

## PRIVITY AND THE ESSENCE OF CONTRACT

PETER KINCAID\*

In *Trident General Insurance Co. Ltd v. McNiece Bros Pty Ltd*<sup>1</sup> a third party beneficiary of an insurance contract was allowed a cause of action against the promisor insurance company. By definition, he had not provided consideration for the promise. Nor was the promise made to him; he could not show privity. This judgment of the High Court of Australia represents an unusually direct judicial attack on a doctrine of traditional contract law. I shall discuss below whether or not the attack succeeded.

What is the significance of an attack on privity and the rule that consideration must move from the plaintiff for the law of contract generally? The topic of this 'Thematic Issue' of the Law Journal suggests that it is worth asking whether the attack represents the death of contract, or merely its transfiguration. 'Death' suggests that *Trident's* attack on privity, if successful, has so fundamentally interfered with the substance of contract doctrine that the very idea of what lies behind the word 'contract' has been destroyed. 'Transfiguration', on the other hand means that the effect of the case has altered the appearance of contract law without affecting its substance. There is another possibility between these two extremes of death or transfiguration, namely, 'transmutation'. It is possible that the substance of the doctrine has been altered without killing it, much as a caterpillar is substantially changed by its transmutation into a butterfly, even though it does not lose its identity.

In order to assess the effect of *Trident* in terms of these three possibilities, the first task is to try to see what the case decided. If it does abandon privity, how fundamental is this result for the idea of contract?

---

\*B.A., LL.B. (Brit.Col.), LL.M. (Syd.), Senior Lecturer in Law, Macquarie University.

1 (1988) 165 CLR 107 (*Trident*).

The answer to that question requires postulating what is meant by contract - what is the essence of the idea? Is privity a necessary part of it?

## I. THE TRIDENT CASE<sup>2</sup>

Trident General Insurance Co. Ltd had contracted with Blue Circle Southern Cement Ltd. The promise sued on was that Trident would indemnify certain people against liability while they were working on building a limestone crushing plant for Blue Circle at Marulan in New South Wales. McNiece Bros Pty Ltd fell within the class of persons whom Trident promised Blue Circle that it would indemnify. McNiece became liable to a crane driver who was injured on the site.

Blue Circle clearly had a cause of action against Trident on the contract of insurance and, if it had sued, could have recovered damages (if it had suffered any) or, quite possibly, specific performance.<sup>3</sup> However it was not Blue Circle, the promisee, who sued Trident, but the intended beneficiary of the promise, McNiece.

McNiece came up squarely against two rules of contract law. First, only a person to whom a promise has been made can sue on it (the doctrine of privity) and, second, a plaintiff suing on a promise must show that he has provided consideration for it. McNiece could satisfy neither requirement. As a judge in another case put it:

[t]he plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him.<sup>4</sup>

In the New South Wales Court of Appeal, McNiece succeeded because of what that court recognized to be an exception to the privity rule in favour of third party beneficiaries of insurance contracts.<sup>5</sup> But the High Court judges were unanimous in rejecting the suggestion that a common law rule already existed recognizing such an exception. The law had been settled since 1861.<sup>6</sup> It had repeatedly been affirmed in England,<sup>7</sup> Australia,<sup>8</sup> and Canada<sup>9</sup> that the common law recognizes no *jus quaesitum tertio*, that is, no right in a third party to sue on a promise. But there the unanimity in *Trident* ended. Although five of the seven judges were prepared to allow the plaintiff McNiece to succeed, their reasons fall into at least three different groups.

<sup>2</sup> For a fuller analysis of this case, see P.Kincaid, "The Trident Insurance Case: Death of Contract?" (1989) 2 JCL 160.

<sup>3</sup> *Coulls v. Bagot's Executor & Trustee Co. Ltd* (1967) 119 CLR 460, 501-3 per Windeyer J.

<sup>4</sup> *Lawrence v. Fox* (1859) 20 NY 268, 275 per Comstock J. dissenting.

<sup>5</sup> (1987) 8 NSWLR 270.

<sup>6</sup> *Tweddle v. Atkinson* (1861) 1 B&S 393; 121 ER 762.

<sup>7</sup> *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd* [1915] AC 847; *Midland Silicones Ltd v. Scruttons Ltd* [1962] AC 446; *Beswick v. Beswick* [1968] AC 58.

<sup>8</sup> *Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd* (1956) 95 CLR 43; *Coulls v. Bagot's Executor & Trustee Co. Ltd*, note 3 *supra*.

<sup>9</sup> *Greenwood Shopping Plaza Ltd v. Beattie* (1980) 111 DLR 3d 257 (Supreme Court of Canada).

