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Ireland's Call: *Junior Books* or *Hedley Byrne*? (Halftime in) *Bates v Minister for Agriculture*

Brian Flanagan*

> One of the curious features of the law of negligence is the extent to which it is, on the one hand, routinely and mundanely applied without any great controversy in a large number of cases on a daily basis but, on the other hand, has generated, at the level of high principle, perhaps more debate than any other issue of controversy in the common law world.[1]

One may picture the law of torts as a set of qualifications to the legal application of the principles of corrective justice, including, notably, the principle that a loss to one party caused by another's negligence should be made good. From this perspective, the first set of categories that come into view concern the reasons for which the application of these principles might be suspended; the second set concern the considerations that, in turn, suspend the application of these reasons. In the case of the principle that negligently caused losses should be compensated, the common law of torts has recognized at least three sorts of reasons for suspension, to wit, the identity of the defendant, eg the historic immunity of the State; the nature of the activity causing the loss, eg the occupation of a premises or the public administration of the State; and the form taken by the loss in question, eg a purely psychiatric or economic loss. In a case such as *Bates and Moore v Minister for Agriculture*,[2] reasons of each sort might, at one time or another, have served to deny the plaintiff recovery of the loss caused by the defendant's negligence. Crucially, it seems that any decision to award compensation must presuppose not simply that the economic character of Bates' loss fails to preclude liability in the case in question, but that it fails to preclude liability in *any* contemporary case in negligence.

Both the High Court and Supreme Court have so far ruled in the plaintiffs' favour. However, in its judgment of 7 February 2018, the Supreme Court diverged inadvertently, but significantly, from the High Court's findings of fact. This divergence prompted the State to apply to have the Court revisit its judgment on the merits of the State's appeal. The Court held a hearing on the State's motion in July 2018 and subsequently invited written submissions from

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1. Clarke J in *Cromane Seafoods Ltd v Minister for Agriculture, Fisheries and Food* [2016] 2 ILRM 81 at 145.
2. [2018] IESC 5.

the parties; judgment on the application has been reserved. As we shall see, on the High Court facts, *Bates* poses an inescapable dilemma between following the rule in *Junior Books* or that in *Hedley Byrne*, one which it seems that the Supreme Court must now squarely confront.

Bates raises two issues that are central to the theory of Irish private law, namely, the parity of economic and other forms of loss and the immunity attaching to acts of public administration. On reviewing the case's judicial analysis to date, I describe how the resolution of the described factual divergence is liable to complicate the Supreme Court's reconsideration of each of these questions.

I. Judicial analysis in *Bates*

On identifying a possible business opportunity to fish for scallops in part of the Bay of Biscay adjacent to French territorial waters, 'Area VIIIa', the plaintiffs approached the Department of Agriculture to look for advice as to their legal entitlements under EU fisheries law. In early 2000, a Department official, Michael O'Driscoll, assured the plaintiffs that, on being granted a sea-fishing licence from the Minister for Agriculture, they would be legally entitled to fish for scallops in Area VIIIa. On this basis, the plaintiffs applied for and received a licence for the boat 'William Joseph' in June 2000 and, in late 2000, acquired a second boat, the 'Alicia', for the same purpose and for which they were similarly granted a licence. In applying for these licences, the plaintiffs submitted documentation outlining their intention to fish in Area VIIIa. From 2002 to 2003, the plaintiffs duly fished for scallops in Area VIIIa for a total of 22 days. However, on 18 August 2003, when both boats were fishing in Area VIIIa, they were informed by a French fisheries patrol aircraft that they were fishing illegally and they were ordered to leave Area VIIIa immediately, which they did. The boats then made contact with Mr Bates, who was ashore; Mr Bates, in turn, made contact with Mr O'Driscoll in the Department. On being reassured that the plaintiffs were indeed entitled to fish in Area VIIIa, Mr Bates conveyed that information, which was confirmed by a fax message to him from a Sea Fishery Officer in the Department, to the skippers of the two boats, but he told them to stay where they were now positioned (outside Area VIIIa). Later, in the early hours of 19 August, both boats were arrested by the French Navy and directed to the port of Brest, where they were held and their catch confiscated. It was, as it happened, illegal under EU law for the plaintiffs to fish for scallops in Area VIIIa; they were subsequently convicted of charges of illegal fishing. In advising the plaintiffs, the Department officials had relied on a defective version of the English translation of the relevant EU legal instrument, Council Regulation (EC) No 2027/95 of 15 June 1995, which had omitted the Regulation's specification that Ireland retained zero scallops fishing effort in Area VIIIa.

