

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

MICHAEL ASTLEY, DEAN CLAYTON,
STEPHEN GERLACH, JOHN T GREGERSON,
JOHN H MELVILLE, JEAN MATYSEK,
JERRY McQUADE, ANNE ROBINSON,
ROSS L PROUD, NICHOLAS J T SWAN,
NIGEL W WINTER and JOHN C TUCKER

APPELLANTS

AND

AUSTRUST LIMITED

RESPONDENT

Astley v Austrust Limited (A65-1997) [1999] HCA 6
4 March 1999

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of South Australia

Representation:

D M J Bennett QC with B F Beazley for the appellants (instructed by Daenke O'Donovan)

F S McAlary QC with G B Colyer for the respondent (instructed by Griffins)

Notice: This copy of the Court's Reasons for Judgment is
subject to formal revision prior to publication in the
Commonwealth Law Reports.

CATCHWORDS

Astley & Ors v Austrust Limited

Negligence – Contributory negligence – Concurrent liability in contract and tort – Whether award of damages for breach of contract may be reduced under apportionment legislation – *Wrongs Act 1936 (SA)*, s 27A.

Negligence – Contributory negligence – When available – Whether solicitor's client guilty of contributory negligence – Failure to take proper care of own interests – Defendant's duty to take reasonable care in contract and tort – Plaintiff's loss the very kind protected by defendant's duty.

Contracts – Solicitor and client – Whether duty to exercise reasonable care and skill should be implied as a term.

Contracts – Defences – Contributory negligence not available.

Words and phrases – "Fault".

Wrongs Act 1936 (SA), s 27A.

1 GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. Two important questions arise for determination in this appeal. The first is whether a plaintiff can be guilty of contributory negligence where the defendant has contractually agreed to protect the plaintiff from the very loss or damage which the plaintiff has suffered as the result of the defendant's breach of duty. The second is whether an award of damages for breach of contract may be reduced under apportionment of liability legislation, such as s 27A of the *Wrongs Act* 1936 (SA), because of contributory negligence on the part of the plaintiff where the defendant is liable concurrently in tort and contract for breach of a duty of care.

2 The appeal is brought against an order of the Full Court of the Supreme Court of South Australia. That order set aside the finding of a trial judge in the Supreme Court who had held that the respondent had been guilty of contributory negligence in failing to protect its property and that the damages it was entitled to in actions for breach of contract and negligence should be reduced by 50 per cent. In our opinion, the Full Court erred in finding that the respondent was not guilty of contributory negligence. However, the respondent sued in contract as well as in tort. It was entitled to recover for the whole of the damage that it suffered because damages awarded pursuant to a claim in contract cannot be reduced by reason of conduct that constitutes contributory negligence for the purposes of the *Wrongs Act*. The history, text and purpose of the *Wrongs Act* make it clear that that Act was not intended to apply to claims for breach of contract.

The issues

3 The respondent, a trustee company, ("Austrust") sued the appellants, a firm of solicitors, ("the solicitors") in the Supreme Court of South Australia for breach of contract and for negligence in carrying out a retainer to give legal advice. Austrust had sought general advice from the solicitors in relation to its intention to assume the position of trustee of an existing trading trust. The trust venture failed shortly after Austrust took office. As a result, it became personally liable for losses that exceeded the value of the trust property. In the Supreme Court proceedings, Austrust claimed the solicitors were at fault in failing to advise it that it should not accept the office of trustee without excluding its personal liability for losses arising in the course of carrying out the trust. The solicitors denied liability. In the alternative, they pleaded contributory negligence on the part of Austrust.

4 The trial judge, Mullighan J, held¹ that the solicitors had been negligent in failing to advise Austrust that it would be personally liable in dealings with third parties unless it limited its liability to the extent of the trust assets. His Honour

1 *Austrust Pty Ltd v Astley* (1993) 60 SASR 354.

Gleeson CJ
McHugh J
Gummow J
Hayne J

2.

held that the damage suffered by Austrust, together with interest, up to a date in June 1995, amounted to \$1,436,837.78. However, he also found that there had been contributory negligence on the part of Austrust. Pursuant to the provisions of s 27A of the *Wrongs Act*, he apportioned responsibility equally between the parties. His Honour entered judgment for Austrust in the sum of \$718,418.89. He held that the contributory negligence of the plaintiff entitled the defendant to have the damages reduced "where the duty of care is the same in contract and in tort and both causes of action are pleaded"².

5 Both parties appealed to the Full Court of the Supreme Court. That Court (Doyle CJ, Olsson and Duggan JJ) allowed Austrust's appeal against the finding of contributory negligence and dismissed the solicitors' appeal³. Their Honours' finding in respect of contributory negligence made it unnecessary to consider the correctness of the primary judge's decision that the *Wrongs Act* applied to the action in contract. The Full Court increased the amount of the judgment including interest from a date after June 1995 to \$1,527,702.

6 Pursuant to the grant of special leave, the solicitors now appeal to this Court. They contend that the Full Court erred in finding that Austrust was not guilty of contributory negligence. By a notice of contention, Austrust submits that, even if it was guilty of contributory negligence, the solicitors were in breach of the implied term of the retainer to take reasonable care in giving legal advice and that Austrust's contributory negligence cannot be used to reduce the damages resulting from the breach of contract.

The factual background

7 The first appellant, Astley, was the senior partner of the solicitors. That firm had acted for Austrust for many years. Astley was the member of the firm principally concerned with the advice given to Austrust in this matter.

8 Austrust has carried on the business of a trustee company since 1910⁴ - originally under the name Elder's Trustee and Executor Company Limited and, since 1990, under the name Austrust Limited. The company was formerly associated with the pastoral group Elder Smith and Company Limited. The

2 *Austrust* (1993) 60 SASR 354 at 380.

3 *Austrust Ltd v Astley* (1996) 67 SASR 207.

4 *Elder's Executor Company's Act* 1910 (SA) conferred power on the company to act as a trustee company.

3.

chairman of the board of Austrust was an experienced chartered accountant in private practice. The general manager had a background in commercial finance. Austrust had on its staff a number of trust officers who attended to its ordinary affairs, which included acting as trustee of deceased estates, of settlements, of protected estates, of persons who were under disability, and similar activities referred to in the judgments below as "conventional" trusts. Austrust also employed a qualified legal practitioner as a member of its staff. During the events in question, he ceased to be an employee and became a consultant to Austrust. But the trial judge and the Full Court regarded his role in the present case as immaterial.

9 In 1983, Austrust decided to enter into a new field of activity - acting as a trustee of trading trusts. Consequently, it decided to accept appointment as trustee of a proposed trust which was to be set up to establish a piggery on land in New South Wales. The proposal involved the purchase of land and the borrowing of a substantial sum for that purpose. The establishment of the trust extended over a lengthy period.

10 The history of the trust began in July 1982 when QFP Properties Pty Ltd ("QFP") was appointed as trustee of the "GGI Pig Trust", a trust promoted by members of the O'Dea family. In August 1982, QFP acquired land near Young in New South Wales from the O'Deas. This land was to become the Golden Grove Piggery. In April 1983, one of the O'Deas discussed with an officer of Austrust the possibility of Austrust becoming trustee of the GGI Pig Trust.

11 In May 1983, one of the O'Deas entered into negotiations with the Reeves' interests for the purchase of another property near Tenterfield in New South Wales. Mr Reeves told Mr O'Dea that the property was valued at \$1 million. Later that month, the general manager of Austrust informed Mr O'Dea that it was prepared to act as trustee of the pig trust. In June, Mr O'Dea acquired an option to purchase the Tenterfield property.

12 On 31 August 1983, Austrust wrote to Astley asking for advice concerning a proposed deed of trust. Subsequently, Astley gave advice concerning the deed and various documents entered into for the purposes of the acquisition of land and the borrowing of moneys. It is unnecessary to go into the details. It suffices to say that the original written instructions to Astley were expressed in very general terms by Austrust and required the solicitors to examine the proposed deed of trust and "let us have your comments on it in due course". The letter stated⁵:

5 *Austrust* (1993) 60 SASR 354 at 359.

Gleeson CJ
McHugh J
Gummow J
Hayne J

4.

"The aim of the Trust, briefly is to set up an intensive piggery on land at Young in New South Wales. The land is presently owned by Golden Grove, and, in fact, is part of a larger holding upon which Golden Grove have already established (using private funds) a piggery of a similar but smaller nature to the [sic] proposed for the Trust."

- 13 From at least March 1984, Austrust involved itself in the arranging of finance for the acquisition of the properties on behalf of the trust. On 6 August 1984, Austrust executed a deed appointing a new trustee of the original trust, a deed of variation of the trust deed and a new trust deed. On 10 August 1984, Austrust executed in escrow mortgages over the Tenterfield property and a bill of sale over the plant and equipment on the Tenterfield property. The purchase price was to be financed by a loan of \$813,000 to Austrust by a syndicate of lenders to be secured by a first mortgage over the property and a second mortgage of \$490,000 in favour of the Reeves' interests. Settlement of purchase of the Tenterfield property was completed on 22 August 1984. On 4 October 1984, Austrust executed an agreement borrowing \$400,000 from an insurance company which was secured by a mortgage given by QFP over the Young property of which it was still the owner. In November, QFP transferred the Young property to Austrust as trustee of the trust.
- 14 By November 1984, therefore, Austrust had become the owner of two properties which it held upon trust for what had now become known as the GGI Rural Income and Growth Trust. Furthermore, it had entered into various loans giving rise to liabilities in excess of \$1.3 million.
- 15 By February 1985, it had become apparent to Austrust that the trust might have to be wound up. In March, Austrust decided to terminate the trust. In May 1985, the unit holders in the trust resolved to terminate the trust. The Supreme Court of Queensland confirmed the resolution and authorised Austrust to wind up the trust. By reason of the inability of the assets of the trust to meet its liabilities, Austrust incurred extensive losses in its capacity as trustee.
- 16 In the Supreme Court, Austrust alleged that Astley was negligent because he did not advise it about, or turn his mind to, the question of its liability to creditors of the trust or the desirability of excluding such liability by an appropriate provision in the documentation which he approved. In his evidence, Astley claimed that "it was not part of my job to have anything to do with the mortgages or the transfer or the contract, or the bill of sale or the stock mortgage."⁶ Thus, the issue of negligence turned on the scope of the solicitors' retainer. That issue

6 *Austrust* (1996) 67 SASR 207 at 224.

5.

was decided against them by the trial judge and the Full Court. The Full Court concluded that the trial judge had accepted that Astley "simply overlooked the problem of liability" of Austrust⁷.

17 Both the trial judge and the Court of Appeal accepted the evidence of senior officers of Austrust to the effect that, if they had been informed by the solicitors of the liability which was being undertaken, then either Austrust would have insisted upon the inclusion in all the relevant documents of a provision excluding its "personal" liability⁸ or it would not have agreed to act as trustee of the trading trust.

18 The Full Court summarised the primary judge's findings concerning contributory negligence as follows⁹:

"(1) [The general manager of Austrust] was a man of considerable knowledge and experience in respect of the financing of business activities.

(2) [Austrust] was a member of a corporate group which employed senior staff with considerable, relevant expertise in business and rural management and analysis.

(3) [Austrust] was anxious to break into the business of acting as trustee of trading trusts.

(4) There were two crucial issues to be resolved prior to accepting such a trusteeship, namely:

(a) the legal implications;

(b) the commercial soundness of doing so.

(5) [Austrust] had accepted sole responsibility for making a judgment as to (b) above.

7 *Austrust* (1996) 67 SASR 207 at 224.

8 See *Helvetic Investment Corporation Pty Ltd v Knight* (1984) 9 ACLR 773 at 774, 775.

9 *Austrust* (1996) 67 SASR 207 at 230-231.

Gleeson CJ
McHugh J
Gummow J
Hayne J

6.

(6) 'Even cursory inspection of the accounts of the GGI Pig Trust by a person with a modicum of business acumen would have revealed that at all material times the Trust was insolvent.' There was no prospect of success absent substantial public investment.

(7) [Austrust] 'blindly accepted that there were sufficient investors standing by to purchase units when the new trust was established and the prospectus issued, and that sufficient capital would be obtained to resolve all of the financial ills of the Trust, which was plainly not the case'.

(8) No inquiry was made by [Austrust or the promoter of the trust] or anyone else as to the identity of potential investors, or as to any other matter which might have revealed that the financially hazardous position of the trust would not be resolved by public subscription. In short, [Austrust] failed to make appropriate inquiries as to the availability of the funds which the trust required if it was to be viable.

(9) [The general manager of Austrust] was content to rely upon assurances given by [the promoter] without verification, and in particular made no inquiry of the auditors of GGI Pig Trust.

(10) Had appropriate inquiries been made and financial accounts been called for and checked, [Austrust] would have realised that the trust was insolvent and likely to remain so.

(11) [Austrust] failed to inform Astley of the true position and positively assured him that the proposed venture was commercially viable and without financial risk."

19 Mullighan J concluded that Austrust became exposed to personal liability by reason of: (1) its own failure to assess the financial work of the trust; and (2) the solicitors' breach of duty. He found that both defaults were concurrent and successive causes of the loss sustained¹⁰.

20 The Full Court accepted Austrust's submission that, notwithstanding the facts set out above, the solicitors had not made out a case of contributory negligence. Two reasons led the Full Court to that conclusion. First, while Austrust might well be open to criticism for failing to take proper account of the interests of the beneficiaries of the trust, it did not fail to give due consideration to its own interests. That was because it had no reason to think that its own interests were at

¹⁰ *Austrust* (1993) 60 SASR 354 at 381.

7.

stake. There was no evidence that a reasonably competent trustee would have been aware of the risk of "personal" liability, and there was no basis for concluding that Austrust, acting reasonably, ought to have known of that risk. Second, the risk of personal liability to which Austrust was exposed was the very risk against which Astley, in the discharge of his professional responsibility, should have protected it. Doyle CJ and Olsson J said¹¹:

"If proper advice had been given it would not have mattered that [Austrust] made an unwise decision. The very purpose of excluding personal liability is to protect [Austrust] against liabilities incurred wisely or unwisely."

Contributory negligence at common law

- 21 At common law, contributory negligence consisted in the failure of a plaintiff to take reasonable care for the protection of his or her person or property. Proof of contributory negligence defeated the plaintiff's cause of action in negligence¹². Although conduct amounting to contributory negligence may also constitute the breach of a duty which the plaintiff owes to the defendant, a plaintiff can be guilty of contributory negligence notwithstanding that he or she owes no duty to the defendant or any third person¹³. A pedestrian, for example, owes no duty to a speeding driver to avoid being run down but is guilty of contributory negligence if he or she fails to take reasonable care to keep a proper lookout for speeding vehicles¹⁴. Similarly, if a plaintiff fails to take care for its property, it may be guilty of contributory negligence although it owed no duty to the defendant in respect of the property. Thus, in *Smith v Badenoch*¹⁵ where a fire started by the defendant damaged an adjoining property, the Supreme Court of South Australia held that

11 *Austrust* (1996) 67 SASR 207 at 234.

