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A CYCLICAL PERSPECTIVE OF THE COMMON LAW

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The thesis is dedicated to the work of Lord Cooke of Thorndon, who in New Zealand was a pioneer of the concept of an open-ended moderate approach to obligation law.

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This thesis is an attempt to use synthesis and analysis in respect of certain models of tort obligation to show that the common law has evolved and been shaped by recurring cycles. It was not possible to analyse the entirety of the wide sweep of tort obligation, so the models of trespass, trespass on the case, deceit and special relationship negligence were synthesised and then historically compared. From these models distinct recurring cycles of the common law became apparent, which alternated between expansionary and conservative stages. At one time the common law seeks a vehicle for new flexible remedies and obligations, and at another, it seeks the certainty of fixed rules. The cycle is incessant as for every swing in one direction, at a certain point on the pendulum, there will be a reaction.

This thesis explores the pathology of those cycles through such selected models, including the symptoms exhibited by the initial ad hoc characteristics of the birth of a remedy or obligation, the maturing phase of a remedy or obligation created by the emergence of categories of liability, the abstraction from such categories of a general principle, and either the over-extension of such general principle, or the narrowing of such general principle leading to the obligation's ultimate demise as a flexible vehicle of liability. In the event of the death of an obligation or remedy, as a flexible vehicle of liability, the common law will seek to find or create another avenue of flexible remedy. The thesis does not seek to investigate the reasons or causes of such cycles, but is content to examine the symptoms exhibited by the various phases of such cycles.

The initial two chapters summarise the general theory of such cyclic perspective and briefly outline the template of such cycles created by the early origins of the common law. The cycles of 'trespass' and 'deceit' show the rise and fall of those respective obligations from flexible remedies to narrow moribund obligations. The concepts upon which they were based of contra pacem and honesty were to prove excessively narrow and restrictive to survive the inevitable attrition
caused through the natural accumulation of rules. A study of the cycle of these two obligations is rewarding as they both show a complete life-span of an obligation through the various phases of a cycle up to the point of its death as an instrument of flexibility.

The protean action on the case and the modern pragmatic case-by-case negligence formula, based on the open-ended elements of 'foresight', 'proximity' and 'just and reasonableness', illustrate the problems caused by a remedy or obligation whose conceptualisation is vague and uncertain. The common law itself until 1875, apart from equity, had the ability through the action on the case to provide the common law with flexibility when needed. The closest that the common law in modern times has come to emulating the action on the case has been the remedial use of the negligence mechanism.

While the action on the case did not survive the procedural reforms of the 19th century, it had developed general rules that limited the scope of such open-ended action. These general over-arching rules are important to a study of modern negligence liability. This thesis will endeavour to show that the modern open-ended negligence formula should be limited by comparable general rules to resist the inevitable pressure upon it to define its fault component or duty mechanism too narrowly.

Synthesis by use of the tool of comparative legal history shows the constant tension in the common law between the quest for certainty through rules, on the one hand, and the ability to administer individual justice, despite the presence of a general rule, on the other. A comparison of the life cycles of the models selected shows a certain symmetry concerning the reasons and justifications advanced in constructing liability in either an expansionary or conservative phase of the common law.

A cyclic perspective of the common law treats it as a dynamic constantly moving instrument that reflects the policy moods of contemporary society. Such a view of the law is not one-dimensional
and may provide answers as to the past and present evolution of the common law and may give clues as to its future direction.

