PERSPECTIVE

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Doctrinal Clarity in Tort Litigation: A Comparative Lawyer's Viewpoint**

I. Introductory Remarks

A non-American lawyer must be cautious when expressing value judgments about the legal scene in the U.S. Variations in the case law of the states can be significant; the law can change suddenly—at times as a result of "political" changes in the state judiciary—which a foreign observer may not be able to follow let alone fully understand; and the different legal roles[1] that judges and academics have to perform in the constant development of the law make it dangerous for the latter to criticize the former. Yet despite these caveats, an academic with a comparative training would like to express some reservations about what appears to him as an absence of doctrinal clarity in some tort cases

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**This article is a written version of a presentation made to the law faculty of Southern Methodist University on February 15, 1991. References to the rich case law and periodical literature have deliberately been kept to a minimum. The paper mainly deals with attorney malpractice. In a sequel I hope to discuss the confusing rules that govern survival and wrongful death actions. I am particularly grateful for useful discussions I have had with my colleagues Jim Henderson, the Frank B. Ingersoll Professor of Law, and Robert Summers, the William G. McRoberts Research Professor in Administration of the Law, during my brief teaching visit at the Cornell Law School during the spring term of 1991. Neither of them, of course, bears any responsibility for the ideas put forward in the text.

1. Goff, *Judge, Jurist and Legislator,* 1987 DENNING L.J. 79; Goff, *The Search for Principle,* 69 PROC. OF THE BRIT. ACAD. 169 (1983).

that are often litigated before state courts and are invariably included in class materials used by students at different stages of their legal education. In advocating the need to pay greater attention to proper doctrinal analysis of these problems, I have all along remained mindful of the *practical* implications of such an exercise which I discuss later in this paper. However, as a teacher I am also conscious of the need to analyze and teach law without underplaying or ignoring the impact that the institutional, political, and social background can have on the operation of legal rules. For me, advocating rigorous doctrinal analysis is thus not an alternative to a policy-oriented exegesis of the law but a necessary complement.[2]

II. Attorney Liability Towards Third Parties (Nonclients): Contract, Tort, or Nothing?

The subheading gives some idea of the rich variations of American case law. In reality the situation is even more complicated. Some courts accept liability in tort (provided certain criteria are satisfied); others declare that recovery can be based on either contract *or* tort theory; others declare contractual theories "superfluous" (for which read unnecessary); yet others use hybrid language which, at best, can bring them in one of the above categories and, at worst, can be regarded as sloppy; while a final group of courts, adhering to the traditional notion of privity, deny recovery altogether. This text need not be cluttered with the kind of exhaustive footnote references American (and German) lawyers so admire. Suffice it to illustrate these categories with limited references and, from these, examine which classification is preferable and why.

As has often been the case in the 1960s and 1970s, the law on this topic was first shaped by Californian courts. *Biakanja v. Irving*[3] had to decide whether a nonlawyer notary public could be liable to a frustrated beneficiary for failing to have the will properly attested. The decision of the Supreme Court of California was to allow such an action and it did so by invoking tort doctrine. For this to happen, however, the court has to

> balanc[e] . . . various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[4]

2. In the context of comparative methodology, I have stressed the need for this duality in my following works: 1 F. H. LAWSON & B. S. MARKESINIS, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW ch. 2 (1982); B. S. MARKESINIS & C. VON BAR, RICHTERLICHE RECHTSPOLITIK IM HAFTUNGSRECHT (1981); Markesinis, *Litigation-Mania in England, Germany and the U.S.A.: Are We So Very Different?*, CAMBRIDGE L.J. 233 (1990).

3. 49 Cal. 2d 647, 320 P.2d 16 (1958).

4. *Id.* at 650, 320 P.2d at 19.

In its subsequent decision in *Lucas v. Hamm*,[5] involving a defective will drafted by a qualified attorney, the Supreme Court of California purported to "restate" [*sic*][6] the *Biakanja* test though, in reality, it "paraphrased" it—as one commentator has put it[7]—by omitting all reference to the penultimate requirement (moral blame). Whether this omission was deliberate (given the different factual context of the two cases) or accidental is by no means obvious; indeed, subsequent decisions do not seem to have paid much attention to the verbal variation of what has become known as the "multi-criteria test."

