Certainty and Civil Obligation

John Smillie*

From Formalism to Fairness

In an article published in 1996 I described a movement away from a relatively "formalistic" approach to civil adjudication which placed a high value on certainty in the law and sought to promote it by consistent application of settled rules of general application.[1] In the last quarter of the twentieth century the inherited rules of common law and equity that defined the incidence and content of the various heads of civil obligation under our law and the remedial consequences that follow from their breach came under attack for being too rigid and insufficiently responsive to the current needs, values and aspirations of New Zealand society. "Fairness" and "relevance" became the fashionable touchstones, and we were instructed by prominent judges, serious academics, and enthusiastic law reform agencies, that the fundamental and overriding purpose of our legal system is to achieve substantively "fair" results on the facts of individual cases.

While promoters of this approach to adjudication seek to ground the concept of "fairness" in objective external standards such as "the reasonable expectations of the parties"[2] or "the sense of justice or fairness which is immanent in the community",[3] they tend to overlook the fact that since the law not only *meets* but also *engenders* expectations, the best evidence of their nature and scope is found in the pre-existing law on the point in issue. Ultimately, the ideal of fairness is personal and intuitive, reflecting the individual judge's own moral convictions. The most committed (and honest) judicial advocate of the fairness approach in New Zealand, Justice E W Thomas, concedes this point and asserts that judges are entitled, indeed "required", "to express that opinion which best serves their intelligence and wisdom and best discharges their personal scruples and conscience."[4]

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* Professor of Law, University of Otago.

1 J Smillie, "Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand" [1996] NZ Law Rev 254.

2 See Sir Robin Cooke, "Dynamics of the Common Law" in *Proceedings of the Ninth Commonwealth Law Conference* (Auckland, 1990) 1 at 4: "[A] guiding principle in many recent New Zealand developments, however expressed, has been the need to give effect to reasonable expectations". For explicit judicial application of this concept, see eg *Gillies* v *Keogh* [1989] 2 NZLR 327, 331, 333; *Phillips* v *Phillips* [1993] 3 NZLR 159, 167-168; *Elders Pastoral Ltd* v *Bank of New Zealand* [1989] 2 NZLR 180, 186.

3 Justice E W Thomas, "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) 23 VUWLR Monograph No 5 at 56-58; and "Fairness and Certainty in Adjudication: Formalism v Substantialism" (1999) 9 Otago LR 459 at 470-471.

4 "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy", ibid, at 58; "Fairness and Certainty in Adjudication: Formalism v Substantialism", ibid, at 471.

In the area of private obligations, achievement of individualised fairness demands that the traditional rules that define the different heads of civil liability and their associated remedial regimes be diluted or abandoned in favour of more abstract standards which leave judges with wide practical discretion at their point of application. In particular, the area within the exclusive province of consensual obligations governed by the law of contract must be eroded by extension of the scope of imposed obligations which require citizens to forego pursuit of their own self-interest in order to conform with vague judicially-assessed standards of reasonable concern for the interests of others.

In my 1996 article, I described how New Zealand judges sought to achieve this object through expansive application of tortious duties of reasonable care; equitable concepts of estoppel, unconscionability and fiduciary duty; unjust enrichment and implied contractual terms.[5] And if different obligations, variously derived from contract, tort and equity, are perceived as serving essentially the same purpose and are directed at essentially the same sort of conduct, it seems anomalous and unfair if the remedies available to a judge in the event of breach must vary according to the historical source of the obligation. Since the ultimate objective in every case is to secure an outcome that is fair and just to both parties, the judge must be free to issue the particular remedy that is most "appropriate" for that purpose, guided only by a non-exhaustive and contradictory list of "relevant factors".[6]

So an award of damages would no longer have primacy over equitable remedies directed at specific enforcement of common law obligations. Indeed, since selection of the appropriate remedy must always be left to the judge, proof of liability at common law would no longer raise an entitlement to an award of compensatory damages. At the same time, damages for lost expectations of future benefits need not be confined to actions for breach of contract, and damages for mental distress should no longer be limited to tort actions. Gain-based remedies of account or restitutionary damages requiring disgorgement of benefits should not be confined to equitable wrongs and property torts, and fairness may require an award of exemplary damages to inflict punishment on a deliberate contract-breaker or fiduciary defaulter. Different approaches, depending on the source of the obligation breached, to such matters as causation and remoteness of damage, accrual of the cause of action, apportionment for contributory fault, and contribution rights must be reconciled, usually by adoption of the tortious negligence standard.

This assertion of complete remedial discretion is justified by portraying the rules that link particular remedies to particular obligations as anachronisms, mere accidents of the separate historical development of common law and equity, which may now be ignored since those two historical sources of obligations have "mingled", "merged" or "fused".[7]

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5 Supra, n 1 at 262-264.

6 See Justice Thomas, "An Endorsement of a More Flexible Law of Civil Remedies" (1999) 7 Waikato LR 23 and the sources cited therein.

7 See *Acquaculture Corporation* v *New Zealand Green Mussel Co* [1990] 3 NZLR 299, 301. See generally Thomas, ibid, at 28-33.

In 1996 I noted that these developments marked a trend towards collapsing the separate heads of civil obligation into a single integrated law of civil wrongs characterised by abstract, very generalised standards of *prima facie* liability coupled with very wide judicial discretion as to excuses and remedies. Taken to its logical conclusion, a judge would be required to answer just three questions. First, what standards of conduct could reasonably be expected of the parties in the particular circumstances in which they were placed? Second, did their conduct fall short of those standards? Third, which of the whole range of remedies and recourse rules recognised by common law, equity or statute is most appropriate to achieve a fair and just outcome between the parties?

Reaction Against Discretionary Justice

Individualised justice comes at a high price. Substitution of vague discretionary standards and lists of relevant "factors" for firm rules means that litigation becomes increasingly complex, protracted and expensive, and the incentive to appeal an adverse decision becomes stronger. Even where it is clear that a plaintiff has a good cause of action against a principal defendant, uncertainty as to the law's response in terms of remedies, apportionment and contribution hampers settlement and encourages recourse to litigation. So it should come as no surprise to find that over the past 25 years or so there has been a dramatic increase, relative to population growth, in the number of civil claims filed in the High Court, the number of civil appeals filed and heard in the Court of Appeal, the number of superior court judges, and the total number of judicial officers in New Zealand.[8] Since a significant proportion of the total cost of administering the justice system is shouldered by taxpayers, it is hardly surprising that some have been moved to suggest that a small number of decisions that fall short of the ideal of perfect individual justice may be a price worth paying for the virtues of certainty, predictability and efficiency. As an English commentator on Lord Cooke's version of "fairness" observed: "The aim of the law may well be to meet people's reasonable expectations, but its most urgent duty is to make it possible for lawyers to give clear advice to their clients ..."[9]

