltons Stores*,[76] have had a strong impact. In *Waltons*, Deane J. thought that the facts sufficed to found an estoppel by conduct on the basis that the Mahers had been led to rely on a belief that the store contract had been completed. Deane J. found no basis in principle for a construction of the doctrine of estoppel "in a way which would preclude a plaintiff from relying upon the assumed or represented mistaken state of affairs ... as the factual foundation of a cause of action arising under ordinary

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73. *Ibid.*
74. *Ibid.*, p. 332.
75. *Ibid.*, p. 333.
76. Indeed in *Silovi Proprietary Ltd.* v *Barbaro, supra*, note 56, Priestley J.A. did not even put Deane J.'s views on his chart of how the reasons in *Waltons* can be standardized and reconciled. (See p. 476). Deane J's tentative thoughts on the possible applications of promissory estoppel can be found in *Reed* v *Sheehan* (1982), 56 FLR 206 (Fed. Ct. of Aust., Gen. Div.).

principles of the law."[77] Thus estoppel could provide the factual foundation for an ordinary action for enforcement of the "contract" between Mahers and Waltons Stores, notwithstanding the fact that no "binding contract" had actually been made. Estoppel, according to Deane J., outflanked any writing requirements for such a contract by preventing denial of the existence of a binding agreement.

Despite this finding, Deane J. went on to consider the situation if it were established that Maher thought contracts were to be exchanged rather than that they had actually been exchanged. So he considered promissory estoppel. Deane J. saw promissory estoppel as simply the equitable manifestation of estoppel by conduct. Deane J.'s theory was that given the fusion of law and equity, there was no longer any reason to preserve past distinctions based on the separation of the two systems of law.[78] Even before the fusion of law and equity, according to Deane J., there was a general consistency, both in content and rationale, between common law and equity principles relating to estoppel by conduct, a proposition for which Deane J. provided a couple of authorities.[79]

The only reason that representations or assumptions about future conduct could be excluded from either common law or equitable estoppel was concern for the primacy of the doctrine of consideration. However, the distinction between a representation or assumption of existing fact and one of future action or inaction had, according to Deane J., always sat uncomfortably with the general notions of good conscience and fair dealing which underlay the common law as well as equitable doctrines of estoppel by conduct.[80] Estoppel by conduct was meant to preclude unconscionability and according to Deane J. was a doctrine of substantive law. The limiting or controlling factor was unconscionability.

Deane J. adopted rather singular terminology, lumping together, as he did, promissory estoppel and estoppel by conduct. He also glossed over what exactly was the problem posed by consideration. Deane J. concluded that a (common law) estoppel by conduct could found a cause of action. His reasoning in *Waltons* would seem to indicate that the same rationale ought to apply to equitable estoppel and promissory estoppel. If so, then the doctrine of consideration is surely affected. Furthermore, the distinction between the evidentiary function for estoppel and its substantive role is

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77. *Waltons Stores* v *Maher, supra,* note 55, p. 445.
78. See P. Perell, *The Fusion of Law and Equity, supra,* note 25, ch. 11. Perell concludes that it is too early to say whether a comprehensive and fused principle covering law and equity will be established (p. 111).
79. *Waltons Stores* v *Maher, supra,* note 55, pp. 447-448.
80. *Ibid.*, p. 449.

too basic and well entrenched to be lightly brushed aside as it was by Deane J. The other problem is that Deane J. gave no guidance as to what is incorporated by the notion of unconscionability. Deane J.'s treatment, therefore, although perhaps welcome in its attempt at simplification of the learning on estoppel, ignored or trivialised many important distinctions and failed to explain why they are no longer relevant.

In *Foran* v. *Wight*, Deane J. went on to say that he was willing to take the step which he refrained from taking in *Waltons Stores*, namely that "the doctrine of estoppel by conduct extends, as a matter of general principle, to a representation or induced 'assumption of fact or law, present or future'."[81] So the representation can be to future fact – and as to the state of the law. Part of Deane J.'s reason for extending it to questions of law seems to do with his view that statements of law must have some factual basis. Deane J. noted that it might be difficult to establish estoppel if what was held was simply an opinion.

In *Commonwealth of Australia* v. *Verwayen*, Deane J. attempted to clarify his position on estoppel. He said that he agreed with the point that "promissory estoppel does not of *itself* give rise to any entitlement to relief in equity".[82] Deane J. continued:

> "*A fortiori*, estoppel does not of itself provide an independent cause of action in equity for non-traditional equitable relief in the form of compensatory damages under Lord Cairns' Act or subsequent statutory provisions, for the detriment caused by departure from an otherwise unenforceable promise as to future conduct. If it did, promissory estoppel could no longer be said to provide a basis upon which ordinary principles of law, including the doctrine of consideration, would operate ... . To the contrary, it would directly confound the doctrine of consideration and, in a case of promissory estoppel where consideration had moved from the promisee but compensatory damages for detriment sustained exceeded damages for loss of bargain, simply override the law of contract."[83]

To make his point, Deane J. gave an example wherein he said that a landowner would be precluded by estoppel from denying a transfer in title to the party to whom a representation had been made that the transfer would take place or had taken place. The representee could claim relief by seeking a declaration of trust or an order for transfer. Estoppel, Deane J. said, did not give rise to a cause of action. But does this follow? If there were a *contract* between parties relating to land, an order for transfer could also be sought and it could hardly be denied that the cause of action

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81. *Foran* v *Wight*, *supra*, note 55, p. 448.
82. *Commonwealth of Australia* v *Verwayen*, *supra*, note 55, p. 350.
83. *Ibid.*, pp. 352-353.

did not arise from the contract. It is not satisfactorily explained why, when *estoppel* provides the basis for the claim to an order for transfer, it cannot be said that estoppel gives rise to a cause of action.

