The Law Commission

Working Paper No. 114

Contributory Negligence as a Defence in Contract

HER MAJESTY'S STATIONERY OFFICE

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THE LAW COMMISSION

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CONTENTS

SUMMARY

The Law Reform (Contributory Negligence) Act 1945 allows a plaintiff's damages to be reduced on account of his contributory negligence in an action in tort, but its application to actions in contract is a matter of controversy. This Working Paper examines the question whether a plaintiff's damages should be reduced where his loss has been caused partly by the defendant's breach of contract and partly by his own conduct.

A note on citations

The following works are cited hereafter by the name of the author(s) alone.

Glanville Williams, Joint Torts and Contributory Negligence (1951)

N.E. Palmer & P.J. Davies, "Contributory Negligence and Breach of Contract - English and Australasian Attitudes Compared", (1980) 29 I.C.L.Q. 415

THE LAW COMMISSION

CONTRIBUTORY NEGLIGENCE AS A DEFENCE IN CONTRACT

PART I

Introduction

1.1 Should a plaintiff's damages be reduced where his loss has been caused partly by the defendant's breach of contract and partly by his own conduct? This controversial question was brought to the attention of the Commission[1] as one which ought to be considered, given the increasing interest in the subject.[2] The pressure for reform has come from the judiciary,[3] academics,[4] other law reform agencies, including the Scottish Law Commission,[5] and other review bodies.[6]

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1. By Lesley Anderson and Andrew Bell of Manchester University.

2. See, for example, Williams, pp. 214-222 and 328-332; Burrows, Remedies for Torts and Breach of Contract (1987), pp. 73-78; McGregor on Damages (15th ed., 1988), ch. 5; Palmer & Davies; Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract", (1981) 55 A.L.J. 278; Chandler, "Contributory Negligence and Contract: Some Underlying Disparities", (1989) 40 N.I.L.Q. 152.

3. A.B. Marintrans v. Comet Shipping (The Shinjitsu Maru No. 5) [1985] 1 W.L.R. 1270, 1288 per Neill L.J.

4. For instance, Burrows, op. cit., p. 77; Anderson, [1987] L.M.C.L.Q. 10.

5. The Scottish Law Commission's Report on Civil Liability - Contribution (1988) Scot. Law Com. No. 115, recommends apportionment in cases where the plaintiff sues for breach of a contractual duty of care or where the defendant's liability is concurrent in contract and tort. The Canadian Draft Uniform Contributory Fault Act [Proceedings of the 66th Annual Meeting of the Uniform Law Conference of Canada (1984), Appendix F], would allow for apportionment where the plaintiff sues for breach of a contractual duty of care. The New Zealand Contracts and Commercial Law Reform Committee's Working Paper on

Generally speaking, these have recommended an increased role for apportionment in contract cases.

1.2 The question of contributory negligence as a defence in contract actions arose in connection with the Commission's work on contribution,[7] at which time the Commission took the view that since contributory negligence and contribution involved different questions,[8] and because contributory negligence required deeper study than could be conveniently given in its work on contribution, they should be dealt with separately.[9] In its Report on the Law of Positive and Restrictive Covenants,[10] the Commission recommended that where there has been a contravention of a land obligation, but the loss or damage suffered by a person results partly from his own fault and partly from the contravention, apportionment of damages should be available.

1.3 More recently, two other review bodies have recommended that apportionment on the basis of the plaintiff's contributory negligence should be available in actions for breach of contract. The Report by

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5. Continued
Contribution in Civil Cases (1983) provisionally recommended apportionment in all contract actions. See also the Alberta Institute for Law Research and Reform's Report on Contributory Negligence and Concurrent Wrongdoers (1979).

6. See para. 1.3 below.

7. Working Paper No. 59 (1975), paras. 52-54; Law Com. No. 79 (1977), para. 30, where the principal issue had been whether the statutory jurisdiction of the courts to apportion an award of damages, under s. 6 of the Law Reform (Married Women and Tortfeasors) Act 1935, should be extended beyond joint tortfeasors.

8. The former concerning the relative blameworthiness of the plaintiff and the defendant, the latter the relative blameworthiness of joint defendants: see Fitzgerald v. Lane [1989] A.C. 328.

9. Nevertheless, many consultees expressed the view that the Law Reform (Contributory Negligence) Act 1945 should be examined with a view to its reform: Law Com. No. 79, para. 30.

10. Law Com. No. 127 (1984), para. 13.32 and clause 10(9) of the Draft Land Obligations Bill appended thereto.

the Review Committee on Banking Services Law recommended the introduction of a statutory provision whereby contributory negligence may be raised in an action against a bank. It recommends that apportionment should be available in claims for damages or in debt arising from an unauthorised payment, provided that the degree of negligence shown by the plaintiff is sufficiently serious for it to be inequitable that the bank should be liable for the whole amount.[11] The Report of the Auditors Study Team on Professional Liability[12] recommended that the Law Reform (Contributory Negligence) Act 1945 should be amended so as to make it clear that negligence by a plaintiff is relevant in actions for breach of contract.

1.4 Broadly speaking, apportionment is permitted where the defendant is liable in tort,[13] or is concurrently liable in tort and contract, but is not permitted where the defendant is liable only in contract. The Commission has now examined the options for reform[14] and has reached a provisional conclusion on which comments are invited.[15]

1.5 While on one view the courts should be left to develop this area of the law pragmatically, our provisional view is that such an approach would be inappropriate, for the following reasons:

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11. Banking Services: Law and Practice, Report by the Review Committee (Chairman, Professor R. B. Jack C.B.E.) (1989) Cm. 622, paras. 6.14 - 6.15: see Appendix below.

12. Report of the Study Teams on Professional Liability (Chairman, Professor Andrew Likierman), 1989 H.M.S.O., para. 9.7. The broad conclusions of the report have been accepted by the Government: Hansard (H.C.), 31 October 1989, Vol. 159, No. 165, Written Answers col. 107.

13. It is probably not available in respect of intentional torts: see para. 4.40 below.

14. See Part IV below.

15. See Part V below.

(i) The applicability of the Law Reform (Contributory Negligence) Act 1945 to actions for breach of contract has been a matter of controversy. The courts do not have a free hand to develop the law on contributory negligence, constrained as they are by the wording of the 1945 Act.

(ii) The subject raises important and complex questions of principle and policy concerning the proper relationship between contract and tort which are not best resolved in the context of litigation. A case may not raise all the relevant issues and a court, quite properly, may be reluctant to examine matters going beyond the particular questions on which it is required to adjudicate. In Forsikringsaktieselskapet Vesta v. Butcher,[16] although the matter was examined by the trial judge and the Court of Appeal, the House of Lords was not required to deal with the question of contributory negligence as a defence to actions in contract. Furthermore, the statements of the Court of Appeal on contributory negligence were obiter.[17]

Arrangement of the Paper

1.6 The remainder of this paper is divided as follows. Part II considers what conduct might amount to contributory negligence in a contractual context. Part III discusses the present law and the arguments for and against the proposition that the 1945 Act applies to actions for breach of contract. Part IV discusses the options for reform. Part V contains our conclusion and provisional recommendations on which comments are invited. There is also an Appendix on the law of Banking.

1.7 Those readers who require only a broad outline of the present law and our proposals for reform may find it sufficient to confine

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16. [1988] 3 W.L.R. 565 (C.A.); [1989] 2 W.L.R. 290 (H.L.), hereinafter referred to as Vesta v. Butcher.

17. See para. 3.11 below.

their attention to Part II and the concluding paragraphs in Parts III and IV. All readers are invited to consider Part V and to address the questions set out there. The paper adopts the convention of referring to the plaintiff as P and the defendant as D.

PART II

Conduct amounting to Contributory Negligence

2.1 The defence of contributory negligence is established where P does not in his own interest take reasonable care of himself and contributes by this want of care to his own injury.[1] Contributory negligence has been described as negligence which contributes to cause the injury[2] or as negligence materially contributing to the injury.[3] However, to be contributorily negligent, P need not owe any duty of care to D. In Froom v. Butcher,[4] Lord Denning M.R. said:

> "Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might be hurt himself...".[5]

2.2 The relevance of contributory negligence in contract law may not be immediately apparent because, in the absence of an express or implied agreement that P should take care in the performance of a contract, it might be thought that the law should not impose such a

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1. Nance v. British Columbia Electric Railway Co. [1951] A.C. 601, 611 per Viscount Simon.

2. Caswell v. Powell Duffryn Associated Collieries Ltd. [1940] A.C. 152, 165 per Lord Atkin.

3. Ibid., pp. 185-186 per Lord Porter. See also the American Law Institute Second Restatement of the Law of Torts, s. 463.

4. [1976] Q.B. 286.

5. Ibid., p. 291.

term on the parties.[6] However, the essence of the doctrine of contributory negligence is that it enables the court to make a fair adjustment of the parties' rights in a case where the plaintiff has failed to use reasonable care in his own interests so as to become, at least partially, the author of his own injury.[7] It was this realisation that led Lord Atkin to say[8] that he found it impossible to divorce any theory of contributory negligence from the concept of causation, and led Grange J. in Re Weinstein[9] to say:

> "The principle that where a man is part author of his own injury he cannot call upon the other party to compensate him in full, has long been recognised as applying in cases of tort ... I see no reason why it should not equally be applicable in cases of contract."[10]

2.3 If such apportionment is not available in contract, where P's acts are the predominant cause of his loss they are likely to be held to break the chain of causation and he will recover nothing.[11] On the other hand, where P's acts contribute substantially to his loss but are held not to be the predominant cause, he will recover in full. While the introduction of apportionment may adversely affect P in the second case, if P is the part author of his own loss apportionment is more likely to reflect the equities between the parties than would a solution in which he won or lost entirely.

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6. See para. 4.4 below.

7. Charlesworth & Percy on Negligence (7th ed., 1983), para. 3-02.

8. Caswell v. Powell Duffryn Associated Collieries Ltd. [1940] A.C. 152, 165.

9. (1983) 26 R.P.R. 247. (Ontario High Court).

10. Ibid., p. 266.

11. Treitel, The Law of Contract (7th ed., 1987), p. 761. See Lambert v. Lewis [1982] A.C. 225, para. 4.21 below.

2.4 The introduction of apportionment in contract cases might be thought to give rise to the prospect of P being liable to a deduction in his damages because he has relied on D to perform his part of the contract and has failed to check, supervise or otherwise guard against breach of contract by D. The approach of the courts to the question of whether conduct in fact amounts to contributory negligence suggests that this will usually be unlikely. For instance, it has been said that the scope for contributory negligence may well be limited in the case of negligent misstatement:

> "If it is reasonable to rely on [the statement], it is difficult to envisage circumstances where as a matter of fact it would be negligent to do so ...".[12]

By the same reasoning, the contractual undertaking of a task by D will normally entitle P to rely on D carrying out his undertaking and acting carefully in doing so.[13]

> "It does not lie in the mouth of the promisor [D] to say that a promisee [P] has no right to assume that a promise has been faithfully carried out and should make his own inquiries to see whether it is or not. If everything done under contract has to be scrutinised and tested by the other party before he can safely act upon it, many transactions might be seriously held up".[14]

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12. JEB Fasteners Ltd. v. Marks Bloom & Co. [1981] 3 All E.R. 289, 297 per Woolf J., aff'd. [1983] 1 All E.R. 583, (accounts prepared by auditors). See also Simonius Vischers & Co. v. Holt [1979] 2 N.S.W.L.R. 322, 329-330; Dugdale & Stanton, Professional Negligence, (2nd ed., 1989) 21.24-21.26.

13. Williams, pp. 214 ff and 374 ff; Sims v. Foster Wheeler Ltd. [1966] 1 W.L.R. 769, 777; Driver v. William Willett (Contractors) Ltd. [1969] 1 All E.R. 665, 672.

14. Compania Naviera Maropan S/A v. Bowaters Lloyd Pulp and Paper Mills Ltd. [1955] 2 Q.B. 68, 77 per Devlin J., approved in Reardon Smith Line Ltd. v. Australian Wheat Board [1956] A.C. 266 (ship may refuse to accept the nomination by a charterer of an unsafe port, but if master complies, it does not, subject to the ordinary rules as to remoteness and causation, relieve the charterer of liability).

2.5 In Becker v. Medd,[15] P, an egg importer, employed D as his sole agent in England. D was to pay all money he received into P's account, keeping all the relevant books and rendering to P a regular account. D's clerk over a period of time appropriated £951 and P alleged that the frauds were due to D's negligent supervision of the clerk. D in turn alleged that P had been negligent in not examining the accounts and other documents sent to him each month. Although the jury found negligence on both sides, the Court of Appeal held that P owed no duty to D.[16] Lord Esher M.R. said:

> "The person who had undertaken the duty could not say that he had been negligent in the performance of the duty, but that the other person was guilty of contributory negligence in not finding him out".[17]

2.6 On principle, a court today should also conclude, as did Lord Esher M.R., that P was not contributorily negligent. Moreover, even where P has made a positive mistake, failed to appreciate a danger, or taken a risk, similar reasoning may preclude a finding that he has been contributorily negligent. Thus, where an accountant who had undertaken to prepare P's tax return used erroneous calculations submitted to him by P, it was held that P had not been contributorily negligent.[18] A participant in a physical education class who injured himself by slipping on a highly polished and unsafe floor was assumed not to have been contributorily negligent for failing to foresee that such an accident might occur. He trusted the organisers "who were, so

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15. (1897) 13 T.L.R. 313, applied in Cosyns v. Smith (1983) 146 D.L.R. (3d) 622 (P's failure to check that insurance agent, who had undertaken to provide coverage, had done so).

16. This aspect of Lord Esher M.R.'s reasoning involved the assumption that contributory negligence on P's part requires a breach of duty owed to D. See, generally, Williams, p. 349 ff.

17. Ibid., p. 314. See also Roles v. Nathan [1963] 1 W.L.R. 1117, 1123.

18. Walker v. Hungerfords (1987) 44 S.A.S.R. 532, 553, aff'd. (1988) 84 A.L.R. 119.

to speak, in command".[19] Again the conduct of a tenant who continued to use the only window in a bedroom where one of its sash cords was broken and the landlord had failed to repair it, was "lawful, reasonable and free from blame".[20]

2.7 Where P and D are in a contractual relationship, the starting point in the determination of whether there has been contributory negligence should be the contract itself.[21] In some cases, it would be inconsistent with the contractual term breached by D to reduce P's damages. Thus, much liability insurance is concerned with shifting the risk of one's negligence. It would be odd if an insurer, who was contractually obliged to pay an agreed sum in the event of P's negligence, was able to reduce this sum on account of that very same negligence.[22] In other cases P's undertaking will be relevant. For instance, where D is the occupier of premises which P has entered pursuant to a contract, P may be held to have impliedly agreed that he

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19. Gillmore v. L.C.C. [1938] 4 All E.R. 331, 336; Jerred v. T. Roddam Dent & Son Ltd. [1948] 2 All E.R. 104, 107 (employees who were in breach of safety regulations not contributorily negligent where employers had accepted responsibility of directing employees when it was safe to start work).

