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# How the common law gets made: *Hedley Byrne*\* and other cautionary tales

by The Rt. Hon. Lord Justice Buxton

from Wednesday 9th July 2008 in  
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\* *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

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# **How the common law gets made:**

## ***Hedley Byrne* and other cautionary tales**

This lecture has two, not wholly consistent, themes. The first is to sound a warning about the use of the basic weapon of the common law, a decision in a particular case, to develop or reform what is thought to be the unsatisfactory state of that law. The particular weaknesses of case-law as an instrument of reform are

- The purpose of any case is to decide the issue between the parties, and not to reform the law. The decision, and therefore the general shape of the law that is deduced from it, may be unduly influenced by a desire to do justice in the particular case, without appreciation of the wider implications of the way in which instant justice has been achieved.
- The glory of litigation, at least as practised in England & Wales, is the oral advocacy of counsel, and their ability seamlessly to reformulate a case to meet the exigencies of forensic debate. Moves that help to win the case may not help with the rational development of the law.
- There is no place in the English forensic process for the sort of review of opinion, practicalities and collateral damage that is undertaken by the Law Commission before it sets about changing the law
- When an attempt is made to change the general law by the decision in a particular case, there may be prolonged uncertainty, often extending over a period of years, about the extent and generality of what the court has decided. The subsequent history of all of the cases examined in this paper well illustrates that particular failing.

The second theme of the paper is to emphasise that if we do have to get the law out of the decisions in particular cases then it is important that there should be available to the

reader of the reports of those cases not only the judgment but also an account of the facts and of the arguments of the advocates. It is necessary to know about the particular facts, and about the arguments, in order to know how the court arrived at the question that it asked itself, and how far it was told about the implications of any general statements of rules that extend beyond the limits of the case itself. Law reports that give only the judgments and omit the arguments may make it difficult to extract the whole story.

The resources of the official reports will now be used to analyse three examples of the dangers summarised above. In *Hedley Byrne v Heller* the flow of argument produced a solution very different from what the case had set out to try to achieve, and which proved to be difficult to fit into the general law of negligence of which it claimed to be a part. In *Pepper v Hart* and *AG v Blake* new solutions were thought to be needed to right serious injustices or serious affronts to the propriety of public life. That could only be achieved by the formulation of novel generalisations, reaching beyond the confines of the particular case, which have been the subject of anxious qualification and retrenchment ever since.

## HEDLEY BYRNE

We are now so accustomed to thinking of Lord Atkin's "neighbour" aphorism in *Donoghue v Stevenson* as an iconic principle governing the whole of the law of negligence that it is difficult to appreciate how long it took for that understanding to take hold. The decision of the House of Lords was greeted with open hostility by the leading academic writers of the day; the case was for long argued to be confined to its particular category of facts, the liability of manufacturers of goods to persons physically injured by them; and it was not until the decision of the House of Lords in *Dorset Yacht v Home Office* in 1970 that the generalising power of Lord Atkin's statement came to be recognised. In particular, the majority of the Court of Appeal had firmly held in *Candler v Crane Christmas* that *Donoghue v Stevenson* had not affected the principle that a false statement made by one person to another and acted on by the latter to his detriment was not actionable in the absence of fraud or of a contractual or fiduciary relationship between the parties.

That was the position when *Hedley Byrne* fell to be decided in 1964. Although the facts of the case are notorious, some aspects of them need to be stressed, not least to show how unpromising the case was as a vehicle for reconsideration of the then current received wisdom. Hedley Byrne asked its banker, NP, to obtain a report on the financial standing of Easipower. NP telephoned Hellers, Easipower's bankers, told them (without revealing who was NP's client) that a report was required as to whether Easipower would be good for a contract of £9,000, and said that the information was sought without responsibility on Hellers' part. Hellers replied saying that Easipower was respectably constituted, and it was believed that it would not undertake any commitment that it was unable to fulfil. NP passed that information to Hedley Byrne, saying that it also acted without responsibility. Some three months later Hedley Byrne asked NP to make further enquiries, this time in respect of a proposed contract valued at £100,000. NP raised the enquiry with Hellers, and received back a letter of 11 November 1958: "For your private use and without responsibility on the part of this bank or its officials....Respectably constituted company, considered good for its ordinary business arrangements. Your figures are larger than we are accustomed to see." NP passed the letter to Hedley Byrne, without comment as to its