Deane J. went on to support his point further by saying that if the representor ("A") had no interest in the land purportedly the subject of the transfer, then the representee ("B") could gain no assistance from estoppel to make a claim against A. "The reason why that is so is that the estoppel of itself gives rise to no cause of action and the assumed facts which it would establish would not provide an ingredient of a cause of action against A."[84] There is no good reason given why it cannot be said that B should not have a cause of action against A if A's representation has caused B to rely on it to B's detriment. The case is similar to a case like *McRae* v. *Commonwealth Disposals Commission*[85] where compensation was awarded for expenses incurred in anticipation of the salvage of a tanker that in fact did not exist. The similarity is such that there is no justification for the differing results in the two cases.

One should note that in *Waltons Stores* v. *Maher* there was no contract, but yet a cause of action arose. This was because the estoppel gave rise to the assumption that a contract would be entered into. But surely it is disingenuous to suggest that it was the contract that gave rise to the cause of action and not the estoppel. The view of Deane J. is formalistic. It makes the contract absolutely meaningless – just a formal step which must be gone through to get from estoppel to remedy. Deane J., commendable though his views might be in simplifying estoppel, refused to dispose of the most formalistic aspect of this part of law, namely the denial that the estoppel can create a cause of action. Deane J. noted that the scope for relief in the event of estoppel by conduct was broad. He even admitted that in some cases, "...the appropriate order may be an order for compensatory damages".[86] – surely a step close to admitting estoppel's kinship with contract and tort.

(iii) *Brennan J.*

In *Waltons Stores*, Brennan J. clearly distinguished between an estoppel in pais and equitable estoppel. An estoppel in pais related to a situation where one party has led another to make an assumption about the existence of a state of affairs. "The effect of an estoppel in pais is not to

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84. *Ibid.*, p. 351.
85. (1951), 84 C.L.R. 377.
86. *Commonwealth of Australia* v *Verwayen, supra,* note 55, p. 355 .

create a right in one party against the other; it is to establish the state of affairs by reference to which the legal relationship between them is ascertained."[87] So phrased, according to Brennan J., the scope of estoppel in pais did not extend to compel adherence to representations of intention.[88] Brennan J. acknowledged that estoppel in pais was mostly a rule of evidence – but as a result of facts established by the evidence a cause of action would be enforced, for example, where the estoppel related to the existence of a contract between the parties, the contract would create a cause of action.

Contrasted with estoppel in pais was equitable estoppel which did not operate by establishing an assumed state of affairs – but was a "source of legal obligation".[89] "It is not enforceable against the party estopped because a cause of action or ground of defence would arise on an assumed state of affairs; it is the source of a legal obligation arising on an actual state of affairs. An equitable estoppel is binding in conscience on the party estopped, and it is to be satisfied by that party doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or abstained from acting in reliance on the assumption or expectation which he has been induced to adopt."[90] The principle on which equitable estoppel rested was unconscionability. In giving a remedy where a legal obligation was created by equitable estoppel the court "as a court of conscience, goes no further than is necessary to prevent unconscionable conduct."[91]

According to Brennan J., "... a promissory or proprietary estoppel may arise when a party, not mistaking any facts, erroneously attributes a binding legal effect to a promise made without consideration."[92] The estoppel would have no effect if an assumption or expectation was not intended by the promisor or understood by the promisee to affect their legal relations. Having set out the basis for how equitable estoppel could work, Brennan J. sought to elaborate on the key element of unconscionability. Like all judges, he had a difficult time giving a satisfactory and comprehensive definition to this concept. He said:

> "The unconscionable conduct which it is the object of equity to prevent is a failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfill

87. *Waltons Stores* v *Maher, supra*, note 55, p. 414 .
88. *Ibid.*, p. 415.
89. *Ibid.*, p. 416.
90. *Ibid.*
91. *Ibid.*, p. 419.
92. *Ibid.*, p. 421.

> the assumption or expectation or otherwise to avoid the detriment which that failure would occasion. The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or abstain from acting thereon."[93]

In this way, according to Brennan J., the doctrine of consideration was not affected, but Brennan J. recognised that there will be times when the difference between the two, estoppel and consideration, would be slight (at least in result).

But, despite this similarity, Brennan J. explained that a contractual obligation was created by agreement of the parties, whereas an equity imposed by estoppel might be imposed irrespective of any agreement by the party bound. The measure of a contractual obligation depended on the contract; the measure of an equity created by estoppel varied according to what was necessary to prevent detriment resulting from unconscionable conduct. According to Brennan J., that was such a sufficient difference that consideration would not be undermined. There was therefore no need for a limitation confining promissory estoppel to prevention of the enforcement of *existing* legal rights. The sword versus shield distinction was therefore unwarranted. Moreover, Brennan J. noted that there was no such limit on proprietary estoppel and it was just another form of equitable estoppel.

Brennan kept the orthodox views of the distinction between different types of estoppel but expanded promissory estoppel. He recognised that it created a cause of action. But his distinction between contract and estoppel was weak for the reason he well recognised. They give the same result and lead to the same existence of a cause of action. One is left with the definite impression that respect for the existing doctrine of consideration was a token rather than a real effort.

Brennan J. did not much elaborate on his views on estoppel in the other two cases. In *Verwayen*, he made it clear that his views had not changed. He stressed the role of unconscionability and said that "the remedy [of equitable estoppel] is not designed to enforce the promise although, in some situations (of which *Waltons Stores* v. *Maher* affords an example), the minimum equity will not be satisfied by anything short of enforcing the promise."[94]

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93. *Ibid.*, p. 423.
94. *Commonwealth of Australia* v *Verwayen*, *supra*, note 55, p. 345.

3. *Canadian Developments*

Canadian cases have, with a few exceptions, followed English developments. There is not a strong Canadian jurisprudence on estoppel. Courts are most comfortable using short summaries of learning from English cases, or to take a particularly pertinent extract from Spencer Bower and Turner on the *Law Relating to Estoppel by Representation*.[95]

In *Canadian Superior Oil* v. *Paddon-Hughes Dev. Co.*,[96] the issue arose of whether one party was estopped from denying that a petroleum and natural gas lease had come to an end. Martland J, for the Court, said clearly that "a cause of action cannot be founded upon estoppel"[97]. He said that the principle in *Hughes* v. *Metropolitan Railway*:

> "... assumes the existence of a legal relationship between the parties when the representation is made. It applies where a party to a contract represents to the other party that the former will not enforce his strict legal rights under it. In the present case, however, the contractual relationship between the parties had come to an end before any representation is alleged to have been made."[98]

Therefore, there could be no estoppel.

