

“SEDUCTIVE COMPANY”: CONTRACT, TORT OR OBLIGATIONS IN THE SOUTH PACIFIC?

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INTRODUCTION

In jurisdictions which have inherited the English common law, there increasingly appear to be areas of contract law which overlap with the law of torts; where clear distinction is more a matter of academic debate than practical application, and where it might well be asked, as long as a just solution is reached does it matter whether the solution is by way of tort or contract. This is particularly so in the case of liability for negligent advice or information resulting in economic loss. Here, the relationship between the parties might well be one of contract and often, but not always, in circumstances where one party is relying on the expertise or professional skill of the other. Implied into the contract, but generally not stipulated, is the idea that the expert or professional will conduct themselves in accordance with the standards generally associated with that profession or expertise. Where the expected standard is not met and loss results, there is the question not so much of who is liable, but on what grounds should liability be imposed? Where the damage is physical, an action will lie in tort, even if there is no contract, for example, where a surgeon is not employed by the patient but by the State, or where a builder contracts with the previous but not current owner of the building. If, however, the loss or damage is not physical, but only financial, there is reluctance in the law of tort to recognise a claim. Recovery in contract may also be ruled out by the absence of privity or, in a seemingly diminishing number of cases, of con-

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sideration.¹ A consequence of this is the risk that victims may go uncompensated for their loss.

Recently, many jurists have advocated rejection of artificial legal distinctions between contract and tort.² Indeed, even in 1931 Winfield wrote,

[T]here is no tort more likely to co-exist with breach of contract than negligence. In a great number of instances a contractor fails in what he has promised because he has acted incompetently . . . [there are] a large number of cases in which the foundation of the action springs out of privity of contract between the parties, but in which nevertheless the remedy is alternatively in contract or in tort.³

Considering the debate on concurrent liability in contract and tort and the possible injustice which could result from applying rigid distinctions, Justice Thomas expressed the view that the argument is largely about theoretical distinctions between contract and tort rather than the substantive essence of civil liability.⁴

A more flexible approach has found favour in the South Pacific, where the relative simplicity of everyday life arguably undermines the justification for artificial legal distinctions to a greater extent than more "sophisticated" societies.⁵ As it was put by Chief Justice Ryan in *Australia and New Zealand Group Limited v. Ale*,

The debate as to whether all civil disputes must fall either into contract or tort or whether quasi-contract is a legitimate category it seems to me must be rather bemusing for the pragmatic bystander in the South Pacific half a world away from the esoteric discussions taking place in the Courts of England . . . For my part I am quite satisfied that the Courts in Western Samoa should not be bogged down by academic niceties which have little relevance to real life.⁶

This paper commences by summarising the historical evolution of the English common laws of contract and tort from the law of

1. See, e.g., *Williams v. Roffey Bros. & Nicholls Bros. (Contractors) Ltd.*, 1 All E.R. 512 (1990).

2. As have the courts, see, e.g., *Rowlands v. Collow*, 1 N.Z.L.R. 178, 190 (1992); *Sealand of the Pac. Ltd. v. Ocean Cement Ltd.*, 33 D.L.R. 3d 625 (1973); *Ellul v. Oakes*, 3 S.A.S.R. 377, 390 (1972); *Dillingham Construction Pty. v. Downs*, 2 N.S.W.L.R. 49 (1972).

3. PERCY HENRY WINFIELD, *THE PROVINCE OF THE LAW OF TORT* 63 (1931). The literature on this field is extensive, see, e.g., Poulton, *Tort or Contract*, 82 L.Q.R. 346 (1966); French, *The Contract/Tort Dilemma*, 5 Otago L.R. 236 (1982); Holyoak, *Tort and Contract After Junior Books* L.Q.R. 591 (1983); Reynolds, *Tort Actions in Contractual Situations* 11 N.Z.U.L.R. 215 (1985), among others.

4. *Rowlands v. Collow* 1 N.Z.L.R. 178, 190 (1992).

5. Commercial dealings are often less complex than in more developed economies, see for example the comments of the Solomon Islands Law Reform Commission, Annual Report, 1996, p.10.

6. *Austl. and N.Z. Group Ltd. v. Ale*, W.S.L.R. 468, 469 (1980-93).

obligations and examines some areas where the laws still overlap. It proceeds to consider the attitudes of Commonwealth and regional courts to concurrent liability, examines the principle distinctions between tort and contract which still remain and looks at some of the problems that this concurrency causes. It then explains the extent to which the English laws of contract and of tort apply within the small island countries of the South Pacific.⁷ This includes a consideration of the ability of local courts to apply or reject overseas developments in the common law, and thereby either integrating or distinguishing the laws of contract and tort. Finally, the paper considers whether or not it is appropriate to maintain the distinction between contract and tort in the South Pacific or whether, at least in some circumstances, a common law of obligations might be more suitable.

THE HISTORICAL POSITION OF CONTRACT AND TORT

Historically, both tort and contract are derived from the action of trespass on the case, which appeared originally as a claim based on a breach of the King's Peace, which sought compensation by way of damages.⁸ Trespass to land, to the body (assault and battery) and trespass to chattels were all within the action of trespass. From trespass a more flexible action was created, known as action on the case or just "Case." An action on the case enabled a person to bring a matter to court even where it did not exactly fit into the recognised forms of action, which were very limited in scope. Case became a general residuary action, encompassing defamation and deceit and allowed for the development of the modern law of negligence. From Case there also emerged a major branch of law, Assumpsit. The action of Assumpsit allowed compensation to be awarded for a defendant's active misconduct in the performance of voluntarily assumed undertakings.⁹ This action developed by way of a fusion of the action for trespass and that of deceit, an action which arose when a person failed to do what was promised. By the sixteenth century

7. This article will concentrate on the position within the member countries of the USP region, being Cook Islands, Fiji Islands, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. In this paper, the word 'region' is used to refer to the area covered by those countries, unless the context requires otherwise.

8. See further FREDERIC WILLIAM MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (1968).

9. It was not possible to bring an action in respect of a verbal contract on the basis of non-feasance until the early sixteenth century: compare *Watton v. Brinth*, 9 Y.B.2 Hen. 4, 19 with *Pickering v. Thoroughgood*, 9 Y.B. Sel. Soc. 4, both cited in GEOFFREY CHEVALIER CHESHIRE, CECIL HERBET STUART FIFOOT & MICHAEL FURMSTON, *LAW OF CONTRACT* 5 (13th ed., 1996).

actions by way of Assumpsit were being brought for non-performance as well as misfeasance or wrong performance. Initially the action was interchangeable with that of debt, where the dispute was simply over a sum of money owing or due, but gradually Assumpsit emerged as a general contractual action including claims for debt.¹⁰

For some time Assumpsit and Case existed side by side. This is hardly surprising since both devices were examples of the way the law had evolved away from the straight-jacket of the common law forms of action, to meet the new needs of an increasingly complex economy. While prior to the Judicature Acts, the procedural pigeon-holes attached to the different forms of action were of great practical importance, because the form of action determined the court in which the matter was raised, the attempt to distribute the forms under the heads of contract and tort was "never very successful or very important."¹¹ Detinue, for example, was sometimes classified under the heading of tort and at other times under the heading of contract.¹² Often non-contractual actions had to be brought within the realm of contract by way of legal fictions in order to properly fall within a specific form of action, and the same applied to the various torts. The alternative was to argue in Case. Therefore, it is not surprising to find that similar facts could give rise to claims in tort or contract. Indeed, this seems to have occurred in England until the early to mid-nineteenth century,¹³ and even later in America. For example, in the case of *Flint & Walling Mfg. Co v. Beckett* the court held,

Where the duty has its roots in contract, and the undertaking to observe due care may be implied from the relationship, and should it be the fact that a breach of the agreement also constitutes such a failure to exercise care as amounts to a tort, the plaintiff may elect, as the common law authorities have it, to sue in case or in assumpsit.¹⁴

The forms of action were abolished by the Common Law Proceedings Act of 1852, which provided for all actions to commence by Writ of Summons. However, the pleading precedents for each action were retained, thus perpetuating their distinctive features. The Judicature Acts, 1873-75, finally "buried" the forms of action by introducing a new code of civil procedure. This legislation had the unintended effect of segregating contract

10. This form of assumpsit, which supplanted the action of debt and had been recognized since the thirteenth century, was called *Indebitatus Assumpsit*.

11. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 61 (1968).

12. *Id.*

13. *Howell v. Young*, 5 B&C 250 (1826) and *Smith v. Fox*, 6 Hare 386 (1848).

14. *Flint & Walling Mfg. Co. v. Beckett*, 79 N.E. 303, 505 (Ind. S.C., 1906).

and tort. Although the intricate procedures attaching to forms of action were abolished, the legislation and the practice arising from it, created new differences in procedure based on the nature of the action. For example, in claims based in contract for a liquidated amount, a special procedure existed for judgment by default. Accordingly, differences in the substantive rights of contract and tort tended to be emphasized in a way that was unlikely to have been envisaged when the legislation was drafted.¹⁵ In *John Morgan International Ltd. v. New Brunswick Telephone Co. Ltd.*, La Forest, Judge of Appeal, commented, "The attempt in the nineteenth century to create a barrier between tort and contract was contrary to the spirit of the common law which allowed various forms of action to be used in respect of the same facts."¹⁶ Recognition that this was an artificial distinction belied by the historical origins of these wrongs can be found in *Boorman v. Brown*, where Chief Justice Tindal stated,

There is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for breach, or non-performance, is indifferently either assumpsit or case upon tort . . . The principle in all these cases would seem to be that the contract creates a duty and the neglect to perform that duty or the non-feasance, is a ground of action upon a tort.¹⁷

Justice Connolly, in the case of *Aluminium Products (QLD) Pty. Ltd. v. Hill*,¹⁸ considered the history of solicitors' liability for inadvertent damage, which came under the liability of common callings, and noted that inadvertence was as likely to attract liability as intentional harm. If no action lay in contract then one was brought in case. If there was no obligation imposed generally by the law but as a result of a special contract then the claim lay in assumpsit. The authority he relied on was Winfield, who noted that,

From the seventeenth century to the early nineteenth, there was continuous vacillation, the foundation being said to be quasi contract, or contract, or assumpsit, or delict, or two or more of these alternatively until opinion finally settled in favour of regarding liability as being alternatively in contract or tort.¹⁹

15. An excellent historical review of the interaction of tort and contract claims against solicitors in the nineteenth century can be found in Dwyer, *Solicitor's Negligence - Tort or Contract?*, A.L.J. 524 (1982).

16. *John Morgan Int'l Ltd. v. New Brunswick Tel. Co. Ltd.*, 141 D.L.R. 3d 193, 232 (1982).

17. *Boorman v. Brown*, 3 Q.B. 511, 525 (1842).

18. *Aluminium Products (QLD) Pty. Ltd. v. Hill*, Qd.R. 33, 40 (1981).

19. WINFIELD, *SELECT LEGAL ESSAYS* 76 (1952).

Justice Thomas, in the case of *Rowlands v. Collow*, also referred to this historical dimension as justification for a more flexible approach stating, "Legal historians confirm that in the seventeenth and eighteenth century, assumpsit and the other species of action on the case co-existed comfortably."²⁰

Justice Thomas, suggested that subsequent deference to the primacy of contract obscured this flexibility and distorted consideration of whether concurrent liability could exist. His argument was that every contract should *not* be read to include an implied term that the relationship should be governed by contract law alone. Relying on the historical overlap of the causes of action he held that, "Because the parties have entered into a contract their rights and duties will be regulated by the law of contract, but they may also be governed by any other law which is applicable in the circumstances."²¹

While the law of tort remained relatively unchanged until the twentieth century, the doctrine of laissez faire in the nineteenth century added impetus to the growth and development of contract law, with the emphasis being on the concept of contractual freedom and the dominance of the parties' intentions. Whereas, in tort, obligations were imposed not on particular parties, but as a general rule, parties to a contract voluntarily assumed obligations towards each other. This approach is encapsulated in the words of Sir George Jessel,

If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.²²

The scope of contractual liability was narrowed by the introduction of formalistic requirements, in particular the need for consideration.²³ This notion of reciprocity between the contracting parties operated to limit the area of enforceable contracts.

