Loosening the Privity Fetters: Should Common Law Canada Recognize Contracts for the Benefit of Third Parties?

John D. McCamus
Osgoode Hall Law School of York University, jmccamus@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Recommended Citation
LOOSENING THE PRIVITY FETTERS: SHOULD COMMON LAW CANADA RECOGNIZE CONTRACTS FOR THE BENEFIT OF THIRD PARTIES?

John D. McCamus*

CONTENTS

A. Introduction ........................................................................................................ 174
B. The Current Status of the Doctrine in Canada .................................................. 177
   I. Development and Rationale of the Rule ......................................................... 177
   II. Limitations on and Exceptions to the Rule .................................................. 181
       1. Agency ..................................................................................................... 181
       2. Trust ....................................................................................................... 184
       3. Collateral Contracts ............................................................................... 185
       4. Tort Law ................................................................................................. 186
       5. Assignment ............................................................................................. 187
       6. Statutory Exceptions ............................................................................... 188
       7. Additional Exceptions at Common Law .................................................. 189
           (a) Provisions Limiting the Liability of Employees ................................... 189
           (b) Insurance ........................................................................................... 190
               (i) Waiver of Rights against Third Parties ........................................... 191
               (ii) Coverage of Third Parties ............................................................... 193
           (c) The Open-Textured “Principled Exception” ........................................ 194
   III. Subsequent Variation or Annulment of the Promise .................................... 199

* Professor, Osgoode Hall Law School, York University. This is the revised version of a paper presented by the author at the 30th Annual Workshop on Commercial and Consumer Law held at the Faculty of Law, University of Toronto on October 20 and 21, 2000, which was formally commented on by Martin Boodman. See “Third-Party Beneficiaries in Quebec Civil Law”, infra, this issue, p. 216.
A. INTRODUCTION

The doctrine of privity of contract applies to situations in which one of the parties to an agreement has undertaken to confer a benefit on a third party. For example, A and B may enter into a contract where, in return for services provided to A by B, A promises to pay money to C. For convenience we shall refer to A as the promisor, to B, the party who gives consideration to the promisor, as the promisee, and to C as the third-party beneficiary. According to the doctrine of privity, C has no standing to enforce A's undertaking. C is a mere third-party beneficiary of A's undertaking and therefore not truly a party to the agreement. As has been explained, "only a person who is a party to a contract can sue on it".¹

It is true, of course, that if A breaches his undertaking to pay C, B could bring an action for damages for breach of contract. This prospect may provide only cold comfort for C, however, for two reasons. First, in many third-party beneficiary cases, B will have sustained no real loss as a result of A's nonperformance. Although the point is not free from difficulty,² it appears that where this is so,
B’s claim would likely result in the recovery of only nominal damages. Second, quite apart from remedies issues, it may well be that B is unlikely to bring an action of this kind. B may be uninterested or may have disappeared. B may have no financial incentive for bearing the cost of a lawsuit that might redound only to the benefit of C. In many cases, then, the third-party beneficiary rule will leave the third party without any effective redress against the person who promised, for good consideration, to confer a benefit on the third party.

The third-party beneficiary rule is potentially applicable in a number of commonplace transactional patterns. The phenomenon of agreements in which the promisor undertakes to pay money to the third-party beneficiary has been referred to above. In some instances of this kind, the intention of the promisee may be to confer a gift on the third-party beneficiary. In others, the promisee’s intent may be to ensure a discharge of a pre-existing debt owed by a promisee to the third-party beneficiary. Many insurance contracts may give rise to third-party beneficiary issues. Insurance contracts often impose obligations on the insurer to pay money to a third-party beneficiary in certain defined circumstances. The distribution of manufactured goods through the common pattern of a manufacturer selling goods to a dealer who sells, in turn, to a consumer may give rise to similar problems. If the manufacturer includes, in its contract of sale with the dealer, a manufacturer’s guarantee that is intended to benefit the ultimate consumer, the consumer will be a third-party beneficiary of that guarantee.

Similar problems may arise in the context of building contracts. In the typical pattern, the owner of land hires a general contractor to construct a building. In turn, the general contractor will hire subcontractors to supply goods and services of various kinds. The owner would be a mere third-party beneficiary of the promises given by the subcontractors in their agreements with the general contractor. Another possibility arising in this context results from the common practice of owners requiring contractors to ensure that they will pay their subcontractors by purchasing a performance bond under which a surety guarantees that the subcontractors will be paid. The subcontractors are third-party beneficiaries of arrangements of this kind.

Provisions of agreements that are designed to limit the liability of one of the parties to the agreement may also be drafted with a view to restricting the liability of third parties. Thus a shipper of
goods might agree with the carrier that the carrier’s liability for
damage to the goods may be restricted to some degree and, further,
that the restriction will be applicable also to the potential liability
of the carrier’s employees and any independent contractors, such
as stevedores, whom the carrier might hire to handle the goods.
The carrier’s employees and the stevedores would be third-party
beneficiaries of such a provision.

Although, as we shall see, the courts and legislatures have
developed techniques for providing relief to third-party beneficiar-
ies in some of these situations, the general principle to the effect
that the third-party beneficiary has no right to enforce the undertak-
ing of the promisor is clearly established. The doctrine is capable
of producing much mischief, however, and accordingly, it has been
the subject of much criticism. The doctrine has been subjected to
trenchant criticism by judges in England, Canada, and Australia.

Frequent calls for reform are made in reports of various law reform
agencies. A number of Commonwealth jurisdictions, including one
Canadian province, New Brunswick, and most recently, the United
Kingdom, have abrogated the rule by statute. The unsatisfactory
nature of the traditional Anglo-Canadian rule can be contrasted with
the approach taken in other jurisdictions. Third-party beneficiaries

3. See, for example, Woodar Investment Development Ltd. v. Wimpey Construction U.K.
   Ltd., [1980] 1 W.L.R. 277 (H.L.) at p. 291 per Lord Salmon and at p. 300 per Lord
   Scarman; Darlington Borough Council v. Wiltshier Northern Ltd., [1995] 1 W.L.R. 68
   (C.A.) at p. 76 per Steyn L.J.; and White v. Jones, [1995] 2 A.C. 207 (H.L.) at pp. 262-63
   per Lord Goff.
   [1993] 1 W.W.R. 1, 97 D.L.R. (4th) 261 per Iacobucci J. For discussion, see M.
   Beneficiaries in the Supreme Court: Categorization and the Interpretation of Ambiguous
   pp. 116-24 per Mason C.J. and pp. 169-72 per Toohey J.
6. See, for example, Ontario Law Reform Commission, Report on Amendment of the Law
   of Contract (Toronto, Ministry of the Attorney General, 1987); Manitoba Law Reform
   Commission, Privity of Contract (Winnipeg, Law Reform Commission, 1993); and U.K.
   Law Commission, “Privity of Contract: Contracts for the Benefit of Third Parties Cm
7. New Zealand, Queensland, and Western Australia. See U.K. Law Commission, ibid., at
   pp. 55-62.
9. Contracts (Rights of Third Parties) Act (U.K.) 1999, c. 31. For discussion, see C. MacMillan,
   “A. Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act
   1999” (2000), 63 Mod. L. Rev. 721 (the title alluding to the fact that upon second reading
   of the bill in the House of Lords, a colleague “presented” the bill to Lord Denning, a
   persistent critic of the doctrine, as a gift in celebration of his hundredth birthday).
have been accorded the right to enforce promises for their benefit in American law. Further, as Viscount Haldane noted in the Dunlop case, the rule knows no parallel in a number of civilian jurisdictions. In common law Canada, apart from New Brunswick, the general rule has survived nonetheless. As we shall see, however, the force of the rule has been significantly undermined by two recent decisions of the Supreme Court of Canada, London Drugs Ltd. v. Kuehne & Nagel International Ltd. and Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. In these decisions, the court resisted the temptation to overrule the general privity of contract doctrine but developed a new exception to the general rule that enabled the court to withhold application of the doctrine in each case.

This article attempts to provide, in Part B, an account of the current status of the doctrine of privity of contract in Canadian common law. More particularly, the article attempts to assess the ramifications for the doctrine of these two decisions. The article then attempts to make the case, in Part C, for outright abolition of the doctrine and, more particularly, for abolition of the doctrine through judicial reform.

B. THE CURRENT STATUS OF THE DOCTRINE IN CANADA

I. Development and Rationale of the Rule

Although there is some evidence in 17th- and 18th-century authorities of a judicial willingness to admit claims by third-party beneficiaries, a rule to the contrary was clearly adopted in 1861 in Tweddle v. Atkinson and, more importantly, reaffirmed by the House of Lords in 1915 in Dunlop, in 1962 in Scruttons Ltd. v. Midland Silicones Ltd., and by numerous Canadian decisions. In Tweddle, the father of a bride exchanged promises with the father of

---

10. See generally, M. Eisenberg, "Third Party Beneficiaries" (1992), 92 Col. L. Rev. 1358.
11. Supra, footnote 1, at p. 853.
16. Supra, footnote 1.
17. (1962) A.C. 446.
the groom that they each would pay moneys to the groom before a certain date. After the wedding, they recorded these promises in a writing, which was assented to and ratified by the married couple. The agreement further stipulated that the husband was to have full power to sue either of the parties with respect to the enforcement of these promises. In the claim eventually brought against his father-in-law, however, the husband was unsuccessful on the ground that he was a "stranger to the consideration" and was not a "party" to the contract.19

The facts of the Dunlop case involved what would now be called a resale price maintenance scheme.20 It was designed to operate in the following fashion. The plaintiff tire manufacturer, Dunlop, wished to ensure that retailers who sold their tires would not do so at prices below the manufacturer’s list price. As is often the case, however, the manufacturer did not deal directly with retailers, but rather distributed their tires by selling them to its wholesale merchant who, in turn, sold the tires to retailers. In its contract with its wholesaler, Dew & Co., Dunlop provided an incentive for Dew to obtain, in its contracts with retailers, an undertaking that the retailers would observe the manufacturer’s list price when dealing with their own customers. Breach of the undertaking would render the retailer to pay £5 per sale directly to Dunlop. If Dew extracted such an undertaking from a retailer, Dew was entitled to sell the tires to that retailer at 10% below the list price. Dew had, in fact, obtained such an undertaking in its contract with the defendant Selfridge & Co., but the latter failed to live up to the agreement and sold two tires to its customers at less than the list price. Dunlop then brought an action to enforce Selfridge’s undertaking and recover £10. The claim was defeated by the third-party beneficiary rule. The undertaking had been given to Selfridge in its contract with Dew. Dunlop was a mere third-party beneficiary of that promise.