There are encouraging signs that some of our senior judges are becoming persuaded to this point of view. The Court of Appeal has made some recent

8 Between 1977 and 1997 the population of New Zealand increased by 19 percent. During the same twenty-year period the number of civil appeals heard by the Court of Appeal increased by 220 percent (50 to 160); the number of civil appeals lodged in the Court of Appeal increased by 84 percent (164 to 303); the number of superior court judges increased by 78 percent (23 to 41); and the total number of judges and "judge equivalents" increased by 187 percent (89 to 256). Over the period 1970 to 1990, the number of civil claims filed in the High Court increased by 115 percent (3312 writs to 7143 originating applications): Justice Hansen, "Case Management in New Zealand Courts" (1998) 9 Otago LR 319. Predictably, judgments have got longer: Court of Appeal judgments in cases involving statutory interpretation reported in the 1996 volumes of the New Zealand Law Reports were on average 38 percent longer than equivalent judgments reported in 1976 (J Allan, "Statutory Interpretation and the Courts" (1999) 18 NZULR 439 at 442, 443).

9 Tony Weir, "Errare Humanum Est" in P Birks ed, *The Frontiers of Liability* (Oxford, 1994) Vol 2, p 103 at 106.

efforts to check the progressive intrusion of the tort of negligence into the domain of contract law,[10] public law[11] and the law of nuisance,[12] and to differentiate strict fiduciary duties of loyalty from ordinary contractual undertakings,[13] duties of reasonable care[14] and obligations of confidentiality.[15] But the Court of Appeal remains deeply divided on many issues, and it has been unable to provide any clear direction on such fundamental matters as the criteria for a duty of care in respect of purely economic loss,[16] the tests for causation and remoteness of damage,[17] whether fiduciary obligations extend beyond economic interests to personal interests in physical and mental security,[18] the circumstances in which damages for mental distress can be recovered in a contract action,[19] and whether exemplary damages can be awarded in actions for negligence[20] or breach of contract.[21]

The full extent of the gulf between the two camps was exposed in *Cox & Coxon Ltd* v *Leipst*[22] which concerned the proper measure of damages for a breach of s 9 of the Fair Trading Act 1986 consisting of a misrepresentation by a real estate agent as to the earning capacity of an orchard. Section 43(2) of the Act gives the court a wide discretion as to remedies, including power to order payment of

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10 See *Brownie Wills* v *Shrimpton* [1998] 2 NZLR 320; *Boyd Knight* v *Purdue* [1999] 2 NZLR 278. But cf *Riddell* v *Porteous* [1999] 1 NZLR 1; and *Price Waterhouse* v *Kwan*, 16 December 1999, CA 80/99.

11 *B* v *Attorney-General* [1999] 2 NZLR 296. Cf *Attorney-General* v *Prince and Gardner* [1998] 1 NZLR 262.

12 *Hamilton* v *Papakura District Council* [2000] 1 NZLR 265. Cf *Autex Industries Ltd* v *Auckland City Council*, 23 February 1998, CA 198/97.

13 *Fortex Group Ltd* v *MacIntosh* [1998] 3 NZLR 171. Cf *Liggett* v *Kensington* [1993] 1 NZLR 257, rev'd *Re Goldcorp Exchange Ltd* [1994] 3 NZLR 385 (PC).

14 *Bank of New Zealand* v *New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 680-681. Cf *Day* v *Mead* [1987] 2 NZLR 443; *Mouat* v *Clark Boyce* [1992] 2 NZLR 559, rev'd [1993] 2 NZLR 641 (PC).

15 *MacLean* v *Arklow Investments Ltd* [1998] 3 NZLR 680, affirmed by the Privy Council 1 December 1999, PC 17/99.

16 See infra, n 69-76 and accompanying text.

17 Compare *Sew Hoy and Sons Ltd* v *Coopers & Lybrand* [1996] 1 NZLR 392; *Bank of New Zealand* v *New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664; and *Price Waterhouse* v *Kwan*, 16 December 1999, CA 80/99.

18 In *S* v *G* [1995] 3 NZLR 681, and *W* v *Attorney-General* [1999] 2 NZLR 709, the Court seemed to assume that fiduciary duties extend to protection of such personal interests, but in *Daniels* v *Thompson* [1998] 3 NZLR 22, 54, the majority of the Court expressly reserved its opinion on the point.

19 It remains unclear whether damages for distress are available only where the object of the contract was to provide pleasure or peace of mind (*Bloxham* v *Robinson* (1996) 7 TCLR 122 137-138 per McKay and Temm JJ); or are available for breach of any non-commercial contract (*Mouat* v *Clark Boyce* [1992] 2 NZLR 559, 569 per Cooke P); or are recoverable whenever distress is a forseeable consequence of breach (Thomas J in *Rowlands* v *Collow* [1992] 1 NZLR 178 and dissenting in *Bloxham* v *Robinson*, supra).

20 See infra, n 80 and accompanying text.

21 In *State Insurance Ltd* v *Cedenco Foods Ltd*, 6 August 1998, CA 216/97, a five-judge Court was assembled to determine whether exemplary damages are available in an action for breach of contract, but apparently they were unable to agree and the issue was left unresolved.

22 [1999] 2 NZLR 15.

"the amount of the loss or damage" suffered as a result of the breach. In 1992, in *Goldsbro* v *Walker*,[23] the Court of Appeal seemed to assert a complete discretion to award such damages as the Court thinks fit in the particular case. Understandably, some High Court judges interpreted this decision as giving a discretion not only as to the *amount* of damages payable but also as to the appropriate *measure* of damages, so that expectation damages to compensate for loss of anticipated future benefits could be awarded under the Act.[24] But misleading or deceptive conduct which infringes s 9 of the Fair Trading Act will often also amount to breach of a common law or equitable obligation, and if the Act leaves the choice of remedy entirely within the court's discretion it is natural to ask why the same flexible approach should not apply to common law and equitable remedies. So an expansive view of the remedial jurisdiction conferred by the Fair Trading Act undoubtedly encouraged the movement towards an integrated law of civil obligations coupled with an unfettered discretion as to the appropriate remedial response.[25]

The decision in *Cox & Coxon Ltd* v *Leipst* marks an attempt to halt this development. There a bare majority of a full five-judge Court held that expectation damages for loss of future benefits cannot be recovered in an action for breach of the Fair Trading Act. The majority (Gault, Henry and Blanchard JJ) justified this result by reference to the function of an award of expectation damages and the nature of the legal right or entitlement which the remedy is designed to support and vindicate. An award of expectation damages supports the legal right to enforce a promise by compensating the disappointed promisee for loss of the benefits which performance of the promise would have conferred. But only a binding contract can create a legal right to enforce a promise to confer a benefit. Put another way, only a contract can generate an entitlement (or "reasonable expectation") that a promise to confer a benefit will be performed. Accordingly, a claimant under the Fair Trading Act is confined to damages in the tort measure designed to put him in the position he would have occupied if the misrepresentation had not been made.