The late nineteenth century saw the emergence of significant law faculties in English Universities, which accelerated the academic debate on the relationship between contract and tort in the common law, a point commented on by Lord Goff in *Henderson v. Merrett Syndicates Ltd.*, which is discussed below.²⁴ Simultaneously, the courts were tending to elevate contract to a position of primacy over tort. Support for this approach can also

20. *Rowlands v. Collow*, 1 N.Z.L.R. 178, 190 (1992).

21. *Id.* at 191.

22. *Printing & Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1875).

23. See, e.g., *Tweddle v. Atkinson*, 1 B&S 393 (1861).

24. *Henderson v. Merrett Syndicates Ltd.*, 3 All E.R. 506, 524 (1994).

be found in the twentieth century. For example, Lord Scarman, arguing for the adherence to contract law in the case of *Tai Hing Cotton Mill Ltd. v. Lin Chong Hing Bank Ltd.*, stated that,

[T]he court believed it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other.²⁵

This approach reflects the traditional view, referred to above, that in contract the parties voluntarily assume obligations towards each other, whereas in tort, obligations are imposed, not on the parties in particular but in general. However, this approach has always been restricted by the need to protect those who were not of "full age and competent understanding." At the turn of the century, it became clear that restrictions should also apply in favour of those who were economically disadvantaged. As pointed out by Cheshire, Fifoot and Furmston, "Laissez-faire as an ideal has been supplanted by 'social security'; and social security suggests status rather than contract."²⁶

During the twentieth century, contractual freedom has become circumscribed by legislation, for example, the Unfair Contract Terms Act of 1977, Consumer Credit Act of 1974, Fair Trading Act of 1973, and Minors' Contracts Act of 1987, in the U.K. Similar legislative action has been found elsewhere, including the Pacific region, where examples can be found in the Motor Vehicles (Third Party Insurance) Acts of Fiji²⁷ and Solomon Islands,²⁸ which compel a motorist to insure against third-party risks, and the Land and Titles Act of Solomon Islands,²⁹ which prohibits the owner of customary land from contracting to dispose of any interest in that land other than to a Solomon Islander. It has also become clear that the notion of freedom of contract does not take into account inequality of bargaining power. For this reason, contractual freedom has long been recognised as illusory for many individuals.³⁰

This is one reason why all rights and liabilities may not be express or implied terms of the agreement. Even where such rights and liabilities are implied, there is some justification in asserting, as Justice Deane did in the Australian case of *Hawkins v.*

25. *Tai Hing Cotton Mill Ltd. v. Lin Chong Hing Bank Ltd.*, 2 All E.R. 947, 957 (1985).

26. GEOFFREY CHEVALIER CHESHIRE, CECIL HERBET STUART FIFOOT & MICHAEL FURMSTON, *LAW OF CONTRACT* 21 (13th ed., 1996).

27. Motor Vehicles (Third Party Insurance) Act of Fiji, Cap. 177.

28. Motor Vehicles (Third Party Insurance) Act of Solom. Is., Cap. 83.

29. Land and Titles Act of Solom. Is., Cap 133, § 241.

30. ATIYAH, *THE RISE AND FALL OF THE FREEDOM OF CONTRACT* (1979).

Clayton, that duties imposed by the general law of tort ought to prevail over any implied terms of the contract, or be referred to in interpreting the content of such contractual terms.³¹ To maintain a rigid distinction between tort and contract is, according to Deane, undesirable,

[W]here rules classified in different divisions would otherwise conflict or compete, an essential function of the whole system is to avoid, resolve or rationalise such conflict or competition, not induce or preserve it.³²

Once it is accepted that the contractual terms agreed by the parties may be insufficient to govern all the consequences of their relationship, there is no need to exclude the application of the general law. Consequently, as Justice Thomas stated in *Rowlands v. Collow*,

[T]he presence of a contract and a finding of contractual liability does not preclude liability arising for breach of a fiduciary duty and the enforcement of equitable duties. It has not prevented liability existing in both contract and tort in cases involving the common callings. . . . [T]his approach recognises that the contract has been entered into in the context of the general law, and that includes the law of negligence.³³

It may be the case, of course, that the common law duty of care has been negated, excluded, or modified by the contract, either explicitly or by necessary implication. To recognise concurrent claims, therefore, does not render the law of contract obsolete, or submerge voluntarily assumed obligations in the general law.

OVERLAPPING BOUNDARIES

THE DUTY OF CARE IN CONTRACT LAW

Recognition of elements of tort in contract can be found in the concept of duty of care. Initially this duty might be an express or implied term of particular contracts. Once the general principle was established in tort, through the development of the tort of negligence, the duty of care was extended further.

Prior to 1930, application of the strict doctrine of privity excluded non-contracting parties from any cause of action where the subject matter of the contract had caused harm. The judgment in the case of *Donoghue v. Stevenson*, provided a solution in cases where there was sufficient proximity through the development of a general duty of care to those who could foreseeably be harmed regardless of any contractual link.³⁴ Although ini-

31. *Hawkins v. Clayton*, 164 C.L.R. 539 (1988).

32. *Id.* at 584.

33. *Rowlands v. Collow*, 1 N.Z.L.R. 178, 191 (1992).

34. *Donoghue v. Stevenson*, A.C. 562 (1932).

tially limited to physical harm, the principle was sufficiently general to extend to consequential, and then pure, economic loss. Privity or proximity provided the necessary nexus between the parties to give rise to obligations, the breach of which would provide a remedy.

In English law, the line of cases which followed *Donoghue v. Stevenson*, such as *Hedley Byrne & Co. Ltd. v. Heller & Partners*,³⁵ *Dorset Yacht Co. Ltd. v. Home Office*,³⁶ and *Anns v. London Borough of Merton*,³⁷ established that a finding of a duty of care was not limited to particular situations. The question was first, whether there was a relationship of sufficient proximity, and secondly, whether there were any considerations which ought to limit or reduce the scope of the duty, or the class of persons to whom it was owed. Subsequent case law, particularly case law concerned with economic loss, refined the proximity test and developed considerations that might limit the duty of care, but did not fundamentally alter the general principle. Indeed, in a House of Lords decision in 1996, it was stated by Lord Hoffman that, "[T]he law implies into the contract a term that the valuer will exercise reasonable care and skill. The relationship between the parties also gives rise to a concurrent duty in tort . . . But the scope of the duty in tort is the same as in contract."³⁸

DEFENCES

There is also an overlap between tort and contract in that certain defences to claims in contract require proof of absence of negligence to succeed, such as the equitable defence of *non est factum*. In very rare circumstances a person who signs a document may be able to allege that there was a substantial or radical difference between the document signed and the document the signatory thought they were signing.³⁹ The courts are reluctant to allow this plea, and a person relying on it bears the burden of adducing convincing evidence of lack of real consent.⁴⁰ In addition to proving lack of consent, lack of negligence in signing the document must also be shown.⁴¹ In the Solomon Island case of *Maeianiani v. Saemala*,⁴² the defendant signed a document stating that he had received money from the plaintiff as full settlement for his land. He later refused to execute the transfer document,

35. *Hedley Byrne & Co. Ltd. v. Heller & Partners*, A.C. 465 (1964).

36. *Dorset Yacht Co. Ltd. v. Home Office*, A.C. 1004 (1970).

37. *Anns v. London Borough of Merton*, A.C. 728 (1978).

38. *S. Austl. Asset Corp. v. York Montague*, 3 All E.R. 365, 370 (1996).

39. *Foster v. MacKinnon*, L.R. 4 C.P. 704 (1869).

40. *Gallie v. Lee and Another*, 1 A.C. 1004, 1084 & 1092 (1971).

41. *Id.* at 1091.

42. *Maeianiani v. Saemala*, S.I.L.R. 70 (1982).

and the plaintiff sued for specific performance. The defendant claimed that he had not read the document as he was illiterate and that it had been explained to him as being a document concerning a loan by the plaintiff to the defendant to purchase tools and equipment to build a house on the land as a joint enterprise. Chief Justice Daly agreed with the view of Lord Wilberforce in *Gallie v. Lee* that, "The law ought . . . to give relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents."⁴³ In this case, the plea of *non est factum* was not established. Chief Justice Daly took account of the fact that the defendant was a carpenter and builder, who had lived and worked in the capital for twenty-five years, before returning to Malaita Island. He operated a number of taxis in the capital, was articulate, intelligent and could be described in the broader sense as a business-man.⁴⁴

MISREPRESENTATION

Perhaps the topic of greatest overlap between contract and tort is misrepresentation, as it has roots in both. Whilst frequently dealt with in theoretical works on contract law, it is impossible to understand without regard to the law of tort. Misrepresentation is part of the law of contract in that it deals with the remedy for statements of fact made to induce the representee to enter into a contract. It is only concerned with statements that do not form part of that contract or a collateral contract.

In contract, as in tort, the law distinguishes the representor, who holds himself out as having specialist knowledge, from the one who does not. In the former case, the misrepresented facts are more likely to become terms of the contract so that on discovery the representor will be liable for breach of contract. Where the representation is fraudulent and induces a party to enter the contract or becomes a term of the contract then the remedy lay originally not in contract, but tort – the tort of deceit.⁴⁵ Indeed, in common law, damages were available only if the misrepresentation was fraudulent.⁴⁶ The expansion of the law of negligence stemming from *Hedley Byrne v. Heller*,⁴⁷ to impose liability for negligent misstatements, led to the extension of

43. *Gallie v. Lee*, S.I.L.R. 70, 74(1982).

44. *Id.* at 75.

45. *See Doyle v. Olby (Ironmongers)*, 2 Q.B. 158 (1969).

46. *Derry v. Peek*, 14 App. Cas. 337 (HL, 1889).

47. *Hedley Byrne v. Heller*, 2 All E.R. 575 (1963).

misrepresentation in contract.⁴⁸ The common law, which still applies in most countries of the South Pacific region, now recognises a category of negligent misrepresentation for which damages are available. However, even if the action is brought in contract, the measure of damages is in tort⁴⁹ and governed by the rules of remoteness.⁵⁰

In England, the common law has been superseded by the Misrepresentation Act (UK) of 1967, which appears to apply in Nauru, Tonga and Vanuatu.⁵¹ Fiji has its own Sale of Goods Act, which incorporates the law on misrepresentation.⁵² The measure of damages under the legislation remains tortious.⁵³

CAUSATION

In contract law, the test for establishing whether the breach of contract caused the loss is whether it was the effective or dominant cause. There can be no damages for breach if the breach did not cause the loss, whether this is loss of profits or loss of expenditure.⁵⁴ If the loss was caused only partly by the breach, damages may still be recoverable without assessing which cause was most effective.⁵⁵ If, however, the loss is excessive due to a combination of factors, then the issue may be not just one of causation but also one of extent and therefore be decided according to the rules of remoteness.⁵⁶

Where a claim is brought in tort, under the principle of *Hedley Byrne* the causative link is the reliance. The test of causation is often said to be the "but for" test, established in *Barnett v.*

48. See, e.g., *Esso Petroleum v. Mardon*, 1 Q.B. 801 (1976).

49. But see, *S. Austl. Asset Mgmt. Corp. v. York Montague Ltd.*, 1 A.C. 191 (1997) (where damages for misinformation were limited by reference to the contractual bargain). This method of calculation has been criticised: Stapleton, *The Normal Expectancies Measure in Tort Damages*, 113 L.Q.R. 257 (1997).

50. *Esso Petroleum v. Marden*, Q.B. 801 (1976); *Saville Heaton Company Limited v. United Apparel (MGF) Limited & the Attorney General*, Civ. Cas. 410/1992, (Fiji High Court April 9, 1996).

