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## Assumption of Responsibility and Loss of Bargain in Tort Law

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*The author seeks to justify recovery in negligence law for loss of bargain, which is the pure economic loss incurred by a subsequent purchaser of a defective product or building structure in seeking to repair the defect. The difficulty is that the purchaser is not in a relationship of contractual privity with the manufacturer. The conflicting approaches in Anglo-American tort law reveal confusion, owing to loss of bargain's dual implication of the law governing pure economic loss and products liability. These difficulties are overcome by drawing from Hedley Byrne's requirements of a defendant's assumption of responsibility and a plaintiff's reasonable reliance, and by casting the damaged interest as that of the plaintiff's own autonomy. In doing so, the doctrine of assumption of responsibility is encapsulated, and the case for its extension to loss of bargain cases is made with reference to early U.S. products liability jurisprudence.*

*L'auteur cherche à justifier le recouvrement, dans les règles du droit relatives à la négligence, de la « perte d'un marché », soit la perte purement économique subie par un acquéreur subséquent d'un immeuble ou d'un produit défectueux qui demande compensation pour les vices. La difficulté découle du fait qu'il n'y a aucun lien contractuel entre l'acheteur et le fabricant. Les approches contradictoires en droit anglo-américain de la responsabilité civile délictuelle révèlent la confusion qui règne à cet égard étant donné que la perte de marché met en cause tant le droit applicable à la perte purement économique que le droit relatif à la responsabilité du fait du produit. Il est possible de surmonter ces difficultés en extrapolant des exigences énoncées dans l'arrêt Hedley Byrne la présomption de responsabilité de la partie défenderesse et de la confiance raisonnable de la partie demanderesse et en déclarant que les dommages subis ont trait à l'autonomie de la partie demanderesse. Ainsi, la doctrine de l'endossement de la responsabilité est bien cadrée, et l'argument voulant qu'elle soit étendue aux affaires de perte de marché est bien assis et relié à la jurisprudence américaine antérieure sur la responsabilité du fait du produit.*

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### *Introduction*

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### *Introduction*

My objective in this article is to justify recovery in the tort of negligence for what I shall refer to as loss of bargain. At stake is the recoverability of the pure economic loss incurred by a subsequent purchaser<sup>1</sup> of a defective product or building structure<sup>2</sup> in seeking to repair the defect and restore the bargain which had been anticipated. The essential problem to be overcome is that such a purchaser is not in a relationship of privity with the manufacturer and therefore cannot assert a claim for damages under the law of contract. As such, I will confront the thorny question of whether the subsequent purchaser's expectations should, where they have been dashed by defective manufacture, be treated as a protected interest in *tort* law – specifically, the law of negligence – and whether the law ought to require the manufacturer to restore such expectations by awarding damages reflecting the cost of repair.

My inquiry is complicated by its engagement of two persistently confounding aspects of tort law. First, it touches upon the law governing recovery of pure economic loss, with which tort jurists continue to grapple

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1. By "subsequent purchaser," I refer to a purchaser after the original purchaser – usually a consumer purchaser – on the distributive chain. The subsequent purchaser is also known as a "remote purchaser." (Jane Stapleton, "Benefits of Comparative Tort Reasoning: Lost in Translation," forthcoming in (2006) 1 J. Tort L.).

2. Defective products and defective building structures have commonly been treated synonymously – that is, building structures as "products" and builders as "manufacturers" – in reliance on Lord Keith's statement in *Murphy v. Brentwood District Council* (1990), [1991] 1 A.C. 398, [1990] 3 W.L.R. 414, [1990] 2 All E.R. 908 (H.L.) [*Murphy* cited to All E.R.] at 921: "[i]f the builder of the house is to be [subject to a duty of care], there can be no grounds in logic or in principle for not extending liability on like grounds to the manufacturer of a chattel." See also S.M. Waddams, *Products Liability*, 3d ed. (Toronto: Carswell, 1993) [Waddams, *Products Liability*] at 25-26.

by offering various rationales for its non-recoverability.<sup>3</sup> Additionally, cases of defective products or building structures represent a subset of the law of products liability which, as John Fleming observed nearly thirty years ago (and as Stephen Waddams has recently affirmed) is “not yet a coherent concept of our law.”<sup>4</sup> Here, current governing principles constitute a mixture of strict liability, imposed by way of statutory implied warranties, and negligence law. My task, then, implicates subjects of live concern. Efforts to make legitimate space for tort law in loss of bargain cases must also account for the objection that tort law would be operating in such a manner as to distort its own parameters or those of other areas of private law.<sup>5</sup> The fundamental challenge to my justificatory inquiry here is the orthodoxy that the *contract* to which the manufacturer subscribed should, in the absence of injury to person or property, delimit its obligations.

The divergent paths which Anglo-American courts have followed in cases of lost bargain demonstrate the confusion generated by commingling products liability with pure economic loss. After a series of 1970s decisions in which English courts allowed recovery by eschewing all distinction between such loss and loss arising from physical damage,<sup>6</sup> they retreated<sup>7</sup> and later rejected recovery altogether in *Murphy v. Brentwood District Council*.<sup>8</sup> English law has since applied a strict exclusionary rule. In

3. See, for example, Allan Beever: “A Rights-Based Approach to the Recovery of Economic Loss in Negligence” (2004) 4 Oxford U. Comm. L.J. 25; Peter Benson, “The Basis for Excluding Liability for Economic Loss in Tort Law” in David Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) at 427; W. Bishop, “Economic Loss in Tort” (1982) 2 Oxford J. Leg. Stud. 1; Fleming James, “Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal” (1972) 25 Vand. L. Rev. 43; and Mario J. Rizzo, “A Theory of Economic Loss in the Law of Torts” (1982) 11 J. Leg. Stud. 281.

4. John G. Fleming, *The Law of Torts*, 5th ed. (Sydney: The Law Book Co. Ltd., 1977) at 498; and Stephen M. Waddams, “New Directions in Products Liability,” in Nicholas J. Mullany and Allen M. Linden, *A Tribute to John Fleming* (Sydney North Ryde, N.S.W.: LBC Information Services, 1998).

5. Bruce Feldthusen, “Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.: Who Needs Contract Anymore?” (1995) 25 Can. Bus. L.J. 143; and Bruce Feldthusen & John Palmer, “Economic Loss and the Supreme Court of Canada: An Economic Critique of *Norsk Steamship and Bird Construction*” (1995) 74 Can. Bar Rev. 427.

6. See *Dutton v. Bognor Regis United Building Co. Ltd.*, [1972] 1 Q.B. 373, [1972] 1 All E.R. 462 (C.A.) [*Dutton*]; and *Anns v. Merton Borough Council*, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) [*Anns* cited to All E.R.]. This trend reached its apogée in *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.).

7. *Leigh & Sullivan Ltd. v. The Aliakmon Shipping Ltd.* (1984), [1985] Q.B. 350, [1985] 2 All E.R. 44 at 58 (C.A.), aff’d [1986] A.C. 785, [1986] 2 All E.R. 145 (H.L.); *Aswan Engineering v. Lupdine Ltd.* (1986), [1987] 1 W.L.R. 1, [1987] 1 All E.R. 135 (C.A.) (particularly Lloyd L.J.’s speech at 151-53).

8. *Murphy*, *supra* note 2.

the United States, both the *Third Restatement*<sup>9</sup> and the Supreme Court<sup>10</sup> have also rejected recovery in tort for loss of bargain. Australian and New Zealand decisions do, however, allow it.<sup>11</sup>

Canadian law has evolved over the past three decades from the exclusionary rule<sup>12</sup> to a middle-ground position staked by the Supreme Court of Canada in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*<sup>13</sup> There, La Forest J. (for the Court) cited “compelling policy reasons”<sup>14</sup> for the imposition of liability in tort upon manufacturers of buildings” where the defect at issue (in that case, improperly installed exterior stone cladding on a condominium building) was “not merely shoddy” but “dangerous”.<sup>15</sup> As to those policy reasons, he reasoned that the exclusionary rule penalizes the responsible property owner who promptly repairs a defect before it causes injury, while rewarding the plaintiff who recklessly defers repairs.<sup>16</sup>

There is an intuitive logic to La Forest J.’s argument in *Winnipeg Condominium* that a manufacturer, which would be liable where its negligence causes physical damage, ought also to be liable where a dangerous defect is discovered and mitigated or remedied before physical damage occurs. Or, as Brennan J. (as he then was) said in *Bryan v.*

9. *Restatement (Third), Torts: Products Liability* §21(c).

10. *East River Steamship Corp. v. Transamerica Delaval Inc.*, 106 S. Ct. 2295, 476 U.S. 858 (1986) [*East River* cited to U.S.].

