The Role of Apportionment in Contract

Introduction

The assessment of when and how plaintiff fault should be relevant to the apportionment of civil liability has long troubled those who make and apply the law. The record of common law legal systems in this matter, if certainty and coherency are the relevant criteria, is not a proud one. Many of the problems have been created by a lack of willingness to look beyond traditional categories influenced more by historical origin than principle. Where principle and policy have been applied, the common law fixation on precedent has too often seen the results continue long after policy and principle have moved on. Inconsistencies in approach abound between national jurisdictions, and between different categories of civil obligation; the law of contract provides no exception. It is convenient to illustrate some of the issues by way of example.

Take the case of a client who wishes to sue her solicitor for a loss caused partly by the fault of each party. An implied term of the contract of retainer will be that the work is performed with due care and skill. In an action for breach of the contractual duty of care, should the loss be apportioned due to the client's contributory conduct? Should such apportionment be available only where a concurrent liability exists in tort, or wherever a duty is based on fault? Which principles should operate if there is an express warranty that, for example, the transaction will lead to a certain result?

This update examines conflicting views on the applicability of statutory apportionment to the law of contract. Following an exposition of judicial approaches in New Zealand and England, the recent decision of the High Court of Australia in *Astley v Austrust*,[1] in which the local apportionment legislation was held not to apply to any action framed in contract, is evaluated. Reform is then considered with strict contractual obligations the main area of focus. I suggest that the Law Commission's proposal for reform,[2] already modified once in response to academic criticism, remains in a state which does not give principled direction to the judiciary. I argue that principle and policy demand the exclusion of strict contractual terms from the ambit of apportionment.

Judicial Approaches

1. The New Zealand Position

The question of whether loss may be apportioned in contract under the Contributory Negligence Act 1947 ("the Act") is of particular importance in

1 (1999) 161 ALR 155.
2 New Zealand Law Commission, *Apportionment of Civil Liability* (Report 47, 1998).

New Zealand, given the residual uncertainty over concurrent liability in tort and contract.[3]

An important case in the area is the much discussed decision of the Court of Appeal in *Mouat v Clark Boyce*[4] which concerned an elderly widow and her impecunious son. Together, they instructed the defendant solicitor to facilitate a loan to the son secured by a mortgage on the widow's home. The solicitor advised the widow to seek independent advice but she refused in writing to do so. Nonetheless, the Court of Appeal held that there had been a breach of the solicitor's duty to his client.[5] Both Richardson and Gault JJ considered the duty to have arisen first in tort. Thus, their Honours avoided the question of whether the Act applied to contract, although Gault J noted that it would be "formalistic in the extreme" to draw distinctions as to remedy according to the cause of action pleaded.[6] President Cooke agreed that the tort action would be enough to decide the case, but went on to make obiter comments on the issues of concurrent liability and apportionment.

His Honour cited with approval the English case of *Forsikringsaktieselskapet Vesta v Butcher*,[7] to the extent that it was decided in that case to apply the English apportionment legislation to breach of contract where there was a concurrent duty in tort.[8] The President also considered the meaning of the term "negligence" in the statutory definition of fault, which is "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort".[9] The President read the section disjunctively, concluding the negligence referred to is any fault based on a failure to take care, rather than being confined to the tort of negligence.[10] Thus, the Act should extend to breaches of contractual duties of care even where no tort can be made out. His Honour then went further, stating that the duty was the same whether derived from tort, contract, or equity, and apportionment should accordingly be available in all appropriate cases.[11] Moreover, the power to apportion could be derived from the common law and resort need not be had to the Act, although his Honour felt that the Act could be used as an analogy.[12]

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3 The uncertainty may finally have been resolved by the Court of Appeal decision in *Riddell v Porteous* [1999] 1 NZLR 1, 9, where Blanchard J appears to confirm that the rule against concurrent liability is no longer good law.