51. See further JENNIFER CORRIN CARE ET AL., INTRODUCTION TO SOUTH PACIFIC LAW, ch. 4 (1999).

52. Sale of Goods Act, § 76(1) (1979), provides that damages may be awarded for negligent misrepresentation.

53. See *Sharneyford v. Edge*, Ch. 305 (1987), and *Royscott Trust Ltd v. Rogerston*, All E.R. 294 (1991).

54. *C & P Haulage v. Middleton*, 3 All E.R. 94 (1983).

55. See, e.g., *Taubmans Paints (Fiji) Ltd. v. Faletau & Trident Heavy Eng'g Civil case 456/19996*, (Tonga Supreme Court January 15, 1999) (where the defendant was successful in suing for loss of profits caused by the plaintiff's wrongful repudiation of a sole agency contract even though a third party had taken out an injunction prohibiting the defendant from access to the first consignment of paint sent by the plaintiff).

56. *S. Austl. Asset Mgmt. Corp. v. York Montague Ltd.*, 3 All E.R. 365 (1996).

Chelsea & Kensington Hospital Management Committee.⁵⁷ That is, but for the tort the loss or injury would not have been suffered. However, the “but for” test is not appropriate in contract. For example, in *Galoo Ltd. v. Bright Grahame Murray*,⁵⁸ it was held that, although the breach of contract by the companies’ auditors related to the fact that the audited accounts of the plaintiff companies contained substantial inaccuracies, this merely provided the opportunity to incur further trading losses. It did not actually cause those losses.

Whilst this would appear to be a differentiating factor between contract and tort, it is only in the most straightforward negligence cases that the “but for” test will be sufficient. In claims for non-pecuniary loss or consequential economic loss, the test is a combination of the factual “but for” test and the test of foreseeability. Where there are a number of possible causes, the test in tort is not dissimilar to that in contract, namely whether the breach of the duty of care materially contributed to the loss or injury.⁵⁹ Thus, the cause need not be the actual or only cause of the loss or harm.

In Australia the courts have accepted that the “but for” test may be satisfied in tort and contract on the same facts, unless there are value judgments or policy considerations which need to be taken into account. The latter might include the need to set certain standards for particular duties of care, concern at the floodgates effect of decisions and the desirability of encouraging the parties towards dispute resolution rather than litigation. Examples can be seen in the cases of *March v. Stramore (E & MH) Pty. Ltd.*⁶⁰ and *Bennett v. Minister of Community Welfare*.⁶¹

Causation, whether in tort or contract, involves taking account of recognised legal principles, but is also a question of fact. The related principles are of remoteness of damage, contributory negligence and mitigation of damage, which are discussed below.

RECOVERABLE LOSS

In both the law of contract and tort, distinctions are made between damages for physical injury and damages for economic loss (including loss of profit). The decisions in *Spartan Steel &*

57. *Barnett v. Chelsea & Kensington Hospital Management Committee*, 1 Q.B. 428 (1969).

58. *Galoo Ltd. v. Bright Grahame Murray*, 1 All E.R. 16 (1995).

59. *McGhee v. Nat'l Coal Board*, 3 All E.R. 1008 (1972).

60. *March v. Stramore (E & MH) Pty. Ltd.*, 171 C.L.R. 506 (1991).

61. *Bennett v. Minister of Community Welfare*, 175 C.L.R. 408 (1992). See also, Swanton & McDonald, *Concurrent Liability in Tort and Contract* 73 A.L.J. 541 (1999).

Alloys Ltd. v. Martin and Co. (Contractors) Ltd.,⁶² in tort, and *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*,⁶³ in contract, are good examples of this.

In tort law, consequential economic loss caused by physical damage is claimable. Further economic loss can only be claimed if it is sufficiently foreseeable and not too remote. Limitation on the extent of the claim may be argued in terms of duty of care or foreseeability. Lord Denning in *Spartan Steel* suggested that the real boundary to liability was based in policy and criticised the duty/remoteness test as being too elusive and one which should be abandoned. He argued that the court should simply take into account the particular circumstances of the parties, the nature of the relationship and policy.⁶⁴

Restrictions on liability for loss in contract law are formulated slightly differently although there are some similar features, particularly if one takes into account the arguments expressed by Lord Denning. As pointed out by Lord Justice Asquith in the *Victoria Laundry* case, if the plaintiff were to be compensated for all loss flowing from a breach of contract, then liability might be indeterminate, therefore liability is limited by a two limbed test: first, damages arising naturally from the breach – in other words those arising in the usual course of things; secondly, damages which may reasonably be supposed to have been contemplated by at least the defaulting party, as being probable to arise if there was a breach.⁶⁵ Liability rests, therefore, on actual and imputed knowledge at the time the contract was made. Both tests include an objective assessment, the “reasonable man’s contemplation” in the latter and “the natural course of things” in the former.

The distinction between the liability tests applied in tort and contract has been criticised, notably by Lord Justice Scarman in the case of *H. Parsons (Livestock) v. Uttley Ingham & Co.*,⁶⁶ where His Lordship suggested that the tests of foreseeability or reasonable contemplation provided sufficient safeguards against excessive compensation however the claim was framed.

62. *Spartan Steel & Alloys Ltd. v. Martin and Co. (Contractors) Ltd.*, Q.B. 27 (1973).

63. *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, 2 K.B. 528 (1949).

64. In the *Spartan Steel* case, policy considerations meant taking into account the nature of the commodity supplied – electricity; the public supplier of a commodity; the hazards naturally associated with this commodity; dangers of “floodgates”; principles of loss spreading across all consumers of the electricity; and adherence to the principle of liability based on fault not chance.

65. *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, 2 K.B. 528, 533 (1949).

66. *H. Parsons (Livestock) v. Uttley Ingham & Co.*, 1 All E.R. 598 (1978).

ECONOMIC LOSS

In both tort and contract cases, a claim may be made for economic loss. In either case different tests may be applied to consequential economic loss and loss of profit, but in addition distinctions are made between loss arising from conduct and that arising from professional advice. In the law of tort, the decision in the case of *Hedley Byrne v. Heller*, developed from general principles deriving from *Donoghue v. Stevenson*, marked the recognition of liability for economic loss where there was no contract, but also created a special relationship between the provider of information and the person relying on that information. The assumption of responsibility by a professional or quasi-professional provider of services gave rise to a duty of care and skill in the exercise of the professional function. In subsequent cases it was established that the relationship did not have to be gratuitous, and that the principles could be applied in contractual as well as non-contractual situations, and to quasi-professional as well as professional service providers. Thus, *Hedley Byrne* was applied to solicitors,⁶⁷ surveyors and valuers,⁶⁸ accountants⁶⁹ and insurance brokers.⁷⁰ By this route, third parties prevented from suing in contract by the privity rule, were able to sue in tort for breach of duty of care in the execution of a contract to which they were not a party.

In Australia the scope of the principle was extended by *Shaddock & Associates Pty. Ltd. v. Parramatta City Council*⁷¹ from professional advice provided by experts to all situations where the advice giver or information provider ought to have known that the advice or information would be relied upon and such reliance was reasonable in the circumstances.

Once economic loss has been established under the principles of *Hedley Byrne*, it would seem that there is no need to apply the further tests for duty of care as set out in *Caparo v. Dickman*,⁷² namely whether it is fair, just and reasonable to find a duty of care, or whether there are any policy reasons for not holding the defendants liable.⁷³

67. *Ross v. Caunters*, Ch. 287 (1980).

68. *Smith v. Eric Bush*, Harris & Wyne Forest DC, 2 All E.R. 514 (1989).

69. *Caparo Indus. Plc. v. Dickman*, All E.R. 568 [1990].

70. *Youell v. Bland Welch & Co.*, 2 Lloyds Rep. 431 (1990).

71. *Shaddock & Assocs. Pty. Ltd. v. Parramatta City Council*, 150 C.L.R. 225 (1981).

72. *Caparo v. Dickman*, 2 A.C. 605 (1990).

73. See, e.g., *Greatorex v. Greatorex & Others* T.L.R. 18 (2000), (where the policy considerations against imposing a duty of care on a victim of self-inflicted injuries towards a secondary party and family member, who suffered psychiatric illness as a result of having witnessed the event, outweighed the arguments in favour of imposing such a duty).

The greater difficulty in tort arises where the claim is not brought under the principles of *Hedley Byrne* but falls under the general tort of negligence. Here, liability for the loss may be avoided due to the greater difficulty of establishing the duty of care under the rules of *Murphy v. Brentwood District Council*.⁷⁴ In English law, the decision of the House of Lords in *Murphy* overruled that of the earlier decision in *Anns v. Merton London Borough Council*.⁷⁵ In *Anns*, liability for negligent construction resulting in economic loss had been expanded by the holding that a duty of care was owed by anyone involved in the process of building a house, to avoid risk of damage to the occupier of the house, unless there were policy reasons to limit either the extent of the duty of care, the type of harm, or the category of claimant. The approach in *Murphy* was considerably narrower. Even where the local authority had been negligent in ensuring that the building complied with required standards, it would not be liable to the owner or occupier for the cost of remedying the defect.

However, the *Murphy* approach has not been followed elsewhere in the common law world. The impact of *Murphy* has been considerably weaker in those jurisdictions where liability stems from the precedent of *Anns v. Merton London Borough Council*. For example, in Canada, in *Central Trust Co. v. Rafuse*, the court stated,

The basis of the solicitor's liability in tort for negligence and the client's right to recover for purely financial loss is the principle affirmed in *Hedley Byrne* and treated in *Anns* as an application of a general principle of tortious liability for negligence based on the breach of a duty of care arising from a relationship of sufficient proximity. That principle is not confined to professional advice but applies to any act or omission in the performance of the services for which a solicitor has been retained.⁷⁶

The *Murphy* approach has also not been followed in Australia or New Zealand, where a much more pragmatic approach has been adopted. In New Zealand, evidence of this can be found in the case of *South Pacific Manufacturing Co. Ltd. v. New Zealand Security Consultants and Investigations*,⁷⁷ which illustrates a pragmatic synthesis of the *Anns* and *Murphy* approaches to the question of the duty of care. That is, is it just and reasonable that a duty of care to a particular plaintiff should rest on a particular defendant? This difference of approach is significant for concur-

74. *Murphy v. Brentwood Dist. Council*, 1 A.C. 398 (1991).

75. *Anns v. Merton London Borough Council*, A.C. 728 (1978).

76. *Central Trust Co. v. Rafuse*, 31 D.L.R. 4th 481, 522 (1987).

77. *S. Pac. Mfg. Co. Ltd. v. N.Z. Security Consultants and Investigations*, 2 N.Z.L.R. 282 (1992).

rent liability, for as pointed out by Cooke, President of the Court of Appeal, "When the question is whether a defendant should be held to have assumed a certain responsibility the dividing line between tort and contract is necessarily somewhat arbitrary."⁷⁸

The decision of the New Zealand court in *Invercargill City Council v. Hamblin*⁷⁹ to follow *Anns* rather than *Murphy*, on the basis of different social conditions pertaining to residential construction in New Zealand, has also been upheld by the Privy Council.⁸⁰ The *Anns* approach has been followed in the South Pacific. For example, in the case of *Lal v. Chand*⁸¹ it was held that the duty of care owed by builders lay in contract and tort, and the case was decided on the principles of both *Anns* and *Dutton v. Bognor Regis UDC*.⁸² However, this case was decided before *Murphy*, and courts in Fiji might take a different approach if a similar case were to arise today. *Anns* was also followed in Samoa in *Lauofo Meti Properties v. Morris Hedstrom Samoa Ltd.*,⁸³ and in Tonga, in *Tonga Flying Fish Co. v. Kingdom of Tonga*,⁸⁴ *Clark v. Pikokivaka*,⁸⁵ and *Kauhala v. Ministry of Police and Another*.⁸⁶ However, all of these Samoan cases were decided before *Murphy*, except *Clark* and *Kauhala*, and those two cases may have been decided *per incuriam* as there was no mention of *Murphy* in the judgments and instead the court seemed to have assumed that *Anns* was still good law.