The first group (the 'radicals') consists of Mason C.J. and Wilson J. (who gave a joint judgment) and Toohey J. They were prepared to allow the third party a cause of action on the promise provided that there was a contractual intention to benefit the third party. The Chief Justice and Wilson J. took judicial notice of the likelihood that third party beneficiaries, particularly of insurance contracts, would rely on the promise, but they did not require the plaintiff to show that he had relied.<sup>10</sup> Toohey J. also based the new cause of action on the intention of the parties to the contract, but treated the question of reliance slightly differently. Whereas the first two judges used the general probability of reliance as a justification for formulating the rule, Toohey J. made the likelihood of reliance an actual element of the rule.<sup>11</sup> To succeed, the plaintiff would have to show not merely that he was intended to benefit, but that in the circumstances it was likely that he would rely on the promise. But note that this formula is a step short of requiring the plaintiff to show that he actually did rely. Despite this slight difference, the 'radicals' are clearly prepared to abandon privity for intended third party beneficiaries and allow them a cause of action on the promise.

The second group (the 'conservatives') consists of Brennan, Deane and Dawson JJ. Only Deane J. was prepared to find for the plaintiff. All three judges were opposed to the change in the law advocated by the 'radicals'. There were and could be no exceptions to the privity requirement without a complete new theory of promissory liability to replace the bargain theory.<sup>12</sup> Present theory defines the relationship in *personam* between the promisor and the promisee. It says nothing, and is not equipped to say anything, about the relationship between the promisor and the third party.<sup>13</sup> The equitable concept of trust could be used to find a property interest in the third party enforceable directly in equity against the promisee and indirectly against the promisor. But the necessary intention in the promisee to grant this interest to the third party had to be found. All three of the 'conservative' judges were prepared to be more liberal in finding the necessary intention.<sup>14</sup> Brennan and Dawson JJ. thought that a cause of action in trust could not be considered in this case because it had not been pleaded,<sup>15</sup> but Deane J. was prepared to overlook this deficiency.<sup>16</sup> Consequently, he found for the plaintiff McNiece, whereas the other two found for the defendant.

---

10 Note 1 *supra*, 123.

11 *Id.*, 172.

12 *Id.*, 132, 135 *per* Brennan J., 143 *per* Deane J., 155, 160 *per* Dawson J.

13 *Id.*, 132 *per* Brennan J..

14 Relaxing the strict attitude of the Privy Council in *Vandepitte v. Preferred Accident Insurance Corp. of New York* [1933] AC 70. See note 1 *supra*, 140 *per* Brennan J., 150 *per* Deane J., 156 *per* Dawson J.

15 *Id.*, 140 *per* Brennan J., 157 *per* Dawson J.

16 *Id.*, 153-4.

The difference between the 'conservatives' and the 'radicals' is that the former would require any cause of action to be based on existing doctrines, which meant that there could be no action by the third party on the promise, but only on the trust. The 'radicals' invented a new cause of action on the promise, based not upon bargain but upon the contractual intention of the promisor. Three judges would thus dispense with the requirement of privity for third parties, while the other three would make no change to the privity requirement.

The judgment of Gaudron J contains elements in common with both the other groups. Although sympathetic to the approach of Mason C.J. and Wilson J. in that she is prepared to find for the plaintiff, she does not base the cause of action upon promise but upon unjust enrichment. Her Honour gives the third party a cause of action against the defendant, not in his role as a promisor, but in his role as a person who has been enriched through being paid the premium, that is through execution of the consideration for his promise to the promisee. Justice Gaudron sees the enrichment as unjust because it was received as the price of a promise which the defendant now refuses to carry out.<sup>17</sup>

Her Honour's doctrine of unjust enrichment is a 'radical' departure in that she dispenses with the requirement that the enriching of the defendant be at the expense of the plaintiff when it occurs.<sup>18</sup> She is prepared to view the enrichment as being at the expense of the plaintiff in this case in that, if the promise is not carried out, the plaintiff will be worse off than he would have been if it had been carried out.<sup>19</sup> But surely that is circular. It is the fact that the plaintiff has suffered expense (leading to benefit to the defendant) which makes it unjust for the defendant to keep the benefit. The mere fact that the plaintiff will be worse off if the defendant does not confer a benefit on the plaintiff justifies nothing. By that argument any outrageous claim that a stranger confer a benefit on the plaintiff would be justified by saying that the plaintiff would be worse off if the defendant refused.

In any case Gaudron J. appears to see no need for the requirement of a detriment to the promisee. She purports to find support for this idea in the judgment of Windeyer J. in *Mason v. New South Wales*<sup>20</sup> where he says, "[t]he concept of impoverishment as a correlative of enrichment ... is foreign to our law."<sup>21</sup> However, in that case the plaintiff had, under

---

17 *Id.*, 175-6.

18 See I.M.Jackman, "Unjust Enrichment and Privity of Contract" (1989) 63 *ALJ* 368, 369 where it is argued that "it is the non-voluntary conferring of a benefit which makes its retention unjust". Also see K.B.Soh, "Privity of Contract and Restitution" (1989) 105 *LQR* 4, 6 who writes that "[t]his judgment would seem to be an illustration of the danger of too wide a definition of 'at the expense of the plaintiff' ... Any enrichment would seem to be at the expense of the original promisor".

19 Note 1 *supra*, 175-6.

20 (1959) 102 CLR 108.