4 [1991] 2 NZLR 559. See also Tobin, "Solicitor's Concurrent Liability in Tort and Contract" (1992) 6(9) BCB 110; Francis, "Privy Council Decision: *Mouat v Clark Boyce*" [1994] NZLJ 83.

5 The Privy Council overturned the decision on this point; [1993] 3 NZLR 641 (PC).

6 Supra note 4, 574-575.

7 [1989] AC 852 (CA and HL).

8 Supra note 4, 564.

9 Ibid 564-565, citing Contributory Negligence Act 1947, s 2.

10 This view was also held by Henry J in *Fletcher v National Mutual Life Nominees Ltd* [1990] 1 NZLR 97, 107.

11 Supra note 4, 565. These comments draw on Cooke P's own prior dicta in *Day v Mead* [1987] 2 NZLR 443.

12 Ibid.

Mouat cannot be considered to have decided as a matter of authority that the Act applies to actions framed in contract. The case does contain some stimulating and, in the author's view, forward-thinking obiter by the one Judge who no longer sits in that Court. The decision does not justify lower courts stating that it does not matter whether actions are brought in tort or contract, without rigorous analysis of the substance of the particular obligation.[13] *Mouat* leaves the matter open for future decision, and the lower courts must decide cases based on conflicting obiter in the Court of Appeal, and conflicting ratios in the High Court. One such High Court decision much cited in this area is *Rowe v Turner Hopkins and Partners.*[14]

In this case, Pritchard J considered the definition of fault contained in section 2 of the Act to consist of two limbs.[15] The first limb referred to the conduct of the defendant which gave rise to liability. The second limb was directed only to the actions of the plaintiff in failing to adequately protect its own interest. Reading the phrase "negligence, breach of statutory duty or other act or omission" conjunctively with "which gives rise to a liability in tort", Pritchard J held that for the Act to apply the defendant's conduct had to give rise to a liability in tort. Thus the Act could be applied to an action framed in contract provided that the facts would also support a tort action.

2. The English Position

The leading authority on the application of the indigenous apportionment legislation in England is *Forsikringsaktieselskapet Vesta v Butcher*[16] in which Hobhouse J identified three categories of contractual duty to which the legislation could apply. These were:[17]

1. Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant;

2. Where the defendant'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; and

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

As had Pritchard J in *Rowe v Turner Hopkins & Partners*, Hobhouse J and the English Court of Appeal came to the conclusion that the English Act, as

13 As occurred, for example, in *O'Callahan v Murray* [1998] DCR 901.

14 [1980] 2 NZLR 550; reversed on appeal on the ground that the defendant was not in fact negligent: [1982] 1 NZLR 178, 181. Notably the Court of Appeal drew attention obiter to the view that the Act can apply wherever negligence is an essential ingredient of the cause of action.

15 Ibid 555.

16 [1986] 2 All ER 488; affirmed by the English Court of Appeal, supra note 7.

17 Ibid 508.

presently worded, could only apply to the third category. Their Honours felt it was clear from the statutory wording that apportionment was available wherever a tort could be made out. Therefore, it would be contrary to Parliament's intention to allow a plaintiff to achieve a different result by bringing an action solely in contract.

3. The Australian Position

Before the recent decision of the High Court of Australia in *Astley v Austrust*,[18] the issue of the application to contract of the contributory negligence legislation based on the English Act had never been authoritatively decided in any of the common law jurisdictions. This case is thus a landmark in the jurisprudence on the topic, and has given rise to a rash of academic comment.[19] The High Court, perhaps unexpectedly, found that the legislation did not apply to any action framed in contract. In doing so, the Court has chosen to swim against a very strong tide.

The majority of the High Court was of the view that applying the apportionment legislation to contract cases was "contrary to the text, history, and purpose of the legislation".[20] The focus of the majority decision was on the traditional canons of statutory interpretation. First, the wording of the statute was examined. In the majority's opinion, there was nothing "in the ordinary and natural meaning of the section that can be said to assume or by necessary implication authorise the apportionment of damages in claims for breach of contract".[21] Moving then to the legislative history and intended purpose of the Act, the majority concluded that:[22]

> [There is] nothing ... that remotely suggests that the legislation was to have any impact on contractual damages and nothing to suggest that parliament intended it to apply, or even turned its collective mind, to the situation where a liability in tort was concurrent with a liability under contract.

