

Defeating Reasonable Reliance

MICHAEL PRATT*

The Reliance Theory of Estoppel

The reliance thesis of promissory estoppel has attracted a great deal of support among Anglo-Australian courts and commentators in recent years.¹ Its central tenet is that the purpose of estoppel is to protect against injurious reliance. Estoppel is seen to be delictual in character. On the map of civil obligations it belongs alongside tort as an equitable branch of the law of wrongs, and is to be sharply distinguished from contract. It is not concerned with binding promises, but with compensating those who have been injured due to reliance on another's conduct. This conduct may amount to a promise, but in compensating an injured promisee estoppel does not treat the promise as a contractual undertaking.² Promises function in the estoppel context not as voluntary undertakings, but as instruments of a particular species of harm (detrimental reliance) for which the law provides a remedy.³ Nor are promises the only form of conduct capable

* LLB (Osgoode), LLM (Toronto). Lecturer in Law, University of Queensland. The author is a PhD candidate in the Faculty of Law, University of Sydney.

¹ See, eg, M Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart, 1999); A Robertson, 'Towards a Unifying Purpose for Estoppel' (1996) 22 *Monash ULR* 1; P Parkinson, 'Estoppel' in P Parkinson, *Principles of Equity* (LBC, 1996) Ch 7; H Collins, *The Law of Contract* (3rd ed, Butterworths, 1997) pp 71-88; A Beech, 'The Remedy for Estoppel: Identifying and Preventing Detriment' in R Carrol (ed) *Civil Remedies: Issues and Developments* (Federation Press, 1996) p 156. I would also include Patrick Atiyah among reliance theorists. In his 'Situating Equitable Estoppel Within the Law of Obligations' (1997) 19 *Syd LR* 32 at 47, Andrew Robertson disputes this and insists that Atiyah 'sees estoppel as essentially concerned with the enforcement of promises'. Indeed he does. But what Robertson overlooks is that Atiyah regards promissory obligation as essentially reliance-based. See P Atiyah, *Promises, Morals, and Law* (Clarendon Press, 1981) esp pp 184-202.

² 'For the purpose 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... But it can also be looked at as simply undifferentiated conduct which may influence other people'. P Kincaid, 'Privity and the Essence of Contract' (1989) 12 *UNSWLJ* 59 at 68.

³ 'The reason for the court's intervention in the case of relied-upon promises is to protect against harm resulting from reliance on the conduct of others'. A

of inflicting this sort of harm: they are not an essential ingredient in estoppel.

In this article I argue that in elevating reliance over promise as the justificatory core of promissory estoppel, reliance theorists are prone to lose sight of the fact that harm due to reliance 'is not a datum of nature but the reflection of a normative order.'⁴ Defeating reliance is seen as wrongful harm because the law protects people in their choice to rely on the conduct of others.⁵ But the law does not protect this choice in all cases, and the onus is on the reliance theorist to identify a criterion by which to distinguish justifiable reliance. I criticise the popular view that 'reasonable reliance' is such a criterion, and argue that liability in estoppel depends on the making of a binding representation.

Eclipsing the Promise

I begin by defining my quarry, for not all those who agree that liability in estoppel depends on reliance deny that it also depends on a promise. Some treat these criteria as complementary. Theories of this sort, which do not concern me here, are of two kinds. The first conceives of estoppel as a deviant (ie non-contractual) approach to the enforcement of promises: one that designates reliance as a formal criterion of enforceability. On this view reliance functions not as a substantive ground of obligation, but as evidence of the parties' consent to be legally bound, which is understood to be the true basis of estoppel.⁶ I take no issue with this view here.

Robertson, 'Reliance and Expectation in Estoppel Remedies' (1998) 18 *Leg Stud* 360 at 365.

⁴ L Fuller and W Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Lj* 52 at 53. The authors were referring to the harm involved in defeated expectations, but their insight is equally applicable to the harm involved in defeated reliance on an expectation. See also J Conison, 'Assurance, Reliance, and Expectation' (1998) *Southern Cal Interdisciplinary Lj* 335 at 357: 'Whether a person may be criticized for causing harm of a given type depends on prevailing social norms... One such norm is that a speaker is subject to strong criticism if his false assurance leads a hearer to rely, to her harm. It is not always appreciated that this norm is contingent. It is certainly not a law of logic'.