Lucas v. Hamm, however, did not stop there. In line with a previously expressed (but not here referred to) line of reasoning first formulated by Justice Cardozo,[8] the court in *Lucas* was also prepared to treat the third party as an intended beneficiary of the contract between testator and attorney since he (the third party) was the "end and aim" of the entire transaction (the drawing up of the will). If *Biakanja* thus provides an illustration of tort theory of recovery, *Lucas* provides an example of *either* tort *or* contract reasoning for achieving this result.

While courts in other states inevitably followed suit, a restless California Supreme Court was to muddy the waters further. A bare eight years later in its decision in *Heyer v. Flaig*[9] (yet another wills case) it would describe "this latter [*i.e.*, contractual] theory of recovery . . . [as] *conceptually superfluous* since the *crux* of the action must lie in tort in any case."[10] Justice Tobriner, delivering the majority judgment, then added, "This reading of *Lucas* is reinforced by the following language recited with approval in the case of *Eads v. Marks* (1952) 39 Cal.2d 807, 811, 249 P.2d 257, 260: 'It has been well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, but if it arises *from a breach of duty growing out of the contract* it is ex delicto.' "[11]

It is submitted that on closer analysis the meaning of this statement is far from obvious. At this stage, however, suffice it to say that *Heyer* represents an example of the third possible stance that the courts can take on the topic under consideration: If the attorney is to be held liable towards a third party, it can *only* be in tort. Back to *Biakanja* but in a more categorical way!

Heyer, however, does not mark the end of the variations. Some courts, obviously unsettled by these constant reformulations, have come down in favor of contract *or* tort but using language that belongs to both and displays, at the very

5. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).
6. *Id.* at 585, 364 P.2d at 687, 15 Cal. Rptr. at 823.
7. C. WOLFRAM, MODERN LEGAL ETHICS 225 n.50 (1986).
8. *See* Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).
9. 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).
10. *Id.* at 226, 449 P.2d at 164, 74 Cal. Rptr. at 228 (emphasis added).
11. *Id.* (original emphasis).

least, an aversion to terminological precision. The following quote, from the decision of the Supreme Court of Illinois in *Pelham v. Griesheimer,* I think, makes my point:

> While privity of contract has been abolished in many areas of tort law, the concern is still that liability for negligence not extend to an unlimited and unknown number of potential plaintiffs. In the area of legal malpractice the attorney's obligations to his client must remain paramount. In such cases the best approach is that the plaintiffs must allege and prove facts demonstrating that they are in the *nature of third-party intended beneficiaries* of the relationship between the client and the attorney in order to *recover in tort.* . . . By this we mean that *to establish a duty* owed by the defendant attorney to the nonclient the nonclient must allege and prove that *the intent of the client to benefit the nonclient* third party was the *primary* or *direct* purpose of the transaction or relationship.[12]

The fifth and last position towards our problem can be found in states like Texas where the (otherwise pro-plaintiff) courts adhere to the traditional privity rule and deny all liability towards third parties. The latest decision I am aware of is *Dickey v. Jansen.*[13] It was decided on April 9, 1987, by the Houston (1st District) Court of Appeals and boldly asserts that "Texas law does not recognize a negligence cause of action in these circumstances, on the theory that an attorney owes a duty only to those parties in privity of contract with him. *Berry v. Dodson, Nunley & Taylor, P.C.,* 717 S.W.2d 716, 718. . . ."[14] A number of points arise from the majority and dissenting judgment (delivered by Chief Justice Evans) if read together.

First, the majority decided the case on negligence theory alone since the "appellants [third party] did not plead a theory of third party beneficiary."[15] If that is true, then the citing of *Berry v. Dodson* as authority for nonliability in negligence is not entirely satisfactory. For the facts in *Berry,* as the dissenting Chief Justice pointed out, were "different . . . [since] the allegation [in *Berry*] was not that the testator's attorney had been guilty of negligent draftsmanship, but that he had not . . . prepared [the will at all] for execution before the testator died."[16] This, in other words, was arguably a case of nonfeasance, not misfeasance, and the reluctance to impose liability for omissions in tort is as hallowed in the common law as it is well-known.[17]