NON-PECUNIARY LOSS

Claims for non-pecuniary loss, such as distress or mental suffering, were traditionally brought in tort, where they would succeed provided a duty of care could be established. Damages for this type of loss was not normally regarded as recoverable in contract. However, this distinction is not as marked as it once appeared. Recognition that damages for the breakdown of the plaintiff's health might be recoverable, whether the claim arose in tort or in contract, can be found in *Groom v. Crocker*.⁸⁷ In fact, the claim in that case, for various manifestations of ill health, ultimately failed on the ground that the harm was not

78. *Id.* at 297.

79. *Invercargill City Council v. Hamblin*, 3 N.Z.L.R. 514 (1994).

80. A.C. 624 (1996).

81. *Lal v. Chand*, F.L.R. 71 (1983).

82. *Dutton v. Bognor Regis UDC*, 1 Q.B. 373 (1972).

83. *Lauofo Meti Props. v. Morris Hedstrom Samoa Ltd.*, W.S.L.R. 348 (1980-93).

84. *Tonga Flying Fish Co. v. Kingdom of Tonga*, S.P.L.R. 372 (1987).

85. *Clark v. Pikokivaka*, Tonga L.R. 50 (1993).

86. *Kauhala v. Ministry of Police and Another*, Tonga L.R. 119 (1994).

87. *Groom v. Crocker*, 1 K.B. 194 (1939).

forseeable and therefore too remote. In *Heywood v. Wellers*,⁸⁸ however, the plaintiff succeeded in obtaining damages for the anxiety suffered as a result of a solicitor's negligence. While these cases may be restricted to their facts or the type of contract involved, if the test for harm is foreseeability, there is no good reason why such a claim should not succeed in tort or contract as long as the harm is not too remote and the causation element is satisfied.

Recent cases support the view that the gap is narrowing. Where the contract is one whose main object is providing comfort or pleasure, the courts have been willing to award damages in contract for non-pecuniary loss. An obvious example is a contract for a holiday. In *Jarvis v. Swan Tours Ltd.*⁸⁹ the English Court of Appeal awarded general damages for disappointment suffered when a holiday did not live up to the promised standard. In *Jackson v. Horizon Holidays Ltd.*,⁹⁰ the court went even further and allowed the plaintiff to recover not only for his own discomfort and distress, but also for that of his wife and children when their holiday was ruined by reason of the breach. A similar approach has been taken in Canada in *Newell v. Canadian Pacific Airlines*.⁹¹ A less obvious example is *Ruxley Electronics & Construction Ltd. v. Forsyth*,⁹² where the House of Lords awarded damages for loss of pleasure when the defendant failed to build the plaintiff's swimming pool to the agreed depth.

Even in employment contracts the rigors of the decision in *Addis v. Gramophone Co.*,⁹³ where the court refused to grant damages for injury to reputation in the case of wrongful dismissal, seem to have been softened. For example, in the case of *Cox v. Philips Industries Ltd.*,⁹⁴ which was not a wrongful dismissal case, the court was satisfied that the defendants could have contemplated the type of mental distress suffered by the plaintiff when he was wrongfully demoted.

In New Zealand, it has been suggested that the rule in *Addis* ought not to be extended, and that the test should be one of causation and remoteness rather than the exclusion of certain types of harm on the grounds, primarily, of policy.⁹⁵ In the case of

88. *Heywood v. Wellers*, Q.B. 446 (1976).

89. *Jarvis v. Swan Tours Ltd.*, 1 All E.R. 71 (1973). See also, *Peninsular and Oriental Steam v. Yowell*, Times L.R. 184 (1997).

90. *Jackson v. Horizon Holidays Ltd.*, 3 All E.R. 92 (1995).

91. *Newell v. Canadian Pacific Airlines*, 74 D.L.R. 3d 474 (1976).

92. *Ruxley Electronics & Construction Ltd. v. Forsyth*, 3 All E.R. 268 (1995).

93. *Addis v. Gramophone Co.*, A.C. 488 (1909).

94. *Cox v. Philips Indus. Ltd.*, 3 All E.R. 161 (1976).

95. *Horsburgh v. New Zealand Meat Processors Industrial Union of Workers*, 1 N.Z.L.R. 698 (1988), per Cooke President of the Court of Appeal.

Rowlands v. Collow,⁹⁶ the court had no difficulty awarding, under the head of general damages, a sum for mental distress, anxiety, disturbance and general inconvenience. The same result was achieved in *Whelan v. Wanaki Meats Ltd.*,⁹⁷ in which the court found an implied term in the contract of employment that the employer would not conduct itself in a manner calculated to damage the reputation of the plaintiff or cause undue injury to his feelings, unless there was reasonable cause. This line of reasoning appears to have found support in other Commonwealth courts, for example in the comments of Justice Linden in *Brown v. Waterloo Regional Board of Commissioners of Police*.⁹⁸

In the South Pacific, courts appear to take a less rigid view as to the type of damages that can be awarded. There are cases where damages have been awarded for anxiety and ill health caused by breach of contract in the form of wrongful dismissal, for example, in the Samoan case of *Matatumua v. Public Service Commission*.⁹⁹ Further, in the Solomon Islands case of *Beti v. Aufiu*,¹⁰⁰ damages were awarded for frustration and disappointment after breach of a contract for sale of a residence.

Injury to reputation caused by the wrongful dishonouring of cheques has also merited the award of substantial damages, initially only in the special cases of traders,¹⁰¹ but recently non-traders as well, where substantial damages for loss of business reputation was considered to be a valid claim.¹⁰² A claim for damage to reputation alone would not succeed in contract or in any tort other than that of defamation.¹⁰³

THE RECOGNITION OF CONCURRENT CLAIMS IN CONTRACT AND TORT

Until the latter part of this century, there was little consideration of concurrent liability in contract and tort law. The case of *Hedley Byrne & Co. Ltd. v. Heller & Partners*¹⁰⁴ marked the turning point. Although the claim failed on the facts, the court recognised in principle that there could be a claim in tort, even where there was a contractual remedy available. This was followed by *Esso Petroleum v. Marden*, in which the Master of the

96. *Rowlands v. Collow*, 1 N.Z.L.R. 178 (1992).

97. *Whelan v. Wanaki Meats Ltd.*, 2 N.Z.L.R. 74 (1991).

98. *Brown v. Waterloo Regional Board of Commissioners of Police*, 136 D.L.R. 3d 49 (1982).

99. *Matatumua v. Public Service Commission*, W.S.L.R. 295 (1980-93).

100. *Beti v. Aufiu*, civil case 170/1991 (Solom. Is. High Court July 4, 1991).

101. *Wilson v. United Counties Bank Ltd.*, A.C. 102 (1920).

102. *Kpohraror v. Woolwich Building Society*, 4 All E.R. 119 (1996).

103. *Joyce v. Sengupta*, 1 All E.R. 897 (1993).

104. *Hedley Byrne & Co. Ltd. v. Heller & Partners*, 2 All E.R. 575 (1963).

Rolls, Lord Denning, held that negligence in pre-contractual statements could also attract liability on the grounds that, "in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed apart from contract, and is therefore actionable in tort."¹⁰⁵

In English law this trend continued. In the case of *Batty v. Metropolitan Property Realization Ltd.*, Lord Justice Megaw stated,

[T]he mere fact that the plaintiffs have obtained judgment for breach of contract does not preclude them from entitlement which would have existed apart from contract to have judgment entered in their favour also in tort.¹⁰⁶

The principle, enunciated in *Hedley Byrne*, that tortious negligence arose out of special relationships, was expressed by the court to be a principle of general application in the case of *Midland Bank Trust Co. Ltd. v. Hett Stubbs and Kemp (a firm)*.¹⁰⁷ Justice Oliver stated that the enquiry on which the court should embark in deciding whether the principle was applicable was, "what is the relationship between the plaintiff and defendant and not how did the relationship (if any) arise?"¹⁰⁸

The 1990's have seen a general acceptance of concurrent claims in tort and contract where the facts of the case justify the protection of economic interests by finding duties in tort and contract. The leading case in this development was *Henderson v. Merrett Syndicates Ltd.*, which held that where there is an assumption of responsibility and reliance on professional or quasi-professional services, there is a tortious duty of care irrespective of a simultaneous contractual relationship.¹⁰⁹ Where the duty of care is breached, the plaintiff has the choice to sue in contract or tort. The general rule will be that the plaintiff can sue in tort unless he or she has contracted out of tortious liability.

There have also been some dissenting views, for example, that of Lord Scarman in the case of *Tai Hing Cotton Mill Ltd. v. Lin Chong Hing Bank Ltd.*¹¹⁰ Lord Scarman, while recognising the possibility of suing in contract and tort, expressed doubt that, at least in commercial relations – here, between a corporate customer and a bank – "there is anything to the advantage of the

105. *Eso Petroleum v. Marden*, 2 All E.R. 5, 15 (1976).

106. *Batty v. Metropolitan Property Realization Ltd.*, 2 All E.R. 445 at 453 (1978).

107. *Midland Bank Trust Co. Ltd. v. Hett Stubbs and Kemp*, 3 All E.R. 571 (1978).

108. *Id.* at 592.

109. *Henderson v. Merrett Syndicates Ltd.*, 2 All E.R. 506 (1994).

110. *Tai Hing Cotton Mill Ltd. v. Lin Chong Hing Bank Ltd.*, 2 All E.R. 947, 957 (1985).

law's development in searching for liability in tort where the parties are in a contractual relationship."¹¹¹ There has also been some confusion as to whether concurrent liability means simply that the plaintiff may choose to sue in contract or tort, where both are available, or whether there is dual liability. In *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* solicitors were held liable for breach of contract and in also in tort, independently of any liability in contract for the same omission.¹¹²

Recognition that there may be concurrent claims in tort and contract in certain situations moves the legal focus from the formation of the relationship to its consequences when things go wrong. Once there is a relationship between the parties, its origins become less significant. For example, in the case of *Henderson v. Merrett Syndicates Ltd.*, it was suggested that where there is a contract or a case equivalent to a contract, an objective test can be applied when asking the question whether responsibility should be held to have been assumed by the defendant to the plaintiff.¹¹³ In other words, is the relationship sufficiently 'special' or 'proximate'? Evidence of a contract may facilitate such a finding but is not essential.

A willingness to recognise a pre-contractual duty of care can also be found in other Commonwealth jurisdictions, notably in Canada in the cases of *Sealand of the Pacific v. Ocean Cement Ltd.*¹¹⁴ and *Walter Cabott Construction Ltd. v. The Queen*,¹¹⁵ in New Zealand in the case of *Capital Motors Ltd. v. Beecham*,¹¹⁶ and in Australia in the cases of *Presser v. Caldwell Estate Pty. Ltd.*,¹¹⁷ *Dillingham Constructions Pty. Ltd. v. Downs*¹¹⁸ and *Johnson v. South Australia*.¹¹⁹ Similarly, the recognition of concurrent claims has not been limited to English law. In Canada, Justice Le Dain in *Central Trust Co. v. Rafuse* adopted a very similar line of reasoning to that of Justice Oliver.¹²⁰ While a common law duty of care might arise because of a relationship of proximity, which would not have arisen in the absence of a contract, relationships

111. The cautious approach voiced by Lord Scarman in this Privy Council decision has been followed in *Downsview Nominees Ltd. v. First City Corp. Ltd.*, 2 W.L.R. 86 (1993).

112. *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*, 3 All E.R.571 (1978)

113. *Henderson v. Merrett Syndicates Ltd.*, 3 All E.R.506, 521 (1994), per Lord Goff.

114. *Pacific v. Ocean Cement Ltd.*, 33 D.L.R. 3d 625 BCSC (1973).

