

Tettenborn, 'From chaos to cosmos – or is it confusion?', [2002] 2 *WEB JCLI*
<<http://webjcli.ncl.ac.uk/2002/issue2/tettenborn2.html>>

From chaos to cosmos – or is it confusion?

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Summary

In this article I look at attempts which have been, and are being, made to synthesise certain aspects of the English law of obligations or even to codify them. I point out that while some of these attempts have been successful, a number of others have created serious problems of their own. The conclusion is that before one tries to encapsulate the rules of English (or even European) law into ever more abstract propositions, these difficulties should be borne in mind and a degree of scepticism employed.

Introduction

This paper concerns a vital theme in judge-made and other law: the creation of order from legal chaos. I have discussed the matter in one particular context – the law of obligations. My theme is that, while many efforts at synthesis have been brilliantly successful, others – perhaps more than might appear at first sight – have not. It may be that generalisation simply creates unclarity. The supposed underlying principle may be too widely or too narrowly stated. Or there may simply be no coherent principle to find in the first place.

Starting off a discussion of this sort is hardly difficult. In any legal system worth the name, legal principles have always developed inductively, and by a process of increasing abstraction. If Result X applies in Cases A and B, why – lawyers and their clients have always asked – should it not also obtain in case C, where the relevant facts are (more or less) similar? General propositions, after all, are always neater, more convincing and easier to deal with than a congeries of random rules created haphazard by experience and the accidents of litigation. In addition, of course, they

are easier to defend from the point of view of abstract justice. Like cases, after all, ought (all other things equal) to be decided alike: and the more abstract the proposition, the easier it is to defend from critics. No wonder, therefore, that jurists, or at least the more thoughtful ones, have always preferred cosmos to chaos and set themselves to thinking out and assembling general rules from disparate and at times unpromising single instances. Historical examples abound. The *praetor peregrinus*, who developed a *ius naturale* of contract from the specific forms reserved for Roman citizens, is a clear classical example. More recently there were Portalis and his collaborators who, faced with the mess of Roman sources and *droit coutumier* that passed for law in eighteenth-century France ¹, formed the touching idea that all this could be distilled into a collection of elegant if abstract principles of contract, delict and so on, so as to allow the notional citizen, armed merely with his slim *Code Civil*, to know precisely where he stood ². And, of course, at the other end of the scale stand the Pandectists and others whose scholarship created the massive intellectual abstractions that go to make up the Obligations section of the *Bürgerliches Gesetzbuch*.

Exactly the same thing goes for the common law. Think of the great cases which gathered together large numbers of previous authorities, processed them and effectively prevented us having to think about them again: cases, in other words, that came to provide the clear starting-point of any discussion. All involve, to a greater or lesser degree, a process of synthesis and rationalisation. *Slade's case* (1602) 4 Co Rep 91a is an obvious early instance, producing something like a recognisable law of contract out of the dry bones of *assumpsit*. Again, take the economic torts. Filching other peoples' servants or workmen (e.g., *Hart v Aldridge* (1774) 1 Cowp 54; *Blake v Lanyon* (1795) 6 T.R. 221) and one or two other cases of interfering in someone else's business (for example, by shooting his customers, as in *Tarleton v McGawley* (1793) 1 Peake 270) had always been recognised as wrongful, but simply as isolated instances of delictual liability. In 1851 *Lumley v Gye* (1853) 2 E. & B. 216 took these materials and others like them, and used them as the foundation for an entirely abstract tort: knowingly inducing any breach of contract without good reason became a wrong in itself. Some time later, the year 1868 saw with *Rylands v Fletcher* (1868) L.R. 3 H.L. 330 the synthesis of a curiously mixed bunch of strict liability rules into something like a workable principle of social risk (albeit one which still at times defies close analysis and was arguably inappropriate even at the time). During the First World War, a slightly skewed collection of House of Lords cases starting with *Horlock v Beal* [1916] A.C. 486 hammered out a modern doctrine of frustration from a long series of rather disparate decisions from the previous century (we will have more to say about this below). The list goes on: *Bell v Lever Bros* [1932] A.C. 161 and *Solle v Butcher*

¹ As Voltaire succinctly put it, "Un homme qui voyage dans ce pays change de lois presque autant de fois qu'il change de chevaux de poste" – *Dictionnaire Philosophique*, V Coutumes.

² Cf Schwartz 1956, Chs. 2, 4; Halpérin 1992, Ch.9.