The law is stated as at the 1st day of April 1997.
# TABLE OF CONTENTS

ACKNOWLEDGEMENTS ................................................................. 1  
ABSTRACT ................................................................................. 2  
TABLE OF CONTENTS ............................................................... 5  
CHAPTER 1 ................................................................................ 11  
THE LEGAL CYCLES OF FLEXIBILITY AND RIGIDITY .......................... 11  
  Certainty versus individual justice ................................................. 13  
  The models ................................................................................ 14  
  The importance of the action on the case ....................................... 15  
  The early cycle of the common law and the life cycles of trespass, ‘deceit’, contract and negligence ........................................ 15  
  The phases of the cycles .............................................................. 17  
  Birth ....................................................................................... 19  
  Maturity ................................................................................... 20  
  Death ....................................................................................... 25  
  Expansionist policies ................................................................. 25  
  Pragmatism ............................................................................. 25  
  The common law will endeavour to reflect existing social values and policies ... 26  
  The duty of the Courts is to make law ......................................... 27  
  Conservative policies .............................................................. 28  
  The virtues of predictability ........................................................ 28  
  The importance of future action .................................................. 29  
  The constitutional objection ....................................................... 30  
  Every legal system has elements of informality and formality .......... 30  
  The broad techniques that are applied to create or inhibit a new remedy .......................... 30  
  Flexible reasons for constructing a remedy .................................... 31  
  Conservative reasons ............................................................... 32  

CHAPTER 2 .................................................................................. 34  
THE EARLY CYCLES OF THE COMMON LAW .................................. 34  
  The ad hoc phase of the early cycle ............................................. 34  
  The category phase .................................................................... 35  
  The general principle phase ....................................................... 35  
  Reaction to the conservative phase and the ability to create pragmatic remedies .......................... 37  
  The safety valves of the common law were the actions of trespass and the action on the case .......... 38  

CHAPTER 3 .................................................................................. 40  
THE CYCLE OF TRESPASS ............................................................... 40  
  The early ad hoc phase of Trespass ............................................ 40  
  Trespass invades other fields ....................................................... 41  
  The width of trespass was extended by a fiction in respect to actions for the recovery of land .................. 42  
  The categories phase ............................................................... 42  
  The abstraction of a general principle ......................................... 44  
  The expansive use of the general principle by way of a fiction ........ 45  
  The fiction creates the action on the case .................................... 45  
  The special nature of case ........................................................ 46  
  Doctrinal boundary line distinctions between trespass and case lead to a narrow abstracted principle of trespass ........................................... 47  
  The accretion of precedent defines the essential characteristics of the two actions .................. 48  
  A rigid demarcation of 'trespass and 'case': Reynolds v Clarke .......... 49  
  The final phase: Case supplants its analogue trespass .................... 52  
  The issue of concurrency of remedies ......................................... 52
Pressures build in favour of concurrency of remedy ........................................52
The conservative to liberal cycle of the concurrency issue.............................54
The rules further harden and narrow trespass ................................................55
Overview of the cycle of trespass .......................................................................57

CHAPTER 4 .............................................................................................................60

THE ACTION ON THE CASE .............................................................................60

The open-ended mechanism of case ....................................................................60
The pragmatic special basis of case .................................................................61
The rules of case .................................................................................................64
Wrong ................................................................................................................65
Damage ..............................................................................................................70
Need for a Remedy .............................................................................................71
Analogy ...............................................................................................................75

The creative powers of case ..............................................................................78
Assumpsit ..........................................................................................................78
Analogues ..........................................................................................................79
Trover ...............................................................................................................81
Trespass on the case and the various branches that it had created became the only
forms of action in common use ........................................................................82

Nominate and innominate actions on the case: The search for a general residuary
remedy ............................................................................................................83
The death of case ................................................................................................83
Attempts to build an innominate tort after the death of case ...............................84
Overview ..........................................................................................................86

CHAPTER 5 .........................................................................................................88

THE CYCLE OF DECEIT ......................................................................................88

The ad hoc phase of deceit .................................................................................89
The action on the case for deceit .......................................................................90
Deceit is equated in this phase with general wrong ...........................................91
Deceit and equity ...............................................................................................92
The creative power of deceit ............................................................................92
The category phase of deceit ............................................................................94
The action on the case for deceit creates the action of warranty .......................94
The action of warranty starts to develop categories ...........................................94
The categories of deceit ...................................................................................97