As to policy, the majority felt it entirely appropriate to allow a legal environment wherein different results could occur simply by changing the pleadings. Here the majority relied on the conventional view that contractual obligations are voluntarily assumed, while tortious obligations are imposed.[23]

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18 Supra note 1.

19 See, for example, Legg, "The High Court's decision on concurrent liability and contributory negligence in *Astley v Austrust Limited*" (1999) 18(3) Aust Bar Rev 262; Swanton, "Contributory Negligence is Not a Defence to Actions for Breach of Contract in Australian Law – *Astley v Austrust Ltd*" (1999) 14(3) JCL 251; Swanton and McDonald, "Concurrent liability in tort and contract – professional negligence – contributory negligence" (1999) 73(8) ALJ 541; Edwards, "Contributory negligence defence in contract left hanging: (1999) 37(5) Law Soc J 55; Muir, "Solicitors' Duties Reinforced" (1999) 73(8) Law Inst J 52.

20 Supra note 1, 182 per Glesson CJ, McHugh, Gummow and Hayne JJ.

21 Ibid 167. The section referred to by their Honours is s 27A(3) of the Wrongs Act 1936 (SA), the equivalent of s 3(1) of New Zealand's Contributory Negligence Act 1947.

22 Ibid 180.

23 Ibid 182.

The beneficiary of the obligation pays for it with "consideration, often very substantial consideration",[24] so that there is no issue with resultant liability being more onerous.

Given that the wording of the apportionment legislation is able to accommodate varying judicial manipulation, the fundamental inquiry must be based on first principles. It is here that the majority judgment contains serious flaws.

The majority's reasoning concerning the nature of contractual and tortious obligation lacks intellectual integrity. As Swanton thundered:[25]

> The High Court adopted a conservative, mechanical, even formalistic construction of the legislation which harked back to the ghosts of the forms of action and ignored developments in the law since apportionment legislation was first enacted in England more than fifty years ago.

The majority placed great weight on what they perceived as a rigid and immutable distinction between contractual obligations which are voluntarily assumed, and tortious obligations which are imposed by the law.[26] Yet this does not stand up when analysed from the perspective of principle rather than historical categorisation. The contractual duty in *Astley* was a duty of care *implied* by law into the particular class of contract. The tortious duty of care was necessarily *assumed* as the plaintiff was suing in a tort that requires assumption of responsibility as an element of the cause of action.[27] Moreover, in an action in tort the plaintiff must also show that his or her reliance on the defendant was reasonable which increases the focus on the closeness of the relationship.[28] One is left with the only theoretical point of distinction being the element of consideration, yet it is often artificial in the extreme to attempt to fence off consideration and hold it relevant only to contract. For example, in *Astley* the defendant solicitors would never have assumed the duty of care if they had not thought that they would be paid for their services.[29] On this view, there can be no justification for refusing to apply the apportionment legislation to certain

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24 Ibid 181.

25 Swanton, supra note 19, 260.

26 Their Honours considered this ample justification for the seeming arbitrariness that could result from plaintiffs having this option of avoiding the apportionment legislation: supra note 1, 181. Swanton gives examples, including passengers in a taxi who suffer personal injury worsened by failing to wear seat-belts. The passenger who ordered and paid for the taxi could sue in contract, while the others would be left with an action in tort and would have their damages reduced for contributory negligence: supra note 19, 261.

27 As noted by Hewson J in *Hedley Byrne v Heller* [1964] AC 465, this requirement brings the liability "nearer contract than tort". Yet the High Court does not suggest contributory negligence should not be available for negligent misstatement, or other professional negligence causing pure economic loss.