115. *Walter Cabott Construction Ltd. v. The Queen*, 44 D.L.R. 3d 83 (F.C.) (1974).

116. *Capital Motors Ltd. v. Beecham*, 1 N.Z.L.R. 576 (S.C., 1975).

117. *Presser v. Caldwell Estate Pty. Ltd.*, 2 N.S.W.L.R. 471 (1971).

118. *Dillingham Constructions Pty. Ltd. v. Downs*, 2 N.S.W.L.R. 49 (1972).

119. *Johnson v. South Australia*, 26 S.A.S.R. 1 (1980).

120. *Central Trust Co. v. Rafuse*, 31 D.L.R. 4th 481 (1987).

of proximity were not confined to either those that were contractual or those that arose apart from a contract.

In New Zealand, there has been some resistance to concurrent liability, particularly in the case of professional negligence. For example, in *McLaren Maycroft & Co. v. Fletcher Development Co. Ltd.*, subsidence occurred after building work had been carried out pursuant to a contract. The court held that the only action available to the plaintiffs was one in contract.¹²¹ Relying on the English authority of *Bagot v. Stevens Scanlan & Co. Ltd.*, the court regarded the failure by architects to exercise due care and skill in their professional capacity within a contractual relationship, which created a duty to exercise reasonable care and skill, as a breach of contract.¹²² Similarly, Justice Tipping in the case of *Simms Jones Ltd. v. Protochem Trading New Zealand Ltd.* stated, "if the parties have chosen a contractual bed they should ordinarily be expected to lie in it alone, without the seductive company of tort."¹²³ However, the cases of *Rowe v. Turner Hopkins & Partners*¹²⁴ and *Gabolinscy v. Hamilton City Corporation*¹²⁵ indicated possible reconsideration of the stance that there could only be an action in contract. In the case of *Morton v. Douglas Homes Ltd.*, in which a concurrent claim was recognised by Justice Hardie Boys, it was suggested that *McLaren* should be limited in its application to situations where the alleged tortious duty is co-extensive with the duty assumed under contract.¹²⁶ In *Day v. Mead*, Cooke, President of the Court of Appeal, stated that the law should "recognise that, subject to special contractual terms, the same duty of care arises in both tort and contract and has the same incidents."¹²⁷

The turning point came in 1992 in the case of *Rowlands v. Collow*.¹²⁸ In this case, which involved the faulty construction of a communal driveway, the claims were brought for breach of contract and tort. Justice Thomas departed from the decision in *McLaren Maycroft & Co. v. Fletcher* by emphasizing the shaky historical foundations for that decision, the subsequent undermining of the English legal authorities on which it was based, and the trend in other Commonwealth jurisdictions toward accepting

121. *McLaren Maycroft & Co. v. Fletcher Development Co. Ltd.*, 2 N.Z.L.R. 100 (1973).

122. *Bagot v. Stevens Scanlan & Co. Ltd.*, 1 Q.B. 197 (1968).

123. *Simms Jones Ltd. v. Protochem Trading New Zealand Ltd.*, 3 N.Z.L.R. 369 at 381 (1993).

124. *Rowe v. Turner Hopkins & Partners*, 1 N.Z.L.R. 178 (1982).

125. *Gabolinscy v. Hamilton City Corp.*, 1 N.Z.L.R. 150 (1975).

126. *Morton v. Douglas Homes Ltd.*, 2 N.Z.L.R. 548 (1984).

127. *Day v. Mead*, 2 N.Z.L.R. 443 (1987).

128. *Rowlands v. Collow*, 1 N.Z.L.R. 178 (1992).

concurrent liability.¹²⁹ Despite the decision in *Rowlands v. Col-low*, New Zealand has continued to follow a relatively cautious approach to concurrent liability, as evidenced by the decisions in *Shivas v. Bank of New Zealand*,¹³⁰ *Sinclair Horder O'Malley and Co. v. National Insurance Company of New Zealand Ltd.*,¹³¹ and *Simms Jones Ltd. v. Protochem Trading New Zealand Ltd.*¹³²

In Australia, the authorities have been conflicting. In the case of *Pennant Hills Restaurants Pty. Ltd. v. Barrett Insurances Pty. Ltd.*, Pennant Hills was sued in tort and contract, but the court adopted a contractual measure of damages, with Justice Hartley expressing the view that "claims based on failure to perform professional services must be brought in contract."¹³³ On appeal, however, Justice Gibbs stated, obiter, "It seems to me immaterial whether damages are assessed in tort or in contract."¹³⁴ The same point remained open in the subsequent case of *Simonius Vischer v. Holt Thompson*.¹³⁵ In Queensland, concurrent liability was approved in the case of *Hardi (Qld) Employees Credit Union Ltd. v. Hall Chadwick and Co.*,¹³⁶ which followed the English case of *Midland Bank Trust Co. v. Hett, Stubbs and Kemp*.¹³⁷ Similarly, in the case of *Aluminium Products (Qld) Pty. Ltd. v. Hill* the possibility of concurrent claims was raised although not applied.¹³⁸

In *Hawkins v. Clayton*, the question of concurrent claims in tort and contract was subjected to judicial scrutiny by Justice Deane, who remarked that "[t]he law of contract and the law of tort are, in a modern context, properly to be seen as but two of a number of imprecise divisions for the purpose of classification, of a general body of law constituting one coherent system of law."¹³⁹ Although the case was decided in tort, the plaintiff's claim was pleaded in both contract and tort, and Justice Deane accepted that there could be situations where a solicitor might be under a concurrent and co-extensive contractual and common

129. *Id.* at 192-193.

130. *Shivas v. Bank of New Zealand*, 2 N.Z.L.R. 327 (1990).

131. *Sinclair Horder O'Malley and Co. v. Nat'l Ins. Company of New Zealand Ltd.*, 2 N.Z.L.R. 706 (1992).

132. *Simms Jones Ltd. v. Protochem Trading New Zealand Ltd.*, 3 N.Z.L.R. 369 (1993).

133. *Pennant Hills Restaurants Pty. Ltd. v. Barrett Insurances Pty. Ltd.*, 2 N.S.W.L.R. 827, 845 (1977).

134. *Pennant Hills Restaurants Pty. Ltd. v. Barrett Insurances Pty. Ltd.*, 55 A.L.J.R. 258 (1981).

135. *Simonius Vischer v. Holt Thompson*, N.S.W.L.R. 322 (1979).

136. *Hardi (Qld) Employees Credit Union Ltd. v. Hall Chadwick and Co.*, Qd. R. 362 (1980).

137. *Midland Bank Trust Co. v. Hett, Stubbs and Kemp*, 3 All E.R. 571 (1978).

138. *Aluminium Products (Qld) Pty. Ltd. v. Hill*, Qd. R. 33 (1981).

139. *Hawkins v. Clayton*, C.L.R. 539, 584 (1988).

law duty of care.¹⁴⁰ However, on the facts in *Hawkins v. Clayton*, Justice Deane expressed the view that, as tort had developed to provide a remedy for negligent misstatement, there was no longer any justification for implying a contractual term to take reasonable care unless such a term could be implied on the basis of the imputed intention of the parties as necessary for the effective, or reasonable, operation of the contract.¹⁴¹ His Lordship stated that,

On balance, however, it seems to me to be preferable to accept that there is neither justification nor need for the application of a contractual term which, in the absence of actual intention of the parties, imposes upon a solicitor a contractual duty (with consequential liability in damages for its breach) which is co-extensive in content and concurrent in operation with a duty (with consequential liability in damages for its breach) which already exists under the common law of negligence.¹⁴²

The other members of the High Court did not express a view on this issue.

In *Astley v. Austrust*,¹⁴³ the High Court did not hesitate in rejecting Deane's views on the basis of 'history and legal principle' in favour of the House of Lords' approach in *Henderson v. Merrett Syndicates Ltd.*¹⁴⁴ The majority judgment states that,

The theoretical foundations for actions in tort and contract are quite separate. Long before the imperial march of modern negligence law began, contracts of service carried an implied term that they would be performed with reasonable care and skill. Reliance on an implied term giving effect to that expectation should not be defeated by the recognition of a parallel and concurrent obligation under the law of negligence. The evolution of the law of negligence has broadened the responsibility of professional persons and requires them to take reasonable care and skill even in situations where a contractual relationship cannot be established. But given the differing requirements and advantages of each cause of action, there is no justification in recognising the tortious duty to the exclusion of the contractual duty.¹⁴⁵

There has been some similar confusion as to how the two claims may exist together. For example, in the New Zealand case of *Rowlands v. Collow* damages were awarded both for breach of contract and liability in tort.¹⁴⁶ Where the duty of care in carry-

140. *Id.* at 585-6.

141. *Id.* at 584.

142. *Id.* at 585.

143. *Astley v. Austrust*, 73 A.L.J.R. 403 (1999).

144. *Henderson v. Merrett Syndicates Ltd.*, 2 All E.R.506 (1994).

145. *Astley v. Austrust*, 73 A.L.J.R. 403, 414-415 (1999).

146. [1992] 1 N.Z.L.R. 178.

ing out the contract is the subject of a special contract, it would seem that any claim must lie in contract. See, for example, the dictum of Justice Connolly in *Aluminium Products (Qld) v. Hill*.¹⁴⁷ If, however, the contract is simply the vehicle for establishing a relationship of sufficient proximity to give rise to a duty of care in tort, then it would seem that the plaintiff either has a choice or may sue in both. A contract may still preclude tortious liability, but it would seem that this must be done expressly or by necessary implication.¹⁴⁸

In the South Pacific region, the contract/tort debate has been acknowledged in the Samoan Supreme Court case of *Australia and New Zealand Bank Group Ltd. v. Ale*, referred to above.¹⁴⁹ The flexible attitude advocated in that case appears to be echoed in other parts of the region. In *Hunt v. The Australasian United Steam Navigation Co. Ltd.*, the plaintiff delivered a cargo of bananas to the defendant for shipment to the Fiji Islands.¹⁵⁰ In spite of the contract of carriage between the parties, the plaintiff was permitted to sue for negligence. Another example can be seen in *Lal v. Chand and Suva City Council*, where the vendor of a house which he himself built was successfully sued in tort and contract for the negligent work done, work that he had fraudulently represented as having been soundly constructed.¹⁵¹

CONTINUING DIFFERENCES

There still remain some important differences between contract and tort. Justice Le Dain, in the Canadian case of *Central Trust Co. v. Rafuse*, highlighted three areas in which the different rules applicable to claims in contract and tort would continue to be important, even where such claims were brought concurrently.¹⁵² Two of these relate to calculation of loss, that is, the measure of damages and the apportionment of liability. To this perhaps may be added mitigation of loss. The other area mentioned by Justice Le Dain was limitation of actions. These areas will now be considered.

147. [1981] Qd.R. 33.

148. *Burns Philp (South Seas) Co v. Marie Pacific*, civil app. 7/1979 (Fiji Court of Appeal July 12 1979).

149. *Australia & New Zealand Bank Group Ltd. v. Ale*, W.S.L.R. 468 (1980-93).

150. *Hunt v. The Australasian United Steam Navigation Co. Ltd.*, 2 F.L.R. 72 (1919).

151. *Lal v. Chand and Suva City Council*, 29 F.L.R. 71, 74 (1983).

152. *Central Trust Co. v. Rafuse*, 31 D.L.R. 4th 481 (1987).

CALCULATION OF LOSS

The Purpose of the Award of Damages

The basic purpose of damages for breach of contract is to compensate the innocent party for the loss suffered, not to punish the wrongdoer.¹⁵³ In *Barrett v. Patterson and Patterson*, Chief Justice D'Imecourt stated that damages for breach of contract must remain compensatory for loss and in no way punitive.¹⁵⁴ The object is to place the plaintiff, as far as money can do it, in the same position in which he or she would have been if the contract had been performed. This means that plaintiffs can recover gains of which the breach has deprived them, such as loss of profits due to failure to deliver machinery. It also entitles plaintiffs to damages for loss of bargained-for performance, assessed by reference to 'expectation' or 'performance' loss.