The plaintiffs looked to receive compensation from the Minister for, inter alia, the fine and associated expenses they incurred on their arrest by the French coastguard. Their argument was that they had incurred these losses due to the careless advice as to their legal rights that they had received from

the Minister's officers. To overcome the traditional bar to recovery for purely economic loss, the plaintiffs sought to invoke the common law jurisprudence on negligent misstatement as established in the English case of *Hedley, Byrne v Heller*,[3] and subsequently adopted into Irish law in the High Court decision in *Securities Trust Limited v Hugh Moore & Alexander Limited*.[4] But their immediate difficulty lay in overcoming the impediment, invoked by the Supreme Court in its earlier decisions in *Glencar v Mayo County Council*[5] and *Beatty v Rent Tribunal*,[6] to recovering damages for losses of any sort that have been caused by negligence in the exercise of powers of public administration. In the High Court, Laffoy J agreed with the plaintiffs that, in exercising his power to licence sea-fishing, the Minister could not avail of any such immunity to defeat their claim. Laffoy J's rationale was notably broad; by analogy with the Department's potential liability for non-negligence torts, she held that such immunity could not exclude liability for any form of negligence involving a misstatement:

> In my view, the position of the plaintiff is no different to that of a plaintiff who invokes private law duties in relation to occupiers' liability or employers' liability against a public body defendant. I can see no reason why a public authority or the State should be afforded immunity in an action for negligent misstatement by a person for whom it is vicariously liable, in the type of situation where a defendant, which does not have public authority status… would be held liable in tort.[7]

Laffoy J then proceeded to set out a test for liability for a purely economic loss caused by a negligent misstatement:

> [T]he proximity test in respect of a negligent misstatement included persons in a limited and identifiable class, when the maker of the statement could reasonably expect, in the context of a particular inquiry, that reliance would be placed thereon by such persons to act or not to act in a particular manner, potentially to their detriment, in relation to the transaction.[8]

On applying this test, Laffoy J concluded that the actions of the Department satisfied its conditions, and, hence, that the plaintiffs were entitled to compensation for their consequent arrest and associated losses:

> Given the context in which the plaintiffs sought information from the officials of the Department in relation to their entitlement to fish for scallops in Area VIIIa, in my view, the proximity test is met and a duty of care was owed to the plaintiffs… The official who gave the admitted assurances to the plaintiffs *prior* to August 2003, Mr O'Driscoll… g[ave] the plaintiffs the wrong information….

3. [1964] AC 465.
4. [1964] IR 417.
5. [2002] IR 84.
6. [2006] 2 IR 191.
7. [2011] IEHC 429 [9.3].
8. ibid [9.4].

> [S]ome official... must have been negligent in failing to ensure that the version of the translation of the 1995 Regulation which was available to be consulted by officials who had to deal with queries... correctly reflected the regulation as implemented. Therefore, I am satisfied that the plaintiffs have established an entitlement to damages.[9] (Emphasis added) [Passage A]

The context in which the Supreme Court considered the Minister's appeal from Laffoy J's judgment appears to have been decisively shaped by its intervening judgment in *Cromane Seafoods Limited v Minister for Agriculture*.[10] In *Cromane*, the Minister for Agriculture, in a series of statutory orders, prevented the plaintiffs, who ran a mussel fishing business in Castlemaine Harbour, from accessing the Harbour for certain periods in the years 2008-10. These orders sought to achieve compliance with the European Council's Habitats Directive on environmental conservation (92/43/EEC). Initially, however, the Minister had indicated that it was not envisaged that compliance would require any such orders to be made. The plaintiffs sought to recover for the consequent losses to their respective businesses. The Supreme Court majority, comprising Charleton, MacMenamin and Dunne JJ, rejected their claim on the basis, inter alia, of the immunity of public authorities from liability for negligence in the exercise of official powers:

> Negligence is not all encompassing. It has not swamped every other tort. If ill is broadcast of a person, the remedy is defamation. If a person is illegally arrested, the remedy is false imprisonment. If in public office, something is done which affects rights, the remedy may be judicial review in terms of overturning a decision in excess of jurisdiction or, if damages are sought, tort law requires that a claimant should prove misfeasance in public office.[11] [Passage B]

The consistency of this analysis with the amalgamation, by Laffoy J in *Bates*, of liability for negligent misstatement in the exercise of public authority with liability for negligent misstatements by private individuals, is open to doubt. For the Supreme Court in *Bates*, comprised, as it was, of its majority in *Cromane*, this potential conflict may have loomed large.

