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THE BASIS OF CONTRACTUAL OBLIGATION: AN ESSAY IN SPECULATIVE JURISPRUDENCE

by G. H. L. Fridman*

I

Forty years have passed since Morris Cohen discussed various jurisprudential foundations of contract in the pages of the *Harvard Law Review*.¹ Much has been written on the subject since then. In the courts there has been considerable development of several notions that bear strongly on the whole question of contractual (and extra-contractual) obligation. Although the issues have been debated at length on a number of occasions from differing standpoints and with varying conclusions, there is a fascination about fundamental concepts that keeps drawing lawyers back toward such matters, if not in the hope that anything new may be discovered or said, at least with the expectation that by maintaining interest in such questions it may be possible to ensure that in the hurly-burly of everyday legal life fundamental principles are not forgotten. It is always necessary to question basic assumptions of the law, lest too much be taken for granted and efforts not be expended to improve and develop the legal system in the light of changed social, economic, and political perceptions and conditions.

Of all legal concepts, that of contract is one of the most important. Kohler has pointed out how vital such an idea is in any developed society.² Whatever the political or economic structure of society, however primitive or advanced, some notion of contract has been found not only useful but also necessary. Naturally the nature and content of such notion has varied with changes in society. But in every instance there is a common factor, namely that in certain circumstances, certain "agreements" or, if you prefer, "promises," must be kept, and failure to keep them will result in whatever sanction is permitted or recog-

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1. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933). See also Gardner, *An Inquiry Into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1 (1932), in which the author submits twelve principles "which should guide the administration of justice in controversies arising out of consensual relations between men." *Id.* at 39. The real question, however, is: What are *consensual* relations?

2. J. KOHLER, *THE PHILOSOPHY OF LAW* 134-36 (1969).

nized by the society in which the parties to such agreement or the one making the promise belong. In every such society, the search has been for some principle or principles from which a distinction can be made between agreements or promises that must be so maintained or performed and those which are permitted to be neglected or unfulfilled. In this respect, I should distinguish the idea of freedom of contract which accompanied the development of the concept of contract in Anglo-American common law. There can be no doubt that one of the great, fundamental principles (perhaps nowadays one can call them "shibboleths") of the common law was the freedom of individuals to undertake contractual obligations, a freedom, now, possibly, undergoing a decline.³ Even in its heyday, the idea of freedom of contract was always firmly ensconced behind the protective bastion of the legal concept of a contract. Parties were free to enter into whatever contractual obligations they desired (as long as their contract did not infringe upon the mandatory provisions of the law with respect to public policy, legality, and so forth), but their transaction had to enshrine the essence of contractual obligation as understood by the law if it was to have any ultimate validity and effect. Wherein lay such essence?

It has been shown many times, and may be accepted as axiomatic, that the common law evolved the idea of consideration as the cornerstone of contractual obligation, shrugged off any other rival suggestions (such as the notion that moral obligations should be legally binding), and concentrated on the notion that only a "bargain" could be the basis for a valid legal transaction that could be called a contract. What was, and is, a "bargain" is a matter of debate.⁴ There are many technicalities surrounding the law of consideration, which in part account for the difficulties of this artificial notion, and have resulted in the opprobrium which has been expressed from time to time. One instance is the doctrine of *Foakes v. Beer*.⁵ In that case, the House of Lords, putting into more modern guise the archaic language of *Pinnel's case*,⁶ held that payment of a lesser sum in discharge of the larger amount owed to the creditor was not sufficient consideration for the promise to remit the larger amount. Hence the original debt, *i.e.*, to the extent to which it had not been settled, still bound the original debtor. Though

3. Fridman, *Freedom of Contract*, 2 OTTAWA L. REV. 1 (1967).

4. For some early discussions, see Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1899); Langdell, *Mutual Promises as a Consideration for Each Other*, 14 HARV. L. REV. 496 (1901); Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27 (1894).

5. 9 App. Cas. 605 (1884).

6. 77 Eng. Rep. 237 (C.P. 1602).

this doctrine has been subject to criticism in the United States,⁷ rejected in some jurisdictions,⁸ and altered by the Uniform Commercial Code,⁹ it is nonetheless good law in England and Canada (except in the Province of Alberta).¹⁰ Another situation which has provided troublesome effects is that of contracts for the benefit of third parties. In *Dunlop Pneumatic Tire Co. v. Selfridge & Co.*,¹¹ decided in 1915, the House of Lords held that the doctrine of consideration operated to prevent the creation of third party rights under contracts. More recently in *Beswick v. Beswick*,¹² the same court was able to grant such a third party a right of action but on a different basis, without making any inroads on the basic doctrine enunciated in 1915. Although in the United States there appear to be limitations on the stringency of this doctrine, stemming from the decision in *Lawrence v. Fox*,¹³ many problems remain.¹⁴

It is not surprising, therefore, that almost forty years ago the Law Revision Committee in England recommended changes in the law by reason of the criticism and limitations that had come to light over the years.¹⁵ Nothing, of course, was ever done to enact such reforms or take account of the criticism—nothing, that is, by legislation. But the common law (or should it be equity?) has not stood still in this regard, any more than it has in other respects, over the intervening period. Whether such changes have been sufficient is another question.

The doctrine of consideration is really nothing more than an elaborate fiction invented by the common law to take care of the problem of differentiating serious promises worthy of recognition and enforcement from those which should not be held binding in law.¹⁶ It might be said that the courts were attempting to follow the practices of businessmen and make the law of contract into a commercial instrument.

7. See J. CALAMARI & J. PERILLO, *CONTRACTS* 124-30 (1970) [hereinafter cited as CALAMARI & PERRILLO]; cf. Comment, *The Pre Existing Duty Rule of Foakes v. Beer—A Victory by Default for Stare Decisis*, 11 ARIZ. L. REV. 344 (1969).

8. See, e.g., *Frye v. Hubbel*, 68 A. 325 (N.H. 1907).

9. UNIFORM COMMERCIAL CODE § 2-209(1). But cf. UNIFORM COMMERCIAL CODE § 1-207.

10. Judicature Act, REV. STAT. ALBERTA c. 193, § 34(8) (1970).

11. [1915] A.C. 847.

12. [1968] A.C. 58 (1967).

13. 20 N.Y. 268 (1859).

14. CALAMARI & PERILLO, *supra* note 7, at 379-84, 390-400; cf. *Ridder v. Blethen*, 166 P.2d 834 (Wash. 1946).

15. See W. ANSON, *LAW OF CONTRACT* 112-13 (22d ed. 1964).

16. For differing views, see Chloros, *The Doctrine of Consideration and the Reform of the Law of Contract*, 17 INT'L & COMP. L.Q. 137 (1968); Hamson, *The Reform of Consideration*, 54 L.Q. REV. 233 (1938); Hepple, *Intention to Create Legal Relations*, 28 CAMB. L.J. 122 (1970) [hereinafter cited as Hepple].

Hence the insistence upon bargains. But what then of the idea that the law will not look into the adequacy of the consideration unless there be a suggestion of fraud or similarly questionable conduct? That seems to make nonsense of the whole idea that consideration is meant to underline the commercial character of contract. So too with the notion of good (though not valuable) consideration. And the absurdities of *Pinnel's* case, accepted by *Foakes v. Beer*, emphasize the artificiality of the whole common law concept of consideration. It is hard to argue that the purpose of consideration, whatever its legal definition may be,¹⁷ is to ensure that the law is only concerned with truly commercial, meaningful transactions. Two other matters make such a suggestion even more questionable. In the first place, there are several transactions which the man in the street would undoubtedly consider to be truly commercial but which are given no effect by the law, for example wagers. In the second place, there are cases in which the courts have stated that consideration is not enough. There must be an intent to create legal relations, so that even in a truly commercial situation there may be no contract because the parties expressly or by implication have repudiated any legal character in respect of their transaction.¹⁸ A good example of this in England, until the recent Industrial Relations Act, 1971,¹⁹ was collective bargains between employers and trade unions.²⁰ A third point may be added. In recent years, there has been much debate in the English courts on the subject of exemption or exclusion clauses in contracts. The effect of these in some appropriate circumstances may be to render a party not liable for any breach of contract. I have argued elsewhere²¹ that if this is valid and correct, then it would seem that there may be a "contract" which does not involve, at least on one side, any contractual obligation or obligations. This is a difficult result to accept, but nonetheless, possibly an accurate description of the true legal situation.²² Yet there

17. *Currie v. Misa*, L.R. 10 Ex. 153 (1875), provides the classical definition of consideration:

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. . . .