[1950] 1 K.B. 671 on how error affects contractual liability; *Donoghue v Stevenson* [1932] A.C. 562 on general negligence liability; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465 on careless advice; *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 on material breach of contract; *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 on a wide-ranging defence of change of position in restitution; and so on.

Nor can we forget the synthesising power of statute. Compare the tangle of rules on causation, “last clear chance” and so on with the simple-sounding comparative fault regime of the Law Reform (Contributory Negligence) Act 1945: or the rules on invitees and licensees and the varying duties owed to each with the concept of the common duty in the Occupiers’ Liability Act 1957. Similarly, the Unfair Contract Terms 1977 was able to set the doubts of the common law³ at rest by introducing, where consumer protection needed it, the general idea of “inequality of bargaining power”.

Difficulties

In all these cases the process has been one of simplification; of generalisation; and, to some degree, of abstraction. And, very often, the attempt at improvement has been spectacularly successful. No sane restitution lawyer wants to restore the anomaly and uncertainty bedevilling the defence of change of position before *Lipkin Gorman*; and you would have to be a very keen pettifogger indeed to hanker after the last opportunity doctrine in contributory negligence, or the impenetrable legal thicket that predated the Occupiers’ Liability Act 1957.

Yet, on further thought, doubts still nag. We memorialise our successes and forget our failures; and actually the record of such generalisation is much patchier than it looks. For every success story which makes its way into the law teacher’s canon, there is a surprising number of other attempts at synthesis that have failed outright, or have gone off at half-cock, or have simply been quietly abandoned, leaving little more than troubled lawyers and a few litigants impoverished in direct proportion to their advocates’ gain. Now, these unsuccessful attempts to bring order to chaos can, if anything, be more interesting than the successful ones. Apart from anything else, they may help us to see where attempts to rationalise the law are likely to succeed.

Over-generalisation and under-specificity

I have taken four examples to support my argument. The first, since transmuted into a historical footnote (in England, at least), is *Lloyds*

³ Largely introduced by Lord Denning: e.g. *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400, 416; *Re Brocklehurst, dec’d* [1978] Ch 14, 31.

Bank v Bundy [1975] Q.B. 326. In case anyone needs reminding what happened, a ne'er-do-well customer of the bank had run out of credit to prop up his ailing business. The bank leant heavily on his elderly father, and in due course the latter without further advice mortgaged his farm to cover his son's further outgoings. Things went from bad to worse, the bank sought to cash in on its security, and the father sought relief. Lord Denning M.R., like the rest of the court, had no difficulty in saying that orthodox undue influence doctrine prevented the bank from holding the mortgage, and he was clearly right. But, having done so, he went on to deprecate the idea of maintaining the existing learning on duress, undue influence, unconscionable bargains and similar doctrines as separate ideas. On the contrary: "I think", he said, "the time has come when we should seek to find a principle to unite them." And he then went on to suggest that

"through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to anyone who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other." (see p.337).

The rationalisation has an attractive ring to it. One can almost see the potential provision in a would-be English Civil Code on the European model: "Contracts are binding on the parties, save in the case of manifest unfairness, or of unconscionable advantage taken of one party's weakness, etc..."⁴, and so on. No doubt this is why the idea received a considerable welcome from the academics⁵, besides being echoed in a series of later cases dealing with personal injury settlements⁶, and indeed extended to cover restraint of trade as well⁷. Nevertheless, the whole thing turned out to be a nine-years' wonder. In 1984 it fell to Lord Scarman to administer the *coup de grâce* in *National Westminster Bank plc v Morgan* [1985] A.C. 696. There was no reason to abandon the

4 Cf. McGregor 1993. In this proposed English Contract Code (prepared for the Law Commission and published by Sweet & Maxwell in 1993), he provided in § 564:

"Improper economic advantage is taken of a contracting party when a person knows that he is under such pressure of circumstances to enter into the contract and takes unfair advantage of that pressure to obtain manifestly unfair terms."

5 See, e.g. Cheshire & Fifoot, 1972, pp.282-283; Carr 1975; Waddams 1976; Trebilcock 1976. To be fair, some commentators were less carried away: e.g. Sealy 1975.

6 *Arrale v Costain* [1976] 1 Lloyd's Rep 98; see too *Horry v Tate & Lyle Refineries Ltd* [1982] 2 Lloyd's Rep. 416. Both were agreed by plaintiffs as a result of advice provided obligingly by the defendant's liability insurers.