In explaining the decision, Viscount Haldane repeated what are often thought to be two separate justifications for the privity doctrine alluded to in the Tweddle case and described them as “fundamental” principles of English law. First, “only a person who is a

19. Supra, footnote 15, at p. 764. The court rejected the suggestion that an exception obtained where the promisee was a parent of the third-party beneficiary, thereby dismissing the potential applicability of Dutton and Wife v. Poole (1678), 2 Lev. 210.
party to a contract can sue on it”.\textsuperscript{21} Second, if a person is to be able to enforce a contract, “consideration must have been given by him to the promisor”.\textsuperscript{22} Dunlop had entered into a contract of purchase and sale with Dew and did not itself either enter into a contract with Selfridge or provide consideration to it for Selfridge's undertaking to observe the list price. Although Lord Dunedin confessed that “this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration”,\textsuperscript{23} he was nonetheless confidently of the view that the privity doctrine was a well established feature of English law.

The justifications offered for the privity doctrine in these cases are quite unconvincing.\textsuperscript{24} The first explanation is that the third-party beneficiary is not a “party” to the agreement. It is not entirely clear what is meant by this notion and how this concept can be distinguished, if at all, from the requirement that only a party who has given consideration to the promisor can enforce a promise. In \textit{Tweddle},\textsuperscript{25} for example, the son-in-law was not only named in the agreement expressly as the person to whom the payments were to be made, he also explicitly assented to and ratified the arrangement. Nonetheless, he is said not to be a “party” to the agreement. It is not entirely clear, then, what content can be given to the concept of being a party other than the requirement that in order to be a party in the requisite sense, one must have given consideration to a promisor. If there is any independent content to the notion of “party” in this context, it would appear to be a mere circularity of reasoning. One is not a party because a third-party beneficiary is not a party.

The suggestion that the privity doctrine simply flows from or is somehow deductible from the doctrine of consideration is also seriously flawed. The doctrine of consideration performs the role of determining whether a particular promise should be considered to be legally binding. It is a test for the enforceability of promises. The doctrine, in its own terms at least, says nothing with respect to the question of who should be able to enforce a binding promise.\textsuperscript{26} Indeed, it might be suggested that the privity doctrine is inconsistent

\textsuperscript{21} \textit{Supra}, footnote 1, at p. 853.
\textsuperscript{22} \textit{Ibid}.
\textsuperscript{23} \textit{Ibid.}, at p. 855.
\textsuperscript{24} See Eisenberg, \textit{supra}, footnote 10.
\textsuperscript{25} \textit{Supra}, footnote 15.
\textsuperscript{26} See Eisenberg, \textit{supra}, footnote 10. See further, \textit{infra}, the text at footnotes 109-113.
with consideration theory inasmuch as it will lead, in many situations, to the perverse result that a promise given for good consideration will be essentially unenforceable for all practical purposes.

Lord Denning championed judicial reform of the rule on a number of occasions, but his attempts to overrule the doctrine in a general manner did not enjoy success. In *Beswick v. Beswick*, for example, he mounted a persuasive attack on the rule in a case where a deceased person had, while living, sold his business to a nephew who promised in return that after the uncle's death the nephew would pay his widow an annuity of £5 per week. The uncle died and the nephew refused to pay the annuity. Lord Denning would have allowed the widow's direct claim to enforce the nephew's promise on the ground that the third-party beneficiary rule is not commanded by earlier authority and would lead to an unattractive result. The other two members of the Court of Appeal, however, justified a decision in the widow's favour on the basis that she had also sued the nephew in her capacity as administratrix of her husband's estate. In their view, she was entitled to succeed in that capacity and indeed should be granted a decree of specific performance ordering the nephew to make the payments to her. On appeal to the House of Lords, the latter view prevailed. Their Lordships were unanimous in rejecting Lord Denning's approach and reaffirming the commonly accepted view that the third-party beneficiary rule is good law. Though there was some hesitancy on the question of whether the estate was entitled only to nominal damages, the court was also unanimously of the view that the estate was entitled to a decree of a specific performance.

In cases like *Beswick*, judicial reaffirmation of the traditional rule is often accompanied by an acknowledgement of its unsatisfactory nature. In *Beswick*, for example, Lord Reid observed that a strong Law Revision Committee had recommended statutory overruling of the doctrine 30 years before, in 1937. He then suggested that "if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to

29. Danckwerts and Salmon L.JJ.
30. See supra, footnote 2.
31. See *ibid*.
32. See *ibid* at p. 72, referring to U.K. Law Revision Committee, Cmd 5449 in *Sixth Interim Report, Statute of Frauds and the Doctrine of Consideration* (London, H.M.S.O., 1937).
deal with this matter". Similarly, in the recent decision of the Supreme Court of Canada in London Drugs, Iacobucci J., writing for a majority of the court, rehearsed many of the standard criticisms of the doctrine in pithy fashion and acknowledged "strong reservations about the rigid retention of a doctrine that has undergone systematic and substantial attack". It was nonetheless his view that major reform to such an established principle of the law of contracts must come from the legislature.

After the passage of more than 30 years since the decision in Beswick, reforming legislation has been enacted in the United Kingdom. In Canada, however, no legislative solution has been forthcoming and the path of judicial reform to date has adopted the strategy of carving out exceptions to the general rule. We turn, then, to a consideration of the various means by which application of the rule can be avoided in particular fact situations through adoption of other analytical devices or through the application of exceptions to the rule itself.

II. Limitations on and Exceptions to the Rule

Application of the third party beneficiary rule can be avoided if other doctrines, such as agency, trust, collateral contract or tort provide a foundation for a claim by the beneficiary against the promisor. As well, there are recognized exceptions to the doctrine, both statutory and at common law, that ameliorate the harsh consequences of the rule in particular circumstances.

1. Agency

Under the principles of the law of agency, where a principal authorizes an agent to enter into contracts on the principal's behalf with third parties, the result of the agent's doing so is that the principal has a direct contractual relationship with the third party. In what appears to be a third-party beneficiary case, then, it might be successfully argued that the promisee, B, was acting as an agent

33. Supra, footnote 2, at p. 72. And see the authorities cited in footnote 3, supra.
34. Supra, footnote 4.
35. Ibid., at p. 437.
36. See ibid. at p. 439.
37. Supra, footnote 9.
on behalf of C, the third-party beneficiary, in extracting a promise from A to confer a benefit on C. C, then, would have a direct contractual relationship with A and the third-party beneficiary rule would be avoided. From time to time, this agency analysis has been applied to what might otherwise appear to be a third-party beneficiary case. In McCannell v. Mabee McLaren Motors Ltd., 39 for example, a dispute arose in the context of a series of agreements entered into by the manufacturer of Studebaker cars and each of its Canadian dealers. In each agreement with a dealer, the manufacturer required the dealer to, in effect, respect the territories assigned to other dealers, and provided for remedies for breach of this undertaking. The provision also stipulated that “[i]t is understood and agreed that this paragraph shall be construed as an agreement between dealer and all other Studebaker Dealers who have signed a similar agreement”. 40 When one dealer sued another for breach of this agreement, the court held that with respect to this provision, the manufacturer acted as the agent of the several dealers to bring about privity of contract amongst them. Through the agency of the manufacturer, then, each dealer had entered into a contract with every other dealer concerning this matter. 41

A similar approach was taken by the Privy Council in New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd., 42 a case concerning a sale of equipment to be carried by sea to the purchaser. The seller, as the consignor or sender of the goods, entered into a contract, the bill of lading, with the operator of the vessel. The bill of lading provided that “no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability . . . for any loss or damage”. 43 When the purchaser or consignee of the goods received them, it became apparent that they had been damaged by the stevedores who had been hired by the carrier to unload the vessel. Although the consignee conceded that he was bound by the terms of the bill of lading with respect to any claim against the carrier, the consignee sued the stevedores in

40. Ibid., at p. 371.
43. Ibid., at p. 165.
Loosening the Privity Fetters

negligence and claimed that the stevedores could not rely, as third-party beneficiaries, on the provision of the bill of lading, which appeared to be designed to protect them. The bill of lading further stipulated, however, that with respect to this provision, the carrier was acting as an agent on behalf of its servants or agents or any independent contractors it might hire. The court held that the effect of this provision was to constitute the carrier as an agent for the purpose of communicating an offer of a unilateral contract to the stevedores. In effect, the consignor and consignee offer an agreement under which they promise that any independent contractors shall be entitled to the protections set out in the bill of lading, which offer can be accepted by an independent contractor, as in this case, by performing the act of unloading the vessel. A similar approach has been adopted in this same context by the Supreme Court of Canada. 44

Although agency analysis may appear to offer a useful device for avoiding application of the third-party beneficiary rule, there are severe limitations on its utility. The application of agency principles, in the normal case, rests on the finding of a genuine intention to create a relationship of agency. Thus, strained applications of the agency concept such as that found in the New Zealand Shipping case are vulnerable to the charge that the parties, in fact, had no such intention. In New Zealand Shipping, for example, Viscount Dilhorne dissented on the ground that the provision in the bill of lading did not either expressly or impliedly contain any such offer as that found by the majority. 45 Similarly, in the Dunlop case, the plaintiff tire manufacturer sought to ground relief on the basis that the wholesaler had entered into contracts with the retailer as an agent of the manufacturer. This argument was rejected, however, on the basis that the wholesaler had clearly bought the tires from the manufacturer as a principal and there did not appear to be any separate contractual undertaking negotiated by the wholesaler as an agent of the manufacturer. Cases such as these indicate that


45. See supra, footnote 42, at p. 170.

46. Supra, footnote 1.
reliance on artificial extension of the agency analysis is a precarious device for avoiding application of the third-party beneficiary rule.