20. Summers v. Salford Corp. [1943] A.C. 283, 296 per Lord Wright.

21. In Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck) [1989] 3 All E.R. 628, insufficient attention may have been paid to the contract. Hobhouse J. ([1988] 1 Lloyd's Rep. 514, 530-1, 554) and the Court of Appeal (at pp. 640, 643, 672) regarded a mortgagee-bank as being contributorily negligent in failing independently to verify that a mortgaged vessel was insured, even though there existed a contract between the bank and the insurer that the latter should inform the bank promptly it ceased to insure a vessel and even though the bank had made a specific enquiry of the insurer at a time when the latter almost certainly knew that they would be justified in refusing to treat the vessel as insured.

22. An insurer is generally liable to indemnify the assured against a loss even where it was caused by the negligence of the assured: MacGillivray & Parkington on Insurance Law (8th ed., 1988) para. 471. Insurers can protect themselves by express terms providing that the assured should take reasonable care in safeguarding his interests which will mean that he must not act recklessly: W. & J. Lane v. Spratt [1970] 2 Q.B. 480.

would take reasonable care.[23] In such a case, the question is whether it follows from this that P has agreed to bear the entire loss if he fails to take care.

2.8 Where the risk has not been entirely allocated to one of the parties by the express terms of the contract, the cases[24] suggest that contributory negligence is more likely to be established in the following circumstances. First, where performance involves co-operation between the parties or in some sense a joint enterprise.[25] This is likely to be the case in the context of construction where the responsibilities and liabilities of those engaged in the project are interwoven.[26] Secondly, where P actually knows of the risk. For instance, if a passenger in a railway carriage knows that the door is defective and yet leans upon it and falls out, it is difficult to see why the passenger should not be said to be contributorily negligent.[27] Even a failure to check could constitute contributory negligence if P had greater expertise than D or possibly where experience showed that negligence on the part of a person in D's position is common.[28] However, a lay client or consumer contracting with a professional would be less likely to be held to be

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23. See paras. 4.9 and 4.21 below.

24. See paras. 2.5 - 2.7 above.

25. A number of cases in which contributory negligence in contract has arisen have been cases in which co-operation was required or in which one of the issues was whether there was joint responsibility for a particular part of performance: for instance, A.B. Marintrans v. Comet Shipping (The Shinjitsu Maru No. 5) [1985] 1 W.L.R. 1270, (whether responsibility for stowage on owner, charterer or both); Husky Oil Operation Ltd. v. Oster (1978) 87 D.L.R. (3d) 86.

26. Likierman Report, op. cit., (Construction Professionals Study Team) paras. 0.2, 9.2.

27. Williams, p. 214 ff and the facts of Adams v. Lancs. & Yorks. Ry. (1869) L.R. 4 C.P. 739. Cf. Brookes v. L.P.T.B. [1947] 1 All E.R. 506.

28. Grant v. Sun Shipping Co. Ltd. [1948] A.C. 549, 567; Quinn v. Burch [1966] 2 Q.B. 370, 381, and see Appendix below.

contributorily negligent.[29] A person will not be held to be contributorily negligent unless he has acted unreasonably, and it will not normally be unreasonable for a party to a contract to rely on the other party performing the task he has undertaken.

2.9. The following examples are intended to give a general idea of the type of case in which contributory negligence may be relevant in a contractual context.

(a) A passenger (P) in the front seat of a private hire car is injured as a result of the negligent driving of D. P may sue either in tort, alleging the breach of a duty of care, or in contract, alleging the breach of an implied term that the driver would use reasonable skill and care. If the passenger failed to wear a safety belt and sued in tort he would, prima facie, be contributorily negligent and be liable to a proportionate reduction in his damages.[30] If apportionment is possible in actions for breach of contract the result would be the same. If it is not, the passenger would, by suing in contract, either recover in full or, if the court found that his injuries were caused not by the driver's breach but by his own carelessness, not at all. Similarly, an employee who is contributorily negligent in respect of an injury sustained at work and sues his employer in contract rather than in tort would not be subject to a reduction in damages.[31]

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29. Walker v. Hungerfords; Cosyns v. Smith; Gillmore v. L.C.C. above, para. 2.7; Dugdale & Stanton, Professional Negligence, (2nd ed., 1989), para. 21.25.

30. Froom v. Butcher [1976] Q.B. 286.

31. Conceptually, it is perhaps more natural to base the employer's duties on implied terms of the contract: see P.S. Atiyah, An Introduction to the Law of Contract (4th ed., 1989), p. 215. Cf. Hawkins v. Clayton (1988) 62 A.L.J.R. 240 (per Deane J.).

(b) A company (P) engages D to supply and install a new transformer in its factory. P's foreman and D work together in checking electrical circuitry, but neither realises that the main cable will be unable to cope with the increased power requirements once the transformer is installed. After installation the power is switched on and the cable is burned out. No physical damage is caused to the factory or its equipment but it takes the electricity company three days to repair their cable, during which time no production is possible. D may have been in breach of his contractual duty to perform to the standard of a competent electricity contractor.[32] However, it is unlikely that he will be liable in tort for P's economic loss.[33] In view of the specialised nature of the problem and his knowledge of the day to day running of the plant and the potential danger, it was proper for P's foreman to participate in the decision to proceed with the installation, but his participation and co-operation involved a serious miscalculation. There was therefore breach of a contractual duty of care by D and contributory negligence by P. If apportionment is not possible in contractual actions, P would either recover in full or not at all.

(c) A customer (P) buys an iron from a retailer (D). When taking it out of the package, he notices that the heat dial has fallen off and that it is defective in several other ways. Nevertheless, he uses it and ruins a shirt. Assuming that there was no negligence on D's part, P sues D for breach of his undertaking that the iron will be of merchantable quality and reasonably fit for its purpose.[34] If contributory negligence by P is no defence in an action for the breach of D's strict contractual duty, again P would either recover in full or not at all.

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32. Supply of Goods and Services Act 1982, s. 13 (duty to use reasonable care and skill).

33. Muirhead v. Industrial Tank Specialities Ltd. [1986] Q.B. 507; para. 4.3 below.

34. Sale of Goods Act 1979, s. 14.

(d) If the defect in the iron in the example in (c) could have been discovered by D had he exercised reasonable care, P could sue D in tort in addition to contract. The liability in tort and contract is not the same since D owes a stricter duty in contract than he does in tort. If apportionment is possible in this case but not in (c), the careless seller who is liable in contract and in tort will be in a more favourable position than the careful seller who is liable only in contract, since the buyer's damages will be reduced in the former, but not the latter, case.

(e) One of two bedroom windows in a house leased by D to P and subject to a covenant to repair, is in a dangerous state. P, knowing of this, continues to open and close it, and is injured one day doing so. Assuming that there was no negligence on D's part, P sues D in contract for breach of the strict duty under the repairing convenant. Under the present law, apportionment is not possible and P will either recover in full or lose entirely. If, however, D has also failed to take reasonable care that P is reasonably safe from personal injury or damage to property, P could also, as in example (d), sue D in negligence.[35] If apportionment is possible in this case but not where there is non-negligent breach of the repairing covenant, the careless landlord, who is liable in contract and in tort, will be in a more favourable position than the careful one who is liable only in contract.

2.10 To sum up, in a contractual context P's conduct may be held to be contributorily negligent if (i) judged by reference to the contractual obligations undertaken by D, P's conduct was unreasonable and, (ii) this conduct contributed, together with D's breach of contract, to cause P's loss.

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35. Defective Premises Act 1972, s. 4; Smith v. Bradford M.C. (1982) 44 P. & C.R. 171.

PART III

The Present Law

1. The law before 1945 and its reform

3.1 Before 1945, contributory negligence constituted a complete defence to an action in tort.[1] It was immaterial that the fault of P was slight and that of D great.[2] Reform of the general law[3] came with the Law Reform (Contributory Negligence) Act 1945, which allows a court, where P's loss results partly from D's fault and partly from his own fault, to reduce his damages by a proportion commensurate with his blameworthiness. The relevant provisions of the 1945 Act are sections 1 and 4:

> 1. (1) Where any person suffers damage as the result partly of his own fault and partly of any other person's, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:
>
> Provided that -
>
> (a) this subsection shall not operate to defeat any defence arising under a contract;
>
> (b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable...

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1. The leading case was Butterfield v. Forrester (1809) 11 East 60.

2. The rule produced injustice in such cases, and a number of exceptions were devised, such as the so-called "last opportunity" rule, i.e. that the loss should fall on the party who had the last opportunity to prevent the loss or damage in question: Davies v. Mann (1842) 10 M. & W. 546.

3. A scheme of apportionment already operated in cases of collisions at sea, under the Maritime Conventions Act 1911.

> 4. ... "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

3.2 The 1945 Act does not state explicitly whether or not it applies to contract actions.[4] Section 4 provides a single definition of fault, although it appears to be generally agreed[5] that the first part relates to D's fault and the second part to P's fault. Thus:

(1) D's fault consists of "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort". Usually, this will not refer to P's fault because P can be contributorily negligent without his conduct being actionable.[6]

(2) P's fault consists of "other act or omission which ... would, apart from this Act, give rise to the defence of contributory negligence". This does not refer to D's fault because such an act or omission might not be actionable.[7]

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4. The mischief against which the Act was aimed was a problem in the law of tort: see the Law Revision Committee's Eighth Report (Contributory Negligence), Cmd. 6032 (1939). Cf. the Irish Civil Liability Act 1961, section 2(1) of which defines "wrong" (the equivalent of "fault" in the English Act) to mean "a tort, breach of contract or breach of trust".

5. See, for instance, McInerney J. in A.S. James Pty. Ltd. v. Duncan [1970] V.R. 705, 725-726, and Prichard J. in Rowe v. Turner Hopkins and Partners [1980] 2 N.Z.L.R. 550, 555-556, whose judgment was approved in Basildon D.C. v. J.E. Lesser (Properties) Ltd. [1985] Q.B. 839, 849 and in Vesta v. Butcher [1988] 3 W.L.R. 565, 577. Also, Palmer & Davies, p. 416, and Burrows, op. cit., p. 75. Cf. Chandler, op. cit., pp. 165-166.

6. Cf. Vesta v. Butcher [1988] 3 W.L.R. 565, 573, where O'Connor L.J. observed that both parts of the definition may apply to P's fault, since P's contributory negligence may be actionable. Nevertheless, he recognised that if P's fault came within the first part of the definition it would necessarily come within the second part.

7. Burrows, op. cit., p. 75; Palmer & Davies, p. 416 n. 7.

3.3. The court is empowered to reduce the damages to such an extent as it thinks "just and equitable having regard to the claimant's share in the responsibility for the damage". In determining "responsibility" both causation and blameworthiness are taken into account.[8] Although there is often no separate consideration of what is just and equitable, a court may base its decision on this.[9] In a contractual context, the fact that it is normally reasonable for P to rely on D performing his undertaking will often mean that his conduct is not contributorily negligent.[10] However, in some circumstances where it is, it may nevertheless not be just and equitable in the light of D's undertaking, to reduce the damages awarded.[11]

3.4 The trend of the comparatively few English decisions has been to allow apportionment of damages, at least in some contract actions, while the trend of the decisions in several common law jurisdictions[12] has been the other way.[13] Before considering the case law since 1945, we consider the arguments for and against the proposition that, on its

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8. Winfield & Jolowicz on Tort (13th ed., 1989), p. 166.

9. Hawkins v. Ian Ross (Castings) Ltd. [1970] 1 All E.R. 180, 188 (even if P contributorily negligent, not just and equitable to reduce damages).

10. See paras. 2.4 - 2.8 above.

11. See Banking Services: Law and Practice, Report by the Review Committee (1989) Cm 622, para. 6.14, discussed in the Appendix below.

12. Since many common law jurisdictions have similar statutory provisions (e.g. the New Zealand Contributory Negligence Act 1947, the Victoria Wrongs Act 1958, the Ontario Negligence Act 1970), the case law from these jurisdictions is directly in point.

13. In Belous v. Willetts [1970] V.R. 45, A.S. James Pty. Ltd. v. Duncan [1970] V.R. 705 and Harper v. Ashtons Circus Pty. Ltd. [1972] 2 N.S.W.L.R. 395, courts in Victoria and New South Wales refused to apply apportionment legislation to breach of contract actions. See Palmer & Davies, pp. 431-441; Trindade & Cane, The Law of Torts in Australia, (1985), pp. 428-429. Cf. Walker v. Hungerfords (1988) 84 A.L.R. 119, (apportionment allowed), para 2.7 above. In Rowe v. Turner Hopkins & Partners [1980] 2 N.Z.L.R. 550, Prichard J. said that

true construction, the 1945 Act applies in respect of actions for breach of contract.

2. Arguments that the 1945 Act does not apply to actions in contract

3.5 There are two principal arguments against the application of the 1945 Act to contract actions:

(i) Before 1945, contributory negligence was never a defence to actions in contract, so that the conduct of P could never be such as "would, apart from this Act, give rise to the defence of contributory negligence".

(ii) The definition of fault in s. 4 does not encompass a breach of contract by D.

3.6 As for the first of these arguments, in Vesta v. Butcher[14] Sir Roger Ormrod said:[15]

> "... I remain quite unconvinced that contributory negligence, as such, at common law had any relevance in a claim in contract. ... Had contributory negligence been a defence at common law to a claim for damages for breach of contract the reports and the textbooks prior to 1945 would have been full of references to

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13. Continued
the Act could only apply where D's act or omission was actionable in tort and where concurrent liability in contract was immaterial. The New Zealand Court of Appeal ([1982] 1 N.Z.L.R. 178), though not having to deal with this question, said that it should not necessarily be regarded as having assented to the view (described as narrow) taken by Prichard J.

14. [1988] 3 W.L.R. 565, 589.