Canadian cases have taken a similar approach without analysing why it is that estoppel should not form a cause of action or what the justification for estoppel is. In *Gilbert Steel Ltd.* v. *University Construction Ltd.*,[99] Wilson J.A. agreed with the maxim that "estoppel can never be used as a sword but only as a shield".[100] The Ontario Court of Appeal, like countless other Canadian courts,[101] required that an existing legal

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95. See, *e.g.*, *CAE Aircraft Ltd.* v *Canadian Commercial Corp.* (1989), 57 Man. R. (2d) 1 (QB) at pp. 11-12.
96. [1970] S.C.R. 932.
97. *Ibid.*, at p. 937.
98. *Ibid.*, at p. 938.
99. *Supra*, note 8. See criticism of this case, and the doctrine of consideration, in John Swan, "Consideration and the Reasons for Enforcing Contracts" (1976), 15 UWO Law Rev. 83; and in Reiter, "Courts, Consideration and Common Sense" (1977), 27 U.T. L.J. 439 at 483ff.
100. *Gilbert Steel Ltd.* v *University Construction Ltd.*, *supra*, note 8, at p. 610.
101. See also *CAE Aircraft*, *supra*, note 95; *Fobasco Ltd.* v *Cogan* (1990), 72 O.R. (2d) 254 (H.C.J.); and see Stevenson JA in *Smoky River Coal Ltd.* v *United Steelworkers of America, Local 7621* (1985), 38 Alta. L.R. (2d) 193 (C.A.), where he said that the sword/shield distinction was not "helpful", but said that when the doctrine of promissory estoppel is applicable, "It only prevents a party from insisting on his strict legal rights...." p. 197, citing *Combe* v *Combe*, *supra*, note 40. See also *Owen Sound Public Library Board* v *Mial Developments Ltd.* (1979), 102 D.L.R. (3d) 685 (Ont. C.A.), leave to appeal to S.C.C. refused (1980), 31 N.R. 449n; and *Petridis* v *Shabinsky* (1982), 35 O.R. (2d) 215 (H.C.J.). See a very recent non-discussion of promissory estoppel in *Maracle* v *Travellers Indemnity Co*, *supra*, note 61.

relationship, normally a contract, be altered, in order for promissory estoppel to be available.[102]

Although there is not the strength of authority for change in estoppel in Canada that there is in Australia and England, there have been some notable judges and courts willing to challenge the orthodox notions on promissory estoppel and the creation of obligations.[103] In *Re Tudale Explorations Ltd. and Bruce*,[104] Grange J, writing for the Court, noted that "the sword/shield maxim has been heavily criticized" and added that "I must confess to difficulty in seeing the logic of the distinction and it does not appear to be universally applied". [105] However, the matter did not call for elaboration in that case. Osborne J. followed this critical vein in *Edwards* v. *Harris-Intertype (Canada) Ltd.*[106] where he wrote:

> "It is apparent that the weight of authority prior to the *Tudale* decision was that promissory estoppel could be used solely as a defence, and could not be asserted as a cause of action. None of the decisions since *Gilbert Steel* unequivocally state [*sic*] that estoppel may constitute a cause of action, but many move in that direction."[107]

The Court of Appeal[108] simply said that it was " not necessary to decide whether promissory estoppel can provide the basis of a cause of action where none existed, because the trial judge found as a fact that the appellant did not alter its position to its detriment... ."[109]

Rice J.A. picked up on this theme in *Robichaud* v. *Caisse populaire de Pokemouche Ltee.*[110] In that case, the Caisse populaire had a judgment obtained against Robichaud. Avco Financial Services, on behalf of Robichaud, entered into an arrangement with the manager of the Caisse populaire to pay off a little over one quarter of the amount owed by Robichaud to the Caisse populaire in full satisfaction of the debt. Avco paid the agreed amount to the Caisse populaire but the Board of Directors of the Caisse populaire refused to ratify the agreement between Avco and

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102. See *Cominco Ltd.* v *Canadian Pacific Ltd.*, (1988), 24 B.C.L.R. (2d) 124 (S.C.); *Campbell* v *Inverness County* (1990), 98 N.S.R. (2d) 330 (S.C. T.D.); *Re Canadian Superior Oil Ltd. and Jacobson* (1990), 81 D.L.R.(4th) 526 (Alta. C.A.); *Town of Fort Francis* v *Boise Cascade Canada Ltd.* (1983), 143 D.L.R. (3d) 193 (S.C.C.). Unfortunately, the Supreme Court of Canada in that latter case did not explore the meaning of "inequity" which it said was the basis for promissory estoppel.

103. See, generally, J.A.Manwaring, "Promissory Estoppel in the Supreme Court of Canada" (1987), 10 Dal. L J 43.

104. (1978), 20 O.R. (2d) 593 (Div. Ct.).

105. *Ibid.*, p. 597.

106. (1983), 40 O.R. (2d) 558 (H.C.J.).

107. *Ibid.*, p. 570.

108. (1984), 9 D.L.R. (4th) 319.

109. *Ibid.*, p. 320.