11. This applies only to building structures and, in New Zealand, perhaps only to residential structures. See *Stieller v. Porirua City Council*, [1986] 1 N.Z.L.R. 84 (C.A.); *Invercargill City Council v. Hamlin*, [1994] 3 N.Z.L.R. 513 (C.A.), aff’d [1996] A.C. 624, [1996] 2 W.L.R. 367, [1996] 1 N.Z.L.R. 513 (P.C.); *Three Meade Street Ltd. v. Rotorua District Council*, [2005] 1 N.Z.L.R. 504 (H.C.) [*Three Meade*]; and *Bryan v. Maloney* (1995), 182 C.L.R. 609, 128 A.L.R. 163 (H.C.A.) [*Bryan v. Maloney* cited to A.L.R.]. The law in New Zealand may, however, be shifting towards an exclusionary rule – see the Court of Appeal’s decision in *Rolls Royce New Zealand Ltd v. Carter Holt Harvey Ltd*, [2005] 1 N.Z.L.R. 324 (C.A.). Moreover, a majority at the High Court of Australia has recently cast doubt on the authority of *Bryan v. Maloney*, although it refrained from overruling it. (See *Woolcock St Investments Pty Ltd v. CDG Pty Ltd* (2005), 216 C.L.R. 515 (H.C.A.).)

12. *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, [1973] 6 W.W.R. 692.

13. *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193, [1995] 3 W.W.R. 85 [*Winnipeg Condominium* cited to D.L.R.].

14. *Ibid.* at 199. Although La Forest J. referred only to “buildings,” his substantial reliance on Laskin J.’s dissent in *Rivtow*, *supra* note 12 (which involved a defective crane) suggests that La Forest J.’s reasoning was likely intended to apply to products as well. The Ontario Court of Appeal has also applied *Winnipeg Condominium* in a case involving allegedly defective smoke alarms. (See *Hughes v. Sunbeam Corporation Canada Ltd.* (2002), 61 O.R. (3d) 433, 219 D.L.R. (4th) 467 (C.A.).)

15. *Ibid.* At 215, LaForest J. expressly left the door open to follow the Australian and New Zealand courts in allowing recovery irrespective of danger but, lacking “argument more squarely focused on [that] issue,” demurred.

16. *Ibid.* at 223. The exclusionary rule, as he expressed it, “provides no incentive for plaintiffs to mitigate potential losses and tends to encourage economically inefficient behaviour.”

*Maloney*,<sup>17</sup> dissenting from the majority's decision allowing recovery for loss of bargain,

it is right that the party incurring it should be indemnified by the party who, if the risk had materialized and physical damage had occurred, would have been primarily liable to the third party suffering that damage.<sup>18</sup>

This argument's force is amplified where the plaintiff presents himself or herself as having incurred repair expenses not to avoid a bad bargain, but to preserve the bargain, the value of which is threatened by the manufacturer's negligence. On this reasoning, it seems a small step to extend tort law's reach to embrace the cost of repairing the structure or product altogether.

The difficulty, however, is the objection which I have already identified, voiced by some commentators (notably Dean Bruce Feldthusen), that the manufacturer's contract with the original purchaser ought to govern the scope of its liability.<sup>19</sup> In this article, I will construct an account by which tort law can properly – that is, without distorting the boundaries of tort law or contract law – be understood as imposing liability in cases of lost bargain, even in the absence of privity between the parties or physical damage. The critical element justifying liability will be shown to be the subsequent purchaser's detrimental reliance on an undertaking or assumption of responsibility – the touchstone of liability under *Hedley Byrne & Co. v. Heller & Partners*<sup>20</sup> – given by the defendant manufacturer. My argument here does not entail acceptance that economic interests are, without more, protected interests in the law of negligence. Rather, as I will explain, the loss in cases involving a subsequent purchaser's reliance on a manufacturer's undertaking is properly regarded as injury to a legally protected interest in his or her own autonomy.<sup>21</sup> Thus while *Donoghue v. Stevenson* addresses physical damage to person or property, *Hedley Byrne* will be shown to address interference with a person's right in his or her personal autonomy to choose among different courses of action.

In making this case, I will first encapsulate the doctrine of assumption of responsibility as it was articulated in *Hedley Byrne*. I will then proceed

17. *Supra* note 11.

18. *Ibid.* at 189. See also Woodhouse J.'s reasons in *Bowen v. Paramount Builders (Hamilton) Ltd.* (1976), [1977] 1 N.Z.L.R. 394 (C.A.) [*Bowen*] at 417: "It would seem only common sense to take steps to avoid a serious loss by repairing a defect before it will cause physical damage and rather extraordinary if the greater loss when the building fall (*sic*) down could be recovered from the careless builder but the cost of timely repairs could not."

19. See *supra* note 5.

20. *Hedley Byrne & Co. v. Heller & Partners* (1963), [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.) [*Hedley Byrne* cited to All E.R.].

21. Stephen R. Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 U.T.L.J. 247 [Perry, "Protected Interests"] at 250.

to argue for the extension of that doctrine to loss of bargain cases by illustrating how development of this aspect of tort law might helpfully draw more deeply, first, from a broader understanding of the doctrine of assumption of responsibility and, secondly, from U.S. products liability jurisprudence. I will, however, also conclude by suggesting that while the doctrine of assumption of responsibility holds particular promise for plaintiffs in loss of bargain cases involving defective consumer products, it may have a more limited application – or, more correctly, recovery will be more difficult (although not impossible) to achieve – in cases involving defective building structures.

### I. *The doctrine of assumption of responsibility*

That loss of bargain is a species of pure economic loss is not conclusive of its (non)recoverability. As *Hedley Byrne* demonstrates, tort law does not recognize an all-embracing exclusionary rule for economic loss. But for the defendant's disclaimer in that case, the House of Lords would have imposed liability for pure economic loss arising from the defendant's negligent misrepresentation. Can, however, such a duty be extended to the relationship between manufacturers and subsequent purchasers who have suffered pure economic loss resulting from a lost bargain? Although *Hedley Byrne*'s scope has not been without controversy,<sup>22</sup> and despite its having been effectively confined by the House of Lords to cases of fiduciary relations or negligent misrepresentation,<sup>23</sup> I propose that its application, properly understood, transcends such confines and remains relevant (indeed critical) to the liability inquiry here.

In *Hedley Byrne*, the House of Lords articulated a broad principle of tort liability, which was summarized in Lord Morris's speech:

My lords, I consider that it follows that it should now be regarded as

22. *Hedley Byrne*'s scope has been variously described. J.C. Smith cited it as "an extension of the *Donoghue v. Stevenson* principle" (see J.C. Smith, "Economic Loss and the Common Law Marriage of Contract and Torts" (1984) 18 U.B.C. L. Rev. 95 at 99). Writing with Peter Burns, Smith had one year earlier described *Hedley Byrne* in the narrowest of terms, citing it as a basis for liability from pure economic loss resulting from negligent misrepresentation in limited circumstances. (See J.C. Smith and Peter Burns, "*Donoghue v. Stevenson* – The Not so Golden Anniversary" (1983) 46 Mod. L. Rev. 147. Stephen Perry had taken a broader view, seeing *Hedley Byrne* as a manifestation of "overlap" with the *Donoghue v. Stevenson* principle. (Perry, "Protected Interests", *supra* note 21 at 288.) Even more ambitiously, the Supreme Court of Canada has cited *Hedley Byrne* as authority for the proposition that "where liability is based on negligence the recovery is not limited to physical damage but also extends to economic loss." (*Rivtow*, *supra* note 12 at 546.) For a review of the disparate viewpoints on *Hedley Byrne*'s scope found in recent English jurisprudence, see Paul Mitchell & Charles Mitchell, "Negligence Liability for Pure Economic Loss" (2005) 121 Law Q. Rev. 194 at 194-97.

23. See *White v. Jones*, [1995] 2 A.C. 207, [1995] 1 All E.R. 691 (H.L.) [*White v. Jones* cited to A.C.] at 274 *per* Lord Browne-Wilkinson. This was affirmed by Lord Mance in *Commissioners of Customs and Excise v. Barclays Bank plc*, [2006] UKHL 28, [2006] 4 All E.R. 256 [*Barclays Bank*] at para. 92.

settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore if, in a sphere which a person is so placed that others could reasonably rely on his judgment or skill or on his ability to make a careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.<sup>24</sup>

For the House of Lords, a protected interest is founded, first, on a notion of undertaking to employ a special skill for the assistance of another person. Indeed, all five Law Lords accepted that an undertaking can, in part, ground a right arising in its recipient.<sup>25</sup> Secondly, the defendant's liability depends on the plaintiff having reasonably and detrimentally relied on the defendant's undertaking. From this statement, then, we can extract two fundamental components – undertaking and reliance – which, taken together, generate a legally protected interest in the plaintiff. As such, they merit deeper consideration.

### 1. *The undertaking*

The House of Lords in *Hedley Byrne* did not seize the notion of “undertaking” from thin air. Its pedigree is substantial, having been specifically cited by Holt C.J. and Powell J. in *Coggs v. Bernard*<sup>26</sup> as the basis for the defendant bailee's liability. Lord Abinger C.B. also referred, in *Winterbottom v. Wright*,<sup>27</sup> to the necessity of an undertaking as a precondition to imposing liability outside the law of contract. As to what constitutes an undertaking, the House of Lords required in *Williams v. Natural Life Foods*<sup>28</sup> that it amount to an “assumption of responsibility,” “conveyed directly or indirectly” by which the undertaker “assumed personal responsibility” with

24. *Ibid.* at 594. This passage is scrutinized in Perry, “Protected Interests,” *supra* note 21 at 271-72.