15. A view shared by Judge John Newey Q.C. in Basildon D.C. v. Lesser (Properties) Ltd. [1985] Q.B. 839, by Neill L.J. in A.B. Marintrans v. Comet Shipping (The Shinjitsu Maru No. 5) [1985] 1 W.L.R. 1270 and by Dillon L.J. in Tennant Radiant Heat Ltd. v. Warrington Development Corp. [1988] 1 E.G.L.R. 41, expressly adopting the statement of Sir Roger Ormrod cited above.

it".[16]

3.7 Professor Glanville Williams has contended that contributory negligence was a defence at common law to actions for breach of contract.[17] Although there is no English case containing a systematic examination of the pre-1945 authorities, in the Australian case of A.S. James Pty. Ltd. v. Duncan,[18] McInerney J. concluded, after such an examination, that contributory negligence was not a defence to an action in contract at common law:

(a) The railway cases, where the passenger's contributory negligence was a defence to his claim against the carrier, appear to have been negligence actions rather than breach of contract actions.[19]

(b) In some cases the question was left open.[20]

(c) In other cases conflicting views were expressed.[21]

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16. O'Connor L.J. took the view that contributory negligence was a defence before 1945 in cases where there were concurrent duties owed in contract and tort. Neill L.J., while reluctantly agreeing with O'Connor L.J. that apportionment under the 1945 Act is possible in category (3) cases, does not make clear his view on the position at common law.

17. Williams, pp. 214-222.

18. [1970] V.R. 705. Similarly, the South African Apportionment of Damages Act 1956 does not apply to actions for breach of contract: OK Bazaars (1929) Ltd. v. Stern and Ekermans 1976 2 S.A. 521 (C).

19. Williams, p. 214 n. 1.

20. e.g. Martin v. Great Northern Railways (1855) 16 C.B. 179; 139 E.R. 724.

21. e.g. Burrows v. March Gas Co. (1870) L.R. 5 Exch. 67; (1872) L.R. 7 Exch. 96.

(d) There were cases where the question did not arise because there was a finding of fact that there was no contributory negligence.[22]

(e) There were cases where P's failure to take reasonable care was held to be the cause of his damage rather than anything done by D.[23]

(f) There were other cases which were limited to a particular context.[24]

3.8 The second argument against the application of the 1945 Act to actions in contract is that breach of contract by D does not come within the definition of fault in section 4. D's fault must be "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort". Accordingly, breach of contract does not come within the definition.[25] An alternative version of this argument is that a breach of contract which does not also give rise to liability in tort does not come within the definition. It was the latter argument which the Court of Appeal in Vesta accepted, since none of the judgments would allow for apportionment where there was breach of contract simpliciter, but only where there was liability in tort and where breach of contract was thus immaterial.[26]

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22. e.g. Re Government Security Fire Insurance Co. (1880) 14 Ch.D. 634.

23. e.g. Quinn v. Burch [1966] 2 Q.B. 370.

24. e.g. Young v. Grote (1827) 4 Bing. 253 and London Joint Stock Bank v. Macmillan [1918] A.C. 777 may be limited to the particular context of the relationship between banker and customer. See Appendix below.

25. See Neill L.J. in A.B. Marintrans v. Comet Shipping (The Shinjitsu Maru No. 5) [1985] 1 W.L.R. 1270, 1288 and Sir Roger Ormrod in Vesta v. Butcher [1988] 3 W.L.R. 565, 589.

26. See para. 3.25 below.

3. Arguments that the 1945 Act does apply to actions in contract

3.9 When the 1945 Act was passed, the circumstances in which there existed concurrent liability in contract and tort were fewer than today.[27] It may be, therefore, that it was not thought necessary to draft the Act with such situations in mind.[28] Nevertheless, it has been argued, principally by Professor Glanville Williams,[29] that the 1945 Act does apply to breach of contract actions. We now turn to examine his main arguments:[30]

(1) "Negligence" in section 4 is not limited to negligence which is actionable in tort, but includes a breach of contract which occurred through D's negligence (a so-called negligent breach of contract). Thus, fault under section 4 includes all cases of negligence and breaches of statutory duty (not limited by the requirement of actionability in tort) and, in addition, other acts or omissions providing they gave rise to a liability in tort.

The two main problems with this construction are that:

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27. For instance, at one time solicitors owed their clients only a contractual duty (Groom v. Cocker [1939] 1 K.B. 194) but now they may owe duties of care in tort, not only to their clients (Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1979] Ch. 384) but also to third parties (Ross v. Caunters [1980] Ch. 297). For a criticism of the modern position, see Kaye, "Liability of Solicitors in Tort" (1984) 100 L.Q.R. 680. Quaere whether after Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. [1986] A.C. 80 and Greater Nottingham Co-op. v. Cementation Ltd. [1989] Q.B. 71 courts will be as willing to superimpose a tortious duty of care on a contractual one: see para. 4.3 below.

28. Nonetheless, the common law had long recognised that, in respect of certain "common callings" (e.g. the common carrier of goods, the common innkeeper and the carrier of passengers) D owed a duty of care independently of contract. See Kaye, op. cit., pp. 686-692; Chandler, op. cit., pp. 154-161.

29. Williams, pp. 328-332.

30. Williams (at p. 331) also raised the argument (albeit one which he conceded was not justiciable) that the legislative history of the 1945 Act suggests that it was designed to apply in contract cases, on the

(a) "[I]t is not easy to understand why the words 'act or omission' must be read as limited to those acts or omissions which give rise to a liability in tort, while the words 'negligence' and 'breach of statutory duty' are not to be regarded as similarly limited".[31]

(b) The phrase "negligent breach of contract" is misleading because in contract law the manner of the breach is irrelevant to liability. If D is in breach, it is of no account that he acted carefully or negligently.[32] If the Act were to apply where D negligently broke his contract, but not where he was simply in breach, then he would have an incentive to act negligently in the hope that if P was also at fault, there would be apportionment.

(2) Where the same act or omission is a tort and a breach of contract so that the Act would apply to the tort, it should also apply to the breach of contract.

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30. Continued
ground that a clause, which stated that the Act was not to apply to any claim under a contract, was removed, to be replaced by the present s. 1 (1) (b). However, Palmer & Davies, p. 417 n. 9, argue that it is equally plausible to suggest that the original intention was to exclude contract actions and that the specific reference to such actions was dropped because it was felt to be redundant or confusing in a proviso designed mainly to preserve the power to exclude liability.

31. A.S. James Pty. Ltd. v. Duncan [1970] V.R. 705, 726.

32. The phrase dates from the dissenting judgment of Greer L.J. in Grein v. Imperial Airways Ltd. [1937] 1 K.B. 50. It was criticised by Paull J. in Quinn v. Burch Bros. (Builders) Ltd. [1966] 2 Q.B. 370 as appearing to suggest that liability in contract depends upon the manner of breach. He thought, however, that the phrase as used by Greer L.J. merely meant that there was breach of a term not to be negligent. Similarly, Treitel, The Law of Contract (7th ed., 1987), p. 759, says that the phrase "negligent breach of contract" refers to situations where liability arises for breach of a contractual duty of care and not to cases where liability for breach of contract is strict, but where the breach happens to have been committed negligently.

"The Act is paramount. Hence the new tort rule ought to be regarded as a matter of policy as exclusive of the old contract rule[33] where both issues arise in the same case."[34]

The argument is open to question for two reasons.

(a) It proceeds on the view that at common law the defence applied to breaches of contract, which is highly debatable.[35]

(b) If "negligence" in section 4 is limited to negligence which is actionable in tort,[36] a court should not on ordinary canons of statutory construction be allowed to interpret the section on the basis of policy in the face of its express wording.[37]

(3) The definition in section 4 should not be restrictive of the word "fault", so that it could include a negligent breach of contract. However, while this construction would have been feasible had section 4 read "fault includes...", it is not permissible since it is of the form, "fault means...". Hence any other meaning, other than that included in the definition, is excluded.[38]

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33. Williams assumes that contributory negligence was a complete defence in contract actions at common law.

34. Williams, p. 330.

35. See paras. 3.6 - 3.7 above.

36. If it is not so limited, there is no need for Williams's second argument at all.

37. Taggart, (1977) 3 Auck. U.L.R. 140, 145-6.

38. For judicial criticism of Williams's arguments, see Belous v. Willetts [1970] V.R. 45, 48-50 per Gillard J., and A.S. James Pty. Ltd. v. Duncan [1970] V.R. 705, 721-727 per McInerney J. In Harper v. Ashtons Circus Pty. Ltd. [1972] 2 N.S.W.L.R. 395, 401, Manning J.A. would have inclined to Williams's viewpoint had he not felt compelled by authority to do otherwise.

4. The case law since 1945

3.10 The leading case is now Vesta v. Butcher.[39] PP, a Norwegian insurance company, insured the owners of a fish farm against loss of fish from any cause. PP had earlier arranged for the reinsurance of 90% of the risk with London underwriters through brokers. It was a condition of the insurance and reinsurance contracts that a 24-hour watch be kept on the farm. The owners of the fish farm, when they saw their insurance policy, said that they could not comply with the 24-hour watch condition. PP telephoned the brokers to ask them to inform the reinsurers of this, saying that it would await confirmation that this was acceptable. However, the brokers took no action, PP never followed up its telephone call and the reinsurers never heard of any problem. Six months later a storm severely damaged the fish farm. PP paid out on the insurance contract but the reinsurers repudiated liability, inter alia, because of the breach of the 24-hour watch condition.

3.11 PP sued the re-insurers to recover the 90% indemnity and the brokers for breach of duty in not acting on the telephone conversation. The brokers argued that PP had been contributorily negligent in failing to follow up the original telephone call when no confirmation was forthcoming. Before Hobhouse J., the Court of Appeal and the House of Lords, PP succeeded against the reinsurers so that comments relating to contributory negligence in respect of PP's action against the brokers were strictly obiter. Nevertheless, Hobhouse J. and the Court of Appeal said that if PP had recovered substantial damages against the brokers, these damages would have been reduced under the 1945 Act by reason of PP's contributory negligence in not following up its telephone call.[40]

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39. [1988] 3 W.L.R. 565 (C.A.), aff'd [1989] 2 W.L.R. 290 (H.L.); noted (1988) 4 Const. L.J. 75, (1989) 63 A.L.J. 365; (1989) 48 C.L.J. 175; [1989] L.M.C.L.Q. 285.

40. The House of Lords did not deal with the issue of contributory negligence. Having held that PP could recover against the

3.12 At first instance,[41] Hobhouse J. adopted an approach originating in the academic literature[42] and identified three categories of contractual duties:

(1) Where D's liability arises from some contractual provision which does not depend on negligence on his part.

(2) Where D's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.

(3) Where D's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

3.13 In fact, there are several ways of classifying contractual duties:

(I) In terms of the nature of the duty, there is a two-fold division into (a) cases where liability for breach of contract is strict and (b) where liability is fault based.

(II) In terms of the source of the duty, there is also a two-fold division into (a) cases where liability sounds only in contract and (b) where there is concurrent liability in contract and tort.

(III) Combining the nature and source of the duty, there is the three-fold division used by Hobhouse J.: (a) cases of a strict duty

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40. Continued
underwriters, there was no question of recovering substantial damages against the brokers and therefore no need to discuss whether these damages could have been reduced on account of PP's contributory negligence.

41. [1986] 2 All E.R. 488.

42. See Part I, n. 2 above. This is now an accepted part of the case law. Cf. Smith (1988) 4 Constr. L.J. 75, 82.

owed only in contract;[43] (b) cases where a duty of care is owed only in contract; and (c) cases where a duty of care is owed concurrently in contract and tort.

3.14 The three-fold categorisation stems from the fact that the matter has always arisen in the context of the 1945 Act, an Act primarily concerned with tort. It should not obscure the fact that in principle there are two main types of contractual obligation: obligations which are strict and those which are fault based.[44]

Contractual liability strict

3.15 Most contractual duties are strict,[45] i.e. D's liability exists regardless of whether he was at fault or used all reasonable skill and care.

> "It is axiomatic that, in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best."[46]

3.16 Thus, where D agreed to sell 4 tons of hematine crystals to P but where, through no fault of his own, he failed to receive the goods

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43. In turn, strict contractual obligations can be divided into those which are broken by conduct amounting to negligence and those broken by conduct not amounting to negligence: Palmer & Davies, p. 446.

44. For the argument that the most fundamental classification of juridical obligations is that based on their nature, rather than their source, see Legrand, Elements d'une Taxinomie des Obligations Juridiques, (1989) 68 Can. Bar. Rev. 259.

45. Treitel, The Law of Contract (7th ed., 1987), pp. 642-646, from which the following discussion is drawn.

46. Raineri v. Miles [1981] A.C. 1050, 1086, per Lord Edmund-Davies.

from his own supplier, this was no defence in an action for non-delivery by P.[47] Similarly, where P's wife died as a result of drinking milk containing germs of typhoid fever, the supplier was held to be in breach of the implied condition of reasonable fitness for its purpose of consumption, even though he had not been lacking in reasonable skill and care.[48]

Contractual liability fault based

3.17 Whereas liability for breach of contract is typically strict, there are instances where D's obligation is limited to using reasonable skill and care. For instance the supplier of a service in the course of a business impliedly undertakes to carry out the service with reasonable skill and care.[49] In a building contract for the supply of work and materials, the contractor undertakes to do the work with all proper skill and care,[50] just as the doctor usually undertakes to use reasonable skill and care rather than to cure the patient.[51]

3.18 While an examination of the nature of contractual duties produces a division into strict duties and fault based duties, the picture is complicated by the fact that contractual duties may overlap with tortious duties. For instance, there may be an overlap between

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47. Barnett v. Javeri & Co. [1916] 2 K.B. 390.

48. Frost v. Aylesbury Dairy Co. [1905] 1 K.B. 608.

49. Supply of Goods and Services Act 1982, s. 13.

50. Young & Marten Ltd. v. McManus Childs Ltd. [1969] 1 A.C. 454, 465.

51. Thake v. Maurice [1986] Q.B. 644 (physician only to be taken to have guaranteed the success of medical treatment where he expressly said as much in clear and unequivocal terms).

fault based duties in contract and duties of care in tort,[52] as well as strict duties in contract and duties of care in tort.[53] It is this factor which produces the three-fold categorisation. In analysing the case law, we will use this categorisation which is an accepted part of the literature, but it should not necessarily dictate the pattern of any reform. To recapitulate:

Category (1) refers to those cases where D's liability exists solely in contract and regardless of fault: it is no excuse to say that he did his best or that he used all reasonable skill and care.

Category (2) refers to those cases where D's liability exists solely in contract but where his obligation is limited to using reasonable skill and care.

Category (3) refers to those cases where D's liability in contract to use reasonable skill and care co-exists with liability in the tort of negligence, and where proof of the existence of a contract is not necessary to establish liability in tort.

3.19 The expansion of tortious liability together with the development of concurrent liability in contract and tort has led some to question the significance and indeed the existence of category (2).[54] However recent developments in the law of tort, particularly in the context of economic loss, reveal a growing reluctance to find

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52. Professionals may owe concurrent duties in contract and tort: Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1979] Ch. 384 (solicitors); Thake v. Maurice [1986] Q.B. 644 (surgeons); Vesta v. Butcher [1988] 3 W.L.R. 565 (insurance brokers).