⁵ The converse is false: the law does not protect people in their choice to rely because defeating reliance is wrongful harm

⁶ I am aware of no Anglo-Australian proponents of this view, but it has advocates in the United States. 'In our view, the requirement that there be injurious, demonstrable reliance should serve only as a cautionary and evidentiary function. Our understanding of the morality of promising leads us to the conclusion that a promise should be enforced if the promisee understood, or under the circumstances had reason to understand that the promise was sincerely made...

The second view is less easy to distinguish from that which I intend to criticise, since both conceive of reliance as a substantive ground of liability. The distinction lies in the importance that each theory ascribes to promises. I am not concerned here with those theories that fuse promise and reliance together as the justificatory basis of estoppel by either (i) citing the plaintiff's reliance as the reason for enforcing the defendant's promise;⁷ or (ii) citing the defendant's promise as the reason for protecting the plaintiff's reliance.⁸ These are two sides of the same conceptual coin.⁹ The distinction between

Consequently, a showing of actual reliance would be one way of establishing the legal responsibility of the promisor to fulfil his promise'. M Swygert and D Smucker, 'Promissory Estoppel in Florida: Growing Recognition of Promissory Obligation' (1986) 16 *Stetson LR* 1, 26. See also J Kostriksy, 'A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defence' (1987) 33 *Wayne LR* 895 at 946-47; E Holmes, 'The Four Phases of Promissory Estoppel' (1996) 29 *Seattle ULR* 45 at 65-76; and R Barnett, 'A Consent Theory of Contract' (1986) 86 *Col LR* 269 at 314-17.

⁷ 'Estoppels have all along been binding promises... Since estoppels are perfected by detrimental reliance, these promises are "detrimental reliance promises"'. P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *W Aust LR* 1 at 63. 'Although an estoppel cannot be said to be a "contract" it is still concerned with the enforcement of promises where not to do so would be unconscionable and where they have caused reliance detriment'. J Edelman 'Remedial Certainty or Remedial Discretion in Estoppel after *Gianneli*?' (1999) 15 *JCL* 179 at 189. 'We begin with a promise, but before liability is imposed for non-performance the promisee must furnish the court with reasons for enforcement. One acceptable reason could be that the promise induced or brought about action or forbearance by the promisee.' B Boyer, 'Promissory Estoppel: Requirements and Limitations of the Doctrine' (1950) 98 *U Pa LR* 459 at 470. 'Undoubtedly the strongest argument against the adequacy of the bargain theory of enforceability is the case of subsequent reliance by the promisee... [A] remedy has always been found for the promisee in such cases. The remedy has often been explained as a kind of 'equity' but this does not make it any less an enforcement of the promise.' S Waddams, *The Law of Contracts* (3rd ed, Canada Law Book, 1993) at §183. See also S O'Byrne, 'More Promises to Keep: The Expansion of Contractual Liability Since 1921' (1996) 35 *Alberta LR* 165.

⁸ 'Our civilisation appears to have reached the point at which the promisor must answer for the consequences of his promise. But have we reached the point at which a promise to make a gift, not followed by such a detrimental reliance, will form the basis of a legal duty? Until that point is reached, it must be clear that the reason for allowing the gratuitous promisee an action is his injury through reliance and not the promisor's act of promising'. W Shattuck, 'Gratuitous Promise - A New Writ?' (1937) 35 *Mich LR* 908 at 944. '[W]hile a promisor may sometimes be required by a court to fulfil the expectations that he or she (gratuitously) induced, the reason for such a remedy [lies] in the nature of the detriment suffered by the promisee rather than in any inherent legal effect of the gratuitous promise'. B Morgan, 'Estoppel & Gratuitous Promises: A New Liability?' (1991) 13 *Syd LR* 213 at 218.