12 *Butterfield v Forrester* (1809) 11 East 60 [103 ER 926].

13 *Davies v Swan Motor Company (Swansea) Ltd* [1949] 2 KB 291 at 308-309, 316, 324. In *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611, the Judicial Committee of the Privy Council said:

"[W]hen contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury."

14 *Davies v Swan Motor Company (Swansea) Ltd* [1949] 2 KB 291 at 324.

15 [1970] SASR 9.

the plaintiff was guilty of contributory negligence because he had failed to call out the local fire service promptly. A person may also be guilty of contributory negligence even though the negligence of the plaintiff did not contribute to the *accident* which caused the damage. That is because contributory negligence is concerned with the failure of the plaintiff to protect his or her person or property against damage and not with whether the failure contributed to the *accident*.

22 In determining that contributory negligence was not established in the present case, the Full Court suggested that contributory negligence would not arise where the loss sustained is "the very kind of loss" against which the defendant should have protected the plaintiff¹⁶. Their Honours said that the loss suffered by Austrust "was the loss against which it was Astley's duty to advise [Austrust] to protect itself. ... In such a case it could hardly be that the failure to protect itself against personal liability could constitute contributory negligence"¹⁷.

23 *Obiter* comments in various decisions favour the proposition that contributory negligence cannot be made out in circumstances where the very purpose of the duty owed by the defendant was to protect the plaintiff's property. In *Simonius Vischer & Co v Holt & Thompson*¹⁸, Moffitt P said that:

"Where the action for professional negligence is against an auditor, it is difficult to see how a finding of contributory negligence, according to usual concepts, could be made. If, as where the audit is of a public company, the audit contract or the undertaking of an audit is found to impose a duty to be exercised so as to safeguard the interests of shareholders, it is difficult to see how the conduct of any servant or director could constitute the relevant negligence, so as to defeat the claim against the auditor, whose duty is to check the conduct of such persons and, where appropriate, report it to the shareholders."

24 This statement was applied in *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd*¹⁹ where Burt CJ said that "to say that [contributory negligence was made out] would seem to me to deny the purpose of the audit which was to safeguard the interest of the shareholders".

16 *Austrust* (1996) 67 SASR 207 at 232.

17 *Austrust* (1996) 67 SASR 207 at 232.

18 [1979] 2 NSWLR 322 at 329-330.

19 [1989] WAR 100 at 104.

- 25 In *AWA Ltd v Daniels*²⁰, Rogers CJ Comm D appeared to accept that damages should not ordinarily be apportioned on the ground of the plaintiff's contributory negligence where the defendant's negligence was the breach of a duty it owed to the plaintiff as auditor. His Honour said²¹:

"There is a respectable body of authority for the proposition that ... a defence of contributory negligence against a company, based on the allegedly negligent conduct of a servant or director, is not available to an auditor whose duty it is to check the conduct of such persons."

- 26 Some United States decisions hold that an auditor cannot raise a defence of contributory negligence against a plaintiff. Thus in *National Surety Corporation v Lybrand*²², the Appellate Division of the Supreme Court of New York said that:

"Accountants, as we know, are commonly employed for the very purpose of detecting defalcations which the employer's negligence has made possible. Accordingly, we see no reason to hold that the accountant is not liable to his employer in such cases. Negligence of the employer is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth."

Similarly in *Shapiro v Glekel*²³, the US District Court for the Southern District of New York said that:

"[S]ignificant policy considerations ... are supportive of this approach. Accountants should not be allowed to avoid liability resulting from their own negligence except upon a showing of substantial negligence or fault by their employer".

- 27 Other courts in the United States have adopted a different view. Thus, in *Craig v Anyon*²⁴ the Appellate Division of the Supreme Court of New York found that the defence of contributory negligence was available to auditors who were

20 (1992) 7 ACSR 759.

21 (1992) 7 ACSR 759 at 842.

22 9 NYS 2nd 554 at 563 (1939).

23 380 F Supp 1053 at 1058 (1974).

24 208 NYS 259 (1925).

Gleeson CJ
McHugh J
Gummow J
Hayne J

10.

negligent in failing to discover that an employee had defrauded the plaintiff over five years.

- 28 The implicit adoption by Rogers CJ Comm D of the rule that contributory negligence cannot arise where the defendant has negligently performed the "principal purpose" for which he or she was engaged was rejected by the Court of Appeal in *Daniels v Anderson*²⁵. Clarke and Sheller JJA²⁶ expressly rejected the authorities relied upon to support the proposition. They pointed out²⁷ that, in many of the United States decisions, the issue arose in a context where a finding of contributory negligence would have defeated the plaintiff's claim. Their Honours said that, in the context of apportionment legislation²⁸:

"[T]here is no basis for a legal rule disentitling auditors from claiming that their clients are guilty of fault.

To the extent that any of the cases on which AWA relies suggests that there is such a legal rule [that contributory negligence could not be found in an auditor's favour] (and neither the Australian, New Zealand or Canadian cases make such a suggestion) we are not prepared, or able, to apply them. ... The policy that this Court is obliged to apply is to be found in s 10 and on no reading of that section could it be said that there is implied an exception concerning auditors."

Nevertheless, their Honours said that²⁹:

"The role of the auditor may have other significance. It will, almost certainly, be relevant in considering questions of apportionment and it may be appropriate, in particular circumstances, to make a finding that it is just and equitable that, for instance, the auditor bear all the damages despite the fault of the client."

25 (1995) 37 NSWLR 438.

26 Powell JA, the other member of the Court, did not specifically address this point but agreed in general with their Honours' reasons.

27 (1995) 37 NSWLR 438 at 565.

28 (1995) 37 NSWLR 438 at 567.

29 (1995) 37 NSWLR 438 at 568.

29 In our opinion the reasoning of the Court of Appeal in *Daniels* is correct. There is no rule that apportionment legislation does not operate in respect of the contributory negligence of a plaintiff where the defendant, in breach of its duty, has failed to protect the plaintiff from damage in respect of the very event which gave rise to the defendant's employment. A plaintiff may be guilty of contributory negligence, therefore, even if the "very purpose" of the duty owed by the defendant is to protect the plaintiff's property. Thus, a plaintiff who carelessly leaves valuables lying about may be guilty of contributory negligence, calling for apportionment of loss, even if the defendant was employed to protect the plaintiff's valuables.

30 A finding of contributory negligence turns on a factual investigation of whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty³⁰. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases the nature of that duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of the many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property.

31 Courts, including this Court, accept that contributory negligence can be made out in non-contractual situations, notwithstanding that the defendant was under a duty to protect people in the class of which the plaintiff was a member. Thus, it is now settled that a plaintiff may be guilty of contributory negligence even though he or she is injured as the result of a breach of a statutory duty whose very purpose was to prevent that type of injury³¹. Initially, in *Bourke v Butterfield & Lewis Ltd*³², this Court held that safety obligations are placed upon employers for the purpose of protecting not only workmen who are careful but also those who are

30 cf *Trompp v Liddle* (1941) 41 SR (NSW) 108 at 109-110.

31 *Davies v Adelaide Chemical and Fertilizer Co Ltd* (1946) 74 CLR 541.

32 (1926) 38 CLR 354.

Gleeson CJ
McHugh J
Gummow J
Hayne J

12.

careless. Because that is so, the Court held that the object of safety legislation would be defeated if the right to sue for injuries caused by the breach of a safety obligation was denied to the careless workman for whose benefit, amongst others, the legislation was specifically enacted. However, in *Caswell v Powell Duffryn Associated Collieries Ltd*³³, the House of Lords rejected that reasoning. In *Davies v Adelaide Chemical and Fertilizer Co Ltd*³⁴, this Court reconsidered the issue and accepted that, in Australia also, a plaintiff could be guilty of contributory negligence where the defendant had breached a statutory duty even if the purpose of the statute was to prevent the very damage or accident which occurred³⁵.

- 32 There is no reason in principle or policy for distinguishing duties arising from contract from those arising from statutes. In each category, the existence of a duty to protect the plaintiff from the kind of loss suffered is a relevant, but not decisive, factor.

Austrust's contributory negligence

- 33 With great respect to the learned judges of the Full Court, the unchallenged findings of the trial judge compel the conclusion that Austrust was guilty of contributory negligence. Those findings show that under the terms of the trust Austrust was obliged to borrow large sums of money in its own name secured by a mortgage on the two properties of which it was to become legal owner. Yet it made no proper inquiries as to whether those borrowings could be repaid either from the sale of the properties, the earnings of the business, or contributions from subscribers for trust units. It therefore took no care to protect itself from the financial loss that it would inevitably suffer if the value of the properties, the revenue of the trust, or the contributions from unit holders were insufficient to repay the loans and the interest thereon.

- 34 It is not to the point that the officers of Austrust thought that, by entering into the trust, it would incur no personal liability. That the officers of a trustee company in business for over 70 years believed that it could borrow more than a million dollars in its own name without any primary liability to repay the moneys is not easy to accept. One's scepticism is not reduced by the contemporaneous note of Astley made at a conference on 26 July 1984 with officers of Austrust:

33 [1940] AC 152.

34 (1946) 74 CLR 541.

35 See (1946) 74 CLR 541 at 545 per Latham CJ, 547 per Rich J, 549 per Starke J.

13.

"Happy to go into this as trustee *even if no public investors come for* [sic].
Satisfied as to security.

We have seen all books of A/C up to a couple of months ago. So happy about assets we are taking over and the books of a/c." (our emphasis)

- 35 However, it is immaterial whether or not those officers believed that Austrust was under no personal liability to repay the loans and meet the interest payments. The standard of care required of a plaintiff is determined objectively by reference to what a reasonable person would have done in all the circumstances of the case. As Lord Denning MR pointed out in *Froom v Butcher*³⁶:

"In determining responsibility, the law eliminates the personal equation. It takes no notice of the views of the particular individual or of others like him. It requires everyone to exercise all such precautions as a man of ordinary prudence would observe".

Leaving aside the case of minors³⁷, the beliefs or lack of knowledge of the plaintiff cannot prevent a finding of contributory negligence if a reasonable person in the same circumstances would have taken steps to protect the interests of the plaintiff.

- 36 In the present case, any reasonable person in Austrust's position would have taken steps to inquire whether the borrowings and the interest thereon could be repaid either from the sale of the properties, the earnings of the business or contributions from unit holders in the trust. However, as the findings of the learned trial judge show, Austrust did practically nothing to determine the viability of the venture. The plaintiff's loss was the result of two factors: (a) the failure to get a covenant against personal liability and (b) the failure to investigate the viability of the venture. One is entitled to be sceptical as to the chance that the lenders would have agreed to lend money to Austrust on the basis that it was to incur no personal liability for the loans. If the solicitors had warned Austrust of its personal liability, however, it may be that Austrust would not have accepted the office of trustee or that it would have been able to obtain satisfactory indemnities from the promoters of the trust. In any event, on the findings of the learned trial judge, Austrust's loss arose from the solicitors' failure to advise and Austrust's lack of investigation. Both factors had to be present before Austrust could suffer any loss. Accordingly,

36 [1976] QB 286 at 294.

37 *McHale v Watson* (1966) 115 CLR 199.

Gleeson CJ
McHugh J
Gummow J
Hayne J

14.

Austrust's failure to take care to protect its interests contributed to the losses that it suffered. At common law its conduct constituted contributory negligence.

- 37 However, in South Australia, as in many other common law jurisdictions, contributory negligence no longer defeats an action for negligence. Instead, the court hearing such an action must reduce the plaintiff's damages "to such extent as the court thinks just and equitable having regard to the [plaintiff's] share in the responsibility for the damage"³⁸. The important question in this case is whether the contributory negligence of the plaintiff also requires the apportionment of damages between the plaintiff and the defendant where the plaintiff has sued in contract in circumstances where he or she has, or could have, sued in tort.

38 *Wrongs Act 1936 (SA)*, s 27A(3).

Section 27A of the *Wrongs Act*

38 Section 27A of the *Wrongs Act* relevantly provides:

"(1) In this section –

...

'damage' includes loss of life, personal injury, and suffering for which a sum by way of *solatium* may be awarded under section 23A or 23B of this Act;

'damages' includes any such *solatium* as mentioned in section 23A or 23B of this Act but does not include any sum payable as compensation pursuant to the *Workmen's Compensation Act 1932-1950* or pursuant to any corresponding subsequent enactment;

...

'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.

(2) Every reference in this section to the fault of a person shall be deemed to include a reference to a fault for which that person is vicariously responsible and in a case where the claim arises out of the death of a person, a fault of the deceased shall be deemed to be a fault of the claimant.

(3) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, 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) this subsection is subject to subsection (4) of this section.

(4) Where damages (not being a *solatium*) are recoverable by virtue of subsection (3), subject to such reduction as is therein mentioned, and a contract or enactment providing for a limitation of liability is applicable to

Gleeson CJ
McHugh J
Gummow J
Hayne J

16.

the claim or the jurisdiction of the court is limited, the amount of the damages recoverable shall be arrived at as follows: -

- (a) the court shall find the total damages which would have been recoverable if the claimant had not been at fault and there had been no limitation of liability or of the jurisdiction of the court;
- (b) the total damages so found shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in responsibility for the damage and the reduced amount shall, except as provided in paragraph (c) of this subsection, be the amount recoverable;
- (c) if the amount of damages as reduced under paragraph (b) of this subsection exceeds the limit provided for in the contract or enactment or the limit of the jurisdiction of the court the court shall award the maximum amount of damages permitted by the contract, enactment, or limit of the court's jurisdiction.

(6) Where damages are recoverable by any person by virtue of subsection (3) subject to such reduction as is therein mentioned, the court shall in every case find and record the total damages which apart from any limitation of liability provided by contract or enactment, or any limitation of the jurisdiction of the court would have been recoverable if the claimant had not been at fault.

(7) Sections 24 to 27 (inclusive) of this Act (which relate to proceedings against, and contributions between, joint and several tort-feasors) shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of subsection (3) of this section in respect of the damage suffered by any person.

(8) Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the *Survival of Causes of Action Act 1940* the damages recoverable would be reduced under subsection (3) of this section, any damages recoverable in an action brought for the benefit of the dependants of that person under Part 2 of this Act and any amount recoverable by way of *solatium* under that Part shall be reduced to a proportionate extent."

39 Section 27A(3), which provides the apportionment mechanism, is the key provision. Its operation is conditioned on the term "fault" which appears twice in

the opening statement in the sub-section. Apportionment applies where "any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons." When first used in s 27A(3), the "fault" is that of the plaintiff and the term "fault" identifies "negligence, breach of statutory duty or other act or omission" which would, apart from the *Wrongs Act*, "give rise to the defence of contributory negligence". The defence of contributory negligence was available in an action for damages in tort; as will appear, it was not available as a defence in contract. When used for the second time in s 27A(3), the "fault" is that of the defendant and the term "fault" identifies the "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort".