Id. at 162 (citation omitted).

18. Hepple, *supra* note 16, at 127-34; cf. CALAMARI & PERILLO, *supra* note 7, at 16-17.

19. Industrial Relations Act, 1971, c. 72, §§ 34-36.

20. See Hepple, *supra* note 16, at 122-27.

21. Fridman, *The Effect of Exclusion Clauses*, 7 ALBERTA L. REV. 281 (1969).

22. Might this not be considered in the United States an "illusory contract," and therefore subject to judicial control? See CALAMARI & PERILLO, *supra* note 7, at 125-26.

might be consideration, in the strict technical sense, flowing from each party to the other, without the effect of creating a contract.

In view of all this, how is it possible to argue that the notion of contract is really rooted in commercial convenience or mercantile ideas? I would prefer to view it as a totally artificial concept which, to quote Maitland's famous phrase in another context, is one long *suppressio veri, suggestio falsi*.²³ What, then, is so sacrosanct about the doctrine of consideration that should make us pause before we repudiate it as the basis of contractual obligation? It might be possible to justify adherence to a well-developed concept of the common law if it could be said to transcribe into legal terms the realities of the marketplace and of everyday life generally. In fact, as is well known, there are many instances of commercial transactions, apart from those already mentioned, where the doctrine of consideration is not observed, yet commercial men transact business in a binding way. I instance the whole field of commercial letters of credit, which has always caused problems for lawyers, and particularly academic lawyers, from the standpoint of rationalizing commercial credit practices with the doctrine of consideration.²⁴ Neither is the doctrine of consideration observed in the composition of a debtor with his creditors, whereby the normal effects of bankruptcy are ousted.²⁵ The latter is a clear breach of the rule in *Pinnel's* case or *Foakes v. Beer*, yet it has been accepted as creating binding obligations. It almost begins to look as if the doctrine of consideration is, in Shakespeare's words, "more honoured in the breach than in the observance thereof." Why, therefore, insist upon such an artificial "bargain" theory to provide the basis for a law of contract, when it becomes either a Procrustean bed or a doctrine that must be swept under the carpet when convenience otherwise dictates?

II

I am aware that there is no unanimity on the undesirability of basing contractual obligation upon the notion of consideration. Twenty-five years ago, for example, Professor Page, writing in the *Wisconsin Law Review*, extolled the virtues of the modern common law of consideration, and repudiated any suggestion that it should be overthrown

23. F. MAITLAND, *EQUITY* 82 (rev. ed. 1936).

24. A. DAVIS, *THE LAW RELATING TO COMMERCIAL LETTERS OF CREDIT* (2d ed. 1954); Davis, *The Relationship Between Banker and Seller Under a Confirmed Credit*, 52 L.Q. REV. 225 (1936); Hershey, *Letters of Credit*, 32 HARV. L. REV. 1 (1918).

25. G. TRIETEL, *THE LAW OF CONTRACT* 102-03 (3d ed. 1970); CALAMARI & PERILLO, *supra* note 7, at 125-26.

in favor of some new-fangled approach which would involve starting all over again "with the uncertain light of a few vague, new, untried principles to guide us."²⁶ This could necessitate having different principles for contracts concerning land, contracts regarding goods, and contracts dealing with work and labor. The implicit suggestion is that this would be unsatisfactory. Personally, there seems nothing inherently unsatisfactory in such a differentiation. It might be argued that in many respects there does exist at the present time, even with the doctrine of consideration in full operation, some differentiation among those classes of contracts Professor Page mentioned. At least in England (though not in the United States or Canada) there are distinctions resulting from the repeal of the Statute of Frauds. These result from the need for a writing in respect to, *e.g.*, contracts concerning land, whereas other contracts can be oral.²⁷ Different types of contracts have different implied terms as a matter of law, *e.g.*, a contract for the sale of goods (in respect to which there are statutory implied terms), and contracts for work and labor. Different types of contracts attract different remedies; for example, specific performance is allowed for contracts involving land and sometimes goods, but never contracts for services. There may be some underlying general contractual principles applicable to all categories of contract, but that is not to say that the law of contract is entirely homogeneous. Why cavil then at possible, further differences that might emerge from any movement away from consideration as the basis of contract.

Much more recently, in an inaugural lecture in Australia, Professor Atiyah has expressed the view that "to talk of the abolition of the doctrine of consideration is nonsensical. Consideration means a reason for the enforcement of a promise."²⁸ While Professor Atiyah is not as loathe as Professor Page was to amend or develop the law, his general thesis, as I understand it, seems to be that restatement of the existing law will engender such needed development; that when properly understood and applied in the light of modern social and economic developments, the current law of consideration (which orthodoxy has ossified in undesirable shapes and meanings) can be made to perform the proper task of any doctrine that is required to provide the basis for contrac-

26. Page, *Consideration: Genuine and Synthetic*, 1947 *Wis. L. Rev.* 483, 513.

27. In Canada and the United States certain other contracts also may have to be in writing or evidenced by a note or memorandum, *e.g.*, contracts for the sale of goods whose value exceeds a certain amount.

28. P. ATIYAH, *CONSIDERATION IN CONTRACTS: A FUNDAMENTAL RESTATEMENT* 60 (1971).

tual obligation. If he is correct, there would be little or no need for fundamental change in the law as and when the Law Commission in England produces the codification of the law of contract upon which it is now working. It is relevant to point out that Professor Atiyah was one of those who worked with the Law Commission to such end. Hence what he writes may be significant in that it represents publicly the views of one who, as it were privately, may be very influential in the development of English law (and, thereby, possibly, the law in Canada and the United States—in the same way that the American Law Institute's *Restatements* have had some effect upon common law jurisdictions outside America).

Despite such strong support for the present approach of Anglo-American common law to the problem of identifying the basis or foundation of contractual obligation, with all that flows therefrom (and I would freely admit that there is probably even greater accord among the "silent majority" of lawyers and academicians in favor of not tampering with the doctrines that centuries of effort have evolved and refined), it is neither rash nor irresponsible to suggest that at the present juncture in the historical evolution of our common law, the time may be ripe for re-evaluation of the doctrine of consideration in respect to contract, and an examination of the possibility that a wider, jurisprudentially different basis for contractual obligation can be admitted into the law without causing too great a tear in its "seamless web."²⁹ This is not to say that any such suggestions will meet with universal, or even widespread approval. On the contrary, generations of conservatism, rigid adherence to the doctrine of precedent (which has been manhandled in all kinds of strange ways by writers on this subject in order to produce innovation without destruction of the doctrine itself), and a profound positivist, restrictive, and academically inspired or conceived (though not, curiously enough, a practical or realistic) commercial approach to the law, will undoubtedly operate to bar any attempt to modify the law by the introduction of more abstract, less concrete, and more fluid concepts. In saying this, I recognize the strictly logical objections to any change. In this regard, I would not join with certain academic writers who have argued in favor of different views as to the nature and basis of contractual obligation by employing, as it were, "the rules of the game," in other words, by seeking to use and interpret the authorities in support of their arguments, not dismissing

29. I am aware that Maitland used this expression about history, 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 1 (2d ed. 1898), but I think it can also be used in reference to the law.

or attacking them, but endeavoring to show that, while valid and binding, they have been misunderstood and, therefore, incorrectly applied so as to bar certain otherwise acceptable and desirable developments. I eschew such, to me, in the present context, unworthy methods of approach. Rather, I would acknowledge that the cases may be against the point of view I am advocating, but the time has come to repudiate the cases and accept that, for the amelioration of the law—once it be accepted that this is both desirable and possible—there is a case for taking a new line and cutting off the links with the past.