⁹ The most candid theories of this sort are explicitly ambiguous between (i) and (ii). See eg PN Pham, 'The Waning of Promissory Estoppel' (1994) 79 *Cornell LR*

(i) and (ii) may be relevant to the question of remedies, but it has no obvious bearing on the issue of liability.¹⁰ Underlying both (i) and (ii) is the premise that liability in estoppel accrues only where a *promise* has induced *reliance* – neither ingredient is seen as more basic to the cause of action. The view I take issue with denies this premise and places injurious reliance over promise as the justificatory core of estoppel.¹¹

Because they assert that harm is the moral core of estoppel, reliance theorists are forced to dismiss promises as redundant: ‘If the basis of recovery were harm caused by the defendant’s conduct, it should not matter whether the conduct constituted a promise’.¹² The objection is unanswerable and reliance theorists avoid it by insisting that a promise is but one of *many* forms of conduct capable of generating an es-

1263 at 1286, and RA Hillman, *The Richness of Contract Law* (Kluwer, 1997) pp 74–75, who writes: ‘Analysts of promissory estoppel debate the theory’s conceptual core. Some theorists champion the reliance interest; others claim that promissory estoppel focuses on promise. Each school contributes by emphasising the importance of one or the other element. The somewhat stubborn insistence of some writers that everything turns on either reliance or promise, however, diminishes the force of their arguments...[J]udicial attention to both promise and reliance because of the normative significance of both principles leaves little reason to promote one and demote the other’.

¹⁰ The difference between (i) and (ii) is purposive. According to (i) the object of estoppel is to enforce promises that have induced reliance; according to (ii) the object of estoppel is to protect reliance induced by promises. This may be seen to invite an analogous remedial distinction according to which relief in estoppel is calculated on the basis of (i) expectancy, or (ii) reliance.

¹¹ There are also those who deny the premise from the opposite direction, insisting that estoppel is rooted in promise and *not* reliance. This argument has considerable support in the United States, where it has been advanced primarily on empirical rather than theoretical grounds. Studies have concluded that plaintiffs regularly succeed in (section 90 of the Restatement (Second) of Contracts) estoppel actions even where they have not altered their position in reliance on the defendant’s promise. See eg E Yorio and S Thel, ‘The Promissory Basis of Section 90’ (1991) 101 *Yale Lj* 111. So influential have these studies been that Randy Barnett recently proclaimed a ‘scholarly consensus’ on estoppel in the United States, according to which the purpose of the doctrine is not to remedy detrimental reliance, but rather to encourage reliance by expanding the class of enforceable promises beyond those that are exchanged for consideration. See R Barnett, ‘The Death of Reliance’ (1996) 46 *J Leg Ed* 518. But see R Hillman, ‘Questioning the “New Consensus” on Promissory Estoppel: An Empirical & Theoretical Study’ (1998) 98 *Col LR* 580, and C Knapp, ‘Rescuing Reliance’ (1998) 49 *Hastings Lj* 1191. No such consensus exists among scholars elsewhere in the common law world, and reliance is an incontrovertible ingredient of estoppel in Anglo-Australian law. See *Grundt v Great Boulder Pty Gold Mines* (1937) 59 CLR 641 per Dixon J at 674.

¹² E Yorio and S Thel, ‘The Promissory Basis of Section 90’, *id* at 161–62.

toppel.¹³ Conduct capable of precipitating an estoppel is just conduct that induces another to adopt an assumption and to rely on it. To press for a *definition* of the kind of act necessary to found an estoppel is to miss the point – how else is ‘harmful conduct’ to be defined except as ‘conduct causing harm’?

Unconscionable Conduct

The difficulty with this view is that a plea of estoppel does not lie every time one induces an assumption in another and then departs from it. The delusional plaintiff who relies on my ‘I won’t’ to imply ‘I will’ must not succeed in estopping me because he or she is disadvantaged when I don’t. A promise requirement would preclude this, and the burden of the reliance thesis is to identify an alternative criterion by which to deny recovery in such cases.