2. Trust

In contrast to the entrenchment of the third-party beneficiary rule in the common law of contract, the courts of equity developed the law of trusts under which the rights of third-party beneficiaries were recognized. Trust arises in circumstances where property is being held by a person, the trustee, subject to an obligation to deal with the property for the benefit of third persons, the beneficiaries of the trust. A parent, for example, may transfer assets into the hands of a trustee to be administered for the benefit of the children. The law of trusts recognizes that the right to enforce a contractual obligation, a so-called “chose in action”, is included among the kinds of assets that can be made the subject-matter of a trust. Accordingly, if a third-party beneficiary of a contract can successfully claim that the promisee held the right to enforce the promise as a trustee for the beneficiary, the beneficiary could enforce the promise on the basis of the principles of the law of trusts. Although English and Canadian courts have applied the trust analysis to third-party beneficiary cases, at least in the context of promises to pay money or to transfer land, the modern authorities indicate that trust analysis will apply only in circumstances where it is clear that the parties actually intended to create a trust relationship. In Vandepitte v. Preferred Accident Insurance Co., for example, it was argued that a provision in a father’s car insurance policy which extended indemnity protection to persons driving the car with permission was held by the father in trust for the benefit of his daughter. The argument was rejected on the basis that there was no evidence that the father “had any intention to create a beneficial interest” for his daughter specifically or as a member of a described class.

51. Ibid. at p. 80. In Greenwood, the Supreme Court of Canada suggested that an important test for the absence of trust is whether the parties to the contract could change its terms “without reference to the alleged cestui que trust”. See supra, footnote 18, at p. 240.
As with agency law, then, extended application of the law of trusts to third-party beneficiary contract cases is vulnerable to the charge that no genuine intention to create such a relationship is evident on the facts of the case. The role of trust law as a device for circumventing the third-party beneficiary rule in contracts cases is thus severely limited.

3. Collateral Contracts

As has been indicated, the distribution of manufacturer's goods through dealers who purchase the goods from the manufacturer and then sell the goods, in turn, to the consumer may give rise to third-party beneficiary problems. The consumer may be a third-party beneficiary of a manufacturer's guaranty contained in the contract of sale to the dealer. In some instances, the device of collateral contract may enable the consumer to directly enforce the manufacturer's undertaking. Such relief is likely limited, however, to cases where the manufacturer has communicated with the consumer. In Shanklin Pier Ltd. v. Detel Products Ltd., for example, the defendant paint manufacturer had represented to the plaintiff that its paint had certain qualities that rendered it appropriate for use in repainting the plaintiff's pier. The plaintiff then required its painting contractor to use the defendant's paint. The contractor then purchased the paint from the defendant and applied it to the pier. When the paint proved to be unsatisfactory, the plaintiff successfully claimed damages from the manufacturer. Even though the contract for the supply of the paint was between the manufacturer and the contractor, the court held that there was a collateral unilateral contract offered by the manufacturer to the plaintiff. In effect, the manufacturer was held to have offered to the plaintiff that it would be bound by its representations concerning the quality of the paint if the plaintiff instructed its contractor to use its paint on the project. When the plaintiff did so, it accepted the manufacturer's offer and gave the consideration that rendered the manufacturer's warranty binding.

Similar unilateral contracts may be found where the advertising material of manufacturers is read by consumers prior to the purchase of goods from an independent supplier. As the connection between the manufacturer and the consumer becomes more tenuous, however, the inference of contractual intentions of this kind appears more artificial and, hence, unpredictable in application.

4. Tort Law

In some cases, the breach of A's contractual duty to B may also constitute a tort imposing compensable injuries upon C. C's tort claim against A may thus appear as another device for avoiding the third-party beneficiary rule. Thus, if A supplies a defective product to B who, in turn, sells the item to C, A may be in breach of the contract with B, but this will not avail C. If, however, the defect results from negligence and causes physical injury or property damage to C, a claim may be brought by C against A on the basis of Donoghue v. Stevenson. The development of tort principles enabling recovery of economic loss expands the possible scope of this solution to the third-party beneficiary problem. Recently, for example, the Supreme Court of Canada has held that the builder of a defective building may be liable in tort to a subsequent owner of the building for the economic loss involved in repairing the defect, at least where the defect poses a foreseeable and substantial danger to the health and safety of the occupants of the building.

Although these tort duties relating to the supply of defective goods and structures typically arise independently of the contractual duties imposed by the initial contract of supply, there are other cases in which the tort duty owed to the third party appears to arise directly from the breach of contract. In recent English cases, for example, solicitors have been held liable to prospective beneficiaries for their failure to draw up a will or execute it properly. Such

failures would constitute breach of contractual duties owed to their clients that could not be enforced in a contract claim by the prospective beneficiaries because of the third-party beneficiary rule. Their claim in tort, which avoids the third-party beneficiary rule, appears to flow directly from the initial breach of contract.\(^{59}\)

5. Assignment

The law concerning the assignment of contractual rights is a complex subject that is beyond the scope of the present article.\(^{60}\) For present purposes, however, it is sufficient to note that contractual rights are considered to be a species of property, so-called "chooses in action", which like other species of property can be transferred from one person to another. The assignment of a contractual right by an assignor to an assignee will be enforceable by the assignee against the original promisor if the assignment complies with the rules\(^{61}\) of common law, equity or statute relating to the effectiveness of assignments. In the context of a contract in which the promisor promises to confer benefits to a third-party beneficiary, then, if the promisee were to assign the benefits of the contract to the third-party beneficiary in an effective manner, the third-party beneficiary would be entitled to enforce the contract as an assignee.\(^{62}\)

The possibility of assignment does not provide a general solution to the third-party beneficiary problem. Not all agreements are


61. Although common law doctrine was inhospitable to assignment, equity permitted it. Late 19th century legislation enacted in England and the Canadian provinces removed some of the obstacles to its recognition. See, for example, Judicature Act, R.S.A. 1980, c. J-1, s. 21(1) and Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 53(1).

62. As Professor Waddams has argued, the acceptance by the courts and the legislatures of the principle of assignment appears quite inconsistent with the third-party beneficiary rule. If parties can subsequently assign the right to enforce A's promise to B, what objection can there be in principle to allowing C to enforce an initial agreement by the parties to directly confer a benefit upon C. See Waddams, supra, footnote 60, at p. 194.
capable of being assigned. Contracts involving a personal or service element, for example, cannot be assigned. In other cases, assignment may be inconvenient or impractical. In a narrow range of cases, however, an assignment of the promisee's rights to the third-party beneficiary could provide a solution to the third-party beneficiary problem.

6. Statutory Exceptions

A number of statutory exceptions to the third-party beneficiary rule have been enacted in order to avoid unsatisfactory results. A number have been found necessary in the insurance context. Thus, the beneficiary under a life insurance policy has a statutory right to enforce the policy. In the context of motor vehicle insurance, an accident victim has a statutory right to claim directly against the insurer of the person who caused the accident. Similarly, the problem revealed by the decision in Vandepitte was remedied by statute. Examples from other contexts would include the statutory right of a purchaser of goods being carried by sea to enforce the contract of carriage (evidenced by a bill of lading) entered into by the seller and the carrier, and the right of a mortgagee to sue the assignee of the mortgagor who has promised the mortgagor that it will make mortgage payments to the mortgagee. Some provinces have enacted consumer protection statutes that enable consumers to directly enforce manufacturers' or sellers' product warranties,

64. See, for example, Insurance Act, R.S.A. 1980, c. 1-5, s. 264; Insurance Act, R.S.B.C. 1996, c. 226, s. 53; Insurance Act, R.S.M. 1987, c. 140, s. 172; Insurance Act, R.S.N.B. 1973, c. I-12, s. 156; Insurance Act, R.S.N.S. 1989, c. 231, s. 197; Insurance Act, R.S.O. 1990, c. I.8, s. 195; and Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 157.
65. See, for example, Insurance Act, R.S.A. 1980, c. I-5, s. 320(1); Insurance Act, R.S.B.C. 1996, c. 226, s. 159(1); Insurance Act, R.S.M. 1987, c. 140, s. 258(1); Insurance Act, R.S.N.B. 1973, c. I-12, s. 250(1); Insurance Act, R.S.N.S. 1989, c. 231, s. 133(1); Insurance Act, R.S.O. 1990, c. I.8, s. 258(1); and Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 210(1).
66. See, for example, Insurance Act, R.S.A. 1980, c. I-5, s. 305; Insurance Act, R.S.B.C. 1996, c. 226, s. 172; Insurance Act, R.S.M. 1987, c. 140, s. 267(1); Insurance Act, R.S.N.B. 1973, c. I-12, s. 236; Insurance Act, R.S.N.S. 1989, c. 231, s. 142; Insurance Act, R.S.O. 1990, c. I.8, s. 244; and Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 219.
67. Mercantile Law Amendment Act, R.S.O. 1990, c. M.10, s. 7(1); Bills of Lading Act, R.S.C. 1985, c. B-6, s. 2 and Bills of Lading Act, R.S.N.S. 1968, C. 38, s. 2.
whether or not the consumers are mere third-party beneficiaries of the warranty in issue. 69

7. Additional Exceptions at Common Law

(a) Provisions Limiting the Liability of Employees

The privity rule has given rise to particularly harsh results in the context of limitation of liability clauses negotiated by employers with their customers. Where harm to the customer results from the careless conduct of employees, the employer may be immune from liability but this immunity would not extend to employees because they are merely third-party beneficiaries of the contract between their employer and the customer. An analysis of this kind was applied by the Supreme Court of Canada in Greenwood70 in the context of a lease taken out by a retailer. The lessor had agreed to obtain fire insurance and not to seek compensation from the lessee in the event of a fire occurring on the premises. Nonetheless, a claim by the lessor directly against the lessee’s employees who had caused a fire enjoyed success.

This point was reconsidered by the court, however, in London Drugs,71 and a new exception to the privity doctrine was crafted to deal with this type of situation. In this case, the customer stored a large transformer in a warehouse and agreed that the warehouseman’s liability in the event of damage to the transformer would be limited to $40. The plaintiff declined to exercise an option under the storage contract to pay additional charges to effect an insurance cover for damage to the transformer. When the transformer was damaged as a result of the negligence of the warehouseman’s employees, the plaintiff brought an action directly against them in tort.