21 *Id.*, 146.

protest, paid money to the defendant pursuant to an Act which was later declared void. Clearly the enrichment was at the expense of the plaintiff. I think that by "impoverishment" Windeyer J. means something different. To ask whether the plaintiff has been impoverished deals not with whether or not he has suffered a detriment, but whether or not his *net position* is that he is worse off. The suffering of a detriment which caused the enrichment was not at issue. The suggestion which Windeyer J. rejected was that despite the enrichment at the expense of the plaintiff, the plaintiff should lose his cause of action because, as things had turned out, he was no worse off.

The approach of Gaudron J. is like that of the 'conservatives' in that she does not find a cause of action in contract. The obligations of the defendant who has been unjustly enriched in these circumstances are:

independent of, but ordinarily corresponding in content and duration with, the obligation owed under the contract by the promisor to the promisee.<sup>22</sup>

Because privity is an idea peculiar to promissory liability, if the basis of liability is not promise, the question of privity simply does not arise.<sup>23</sup> So her judgment may be seen as having no effect on privity.

However, her redefinition of the doctrine of unjust enrichment shows evidence of the same revolutionary change of approach to civil liability as that displayed by the 'radicals'. Causes of action on the civil side of the common law are plaintiff-oriented. They are defined from the point of view of doing justice to the plaintiff, rather than punishing the defendant. The practical result of this approach to civil causes of action is that the plaintiff must show that he has suffered at the hands of the defendant in a legally relevant way.<sup>24</sup> This view can be seen as requiring the plaintiff to show a change in his 'condition' (such as suffering a detriment) and a legally relevant 'link' (such as request or foreseeable inducement) between this change and the defendant's behaviour which makes it just that he should bear responsibility for the plaintiff's loss.<sup>25</sup> A plaintiff has a cause of action on a promise in contract only if he has given up something of value in response to a request by the promisor. Similarly, the 'pre-Gaudron' law of unjust enrichment required the plaintiff to show that he had suffered a detriment in enriching the defendant and that the manner in which the defendant acquired the benefit made it improper for him to keep it.<sup>26</sup>

The third party's cause of action on the promise as defined by the 'radicals' is defendant-oriented, as is Justice Gaudron's doctrine of unjust enrichment. The 'radicals' focus on the duty of the promisor in isolation

22 Note 1 *supra*, 173.

23 *Id.*, 176-7.

24 See P.Kincaid, "Third Parties: Rationalising a Right to Sue" [1989] *CLJ* 243 where this theme is expanded.

25 *Id.*, 264-5.

26 Note 19 *supra*.

from the plaintiff and the justice of his claim. If the defendant has intended (in the context of a contract) to benefit the plaintiff, then he has a duty to do so. This duty is not defined by reference to the plaintiff or his relationship to the defendant. It is a duty in the abstract, in this respect resembling a duty in criminal law. Although Mason C.J. and Wilson J. *define* the cause of action in a wholly duty-oriented way, it is true that their motives are plaintiff-oriented. They grant third parties this cause of action not solely to punish the evil promise-breaker, but because they think it likely that the plaintiff will have suffered through reliance.

Similarly, Gaudron J. sees the defendant as having a duty to give up his ill-gotten gains, but the plaintiff's cause of action is not limited by requiring him to show that he suffered. In other words, the approach shared by the 'radicals' and Gaudron J. is that they are happy to allow the plaintiff to enforce the defendant's duty without requiring him to show why that duty is owed to *him*. This shift seems to represent a concern with the 'wrongness' of the defendant's behaviour independent of any demonstrated 'right' in the plaintiff.

To summarise the effect of *Trident*, technically it probably decides 4:3 that the rule that a plaintiff must show privity and consideration to sue on a promise is not altered. What if the third party can show that the promisee has executed the consideration for the promisor's promise? On those facts, Gaudron J. would agree with the three radicals that the third party should succeed. Yet there is no ratio to that effect since the reasons of the two groups differ. In practical terms, though, surely the case represents a sympathy for third parties. There is also common ground between the 'radicals' and Gaudron J. in that all four judges adopt an approach to the definition of causes of action which is more defendant-oriented than is usual in the common law tradition.

## II. ABOLITION OF PRIVACY

Let us consider the powerful minority view of the 'radicals'. If their view is that a third party can sue without privity or consideration, what effect would this have on the law of contract?

If 'contract' means all enforceable promises,<sup>27</sup> then it is arguable that the abolition of privity for third parties does not kill contract; it only provides a new alternative theory of promissory liability in addition to deeds and bargains. A person can sue on a promise provided it was intended to benefit him and provided it was part of a bargain made with someone else.

But if contract means the law of bargains, then the abolition of consideration is fatal. At the centre of the idea of bargain is reciprocity.<sup>28</sup>

---

27 B.Coote, "The Essence of Contract: Part II" (1988) 1 *JCL* 183, 195.

28 K.O.Shatwell, "The Doctrine of Consideration in the Modern Law" (1954) 1 *Syd L Rev* 289, 305.

The plaintiff qualifies himself to enforce the promise in question if he has paid for it. To remove the requirement that the plaintiff show consideration is to abandon the theory of contract based on bargain.