40 The "damage" that may be suffered for the purpose of s 27A(3) includes loss of life, personal injury and suffering for which a sum by way of *solatium* may be awarded under s 23A or s 23B of the *Wrongs Act*. This is the consequence of applying the definition of "damage" in s 27A(1) to that term where it appears in s 27A(3). When s 27A(3), so construed, is read with s 27A(8), it is clear that the mechanism provided by s 27A(3) applies not only to claims in respect of personal injury by an injured plaintiff but also to actions brought under the wrongful death statute, the *Survival of Causes of Action Act* 1940 (SA), for the benefit of the estate of a person who dies as the result of personal injury. Section 27A(8) also has the effect of applying the proportionate reduction to actions brought for the benefit of the dependants of the deceased. In such cases, "a fault of the deceased shall be deemed to be a fault of the claimant"³⁹.

41 The natural and ordinary meaning of s 27A(3), read in the light of the definitions contained in the section, indicates that the section is concerned with claims in tort rather than claims in contract. The sub-section was designed to remedy the evil that the negligence of a plaintiff, no matter how small, which contributed to the suffering of damage, defeated any action in tort in respect of that damage.

42 Nothing in s 27A(3) suggests that "fault" - in either of its uses in s 27A(3) - includes rights and obligations arising from a breach of contract. Nor is there anything 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. On its face, s 27A deals only with actions in tort. It is not an example of that category of legislation identified by Scalia J, delivering the opinion of the Court in *Oncale v Sundowner Offshore Services Incorporated*⁴⁰,

39 s 27A(2).

40 140 L Ed 2d 201 at 207 (1998), (United States Supreme Court).

that is to say, legislation, the natural and ordinary meaning of which goes beyond remedying the evil which the legislature was concerned to abolish.

- 43 However, the learned trial judge found that s 27A of the *Wrongs Act* operates so as to reduce the damages otherwise recoverable for a breach of contract where the obligation under the contract is commensurate with the duty imposed by the general law of negligence. Notwithstanding that both text and history apparently indicate a contrary conclusion, his Honour's finding has much support in the recent case law. Before examining these cases, it is first necessary to examine the circumstances in which a plaintiff may sue a professional person for breach of contract and for common law negligence.

Concurrent liability

- 44 As the learned trial judge found, it was open to Austrust to sue in contract as well as in tort. Until comparatively recently, the mutual rights and duties of a solicitor and client were regarded as regulated exclusively by the express and implied terms of the solicitor's retainer. As recently as 1939, the English Court of Appeal held in *Groom v Crocker*⁴¹ that "the mutual rights and duties of the two are regulated entirely by the contract of employment". The Court rejected an argument that liability in tort could arise from their relationship. But times change. Since that decision, the law has evolved to the conclusion that concurrent liabilities in both contract and tort may arise in cases of professional negligence. Prima facie, a plaintiff may sue a solicitor in either contract or tort or both. In *Central Trust Co v Rafuse*⁴², Le Dain J, delivering the judgment of the Court, said that:

"where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence".

- 45 The reach of tort liability has extended so far in professional negligence cases that in *Hawkins v Clayton*⁴³ Deane J suggested that, where a tortious duty to take reasonable care exists, there is no justification for implying a term of the same

41 [1939] 1 KB 194 at 222 per Scott LJ. The authorities before *Groom* were collected and criticised by Connolly J in *Aluminium Products (Qld) Pty Ltd v Hill* [1981] Qd R 33 at 39-42.

42 (1986) 31 DLR (4th) 481 at 522; see also *Finlay v Murtagh* [1979] IR 249 at 263 per Griffin J and *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384.

43 (1988) 164 CLR 539.

content into the contract. Consequently, no action for breach of an implied term to take reasonable care can arise. Deane J said⁴⁴:

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

His Honour explained his rationale thus⁴⁵:

"To the extent that the content and incidents of the contractual duty of care correspond with those of the ordinary duty of care under the common law of negligence, the implication of a general contractual term is difficult to rationalise. If the implication of the term is based upon some perceived general principle of law, one is led to ask why the common law should imply a contractual term imposing a duty of care which the common law imposes in any event. If the implication of the term is based upon imputed intention of the parties, it is difficult to see how any of the ordinary tests for the implication of a term on that basis could properly be seen as satisfied. It could not be sensibly said that it is necessary for the business efficacy or the reasonable or effective operation of a contract to imply a contractual term imposing a general duty which corresponds with the general duty which already exists under the common law. If the contract between solicitor and client is in writing and complete upon its face, it cannot sensibly be said that the implication of a term imposing such a concurrent general contractual duty is so obvious that 'it goes without saying'. To the contrary, it would seem at least possible that the solicitor and client would, if asked whether they wished to complicate their contract by a term imposing a duty of care which was co-extensive with that which already existed under the common law, join in the answer that they did not.

To the extent that the incidents of an independent general contractual duty of care would differ from those of an independent tortious duty, it is even more difficult to rationalize the implication of a contractual duty. Once one accepts that the ordinary law of negligence can apply to render a solicitor

44 (1988) 164 CLR 539 at 585.

45 (1988) 164 CLR 539 at 583-584.

Gleeson CJ
McHugh J
Gummow J
Hayne J

20.

liable for economic loss caused to a client by professional negligence, the content and incidents of the solicitor's common law duty of care must be seen as representing the law's judgment of the extent to which it is reasonable and desirable to render a solicitor liable for loss or damage suffered by his client."

No other member of this Court addressed the issue.

- 46 The reasoning of Deane J on this point was rejected by the House of Lords in *Henderson v Merrett Syndicates Ltd*⁴⁶. In *Henderson*, their Lordships held that an action could be brought for professional negligence against underwriting agents both in contract and in tort. Lord Goff of Chieveley, with whom Lord Keith of Kinkel, Lord Browne-Wilkinson, Lord Mustill and Lord Nolan agreed, after referring to the view expressed by Deane J, said⁴⁷:

"It is however my understanding that by the law in this country contracts for services do contain an implied promise to exercise reasonable care (and skill) in the performance of the relevant services; indeed, as Mr Tony Weir has pointed out⁴⁸ in the 19th century the field of concurrent liabilities was expanded 'since it was impossible for the judges to deny that contracts contained an implied promise to take reasonable care, at the least, not to injure the other party.' My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

- 47 History and legal principle combine to indicate that the conclusion of the House of Lords in *Henderson* is the correct view. The implied term of reasonable care in a contract of professional services arises by operation of law. It is one of

46 [1995] 2 AC 145.

47 [1995] 2 AC 145 at 193-194.

48 *International Encyclopedia of Comparative Law*, vol 11, *Torts*, ch 12, par 67.

those terms that the law attaches as an incident of contracts of that class⁴⁹. It is part of the consideration that the promisor pays in return for the express or implied agreement of the promisee to pay for the services of the person giving the promise. Unlike the duty of care arising under the law of tort, the promisee in contract always gives consideration for the implied term. And it is a term that the parties can, and often do, bargain away or limit as they choose. Rather than ask why the law should imply such a term in a contract for professional services, it might be more appropriate to ask why should the law of negligence have any say at all in regulating the relationship of the parties to the contract? The contract defines the relationship of the parties. Statute, criminal law and public policy apart, there is no reason why the contract should not declare completely and exclusively what are the legal rights and obligations of the parties in relation to their contractual dealings. The proposition that, in the absence of express agreement, tort and not contract regulates the duty of care owed by a professional person to a person hiring the professional services is inconsistent with the historical evolution of professional duties of care which, until recently, could be the subject of action only in contract. Moreover, the conceptual and practical differences between the two causes of action remain of "considerable importance"⁵⁰. The two causes of action have different elements, different limitation periods, different tests for remoteness of damage and, as will appear, different apportionment rules.

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

49 In *Lanphier v Phipos* (1838) 8 Car & P 475 at 479 [173 ER 581 at 583] Tindal CJ said:

"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill."

50 *Aluminium Products (Qld) Pty Ltd v Hill* [1981] Qd R 33 at 52.

Application of the *Wrongs Act* to an action for breach of contract

- 49 Despite the textual indications and the historical reasons that point to s 27A of the *Wrongs Act* being unconcerned with contractual claims, the solicitors submit that s 27A should be construed as applying to cases of breach of contract, at least where there is a breach of concurrent and co-extensive contractual and tortious duties of care. They rely on a number of authorities which hold that apportionment statutes require a plaintiff's damages in contract to be reduced where that person is guilty of contributory negligence. However, there are also cases which hold to the contrary. That being so, precedent cannot resolve the issue whether the *Wrongs Act* applies to a breach of a contractual duty of care. The issue is one of statutory construction which is to be resolved by reference to the relevant text, history and purpose of the statute. Nevertheless, the case law gives insights into the competing arguments for and against holding that s 27A authorises a reduction of the damages otherwise payable to the plaintiff for the breach of a contractual duty of care when that person has been guilty of contributory negligence.

The case law

- 50 Judicial exposition of the construction of apportionment legislation has largely turned on the meaning of "fault" as defined in that legislation and the extent to which the history and purpose of the legislation should colour that construction. The phrase "negligence, breach of statutory duty or other act or omission" governs the balance of the definition which is introduced by "which" and has two limbs. The first is "gives rise to a liability in tort" and the second is "would, apart from this Act, give rise to the defence of contributory negligence". However, the cases diverge over whether the word "negligence" is disconnected from the balance of the definition, so that there may be "fault" by reason of "negligence" which need not be tortious. Another view of the legislation is that it applies to claims for breach of contract because contributory negligence always constituted a possible defence to an action for damages for breach of contract. This position was advanced by Professor Glanville Williams in his influential book, *Joint Torts and Contributory Negligence*⁵¹.
- 51 Two further considerations are evident in some of the cases. First, there appears to be an implied view that the principle of apportionment in the legislation is paramount and that it should apply in all cases where there is a breach of both a tortious and contractual duty of care. Second, there is an assumption that an implied duty of care within a contract is identical to a duty of care under the law

51 (1951).

of negligence and that the same rule should apply to both duties irrespective of how the action is pleaded.

- 52 The earliest Australian authority in favour of applying the apportionment legislation to contract cases is *Queen's Bridge Motors & Engineering Co Pty Ltd v Edwards*⁵². There, Crisp J construed the word "negligence" in a broad sense and held that it was not limited to negligence giving rise to a liability in tort⁵³. His Honour accepted Professor Glanville Williams' claim that contributory negligence was a defence to breach of contract. Crisp J said⁵⁴:

"The disjunctive form of the last part of the definition [ie of 'fault'] makes it at least clear that in those actions in contract, where prior to this Act the defence of contributory negligence had been recognised, this Act does nothing to disturb it."

His Honour went on to say⁵⁵ that "the form of the statute is such as to state a general principle in regard to contributory negligence which is not restricted in the case of contractual liability to those few plain and other doubtful cases in which before the Act courts for differing reasons had recognised the defence."

- 53 It is true that a person could be guilty of negligence even though his or her conduct did not give rise to a liability in tort. Thus, a person could be guilty of contributory negligence at common law even though that negligence did not "give rise to a liability in tort". But it does not follow that the legislation makes the contributory negligence of the plaintiff a ground for reducing the damages for breach of contract. The term "negligence" where it refers to a liability in tort in the first limb of the definition of "fault" is referring to the defendant's negligence, not the plaintiff's negligence. Where the term refers to "negligence" which gives "rise to the defence of contributory negligence", it is referring to the plaintiff's negligence. Contrary to what Crisp J accepted, the plaintiff's "negligence" never gave rise "to the defence of contributory negligence" in an action for breach of contract. No doubt a plaintiff's conduct, which could be equated with "contributory negligence" in an action in tort, could defeat an action in contract. It might, for example, show that there was no causal connection between the

52 [1964] Tas SR 93, followed in *W & G Genders Pty Ltd v Noel Searle (Tas) Pty Ltd* [1977] Tas SR 132.

53 [1964] Tas SR 93 at 96.

54 [1964] Tas SR 93 at 96.

55 [1964] Tas SR 93 at 96.

plaintiff's damage and the breach of contract. But "contributory negligence", that is, negligence which contributed to the damage was not as such a defence to an action for breach of contract.

54 In *Belous v Willetts*⁵⁶, Gillard J rejected Crisp J's reasoning. Gillard J concluded that "the word 'negligence' should be construed as meaning the tort of negligence, and not mere carelessness, or negligent breach of contract which would not give rise to a liability in tort."⁵⁷ His Honour relied in particular on the purpose of the statute, which was "to prevent a plaintiff guilty of contributory negligence from failing in his action" and pointed out that that purpose was not relevant to breaches of contract since "if the action is based on contract and a breach of that contract is proved, the plaintiff cannot fail. Proof of damage that is caused by the defendant is not of the gist of the action."⁵⁸ Gillard J also rejected, correctly in our opinion, Professor Glanville Williams' thesis that contributory negligence was a defence to actions in contract. His Honour held that, irrespective of whether the conduct of the plaintiff may require damages for breach of contract to be reduced in some circumstances, it was not equivalent to the defence of contributory negligence in tort which operated as a complete defence to the action.

55 In *AS James Pty Ltd v Duncan*⁵⁹, McInerney J agreed with Gillard J's reasoning and refused to follow *Queen's Bridge Motors*. McInerney J also held that Crisp J's construction of the term "fault" was strained because his approach would logically require the words "breach of statutory duty" within that definition to mean all breaches of statutory duty, which could not have been intended by the legislation.

56 The New South Wales Court of Appeal examined the issue in *Harper v Ashtons Circus Pty Ltd*⁶⁰. In an *obiter* comment the Court, having found that there was no contributory negligence in that case, indicated that the importation of contributory negligence into the law of contract was unjustified and unnecessary. One member of the Court, Manning JA, reached this conclusion reluctantly and expressed the hope that the law would develop in such a way that "a litigant with

56 [1970] VR 45.

57 [1970] VR 45 at 48.

58 [1970] VR 45 at 47.

59 [1970] VR 705.

60 [1972] 2 NSWLR 395.

a cause of action in tort will be required to abandon a similar cause of action in contract"⁶¹. Hope JA, with whom Jacobs P agreed, said that⁶²:

"The importation into the law of contract of contributory negligence as a defence in this sense seems both unjustified and unnecessary. ... [T]he law of contract is not so intractable as to be unable to produce an acceptable solution in those cases where no difference is justified or, where some difference is justified, in respect of what might be called the common areas, by the application of its own principles, without bringing in aid principles of the law of torts."

57 A few years later in *Rowe v Turner Hopkins & Partners*⁶³, a case concerned with the equivalent New Zealand apportionment legislation, Prichard J held that the apportionment legislation applies to a breach of contract where the breach gives rise to concurrent liability in tort and contract. His Honour said⁶⁴:

"In my view, the first limb of the definition is plainly directed to defining 'fault' as it relates to the conduct of the defendant - in other words, as it relates to the plaintiff's cause of action. This phrase is qualified by the expression 'which gives rise to a liability in tort'. It follows that no negligence, breach of statutory duty and no other act or omission of the defendant will bring section 3(1) into play unless it is one which gives rise to liability in tort. In other words, the Act applies only when the plaintiff's cause of action is in respect of some act or omission for which the defendant is liable in tort. Conceivably, the defendant may be concurrently liable in contract - but that is immaterial - the sine qua non is conduct creating liability in tort.