In *Bates*, speaking for a unanimous Supreme Court, Charleton J purported to uphold both the High Court's decision and its ratio decidendi. In fact, the Supreme Court's basis for assigning liability to the defendant Department not only differed from that of the High Court but also supposed a factual matrix that implicitly contradicted the latter's findings of fact:

> The plaintiff Eugene Bates was ashore and thus in a position to contact the

9. ibid [9.4].
10. [2016] 2 ILRM 81.
11. Charleton J, *Cromane* ibid at 122. Laffoy J joined Clarke J's dissent, which argued that the fact that the negligence causing Cromane's loss occurred in the exercise of public power was relevant but not dispositive.

> defendant Department when he received the query from the vessels. The information which he received from the Department was that the plaintiffs were entitled to fish... He thus told the skippers of the two boats to continue fishing in that area... [T]he trial judge awarded only the damages immediately consequent upon the advice given by the Department when the vessels were on the high seas in the Bay of Biscay which resulted in them staying within area VIIIa... [She] held that... the particular circumstances had established liability but only in respect of the last action in advising an entitlement to fish... [T]he reasoning and order of the trial judge should be upheld on appeal by this Court.[12]

The contradiction consists in the Supreme Court's assumption that the boats had decided, despite the intervention of the French spotter aircraft on August 18, to remain in Area VIIIa, and that they were arrested in virtue of that decision, which, in turn, had been the result of the advice given by the Department on August 18. In fact, Laffoy J had found that the boats had duly left Area VIIIa, as directed. Whilst significant, the conflict seems inadvertent; first, at the outset, the Supreme Court explicitly considered and expressly rejected an objection to a finding of Laffoy J in relation to the ultimate source of the misinformation given the plaintiffs; second, Charleton J in fact quotes in his judgment a passage of Laffoy J's opinion (Passage A, above), which duly expresses her exclusive reliance on the Department's pre-August statements in assigning liability thereto.

One possible explanation for the described conflict lies in the Court's concern to preserve *Cromane*'s apparent recognition of immunity for negligent misstatement in the exercise of public authority. Thus, Charleton J's judgment in *Bates* both quotes the cited passage from his judgment in *Cromane* (Passage B, above) and notes, obiter, that:

> Had it been the case that the function being exercised on behalf of the defendant Minister was an administrative task conducted pursuant to a statutory remit, then, the question of whether any duty of care was owed, the proper starting point for any negligence analysis, would be answered negatively.[13]

On restricting the Department's liability to its final, improvised action of advice, remote, as this was, from any assigned administrative function, the Supreme Court ensures that its decision to allow recovery of the plaintiffs' loss could not be taken to significantly weaken the State's immunity in negligence respect of its exercise of public powers. As noted, however, the underlying factual conflict has since been brought to the attention of the Court. In the circumstances, it seems plausible that the Court both will recognise the High Court's findings of fact (which themselves presumably reflect the record of the original French proceeding) as correct and will acknowledge the disparity as sufficiently, 'fundamental and central that it should lead to the setting aside of

12. n 2 per Charleton J [8], [13], [15] and [29].
13. [18].

[its] judgment including perhaps resulting in the reversal of the decision itself', O'Donnell J in *Nash v DPP*.[14]

The first complication that arises from this prospective factual revision is that the Supreme Court will have to directly reconcile the High Court's decision in *Bates* with its own subsequent decision in *Cromane*.