If consideration is essential to contract as bargain, what about privity? As Windeyer J. said in *Coulls v. Bagot's Executor & Trustee Co. Ltd.*:

[d]oubtless the two requisites merge in the strict view of a contract as a bargain, a promise for which the promisee has paid the price.<sup>29</sup>

To participate in a bargain, you must pay the price requested for a promise made to you.<sup>30</sup>

So it does not really matter whether the *Trident* 'radicals' are seen as advocating the abolition of privity or of consideration. To dispense with the need for consideration is also to dispense with the need for privity, since in a bargain no one but the promisee can pay the price.

Toohey J. took the view in *Trident* that privity was not central to contract theory and so its abolition would not greatly affect the underlying principles.<sup>31</sup> His Honour can only be right if existing contract theory is not based on bargain. There are rival theories. For example, that it is based upon the inherent moral force of the promise itself.<sup>32</sup> But Toohey J. does not expressly say what he thinks the existing theory is. The new rule he proposes suggests, though, that he views 'contract' or promissory liability as depending upon the intention of the promisor.

The Chief Justice and Wilson J. are more forthright. They do not deny that privity is central to existing contract theory and acknowledge that they are breaking new ground. An additional theory of promissory liability will exist alongside bargain. But note that the new theory depends on the existence of a bargain (although not one in which the plaintiff participated) for a cause of action to exist. The promise sued upon must have been part of a conventional contract.

Is the nature of bargain altered by the recognition of this new theory? A person can now sue on a promise if it was intended to benefit him and if the promise was paid for. Paid for by whom? In *Trident* it was paid for by the promisee, but it is not clear if these two judges would regard that as essential. It seems to come down to this: a plaintiff can now enforce a promise merely by showing intention to benefit and that someone paid for it. Do privity and consideration retain any meaning as a way in which a plaintiff can qualify himself to enforce a promise? The answer seems to be yes, because the promisee in a contract intended to benefit a third party

29 Note 3 *supra*, 494 (*Coulls*).

30 *Id.*, 478-9 *per* Barwick C.J., 493 *per* Windeyer J. who thought that in the case of joint promisees, the promisees *together* constituted the promisee. The consideration had to proceed from the 'entity' constituted by both of them, and it was irrelevant which one of them individually provided it on behalf of the entity: see Kincaid note 24 *supra*, 261. For a persuasive different interpretation, see B.Coote, "Consideration and the Joint Promisee" [1978] *CLJ* 301.

31 Note 1 *supra*, 168-9.

32 C.Fried, *Contract as Promise* (1981).

may not satisfy the Mason C.J., Wilson and Brennan JJ. test if the promise was intended to benefit only the third party. Cases like *Coulls* show clearly that the promisee could enforce the promise in such a situation, and there is no suggestion in *Trident* that he would not continue to have that right. If so, his right must depend on the old law. If, as I think, that was based on bargain, then it would continue to be so based, and the plaintiff could succeed only by showing both privity and consideration. If this analysis is correct, bargain remains an independent theory of promissory liability. It is supplemented, but not altered, by the new theory based upon promissory intent manifested in an external bargain promise.

### III. THEORIES OF PROMISSORY LIABILITY

So far I have assumed that the new *Trident* theory is a theory of promissory liability. That is, that the third party was suing *on the promise*. If, as Brian Coote says, 'contract' simply means any enforceable promise, then the new theory would be a new theory of contract.<sup>33</sup> Like deeds, bargain, and promissory estoppel,<sup>34</sup> it would provide one available solution to the problem of promissory liability.

Although I think it more in keeping with convention to confine the word 'contract' to bargain theory, I agree with Brian Coote that the essence of contract is promise.<sup>35</sup> The social problem with which the law has to deal is to differentiate between promises morally binding and those binding in law. Which promises are to be legally enforceable and by whom? There is no logical reason why there need be only one answer. That is, a number of theories of promissory liability can exist alongside one another as long as they do not contradict each other. It is not necessary to think that all enforceable promises conform to one theory.<sup>36</sup> The content of the theory or theories of promissory liability must depend upon social values. So the bargain theory reflects a secular commercial approach which asserts that a plaintiff should be able to sue if he can show that he has paid for the promise made to him. The concern of bargain theory is to give a remedy to such a plaintiff, not to punish the defendant for breaking his promise. Deed theory, on the other hand, reflects the idea that a promisor who has clearly intended to bind himself should be made to honour his undertaking.<sup>37</sup> If values change markedly, then theories of promissory

---

33 Note 27 *supra*.

34 Before *Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 CLR 387.

35 Note 27 *supra*.

36 The attempt in earlier editions of Cheshire and Fifoot to explain the reliance in promissory estoppel as consideration is an example of an attempt to confine all promissory liability to a single theory. See, for example, J.G.Starke and P.F.P.Higgins, *Cheshire and Fifoot's The Law of Contract* (3rd Aust. ed., 1974), 100.