On the other hand, the dissenting minority (Tipping J and Richardson P) vigorously defended the discretionary approach. Speaking generally, Tipping J insisted that:[26]

> Assessment of damages is essentially a question of fact. Such rules or general principles as are formulated are simply for general guidance. An unduly rigid approach is not appropriate. .... The most the Court can usually do in the damages area is to lay down prima facie rules which will apply in particular situations in the absence of good reason to depart from them.

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23 [1993] 1 NZLR 394.

24 *Crump* v *Wala* [1994] 2 NZLR 331; *Smythe* v *Bayleys Real Estate Ltd* (1993) 5 TCLR 454; *Gloken Holdings Ltd* v *The CDE Co Ltd* (1997) 8 TCLR 278, 289.

25 See also the very broad interpretation given to s 9 of the Contractual Remedies Act 1979 in *Thomson* v *Rankin* [1993] 1 NZLR 408 (CA); and *Coxhead* v *Newmans Tours Ltd* [1993] BCL 1 (CA).

26 [1999] 2 NZLR 15, 31.

So the common law rules as to damages are really mere discretionary guidelines. As to the Court's jurisdiction under s 43(2)(d) of the Fair Trading Act, Tipping J concluded:[27]

> ... I adhere to the view that the Court may compensate for a false representation under the Fair Trading Act, either by assessing the plaintiff's position had the representation not been made at all, or when appropriate, by requiring the representor to put the representee into the position the representee would have been in had the representation been true. *Which of those approaches, or any other which may be suggested, should be adopted will depend on which approach is best calculated to do justice to all concerned in the individual case.*

According to Tipping J, the particular representation complained of in this case had a "promissory connotation" which raised "legitimate expectations" that it would be fulfilled, and fairness required those expectations to be made good.[28]

Cox & Coxon is an important decision. Its significance lies in the majority's emphasis of the distinctive nature of contractual obligation, and the functional link between the obligation and the primary remedy for its breach.[29] But the majority did not explain *why* contractual obligations are distinctive in this way: viz why only a binding contractual promise can create an enforceable legal right to performance.

Those of us who favour return to a more predictable rule-based system of civil liability must recognise that appeals to tradition, certainty, and the associated benefits of administrative efficiency and reduced costs, do not have the same emotive force and popular attraction as a general appeal to fairness and substantive justice. So if the traditional formal categories of civil liability and their associated remedial regimes are to be preserved and defended, we must be able to demonstrate that they reflect and serve quite distinct social purposes which remain worthy of promotion so that something of real value will be lost if the rules associated with those formal categories are abandoned or eroded.

Obligations and their Functions

I believe that the traditional heads of civil obligation recognise and promote fundamental human values and interests that remain relatively fixed and constant over time. These values and the relationships between them are not subject to rapid or radical change – in particular, they do not react quickly to sudden shifts in political direction or popular ideology. The purposes of the various heads of obligation and the nature of the interests they protect and serve dictate the remedies available for their breach.

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27 Ibid, at 42. (Emphasis added).

28 Ibid, at 30.

29 That majority is tenuous. Thomas J prefers the view of the dissenting minority: see "An Endorsement of a More Flexible Law of Civil Remedies" (1999) 7 Waikato LR 23, at p 30, n 36. That leaves the casting vote among the permanent members of the Court of Appeal with Keith J, a specialist in public law.

(a) Contract

The purpose of the common law of contract is to positively encourage contracting: i.e. to encourage citizens to exchange binding promises as to future action. The activity of contracting promotes two distinct but complementary social values; one moral, the other economic. First, by providing the means by which people can secure a measure of control over the future, contracting enhances the core moral value of freedom or autonomy – the ability of each individual person to choose and pursue his or her own goals and plans for life. Secondly, voluntary exchange-bargains promote the collective welfare of society as a whole by creating and sustaining markets which tend to allocate scarce resources to those who value them most highly and can use them most productively. So contracting is good for us all, and citizens must be encouraged to pursue their goals and realise their choices by negotiating exchanges of binding promises.

This view of the purpose of the law of contract explains why the classical common law rules place such a high value on certainty and predictability. In order to encourage people to embark on the process of negotiating exchanges of promises as to their future conduct, they must be able to know with confidence whether and when they are legally bound. So the requirements for contract formation must be clear, readily understandable and objectively applied, and the law should not recognise any "duty to negotiate".[30] The requirement that a binding promise must be supported by some consideration of economic value is easily justified: it provides the best external evidence of voluntary agreement, and it is exchange-bargains – not gratuitous transfers – that support markets. But the adequacy of the consideration exchanged for a promise is a matter for the parties to decide, and judges must not substitute their views as to the substantive fairness of the bargains reached. Of course, this assumes the existence of the necessary background conditions for free and informed choice. If the market offers no real choice, then contracting can neither enhance autonomy nor promote economic growth. So a strong competition law is essential in order to ensure competitive markets for goods and services.[31] For the same reason, it is necessary to deter pre-contractual misrepresentations[32] and deceptive trading practices[33] – they impair freedom of choice and erode the integrity of markets.

In order to maximise the incentive to make binding promises as to the future, the remedies available in the event of breach must strike a balance between two conflicting interests: (a) providing security of performance to promisees; and (b) preserving the freedom of promisors to change their minds. Contract theorists tend to focus their attention on the promisee's interest in securing performance of the promise, and downplay the promisor's legitimate interest in being free to withdraw from the obligation to perform. But the decision to withdraw is just as much an exercise of autonomous choice as the original decision to enter into the contract, and it is entitled to due respect. After all, it is autonomy over a complete life – rather than in relation to some discrete event – that is truly important and

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30 See *Walford* v *Miles* [1992] 2 AC 128.
31 See Commerce Act, 1986.
32 See Contractual Remedies Act 1979, s 6.
33 See Fair Trading Act 1986, s 9.

valuable.[34] And of course people would be much less willing to make contractual undertakings if they knew that they could never withdraw unilaterally and could always be compelled to perform as promised.