The cases point to unconscionability as such an alternative. Estoppel is an equitable doctrine that intervenes where it would offend against conscience to permit a representor to renege.¹⁴ This clarifies little, of course; the woolly concept of unconscionability rarely does. But it serves to put the reliance thesis on the defensive, for what else binds the conscience of a representor except her promise? There is, as Pe-

¹³ Assertions to this effect abound in the literature. See eg A Robertson, ‘Situating Equitable Estoppel’, note 1 above, at 56: ‘Liability... does not depend on the making of a promise, but rather on the representee adopting an assumption which is induced by the representor... Accordingly, the duty on which the Australian doctrine of equitable estoppel is based must be a duty to prevent harm being suffered by those who rely on one’s conduct, not just one’s promises’. H Collins, *The Law of Contract* note 1 above, at 75: ‘An express promise [will suffice], but also actions short of a promise which amount to the deliberate creation or encouragement of an expectation of future action’. M Spence, *Protecting Reliance*, note 1 above, at 79: ‘A promise is just one of the ways in which an assumption may be induced for equitable estoppel’. Because promises are explicitly required under s90 of the *Restatement (Second) of Contracts* (the fount of estoppel doctrine in the US), American reliance theorists attempt to meet the objection by emphasising the broad range of conduct judicially construed as falling within the *Restatement’s* definition of ‘promise’, including so-called ‘illusory promises’ manifestly not intended by their makers to be binding. See M Metzger and M Phillips ‘Promissory Estoppel and Reliance on Illusory Promises’ (1990) 44 *Southwestern LJ* 841.

¹⁴ In *Commonwealth v Verwayen* (1990) 170 CLR 394 at 444 Deane J said that the central principle of the doctrine of estoppel by conduct ‘is that the law will not permit an unconscionable – or, more accurately, unconscientious – departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party’s detriment if the assumption be not adhered to for the purposes of the litigation’.

ter Birks asserts, no other unconscionable behaviour involved in estoppel 'other than that which consists in failing to honour one's promises'.¹⁵

Reliance theorists answer this argument by questioning the extent to which the nature of the conduct that *induces* an assumption determines the unconscionability of *departing* from it. Liability in estoppel turns less on how a representor causes an assumption than on the harm she inflicts in resiling from it.¹⁶ Andrew Robertson goes so far as to suggest that the representor's conduct is irrelevant to the question of liability except in so far as it establishes the cause of the representee's reliance.¹⁷

[I]t is difficult to see what role the representor's knowledge and conduct can play in determining liability, beyond the threshold question whether the representor bears sufficient responsibility for the representee's adoption of the relevant assumption.

Robertson uses 'responsibility' here in a causal ('the rain was responsible for the accident') sense.¹⁸ The justice of my departure from your assumption turns not on how or why, but *whether* I caused you to form it. The spectre of the delusional plaintiff is left to be dealt with by the acid test of unconscionability: was the reliance *reasonable*?

'The real meat of the reliance model, writes Hugh Collins, 'lies in the requirement that the reliance must have been reasonable'.¹⁹ Rob-

¹⁵ P Birks, 'Equity in the Modern Law', note 7 above, at 63.

¹⁶ 'The relatively weak requirement as to the type of conduct by a representor which is required to found an estoppel suggests that the fundamental concern of the doctrine is elsewhere, namely on the representee's detrimental reliance'. A Robertson, 'Situating Equitable Estoppel', note 1 above, at 45. Robertson concludes that the injurious reliance component of estoppel so dominates its 'promissory aspect' as to 'render the latter nugatory'.

¹⁷ A Robertson, 'Situating Equitable Estoppel Within the Law of Obligations', note 1 above, at 55. Robertson refines this thesis in 'Knowledge and Unconscionability in a Unified Estoppel' (1998) 24 *Monash ULR* 115. There he argues that where a defendant has engaged in 'active conduct' that 'clearly indicates' he or she will perform a future deed, the unconscionability requirement will be satisfied simply by establishing that the conduct caused an assumption which the plaintiff then reasonably relied upon to his or her detriment. Robertson further emphasises the relative unimportance of the representor's conduct in his 'Estoppel by Conduct: Unresolved Issues at Common Law and in Equity' (1999) *National Law Review* 7 at n 47.

¹⁸ See also A Robertson, 'Towards a Unifying Purpose for Estoppel', note 1 above, at 15.