110. (1990), 264 A.P.R. 227 (N.B.C.A.).

the Caisse populaire manager. Robichaud argued that the Caisse populaire was estopped from claiming the (higher) judgment amount. Ayles and Angers JJ.A. found for Robichaud on the basis of accord and satisfaction. Rice J.A. decided on the basis of estoppel. He noted that Robichaud was trying to use promissory estoppel as a sword and that the bulk of authority was contrary to that use. He also noted the criticism that had been made of the sword/shield distinction. He alluded to the fortuitousness of the distinction, depending as it does on who is plaintiff and who defendant. He wrote:

> "In this matter, the Caisse can plead rights available to it prior to its promise by relying on the judgment against the appellant without bringing any proceedings against him and without the appellant being able to plead his rights resulting from this agreement. If the doctrine of promissory estoppel can be successfully invoked in defense in an action by the Caisse against the appellant, given the circumstances between them, then to reject his application under the pretext that it was not invoked as a defense is, in my opinion, untenable and contrary to the principles of equity upon which this doctrine is based."[111]

Without going into an elaborate discussion of estoppel, Rice J.A. put his finger on one of the most illogical aspects of the notion that promissory estoppel cannot be used to found a cause of action, *i.e.* the fortuitousness of who is plaintiff and who is defendant.[112]

III. *Consideration and Estoppel: Analysis and Comment*

The developments in recent cases are significant for the law of estoppel in that they permit the expansion of that most expansive of estoppels, promissory estoppel. At least in Australia, this doctrine can be taken to have effectively swallowed up other sorts of estoppels. There is now a

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111. *Ibid.*, p. 247.

112. The British Columbia Court of Appeal came close to eliminating many barriers around estoppel in *Litwin Construction (1973) Ltd.* v *Kiss* (1988), 29 B.C.L.R. 88 (C.A.) where the Court said:

> "Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable."(p.99)

This is a remarkably wide statement, the implications of which the court may not have been fully aware. (Certainly in *Cominco Ltd.* v *CP Ltd., supra,* note 102, Gibbs J did not seem impressed (p. 143), see also *Beaton* v *Pyfrom* (1991), 56 BCLR (2d) 18 (SC).) The sword/shield issue and its malleability is touched upon in para. 81 of *K/S A/S Offshore Atlantic* v *Marystown Shipyard Ltd.* (1990), 87 N. & P.E.I.R. 324 (Nfld. C.A.).

conception of estoppel as a remedy available to be of assistance where a doctrine such as contract is unable to help, but where, without the assistance of a court, there would be unconscionability. The desire and willingness of a court to intervene is commendable. There is a temptation for judges, as with anyone, to choose the status quo, to follow well-trodden paths. The recent Australian High Court decisions are perhaps most remarkable for the fact that such a senior court is willing to make broad and general statements about a complicated and important area of the law.

Many of the developments in the recent cases are to be welcomed. There is no question but that many of the limitations placed on estoppel, and promissory estoppel in particular, are somewhat artificial. The representation/reliance/detriment formula, if it worked well for representations about the past and present should logically be of use when the statements are about the future. The distinction between working as a sword and as a shield was never satisfactory.[113] It was often assumed, wrongly, to mean that estoppel could only be raised by a defendant. Courts as far back as *Combe* v. *Combe* admitted an estoppel as *part* of a cause of action. What was meant, therefore, by the sword/shield distinction was that promissory estoppel could not give rise to a cause of action. However, in a case like *High Trees*, there seems nothing to prevent a plaintiff from seeking, say, a declaration of rights based on estoppel and that, it would seem, would be using the estoppel as a cause of action. If it is only damages that are unavailable on the basis of estoppel, then courts should express this result clearly and indicate (as they have not) why damages should be so exceptional.[114] The establishment of a legal

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113. This distinction goes back to *Low* v *Bouverie*. See, *supra*, note 43.

114. See generally on this point J. Field, "Estoppel: Shields and Swords" (1987), 11 Trent L.J. 57. Atiyah terms a "myth" the view that estoppel is not a cause of action: See "Misrepresentation, Warranty and Estoppel", Ch 10, Atiyah's *Essays on Contract*, *supra*, note 20. M.A. Hickling concludes that in many cases where promissory estoppel is employed, "To deny that estoppel is being used as a cause of action is no more than a matter of semantics.": "Labouring with Promissory Estoppel: A Well-Worked Doctrine Working Well?", *supra*, note 17, at 186. See also K.E. Lindgren and K.G. Nicholson, "Promissory Estoppel in Australia" (1984), 58 Aust. LJ 249. A thorough examination of the cases was made by L.A. Sheridan in "Equitable Estoppel Today" (1952), 15 M.L.R. 325. He concluded that there was abundant evidence of estoppel being used as a cause of action and not just as a rule of evidence. The sword/shield distinction was criticised by Reiter in "Courts, Consideration and Common Sense", *supra*, note 99. Turner, however, came to the conclusion that estoppel cannot found a cause of action: Spencer Bower and Turner, *The Law Relating to Estoppel by Representation*, *supra*, note 24, p. 10 and p. 387. Turner's fear is that: "It would be impossible to allow promissory estoppel to found a cause of action without completely revising accepted ideas on the essentials of consideration in contract." (at p. 387) Turner does not contemplate revising the notion of consideration.

relationship gives a party a cause of action when the terms of that legal relationship are broken. Thus, if estoppel can create a legal relationship (and it is disingenuous to suggest that in a case like *Commonwealth of Australia* v. *Verwayen* it did not), it can also create a cause of action. [115]

Furthermore, the distinction between a representation of law and one of fact has always been a difficult one to make, and, therefore, to justify.[116] This distinction may be fine in theory but in practice the two are usually combined or at least difficult to disentangle.[117] The distinction forces a court to make invidious distinctions between similar situations. Has a contract come into being? – Is this a question of fact or of law? Is a person an agent? – Is this a question of fact or law? The most unconscionable thing that could happen in such a situation is for a court to deny that it can provide a remedy because of its determination that the question relates to law and not fact. So, the casting off of this restraint on estoppel is to be welcomed.

The ability of an estoppel to lead to the foundation of a contract is not to be regretted, at least to the extent that it cures the inability of the current law of contract to prevent unconscionable results. This role of promissory estoppel has been recognised expressly as far back as *Crabb* v. *Arun District Council*,[118] but it has always been unsettling for judges because of its seeming potential to intrude upon the central territory of contract itself, the enforcement of obligations in the future. There is no reason why, if contract is unable to provide assistance in a situation where the result would otherwise be unconscionable, a doctrine such as estoppel should not be employed to achieve the just result. The criticism this paper makes, however, is with the need to resort to estoppel at all to achieve the contractual result.