So it is right to treat specific performance as an exceptional remedy, available only where damages do not provide an adequate economic substitute for performance due to the lack of a ready market for the subject matter of the contract.[35] In most cases the law respects and preserves the freedom of a promisor to change his mind and refuse to perform as promised. Of course exercise of the freedom to break a contract is conditional upon the promisor compensating the promisee for his frustrated expectations. Payment of damages representing the economic value of the promised performance satisfies the promisee's economic expectations and secures an appropriate level of deterrence against opportunistic contract-breaking. The obligation to pay expectation damages in lieu of performance achieves the optimal balance between the conflicting interests of security and freedom, and maximises the incentive to contract.[36]

It follows that a deliberate decision to break a contractual promise is not "wrongful" in the same sense as an intentional tort – it is not presumptively anti-social conduct that must be prevented and suppressed by imposition of penal sanctions. As Lord Hoffmann observed in the *Argyll Stores* case, the purpose of contract remedies "is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance".[37] Once those expectations are satisfied, the promisor's contractual obligation is discharged and his reasons or motives for breaching the contract are entirely irrelevant. So awards of exemplary damages to punish "intentional" or "malicious" or "flagrant" contract-breaking are entirely inappropriate. So too are awards of "restitutionary" damages designed to deter deliberate breaches which leave the contract-breaker with a net profit after fully compensating the promisee for loss of performance.[38] Whether or not one accepts the economic theory of "efficient breach", it is important that the mere fact of entry into a contract involving the use of certain resources should not foreclose the opportunity to find some other use for them. Extra-compensatory damages over-deter breach and unduly inhibit freedom to withdraw from contracts, thereby presenting a significant deterrent to entering contractual relations.

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34 This point is well made by Stephen A Smith in "Future Freedom and Freedom of Contract" (1996) 59 MLR 167 at 179.

35 See *Co-operative Insurance Society Ltd* v *Argyll Stores Ltd* [1998] AC 1 where the House of Lords re-emphasised the exceptional nature of specific performance and the primacy of common law damages.

36 Of course the promisee's entitlement to full expectation damages must be qualified by an obligation to mitigate loss in order to reduce the most obvious *ex ante* deterrent to contracting. Interested parties are more likely to enter into a binding contract if each knows that the other will be obliged to take reasonable steps to mitigate loss on becoming aware of breach. But until the promisee receives notice of breach he is entitled to expect full performance, and damages should never be reduced for contributory negligence: see *Astley* v *Austrust Ltd* (1999) 161 ALR 155 (HCA).

37 Supra, n 35 at 15.

38 *Surrey County Council* v *Bredero Homes Ltd* [1993] 1 WLR 1361 (CA). Cf *Attorney-General* v *Blake* [1998] Ch 439 (CA).

Inability to predict the extent of one's potential liability in the event of breach will certainly deter people from entering into contracts. So assessment of compensatory damages must be governed by clear rules that deliver predictable outcomes. The incidence and extent of mental distress and other forms of intangible harm consequent on breach depend entirely on the particular circumstances, personality and subjective preferences of the individual promisee, and are therefore inherently incapable of reasonable prediction. It follows that awards of general damages must be denied in contract actions. As to claims for consequential economic losses, the rule in *Hadley* v *Baxendale*[39] makes perfect sense by limiting recovery to losses which the parties, at the time they entered into the contract, ought to have had in mind as likely to result from breach. This rule reduces the disincentive to contract associated with uncertainty by encouraging negotiating parties to disclose abnormally high risks of loss associated with non-performance. In the absence of any such disclosure, both parties can enter the contract safe in the knowledge that in the event of breach their liability will fall within a reasonably predictable range.

Finally, in order to maintain the incentive to bargain the distinctive advantages of a contractual right must be preserved. This is the justification for insisting that only a binding contractual promise should confer a right to demand performance or payment of full expectation damages in lieu.[40] For the same reason, contract damages should not be subject to reduction for contributory negligence on the part of the promisee, even where the contractual duty breached required only the exercise of reasonable care.[41] Inability to rely on a professional to perform a contractual undertaking for one's benefit or protection without having to monitor his competence and diligence will certainly deter people from paying for such undertakings. And of course apportionment of damage according to a judge's view of what is "just and equitable" is hopelessly unpredictable and leads to much unnecessary litigation.

(b) Fiduciary Obligations

Fiduciary obligations serve a single narrow purpose: to uphold the integrity of relationships of absolute trust and loyalty founded on an undertaking by the fiduciary to serve only the economic interests of the principal to the exclusion of all competing interests.[42] This purpose is achieved by fixing fiduciaries with a narrow range of strict proscriptive obligations – they must not use their positions to obtain a profit for themselves and they must avoid any unauthorised conflict between duty and interest. The prophylactic, deterrent function of fiduciary law explains the extensive range and stringent nature of the remedies available to correct a breach of fiduciary duty. A defaulting fiduciary must compensate the

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39 (1854) 9 Exch 341.

40 See *Cox & Coxon Ltd* v *Leipst*, supra, n 22 and accompanying text.

41 On this point, the High Court of Australia is right (*Astley* v *Austrust Ltd* (1999) 161 ALR 155), and the New Zealand courts are wrong (*Mouat* v *Clark Boyce* [1992] 2 NZLR 559, 565-566 per Cooke P; *Dairy Containers Ltd* v *NZI Bank Ltd* [1995] 2 NZLR 30 (Thomas J); *Price Waterhouse* v *Kwan*, 16 December 1999, CA 80/99 per Tipping J).

42 See the excellent short article by S Worthington, "Fiduciaries: When is Self-Denial Obligatory?" (1999) 58 CLJ 500.

principal for all loss caused by the breach, whether foreseeable or not.[43] And in order to remove any incentive for a fiduciary to be swayed from his duty of undivided loyalty, equity requires even an innocent defaulter to disgorge any benefits secured by reason of his position.[44] So the court may order an account of profits, or declare assets subject to a constructive trust which confers any increase in value on the principal and gives priority over general creditors in the case of insolvency.[45]

But mindful of the fundamental value of individual autonomy, courts of equity were concerned not to encourage citizens to abdicate responsibility for their own well-being by placing unnecessary or disproportionate reliance on others. So the traditional "status based" categories of fiduciary relationships involving trustees, company directors, partners, solicitors and certain other agents, identify common contexts in which pursuit of socially valuable ends leaves a person with little choice but to entrust his property or financial affairs to another, and the loss-based common law remedies provide insufficient deterrence against self-serving conduct. And since contractual consent remains the primary source of civil obligation in respect of financial dealings, recognition of a fiduciary duty of loyalty must not be inconsistent with the express or implied terms of a contract between the parties.[46] So traditionally, fiduciary obligations were narrowly drawn but strictly enforced.