Noting that “it would be absurd in the circumstances of this case to let the appellant go around the limitation of liability clause by suing the respondent employees in tort”, the court concluded that the concept of “warehouseman” in the agreement must be taken to implicitly cover the employees of the warehouseman.72 The court observed that in this context the parties understand that a warehouseman performs its contractual obligation through the actions of

70. Supra, footnote 18.
71. Supra, footnote 4.
72. Ibid., at p. 444.
its employees. Where the customer has agreed to a limitation of liability, the employees would not reasonably expect to be liable and holding them so would lead to "serious injustice". Thus, where a limitation of liability clause negotiated by an employer either expressly or impliedly extends to cover the employees and where the employees were performing the very services contracted for by the customer in the ordinary course of their employment, the doctrine of privity, in the court's view, should not apply. In these narrowly defined circumstances, then, employees can rely on an exception to the privity doctrine.

As noted above, however, the court declined to effect a broader reform of the doctrine of privity on this occasion. Indeed, the court merely distinguished rather than overruled Greenwood, on the grounds that a lease is rather different from a contract to provide services as it is not performed by the employees and that, in any event, the contractual provisions in Greenwood were not intended to confer protection on the employees. It may be considered unclear, then, what result would obtain if a lease explicitly either identified as its purpose the running of a retail shop or imposed an obligation on the lessee to do so. As we shall see, however, the court returned to consider and, perhaps, expand the exception created in London Drugs in a manner that might capture these kinds of arrangements.

(b) Insurance

Strict application of privity doctrine in the context of insurance could work a hardship in many cases. Accordingly, insurance contracts have been a fertile source of exceptions to the general rule, both at common law and, as we have seen, in the statute books. Two different fact patterns are typically found in the cases. The first arises in the context of provisions that, in some fashion or other, waive rights that an insurer would otherwise have to

73. Ibid., at p. 446.
74. The potential implication that employees are protected where precisely providing such services but not where committing "independent torts" is explored by M. Baer, supra, footnote 4, at pp. 400-02. See also M.A.N.-B&W Diesel v. Kingsway Transports (1997), 33 O.R. (3d) 355, 99 O.A.C. 69 (C.A.).
75. See supra, the text at footnotes 33-36.
76. See supra, footnote 4, at p. 431.
77. See the discussion of Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd., in the text, infra, at footnote 82.
pursue claims against third parties. When the insurer, in breach of such provisions, then pursues such relief, the third-party beneficiary will seek to rely on the waiver contained in the insurance contract. The second type concerns insurance agreements, which extend coverage to third parties who are not, in the formal sense, parties to the agreement. The question arising in this context is whether the third parties can enforce the positive obligation of the insurer to provide coverage.

(i) Waiver of Rights against Third Parties

Where a contract of insurance provides that the insurer shall have no "recourse" against third parties, or where the insurer waives a right to subrogate itself to the position of the insured for purposes of bringing a claim against a third party, it is now clearly established that such provisions are binding on the insurer. Thus, if the insurer pursues an action against a third party protected by such a provision, the third party may rely on the provision to defeat the claim, notwithstanding the third party's lack of privity. In one line of authority reaching back into the 19th century, insurers who issued indemnity coverage to insureds "without recourse" were held unable to bring an action against a party causing the loss who was covered by the "without recourse" stipulation.78 The Supreme Court of Canada reached a similar conclusion in the context of a "builders' risk policy" in Commonwealth Construction Co. v. Imperial Oil Ltd.79 In that case, a builders' risk policy was taken out by the owner of the project under construction. The policy covered not only the owner but the contractors and subcontractors working on the project. During the course of construction, the property was damaged by a fire resulting from the negligence of a subcontractor. Having indemnified the owner for its loss, the insurer then claimed against the subcontractor. The Supreme Court rejected the claim on two grounds. First, to permit the insurer to subrogate itself to the owner in a claim against a subcontractor would be inconsistent with the very purpose of the provision extending coverage to the contractors and subcontractors. The point of the arrangement was to spare the participants in the project "the necessity of fighting between themselves should an accident occur involving the possible

responsibility of one of them". Second, the court relied upon a provision of the policy that explicitly permitted the insurer to bring subrogated claims against non-insured parties. In the court's view, this provision plainly precluded subrogation against insured parties such as subcontractors. The third party could rely on this provision, therefore, as a basis for dismissing the claim. A recent Ontario decision has extended protection to the employees of a subcontractor on the basis that they are implicitly protected by arrangements of this kind. 80

Although it has been suggested that the latter line of authority rests on the particular nature of builders' risk insurance, 81 the Supreme Court has now clearly established that the principle that an insurer's waiver of subrogation or recourse is binding as against third-party beneficiaries is a principle of general application. In Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. 82 a marine insurance policy contained a waiver of subrogation by the insurer against "any charterer". The boat covered by the policy was sunk as a result of the negligence of a charterer. Subsequently, the owner of the boat and the insurer agreed to suspend the waiver of subrogation clause and the insurer brought a subrogated claim against the charterer. The charterer successfully defended the claim on the basis that the exception to the doctrine of privity established in London Drugs could extend to this fact situation. Understandably, the plaintiff urged that the London Drugs exception would apply only where the initial contract was for the supply of services and where the parties would understand that the services could only be supplied by employees or agents of the contractor. The Supreme Court rejected so narrow a reading of London Drugs, however, and held that the exception applies in any case in which the facts meet a twofold test. First, it must be established that the third-party beneficiary was intended by the parties to the initial contract to be benefited by the contractual provision in question. Second, the "activities performed by the third-party seeking to rely on the contractual


82. Supra, footnote 13.
Loosening the Privity Fetters

provision [are] the very activities contemplated as coming within the scope of the contract in general, or the provision in particular”. In the court’s view, the Fraser River facts passed these tests. The first branch was met by the explicit reference to “charterers” as a class in the initial agreement. The second branch of the test was met on the basis that the agreement envisaged that the boat would be let out to a charterer and that this is, in fact, what occurred. On the basis of this decision, then, it is clear that the exception to the doctrine of privity applicable to waivers of subrogation and similar provisions applies generally within the context of insurance agreements and is not limited to a particular class or type of policy.

(ii) Coverage of Third Parties

It is commonplace for insurance policies to extend coverage not only to the party who takes out the insurance but to other parties who may be either named or at least identified by reference to a category of covered persons. The question then arises as to whether such third parties can enforce the insurance policy against the insurer. A refusal to enforce such arrangements, of course, would have the effect that insurance coverage that had been paid for could not be effectively enforced by the third-party insureds. This was the problem in Vandepitte, 83 which held that the doctrine of privity prevented third-party insureds from enforcing such provisions. Although, as noted above, the decision in Vandepitte was abrogated by legislation in the context of automobile insurance, the reasoning in Vandepitte created a potential hazard in other insurance contexts. Nonetheless, Canadian courts appear to have adopted the practice of ignoring Vandepitte. In a Nova Scotia case, for example, the Appeal Division held that a mortgage-loss insurance policy taken out by a chattel mortgagor, which was payable to the mortgagee, could be enforced at the suit of the mortgagee. 84 Further, in Scott v. Wawanesa Mutual Insurance Co., 85 the Supreme Court of Canada

83. Supra, footnote 50.
84. Trans Canada Credit Corp. v. Royal Insurance Co. of Canada (1983), 58 N.S.R. (2d) 280, 149 D.L.R. (3d) 280 (C.A.). Similarly, insurers who have issued indemnity coverage to insureds “without recourse” have been held unable to bring action against a party causing the loss who is covered, albeit only as a third-party beneficiary, of the “without recourse” stipulation. See Thomas & Co. v. Brown and J. Clark & Son Ltd. v. Finnamore, both supra, footnote 78.
appeared to conclude that third-party insureds were effectively covered by an insurance policy even though the reasoning in Vandepitte would suggest that this was not so. In the recent decision in Fraser River, the Supreme Court confirmed that “it is time to put to rest the unreasonable application of the doctrine of privity to contracts of insurance established by the Privy Council in Vandepitte, a decision characterized since its inception by both legislatures and the judiciary as out of touch with commercial reality”.

With the effective overruling of Vandepitte, then, a further exception to the privity doctrine appears to permit the enforcement of insurance contracts by third-party insureds.

A similar development has occurred in Australia. In Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd., the Australian High Court refused to apply the doctrine of privity in the context of a third-party claim arising from a construction project at a limestone crushing plant. The operator of the plant had taken out liability insurance which included indemnification for itself, its subsidiaries and related companies and all contractors and subcontractors at the plant. The principal contractor was held liable on a claim by an injured worker. Though merely a third-party beneficiary to the contract of insurance, it then successfully sought indemnification from the insurer. Two of the opinions forming part of the majority of the court offered criticism of the third-party beneficiary rule and called for its reform. Nonetheless, the holding of the court is grounded on the recognition of a specific exception to the rule applicable to insurance contracts.

(c) The Open-Textured “Principled Exception”

In Fraser River, the Supreme Court confirmed the existence of a “principled exception” to the doctrine of privity that is not restricted to a particular class or type of agreement. Although the principled exception was first articulated in the decision in London Drugs, the reasoning in that case was vulnerable to the interpretation that the exception only applied to a fact situation in which the

86. Supra, footnote 13, at pp. 273-74.
87. Supra, footnote 5.
88. Mason C.J. and Wilson in their joint opinion and Toohey J. favoured judicial reform of the rule. Gaudron J., concurring in the result, preferred an unjust enrichment approach. Deane J. favoured the trust approach but would have allowed further evidence and submissions on the point. Brennan and Dawson JJ. dissented.
initial contract concerned the provision of services and the parties to that agreement would have appreciated that the services could only be performed by servants or agents of the supplying party. In such circumstances, the suppliers' employees were implicitly protected by a limitation of liability provision in the initial supply contract. This narrow reading of *London Drugs* appeared to be reinforced by the court's narrow distinction of the previous holding in *Greenwood*, in which a limitation of liability in a lease for retail premises was held to offer no protection to the employees of the lessee who negligently caused a fire. The *Greenwood* case was distinguishable, it seemed, because the initial agreement was a lease, not a service agreement, and the lessees' employees could therefore not be said to be providing the very service envisaged in the initial agreement. In this respect, the charterparty in *Fraser River* appears to be rather similar to the lease in *Greenwood*.