¹⁹ H Collins, *The Law of Contract* (Weidenfeld & Nicolson, 1986) p 38. Not all reliance theorists adopt the reasonableness requirement. Michael Spence rejects it on the ground that the focus of estoppel 'must be, not on the conduct of the party seeking to establish the estoppel as [Andrew] Robertson claims, but on the

ertson agrees: ‘the only answer to the question: “when should reliance be protected?” is “when it is reasonable”’.²⁰ But since it is perverse to treat this requirement as divorced from any inquiry into the nature of the defendant’s conduct, Robertson’s claim that such an inquiry is material only to the ‘threshold’ factual question of causation is untenable unless the causation requirement is understood to embrace the reasonableness requirement.²¹ That the problem of causation in estoppel is neither prefatory nor purely factual is made clear by Deane J in *Commonwealth v Verwayen*.²²

The question whether... a departure would be unconscionable relates to the conduct of the allegedly estopped party in all the circumstances. That party must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it.

It is not enough that but for my conduct you would not have relied. I must induce your reliance by encouraging it in a manner that justifies the consequences of your decision to act on it being laid at my door. Nor is it enough that your reliance was *reasonable*: the justification is either redundant or absurd. Or so I shall argue.

Reasonable Reliance

For all the moral work some of them would have it perform,²³ reliance theorists do little to explain in detail the concept of reasonable reliance.²⁴ It is, we are told, an essentially ‘open-ended’²⁵ standard, to

wrongfulness of the behaviour of the party against whom the estoppel is sought’. *Protecting Reliance*, note 1 above, at 55. There is also recent dicta supporting the view that reasonableness is not a discrete criterion of liability in Australian estoppel. See *W v G* (1996) 20 Fam LR 49 at 66.

²⁰ ‘Situating Equitable Estoppel’, note 1 above, at 61.

²¹ Such a relationship between causation and reasonableness is suggested by Alec Leopold: ‘The requirement for reasonableness presumably arises because, if the assumption or expectation were unreasonable, it would not in any event be unjust or unconscionable to disregard it, because the ‘guilty’ party’s conduct could not truly be said to have played a part in the formation of the assumption or expectation’. A Leopold, ‘Estoppel: A Practical Appraisal of Recent Developments’ (1991) 7 *Aust Bar Rev* 47 at 63. Robertson himself alludes to a logical nexus between causation and reasonableness in his ‘Knowledge and Unconscionability’, note 1 above, at 139.

²² (1990) 170 CLR 394 at 445.

²³ Not all reliance theorists adopt this criterion. See note 19 above.

²⁴ For discussions of the requirement, see A Robertson, ‘The ‘Reasonableness’ Requirement in Estoppel’ (1994) 1 *Canberra LR* 231; A Leopold, ‘Estoppel: A Practical Appraisal of Recent Developments’, note 21 above, at 63-64; and H Collins, *The Law of Contract*, note 1 above, at 77-79.

be defined by the social group through 'agreement, or by rule or by custom and precedent, or perhaps even by simple coincidence of behaviour.'²⁶ I want to put some pressure on the concept by asking whether it calls for a standard of normative or epistemic reasonableness.

Suppose I refrain from preparing my contract law lecture in reliance on your representation that you will take my class next week. My reliance will be epistemic if I expect *that* you will show up (because eg I know you want me to return the favour next month), and normative if I expect it *of* you that you will.²⁷ In both cases my reliance may be said to be 'reasonable,' since in each I have reason to expect you to show up. 'On the one hand, I predict that you will. On the other, I believe that you should – or at least that you believe that you should'.²⁸

Now let us apply these different senses of 'reasonableness' to reliance in the estoppel context. Assume that a representor has led a representee to believe that she (the representor) will perform some future act ϕ , thus inducing him (the representee) to incur some cost or outlay. Now if reasonable reliance demands that the representee *normatively* expects ϕ to be done, the criterion merely tugs at its own bootstraps. It requires that the representee believe that (the representor believe that) the representor ought to ϕ . But this presupposes that (the representor believes that) the representee normatively expects ϕ to be done. The circle is vicious.²⁹

²⁵ H Collins, *The Law of Contract*, note 19 above, at 38.