This sensible balance came under threat from judges determined to stretch the fiduciary concept in order to give "deserving" victims of unfair business practices,[47] professional incompetence,[48] or even physical abuse[49] the benefit of the stringent remedial regime that attaches to fiduciary default. But when fiduciary obligations were extended in scope but diluted in content, fairness often seemed to demand some relaxation of the rather draconian character of those remedies.[50] These developments introduce unnecessary uncertainty into

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[43] Once the plaintiff shows a loss arising out of a transaction to which the breach of duty related, the plaintiff is entitled to compensation unless the defendant fiduciary can discharge the onus of positively proving that the plaintiff would still have entered the transaction and incurred the loss even if no breach of duty had occurred: *Gilbert* v *Shanahan* [1998] 3 NZLR 528, 535-536. In fact this position represents a relaxation of the approach taken by the Privy Council in *Brickenden* v *London Loan & Savings Co* [1934] 3 DLR 465, 469 where speculation as to what the plaintiff may have done if there had been no breach was deemed immaterial.

[44] See *Boardman* v *Phipps* [1967] 2 AC 46, where the honest defaulter was permitted to retain an allowance for skill and effort expended in securing the profit. On the other hand, a dishonest fiduciary may be further penalised by being made to pay a higher rate of interest or even compound interest: Hanbury & Martin, *Modern Equity* (15th ed, Sweet & Maxwell Ltd, London) 638-639.

[45] *Attorney-General for Hong Kong* v *Reid* [1994] 1 AC 324 (PC).

[46] *Kelly* v *Cooper* [1993] AC 205 (PC); *Clark Boyce* v *Mouat* [1993] 3 NZLR 641 (PC).

[47] Eg *Elders Pastoral Ltd* v *Bank of New Zealand* [1989] 2 NZLR 180; *Watson* v *Dolmark Industries Ltd* [1992] 3 NZLR 311; *Liggett* v *Kensington* [1993] 1 NZLR 257, rev'd *Re Goldcorp Exchange* [1994] 3 NZLR 385 (PC).

[48] Eg *Mouat* v *Clark Boyce* [1992] 2 NZLR 559, rev'd *Clark Boyce* v *Mouat* [1993] 2 NZLR 641 (PC).

[49] See supra, n 18.

[50] So the *Brickenden* rule of causation has been relaxed (see supra, n 43); equitable compensation may be reduced for contributory negligence (*Day* v *Mead* [1987] 2 NZLR

commercial dealings, complicate and prolong litigation and increase the risk associated with contracting.

Fiduciary obligations should be confined to a narrow range of relationships characterised by an undertaking of undivided loyalty to the economic interests of the principal, and default in this duty should attract the full deterrent force of the personal and proprietary equitable remedies.[51] Thankfully, the Privy Council has re-affirmed the traditional approach in a number of recent cases[52] and it seems that our Court of Appeal has at last accepted its direction.[53]

(c) Intentional torts

The intentional torts identify certain human interests as such essential conditions of individual autonomy or freedom that deliberate acts of interference with those interests must be strictly proscribed in order to guarantee everyone an equal freedom to pursue their own chosen ends. So the law of trespass condemns as *prima facie* wrongful any positive voluntary act which interferes directly and immediately with another's freedom of movement, bodily integrity or physical property, and admits only a very narrow range of legitimating excuses – essentially self-defence and consent.[54] By their very nature, such acts display a serious disregard for the equal autonomy of others, and are presumptively devoid of social value. The primary purpose of imposing liability is not to compensate victims for actual harm suffered. Rather it is to mark out and vindicate citizens' core autonomy interests, and suppress entirely conduct which presents a direct and immediate threat to their integrity by imposing appropriate financial sanctions. So trespass is actionable without proof of actual harm, and reasonable mistake or good motive provides no defence. In common with other intentional

443; *Mouat* v *Clark Boyce* [1992] 2 NZLR 559); dishonest fiduciaries have been given an allowance for skill and effort expended (*Cook* v *Evatt (No 2)* [1992] 1 NZLR 676 (Fisher J); *Estate Realties Ltd* v *Wignall* [1992] 2 NZLR 615, 629-631 (Tipping J); cf *Guinness* Plc v *Saunders* [1990] 2 AC 663, 701-702 per Lord Goff); and the court may, in its discretion, prefer an award of compensation for loss suffered to a much large gain-based remedy (*Official Assignee of Collier* v *Creighton* [1993] 2 NZLR 534, 541-542).

51 Properly applied, the equitable remedies provide ample deterrence and exemplary damages should not be awarded for breach of the fiduciary duty of loyalty (cf *Acquaculture Corporation* v *New Zealand Green Mussel Co* [1990] 3 NZLR 299, 301; *Cook* v *Evatt (No 2)* [1992] 1 NZLR 676 (Fisher J)). Of course, a fraudulent fiduciary may be liable for exemplary damages in a tort action for deceit.

52 *Clarke Boyce* v *Mouat* [1993] 2 NZLR 641; *Re Goldcorp Exchange* [1994] 3 NZLR 385; *Attorney-General for Hong Kong* v *Reid* [1994] 1 AC 324.

53 See *Bank of New Zealand* v *New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 where the Court took care to distinguish the fiduciary duty of absolute loyalty from tortious, contractual and equitable duties of care and diligence; and *MacLean* v *Arklow Investments Ltd* [1998] 3 NZLR (aff'd *Arklow Investments Ltd* v *MacLean*, 1 December 1999, PC 17/99) where the majority of the Court drew a clear distinction between fiduciary duties of loyalty and equitable obligations of confidentiality.

54 Cf *S* v *G* [1995] 3 NZLR 681, 687 where the Court of Appeal, in order to extend the limitation period for claims based on sexual abuse, held that "lack of true consent" is a necessary element of the plaintiff's *prima facie* case in an action for battery so that the cause of action does not accrue until the victim ought reasonably to have appreciated that her consent was not free and informed.

torts, aggravated damages are available to compensate the plaintiff for injury to feelings, dignity or reputation due to the defendant's malicious motive or arrogant disregard of the plaintiff's legal rights, and if the total amount of compensatory damages (including aggravated damages) is deemed inadequate to punish the wrongdoer and deter him and others from similar conduct in the future, an additional award of exemplary or punitive damages may be imposed. And since the punitive and deterrent effect of liability will be substantially reduced if a defendant is permitted to avoid personal responsibility for payment of all or part of an award of damages, contracts of insurance against the legal consequences of deliberate tortious conduct must be held void and unenforceable, and damages must not be reduced by reason of the plaintiff's own contributory fault.[55]

Unsurprisingly, the common law affords priority to protection of the individual's interest in personal safety. Serious injury to the person threatens irreversible harm to the capacities necessary for pursuit of a person's chosen life plan and so constitutes the most serious infringement of personal autonomy. So when confronted with a case where deliberate misconduct operated *indirectly* to cause serious injury (and so fell outside the scope of the tort of trespass) the court declared that as a matter of general principle, any wilful act "calculated" (i.e. very likely) to cause physical harm to the plaintiff's person is actionable in tort.[56]

While Commonwealth courts have refused to recognise any such general principle of liability in respect of harm to other interests,[57] together the torts of trespass to land and chattels, conversion and detinue provide a remedy in almost all cases of intentional acts in relation to physical property which result in loss or serious damage. The primary deterrent purpose of these property torts is further served by permitting a successful plaintiff to waive his right to damages for loss suffered in favour of a restitutionary claim to the higher sum represented by the proceeds of the sale of a converted chattel, or the profits derived from a trespass to the plaintiff's property. These intentional torts convey a simple message – don't interfere with the person or property of others without their consent.