Finally the tearing down of some of the barriers between different sorts of estoppels is to be welcomed. There is clearly some considerable doubt as to whether the doctrine of estoppel should be split into separate equitable and common law domains. The theoretical basis of all estoppels is to prevent unfairness, or as it is usually called, unconscionability. The use of estoppel as a tool to be resorted to when all else fails has meant that

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115. On this point, David Jackson gives *Low* v *Bouverie, supra,* note 43, as another example. See D. Jackson, "Estoppel as a Sword" (1965), 81 L.Q.R. 223, at p.228-229. He also argues that it is difficult to appreciate how to separate the "parts" of a cause of action, (p. 239).

116. On "the ridiculous nature of the distinction between law and fact", see D. Jackson, *Ibid.*, p. 224.

117. See *Phipson on Evidence,* 14th ed. (London: Sweet & Maxwell, 1990), para. 1-34; Spencer Bower and Turner on *The Law Relating to Estoppel by Representation, supra,* note 24, at pp. 31-43; cf E. Mureinik, "The Application of Rules: Law or Fact?" (1982), 98 L.Q.R. 587.

118. *Supra,* note 45.

it has had a rather haphazard growth and the result is a baffling array of names, categories and qualifications. The judicial creativity has led to some departure from any sense that there is a unity in estoppel. The recent jurisprudence restores such a unity – or creates it if in fact it never existed.[119]

Despite the welcome nature of many of the recent developments, the use the courts have made of estoppel has left a number of questions and problems. The most obvious problem is the lack of unanimity with which the judges have spoken. There still remains considerable confusion as to the correct or most appropriate nomenclature to use for a particular type of estoppel. For example, estoppel by conduct, promissory estoppel, and equitable estoppel have all been used to mean the same thing. Only a handful of judges, albeit very significant judges, have agreed that the various types of estoppel are merely manifestations of the same idea. While one's attention might be caught by and attracted to declarations that there should be no distinction made between proprietary estoppel and promissory estoppel or between equitable estoppel and common law estoppel, by no means the majority of judges have expressed this view. In fact, it is quite arguable that the new unifying statements about estoppel only confuse the matter further.

The use of the notion of unconscionability is a ready invitation to judicial creativity and confusion for lawyers and the public. This paper cannot address this matter except to note that it would be an advantage if judges using the concept did make an attempt to elucidate what they mean by unconscionability or to state what exactly is unconscionable about the situation with which they are dealing.[120] Unconscionability is quite likely something judges "know when they see it", but such intuitive decision-making is not helpful for the development of the law. [121]The Supreme Court of Canada did make some attempt to address this question in the context of exclusion clauses and fundamental breach in *Hunter Engineering Co. Ltd.* v. *Syncrude Canada Ltd.*[122] Dickson C.J.C. wanted

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119. Most probably there never was such unity. For example, the distinct development of promissory estoppel and proprietary estoppel is set out by Spencer Bower and Turner in *The Law Relating to Estoppel by Representation, supra,* note 24, pp. 306ff.

120. For a discussion of the relationship between rules and discretion, see J.A. Manwaring, "Promissory Estoppel in the Supreme Court of Canada", *supra,* note 103, pp. 44-51.

121. For examples of the use of unconscionability without questioning what it means, see, Priestley JA at p. 610 in *Austotel Pty Ltd.* v *Franklin's Selfserve Pty Ltd.* (1989), *supra,* note 56. (And see Priestley JA, "A Guide to a Comparison of Australia and United States Contract Law" (1989), 12 *UNSWLJ* 4.) Mason CJ feared that over use of the concept of unconscionability could "debase" it: "Foreword" (1989), 12 U.N.S.W.L.J. 1, at p. 2.

122. (1989), 35 B.C.L.R. (2d) 145 (S.C.C.).

to replace fundamental breach with a notion that "Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded."[123] Wilson J. located unconscionability as a part of inequality of bargaining power. The judgments contemplate unconscionability as a means to *strike down* something, but do not anticipate, as the Australian cases do, the use of unconscionability as a means to *construct* obligations between parties.[124]

The erasure of the distinction between common law and equity in the use of estoppel creates uncertainty as to whether what is left is like a common law or like an equitable doctrine. To obliterate it without stating how and in what context the new unified doctrine is to operate is to invite confusion. Furthermore some judges, in particular Deane J, see no need for the distinction between an evidentiary and a substantive role for estoppel. There is a large body of jurisprudence based on just this distinction and quite frankly it is not adequately dealt with by Deane J.[125] Similarly, the extent to which estoppel can create obligations – *i.e.* the extent to which estoppel affects substantive law – is not satisfactorily or consistently dealt with in the judgments. If proprietary estoppel and promissory estoppel are really not distinct principles, then how is it that proprietary estoppel was able to give rise to rights (and, therefore, obligations) where none existed previously, but under the new unified doctrine of estoppel it cannot replace contract?

Many of these criticisms of the new learning on estoppel are criticisms that will pass with time. In the course of years, courts will elaborate on unconscionability. The effect of an obliteration of the distinction between common law and equitable estoppel and between an estoppel that operates in an evidentiary role as opposed to a substantive role will become clearer. What will become much more difficult to establish, based on what the judges have said to date on the matter, is the

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123. *Ibid.*, pp. 171-172.

124. An elaborate examination of unconscionability in the context of the UCC and in equity is to be found in Leff's "Unconscionability and the Code", *supra*, note 6. Regarding the equity unconscionability doctrine, Leff concludes that there are two separate social policies embodied therein:

> "The first is that bargaining naughtiness, once it reaches a certain level, ought to avail the practitioner naught. The second is directed not against bargaining conduct (except insofar as certain results often are strong evidence of certain conduct otherwise unproved) but against results, and embodies the doctrine ... that the infliction of serious hardship demands special justification." (p. 539)

The Supreme Court of Canada approach deals with the second social policy but not the first.

125. This line of authority goes back to *Low* v *Bouverie, supra*, note 43. See Spencer Bower and Turner on *The Law Relating to Estoppel by Representation, supra*, note 24, at p. 7.

relationship between estoppel and the establishment of obligations. The problems are those that arise by virtue of the interaction and overlapping of estoppel and the law of contract, in particular the doctrine of consideration.