28 *Brownie Wills v Shrimpton* [1998] 2 NZLR 320, 324.

29 As Gault J comments in *Mouat v Clark Boyce*, supra note 4, 575, referring to a similar argument in that case, "[i]t would be artificial in a case such as this where one breach of duty arose in effect upon the entering into a contract of retainer the remedy should be different depending upon whether this is regarded as tortious or contractual negligence".

contractual obligations. The question then arising is: which classes of contractual obligation should be covered?

The Proper Ambit of Apportionment in Contract

The Law Commission has proposed legislation extending apportionment to all existing bases of civil liability.[30] The Commission's proposal for reform would allow a court to apportion loss without limitation in all three *Vesta* categories.[31] This was also the English Law Commission's initial proposal in 1990.[32] However, this position was revised and in its final report the English Commission recommended that the availability of apportionment should be extended only to categories two and three.[33] Thus, all duties expressed in terms of taking care would be covered, whether or not there was liability in tort. Strict liability was not to be affected. It accords with first principles to take account of imprudence by plaintiffs wherever non-intentional fault lies at the base of the defendant's liability. Whether strict contractual terms should be affected by apportionment is a more difficult question.

In some civil law jurisdictions, fault is an essential element in an action for breach of contract.[34] The common law has adopted a somewhat inconsistent approach, the prime example being the fundamental divide between goods and services.[35] The strict nature of terms relating to the supply of goods extends not just to matters such as delivery, but also applies to promises that a certain state of affairs exists.[36] With services, however, the position is quite different. While it is possible to promise that a certain result will occur, the guarantee is the exception rather than the rule.[37] The point most relevant to this discussion is that the common law has established a principle of strict liability in contract which has the clear advantage of creating certainty. If the law has determined that defendant fault is to be irrelevant, what is to be done where the plaintiff is partially at fault?

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30 Supra note 2. See the draft Civil Liability and Contribution Act, s 5.

31 Ibid. Apportionment may occur where a "wronged person ... has failed to act with due regard for that person's own interest" [s 8(1)], and is to be assessed according to justice and equity having regard to the nature and causative effect of the parties' respective fault and to their mutual rights and obligations [s 8(2)]. Due to academic pressure from Coote, a provision has been inserted ensuring parties to contracts need not guard against breach; see Coote, "Contributory Negligence Reform and the Right to Rely on a Contract" [1992] NZ Recent L Rev 313.

32 Law Commission (Great Britain), *Contributory Negligence as a Defence in Contract* (Working Paper 114, 1990), cited at infra note 33, 1.

33 Law Commission (Great Britain), *Contributory Negligence as a Defence in Contract* (Report 219, 1993).

34 See, for example, the German Civil Code, para 276.

35 See the Sale of Goods Act 1908, declaratory on this aspect of the pre-existing common law.

36 For example, the implied conditions as to quality or fitness for purpose contained in the Sale of Goods Act 1908, s 16.

37 See generally Tettenborn, *An Introduction to the Law of Obligations* (1984) 44-47.

In his note on *Schering Agrochemicals Ltd v Resibel NV SA*,[38] Burrows puts forward a case for the availability of apportionment even where contractual liability is strict. He describes the case as "a classic illustration of the injustice that can result from the common law's inability ... to reduce damages for contributory negligence where the defendant is being sued for the breach of a strict contractual duty".[39] The defendant had supplied heat-sealing equipment to the plaintiff. This contained a defect which caused a serious fire in the plaintiff's factory. A few weeks earlier, two employees of the plaintiff had witnessed and reported an incident in which the equipment's safety system failed to operate correctly. No action had been taken following this event. The defendant acknowledged that it was in breach of a strict implied term of the contract that the equipment be reasonably fit for its purpose.[40] However, relying on lack of causation, remoteness of damage, and the plaintiff's failure to mitigate, the defendant argued that no damages should be awarded. The English Court of Appeal unanimously accepted the defendant's position, but noted that the defendant was fortunate that the apportionment legislation did not apply. Burrows considered that if a more far-reaching apportionment regime had been in place, it would have led to a more just and principled outcome.