37 Deeds pre-date bargain theory and were probably an anachronism in the heyday of bargain.

liability should change. It may be the detection of such a change which has led the High Court to propose a new theory based on intent and seeming to reflect the value that a promisor who has been paid for a promise should be made to perform it, even without demonstrated suffering by the plaintiff. This would be a return to a more moralistic, less secular approach to promissory liability. In *Eastwood v. Kenyon*<sup>38</sup> in 1840 a conscious choice was made in favour of a secular, 'plaintiff's right' approach and against a moralistic, 'defendant's duty' approach. It may be that values have changed and that *Trident* represents a modern attempt partially to reverse *Eastwood v. Kenyon*.

#### IV. PROMISES

If the proposed *Trident* rule is a rule of promissory liability, then it is still about contract in the wider sense used by Coote. But when the essentials of the idea of promissory liability are examined, there is some doubt that the *Trident* rule really is a rule of promissory liability.

The main characteristic of promissory liability is of course that it is based on promise. A promise is a voluntary assumption of obligation.<sup>39</sup> It is a binding of the conscience to do something or that something is true. It has to be distinguished from a representation, one form of which is a statement of intent. A person who announces that he intends to do something is merely making a statement about his present state of mind. He represents that his present state of mind is as indicated.<sup>40</sup> His statement is not different in kind from a statement that any other state of affairs is true, for example, "This car was made in 1948." A person who makes a representation does not warrant<sup>41</sup> or undertake to do the thing or that the statement is true. He has not manifestly bound himself. The idea of being bound here means morally bound, or bound in conscience, not bound in law. It was apparently this meaning which Brennan J. had in mind in *Waltons Stores (Interstate) Ltd v. Maher*<sup>42</sup> when he said that the plaintiff had been induced to believe that the defendant was "not free" to withdraw from the relationship. Brennan J. cannot have meant that the assumption was that the defendant was contractually bound, since his factual basis rejects that assumption.<sup>43</sup> He must have meant that the plaintiff thought the defendant had promised, and thereby bound his conscience.

It is this characteristic, that a promise binds the conscience, which gives

---

38 (1840) 11 Ad & El 438; 113 ER 482.

39 Note 27 *supra*, 192; C.N.Bagot, "Equitable Estoppel and Contractual Obligations in the Light of *Waltons v. Maher*" (1988) 62 ALJ 926, 934.

40 Note 32 *supra*, 9.

41 *Oscar Chess Ltd v. Williams* [1957] 1 WLR 370, 374 *per* Denning L.J.; *Kleinwort Benson Ltd v. Malaysia Mining Corp.* [1989] 1 WLR 379, 386.

42 Note 34 *supra*, 418, 423.

43 See below discussion accompanying note 47.

rise to the problem with which theories of promissory liability have to deal. Should all promises, because of their morally binding nature, be legally enforceable? Most societies conclude not. There should be some areas where social sanctions, not legal ones, should affect the promise-breaker. If that is the case, some test is required to differentiate legally enforceable promises from promises generally. Bargains and deeds are two internally-coherent tests.

So a promise is a voluntary assumption of obligation. I disagree with Coote when he says that a contract is a voluntary assumption of *legal* obligation.<sup>44</sup> The assumption of a personal, moral obligation is the social phenomenon with which the law deals. The rules of promissory liability then attach to promises which satisfy the appropriate legal test: the characteristic of legal enforceability. There is another objection to Coote's definition of contract. It requires the promisor to apply his mind to the question of legal consequences. The beauty of the bargain theory, though of course not of deeds, is that it attaches legal enforceability without requiring the parties to know any law or even to think about the question of enforceability. Most people would expect to be legally bound by a bargain promise, but the theory does not require them even notionally to form such an intention. All they have to intend is to sell a promise.<sup>45</sup>

For the purposes of defining a cause of action, a promise can be characterised in two different ways. First it can be looked at as an assumption of obligation, as described above. But it can also be looked at as simply undifferentiated conduct which may influence other people. For example, I might, in a hushed library, say loudly to X, "I promise to give you this book tomorrow morning." To X my act of promising is an undertaking. But to Y, whose concentration is broken by my voice, my act of promising is simply an irritating disturbance.

The act of making a promise may give a person a cause of action on the undertaking, or it may give him a cause of action on the conduct viewed otherwise than as an undertaking. It was this choice which exercised the High Court of Australia in *Waltons Stores (Interstate) Ltd v. Maher*.<sup>46</sup> On the facts as found by Mason C.J. and Wilson J. (who delivered a joint judgment) and Brennan J., the plaintiff had been induced by the defendant to believe that the defendant had undertaken to execute a contract of lease. The defendant unconscionably stood by and watched the plaintiff suffer a detriment in reliance on this belief. An action on the promise was made difficult by the lack of consideration. But could equitable or promissory estoppel be used? The trouble was that it had been well established that this doctrine could be used only to prevent a cause of action from being

---

44 Note 27 *supra*, 195.

45 Note 28 *supra*, 315; B.A.Hepple, "Intention to Create Legal Relations" [1970] *CLJ* 122, 127-30.

46 Note 34 *supra*.

pursued, not to found one. In other words, it could be used as a shield not a sword.<sup>47</sup>