The tensions driving the need for an independent tort remedy .........................98
Deceit abstracts a general principle .................................................................99
Pasley v Freeman .............................................................................................101
The conservative objections of Grose J .............................................................101
The expansive majority ....................................................................................104
Commentary on Pasley .....................................................................................107
Rules develop ...................................................................................................108
19th century influences ....................................................................................109
Rules narrowing representations .....................................................................111
Overview of deceit rules ...................................................................................122

The stiffening of the abstracted principle .........................................................122
Warranty actions .............................................................................................123
Estoppel ..........................................................................................................124
The action on the case ....................................................................................125
Misrepresentation in equity ............................................................................126

Overview ..........................................................................................................134

The conflict over the fault element ...................................................................134
Initially there was resistance to the abstracted principle ................................135
The conflict in the Court of Exchequer .............................................................137
The influence of equity ....................................................................................140
Conflicting statements in the House of Lords ................................................141
The Court of Appeal in the 1870s ...................................................................142
The issue of liability of directors of a company .................................................. 144
Derry v Peek .................................................. 145
The Court of first instance .................................................. 146
The Court of Appeal confronts the issue of the degree of fault .................................................. 147
The House of Lords .................................................. 150
Reaction to Derry v Peek .................................................. 155
Derry v Peek was the product of a conservative cycle .................................................. 157
Deceit rigidly insists on its boundary lines .................................................. 159
Strict application of the precedent of Derry v Peek .................................................. 160
The case of Low v Bouverie obliterates the remedy of 'making representations good' .................................................. 162
Proscribing the category of negligent statement .................................................. 166
Warranty actions are limited to contract .................................................. 171
The death of deceit as an expansive obligation distorted the common law .................................................. 173
Conclusions .................................................. 175

CHAPTER 6 .................................................. 176
PARTIAL RESURRECTION THROUGH EQUITY .................................................. 176
Equity creates the capacity to erect a special case remedy .................................................. 176
Limiting the boundaries of Derry v Peek .................................................. 178
Fraud created a universal duty, but the exclusive jurisdiction was founded on a special relationship .................................................. 182
There could be a special duty of care for negligence in word: special duties were not stereotyped .................................................. 182
Comment .................................................. 185
The cases after 'Nocton' developed its principles cautiously .................................................. 186

Banbury v Bank of Montreal: On the facts it was held that there was no liability .................................................. 187

By contrast, the cycle of negligence liability in the United States was more advanced .................................................. 190

Overview .................................................. 192

CHAPTER 7 .................................................. 194
THE RISE OF TORTIOUS NEGLIGENCE .................................................. 194
The ad hoc culpa phase of negligence .................................................. 195
The two streams of negligence liability .................................................. 197
Assumption of responsibility .................................................. 198
The 19th century categories of negligence liability .................................................. 199
The climate of the 19th century .................................................. 199
The evolution of a duty of care in tort .................................................. 202
The categories of negligence develop .................................................. 204
Categories of negligence before Donoghue v Stevenson .................................................. 205
The conservative policy considerations .................................................. 206
Proscribed categories .................................................. 208
Economic loss: barred by precedent .................................................. 214
Proportionate damages .................................................. 215
Summary .................................................. 215