7 A. *Schroeder v Macauley* [1974] 1 W.L.R. 1308; *Clifford Davis Management v WEA Records Ltd* [1975] 1 All E.R. 237

separate treatment of undue influence: any general principle of inequality of bargaining power was otiose; the matter called for the precision of legislation rather than the broad brush of legal decision (see pp.707-708).

What went wrong? I suggest two things: over-generalisation, and under-specificity. As to the first, it is easy to forget that contracts, and the position in which contractors might find themselves, vary far more than legal theorists and academic commentators care to admit⁸. More importantly, so do the moral and other values lying behind particular exceptions to freedom of contract. A very real difficulty with *Bundy* was that it tried to conflate rules with widely differing purposes. The rules of economic duress are aimed at upholding commercial morality; unconscionability and coercion *à la Williams v Bayley* (1866) L.R. 1 H.L. 200 at preventing undue exploitation of human frailty; and undue influence at suppressing the misuse of opportunities to control others' actions. These aims may no doubt have some very vague principle in common: but they remain substantially different. With such varied material, it is hardly surprising that a uniform solution should be hard to make stick.

The other problem, under-specificity, is not simply another word for uncertainty. It is rather that whereas undue influence, duress, and so on have relatively precise meanings, inequality of bargaining power (or unconscionability) on its own is a concept which, like a number of others used by lawyers, does not⁹. If a litigant argues that unfair advantage has been taken of her inexperience in financial matters, it is clear what she is alleging. True, there is obviously no "bright line" between what amounts to unfair advantage and what does not. Nevertheless, it is clear what enquiries the tribunal has to make. Alleging unconscionability or "inequality of bargaining power", by contrast, merely invites further definition. Faced with such an allegation, in practice all one can do is to ask "What kind of unconscionability is being alleged?" – which, of course, takes one straight back to the individual concepts from which the original generalisation was derived.

Bundy's case is a very good example of the difficulties of over-generalisation and insufficient specificity. There are, of course, others. *Anns v Merton L.B.C.* [1978] A.C. 728, extending *Donoghue v Stevenson* [1932] A.C. 562 to cover negligent licensing of building work, was one. The case involved a claimant who deserved some sympathy. She was a

⁸ As Weir 1976 at p.34 pungently put it: "Different transactions call for different rules, even if they are all contracts ... it is not a merit of the common law to fail to distinguish what a child can tell apart, who knows better than to offer 'rent' to the bus-conductor or a 'premium' to his barber".

⁹ As American lawyers have found when trying to apply a similar provision, § 2-302 of the U.C.C. Another example is the "good faith" provision in § 242 of the German Civil Code: for all its apparent simplicity, German lawyers have had to go to astonishing lengths to unravel its meaning, and to delineate those practices which count as lack of good faith.

consumer (or at least acting in a private capacity). She was left with a dangerous house and the ruinous expense of making it habitable. So the decision was understandable. But the principle invoked in that case was entirely inappropriate where consumer protection and safety considerations of this sort were absent: which was largely why a dozen or so years later the principle had to be discountenanced by the House of Lords in *Murphy v Brentwood D.C.* [1991] 1 A.C. 398¹⁰. As for under-specificity, an interesting example comes in the idea, often proposed but not yet acted on in English law, that there should be an obligation of “good faith” in contract (see, e.g., Beatson 1995, Chs. 1, 9; Collins 1994). In abstracto, such an idea seems admirable. But, once again, it is worryingly indeterminate. Asked to define it, one is thrown back on more specific instances, such as the idea that certain contractual rights should have to be exercised reasonably; that one should not be allowed to take advantage of a contract when one has knowingly concealed relevant information from the other party; and so on.

Mistaken identification of a general principle

My second example concerns a rather more straightforward difficulty inherent in attempts to reduce chaos to order. Before assuming that a series of disparate authorities can be reduced to a simple expression, it is as well to think whether the reasons behind those authorities actually support a generalisation of this sort. The instance I have chosen to illustrate this may surprise some people. It is *Hedley Byrne* [1964] A.C. 465, and the subsequent cases based on it that have extended the tort of negligence to cover professional liability. At first sight this seems an unpromising subject for attack. Who could argue with the idea that there ought to be a potential liability for negligent misstatement, even where the claimant cannot show a contract or alternatively some relationship cognisable in equity – particularly in view of the very constricted nature of the English law of contract? Who indeed ... but this misses the point. The difficulty, as I see it, does not lie in the bald proposition *that* such a liability should exist. Where a person gives advice to another on the basis that that other can rely on it and hold the giver responsible if it is negligent, clearly the law must provide a remedy. Thus I have no quarrel with the decision itself. The problem lies rather in the failure of courts to articulate precisely *why* the liability should exist. Since *Hedley Byrne*, we have a veritable jungle of cases concerning the duty of care as it affects the professional liability of accountants, solicitors and others. Yet even after all that, including nearly half-a-dozen cases in the House of Lords¹¹, advising as to whether a duty of care is owed has become at times well-