II. Immunity of public authorities

Laffoy J's stated rationale for rejecting public authority immunity for the Department in *Bates* does seem in tension with the Supreme Court's basis for excluding the Department's liability in the later *Cromane* decision, as expressed in Passage B, above. It might seem to follow that the Supreme Court must now choose between affirming the High Court result and preserving public authority immunity in negligence. The severity of this dilemma is allayed, however, by a distinction in the forms that negligent misstatements may take. In its original *Bates* judgment, the Supreme Court is careful to note that the High Court's imposition of liability for negligent information:

> [D]id not extend to the imposition of a duty of care in issuing licences based upon any supposed duty to examine documentation supporting such an application to ensure that advice was spontaneously proffered to the plaintiffs warning them off any anticipated danger.[15]

Crucially, this appears to be true of the imposition of liability on the Department based on *either* its final, improvised act of advice *or* its earlier, pre-August 2003 advices. It is one thing to offer a careless assurance and another to carelessly omit to offer a warning:

> The same reluctance on the part of the courts to give a remedy in tort for pure omission applies, perhaps even more so, when the omission is a failure to prevent economic harm.[16]

According to the High Court, Department officials had sight of information that should have allowed them to conclude that the plaintiffs would be placing themselves in danger. But, equally, the High Court found that a Department official had chosen to give positive assurances as to the legal effect of the Minister's licencing decision. Thus, the Supreme Court might now specifically condition any imposition of liability on the Department on its carelessness in taking the latter, positive act rather than on any carelessness in failing to bring the plaintiffs' legal peril to their attention on foot of their submission to the Department of materials for the purpose of informing the Minister's licensing

14. [2017] IESC 51 [6].
15. n 2 per Charleton J [22].
16. *Banque Financière v Westgate Insurance Co* [1989] 2 All ER 952, per Lord Slade at 1009 (quoted by Keane J in *Doolan v Murray* (HC, 21 December 1993) at 44).

decision. This analysis would permit the plaintiffs to recover for a negligent misstatement attributable to the Department whilst preserving the immunity of public authorities to some forms of negligent misstatement. In this way, *Cromane* can be reconciled with Laffoy J's exclusion of the Department's immunity in *Bates*, even if not with her stated rationale of equivalence between public and private liability.

The proposed analysis resolves the tension between *Cromane* and the High Court's decision in *Bates* but only by tempering the ambit of the former's recognition of public immunity for negligent misstatement. In principle, the Supreme Court might consider such an analysis sufficiently restrictive of the immunity of public authorities to justify reconsideration of its original recognition of the Department's liability to Bates and Moore. One effect of such a decision to overturn the award of the High Court would be to remove the need to address the second, deeper complication that *Bates*, in view of the High Court's findings of fact, now presents, namely, the issue of choosing between the authority in this jurisdiction of *Junior Books* and *Hedley Byrne*.

III. Recoverability of economic loss

One policy concern that has been taken to motivate the traditional rule against the recoverability of economic loss is the fairness of holding a defendant liable for a multiplicity of losses caused by a single event:

> [A] crucial concern is that of disproportionate liability... It seems unfair to many courts that one single moment of carelessness could lead to, 'a liability in an indeterminate amount for an indeterminate time to an indeterminate class'...[17]

In principle, however, this concern appears to be directed, not at conduct causing economic loss per se, but at any conduct that consists in a statement, eg liability for presentation of a negligently prepared recipe that leads to physical injuries in a multiplicity of victims among whom the recipe is exchanged. Moreover, not all economic losses are caused through negligent statements, eg the defective manufacture of a factory floor in *Junior Books* Ltd *v Veitchi Co Ltd*[18] or the negligent setting of a fire that cut the electricity supply to a neighbouring business in *McShane Wholesale Fruit & Vegetables Limited v Johnston Haulage Company*.[19] Yet an *act* causing pure economic loss seems no more likely to produce indeterminate liability than an act that physically damaged the relevant property in a corresponding way, eg a damaging spill of chemicals on the factory floor by its manufacturers just after its otherwise non-defective completion or the negligent setting of a fire that actually spread to the

17. Bryan McMahon and William Binchy, *The Law of Torts in Ireland* (4th edn, Bloomsbury 2013) 298 (quoting Cardozo J in *Ultramares Corporation v Touche* 174 NE 441 (1932)).
18. [1983] 1 AC 520.
19. [1997] 1 ILRM 86.

neighbouring premises. Thus, it seems that concerns about 'indeterminate' liability are, on the one hand, potentially as salient in respect of statements that do not cause pure economic loss as those that do, and, on the other, potentially as redundant in respect of acts that cause pure economic loss as those that cause losses taking other forms.