Secondly, the dissent was willing to consider contractual recovery on the ground that "the appellants alleged the essential elements of a third-party beneficiary action against the appellees."[18] In doing so, however, it cited cases

12. 92 Ill. 2d 13, 440 N.E.2d 96, 99 (1982) (emphasis added).
13. 731 S.W.2d 581 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
14. *Id.* at 582.
15. *Id.*
16. *Id.* at 584.
17. *But see* the New Zealand case of Gartside v. Sheffield, Young & Ellis, [1983] N.Z.L.R. 37. German courts have, in such cases of inaction, accepted liability, but the theory of recovery is contractual and, therefore, the result is more understandable. *See* BGH, [1965] NJW 1955; [1966] JZ 141, with a note by Professor W. Lorenz.
18. Dickey v. Jansen, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987).

which are not entirely supportive of its view. Thus the dissent's reference to both *Biakanja* and *Lucas* to buttress its contractual theory is misleading for, as we have already noted, only the second case recognized a contractual cause of action; and even this is now, as a result of *Heyer,* in doubt.

Thirdly, notwithstanding the above, could the intended beneficiary doctrine be applied in Texas? The subsequent decision of the Texas appellate court in *Hellenic Investment, Inc. v. Kroger*[19] would suggest an affirmative answer. For *Hellenic*—which was *not* a wills case—held that for a third party to be able to invoke the intended beneficiary doctrine it would have to show that "it was not a party to the contract [in the wills cases between the testator and the attorney], that the contract was made for its direct benefit [which in the wills cases it is], and that the contracting par*ties* intended that it so benefit."[20] These requirements, as indicated in the brackets, are fully satisfied in the wills cases and the only doubt one has with the quote, which *broadly* follows the Restatement terminology,[21] is the use of the plural in the word *parties*. Since this slip has appeared in a number of wills cases it should, it is submitted, be corrected and the clarification made that in contracts in favor of third parties the intention to confer a benefit is the intention of the promisee (testator) and not of the promisor (attorney) though, of course, the latter must know to whom he must render his contractual performance.[22]

III. Contract or Tort—Does It Matter?

Much of the above may strike some as nit-picking; but the designation of the action as contractual or tortious becomes essential, especially in the light of the categorical statements in *Heyer v. Flaig* that the contractual action is "superfluous" and that "the *crux* of the action *must* lie in tort." The submission of this paper is that it is necessary to decide on the proper characterization of the cause of action for this may affect the following rules.[23]

A. Measure of Damages

The tort and contract measure of damages may differ even though academics and judges have, in some instances, proposed a greater approximation of the

19. 766 S.W.2d 861 (Tex. App.—Houston [1st Dist.] 1989, no writ).

20. *Id.* at 865 (emphasis added).

21. Restatement (Second) of Contracts § 302 (1979).

22. It is submitted that Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961), once again gets this point right. Even within the same state, courts are sometimes confused. Thus, in Guy v. Liederbach, 459 A.2d 744, 751 (Pa. 1983), the court seems to be stating that the promisor must have had the requisite intention, while in the earlier (nonwills) case of Spires v. Hanover Fire Insurance Co., 70 A.2d 828 (Pa. 1950), the court talks of *both* promisor and promisee intending to benefit the third party. Finally, in Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985), the court (correctly) refers to the promisee's intentions.

23. This section draws on the comparative account I have given in B. S. Markesinis, The German Law of Torts 233–39 (2d ed 1990), and my case note, Markesinis, *Eternal and Troublesome Triangles,* 106 Law Q. Rev. 556–61 (1990).

rules.[24] The classical contractual approach would favor the award of full expectation damages to the plaintiff/third party. In the U.S.A., a tort action might justify an additional claim for punitive damages. This did, in fact, occur in *Heyer.*

B. Liability for Omissions

Traditional tort theory would deny liability where the defendant had remained inactive rather than had acted badly (unless, of course, one were able to recharacterize the inactivity as a wrongful act which in many cases one can do without too much difficulty). A contractual solution could, by contrast, make the defendant liable for both misfeasance and nonfeasance. In other jurisdictions courts have held attorneys liable for failure to draw up in a timely fashion their clients' wills. Thus, Germany has done this contractually; New Zealand and The Netherlands have achieved the result through tort.[25] The Dutch result is not so surprising since the civil law systems are more inclined than the common law to impose liability for omissions. The New Zealand case on the other hand is "unorthodox" by common law standards; and it is also irreconcilable with cases like *Berry v. Dodson.*[26]