The protection afforded purely economic interests has always been more limited in scope. Rights under existing contracts attract strong protection – it is a tort to intentionally cause a person economic loss by inducing a third party to break a contract with the plaintiff. But wilful – even malicious – interference with economic interests other than existing contractual rights attracts no liability unless the means used by the defendant to achieve his purpose are independently unlawful.[58]

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55 Cf *Dairy Containers Ltd* v *NZI Bank Ltd* [1995] 2 NZLR 30, 112 (Thomas J).

56 *Wilkinson* v *Downton* [1897] 2 QB 57.

57 The High Court of Australia came closest in *Beaudesert Shire Council* v *Smith* (1966) 120 CLR 145 where it held that an unlawful, intentional and positive act inevitably causing loss to another gave rise to an action for damages. The High Court has since rejected this formulation as being too broad: *Northern Territory* v *Mengel* (1995) 185 CLR 307.

58 *Allen* v *Flood* [1898] AC 1. An exception to the requirement of unlawful means exists in the case of "unlawful purpose" conspiracy. So a combination of two or more persons who agree to take collective action which would otherwise be lawful will commit a

This ranking of interests is easily explained. While less central to personal autonomy than bodily integrity (after all, an able-bodied person can still work to restore lost assets), the law must guarantee the security of property rights and existing contractual entitlements from deliberate intentional interference in order to protect the subject-matter of the voluntary exchange-bargains that realise individual choices and sustain economic markets. While a party to a contract must normally be free to change his mind and refuse to perform a promise (subject, of course, to compensating the promisee for the economic value of performance), the law of tort supports security of contract by attempting to ensure that decisions to break existing contracts are in fact free and voluntary and not induced by deliberate pressure from third parties.

But economic loss resulting from interference with *non*-contractual expectations of economic advantage is a necessary and accepted incident of competitive behaviour in a market economy. We encourage market participants to compete to *secure* contractual entitlements, even although success and economic gain for some inevitably means failure and financial loss for others. A general principle of liability for intentionally causing economic harm to another would be far too restrictive of personal freedom, and any attempt to confine it by reference to an additional requirement that the defendant's conduct also be "immoral", or "unreasonable", or "improper", or some other synonym for "unfair",[59] would leave the decision to turn on a judge's subjective appraisal of a whole range of factors and is inherently unpredictable. The nineteenth century English judges very sensibly resisted the temptation to discriminate on a case-by-case basis between fair and unfair forms of competition. Instead they fixed upon the objective and much more manageable criterion of illegality, insisting that the defendant's conduct must not only be directed at the plaintiff but must also be independently unlawful in itself.

(d) Negligence

The independent tort of negligence is a relatively recent judicial creation that has never sat easily alongside the older, more established heads of civil liability. A general duty to avoid foreseeable harm to others tends to cut across and disrupt the pattern of the more specifically focused rights and obligations established by the traditional heads of liability. While the fundamental moral norm of equal respect for the autonomy of others justifies requiring every citizen to honour binding undertakings freely given, and to refrain from deliberately misleading others or wilfully engaging in conduct which presents an immediate and obvious threat to the security of their vital interests, the tort of negligence is concerned with accidental harm – the unintended, often indirect and remote, consequences of human action that is *prima facie* lawful and socially beneficial. In this context, the autonomy interests of potential victims in the security of their bodies, property

tort if their sole or predominant purpose is to injure the plaintiff rather than to further their own legitimate economic interests. The very specific and demanding nature of the intent required means that the practical scope for this tort is very limited indeed: see *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch* [1942] AC 435.

59 See Tony Weir, *Economic Torts* (Clarendon, Oxford, 1997) pp 45-69, surveying the law of Germany, France and the United States.

and wealth conflict with the equally significant autonomy interests of actors being free to take positive action in pursuit of their legitimate chosen goals. Since all human action involves some risk of harm to others, it is not surprising that the early common law did not recognise a general duty to take care to avoid inflicting harm on others.

The independent tort of negligence arose during the mid-nineteenth century as a pragmatic response to the dramatic increase in the incidence of accidental, indirect (non-trespassory) personal injuries that accompanied the growth of mechanised transportation and industry. The victims of serious industrial and transport accidents were left in obvious financial need. But at the same time, such accidents were seen as inevitable consequences of activities that were *prima facie* lawful and beneficial to society generally. If the law suppressed *all* potentially dangerous activity, this would unduly inhibit industrial innovation and progress. The concept of liability for negligent conduct enabled the courts to provide compensation to *some* deserving victims of accidental injury without imposing such an onerous burden on industry as to stifle productive enterprise.

While the imposition of liability was justified in terms of a finding that someone was "at fault", it soon became clear that the primary and overriding purpose of the tort of negligence was not, like the intentional torts, to punish individual wrongdoing and suppress anti-social behaviour. Instead, the primary function of negligence liability was to compensate deserving injury victims for their losses, and spread the cost as widely as possible over a broad section of the community. So the concept of actionable negligence was severed from any notion of personal moral culpability,[60] and the courts progressively extended the doctrine of vicarious liability which holds blameless employers liable for the tortious acts of their employees. The courts also accepted that contracts of insurance against future liability for negligent (but not intentional) tortious conduct were valid and enforceable. Of course, vicarious liability and liability insurance substantially diminish the punitive and deterrent impact of liability on the careless individual. But these doctrines do promote the compensatory function by giving successful plaintiffs access to financially responsible defendants capable of paying the damages awarded against them.

Initially, the range of situations which the courts would recognise as attracting a legal duty of care was strictly limited.[61] But the apparent ability of the insurance industry to respond immediately to new risks of liability encouraged the courts to extend the scope of negligence liability, and by the 1940s it was generally accepted that satisfaction of the *Donoghue* v *Stevenson*[62] "neighbour" test of

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60 In *Vaughan* v *Menlove* (1837) 3 Bing NC 468, 475, 132 ER 490, 493 it was decided that actionable negligence was to be determined by reference to the external objective standard of the "reasonable man of ordinary prudence", and the fact that the individual defendant was personally incapable of appreciating the risk associated with his conduct, or of responding adequately to that risk, did not relieve him of legal responsibility for resulting harm.