There is, however, an alternative policy concern that does seem to directly motivate the irrecoverability of economic loss, namely, the independence of contractual and tortious liability:

> [C]ourts traditionally felt that pure economic loss was more properly a matter exclusively related to a breach of contract.[20]

We will take it then that, strictly, any rule against recovery for negligently caused economic loss will be based on the principles underpinning the independence of the laws of contract and tort. It follows that no such rule exists unless any occasion in which a pure economic loss is found to be recoverable is justified by reference to some feature that mitigates the dilution of the described independence. Accordingly, if such occasions are justified by appeal merely to some mitigation of the indeterminacy of liability that might otherwise arise from a careless statement, then there will be no bar to the recovery of pure economic loss. The reasoning supporting *Hedley Byrne*'s introduction of a general exception to the irrecoverability of economic loss reflects this logic. Lord Devlin, seeking to unify the Law Lords' speeches, held that the application of this exception was conditional on the resemblance of the relationship between defendant and plaintiff to that of a contract:

> I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care... include... relationships which... are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.[21]

The UK Supreme Court has recently reaffirmed the dependence of any exception to the irrecoverability of economic loss on the existence of a relationship equivalent to contract:

> The expression 'equivalent to contract' [as used by Lord Devlin]... serves... as an explanation of why it is appropriate to award a purely economic loss as damages for negligence in the course of such a relationship.[22]

20. McMahon and Binchy n 17 at 298.
21. *Hedley Byrne v Heller* n 3.
22. *Banca Nazionale del Lavoro SPA v Playboy Club London Limited* [2018] UKSC 43 Lord Sumption at 9.

Equally, the assumption that the recovery of economic losses stemming from relationships that are not equivalent to contracts would entail the abandonment of any general rule against recoverability is implicit in how Irish courts have characterized their continuing reservation of the question of the existence of such a rule:

> I would expressly reserve for another occasion the question as to whether economic loss is recoverable in actions for negligence other than actions for negligent misstatement... and whether the decision of the House of Lords in *Junior Books*... should be followed in this jurisdiction.[23]

Similarly:

> I am prepared to assume that the law of negligent misstatements is a separate code from the law of negligent acts. This has the advantage that I do not have to consider the law relating to the recoverability of damages for economic loss arising from negligence in general.[24]

On this account, a relationship's equivalency to contract, understood in terms of an assumption of responsibility for the accuracy of the advice in question, is conceptually crucial to the recognition of exceptions to the irrecoverability of economic loss. It is unsurprising, therefore, that, in the actual justification of recovery for negligent misstatements causing economic loss, the fact of the defendant's assumption of responsibility has been critical.[25] Summarizing English law since *Hedley Byrne*, the UK Supreme Court has noted:

> It has therefore become clear that, although it may require cautious incremental development in order to fit cases to which it does not readily apply, th[e] concept [of an assumption of responsibility] remains the foundation of the liability.[26]

Equally, the centrality of the defendant's assumption of responsibility to his liability for economic loss under *Hedley Byrne* in Irish law is reflected in the Irish Supreme Court's recent summary of that case's reception:

> [Dispensing with the traditional issues such as assumption of responsibility]... would, of course, be a very large movement away from the law which was thought

23. *Glencar Exploration v Mayo County Council* [2002] 1 IR 84 Keane CJ at 143.
24. *Harold Wildgust and Carrickowen Limited v Bank of Ireland and Norwich Union Life Assurance* [2006] 1 IR 570 Geoghegan J at 576.
25. 'If I am in a railway station and I am asked the time by an agitated passenger who says that he or she is rushing to an important interview, I will not be exposed to a *Hedley Byrne* claim if my watch is slow and the passenger misses the interview and damages the prospects of new, better-paid employment.' Bryan McMahon and William Binchy n 17 341.
26. *NRAM Ltd (formerly NRAM plc) v Steel and another* [2018] 1 WLR 1190, 1199 Lord Wilson JSD.