C. The Requisite Standard of Care that Must Be Attained by the Defendant

There has been some concern about this point in both England and the U.S.A. German law, on the other hand, proceeding on contract theory, has not experienced this difficulty; and German writers, considering a hypothetical (for them) tort action have had no difficulty in saying that the tort standard of care should be determined by the contract. The passage from Justice Tobriner's judgment in *Heyer v. Flaig* quoted above[27] may also be taken to support this view.

D. The Period of Limitation

Both the length and the starting point (*e.g.*, breach of contract versus occurrence of the damage) may differ in tort and contract. If this were so, it would be impracticable to subject one relationship (plaintiff-attorney) to one set of rules and the other relationship (testator-attorney) to a different set of rules. The point is, again, of practical significance. Thus, Pennsylvania courts have, for example,

24. In England a controversial proposal has been made by Lord Denning in H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co., [1978] Q.B. 791.

25. BGH, [1965] NJW 1955; [1966] JZ 141; Hof Amsterdam [1985] N.J. 40. In Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability,* 23 San Diego L. Rev. 37, 42 (1986), the author provides a hypothetical example involving inaction in the context of drafting a will and suggests that the solution should lie in contract, not tort.

26. 717 S.W.2d 716 (Tex. App.—San Antonio 1986, writ dism'd by agr.).

27. 70 Cal. 2d 233, 449 P.2d 101, 74 Cal. Rptr. 225 (1969).

agonized as to whether the applicable statute of limitations should be determined by the nature of the cause of action or other criteria;[28] and the result is a difference between two, four, or six years of limitation period.

E. Jurisdiction International and Internal

The choice-orientated approach adopted by conflicts rules in cases of contract seems more appropriate in these types of cases than the *locus* of the accident tort approach. In any event, it would be odd (if not inconvenient) if the dispute between plaintiff/defendant (third party-attorney in the cases under consideration) were subject to one rule and the relationship between attorney/testator were governed by a different law. We could, again, allow the underlying contractual relationship to influence the tort action (as Justice Tobriner implied in *Heyer*); but why not opt more openly whenever we can for the more straightforward contractual reasoning?

F. Exemption Clauses/Defenses

It has never been in doubt, both in the civil law and those common law systems that recognize contracts in favor of third parties, that the promisor can oppose against the third party the defenses and other exemption clauses that he may have as a result of his contract with the promisee. I am not aware of this point ever having been raised in the attorney malpractice cases though Lord Justice Goff (as he then was) alluded to it in an obiter dictum[29] giving the hypothetical example of an attorney agreeing to draft a will in an emergency and without access to his law books. In such a case, if the attorney had limited his liability towards his client, he ought to enjoy the same protection as against a third party. One can achieve this result by saying, yet again, that the tortious action is shaped by the underlying contract (as Tobriner's dicta in *Heyer* might suggest, though remember he talks of the *crux* of the action lying in *tort*), or by openly opting for the contractual option and saying that the attorney (promisor) can invoke against the third party the defenses he has against the promisee (testator). Does it matter in practice which way this result is achieved? I think it does, not least because the contractual way concentrates one's mind on the various points I have raised in this section. The contractual approach has the further advantage of making it clear that the exemption clause that matters is the one in the contract between promisor and promisee. This point becomes crucial in another triangular context involving *two* sets of contracts between site owners (*O*), contractors (*C*), and

28. *Compare* Moore v. McComsey, 459 A.2d 841, 844 (Pa. 1983), *and* Guy v. Liederbach, 459 A.2d 744, 752–53 (Pa. 1983), *with Gatley v. Lewis*, quoted by Bogutz & Albert, *A Survey of the Developing Pennsylvania Law of Attorney Malpractice*, 61 Temple L. Rev. 1237, 1258 (1990), where further references are available.