III

An important, and in the present context, a very relevant development that has occurred in recent years, is the movement toward a greater assimilation of, or at least closer association between, obligations arising out of contract and those arising out of tortious conduct. This is not to say that the common law is accepting the notion of Mr. Justice Holmes, expressed many times, notably in his correspondence with Sir Frederick Pollock³⁰ (and subjected to heavy criticism from what might be termed an unexpected source, in an article by the then Regius Professor of Civil Law at Cambridge, Professor Buckland³¹) to the effect that a contract is only an undertaking to pay damages if it is broken or unfulfilled, rather like the obligation to pay damages if one commits a tort. I do not think that, for reasons of principle as well as logic, the common law would agree to any such view of what is, or was involved, in a contractual obligation. Nor do I think that it would be accurate to do so with all respect to the memory of an outstanding jurist and judge. It would be wrong to assimilate contractual and tortious obligations in accordance with the views of Justice Holmes because, as Pollock and Buckland explained, Holmes' view (1) disappoints reasonable expectations; (2) is inconsistent with the law of specific performance; (3) is inconsistent with the doctrine that anticipatory refusal to perform is a breach; (4) is inconsistent with the rules concerning frustration; (5) makes a misleading parallel between "committing a tort" and "committing a contract." The more detailed and scholarly discussion by Buckland, which draws upon the author's broad knowledge and understanding of Roman law, must be read to appreciate the full force of these criticisms. In the present context, hopefully, it will

30. 1 HOLMES-POLLOCK LETTERS 21, 79, 119 (M. Howe ed. 1961); 2 HOLMES-POLLOCK LETTERS 55, 200, 233 (M. Howe ed. 1961); O. HOLMES JR., THE COMMON LAW 300-301 (1881); *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903).

31. Buckland, *The Nature of Contractual Obligation*, 8 CAMB. L.J. 247 (1942).

suffice to point out that the Holmes theory is basically unacceptable. Nonetheless, it may be hinted that the divergence which occurred in the history of the common law between contract and tort—even though they had a common ancestry as historians have shown³²—reached its furthest development years ago, perhaps just before the great case of *Donoghue v. Stevenson*,³³ and the current movement of the law is toward a greater connection, or, if it be preferred, towards a closer relationship between the two sources of personal obligation between individuals. There are still potential areas of difference. One such is in respect to remoteness of damage. In *The Heron II*,³⁴ a case concerned with remoteness of damage when a contract of affreightment was breached, several members of the House of Lords pointed out that the measure of damages in tort was not the same as in contract.³⁵ As Lord Upjohn said:

[T]he claim for damages must be the natural consequence of the breach or in the contemplation of both parties: but in tort a different test has been adopted . . . that the tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach however unlikely it may be, unless it can be brushed aside as far fetched.³⁶

The reason why this difference has arisen was explained thus by Lord Pearce:

In the case of contract two parties, usually with some knowledge of one another, deliberately undertake mutual duties. They have the opportunity to define clearly in respect of what they shall and shall not be liable. The law has to say what shall be the boundaries of their liability where this is not expressed, defining that boundary in relation to what has been expressed and implied. In tort two persons, usually unknown to one another, find that the acts or utterances of one have collided with the rights of the other, and the court has to define what is the liability for the ensuing damage, whether it shall be shared, and how far it extends. If one tries to find a concept of damages which will fit both these different problems there is a danger of distorting the rules to accommodate one or the other and of producing a rule that is satisfactory for neither.³⁷

32. See S. MILSOM, *HISTORICAL FOUNDATION OF THE COMMON LAW* (1969), particularly chapter 12, and the references cited at 416.

33. [1932] A.C. 562.

34. [1969] 1 A.C. 350.

35. *Id.* at 385-86, 411, 413, 422.

36. *Id.* at 422.

37. *Id.* at 413-14.

Apart from the issue of remoteness, there are fundamental distinctions with respect to the ways in which tortious and contractual obligations arise or are created, their scope and content, the available remedies, and so on. Nonetheless, I would suggest that the gap between obligations arising *ex delicto* and those arising *ex contractu* (if it is permitted to use Romanistic language) is narrowing. This, I see, as a fertile field for the growth of new ideas about the nature of contract.

At the same time certain changes have occurred in recent years in relation to the attitude of the common law to economic or financial loss which is not the result of physical damage whether it be damage to person or damage to property. Between the common law in the United States and the common law in England (and other parts of the Commonwealth), there may have been divergent developments. I speak here really of the way things have changed in England, or in jurisdictions which are more closely allied to England, such as Canada and Australia—though it is relevant to point out, as the House of Lords has recently stated,³⁸ that there is no fundamental reason why common law countries other than England should adopt the same approach to some principle of the common law as England. In these matters, however, I think it is fair to say that there has been some similarity of approach. Thus the common law has now accepted the possibility of damages for negligent, non-contractual misrepresentation.³⁹ The original decision in this regard has been subjected to some limitation by the Privy Council, on appeal from Australia, in the case of *Mutual Life Assurance Ltd. v. Evatt*.⁴⁰ In that case, over the powerful dissent of two members of the Board, Lords Reid and Morris, who were also participants in the earlier House of Lords case, it was held that the only circumstances in which such misrepresentation would give rise to liability were when the maker of the statement, in Lord Diplock's words,

made it [the statement] in the ordinary course of his business or profession and . . . the subject-matter of the statement called for the exercise of some qualification, skill or competence not possessed by the ordinary reasonable man, to which the maker of the statement was

38. *Cassell & Co. v. Broome*, [1972] A.C. 1027.

39. *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465 (1963). This case has been followed in Australia, Canada, and New Zealand. The United Kingdom has, by statute, been even more expansive, giving damages for negligent misrepresentation and, in certain circumstances, placing on the defendant the burden of proving a belief that the representation was true, as well as prohibiting clauses that would exclude or restrict liability. See *Misrepresentation Act 1967*, c. 7.

40. [1971] A.C. 793 (P.C. 1970) (Austl.).

known by the recipient to lay claim by reason of his engaging in that business or profession.⁴¹

Notwithstanding such qualification on the scope of liability for negligent misrepresentation, another breach in the old privity of contract doctrine, or if you prefer, in the dichotomy between contract and tort, which was bridged only where there was fraud, or some physical damage (and that only after 1932), has now been effected. An offshoot of that breach is reflected in cases which suggest, albeit haltingly, and in a very restricted way, that for negligence which interferes with the damnified party's ability to perform contracts, or to conduct his business so as to make a profit, there may be a remedy even though there is no contract between the wrongdoer and the injured party.⁴² In other words, the realization is growing that the law should take cognizance of economic loss which is effected by non-fraudulent conduct, where the normal requirements of a contract between the parties, in particular the essential factor of consideration, are absent. Once upon a time, the common law barred completely and without qualification the way toward a remedy for loss resulting from non-fraudulent conduct in the absence of consideration between the parties. Since consideration did not, and does not have to be adequate (as long as it is, in the cant phrase, "sufficient"), it was possible to "buy" protection from non-fraudulent wrongdoing at the cost of a peppercorn; in the absence of anything so humble or worthless, the victim of such conduct or misconduct was left without any recourse to the law. At least such absurdity has been eradicated from the law of England (and elsewhere), even though the developments in this respect may not have gone as far as some lawyers would have them go. But the illogicality and stupidity which was once pointed out by Lord Devlin⁴³ no longer find a home in the bosom of the law of tort.

It is interesting to note, however, that when the House of Lords considered the notion of liability for negligent, non-contractual misrepresentation, their Lordships went out of their way to insist that such liability could only be founded upon a "special" relationship between the parties that was akin to, or practically the same as, a contractual relationship.⁴⁴ What it would seem they were thinking of, as later cases

41. *Id.* at 802.