distinctly cautious terms. Hedley Byrne relied on Hellers' letter in entering into contracts with Easipower, over which they lost some £15,500 when Easipower went into liquidation. On the assumption (which the judge did not accept) that Hellers owed a duty of care McNair J held that "(1)...Mr Heller was guilty of negligence in giving such a reference without making plain-as he did not-that it was intended to be a very guarded reference, and (2) that properly understood in its ordinary and natural meaning the reference was not justified by the facts known to Mr Heller." That was a striking finding, which the defendants wished to contest in the House of Lords, but were not heard on it because the appeal was decided in their favour in any event. Hellers' letter of 11 November 1958 was written not to a layman but to a banker. A banker was entitled in such a letter to use the private language of bankers, in which the phrase "Your figures are larger than we are accustomed to see" sounds warning bells. And as Lord Reid pointed out, the fatal condition, that the information was given by Hellers without responsibility on our part, had been proposed by NP in the original telephone call that they made on behalf of Hedley Byrne. It was not a good start to an attempt to change the law on responsibility for words to invite the defendant to speak without responsibility.

Nothing daunted, counsel for Hedley Byrne, Mr SBR Cooke QC, argued that as a result of *Donoghue v Stevenson* there was no logical reason why there should be a distinction between liability in negligence for financial loss and liability in negligence for physical injury, and that *Candler v Crane Christmas* had looked at that question too narrowly. It was recognised that that argument had to be reserved for the House of Lords; but at the level of the Court of Appeal it was further submitted that *Candler's* case was distinguishable because there had been a special relationship between Hedley Byrne and Hellers. That alleged relationship was not based on the relationship of enquirer and enquiree between NP's undisclosed principal and Hellers. Rather, it was based on the fact that Easipower was only able to survive because of support from Hellers, who therefore had a vested interest in Easipower continuing in business. That "special relationship" was argued to place Hellers in the position of a fiduciary, a status that had been acknowledged in *Nocton v Ashburton* to be a possible source of liability for misstatement. However, that liability was limited in *Nocton v Ashburton* to cases of a pre-existing obligation, such as

exists between, as it was in that case, solicitor and client. The Court of Appeal in *Hedley Byrne* held that special, fiduciary, duties could only be based on such an existing relationship between the speaker and the maker of the enquiry. A relationship between the speaker and a third party, such as Easipower, did not count. The Court of Appeal not having called on the respondent, and in a case that was bound to fail on its facts, nonetheless gave permission to appeal to the House of Lords. According to the printed case in the House of Lords settled by the appellants' new counsel, Mr Gerald Gardiner QC, they did so at least partly so that the significance of *Donoghue v Stevenson* could be further examined.

Mr Gardiner put the appeal on a combination of three sources. First, *Donoghue v Stevenson* regarded as a general rule, extending to all cases in which negligence was alleged. Second, and alternatively, the special responsibilities of a person holding himself out as exercising a special skill. Third, that a duty of care in the "particular and highly peculiar circumstances of this case". That argument ran into heavy weather from Mr John Foster QC, also appearing in the case for the first time, who made effective observations on the nature of the particular transaction and the disruption that a finding of liability would cause to bankers' general practices. In accordance with the common law tradition noted earlier there was no expert evidence to support this attempt to define the nature and legal acceptability of banking business, but no doubt Mr Foster was thought to be as good an authority on that subject as any other. Passing on to the law, Mr Foster submitted that the categories of a special duty to take care were closed, as demonstrated by *Candler v Crane Christmas*, and that the only recourse for plaintiffs complaining about incorrect but non-fraudulent statements was to establish either a contractual or a fiduciary relationship. The fiduciary obligation originally alleged had been rejected and not sought to be revived; and the relationship between *Hedley Byrne* and *Hellers* now relied on looked nothing like the sort of fiduciary relationship that had been recognised in earlier cases.