29. Leigh & Sillavan Ltd. v. The Aliakmon Shipping Co. (The Aliakmon), [1985] Q.B. 350, 397–98.

subcontractors (*SC*).[30] For reasons of space, two simple factual situations will be considered, but little ingenuity is required to envisage more complicated variants. Though the cases considered in the following are English, they represent factual variations on the *J'Aire* theme so the points raised here could be of relevance to American lawyers.

In my first example, the *SC*'s fault gives rise to remedial *expenditure* costing, say, $1,000 to *O*. This, essentially, was the situation in the English case of *South Water Authority v. Carey.*[31] In the second situation, the *SC*'s fault causes *damage* to *O*'s existing property, which, again for argument's sake, will cost him $1,000 to repair. In the more recent English case of *Norwich City Council v. Harvey*[32] the Court of Appeal, partly through silence and partly as a result of frequent references to *Carey,*[33] gave the impression that the two situations were identical. They were not. For the former involved pure economic loss—increasingly viewed with disapproval by conservatively (especially in England) inclined courts—whereas the latter is concerned with property damage, an area of tort law which has, traditionally, been widely compensated, especially in American law.

Norwich, as is typical of such cases, not only involved the question of liability in principle of *SC* to *O* but also *SC*'s potential avoidance of liability because of an exemption clause to be found in the contract between *O* and *C*. The first point one can make in passing (without going into details as to how exemption clauses theoretically affect the defendant's position) is that *Carey* could be read as holding that there was a prima facie duty of care but that the area of risk the plaintiff had chosen to accept was defined by the contract.[34] In *Norwich,* on the other hand, the phraseology of the court is not all that clear. *Garland J.,* at first instance, apparently adopted the *Carey* approach[35] whereas there are passages in the Court of Appeal's judgment[36] which suggest that, because of the exemption clause, no duty arose in the first place.[37] This, however, is not the *crucial* point about the effect of the exemption clauses in the cases under review. The real

30. The contractor cases, introduced at this stage of the discussion, have many things in common with the attorney cases. They both involve triangular relations; they both (invariably) involve pure economic loss; and in both the economic loss will typically affect a limited or, at any rate, definable set of persons and thus the floodgates argument, which is invoked to defeat economic loss claims, is of no use here. This similarity between these two cases has been recognized by the courts which have used these decisions as having precedential value. *See, e.g.,* J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979). On the other hand, one must also remember that the attorney-client relationship has its own characteristic features; and in the building cases one is faced, as already stated, with *two* contracts (*O* and *C*, and *C* and *SC*), whereas in the attorney cases there is one contract only between testator and attorney. Thus, one must not press the analogy too far.

31. [1985] 2 All E.R. 1077.

32. [1989] 1 W.L.R. 828.

33. Which was described as containing an "extremely" helpful judgment. *Id.* at 838.

34. [1985] 2 All E.R. 1077, 1078 headnote.

35. [1989] 1 W.L.R. 828, 831.

36. *Id.*

37. The headnote on page 828, admittedly not part of the judgment, also suggests that this interpretation is plausible. *Id.* at 828.

point is *which* exemption clause should have the above effects? This is a crucial point because in these triangular situations under consideration we are faced with *two* contracts—one between *O* and *C* (henceforth contract 1) and one between *C* and *SC* (contract 2). Both may contain exemption clauses which may be identical (*Norwich*) or different (as was the case with the third but not the other defendants in *Carey*). As stated, in *Norwich* the Court of Appeal took the view that because of the exemption clause in contract 1, *SC* was not liable. Crucial to this result was Lord Keith's observation in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co., Ltd.* that "in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is *just and reasonable that it should be so.*"[38] So was the result just and reasonable? How are we to judge this question, save by looking at the usual extracts that our judges quote *in extenso* over and over again in the process of producing longer than necessary judgments? In actual fact we have two pointers: (1) a clear statement[39] that, in essence, all parties were involved (commercially) in the same transaction and knew where they stood; and (2) one tantalizing but incomplete hint at the very end of the judgment about "the insurance position and subrogation rights."[40] Let us look at these points in reverse order.