61 And contributory negligence operated as a complete defence – unless a claimant was entirely blameless, he could not expect others to restrict their activities in his interests, and he was undeserving of relief. The Contributory Negligence Act 1947 substituted apportionment of loss according to comparative responsibility.

62 [1932] AC 562.

reasonable foreseeability of harm was sufficient to establish a legal duty of care in respect of positive acts causing physical harm.

But this regime was badly flawed. Once compensation of injury victims and wide distribution of accident costs was firmly established as the overriding purpose of the tort of negligence, it became apparent that a system of negligence liability backed by comprehensive liability insurance was a grossly unfair and economically wasteful means of achieving that end. The need to prove actionable negligence was seen merely as a capricious and costly barrier to access to compensation funds financed by a form of indirect taxation levied on the whole community. Only a very small proportion of accident victims were fully compensated for their losses, while the cost of administering the system was extraordinarily high.

In 1972 Parliament responded to these concerns by removing common law rights of action in respect of personal injuries, and substituting a state-operated system of compulsory first party insurance that provides automatic compensation of income losses resulting from personal injury irrespective of the cause of the injury and regardless of fault.[63] Commencement of the Accident Compensation Scheme in 1974 marked final recognition that the tort of negligence did not provide an adequate response to the central concern that had spurred its initial development and had remained the focus of its attention – compensating victims of serious personal injury. In 1974 most observers thought that the Accident Compensation Scheme sounded the death-knell for the tort of negligence - deprived of its core subject-matter it would simply fade into obscurity. In principle, the action remained available in respect of damage to property and purely financial loss. But both of these areas were of minor practical significance.

The *Donoghue* v *Stevenson* duty of care had been applied to property damage without any real reflection, possibly because the original trespass action had treated damage to tangible property in the same way as injury to the person. But in practice, compensation for accidental damage to property was regulated by an efficient system of first party insurance and the negligence action had long been reduced to a peripheral role in this area. So it remains today. Almost all items of valuable property are covered by first party insurance, and the negligence action is no longer necessary to provide compensation for accidental damage. The few cases that do arise are usually subrogation claims by first party insurers seeking to recover their losses from liability insurers or large self-insurers. These claims represent a waste of social resources. They serve only to shift loss from one loss-spreading agency to another and the social cost involved in employing the justice system for this purpose cannot be justified.

As for purely financial loss, since a general principle of liability for *intentional* infliction of economic harm had been rejected as too restrictive of market freedom, obviously there could be little room for liability for *negligently* inflicted loss of this kind. In 1974 the only recognised exception to the long-established rule of no liability in negligence for pure economic loss was the anomalous quasi-

[63] Accident Compensation Act 1972. The Act implemented the core recommendations of the *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (the "Woodhouse Report") 1967.

contractual head of liability for negligent misrepresentation established by the House of Lords in *Hedley Byrne* v *Heller*.[64] This exceptional duty was founded on a "special relationship" between the parties marked by a voluntary assumption of responsibility by the defendant to the plaintiff for the accuracy of the statement, and reasonable reliance on the statement by the plaintiff to his detriment. While the *Hedley Byrne* principle clearly had the potential for expansion,[65] it had been confined as narrowly as possible by the English courts,[66] and in New Zealand it seemed likely to be overtaken by limited statutory extensions of contract remedies.[67]

But those of us who, in 1974, saw no future for the tort of negligence, reckoned without the judges. Many judges have a strong attachment to the law of negligence – the duty of reasonable care provides the perfect vehicle for the invigorating work of imposing their own moral standards on the community while relieving cases of individual hardship. And in 1977 the two-stage test of duty set out by Lord Wilberforce in *Anns* v *Merton London Borough Council*[68] provided our judges with a principled justification for ignoring settled precedent and embarking on a process of rapid and dramatic expansion of the scope of liability for purely economic loss. More recently, retrenchment of the scope of cover provided by the Accident Compensation Scheme gave the courts an opportunity to reintroduce the negligence action into the area of personal injury.

In relation to purely economic loss, the Court of Appeal used the two-stage *Anns* approach to first stretch and then abandon the elements of the limited *Hedley Byrne* duty. Professional advisers, business people and public authorities were held liable to plaintiffs with whom they shared no contractual relationship

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64 *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465.

65 The critical limiting concepts of "assumption of responsibility" and "reasonable reliance" were inherently uncertain, and since all purely economic loss flows from the adverse impact of the defendant's conduct on the plaintiff's existing or prospective financial relationships there was no logical basis for drawing a rigid distinction between negligent advice, and negligent acts or omissions associated with provision of other goods and services.

66 The English Court of Appeal refused to extend the *Hedley Byrne* principle beyond statements to negligent acts (*SCM (United Kingdom) Ltd* v *W J Whittall & Son Ltd* [1971] 1 QB 337; *Spartan Steel & Alloys Ltd* v *Martin & Co Ltd* [1973] 1 QB 27), and the Privy Council attempted to limit the duty to a narrow class of professional advisers (*MLC Ltd* v *Evatt* [1971] AC 793).

67 As early as 1967, the New Zealand Contracts and Commercial Law Reform Committee expressed the firm view that any deficiencies in the law's response to broken undertakings should be addressed by limited statutory extension of contract remedies rather than by judicial expansion of the tort of negligence: *Report on Misrepresentation and Breach of Contract* (1967) para 9.43. Legislative adoption of the Committee's recommendations resulted in statutory extension of contract damages to victims of pre-contractual misrepresentations and abolition of tort liability for such misrepresentations: Contractual Remedies Act 1979, s 6. A later report by the Committee on *Privity of Contract* (1981) resulted in the Contracts (Privity) Act 1982 which allows a designated third party to enforce a contractual promise made for his or her benefit.

68 [1978] AC 728.

for failing to confer expected financial benefits,[69] and for failure to protect their economic interests from harm at the hands of third persons.[70] The legal duty in these cases seems to be founded on a relationship of power and dependence – the defendant has the power or capacity to affect the plaintiff's economic interests and people in the position of the plaintiff rely in a general, non-specific way on the defendant to exercise that power carefully for their benefit or protection. Such a relationship gives rise to "reasonable expectations" of protection or advancement that the courts will recognise and enforce. Of course there is no meaningful sense in which defendants in these cases can be viewed as having voluntarily assumed any obligation to the plaintiffs – the duty is simply imposed by the court in order to achieve a "fair" outcome.