¹⁰ Interestingly enough, some Australian courts have been prepared to develop the common law in a more focused manner, and to accept *Anns'* case while limiting it effectively to private buyers of dwelling-houses. A most instructive example is *Fangrove Pty Ltd v Tod Group Pty Ltd* [1999] 2 Qd.R. 236.

¹¹ *Smith v Eric S. Bush* [1990] 1 A.C. 831; *Caparo Industries plc v Dickman & Ors* [1990] 2 A.C. 605; *Marc Rich & Co AG v Bishop Rock Marine* [1994] 1 W.L.R. 1071; *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145; *White v Jones* [1995] 2 A.C. 207.

nigh impossible. Although judicial reasoning almost invariably starts with *Hedley Byrne*, the guidance offered by that case in determining the duty of care question.

The difficulty, of course, is this. From a reading of *Hedley Byrne* itself, and its sequels such as *Caparo v Dickman* [1990] 2 A.C. 605, *White v Jones* [1995] 2 A.C. 207 and *Smith v Eric S. Bush* [1990] 1 A.C. 831, what comes across clearly is that the courts regard the *Hedley Byrne* principle as just an extension of ordinary tort liability, albeit one calling for careful treatment. Talk of “voluntary assumption of responsibility”, “special relationships” or the purposes for which advice is given sounds well *in abstracto*. Nevertheless, what we have in effect is liability based on a high degree of foreseeability, subject to a let-out in the case of off-the-cuff remarks, explicitly unwarranted advice, and situations likely to spawn practical problems such as open-ended or over-expansive liability. Witness, in particular, the repeated citation of Denning L.J.’s judgment in *Candler v Crane Christmas* [1951] 2 K.B. 164, which had put liability on precisely this basis, and the repeated emphasis on the need for some kind of safety-catch to be fitted to notional floodgates. But all this, it is submitted, is simply misconceived. It forgets that in the *Hedley Byrne* context, tort is doing not one job but two, and different rules ought to apply to each. One function parallels the rest of the ordinary law of “social responsibility” negligence. Subject to practical or other limits, we must pay for the damage we culpably do, and it should make no difference that the medium is words not actions, or (at least to some extent) that the only damage is to someone else’s bank balance rather than to their person or tangible property. *Minister of Housing v Sharp* [1970] 2 Q.B. 223, the case where a Land Registry blunder annihilated the Ministry’s cast-iron claim against a householder, is a perfect example. Here, by all means base liability on (modified) foreseeability of the claimant, his loss, etc., with one eye on preventing tort law from getting out of hand. The issue is really the same as in *Donoghue v Stevenson*, even though it may need more sensitive handling. But remember that in practice this is a rather rare scenario. Read any book on professional negligence, and you will realise that most *Hedley Byrne* claims are not “social responsibility” actions at all, but rather complaints about quality of service¹². They concern not dangerous services but bad ones; to take the analogy of the distribution of goods, they parallel not so much *Donoghue v Stevenson* but ss.13-14 of the Sale of Goods Act 1979. The only reason they fall within the law of tort is that often services are in substance rendered to someone who for whatever reason (privity, consideration, etc) does not have a contract with the person providing them, and that some means has to be found to allow that person to take the benefit of a guarantee of proper execution – if that is the intention of the provider. Now, in the case of sale of goods it has always been acceptable for a supplier to say “Yes, we admit the goods were defective.

¹² Indeed, this is true of every one of the House of Lords cases referred to in the previous note.