The second limb of the definition is concerned with and is referable only to the conduct of the plaintiff. It relates not to any cause of action but to conduct which, prior to the Act, would give rise to the defence of contributory negligence and which is now to be regarded as that conduct on the part of a plaintiff which will lead not to a complete defence but to a reduction in damages. Before the enactment of the Contributory Negligence Act, the

61 [1972] 2 NSWLR 395 at 401.

62 [1972] 2 NSWLR 395 at 404.

63 [1980] 2 NZLR 550.

64 [1980] 2 NZLR 550 at 555-556.

defence of contributory negligence was a complete defence in tort: it was not a defence in contract - where the issue was more likely to be simply causation.

I therefore conclude ... that the first limb of the definition of s 2 determines the meaning of the word 'fault' as it relates to the plaintiff's cause of action: that accordingly, 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. By the same token - the second limb of the definition means simply and logically that no act or omission of the plaintiff will entitle the defendant to a reduction of damages unless it amounts to the sort of conduct which, prior to the enactment of the Contributory Negligence Act, would have afforded a defence of contributory negligence."

58 On this reasoning, the plaintiff's damages in contract are liable to be reduced simply because the defendant is also liable in tort. This is a surprising conclusion. It appears to be based on the definition of "fault" without regard to either the mischief which the section was designed to remedy or the context of "fault" in the apportioning provision⁶⁵. That context makes it clear that the apportionment mechanism only applies to a claim which in the absence of the statute, would "be defeated by reason of the fault of the person suffering the damage"⁶⁶. Since, as his Honour accepts, the fault of the plaintiff was never a defence to an action for breach of contract, the direction to apportion, made by the substantive provision of the legislation, is inoperative in cases of contract.

59 The judgment of Prichard J, like that of Crisp J in *Queen's Bridge Motors*⁶⁷, appears to assume that the principle of apportionment is paramount and that the legislation was intended to require that damages be apportioned in all contract cases where a liability in tort also exists and where contributory negligence can be made out. This assumption is inconsistent with the history of the legislation whose purpose was to enable recovery of damages by plaintiffs in cases where their contributory negligence would have meant that they recovered nothing. The section was designed to increase the rights of plaintiffs, not reduce them.

⁶⁵ s 27A(3).

⁶⁶ s 27A(3).

⁶⁷ [1964] Tas SR 93.

60 Furthermore, the assumption overlooks the fact that the damages awarded for the breach of contract may be different from those in tort because of the rules of remoteness or the terms of the contract. Nothing in the legislation gives any hint that it seeks to regulate awards of damages in contract cases. Moreover, the assumption that the two causes of action are effectively merged does not accord with the attitude of the courts in relation to the differences between bringing an action in both tort and contract. When a contract action is statute barred, for example, an action in tort may still be taken⁶⁸. Similarly, an action in contract for breach of a promise to take care may be maintainable against a defendant outside the jurisdiction when an action in tort could not be maintained⁶⁹.

61 Moreover, there is nothing in the legislation which suggests that the *Wrongs Act* intends to limit recovery of damages by plaintiffs in contract to the amount allowable under the apportionment section.

62 In 1985 in *Forsikringsaktieselskapet Vesta v Butcher*⁷⁰, Hobhouse J reached the same conclusion as Prichard J in respect of the United Kingdom apportionment legislation. His Lordship held that, where a defendant's liability was the same in contract and in tort, the legislation applied and that a court could apportion the fault between the parties. Hobhouse J distinguished three categories of cases: (1) those where liability arises from a contractual provision which does not depend on negligence on the part of the defendant; (2) those where the liability arises from a contractual obligation which is expressed in terms of taking care but does not correspond to a common law duty of care which would exist in the given case independently of contract; and (3) those where the liability in the contract is the same as the liability in the tort of negligence independently of the existence of any contract. His Lordship said that in category three cases⁷¹:

"[T]he correct analysis is that where there is independently of contract a status or common law relationship which exists between the parties and which can then give rise to tortious liabilities which fall to be adjusted in

68 *Aluminium Products (Qld) Pty Ltd v Hill* [1981] Qd R 33.

69 *Matthews v Kuwait Bechtel Corporation* [1959] 2 QB 57.

70 [1986] 2 All ER 488.

71 [1986] 2 All ER 488 at 510.

Gleeson CJ
McHugh J
Gummow J
Hayne J

28.

accordance with the 1945 Act⁷², the relevant question in any given case is whether the parties have by their contract varied that position."

This statement has proved to be extremely influential.

63 In *Vesta*⁷³, the Court of Appeal upheld Hobhouse J's conclusion that, where a defendant's liability was the same in contract and in tort, the apportionment legislation applied and that the court could apportion responsibility for the damage. A subsequent appeal⁷⁴ to the House of Lords did not deal with this point. In the Court of Appeal, O'Connor LJ, with whom Neill LJ concurred somewhat reluctantly⁷⁵, quoted⁷⁶ with approval the reasoning of Prichard J in *Rowe*⁷⁷. The third member of the Court of Appeal, Sir Roger Ormrod, also dismissed the appeal. But he concluded that the context of the 1945 Act and the language of the relevant section made it clear that the Act was only concerned with tortious liability. However, he thought that an apportionment of damages could be made in that case because an action in contract could not be brought upon the facts of the case. He concluded that there was⁷⁸:

"not a breach of a specific term of the contract between them, though it could be, and was, pleaded as breach of an implied term. It might be more accurate to say that the existence of the contract created a degree of proximity between Vesta and the brokers sufficient to give rise, on ordinary principles, to a duty of care and, therefore, to a claim in negligence. Consequently, I agree with Hobhouse J that this is a case for apportionment of damages."

72 *Law Reform (Contributory Negligence) Act 1945 (UK)*.

73 [1989] AC 852. This decision has been followed and applied in *Tennant Radiant Heat Ltd v Warrington Development Corporation* [1988] 1 EGLR 41; *Youell v Bland Welch & Co Ltd* [1990] 2 Lloyd's Rep 423.

74 [1989] AC 852 commencing at 880.

75 [1989] AC 852 at 875.

76 [1989] AC 852 at 865-866.

77 [1980] 2 NZLR 550 at 555-556.

78 [1989] AC 852 at 879.

64 The reasoning of the majority in the Court of Appeal, like that of Prichard J in *Rowe*, assumes that, if an action can be brought in tort, that is sufficient for the application of the apportionment legislation to a claim in contract.

65 In Australia, the impact of the decision of *Vesta* is evident in a series of decisions which start with *Bains Harding Construction & Roofing (Aust) Pty Ltd v McCredie Richmond & Partners Pty Ltd*⁷⁹ where Smart J held that the apportionment legislation could apply to an action in contract where the action could have been brought in tort and was in substance a tort claim. His Honour declined to follow the earlier Victorian authority and the *dicta* of the Court of Appeal in *Harper* because the earlier decisions were given at a time when it was believed that the cause of action in professional negligence cases lay in contract and not in both contract and tort. Smart J said⁸⁰:

"I agree with the decision of the Court of Appeal in *Vesta* and the reasons for that decision. The result should depend on the substance of the matter and not on the forms of action and the skill with which these can be employed by members of the legal profession."

66 In *AWA*⁸¹, Rogers CJ Comm D applied the legislation to a case where there was concurrent liability in contract and tort. His Honour's views seem to be representative of the approach taken to this area of the law by Australian trial courts. Rogers CJ Comm D said⁸²:

"While there is no decision, at an appellate level, in Australia, to a contrary effect to that arrived at by the WA full court [in *Arthur Young*], in my view, the tide has been running so strongly against that view, in authoritative

79 (1988) 13 NSWLR 437. In the very next year, in *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd* [1989] WAR 100 the majority of the Full Court held that the whole history behind the apportionment legislation denied a contribution for contributory negligence in actions for breach of contract if a concurrent tortious duty has been breached. In *Challenge Bank Ltd v VL Cooper & Associates Pty Ltd* [1996] 1 VR 220, however, Smith J held that the legislation could apply where the party was concurrently liable in tort and contract even if the action was pleaded solely in contract.

80 (1988) 13 NSWLR 437 at 444.

81 (1992) 7 ACSR 759.

82 (1992) 7 ACSR 759 at 841.

Gleeson CJ
McHugh J
Gummow J
Hayne J

30.

pronouncements in other countries, that, even at first instance, it is open to a judge to take a different view."

In *AWA*, Rogers CJ Comm D did not undertake a detailed analysis of the legislation. Moreover, it appears that counsel for the plaintiff conceded the point⁸³.

67 Subsequently, in *Craig v Troy*⁸⁴, the Full Court of the Western Australian Supreme Court refused to follow its earlier decision in *Arthur Young*⁸⁵ which had held that the apportionment legislation did not apply to contract cases. In *Craig*, Malcolm CJ held that the Full Court of the Supreme Court of Western Australia in *Arthur Young* had taken insufficient notice of the impact of the provisos in the

83 (1992) 7 ACSR 759 at 842.

84 (1997) 16 WAR 96.

85 [1989] WAR 100.

equivalent of s 27A(3) on the interpretation of the statute⁸⁶. His Honour said⁸⁷:

"Proviso (a)⁸⁸ necessarily contemplates that the provision applies to contractual claims because 'any defence arising under a contract' relates to a duty imposed by contract. Apart from any limitation on liability imposed by the contract dealt with in proviso (b), defences to claims in tort do not normally arise 'under' a contract."

68 With great respect, proviso (a) has no such contemplation. The purpose of proviso (a) is simply to ensure that a claim cannot be brought in tort and damages awarded under the apportionment legislation if such a claim would circumvent a contractual restriction. The proviso does not establish that the legislation applies to contractual claims with the result that the plaintiff cannot claim more in an action in contract than that person could claim in an action in tort. On the contrary, the proviso demonstrates that the contractual arrangement between the parties has primacy over any claim in tort.

69 In our opinion, the case law in this area is unsatisfactory. It displays substantial flaws of reasoning and is overall in a state of confusion. Furthermore, the tripartite division adopted by the United Kingdom cases is unacceptable. The legislation does not hint at such a distinction. In the words of La Forest JA⁸⁹:

"The difficulty with the foregoing authorities [in favour of applying the legislation to such cases] is to justify them on the basis of a generally

86 The Western Australian legislation is different in many respects from that of the comparable legislation in England and other Australian States. However, the legislation is clearly confined to the common law defence of contributory negligence in an action in tort. This is clear from the words in s 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA): "notwithstanding that the plaintiff had the last opportunity of avoiding or could by the exercise of reasonable care, have avoided the consequences of the defendant's act or might otherwise be held guilty of contributory negligence, the defendant shall not for that reason be entitled to judgment".

87 (1997) 16 WAR 96 at 154.

88 "Provided that - (a) this subsection shall not operate to defeat any defence arising under a contract".

89 *Doiron v Caisse Populaire D'Inkerman Ltée* (1985) 17 DLR (4th) 660 at 674-675.

Gleeson CJ
McHugh J
Gummow J
Hayne J

32.

acceptable theory. For the most part the reasoning in the cases ... 'is generally sparse to the point of non-existence'⁹⁰."

- 70 In our opinion, those decisions which have applied apportionment legislation, based on the *Law Reform (Contributory Negligence) Act 1945* (UK), to breaches of contract are wrong and should not be followed in this country. The interpretation of the legislation adopted by those courts which have applied the legislation to contract claims is strained, to say the least. It relies principally, if not exclusively, on the use of the term "negligence" in the definition of "fault". It ignores not only the context of that term in the definition itself but also the context provided by the various equivalents of s 27A(3) which is the principal substantive provision of the legislation. It also ignores the mischief which the legislation was intended to remedy.

The construction of s 27A

- 71 The construction of statutes is not an exact science. In many cases, every argument in favour of a particular construction can be met with a plausible counter argument. But so far as issues of statutory construction go, on any fair reading of the apportionment legislation against the background of the mischief it was intended to remedy, it is clear to the point of near certainty that the legislation does not and was never intended to apply to contractual claims.

- 72 As indicated earlier in these reasons, the definition of "fault" in s 27A is a key element in determining the applicability of the apportionment mechanism in s 27A(3). For s 27A(3) to apply, the damage must arise partly by reason of the "fault" of the plaintiff and partly by reason of some other person's fault. Fault is defined to mean "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". In terms, a breach of contract does not come within the meaning of "fault". The solicitors argue that the word "negligence" should not be limited by the words "which gives rise to a liability in tort". However, as McInerney J pointed out in *James*⁹¹, to construe negligence as applying to all cases of negligence, whether giving rise to a liability in tort or in

90 Citing Bridge, "Defective Products, Contributory Negligence, Apportionment of Loss and the Distribution Chain", (1981-1982) 6 *Canadian Business Law Journal* 184 at 197 fn 62.

91 [1970] VR 705.

contract, would logically require the words "breach of statutory duty" to be similarly unrestricted, and to be read as meaning all breaches of statutory duty.

73 The *Wrongs Act* plainly envisages that damages may be awarded for breaches of a tortious duty and separately for breaches of a contractual duty. That this is so is evident from the terms of s 27A(4) and from the lack of any indication that the legislation intended to abolish actions in contract based on conduct which would also give rise to an action in tort. Section 27A(4) deals with the situation where the damages awarded for a breach of tort under s 27A(3) are in excess of a limitation of liability arising from a contract between the parties. Section 27A(4) requires the damages awarded to be reduced to the maximum damages allowable under the contract. It is significant that, while the sub-section specifically deals with the situation where the damages awarded as the result of the operation of the *Wrongs Act* are larger than the damages awarded under the contract, it does not deal with the reverse situation where the damages under the contract would be larger than those resulting from the operation of that Act. That is the situation with which we are concerned in this case.

74 The fact that a difference in the award of damages is addressed at all would suggest that the legislature envisaged that the causes of action would be independent of each other and that a finding of damages under a tortious cause of action would not necessarily be equivalent to a finding of damages under a contractual cause of action. Moreover, it seems implicit in the structure of the section that the *Wrongs Act* recognises a hierarchy in relation to tortious and contractual claims. Proviso (a) to s 27A(3) directs that that sub-section "shall not operate to defeat any defence arising under a contract" and s 27A(4)(c) limits damages to the maximum allowed under the contract. These provisions indicate that the contractual agreement entered into between the parties is to have precedence over the damages awarded under the apportionment legislation. They also support the view that an award for damages under a contractual claim should not be reduced to align it with an award of damages under the *Wrongs Act*.

75 By themselves, the foregoing considerations point to the legislation having no purpose of affecting the damages awarded for breach of contract. But if there were any doubt about the matter, the state of the pre-existing law and the purpose of the legislation make it clear that the legislation does not affect actions for breach of contract.