53. The retailer who sells food unfit for human consumption would, in addition to facing prosecution, be liable to be sued either in tort or in contract, in the latter case for breach of the strict duties owed under s. 14 of the Sale of Goods Act 1979. For another example, see para. 3.33 (iii) below.

54. Buckley, The Modern Law of Negligence (1988), para. 4.13.

liability in tort where the parties are in a contractual relationship.[55] Category (2) will accordingly continue to be of importance.

Category 1

3.20 There is recent Court of Appeal authority for the proposition that where P sues D for the breach of a strict contractual duty, P's damages cannot be reduced under the 1945 Act on account of his contributory negligence.[56] Lessees sued the landlord for negligence and nuisance. The landlord counter-claimed for breach of a strict repairing covenant in the lease. The Court of Appeal held that apportionment under the 1945 Act was not possible, so that at first sight it would appear that the landlord's damages could not be reduced on account of his negligence. However, by an unusual application of causation principles, the court was in fact able to apportion the damages in that case.[57]

3.21 As for the application of the 1945 Act, Dillon L.J. said:

> "...(it) has no application to the present case, since the breach of covenant on the part of the lessee does not fall within the statutory definition of 'fault' in section 4...".[58]

Croom-Johnson L.J. said:

> "Breach of a strict duty under a contract has never given rise to the defence of contributory negligence."[59]

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55. See para. 4.3 below.

56. Tennant Radiant Heat Ltd. v. Warrington Development Corp. [1988] 1 E.G.L.R. 41; Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck) [1989] 3 All E.R. 628.

57. See paras. 4.11, 4.25 - 4.26 below.

58. Tennant Radiant Heat Ltd. v. Warrington Development Corp. [1988] 1 E.G.L.R. 41.

59. Ibid.

Category 2

3.22 There is some authority that the Act can apply where D is in breach of a duty of care owed only in contract, although it is doubtful whether it is consistent with the approach of the Court of Appeal in Vesta v. Butcher.[60] In Artingstoll v. Hewen's Garages Ltd,[61] P claimed damages from D on the ground that the accident in which he had been involved had been caused by D's negligence and/or breach of a contractual duty of care in failing to carry out an M.O.T. test, five weeks before the accident, with reasonable skill. On the facts, P failed to discharge the necessary burden of proof, though Kerr J. considered that, even if P's action sounded solely in contract, his damages could be reduced on account of his negligent driving.

> "I cannot believe that, if an accident is caused both by a breach of contract on the part of the authorised examiner and by careless driving, or worse, on the part of the plaintiff, the plaintiff would either recover the whole of his loss or nothing at all."[62]

3.23 However, the judge said that he had not heard full argument on the point, that the matter did not arise for decision and in any event he thought that the contractual duty of an authorised examiner was largely co-extensive with a tortious duty. Hence, the case is not strong authority for the application of the Act in category (2) cases.

3.24 In De Meza & Stuart v. Apple[63] DD negligently prepared accounts for PP to use for insurance purposes. PP was consequently under-insured and unable to recover from its insurers in respect of loss of earnings due to a fire. PP sued DD who contended that PP's

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60. [1988] 3 W.L.R. 565.

61. [1973] R.T.R. 197.

62. Ibid., p. 201.

63. [1974] 1 Lloyd's Rep. 508; aff'd. [1975] 1 Lloyd's Rep. 498 (C.A.).

conduct had contributed to its loss. Brabin J held that DD was in breach of its contractual duty of care, that its breach was a causative factor in PP's loss but nevertheless apportioned the loss 70:30 under the 1945 Act, which he said applied in a case of "a contract which imposes a duty of care and there is a breach of a duty not to be negligent or as otherwise stated a negligent breach of contract".[64] However:

(i) The Court of Appeal expressly declined to express an opinion on the applicability of the 1945 Act.[65]

(ii) It is difficult to see how De Meza is consistent with Vesta v. Butcher,[66] where Sir Roger Ormrod said:

> "The context of the 1945 Act, and the language of section 1, to my mind make it clear that the Act is concerned only with tortious liability and the power to apportion only arises where the defendant is liable in tort and concurrent liability in contract if any, "is immaterial": see the passage in the judgment of Prichard J. in Rowe v. Turner Hopkins and Partners .... cited in the judgment of O'Connor L.J."[67]

(iii) There is also Commonwealth authority which does not support the decision. After a full examination of the arguments,[68] the Supreme

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64. Ibid., p. 519. For a criticism of the phrase "negligent breach of contract", see para. 3.9 above.

65. Counsel on both sides, for tactical reasons, declined to argue the point before the Court of Appeal though given the opportunity to do so: [1975] 1 Lloyd's Rep. 498, 509.

66. [1988] 3 W.L.R. 565.

67. Ibid., p. 589. On the facts of Vesta, although pleaded as a breach of an implied term of the contract, Sir Roger Ormrod said that it might be more accurate to say that the contract between PP and the brokers created a degree of proximity sufficient to give rise to a duty of care and so a claim in negligence. With respect, it is difficult to see how this reasoning is consistent with the advice of the Privy Council in Tai Hing Cotton Mill v. Liu Chong Hing [1986] A.C. 80 or with Greater Nottingham Co-op. v. Cementation Ltd. [1989] Q.B. 71: see para. 4.3 below.

68. See para. 3.5 ff.

Court of Victoria in A.S. James Pty. Ltd. v. Duncan[69] held that contributory negligence was not a defence to an action for breach of a contractual duty of care.

Category 3

3.25 It would appear from Vesta v. Butcher[70] that the 1945 Act applies only in category (3) cases. Accordingly, "fault" in s. 4 covers situations where D's conduct is actionable in tort even if P chooses to sue in contract.[71] Were this not the case, P could avoid the consequences of his contributory negligence by suing in contract rather than in tort.[72] In employers' liability cases an injured employee could thus have debarred the employer from relying on any contributory negligence by framing his action in contract.[73] O'Connor L.J. said:

> "...the Contributory Negligence Act cannot apply unless the cause of action is founded on some act or omission on the part of the defendant which gives rise to liability in tort: that if the defendant's conduct meets that criterion, the Act can apply - whether or not the same conduct is also actionable in contract."[74]

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69. [1970] V.R. 705.

70. [1988] 3 W.L.R. 565. Bearing in mind that the Court of Appeal's remarks were strictly obiter: see para. 3.11 above.

71. "The key is to be found in the words "which gives rise to a liability in tort" in section 4. There is nothing imperative about this formula; nothing to suggest that the action must actually be framed in tort. It would seem sufficient if the fault of the defendant were of the kind which normally or potentially produces tortious liability; i.e. were capable of being successfully sued upon in tort. If this requirement be satisfied, it would not matter whether the action were actually brought in tort or contract or anything else." Palmer & Davies, p. 445.

72. Although P thereby runs the risk of recovering nothing if his contributory negligence is found to be the cause of his loss, rather than anything done by D.

73. Vesta v. Butcher [1988] 3 W.L.R. 565, 571.

74. Ibid., p. 577, adopting a passage from the judgment of Prichard J. in Rowe v. Turner Hopkins [1980] 2 N.Z.L.R. 550.

3.26 Neill L.J., while finding it difficult to see how, on a proper construction of the 1945 Act, P's damages could be reduced when suing in contract, felt bound to concur in the conclusion reached by O'Connor L.J.[75] Sir Roger Ormrod, while taking the view that contributory negligence was not a defence to an action in contract at common law, thought that the power to apportion only arose where there existed tortious liability, so that any concurrent contractual liability was immaterial.[76]

3.27 Hobhouse J., at first instance,[77] took the view that the Court of Appeal's decision in Sayers v. Harlow U.D.C.,[78] was authority for the proposition that apportionment was permissible in category (3) cases. Sayers contained no examination of the wording of the Act, though the Court may have regarded it as axiomatic that the Act applied where P enjoyed alternative causes of action in tort and contract.

3.28 The facts were as follows. P paid a penny to use a public lavatory owned by D. The lock was defective, due to D's negligence and P became trapped. In attempting to climb over the door, P used the paper-holder as a foothold, but carelessly failed to notice that it would move and cause her to lose her balance. She fell, was injured and sued in contract, on the basis that D had warranted that the cubicle was safe, and in tort. The Court of Appeal, proceeding largely

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75. Ibid., p. 586. In the earlier case of A.B. Marintrans v. Comet Shipping (The Shinjitsu Maru No. 5) [1985] 1 W.L.R. 1270, Neill L.J. had reached the opposite conclusion, viz. that the 1945 Act did not apply in contract actions.

76. Ibid., p. 589.

77. [1986] 2 All E.R. 488, 509.

78. [1958] 1 W.L.R. 623.

on the question of causation and remoteness and without investigating whether the Act applied to cases where P was suing for breach of contract, reduced P's damages by 25%. It is not clear whether the Court of Appeal regarded P's claim as contractual or tortious. Lord Evershed M.R. said:

> "... was her activity from which the damage ensued not a natural and probable consequence of the negligent act of the defendants within the formula in Hadley v. Baxendale?"[79]

3.29 The reference to Hadley v. Baxendale[80] suggests that Lord Evershed M.R. saw P's action as contractual, although he also said that nothing turned upon the foundation of liability.[81] While this might indicate that he considered that the 1945 Act was applicable regardless of whether the action was framed in contract or tort, it may be reading too much into the phrase to say that the defence of contributory negligence is available in any action for breach of contract.[82]

5. Conclusion: The desirability of reform

3.30 At present, it appears from Sayers and Vesta that a court has power to apportion damages under the 1945 Act only in category (3) cases. Dicta suggesting that apportionment is possible in category (2) cases,[83] cannot, it would seem, be taken to represent the law.

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79. Ibid., p. 625.

80. (1854) 9 Ex. 341.

81. [1958] 1 W.L.R. 623, 625.

82. Palmer & Davies, pp. 422-424, discuss various interpretations which may be placed on the words "nothing turns upon the foundation of liability". The context would suggest that Lord Evershed M.R. simply meant that the duty of care was no higher under the warranty of safety than under the common law duty of reasonable care.

83. Quinn v. Burch Bros (Builders) Ltd. [1966] 2 Q.B. 370; Artingstoll v. Hewen's Garages Ltd. [1973] R.T.R. 197; De Meza & Stuart v. Apple [1974] 1 Lloyd's Rep. 508.

3.31 When Parliament legislated in 1945, it had in mind tort law, not contract law, as being the area where reform was necessary. It is unlikely that the legislators could have foreseen the expansion of tort liability into areas which had previously been the sole preserve of the law of contract. This expansion of tort liability gives rise to potential anomalies resulting from the different treatment of purely contractual claims and concurrent claims in contract and tort. It has also focused attention on whether apportionment should be allowed in purely contractual claims. One commentator has written:

> "Supporters of the view that contributory negligence should apply to breach of contract are probably better advised to accept the Act's omission and to call for statutory amendment rather than trying to force breach of contract into the present wording."[84]

3.32 The difficulty in interpreting section 4 of the Act is reflected in the case law. Vesta v. Butcher,[85] the only English appellate authority which treats the matter in any detail, is not altogether satisfactory for several reasons.

(i) The Court's treatment of contributory negligence is, strictly, obiter.[86]

(ii) There was disagreement as to whether contributory negligence was a defence in contract actions before 1945. O'Connor L.J. thought that it was, at least where there was concurrent liability in tort; Sir Roger Ormrod disagreed.

(iii) Only O'Connor L.J. unequivocally accepted that the Act applied to contract in category (3) cases. Neill L.J. found difficulty in accepting that the Act applied where P's claim was for breach of contract. Sir Roger Ormrod, having said that the

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84. Burrows, Remedies for Torts and Breach of Contract (1987), p. 77.

85. [1988] 3 W.L.R. 565.

86. See para. 3.11 above.

1945 Act was concerned solely with tortious liability, went on to say that although the claim was for breach of contract "it might be more accurate" to see it as a tort.[87]

3.33 There are, moreover, several problems which remain unresolved:

(i) Whilst Vesta seems to suggest that the category (2) cases are no longer good law, there is no indication that the Court of Appeal was aware that its reasoning was inconsistent with those cases.

(ii) There is some doubt over the legitimacy of the application of causation principles in Tennant Radiant Heat Ltd. v. Warrington Development Corp.[88] Although the Court of Appeal in that case disallowed apportionment under the 1945 Act in category (1) cases, it achieved much the same result on the basis of causation.

(iii) It is an open question whether the 1945 Act applies in a contract action where P has a right of action in tort but which is not co-extensive with the one he enjoys in contract.[89] Take the

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87. See para. 3.24 above.

88. See paras. 4.25 - 4.26 below.

89. In Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd. [1971] 1 Q.B 88, it was assumed that it could where P sued both in tort and for breach of the implied condition of fitness for purpose under section 14 of the Sale of Goods Act. Quaere whether this would have been so had P chosen to proceed solely in contract. See also Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck) [1988] 1 Lloyd's Rep. 514, where Hobhouse J. (reversed on other grounds: [1989] 3 All E.R. 628) held that apportionment was not possible where the loss was caused by breach of a strict duty owed only in contract and not by breach of a separate contractual duty which existed concurrently with a tortious duty. Quaere whether apportionment is possible where loss is caused both by the breach of a strict contractual duty and also by breach of a separate contractual duty which exists concurrently with a tortious duty.

example[90] where D sells an iron to P which was obviously damaged and not fit for use. D could have discovered that it was defective if he had used reasonable care so that, in addition to his liability under the Sale of Goods Act, he was also liable in negligence. Following Vesta, it could be argued that apportionment would be possible because there was concurrent liability. This would produce the anomalous result that if D had merely been in breach of contract, he would be worse off than if he had also been negligent, because apportionment is not allowed in actions for breach solely of a strict contractual duty and so P would suffer no reduction in his damages. The apparent anomaly can, however, be avoided by analysis of the nature of the obligations in contract and tort. The particular breach of contract for which P would be suing, i.e. breach of D's duty under the Sale of Goods Act to sell goods which are of merchantable quality and fit for their purpose, is not actionable in tort. Proof of negligence in the contractual action is irrelevant whereas it is essential in tort. Any action in tort would be, for instance, for failing properly to inspect the goods before allowing them to be sold. In short, while the particular damage suffered may be recoverable both in contract and tort, there is no concurrent liability in contract and tort and apportionment would accordingly not be available under the present law.

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90. See para. 2.9 (d) above.

PART IV

Options for reform

4.1 We have seen that the 1945 Act and the cases do not deal satisfactorily with contributory negligence as a defence to actions for breach of contract. In this Part, we examine the policy arguments underlying what we consider are the two main options for reform.

(1) That the damages recoverable for breach of contract should not be apportioned.

(2) That the damages recoverable in respect of some or all contractual obligations should be apportioned.