42. S.C.M. (United Kingdom) Ltd. v. W.J. Whittal & Son Ltd., [1970] 3 W.L.R. 694 (C.A.); British Celanese Ltd. v. A.H. Hunt (Capacitors) Ltd., [1969] 1 W.L.R. 959 (Q.B.). See also G. FRIDMAN, *STUDIES IN CANADIAN BUSINESS LAW* 501-03 (1971); Harvey, *Economic Loss and Negligence*, 50 CAN. B. REV. 580 (1972).

43. *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465, 517 (1963).

44. *Id.* at 486, 502, 514, 539.

indicate, and as must be taken to have been emphasized by the ruling in *Mutual Life Assurance Ltd. v. Evatt*,⁴⁵ is in effect a contract minus consideration, *i.e.*, without even the traditional peppercorn. In other words, the more recent development in regard to negligence is to draw together the notions of tort and of contract, rather than to differentiate between them. What I would like to suggest is that if we examine the essence of the relationship that was in the minds of the judges in these cases, we find that what they were searching for, in order to enforce, was something in the nature of a "serious" promise, an undertaking or statement that was meant to be acted upon, intended to be taken at face value by the recipient, designed to have a causal effect upon the latter's conduct, and, therefore, foreseeably likely to produce damage if something went wrong. And to produce damage, *i.e.*, to cause harm, in this context, means to inflict or result in loss of a financial nature. From what will emerge later, it will be seen that, in my opinion, this notion of "serious" promise could be the foundation of contractual liability generally, as it is the foundation of this new kind of tortious liability, and for very much the same reasons and with the same justification.

IV

If recent advances in tort law have eradicated illogicality and stupidity, these defects can still be found flourishing within the boundaries of the law of contract. The problem, in its precise nature, may be different; in essence it is the same. As long as the doctrine of consideration is enforced in all its glory, and the law turns its back on any attempt to qualify that doctrine's operation by more equitable and flexible notions, it will be impossible to protect all those who legitimately might think that their situation deserves legal recognition and protection.

Now it is correct to state that, even in this respect, some change has emerged in England and other Commonwealth countries in recent years, in the past twenty-five to be exact, since the decision of Denning J., as he then was, in the *High Trees* case.⁴⁶ That case was not entirely novel. In fact, what the learned judge did was to resuscitate and apply some older principles laid down by the House of Lords in *Hughes v. Metropolitan Ry.*⁴⁷ in the latter quarter of the nineteenth cen-

45. [1971] A.C. 793 (P.C. 1970) (Austl.).

46. *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130 (1946).

47. 2 App. Cas. 439 (1877).

ture. I have dealt at length with those and other cases, at least down to 1957, elsewhere.⁴⁸ In effect, what that case decided was that if there existed certain rights and liabilities between the parties arising out of contract, a statement by one which purported to waive his rights (or remove or reduce the liabilities of the other, whether totally or to a limited extent) could be relied upon by the other (the promisee as it were) if he acted upon it to his detriment, even if the original promisor, who made the statement, subsequently attempted to repudiate his representation and enforce his original strict legal rights. Hence, in the *High Trees* case itself, a landlord who agreed to waive payment of the full amount of rent originally agreed upon could not afterwards claim the full amount. It is still a matter of debate as to *why* this was so in that particular case,⁴⁹ but the general doctrine was clear before 1945 and has not fundamentally altered (although its application may have been strained from time to time).⁵⁰ There have been later cases,⁵¹ culminating in a dictum by the present Lord Chancellor (Lord Hailsham of St. Marylebone) in a House of Lords decision⁵² to the effect that the doctrine may require some reconsideration and possibly limitation.

There have also been cases in Canada which adopt and apply the principles set out in the English cases, and help to reveal the shortcomings of this departure.⁵³ The chief of these is the suggestion to be found in the English cases, which appears to have been accepted very recently by the Supreme Court of Canada,⁵⁴ that the concept of estoppel, whether it be called promissory, equitable, or quasi-estoppel (set out in the *Hughes* case, the *High Trees* decision, and all the other cases, at first instance, the Court of Appeal, the House of Lords, or

48. Fridman, *Promissory Estoppel*, 35 CAN. B. REV. 279, 291 *et seq.* (1957).

49. Cf. G. TRIETEL, *THE LAW OF CONTRACT* 105 (3d ed. 1970).

50. See, e.g., *D & C Builders Ltd. v. Rees*, [1966] 2 Q.B. 617 (C.A.).

51. *W.J. Alan & Co. v. El Nasr Export & Import Co.*, [1972] 2 All E. R. 127 (C.A.); *Ajayi v. R.T. Briscoe (Nigeria) Ltd.*, [1964] 1 W.L.R. 1326 (P.C.). For reference to Commonwealth decisions, see Jackson, *Estoppel As A Sword*, 81 L.Q. REV. 223, 243 (1965).

52. *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co.*, [1972] A.C. 741, 758.

53. *Cull v. Canadian Superior Oil Ltd.*, 20 D.L.R.3d 360 (1971); *Sohio Petroleum Co. v. Weyburn Security Co.*, 13 D.L.R.3d 340 (1970); *Frankel Structural Steel Ltd. v. Golden Holdings Ltd.*, 5 D.L.R.3d 15 (1969); *Canadian Superior Oil Ltd. v. Murdoch*, 4 D.L.R.3d 629 (1969); *Canadian Superior Oil Ltd. v. Paddon-Hughes Dev. Co.*, 3 D.L.R.3d 10 (1969); *John Burrows Ltd. v. Subsurface Surveys Ltd.*, 68 D.L.R. 2d 354 (1968).

54. *Canadian Superior Oil Ltd. v. Paddon-Hughes Dev. Co.*, 12 D.L.R.3d 247, 251-52 (1970).

the Privy Council), operates as a "shield" not as a "sword."⁵⁵ In other words, the doctrine can be brought into play to affect, modify, qualify, or restrict the operation of strict legal rights, as against a party whose representation has induced the other party to a transaction to act in reliance thereon to his detriment. But it cannot be employed as the basis of an action. To allow that would be to permit "contracts" to emerge or be created without consideration—and that, as everyone knows, will not do! Thus estoppel can result in waiver or variation of a contract, or a term in a contract (which has been properly produced as a consequence of consideration moving from the promisee in accordance with all the strict rules of the law). It cannot result in the formation of a totally new contract, even though the "parties" to the representation which forms the basis of the estoppel (if it be permitted to refer to them in such terms) may have intended their "transaction" to have some kind of force, possibly even legal in effect, and had acted under such beliefs over a period of time. The idea that estoppel is a shield and not a sword has been attacked in the pages of the *Law Quarterly Review*, in a learned article which seeks to show that the cases have been misinterpreted and really allow what all the subsequent authorities have stated is not permissible, namely, the use of estoppel or representation *as to the future* as the basis of a truly contractual relationship or obligation despite the apparent absence of consideration in the strict technical sense.⁵⁶ Professor Atiyah has also expressed the view that the earlier cases have been misunderstood with the result that "virtually all modern academic (and much judicial) discussion of promissory estoppel has been entirely beside the point."⁵⁷ I would not go so far with either writer. I am prepared to accept that, in the light of the nineteenth century cases in England, and the way they have been interpreted and applied, it is not possible to found a contract upon an estoppel. Indeed, in discussing the nature of agency and the creation of the agency relationship, in respect of which there has also been much debate upon the difference between contract or consent and estoppel, I have also made it clear that while the legal relationship of principal and agent may arise *for some purposes* as a result of representation, *i.e.*, estoppel, there is in some respects no true assimilation between agency created by contract (or consent) and agency arising by virtue of an estoppel. Indeed, where agency by estoppel is involved, there

55. *Combe v. Combe*, [1951] 2 K.B. 215, 224-25 (C.A.).