25. *Ibid.* Lord Reid spoke of an “undertaking of responsibility.” Lord Hodson (at 599) referred to “taking responsibility.” Lord Devlin said that “(t)he essence of the matter ... is the acceptance of responsibility” (at 612). Lord Pearce inquired as to whether “a duty of care ... was assumed” (at 618). The Lords also unanimously absolved the defendant of liability on the basis of the disclaimer which had accompanied the impugned misrepresentation.

26. *Coggs v. Bernard*, (1703), 2 Raym. Ld. 909, 92 E.R. 107 (K.B.) [*Coggs v. Bernard* cited to Raym. Ld.] at 912 and 910, respectively.

27. *Winterbottom v. Wright*, (1842), 10 M. & W. 108, 152 E.R. 402 (Exch.).

28. *Williams v. Natural Life Foods*, [1998] 2 All E.R. 577, [1998] 1 W.L.R. 830 (H.L.) [*Williams* cited to W.L.R.].



regard to the referenced act.<sup>29</sup> By “assum[ing] personal responsibility,” I mean that it indicates a general, objective manifestation of an “intention to induce another person to believe that he or she may rely”<sup>30</sup> on the undertaker to act (or refrain from acting) in a certain way.

*Williams* involved the allegedly negligent provision of advice, and so the objective conduct which the House of Lords considered (and determined to fall short of an undertaking to be responsible for the quality of advice) is not specifically applicable here. The House of Lords has, however, since identified the “breadth of the principle”<sup>31</sup> underlying *Hedley Byrne* in less particular terms. In *Henderson v. Merrett Syndicates Ltd.*, Lord Goff (speaking for the House) identified the principle in *Hedley Byrne* as resting “upon a relationship between the parties, which may be general or specific to the particular transaction ....”<sup>32</sup> He continued:

... the principle extends beyond the provision of information and advice to include the performance of other services. It follows, of course, that although, in the case of the provision of information and advice, reliance upon it by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect), nevertheless there may be other circumstances in which there will be the necessary reliance to give rise to the application of the principle.<sup>33</sup>

Lord Goff’s speech in *Henderson* carries important implications for the argument I seek to advance here regarding the nature of the requisite undertaking of responsibility. While he did not elaborate on the nature of a “general relationship”, its contrast with a relationship that is “specific” to a “particular transaction” suggests that an undertaking that induces corresponding reliance carries legal significance *even if* it is not restricted to a particular individual or situation. That is, the contemplated relation need not necessarily be fixed, direct or peculiar. It may involve an undertaking given to a less confined or (as the term “general” suggests) *unconfined* class of persons united only by the common and broad overall

29. *Ibid.* at 834. That assumption of personal responsibility, the House of Lords added, is to be determined by reference to an objective test. “[T]he primary focus,” the court stated (at 835), “must be on things said or done by the defendant or on his behalf in dealings with the plaintiff.”

30. Perry, *Protected Interests*, *supra* note 21 at 282. (I am generally agreeing here with Perry’s argument at 281-82). The objective discernibility of that manifestation has recently been affirmed by Lord Hoffmann in *Barclays Bank*, *supra* note 23 at para. 35: “[t]he answer [to the question of whether the defendant assumed responsibility] does not depend on what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case.”

31. *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 A.C. 145, [1994] 3 W.L.R. 761 (H.L.) at 180 (Lord Goff). Concurring, Lord Browne-Wilkinson spoke (at 205) of *Hedley Byrne*’s “general principle.”

32. *Ibid.* at 180.

33. *Ibid.*

characteristic of having a relationship, engendered by such reliance, with the undertaking party. The scope of intended recipients of an undertaking, then, would be defined by what Cardozo J. would have understood as its “end and aim.”<sup>34</sup> Lord Goff’s statement can be seen as simply recognizing *Hedley Byrne*’s inevitable consequence: circumstances beyond the *Hedley Byrne* paradigm of one-to-one representations which nonetheless also involve undertakings of responsibility may also generate the detrimental reliance necessary to give rise to liability. The essential matter being the undertaking of responsibility and the reliance it engenders, the judicial inquiry does not require a specific, individualized relationship, but instead ascribes legal significance to a generalized undertaking.<sup>35</sup>

The content of an “undertaking” can be further understood by considering what it is *not*. In this regard, a notion of undertaking was criticized at the House of Lords in the late 1980s and early 1990s, beginning with *Smith v. Eric S. Bush*,<sup>36</sup> although not on grounds that compromise the normative function which I am claiming for it. There, Lord Templeman cited Lord Denning MR’s comments in *Ministry of Housing and Local Government v. Sharp*,<sup>37</sup> denying that “the duty to use due care in a statement arises ... from any voluntary assumption of responsibility.”<sup>38</sup> Lord Griffiths also doubted “that voluntary assumption of responsibility is a helpful or realistic test for liability”, adding that “[o]bviously, if an adviser expressly assumes liability for his advice, a duty of care will arise, but such is extremely unlikely in the ordinary course of events.”<sup>39</sup>

Lords Templeman and Griffiths are, however, contemplating a different kind of undertaking, specifically, an *express* assumption of *legal* liability. Lord Griffiths’ speech makes this clear by relying on the presence in *Hedley Byrne* of an express disclaimer of responsibility for the defendant’s advice.<sup>40</sup> This was affirmed in *White v. Jones*,<sup>41</sup> where Lord Browne-Wilkinson sought to “allay the doubts of the utility of the concept of assumption of responsibility” voiced by Lord Griffiths in *Smith v. Eric S. Bush* by clarifying that “the assumption of responsibility

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34. *Ultramares Corporation v. Touche*, 255 N.Y. 170 (C.A., 1931) at 182, 174 N.E. 441, 74 A.L.R. 1139. My point here is that the purpose of a representation will define the scope of those who are owed a duty. If the purpose was mass communication, the “masses,” where they reasonably and detrimentally rely, can recover.

35. Here I am agreeing with Perry, “Protected Interests,” *supra* note 21 at 305.

36. *Smith v. Eric S. Bush*, [1990] 1 A.C. 831, [1989] 2 All E.R. 514 (H.L.) [*Eric S. Bush* cited to All E.R.].

37. *Ministry of Housing and Local Government v. Sharp*, [1970] 2 Q.B. 223, [1970] 1 All E.R. 1009 at 1018-19 (C.A.) [*Sharp*].

38. *Ibid.*, cited in *Eric S. Bush*, *supra* note 36 at 522.

39. *Eric S. Bush*, *supra* note 36 at 534.

40. *Ibid.* at 529.

41. *White v. Jones*, *supra* note 23.

referred to is ... not the assumption of legal liability.”<sup>42</sup> The *Hedley Byrne* “undertaking”, then, need not entail such an assumption which, as Lord Griffiths acknowledged, would be “extremely unlikely in the ordinary course of events.”<sup>43</sup> Moreover, there is nothing in the Lords’ speeches in *Hedley Byrne* that remotely suggests that they intended to be viewed as imposing such a requirement.

The undertaking I am privileging here instead was described by Lord Browne-Wilkinson as the defendant’s “assumption of responsibility *for the task*.”<sup>44</sup> Or, as Lord Denning elaborated in *Sharp*, it entails an assumption of responsibility to do something in a reasonable manner, demonstrated where “the person making it knows, or ought to know, that others ... would act on the faith of the statement being accurate”<sup>45</sup> (or, more precisely, on its maker’s having taken care to ensure its accuracy). Hence Stephen Perry’s equation of an undertaking with an assumption of responsibility which, as a practical matter, can be inferred or implied from the facts using the objective standard of the reasonable person.<sup>46</sup>

The affinity between tort and contract here is strong, inasmuch as they both engage a conception of liability which draws, at least in part, from the manufacturer’s assumed responsibilities. There is, however, an important distinction. The critical co-determinant for tort liability, I will argue, is whether the defendant’s undertaking to engage in or to refrain from particular conduct conferred upon the plaintiff a corresponding right to rely on the defendant’s ultimate discharge of that undertaking. Absent such

42. *Ibid.* at 273. *White v. Jones*, however, involved not a loss of bargain, but rather a claim for the loss of a benefit asserted by disappointed beneficiaries against a solicitor for failing to attend reasonably to his client’s testamentary affairs. As such, it invites an additional objection to recovery, which is that the plaintiffs were mere third-party beneficiaries to a contract who neither received nor relied on any undertaking by the solicitor and as such were owed no duty.

43. *Eric S. Bush*, *supra* note 36 at 534.

44. *White v. Jones*, *supra* note 23 at 273 [Emphasis added].