As we have seen, however, the court in *Fraser River* held that the *London Drugs* exception to the doctrine of privity was not limited to provisions limiting liability under contracts for the supply of services. The principled exception to the doctrine, then, is of general application and is available whenever the two branches of the test set out in *Fraser River* are met. The first branch requires that the parties to the initial agreement intended to extend the benefit in question to the third party. That intention may be explicit, as it was in *Fraser River*, or implicit as it was in *London Drugs*. The second and somewhat opaque branch of the test is that the "very activities" of the third party come within the scope of the initial contract or provision. In *Fraser River*, the initial contract referred to "any charterer". The defendant who, in fact, chartered the boat in question was therefore engaged in the "very activity" envisaged by the agreement. The general or open-textured nature of the principled exception was emphasized by the court in *Fraser River*. The purpose of the exception is to confer upon courts, in cases where the traditional exceptions of agency and trust do not apply, a discretion to "undertake the appropriate analysis, bounded

---

89. *Supra*, footnote 18.
90. As formulated in *London Drugs* and *Fraser River*, the test does not require that the parties intend to confer a direct right to enforce on the third party; it is sufficient to establish an intention-to-benefit. For discussion of this distinction supporting the intention-to-benefit approach on the ground that the parties are unlikely to think of the question of direct enforcement, see *Trident General*, supra, footnote 5, at pp. 122-23 per Mason C.J. and Wilson J.
by both common sense and commercial reality, in order to determine whether the doctrine of privity with respect to third-party beneficiaries should be relaxed in the given circumstances". The principled exception is thus not limited to a particular class or category of contracts.

In attempting to determine the reach of the "principled exception", three issues arise. First, the content of the second branch of the test requires examination. Second, it may be asked whether the application of the exception is restricted to cases where third-party beneficiaries rely upon a provision such as limitation of liability clauses and waivers of subrogation in order to protect themselves against claims being brought by the original promisor. Third, the extent to which courts may be expected to apply the Greenwood decision in future cases may be assessed.

The scope or content of the second branch of the test is not easily discerned. Having found that the parties to the original agreement intended to benefit the third party with the provision, the second branch then requires that the third party be engaged in the "very activity" envisaged by the agreement. It is not entirely clear, however, what is contained in the second branch of the test that is not contained in the initial requirement that the third party be an intended beneficiary of the promise. In Fraser River, the provision was intended to protect charterers. The defendant was a charterer. Little is added to this analysis by the observation that chartering was the very activity envisaged by the agreement. Further light on the second branch may be shed by examining the role it plays in the London Drugs decision. Certainly it could be said that the employees in London Drugs were engaged in the very activity envisaged by the agreement, that is, providing storage services. As the reasoning in London Drugs itself demonstrates, however, the materiality of that fact appears to be that it supports the inference that the parties must have implicitly intended to extend protection to the employees, even though the agreement does not explicitly so provide. In Fraser River, on the other hand, where the agreement explicitly purports to confer a benefit on "charterers", it is not surprising that the second branch of the test appears to have no work to do. If this is correct, a better view of the content of the second branch of the test is that it applies only in cases where the third-party beneficiary is not explicitly referred to

91. Supra, footnote 4, at p. 452 per Iacobucci J.
in the agreement and it applies in support of an inference that the agreement implicitly so provides.

The second issue is whether the principled exception could apply to a case such as Beswick v. Beswick\(^9\) where the third-party beneficiary, as plaintiff, brings a claim to enforce the promise or whether, on the other hand, its application is restricted to cases like London Drugs and Fraser River where the third-party beneficiary, as defendant, relies on a provision as protection against a claim brought by the promisor. It is true that in both London Drugs and Fraser River, the court placed some emphasis on the nature of the reliance being placed by the third-party beneficiary on the provision in question and implicitly, one might argue, distinguished thereby cases in which a third-party beneficiary, as plaintiff, seeks to enforce a provision. Nonetheless, there are two considerations that weigh in favour of the view that the principled exception could apply in both types of cases. First, as a matter of precedent, the overruling of Vandepitte in Fraser River offers support for the view that the exception can so apply. Vandepitte was a case in which the third-party beneficiary, as plaintiff, sought to enforce a promise of insurance coverage given by the promisor insurer. Fraser River plainly intimates that such a claim would now lie in common law Canada. Further, such a claim has been recently allowed by the Australian High Court in the Trident General Insurance Co. case.\(^9\) Second, if, as the court states in Fraser River, the purpose of the exception is to withhold application of the privity doctrine in cases where considerations of “common sense and commercial reality” suggest that the doctrine should be ignored, there appears to be no convincing basis for assuming that such considerations could apply only in the context of third-party reliance on limitations of liability or waiver of subrogation provisions. We should note in passing that the second branch of the test, as formulated in Fraser River, does not appear to apply neatly to all cases in which third-party beneficiaries seek to enforce, as plaintiffs, promises that are intended to benefit them. Although the “insured” plaintiffs in Vandepitte\(^9\) and Trident\(^9\) may appear to be engaged in the “very activity” envisaged by the agreement, i.e. they suffered the defined loss or injury, the agreement in Beswick\(^9\)

\(^9\) Supra, footnote 2.
\(^9\) Supra, footnote 5.
\(^9\) Supra, footnote 50.
\(^9\) Supra, footnote 5.
\(^9\) Supra, footnote 2. The facts are set out in the text, supra, at footnote 28.
does not envisage that the widow will engage in any particular activity other than the receipt of money. This does not appear to be, however, a satisfactory basis for proposing different results in these cases. If, as suggested above, the true role of the second branch of the exception is to determine whether or not the third party was an intended beneficiary of the promise, this potential difficulty is made to disappear.

Finally, the breadth of the principled exception suggests that the vitality of the court’s earlier decision in Greenwood has been severely curtailed. Although the court declined to overrule Greenwood in London Drugs and neglected to mention the Greenwood decision in Fraser River, it may be that Greenwood should now be considered to be restricted essentially to its own facts. Such an approach was adopted in a recent decision of the Ontario Court of Appeal in Tony and Jim's Holdings Limited v. Silva, a case in which the court applied the principled exception in a fact situation similar in its essentials to that of Greenwood. Like Greenwood, the promise at issue in Tony and Jim's was contained in a lease in a shopping mall. The lease provided that the landlord would procure fire insurance, the premiums for which would be paid by the tenant. The policy stipulated that “all rights of subrogation are hereby waived against any corporation, firm, individual or other interest with respect to which insurance is provided by this policy”. A fire occurred and the insurer brought a subrogated claim against an officer of the insured corporation, alleging that the officer’s negligence had caused the fire. The Court of Appeal refused to apply Greenwood in the insurer’s favour on the basis that Greenwood was a case in which the court held that the defendant employees were “strangers” to the contract. The question to be asked, after London Drugs, in the court’s view, was whether there existed sufficient “identity of interest” between the officer and the corporation so as to warrant application of the principled exception. Such an identity of interest was established because the “parties must be taken to have understood that the corporate tenant could only be guilty of negligence through its directors or employees”.

97. (1999), 170 D.L.R. (4th) 193 (Ont. C.A.). See also Laing Property Corp. v. All Seasons Display Inc. (2000), 190 D.L.R. (4th) 1, 229 W.A.C. 203 (B.C.C.A.), distinguishing Greenwood on the basis that the lessor in this case had contracted to provide certain building management services in the lease.

It is very difficult, however, to distinguish *Greenwood* on this basis. The lease in *Greenwood* imposed an obligation on the landlord to procure fire insurance and not to grant subrogation rights with respect to any loss caused by the tenant. Again, in *Greenwood* it must have been obvious to the parties that the corporate tenant could be careless only through the acts of employees. However, the result in the Ontario case is more attractive than that in *Greenwood* and it may be likely, therefore, that *Greenwood* will continue to be distinguished in the future as a case where the intention to extend protection to third parties was not clearly established\(^{99}\) and that it will eventually be eclipsed by application of the principled exception to fact situations of this kind.

### III. Subsequent Variation or Annulment of the Promise

To the extent that third-party beneficiaries are able to enforce promises against the promisor, consideration must be given to the question of whether such enforceable promises can be subsequently varied or annulled either unilaterally by the promisor or with the agreement of the promisee. Indeed, the possibility that recognition of third-party beneficiary rights would complicate or create obstacles to the exercise of variation or rescission of the initial agreement is offered by some observers as a justification for the traditional doctrine of privity.\(^{100}\) On the other hand, a unilateral right to vary or rescind is capable of working injustice on third parties who have relied on the provision to their detriment. The United Kingdom legislation\(^{101}\) that abrogates the privity doctrine resolves this difficulty by restricting the ability of the parties to the agreement to rescind or vary the agreement to the disadvantage of the third party to situations where the third party had communicated his assent to the arrangement to the promisor and where the promisor is either aware that the third party has relied on the term or should reasonably have foreseen that reliance. Thus, in any case where the third party either has not agreed to the term or has not relied upon it, the parties to the original agreement are free to vary or rescind its

---

99. A basis for distinguishing *Greenwood* on this ground is set out in *London Drugs* itself, *supra*, footnote 4, at p. 431 *per* Iacobucci J. (“there was little, if any, evidence to support a finding that the parties to the contract intended to confer a benefit on the employees”).


101. *Supra*, footnote 9, s. 2.
terms. The New Brunswick statute\textsuperscript{102} adopts a different approach. The original parties may amend or terminate their agreement at any time, but the third party is protected with respect to any detrimental reliance on the promise of which the promisor knew or ought to have known.