76 At common law, contributory negligence, which was invented in 1808 as an answer to an action in nuisance, was a complete defence to an action in tort for negligence. No case can be found in the books where contributory negligence, as such, was ever held to be a defence to an action for breach of contract. Moreover, if it had been a defence to breach of contract, it is impossible to understand why

Gleeson CJ
McHugh J
Gummow J
Hayne J

34.

the great works on pleading written in the nineteenth century make no mention of it. No trace of the defence can be found in any of those works notwithstanding that, at least after the Hilary Term Rules of 1834, such a defence would have to have been specially pleaded.

77 At common law, contributory negligence could be raised under the plea of Not Guilty⁹² which was the plea of the general issue to an action in trespass or on the case⁹³. Case was the basis for what is now, but was not then, the independent tort of negligence. Contributory negligence could be raised under the general issue because it denied that the plaintiff had a cause of action on the spurious theory that the plaintiff had caused his own damage. But an action in contract was an action in assumpsit and the plea of the general issue in assumpsit was non assumpsit. After 1834, non assumpsit only denied the promise alleged against the defendant. Contributory negligence plainly could not be raised under the general issue in contract. Nor could it be raised as a traverse of any part of the plaintiff's pleaded cause of action. If it could be raised at all, it would have to be specially pleaded as a plea in confession and avoidance to a claim of assumpsit. Every plea in confession and avoidance at common law had to "give colour" - that is, it had to admit the apparent right of the plaintiff and plead new matter that defeated that right. Common illustrations were pleas of performance, payment, accord and satisfaction or release. If contributory negligence was a defence to a breach of contract, it would have had to have been specially pleaded. Yet neither the case law nor the practice works contain any reference to such a plea. It is impossible to accept that contributory negligence, as such, was ever a defence to a claim in contract when neither the cases nor the books of pleading and practice make any reference to it.

92 *Bridge v Grand Junction Railway Company* (1838) 3 M & W 244 [150 ER 1134].

93 Great Britain, *Eighth Report of the Law Revision Committee*, presented in 1939, (Cmd 6032) declared at 4:

"Until comparatively recent times the question which arose when a plaintiff sued a defendant was not 'Has the defendant broken any duty which he owed to the plaintiff?' but 'Has the plaintiff any form of action against the defendant, and if so what form?' Most forms of action in tort began in trespass and developed through trespass on the case and an action on the case. To such a writ the proper plea in defence was 'not guilty.' Under such a plea the defendant must be found guilty or not guilty; it was not possible for him to be partly guilty and partly not guilty, and therefore there was no method by which liability could be divided between plaintiff and defendant. It was all or nothing - the plaintiff must wholly succeed or wholly fail."

78 The reason why it would never have occurred to the common lawyers to plead such a defence is not hard to find. Because such a plea had to "give colour", it would have to confess (1) the promise; (2) its breach; and (3) the causal connection between the breach and damage ("whereby the plaintiff suffered loss and damage") alleged in the plaintiff's declaration. In that context, the plea to the breach of contract would have had to allege: "The defendant says that the plaintiff negligently failed to take care of his property [or person]". Such a plea would have had no meaning for the common lawyers, for it alleged no matter that logically or otherwise confessed and avoided the cause of action in the plaintiff's declaration.

79 The proposition that, prior to the enactment of the legislation, contributory negligence operated as a defence to a breach of contract, relies principally on Professor Glanville Williams' thesis in *Joint Torts and Contributory Negligence*. However, it cannot be seriously maintained in the face of the lack of any suggestion in any contract case or work of pleading that the principle of contributory negligence is or ever was a "defence" to a claim for breach of contract⁹⁴. Professor Jane Swanton notes that "[I]t was never clearly established whether contributory negligence was a defence at common law to actions for breach of contract. Though Professor Glanville Williams argues that it was⁹⁵ he is not prepared to assert that it was a defence *eo nomine*."⁹⁶

80 The fact that contributory negligence was not a defence to an action in contract points irresistibly to the conclusion that the apportionment legislation is concerned only with actions in tort and does not affect awards of damages based on breach of contract. To what, other than a common law action in tort, can s 27A(3) be referring when it says that a claim in respect of damage "shall not be defeated by reason of the fault of the person suffering the damage"? It makes no sense now, and it made even less sense when the legislation was passed, to speak of an action in contract being *defeated* by "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".

81 The purpose of the enactment of the apportionment legislation was to allow recovery of damages in cases where contributory negligence would defeat an

94 See Sir Roger Ormrod in *Vesta* [1989] AC 852 at 879 as supporting the view that contributory negligence had at common law no relevance to a claim in contract.

95 *Joint Torts and Contributory Negligence* (1951) at 330-331.

96 "Contributory Negligence as a Defence to Actions for Breach of Contract", (1981) 55 *Australian Law Journal* 278 at 284.

Gleeson CJ
McHugh J
Gummow J
Hayne J

36.

action in tort. The enactment in the United Kingdom of the 1945 Act followed the recommendations made in 1939 in the *Eighth Report of the Law Revision Committee*⁹⁷ which had been chaired by Lord Wright⁹⁸. The Report referred to the position in Admiralty where loss was equally divided between the vessels responsible and, after the change made by s 1 of the *Maritime Conventions Act* 1911 (UK), in proportion to the degree to which each vessel was in fault⁹⁹. Reference also was made¹⁰⁰ to Canadian legislation which had adopted the Admiralty principle. The first Canadian statute had been the *Contributory Negligence Act* 1924 (Ont)¹⁰¹. The object of that law had been¹⁰²:

"to abate the rigour of the rule of common law at present so well established that where from the concurring negligence of two parties, one party suffers all the injury, he must bear the whole loss, although the other party may have been equally or even more negligent".

It would be strange if a rule introduced to do away with an absolute defence to a claim in negligence, diminished the rights of a plaintiff who sued in contract.

- 82 It was against the background of the 1939 Report of the Law Revision Committee and the 1945 United Kingdom Act that s 27A was introduced into the law of South Australia. The South Australian Attorney-General, in the Second Reading Speech on the amendment of the *Wrongs Act* to include s 27A, explained the reasons for the legislation when he said¹⁰³:

97 Cmd 6032.

98 Other members of the Committee included Lord Romer, Lord Porter, Goddard LJ and Professors Goodhart, Gutteridge and Winfield.

99 Cmd 6032 at 3-4.

100 Cmd 6032 at 17.

101 Glanville Williams, "The Law Reform (Contributory Negligence) Act, 1945", (1946) 9 *Modern Law Review* 105 at 122-123.

102 MacMurchy, "Contributory Negligence – Should the Rule in Admiralty and the Civil Law be Adopted?", (1923) 1 *Canadian Bar Review* 844 at 845-846.

103 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 6 November 1951 at 1082-1083.

"By the common law of England a person who causes damage to another by negligence is guilty of a tort or wrong and, in general, liable to pay damages to the injured person. But if the injured person has contributed to his injury by his own negligence, or by want of proper care for his own safety, he is said to be guilty of contributory negligence and cannot recover damages from the other negligent party. He must bear the whole of his loss even though his fault was relatively small and that of the other party great."

- 83 The Attorney-General noted that "[M]uch dissatisfaction has been expressed with the 'all or nothing' principle of the common law"¹⁰⁴ and referred to the English Law Reform Revision Committee finding that "the rule of apportionment applicable in admiralty cases was much fairer than the common law rule". There is nothing in the Second Reading Speech 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. On any view of the matter, apportionment legislation was intended to give plaintiffs a cause of action which they did not have because of their contributory negligence. It is hardly to be supposed that the Parliament also intended that the damages otherwise payable in respect of a cause of action, which they did have, were to be reduced - perhaps by as much as 90 per cent¹⁰⁵ - in situations where the plaintiff had failed to take care for his or her own safety or interests.

Policy considerations

- 84 It seems likely that those judges who have held that apportionment legislation applies to contract claims have regarded the contrary view as either anomalous or unfair or both¹⁰⁶. But when the nature of an action for breach of a contractual term to take reasonable care and the nature of an action in tort for breach of a general law duty of care are examined, it is by no means evident that there is anything anomalous or unfair in a plaintiff who sues in contract being outside the scope of the apportionment legislation. Tort obligations are imposed on the parties; contractual obligations are voluntarily assumed. In *Simonius Vischer*¹⁰⁷ Samuels JA noted that "the first count founds upon a duty imposed by the

¹⁰⁴ South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 6 November 1951 at 1083.

¹⁰⁵ cf *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492; 59 ALR 529.

¹⁰⁶ *Doiron v Caisse Populaire D'Inkerman Ltée* (1985) 17 DLR (4th) 660 at 679.

¹⁰⁷ [1979] 2 NSWLR 322 at 349.

relationship in which the parties stood, and the second upon a duty imposed by their agreement". In *Henderson*¹⁰⁸, Lord Goff of Chieveley emphasised the will of the parties as the factor which supported different results in contract and tort:

"The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him".

85 In contract, the plaintiff gives consideration, often very substantial consideration, for the defendant's promise to take reasonable care. The terms of the contract allocate responsibility for the risks of the parties' enterprise including the risk that the damage suffered by one party may arise partly from the failure of that party to take reasonable care for the safety of that person's property or person. Ordinarily, that risk is borne by the party whose breach of contract is causally connected to the damage. Rarely do contracts apportion responsibility for damage on the basis of the respective fault of the parties. Commercial people in particular prefer the certainty of fixed rules to the vagueness of concepts such as "just and equitable". That is why it is commonplace for contracts to contain provisions regulating liability for breach of a duty to take reasonable care, whether by excluding liability altogether or limiting it in some other way.

86 Absent some contractual stipulation to the contrary, there is no reason of justice or sound legal policy which should prevent the plaintiff in a case such as the present recovering for all the damage that is causally connected to the defendant's breach even if the plaintiff's conduct has contributed to the damage which he or she has suffered. By its own voluntary act, the defendant has accepted an obligation to take reasonable care and, subject to remoteness rules, to pay damages for any loss or damage flowing from a breach of that obligation. If the defendant wishes to reduce its liability in a situation where the plaintiff's own conduct contributes to the damage suffered, it is open to the defendant to make a bargain with the plaintiff to achieve that end. Of course, the result of such a bargain may be that the defendant will have to take a reduced consideration for its promise to take reasonable care. But the bargain will be the product of the parties' voluntary agreement to subject themselves to their respective obligations.

87 In an action in tort, however, the duty of the defendant to take reasonable care and the obligation of the plaintiff to take reasonable care for his or her own safety or interests are imposed on the parties by law. Absent a contractual stipulation varying the rights of the parties, it is the general law that defines their

108 [1995] 2 AC 145 at 194.

rights and liabilities. It is one thing to apportion the liability for damage between a person who has been able to obtain the gratuitous services of a defendant where the negligence of each has contributed to the plaintiff's loss. It is another matter altogether to reduce the damages otherwise payable to a plaintiff who may have paid a very large sum to the defendant for a promise of reasonable care merely because the plaintiff's own conduct has also contributed to the suffering of the relevant damage.

- 88 Perhaps the apportionment statute should be imposed on parties to a contract where damages are payable for breach of a contractual duty of care. If it should, and we express no view about it, it will have to be done by amendment to that legislation. If courts are to give effect to the will of the legislature, it is not possible to do so having regard to the terms of apportionment legislation, based on the United Kingdom legislation of 1945, and the evil that it was designed to remedy.

Conclusion

- 89 For the above reasons, a construction applying the apportionment legislation to contract cases is contrary to the text, history and purpose of the legislation. That means in this case that, although the learned trial judge was correct in finding that Austrust was guilty of contributory negligence, that finding could only apply to the assessment of damages in the tort claim. It had no application to Austrust's claim for breach of contract. It follows that, for different reasons, we are of the opinion that the Full Court was correct to allow Austrust's appeal from the order of the learned trial judge.

- 90 This appeal must be dismissed with costs.

CALLINAN J

Facts

91 This appeal from the Full Court of the Supreme Court of South Australia raises the important question, whether, in a case of professional negligence, in which the duty of care owed in contract is the same as in tort and the breaches relied on by the plaintiff are both contractual and tortious, the plaintiff's damages may be reduced to reflect the plaintiff's own contributory negligence.

92 The appellants are members of a firm of solicitors practising in Adelaide. The respondent had carried on business as a trustee company since its incorporation in 1910. Until about 1983 the respondent conducted its business in a fairly conservative way, undertaking mainly the management of trusts of persons under disabilities, and trusts created by wills and inter vivos settlements. From time to time however, inevitably, the respondent as a trustee must have been involved in the conduct of conventional business activities in the course of administering trusts and estates.

93 In 1983 the respondent, after a major change in the composition of its shareholders and board resolved to seek business as a trustee of commercial trading trusts. The chairman of the board by this time was an experienced chartered accountant in private practice. The respondent appointed as its general manager, Mr Wood, a person knowledgeable in commercial lending rather than in trusts as was Mr Oakeshott whom he replaced. The latter gave evidence which was accepted by the primary judge, that he could not recall any occasion of borrowing by the respondent in its capacity as a trustee.

94 A qualified lawyer, Mr Lamshed (who did not give evidence) had worked for some years as an employee of the respondent. His precise role was not clearly defined but the trial judge, Mullighan J, made a finding in these terms¹⁰⁹:

"The [respondent] employed Mr Lamshed who is a solicitor. He held various positions but worked closely with senior management and also in the administration of trusts. His duties included advising staff on legal matters relating to wills, income taxation and, according to Mr Oakeshott, the former general manager, 'anything else that came up in the company that had some legal implications', but he did not give formal legal advice to management."

95 In August 1983 the respondent engaged the appellants (who had acted for the former for many years) to "examine the Deed [to establish a unit trust of which the

109 *Austrust Pty Ltd v Astley* (1993) 60 SASR 354 at 357.

respondent would be trustee] and let [the respondent] have [the appellants'] comments on it in due course". The engagement was by letter, which continued:

"The aim of the Trust, briefly is to set up an intensive piggery on land at Young in New South Wales. The land is presently owned by Golden Grove, and, in fact, is part of a larger holding upon which Golden Grove have already established (using private funds) a piggery of a similar but smaller nature to [that] proposed for the Trust. It is proposed that the Trust should also become involved in the slaughter and processing of pigs later."

96 The land upon which the piggery business was to be initially conducted had been owned by Mr O'Dea and his family. That land had been acquired in August 1982 by QFP Properties. QFP Properties became the trustee of a unit trust, the GGI Pig Trust. Golden Grove Industries Pty Ltd was the manager of the trust. Mr Hunt, a partner in a Brisbane firm of solicitors, MacGillivray and Co, acted as solicitor for Mr O'Dea, his family and the other legal personalities associated with him.

97 Before the appellants were engaged there had been negotiations between the respondent and Mr O'Dea in which the appellants, relevantly Mr Astley, who was the partner who undertook the engagement on behalf of the firm, had not been involved.

98 Mr O'Dea's ambitions for the piggery business were not confined to the land originally owned by him and his family. In June 1983 he acquired an option to purchase a property ("Booka") of 1028 hectares near Tenterfield in New South Wales for utilization as another piggery.