1. No apportionment in contract

4.2 There are several arguments against the introduction of apportionment in actions for breach of contract.[1]

(a) The different nature of contractual and tortious obligations

4.3 Although in the last 40 years there may have been some movement in the direction of an assimilation of the rules of contractual and tortious liability,[2] the distinction between obligations in tort which are imposed as a matter of law and rights and obligations arising under a contract, which result generally

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1. For the contrary arguments, see paras. 4.19-4.32 below.

2. For instance, by the development of the law on promissory estoppel, misrepresentation, economic loss and the erosion of privity. See, generally, Atiyah, The Rise and Fall of Freedom of Contract, (1979), ch. 22, and Essays 1 & 2 in Essays on Contract (1986).

speaking, from agreement between the parties, remains valid.[3] Recent authority represents a move away from any assimilation,[4] and is favourable to the distinction between contract and tort. In Tai Hing Cotton Mill v. Liu Chong Hing Bank[5] Lord Scarman, delivering the advice of the Judicial Committee of the Privy Council, said:

> "Their Lordships do not believe there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships... either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe 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, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action."[6]

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3. See, for instance, Burrows, "Contract, Tort and Restitution-A Satisfactory Division or Not?" (1983) 99 L.Q.R. 217. It has been argued that three factors in particular have combined to destroy the coherence of this model: the widespread use of the standard form contract, the declining importance attached to free choice and intention as grounds of legal obligation and the growth of consumer protection: Atiyah, An Introduction to the Law of Contract, (4th ed., 1989), ch. 1.

4. Leigh & Sillivan v. Aliakmon Shipping Co. (The Aliakmon) [1986] A.C. 785; Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank [1986] A.C. 80; Bliss v. South East Thames R.H.A. [1987] I.C.R. 700; D. & F. Estates v. Church Commissioners [1988] 3 W.L.R. 368; Simaan General Contracting Co. v. Pilkington Glass Ltd. (No.2) [1988] Q.B. 758; Greater Nottingham Co-operative Society v. Cementation Piling & Foundations Ltd. [1989] Q.B. 71; Norwich City Council v. Harvey [1989] 1 W.L.R. 828; Pacific Associates v. Baxter [1989] 2 All E.R. 159.

5. [1986] A.C. 80. For a critique see Holyoak, "Concurrent Liability: A Judicial U-turn?" (1985) 4 Professional Negligence 198.

6. Ibid., p. 107.

4.4 Thus the central argument against the application of apportionment in contract actions is that, in the absence of an express or implied term to the contrary, a contracting party should not be liable to a reduction in his damages on the ground that he failed to take reasonable care in his own interests. Contractual liability is consensual, P and D having agreed their mutual obligations and P having provided consideration for the undertaking of which D is in breach. In these circumstances, if the parties have not agreed that P should take reasonable care in his own interests, the law should not impose such a term on them. If the contract imposes on P such a duty, of which he is in breach, then the matter can be dealt with, for example, by asking whether P's breach was the cause of his loss or whether D can counterclaim.[7]

4.5 Moreover, in certain contexts such as liability insurance, it would be repugnant to the nature of the agreement to take account of P's fault in assessing damages for breach of contract. It would also be odd in the normal case to require a contracting party to check that the other party was performing as required.[8]

4.6 In short, it is open to the parties to agree that P should take reasonable care in his own interests. In the absence of such agreement, to reduce P's damages on account of his fault is to import a term for which the parties have not bargained.

4.7 If taken to its logical conclusion this argument should prevent apportionment in all cases where there is a contractual obligation, even in category (3) cases where there are concurrent duties in contract and tort. This follows from the law of contract's

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7. See paras. 4.9 and 4.11 below.

8. See para. 2.4 ff above.

insistence that terms cannot be written into a contract in the absence of express or implied agreement. If what is relevant is the obligation, and if the parties have not contracted for P to take reasonable care in his own interests, then this allocation of risk should not be subverted simply because D fortuitously happens to be liable in tort as well as contract. P would obtain a more generous result by suing in contract rather than in tort, but so he does when he sues in tort to avoid an unfavourable contractual limitation period.[9] It is well established that where relationships give rise to duties in both contract and tort, P may frame his case in whichever cause of action is more beneficial to him.[10]

(b) Adequacy of existing contractual doctrines

4.8 It has been argued that existing contractual doctrines deal adequately with those cases where apportionment would otherwise be desirable.[11] The following matters will be considered:

(i) Breach of a contractual duty by P.

(ii) Failure to mitigate.

(iii) Causation.

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9. Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1979] Ch. 384.

10. Matthews v. Kuwait Bechtel Corp. [1959] 2 Q.B. 57.

11. See Hope J.A. in Harper v. Ashtons Circus Pty. Ltd. [1972] 2 N.S.W.L.R. 395, 404. Harris, Remedies in Contract and Tort (1988), pp. 50-51, argues against an extension of the 1945 Act beyond category (3) cases, because the rules of causation and mitigation already give P a sufficient incentive to take care to avoid loss once he knows of D's breach.

(i) Breach of a contractual duty by P

4.9 A contract may expressly or impliedly impose on P a duty to take care for his own interests. If the damage to P is partly caused by breach of such a contractual duty, D could counterclaim or plead that the exercise of reasonable care by P was a condition precedent to his (D's) liability or that P's breach entitled him to repudiate the contract. Thus, while a railway company is under a contractual obligation to carry luggage in the carriage with the passenger safely, this is subject to an implied condition that the passenger takes reasonable care of it.[12] In these circumstances it has been argued, the importation of the defence of contributory negligence into contract is unnecessary since the contract impliedly provides for the situation.[13] Apportionment would, moreover, undermine the contractual allocation of risk.

(ii) Failure to mitigate

4.10 The concept of the "duty to mitigate"[14] prevents P from recovering any loss caused by his failure to take reasonable steps to minimise the consequences of D's breach. The duty to mitigate does not arise until after the breach has occurred so that P does not have a duty to take precautions in case D breaks his contract. On the other hand, because the cause of action in contract arises on breach whereas torts are not usually actionable without damage, it means that the duty to mitigate has a wide ambit and therefore there is less need for

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12. Talley v. G.W.R. (1870) L.R. 6 C.P. 44. (passenger who left luggage unattended failed to recover).

13. Harper v. Ashtons Circus Pty Ltd. [1972] 2 N.S.W.L.R. 395, 404-405.

14. To call this a duty is misleading because it is not actionable in itself. It is a principle limiting damages recoverable by P: see The Solholt [1983] 1 Lloyd's Rep. 605.

some such doctrine as contributory negligence. For instance, if D in breach of contract fails to repair P's car properly and this is manifestly obvious when P begins driving but he nevertheless continues driving and crashes, a court would be entitled to hold that the crash was caused by P's failure to mitigate.

(iii) Causation

4.11 P may be prevented from recovering in respect of all or part of his loss if it was not caused by D's breach.[15] For instance, in Quinn v. Burch Bros. (Builders) Ltd.,[16] D, in breach of a contractual term to supply equipment which was reasonably necessary, failed to provide a suitable ladder for P, a sub-contractor. P used a trestle as a substitute and was injured but was unable to recover because the judge held that his injuries were caused not by D's breach but by his own carelessness in using the trestle in a dangerous way. Again, in Lambert v. Lewis,[17] a purchaser of a clearly faulty trailer was unable to recover from the retailer because his loss had been caused by his own negligence in continuing to use it without taking steps to repair it or ascertain whether it was safe, rather than by the fact that it was defective when he bought it. In Tennant Radiant Heat Ltd. v. Warrington Development Corp.,[18] where a roof had collapsed, the landlord's damages against his lessees for breach of a repairing covenant were substantially reduced because his negligent failure to keep the drainage outlets clear was a concurrent cause. Damages were

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15. As an alternative analysis to that of denying recovery on the basis of causation, P's intervening conduct may be said to make the loss too remote a consequence of D's breach of contract: see, for instance, Compania Financiera Soleada S.A. v. Hamoor Tanker Corp. (The Borag) [1981] 1 All E.R. 856, 864.

16. [1966] 2 Q.B. 370.

17. [1982] A.C. 225, and see further para. 4.21 note 33 below.

18. [1988] 1 E.G.L.R. 41.

apportioned "on a broad assessment"[19] as to 90:10 in favour of the lessees. The landlord's negligence and the lessees' breach of covenant were said to be concurrent causes of the damage operating contemporaneously, each springing from the breach of a legal duty but operating in unequal proportions, the former being a factor of nine-tenths of the united cause, the latter one-tenth.[20]

(c) Fault is generally irrelevant in contract

4.12 Since considerations of blameworthiness are inherent in the defence of contributory negligence while contract law operates on the basis of strict liability regardless of fault, P should be entitled to damages for non-performance regardless of how or why the breach occurred.

> "...negligence must surely contribute to negligence and be irrelevant to a strict or absolute obligation...".[21]

4.13 If fault on the part of D is irrelevant to the question whether there has been a breach, the fault of P should not be relevant to quantum.

> "...it may be contended that where a plaintiff has the good fortune to be owed a strict contractual duty as well as one of reasonable care, he should be entitled to the benefits which normally flow from that. The policy of the law appears to be that where there is a strict contractual duty and moral fault or

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19. Per Dillon L.J., ibid., p. 44.

20. Per Croom-Johnson L.J., ibid.

21. McGregor on Damages, (15th ed., 1988), para. 129A. The common law can be contrasted with the position in some civilian systems (e.g. German, Swiss and Austrian law) that fault is a requirement for the availability of contractual remedies. From this it follows in French and German law that, where there is contributory fault on the part of P, apportionment of damages is possible whether P sues in contract or tort. See Treitel, Remedies for Breach of Contract (1988), ch. 2; Nicholas, French Law of Contract (1982), pp. 198-199; Horn, Kotz and Leser, German Private and Commercial Law - An Introduction (1982), p. 153; Scottish Law Commission's Consultative Memorandum No. 73, Civil Liability - Contribution (1988), para. 5.30.

blameworthiness on the part of the defendant is irrelevant to liability, then moral fault on the part of the plaintiff is not per se a defence. Arguably, where a plaintiff sues for breach of a strict contractual duty he should not be prejudiced by the fact that another branch of the law also gives him a remedy, but one which is qualified by a provision for reduction of damages if he was at fault himself".[22]

(d) It would lead to uncertainty

4.14 Allowing apportionment in actions for breach of contract may add an unacceptable degree of uncertainty to the ambit of contractual agreements. Contracting parties may view with distaste the prospect of a court being able to reduce the amount of damages awarded for breach of contract by reference to the criteria of justice and equity, which are those used in the 1945 Act. Parties to both commercial and consumer transactions, it can safely be predicated, like to know as far as possible exactly where they stand: whether a particular term is a condition, when performance is due, whether time is of the essence and so forth. For the courts, in contract cases, to exercise the sort of discretion which they have under the 1945 Act may amount to judicial rewriting of agreements, many of which will have been negotiated between parties at arm's length. It will also be a factor complicating the arranging of insurance and the settlement of disputes. Where a contract is made between parties with unequal bargaining power, the uncertainty may well inhibit the weaker party from pursuing a claim.[23]

(e) Effect on other contractual doctrines

4.15 In its earlier work on contribution,[24] the Law Commission raised the problem of how the law on discharge by breach would be

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22. Swanton, op. cit., p. 288.

23. Cf. the absolute prohibition in consumer sales of exemption from the implied terms in ss. 13-15 of the Sale of Goods Act 1979, by the Unfair Contract Terms Act 1977, s. 6.

24. Law Com. No. 79 (1977), para. 30.

affected by allowing contributory negligence to be pleaded as a defence in contractual actions. For example, P engages a builder D and in breach of contract fails to pay an instalment. D therefore stops work altogether, though he is not entitled to do so. The difficult question arises whether D can raise P's initial non-repudiatory failure to pay the instalment as a partial defence to P's action against D for wrongful repudiation.

4.16 Another question is whether contributory negligence as a defence in contract would affect the rule in White & Carter v. McGregor.[25] This rule states that, in general, there is no obligation on an innocent party confronted with repudiatory conduct to accept the repudiation and sue for damages rather than keep the contract alive. It could be argued that P's failure to accept the repudiation was conduct contributing with that of D to cause his loss and thus which called for apportionment.

(f) Effect on consumer and standard form contracts

4.17 Where the Unfair Contract Terms Act 1977 is applicable, if D purports where he is himself in breach of contract to limit his liability where P fails to take reasonable care, and if the liability is for death or personal injury resulting from negligence, the limitation will be ineffective.[26] In other cases, the limitation will be subject to the requirement of reasonableness.[27] Thus, where D is in breach, the onus is on him to prove that any contract term limiting his liability is reasonable. To the extent that apportionment applies in respect of damages for breach of contractual obligations, it might

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25. [1962] A.C. 413.

26. Unfair Contract Terms Act 1977, s. 2(1). In such cases, if the 1945 Act applies, the court will be able to apportion damages and so achieve a result which the parties were unable to achieve.

27. Unfair Contract Terms Act 1977, sections 2(2), 3(2)(a) & 13.

be argued that in effect it would amount to a statutory form of exemption clause limiting the extent of D's liability where P was at fault. Since D would have the benefit of this if the law were reformed, there would be no need to make contractual provision for it. Hence the control of the 1977 Act would be circumvented and the onus would be on the consumer, or the person subject to D's written standard terms of business, to negotiate for a term providing that his contributory negligence will be irrelevant in an action against D for breach of contract. Although this would be possible in theory, consumers and parties to written standard forms will usually not have the bargaining position to achieve this.

2. That apportionment should be available in respect of breaches of some or all contractual obligations where loss is partly caused by the plaintiff

4.18 The arguments in favour of apportionment in contract actions are set out under similar headings as the arguments against apportionment considered above in Option 1, in order to facilitate a comparison of their relative strengths. After setting out these arguments, this section will also consider whether parties should be free to contract out of the defence, the criteria for determining in respect of which breaches of contractual obligation the defence should be available and whether, if apportionment is to be introduced in contract, it should be by way of an amendment to the 1945 Act or otherwise.

(I) Arguments in favour

(a) It is correct in principle

4.19 The main argument against apportionment in contract actions is that, in the absence of agreement, to impose a duty on P to take reasonable care in his own interests may amount to courts varying an agreed allocation of risk.

4.20 There are, however, several points which can be made against this argument and in favour of the proposition that it is correct in principle to take into account P's fault in assessing damages for breach of a civil obligation by D, except where the parties have agreed otherwise.

(i) A party should not profit from his wrong by obtaining complete recovery in respect of harm, part or all of which he may have brought upon himself. This is the underlying principle in contributory negligence and is equally applicable in contract and tort law. It cannot be said that it is no part of the law of contract to take account of the fact that P is the part author of his own loss because this is done by several rules, particularly causation and mitigation, but also estoppel by negligence and the rule that a party who has brought about the failure of a condition is denied the benefit of that failure.