However, the court pointed out that the reason for this limitation was fear of allowing a rival theory of promissory liability to encroach on contract. If a promisee could enforce a promise (as an undertaking) without consideration, then contract as bargain was effectively abolished.<sup>48</sup> It was for this reason that this limitation had been placed on enforcement of the promise. On the other hand, if equitable estoppel were seen not as enforcement of the undertaking in a promise, but as giving relief for detriment suffered because of the defendant's unconscionable conduct, then it could be seen as no threat to the theory of contract. This was the view adopted by the Court. Equitable estoppel was seen to be no different in principle from estoppel generally, the principle of which was that a plaintiff should have relief for detriment suffered by reliance on an assumption unconscionably induced.<sup>49</sup> Once the action was seen as not depending on a promise as an undertaking, that is not as a rival theory of promissory liability, there was no reason why the shield-not-a-sword rule should survive.<sup>50</sup> The plaintiff was given a cause of action in estoppel against the defendant because of the latter's unconscionable conduct in making a promise and standing by watching the plaintiff rely on it to his detriment.

## V. CHARACTERISTICS OF ACTIONS ON PROMISES

Does it make any difference whether or not the action is characterised as being on the promise? The chief characteristic of an action on a promise is that the actual content of the obligations is determined by the terms of the promise. By making a promise a person assumes an obligation but it is an obligation which he has himself defined. By contrast, obligations in tort or estoppel are imposed, not assumed.<sup>51</sup> Brennan J. points out that in an action in estoppel because of a promise, as in *Waltons*, the obligation imposed may be greater or less than that assumed in the promise.<sup>52</sup>

This difference in extent of obligation is linked to another difference between tort and promise. The object of the remedy in an action on the promise is to compensate the plaintiff for disappointment of his expectation that the promise would be executed.<sup>53</sup> His loss is the difference between his position after breach of the promise and the position he would

---

47 *Combe v. Combe* [1951] 2 KB 215 (Court of Appeal).

48 Note 34 *supra*, 400 *per* Mason C.J. and Wilson J.

49 *Id.*, 404 *per* Mason C.J. and Wilson J., approving remarks by Oliver J. in *Taylor's Fashions Ltd v. Liverpool Victoria Trustees Co. Ltd* [1982] QB 133, 153.

50 Note 34 *supra*, 405 *per* Mason C.J. and Wilson J., 425-7 *per* Brennan J.

51 *Id.*, 425 *per* Brennan J.

52 *Id.*, 419, 425 *per* Brennan J.; see also Bagot, note 39 *supra*, 931.

53 Note 32 *supra*, 17.

have been in had the promise been carried out.<sup>54</sup> But the remedy for a promise as unconscionable conduct is whatever is necessary to offset any detriment which the plaintiff because of his reliance on the promise will suffer if the defendant does not perform. The amount may be more or less than what he would receive as compensation for disappointed expectation.<sup>55</sup>

Another difference is that legal obligation on a promise arises on the making of a contractual promise. The result is that the promisee has a right in *personam* against the promisor from that moment and a cause of action the moment the promise is broken, whether or not he has suffered any damage.<sup>56</sup> However, the cause of action in the tort-type action in estoppel arises only when damage is (or would be) suffered. This is because the plaintiff's right in tort is *in rem*; the class of duty-holders is indeterminate.<sup>57</sup> He has a right against everyone not to be injured by reliance on that person's unconscionable conduct. The defendant is not identified as a particular duty-holder, nor the plaintiff as a particular right-holder, until the defendant's duty is broken and damage suffered by the particular plaintiff.

It seems, then, that the High Court in *Waltons* was not simply playing with words when it said that the plaintiff was not being given a cause of action on the promise as undertaking but on the promise as conduct. But what of *Trident*? Is the third party's cause of action on the promise as an undertaking? Gaudron J. says:

in my view a promisor who has accepted an agreed consideration for a promise to benefit a third party comes under an obligation to the third party to fulfill that promise and the third party acquires a right to bring an action to secure the benefit of that promise. The right of the third party is not a right to sue on the contract: rather, it is a right independent of, but ordinarily corresponding in content and duration with, the obligation owed under the contract by the promisor to the promisee.<sup>58</sup>

Note that she describes the promisor's duty to the third party as being to "fulfill the promise", suggesting that she is concerned with protecting the third party's expectations. That is the language of promissory liability. But note that the obligation, according to her theory of unjust enrichment, does not arise upon the making of the promise, but upon execution of the promisee's consideration to the promisor. Does this fact point away from promissory liability? I think the answer is no. The defendant's duty is owed specifically to the third party (and to the promisee). It is a relationship *in personam* from the beginning. The third party plaintiff, unlike the plaintiff in *Waltons*, need not suffer damage for his cause of action to be perfected or for him to be identified as the right-holder. The

---

<sup>54</sup> B.Kercher and M.Noone, *Remedies* (1983), 57.

<sup>55</sup> Note 34 *supra*, 419 *per* Brennan J.

<sup>56</sup> Hence he may recover judgment but only nominal damages.

<sup>57</sup> J.Stone, *Legal System and Lawyers' Reasonings* (1964), 149-151; Kincaid, note 24 *supra*, 262.