99 It was the intention of Mr O'Dea that the GGI Pig Trust, a private trust would be subsumed by a public unit trust to which the public would be invited to subscribe. Mr O'Dea requested the respondent in about April 1983 to be the trustee of the public trust after it was established.

100 The primary judge made a finding with respect to the responsibility within the company of Mr Lamshed for the handling of Mr O'Dea's proposal¹¹⁰:

"It appears that the responsibility for handling this proposal must have been entrusted to Mr Lamshed at this time. The proposal represented a new type of venture for the plaintiff as it had never before been involved as trustee of a trust of this nature, ie a trust which conducted a business and traded in livestock. Mr Oakeshott regarded that sort of business as risky."

110 *Austrust Pty Ltd v Astley* (1993) 60 SASR 354 at 358.

101 In September 1983 Mr Hunt, on behalf of Mr O'Dea telephoned Mr Astley to ask how matters stood with respect to the latter's consideration of the deed. Thereafter Mr Astley perused the deed, entered into some correspondence with Mr Hunt and personally discussed its contents with Mr Lamshed. Mr Astley applied his mind particularly to the Companies Code and whether the deed was prepared in compliance with it. He found this to be so and in due course advised the respondent accordingly.

102 There are concurrent findings of fact that it did not occur to Mr Astley to raise with the respondent the risks that might be associated with the trusteeship of a trading trust even though he knew that this was a novel venture for the respondent. This Court does not need to concern itself with the issue that was resolved against the appellants at the trial and in the Full Court of the Supreme Court of South Australia whether Mr Astley was justified in not turning his mind to these matters when advising a trustee company that employed a legal officer, that had been carrying on business as a trustee company for more than 70 years, and had necessarily been obliged to carry on businesses as a trustee from time to time, as the appeal to this Court is concerned with matters of contributory negligence only.

103 The trust deed empowered the trustee to borrow money subject to this proviso:

"PROVIDED THAT the Trustee shall not be required to accept any personal liability for such borrowing."

104 It was because the respondent was ignorant of the fact that neither this clause, any other provisions of the deed, nor any legal principle operated to insulate the respondent from liability to a lender, and that the appellants failed to dispel that ignorance, that the primary judge, and the Full Court held that the appellants were negligent.

105 To continue the narrative, Mr Astley and Mr Hunt communicated from time to time after September 1983. Among other things a prospectus acceptable to the parties and the regulatory authorities had to be prepared and discussed. In March 1984 Mr Lamshed's role changed from that of an employed solicitor to one in independent practice. He continued however to be concerned in the legal affairs of the respondent at their request in particular matters, including, for a time, the proposed trusteeship, but, contrary to arguments advanced by the appellants, the courts below held that nothing turned on these new arrangements.

106 By late July 1984 Mr Hunt was able to inform Mr Astley that the trust deed was in its final form and that the respondent might now proceed to purchase the property "Booka". Mr Hunt shortly afterwards asked Mr Astley to have the respondent execute the documents to complete the purchase of the property. The

price of the property and plant and equipment was \$1.2 million, made up of \$1 million for the land and \$200,000 for plant and equipment.

107 Much of the money for the purchase of the land and moveables was either borrowed or left unpaid and secured by mortgages and bills of sale granted by the respondent. Unfortunately for the appellants, Mr Astley did give some advice regarding the mortgages, and touched upon the borrowing powers of the respondent. The Full Court placed significance upon his failure to advert in this context particularly to the possibility of personal liability.

108 At this point it is relevant to observe that there was uncontradicted evidence that the respondent had satisfied itself that the secured property was sufficient to cover the debts secured by the mortgages and bill of sale. The respondent expressed itself as "Happy to go into this as trustee even if no public investors come for[ward]. Satisfied as to security".

109 By December 1984 financial problems were already apparent. The respondent took over the management of the trust which was wound up by the Supreme Court of Queensland in the following year. The assets were sold at a considerable loss and the respondent was obliged to make good the shortfall to the mortgagees.

The proceedings in the Supreme Court

110 The respondent sued the appellants in the Supreme Court of South Australia in both contract and tort to recover the shortfall, interest and other losses incurred from the undertaking of the trust and its termination. The appellants pleaded in their defence contributory negligence and breaches of the contract between the parties as causing or contributing to the losses sustained by the respondent. Mullighan J at first instance found that the appellants were negligent in failing to advise the respondent of the risk of personal liability but held that the respondent was guilty of contributory negligence, apportioning liability equally between them¹¹¹. The Full Court of the Supreme Court of South Australia (Doyle CJ, Olsson and Duggan JJ) reversed the finding of contributory negligence and held that the negligence of the appellants was the sole cause of the respondent's loss¹¹².

111 The findings of fact which led the primary judge to hold that the respondent was guilty of contributory negligence were summarised by the Full Court¹¹³:

111 *Austrust Pty Ltd v Astley* (1993) 60 SASR 354 at 381.

112 *Austrust Ltd v Astley* (1996) 67 SASR 207.

113 *Austrust Ltd v Astley* (1996) 67 SASR 207 at 230-231.

- "1. Wood was a man of considerable knowledge and experience in respect of the financing of business activities.
2. The [respondent] was a member of a corporate group which employed senior staff with considerable, relevant expertise in business and rural management and analysis.
3. It was anxious to break into the business of acting as trustee of trading trusts.
4. There were two crucial issues to be resolved prior to accepting such a trusteeship, namely:-
 - (a) the legal implications;
 - (b) the commercial soundness of doing so.
5. The [respondent] had accepted sole responsibility for making a judgment as to (b) above.
6. 'Even cursory inspection of the accounts of the GGI Pig Trust by a person with a modicum of business acumen would have revealed that at all material times the Trust was insolvent.' There was no prospect of success absent substantial public investment.
7. The [respondent] 'blindly accepted that there were sufficient investors standing by to purchase units when the new trust was established and the prospectus issued, and that sufficient capital would be obtained to resolve all of the financial ills of the Trust, which was plainly not the case.'
8. No enquiry was made by the [respondent] of O'Dea or anyone else as to the identity of potential investors, or as to any other matter which might have revealed that the financially hazardous position of the Trust would not be resolved by public subscription. In short, the appellant failed to make appropriate enquiries as to the availability of the funds which the trust required if it was to be viable.
9. Wood was content to rely upon assurances given by O'Dea without verification, and in particular made no enquiry of the auditors of GGI Pig Trust.
10. Had appropriate enquiries been made and financial accounts been called for and checked, the appellant would have realised that the Trust was insolvent and likely to remain so.

11. The appellant failed to inform Astley of the true position and positively assured him that the proposed venture was commercially viable and without financial risk."

112 It was again argued by the respondent in the Full Court that as a matter of law contributory negligence was not a plea available to answer a claim alleging a duty of care in contract and in tort, and pleading both causes of action. The Full Court found it unnecessary to decide this point of law and resolved the issue adversely to the appellants in that Court on the facts.

113 Their Honours in the Full Court rejected a challenge by the respondent to the findings of the trial judge summarised above. However, they held that although the respondent had failed to make proper inquiries (as to the financial affairs of the piggery business and the possibility of investment by the public) that failure was not a failure by the respondent to take proper care for itself: perhaps, the Full Court thought, there was a failure by the respondent to take proper care for the beneficiaries of the trust; but, having no awareness of the possibility of personal liability, it was reasonable for the respondent to remain in ignorance of that possibility. The Full Court did not find it necessary to take a concluded view on the issue whether a defendant might incur liability to a plaintiff as a result of a breach of duty of care owed to a third party¹¹⁴.

114 It was also put against the appellants and held by the Full Court that the loss actually sustained was the kind of loss against which appropriate advice would have protected it: and, as an answer to the appellants' submission that the respondent's carelessness in embarking on a highly risky financial transaction such as this one was the cause of the loss, that it, the loss, which materialized was one which might have occurred without any fault on the part of the respondent; that natural, adverse seasonal or market conditions could have financially disabled the trust business. Their Honours said that¹¹⁵ "[i]n the present case the cause of the loss is seen as the making of an improvident purchase", that is to say "without proper inquiry".

115 The Full Court made a further inferential finding of fact, that the "[respondent] had no reason to think that its own interests (other than, perhaps, its ability to collect its remuneration) were at stake"¹¹⁶. On this view of the facts the Full Court found it unnecessary to consider the decision of the New South Wales

114 *Pennington v Norris* (1956) 96 CLR 10 at 16.

115 *Austrust Ltd v Astley* (1996) 67 SASR 207 at 232.

116 *Austrust Ltd v Astley* (1996) 67 SASR 207 at 234.

Court of Appeal in *Daniels v Anderson*¹¹⁷ in which it was accepted on both sides and by the court that a plea of contributory negligence was available in a case of professional negligence by auditors.

The appeal to this Court

116 The appellants appealed to this Court on grounds that the Full Court erred in:

1. failing to regard the possibility of liability of the respondent to beneficiaries for breach of trust as a failure to take proper care for its own interests and therefore as "fault" for the purposes of s 27A of the *Wrongs Act* 1936 (SA);
2. failing to include as "fault" for the purpose of s 27A of the *Wrongs Act* conduct which is in breach of duty to a person other than the tortfeasor sued;
3. holding that the respondent's belief that it was not exposed to personal liability arising from the appellants' negligence precluded any duty to question such belief bearing in mind that the respondent was a professional trustee entering into a commercial transaction as trustee;
4. concluding that had proper advice been given it would not have mattered if the respondent had made an unwise decision, and erred in applying a "but for" test of causation.

117 It seems to me with respect that the further inferential finding of fact by the Full Court may not be sustained. The last matter of substance to which the Full Court referred contains within itself an answer to any proposition that the respondent owed no duty of care to itself in relation to financial matters associated with the trust business. As the Full Court recognised, the financial viability or otherwise of the business could affect its capacity to meet the remuneration payable to the respondent. But this is not the only respect in which the respondent could be expected to be diligent in its own interests. It was embarking on a novel venture. It wished to be involved in more of such ventures. It had an interest in maintaining, improving and expanding its goodwill, its profits and its business reputation.

117 (1995) 37 NSWLR 438 at 564-568 per Clarke and Sheller JJA. The argument proceeded in the appeal as it had at first instance upon a common understanding that it did not matter on the issue of contributory negligence whether the action was viewed as an action in tort or for breach of contract: at 564.

118 Equally, it had an interest, and it was its own interest, in placing itself in a position of not having to look to the beneficiaries for reimbursement of money expended and not otherwise recouped, with all of the inconvenience, expense and uncertainty that might be involved in such a pursuit.

119 It follows inexorably in my opinion that in the respects found by the trial judge the respondent was guilty of negligence.

120 The next question is whether that negligence contributed to the losses that were sustained. It seems to me to be inescapable that the respondent's negligence contributed to the respondent's losses. Had the business (in some or all of its components, for example, its capacity to generate income, and the value of its assets) been sound there would have been no or perhaps a less significant loss. As the trial judge said¹¹⁸:

"Even cursory inspection of the accounts of the GGI Pig Trust by a person with a modicum of business acumen would have revealed that at all material times the Trust was insolvent. It had no prospects of success unless there was substantial public investment."

121 Had the business been sound, presumably there would have been no need to resort at all to the properties and to suffer the shortfall that in fact eventuated.

122 I agree with the primary judge's conclusion that the negligence of the respondent was a concurrent and successive cause of the respondent's loss with the negligence of the appellants¹¹⁹. On the assumption that the plea is available in a case of concurrent causes of action for breach of contract and professional negligence, the matter to which I will next turn, there would be no reason to disturb the allocation of responsibility to the appellants and the respondent equally.

123 The House of Lords in cases decided before the apportionment legislation when contributory negligence, once established, afforded an absolute defence to a claim in negligence, held that contributory negligence could equally be an answer to a claim for breach of statutory duty¹²⁰. Viscount Simon LC in *Lewis v Denye* said that the breach of statutory duty was for the purposes of an action for damages, "equivalent to negligence"¹²¹. The High Court (Latham CJ, Rich, Starke,

118 *Austrust Pty Ltd v Astley* (1993) 60 SASR 354 at 380.

119 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 512 per Mason CJ.

120 *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152; *Lewis v Denye* [1940] AC 921.

121 *Lewis v Denye* [1940] AC 921 at 925. See also *Lochgelly Iron and Coal Co Ltd v M'Mullan* [1934] AC 1.

McTiernan and Williams JJ) in *Piro v W Foster & Co Ltd*¹²² decided to apply the decisions of the House of Lords in preference to its own decision to the contrary in *Bourke v Butterfield & Lewis Ltd*¹²³.

124 In *Aluminium Products (Qld) Pty Ltd v Hill*¹²⁴ the Full Court of the Supreme Court of Queensland by majority (Douglas and Campbell JJ, Connolly J dissenting) answered the question on a case stated "[h]as the plaintiff an action for negligence against the defendants [its solicitors] independent of his action in contract?" in the affirmative. The practical consequence of that answer was that the plaintiff became entitled to the benefit of the later commencement of the limitations period applying to the suffering of damage (in tort) to complete the cause of action, rather than the occurrence of the breach in contract. Special leave to appeal to this Court in that case was refused on 5 December 1980. The Full Court of the Supreme Court of Victoria in *Macpherson & Kelley v Prunty & Associates*¹²⁵ by a majority (Lush and Beach JJ, Murphy J dissenting) adopted the same position as the Full Court of the Supreme Court of Queensland in *Aluminium Products*.

125 On the other hand, in *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd*¹²⁶, Hutley JA made, in a case in which the defendant was an insurance broker, observations similar to those of Connolly J who had dissented in *Aluminium Products*:

"The burden of liability on professionals is heavy, and, when parties enter into a contract, I cannot see why their liabilities should not be referred to that contract, rather than the general law."

126 *Max Garrett (Distributors) Pty Ltd v Tobias* was a case in which solicitors were sued in both negligence and contract. Barwick CJ (with whom Stephen and Mason JJ agreed) said¹²⁷:

122 (1943) 68 CLR 313. See also Williams J at 339.

123 (1926) 38 CLR 354.

124 [1981] Qd R 33.

125 [1983] 1 VR 573.

126 [1977] 2 NSWLR 827 at 845.

127 (1975) 50 ALJR 402 at 403.

"If such failure were made out as negligent or in breach of contract, the plaintiff's cause of action based on such failure would not have been statute barred."

- 127 Speaking of the architect's failure to take due care in *Voli v Inglewood Shire Council*, Windeyer J said¹²⁸:

"If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort."

- 128 In *Aluminium Products*, Connolly J examined at some length the authorities in Australia and elsewhere before 1981¹²⁹. His Honour concluded that there was no authority to compel him to give the answer preferred by the majority, and, in a passage with perhaps a strong resonance with this case at first instance, said¹³⁰:

"I do not for one moment suggest that the nature of the liability of the solicitor should be any different from that of any other professional man but when one considers the problems faced by a solicitor retained to carry through a specific transaction and who is not asked to and does not direct his mind to the possible effects of other branches of the law such, for example, as to the conceivable incidence of income tax, the essential unfairness of departing from the contract between the parties and the well established incidents of that contract becomes apparent."