> "In none of these cases, of course, is there any dependence upon a duty being owed in law to oneself, nor need an enforceable duty to the other party be shown. The underlying principle is one of disqualification."[28]

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28. New Zealand Contracts and Commercial Law Reform Committee Working Paper, Contribution in Civil Cases (1983), at para. 8.4; Spowart Taylor, "Contributory Negligence-A Defence to Breach of Contract?" (1986) 49 M.L.R. 102, 103-4.

Indeed it is arguable that the present system, whereby if D can show that P's injury was caused by his own act he is not liable at all, "is simply the Common Law (i.e. unamended) doctrine of contributory negligence under another name".[29] The fact that there are few examples may be because the courts strive to avoid the harsh effects of the common law rule, as they did in respect of claims in tort before the 1945 Act.

(ii) Apportionment is not contrary to the nature of contractual liability since parties could agree that damages should be apportioned. Where they have not done so expressly, there is no reason in principle for a court nevertheless to assume that risks have been allocated entirely to one or other of the parties. It does not follow that, where P pays D to undertake a task, D has thereby agreed to compensate P in full where P is the part author of his own loss. This is particularly so where D's obligations are implied, whether by statute or otherwise. Unless it is clear that D has so undertaken and thus accepted the entire risk, there is no reason in principle to exclude the possibility of apportionment.

(iii) Logically the argument against apportionment in contract, if valid, should apply in category (3) cases. However, it may be unfair to allow P, where he is the part author of his own loss, to avoid the consequences of his own negligence by the expedient of framing his action in contract rather than tort, even though the claims arose from identical facts.[30]

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29. Treitel, Remedies for Breach of Contract (1988), p. 190.

30. For facts giving rise to this possibility see examples (a) and (d) in para. 2.9 above. In Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck) [1988] 1 Lloyd's Rep. 514, a bank sued a P. & I. Club for what was a breach of a strict contractual duty and also breach of a duty owed concurrently in contract and tort. Hobhouse J. held that the bank had been one third to blame for its loss, the Club two thirds to blame. Nevertheless, he allowed full recovery by the bank: apportionment was not possible in respect of the category (1) duty, though it would have been in respect of the category (3) duty. (Though the Court of Appeal reversed Hobhouse J. on the question of the Club's liability, [1989] 3 All E.R. 628, it agreed with Hobhouse J. on the question of apportionment.)

(iv) If apportionment is to be available in respect of breaches of some, or all, types of contractual duty, parties could contract out of such a result within the limits allowed by the Unfair Contract Terms Act 1977.[31] Thus if P sues D in contract and D pleads P's contributory negligence as a defence, P could argue that D was prevented from doing so by the terms of their contract.

(b) Existing contractual doctrines are not a substitute for apportionment

(i) Breach of a contractual duty by P

4.21 The implication of a term that P will take reasonable care is not an adequate substitute for apportionment precisely because it shifts the entire loss to P even if D is also responsible for bringing it about.[32] Moreover, the implication will not be made in all cases.[33] As far as the argument that apportionment would undermine a contractual allocation of risk is concerned, while this may be plausible in the case of an express warranty, it is less convincing in the context of implied warranties which have been described as "hybrids of contract and tort".[34] Even in the case of express warranties, it does not necessarily follow from the fact that P has agreed to exercise reasonable care that he has agreed to bear the entire loss where he has failed to take such care, but where a

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31. See para. 4.33 below.

32. Harper v. Ashton's Circus Pty Ltd. [1972] 2 N.S.W.L.R 395. See also Lambert v. Lewis [1982] A.C. 225, 277, and the critical comments of Bridge, "Defective Products, Contributory Negligence, Apportionment of Loss and the Distribution Chain" (1982) 6 Can J. Bus. L. 184.

33. It was not made in Lambert v. Lewis [1982] A.C. 225, although the House of Lords achieved the same result by holding that D's duty under s. 14 of the Sale of Goods Act was terminated when it became apparent to P that the goods sold were defective. No mention was made of P's obligation in a number of the leading formulations of D's duty; see e.g. Francis v. Cockrell (1870) L.R. 5 Q.B. 184; Hyman v. Nye (1881) 6 Q.B.D. 685; Norman v. G.W.Ry Co. [1915] 1 K.B. 584

34. Bridge, op. cit., p. 203.

concurrent cause of his loss is D's breach of contract. Unless it is absolutely clear that P has so agreed, apportionment should not be excluded. If apportionment is allowed, the position of P who impliedly agrees to take care will be improved since at present he can recover nothing. The introduction of apportionment could, however, adversely affect the position of P who has not agreed to take reasonable care and has not done so. As, however, (a) the nature and extent of D's contractual duty will determine whether P's conduct is unreasonable[35] and, (b) unreasonable conduct might well, under the existing law, be held to breach the chain of causation, this is unlikely.

(ii) Mitigation

4.22 Until the enactment of the 1945 Act, the concept of the "duty to mitigate" may have appeared to be superior to contributory negligence because contributory negligence was a bar whereas failure to mitigate could reduce the amount recoverable. However, this duty is not a satisfactory substitute for apportionment because it does not arise until after D's breach. Where there is a failure to mitigate it generally results in damages being disallowed after a certain point in time or in items of claim being disallowed altogether rather than in a percentage reduction based on what the court thinks just and equitable. It may therefore be thought less flexible than the apportionment provisions of the 1945 Act.

> "As a matter of policy it would seem that contributory negligence ought to apply as a defence to breach of contract. If the plaintiff's unreasonable conduct can sometimes result in his recovering no damages, through the principles of intervening cause or mitigation, it must be sensible for there to be a mid-position where his negligence results in a mere reduction of damages. This is particularly so where the defendant is in breach of a contractual duty of care, for then the plaintiff's and defendant's fault are both in the same range i.e. there is clear negligence/

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35. See para. 2.8 above.

blameworthiness on both sides. But the same argument applies even where there is the breach of a strict contractual duty."[36]

4.23 Thus, where there is fault on both sides, D should not be permitted to throw the whole loss upon P by pleading P's failure to mitigate any more than P should be able to throw the whole loss upon D by suing in contract.[37]

(iii) Causation

4.24 Where the apportionment legislation is inapplicable, the principles of causation usually operate in an "all or nothing" way.[38] In Solle v. W.J. Hallt Ltd.[39] P, a self-employed builder, was injured after falling down an unguarded stairwell. DD pleaded that P, in stepping back into the stairwell without looking, had been contributorily negligent. The judge held that P could sue either in tort or contract, under s. 2(1) or s. 5(1) of the Occupiers Liability Act 1957. But he also said that, if P's claim had sounded in contract alone, he would have been denied recovery completely on the basis that

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36. Burrows, Remedies for Torts and Breach of Contract (1987), pp. 74-75.

37. Bridge, "Mitigation of Damages in Contract and the Meaning of Avoidable Loss" (1989) 105 L.Q.R. 398, 404, except where this would undermine a contractual allocation of risk.

38. Quinn v. Burch Bros. (Builders) Ltd. [1966] 2 Q.B. 370, Bonnington Castings Ltd. v. Wardlow [1956] A.C. 613 and Hotson v. East Berkshire H.A. [1987] A.C. 750; Price, "Causation - The Lords' Lost Chance?" (1989) 38 I.C.L.Q. 735. Cf. Tennant Radiant Heat v. Warrington Development Corp. [1988] 1 E.G.L.R. 71. There is no reason why this should necessarily be so. Hart & Honoré, Causation in the Law (2nd ed., 1985), at pp. 225-235, discuss how responsibility is allocated when harm results from concurrent causes. Where the harm is not divisible and where the law does not provide for apportionment, the authors canvass two rational alternatives: either the common law rule that P is disbarred from recovery, or a rule that P can recover if he is less at fault or less negligent than D. For criticism of the "all or nothing" aspect of causation, see Stapleton, "The Gist of Negligence", (1988) 104 L.Q.R. 389, 390.

39. [1973] 1 Q.B. 574.

his contributory negligence was a novus actus interveniens which broke the chain of causation. As it was, since P could sue in tort, apportionment was possible and P recovered two-thirds of his loss. This result has been criticised[40] because it suggests that the principles of factual causation differ between tort and contract actions, so that the same act can break the chain of causation in a contract action but not in a tort action. Furthermore, while the duty in contract and tort was the same, different results would have followed if P had sued either in contract alone or tort alone. For the result to depend on the technical classification of the action gives undue significance to the form rather than the substance of the claim.[41]

4.25 Subject to a contrary agreement by the parties, allowing a court to apportion on a flexible percentage basis in all contract cases would obviate the need for the "all or nothing" results which usually obtain where courts in contract cases deny recovery to P on the basis that his fault has broken the chain of causation. It has been held by the Court of Appeal in Tennant Radiant Heat Ltd. v. Warrington Development Corporation[42] that causal principles permit apportionment where P is in breach of a duty owed to D. Where P's exercise of reasonable care is a condition precedent to D's liability,[43] this form of apportionment will not be possible. Furthermore, where there is no such breach of duty by P but merely "fault", O'Connor v. Kirby & Co.,[44] a decision of the Court of Appeal not cited in Tennant, appears to preclude such apportionment.[45]

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40. Goodhart, (1973) 89 L.Q.R. 322, 326.

41. Jolowicz, (1973) 32 C.L.J. 209, 211.

42. [1988] 1 E.G.L.R. 41. See para. 4.11 above.

43. See para. 4.9 above.

44. [1972] 1 Q.B. 90.

45. Cf. Dugdale & Stanton, Professional Negligence, (2nd. ed., 1989), para. 21.23.

Indeed, the Court of Appeal in Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck)[46] said:

> "the scope and extent of [Tennant] will have to be a matter of substantial argument if the principle there applied were to arise for consideration in another case".[47]

Finally, even where it is available, apportionment in terms of causation is a more rigid and possibly less fair method of sharing the loss than apportionment on the basis of what the court deems just and equitable.[48]

4.26 Given that contributory negligence is "negligence materially contributing to the injury",[49] which at common law was in effect an assertion that P substantially caused his own loss, it seems odd to say that P's damages in a contract action cannot be reduced on account of his contributory negligence but can be reduced or even eliminated because he caused the loss.[50] In Tennant Radiant Heat Ltd. v. Warrington Development Corp.,[51] the Court of Appeal emphasised that apportionment under the 1945 Act was not possible in cases where P was suing for breach of a strict contractual duty. Yet, it is difficult to understand why a court should deny the possibility of apportionment under the 1945 Act, and then achieve the same result by saying that as a matter of causation, P's breach of his strict contractual duty was a factor of 1/10 of the cause of the damage and D's negligence 9/10.

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46. [1989] 3 All E.R. 628.

47. Ibid., p. 672.

48. Scot. Law Com. No. 115, para. 4.13. See also Chapman, (1948) 64 L.Q.R. 26, 28; Williams, (1954) 17 M.L.R. 66, 69.

49. Caswell v. Powell Duffryn Associated Collieries Ltd. [1940] A.C. 152, 185-6, per Lord Porter. See para. 2.1 above.

50. Bennett, "Contributory Negligence and Contractual Claims", (1984-1985) 4 Litigation 195, 197.

51. [1988] 1 E.G.L.R. 41.

Precluding a result on the ground of contributory negligence and allowing a similar result on the ground of causation is, again, to concede to form a greater importance than to substance.

(c) The role of fault

4.27 To say that fault is generally irrelevant to contractual liability ignores the fact that very often, for instance in category (2) cases of which the paradigm case is the obligation to perform a service, D will be contractually liable only if his performance is at fault.[52] In such cases an action in contract is substantially similar to an action for breach of a tortious duty of care. Hence:

> "... (given) that the policy of the common law and the apportionment legislation is to defeat the plaintiff's claim or reduce his damages where his own negligence combined with that of the defendant to produce his damage, ... it is illogical to apply a different rule where the defendant's negligence chances to sound in contract rather than tort."[53]

4.28 Furthermore, section 4 of the 1945 Act permits apportionment in cases of strict liability as well as negligence liability.[54] True, there is a theoretical difference between D being liable for the breach of a strict contractual duty, where apportionment is not permissible under the Act,[55] and being strictly liable in tort,[56] for

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52. See para. 3.17 above and Thake v. Maurice [1986] Q.B. 644.

53. Swanton, op. cit., p. 283.

54. Under s. 6 of the Consumer Protection Act 1987, the definition of "fault" in the 1945 Act has been extended to include cases of strict product liability.

55. See para. 3.20 above.

56. The difference is that the contractual obligation results from agreement and hence there is an opportunity for D to limit the extent of his liability where P is at fault. Nevertheless, an attempt to do this where the Unfair Contract Terms Act 1977 applies may be ineffective. Cf. Scottish Law Commission's Consultative Memorandum No. 73, Civil Liability - Contribution (1988), para. 5.43.

instance under the Consumer Protection Act 1987, where apportionment is expressly permitted where damage is caused partly by a defect in a product for which D is strictly liable and partly by the fault of P. Nevertheless, it is odd that apportionment should not be allowed where D is liable in contract regardless of fault, whereas apportionment is allowed where D is liable in tort regardless of fault.[57]

(d) Certainty would not be unduly impaired

4.29 Two points can be made in answer to the argument that contributory negligence in contract may add an unacceptable degree of uncertainty to the ambit of contractual agreements.

(i) There is no real certainty about the present state of the law. So long as the law's current perception of the scope and content of the duty of care in tort is changing,[58] the dividing line will also change between cases where a duty of care exists only in contract and cases where it co-exists with a tortious duty.[59] At present, this dividing line is crucial because apportionment is allowed in the latter case but not the former.[60] One commentator has noted that the Canadian courts, in order to do justice between parties to construction

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57. P buys a product directly from a producer or importer, who owes strict contractual duties under the contract of sale in addition to the duty of strict liability owed under s. 2 of the Consumer Protection Act 1987. Assuming that P is contributorily negligent, apportionment is possible in respect of the tort claim but not the contract claim.

58. See the Likierman Report on Professional Liability, (1989) H.M.S.O., Auditors Study Team, paras. 3.9-3.22; Construction Professionals Study Team, para. 5.7; Surveyors Study Team, paras. 4.5, 5.19-5.20.

59. As pointed out by Hobhouse J. at first instance in Vesta v. Butcher [1986] 2 All E.R. 488, 508.

60. See Part III above.

contracts, regularly "find" concurrent duties in contract and tort so as to be able to apply the apportionment legislation.[61]

(ii) Even if there were to be some uncertainty added to contractual agreements, it is arguably off-set by the fact that apportionment in situations where both parties have contributed to the loss is more likely to reflect the equities as between the parties than would a solution whereby one side won outright.