We also admit that it was our fault, and that we should have known you would suffer loss if you relied on them. But you still shouldn't be able to sue us, because we didn't supply them *to you*." That is the point of decisions like *Simaan v Pilkington (No 2)* [1988] Q.B. 758, the case of the discoloured glass that – as a building company found to its cost – would not quite do for the Sheikh's new palace in Abu Dhabi. In exactly the same way, I would suggest, the practice (if not the theory) of *Hedley Byrne* liability is moving in a similar direction. The question is not really foreseeability in any guise, but "to whom were the services rendered?"¹³ Take *Caparo v Dickman* [1990] 2 A.C. 605 and ask an obvious question. Why was Swraj Paul not allowed to dip into Price Waterhouse's pocket to make good his losses when he found, on taking over Fidelity plc, that he had bought a pup? It wasn't that he was unforeseeable as a plaintiff (the defendants knew perfectly well about the possibility of a bid); nor was there an insuperable problem of open-ended liability (the Court of Appeal had dealt with that by confining the right to sue to existing shareholders – see [1989] Q.B. 653). The House of Lords decided the issue by reference to the intentions and purposes of auditors' reports: reasoning that may sound convincing, but, if one may say so, fails really to answer the question. Whose intention (or purpose) mattered? The defendants'? The claimants'? Parliament's? What sort of intention are we talking about? Actual? Implied? Imputed? And so on. But strip away the verbiage, and there is a straightforward answer to the problem. The auditors had provided a service, but they had provided it to Fidelity and not to Caparo. Save that the case concerned services and not goods, Caparo were in exactly the same position as the Simaan Engineering Co had been in *Simaan v Pilkington* [1988] Q.B. 758. They had relied on something supplied to a third party; they had been disappointed; and they failed for (it is suggested) the same reason.

For another example, take the position of a sub-agent. Normally he will not be under any duty as regards quality of service *vis-à-vis* the ultimate principal. He works for, and answers to, the person appointing him alone (see, e.g., *Pangood Ltd v Barclay Brown & Co Ltd* [1999] P.N.L.R. 678, holding that an insurance sub-broker owes no duty of care to the ultimate client). Even though he may know that the ultimate principal stands to benefit from his efforts, the latter cannot sue because they were not provided *to him*. But exceptionally the case may be different. Suppose a Lloyds agent is employed to look after the account of a particular Name, but technically he acts as a sub-agent. Here, whatever the legal form, he is in substance acting directly for the Name: from which it is hardly surprising that the House of Lords has held in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 that he owes a direct duty of care.

¹³ In rare cases this is made clear. See, for example, *Kapfunde v Abbey Life* [1999] Lloyd's Rep. Med. 48, where a company doctor examining a prospective employee for signs of illness was held to owe no duty to the employee. The main reason given was that the latter was not the doctor's patient, i.e., not the person to whom the services were being rendered.

Failure to understand the underlying principle

The next reason for failure which I would like to highlight is less forgivable. It is difficult not to believe that at times our judges, in trying to craft general principles from of a confusing congeries of conflicting case-law, have simply failed adequately to understand it or the principles behind it. This is a hard charge, but I think it can be made to stick. An instance, it is submitted, is the contractual doctrine of frustration.

It is a common misconception that frustration as we know it originated with *Taylor v Caldwell* (1863) 3 B. & S. 826, the case of the impresario and the burnt-down theatre, and the abandonment from then on of the old “hell and high water” doctrine of *Paradine v Jane* (1647) Ayleyn 26. The reality, if one looks at it closely, is less tidy. There were actually quite a number of scattered nineteenth-century and older authorities, of which *Taylor v Caldwell* was just one, allowing a contractor to escape liability on the basis of supervening impossibility¹⁴. There were in addition other cases which said, understandably, that where one party failed to perform his side of a contract through no fault of his own, the other party was himself excused¹⁵. The real origin of frustration as a separate doctrine lay in a series of decisions in the First World War which collected these older cases about excuses for non-performance, “rationalised” them and transmuted them into the modern idea that a frustrating event displaced the contract itself. For example, a series of venerable decisions said that an employee had no claim on his employer if he was prevented by no fault of his own from doing his job for an appreciable time and was sacked as a result¹⁶. There was no difficulty about this, since it reflected ordinary contract doctrine: if unable, albeit blamelessly, to provide his side of the bargain, the employee could not make the employer perform his¹⁷. There was little, if any, suggestion that the dissolution of the whole contract was in issue¹⁸. *Horlock v Beal* [1916] A.C. 486, a 1916 case in the House of Lords, raised exactly this point – could sailors claim wages for time spent languishing in German internment camps after their ships had been seized, or had their employers effectively ended their right to be paid by discharging them? The House duly held they had no claim from the moment of internment: what is interesting, however, is Lord

14 E.g. *Brewster v Kitchell* (1697) 1 Salk 198; *Avery v Bowden* (1855) 5 E. & B. 714; *Baily v de Crespigny* (1869) L.R. 4 Q.B. 180.