- 129 In Canada, in *Central Trust Co v Rafuse*¹³¹, the Supreme Court reviewed the authorities in the various jurisdictions before concluding that a plaintiff is entitled to assert, in a case of concurrent liability, the cause of action that appears to be the more advantageous to him or her in respect of any particular legal consequence. The only qualification that the Supreme Court of Canada would countenance is that the right so to assert could not be used to escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. On the facts of the case the Court held that there was no contributory negligence.

128 (1963) 110 CLR 74 at 84.

129 [1981] Qd R 33 at 39-53.

130 [1981] Qd R 33 at 53.

131 (1986) 31 DLR (4th) 481.

130 The trend of modern authority has generally, if not unanimously moved in favour of a dual liability¹³² certainly in cases of breach of duty by professional advisors and others in what formerly were common callings¹³³. To deny a client of a professional advisor, and therefore a person in a contractual relationship, a right of action in tort also, may be to put that client at an unjustifiable disadvantage compared with a person who has received negligent gratuitous advice or services causing damage from a professional or other advisor, and who may in consequence sue in tort¹³⁴.

131 It is right to say therefore that the common thread in the majority of the recent cases is that where the defendant's breach of duty (of whatever kind) consists of an act or omission co-extensive with, equivalent to, or involving for its proof the same facts or matters as give rise to a claim in tort, the legal incidents of both (as to, for example the commencement of limitations periods and the defence of contributory negligence) may be capable of attaching to the action in which the breach is relied on and proved by the plaintiff. Whether in fact they do, and how they are to be reconciled, is the question that this case throws up.

132 Logically, there is no reason why a defendant should be precluded from relying upon causative negligence of a plaintiff as a partial or, perhaps in some cases in which the facts warrant it, a complete defence to a plaintiff's claim. Indeed, if a plaintiff has been guilty of a real degree of fault which has caused or contributed to his or her damage, it would be anomalous and ultimately unfair for that person to be able to recover the loss in full simply because a defendant has contributed, and perhaps contributed in relatively small measure only to that damage. (In this connexion I am not referring to cases in which the negligent tortfeasor or contractor has been specifically engaged to protect a plaintiff against the consequences of that plaintiff's own oversights or negligence). And again, if the duty of care owed by a gratuitous professional advisor to a person not in a

132 *Batty v Metropolitan Realisations Ltd* [1978] QB 554; *Photo Production Ltd v Securicor Transport Ltd* [1978] 1 WLR 856; [1978] 3 All ER 146; *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384; *Ross v Caunters* [1980] Ch 297. See also the Canadian, Irish and US cases cited in *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481. In *South Australian Asset Management Corporation v York Montague Ltd* [1995] 2 EGLR 219 the lender seems to have sued its valuer in negligence only although there was a contractual relationship between the parties. The trial judge May J made a finding of contributory negligence pursuant to s 1(1) of the *Law Reform (Contributory Negligence) Act* (UK) 1945 and reduced the lender's damages accordingly.

133 Rogers, *Winfield and Jolowicz on Tort*, 15th ed (1998) at 9-11.

134 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628.

contractual relationship with that person is the same as that owed to a paying client, the absence of payment by the non-paying recipient of advice or services will not always provide a sufficient justification for the apportionment of damages in the former situation and not in the latter, in cases in which the plaintiff's negligence has contributed to the damage sustained.

- 133 Connolly J in *Aluminium Products*¹³⁵ and Hutley JA in *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd*¹³⁶ thought that in the interests of fairness to the professional advisor, the plaintiff should be held to his or her contract, the terms of which should be governed and perhaps strictly so by the ambit of the instructions. This case shows how such a view may equally work an injustice to the professional advisor. The instructions here, were, to say the least, somewhat vague. Nonetheless the trial judge and the Full Court thought that the appellants were on sufficient notice to require them to advise on personal liability. It is difficult, in my opinion to discover that duty in the terms of the instructions and therefore within the express terms of the contract. Nor is it easy to give it any foundation in an implied term. In *Hawkins v Clayton*¹³⁷, Deane J referred to the difficulties of reliance upon an implied term in this sort of case:

"To the extent that the content and incidents of the contractual duty of care correspond with those of the ordinary duty of care under the common law of negligence, the implication of a general contractual term is difficult to rationalize. If the implication of the term is based upon some perceived general principle of law, one is led to ask why the common law should imply a contractual term imposing a duty of care which the common law imposes in any event. If the implication of a term is based upon imputed intention of the parties, it is difficult to see how any of the ordinary tests for the implication of a term on that basis could properly be seen as satisfied. It could not be sensibly said that it is necessary for the business efficacy or the reasonable or effective operation of a contract to imply a contractual term imposing a general duty which corresponds with the general duty which already exists under the common law. If the contract between solicitor and client is in writing and complete upon its face, it cannot sensibly be said that the implication of a term imposing such a concurrent general contractual duty is so obvious that 'it goes without saying'. To the contrary, it would seem at least possible that the solicitor and client would, if asked whether they wished to complicate their contract by a term imposing a duty of care which was co-

135 [1981] Qd R 33.

136 [1977] 2 NSWLR 827.

137 (1988) 164 CLR 539 at 583-585.

extensive with that which already existed under the common law, join in the answer that they did not.

To the extent that the incidents of an independent general contractual duty of care would differ from those of an independent tortious duty, it is even more difficult to rationalize the implication of a contractual duty. Once one accepts that the ordinary law of negligence can apply to render a solicitor liable for economic loss caused to a client by professional negligence, the content and incidents of the solicitor's common law duty of care must be seen as representing the law's judgment of the extent to which it is reasonable and desirable to render a solicitor liable for loss or damage suffered by his client.

...

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

134 Here the respondent says no matter how negligent it may or may not have been, because the appellants were guilty of negligence they must bear the whole burden of the respondent's loss.

135 The obligations of professionals in modern times are not light ones. *Rogers v Whitaker*¹³⁸ is a case in point. In it the plaintiff's claim was brought in tort. There were no express terms, and it is certainly not readily apparent that a term would necessarily be implied in the contract between the doctor and the plaintiff to the effect, that in the circumstances of that case, the doctor would be obliged to warn the patient of a risk of sympathetic ophthalmia as remote as one in fourteen thousand. No suggestion was made there of any contributory negligence on the part of the plaintiff. But had there been, and had such a term been implied, it would hardly seem fair that the plaintiff might recover her damages in full, notwithstanding, had it occurred, significant causative negligence on her part, simply because she might be able to frame her claim exclusively, or alternatively in contract. Similarly, logically there is no reason why a patient of sound mind of a doctor who has failed to abide by, for example, a post-operative regime recommended by the doctor, should be able to escape all liability if he or she has been disadvantaged by both that failure and negligence on the part of the doctor. *Rogers'* case also shows that the relationship and the duties owed are in a real and

138 (1992) 175 CLR 479.

practical sense in a process of extension¹³⁹ as the tort of negligence has been since *Donoghue v Stevenson*¹⁴⁰. The duties and the relationship between professionals and other providers of services and advice may in practice extend far beyond matters to which the parties would normally turn their minds, and, even if they did, would mutually wish, or be prepared to include in their contracts. Whilst it might be right to say that the obligation in *Rogers'* case was no more than an aspect of the all-embracing duty to take reasonable care, the content of which will vary from case to case, it is also right to say that the breadth and nature of the content would be unlikely to be, in some cases, such as the parties would contemplate and include in their contracts at the time of their formation. *Chappel v Hart*¹⁴¹ is another example of a situation in which it is rather unlikely that the parties at the inception of a notional bargaining process for, and in the formation of, their contract would have contemplated the imposition of an obligation as broad and as onerous on the doctor as that which the Court found to exist there. In this respect the obligations may more aptly be regarded as obligations in tort than in contract, one of the tests of the former being the objective test of reasonable foreseeability rather than what the parties subjectively may have had in mind when the contract was made. I do not think that in cases such as *Rogers v Whitaker*¹⁴² and *Chappel v Hart*¹⁴³ it can confidently be said that the duty found by the Court to exist is attributable to the will of the parties and therefore contractual, as Lord Goff of Chieveley held it to be in these terms in *Henderson v Merrett Syndicates Ltd*¹⁴⁴:

"It is however my understanding that by the law in this country contracts for services do contain an implied promise to exercise reasonable care (and skill) in the performance of the relevant services; indeed, as Mr Tony Weir has pointed out¹⁴⁵ in the 19th century the field of concurrent liabilities was expanded 'since it was impossible for the judges to deny that contracts contained an implied promise to take reasonable care, at the least, not to injure the other party.' My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a

139 For example *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628.

140 [1932] AC 562.

141 (1998) 72 ALJR 1344; 156 ALR 517.

142 (1992) 175 CLR 479.

143 (1998) 72 ALJR 1344; 156 ALR 517.

144 [1995] 2 AC 145 at 193-194.

145 *International Encyclopedia of Comparative Law*, vol 11, *Torts*, ch 12, par 67.

tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

- 136 Lord Bridge of Harwich in *Caparo Industries Plc v Dickman*¹⁴⁶ before citing with approval some observations of Brennan J in *Sutherland Shire Council v Heyman*¹⁴⁷ spoke of the scope and limits of the varied duties of care the law imposes, duties which must in substance, for the purposes of the law of torts vary from case to case¹⁴⁸. Lord Roskill in the same case recognised the realities in this passage¹⁴⁹:

"I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as 'foreseeability,' 'proximity,' 'neighbourhood,' 'just and reasonable,' 'fairness,' 'voluntary acceptance of risk,' or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At the best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty."

- 137 These observations show, in my opinion, how much more comfortably the relationship between professional advisors and service providers and their clients now fits within the law of tort than contract. If, as Lord Roskill says, the particular circumstances must be carefully examined by the Court before it can be determined what is the scope and extent of the duty of care in a particular case, it is rather unlikely that contracting parties would always be able in their contracts, express

146 [1990] 2 AC 605.

147 (1985) 157 CLR 424.

148 [1990] 2 AC 605 at 618.

149 [1990] 2 AC 605 at 628. See also Lord Oliver of Aylmerton at 635.

or implied, precisely to define the relevant scope and extent of their respective obligations.

138 I think all of these considerations, if the issue fell to be resolved on policy grounds, would provide a further basis for the availability of a plea of contributory negligence in a case of the kind now before the Court.

139 It has at times been suggested¹⁵⁰ that any anomaly which might appear to permit a very negligent plaintiff to recover damages in full in contract may be able to be corrected by reference to basic contractual principles: that there should be implied against a person engaging a professional, a reciprocal term obliging the former to take reasonable care in such matters as, for example, the giving of instructions and the making of appropriate inquiries. However that approach does not seem to have any authoritative modern currency and would not be without difficulties in its application.

140 Anomalous results of the kind to which I have referred do not really accord with the modern tendency to eschew form and prefer substance. A preference for the latter is, with respect, well expressed by Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd*¹⁵¹ although his Lordship does not there deal with any apportionment questions:

"If the common law is not to become again manacled by 'clanking chains' (this time represented by causes, rather than forms, of action), it is in my judgment important not to exclude concepts of concurrent liability which the courts of equity have over the years handled without difficulty. I can see no good reason for holding that the existence of a contractual right is in all circumstances inconsistent with the co-existence of another tortious right, provided that it is understood that the agreement of the parties evidenced by the contract can modify and shape the tortious duties which, in the absence of contract, would be applicable."

¹⁵⁰ *Doiron v Caisse Populaire D'Inkerman Ltée* (1985) 17 DLR (4th) 660 at 671 et seq per La Forest JA. The Court there acknowledged that the approach adopted was not without its difficulties: see for example at 674; cf also the approach of Hodgson CJ in Eq in an unreported bailment case of *Bowden v Lo*, Supreme Court of New South Wales, 19 May 1998, noted by D Jay in (1998) 72 *Australian Law Journal* 598.

¹⁵¹ [1995] 2 AC 145 at 206.

- 141 A statement made by Gibbs J, although made in a different context, is apposite here¹⁵²:

"[I]f a party claims relief on two different legal grounds, but the facts on which the relief is sought on each ground are identical, and the relief sought on each ground is the same in substance if not in form, there is only one matter for determination."

The availability of a defence in a situation of the kind which existed here should not depend on the mere form of relief claimed.

- 142 The answer that the respondent makes in this case is the one given by the Supreme Court of Canada in *Central Trust Co v Rafuse*¹⁵³, and by Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd*¹⁵⁴ in the passage earlier cited that if the law confers more than one cause of action upon a plaintiff, he or she may choose whichever of those causes is preferred and is more advantageous in the circumstances, and indeed all of them if they can be made out even if some or all of the same acts or omissions are relied on for each.

- 143 In the end the matter is one of statutory construction. There is no doubt that apportionment legislation (introduced in Canada, in Ontario first, in 1924) was devised to ameliorate the harshness of the rule that contributory negligence by a plaintiff afforded an absolute defence to a negligent defendant¹⁵⁵. That purpose could hardly provide a foundation for a construction of the legislation to allow it an application in cases in contract¹⁵⁶. But one might also argue that it should equally have no application in a case of breach of statutory duty, an argument which had already been foreclosed by *Piro v W Foster & Co Ltd*¹⁵⁷.

¹⁵² *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 499.

¹⁵³ (1986) 31 DLR (4th) 481. See also *Finlay v Murtagh* [1979] IR 249 and *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384.

¹⁵⁴ [1995] 2 AC 145 at 193-194.

¹⁵⁵ Before the legislation, apportionment was apparently only available in respect of property damage sustained at sea and only as a result of s 1 of the *Maritime Conventions Act* 1911 (UK) following the Brussels Collisions Convention of 1910.

¹⁵⁶ On the other hand, in recent times the language generally used by pleaders and by many judges in cases of default by professionals is much more the language of tort than contract.

¹⁵⁷ (1943) 68 CLR 313.

144 "Fault" is defined in s 27A(1) of the *Wrongs Act* 1936 (SA) in this language:

" **'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."

145 Section 27A(3) provides as follows:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, 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) this subsection is subject to subsection (4) of this section."

146 The questions are: did the respondent suffer damage as the result partly of its own fault; and if it did, what was the respondent's share in the responsibility for the damage?

147 The definition appears to refer interchangeably to negligence, breach of statutory duty or other act or omission giving rise to a liability in tort.

148 It is difficult to give the statutory language a literal application to the concept of fault constituting contributory negligence.

149 Professor Glanville Williams in *Joint Torts and Contributory Negligence*¹⁵⁸ grapples with some of the problems occasioned by the language, not, it must be said, as indeed the text recognises, entirely satisfactorily, to reach the position that the statute prevails whenever the facts establish a tort (regardless whether they also establish a cause of action in contract) so as to make contributory negligence, if proved, available as a partial defence. The reasoning may have its difficulties but as Lord Goff of Chieveley (with whom Lord Keith of Kinkel, Lord Browne-Wilkinson, Lord Mustill and Lord Nolan agreed) in *Henderson v Merrett Syndicates Ltd*¹⁵⁹ said the result that a claimant may have two remedies, in tort and in contract, is an untidy result. When either result is open and is not without its problems, or is untidy, then that which is fairer is perhaps to be preferred. Glanville Williams' rationalization is attractive in light of the anomalies to which I have referred which may otherwise arise.