(e) Effect on other contractual doctrines

4.30 It has been said[62] that an alteration in the law on contributory negligence in contract might affect the law on discharge by breach. The example was given of D, who wrongfully stops work, as a result of P failing to pay an instalment, and who tries to use this as a way of reducing his liability in damages. Although, in principle, a reform would permit D to argue for apportionment, a court would be reluctant to hold that P was at fault within the meaning of the Act for failing to foresee that D would wrongfully repudiate. It would be inequitable for D to say: you should have foreseen that I would have acted wrongfully.[63]

4.31 It is also submitted that changing the law on contributory negligence will not alter the position in cases such as White & Carter v. McGregor.[64] The innocent party who elects to keep the contract alive in the face of D's repudiatory breach claims for an agreed sum due under the terms of the contract; it is technically a claim in

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61. Bristow, "Contributory Fault in Construction Contracts", (1986) 2 Constr. L.J. 252.

62. Para. 4.15 above.

63. See paras. 2.4 ff and 3.3 above.

64. [1962] A.C. 413. See para. 4.16 above.

debt. Such a claim would not be covered by a reform of the law permitting apportionment of damages, because P's action is not one for damages for breach of contract.[65]

(f) Effect on consumer and standard form contracts

4.32 In summary, this argument states that extending the defence of contributory negligence will be a way for D to limit his liability in the event of P's fault; he will have this benefit under the general law; he will therefore not have to contract for it specifically; and will therefore not be subject to the reasonableness criterion under the Unfair Contract Terms Act 1977. Several points can be made.

(i) Since contributory negligence operates to reduce P's damages because he was partly the author of his loss, this principle is applicable to consumers and non-consumers alike. It has been applied in respect of strict statutory duties under the Factories Act imposed for the protection of employees,[66] and under s. 6 of the Consumer Protection Act 1987 in respect of defective products.

(ii) Consumers are unlikely to be unfairly prejudiced, since in many, and probably in most, cases a failure to check or to appreciate a danger will not amount to contributory negligence because it was reasonable to rely on D.[67] Moreover, under the 1945 Act, damages will only be reduced to the extent that the court thinks just and equitable.

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65. Furthermore, there are limits on the generally unfettered right of the innocent party to elect whether or not to accept a repudiation of the contract. Where the innocent party has no legitimate interest in continuing with the contract he will be prevented from enforcing his full contractual rights: The Alaskan Trader [1984] 1 All E.R. 129.

66. Williams v. Sykes & Harrison Ltd. [1955] 1 W.L.R. 1180; Hodkinson v. H. Wallwork & Co. Ltd. [1955] 1 W.L.R. 1195; Winfield & Jolowicz, op. cit., p. 165 n. 59.

67. See para. 2.4 ff above.

(iii) At present, consumers and those who deal on another's standard terms may recover nothing at all if their fault was either the cause of their loss or they have unreasonably failed to mitigate or they have impliedly warranted that they will take reasonable care. Apportionment will usually mean that some damages are recoverable.

(II) Contracting Out

4.33 If contributory negligence is extended to any or all contract actions, the question arises as to whether it should be possible to contract out of the defence. We consider that this should be possible and that parties should be able to stipulate that P should not have his damages reduced for contributory negligence. The nature and extent of the contractual duty undertaken by D are important factors in determining whether P's conduct is or is not unreasonable.[68] If effect is given to such implicit allocations, it should follow that parties should be free to make express provision. The case for introducing the defence is that it is correct in principle to take into account the fact that P is part author of his loss. This does not, however, require or even justify the restriction of the parties' freedom of contract. It is merely a justification of what the appropriate rule should be in the absence of any contractual provision. It should, however, be remembered that the determination of the appropriate rule may reflect the fact that, in some situations, there is inequality of bargaining power. Where P is in the weaker bargaining position, he is unlikely to be able to stipulate that his damages should not be reduced where he has been contributorily negligent.

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68. See para. 2.8 above.

(III) Which contractual obligations should be subject to apportionment?

4.34 As we have seen,[69] contractual obligations can be classified according either to their source (liability purely contractual and liability which is concurrent in contract and tort) or their nature (liability strict and liability which is based on fault). It is the mixture of the two that produces the categorisation which is used in the case-law.

(a) All contractual obligations or none

4.35 If the source of the liability is regarded as the most important determinant of whether or not apportionment should be available, then it is illogical to allow apportionment in some but not all of the three categories which the law recognises. The reason for this is that in all three categories there is contractual liability. Thus:

-- The main argument against apportionment in contract is that, even where holding P partially to blame is not inconsistent with the contractual obligation breached by D, to do so would nevertheless impose on the parties something they have not agreed. However, this argument applies whether liability is strict, fault based or concurrent with tortious liability. Accordingly, if it is accepted, contributory negligence should apply to no contract actions. This would enable P to avoid apportionment, where he has alternative causes of action in contract and tort, by framing his action exclusively in contract.

-- The main argument in favour of apportionment in contract is that, subject to the terms of the contract, P should not recover in full when he is partly the author of his own loss. This argument also

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69. See para. 3.13 above.

applies regardless of whether the contractual obligation is strict, fault based or concurrent with tortious liability. Nevertheless, to allow apportionment may be perceived as allowing the courts too readily to vary an agreed allocation of risk. This is especially so where D is under a strict contractual duty, which involves guaranteeing a particular result.

(b) Fault based contractual obligations

4.36 If the nature of the liability is regarded as the most important factor determining the availability of apportionment, then contract cases divide into those cases where liability is strict and those cases where liability is fault based. Several of the arguments that have been considered above in favour of apportionment apply to strict and fault based contractual liability. The Commission has already recommended that where there has been breach of a land obligation, where liability may be strict, damages should be apportioned.[70] However, the particular arguments in favour of apportionment where D's contractual liability is fault based probably mean that the case for apportionment is stronger for such liability than for strict contractual liability. Furthermore, the potentially anomalous position of situations in which there are concurrent but not co-extensive claims in contract and tort,[71] is avoided.

4.37 The case for permitting apportionment where contractual liability is fault based is the similarity in substance between an action for breach of a common law tortious duty of care and for breach of a contractual duty of care. It is commonplace for pleadings to allege, in the alternative, that a particular breach of contractual duty also amounted to the breach of a common law duty of care. Liability in both cases is expressed in terms of a duty of care. To

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70. Law Com. No. 127 (1984), para. 13.32.

71. Para. 3.33 (iii) above.

allow a flexible percentage apportionment where there are concurrent duties is satisfactory. It is unsatisfactory, where there is simply a breach of a contractual duty of care, to rely exclusively on the blunt instruments of causation, mitigation etc., whose typically "all or nothing" results are unlikely to reflect the equities as between the parties.

4.38 Secondly, if fault on the part of D is introduced into the contract, whether deliberately or by way of an implied term, it is only fair that contributory fault on the part of P should also be relevant.[72] This is particularly so where D's obligations are implied, whether by statute or otherwise. An obligation to exercise reasonable care is not a guarantee of a particular outcome and it should not be assumed that in agreeing to exercise reasonable care, D necessarily undertakes to compensate P fully even if P is the part author of his own loss. Similarly, where P expressly or impliedly agrees that he will take reasonable care, it should not be assumed that he has thereby agreed to bear the entire loss where he fails to do so but D's breach of duty is also a cause of his loss. Here the case for apportionment is particularly strong unless it is clearly excluded by the contract. Although apportionment by reference to causal principles may be possible in some cases, it is not possible in others and in any event is less than satisfactory.[73]

4.39 It is sometimes said that the present law, in permitting apportionment in category (3) but not in any other case, is justified on the basis that parties to a contract should only be taken to have modified the underlying tort position if they do so explicitly. This is not, however, a satisfactory explanation. Often the only factual basis for the tortious duty is the contract and the expectations and

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72. Scot. Law Com. No. 115, para. 4.17.

73. See paras. 4.25-4.26 above.

reliance it creates.[74] Secondly, there is the uncertain question of whether apportionment is possible where there is concurrent but not co-extensive liability in tort, as where there is breach of an implied condition under the Sales of Goods Act in addition to liability for negligence.[75] If apportionment is possible in this case it means that the careful D (liable only for breach of the implied condition) will be worse off than the careless one (liable both for breach of the implied condition and in tort). These reasons and the clear similarity in substance between an action for breach of a common law tortious duty of care and one for breach of a contractual duty of care have lead us to the provisional conclusion that it is not satisfactory to permit apportionment only in category (3) cases.

(c) Intentional breaches of contract

4.40 The scope of the 1945 Act in relation to intentional torts is not entirely clear. Contributory negligence is no defence in proceedings founded on conversion or on intentional trespass to goods,[76] although there is some authority that the defence may apply to cases of battery.[77] The policy behind excluding the defence in cases of intentional wrongdoing has been expressed thus:

> "...it is a penal provision aimed at repressing conduct flagrantly wrongful. Also it is the result of the ordinary human feeling

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74. See the suggestion that tort duties have been invented in contractual situations to permit apportionment, para. 4.29 above.

75. See Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd [1971] 1 Q.B. 88, para 3.33 above.

76. Torts (Interference with Goods) Act 1977, s.11(1). Cf. s. 47 of the Banking Act 1949.

77. Murphy v. Culhane [1977] Q.B. 94. Hudson, "Contributory negligence as a defence to battery", (1984) 4 Legal Studies 332, after a full review of the authorities, concludes that the better view is that apportionment is not available in cases of battery.

that the defendant's wrongful intention so outweighs the plaintiff's wrongful negligence as to efface it altogether."[78]

4.41 Given that the law does not favour apportionment where D has committed an intentional tort, the question arises whether apportionment should be allowed in cases of intentional breach of contract. Since many breaches of contract are deliberate, not to allow apportionment in such cases would be a significant restriction. An alternative would be to disallow apportionment in cases where D cynically resorts to breach of contract solely in order to make a profit.[79] We have taken the provisional view that, if apportionment is to be introduced, no special provision should be made for intentional or cynical breaches of contract. The law does not usually distinguish between intentional and unintentional breaches of contract and there is no satisfactory way of distinguishing cynical and non-cynical breaches of contract.

(IV) Should reform be by an amendment to the 1945 Act or otherwise?

4.42 Consideration of whether contributory negligence is at present a defence in contract naturally involves a discussion of the 1945 Act. One option for reform would involve amending the 1945 Act so that apportionment would be possible in respect of breaches of some or all contractual obligations. However, it may be that the scheme of the 1945 Act, which was clearly aimed at tort, would be inappropriate. For instance, it would be unfortunate if extending the 1945 Act meant

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78. Williams, p. 198. See also Fleming, The Law of Torts (7th ed., 1987), pp. 255-257.

79. For contrasting views on the merits of treating the cynical contract breaker differently (albeit in the context of whether P, instead of claiming compensation for his loss, should be able to claim D's profits from the breach) see Birks, "Restitutionary Damages for Breach of Contract", [1987] L.M.C.L.Q. 421; Beatson, "What Can Restitution Do for You?", [1989] J.C.L. 65, 74-75. See also Law Com. No. 121, Pecuniary Restitution on Breach of Contract (1983), paras. 2.58-2.60.

that conduct by P, which is correctly regarded as contributorily negligent where there is no contractual relationship between the parties, would also be regarded as contributorily negligent where D has undertaken to provide a service or supply goods for which P has paid. However, we consider that this is not what would happen since the existence and precise terms of the contract should be important factors in determining whether conduct in fact constitutes contributory negligence.[80]

4.43 Indeed, the application of the 1945 Act has a positive advantage. It provides a body of authority on what constitutes unreasonable conduct and reflects the fact that it is normally reasonable for P to rely on D to carry out his undertaking, and that even positive mistakes or failure to appreciate a danger may be reasonable in view of D's undertaking. However, since the relevant conduct by P must, in effect, be unreasonable, an alternative option for reform would be to introduce a requirement to act reasonably, a pre-breach equivalent of the duty to mitigate. However, the analogy between mitigation and contributory negligence is imperfect.[81] Such a requirement that P act reasonably would be the introduction of a new doctrine with the consequent uncertainty that this would entail. There might also be the possibility of awkward differences between the new doctrine and what constitutes contributory negligence in category (3) cases where the 1945 Act would continue to apply, at any rate in respect of the concurrent claim in tort. For instance, it might lead to onerous duties being placed on P to check that D has performed his contractual obligations. We invite comments on whether any reform should be by an amendment to the 1945 Act rather than by the introduction of a new doctrine.[82]

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80. See para. 2.8 above.

81. See para. 4.22 above.

82. It is for consideration whether any reform should affect contracts entered into after the implementation date, or only those contracts where the breach occurred after that date.

3. Summary

4.44 The main arguments against the availability of apportionment in contract are:

(a) Contractual liability is consensual and if the parties have not agreed that P should take care of his own interests the law should not impose such a term. There is a danger that apportionment would allow the courts too readily to vary an agreed allocation of risk. This is especially so where D is under a strict contractual duty since that involves undertaking that a particular result will happen or that a particular state of affairs will exist.

(b) Existing contractual doctrines already fulfil the role claimed for contributory negligence.

(c) Fault is generally irrelevant in contract while it is central to the doctrine of contributory negligence.

(d) Allowing apportionment would introduce a new element of uncertainty to the ambit of contractual agreements.

(e) Consumers and other parties to standard form contracts would not have the bargaining strength to contract out of this de facto obligation to take reasonable care. At present a clause in effect limiting liability where P fails to take reasonable care may be subject to the Unfair Contract Terms Act.

4.45 The main arguments favouring the availability of apportionment in contract are:

(a) It is correct in principle to take account of the fact that P is the part author of his loss and the law of contract recognises this principle in a number of its rules,

particularly mitigation and causation. The danger that courts might vary an agreed contractual risk will be avoided if, in determining whether P's conduct is unreasonable so as to amount to contributory negligence, courts take account of the nature and extent of the contractual undertaking, including the extent to which it was reasonable for P to rely on D and the parties' relative expertise.

(b) Existing contract doctrines are inadequate because they usually operate in an 'all or nothing' manner, either permitting P to recover in full or not at all. If loss is caused partly by the fault of D and partly by that of P, except where the parties have agreed otherwise, apportionment is more likely to reflect the equities between them than a solution in which one wins or loses entirely. Although the principles of causation have been held to permit apportionment where P is in breach of a duty owed to D, apportionment on this basis will not always be possible.

(c) Contractual liability is based on fault in a number of important contexts, for instance contracts for the supply of a service. Moreover, apportionment is permitted in cases of strict liability in tort.

(d) There is no real certainty about the present state of the law. Apportionment is available where there are concurrent duties in contract and tort. However, this affords no fixed point of reference, since the scope of tort liability has been the subject of significant changes in recent years.

