

Cases the other way include *J.D. v East Berkshire N.H.S. Trust* [2005] UKHL 23, [2005] 2 A.C. 373, on which Lord Lloyd-Jones relied. These authorities hold that an important duty to one group *does* preclude a cross-cutting duty of care to others. The two lines of authority are hard to reconcile. It is not entirely clear why Lord Lloyd-Jones preferred the *J.D.* approach. Was it the importance accorded to the Commissioner's public duty which turned the scale, rather than the desirability of litigant freedom inherent in (all) civil proceedings? In which case does *James-Bowen* apply with full vigour (or at all) to a private employer? The arguments were finely balanced. Ultimately the Supreme Court's function is to weigh them up and decide. In doing so, it must take all relevant policy considerations into account. *James-Bowen* is a welcome return to this approach.

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SECOND DEGREE BYRNE

WHERE a person (A) negligently misrepresents a fact to another (B) and that representation is then communicated by B to his undisclosed principal (P) who incurs loss in reliance on it, does A owe a duty of care with respect to the representation to B alone, or also to P? This was the question the Supreme Court considered in *Banca Nazionale de Lavoro v Playboy Club London* [2018] UKSC 43, [2018] 1 W.L.R. 4041. The Court held that the representor did not owe a duty of care to the undisclosed principal because it had only "assumed responsibility" towards the person to whom the information had been directly communicated. In so concluding, the Court rejected an attempt to argue by analogy from contractual agency principles, holding that although a person could be liable in contract to his co-contractor's undisclosed principal, it did not follow that a negligent representor would be liable in tort to the representee's undisclosed principal.

Playboy Club operated a casino. A member of the Club, Mr. Barakat, requested a cheque cashing facility to enable him to exchange cheques for casino chips. Before granting such a facility, it was the Club's policy to seek a banker's reference, verifying that the member had sufficient funds to meet liabilities of twice the facility's limit. To protect its members' privacy the Club used another company in its group, Burlington Street Services (Burlington), to obtain references on its behalf. Burlington duly obtained a reference from Barakat's bank, Banca Nazionale del Lavoro (BNL), confirming that Barakat was trustworthy up to £1,600,000 in any one week. Relying on this, the Club approved Barakat's facility. He used

it to gamble large amounts, and his cheques bounced. However, it transpired that Barakat's account had never contained any funds, had only been opened the week of the reference request, and the Club was left £802,904 worse off. It brought a claim against BNL in negligence.

Lord Sumption (with whom Lady Hale, Lord Reed and Lord Briggs agreed) began by considering the development of liability for negligent misstatement and the core importance of the concept of "assumption of responsibility" in determining the persons to whom such duties are owed (at [6]–[9]). After reviewing *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465 and *Caparo Industries plc v Dickman* [1990] 2 A.C. 605, His Lordship noted (at [10]) that it was important to have regard to the state of the representor's knowledge; he must contemplate some "transaction" in respect of which the statement is made. This "transaction" would in turn identify those to whom responsibility had been assumed.

His Lordship then went further, stating that for a representor (A) to assume responsibility to another (B) for the accuracy of a statement, "the representor must not only know that the statement was likely to be communicated to and relied upon by B. It must also be part of the statement's known purpose that it should be communicated and relied upon by B" (at [11]). It followed that, because BNL did not contemplate or intend that the reference would be passed on by Burlington for use in a transaction involving a third party, it had not assumed responsibility towards the Club.

By referring to the "known purpose" of the information and the "transaction" in relation to which it was provided, Lord Sumption was probably not referring to the specific details of how the information was to be used (namely the provision of gaming credit). Unlike the Court of Appeal ([2016] EWCA Civ 457, [2016] 1 W.L.R. 3169, at [19]–[22], per Longmore L.J.), Lord Mance (who concurred with Lord Sumption's analysis) did not regard the fact that the bank was ignorant of the particular business purpose for which the reference was sought as relevant (at [22]). Instead, by "transaction" the court appears to have meant that the representor must contemplate some abstract instance of reliance, and by "purpose" the purpose of reliance generally rather than a particular mode of reliance (such as extending credit to a gambler). This is surely correct because, as Lord Mance noted (at [23]), the fact that the reference was obtained in relation to gambling would not necessarily lead to greater liability than if it related to risky business ventures. Although only Lord Mance explicitly addressed the relevance of the business purpose for which the information was requested, Lord Sumption did not dissent from his analysis.