²⁶ Atiyah, note 1 above, at 129. Atiyah speaks not of 'reasonable' but of 'justifiable' reliance, a preferable description of what I will demonstrate to be a question-begging criterion of liability.

²⁷ This distinction is elegantly described in a different context by M Hollis in his *Trust Within Reason* (Cambridge U Press, 1998) pp 10-14.

²⁸ *Id* at 11.

²⁹ R Barnett has suggested that reliance theory rests on a tautology of a different kind: '[W]hether a person has "reasonably" relied on a promise depends on what most people would (or ought to) do. We cannot make this assessment independently of the legal rule in effect in the relevant community, because what many people would do in reliance on a promise is crucially affected by their perception of whether or not the promise is enforceable. A reliance theory, therefore, ultimately does no more than pose the crucial question that it is supposed to answer: is this a promise that should be enforced?' 'A Consent Theory of Contract', note 6 above, at 275. The argument is flawed, however, for it depends on the untenable empirical premise that people know what the law is and behave accordingly. See also M Metzger and M Phillips 'Promissory Estoppel and Reliance on Illusory Promises', note 13 above, at 891. The tautology I am alleging suffers from no such flaw, as it relies on no such empirical assumption.

The only way to exit the circle is to supply the representee with a reason for believing that the representor ought to ϕ that does not depend on the representee already believing this. An obvious candidate would be that the representor made a promise. In any event, *some* such reason must be supplied. But if we can supply such a reason then it, and not normatively reasonable reliance, must be the basis of liability in estoppel.

So much for normatively reasonable reliance. Is it enough to ground liability that the representee relies on an *epistemically* reasonable expectation that ϕ will be done? Clearly not. That you reasonably predict my behaviour does not commit me to behave predictably. 'If you rent the apartment next to mine because I play chamber music there, do I owe you more than an expression of regret when my friends and I decide to meet at the cellist's home instead?'³⁰

It may be objected that the chamber music fan has more in common with an eavesdropper than with a representee. But the objection proves too much for the reliance theorist. If reliance by an eavesdropper is *ipso facto* unreasonable, then reasonableness acquires a normative sense. For it cannot affect the epistemic reasonableness of an act of reliance that the conduct that caused it was *communicative*. To be sure, I am more confident that you will drive me to work tomorrow if you tell me so, than if I catch a glimpse of this item in your day planner. But that is because by communicating to me your intention to do so, you lead me to expect it *of* you that you will. My belief that you will do as your conduct indicates you intend to do is not bolstered by my knowledge that you intended to communicate that intention to me except in so far as I have some reason to believe that, having so communicated, now you believe that you ought to do as you represented that you would. What reason would I have for believing this? An obvious candidate would be that you made a promise. In any event, *some* such reason must be supplied. But if we can supply such a reason then it, and not an epistemically reasonable reliance, must be the basis of liability in estoppel.

I began by defining reasonable reliance as reliance on a reasonable expectation of performance. As I have shown, this definition breeds an infinite regress, since 'reasonableness' assumes an unavoidably normative sense. Hence the basic problem for reliance theory: it is never reasonable to rely on a representation that is not already

³⁰ C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard U Press, 1981) p 10.

thought to bind the representor. So reasonable reliance is a question-begging explanation of the moral basis of estoppel.

Perhaps we can reformulate our definition of reasonable reliance to avoid the regress. If we take seriously the claim that what generates liability in estoppel is reliance, we may be tempted to say that reasonable reliance is reliance on an expectation that performance ought to occur *if* reliance occurs. Instead of encouraging me to go ahead and rely because performance ought to occur, such an expectation exhorts me to go ahead and rely *so that* performance ought to occur. The regress is avoided, but only at the expense of robbing reasonableness of any explanatory power. Reliance is protected if it is reasonable, and it is reasonable to rely when reliance is protected.

