ABSTRACT

THE PROBLEM OF PRE-CONTRACTUAL RELIANCE: THREE WAYS TO A THIRD WAY

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This paper considers a specific common law problem and raises the general question of how private law can best be reformed. The specific problem consists in the traditional common law approach, prevailing to this day in England, to pre-contractual reliance. If A and B enter into negotiations as to a potential bargain, B may incur costs in reliance on the possibility of a contract's being concluded. For example, if B, a manufacturer, expects to enter into a contract of sale, he may incur costs in preparing for timely production. The traditional common law approach is that, if B acts in the absence of a binding contract, he does so at his own risk. Simplifying somewhat, there are in general only two possibilities: A and B's negotiations have either resulted in a contract, in which case B will be protected; or they have not, and B's loss must lie where it falls.

The purpose of this paper is to argue for a third possibility: where B reasonably relies to his detriment on a belief, for which A is responsible, that a contract will be concluded, then A will be under a duty to protect B's reliance. In the absence of a contract, A will not in general be bound to protect B's expectation; rather, A's duty is to compensate B for the detriment he suffers by that absence.

Three routes to this conclusion are discussed. The first is doctrinal and focuses on the potential for various existing doctrines of English law to protect pre-contractual reliance. The second is comparative and considers approaches adopted in two other common law countries: Australia and, in particular, the United States. The third is economic and builds on arguments made in American academic literature as to the efficiency gains produced by protecting pre-contractual reliance. In this way, the paper raises the general question of how the law can best be reformed. It will be argued that, in the context of this specific problem, a purely comparative approach cannot succeed, but that doctrinal and economic analyses can provide mutual support and, combined with some comparative insights, provide a compelling case for reform.