15 E.g. *Tarrabolchia v Hickie* (1856) 1 H. & N. 183 and *Jackson v Union Marine* (1874) L.R. 10 C.P. 125 (both charterparty cases); *Melville v de Wolf* (1855) 4 E. & B. 844 (mariner’s wages not payable during time when mariner prevented from serving).

16 E.g. *Melville v de Wolf* (1855) 4 E. & B. 844, above.

17 E.g. *Poussard v Spiers* (1876) 1 Q.B.D. 410.

18 Save possibly in the case of trading with the enemy: e.g. *Esposito v Bowden* (1857) 7 E. & B. 763. But this was always a special case: witness *Ertel Bieber v Rio Tinto* [1918] A.C. 260, holding that even express stipulation could not override the dissolutive effect. Stoljar argues (*History of Contract at Common Law* (Canberra 1974)) that the “dissolution” theory appeared in *Geipel v Smith* (1872) L.R. 7 Q.B. 404, where a shipowner prevented from loading for six months did not have to load thereafter: but this case seems better explained on the basis of a reasonable interpretation of the obligation undertaken.

Loreburn's opinion in this case. He read the older cases as embodying the proposition that prolonged inability of one or other side to perform had the effect of ending, not simply the other side's duty to accept performance, but the contract as a whole; and this, he said, was the reason for the sailors' inability to sue (see p.***). Now, this was a major change: it quietly shifted frustration from "excuses for non-performance" where it belonged, to "discharge of contracts" where it did not. In *Horlock v Beal* the change actually made no difference: even if the contract had not been terminated, the seamen had no claim under it anyway. But in later decisions it mattered. Take, for example, *Tamplin v James* [1916] 2 A.C. 397. A tanker was requisitioned as a troopship for a substantial chunk of a five-year charter. Since compensation from the Crown was generous in those days, and went to whoever had the use of the ship at the time, the charterers naturally claimed that they had the right to the money. On the basis of *Horlock v Beal*, it was accepted by the House of Lords that the charterers' right depended on whether there had been a frustrating event: if there had not they would win, but if there had, then the contract would be at an end and the right to the ship would have reverted to the owner. But on the basis of the old impossibility cases this seems very odd. If I am prepared to pay you for the right to use a ship despite the fact that you cannot provide it because the Government has taken it, why should I not be allowed to do so? Since the *Tamplin* case, the theory of termination by frustration has continued to show its baneful influence: in the idea that a contract can be discharged despite the belief that both parties think it continues in force¹⁹; in the idea that the doctrine of impossibility must be confined narrowly because if it does apply the drastic consequence follows that the whole contract collapses; and in the problems where one party to a contract has attempted to use his own wrongdoing to argue that the contract cannot be frustrated because the alleged event is self-induced²⁰.

Frustration is not, of course, the only instance of woolly thinking leading to inappropriate generalisation. The doctrine of deviation in carriage of goods by sea is another obvious one. The straightforward and absolutely comprehensible cases holding that a bailee became an insurer if he did as he should not with the goods²¹ was shoehorned into the law of termination of contracts for breach of condition²², with predictably

19 Thus neutralising an arbitration agreement, for example: *Hirji Mulji v Chong Yue SS Co* [1926] A.C. 497. This impeccably logical piece of nonsense eventually had to be put right by statute: Arbitration Act 1996, s.7.

20 In particular, *Hare v Murphy Bros Ltd* [1984] ICR 603 and *F. C. Shepherd Ltd v Jerrom* [1987] Q.B. 301, where workers imprisoned for misconduct tried to argue – with logic but no merit – that their contracts of employment must have continued in force to allow them to sue for unfair dismissal, since any alleged frustration had been self-induced (by themselves).

21 For example, *Davis v Garrett* (1830) 6 Bing. 716. The principle can be traced back at least to dicta in *Coggs v Bernard* (1703) 2 Ld. Ray. 909, 913.

22 Especially *Joseph Thorley v Orchis Shipping Co Ltd* [1907] 1 K.B. 660 and *Hain SS Co v Tate & Lyle* (1936) 41 Com.Cas. 350.

shambolic results²³. In another instance, the rule that anyone could sue for conversion of goods if he had an immediate right to possess them at common law was extended without thinking to mere equitable owners, again with massive destabilising potential²⁴; and there are others.