56. Jackson, *Estoppel As A Sword* (pts. 1 & 2), 81 L.Q. REV. 84, 223 (1968).

57. P. ATIYAH, *CONSIDERATION IN CONTRACTS: A FUNDAMENTAL RESTATEMENT* 58 (1971).

may be no obligations in the normal sense between "principal" and "agent." There may simply be a relationship (and obligations) between principal and third party (usually for the protection of the latter).⁵⁸ Thus, in what is clearly a business or commercial context, I think that the law makes a distinction between contractual obligations or relations and those emerging from some type of estoppel. Similarly, I believe that efforts to establish that the modern doctrine of promissory, equitable, or quasi-estoppel can be understood or treated so as to permit the creation of contractual obligations exactly of the same nature as those arising more "normally," are misguided. I do not think that English law has accepted, or can be construed as accepting, that the doctrine of consideration can be, or has been, overthrown by a "side-wind" (as it was once put).⁵⁹

By way of comparison, in the United States, there would appear to be stronger authority, both academic and judicial, for the proposition that the kind of conduct which would come within the scope of the *Hughes* and *High Trees* cases in England could lead to an action being brought to enforce the claims of one relying upon the statement or promise in question. The foundation for such a view is the *Restatement of Contracts*, § 90. In its first formulation, which I have discussed elsewhere,⁶⁰ and which perhaps emanated from cases concerned with charitable gifts, gifts of land, and certain other transactions,⁶¹ this doctrine was stated thus:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.⁶²

This seems to have met with approval and adoption by courts in several states; to the extent of permitting actions where agency was gratuitous, which, prior to the *Restatement*, meant that the principal could not sue if the agent failed to perform at all,⁶³ where expenses were in-

58. G. FRIDMAN, *LAW OF AGENCY* 68-69 (3d ed. 1971).

59. *Combe v. Combe*, [1951] 2 K.B. 215, 220 (C.A.).

60. Fridman, *Promissory Estoppel*, 35 CAN. B. REV. 279, 282-90 (1957).

61. S. WILLISTON, *CONTRACTS* 607-19 (3d ed. 1957); Boyer, *Promissory Estoppel: Principles From Precedents*, (pts. 1 & 2), 50 MICH. L. REV. 639, 873 (1952); cf. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950); Goble, *Trends in the Theory of Contracts in the United States*, 11 TUL. L. REV. 412, 414-17 (1937); Laidlaw, *Consideration and Promissory Estoppel*, 5 LINCOLN L. REV. 1 (1932).

62. *RESTATEMENT OF CONTRACTS* § 90 (1932).

63. *Northern Commercial Co. v. United Airmotive*, 101 F. Supp. 169 (D. Alas.

curred in reliance upon promises as to future action such as the granting of a franchise;⁶⁴ where promises were made as to future pensions.⁶⁵ Some writers appear to have suggested that the effect of this provision in the *Restatement* was to create an alternative possible basis for a contractual relationship, namely the notion of detriment of injurious reliance, which has been espoused and elaborated upon by Roscoe Pound⁶⁶ and Morris Cohen.⁶⁷ As related in one textbook, "This overly conceptual approach has very likely hindered full judicial acceptance of the doctrine."⁶⁸ Hence also the suggestion by Seavey that the true basis for an action is tort not contract.⁶⁹ Perhaps for these and similar reasons, the *Restatement, Second* § 90, reformulated this doctrine in this way:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.⁷⁰

It has been suggested that just as the original *Restatement* gave great impetus to promissory estoppel, it may be expected that the second *Restatement* with its liberalization of the doctrine will give added impetus to the utilization of the doctrine as a substitute for consideration (or as the basis of a cause of action that is neither contract, tort, nor quasi-contract).⁷¹

With great respect, this seems somewhat eager. It would be presumptuous of me to attempt to expound the law which is stated and

1951); Siegel v. Speer & Co., 138 N.E. 414 (N.Y. 1923); Comfort v. McCorkle, 268 N.Y.S. 192 (Sup. Ct. 1933); cf. Spiegel v. Metropolitan Life Ins. Co., 160 N.E.2d 40 (N.Y. 1959).

64. Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948); Wheeler v. White, 398 S.W.2d 93 (Tex. 1965); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965). For a discussion of these problems, see Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 357-65, 376-87 (1969) [hereinafter cited as Henderson].

65. CALAMARI & PERILLO, *supra* note 7, at 183-85.

66. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 151 *et seq.* (1954).

67. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 578-80 (1933); cf. Seavey, *Reliance Upon Gratuitous and Other Conduct*, 64 HARV. L. REV. 913 (1951).

68. CALAMARI & PERILLO, *supra* note 7, at 185.

69. Seavey, *Reliance Upon Gratuitous and Other Conduct*, 64 HARV. L. REV. 913 (1951).

70. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Drafts Nos. 1-7, 1973).

71. CALAMARI & PERILLO, *supra* note 7, at 186. The authors also stated: "[O]rdinarily the term promissory estoppel is used in reference to the formation of a contract and not to the modification of a contract." *Id.*, at 268. This is the Anglo-Canadian view.

applied by courts in the United States. Such limited reading as I have been able to undertake in this area, however, does not convince me that courts in the United States are as willing to go to the extremes suggested above as might be hoped by some, if not all writers. In a limited class of cases, and here the emphasis is upon the word "limited," it may be conceded that American courts are prepared to recognize an alternative method of creating a binding obligation (possibly to be dignified by the appellation "contractual") even though no consideration in the classical sense is present or can be manufactured as between promisor and promisee.⁷² But it is by no means clear that this is a doctrine of general application, or even of general acceptance in its limited form.⁷³ Moreover, as should be evident from what has been said earlier, those courts that do adopt this kind of approach seem uncertain, as do some writers, whether the source of this obligation is perceived as the law of contract, tort, quasi-contract, or indeed, something else, which might even be called a kind of general residual equitable jurisdiction of the court.⁷⁴

I would rather eschew any suggestion that such obligations arise outside the law of contract or tort, and can have some different basis, particularly any suggestion that the whole thing is a concoction of equity, in any sense of that term. I would prefer to ask whether any such obligation is contractual or tortious, since, probably, out of such areas of the law a sound reasonable basis for such enlargement of the notion of contract can be extracted.

What I mean to suggest by this question is that the basis of the resultant obligation, whatever it is, and to whatever extent it may be, is not that there is a contract between the parties akin to what may be called a "normal" contract between parties which creates normal contractual relations and obligations *inter se*, but that it takes on more of the nature of a tortious duty, the breach of which produces something

72. See *Porter v. Commissioner*, 60 F.2d 673 (2d Cir. 1932), where Judge Learned Hand said, "[P]romissory estoppel is now a recognized species of consideration. . . ." *Id.* at 675; cf. *Henderson*, *supra* note 64, at 345-57.

73. See *Henderson*, *supra* note 64, at 346.

74. The language of *Restatement (Second) of Contracts* § 90 suggests that the source is equitable in nature. Some cases suggest the same. See, e.g., *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. 1959); *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898); cf. *Henderson*, *supra* note 64, at 379-80. Perhaps this explains the connection between this doctrine and the notion of "good faith" in contracts. See *Summers, "Good Faith" in General Contract Law and the Sales Provisions of The Uniform Commercial Code*, 54 VA. L. REV. 195, 223-27 (1968); *Kessler & Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964) [hereinafter cited as *Kessler & Fine*].

akin to tortious liability. Indeed, the language which some writers utilize to describe and discuss this kind of relationship and the obligations, rights, and duties which stem from it, appears to acknowledge the tortious origins, if not the current tort overtones, of the whole concept. Now it is true that the idea of detriment, which is vital in this context (although it may sometimes be expressed differently, in terms of injurious reliance), smacks of the very similar idea of detriment in relation to consideration—which suggests contract rather than tort. Nevertheless, it appears that the notion of detriment is more readily attributable to the earlier tort foundations of *assumpsit* than to the later contract ideas inherent in the notion of consideration which developed from the idea of *quid pro quo* which is to be found in cases dealing with the subsequent development of *assumpsit* into a general contractual remedy. There is an air of (if you will forgive the term) quasi-fraud about detriment in relation to promissory estoppel. This seems to be inherent in the way in which writers, cases, and both versions of the *Restatement* uniformly contend that this method of creating an obligation is exceptional and can only arise in circumstances which require the judgment that it would be unfair not to accord recognition to this kind of transaction or conduct. In other words, what the law and the courts are doing is preventing fraud, or impropriety, by making the gratuitous promisor perform his gratuitous undertaking without sliding out from under his self-imposed, perhaps unilateral, obligation by repelling any subsequent action or threat of litigation through the incantation of the mumbo-jumbo of consideration.⁷⁵