In tort, on the other hand, while damages are compensatory, the object is, as far as possible, to put the plaintiff back in the position in which he or she would have been had the tort not been committed. Whilst damages may be awarded for loss of profits, for example, due to damage or destruction to property, loss of particularly lucrative bargained-for benefits cannot normally be recovered. Further, punitive damages may be awarded in tort in the three types of circumstances as set out in *Rookes v. Barnard*.¹⁵⁵ Thus, for example, damages were awarded in the Tongan case of *Kaufusi v. Lasa and Others*,¹⁵⁶ where the plaintiff had been wrongfully arrested and seriously assaulted by police officers.

Despite these differences, some Commonwealth courts seem to take the view that there is little real distinction in practice. For example, in the New Zealand case of *Rowlands v. Collow*,¹⁵⁷ Justice Thomas suggested that there was no distinction between the builder's liability in contract and in tort in regard to whether the measure of damages should be the diminution in value of the property or the cost of reinstatement. The aim was the same: to put the plaintiffs in the position they would have occupied had they not suffered the wrong complained of.

In Canada, the Ontario Court of Appeal has held that it was not necessary to decide whether a defendant solicitor was liable

153. *Addis v. Gramophone Co Ltd.*, A.C. 488 (1909).

154. *Barrett v. Patterson & Patterson*, 2 V.L.R. 558, 569 (1989-94).

155. *Rookes v. Barnard*, A.C. 1129 (1964). The three classes of cases specified were (1) where exemplary damages are authorised by statute; (2) where the defendant's conduct was calculated to make a profit which may exceed the compensation payable to the plaintiff; or (3) where the plaintiff has suffered from oppressive, arbitrary, or unconstitutional action by government servants.

156. *Kaufusi v. Lasa & Others*, civil case 29/1989 (Tonga Supreme Court).

157. *Rowlands v. Collow*, 1 N.Z.L.R. 178 (1992).

in tort as well as contract because there was no real difference in the measure of damages.¹⁵⁸

Remoteness of Damage

As has been stated above, the test for losses which may be claimed in contract is one of remoteness as formulated in *Hadley v. Baxendale*,¹⁵⁹ *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*¹⁶⁰ and *Koufos v. Czarndnikow Ltd. (the Heron II)*.¹⁶¹ That is, were the losses caused by the breach of the type that might be presumed to have been in the contemplation of the parties at the time the contract was formed because they would be a natural consequence of the breach? Or, were the losses, even if unusual, within the contemplation of the parties at the time of the breach? In this latter case, if the reasonable man knowing what the defendant knew or ought to have known in the circumstances would have contemplated such losses then the losses would not be too remote, even if the likelihood of them occurring was limited.

The test in tort is also one of remoteness for loss caused through negligence, as formulated in *Overseas Tankship (UK) Ltd. v. Morts Dock Engineering Co. Ltd (the Wagonmound (No. 1))*.¹⁶² However, in the House of Lords decision in *Heron II*, it was held that there was a difference between contract and tort on the question of remoteness. In breach of contract cases the question was, 'were the consequences of such a kind that a reasonable man at the time of the contract being made would have contemplated them as being substantially probable?' In tort the question was, 'were the consequences such that a reasonable man would foresee them as being probable?' It was suggested that the degree of probability in tort was lower than that in contract. However, the language used by the judges varied from judgment to judgment and no clear principles emerge from the case as to how varying degrees of probability are to be assessed, a point commented upon by Lord Denning in the case of *H. Parson (Livestock) v. Uttley Ingham & Co.*¹⁶³

In both contract and tort there is an objective element to judging remoteness. In tort, the standard of foreseeability is that of the reasonable man. In contract, the imputed contemplation is

158. *Kienzb v. Stringer*, 130 D.L.R. 3d 272(1982).

159. *Hadley v. Baxendale*, 9 Ex. 341 (1854).

160. *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, 2 K.B. 528 (1949).

161. *Koufos v. Czarndnikow Ltd. (the Heron II)*, 1 A.C. 350 (1969).

162. *Overseas Tankship (UK) Ltd. v. Morts Dock Engineering Co. Ltd. (the Wagonmound (No. 1))*, A.C. 388 (1961).

163. *H. Parson (Livestock) v. Uttley Ingham & Co.*, 1 All E.R.525 (1978).

judged by the standard of the reasonable man. In both cases, this objective assessment may be modified by the particular ability of the defendant to foresee or contemplate the type of loss in the circumstances. In tort, the test probes the contemplation of the reasonable man in the circumstances as they are the time the tort occurs. In contract, the relevant circumstances are those within the contemplation of the parties at the time the contract was made. Whether these tests are fundamentally different is debatable. Certainly in the case of *Banques Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd.*, Sir Thomas Bingham seemed prepared to apply a similar test whether the claim was grounded in tort or contract.¹⁶⁴ This approach echoes an earlier one. Lord Denning, Master of the Rolls, suggested in *Esso Petroleum v. Marden* that where the defendant was found to owe a duty of care, whether under a contract or not, and was liable for damages as a result of breach of that duty those damages should be, and are, the same whether he is sued in contract or in tort.¹⁶⁵ Similarly, in the case of *Beoco Ltd. v. Alfa Laval Co. Ltd. & Another*, it was held that the principles for assessing the measure of prospective or hypothetical economic loss in tort were equally applicable where the claim arose out of breach of contract.¹⁶⁶

When considering the extent of the harm, there appears to be little distinction between tort and contract. If the harm is not too remote, then the extent of it does not have to be foreseen so long as it is of a type that could have been foreseen. This has been established for some time in tort. For example, in *Hughes v. Lord Advocate*, although the damage that actually materialised was not identical to the danger which was reasonably foreseeable, the defendants were still liable because the damage was of a kind which was foreseeable.¹⁶⁷

In contract this was first suggested in the case of *H. Parsons (Livestock) v. Uttley Ingham & Co.*, where it was held that where the plaintiff suffered physical harm to his person or property as a result of breach of contract, the test of recoverability of damages was the same as in tort.¹⁶⁸ With economic loss, however, liability was limited to loss which at the time of the contract could reasonably have been contemplated by the defendant. Lord Denning and Lord Scarman suggested that where all the parties had the same actual or imputed knowledge the amount of damages recoverable does not depend on whether the plaintiff's cause of

164. *Banques Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd.*, 2 All E.R.769, 838f & 841e (1995).

165. *Esso Petroleum v. Marden*, 2 All E.R. 5, 15 (1976).

166. *Beoco Ltd. v. Alfa Laval Co. Ltd. & Another*, 4 All E.R.464 (1994).

167. *Hughes v. Lord Advocate*, A.C. 873 (1963).

168. *H. Parsons (Livestock) v. Uttley Ingham & Co.*, 1 All E.R.525 (1978).

action arose in contract or tort, for in principle, the test of remoteness of damages is the same in contract as in tort. Indeed, Lord Scarman went on to say that,

[T]he law is not so absurd as to differentiate between contract and tort save in situations where the agreement, or the factual relationship, of the parties with each other requires it in the interests of justice.¹⁶⁹

This approach has been approved in the recent case of *Brown v. KMR Services Ltd.*,¹⁷⁰ where the Court of Appeal dismissed the claim that the loss was too remote, on the grounds that the type of loss in the circumstances was foreseeable, even if the scale or amount of loss could not have been foreseen. However, if the type or class of loss is not foreseeable then the loss may be too remote. This was illustrated in the case of *Kpohraror v. Woolwich Building Society*.¹⁷¹ In this case, the plaintiff sued for the wrongful dishonour of a cheque by the building society, in breach of contract, and for special damages for trading losses due to the consequent delay in a shipment overseas. It was unclear whether the building society had been aware that the plaintiff was a trader. The fact was important in as much as traders have traditionally been entitled to sue for substantial – rather than nominal – damages where their credit-worthiness has been damaged. The Court approved the view that a claim for substantial damages need no longer be limited to traders. It also made it clear that in the case of traders the law had never required a defendant to have actually known of the plaintiff's status to be found liable. Lord Justice Evans went on to suggest that the claim for special damages in such cases was analogous to a claim for damage to business reputation in tort. The approach should, therefore, be one based on common sense, regardless of how the claim was framed. Here the claim failed because the harm complained of had been too remote.

Apportionment

At common law, contributory negligence barred an action in negligence. This position has changed. Many common law countries have changed this position through legislation introducing apportionment. In those countries, there is now a right of contribution in tort where the plaintiff has himself been negligent. Examples include the Law Reform (Contributory Negligence) Act of 1945 (U.K.), the Contributory Negligence Act of 1964 (Samoa), and the Law Reform (Contributory Negligence and

169. *Id.* at 535.

170. *Brown v. KMR Services Ltd.*, 4 All E.R.598 (1995).

171. *Kpohraror v. Woolwich Building Society*, 4 All E.R.119 (1996).

Tortfeasors) Act, Cap. 30 (Fiji). Generally, contributory negligence is not a defense to actions for breach of contract.¹⁷² However, it is a defence to claims for negligent misrepresentation.¹⁷³ Further, it has been suggested that, where there is concurrent liability, the Law Reform (Contributory Negligence) Act of 1945 may apply. This proposition was first considered in *Sayers v. Harlow Urban District Council*, where the cause of action was brought in contract and tort, and apportionment was allowed.¹⁷⁴ It was also considered in *Forsikringsaktieselskapet Vesta v. Butcher*.¹⁷⁵ There it was held that if the defendant's liability in contract was the same as his independent liability in the tort of negligence, then the court had the power to apportion blame under the 1945 Act and reduce the damages recoverable by the plaintiff even though the claim was brought in contract. The application of the Act to concurrent claims has also received academic support from English legal author Glanville Williams.¹⁷⁶

Where there is no negligence in issue and no question of concurrent liability, it has been held that the Act does not apply. In *Barclays Bank Plc. v. Fairclough Building Ltd.*, for example, there was a breach of a building contract requiring strict compliance with its terms.¹⁷⁷ Although the defendant was in breach, it was apparent that the plaintiff had contributed to the harm by failing to supervise the defendant sufficiently. At first instance the court applied the Act and apportioned 40% of the blame to the plaintiff. On appeal by the plaintiff this apportionment was set aside. Nevertheless, the court confirmed that the Act could be applied where liability for breach was the same as and co-extensive with a similar liability in tort, independent of the existence of the contract. In this case, this could not apply as the claim was one of a breach of strictly contractual liability. It should be noted that this approach was in line with the recommendations of the English Law Commission, which published its report on "Contributory Negligence as a Defence in Contract" in 1993.¹⁷⁸ However, the negligence of the party not in breach may amount to a *novus actus* and break the chain of causation, as happened in *Beoco Ltd. v. Alfa Laval Co.*¹⁷⁹

172. *Astley v. Austrust Ltd.*, 161 A.L.R. 155 (1999).

173. *Saville Heaton Co. Ltd. v. United Apparel (MGF) Ltd.*, civil case 410/1992 (Fiji High Court April 9, 1996).

174. *Sayers v. Harlow Urban District Council*, 2 All E.R. 342 (1958).

175. *Forsikringsaktieselskapet Vesta v. Butcher*, 2 All E.R. 43 (1988).

176. GLANVILLE WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* (1951).

177. *Barclays Bank Plc. v. Fairclough Building Ltd.*, 3 W.L.R. 1057 (1994).

178. English Law Commission, *Contributory Negligence as a Defence in Contract*, 219 LAW COMM'N. (1993).

179. *Beoco Ltd. v. Alfa Laval Co.*, 4 All E.R. 464 (1994).