45. Cited in *Eric S. Bush*, *supra* note 36 at 522.

46. Perry, “Protected Interests,” *supra* note 21, n. 81.

an undertaking, the manufacturer's contract is exhaustive of its objections because it represents its only expression of assumed responsibility.<sup>47</sup>

## 2. *The reliance*

Proceeding, then, from a general understanding of an undertaking as entailing an assumption of responsibility to do something in a reasonable manner, I will now engage the second liability component arising from Lord Morris's speech in *Hedley Byrne*. The basis for tort law's place in loss of bargain cases – and the quality of the damage to which tort law can be remedially applied – is the plaintiff's reasonable and detrimental reliance on the defendant's undertaking, manifested by having altered his or her position. The defendant's undertaking engendered the plaintiff's dependency on the defendant, insofar as it induced the plaintiff to entrust to the defendant an aspect of the plaintiff's personal autonomy by foregoing other more beneficial courses of action that were open to him or her. As such, an unfulfilled undertaking constitutes an interference with the plaintiff's protected interest in his or her own autonomy to pursue alternative available options.<sup>48</sup>

While, therefore, the neighbour principle in *Donoghue v. Stevenson* addresses harm consisting of physical damage to person or property, the

47. This was Brennan J.'s dissenting point in *Bryan v. Maloney*, *supra* note 11. The plaintiff was the third owner of a house built seven years earlier by the defendant. Six months after her purchase, she observed cracks appearing in the walls which were determined to have resulted from inadequate foundations. At 184, he stated:

It would be anomalous to have claims relating to the condition of the building by an original owner against the builder determined by the law of contract if the relief claimed by a remote purchaser against the builder would be determined by the law of tort. *Such a situation would expose the builder to a liability for pure economic loss different from that which he undertook in constructing the building and would confer a corresponding right on the remote purchaser which the purchaser had not sought to acquire from the vendor.* [Emphasis added].

In a similar vein, Lord Scarman, in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.*, [1986] A.C. 80, [1985] 2 All E.R. 947 (P.C.) [*Tai Hing* cited to A.C.] said, at 107:

Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. ... [T]heir Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: in principle because it is a relationship which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action.

48. See Perry, "Protected Interests", *supra* note 21 at 290:

... a foregone opportunity to act differently is appropriately treated as a loss in the tort sense if the course of action B would have followed had he or she not relied on A would have been preferable to the one actually taken. A loss of this kind is appropriately regarded as an interference with B's autonomy interest, since that interest is constituted in part by the nature and character of the opportunities or options in life that are available for one to choose from.

*Hedley Byrne* principle addresses the defendant's interference with the plaintiff's right, exclusive as against the defendant, in his or her personal autonomy to choose among multiple potential courses of action. Where a manufacturer's conduct induces reasonable reliance in a subsequent purchaser, it amounts to an undertaking which will engender liability. Underlying this idea is a claim to a general principle of tort law: liability for the consequences of one's actions arises from the inducement, by way of an assumption of responsibility to refrain from risky conduct, of another's reliance on the reasonableness of those actions. For this reason, the idea of "undertaking" as a manifestation of an intention to induce reliance implies a notion of "general reliance", which has been recognized and applied by the House of Lords, and referred to by Lord Steyn in *Williams*<sup>49</sup> as the "extended *Hedley Byrne* principle."<sup>50</sup> In *Stovin v. Wise*,<sup>51</sup> in considering the liability of a local council in respect of a persistent problem of road visibility that had led to multiple accidents, Lord Nicholls of Birkenhead said (in dissent):

Reliance calls for special mention. By reliance I mean that the authority can reasonably foresee that the plaintiff will reasonably rely on the authority acting in a particular way. ... Reliance can be actual, in the case of a particular plaintiff, or more general, in the sense that persons in the position of the plaintiff may be expected to act in reliance on the authority exercising its powers. In *Sutherland Shire Council v. Heyman*, 157 C.L.R. 424, 464, Mason J. treated dependence as having equivalent effect in some circumstances:

"there will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. ... This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (an authority) a realisation that there is general reliance or dependence on its exercise of power...."<sup>52</sup>

Lord Hoffmann, also citing Mason J.'s reasons in *Sutherland Shire Council v. Heyman*, added:

This ground for imposing a duty of care has been called "general reliance." It has little in common with the ordinary doctrine of reliance; the plaintiff does not need to have relied upon the expectation that the

49. *Supra* note 28.

50. *Ibid.* at 834.

51. *Stovin v. Wise*, [1996] A.C. 923, [1996] 3 All E.R. 801 (H.L.) [*Stovin v. Wise* cited to All E.R.].

52. *Ibid.* at 937-38.

power would be used or even known that it existed. It appears rather to refer to general expectations in the community, which the individual plaintiff may or may not have shared.<sup>53</sup>

Mason J.'s notion of general reliance founded upon "expectations" runs up against the criticism (advanced by, among others, Lord Hoffmann) that mere general expectations cannot, without something more, generate a right – that is, a protected legal interest. The expectation must be grounded in a plaintiff's undertaking, and the reliance must be correlative to that undertaking. While, however, reliance must be demonstrated as having specifically been induced in a particular plaintiff by the representation of a particular defendant, reliance can *in a sense* be generalized within the conception of tort liability that I am advancing (and in a way that would not run afoul of Lord Hoffmann), insofar as it is to be *inferred* from that representation. This was Lord Wright's point on the question of (*inter alia*) a retail vendor's liability to a subsequent purchaser in *Grant v. Australian Knitting Mills Ltd.*:<sup>54</sup> "[I]t is clear that the reliance must be brought home to the mind of the seller, expressly or by implication."<sup>55</sup>

An "implied" undertaking invokes a broad notion of reliance *qua* component of the common law duty of care. By "general reliance", then, I refer to the subsequent purchaser's reliance where it is inferred from the fact that he or she makes a purchasing decision "in confidence" in the manufacturer's undertaking that, in respect of a product or building structure, it has employed reasonable care and skill in the manufacturing process. The detrimental quality of such reliance is established where the subsequent purchaser demonstrates that he or she, in making the purchase, opted to forego other purchasing options.

The notion of general reliance which I am describing here is therefore distinct from that enunciated by the House of Lords in *Williams* and in *Stovin v. Wise*, as mine requires contributing conduct in the form of an undertaking on the part of the defendant that operates to the plaintiff's detriment by engendering actual reliance. Moreover, inasmuch as the House of Lords relied on Mason J.'s reasons in *Sutherland Shire Council*

53. *Ibid.* at 954.

54. *Grant v. Australian Knitting Mills Ltd.*, (1935), [1935] ALR 493, 54 C.L.R. 49, [1936] A.C. 85 (P.C.) [*Grant*].

55. *Ibid.* at 99. *Grant* was, strictly speaking, a sale of goods case, and the pertinent statutory provision (South Australia's *Sale of Goods Act*, 1895, section 14), like other Commonwealth sale of goods statutes, referred to a buyer making known to the seller "expressly or by implication" the buyer's purpose in purchasing the goods. This reference, however, is to the buyer's communication to the seller, not to the buyer's *reliance*. As to such reliance, the statute then (as now) required only that the buyer "rely" on the seller's skill and judgment. Yet, Lord Wright ascribed to this bare reference to reliance a dual quality: not only could it be express, but it could also arise "by implication."

*v. Heyman*,<sup>56</sup> its facts may allow us to distinguish it as a case of public authority liability, and indeed Mason J. suggested that his notion of general reliance would arise in cases involving direction of air traffic, safety inspection of aircraft, and the fighting of a fire by a fire brigade. In all such situations, he said, society as a whole has relied on the defendant to discharge a task.<sup>57</sup>

Tempting as it is to consign Mason J.'s notion of "general reliance" to cases involving public authorities (and indeed, both the House of Lords<sup>58</sup> and the Australian High Court<sup>59</sup> have attempted to do so), once one accepts his notion of general reliance, there is no obvious reason to restrict its application to public authorities. Indeed, Lord Browne-Wilkinson's speech in *White v. Jones*,<sup>60</sup> a case of a solicitor's negligence in attending to a client's testamentary affairs, contains an example of such an application:

Although in any particular case it may not be possible to demonstrate that the intended beneficiary relied upon the solicitor, society as a whole does rely on solicitors to carry out their will making functions carefully.<sup>61</sup>

Similarly, the British Columbia Court of Appeal has recently applied the reasoning in *White v. Jones* to the provincial government's failure to include a job-protection term in a license to harvest timber.<sup>62</sup>

The difficulty with "general reliance", so expressed, is that it purports to allow recovery without the plaintiff having actually done anything in reliance on the implied representation. Yet, such reliance – or, more accurately, the detrimental quality of such reliance – is fundamental, because it expresses the quality of the plaintiff's loss. Mason J.'s "general reliance", moreover, misconceives reliance's relationship to an undertaking. A proper judicial inference of reliance does not arise from the sole fact of the manufacturer's undertaking of responsibility, nor from the sole fact of a subsequent purchaser's decision to purchase. As Winkler J. stated

56. *Sutherland Shire Council v. Heyman*, (1985), 60 A.L.R. 1, 157 C.L.R. 424 (H.C.A.) [*Sutherland* cited to C.L.R.].