In this sense, there is a close connection between the rise of promissory estoppel in the United States and the emergence of a remedy for negligent misrepresentation which to some extent, as already seen, has evolved in England, Australia, New Zealand and Canada.⁷⁶ Stripping these artificial terms aside, the bare facts of such cases would reveal that the representor has undertaken some kind of duty, which he is not allowed to break, or can only break on pain of paying damages. In one instance the duty is treated as tortious, and the measure of damages is calculated in accordance with tort principles; in the other, the duty is regarded as contractual, and presumably the measure of damages is contractual (as it is when the action is for breach of the implied warranty of authority that arises where someone acts as an agent when

75. Cf. Henderson, *supra* note 64, at 377-78 and cases there cited for the American view to such effect.

76. See also Atiyah, *Misrepresentation, Warranty and Estoppel*, 9 ALBERTA L. REV. 347 (1971).

in fact he is not, even though, as argued elsewhere, there is no consideration for such warranty, and the duty and liability that arise cannot truly be said to be contractual).⁷⁷ If it is perfectly respectable to provide a tort remedy for negligent misrepresentation without a contract to substantiate any liability for breach of duty, why should it be utterly reprehensible and quite out of keeping with principle or authority (which the English and Canadian, but possibly not the American cases, always say) to allow a remedy for breach of a gratuitous promise or undertaking where there is no tort, in the strict sense of fraud or negligence? This, it is respectfully suggested, is simply to revive and apply in a new context the old distinction between contract and tort obligations and liabilities which has already been dealt body blows in England first by the decision in *Donoghue v. Stevenson*,⁷⁸ and more recently by that in *Hedley Byrne & Co. v. Heller & Partners Ltd.*⁷⁹ Now it is true that in the latter case, and as seen even more recently in the *Evatt*⁸⁰ decision, the scope of such non-contractual liability was limited, perhaps more severely than was necessary, and perhaps not in a manner in strict accordance with the views of some of the members of the House of Lords in the *Heller* case (as witness the dissent of two of them in the *Evatt* case). Even accepting such limitations, however, there would appear to be no great distinction between granting a tort remedy and permitting a remedy in contract. To insist upon such a distinction, and to differentiate cases on such a basis constitutes a stubborn attempt to enforce delineations and demarcations with respect to legal rights and duties, and the liabilities that arise therefrom, that are long since outmoded. It is to insist upon a rigid categorization of the law into separate, wholly insulated compartments. In effect, it is to resuscitate the forms of action long after they have gone. The old adage of Maitland, that the forms of action are dead but they still rule us from their graves, has surely been given its quietus in modern times by more than one judge. Most notably the judgment of Lord Denning, if not the whole Court of Appeal in England, in *Letang v. Cooper*⁸¹ in relation to trespass, case, and negligence, is evidence of the unwillingness of English judges to have their freedom of action delimited and controlled by archaic notions of what is one tort and what is another. Similarly, can it not be argued that courts should not be forced

77. G. FRIDMAN, *THE LAW OF AGENCY* 179-83 (3d ed. 1971). The proper measure of damage is a matter of debate.

78. [1932] A.C. 562.

79. [1964] A.C. 465.

80. *Mutual Life Assurance Ltd. v. Evatt*, [1971] A.C. 793 (P.C. 1970) (Austl.).

81. [1965] 1 Q.B. 232 (C.A.).

to treat a fact situation as either contract or tort, and apply the strict rules of the appropriate classification, to the disadvantage of the litigant and the frustration of justice? Instead should they not be able to apply whatever rules, from whatever source, that they consider to be most relevant and helpful in determining the issue between litigating parties? If this is conceded, then it surely must follow that any distinction between a tortious misrepresentation and a contractual or promissory one is unjustified.⁸²

It might be argued that there is a fundamental *factual*, as opposed to *juridical* difference, which ultimately does lead to a juridical one; namely, that in the tort cases, the misrepresentation is as to present fact (and therefore can be treated as a source of liability in tort), whereas in the other instances, the misrepresentation is as to some future conduct, and therefore is contract or nothing, *i.e.*, must be made in a contractual context if it is to have effect. My answer is as follows. In the tort case, the real basis of the liability is not so much the making of the representation, though of course its occurrence is essential as an ingredient of liability, but rather the detrimental reliance thereon by the injured party. In the same way, the basis of liability in promissory estoppel cases is not the representation, though again, the making of the representation is fundamental and vital, but the injurious reliance thereon by the "promisee" (which is, indeed, the basic American view, as I understand it). Looked at in this way, which, it is suggested, is as legitimate a way of looking at the situations as any other, there is a greater similarity between them than would appear from a comparison between statements of present fact and statements of future intention. If this means that promissory estoppel cases take on even more the flavor of tort, in order to give them some legitimacy as instances of liability or obligation, then I would not quarrel with such an approach (though the notion of "reliance" in the United States does not appear to have been treated from the point of view of the law of tort, save, possibly, by some writers in relation to some specific instances of its use, *e.g.*, cases of gratuitous agency). My argument basically is that the older borders between contractual and tortious obligations (in the sense of the juridical origins or bases of such obligations) are becoming more and more blurred and eventually may even disappear. If recognition of such new forms of "contractual" obligation will encourage and assist such disappearance, then there is an additional reason for promoting such recognition.

82. For an interesting discussion of the classification of the law, see THE DIVISION AND CLASSIFICATION OF THE LAW (J. Jolowicz ed. 1970).

V

In this regard, it is perhaps apposite to ask, what are the purposes which a law of contract should achieve? A technical answer might involve such ideas as clarity, certainty, convenience, and consistency. I am by no means sure that the common law as it has developed to date has achieved all, indeed possibly, any of these. When one reflects upon the mysteries of mistake, the tangled web of exemption clauses, the rigidity and technicalities of the doctrine of privity, and the checkered history of the law relating to frustration, the realization soon dawns that the common law has not significantly succeeded in producing a law of contract that commends itself to the business community (to say nothing of the ordinary man in the street) as being a body of easily digestible, acceptable rules. Not all the blame for this can be laid at the feet of the doctrine of consideration; however, I feel that in part that doctrine has helped to bring about some of the unhappier effects of our law of contract.

A less technical, more philosophical way of answering the question posed above is in terms of the ultimate social and economic functions to be served by a law of contract. There are many ways of putting this. Let me cite only two, somewhat old-fashioned statements. The first is by Kohler: "It is the province of the law of obligations . . . to provide that wealth shall come either directly or indirectly into the possession of those who can employ it."⁸³ The other is by Sheldon Amos:

The phenomenon of Contract as a social characteristic implies that men have found out that they can rely not only on their own conduct in the future, but on that of each other, and that they can safely guide their present conduct, under the assurance that others will do or not do hereafter certain acts specifically described.⁸⁴

With this compare the following by Pound:

So much of everyday life depends upon reliance on promises that an everyday dependence loses its effectiveness if promises are to be performed only when it suits the promisor's convenience. A promise which imposes no risk on the promisor belongs to the prediction theory. It is not a promise. A promisee reasonably expects a promise to be performed even if it hurts. Why relieve only the promisor? Is not the promisee frustrated if he cannot have what was promised him?⁸⁵