Yet a third approach was taken by the Supreme Court of Canada in the \textit{Fraser River} case. There the insurer and insured purported to rescind the waiver of subrogation clause after the loss occurred so as to enable the insurer to bring a subrogated claim against the third-party beneficiary of the provision, the defendant charterer. In the view of the Supreme Court, however, once the loss had occurred, the charterer’s inchoate contractual right had “crystallized” and the insurer and insured were no longer in a position to “revoke unilaterally” the charterer’s rights under the waiver of subrogation clause. This approach differs from the U.K. legislative scheme in two respects. First, crystallization of the third party’s rights does not appear to be contingent upon assent to or, indeed, awareness of the original contractual term. This would appear to be the preferable approach, at least in cases where the provision in question is the normal or usual one and, perhaps, in cases where the third party is unlikely to make enquiries. Secondly, the position of the charterer prior to crystallization may be less secure than it would be under the U.K. scheme. The Supreme Court appears to take the view that a unilateral revocation could occur prior to crystallization even in a case where the charterer had assented to the term and, perhaps, relied upon it by refraining from taking out its own insurance.\textsuperscript{103} Should this matter arise, the preferable view would be that a third party who was aware of and detrimentally relied on the existence of the provision would be protected by it until, at the least, reasonable notice of a proposed variation or rescission was given. Indeed, in a case where the arrangements in place conferring benefits on third parties are the standard arrangements and where the third parties have simply assumed that the standard arrangements are in place, it may be appropriate to dispense with any requirement that the third party have actual notice of the provision.

\textsuperscript{102} Supra, footnote 8, s. 4(3).
\textsuperscript{103} Such reliance, if foreseeable, would enable the third party to recover losses resulting from amendment or termination of the contract under the New Brunswick scheme. See \textit{ibid}. 
C. THE CASE FOR (JUDICIAL) ABOLITION OF THE RULE

The doctrine of privity of contract is plainly unsatisfactory. A number of considerations weigh in favour of wholesale abolition of the doctrine. The doctrine is capable of producing unjust and surprising results in commonplace fact situations. The rule lacks a convincing rationale or policy justification. The doctrine has become remarkably unstable and unpredictable as a result of the continuing growth of the list of exceptions to the general rule. Indeed, the new “principled exception” to the rule appears to be capable of unravelling the rule in its entirety. Further, the doctrine has a distorting effect on other doctrines as artificial applications of other rules are brought in aid of sensible results that can be achieved only by finding a way around the privity doctrine.

A number of objections have been made to outright abolition. Some worry that a doctrine favouring enforcement of contracts for the benefit of third parties will be of uncertain ambit and that, therefore, determining the proper treatment of such issues by the current relatively stable doctrine will be replaced by use of one that is unstable. Others may be concerned that the problems of subsequent variation of the initial agreement and the applicability, as against the third-party beneficiary, of defences available to the initial contracting parties are so difficult that wholesale reform should be resisted. Finally, there are those who, although they favour abolition, feel that reform can or should only come from the legislature. Abolition of the doctrine appears to represent so dramatic a change in the common law that it should not be achieved by judicial modification of the doctrine. I will briefly elaborate on each of these points.

1. The Doctrine Produces Unjust Results

I will not belabour this point. One need only consider the claims in *Beswick v. Beswick* ¹⁰⁴ and *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.* ¹⁰⁵ as illustrations of this phenomenon. In *Beswick*, a nephew who purchased a business from his uncle promised, as part of the consideration for the sale, to pay, upon the uncle’s death, an annuity of £5 per week to his widow. When the uncle died, the nephew refused to pay. The privity doctrine dictates the result

---

¹⁰⁴ *Supra*, footnote 2.
¹⁰⁵ *Supra*, footnote 18.
that the nephew's claim is unenforceable at the instance of the widow and the nephew is thereby able to avoid paying a significant portion of the contract price. In the actual case, of course, the fact that the widow was the executrix of her husband's estate saved the situation and produced a more sensible result. She was able to bring an action on behalf of the estate to enforce the nephew's promise, thereby avoiding the obvious injustice that would otherwise result from application of the rule. In Greenwood, a lessor who promised the lessee that it would take out fire insurance and hold the lessee's employees harmless in the event of a fire nonetheless brought a successful claim against the lessee's individual employees whose negligence had caused a loss. The doctrine of privity precluded the employees from relying on the contractual stipulation that was designed to protect them. Under traditional doctrine, this result would be dictated by the rule whether or not either the lessee or the employees had relied upon the provision by refraining to take out further insurance. The apparent injustice of this result was, no doubt, a good part of the inspiration for the new "principled exception" to the doctrine developed in London Drugs and Fraser River, which may now provide a basis for the opposite result in fact situations of this kind. Moreover, it should not be thought that privity problems arise in only marginal or uncommon factual settings. In the introductory section of this article, I attempted to identify a number of garden-variety commercial settings in which privity problems arise. The hazards created by privity doctrine in the context, for example, of insurance agreements and of construction projects are notorious.

II. Lack of a Convincing Rationale

As has been suggested above, the traditional justifications for the privity rule appear unconvincing. These explanations of the doctrine are that the doctrine of consideration dictates this result — the third party beneficiary has not given consideration for the promise — and, alternatively, that the third party beneficiary, not being a "party" to the agreement, should not be able to enforce it. The suggestion that the privity doctrine is grounded in consideration

106. Supra, footnote 4.
109. Supra, the text at footnotes 23-25.
Loosening the Privity Fetters

The point of consideration doctrine is to identify promisors who should be held to their promises. A promisor who has received consideration in return for the promise, according to consideration theory, should be bound by the promise. The nephew in Beswick and the lessor in Greenwood have received consideration. It is therefore no offence to consideration theory to suggest that they should be bound by their promises. Consideration, per se, does not tell us the answer to the severable question as to whether the widowed aunt should be able to bring an action to enforce the promise.  

The suggestion that a third party beneficiary is not truly a “party” to the agreement may be simply a restatement of the consideration point. If so, it collapses for the same reason. To the extent that it is a different point, it appears to be a circular argument resting simply on the definition of the term “party”.

It is sometimes suggested that an additional rationale for the privity doctrine may be found in the proposition that the common law does not confer upon a mere donee of a promise a right to enforce the promise. Gratuitous promises are unenforceable. Accordingly, the third party beneficiary, who may in some sense be a donee, should not be able to enforce. Like the consideration point, this too is a *non sequitur*. The principal reason for not enforcing gratuitous promises is to protect the interests of the donor promisor who might be surprised by the imposition of such liability. The promisors in Beswick and Greenwood should expect their promises to be binding, as they were given for good consideration.

The practical effect of the privity doctrine is to render promises unenforceable at the instance of the party who may be the only person with an interest in enforcing them. In such cases, the result is that a legally binding promise is, in practical terms, simply unenforceable. And yet, there appears to be little reason for isolating contracts for the benefit of third parties from the common law’s general policy of enforcing promises that are intended to be

---

110. The traditional defence of privity on consideration grounds is not strengthened, in my view, by the assertion that consideration requires “correlativity” or “mutuality of exchange” and that this is why third parties cannot enforce. See, e.g., J. Brock, “A Principled Exception to Privity of Contract” (2000), 58 U. of T. Fac. L. Rev. 53 at p. 70. Such assertions appear to be merely assertions — *ipse dixit* — rather than explanations or justifications in policy terms for the conclusion that a third party beneficiary cannot enforce.

111. See Treitel, supra, footnote 100, at p. 545.

112. See, generally, L. Fuller, “Consideration and Form” (1941), 41 Col. L. Rev. 799.
legally binding. Indeed, the reasons for enforcing promises for the benefit of the third parties appear to be consistent with the reasons for enforcing promises more generally. Failure to facilitate the enforcement of such promises may lead to the unjust enrichment of the promisor and to the disappointment of the expectations of persons who have relied on them.\textsuperscript{113}

III. Unstable and Arbitrary Doctrine

The common law prides itself on its capacity for self-renewal through judicial modification of unsatisfactory doctrine. One signal that a particular doctrine is ripe for reform and restatement is the accretion of a series of exceptions to the general rule which render application of that rule unpredictable — indeed, arbitrary and capricious. The doctrine of privity appears to have reached this advanced state of decay. As we have seen, the traditional exceptions of trust and agency appear to be doctrines that are capable of manipulation in aid of subverting the application of the general rule. The application of agency principles in cases like in \textit{New Zealand Shipping}\textsuperscript{114} and \textit{ITO-International Terminal Operators}\textsuperscript{115} are impressively muscular. At the same time, it is difficult to predict whether a similarly aggressive approach will be taken in other contexts. The uncertain availability of trust analysis offers a further source of instability.

The new "principled exception" to privity doctrine gives rise to similar concerns. As has been suggested above, the outer limits of that exception are not easily discerned. Indeed, if the exception will apply, as it may, in any case where "both common sense and commercial reality" suggest that the privity doctrine should be ignored, the exception appears to carry the inherent capacity to completely overwhelm the traditional principle. At the very least, the "principled exception", at its present stage of development, lends itself to artificial distinctions. It is not clear, for example, how one is to explain the difference in result between \textit{Greenwood}\textsuperscript{116} and \textit{Fraser River}.\textsuperscript{117} Moreover, although the overruling of

\textsuperscript{114} \textit{Supra}, footnote 42.
\textsuperscript{115} \textit{Supra}, footnote 44.
\textsuperscript{116} \textit{Supra}, footnote 18. And see the discussion in the text at footnotes 97-99.
\textsuperscript{117} \textit{Supra}, footnote 13.
Vandepitte\textsuperscript{118} suggests that the principled exception will extend to cases in which the promisee seeks damages for breach of promise against the promisor, the full sweep of the doctrine will not become clear until it is tested in further litigation.

In short, then, both the traditional exceptions and the new principled exception contribute to the creation of a body of doctrine that is very subtle and, accordingly, unpredictable in its application.

\textbf{IV. Distorting Effect on Other Doctrine}

Unsatisfactory doctrine is likely to effect two different kinds of distortions of other doctrines. First, to the extent that the unsatisfactory doctrine creates an obstacle to a just result, pressure is likely to be placed on other doctrines to expand or contract artificially in order to provide a means to a just resolution of the dispute. Second, the unsatisfactory doctrine may perform the role, in a particular case, of providing a convenient excuse for reaching a fair result that might be difficult to achieve through the application of the doctrine that is more relevant to the resolution of the particular dispute. Explication of the relevant doctrine might produce better doctrine in the sense that the issue will be resolved both more soundly and more generally. Both types of distortions are apparent in the jurisprudence of the privity doctrine.