> to have emerged from *Hedley Byrne v Heller* [1964] AC 465 and those cases in this jurisdiction which followed it.[27]

In light of the described role of the notion of an assumption of responsibility, it is striking that, in purporting to permit Bates and Moore to avail of an exception to the irrecoverability of economic loss in *Bates*, the High Court considered only the reasonable foreseeability of the plaintiff's injury and the limitation of the loss to a determinate class of potential litigants. In the Supreme Court, whilst Charleton J does, in addition, attribute to the Department an assumption of responsibility, he explicitly rejects the salience of this assumption as an indication of the relevant relationship's equivalency to contract:

> This was a classic case of the voluntary assumption of responsibility by the defendant Department... While the relationship between the parties was not a professional one, or, to use the language from some of the older cases, one that would be regarded as equivalent to contract, in the situation from which advice was called for and the assumption of responsibility to provide accurate information which the Department assumed, this was what is now more commonly referred to as a special relationship giving rise to liability for negligent advice.[28]

Taken strictly at face value, then, the analysis of the courts in *Bates* does not condition recovery for economic loss on the case's possession of any feature that mitigates the prospective dilution of the independence of contractual and tortious liability. Since any rule against recovery for economic loss will be based on the principles underpinning such independence, it follows that there is no such rule in Irish law. It would be a mistake, however, to reach this conclusion solely on the basis of the stated judicial reasoning. First, the course of the litigation in *Bates* was such that the parties did not provide submissions on the law of negligent misstatement before the High Court.[29] Second, it is clear that the three-member Supreme Court in *Bates* did not take itself to be revising its jurisprudence on negligent misstatement, which it had stated only a few months previously in *Walsh*, but to be merely applying the 'classic' position.[30]

27. *Walsh v Jones Lang Lasalle Limited* [2017] IESC 38, O'Donnell J.
28. n 2 [26].
29. 'Unfortunately, neither the plaintiffs nor the defendants, in their submissions, addressed the criteria which must be met to establish liability on the part of a defendant for negligent misstatement', Laffoy J in *Bates*. Indeed, in her recent opinion in *Walsh v Jones Lang Lasalle*, Laffoy J emphasizes the centrality of the question of the defendant's assumption of responsibility: 'the point on which I fundamentally disagree with the reasoning in the judgment of the High Court, which ultimately led to what I consider to be the incorrect conclusion that JLL owed a duty of care to Mr Walsh... was the failure, having considered the matter objectively, to recognise that there was no assumption of responsibility on the part of JLL.
30. Indeed, as O'Donnell J observed of comparably radical readings of the Court's decision in *Wildgust v Norwich Union*: '[These represent] an approach... which would involve a dramatic departure from the law of negligent misstatement, which has existed since it was first identified in *Hedley Byrne v Heller* and approved in this jurisdiction in *Securities Trust v Moore* and *Bank of Ireland v Smith*. If that step is to be taken it would require more elaborate consideration (and by a full court) than was involved in [*Wildgust*]' *Walsh v Jones Lang Lasalle Limited* [2017] IESC 38.

Nevertheless, the question posed by *Bates* about the recoverability of economic loss is not amenable to resolution simply by way of insistence upon a charitable interpretation of the stated reasoning.

For the purpose of its liability for negligently caused economic loss, a party's assumption of responsibility for the accuracy of its advice may, 'be express or implied from all the circumstance', per Devlin LJ. Accordingly, no hard-and-fast criterion for such an assumption is available. Still, one feature that appears to be common to all instances in which a defendant has been found to have implicitly assumed responsibility for his statement is that his access to the source of the pertinent information was privileged relative to that of the plaintiff.[31] Conversely, in the recent UK case of *NRAM v Steel*, which involved a plaintiff who had relied on a statement about a matter on which it had equal access to information, the UK Supreme Court found that the absence of privileged access precluded liability.[32]

Consider the question of the Department's privileged access to the pertinent information in *Bates* on the facts as posited by the Supreme Court. The (incorrect) premise at work is that the loss was the result of the plaintiffs' reliance on the advice that the Department gave whilst they were at sea in the Bay of Biscay on August 18. In its making of the relevant statement, it is plausible to hold that the Department did indeed have a privileged access to the relevant legal materials, ie that, 'the guidance involved the consultation of documents that reposed within the expertise of the Department.'[33] After all, the plaintiffs could hardly be expected to seek and receive independent legal advice on the pertinent issue within a matter of mere hours. The difficulty is that, on the facts as found by the trial court, and which, presumably, the Supreme Court must now adopt, a comparable analysis seems unavailable.