57. *Ibid.* at 464.

58. Certainly, the House of Lords appeared to assume such a restricted application in *Stovin v. Wise*, *supra* note 51 at 829. Lord Hoffmann emphasized that if the doctrine of general reliance was to be accepted, its application would require "some very careful analysis of the role which the expected exercise of the statutory power plays in community behaviour."

59. In *Pyrenees Shire Council v. Day* (1998), 72 A.L.J.R. 152 (H.C.A.), Brennan C.J., joining Gummow and Kirby JJ. in rejecting the doctrine of general reliance as it was articulated by Mason J. in *Sutherland*, *supra* note 56, stated that the Council's liability for damage suffered is based in legislative intention.

60. *White v. Jones*, *supra* note 23.

61. *Ibid.* at 276.

62. *James v. British Columbia*, 2005 BCCA 136, 38 B.C.L.R. (4th) 263 at para. 49.

in *Carom v. Bre-X Minerals Ltd.*,<sup>63</sup> “the representation must have caused the recipient to act in a certain manner.”<sup>64</sup> After all, without a correlative undertaking of responsibility by the manufacturer that actually induces reliance, there is nothing in the manufacturer’s conduct which corresponds to the plaintiff’s loss. Linkage between these two phenomena, then – the undertaking and the decision taken by the plaintiff in confidence in the undertaking – must be established because otherwise the plaintiff cannot demonstrate an injury.<sup>65</sup>

### 3. *Reclaiming warranty for tort law*

There remains the matter of how, as a matter of doctrinal mechanics, liability is to be imposed in cases of loss of bargain under the dual *Hedley Byrne* elements of undertaking and reliance. I suggest that the reliance-generating undertaking might be conveniently viewed as having been transmitted through the device of warranty. This entails a revived appreciation for the extra-contractual significance of a manufacturer’s undertaking to a subsequent purchaser – that is, of the legal significance of an undertaking that is external to the manufacturer’s contract with the negligent purchaser – and a reconsideration of the “dogma that an innocent misrepresentation of fact which induces a contract does not ... entitle the representee to a remedy in damages against the representor.”<sup>66</sup>

Warranty was originally “a pure action [in] tort”<sup>67</sup> for deceit, brought by a purchaser alleging that his or her purchase was made in reliance on another’s undertaking which was later proven to be false.<sup>68</sup> The court required no particular form of language or words to establish a warranty. It merely inquired as to whether the undertaker had made a statement of fact regarding the product such that he or she could be taken to have assumed

63. *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, 138 O.A.C. 55, (S.C.).

64. *Ibid.* at 241.

65. See also *Serhan Estate v. Johnson & Johnson* (2004), [2004] O.T.C. 969, 135 A.C.W.S. (3d) 22 (Ont. S.C.), where Ground J., in the context of an application to certify a class action, stipulated that each member of the proposed class would have to demonstrate reliance, and that whether a “rebuttable inference of reliance arose” cannot be included as a “common issue” for the purpose of the class proceeding (para. 60). At para. 59, he said: “Whether reliance should be inferred is a question of fact and the answer may differ from individual to individual.” This was later affirmed by the Divisional Court – see 213 O.A.C. 298.

66. D.W. Greig, “Misrepresentations and the Sale of Goods” (1971) 87 Law Q. Rev. 179 [Greig, “Misrepresentations”] at 179.

67. *Escola v. Coca Cola Bottling Co.*, 24 C.2d 453, 150 P. 2d 436 (Sup. Ct., 1944) [*Escola*] at 466, per Traynor J. (as he then was).

68. J.B. Ames, “The History of Assumpsit” (1888) 2 Harv. L. Rev. 1; and Samuel Williston, “Liability for Honest Misrepresentation” (1911) 24 Harv. L. Rev. 415. Lord Cooke, writing extra-judicially in Robin Cooke, “An Impossible Distinction” (1991) 107 Law Q. Rev. 46 [Cooke, “An Impossible Distinction”], said (at 59): “... until the time of Lord Holt an action for breach of warranty was grounded in tort, being treated as a species of deceit.”



responsibility for the truth of its contents.<sup>69</sup> The purchaser, whose decision to purchase was made on the strength of the undertaker's statement of facts, would then have a remedy where the undertaking's contents proved false.

By the mid-eighteenth century, the practice had emerged of pleading actions alleging a false warranty in *assumpsit*, because of certain procedural advantages to a plaintiff in pleading *assumpsit* rather than case (tort).<sup>70</sup> The few commentators on this subject have emphasized that this was merely a procedural shift, and did not reflect a substantive shift in the basis of liability.<sup>71</sup> The defendant's duty of care was still grounded on an undertaking, amounting to an assumption of responsibility, and on the purchase it induced. That is, the "warranty" was not viewed as a necessarily contractual device. During the nineteenth century, however, as the modern law of contract emerged from *assumpsit* and received the device of warranty, courts inquired "to discover the necessary consideration to support it."<sup>72</sup> As a result, the prevailing view gradually became that, for a purchase to have included a warranty, the purchaser had to demonstrate a contractual intention whereby the subject undertaking could form part of the contract. This ultimately led to the House of Lords' pronouncement in *Heilbut, Symons & Co. v. Buckleton*,<sup>73</sup> which confirmed that an undertaking did not give rise to an enforceable warranty unless it was made with an intent to contract.

Subsequent pronouncements attempted to circumvent *Heilbut's* constraints by engaging in strained reasoning that ventured even further from the eschewed rule. Typically, courts took advantage of the

69. Greig, "Misrepresentations," *supra* note 66 at 180. See, however, *Chandelor v. Lopus* (1603), Cro. Jac. 4, 79 E.R. 3 (Ex.) at 4: "the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action." The requirement of formal words of warranty was eventually dropped and, by 1700, Lord Holt in *Medina v. Stoughton* (1700), 1 Salk. 210, 91 E.R. 188 (K.B.) at 188 was able to state:

Where one having the possession of any personal chattel sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation.

Nearly a century later, Buller J. in *Pasley v. Freeman* (1789), 3 T.R. 51, 100 E.R. 450 at 453, referring to *Medina v. Stoughton*, stated:

... a distinction between the words warranty and affirmation ... is not law; ... an affirmation at the time of sale is a warranty, provided it appear on evidence to have been so intended."

70. See in particular *Williamson v. Allison* (1802), 2 East 446, 102 E.R. 439 (K.B.) [*Williamson cited to East*] where (at 451) Lord Ellenborough affirmed the basis of tort liability for breach of warranty, and that the shift to *assumpsit* was essentially a matter of convenience:

The ancient method of declaring was in tort on the warranty broken, and that was just going out of general practice when the case of *Steuart v. Wilkins* was discussed, because it was found more convenient to declare in *assumpsit* for the sake of adding the money counts.

71. Waddams, *Products Liability*, *supra* note 2 at 5; Greig, "Misrepresentations", *supra* note 66 at 180.

72. Greig, "Misrepresentations", *ibid.* at 181.

73. *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30 (H.L.).

“notoriously elusive” nature of intent to find a statement to be a contractual warranty “wherever the result that such a finding [would] lead them to seem[ed] appropriate.”<sup>74</sup> This generally entailed judicial rationalization of the undertaker’s words as amounting to a warranty forming part of a “collateral contract”, separate from the main contract of sale, but in respect of which the consideration is ostensibly the purchaser’s entry into the main contract of sale.<sup>75</sup> Thus an action on an undertaking, in shifting from an action in deceit upon a warranty to *assumpsit*, became subsumed in the modern law of contract and its foundational inquiry into mutual consideration.

*Hedley Byrne* can thus be understood as restoring warranty to its more historically correct place in tort law, reviving a tort law remedy where undertakings that are undischarged due to the undertaker’s negligence have induced their recipients to adopt a particular course of conduct.<sup>76</sup> Such an understanding of *Hedley Byrne* would bring Commonwealth tort law into conformity with the concurring reasons of Traynor J. (as he then was) in *Escola v. Coca Cola Bottling Co.*,<sup>77</sup> who affirmed that “[w]arranties are not necessarily rights arising under contract.”<sup>78</sup> More generally, this complete understanding of the significance of a manufacturer’s extra-contractual undertaking demonstrates the poverty of the contractualist objections. To assert a contract as delimiting a manufacturer’s obligations (in the absence of physical damage) denies any legal importance to infringements of personal autonomy. By understanding the manufacturer’s obligations not to infringe another’s autonomy, its obligations can be understood as distinct from those arising under the law of contract. On the strength, then, of “the tort character of an action on a warranty”, a manufacturer’s liability should arise “under a warranty if the warranty is severed from

74. Waddams, *Products Liability*, *supra* note 2 at 134.

75. The predominance of the “collateral contract” approach was candidly acknowledged by Lord Denning while speaking extra-judicially in response to David E. Allan, “The Scope of the Contract: Affirmations or Promises Made in the Course of Contract Negotiations” (1967) 41 *Aust. L.J.* 274 at 293.