The trust and agency exceptions to the traditional rule are perhaps the best illustration of the first type of distortion. Thus, for example, the agency relationship identified in cases like \textit{New Zealand Shipping}\textsuperscript{119} and \textit{ITO-International Terminal Operators}\textsuperscript{120} is not likely to have occurred to the minds of the natural persons who are alleged to be both principals and agents in these fact situations.\textsuperscript{121} However, the distorting effect of privity doctrine is likely to extend beyond the areas of law affected by the traditional exceptions. Thus, for example, the \textit{Greenwood} problem has been resolved in some cases by holding, somewhat controversially, that the unenforceable

\textsuperscript{118} Supra, footnote 50. And see the discussion in the text at footnotes 92-96.
\textsuperscript{119} Supra, footnote 42.
\textsuperscript{120} Supra, footnote 44.
\textsuperscript{121} The artificiality of the consideration analysis in these cases (the stevedores, hired by the consignee, provide consideration to the consignor by unloading the vessel) has been commented on by Lord Goff in \textit{The Makhutai}, [1996] 3 W.L.R. 1 (P.C.) at pp. 11-12. Cf. Hazmasters Environmental Equipment Inc. v. London Guarantee (1998), 171 D.L.R. (4th) 93, 171 N.S.R. (2d) 176 (C.A.) (arguably creative application of consideration doctrine in a three-party situation).
limitation of liability stipulation nonetheless has the effect of negativing the defendant’s duty of care in tort.\textsuperscript{122}

The second type of distortion — avoiding the central issue in the case — can be illustrated by the \textit{Dunlop} case itself. In \textit{Dunlop}, the effect of applying privity doctrine was to strike down a retail price maintenance scheme. The true justification for refusing enforcement, as Lord Denning later observed, may be that the third-party beneficiary, on these facts, has no legitimate interest to enforce since it is “seeking to enforce the maintenance of prices to the public disadvantage”.\textsuperscript{123} The real question in \textit{Dunlop}, one might argue, is whether such schemes ought to be considered contrary to public policy and therefore unenforceable. The court was able avoid this important and difficult question by relying on privity doctrine.

Similarly, the privity doctrine seems to have been relied upon in a recent Ontario case as a device for avoiding a difficult issue. In \textit{Van Patter v. Tillsonburg District Memorial Hospital},\textsuperscript{124} the plaintiff, a passenger in a motor vehicle, was severely injured in a motor vehicle accident. Her claim against the owner and driver of the vehicle was settled and she signed a standard release in which she agreed not to bring a claim against any other person who might seek contribution or indemnity from the owner and driver. Some time later, she discovered that she had suffered a broken neck in the accident. She then brought a claim against the physicians who had treated her after the accident. The physicians relied upon the release as third party beneficiaries and moved to dismiss the claim. However, the Court of Appeal relied on the doctrine of privity to hold that the physicians, as third-party beneficiaries, could not rely on the provision in the release.

For some, this will appear to be the just result. However, the real issue in the case, I would suggest, is whether the mutual mistake made by the parties with respect to the extent of the victim’s injuries constitutes a basis for setting aside the release or, alternatively, whether the release is an unconscionable arrangement or, in the further alternative, whether on its proper interpretation, the provision in the release extends to these particular circumstances. If, on a careful examination, the doctrine of mistake


\textsuperscript{123} \textit{Beswick}, \textit{supra}, footnote 28, at p. 557.

is unavailing, the agreement appears to be a fair one and, correctly interpreted, applies to these facts, it is not obvious that the just result is to permit the claim. If, on the other hand, the result of the case is appropriate because it is justifiable on grounds of mistake, unconscionability or proper interpretation, it is unfortunate that the matter has been resolved on the basis of privity doctrine. If, say, the doctrine of mistaken assumptions properly applies to these facts, it ought to apply both as against the physicians and as against the owner and driver. In other words, the true issue in the case appears to be the possible effect of a changed appreciation of the nature of an injury on a settlement agreement of this kind. The fact that there is a third-party beneficiary is, arguably, incidental and not material to the true issue in dispute. If, for various reasons, the release should not be binding in these altered circumstances, the doctrine that renders the release unenforceable should be applicable in cases where privity is not an issue. Reliance on the privity point, then, thus appears to have distracted the court from facing what is, arguably, the central issue raised by the case.

Moreover, it is not clear that the privity analysis in the Van Patter case can survive scrutiny under the “principled exception” from Fraser River. One is tempted to predict, however, that the “principled exception” will be applied in a case where a court thinks that, for other reasons, enforcement of the promise brings a just outcome and not applied in other cases where this is not so. Thus, one might argue that the principled exception does not apply to the facts of Van Patter because “common sense and commercial reality” do not so dictate. And yet, the issue in Fraser River with respect to the exemption clause is very similar to that in Van Patter.

In summary, then, the unsatisfactory state of the privity doctrine appears to have a distorting effect on other doctrines on the one hand by creating pressure on other doctrines to adjust in order to counteract the effects of the privity rule, and on the other hand by providing a convenient excuse to deny enforcement of a promise where the question of its enforceability ought more truly to rest on other kinds of considerations.

V. Abrogating the Rule Leads to Uncertainty

One of the possible objections to simply abolishing the doctrine of privity is that this would leave the law in an uncertain state as
to the extent to which contracts to benefit third parties might be enforceable. Would every conceivable third-party beneficiary be able to enforce the agreement? If not, how would one craft a rule that would restrict enforceability to third-party beneficiaries who are, in some sense, the appropriate beneficiaries of such a doctrine? There are two answers to this objection, in my view. First, the comparative experience of other jurisdictions surely provides some comfort on this point. Thus, even in common law jurisdictions, such as the United States, in which the privity doctrine is not followed, this does not appear to have been an unsolvable problem. Moreover, the general privity rule knows no parallel in civilian jurisdictions. I am not aware of any evidence to suggest that jurists in the United States or in civil law countries have articulated a concern with respect to the alleged uncertainties resulting from the lack of a privity doctrine. Nor am I aware of any movement in these jurisdictions to adopt the traditional common law rule.

Secondly, to the extent that this anxiety about uncertainty results from a concern that no reasonable limit can be drawn around promises to benefit third parties that should be enforceable, a number of possibilities are suggested by experience elsewhere. Enforceability could be limited to promises that are explicitly intended to confer benefits on third parties or, more restrictively, on promises that are explicitly intended to confer direct rights of action upon third parties to enforce the promises in question. As we have seen, the Supreme Court of Canada, in developing the new "principled exception" to the rule, appears to be of the view that parties who are implicitly intended to benefit from a provision should be protected by the principled exception. As a further alternative, then, a new rule which simply abrogated the existing privity doctrine could be similarly so limited. By these or other means, the new general rule of enforceability could be crafted in such a way that it would not extend to every conceivable person who might directly or indirectly benefit from the performance of an agreement between two other parties.

125. This is the approach taken in both the New Brunswick and the U.K. legislation. See footnotes 8 and 9.
127. See, e.g. American Law Institute, Restatement of the Law of Contracts 2d (St. Paul, Minn., ALI, 1981) 302(1) (the third party can enforce "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties"). But see, Eisenberg, supra, footnote 10, at pp. 1412-29.
VI. Subsequent Variation or Annulment

As noted above, one of the possible objections to simple abolition of the doctrine is the alleged difficulty of determining the effect of abolition on the ability of the parties to the original agreement to vary or annul subsequently their agreement. Again, there are two responses to this objection. First, as Fraser River, it itself demonstrates, this problem is unavoidable even if the courts persist in merely recognizing new exceptions to the privity doctrine rather than effecting its outright abolition. In Fraser River, it will be recalled, the parties to the original agreement sought to rescind the provision protecting the third party after the loss had occurred. The Supreme Court refused to give effect to their attempted rescission on the basis that the rights of the third party had "crystallized". Thus, the problem of subsequent variation or annulment requires a solution even if the traditional rule is retained. More exceptions give rise to the same difficulty.

The second response again draws from Fraser River. That case may be taken to demonstrate that the problem of subsequent variation or annulment is amenable to a sensible solution. As we have seen, the specific solution adopted in Fraser River itself is not precisely the same as the solutions adopted in the recent New Brunswick and U.K legislation. For present purposes, it is not necessary to choose among these particular solutions. The point, rather, is that the need to find a solution to the problem of subsequent variation or annulment is not a convincing reason for refusing to abolish the general rule.

VII. Availability of Defences

A further and similar possible objection to abolition of the doctrine is an alleged difficulty in determining the impact of such a change on the availability of any defences, set-offs and counterclaims that the promisor might have had against the other party to the initial agreement. That is to say, there is a concern that it might be difficult to determine what the effect would be, in a claim brought by the third party, of the fact that the promisor might have

128. Supra, footnote 13.
129. Supra, footnote 8, s. 4(3).
130. Supra, footnote 9, s. 2. And see the discussion in the text at footnotes 100-02.
131. See Treitel, supra, footnote 100, at p. 545.
had a defence of some kind to a claim brought by the promisee. Obviously, for example, if the contract is unenforceable against the promisor on such grounds as lack of consideration, failure of formation, non-occurrence of a condition, and so on, it would appear unjust if the third party were able to ignore such problems and bring a successful action to enforce against the promisor. On the other hand, it may be asked whether the third-party's claim should be subject to any conceivable set-off or counterclaim available to the promisor as against the promisee, even though the set-off or counterclaim relates to some other transaction between the two parties to the original agreement.\textsuperscript{132}

Again, the comparative experience should provide comfort on this point. One possible solution is to suggest that only issues that undermine the enforceability of the original contract should be available as against the third party. This is essentially the American rule.\textsuperscript{133} The New Brunswick Act adopts a similar approach.\textsuperscript{134} Another possibility would be to make more broadly available to the promisor any set-offs or counterclaims relating to the initial transaction. This is the solution adopted in the United Kingdom\textsuperscript{135} and New Zealand legislation.\textsuperscript{136} Again, the important point for present purposes is not whether one of these two solutions is to be preferred. Rather, the point is that either of these solutions appear to be attractive possibilities, and accordingly the alleged difficulty of providing a solution to this problem does not constitute a compelling objection to abolition of the doctrine.