Before the High Court, the Department argued that, as they related to the correct interpretation of the applicable general law, the assurances it had given prior to August 2003 concerned a matter on which the plaintiffs could have sought independent legal advice. Without directly addressing this point, Laffoy J observed that the plaintiffs had relied on the, 'special knowledge and expertise... of the Department in connection with the complexities of Community law on fishing.'[34] Notice, though, that the fact that a defendant

31. eg *McGee v Friel* [2016] IEHC 59, *Wildgust v Norwich Union* [2006] 1 IR 570, *Doran v Delaney* [1988] IESC 66, *Treston v Mayo County Council* [1998] 7 JIC 0601, *McAnarney v Hanrahan* [1993] 3 IR 492, *Doolan v Murray* (HC, 21 December 1993).
32. 'No authority has been... discovered... in which it has been held that there was an assumption of responsibility for a careless misrepresentation about a fact wholly within the knowledge of the representee': [2018] UKSC 13 per Lord Wilson JSD [38].
33. Charleton J.
34. n 7 [9.4].

enjoyed privileged access to the pertinent information relative to certain third parties does not mean that it enjoyed privileged access relative to the plaintiff.

There is no question that a wide class of legal professionals would have been equally qualified to advise the plaintiffs in *Bates* as to their rights in respect of Area VIIIa. Moreover, the plaintiffs were commercial fishermen who, in pursuit of their ordinary business interest, might have been expected to be able to retain appropriate professional advice, including legal advice. Accordingly, Charleton J described the content of the plaintiffs' undertaking, in applying for a license, to only fish within properly designated areas as a matter on which, 'they could get their own advice'. On this account, the plaintiffs' right to fish for scallops appears to qualify as, 'a fact wholly within the knowledge of the representee', per *NRAM*. Thus, in *Bates*, on its true facts, a factor common to findings of an implicit assumption of responsibility for the accuracy of advice seems to be absent, namely, the parties' unequal access to the relevant information.

In *Bates*, the defendant Department could reasonably suppose that the recipients of its freely given advice were fully equipped to independently verify the accuracy of its advice. Any characterisation of such a party as implicitly assuming responsibility for its advice's accuracy must be open to question. Accordingly, where, as in *Bates*, there is also no evidence of any express declaration of its assumption of responsibility, it seems that the defendant cannot be held liable on the basis of its having undertaken any responsibility. It follows that the Department's liability in *Bates* cannot be justified, on the High Court facts, by reference to the case's possession of any feature that would mitigate such an outcome's prospective dilution of the independence of contractual and delictual liability. It follows, in turn, that the Supreme Court can uphold the High Court's decision on the facts as it found them only by rejecting the policy of reserving the paradigmatic form of contractual liability, that is, liability for losses that are purely economic, to parties who have actually entered contracts. By extension, the Court would thereby exclude the basis for the existence of any bar to the recoverability of economic loss.

Accordingly, should the Supreme Court choose to persist in excluding the application to the Department of public authority immunity in this case, the question of the Department's liability will depend on the recoverability, in Irish law, of economic loss. The Supreme Court would then at last resolve, explicitly or not, the status of *Junior Books* in Ireland, that is, whether, in cases of negligence:

> The quality of the damage does not arise. It can be damage to property, to the person, financial or economic.[35]

IV. Conclusion

It seems that there are three forms that the Supreme Court's revised judgment in *Bates* might take:

35. *McShane* n 19 at 88.

A. Judgment for the Department by recognizing immunity for all forms of negligent misstatement in the exercise of powers of public administration (and thereby continuing to reserve the question of the recoverability of economic loss in Ireland).
B. Judgment for the Department by confining the recoverability of economic loss to cases satisfying the *Hedley Byrne* test (thereby both rejecting the authority of *Junior Books* in Ireland, contra Costello J in *Ward v McMaster*,[36] and reserving the question of the scope of public immunity for negligent misstatement).
C. Judgment for the plaintiffs by, first, confining public immunity for negligent misstatement to misstatements that consist in omissions, and, second, affirming the recoverability of economic loss pari passu with other forms of loss (thereby following *Junior Books*, per *Ward v McMaster*).

On the true facts of the case, the Supreme Court might still reconcile the result in the High Court with a narrower conception of public authority immunity in negligence. It cannot also, however, continue to reserve its position on the contemporary recoverability of pure economic loss; on this, *Bates* poses a dilemma.

36. [1985] IR 29.