76. The “new” ideas, however, die hard. Jason Neyers in “*Donoghue v. Stevenson* and the Rescue Doctrine: A Public Justification of Recovery in Situations Involving the Negligent Supply of Dangerous Structures” (1999) 49 *U.T.L.J.* 475 at 493 criticizes *Winnipeg Condominium* on, *inter alia*, the grounds that “the law will not recognize or infer a transmissible warranty of quality into structures” and that “the only way that this right could exist is through a contract.” Blackmun J. in *East River*, *supra* note 10 at 868, recognized the dual contractual and delictual nature of such cases, but viewed contractual liability principles as exclusively applicable, “the injury suffered” being “the essence of a warranty action, through which a contracting party can seek to recoup the benefit of the bargain.”

77. *Escola*, *supra* note 67.

78. *Ibid.* at 466.

the contract of sale between the dealer and the consumer and based on the law of torts.”<sup>79</sup>

## II. *The doctrine applied: undertakings and reliance in loss of bargain cases*

I have canvassed the two foundational elements of the duty of care propounded by the House of Lords in *Hedley Byrne*. First, a right is founded in part on the defendant having given an undertaking such that it can be taken as having assumed responsibility to do something in a reasonable manner. Secondly, the defendant’s liability depends on the plaintiff having suffered loss as a result of having reasonably relied on the defendant’s undertaking. While this has been more conventionally understood as applying to cases of negligent misrepresentation, my point here is that no legal principle precludes the application of these duty determinants to cases of loss of bargain.

Perhaps ironically, given the predominance of strict products liability in U.S. law,<sup>80</sup> U.S. jurisprudence imparts some instructive insights into this basis for determining a manufacturer’s liability in tort for loss of bargain. It reveals, *inter alia*, the same devices of undertaking and reliance critical to *Hedley Byrne* at work in the context of a general relationship. That is, the undertaking in these cases is not confined to a particular subsequent purchaser or to a particular transaction, but may take a more widely diffused form of representation. Thus tort law can viably account for commercial dealings, despite their considerable evolution from the emergence of modern contract law in the nineteenth century to the modern consumer and mass communications era in which *Hedley Byrne* was decided, with its less directed representations such as mass advertising or product labelling. Here the outcome of an objective inquiry into whether the representation amounted to a legally significant undertaking will obviously depend on the nature of the representation. It might be “puffery” or it might constitute an inducement of reasonable reliance in the subsequent purchaser. That this sort of representation is made to the public generally, rather than to the subsequent purchaser specifically, further complicates the inquiry. It does not, however, necessarily preclude recovery. We must still consider whether the representation could reasonably be taken by its recipient as an assumption of responsibility for the truth of its contents.

79. *Ibid.*

80. Or, more accurately, given the predominance of “strict liability theory [in generating] most of the developing jurisprudence after about 1963.” (Dan B. Dobbs, *The Law of Torts* (West Group: St. Paul, MN, 2001) at 971-72). Dobbs suggests that “whether, or to what extent, strict liability is actually imposed” is currently an open question.

A broadly targeted undertaking was considered by the New York Court of Appeals in *Randy Knitwear v. American Cyanamid Co.*<sup>81</sup> There, the defendant, a chemical manufacturer, had furnished a fabric manufactured with “Cyana”, a resin intended to prevent fabric shrinkage. The plaintiff, a clothing manufacturer, had acquired from an intermediary manufacturer Cyana-treated material which it made into garments and sold to customers, after which time “it was claimed that ordinary washing caused them to shrink and to lose their shape.” Although it alleged breach of an express warranty, the plaintiff’s evidence was that, in acquiring the fabric, it had relied upon two forms of representations made by the defendant: advertising (both in trade journals and in direct mail to clothing manufacturers including the plaintiff)<sup>82</sup> and labels or garment tags furnished by the defendant, bearing the defendant’s name and product identification, and stating: “This Fabric Treated for SHRINKAGE CONTROL[.] Will Not Shrink or Stretch Out of Fit[.]”<sup>83</sup>

As to the advertisements, Fuld J. for (on this point) a unanimous court observed:

Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. ... Under these circumstances, it is highly unrealistic to limit a purchaser’s protection to warranties made directly to him by his immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase.

... The manufacturer places his product upon the market and, by advertising and labelling it, represents its quality to the public in such a way as to induce reliance upon his representations. He unquestioningly intends and expects that the products will be purchased and used in reliance upon his express assurance of its quality and, in fact, it is so purchased and used. Having invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contact directly with the user.<sup>84</sup>

Similar considerations applied specifically to the labels:

Equally sanguine representations on packages and labels frequently accompany the article throughout its journey to the ultimate consumer

81. *Randy Knitwear v. American Cyanamid Co.*, 11 N.Y. 2d 5, 181 N.E.2d 399, 226 N.Y.S. 2d 363 (C.A. 1962) [*Randy Knitwear* cited to N.E.2d].

82. Unfortunately the court’s reasons do not disclose the substance of the advertising.

83. *Randy Knitwear*, *supra* note 81 at 400 [Emphasis in original].

84. *Ibid.* at 402-03.

and, as intended, are relied upon by remote purchasers.

...

Although we believe that it has already been made clear, it is to be particularly remarked that in the present case the plaintiff's reliance is not on newspaper advertisements alone. It places heavy emphasis on the fact that the defendant not only made representations (as to the nonshrinkable character of "Cyana Finish" fabrics) in newspapers and periodicals, but also repeated them on its own labels and tags which accompanied the fabrics purchased by the plaintiff from [the intermediary].<sup>85</sup>

Such representations then, while made "to the public" in form are in substance directed individually to every purchaser further down the supply chain, including the ultimate consumer. Like any undertaking forming part of the causal sequence leading to liability, they are objective demonstrations of the manufacturer's intention to induce the receiver of the undertakings to believe that he or she may rely upon the manufacturer to accept responsibility for its contents.

Although the advertising and labelling in *Randy Knitwear* were each considered separately, they were taken cumulatively as engendering the necessary undertaking of responsibility.<sup>86</sup> The adequacy of a representation as a duty-engendering undertaking, assuming the form of, for example, advertising *alone* or labelling *alone*, was left unclear. Three years after *Randy Knitwear*, however, the Ohio Supreme Court in *Inglis v. American Motors Corp.*<sup>87</sup> considered the claim of a consumer purchaser of an automobile against (*inter alia*) the manufacturer for breach of warranty and negligence. The pleadings made various specific allegations of structural and mechanical defects in the automobile, and further that the plaintiff's purchase had been induced by representations contained in advertising concerning the quality of the automobile's manufacture.<sup>88</sup> In affirming the lower court's judgment for the plaintiff, Herbert J. said:

The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him

85. *Ibid.*

86. This is particularly evident in Fuld J.'s reference to "advertising and labelling" as a representation of "quality to the public in such a way as to induce reliance."

87. *Inglis v. American Motors Corp.*, 209 N.E.2d 583, 32 O.O. 2d 136 (Ohio Sup. Ct. 1965) [*Inglis*].

88. Specifically, the plaintiff alleged that the purchase was induced by "representations ... made ... by advertising in mass communications media that Rambler automobiles were trouble-free, economical in operation and built and manufactured with high quality workmanship."

harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation towards those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturers ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.<sup>89</sup>

Even allowing for the language reflecting the U.S. inclination towards strict products liability, the analysis in *Inglis* is not as satisfying as that in *Randy Knitwear*, as it is focused exclusively on the subsequent purchaser's reliance, and gives no consideration to the scope of responsibility assumed by the manufacturer. Irrespective of whether a finding of reasonable reliance on the subsequent purchaser's part may support a finding that the manufacturer assumed responsibility for the representation that induced it, *Inglis*'s grounding of liability exclusively on the plaintiff's reliance truncates the liability analysis, which necessarily entails an inquiry into the defendant's wrongdoing.

The reasoning of the California Superior Court in *Free v. Sluss*,<sup>90</sup> where the manufacturer's representation consisted only of labelling, is guilty of the converse omission. There the court, observing that the label expressed a "guarantee of quality",<sup>91</sup> found that this representation transcended the manufacturer's privity-bound retailers and extended to the subsequent purchaser. "It establish[ed]", Burch J. found, "the manufacturer's knowledge and intention that the goods should move through the usual channels of trade, and was a representation addressed to those who would deal in its product."<sup>92</sup> The representation therefore amounted to the manufacturer's undertaking to the subsequent purchaser of responsibility for the truth of its contents, on which basis liability could be imposed upon the manufacturer. This analysis missed the undertaking's significance, however, which lay in its impact upon the subsequent purchaser's choice. The undertaking must have amounted to an interference with his or her autonomy to choose from the available purchasing options, whether they included competing brands, other products or the option of refraining

89. *Inglis*, *supra* note 87 at 616.

90. *Free v. Sluss*, 87 Cal. App. 2d Supp. 933, 197 P. 2d 854 (Cal. Sup. Ct. 1948).