The decision to bar *O*'s rights in effect amounts to a decision to bar his insurer's subrogation rights. Should that consideration be relevant to the underlying decision to bar *O*'s rights? For those (mainly British academics) who condemn insurers for wishing to eat their cake and have it (*i.e.*, collect premiums to cover risks *and* exercise subrogation rights when the risk is realized), anything that helps cut down on these rights may appear to be fair and reasonable. Even if insurers' rights are clearly established in this regard, and cannot be taken away openly, they can, it seems, be neutralized obliquely. The *Norwich* court *may* have been doing just that by denying that *O* was owed a duty of care. *If* the court was, in fact, doing this it *may* have been convinced that such a ruling promoted an economic efficiency rule: that losses such as these are best channelled through first-party insurance which avoids litigation. This, in effect, is one of the arguments used in England extrajudicially to support the *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors)* decision;[41] and it might be arguable here, too. Denying subrogation rights would, according to the same school of thought, also avoid the (potential) wastefulness of both fire insurance (taken out by *O*) and liability insurance (probably taken out by *SC*) on the same segment of risk. The

38. [1985] C.A. 210, 241 (emphasis added).
39. [1989] 1 W.L.R. 828, 837.
40. *Id.* at 838.
41. [1973] Q.B. 27. For American equivalents, see Dunlop Tire & Rubber Corp. v. FMC Corp., 53 A.D.2d 150, 385 N.Y.S.2d 971 (Ct. App. 1976); Beck v. FMC Corp., 53 A.D.2d 118, 385 N.Y.S.2d 956 (Ct. App. 1976), *aff'd*, 42 N.Y.2d 1027, 369 N.E.2d 10, 398 N.Y.S.2d 1011 (1977). *But cf.* New Zealand Forest Prod. Ltd. v. Attorney Gen., 1 N.Z.L.R. 14 (1986).

thinking behind Kerr L.J.'s judgment in *Rowlands (Mark) Ltd. v. Berni Inns Ltd.*[42] may thus also be applicable in these *network* contract cases encouraging the courts to look at the global pattern of risk allocation on construction sites.[43]

Having suggested such a way of approaching these cases may I add that there is no evidence in the judgments to suggest that this was the judges' main aim. Moreover, such an analysis may be flawed since it appears to beg, but not answer, the underlying question of barring *O*'s rights. For focusing on *O*'s insurer's right to subrogation overlooks the fact that barring *O* relieves *SC*'s insurer's obligation to indemnify *SC*. When both sides of the insurance picture are considered, the issue becomes which insurance pool—*O*'s or *SC*'s—should bear the loss, which simply raises anew the issue of whether *O* should win or be barred. The point about favoring first-party over third-party insurance may be proving too much if it argues against liability in every instance. Finally, the argument that duplication in insurance coverage should be avoided overlooks the fact that the subrogation clause in *O*'s insurance contract will avoid duplication of coverage. Both *O* and *SC* will, presumably, wish to carry their own insurance to cover potential losses in many other contexts than the one here being considered. It follows that, according to this way of thinking, "insurance and subrogation rights" may not inform decisively the analysis of who should, as between *O* and *SC*, prevail. Happily, for present purposes, this issue need not be settled here. What must be stressed, however, is a different point, namely that if the ingredients for discovering a duty of care are, essentially, devices for introducing into the legal syllogism policy considerations, then these considerations should be discussed openly so that lawyers (teacher and practitioners alike) could contribute meaningfully to the debate.

But what about the first explanation of the *Norwich* conclusion? In colloquial terms they were all in the same boat, liable in the same way through a network of interlocking clauses. In the court's view *SC* was let off the hook thanks to a clause in contract 1.

Norwich did this largely by following *Carey;* and the latter case allowed the third defendant (*SC*) to involve the clause in contract 1 by relying on some dicta of Lord Roskill's in *Junior Books Ltd. v. Veitchi Co.*,[44] apparently interpreting the exclusion clause situation in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[45] Now, if all this reasoning can, indeed, be traced back to *Hedley Byrne* it would appear to be wrong. For if we see *Hedley Byrne* in triangular terms, the plaintiff in that case stands for *O* in *Norwich,* Bank *A* (the plaintiff's bank) stands

42. [1985] 2 Lloyd's Rep. 437.

43. For further references on this, see M. A. CLARKE, THE LAW OF INSURANCE CONTRACTS 1-1A, 31-5D (1989).

44. [1983] 1 A.C. 520, 546–47.