CHAPTER 8 .................................................. 217
THE ABSTRACTION OF A GENERAL PRINCIPLE IN NEGLIGENCE .................................................. 217
The first attempt to abstract a general principle of negligence .................................................. 218
The incremental categorisation approach of the majority .................................................. 219
The importance of Heaven v Pender .................................................. 220
Lord Esher limits his general principle .................................................. 220
Towards a general duty of care .................................................. 221
The importance of Donoghue v Stevenson .................................................. 222
The three majority speeches reveal different approaches: Open-ended categories .................................................. 223
Special duty relationships: Assumption of responsibility .................................................. 224
The general principle approach .................................................. 225
Expansive strategies ................................................................. 226
The dissent: conservative strategies ........................................... 230
Resistance to the 'neighbour principle' .................................... 233
The decision of Scrutton LJ in Farr v Butters Brothers & Co .......... 234
Other zones of proscribed liability were not immediately opened by the use of the 'neighbour principle' ........................................... 237
The liability of builders, and landlords in respect of defective premises was not to be enlarged by Donoghue v Stevenson ........................................... 237
The liability of an occupier was not extended by the 'neighbour principle' ........................................................................... 239
The 'neighbour principle' was adopted by some early cases .......... 240
Grant v Australian Knitting Mills ............................................... 241
The most expansive view of 'Donoghue': Haseldine v Daw .......... 243
Attempting to extend the category of nervous shock: Bourhill v Young ... 245
Early academic opinion did not perceive the importance of 'Donoghue' ........................................................................... 246
The classical approach ................................................................. 248
CHAPTER 9 ............................................................................... 250
ASSAULTS ON THE PROSCRIBED CATEGORY OF NEGLIGENT STATEMENT ........................................................................... 250
The 'Donoghue' principle did not affect the category of negligent statement where the damage did not involve personal injury ........................................... 250
The case of Candler v Crane, Christmas & Co .............................. 252
The majority decisions reveal a conservative approach ................. 253
The expansionist dissent of Denning LJ ........................................ 259
Conclusion ............................................................................. 265
Small steps ............................................................................. 266
Recognition that negligent misrepresentation may cause personal injury or property damage ......................................................... 266
The fiction of using a near fiduciary relationship to impose a duty of care for a negligent misrepresentation causing economic loss .......... 268
A limited exception to recovery for economic loss: The Greystoke Castle ................................. 270
The situation leading up to 'Hedley Byrne' .................................... 271
The time was ripe for negligence as a source of liability ................. 272
CHAPTER 10 ........................................................................... 273
OPENING THE CATEGORY OF NEGLIGENT STATEMENT CAUSING ECONOMIC LOSS ................................................................. 273
Analogy/precedent: The cycle of the restrictive power of Derry v Peek is finally laid to rest ................................................................. 276
A flexible use of categories to extend the law ................................... 280
The policy requirements of the category of negligent statement ........ 282
The gratuitous undertaking cases provided one of the sources of the special duty ................................................................. 284
Fiduciary duties provide another analogue ..................................... 288
The lack of remedy ..................................................................... 290
Special relationship and their requirements: proportionate damage ....... 291
Did that special duty arise here? ................................................... 293
The cycle of negligent statement ................................................. 293
CHAPTER 11 ........................................................................... 296
THE EARLY CYCLE OF THE 'HEDLEY BYRNE' PRINCIPLE IN THE UNITED KINGDOM ................................................................. 296
The early expansive applications of the principle ............................ 296
The cause of action was negligence and not representation .......... 296
The flexible nature of the principle: Ministry of Housing and Local Government v Sharp ................................................................. 298
Conservative attempts to narrow the principle by the the abstraction of a general principle ................................................................. 303
The expansionist dissenting judgment of Lord Reid and Morris ........ 307
'Evatt' is an important early case illustrating the pull of the cycle of rigidity and flexibility........................................................................................................310
Later English cases did not follow the majority decision of 'Evatt'........................................310
Criticism of the attempt to normatise 'Hedley Byrne'.................................................................311
Resistance to expanding the 'Hedley Byrne' principle to relational economic loss........................312

Conclusion................................................................................................................................316

CHAPTER 12
THE EXPANSION OF THE 'NEIGHBOUR DOCTRINE'...............................................................317
The cyclical view of Lord Reid .................................................................................................318
The 'neighbour principle' was extended to provide a generalised basis of negligence liability........................................................................................................................320
The rise of the 'neighbour principle'..........................................................................................321
Negligence was based upon the presumptive generalised 'neighbour principle'................321
Special duty liability..............................................................................................................324
The reservations of Lord Diplock.............................................................................................324
Viscount Dilhorne’s conservative dissent ...............................................................................326
Precedent/analogy .................................................................................................................327
The decision was an expansive decision.................................................................................328
The 'neighbour principle' is over extended..............................................................................329
The doctrinal objections of Stamp LJ concerning recovery for economic loss: the loss sought was the proper domain of contract.................................................................332
The general mechanism principle to all negligence categories.............................................335
The creation of a 'two-step' test of liability..............................................................................336
The effect of the general duty principle on 'special duty' cases..............................................341
Opening the category of professional services: Ross v Caunters .........................................342
The policy factors that enabled the category to be opened.....................................................342
The high-water mark of the expansionary cycle: the case of Junior Books v Veitchi........346
The principles used to invoke a duty of care..........................................................................348
Lord Brandon’s doctrinal objection was to have a profound profound influence in reversing the expansionary cycle.................................................................352
Summary..............................................................................................................................354