(e) It is correct in principle for a consumer who is the part-author of his own loss to have his damages reduced, as occurs under the Consumer Protection Act 1987 in respect of defective products. Consumers are unlikely to be unfairly prejudiced for two reasons. First, the nature and extent of D's contractual duty will determine whether P's conduct is

unreasonable. Secondly, apportionment will improve the position of the consumer whose conduct, under the present law, is held to break the chain of causation and so results in no recovery.

4.46 We invite views as to whether, if apportionment is to be introduced in cases where P is the part author of his loss, it should be by an amendment to the 1945 Act rather than by the introduction of a new doctrine.

PART V

Conclusion and Provisional Recommendations

5.1. We have provisionally concluded that where the loss or damage suffered by P results partly from his own conduct and partly from D's breach of contract, it is correct in principle for the damages to be apportioned. This is particularly so in respect of breaches of contractual obligations to exercise reasonable care, both where D's liability exists solely in contract [category (2)] and where D's contractual liability co-exists with liability in tort which arises independently of the contract [category (3)]. There is a clear similarity in substance between an action for breach of contract and an action for breach of a tortious duty of care. However, the principle also applies where there has been breach of a strict contractual duty [category (1)]. We have provisionally concluded that the danger that courts might vary an agreed contractual risk can be avoided. In determining whether P's conduct is unreasonable so as to amount to contributory negligence, we have also concluded that the courts should take into account the nature and extent of the contractual undertaking, including the extent to which it was reasonable for P to rely on D and the parties' relative expertise. Accordingly we have provisionally concluded that contributory negligence should be available as a defence to breaches of all contractual obligations. Apportionment would not, however, be available where the contract excludes it, whether expressly or by implication from the nature and extent of the contractual duty undertaken by D.

Implications of our provisional conclusion

5.2 The examples used in para. 2.9 above illustrate how our provisional conclusion would work in practice.

(a) The first example was a category (3) case. P failed to wear a seat belt, D negligently and in breach of contract crashed his car. Under the present law, P's damages could be reduced because liability in tort exists. The provisional proposals would also permit apportionment, so that no change is proposed in this type of case.

(b) The second example was a category (2) case. D was in breach of his contractual duty to use reasonable skill and care. However P was also at fault in that his participation in the venture involved a serious miscalculation. Here our provisional proposals would make apportionment possible and involve a change in the law, since at present apportionment in this type of case would not be permissible. Other examples would be the following:

(i) Assuming that a garage's duty to carry out an M.O.T. test is a contractual duty to use reasonable care without a corresponding duty of care in tort, and an accident is caused partly by D's breach of duty and partly by P's negligent driving, apportionment would be possible.[1]

(ii) If a building contractor fails to supply P with equipment which was reasonably necessary and in using an unsafe substitute P is injured, apportionment would be permissible given that there is contributory negligence by P and breach of a contractual duty of care by D. Of course, it might be that one or other of the parties was the sole cause of the loss.[2] It is for this reason that our provisional proposal might adversely affect P since, in the absence of apportionment, if his conduct is not held to be the sole cause of the loss he will recover in full whereas under our provisional proposal a deduction would be made from his damages.

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1. Artingstoll v. Hewen's Garages Ltd. [1973] R.T.R. 197, see para. 3.22 above.

2. Quinn v. Burch Bros. (Builders) Ltd. [1966] 2 Q.B. 370, see para. 4.11 above.

(c) & (e) The third and fifth examples were category (1) cases. In (c), D was in breach of his strict duties under the Sale of Goods Act in providing an iron which was neither of merchantable quality nor fit for its purpose. P was the careless consumer who used the iron though it was clearly damaged. In (e), D in failing to repair the window was in breach of his repairing covenant and P was the tenant who continued to use it although he knew of its condition and the room had another window. Under the present law, apportionment would not be possible in either case because D cannot plead P's contributory negligence as a defence to breach of a strict contractual obligation. Hence, the likelihood would be that in these cases, the court would say that P was the sole effective cause of his damage. In a lesser case, where the damage was not so obvious, P would probably recover in full. Under our provisional conclusion apportionment would be possible and P's damages might be reduced.

(d) The fourth example contains the difficult case where D's strict contractual liability overlaps with a liability in tort. D sold a defective iron which renders him strictly liable under the Sale of Goods Act and also liable in tort, since the defect could have been discovered had he used reasonable care. If P had been contributorily negligent, and apportionment were possible, then the careless seller would be in a better position than the careful one since apportionment would be possible by reason of D's liability in tort. However, we have seen[3] that this problem disappears on close examination. Hence, apportionment would not be available under the present law in this example. However, apportionment would be possible under our provisional conclusion and again, a P whose conduct was contributorily negligent would have his damages reduced.

5.3 The implications for reform may differ in particular contexts. The examples above and the discussion throughout provide illustrations

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3. Para. 3.33 above.

from a number of contexts including consumer transactions,[4] landlord and tenant,[5] employment,[6] shipping,[7] construction,[8] accountancy,[9] and insurance.[10] Banking, which has recently been the subject of a separate review,[11] is considered in an Appendix to this Paper. We invite views on the effect of the proposed reform in all of these areas.

5.4 We invite comments on:

(i) Whether it is correct to reduce P's damages in an action for breach of contract where P is the part author of his loss.[12]

(ii) If so, whether apportionment should be introduced for all breaches of contractual obligations or only for breaches of obligations to exercise reasonable skill and care.

(iii) Whether, if apportionment is introduced for breaches of contractual obligations, the ability of the court to reduce the damages awarded should take into account the nature and scope of the contractual obligation broken.

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4. Example (a) and paras. 2.9, 3.22 and 3.28 above [services rendered to consumer]; examples (c) and (d) [consumer sale].

5. Tennant Radiant Heat Ltd. v. Warrington Development Corp. [1988] 1 E.G.L.R. 41, example (e) and paras. 2.7 and 3.20 above.

6. Williams v. Sykes & Harrison Ltd. [1955] 1 W.L.R. 1180, and para. 4.32 above.

7. A.B. Marintrans v. Comet Shipping Ltd. (The Shinjitsu Maru No. 5) [1985] 1 W.L.R. 1270, and para. 2.5 above.

8. Husky Oil Operation Ltd. v. Oster (1978) 87 D.L.R. (3d) 86, example (b) and para. 2.9 above.

9. De Meza & Stuart v. Apple [1974] 1 Lloyd's Rep. 508 and para. 3.24 above. The Report of the Auditors Study Team on Professional Liability recommended that the 1945 Act be amended so as to make clear that negligence by P is relevant to damages in actions for breach of contract: see Likierman Report, op. cit., pp. 6, 26.

10. Vesta v. Butcher [1988] 3 W.L.R. 565, and para. 3.10 above.

(iv) Whether the proposed reform has particular implications in different contexts, for instance, banking,[13] construction, employment, insurance and landlord and tenant, and in particular whether special provision should be made for consumer and standard form contracts.

(v) Whether reform should be of the 1945 Act or otherwise.

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11. Banking Services: Law and Practice, Report by the Review Committee (1989) Cm. 622, ch.6.

12. See para. 5.1 above.

13. See the Appendix for specific questions concerning banking.

APPENDIX

Law of Banking

1. It is well established law that, in the absence of an express term to the contrary, a customer owes two duties to his bank in relation to the operation of his current account.

(a) A duty to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery.[1] If a customer fails to use reasonable care in writing a cheque so that subsequently someone fraudulently inflates it by the insertion of extra figures, the customer cannot recover against the bank if it debits his account. The most authoritative explanation for this is that since the customer's negligence caused the loss, he must bear it.[2]

(b) A duty to inform the bank of any forgery of which he has knowledge. A customer who fails to report a forgery which comes to

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1. London Joint Stock Bank v. Macmillan [1918] A.C. 777.

2. Ibid., p. 794 per Lord Finlay L.C., p. 821 per Viscount Haldane, p. 827 per Lord Shaw of Dunfermline (agreeing with Lord Finlay L.C.). Other possible explanations for denying recovery to the customer are:

(i) Estoppel by negligence. Since the customer's negligence allowed a fraud to be perpetrated, he is estopped from disputing the bank's authority to pay: ibid., pp. 835-836 per Lord Parmoor. Another way of saying the same thing would be that the customer impliedly represented that the cheque was a good and valid mandate.

(ii) Contributory negligence. Williams, pp. 216-217, and O'Connor L.J. in Vesta v. Butcher [1988] 3 W.L.R. 565, 578, took the view that the customer's contributory negligence prevented his recovery. However, this may simply be another way of saying that the customer's negligence caused the loss.

(iii) The rule against circuity of actions. If the customer recovered against the bank for paying out on a forged mandate, the bank would have an equal right to recover because of the customer's breach of duty. To avoid such circuity of action, the customer is prevented from suing initially: Swan v. The North

his attention will be estopped from recovering any sum the bank debits in reliance on the forged mandate.[3]

2. Although the customer who is in breach of either of the above duties will at present be denied any recovery against the bank, the customer does not owe, in the absence of an express agreement, any wider duty to take reasonable precautions to prevent forged cheques being presented to the bank, nor does he owe a duty to take reasonable steps to check his bank statements so as to detect cheques which might not have been authorised by him.[4]

3. Nonetheless, the Report of the Review Committee on Banking Services Law[5] noted the disquiet felt by the banking community that the present law is unduly favourable to the customer, particularly as a result of Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.[6] In that case, P's account clerk forged cheques of H.K.$ 5.5 million over six years. When the fraud was discovered, P successfully claimed the payments from the bank. The Privy Council held that no duty was owed by the customer apart from the two duties in MacMillan and Greenwood. Evidence before the Review Committee questioned whether it was just for a bank to be wholly liable in respect of forged cheques which it could only have identified by elaborate and expensive enquiries, when a customer could have prevented the fraud by elementary precautions.

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2. Continued
British Australasian Co. (1863) 2 H. & C. 175, 190; 159 E.R. 73, 79 per Cockburn C.J.

3. Greenwood v. Martins Bank Ltd. [1933] A.C. 51. This rule apart, a bank must bear the loss if it pays out on a cheque on which the customer's signature has been forged, because it does not then have a valid mandate.

4. Tai Hing Cotton Mill v. Liu Chong Hing Bank [1986] A.C. 80 (P.C.).

5. (1989) Cm. 622, esp. ch. 6.

6. [1986] A.C. 80.

The contrary argument is that forgery is one of the risks of banking which, subject to the Greenwood and MacMillan duties, is contractually allocated to the bank. It is open to banks to stipulate in their contracts, subject to the Unfair Contract Terms Act, that the customer should take reasonable precautions in the management of his business to prevent forged cheques being presented, or that the customer should be required to check his bank statements so as to be able to notify the bank of any unauthorised items.

4. Nevertheless, the Review Committee took the view that the law should be reformed so that, in an action against a bank in debt or for damages arising from an unauthorised payment, the customer's contributory negligence may be raised as a defence but only if the court is satisfied that the degree of negligence shown by the customer is sufficiently serious for it to be inequitable that the bank should be liable for the whole amount of the debt or damages.[7]

5. The differences between the recommendation of the Review Committee and our provisional recommendations are as follows.

(i) The Review Committee's recommendation is not stated to be in terms of an amendment to the 1945 Act.

(ii) It applies to actions in debt in addition to actions for damages.

(iii) It may appear to require greater fault on the part of the customer than our provisional recommendations. However, it may be that so far as it goes, the Review Committee's recommendation will produce similar results to our proposal. The customer's contributory negligence must be "sufficiently serious" for it to be inequitable for the bank to be wholly liable. Under our proposals, the whole

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7. Ibid., para. 6.14.

contractual matrix must be examined to see whether the customer's conduct was a contributory cause of his loss.

(iv) The major difference is that, while the Review Committee's recommendations operate only in favour of banks, our proposals may operate in favour of the customer in the following cases:

(a) Under the rule in London Joint Stock Bank v. Macmillan,[8] a customer is denied any recovery in respect of an amount debited by the bank in circumstances where the customer failed to use reasonable care in writing the cheque and someone fraudently inflated the amount. Under our provisional recommendations, apportionment would be possible where the bank pays out on the altered cheque in circumstances where it should have discovered the fraudulent addition. This may be a more just and equitable result than a complete denial of recovery to the customer.

(b) Under the rule in Greenwood v. Martins Bank Ltd.,[9] the customer recovers nothing where he fails to report a forgery which comes to his attention and where the bank debits his account in reliance on the forged mandate. However, under our proposals, apportionment would be possible where the bank should have discovered the forged signature.

6. Thus under our proposals and the recommendations of the Review Committee, in a scenario such as occurred in Tai Hing, a court could hold that the customer was partly or wholly responsible for the loss in question and hence apportion the damages on the basis of what is just and equitable, rather than giving complete recovery to the customer. Again, under both our proposals and the recommendations of the Review Committee, the MacMillan and Greenwood duties will still

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8. [1918] A.C. 777.

9. [1933] A.C. 51.

exist and the customer who is in breach thereof will prima facie will be denied recovery. However, where the bank is also in breach of its duty to the customer, under our proposals, but not those of the Review Committee, apportionment will be possible rather than complete denial of recovery to the customer.

7. Our proposals arguably provide a greater scope for achieving a more equitable result between the parties than does the present law. In Tai Hing, the question involved an assessment of who was to bear a loss of H.K.$ 5.5 million. The loss fell entirely on the bank, even though relatively simple precautions taken by the customer could have prevented the fraud. Nevertheless, the present law is clear and certain. Customers know the exact extent of their duties in operating a current account: not to draw cheques so as to facilitate fraud, and to let the bank know of forgeries of which they are aware. A change in the law may lead to fairer results but at the expense of creating uncertainties as to the extent of the customer's duties. Furthermore, even though the present law may favour the customer whose negligence has led to forged cheques being presented, it should not be forgotten that a bank may probably obtain complete recovery in respect of mistaken payments even when it has been negligent in making the payment.[10]

8. The Review Committee did not consider whether apportionment should be allowed in actions founded on breach of trust.[11] This might be of some significance to banks who are liable in a fiduciary capacity.[12]

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10. Kelly v. Solari (1841) 9 M. & W. 54; Barclays Bank Ltd. v. W.J. Simms Ltd. [1980] Q.B. 677; Chitty on Contracts (Vol. 2) (25th ed., 1983) para. 2530; Goff & Jones, The Law of Restitution (3rd. ed., 1986), pp. 104-5.

11. Section 2(1) of the Irish Civil Liability Act 1961 allows apportionment in cases of breach of trust.

12. See Ellinger, Modern Banking Law (1987), pp. 84-96.

9. We invite views on whether our proposals as they apply to banking are acceptable or whether, for instance, they introduce unacceptable uncertainty into the relationship of banker and customer.

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