Relying on judicial comparisons between "assumptions of responsibility" and contract (*Hedley Byrne*, pp. 528–29; *Smith v Bush* [1990] 1 A.C. 831, at 846; *Henderson v Merrett* [1995] 2 A.C. 145, at 181) the

Club argued that the undisclosed principal doctrine applied by analogy to liability for negligent misstatements. In particular, the Club claimed that, just as a party who contracts with an agent is deemed to owe contractual duties to that agent's undisclosed principal (*Siu Yin Kwan v Eastern Insurance Co. Ltd.* [1994] 2 A.C. 199, at 207), so too a party who makes a representation to an agent should owe a duty of care in tort to the undisclosed principal.

Lord Sumption described this argument (at [11]) as “ingenious”, if ultimately “fallacious”. Lord Mance agreed. The application of contractual agency principles to “assumptions of responsibility” was said to be inapt for three main reasons. First, the Court considered (at [13]) that, while the phrase “equivalent to contract” used by Lord Devlin in *Hedley Byrne* was designed to show that parties in negligent misstatement cases were *more proximate* than those who had had no prior dealings, it did not imply exactly the same level of proximity as exists between co-contractors.

Secondly, the Court emphasised that whether a person owes a duty of care in tort is “essentially a question of fact from which the law draws certain conclusions”, whereas the liability of a party to her co-contractor's undisclosed principal was “purely a legal construct” (at [14]). Hence the latter could not influence the former. Applying a purely factual analysis, the relationship between a party and her co-contractor's undisclosed principal was “by definition not proximate” nor “in any sense voluntary or consensual so as to give rise to an assumption of responsibility” (at [14]).

Thirdly, the Court thought it improper to apply one element of the undisclosed principal rule to tort claims, when the bulk of “rights and liabilities” involved in that area were “entirely inapposite to the law of tort” (at [15]). Lord Sumption emphasised the importance of “mutuality” to the undisclosed principal rule, noting that although a party may be sued in contract by an undisclosed principal, this was offset by the fact that: (1) any defences the party has against the agent can likewise be raised against the principal; and (2) the party may herself elect to sue either the agent or the principal. The law of negligence lacked these features.

Playboy Club clarifies the application of the concept of “assumption of responsibility” in negligent misstatement cases. The tests of “contemplated transaction” and “known purpose” provide a means of differentiating between two categories of negligent misstatement cases involving unidentified third parties (i.e. those other than the direct representee). First, there are cases like *Hedley Byrne*, where a representation is made in relation to a contemplated, if non-specific, “transaction”. There the defendant was found *prima facie* to have assumed responsibility towards the claimant, despite the fact that neither the claimant's name nor business was identified; it was sufficient that the defendant had inferred that its reference would be relied upon by someone “contemplating doing business” with its customer (*Hedley Byrne*, p. 494, per Lord Morris; quoted by Lord Sumption,

Playboy Club, at [10]). Secondly, there are cases in which no “transaction” is contemplated by the defendant at the time of the representation. An example is *Caparo Industries plc v Dickman*, where the misrepresentation took the form of negligently prepared accounts. Because the misstatement was made as part of a routine audit, the auditor did not contemplate that it would be relied upon in any particular “transaction” (at [10]), and it was not his “known purpose” that it should be (at [11]). Consequently, no duty was owed.

Finally, *Playboy Club* may be significant in signaling a reversal of the judicial trend of viewing tortious liability for pure economic loss incurred pursuant to “assumptions of responsibility” through a contractual lens. Despite the convergence of certain remedial principles such as contributory negligence (*Forsikringsaktieselskapet Vesta v Butcher* [1988] 3 W.L.R. 565) and remoteness (*Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351) across concurrent duties, *Playboy Club* suggests that reasoning by analogy between contract and tort has its limits. This is to be welcomed. The reasoning in *Withers* reflected the fact that (unlike in most torts) parties in concurrent liability cases have the opportunity to contemplate what kinds of losses might be caused in advance and allocate risk accordingly, and the decision in *Vesta* turned on the wording of the relevant statute; neither was based on the conceptual affinity of “assumptions of responsibility” to contract per se, and they should not be used as building blocks to import contractual doctrines into negligence. However, given the anomalous nature of the undisclosed principal doctrine, the extent to which *Playboy Club* represents a general change in approach to claims of this kind remains to be seen.

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CLEARING THE GROUND – NUISANCE, DAMAGE AND JAPANESE KNOTWEED

MR. Williams and Mr. Waistell each own a bungalow in Llwydardh Road, Maesteg. Their properties lie back from the street, abutting the railway line between Garth and Ewenny Road stations. The land beside the track belongs to Network Rail, a nationalised company that owns most of the UK’s rail infrastructure. For at least 50 years Japanese knotweed has visibly grown on the railway’s land. Japanese knotweed, as all gardeners know, is a menace, suppressing all other growth where it appears. It can also undermine house and garden walls, overwhelm sheds and block drains. It spreads underground through roots, technically “rhizomes”, and because it can regenerate from small amounts of material, is devilishly difficult to