150 The expression "fault" as used in s 27A(3) cannot literally mean, for the purposes of contributory negligence, what the definition states "fault" to mean unless the words "which gives rise to a liability in tort" are confined in operation to "other act or omission" and even then the difficulties do not disappear. In *Pennington v Norris* the High Court (Dixon CJ, Webb, Fullagar and Kitto JJ) recognised some of the problems in the following passage¹⁶⁰:

"The only guide which the statute provides is that it requires regard to be had to 'the claimant's share in the responsibility for the damage'. As to the effect of this see generally an article by Payne, *Reduction of Damages for Contributory Negligence*¹⁶¹. What has to be done is to arrive at a 'just and equitable' apportionment as between the plaintiff and the defendant of the 'responsibility' for the damage. It seems clear that this must of necessity involve a comparison of culpability. By 'culpability' we do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable man. To institute a comparison in respect of blameworthiness in such a case as the present seems more or less impracticable, because, while the defendant's negligence is a breach of duty owed to other persons and therefore blameworthy, the plaintiff's 'contributory' negligence is not a breach of any duty at all, and it is difficult to impute 'moral' blame to one who is careless merely of his own safety."

151 It seems to me to be clear here that the respondent was guilty of negligence. It is irrelevant that the respondent's own negligence may not give rise to a liability

158 (1951) at 329-331.

159 [1995] 2 AC 145 at 194.

160 (1956) 96 CLR 10 at 16.

161 (1955) 18 *Modern Law Review* 344.

in tort. As the Court said in *Pennington v Norris* in the passage I have quoted, a plaintiff's contributory negligence is not a breach of any duty at all. A plaintiff may be guilty of contributory negligence in circumstances in which no duty is owed by him or her to a defendant or anyone else¹⁶². By definition fault means negligence. This respondent did suffer damage as a result partly of its own negligence and therefore fault, and partly as a result of the appellants' (albeit that the fault was a breach of contract as well as a tort) and accordingly in my opinion it then fell for the Court to apportion liability.

152 A number of judges in Australia and elsewhere have expressed similar views with respect to this matter¹⁶³.

153 In *AWA Ltd v Daniels* Rogers CJ Comm D, who was of the same opinion on a consideration of the similar New South Wales legislation, referred to the tide of authority in the direction which I prefer. His Honour said of the authorities¹⁶⁴:

"Until recently, it had been accepted that the defence of contributory negligence was unavailable in all cases in answer to an action brought for breach of contract. This view is supported by the decision of the majority of the full court of the Supreme Court of Western Australia in *Arthur Young & Co v Chip & Pulp Co Pty Ltd*¹⁶⁵. However the WA Act is in different terms from the NSW legislation. The decision rests on the words of the WA Act.

162 *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 at 308-309, 316, 324; *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 esp at 611.

163 See *Rowe v Turner Hopkins & Partners* [1980] 2 NZLR 550; *Bains Harding Construction & Roofing (Aust) Pty Ltd v McCredie Richmond & Partners Pty Ltd* (1988) 13 NSWLR 437; *Challenge Bank Ltd v VL Cooper & Associates Pty Ltd* [1996] 1 VR 220; *Meddick v Cutten and Harvey* (1984) 36 SASR 542 at 556-558 per White J; *Walker v Hungerfords* (1987) 44 SASR 532; *Day v Mead* [1987] 2 NZLR 443; *Mouat v Clark Boyce* [1992] 2 NZLR 559; *Queen's Bridge Co v Edwards* [1964] Tas SR 93; *Doiron v Caisse Populaire D'Inkerman Ltée* (1985) 17 DLR (4th) 660; *Craig v Troy* (1997) 16 WAR 96. But see contra *Arthur Young* [1989] WAR 100; *James Pty Ltd v Duncan* [1970] VR 705; *Belous v Willetts* [1970] VR 45; *Harper v Ashtons Circus* [1972] 2 NSWLR 395.

With respect to the dictum of Hope JA in *Harper* (at 404), that "the law of contract is not so intractable as to be unable to produce an acceptable solution ... in respect of ... the common areas, by the application of its own principles", the passage of time and experience do not suggest that such a solution has yet been found.

164 (1992) 7 ACSR 759 at 841-842.

165 [1989] WAR 100.

While there is no decision, at an appellate level, in Australia, to a contrary effect to that arrived at by the WA full court, in my view, the tide has been running so strongly against that view, in authoritative pronouncements in other countries, that, even at first instance, it is open to a judge to take a different view. Smart J did so in *Bains Harding Construction & Roofing (Aust) Pty Ltd v McCredie Richmond & Partners Pty Ltd*¹⁶⁶. His Honour followed the decision of the English Court of Appeal in *Forsikringsaktieselskapet Vesta v Butcher*¹⁶⁷. On appeal, the House of Lords found it unnecessary to discuss the question. A differently constituted Court of Appeal cited *Vesta* with approval in *Tennant Radiant Heat Ltd v Warrington Development Corp*¹⁶⁸. The decision in *Vesta* has been applied as well in *Youell v Bland Welch & Co Ltd*¹⁶⁹. The Court of Appeal in New Zealand in *Day v Mead*¹⁷⁰, after a careful analysis by Sir Robin Cooke, expressed the view that, where a defendant's liability in contract is the same as his liability in the tort of negligence, independently of the existence of any contract, the defence of contributory negligence may be available. Indeed Mr Bathurst QC, for the plaintiff, did not seek to argue to the contrary. I propose to adopt that view and hold that, in the present case, contributory negligence, if otherwise available, is not denied by the words of the legislation".

- 154 Generally the texts in Australia also acknowledge the availability of contributory negligence as a partial defence in cases of a defendant's dual liability in tort and contract. Justice Zeeman¹⁷¹ states:

"Although there has been no authoritative pronouncement on the question by the High Court of Australia, or indeed by any appellate court in Australia, England or New Zealand, it seems that it may now be asserted with some degree of confidence that there is a substantial body of authority, dealing with the question of the applicability of the apportionment legislation to actions for breach of contract which has established that the legislation applies in all breach of contract cases where a defendant concurrently is liable in tort for

166 (1988) 13 NSWLR 437.

167 [1989] AC 852 [at 867 per O'Connor LJ; at 875 per Neill LJ and at 879 per Sir Roger Ormrod].

168 [1988] 1 EGLR 41.

169 [1990] 2 Lloyd's Rep 431 at 461.

170 [1987] 2 NZLR 443.

171 "Contributory Negligence – A Defence Limited to Actions in Tort?", (1994) 2 *Tort Law Review* 16 at 16-17.

the damage flowing from the breach of contract, no matter how the cause of action is framed ..."

155 In Carter and Harland, *Contract Law in Australia*¹⁷², the following statement appears:

"Although the High Court has not been called upon to interpret the provisions in the context of breach of contract, the clear trend of the recent authorities is in favour of the application of the legislation to situations of concurrent liability, that is, where the defendant's breach of contract also gives rise to a liability in tort, as where a repairer does work badly."

156 Porat argues that the defence should be available on these grounds¹⁷³: its adoption in contract leads to fair and just results; is consistent with a trend generally considered positive, in unifying the remedies available in both contract and tort; it encourages caution, cooperation and solidarity between parties to a contract; and, it provides incentives towards the fulfilment of contracts and the mitigation of damages arising from the breach.

157 And Marks in a more qualified way puts the position in these terms¹⁷⁴:

"Contributory negligence is available as a defence where the facts pleaded show a breach of a duty of care owed by the defendant to the plaintiff under the general law.

However, the degree to which the public are accustomed reasonably to depend upon professional advice makes it difficult to prove that a plaintiff failed to take proper care to protect himself."

158 That there is a tide of authority and texts flowing in a particular direction is reassuring in two respects. First, their existence instills confidence in the making of a decision in accordance with them. Secondly, they give rise to what should be a fairly safe assumption, that actions have been started and shaped on the basis of them: and other decisions and arrangements are likely to have been taken and made on the same assumption; in short, parties' rights and obligations will in general not need to be reassessed and altered midstream. In view of the clear trend of the decisions and texts in this country, I do not have the concern here that

172 3rd ed (1996) at par 2130.

173 "Contributory Negligence in Contract Law: Toward a Principled Approach", (1994) 28 *University of British Columbia Law Review* 141.

174 "Professional Negligence: Contribution and Contributory Negligence", (1989) 15 *University of Queensland Law Journal* 209 at 227.

McHugh J voiced in response to the argument that the rule in *Rylands v Fletcher* should be abolished¹⁷⁵: that such a change might adversely affect existing actions and defences and partial defences.

175 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 594. McHugh J (although in dissent) said in respect of the argument that the rule in *Rylands v Fletcher* should be abolished:

"No one can know how many pending cases or existing causes of action will be defeated by the abolition of the rule. If experience is any guide, the recent bushfires in New South Wales will generate at least some *Rylands v Fletcher* claims."

The injustice that may flow from an effective change in the law by judicial decision was also recently discussed by Lord Browne-Wilkinson in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 at 1100-1101; [1998] 4 All ER 513 at 518. His Lordship was of the view that measures were necessary, and in that case, could be taken to prevent injustice by denying the change any retrospective effect:

"But whilst the underlying myth [that a judicial decision does not change the law] has been rejected, its progeny – the retrospective effect of a change made by judicial decision – remains.

...

Therefore the precise question is whether the fact that the later overruling decision operates retrospectively so far as the substantive law is concerned also requires it to be assumed (contrary to the facts) that *at the date of each payment* the plaintiff made a mistake as to what the law then was. In my judgment it does not. The main effect of your Lordships' decision in the present case is to abolish the rule that money paid under a mistake of law cannot be recovered, which rule was based on the artificial assumption that a man is presumed to know the law. It would be unfortunate to introduce into the amended law a new artificiality, viz., that a man is making a mistake at the date of payment when he acts on the basis of the law as it is then established. He was not mistaken at the date of payment. He paid on the basis that the then binding Court of Appeal decision stated the law, which it did: the fact that the law was later retrospectively changed cannot alter retrospectively the state of the payer's mind at the time of payment. As Deane J said in the High Court of Australia in *University of Wollongong v Metwally* (1984) 158 CLR 447 at 478:

'A parliament may legislate that, for the purposes of the law which it controls, past facts or past laws are to be deemed and treated as having
(Footnote continues on next page)

159 The respondent mounted a further argument that s 27A(3) of the Act requires a strict identity of "damage" so that the damage which is suffered by a claimant must be identical with the damage which is to be the subject of apportionment. It was put that that identity did not exist here. The submission gains support from the fact that the second time "damage" is referred to in the definition, it is prefaced by the word "that". It was then put that the damages assessed by the primary judge did not include any losses sustained by the respondent at the suit of any unit trust holder: that all of the damages were sums paid or payable to third parties by the respondent from its own resources.

160 I do not think that the submission provides an answer to the conclusion that the trial judge reached. One reason why the respondent had to pay damages to third parties was because the assets and earnings of the business of the trust were insufficient to meet the debts incurred by the respondent, by reason in part of its own irresponsibility, that is to say negligence, with respect to elementary financial considerations and precautions. Another way of looking at the matter is this. Had the respondent made proper inquiries it no doubt would not have entered into the transaction at all, and would not have incurred the debts that it did to third parties in the same way as it says (somewhat improbably) that it would have acted differently, by not entering into the transactions at all had it been aware of the potential for personal liability. The debts to the third parties were just as much damages arising from the highly imprudent failure to make inquiries as they were from the failure of the appellant to proffer appropriate advice. But in any event, once negligence and contributory negligence have to be weighed in the balance, it will not be possible in many cases to say that the injury or damage, absent the contributory negligence, would be exactly the same as it would be as a result of the concurrent negligence of the plaintiff and the defendant. Each may have an unascertainable cumulative effect making it a practical impossibility to associate precisely each consequence with each cause or act or omission of negligence. The duty of the Court is to arrive, as was said in *Pennington v Norris*¹⁷⁶ at a just and equitable apportionment.

been different to what they were. It cannot, however objectively, expunge the past or "alter the facts of history".'

If that be true of statutory legislation, the same must a fortiori be true of judicial decision. In my judgment, therefore, if a man has made a payment on an understanding of the law which was correct as the law stood at the date of such payment he has not made that payment under a mistake of law if the law is subsequently changed."

cf *Bropho v Western Australia* (1990) 171 CLR 1 at 23.

¹⁷⁶ (1956) 96 CLR 10.

161 In reaching the decision that I have I do not overlook that in various respects there is room for continuing controversy in applying the decision: when will, in a case of this kind the limitations period begin to run, on the occurrence of the breach of contract or the first occurrence of non-minimal damage: what is the appropriate measure of damages¹⁷⁷? How should issues of remoteness be resolved? Whilst these questions are large ones, their difficulties should not be overstated. In *Aluminium Products*¹⁷⁸, the majority of the Full Court of the Supreme Court of Queensland saw no difficulty in according to the plaintiff the benefit of the commencement of the limitations period in tort rather than in contract. In many cases there will in practice be little difference between the quantum of damages in tort and in contract. In a case of dual liability, the proper approach may simply be to give the plaintiff (if there is a relevant difference) the benefit of the greater of the two measures of damages in a particular case on the basis that the plaintiff should be entitled (without double counting) to such damages as flow from any breach of duty (in contract and tort) that the plaintiff is able to prove. This action was, as is generally the case with actions founded on the negligence of a professional person, conducted on the footing that no matter which cause of action succeeded the damages would be the same. This joint approach by the parties recognises that the dichotomy between the measure of damages in tort and in contract arising from the difference in kind between the respective losses suffered in ordinary cases (that is to say, cases of breaches by persons other than professionals and like service providers) will rarely in practice, if at all, exist in the case of breaches by professionals and like service providers¹⁷⁹. These are matters which in the absence of legislation¹⁸⁰ will have to be worked out on a case by case basis.

162 It follows that I would allow the appeal with costs and order, subject to the following, that the judgment of the trial judge be restored. If the calculation of interest on the damages assessed requires that a judgment for a different monetary sum be entered, then the parties may apply in that regard if they are unable to agree upon the appropriate amount. I would also order that the respondent pay the appellants' costs of the appeal to the Full Court of the Supreme Court of South Australia with respect to all issues relating to contributory negligence.

177 *Jobbins v Capel Court Corporation Ltd* (1989) 91 ALR 314; *Cartledge v E Jopling & Sons Ltd* [1963] AC 758.

178 [1981] Qd R 33.

179 For a discussion of the dichotomy see Gaudron J in *Marks v GIO Australia Holdings Ltd* (1998) 73 ALJR 12 at 15-16; 158 ALR 333 at 338-339.

180 In Victoria, ss 23A, 23B, 24, 24AA, 24AB, 24AC and 24AD of the *Wrongs Act* 1958 are provisions designed to deal with apportionment of fault in cases of different causes of action.