When considering the recent cases that have given rise to the new learning on estoppel it is important to keep in mind what the courts were trying to achieve in employing estoppel as they did. In all cases the courts wished to impose a binding obligation for the future on the party who was estopped. Why was it that the courts did not use the legal device most closely associated with the imposition of such obligations, namely contract?[126] In *Waltons*, the form of the contract had not been met. In *Foran* and *Verwayen*, there was a bare promise or assertion without anything being given in exchange to enforce it.

Why would one wish to use contract if, as the recent cases show, estoppel can be moulded to deal with the issues raised in the cases? Estoppel, with all its manifestations, proves to be abundantly adaptable to meet the demands of the parties who go before the court. Although the specific factual results produced by estoppel may be unproblematic, they are achieved only by augmenting the scope of the already overtaxed doctrine of estoppel and by refusing to consider the possibility that tthe law of contract could be adapted to deal with the situations.

In all of the cases discussed in this paper where estoppel was used, what the court sought to do was to impose an obligation. In many cases this result would have been more satisfactorily accomplished by means of a contract. The availability of contract would have meant that the various contractual remedies would have been at the disposal of the court and the parties. These remedies are flexible, adaptable and relatively certain. In addition to the remedial advantages that contract offers, there is the vast body of law dealing with the composition of the contract, including what terms can be implied, what the effect of various defects are and such things as capacity, frustration and illegality. It is true that estoppel is not necessarily without these devices to regulate or govern the scope of the rights of the parties. The difficulty with estoppel is that many of these limiting or governing devices must come under the rubric of unconscionability. There is not the advantage of the more certain and

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126. That estoppel and contract may have had different historical origins, as argued by Kirby P, in *Austotel Pty Ltd* v *Franklin's Selfserve Pty Ltd., supra*, note 56, p. 584, is, in my opinion, irrelevant to their relationship today.

venerable learning to be had in the law of contract.[127] Estoppel has the further disadvantage of being forced to perform many roles. It is this situation that has given rise to the uncertainty as to the extent to which estoppel can be used to create obligations. If estoppel is used by courts because of a fear of muddying the law of contract then it is rather odd to achieve that result by complicating further one of the least clear and over-used doctrines, that of estoppel.

It is possible to adapt contract to meet the needs of many cases that have used estoppel[128] The obstacle to the formation of a contract is consideration. The other elements of the formation of the contract can easily be met; they are often rather cavalierly dealt with by the courts[129] In *Waltons Stores*, for example, it would have been relatively easy to have found an offer and acceptance and intention to create legal relations. Similarly in *Verwayen*, there would have been no problem finding intention to create legal relations. There might have been a problem finding offer and acceptance, but surely no more than in a vending machine case, for example. The problem is the view of the court that nothing was given in exchange for the promise. Its absence in the estoppel cases means that courts do not even consider "making" a contract for the parties rather than using estoppel as a tool to achieve their desired result.

The recent developments in estoppel ought to be used as an opportunity to re-examine the doctrine of consideration. [130]It is *the* rigid requirement in contract and serves to prevent the achievement of a contract, with all its certainty and flexibility. Courts ought to return to the original conception of consideration, as simply a *moral justification* for finding the existence of an obligation between parties, that obligation being called a contract.

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127. M.P. Thompson argues that certainty must exist in contract but is inessential in equitable estoppel because of the differing remedies, those of estoppel being flexible and those of contract (damages and specific performance) being fixed. ("From Representation to Expectation: Estoppel as a Cause of Action", [1983] C.L.J. 257, at p. 276-7.) Why this is so is not explained except in a circular argument. The remedies are fixed and therefore so must be the doctrine of contract, but the remedies are fixed because the doctrine of contract demands it. Because estoppel is used to lead to a contract, any certainty that exists is easily undermined. It is submitted that Thompson seriously underestimates the potential flexibility of contract and its remedies.

128. North J concluded that "An examination of the cases would seem to indicate that some of the decisions which appear to have been grounded on estoppel could have been supported in contract." *Buckland* v *Commissioner of Stamp Duties*, [1954] N.Z.L.R. 1194, at p. 1204.

129. Indeed it is arguable that consideration is similarly dealt with when it suits the purposes of the courts.

130. The writer disagrees with the simple statement that estoppel and consideration are simply different. There is no proof of this. *E.g.* K. Lindgren, "Estoppel in Contract", *supra*, note 23, p. 172.

If it is *just* that there be a binding obligation between parties then there is a *reason* for enforcing that relationship; *considering* that reason, a court should enforce the relationship or the obligation.[131] That is the consideration for the action of the court. This consideration is no more vague and uncertain than is the requirement of unconscionability as envisaged by the High Court of Australia and other courts in the estoppel cases. If someone pays money or gives a thing or makes a promise in exchange for my goods or promise then it is unconscionable that I not be held to the expectation created in the other person or the detriment suffered by him or her. It is the existence of that state of affairs that is called the consideration in a contract. The benefit given or the detriment suffered is what would make it unconscionable for the existence of the obligation not to be recognised. There is no reason that the unconscionability that has founded an estoppel cannot be the unconscionability that can found consideration for a contract. This result will indeed take the law back in some way to the vision that Simpson saw historically in consideration, a vision of a moral element in contract.[132] This *moral* element is now known by the name of unconscionability or unconscientiousness.[133] The intrusion of such value-laden ideas into contract is not new. In fact, it is arguable that consideration is the only aspect of the law of contract which is superficially inhospitable to these moralistic ideas.[134] Furthermore, if it is argued that the proposed idea of consideration would be entirely too artificial, then such critics should consider carefully all the other artificialities in the law of contract. The implication of terms and, indeed,

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131. It is this important role of consideration that requires that the requirement of consideration not simply be ejected from contract law, as suggested by some. *E.g.* J. Carter, "Contract, Restitution and Promissory Estoppel", *supra*, note 21, p. 41.