Faced with that onslaught, Mr Gardiner somewhat reformulated his case, in terms which influenced the subsequent statements of the law. He continued to argue for *Donoghue v*

*Stevenson* as extending generally to persons who if they thought of it would realise that if they did not take care they would injure another's person or property, which general principle at least covered skilled persons obliged to use their skill and care in tasks that they chose to undertake; but no doubt seeing difficulties in extracting that principle from the law of tort also contended that on the facts there was in any event a "fiduciary relationship" between the parties. Having seen how it had been handled by the Court of Appeal he abandoned the fiduciary obligation that his predecessor had alleged, with its overtones of impropriety springing from the alleged dependence of Hellers on Easipower. Mr Gardiner's fiduciary obligation sprang entirely from the exchange of question and answer between Hellers and NP's undisclosed principal. Hellers' relationship with Easipower was irrelevant to this argument. What placed Hellers in the same position as the solicitor in relation to his client in *Nocton v Ashburton* was simply that they had been asked a question in a professional matter by a third party, and had chosen to give a reply, however guarded that reply had been.

The House rejected the invitation to generalise *Donoghue v Stevenson* the mission to do just that having been the original motive force of the case, and a substantial reason why the case found itself before the House of Lords at all. Rather, the House reached a solution strongly influenced by Mr Gardiner's fall-back argument, that although it purported to form part of the law of negligence in fact depended on taking into fresh waters the law of fiduciary obligation that had been recognised in *Nocton v Ashburton*. That obligation ceased to be solely dependent on a pre-existing relationship between plaintiff and defendant, and sprang instead from the nature of the particular transaction on which they were engaged. If a person with special skill takes it upon himself to give advice which he knows is to be relied on so that he accepts responsibility for the answer being given carefully thus making the relationship equivalent to one in contract, a duty to be careful will arise.

That very broad statement, undoubtedly accepted by all five members of the House, was nonetheless subject to some qualifications. Lord Morris of Borth-y-Gest thought that there was much to be said for imposing a duty of honesty only; and Lord Hodson thought that it

would impose an excessive burden on bankers if anything other than honesty were required when answering enquiries. As Lord Morris made clear, their Lordships did not think it necessary to reason out their doubts because *Hedley Byrne* was in any event going to lose because of the “without responsibility” point. Similarly, Lord Devlin noted Mr Foster’s argument that, since NP had not revealed the name of their client nor stated that it was the client who wanted the report, the only proper construction of the enquiry was that it was for NP itself to use in its own advice to that client. Lord Devlin clearly saw the force of that argument, and said that he would have considered it necessary to examine it were it not for the general disclaimer of responsibility, which appeared to him to be in any event conclusive. Those issues were therefore left in the air, as is likely to happen if attempts are made to lay down very broad principles that are not necessary for the decision of the case in which they are stated.

*Hedley Byrne* therefore had some remarkable features. In the course of argument it departed a long way from its original agenda, which had sought to investigate the general world of negligence as well as the particular world of professional statements. The judges were strongly determined to craft some sort of liability for negligence by word to add to the generalised liability for negligence by deed that had been recognised in *Donoghue v Stevenson*. Mr Gardiner’s argument enabled them to do so by creating a fiduciary duty between A and B, based not on any continuing relationship or pre-existing duty between A and B, but on A’s agreement to answer a question put to him by B. The judgments could only reach that conclusion by formulating very broad statements of principle, that did not address at all the particular circumstances of bankers, and went beyond any previous authority. And as a matter of jurisprudence the case uncomfortably straddled two rather different chapters of the law, the law of negligence and the law of fiduciary obligation.