45. [1964] A.C. 465. Lord Roskill's key words were: "the relevant exclusion clause in the main [*sic*] contract." *Hedley Byrne* was a case involving the potential liability of accountants towards third parties.

for *C*, and Bank *B* (the advising bank/defendant) stands for *SC*, we then note that the all-important exemption clause is that found in contract 2 (or, in the *Hedley Byrne* situation, in the relationship between *A* and *B*). The same is *mutatis mutandis* true of other triangular cases potentially involving exemption clauses such as *Biakanja* or *Lucas* (where the advising attorney is in the position of *SC* and the testator in that of *C* though here, of course, we are faced with only one contract). In all these cases the legally relevant clause is and *should* be that found in contract 2, not contract 1. All this may sound confusing; and it is confusing since triangular relationships in law (as in married life) are just that. Confusing and troublesome until, that is, one takes the trouble to analyze them carefully and see how best one can untangle the mess.

My reading of these cases is that they are really contract cases solved through tort—in England because of the strict doctrine of privity, in the U.S.A. because the advantages of the contractual approach have not seriously been considered; indeed, worse still, in the leading case of *J'Aire* the contractual cause of action was, *according to the plaintiff's lawyer,* abandoned at the Supreme Court level inter alia on the (unbelievable) grounds that "contracts were never [his] strong point in Law School"![46] So why not treat, where the facts allow it, the plaintiff (*O*) as a third-party beneficiary of the contract between *C* and *SC*? Deciding this on the intended beneficiary criteria should be clearer than applying the vaguer tort of negligence or saying that though the action is tortious it is shaped by the underlying contracts that may exist. In my solution, the plaintiff would get his action where, on occasion, tort doctrine has denied it to him.[47] The defendant—*SC* in the building cases—would only be liable to the extent that he had agreed in his contract (contract 2) with his co-contractor to be liable. This would not, necessarily, have been fatal in the *Norwich* case for the court could have argued that the clause in contract 1 had *de facto* if not *de iure* become a clause of contract 2. But is this mere theoretical pedantry? I do not think it is, since it helps explain why the *SC* in *Norwich* can be absolved whereas the third defendant/*SC* in *Carey,* who had originally rejected the *C*'s clause, should not. Thus, to me at least, it may be "transparently unfair" to deny the *Norwich* defendant the right to invoke the protection of the clause in contract 1; but this is by no means obvious in the case of the *Carey* defendant who was allowed to blow hot and cold over the (presumably) differing clauses in contracts 1 and 2.

My contractual solution might also be fairer to the *SC* in the case of bankruptcy of *C*—something which must often happen and tempt *O* to sue *SC* instead of the more obvious co-contractor/*C*. For if *SC* is liable in *contract* (as I suggest) and not in tort, and he has already paid *C*, he would not be liable to pay again if sued,

46. *See* Schwartz, *supra* note 25, at 43. For American building cases solved through contract, see Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc., 336 A.2d 211 (Del. 1975); Sears, Roebuck & Co. v. Jardel Co., 421 F.2d 1048 (3d Cir. 1970); Just's, Inc. v. Arrington Const. Co., 99 Idaho 462, 583 P.2d 997 (1978). For further comments, see 40 FORDHAM L. REV. 315, 331–32 (1971).

47. *See* Leigh & Sillavan, Ltd. v. The Aliakmon Shipping Co., [1985] Q.B. 350.

by *O*. (Unless, of course, *O*'s loss was greater than *C*'s, in which case he would have to pay the difference. This complication, however, has not been considered in this short paper.) All this could be achieved if the action were contractual and accepted doctrine was applied, making it clear that the promisor (*SC*) is liable to the third party (*O*) in precisely the same way as he is liable to the promisee (*C*).

The contractual solution would bring the same advantages to the first triangular relationship discussed in this paper, namely that of testator, attorney, and third-party beneficiary. Indeed, it might even be more appropriate here given the special nature of the attorney-client relationship and the need to have a workable rule to determine the bounds of liability towards nonclient/third parties. For the tort multicriteria test of *Biakanja* seems and remains notoriously vague even though a multitude of decisions by various courts have since purported to apply it. Nor is this surprising since *Biakanja* never decided whether the stated factors must be cumulatively or individually satisfied; nor did it express a view as to whether one of them might, in fact, have a greater normative value over the others.