132. M. Spence writes: "Just as the availability of discretionary relief against unconscionable agreements has not meant that judges have been prepared to undo large numbers of existing contracts, so it may be unlikely that the availability of discretionary relief against unconscionable conduct in promising will undermine the doctrine of consideration.": "Estoppel and Limitation", *supra*, note 57, p. 227. Given the recent developments in estoppel, US jurisprudence on s. 90 of the *Restatement* should be of assistance in determining when to find a contract based on "estoppel": See Priestley JA, "A Guide to a Comparison of Australian and United States Contract Law", *supra*, note 121, p. 26.

133. This approach is consistent, it is submitted, with P.S. Atiyah's view that: "It now seems to me to be more accurate to suggest that consideration really was and is a reason for the recognition of an obligation, rather than the reason for the enforcement of a promise." at p. 183 of "Consideration: A Restatement", Ch. 8 of *Essays on Contract, supra*, note 20. The key is recognition by an outside agency, the law, of a relationship, rather than the act of the parties, a promise. See also P.S. Atiyah, *An Introduction to the Law of Contract*, 4th ed., *supra*, note 22, pp. 157-160.

134. *Cf.* the situation with the doctrines of privity, intention to create legal relations, illegality, misrepresentation and exclusion clauses, all of which are to some extent overtly moralistic.

the implication of whole contracts is the most obvious example.[135] Why is it acceptable to achieve such artificial results by using estoppel, but not by using contract itself, which is in fact the desired reult of many parties when the courts employ estoppel? The true artificiality is in using estoppel, an already overburdened idea, when it is a contract that is desired by the courts and the parties. Further the use of estoppel precludes the combination of certainty and flexibility available when it is a contract that is desired.[136] The amorphousness of estoppel is hardly desirable – and is infinitely more artificial than the proposed conception of consideration. There is no need to await legislative reform; the means to achieve the reform advocated here are all presently at the disposal of the courts.

The proposed notion of consideration would have other beneficial effects as well. First it would give a basis for saying that the courts are not to be concerned with the value of consideration. This would not be because of any faith in the sturdy individuality of the parties, but because a *reason* for enforcing an obligation does not need a particular monetary value. On the other hand if there were no good reason why a promise or expectation should not be enforced, then a court could find no consideration, whatever the value of what had been given in exchange.[137] Parties who made it clear that they were not to be bound to their obligations could have

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135. Implication can be by statute (*e.g.* the *Sale of Goods Acts*). The implication can be of a whole contract (*e.g. New Zealand Shipping Co.* v *A.M. Satterthwaite & Co. Ltd.*, [1975] A.C. 154 (P.C.) (*"The Eurymedon"*); *London Drugs Ltd.* v *Kuehne & Nagel International Ltd.*, [1990] 4 W.W.R. 289 (B.C.C.A.)(leave to appeal to S.C.C. granted, 58 B.C.L.R. (2d) xxviii)). (On *London Drugs*, see Comment by Joost Blom in (1991), 70 Can. Bar Rev. 156.) The implication can be of terms in a contract, by virtue of the common law. (See *CP Hotels Ltd.* v *Bank of Montreal* (1987), 40 DLR (4th) 389.)

136. The use of estoppel ideas directly to create contracts, bypassing consideration, is done in the US – by virtue of laws modelled on s. 90 of the *Restatement.*

137. There would be no need for judges like Handley JA to have to make arguments like the following, which he acknowledged seemed "strange":

> "While a single peppercorn may constitute valuable consideration which can support a simple contract it seems to me that the loss of such an item would not constitute a 'material detriment', 'material disadvantage' or a 'significant disadvantage' for the purposes of the law of estoppel. It may seem strange that there should be such a distinction. However in the first case the consideration has been accepted as the price of a bargain which the law strives to uphold. Promissory estoppels and estoppels by representation lack this element of mutuality, and the relevant detriment has not been accepted by the party estopped as the price for binding himself to the representation or promise."

Hawker Pacific Pty. Ltd. v *Helicopter Charter Pty. Ltd., supra*, note 10, at pp. 307-308.

that desire respected.[138] Secondly the old problem of past consideration would be considerably reduced. It would no longer be sufficient to say that the fact that the consideration was past was in itself sufficient to preclude an enforcement of the promise. It might be or it might not be. In some cases a right created by estoppel can be terminated on notice.[139] There is no reason why an obligation created by contract cannot do the same thing; in fact many contracts, especially service contracts, do.

The revision to our ideas about consideration would also lead to questioning about the law of contract. T. Brettel Dawson has written: "In estoppel cases, judges have simultaneously accepted that the theoretical framework of classical contract law is the legitimate and applicable law, and proceeded to circumvent its application. This has created a cycle of indirect response in situations which diverge from the 'classical model' of contracting."[140] As set out earlier, contract is seen as a thing built by the parties. One of the elements that the parties have to provide to this construction is consideration. A better view of contract is simply as the legal recognition of a relationship of obligation between parties. The parties choose to some extent to be in the relationship and to have that relationship affect their future rights and obligations. It could involve two, three or countless parties. It is wrong to purport that the *parties* do all or most of the construction. Much of the relationship is constructed for the parties by the common law or by the legislature – the parties are free only at the outset, to some extent, to choose not to have anything to do with each other. Once they choose (and it could be as a result of something accidental as in *Verwayen*) to have some sort of connection for the future, then a contract can come into existence. This, a contract, is better seen as an acknowledgement of a present or future obligation-filled relationship rather than as a *thing* which the parties have of their own free will created.[141]

This conception of consideration and contract does invite considerable judicial intervention, but not much more than is presently the case. It certainly leads to greater certainty for the parties if they can use the vehicle of a contract rather than the entirely unpredictable vehicle of

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138. *E.g.* as in *Austotel Pty Ltd.* v *Franklin's Selfserve Pty Ltd., supra,* note 56, p. 620 per Rogers A-JA.