These considerations are important, for two separate reasons. First, a new class of liability had been created for professionals and possibly for others without any clear indication of the limits of that liability. Doubt continued for many years as to what the case had decided. In 1981, eighteen years after the speeches in the House of Lords, the leading text-book on the law of tort told its readers that many further decisions would be required to elucidate their significance. And in 1990, twenty-six years after the decision, leading



judges emphasised the difficulties of definition that it had caused. Second, the *Hedley Byrne* jurisprudence proved difficult to reconcile with developments in the general law of negligence of which it claims to be a part.

That general law of negligence was freed in *Dorset Yacht* from the previously limited view of the effect of *Donoghue v Stevenson* that had been adopted, or at least not rejected, in *Hedley Byrne*. However, that proved to be only the start of a voyage of discovery that took in *Anns v Merton LBC*, *Peabody v Sir Lindsay Parkinson* and *Sutherland Shire Council v Heyman*, before alighting on the threefold analysis of duty, proximity and “fair, just and reasonable” made famous by *Caparo v Dickman*. In the development of the law before *Caparo*, the jurisprudence of *Hedley Byrne* remained on somewhat on the sidelines, difficult to explain as clearly a case in negligence rather than in fiduciary duty. However, *Caparo* appeared at least at first sight to be a *Hedley Byrne* case. The claim was brought against the auditors of the company by shareholders who had lost money when buying further shares on the strength of an inaccurate picture of the position of the company that was given in its accounts. Accordingly, a straightforward application of *Hedley Byrne* would appear to lead to recovery, because the auditors had plainly assumed responsibility to the shareholders for the accuracy of the accounts; and there was nothing here, nor could there be, about without responsibility on our part. That the auditors were liable was indeed the view of a very strong majority of the Court of Appeal. But that width of that liability caused alarm; so the House of Lords fell back on the limitation, not obviously stressed in *Hedley Byrne*, that the scope of the responsibility was restricted to the particular use of the information that had been foreseen. In the case of accounts presented to a shareholder the auditors could not be taken to accept responsibility for loss caused to shareholders by the latter’s investment decisions.

That rationalisation thus depended more on the application of general principles of the law of negligence rather than upon any detailed explication of the *Hedley Byrne* doctrine. The two were eventually brought together, 40 years after the decision in *Hedley Byrne*, in *Henderson v Merrett Syndicates Ltd*. Liability under *Hedley Byrne* depended on an actual

or notional assumption of responsibility for the accuracy or, perhaps more precisely, the non-negligent nature of what was said. If that criterion was met, that was enough to bring the case under the umbrella of *Caparo*. And Lord Browne-Wilkinson explained that the liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act or advise others. Thus the law had come full circle. The doctrine of the responsibility of a fiduciary to act carefully, relied on in the argument in *Hedley Byrne* because of the reluctance to apply the general tort of negligence in that case, had now emerged as an example of the application of that same tort of negligence.

It may be that the law of negligence can only progress by the formulation of very broad general statements which are then qualified and adapted in the light of experience. The price that has to be paid is of a great deal of uncertainty, and litigation, before the law settles down. In the case of *Hedley Byrne* developments over a period of 45 years have largely controlled the original difficulties that the case presented. The same cannot be said of two other and more recent examples.

## PEPPER v HART

Chapter II of the Finance Act 1976 provided for employees to be assessed to tax on the basis of benefits or more colloquially perks received as a result of their employment. By section 61(1) the amount chargeable to tax was to be the “cash equivalent” of the benefit. That by section 63 was defined as an amount equal to the cost of the benefit, which was defined by section 63(2) as “the amount of any expense incurred in or in connection with its provision”.