CHAPTER 13
A CONSERVATIVE CYCLE IS THE REACTION TO THE PRESUMPTIVE GENERAL PRINCIPLE..........................................................356
The paradigm was one of protection to the person or property..............................................356
The recovery of economic loss was sourced in the 'Hedley Byrne' principle........................357
The concentration is upon the scope of the duty and is not presumptively imposed........358
A return to discrete categorisation and away from general principle.....................................363
The death of the 'two-stage' 'Ann's' test in Murphy v Brentwood D.C. .................................365
Conservative policy objectives..............................................................................................371
Some of the categories of exclusion were returned...............................................................372
Categorisation of special duties.............................................................................................378
The death of classical negligence.........................................................................................386

CHAPTER 14
THE RESURRECTION OF SPECIAL DUTIES AND THE EMASCULATION OF THE 'DONOGHUE' PRINCIPLE................................................389
Ironically the 'three-pronged' test of Lord Bridge insulated against the wholesale destruction of flexibility......................................................................................389
The 'three-pronged' test was the usual appropriate mechanism to apply in determining negligence liability.........................................................................................390
A moderately expansionary cycle..........................................................................................392
The normative principles of 'Donoghue' become subject to the test of 'fair, just and reasonable'......................................................................................................................397
The vehicle of 'Hedley Byrne' is extended............................................................................399
Lord Browne-Wilkinson's accent on the equitable nature of 'assumption of responsibility' ........................................ 404
White v Jones creates a legal fiction as to 'assumption of responsibility' .......... 408
The conservative and expansionist views expressed in White v Jones in opening up the category of 'a disappointed beneficiary' ........................................ 409
The conservative objections ........................................................................ 412
The expansionary arguments ........................................................................ 417
The cycle had enriched negligence law in the United Kingdom .................... 422
CHAPTER 15 ......................................................................................... 427
THE CYCLE OF THE 'HEDLEY BYRNE' PRINCIPLE IN NEW ZEALAND .... 427
The early New Zealand negligence cycle was initially linked to that of the United Kingdom ....................................................... 428
The 'Hedley Byrne' principle was cautiously applied ................................... 429
New Zealand asserts the right to fashion its own cycle ................................ 433
The New Zealand paradigm is created by Rutherford v A.G. ...................... 440
The pragmatic approach .............................................................................. 442
The 'Donoghue' principle is pushed to its limits ......................................... 445
A general mechanism of negligence liability ............................................. 451
The high noon of the 'Anns' principle and the height of the expansionist cycle in New Zealand ......................................................... 459
The modifying effect of the conservative swing in the English cycle .......... 463
Modifications restricting the 'Anns' formula .............................................. 464
New Zealand reaffirms its right to create a general duty for the recovery of economic loss .................................................. 470
The New Zealand and the United Kingdom mechanism are essentially the same ......................................................... 473
CHAPTER 16 ......................................................................................... 477
THE MODERN ACTION ON THE CASE ............................................. 477
The influence of policy affected the cycles ................................................. 477
The common 'fault' mechanism of negligence liability of the United Kingdom and New Zealand ...................................................... 485
Analogy ................................................................................................. 487
Proportionate damage .............................................................................. 490
Contributory negligence .......................................................................... 500
Lack of Remedy ...................................................................................... 501
The need for the open-ended negligence model to continue to develop general rules of limitation .................................................. 510
BIBLIOGRAPHY ................................................................................... 512
CASE INDEX ......................................................................................... 523