Where there is no separate duty of care, but a duty to perform a contractual undertaking with reasonable care and skill, there are conflicting decisions as to whether or not the Act should apply. For instance, in *A.B. Marintran v. Comet Shipping Co.*, it was held that it did not.¹⁸⁰ However, in *De Meza & Stuart v. Apple Van Staten*, at first instance, it was held that it did.¹⁸¹ Here, solicitors claimed damages in negligence and for breach of contract against a firm of auditors. Justice Brabin had no difficulty in holding that apportionment applied.

If the facts of the case give rise to concurrent claims in contract and tort, then there are grounds for arguing that both parties should be equally matched. In the Canadian case of *Canadian Western Natural Gas Co. v. Pathfinder Surveys Ltd.*, the defendant was liable in both tort and contract.¹⁸² The court held that the plaintiff could not deny the defendant the defence of contributory negligence by framing the action solely in contract. This was particularly so as the contract was only what gave rise to the relationship. Once harm flowed from that relationship the action was substantially one in tort.

In Australia the High Court has rejected the application of apportionment where the plaintiff sues in contract even though there is evidence of the plaintiff's own contributory negligence.¹⁸³ Although the courts originally followed *Forsikringsaktieselskapet*,¹⁸⁴ in *Astley*¹⁸⁵ the High Court strongly rejected the application of apportionment legislation to breach of contract in concurrent actions. The plaintiff in that case was an experienced trust company which decided to branch out as a trustee of trading trusts. It decided to accept appointment as trustee of a trust to be formed in New South Wales and sought advice on the proposed trust deed from the defendants, a firm of solicitors in South Australia. On the basis of the advice, the plaintiff executed the trust deed and, in due course, became the owner of two properties and the borrower of an excess of AUD1.3 million. Subsequently, the trust had to be wound up, and as assets of the trust were insufficient to meet liabilities, the plaintiff suffered losses in making up for the shortfall. The plaintiff sued in con-

180. *A.B. Marintran v. Comet Shipping Co.*, 3 All E.R. 442 (1985).

181. *De Meza & Stuart v. Apple Van Staten*, 1 Lloyds Rep. 508 (1974).

182. *Canadian Western Natural Gas Co. v. Pathfinder Surveys Ltd.*, 12 Alta L.R. 2d 135 (1980).

183. *James Pty. Ltd. v. Duncan*, V.R. 705 (1970), *Harper v. Ashton Circus Pty. Ltd.*, 2 N.S.W.L.R. 395 (1972), and *Astley v. Austrust Ltd.*, 73 A.L.J.R. 403 (1999).

184. *Forsikringsaktieselskapet*, Loc cit. See, e.g., *Bains Harding Constr. & Roofing (Austl.) Pty. Ltd. v. McCredie Richmond & Partners Pty. Ltd.*, 13 N.S.W.L.R. 437 (1988); *A.W.A. Ltd. v. Daniels*, 7 A.C.S.R. 759 (1992); *Craig v. Troy*, 16 W.A.R. 96 (1997).

185. *Astley v. Austrust*, 73 A.L.J.R. 403 (1999).

tract and tort to recover those losses from the defendant, alleging negligent advice in failing to advise that the trustee might become personally liable to creditors under the trust deed. The defendant's defence was that it was not negligent or alternatively that there was contributory negligence on the plaintiff's part. The Supreme Court of South Australia held that there had been negligence on the defendant's part but also found the plaintiff liable for contributory negligence. It apportioned liability equally between the parties under Section 27A of the Wrongs Act of 1936 (SA). Both parties appealed to the Full Court. The Full Court dismissed the appeal against the finding of negligence, but found no contributory negligence. It was therefore unnecessary for the court to decide whether the apportionment legislation applied. The defendant appealed. The High Court upheld the appeal on whether there had been contributory negligence, finding that the plaintiff's failure to protect its interests contributed to the loss suffered. In doing so, it rejected the full court's view that a finding of contributory negligence was not available with respect to breach of duty to protect a plaintiff against the very loss suffered. The Court then had to consider whether the Wrongs Act of 1936 (SA) applied to breach of duty in contract. The majority judgment dismisses the Australian authorities in the following words,

In our opinion, those decisions which have applied apportionment legislation, based on the Law Reform (Contributory Negligence) Act 1945 (UK) to breaches of contract are wrong and should not be followed in this country. The interpretation of the legislation adopted by those courts which have applied the legalities to contract claims is strained, to say the least. It relies principally, if not exclusively on the use of the term 'negligence' in the definition of 'fault'. It ignores not only the context to that term in the definition itself but also the context provided by the various equivalents of Section 27A which is the principle substantive provision of the legislation. It also ignores the mischief which the legislation was intended to remedy.¹⁸⁶

The mischief in question was the complete barring of actions in tort at common law if contributory negligence was established. There was no such mischief under the law contract.

The Law Reform (Contributory Negligence) Amendment Bill 2001, introduced in the Queensland Parliament on August 7, 2001, aims to put Queensland litigants back in the pre-*Astley* position. Once it becomes law, it will render damages liable to reduction on the basis of the plaintiff's contributory act or omission, whether in the form of negligence or breach of a con-

186. *Id.* at 419.

current contractual duty of care. Similar legislation is being introduced in other Australian jurisdictions.

Another interesting development in Queensland since *Astley* is the decision in *I & L Securites Pty. Ltd. v. HTW Valuers (Brisbane) Pty Ltd*, where the court delivered a unanimous decision holding that damages recoverable under the Trade Practices Act 1974 were liable to reduction under Section 87(1) on account of the plaintiff's conduct. This decision is currently on appeal to the High Court.¹⁸⁷

In New Zealand, the dicta of *McLaren Maycroft & Co v Fletcher* was approved by Justice Pritchard in the High Court in *Rowe v. Turner Hopkins*. In this case, although it was held that the action was purely contractual, Justice Pritchard commented obiter,

[I]t may be irrational and possibly unjust to afford a defendant sued in tort, the right to invoke the plaintiff's conduct as a ground for reducing damages while denying the same right to a defendant sued in contract.¹⁸⁸

On Appeal against the decision of Justice Pritchard, Justice McMullin commented that,

the door which the *McLaren Maycroft* approach might have suggested was firmly closed may now be thought to rest ajar. Whether it is to be opened, and to what extent, to admit concurrent liability in contract and tort must await further argument in this court.¹⁸⁹

However, if the matter is approached by way of causation, if there is contributory causation, and if it is just and equitable to apportion responsibility, then the Act may be applied. It was also suggested by Justices Cooke and Roper in the case of *Rowlands v. Collow* that the Contributory Negligence Act of 1947 could apply where negligence was an essential ingredient of the plaintiff's cause of action, including where the duty of care derives from contract.¹⁹⁰

The problem has been referred to the New Zealand Commercial Law Reform Committee. This may result in recommendations for amendment of the Contributory Negligence Act in a similar way to its Australian counterparts.

Mitigation of Loss

In tort and usually in contract, the victim has a duty to mitigate, and failure to do so in contract might be seen as contribut-

187. *I & L Sec. Pty. Ltd. v. HTW Valuers (Brisbane) Pty. Ltd.*, #383 (Queensland Court of Appeal 2000).

188. *Rowe v. Turner Hopkins*, 2 N.Z.L.R. 550 (1980).

189. *Rowe v. Turner Hopkins*, 1 N.Z.L.R. 178, 182 (1982).

190. *Rowlands v. Collow*, 1 N.Z.L.R. 178 (1992).

ing to the harm. However, as Coote points out, the moment when the duty to mitigate arises is different in contract and tort.¹⁹¹ In tort, the moment is before the harm occurs and is relevant to causation. In contract, it is once the harm has occurred and is relevant to the award and the measure of damages. A further difference is that, if the claim in contract is for a debt or liquidated sum, the duty to mitigate does not apply.¹⁹²

LIMITATION OF ACTIONS

The most significant area of difference between contract and tort, from the point of view of the plaintiff seeking a remedy through the courts, is the operation of limitation periods. In contract, time starts running when the right of action accrues,¹⁹³ whereas in tort it is when the harm is discovered,¹⁹⁴ so that, although the statutory time limits may be the same, in practice the period of time could be considerably different. A claim in tort may therefore be available long after one in contract has become time-barred. The unsatisfactory effect of this has been criticised, including, notably, by Lord Justice Mustill who stated in *Société Commerciale de Réassurance v. ERAS (International) Ltd.* that the different treatment for limitation purposes between claims brought in contract and tort offended common sense, forced the law into unnatural complications and, "pushed the evolution of substantive law in the wrong direction. In most if not all cases a plaintiff will be better off framing his action in tort, whereas in our judgment if a contract is in existence this is the natural vehicle for recourse."¹⁹⁵

PERSISTING PROBLEMS WITH CONCURRENT CLAIMS

If concurrency of claims is recognised and found to be applicable in a case, this tends to favour the plaintiff. In order to balance the rights of the parties, it should follow that the defendant can raise defences which would be open to him in contract or tort. This would include contributory negligence. The injustice of not allowing this can be seen in the case of *Astley*, where although the plaintiff sued in both tort and contract, the court held

191. Coote, *Contract, Tort and Contributory Negligence*, N.Z.L.J. 294 (1982).

192. *White & Carter (Councils) Ltd. v. McGregor*, A.C. 413 (1962).

193. See Limitation Act of 1975 (Samoa), § 6; Limitation Act of 1971 (Fiji), § 4; Limitation Act of 1991 (Vanuatu), § 3; Limitation Act of 1984 (Solomon Islands), § 5; Civil Procedure of Act (29 M.I.R.C. 1988), § 20; Limitation Act of 1950 (N.Z.) (Nuie/Cook Islands), § 4; Limitation Act of 1939 (U.K.), § 2(1)(a); Supreme Court Act (Cap. 10) (Tonga), § 16.

194. *Id.*

195. *Société Commerciale de Réassurance v. ERAS (Int'l) Ltd.*, 2 All E.R. 82, 85 (1992).

that the defence of contributory negligence was not available.¹⁹⁶ This does raise the question of whether it is just to hold a person wholly liable for the harm when in fact, if it were not for the law, they are only partially liable.

One way around this is to allow the claim to proceed in tort even if it originates in contract. For example, in the case of *Youell v. Bland Welch & Co.* the court held that there was a breach of duty to care in tort and a breach of contract and concurrent remedies were available to the plaintiff.¹⁹⁷ The Law Reform (Contributory Negligence) Act of 1945 applied, not because the action was primarily based in tort but because the issue of contributory negligence arose at a point when the breach of the duty of care arose independently of the breach of contract.

More difficult perhaps is the question of limitations, which normally operate in favour of the defendant. If the plaintiff brings concurrent claims, it seems unfortunate that the defendant can defeat the claim by relying on the more favourable time period. This is particularly unjust where the harm caused by the negligent performance of a contractual duty may not become apparent for a considerable length of time. For example, in the case of *Midland Bank Trust Co. v. Hett Stubbs & Kemp*,¹⁹⁸ where a negligent solicitor had failed to register an option to purchase, if the plaintiff had been restricted to suing in contract, the six year limitation period under the Limitation Act of 1939 would have effectively barred any claim before the harm occurred and before the victim could have taken any steps to prevent it.

In New Zealand, Justice Tipping observed in the case of *Simms Jones Ltd. v. Petrochem Trading New Zealand Ltd.*¹⁹⁹ that the Limitation Act of 1950 should be amended so as to provide that, in both contract and tort, a cause of action shall not be regarded as having accrued until the plaintiff discovers or ought to have reasonably discovered the breach of duty, whether it be contractual or tortious.

There is much to be said for removing discriminatory time periods by modest legislative reform. Alternatives would be to include in limitation statutes a provision for the exercise of judicial discretion. Where there is no legislative provision, then it is suggested that there are sufficiently different approaches in case law to justify judicial activism.

196. *Astley v. Austrust*, 73 A.L.J.R. 403 (1999).

197. *Youell v. Bland Welch & Co.*, 2 Lloyds Rep. 431 (1990).

198. *Midland Bank Trust Co. v. Hett Stubbs & Kemp*, 3 All E.R. 571 (1978).