The taxpayers were public schoolmasters whose sons received education at their fathers’ school for one-fifth of the fees charged to other pupils. The issue was whether the expense incurred in or in connection with the provision of that education was to be computed on a marginal cost basis, that is, the additional cost to the school of educating those particular children; or on what might be called a rateable basis, that on the assumption that the cost of educating all of the children was the same, the general costs of running the school should be allocated amongst all pupils, including the children of the schoolmasters. It might seem fairly straightforward that, since the purpose of the section was to assess the value of what the taxpayer had gained by being given the service free or at a low cost, he should be assumed to have gained what anyone else getting the service would have to have paid for it; and that is what the Court of Appeal thought.

An appeal was heard by the House of Lords for one day, at the end of which it seemed that the rateable basis was likely to prevail, at least with a majority of their Lordships. But fate then intervened. By some means that is unclear it came to the attention of the House that in debates about what became section 63 the responsible minister had made statements to the House of Commons the effect of which was that the section would not lead to persons in the position of the appellants being assessed on any more than the marginal cost of their benefits. The House accordingly relisted the appeal, before a tribunal of seven, in order to consider whether to depart from the previous strong authority of the House that Parliamentary debates could not be used as an aid to construction; and, if so to depart, how the Parliamentary debates should be used in the present case.

There is no doubt that, while not engaging in the technical language of marginal and rateable cost, the responsible Minister, the then Financial Secretary to the Treasury, gave every indication that he at least thought that the legislation would lead to the imposition of the marginal cost basis. The bill had originally included clause 54(4), which operated on a third, market price, basis. That clause was withdrawn, and speaking of what then became section 63 the minister said:

The removal of clause 54(4) will affect the position of a child of one of the teachers at the child's school, because now the benefit will be assessed on the cost to the employer, which would be very small indeed in this case.

That revelation caused an immediate difficulty for the majority of the House in *Pepper v Hart*, who had accepted the Revenue's argument that section 63 imposed the rateable cost basis, but were now told that the Minister responsible for the Revenue had assured the House of Commons that the section imposed the marginal cost basis. That discrepancy was seen as requiring extreme steps to right the wrong of the appellants being taxed on a basis that the House of Commons had been told not be used.

While that desire to do justice was, with respect, entirely admirable, it produced a prime example of the dangers of reacting to a particular objection in a particular case in terms that necessarily engage wide issues of legal and, in this case, constitutional principle. While the question of the use of Parliamentary materials in statutory interpretation had been the subject of academic and other debate over the years, it had not since 1969 been exposed to systematic study of the policy and practical implications, based on wide consultation, of the kind provided by the Law Commissions. Nor was the issue raised in *Pepper v Hart* itself until after the case had been first argued in the House of Lords. That meant that the House did not have the benefit of the views of the lower courts, or of informed reaction to those views on the part of the advocates appearing before it. In place of the normal process, the issue was addressed from scratch by Lord Lester of Herne Hill QC, instructed in the second House of Lords case for the appellants. A better vehicle for the argument could not have been found, and Lord Lester produced a very detailed review of authority and principle; but on a matter as fundamental as the present it cannot

be satisfactory to change the law on the basis of submissions from a single advocate, however distinguished. Nor is the machinery of litigation a suitable vehicle for what was deliberately an exercise in law reform.

The problems that emerged when *Pepper v Hart* was tested in practice are directly attributable to trying to find a solution to a particular, and striking, difficulty by changing general rules of law through a method that does not allow for an assessment of the overall impact of the change. Many of the problems have been importantly summarised by Lord Steyn. They include serious constitutional issues as to the relationship between the two Houses of Parliament (the Minister's statement having been made in the Commons but not in the Lords); and the potential for the use by the executive of ministerial statements to seek to coerce the courts to achieve results that are not clearly achieved by the text approved by Parliament. That latter was of course an ironic result of a case whose *principe moteur* had been the need to control, not to give extra licence to, the executive. And turning from principle to practice, Lord Steyn echoed other judges in complaining of the added time and expense taken up in searches for statements falling under the *Pepper v Hart* rubric, most of which turn out not to qualify under that rubric or, if they do qualify, do not assist the court. And whilst the courts have battled manfully to restrict counsel to the ministerial statements to which the House of Lords confined itself, they have not always succeeded.