<sup>58</sup> Note 1 *supra*, 173.

promisee's payment of money to the promisor in no way affects the third party. The third party could presumably recover nominal damages upon breach of the promise. The execution of the consideration is simply an event (alternative to acceptance in the case of bargain) which defines the moment when a relationship *in personam* comes into being.

The above quote from Gaudron J. also contains a reference to the third element which can differentiate tort from promissory liability. Is the content of the obligations identical to those assumed by the promisor? Her Honour says that ordinarily that will be so. If it were invariably so, then despite her statement that this is not an action on the promise, it would look indistinguishable from one in practice. If there is a real possibility that the extent of obligations may differ from those undertaken in the promise, then her statement could have meaning. So I would conclude that if the word "ordinarily" is disregarded, Gaudron J. is in substance creating a cause of action for the third party in promissory liability to the same extent that the 'radical' judges do.

The three 'radical' judges in *Trident*, Mason C.J. and Wilson and Toohey JJ., are quite explicit that they are giving the third party a cause of action on the promise. They are clear that the third party is to be allowed to *enforce the contract*.<sup>59</sup> The obligation *in personam* to the third party would arise on the making of the contract.<sup>60</sup> The contract, that is the promise, would determine the extent of the obligation, and the remedy would be contractual, that is, expectation damages.<sup>61</sup>

The result of this analysis seems to be that a minority in *Trident* are creating a new theory of promissory liability. It may be that the substance of Justice Gaudron's judgment produces majority support for such a theory.

So far I have treated the essence of promissory liability as consisting of three factors. First, the extent of the obligation is that manifestly assumed by the promisor, not something (more or less) defined and imposed by the state. Second, the promise gives rise to a relationship *in personam* which means that the cause of action can come into being before damage to the plaintiff serves to single him out from other potential plaintiffs. Third, the object of the remedy in promissory liability is to compensate the plaintiff for disappointment of his expectation that the undertaking would be fulfilled.

## VI. PRIVACY AS ESSENTIAL TO PROMISSORY LIABILITY

But is it possible that although *Trident* may be regarded as a case about promissory liability on those three criteria, it fails on another one, namely,

---

59 *Id.*, 122-3 *per* Mason C.J. and Wilson J., 172 *per* Toohey J.

60 Note 32 *supra*.

61 *Ibid.*

privity? I want to explore here the idea that privity, though not consideration, may be a fundamental aspect of liability for promise as such. If so, then the *Trident* decision would indeed be seen as a 'killer'. A new theory of promissory liability would not simply have been added. Instead, the whole idea of promissory liability would have been altered.

A promise is an undertaking, a voluntary assumption of obligation, which binds the conscience of the promisor. It creates a moral obligation on him. The source of this moral obligation is the trust which is invoked in the promisor's future actions.<sup>62</sup> But in whom is this trust invoked and to whom is the obligation therefore owed? In the person to whom the undertaking has been made, the person to whom the promisor has pledged his conscience - in short, to the promisee. The very nature of a promise as a morally binding undertaking, then, includes the idea of privity. A promise is made *to* someone. A pledge to oneself is merely a vow.<sup>63</sup> But privity in the case of a promise, as in the case of contract, is not merely a passive requirement. As Fried says, "[a] promise cannot just be thrust on someone - he must in some sense be willing to be its beneficiary."<sup>64</sup> He concludes that a promise, to create a moral obligation, must be accepted.<sup>65</sup>

As I see it, the function of the law in this area, that of promissory liability or contract, is to decide which of these moral obligations is to be legally enforceable. To recognise the existence of an obligation owed to someone other than the promisee is not to enforce a moral obligation assumed by the promisor, but to impose a new obligation. Even if the duties enforced are those defined by the promise (as those enforced by the 'radicals' are), to recognize a right in someone other than the person to whom the undertaking was made is not to enforce a promise as a promise.

To summarise, a promise is a form of behaviour by which a person voluntarily assumes and defines moral obligations to another person. The law of contract may be seen as a branch of the law of promissory liability, the function of which is to give legal enforceability to these voluntarily assumed moral obligations, distinguishing between enforceable and unenforceable promises by some coherent criteria of justice. The obligation which a promisor assumes is only an obligation vis-à-vis the person to whom the promise is made. Therefore, to allow a third party beneficiary of a contract to enforce an obligation undertaken by the promisor is not enforcement of a *promissory* obligation unless it was undertaken to the plaintiff third party.

Charles Fried attempts to show that in American law there is privity of promise between the third party with a right to sue and the promisor. He

---

62 *Id.*, 11.

63 *Id.*, 42.

64 *Id.*, 43.