199. *Simms Jones Ltd. v. Petrochem Trading New Zealand Ltd.*, 3 N.Z.L.R. 369 (1993).

APPLICATION OF COMMON LAW IN THE SOUTH PACIFIC REGION – FREEDOM TO REJECT OR ADOPT

The relevance of developments in the common law with regard to bringing concurrent claims in contract and tort lies in the scope of the choice available to judges, legislators and lawyers in the region, with regard to the jurisprudence and legislation to be followed. The legal heritage of the region is essentially common law. At independence, the countries of the region did not reject the existing laws outright.²⁰⁰ Instead, these laws were 'saved'. Saved laws included:

- Legislation in force in England (and, in some cases, its former colonies of Australia and New Zealand) at a particular date,²⁰¹
- Common law and equity; and
- "Colonial" legislation (made by the legislature of the country before independence).

Whilst this was intended as a transitional step to avoid a legal vacuum, pending the creation of "local" laws by the new legislature, to date there has been little sign of change. Common law and equity continue to apply throughout the region.

In most countries it is the English common law (and equity) which have been adopted as part of the law.²⁰² However, in Samoa it has been held that the courts are free to choose from amongst common law principles as developed throughout the Commonwealth.²⁰³ The courts in Fiji Islands have also shown an inclination to follow Australian and New Zealand contract precedents in preference to the English law.²⁰⁴ In *Nair v. Public Trustee of Fiji*, Justice Lyons said in the course of a discussion as to the relevant rules of estoppel to be applied in the Pacific, "In my opinion the future of the law in Fiji is that it is to develop its own independent route and relevance, taking into account its uniqueness and perhaps looking to Australia and New Zealand for more

200. For details of the former status of the countries of the region, see RON CROCOMBE, *THE SOUTH PACIFIC* 231 et. seq. (5th ed. 1989).

201. Except in Tonga, where no "cut-off" date was specified. See Civil Law Act 1966, § 4.

202. In Marshall Islands American common law is more relevant. In cases involving French law decided in Vanuatu, decisions of French courts may be of persuasive value. See further JENNIFER CORRIN CARE ET AL., *INTRODUCTION TO SOUTH PACIFIC LAW* ch. 4 (1999).

203. *Opeloge Ole v. Police*, m5092/80 (Samoa Supreme Court).

204. See, e.g., *Attorney Gen. of Fiji v. Pacoil Fiji Ltd.*, Fiji Islands Court of Appeal, C.A.N. A.B.U.0014 16, November 29, 1996, in which the Court of Appeal cited with approval the Australian case law on estoppel. See also the reference to New Zealand case law, at 20.

of its direction.”²⁰⁵ In all cases there are conditions on the application of common law. Generally, these are that:

- The principles must be consistent with the Constitution and/or other local Acts of Parliament.
- They must be appropriate/suitable to local circumstances.²⁰⁶

This means that the principles of common law may be altered by local statute. They may also be discarded or modified by regional courts, if they are inappropriate to the country in question.²⁰⁷

Theoretically, this renders the distinction between English common law and Commonwealth common law largely academic, as a regional court that preferred a Commonwealth authority to an English authority could justify following the latter on the grounds that it was more appropriate to local circumstances.²⁰⁸ In practice, courts rarely consider whether common law principles are appropriate.

In addition to the general conditions mentioned above, there is usually a specified date after which, theoretically, new English judicial decisions will not become part of the law. This is sometimes referred to as the “cut-off date.”²⁰⁹ However, English decisions made after the date specified are highly persuasive authority, and in practice, the regional courts will nearly always follow them.²¹⁰ Further, the Solomon Islands Court of Appeal has held that English decisions made after the cut-off date will be binding if they are merely declaratory. According to this view, recent decisions relating to contract and tort made after a regional country’s cut-off date that overrule an earlier case and declare the true state of the common law will be binding in the region. Moreover, once a superior regional court has followed an English decision, it will be binding on lower courts of that

205. *Nair v. Public Trustee of Fiji*, civil case 27/1990, (Fiji High Court March 8, 1996).

206. See, e.g., CONST. OF SOLOM. IS., sch. 3, (1978).

207. The Law Reform Commission of Papua New Guinea has expressed the view that the law of contract generally is unsuitable for the circumstances of Papua New Guinea. Law Reform Commission of Papua New Guinea, *Fairness of Transactions*, Report No. 6, December 1977, at 5.

208. For Australian and New Zealand examples of circumstances justifying departure from English common law on the basis of inapplicability, see *Australian Consol. Press v. Uren*, 1 A.C. 118 (1969), and *Invercargill City Council v. Hamlin*, 2 W.L.R. 367 (1996).

209. Cook Islands Act of 1915 (N.Z.), § 615; Supreme Court Ordinance of 1876, § 35 (Fiji); Laws of Kiribati of Act 1989, § 6(1); Custom and Adopted Laws Act of 1971, § 4; Niue Act of 1966 (N.Z.), § 672; CONST. OF SAMOA, art. 111(1); CONST. OF SOLOM. IS., sch. 3, ¶ 4(1); Tokelau Act of 1948, § 4A; Civil Law Act of 1966, § 3; Evidence Act § 166; Laws of Tuvalu Act, § 6(1); CONST. OF VANUATU, art. 93(2).

210. *Cheung v. Tanda*, S.I.L.R. 108 (1984).

country in accordance with the doctrine of precedent, whether it was decided before or after any cut-off date.

THE CASE FOR A LAW OF OBLIGATIONS IN THE SOUTH PACIFIC

The regional flexibility of legal precedents means that it is open to the courts to adopt, for example, the Australian approach to factual causation,²¹¹ to merge the tests of reasonable contemplation and foreseeability of loss,²¹² and to adopt an indiscriminate approach to the measure of damages.²¹³ Similarly, it is open to the courts to find a wide range of professional and non-professional advisers liable for failing to take sufficient care, by preferring the approach to economic loss of *Anns* rather than *Murphy*, and by adopting the more robust approach of judges such as Cook, P., in *S. Pac. Mfg. Co. v. New Zealand Sec. Consultants & Investigations*,²¹⁴ or Chief Justice Deane in *Hawkins v. Clayton*.²¹⁵ It would also be open to legislators in the region to amend applicable limitation statutes so as to take on board the remarks of Justice Tipping in New Zealand, that a cause of action, however it arises, should not be deemed to have accrued until the plaintiff discovers the wrong or harm complained of.²¹⁶ Statutory provisions governing the law of contributory negligence could also be modified so that a person sued in contract would have as much right to invoke the plaintiff's conduct as a ground for reducing damages as a person sued in tort.²¹⁷

While not all situations will give rise to concurrent claims in contract and tort, where they do, it is suggested that it may be in the interests of justice to concentrate on the fulfilment of the parties' obligations to each other rather than on the niceties of how their relationship arose. Such an approach has been advocated in New Zealand where Justice Thomas in *Rowlands v. Collow* stated,

[T]he approach which suggests itself to me as the most convenient to adopt in this case accords closely with the approach

211. As stated in *March v. Stanmore (E & M.H.) Pty. Ltd.*, 171 C.L.R. 506 (1991) and *Bennett v. Minister of Community Welfare*, 175 C.L.R. 506 (1992).

212. Following the reasoning of Lord Justice Scarman in *H. Parsons (Livestock) v. Uttley Ingham & Co.*, 1 All E.R. 598 (1978).

213. As suggested by Justice Thomas in *Rowlands v. Collow*, 1 N.Z.L.R. 178 (1992) and also the Canadian case of *Kienzb v. Stringer*, 130 D.L.R. 3d 272 (1982).

214. *S. Pac. Mfg. Co. v. New Zealand Sec. Consultants & Investigations*, 2 N.Z.L.R. 282 (1992).

215. *Hawkins v. Clayton*, C.L.R. 539 (1988). See also, *Day v. Mead*, 2 N.Z.L.R. 443 (1987).

216. *Simms Jones Ltd. v. Petrochem Trading New Zealand Ltd.*, 3 N.Z.L.R. 369 (1993).

217. Per Justice Pritchard in *Rowe v. Turner Hopkins*, 1 N.Z.L.R. 178 (1982).

adopted by the courts for some centuries before they were gripped by a passion to draw lines of demarcation between contract and tort. Thus, I make reference to the pre-existing relationship between the parties, the assumption of a responsibility or a promise by the defendant in undertaking certain work, and the reliance of the plaintiffs on the defendant to carry out his undertaking. The combination of undertaking or promise, due reliance, and consequential detriment is as appropriate to judge the liability of a professional adviser to his clients today as it was in those early times.²¹⁸

If a pragmatic approach²¹⁹ to the law is to be adopted in the South Pacific then it is suggested that there is indeed a place for the recognition of concurrent claims in contract and tort. While this may not always be appropriate in commercial contract cases where the parties are of equal bargaining strength and are well able to encompass all foreseen eventualities within the terms of their contract, the position of an individual or small business who relies on the skill and expertise of a professional will often be marked by inequality, especially in developing economies. There is a danger, illustrated by some of the cases discussed above, that insistence on the distinction between contract and tort can lead to injustice, for example, where breach of contract gives rise to strict liability regardless of the degree of fault, or where the type of harm was such that a third party could have foreseen it, but the contracting parties had not provided for it.

To allow a plaintiff to sue in both tort and contract in such situations might attract criticism of protectionism. However, as has been indicated, protective measures of other sorts are already found in the South Pacific region, particularly in the commercial context. These measures include legislative measures and common law approaches. Examples of the former can be found in statutes such as Fiji's Fair Trading Decree of 1990 which, in line with developments elsewhere, seeks to protect the consumer; legislation protecting ownership of customary land, such as the Land and Titles Act of Solomon Islands;²²⁰ and legislation protecting indigenous people from unconscionable dealings, such as the Niue Act of 1966 (N.Z.), § 711 and the Cook Islands Act of 1915 (N.Z.), § 645.

Manifestations of the latter can be found in the relaxation of English common law contract principles by the courts as in *Australia & New Zealand Group Ltd. v. Ale*,²²¹ a less restrictive approach by the courts to the establishment of liability in

218. *Rowlands v. Collow*, 1 N.Z.L.R. 178, 183 (1992).

219. As advocated in the case of *Australia & New Zealand Group Ltd. v. Ale*, W.S.L.R. 468 (1980-93).

220. Land & Titles Act of Solom. Is., Cap. 133, § 241.

221. *Australia & New Zealand Group Ltd. v. Ale*, W.S.L.R. 468, 469 (1980-93).

negligence, following *Anns v. Merton London Borough Council*,²²² rather than *Murphy v. Brentwood District Council*;²²³ and a less rigid view as to the type of damages that can be awarded. Other examples include the willingness to award damages for anxiety and ill-health caused by breach of contract in the form of wrongful dismissal, as in *Matatumua v. Public Service Commission*,²²⁴ and the award of damages for frustration and disappointment after breach of a contract for sale of a residence, as in *Beti v. Aufiu*.²²⁵

As indicated, regional legislatures and courts are constitutionally empowered to reject unsuitable common law, and legislation received under colonial rule can be replaced.²²⁶ Legal independence and the range of choice available from closer jurisdictions incline the authors to agree with Chief Justice Ryan in *Ale*, that "the Courts in [the South Pacific] should not be bogged down by academic niceties which have little relevance to real life."²²⁷

222. *Anns v. Merton London Borough Council*, A.C. 728 (1978).

223. *Murphy v. Brentwood District Council*, 1 A.C. 398 (1991).

224. *Matatumua v. Public Service Commission*, W.S.L.R. 295 (1980-93).

225. *Beti v. Aufiu*, civil case 170/1991 (Solom. Is. High Court July 4, 1991).

226. *See, e.g.*, CONSTITUTION OF SOLOM. IS., § 76 and sch. 3 (1978).

227. *Australia & New Zealand Group Ltd. v. Ale*, W.S.L.R. 468, 469 (1980-93).