91. *Ibid.* at 856. Specifically, the "guarantee" amounted to an offer to refund purchase money if the soap did not meet with the purchaser's "entire approval."

92. *Ibid.* at 856.

from making any purchase.<sup>93</sup> Consequently, while *Free v. Sluss* and *Inglis* each apply only an aspect of the full duty of care analysis, the reasoning in *Randy Knitwear* is complete, linking the plaintiff's loss with the defendant's wrongdoing.

The practical significance of these dual elements of liability in the context of the relationship between a manufacturer and a subsequent purchaser is further illustrated in two contrasting decisions: those of the Supreme Court of New Jersey in *Santor v. Karagheusian, Inc.*<sup>94</sup> and of the Supreme Court of California in *Seely v. White Motor Company*.<sup>95</sup> In a nutshell, whereas *Santor* articulated a broader "implied warranty" rule (not predicated on any undertaking made by the manufacturer), *Seely* required the plaintiff's demonstrated reliance on the manufacturer's representation.

*Santor*, which preceded *Seely* by four months, arose from the plaintiff's retail purchase of a "Gulistan" carpet manufactured by the defendant and which, almost immediately after installation, developed a line down its centre.<sup>96</sup> The manufacturer had advertised the product as "Grade #1" and the plaintiff was aware of the advertising at the time of purchase. For the court, however, Francis J. did not consider whether this advertising amounted to an undertaking of responsibility for its contents by the manufacturer and, if so, whether the plaintiff had in fact relied upon it in deciding to purchase the rug. But for this, *Santor*'s contrast with *Seely* might have been less pronounced. Instead, relying on the U.S. jurisprudence that established strict products liability in cases of bodily injury or property damage,<sup>97</sup> he derived an "implied warranty" of reasonable fitness from the fact of the manufacturer's putting the product "in the channels of trade for sale to the public", thus overcoming "the strictures of the long-standing privity of contract requirement."<sup>98</sup> Strict liability, Francis J. concluded, is thus reflective of "public policy"<sup>99</sup> requiring imposition upon manufacturers of a duty of care irrespective of whether the manufacturer was negligent or had otherwise induced the plaintiff's reliance.

93. While the facts as recited in *Free v. Sluss* suggest that the plaintiff likely purchased in reliance on the manufacturer's undertaking, that was not addressed in the reasons.

94. *Santor v. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (Sup. Ct. 1965) [*Santor* cited to A.2d].

95. *Seely v. White Motor Company*, 45 Cal. Rptr. 17, 403 P.2d 145 (Sup. Ct. 1965) [*Seely* cited to P.2d].

96. Eventually, other lines appeared.

97. In particular *Henningson v. Bloomfield*, 32 N.J. 358, 161 A.2d 69 (Supt. Ct., 1960) and *Greenman v. Yuba Power Products*, 27 Cal. Rptr. 697, 377 P.2d 897 (Sup. Ct., 1963).

98. *Santor*, *supra* note 94 at 309, 311.

99. *Ibid.* at 311.

In *Seely*, the plaintiff had purchased a truck from an intermediate dealer by way of a printed purchase order issued by the manufacturer, which stated:

The White Motor Company hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good at its factory any part or parts thereof.

After finding that the plaintiff had relied on this in purchasing the truck, Traynor C.J. (for the majority) directly addressed the *Santor* “implied warranty,” saying:

We are of the opinion, however, that it was inappropriate to impose liability on that basis in the *Santor* case, for it would result in imposing liability without regard to what representations of quality the manufacturer made. It was only because the defendant in that case marketed the rug as Grade #1 that the court was justified in holding that the rug was defective. Had the manufacturer not so described the rug, but sold it “as is,” or sold it disclaiming any guarantee of quality, there would have been no basis for recovery in that case. Only if someone had been injured because the rug was unsafe for use would there have been any basis for imposing strict liability in tort.

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the “luck” of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer’s business unless he agrees that the product was designed to meet the consumer’s demands.<sup>100</sup>

The prominence of strict products liability in Traynor C.J.’s reasons in *Seely* might generate confusion for two reasons. First, since he had found that the manufacturer had made an express representation to the plaintiff determined the case in the plaintiff’s favour, his reference to strict products liability was, strictly speaking, superfluous.<sup>101</sup> Traynor C.J.’s concern here was, however, to rationalize the *Uniform Commercial Code*’s allowance for sellers to disclaim liability in certain circumstances, and strict liability which would tend to the opposite conclusion, by delineating their respective

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100. *Seely*, *supra* note 95 at 151.

101. For that reason, Peters J. argued in dissent, “[e]verything said by the majority on that subject is obviously dicta.” (*Seely*, *supra* note 95 at 153).



scopes of application. The law required in his view a delimitation of the limits of strict products liability at the boundary between loss of bargain and cases involving an express warranty under the *Uniform Commercial Code*. In doing so, he emphasized the fundamental elements, by then familiar to Commonwealth jurisdictions by reason of *Hedley Byrne*, of the duty of care. Such duty of care could not rest on the mere fact that the manufacturer had placed an item on the market. *Santor*, he said, could be justified only on the basis that the manufacturer had expressly held out the carpet as being "Grade #1"<sup>102</sup> and on the plaintiff's demonstrated reliance on such a holding out as an undertaking that the carpet is made to satisfy his requirements.

The second potentially confusing aspect of the prominence of strict products liability in *Seely* is the concept of an "implied warranty" which Traynor C.J. rejected and upon which Francis J. based recovery in *Santor*. This is a term of art, distinct from the implication of an undertaking of responsibility derived from, for example, a manufacturer's express representation as to quality. *Santor*'s implied warranty is one which, in a strict products liability regime, is imposed by law,<sup>103</sup> derived from the placement of a product on the market, requiring no actual representation of "reasonable suitability of the article manufactured for the use for which it was reasonably intended to be sold."<sup>104</sup> Conversely, the duty of care imposed outside the confines of a strict products liability regime requires (as Traynor C.J. required in *Seely*) an assumption of responsibility demonstrated by an express representation that induces reliance.

Strict products liability aside, another complicating (but ultimately informing) aspect of *Seely* is Traynor C.J.'s reference to "warranty recovery for economic loss." Recall that warranty is commonly, but mistakenly, understood as an exclusively contractual device.<sup>105</sup> This exclusivist view was also evident in the larger context in which *Seely* was decided. After a "sudden burst of rationalizing product cases as belonging to tort law rather than to the warranty side",<sup>106</sup> *Seely* represented "a halt, if not a retreat."<sup>107</sup> The critical point, however, is that the device of warranty (as distinct from *implied* warranty) was being used in *Seely* not to describe a term of the

102. Traynor C.J. did not, however, consider whether that representation constituted "puffery."

103. Walter H.E. Jaeger, "Products Liability: The Constructive Warranty" (1964) 39 *Notre Dame Lawyer* 501 at 506.

104. *Santor*, *supra* note 94 at 311. See also "'Note': Economic Loss in Products Liability Jurisprudence" (1966) 66.2 *Columb. L. Rev.* 917 at 937.

105. See the text accompanying note 72.

106. Mark A. Franklin, 'When Worlds Collide: Liability Theories and Disclaimers in Defective-Products Cases' (1966) 18 *Stan. L. Rev.* 974 at 979.

107. *Ibid.* at 979.

contract between parties in privity, but the manufacturer's representation to the subsequent purchaser from which an undertaking to be responsible for the truth of the representation's contents could be inferred. Thus the historically tortious nature of breach of warranty justifies the significance of undertaking and reliance as duty components. That is, they are constitutive of the circumstances giving rise to a duty of care, famously expressed in *Coggs v. Bernard*,<sup>108</sup> where Gould J. justified imposing a duty of care on a bailee:

The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage. ... The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. ... [I]f a man takes upon himself expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him.<sup>109</sup>

"Warranty" then, both historically and as employed by Traynor C.J. in *Seely*, is more completely understood not only as a contractual device, but as the substance of an undertaking made to induce reliance.<sup>110</sup> Inasmuch as it causes the purchaser to relinquish some of his or her own personal autonomy to the manufacturer's benefit, it gives rise to tort liability for negligent manufacture of defective products or building structures.

### III. *Other issues: damages and evidence*

I have established that, before liability may flow for loss of bargain in the law of negligence, the subsequent purchaser must demonstrate an undertaking, even if only in a diffuse or generalized form, and detrimental reliance, which can be inferred from the subsequent purchaser's confidence in the manufacturer's undertaking in making his or her purchasing decision.

108. *Coggs v. Bernard*, *supra* note 26.

109. *Ibid.* at 909. Holt C.J. (at 912) also affirmed that liability arose from the defendant's "undertaking" to move goods and store them safely and, at 919, concludes that consideration is unnecessary by reason of the plaintiff's reliance, expressed as "the owner's trusting him with the goods." Powell J. agreed (at 910) that "the gist of these actions is the undertaking" which "obliges [the defendant] so to do the thing, that the bailor come to no damage by his neglect." "[T]his action," he concluded (at 911), "is founded upon the warranty ... [a]nd a man may warrant a thing without any consideration."