83. J. KOHLER, *THE PHILOSOPHY OF LAW* 134 (1969).

84. S. AMOS, *A SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE* 177 (1872).

85. R. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 167-68 (1954).

I realize that it is unfair to snatch a few, scattered comments from only a selected number of writers. To be absolutely correct, a full examination of all writings on the subject ought to be at the very least attempted. That is impossible in the present context, nor would it be entirely desirable even if it were possible. My purpose is simply to show that there are many, varied understandings of what ought to be achieved by a law of contract in a modern society. Is the right answer to be sought among men of commerce? The man in the street? The practicing lawyer, who sees many of the by-products of commercial enterprise in the sense of the frustration and unhappiness of his clients, or the loss of expected profit or wealth? The scholar discussing legal ideals in abstraction? Or the non-legal philosopher who wishes to ensure a certain standard of ethical behavior? Everything depends upon whether one wishes to stress the practical as opposed to the ideal. The common law, inevitably, at all stages and in most contexts, is an attempt to reach compromise between what is desirable and what is possible. The danger with the common law, as history has revealed, is that the desiderata of one period do not necessarily remain the same for another. Hence what has been accepted as possible, involving the rejection of something else as impossible, leads to rigidity at a time when the hitherto impossible may have become possible by reason of a changed outlook on the part of society, as to what is desirable and necessary. The law of contract has become locked into a position which it reached at the beginning of the nineteenth century when society (and indeed business) was very different from what it is today. American developments have included the recognition that a different society was involved on that continent, requiring a somewhat different approach to the law in many respects, notably, for present purposes, the law of contract. In England, there has not been a similar pressure, at least to the equivalent extent. Hence, no comparable developments have taken place. The question is whether further development can and should occur.

I would suggest that sufficient change has taken place with respect to the acknowledgement of the purposes of a law of contract in our times, to merit some reconsideration of its content and, inevitably, of its underlying basis. In what has been written thus far, I have endeavored to show what I think are some alterations that have been manifesting themselves in the approach of the law to several closely allied areas in the hope of indicating that the atmosphere is favorable to change in other directions. I have pointed out, obliquely at the very least, the sort of direction which I think the law is beginning to take.

It is necessary for me to state more clearly where I think it ought to be going, and the end which it should be seeking to achieve.

VI

The various possible theoretical bases of contractual obligation, of which some, if not all, have operated at different times in legal history, have been enunciated and discussed by Cohen in the essay referred to previously as well as by Pound.⁸⁶ There has been a movement away from a more philosophical theory, such as the importance of the "will," toward a much more mundane explanation such as "bargain" or "equivalence." Would it be fair to state that this movement represents the decline of religious or psychological factors in relation to legal concepts and the rise of monetary ones, which seems in keeping with the fundamental change in society that occurred with the passing of the medieval period and the rise of modern business and commerce? If so, can it be suggested now that, even if there is not a total return to a previous era, philosophically or otherwise, at least there is a kind of revulsion from the society which emerged between the seventeenth and early twentieth centuries? And that, in part, this is being manifested in the feeling that the law should not be as concerned with (a) property interests, (b) a financial, or monetary basis of legal concepts, or (c) so-called "objective" tests which produce what might be termed a "least common factor" formulation of rights, duties, and liabilities? Subjectivity, greater personalization of the law and its effects, and more emphasis upon broader, perhaps more moral standards, can be seen as factors or ideas which are having more and more influence upon the development of the law at the present time. The "reasonable man," the "officious bystander," whose fictitious existence was created to solve many a knotty legal problem, may well be creatures of a past legal age, who have outlived their utility and relevance for our modern legal system. Instead, perhaps we should be paying more attention to what this particular litigant or participant in the legal process knew, thought, and understood, not what some imaginary objective stranger would have known, thought, or understood by what happened or what was said or written.

If this approach is at all justified, then I would suggest that, in the present context, it is important and meaningful in that it can explain why the developed doctrine of consideration will no longer suffice as a theoretical basis for contractual obligation. That doctrine bears all the

86. See materials cited in footnotes 66 and 67 *supra*.

hallmarks of objectivity, the reasonable man, and the officious bystander. It represents an attempt to formulate the basis of contract in terms of how a transaction could be interpreted by an outsider not personally involved in the intimacies of the transaction, but coming to it without any knowledge of what actually happened, or what might have been intended or understood by the parties. Hence the emphasis on facts and factors which might entitle such an outsider to conclude that the parties were "serious" and meant to enter into a legal transaction which should be held binding. A more subjective, personalized approach would well encourage greater reliance upon, or reference to, the intentions and understanding of the individual parties.⁸⁷

Even the extensions, such as they are, to the scope of "obligation" which have resulted from the American doctrine contained in section 90 of the *Restatement of Contracts*, would seem to employ or involve an objective test with respect to their enforcement and ambit. The language of the *Restatement*, certainly as it has been interpreted by courts in the United States, suggests that whether a promise, though gratuitous, is to be given some effect, depends upon whether it was "reasonable" for the alleged promisee to rely upon it. In this respect, it appears that the courts are attempting to give what might be termed a "contractual" flavor (in the classical sense of contractual) to this new phenomenon of the law. It is not different; it is simply a variation. In contrast, I would suggest, the English cases on promissory estoppel (and their Commonwealth counterparts) adopt a more subjective approach. They are concerned with the question of whether *this* particular party was misled by *this* particular defendant into reliance upon what the latter had represented, so as to result in an estoppel against the latter in subsequent litigation.

Thus, in my view, at least in the way the common law has developed in its original home, there is some movement toward greater subjectivity in respect to the creation of recognition of "obligations." Indeed, whatever may be the situation in the United States, there is support for such an approach coming from quite a different marginal area of the law.

In recent years in Canada (a similar development does not appear to have emerged in England), several cases have given effect to the idea that, without a contract in the normal sense, there may arise liability to compensate someone who has performed services for another

87. For commentary on judicial interference with contract and the decline of the importance of the individual will, see Fridman, *Freedom of Contract*, 2 OTTAWA L. REV. 1 (1967).

at that other's request, or with that other's knowledge.⁸⁸ In none of these instances, could a true contract be created or constructed out of the circumstances. Hence the obligation to pay could not be contractual. It was "quasi-contractual"; it arose because of the unjustified or unjustifiable enrichment of the person now obliged to compensate. It was an obligation to make restitution. Yet, in a sense, the situation was almost a contractual one. The obligation had many contractual features. What was missing? A formal offer and acceptance? Consideration? A promise to pay? An intent to create legal relations? All or some of these in most instances. Such lack did not impede the creation of a binding legal obligation—albeit the precise juridical nature and character of such obligation was novel or unusual. The strict law of contract was obviously being broken, or if you prefer, overreached, outflanked, or finessed. Similarly, it could be argued, why is it essential to observe the totality of the strict law of contract in other situations, when the facts indicate that there was every intention to create an obligation *of some sort* (perhaps not strictly a legal one in the customary sense), even though the precise requirements of the law of contract had not been fulfilled? What is being suggested or requested is not merely a more flexible view of contractual obligations but a broader-based outlook upon the nature of legal obligations in general. The attack upon the formalized, rigid classification of legal situations that emerged over the centuries has obtained greater impetus in recent years. Developments in the conflict of laws have revealed that it is by no means easy to attribute a fact situation to its proper or appropriate legal category (so as to apply the "right" legal rules to it). Indeed, there may be no "proper" or "appropriate" legal category, or in fact, the category which is proper or appropriate for legal system *A* is not that which would be proper or appropriate for legal system *B*. Which is to "win"? Is it really "winning"? We have grown accustomed to such complexities, and realize that such differences must be acknowledged and accepted in the interests of justice. Why, then, can the further step not be taken, namely to acknowledge and accept that such

88. *Re Fink*, 14 D.L.R.3d 31 (1970); *Brownscombe v. Public Trustee of Alberta*, 5 D.L.R.3d 673 (1969); *Samilo v. Phillips*, 69 D.L.R.2d 411 (1968); *Re Jacques*, 66 D.L.R.2d 447 (1968); *Re Reid*, 46 D.L.R.2d 32 (1964); *Estok v. Heguy*, 40 D.L.R.2d 88 (1963); *Rowe v. Public Trustee*, 38 D.L.R.2d 462 (1963); *Morton Constr. Co. v. City of Hamilton*, 31 D.L.R.2d 323 (1961); *Peter Kiewit Sons' Co. of Canada v. Eakins Constr. Ltd.*, 22 D.L.R.2d 465 (1960); *Goodwin v. Goodwin*, 13 D.L.R.2d 365 (1958); *Arding v. Buckton*, 6 D.L.R.2d 586 (1956); *City of Moncton v. Stephen*, 5 D.L.R.2d 722 (1956); *Re Murphy*, 2 D.L.R.2d 132 (1956); *Degelman v. Guaranty Trust of Canada*, 3 D.L.R. 785 (1954); see *Angus, Restitution in Canada Since the Degelman Case*, 42 CAN. B. REV. 529 (1964).