The case provides a powerful example of how judges manipulate other doctrines in an unprincipled manner in order to achieve a certain result where apportionment is not available. The bald admission by the English Court of Appeal that the plaintiff would have recovered partially if the Court had the power to apportion cannot be reconciled with principle, as apportionment cannot apply where loss is either not caused by the defendant or is too remote.

However, the law should not be changed merely because a few difficult cases produce strained decisions. The principle that underlies apportionment is relative fault. How is this to be assessed where the defendant is not at fault at all?[41] Where a party to a contract commits to a strict obligation regardless of fault, the promisee should be able to rely on performance of the obligation and should not need to take precautions against the possibility that a breach will occur.[42]

While courts would likely be generous in allowing consumers to rely on warranties, the same cannot be assumed where commercial parties are concerned. Take the facts of *Schering*, but assume that the plaintiff's "negligence" was simply to omit maintaining any guard against the safety system failure. The defendant had warranted that the goods were fit for the purpose, and in a commercial context it must be right that reliance on the warranty would be

38 (26 November 1992) unreported, English Court of Appeal.

39 Burrows, "Contributory Negligence in Contract: Ammunition for the Law Commission" (1993) 109 LQR 175.

40 Sale of Goods Act 1979 (UK), s 14(3).

41 Even if the defendant is at fault in the breach of a strict contractual duty, this should not be relevant, as fault is irrelevant to the obligation.

42 Coote, supra note 31, 318.

justified. The contrary position would "create unacceptable uncertainty, particularly in commercial dealings".[43] As has been noted in the United States:[44]

> [I]n commercial disputes between seasoned bankers and other businessmen, certainty of result is more important than in traditional tort litigation. In commercial relationships known risks can be priced or shifted to others; if disputes arise, a bright line rule results in faster, easier settlements.

This statement is of equal application to the rules concerning commercial disputes regardless of jurisprudential origin.

Reform in New Zealand

In response to criticism from Coote,[45] the New Zealand Law Commission modified its position of universal application of apportionment with regard to the right to rely on a contract prior to breach. The Commission revised its draft legislation by including the following provision:[46]

> [T]he reliance by a wronged person on a contract does not cease to be justified by reason only of a failure by that person to take any precaution against default by the wrongdoer in the performance of an obligation under the contract before the wronged person knows that such default has occurred.

This proviso precludes any focus on contributory negligence before breach. As is the case with mitigation, the wording of the section accommodates the potential for time-lapse between breach and loss. The effect seems to be to leave the law much as it is under the doctrine of mitigation, where plaintiff fault is relevant only after a breach is known to have occurred. This accords with principle where contractual duties are strict. However, it completely removes the point of the reform as regards duties of care and skill. The focus of Coote's article was strict contractual liability. He was concerned that, where such duties are at issue, promisees should not be required to take precautions against breach.[47] Yet he did not suggest how the problem could be remedied.[48] The Law Commission, while attempting to meet this concern, appears to have gone further. The result is that much of the intended reform of contract may not occur under the current wording of the draft legislation. As Coote noted in his article, the Law Commission should not expect judges to be mind-readers.[49] Judges can only interpret the words that end up on the statute book.

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43 Ibid.

44 *Bradford Trust Company of Boston v Texas American Bank – Houston* 790 F 2d 407 (5th Cir, 1986) 409.

45 Coote, supra note 31.

46 Supra note 2. See the draft Civil Liability and Contribution Act, s 8(3)(b).

47 Coote, supra note 31, 318-321.

48 Ibid 312.

49 Ibid.

A simpler and more principled approach would be to exclude strict contractual duties from the ambit of the legislation. The reasonableness of plaintiff behaviour can be assessed subsequent to breach through the device of mitigation. Until any breaches occur, promisees will be able to go about their business with relative certainty, knowing where the relevant risks lie.

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