65 *Ibid.*

does this by applying his idea of acceptance of a promise. He says, "C's 'acceptance' of the promise will cause C's rights to vest, preventing A and B from undoing what they have done".<sup>66</sup> I think he confuses a criterion for preventing the destruction of a right with one for its creation. The *American Restatement, Second, Contracts*<sup>67</sup> provides that:

[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.<sup>68</sup>

The clear meaning is that it is the contractual promise which creates the right and duty. The role of acceptance is explained in section 311(3), which allows the parties of a contract to modify their duty to a third party up to the time the third party,

- (i) materially alters his position in justifiable reliance on the promise, or
- (ii) brings suit on it, or
- (iii) assents to the promise at the request of either of the parties.<sup>69</sup>

The fact that the third party may bring suit on the promise without assent shows that the rights and duties exist independently of it.<sup>70</sup>

To return to the effect of the *Trident* case, Mason C.J. and Wilson J. clearly regard the right in the third party as arising upon the making of a contract intended to benefit the third party.<sup>71</sup> They do not use the notion of acceptance at all, even to limit the destruction of this right, which they decide will be lost upon detrimental reliance on the promise by the third party beneficiary.<sup>72</sup>

The 'radicals' thus impose no requirement which could amount, even in Fried's view, to privity of promise. It follows from what I argued above that the true nature of the third party's right which they recognise is not part of the law of promissory liability, since the third party is not enforcing the promise as an undertaking to him. This proposed new law is then better viewed as an imposed, tort-like, right and duty combination.

In my view the only thing which really distinguishes contract from tort is this difference between imposition and free assumption of obligation. People *do* make promises, and by doing so freely undertake moral obligations which are defined and limited by their promises. Contract law has evolved to give legal enforceability to certain of these promises. Many

66 *Id.*, 45.

67 *Restatement, Second, Contracts*.

68 *Id.*, s.304.

69 *Id.*, s.311(3).

70 Note 24 *supra*, 253, 268. The third party acquires the right (by statute) without assent in Western Australia: Property Law Act 1969 (W.A.) ss.11(2) and 11(3). In New Zealand the Contracts (Privity) Act 1982 (N.Z.) s.4 is to the same effect. However, in Queensland Fried's notion of assent, or acceptance, is a requirement before the right vests in the third party: Property Law Act 1974 (Qld) s.55(1). The same is true under the civil law of France: Article 1121 of the French Civil Code.

71 Note 1 *supra*, 122-3.

72 *Id.*, 123; Toohey J. takes the same view of the creation of the third party right, but does not address the question of its destruction: *id.*, 172.

rules of the common law evidence this attitude that the job of contract law is to give effect only to such assumed obligations. The rules as to implication of terms, for example, are framed to ensure that the court does not impose sensible or reasonable terms on the parties.<sup>73</sup> The general insistence that the courts will not make a contract for the parties is another example of this attitude.<sup>74</sup>

Once the High Court is prepared to describe as 'contract' a cause of action based on an obligation which was not assumed by the defendant, an important change in the idea of contract has occurred. The issue is not whether the legislature or the courts may alter the area within which, or the rules by which, 'contracts' may be made. Of course they may. The idea of freedom of contract implies no such 'no go' area. The issue is whether the courts see it as desirable that there should be an area of freedom of contract, however circumscribed, within which people may voluntarily assume obligations which the courts will enforce. It is an expression of the value of individual liberty if the law does contain such a species of obligation. Writers like Atiyah<sup>75</sup> and Gilmore<sup>76</sup> see contract as simply another area of activity, like tort, in which obligations may be imposed on people in the interests of social policy. The judgment of the 'radicals' in *Trident* indicates that the High Court agrees. In this most fundamental way, then, the case may represent the death of contract.

## VII. CONCLUSION

There are a number of possible views as to what in essence a contract is. The term may be confined to bargains. Or it may refer to all enforceable promises, including those in bargains. In either case, contract may be seen as being about enforcing promises as obligations voluntarily undertaken. Or it may be seen as concerned with the enforcement of obligations imposed on people in the context of their making promises.

*Trident* permits a cause of action against a promisor by a plaintiff who cannot show privity. If this cause of action is labelled as being in contract, then for those who see contract as bargain only, the case represents the death of contract, since privity is an inextricable element of the notion of bargain. For those who see bargain as merely the (previously) predominant test of promissory liability, the displacement of bargain by a new theory of promissory liability would be a transmutation, since the essential idea of enforcement of voluntarily undertaken obligations would remain. However, the abolition of privity in any cause of action labelled as enforcement of a promise has fatal implications.

---

73 *The Moorcock* (1889) 14 PD 64. See also *Bell v. Lever Bros Ltd* [1932] AC 161, 226 per Lord Atkin.

74 *Scammel v. Ouston* [1941] AC 251, 273 per Lord Wright.

75 P.S. Atiyah, *Essays on Contract* (1986).

76 G. Gilmore, *The Death of Contract* (1974).

If the essence of contract is the enforcement of promises, then privity is itself an essential element. The concept of promise includes privity. A promise is a voluntary assumption of obligation to a particular person. Even outside the law, it creates a relationship *in personam*. The enforcement in law of promises means the enforcement of voluntarily assumed obligations. To allow a person other than the promisee to 'enforce' a promise is in effect to impose an obligation not assumed. The idea of the enforcement of promises implies an area within which parties are free to assume and define obligations which the state will enforce. The distinction between assumed and imposed obligations is that between contract and tort.

If the High Court intended to eliminate contract as the distinct category of assumed obligations, it should have indicated more clearly that it was aware of the import of what it was doing, and explained why it was doing it.

---