Reliance on Conduct Falling Short of a Promise

The upshot is that 'reasonable' may describe protected reliance, but it cannot explain when reliance will be protected. Reliance theorists may of course concede this without accepting that liability in estoppel depends on a promise. Indeed, they are insistent that reliance on conduct falling 'short of a promise'³¹ may yet be reasonable.³²

The point of this insistence is unclear.³³ If it is to demonstrate that estoppel is concerned with harm due to reliance and not with binding representations, it rests on a mistake. We have seen that the reasonableness of an act of reliance depends on the bindingness of the relied-upon representation. The *entitlement* to rely is logically prior to the justifiability of the reliance.³⁴

³¹ H Collins, *The Law of Contract*, 3rd ed, note 1 above, at 75.

³² See note 13 above and accompanying text.

³³ It may be that the point of the insistence is simply to distinguish estoppel from contract on the map of civil obligations: since contracts are promises, and estoppel does not require a promise, therefore the doctrine is not contractual. But without more this is hardly a point worth making. '[W]e should not particularly care whether a field is characterized as contractual – unless something turns on the characterization. Our first response to someone's impassioned suggestion that a particular area is or is not contractual should be "who cares" or perhaps more precisely "why should we care"'. I Ayres, 'Empire or Residue: Competing Visions of the Contractual Canon' (1999) 26 *Florida State LR* 897 at 898.

³⁴ Justice Gleeson seems to recognise this point (extra-judicially) when he writes: '[T]he question of when a representation of present intention as to future conduct, as distinct from a promise, would reasonable induce an assumption as to future conduct is one that is, in practice, capable of giving rise to difficulty. If the question is considered in terms of the reasonable or legitimate expectations of the representee, why should not one start from the point that, as a general rule, people who have honestly stated their future intentions may change their intentions

The point of the insistence seems to be that the entitlement which estoppel enforces is an entitlement to rely without risk and not an entitlement to the value of performance. Thus Michael Spence writes that whereas a promise is a 'commitment to perform' which generates 'a primary obligation to perform', conduct such as 'advising' or 'informing' generates a lesser primary obligation to 'prevent harm to the relying party'.³⁵ And since an estoppel may be generated by such non-promissory conduct, it must follow that the duty to which estoppel gives effect is a duty to prevent injurious reliance. Estoppel is thus distinguished from contract, which retains its exclusive domain over the enforcement of expectations.³⁶

This argument is fraught with difficulty. Examples may exist of estoppel-generating acts incapable of supporting a duty to satisfy induced expectations. But their existence is not demonstrated by reeling off instances of justifiable reliance on 'mere declaration[s] of intention',³⁷ acts of 'informing' and 'advising',³⁸ 'conduct which indicates that the representor will act in a certain way',³⁹ and even 'silence'.⁴⁰ That promises suffice to support a duty to satisfy raised expectations does not imply they are *necessary*. Furthermore, acts of asserting, informing, advising, and the like are not mutually exclusive with promises. 'The words "I am going to..." or "I will..." do not in themselves indicate that you are *merely* expressing an intention [or advising, informing, etc.] and *not* promising'.⁴¹ Suppose I rebuke you for break-

unless they have made a binding promise?' AM Gleeson, 'Innovations in Contract: An Australian Analysis' in P Birks (ed) *Frontiers of Liability*, Vol 2 (Oxford U Press, 1994) p 113 at 118

³⁵ *Protecting Reliance*, note 1 above, at pp 4, 6-7.

³⁶ Courts have traditionally refused to enforce expectations except in so far as the law of contract permits it. See eg *Combe v Combe* [1951] 2 KB 215 per Denning LJ at 220. In *Commonwealth v Scituate Savings Bank* (1884) 137 Mass. 301 at 302 Justice Oliver Wendell Holmes Jr said it 'would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it'.

³⁷ A Robertson, 'Situating Equitable Estoppel', note 1 above, at 24. See also P Atiyah, *Promises, Morals, and Law*, note 1 above, pp 165-69 and P Atiyah, *An Introduction to the Law of Contract* (4th ed, Clarendon, 1989) pp 155-56.

³⁸ M Spence, *Protecting Reliance*, note 1 above, at 4.

³⁹ A Robertson, 'Situating Equitable Estoppel', note 1 above, at 45. See also the sources cited in note 13 above.