differences can be accommodated within the municipal, or home legal system, even when there is no conflict of laws situation which necessitates any such accommodation. There comes to mind the famous dictum of Mr. Justice Cardozo to the effect that we are not so parochial as to imagine that what is home-produced is necessarily the best, and that foreign ideas are *ipso facto* unacceptable, wrong, to be shunned and unenforced.⁸⁹

Of course I am not speaking of something that is, strictly speaking, foreign. The ideas of promissory estoppel, and the enforcement of so-called gratuitous promises, are not imports from another system of law. They are as indigenous as consideration itself, and they have been analyzed, supported, and disseminated by such "local" worthies as Pound and Seavey in the United States, and Lords Wright and Denning in England. They do, however, bear a greater resemblance to non-common law concepts than to the fundamentals of the common law of contract. In that sense, they have a foreign flavor which may be distasteful to some. The common law, like the countries in which it has flourished, has always benefited by taking in foreign ideas, and making them into its own, but giving them a distinctive and much more local character. Why not in this instance too?

Indeed, I would use in support arguments raised many years ago in the United States seeking to establish that whether or not an obligation were truly contractual, the basis of the recovery of damages was what was termed the "reliance interest"⁹⁰ of the plaintiff. The language employed in that discussion reveals that what is involved is giving the plaintiff what he has lost through reliance upon the promise made by the defendant. "Our object is to put him in as good a position as he was in before the promise was made."⁹¹ The whole tenor of the argument, I would suggest, is that a more subjective approach to the issue of damages should be made. Cases determined by the use of section 90 of the *Restatement* seem to support this, at least to the extent of putting the measure of damages in such cases upon the footing of replacing the promisee in his pre-promise situation.⁹² To put it another way, only those damages should be awarded in such an action as are necessary to prevent injustice.⁹³ The reliance interest of the plaintiff, not

89. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918).

90. Fuller & Perdue, *The Reliance Interest In Contract Damages* (pts. 1 & 2), 46 *YALE L.J.* 52, 373 (1936) [hereinafter cited as Fuller & Perdue].

91. *Id.* at 54.

92. *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948); *Wheeler v. White*, 398 S.W. 2d 93 (Tex. 1965).

93. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965).

what has been termed his expectation interest (*i.e.*, putting him in as good a position as he would have been had the promise been performed) is the basis of damages in such a case.⁹⁴ That this is settled law in the United States has been queried.⁹⁵ It may be that much depends, as one comment has put it, upon whether this provision of the *Restatement* is "read in a flexible spirit."⁹⁶ The formula employed is elastic enough to permit a court to vary the quantum of recovery with the facts of the individual case. This suggests, to me at any rate, that if this approach is correct and is widely accepted by courts in the United States, then in such instances, while the question of liability may be based upon objective considerations, the extent of any such liability, *i.e.*, the measure of damages, will be more subjective. With this I would not disagree. Indeed, as already indicated, I would go further and make the entire issue turn upon subjective criteria. I do not consider that the present American trend goes far enough toward replacing the classical law of consideration by more modern and acceptable theories of liability.

The view put forward in this essay, which, to quote from another context, should be "read not as law but as an excursus into legal philosophy,"⁹⁷ is that obligations of a contractual nature (if it still be correct to use that adjective in the future) should be founded not upon any doctrine of consideration, even augmented or ameliorated by some notion of promissory estoppel (of the English or the American variety) but upon the idea that "serious" promises merit enforcement in some way or another. The exact remedy, and its scope, *i.e.*, specific performance, injunction, damages, and their calculation, may depend upon the kind of obligation involved and other relevant circumstances, but the existence of an obligation should be determined in accordance with the clear wishes of the individuals concerned.⁹⁸ Of course, this raises the problem of how one is to decide whether a promise is "serious" enough to deserve recognition and enforcement by the law. This may require an investigation of the facts of each individual case (though in the course of time certain principles may well develop). This is pre-

94. Fuller & Perdue, *supra* note 90, at 54.

95. See Henderson, *supra* note 64, at 378.

96. Kessler & Fine, *supra* note 74, at 424.

97. Fuller & Perdue, *supra* note 90, at 57.

98. If one party were serious and the other not, or if one were mistaken, how would a decision be reached? It seems to me that even a *unilateral* reliance could be enforced as long as the relying party acted in good faith. I do not consider this to be an insoluble problem. After all, even with objective tests and consideration, the law of mistake and misrepresentation has not been entirely satisfactory.

cisely what the courts appear to have been doing with respect to liability for negligent misrepresentation, an area which is still in the process of being worked out in detail. This approach could also be taken in the context of "contract." If the bogeyman of uncertainty is raised in this regard, I would counter by the language of Fuller and Perdue written years ago:

The assumption is very commonly made that legal certainty is necessarily promoted by limiting the alternative courses of action open to judges. Though the all-or-nothing-approach may be harsh, it at least allows a man to know where he stands. This comforting supposition can be preserved only so long as one ignores the psychological realities of the judicial process.⁹⁹

Though this was written about the calculation of damages in contract cases, I would suggest that it could be applied to the more basic problem of creation of a contractual obligation. In less sophisticated times, possibly, it was necessary to eschew the dangers of excessive creation of settled principles which could be used as the basis for easy, certain, and uniform decisions. We have surely gone beyond such a primitive stage and can safely undertake the problems and hardships of more variable decisions. It is time for the law of contract to renounce the strictures of the medieval and post-medieval period and recognize the need for a more liberal, and sympathetic approach to obligations of this kind.

The law of obligations in general is in a state of flux. Contract, tort, and quasi-contract (or unjust enrichment or restitution, whichever term be preferred) have reached a juncture at which they are being subjected to subtle, and sometimes not so subtle, change. Centuries of development produced distinctive concepts designed to cope with situations which were conceived of as being fundamentally different, therefore requiring distinctive treatment by the law, theoretically and from the point of view of remedies. These apparently clear-cut differentiations are now being recognized as sufficiently blurred and unclear to merit some revision of the attitudes to be adopted. In this essay, I have been concerned with the law of contract and with the nature of contractual obligation. My aim has been to argue that the notion of promise with its concomitant legal consequences and effects should be regarded differently from the way it is now viewed. Promise, or undertaking, is fundamental to contract. What is to be accepted as a legally binding promise or undertaking is obviously central to the whole

99. Fuller & Perdue, *supra* note 90, at 419.

conception of a contractual obligation. Quintessentially my point is that, current trends and tendencies being what they are, there is scope for, and impetus towards, a newer outlook upon the nature and creation of binding contractual obligations.¹⁰⁰ Indeed, one might go further and suggest that, while for analytical purposes some classification may be sensible and helpful, realistically speaking the tripartite division of obligations into contractual, tortious, and quasi-contractual is no longer as valid or justified as once it may have been.¹⁰¹ We should be searching for a more comprehensive definition of obligation in the law. In place of our somewhat piecemeal exposition of the law (even the law of contract), can we not now find something more satisfying? A start could be made by finding a happier, more suitable, explanation for contractual obligation, from which, possibly, a bridge could be built towards a more generalized definition of legal obligations of all sorts.

100. Cf. Lewis, *Obligation and the Law*, 5 OTTAWA L. REV. 84, 100-03 (1971).

101. Cf. Fuller & Perdue, *supra* note 90, at 419, "[T]he breaking down of these departmental barriers would represent a distinct service to legal thinking."