Once professionals and business people were held liable in negligence for economic loss suffered by non-contracting third parties, it seemed unfair to deny the advantages of suing in tort (a longer limitation period and availability of general damages) to their clients who had, after all, paid for careful performance of a task. So an imposed tortious duty of care now exists concurrently with a contractual obligation to exercise reasonable skill and diligence. Apparently, the general duty imposed by the tort of negligence is the *primary* obligation, and the existence of a contract is relevant only to the extent that the parties may, by agreement, exclude or limit it.[71]

Yet it remains very difficult to predict the outcome of individual cases. Sometimes the fact that the plaintiff has a remedy in contract against the defendant,[72] or a third party,[73] or even had the opportunity to bargain for contractual protection of the interest in question,[74] may justify denial of a tortious duty of care. And on two recent occasions the Court of Appeal reverted to strict application of the *Hedley Byrne* criteria in an attempt to restrict the scope of the duty owed by professionals to non-clients.[75] But as soon as it was confronted with a "hard" case involving claims by "vulnerable" non-commercial parties, the Court immediately abandoned these more stringent criteria for liability.[76]

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69 Eg *Meates* v *Attorney-General* [1983] NZLR 308; *Gartside* v *Sheffield Young & Ellis* [1983] NZLR 37; *Comptroller of Customs* v *Martin Square Motors Ltd* [1993] 3 NZLR 289.

70 Eg *Stieller* v *Porirua City Council* [1986] 1 NZLR 84; *Craig* v *East Coast Bays City Council* [1986] 1 NZLR 99; *Deloitte Haskins and Sells* v *National Mutual Life Nominees* (1991) 3 NZBLC 102,259, rev'd [1993] 3 NZLR 1 (PC); *Connell* v *Odlum* [1993] 2 NZLR 257; *Invercargill City Council* v *Hamlin* [1994] 3 NZLR 513, aff'd [1996] 1 NZLR 513 (PC); *Price Waterhouse* v *Kwan*, 16 December 1999, CA 80/99.

71 See *Riddell* v *Porteous* [1999] 1 NZLR 1, 9; and *Price Waterhouse* v *Kwan*, ibid, where the Court of Appeal preferred the decision of the House of Lords in *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145 to its own previous decision in *McLaren Maycroft & Co* v *Fletcher Development Co Ltd* [1973] 2 NZLR 100.

72 *Kavanagh* v *Continental Shelf Company (No 46) Ltd* [1993] 2 NZLR 648.

73 *South Pacific Manufacturing Co Ltd* v *New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.

74 *South Pacific*, ibid, 309 per Richardson J; *Brownie Wills* v *Shrimpton* [1998] 2 NZLR 320, 326 per Gault and Blanchard J J.

75 *Brownie Wills* v *Shrimpton* [1998] 2 NZLR 320; *Boyd Knight* v *Purdue* [1999] 2 NZLR 278.

76 *Price Waterhouse* v *Kwan*, 16 December 1999, CA 80/99.

Decisions on the liability of public officials exercising discretionary functions of a protective character follow the same erratic course.[77]

In its application to purely economic interests the negligence duty of reasonable care lacks any coherent basis in either principle or policy, and is hopelessly unpredictable in its application. Moreover, it is quite unnecessary. The legitimate claims of deserving victims of purely economic loss are adequately met by the intentional economic torts, contractual and equitable obligations, and a cluster of statutory remedies specifically directed at inequality of information and bargaining power in the market place.[78] Judicial imposition of a super-added negligence liability of uncertain incidence and content serves only to complicate and extend the process of litigation and disrupt the perfectly sensible allocations of risk and responsibility achieved by contractual agreement and other more specifically focused obligations and remedies. Indeed, the persistent notion that the negligence duty is an imposed obligation of general scope encourages a judicial tendency to incorporate negligence concepts into other causes of action, and threatens the coherence and integrity of the law of civil obligations.

Finally, the Court of Appeal's indecisive response to personal injury claims at the margins of the Accident Compensation Scheme has generated a great deal of costly and unnecessary litigation. After first encouraging claims for exemplary damages based on common law negligence[79] the Court retreated, holding that "negligence simpliciter" will not support an exemplary claim, and noting that since negligence is an unintentional tort, successful cases will be rare indeed.[80] Yet, inexplicibly, the Court declined to finally decide whether or not an action pleaded in negligence could ever support a claim for exemplary damages. Then, after straining the statutory language to preserve a claim for compensatory damages for "mental injury" suffered by a secondary victim of negligent conduct,[81] the Court felt obliged to stem the resulting flood of claims by insisting that an action will not lie unless the effect on the mind of the victim is so severe as to amount to a "recognisable psychiatric disorder or illness".[82] This reintroduction of the negligence action into the field of personal injury is wholly undesirable. Not only is it productive of much socially wasteful litigation; by providing a handful of victims with more generous compensation, it threatens the integrity of the Accident Compensation Scheme.

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77 Compare *Invercargill City Council* v *Hamlin* [1994] 3 NZLR 513; *Fleming* v *Securities Commission* [1995] 2 NZLR 514; *Attorney-General* v *Prince and Gardner* [1998] 1 NZLR 262; and *B* v *Attorney-General* [1999] 2 NZLR 296.

78 See Contractual Remedies Act 1979, s 6; Credit Contracts Act 1981; Fair Trading Act 1986, ss 9, 43; Consumer Guarantees Act 1993.

79 And apparently accepting that deliberate acts of sexual abuse can be pleaded in negligence in order to extend the limitation period: *S* v *G* [1995] 3 NZLR 681; cf *Stubbings* v *Webb* [1993] AC 498, 508 (HL).

80 *Ellision* v *R* [1998] 1 NZLR 416, 419. See also *van Soest* v *Residual Health Management Unit* [2000] 1 NZLR 179, 183.

81 *Queenstown Lakes District Council* v *Palmer* [1999] 1 NZLR 549.

82 *van Soest* v *Residual Health Management Unit* [2000] 1 NZLR 179. Unbelievably, the Court did not go on to make a clear ruling on whether the additional requirements of temporal and physical proximity imposed by the English courts apply in New Zealand.

In fact, the practical utility of the independent tort of negligence was exhausted in 1974 on commencement of the Accident Compensation Scheme, and it should have been formally abolished then. That omission should now be corrected.

Conclusion

The traditional formal categories of civil obligation and their associated remedial regimes are not mere accidents of history that serve only to obstruct achievement of just outcomes. In fact the traditional heads of obligation protect different fundamental human values and interests and promote quite distinct social purposes. And the nature of those values and purposes dictate the form of the remedies available for breach of the particular obligation. So the traditional categories of obligation and their associated rules form a coherent set of norms directed at socially valuable ends. They also have the very real advantage of confining judicial discretion within narrow limits, thereby enabling the law to be applied consistently, predictably and efficiently. While governments may choose to sacrifice these values in pursuit of short-term ideological or political goals, that is not an option open to a judge whose sworn duty is to do justice *according to law.*