⁴⁰ *Ibid.* There is of course nothing about silence *per se* that precludes it counting as a promise in an appropriate context. Witness the promise of the appellants in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

⁴¹ S Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy* (Oxford U Press, 1982) p 298 (emphasis in original). Cavell argues that there is no essential distinction between promises and 'the expression or declaration of an

ing your promise to lecture to my contract law class. 'But I only informed you that I would give the lecture, I never promised' is hardly an answer. It shows only that you have 'failed to put away childish things.'⁴²

Thus reliance theorists succeed in demonstrating neither that an estoppel may be founded other than upon a promise, nor that an estoppel may be founded upon conduct incapable of supporting a duty to satisfy induced expectations. Moreover, nowhere do they show that proof of the former would be proof of the latter.

Conclusion

Although courts pay lip service to the view that estoppel underwrites a duty to prevent injurious reliance, they routinely award relief in the full expectation measure.⁴³ Although this practice is not logically inconsistent with a duty to prevent harm due to reliance, I have argued elsewhere that in fact estoppel enforces a duty to satisfy (relied-upon) expectations.⁴⁴

intention, the giving of an impression, not correcting someone's misapprehension, beginning a course of conduct on the basis of which someone else has taken action, and so on'.

⁴² P Árdall, "And That's a Promise" (1968) 18 *Phil Quart* 225 at 225.

⁴³ In both of the two leading Australian cases on promissory estoppel, expectation relief was awarded: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; and *Commonwealth v Verwayen* (1990) 170 CLR 394. Some more recent examples include: *Giumelli v Giumelli* (1999) 161 ALR 473; *Morton v Morton* [1999] SASC 368, Unreported decision, (2 December 1999); Millhouse, Duggan and Lander JJ, *Flinn v Flinn* [1999] VSCA 109, Unreported decision (4 August 1999) Brooking, Charles and Batt JJA; *Horsman v Commissioner of Main Roads* [1999] FCA 1733, Unreported decision (3 December 1999), Spender, Whitlam and Carr JJ; *Agius v Sage* [1999] VSC 100, Unreported decision (1 April 1999), Byrne J, paras 77-85; *The Redder than Red Tomato Co Pty Ltd v AB & SM Rawlings Pty Ltd* [1999] SASC 30, Unreported decision (5 February 1999), Burley J aff'd [1999] SASC 367, Unreported decision (2 December 1999), Millhouse, Duggan and Lander JJ; *AMP Workers Compensation Services (NSW) Ltd v Williams*, New South Wales Supreme Court – Court of Appeal, Unreported decision (4 September 1997), Cole, Beazley and Stein JJA; *W v G* (1996) 20 Fam LR 49. In 1995 Andrew Robertson carried out a survey of 26 post-*Verwayen* cases in which estoppel had been successfully pleaded. He concluded that in two cases the nature of the relief was not reported, 'but in each of the other 24 cases expectation relief was granted'. 'Satisfying the Minimum Equity: Estoppel Remedies After *Verwayen*' (1996) 20 *MULR* 805, at 829. See also A Robertson, 'Reliance and Expectation in Estoppel Remedies' (1998) 18 *Leg St* 360, at 366; and A Robertson, 'Estoppel and the Minimum Equity Principle' (1998) 13 *JCL* 178.

⁴⁴ 'Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel' forthcoming (2000) 21 *University of Adelaide Law Review*.

Whether this duty may accrue in the absence of a promise is a difficult question. What amounts to a promise and whether a particular act falls 'short of a promise' are vexed problems that have occupied philosophers since the eighteenth century.⁴⁵ The task of addressing them in the estoppel context will be deferred to another article.

My quarry in this paper has been those who insist promises are not essential to liability in estoppel. The burden on these writers is to identify an alternative criterion by which to distinguish protected reliance. I have demonstrated that 'reasonable reliance' is inadequate, and serves only to point up the basic problem with the reliance thesis, namely, that justifiable reliance presupposes a prior binding representation, if not a binding promise.

⁴⁵ The literature on promises is as eclectic as it is extensive, comprising work in moral and political philosophy, the philosophy of language, and law. Although it is now rather dated, Eddie Yeghiayan's bibliography on the subject remains a useful starting point: 'Promises: A Bibliography' (1981) 7 *Phil Res Arch* 1054.