VIII. By Legislation or By Common Law Methodology?

Finally, among those who favour abolition of the common law doctrine, there are those who feel that so significant a shift in common law doctrine can be achieved only by legislative enactment. Indeed, the Supreme Court of Canada itself has taken this position with respect to the privity doctrine. As noted above, in \textit{London Drugs}, the court rehearsed the many criticisms that have

\begin{itemize}
  \item 132. See, generally, Law Commission, \textit{supra}, footnote 6, at pp. 115-23.
  \item 133. See Eisenberg, \textit{supra}, footnote 10.
  \item 134. \textit{Supra}, footnote 8, s. 4(2) ("any defence may be raised that could have been raised in proceedings between the parties").
  \item 135. \textit{Supra}, footnote 9, s. 3.
  \item 136. The Contracts (Privity) Act 1982, S.N.Z. c. 132, s. 9(2).
\end{itemize}
Loosening the Privity Fetters

been made of the doctrine but then went on to observe that "[w]ithout doubt, major reforms to the rule denying third parties the right to enforce contractual provisions made for their benefit must come from the legislature". 137 Further, the court observed that "privity of contract is an established principle in the law of contracts and should not be discarded lightly. Simply to abolish the doctrine of privity or to ignore it, without more, would represent a major change to the common law involving complex and uncertain ramifications. This Court has in the past indicated an unwillingness to sanction judge-made changes of this magnitude . . . " 138 Having thus rejected the possibility of abolition of the doctrine, however, the court went on to craft a new exception to the doctrine applicable to the circumstances of this case. In Fraser River, as we have seen, the court then generalized the nature of this "principled exception" in such fashion as to create a rather powerful exception to the doctrine. Further, as noted above, the court explicitly overruled the Vandepitte decision in Fraser River, thus indicating that the principled exception can apply to claims brought by third parties against promisors to enforce their promises.

In considering whether legislative or judicial abolition of privity doctrine is the more appropriate vehicle of reform, a number of considerations may be brought to bear. First, we should note that the model of doctrinal reform endorsed by the Supreme Court in London Drugs and Fraser River may not correspond to current political realities in common law Canada. This model of legislative reform implicitly assumes that provincial legislatures, either upon the polite hint of the judiciary or upon the recommendations of a provincial law reform commission, will take an interest in enacting legislative modifications of the private law of obligations. This expectation no longer corresponds to the dynamics of provincial politics. Indeed, it may be wondered how realistic or effective this model has been in the past. We may note that legislative reform of privity doctrine in the United Kingdom was effected only some 60 years after it was initially proposed. 139 Nonetheless, it may be answered that both the New Brunswick legislature and the U.K. Parliament did deal with the matter and that this, arguably, is a preferable approach. It is legitimate to question, however, the extent

137. Supra, footnote 4, at pp. 436-37.
138. Ibid., at p. 437.
139. See the text at footnotes 36-37.
to which the other Canadian provincial legislatures may be counted on to address issues of this kind. The evidence of recent decades suggests a lack of interest in law reform of this kind.\textsuperscript{140} Moreover, legislative reform in common law Canada may be a less attractive option than it is in the United Kingdom, as here the involvement of many provincial legislatures would be required to effect comprehensive change. Although the call for legislative activity made by the court implicitly in \textit{London Drugs} has been responded to by New Brunswick,\textsuperscript{141} it seems unlikely that all or even some of the other provinces will follow suit. The optimal outcome is likely to be a patchwork of reform across the country. It is not obvious that a patchwork reform is preferable to persistence of the \textit{status quo} which, apart from New Brunswick, is at least uniform across the other common law provinces.

If, for reasons such as these, abolition of the doctrine by provincial legislatures appears an unlikely prospect, it nonetheless will seem problematic for some observers that abolition should be effected at common law. Here we confront, of course, the forgivable schizophrenia of the common law on the issue of judicial modification of unsatisfactory doctrine. On the one hand, common lawyers take pride in the ability of the common law to purify itself and expel unsatisfactory doctrine from its body. Some see this, however unrealistically, as a significant difference from or advantage over the law of code-bound civilian jurisdictions. On the other hand, of course, both the profession and the citizenry have a compelling interest in the stability of doctrine. A vigorous approach to reforming the law through judicial modification of the doctrine creates risks for those who plan their affairs on the basis of existing doctrine and complicates the professional tasks of rendering legal advice and resolving disputes. The problem of resolving this tension between stability and change is, of course, a topic of central importance for adjudication generally and for common law methodology in particular. Fortunately, it is, I would suggest, not necessary to resolve this tension in any absolute sense in order to adequately address the question of whether abolition of the doctrine of privity should be considered to come comfortably

\textsuperscript{140} It is difficult to identify recent instances of legislative reform of basic private law doctrine. The law reform commissions in British Columbia, Manitoba and Ontario were disbanded in the mid-1990s.

\textsuperscript{141} \textit{Supra}, footnote 8.
within the category of doctrinal reform that can be appropriately undertaken by the common law method.

Three considerations may be offered in support of the view that privity doctrine is an appropriate subject for judicial reform and abolition. First, and at the risk of some over-simplification, the principal rationale for stability of doctrine relates to the ability of individuals and their lawyers to plan their affairs and resolve conflicts. The high level of instability of current privity doctrine suggests that it does not perform either of these functions very satisfactorily at the present time. Moreover, we may note that the claims of those who wish to rely on the traditional rule are less than completely attractive. Consider, for example, the nephew in Beswick. We would not seriously be moved by an argument from the nephew that in promising his uncle to pay an annuity after the uncle’s death to his widowed aunt, the nephew was relying on privity doctrine for the conclusion that the promise would not, in any event, be enforceable on her motion. Indeed, the nephew’s position would appear dishonourable. Thus, whatever claim the planning function of private law would normally hold against reform of a private law doctrine appears to be substantially diminished, if not obliterated, in the context of the privity doctrine. The effect of the reform would be to hold parties to promises made, we may assume, with serious intent and within the four corners of otherwise enforceable agreements. It would not be dishonourable or intolerable, of course, to give legal advice or attempt to resolve disputes on the basis of traditional privity doctrine. On this point, the argument for reform must rest on the current inability of the doctrine to provide a confident basis for prediction.

Secondly, in attempting to tease out the appropriate role for judicial as opposed to legislative reform of private law doctrine, it may be appropriate to examine more carefully the nature of the proposed reform in the light of the more general responsibility of the judicial system to articulate coherent doctrine and to seek to achieve the noble ambition of deciding like cases in like fashion. If, as appears to be the case with privity doctrine, the doctrine has become sufficiently incoherent that it creates an obstacle to this objective, it appears doubtful that abdication of responsibility for reform to the legislature is an appropriate solution. Although the responsibility of the judiciary for the reform of private law doctrine is neither exclusive nor ultimate, as it is always subject to the legislative trump, neither is it non-existent in the common law
tradition. As Chief Justice Mason observed in his reasons in *Trident General Insurance*: “it is the responsibility of this Court to reconsider in appropriate cases common law rules which operate unsatisfactorily and unjustly”.142

Finally, it may be asked whether abolition of the general rule is, as the court suggested in *London Drugs*, such a “major” reform with “complex and uncertain ramifications” that it should not be contemplated by the courts. Some consideration may be given to the nature of the proposed reform in social, political and economic terms. Although predictions with respect to such matters are, of course, difficult, comparative experience again provides some comfort. More particularly, there appears little reason to believe that the absence of traditional privity doctrine in the contract law of the United States has had particularly negative or noticeable effects in these spheres. As far as the ramifications for contract doctrine are concerned, we may question whether the impact of abolition of the rule should now be considered a “major” change. If, as has been argued here, the exceptions threaten to overwhelm the general rule, the abolition of the general rule moves away from the category of radical reform in the direction of modest reform or, indeed, needed clarification. One may, in any event, question the appropriateness, in the light of the considerations identified above, of a general judicial refusal to engage in what may even be considered significant or major reform of technical aspects of the private law of obligations which appear to “operate unsatisfactorily and unjustly”.

D. CONCLUSION

The doctrine of privity of contract was described by the U.K. Law Revision Committee in the mid-1930s as “uncertain and confused”. The doctrine has not improved with age. This article has argued that the lengthening list of exceptions to the general rule has created a subtle and needlessly complex doctrine that is ripe for judicial reform. The appropriate reform, it has been suggested here, would be to simply recognize that the general principle has been overwhelmed by its exceptions and that it no longer

survives. Although the doctrine appears to have a continuing capa-
city to effect unjust results, it may well be that the exceptions to
the rule and, more particularly, the new “principled exception”,
developed by the Supreme Court of Canada in the London Drugs
and Fraser River decisions, has the capacity to avoid application
of the general rule in any case where its application would effect
an unjust result. If this is so, it may simply be misleading to persist
in the belief that the general rule against enforceability survives.

The reluctance of the Supreme Court to engage in substantial
modification of private law doctrine is understandable. It may be,
however, that a tendency to err on the side of stable doctrine at the
expense of needed reform is exacerbated with respect to the present
topic by the fact that the general principle was reaffirmed by the
Supreme Court itself as recently as 1980 in the Greenwood case.
Nonetheless, the inadequacy of the Greenwood decision seems
readily apparent. Indeed, it is difficult to avoid the conclusion,
suggested above, that the decision has been effectively overruled
by the decision of the court in Fraser River.

The doctrine of privity of contract bears a number of striking
similarities to the traditional rule that moneys paid under a mistake
of law are irrecoverable. As with privity doctrine, many observers
noted that the mistake of law doctrine produced harsh results,
generated a lengthy list of exceptions that threatened to overwhelm
the general principle, was the subject of persistent and vigorous
criticism in the law reviews and in law reform commission reports
and was overruled by statute in a number of jurisdictions. Further,
it could plausibly be said that abolition of the mistake of law rule
consisted a “major” reform of the common law.\textsuperscript{143} Nonetheless, in
recent years, the doctrine was simply abolished by the Supreme
Court of Canada\textsuperscript{144} and, more recently, by the House of Lords.\textsuperscript{145} The
doctrine of privity of contract deserves a similar fate.

\textsuperscript{143} A characterization adopted by Lord Goff in Kleinwort Benson Ltd. v. Lincoln City Council, [1998] 4 All E.R. 513.
\textsuperscript{145} See Kleinwort Benson Ltd. v. Lincoln County Council, supra, footnote 143.