All of this means that *Pepper v Hart* has been a fruitful source of time-consuming judicial consideration and academic speculation. There is however another and particular difficulty that springs from the use in *Pepper v Hart* of a general change in the law in an attempt to meet an immediate problem.

There is now considerable controversy as to what *Pepper v Hart* actually decided. Lord Lester presented a detailed procedure, in quasi-legislative form, for the use of Parliamentary material, a procedure that was to operate in any case in which such reference was necessary in order to determine the meaning of legislation where the provision was ambiguous or obscure; or to determine the meaning where the ordinary

meaning was manifestly absurd or unreasonable. Lord Browne-Wilkinson accepted the substance of those pre-conditions for recourse to Parliamentary debates: ambiguity, obscurity or manifest absurdity. The generality of the argument that led to that conclusion appeared to mean that it applied to any clear statement by any promoter of any legislation. However, Lord Steyn and others have suggested that *Pepper v Hart* is authority for, and may only be authority for, a principle similar to an estoppel, whereby a categorical assurance by the Government as to the meaning of legislation will prevent the Government from later contending for a different meaning.

Both camps are right. The general identification of cases in which reference to Parliamentary material is permitted formed part of the argument that was required to reverse the former absolute rule against such reference in determining the meaning of words used in a statute. But when the House came to decide the actual dispute that was the subject of the appeal, it did not apply the meaning of the words that the statute used. That is demonstrated by the fact that the majority of the House, even when it had looked at *Hansard*, continued to think that the words of the statute had the meaning for which the Revenue contended; but despite that, and because of the Minister's statement, the House refused to apply the statute to a case to which on the meaning of its words it plainly did extend. The House accordingly really had created new law, and law that was not the law that it had been asked to create by the arguments addressed to it. According to this view, at least when the Government is the litigant, the court should look at stated objective of the legislation and, whatever the wording of the legislation says, should refuse to apply it to a case falling outside that objective. That is strikingly similar to the obligation imposed by section 3 of the Human Rights Act 1998 to read and give effect to legislation in a way which is compatible with Convention rights: which, as Lord Steyn has reminded us, is an exercise in instrumentality and not of common law construction.

Because of the way in which the issue arose in *Pepper v Hart*, and the perceived injustice of the position adopted by the government, there was, one has to say, a rush to judgement, that would not have occurred if it had been recognised that the revocation of long-standing rules and the invention of new remedies is the business of the legislature

and not of the courts. The debate that now seeks to explicate what the House of Lords did should have taken place before the decision was made, and not after it.

*Pepper v Hart* has been widely used, and as widely criticised. In that it differs from the third judicial change in the law, the introduction of restitution damages, which so far seems not to have penetrated beyond the case in which the doctrine was invented. That in itself raised questions not only as to the wisdom of the process by which that change was wrought, but also about its necessity.

## AG v BLAKE: RESTITUTION DAMAGES

Mr George Blake needs no introduction. Employed as a member of the British security and intelligence services from 1944 until 1961, in 1951 he became an agent of the Soviet Union and disclosed to that country much valuable information obtained in the course of his employment, including the betrayal of other British agents. He was apprehended in 1960 and sentenced to 42 years imprisonment. In 1966 he removed himself from the custody of Her Majesty's Prison Service and went to Moscow. So far so good. What made the case further remarkable was that in 1989 Blake wrote his autobiography describing his career as a spy and traitor, and a hitherto well-respected British publishing house was willing to pay him the sum of £150,000 for the privilege of publishing the book. The Attorney-General commenced proceedings seeking to intercept the payment by the publishers to Blake of the £90,000 still owing under their contract. Neither the publishers nor Blake took any part in the proceedings, but the court was assisted by counsel as *amicus curiae* and, in the House of Lords, by counsel acting for Blake *pro bono*.