Finally, though my preferred test is more restrictive than the tort approach, it should not, necessarily, be taken to limit attorney liability towards third-party beneficiaries of a will. For, on occasion, the promisee must be taken to intend to benefit the third party *and* derive himself some advantages from the proposed transaction. Thus, an attorney who negligently perfects an adoption could be held liable both towards the "adopting" parents (who employed the attorney to this end) *and* towards the adoptee who, because of the attorney's negligence finds himself deprived of his inheritance rights vis-à-vis his "adopting" parents. *Metzker v. Slocum,*[48] applying tort reasoning, held the adoptee's loss in a situation analogous but not identical to my hypothetical case to be unforeseeable and thus denied him recovery; but the result seems as unfair as its reasoning is strained and it is, therefore, submitted that my preferred contractual reasoning could in this case help achieve a more equitable result.

IV. Concluding Observations

At the end of this presentation may I make two points by way of concluding remarks?

First, I have in this paper been talking of intended beneficiaries and contracts in favor of third parties. The factual situations to which I have been applying these terms are not, really, typical examples of contracts in favor of third parties. For what the plaintiffs are seeking in these cases is not to make the defendants perform their primary obligation (to draw up the will or to do the subcontracting work) but to make them liable for damages for bad performance of the main (or subsidiary) obligations and the resulting economic loss. The Germans do not refer to these contracts as contracts in favor of third parties but as contracts with protective effects vis-à-vis third parties. The reason why this distinction is made

48. 272 Or. 313, 537 P.2d 74 (1975).

in German law is particular to that system and need not concern us here. But the central idea strikes me as a good one, namely that while the contractual debtor/defendant should in certain circumstances be liable towards noncontracting parties he should *not* be more extensively liable towards them than he is vis-à-vis his co-contracting party. Whether you do this through a tort action which is shaped by the underlying contract or through contract may, at the end of the day, be treated as one of semantics. What, however, *is* important is to give the third party a remedy while not overexposing the defendant. My preferred contractual approach reveals the need for such a compromise and makes the means for achieving it more evident.

My second observation is in the form of a question: Why has the need for such a compromise gone unnoticed in the U.S.A.? And why have these cases received such inadequate theoretical consideration? During eleven years of teaching in leading American law schools, questions such as the above, when asked, have produced three answers. From the most cynically minded the reply was that it was expecting too much from state judges (who decide the bulk of these cases); from the practically orientated the response has been that neither judges nor practitioners have sufficient time to prepare *and reflect* on these problems; finally, the jurisprudentially inclined of my colleagues have come up with the familiar explanation that it is not the role of judges—at any rate American judges—to attempt the doctrinal analysis of the issues put before them. I would not wish to be convinced as to the accuracy of the first explanation; I have much sympathy for the second but bemoan the fact that so many modern lawyers seem to devote to reflection the inverse amount of time than they do to collating the ever-increasing legal material that modern technology puts at their disposal; and if the third reason is the more respectable one, then I feel it is the duty of academics to supply the theoretical underpinnings for what judges do or ought to do.[49] For academics can study law as a science, with greater detachment and under less time pressure than their practicing colleagues. They can also test the validity of their solutions against a broader and more comprehensive background than that offered by a particular dispute. The advantages of such a study must then constantly be related to and combined with the more focused work of judges. Academics and judges must, therefore, work even closer than they have done so far. For, as an experienced English judge (who can lay equal claim to being considered a learned jurist) once wrote, "jurists are pilgrims with us [judges] on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding."[50]

49. And, in fact, academics have supplied these underpinnings in the context of the factual situations discussed above. Thus, to the work of Professor Schwartz, quoted *supra* note 25, add Reynolds, *Tort Actions in Contractual Situations*, 11 N.Z.U.L. REV. 215 (1985). For a thoughtful discussion of Texas case law on the boundaries of contract and tort, see William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the "Economic Loss,"* scheduled for publication in the November 1991 issue of TEX. TECH L. REV.

50. Spilada Maritime Corp. v. Causulex Ltd., [1986] 3 All E.R. 843, 863 (Goff, L.J.).