139. *E.g. Central London Property Trusts Ltd.* v *High Trees House Ltd., supra,* note 35; *Tool Metal Manufacturing Co. Ltd.* v *Tungsten Electric Co. Ltd.,* [1955] 1 W.L.R. 761 (H.L.). M.P. Thompson discusses the difference between pre-breach and post-breach representations in "From Representation to Expectation: Estoppel as a Cause of Action", *supra,* note 127, p. 263.

140. In "Estoppel and Obligation: the modern role of estoppel by convention", *supra,* note 25, p. 19.

141. *Cf.* the approach of Leff in "Contract as Thing", *supra,* note 7.

estoppel. It does involve some uncertainty in the use of the ill-defined notion of unconscionability. But this notion is well established in contract anyway and appears to be the instrument of choice in the new cases on estoppel. The use of unconscionability proposed here does not mean the ouster of consideration as we know it. Rather it involves a reconsideration of the current elements that can constitute consideration and an expansion of them to include the situations in the estoppel cases. In the area of constitutional theory, Joel Bakan has argued that there are two (main) types of legitimisation argument – "the one based on *constraint* by the constitution, the other on *trust* in judicial interest balancing".[142] The first type of argument sets out constraints upon judges to reach legally correct answers. Judges may not substitute their own policy choices and preferences for those of elected officials. The second argument accords considerable discretion to the judiciary. Judges are trusted to balance competing interests and consider the probable consequences of deciding one way or the other.[143] The discussion in most contract and consideration cases to date accepts the first argument of the role of judges.This results in a rigid application of accepted structures to determine when obligations have been created by contract (and by the parties). This paper argues that, despite that ostensible acceptance of the first argument, what judges have tried to do in fact is to derive a successful conclusion or balancing of interests by manipulating and distinguishing accepted rules. They have *in fact* used the second model of the role of the judiciary.[144] In the recent Australian cases discussed in this article, the courts have concluded that a particular result is necessary and have manipulated the tools of estoppel to arrive at the contract result they desired, all the while distinguishing their efforts from an assault on orthodoxy. Far preferable would it be to accept what Duncan Kennedy has called a paternalistic motive for the judiciary in contract law.[145]

The overt acceptance of what judges in fact do in cases like those under consideration here would be a better way to establish some sort of principled determination of when it is that courts ought to recognise a contract as existing between parties. "Covert tools are never reliable

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142. J. C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989), 27 Osgoode Hall L.J. 123, at p.126.

143. Bakan goes on to discuss a middle ground in the constitutional area.

144. Some judges have been somewhat more candid about their role. *E.g.* Lord Denning M.R. in *George Mitchell Ltd.* v *Finney Lock Seeds Ltd.*, [1983] 1 Q.B. 284.

145. D. Kennedy, "Distributive and Paternalistic Motives in Contract and Tort Law", *supra*, note 6. See also D. Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986), 36 J. Legal Educ. 518.

tools."[146] The first important step is to acknowledge that contracts are not simply built by parties but are judicial responses to a situation requiring a balancing of conflicting claims and interests. As Wilson J. suggests in *Hunter Engineering*,[147] in the absence of inequality of bargaining power, the parties involved may well be the best judges of what is fair as between themselves. In those cases the task of the judge will simply be to determine what that construction of the parties is and approve it. But, in other cases, the judge will supply in whole or in part the resolution as to what is fair as between the parties, probably taking into account broader social issues. This overt role *does* place considerable trust in the ability of the judiciary to accomplish satisfactorily the balancing of these interests and obviously leaves room for personal prejudices of judges. Suffice it to argue in response that an alternative will not make these prejudices disappear, but will merely force them once again to be disguised or ignored.

Such a reworking of consideration and the law of contract, as proposed here, could have implications for other areas of the law. The one that comes first to mind is fiduciary relations where Canadian courts have been active in the way that Australian courts have been active in the area of estoppel.[148] It might well be worthwhile to investigate whether the recent Canadian cases on fiduciary duties would benefit by a new vision of contract rather than by use of the drastic "remedy" of imposition of a fiduciary duty. It would certainly prevent making fiduciary duty a work-horse like estoppel has become, thereby debasing it and spoiling it for those situations where it is truly vital. The fictions in restitution, such as "acceptance" and "incontrovertible benefit" would be needed less or eliminated altogether. [149]

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146. Per K. Llewellyn, *The Common Law Tradition: Deciding Appeals,* (Boston: Little, Brown, 1960), quoted by Leff at p. 559 in "Unconscionability and the Code", *supra*, note 6.
147. *Supra,* note 122, at p. 207.
148. *E.g. Standard Investments Ltd.* v *CIBC* (1985), 22 D.L.R. (4th) 410 (Ont. C.A.); *Guerin* v *The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.). See also *Lac Minerals* v *International Corona Resources* (1989), 61 D.L.R. (4th) 14 (S.C.C.); *Frame* v *Smith* (1987), 42 D.L.R. (4th) 81, per Wilson J at 97-98; J.C. Shepherd, *The Law of Fiduciaries, supra,* note 21; P.D. Finn, *Fiduciary Obligations, supra,* note 21; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies,* ch. 5, *supra,* note 21; Paul Finn, "Contract and the Fiduciary Principle", *supra,* note 21.
149. See J. Carter, "Contract, Restitution, and Promissory Estoppel", *supra,* note 21, p. 45.

The other effect of the suggested approach to consideration is that it would reduce the role of estoppel and confine it to more of an evidentiary function.[150] It can only be beneficial to give estoppel a more precise and discrete role. The writer is unable at this point to see for estoppel a substantive role that could not be played by the proposed vision of consideration and contract. Estoppel could retreat to the function that estoppel by representation has historically played. The role of promissory estoppel and proprietary estoppel could be replaced by the true work horse of future obligations, namely contract.

150. Atiyah would seem to go further and obliterate any distinction between estoppel and contract. See p. 230 of "Consideration: A Restatement", Ch. 8 of *Essays on Contract, supra,* note 20. According to Atiyah, estoppel is no more a rule of evidence than is the so-called "irrebuttable presumption". (p. 310 of "Misrepresentation, Warranty and Estoppel", ch. 10 of *Essays on Contract, ibid.).*