Before Scott V-C the Crown did not contend that the information contained in the book was confidential, but said rather that Blake had a life-long fiduciary obligation not to misuse even non-confidential information gained through his employment. The Vice-Chancellor held that that claim was far too wide, and the Court of Appeal agreed: a former employee owes no duty of loyalty, as opposed to confidentiality, to his former employer. But that Blake should not merely be entitled to retain the fruits of his treachery, but also be able to use the English courts to enforce their payment to him, gives rise to a sense of outrage. As Lord Woolf MR put it, the ordinary member of the public would be shocked if the position was that the courts were powerless to prevent the defendant from profiting from his criminal conduct. But on the case as presented by the Crown that was exactly the position, so new weapons had to be forged. That meant that all of the dangers set out earlier in this paper were present: there was seen to be a pressing need to adapt the law to meet the exigencies of the instant case, and the solutions reached at appellate level were not those put forward by the parties and thus had not been considered in the lower courts.



The Court of Appeal accordingly took the initiative, and invited the Crown to pursue two new lines of argument that the Crown itself had not thought to employ. First, a claim in public law, that the Attorney-General, not as representing the Crown as Blake's employer, but as guardian of the general public interest, had a power to intervene not only to prevent the commission of crime, but also to restrain the receipt by a criminal of the benefits of a past crime. That claim, having been formulated by the Court of Appeal itself, perhaps unsurprisingly succeeded in that court. It failed in the House of Lords on the basis that the order was in substance confiscatory of the proceeds of crime, a subject addressed in legislation, and therefore not to be extended beyond its statutory limits by common law or prerogative powers. I say no more of that aspect of the case, revelatory though it is of the hazards of ad hoc law-making, and turn to the second of the Court of Appeal's proposals.

Scott V-C had been allowed to proceed on the basis that there was no contractual obligation preventing Blake from publishing his memoirs. However, the Crown then discovered a document that Blake had signed when entering the service in 1944 in which he undertook not to divulge inter alia in book form any information that he gained as a member of the service. It was accepted that the undertaking had contractual effect; but that since the Crown could not establish any loss from the publication of the book, on the orthodox approach to contractual damages only nominal damages could be recovered. That in turn would make only a negligible inroad into the £90,000 that his publisher owed to Blake, when the object of the exercise was to prevent him from getting any part of that sum. The Court of Appeal therefore invited the Crown to consider whether the contractual claim might sound in restitution damages: put shortly, that the damages should be measured according to the amount by which Blake had profited from his breach rather than by the amount that the Crown had lost as a result of the breach. Although Blake himself was immune from effective suit, the claim if made good could be used in one way or another to divert from Blake to his employer the outstanding funds owed by the publisher but not yet paid.

Very strikingly, not only the *amicus* but also the Attorney-General told the court that it had no jurisdiction to make an award on that basis. The Attorney said that the rule that

damages were compensatory only had been settled by the House of Lords in *Johnson v Agnew* and could only be changed by the House. He declined to amend his case to seek restitution damages in the Court of Appeal. However, of its own motion the Court of Appeal embarked on a survey of academic and other material on restitution damages, confessedly obiter and without the benefit of argument. There was no clear authority on the issue, but a good deal of academic commentary, including the observation by a leading restitution scholar that the subject is devilishly difficult. The court concluded that restitution damages could be awarded in two circumstances. First, "skimped performance": where the defendant has saved himself substantial expense by underperformance, without actually causing the claimant any loss. Second, seen as directly relevant to Blake's case, where the defendant has obtained his profit by doing the very thing that he contracted not to do. That is hardly a limiting condition, because a person only becomes a contract-breaker by doing what he has promised not to do. However, that general principle could be used to deprive a contract-breaker of the profits made by his breach, and that is what the court would have done in *Blake* if the claimant had been prepared to ask it to do so.