110. Here I am agreeing with William C. Pelster, "The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties" (1966) 64 Mich. L. Rev. 1430 at 1442. I disagree however with Pelster's overall thesis which would allow recovery for subsequent purchasers by modifying the notion of privity. At the very least, I have attempted to show that such a development would be unnecessary. I am also agreeing on this point with Cooke, "An Impossible Distinction," *supra* note 68 at 59.

The permissible inference here is that, but for the undertaking, he or she would have acted on another consumer option. Where the subsequent purchaser can demonstrate these elements, then, what is the measure of damage? In acting on another consumer option, the subsequent purchaser would have had something reflecting the value that was actually paid. He or she would have been better off as a result. Accordingly, he or she ought to recover the difference between that value and the residual value (if any) of the product or building structure.

For example, if the subsequent purchaser had paid \$100 and the residual value is \$10, his or her recoverable damages would be \$90. Two important implications arise: first, the subsequent purchaser's recovery is not determined by the price of the functional alternative product. That is, he or she recovers \$90, irrespective of whether the alternative also costs \$100, or more, or less. The measure of damages is governed by the cost to him or her of having relinquished some of his or her own personal autonomy in making consumer choices to the manufacturer's benefit.<sup>111</sup> The second implication of the quantum of the subsequent purchaser's damages is that recovery in tort may exceed the recovery that he or she might have had under a contractual warranty. This would occur where the value of the product or building structure is less than what he or she paid for it, and where the contractual warranty provides for a functional replacement (as opposed to a refund of the purchase price).

The plaintiff's underlying evidentiary burden raises more factual variables than does the question of damages. The facts of *Santor* are illustrative. Assume that Santor could have demonstrated that there were competing carpet dealers of which he was aware at the time he purchased the carpet. Assume also that he could have demonstrated those competitors would have offered him a carpet combining the function and aesthetics he sought and which he believed he was obtaining from Karagheusian. Santor would then have had to prove that he was induced, by reason of Karagheusian's representation, to forego an opportunity to purchase a different and functional carpet elsewhere and instead to purchase the carpet from Karagheusian. In doing so, Santor would have had to distinguish Karagheusian's representation of the carpet as "Grade #1" from legally

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111. This is consistent with the principles governing recovery for negligent misrepresentation in the law of torts, which require that "the plaintiff ... be put into the position it would have been in had the misrepresentation not been made": *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577 [*BG Checo* cited to S.C.R.] at 37. This principle has also been applied by the British Columbia Court of Appeal in *Prince George (City) v. Rahn Bros. Logging Ltd.*, 2003 BCCA 31, 9 B.C.L.R. (4th) 253, 222 D.L.R. (4th) 608.

insignificant puffery which is not demonstrably reflective of an intention to undertake responsibility for the carpet's quality.

If, for example, Santor had demonstrated that "Grade #1" represented an industrial classification, then he ought to have succeeded on the basis that the representation inaccurately implied a sufficiently particular quality, such that it induced Santor to favour it over other available competing products. Similarly, if the bald statement "Grade #1" had been accompanied in the advertisement with a more particular statement to the effect that the carpet would maintain its aesthetic appearance over a certain period of time, or would not develop lines, Santor also ought to have succeeded. The more particular the representation, the more likely it will demonstrate an underlying intent to induce reliance, and the greater the consumer's ability to demonstrate actual and reasonable reliance. If, conversely, the statement "Grade #1" had appeared by itself in the advertisement unaccompanied by any other information regarding the quality of the rug, or if instead it had not appeared in an advertisement but in a banner hanging in the storefront window, it would have been open to Karagheusian to argue that Santor could not have reasonably taken from such a general, ambiguous statement that Karagheusian had undertaken responsibility for the rug's quality. Were that the case, Karagheusian could add, such puffery ought to have invited, at the very least, further specific inquiries from Santor as to quality before Santor would have been entitled to rely on anything Karagheusian told him.

The particularity of the representation and the context in which it is given are, therefore, central to the inquiry. In *Seely* the representation (warranting the truck to be "free from defects in material workmanship under normal use and service") was more specific than Karagheusian's "Grade #1" statement in *Santor*. The *Seely* representation also resembled the language of a contractual warranty, which might in similar circumstances influence a court in finding both an undertaking on the part of the manufacturer to be responsible for the product's quality, and justification for a consumer's reliance, thus mitigating if not overcoming any concerns that might be posed by, for example, context. Absent such particularity, context assumes greater significance inasmuch as the governing principles may result in varying outcomes owing to divergent commercial customs across communities and jurisdictions. The essential point however is that both particularity and context of a representation can be accounted for within an inquiry into the manufacturer's objectively determined undertaking and the reasonableness of the consumer's reliance.

### Conclusion

Commonwealth courts have struggled since *Donoghue v. Stevenson* with claims arising from defective products and building structures, usually by applying diverse “public policy” considerations.<sup>112</sup> As demonstrated by the disparate quality, taken together, of Commonwealth jurisprudence generated over the past two decades, the results have been practically and conceptually unsatisfying and, in the particular instance of *Winnipeg Condominium*, invite the criticism of inconsistency with tort law’s parameters. It behooves us to consider alternative paths. Hence my focus on examining afresh conceptions of “undertaking” and “reliance” as fundamental liability components whose application extends beyond their conventional confines of negligent misrepresentation or fiduciary duty to define the liability inquiry in cases of defective products and building structures.

While my analysis would result in a more pronounced shift towards allowing plaintiffs’ claims in cases involving defective *products*, their ability to invoke this doctrine to obtain recovery in cases of defective *building structures* might, as an empirical matter, be more limited.<sup>113</sup> It is conceivable that instances of diffuse but legally significant communication between builders and subsequent purchasers are less common, as builders of residential or commercial structures might not generally engage in substantive marketing to the same degree as, for example, automobile manufacturers. Moreover, the builder would not be without defences, even in the face of a specific representation. The now-common practice of employing “home inspectors” to scan the structure for visible structural defects would allow builders to argue that the subsequent purchaser’s conduct reveals, far from reliance on their representation, a deliberate choice to rely instead on a third party. Accordingly, the approach which I advocate might arguably lead to less frequent recovery for subsequent purchasers of building structures than for subsequent purchasers of products.

That said, it is hardly fanciful to foresee instances where subsequent purchasers of building structures would be able to prove that a statement

112. See Venning J.’s compendium in *Three Meade*, *supra* note 11 and La Forest J.’s “compelling policy reasons” in *Winnipeg Condominium*, *supra* note 13 (in the text accompanying note 16).

113. New Zealand courts might disagree, having, since *Bowen*, *supra* note 18 treated subsequent purchasers of building structures as even more deserving of tort law’s protection than subsequent purchasers of products. This has been attributed to what Venning J. described in *Three Meade*, *ibid.* (at 510) as “the particular social and historical context of home ownership in New Zealand,” which included a high proportion of owner-occupied housing; the extent of low-cost housing undertaken by small-scale builders for individual purchasers; the nature and extent of government support for homebuilding and ownership; the surge in homebuilding during the 1950s and 1960s; government regulation of home construction; and the absence of any practice of house buyers to commission engineering or architectural examinations.

by a builder amounts to a reliance-inducing assumption of responsibility for the building structure's quality, but for which they would have acquired a satisfactory building structure that met their requirements. Sole developers of large residential housing projects such as condominiums, for example, typically engage in mass advertising to attract prospective purchasers which will unavoidably reach subsequent purchasers as well. It is conceivable, moreover, particularly in the case of high-end homes or in high-market cities, that subsequent purchasers will contact the builder in advance of making an offer to purchase in order to discuss general and specific aspects of the construction and that they will rely on the builder's assurances in reaching a decision to purchase the particular home. As in the case of consumer products, the particularity of the content of the builder's representation is critical to the subsequent purchaser's ability to demonstrate the reasonableness of his or her reliance. An assurance that the home is "well-built" or "should have no problems" would be less likely to be viewed as having engendered reasonable reliance than specific representations responding to specific inquiries about, for example, the adequacy of foundations given subsoil characteristics, the adequacy of ventilation in ceiling space or under external cladding, or the reliability of sub-contractors.

Ultimately, some plaintiffs will succeed while others fail. This by itself is no indictment. My inquiry has not sought to impose strict liability for loss of bargain, but rather to construct a justificatory regime for its recovery. That is, it has attempted to rationalize a juridical conception of tort law's protection with the intuitive sense of "justice" that still leads courts in Australia, Canada and New Zealand to impose, on varying and not necessarily consistent bases *inter se*, liability for loss of bargain. Any solution to that problem necessarily creates winners and losers. The animating question does not go to divergent outcomes among parties, but to the reason *why* a particular plaintiff or defendant wins or loses. Hence my stress on the yardstick of whether a subsequent purchaser relied on a manufacturer's extra-contractual undertaking. Irrespective of whether a particular subsequent purchaser of a product or of a building structure can meet that threshold for recovery, I have demonstrated a principled, juridical solution to the general problem of loss of bargain.