Abstraction for abstraction's sake

The fourth problem as often as not goes entirely unnoticed. At times, the desire to create a logical whole has, as it were, taken over and as a result simply glided over important and valuable doctrinal distinctions: abstraction has been pursued for abstraction's sake. A nice example of this comes from hornbook contract law, and in particular the rule that one could not enforce a contract if one was not a party or (until 1999) had not given consideration. It never seemed to worry students or others that a number of the stock authorities here did not involve attempts to enforce a contract at all, but rather either purported waiver of an existing contractual right (for example, release of a debt and the rule in *Foakes v Beer* (1884) 9 App. Cas. 605), or alternatively an attempt to take advantage of an exception clause in a contract (the problem in *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446). In both these situations, it had simply been assumed without discussion that the requirements for creating binding contractual rights should equally apply to their cancellation or modification, and to the question whether they could be relied on defensively when incorporated in an exception clause. But however satisfying the abstract proposition (contract requires consideration: no-one can rely on a contract if he has not given consideration) a moment's thought shows that the point is by no means obvious. The arguments for demanding formalities or other prerequisites to create contractual relations where none existed before are strong. Contractual obligation, especially gratuitous contractual obligation, should not be lightly inferred. But the case is far weaker where what is claimed is a mere variation of a contract, or reduction of a sum already owing (as other systems of law accept). The same goes for third-party reliance on exception clauses: at least where the clause is known to and relied on by the beneficiary, there is a strong argument for the application of *volenti non fit injuria*, or some similar doctrine²⁵, whatever the status of the beneficiary as regards the contract as a whole.

Conclusion

23 For example, the odd idea that a deviating shipowner who delivered the cargo safe and sound could not claim the contract freight, the contract having disappeared – *Hain SS Co v Tate & Lyle* (1936) 41 Com.Cas. 350, 368-369 (Lord Wright) – or that terms protecting him from liability could not apply even after the ship had arrived at its destination (*Joseph Thorley v Orchis Shipping Co Ltd* [1907] 1 K.B. 660).

24 The history of this heresy is nicely exposed in *MCC Realisations Ltd v Lehman Bros* [1998] 4 All E.R. 675.

25 As Lord Denning, to his credit, pointed out when dissenting in *Midland Silicones*: [1962] A.C. 446, 488 *et seq.*

What lessons can be drawn from all this? In a way, the answer is obvious. Despite its attraction to law students and academics alike, legal generalisation should be approached with some caution. Like marriage, it is not something to be undertaken “lightly, wantonly or inadvisedly”. Before attempting to draw together a collection of single instances and create some all-encompassing rule out of them, it is as well to consider (a) whether one has actually understood the materials concerned; (b) whether there is sufficient commonality between them, so as to avoid the risk of obliterating important distinctions; (c) whether the existing rules in fact serve a common purpose; and (d) whether one is not simply substituting some amorphous and uninformative principle for structured and reasoned argument.

There is, however, a further point. The idea of codifying and thereby simplifying the principles of private law we live under has always been an active one, and is becoming increasingly so with the growing influence of the European Union. The ongoing proposal for a European Contract Code (European Commission 2001) is just one example. Another, slightly less far-reaching and more on the line of the American Restatement, is the academic project for a statement of General Principles of European Contract Law. But even the great codes of France and Germany, with all their carefully thought out distillations of principle, have by no means produced a perfect solution: there are plenty of examples of provisions which are either so general as to tell us very little, or have had to be artificially cut down to avoid unfortunate results. There may equally well be dangers lurking in the current proposals. In the European Contract Law proposals, for example, the wide-ranging provision for unfair contract terms (§ 4.110) is based on the wording of the European Directive on Unfair Terms in Consumer Contracts but oddly is not even limited to consumer contracts. There is room for a fair number of difficulties here of the type described above. Again, there is an awkward proposal (to be found in § 9.303(4)) which seems to perpetuate the idea that certain frustrating events put an end to the whole contract willy-nilly; this will certainly raise some scepticism in anyone who has seen the mess this idea has already caused in English law. In short, anyone who is thinking of taking parts of English law down the same road should stop to think about such matters, and consider whether the result may not be a great deal of well-meaning effort expended for surprisingly little return.

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