When the case reached the House of Lords the Crown did feel able to take up the invitation advanced to it by the Court of Appeal. On the private law issue the argument of Cranston S-G continued to be expressed in terms of a claim for damages. But as Professor Gareth Jones points out, on any view the claim is highly discretionary, whereas once a party falls into a category in which damages may be awarded he is entitled to that award, and the court has no discretion to withhold it. In truth, as the House of Lords stressed, the claim adumbrated in *Blake* had to be an equitable claim, not for payment of damages but for an account of profits. The House therefore had to set about fixing the boundaries of such a claim, largely without assistance and with a strong predisposition to forbid Blake access to his money.

In the majority were two leading speeches, by Lord Nicholls, agreed in full by Lord Goff and Lord Browne-Wilkinson; and by Lord Steyn. Lord Nicholls said:

An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances....A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

Applying this open-ended regime, what of the case of Blake? Lord Nicholls said:

In considering what would be a just response to a breach of Blake's undertaking the court has to take these considerations into account. The undertaking, if not a fiduciary obligation, was closely akin to a fiduciary obligation, where an account of profits is a standard remedy in the event of a breach. Had the information which Blake has now disclosed still been confidential, an account of profits would have been ordered, almost as a matter of course. In the special circumstances of the intelligence services, the same conclusion should follow even though the information is no longer confidential. That would be a just response to the breach.

That was a remarkable conclusion indeed. An orthodox claim for an account was not available precisely because the Crown refused to argue (throughout) that the information was confidential, or (in the House of Lords) that Blake was a fiduciary. The Crown dropped the latter claim presumably because of the severe criticism that it encountered from the Court of Appeal. Yet an admittedly exceptional claim for an account as a remedy for breach of contract was allowed on the basis that the conduct of the defendant was something like breach of confidence or something like breach of a fiduciary obligation.

Lord Steyn noted that it would be wrong to create a remedy simply to cover the instant case, and therefore set himself to explain the principled basis on which the law should be developed in a way that covered this case and other cases sharing materially similar features. He accepted Lord Nicholls' analogy with the position of a fiduciary and of a holder of confidential information, and concluded that therefore "practical justice" would be done by ordering Blake to disgorge his profits. That, he said, demonstrated the enduring strength of the common law in seeking justice on a case-by-case basis. Lord

Steyn saw that process as exemplified by the majority in *White v Jones*, who had subordinated conceptual difficulties to the needs of practical justice.

It has proved extremely difficult to extract any more general guidance from these observations. If the doctrine indeed only extends to cases with materially similar features to that of *Blake*, then it seems likely, *Blake's* experience having been so singular, that no further case will arise. And there indeed does not seem to be any subsequent case in which restitution damages so-called, although sought, have in fact been awarded. That is no doubt a reflection of the uncertainty that has been caused by the adoption of what at first sight seems like a broad general principle, but which is hedged about with severe and very broadly expressed savings and, being confined to exceptional cases in which the demands of practical justice are sufficient to overcome difficulties of analysis, would seem to operate happily only in the case for which it was conceived. As the leading text book on the law of restitution puts it, echoing similar feelings in the two decades after *Hedley Byrne*:

An account of profits as a remedy for breach of contract was born in *Blake*. It will take many years before the parameters of the equitable discretion to grant an account will be drawn. As present, the jurist can but look into a glass darkly.

## ENVOI

I return to the second of the themes of this lecture. If the common law is to continue to play this role it can only do so even arguably safely if the lawyers and the judges have available to them reports of the nature and standard of those produced by the law reporters of the Incorporated Council of Law Reporting. It has been my privilege to serve on that Council for the last fifteen years, and I wish it well as I now take my leave of it.