

# CONTRACT AND TORT: THE VIEW FROM THE CONTRACT SIDE OF THE FENCE

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## I. SHOULD THERE BE A FENCE AT ALL?

When Mr Tony Weir wrote his valuable essay of 1976 on “Complex Liabilities” in the *International Encyclopedia of Comparative Law*<sup>1</sup> he was able to say that there was little writing in the common law world, at any rate outside the United States, on the interaction of tort and contract. He referred to only two articles.<sup>2</sup> Since that time there has been much. I tried to contribute to the discussion in a paper delivered at Auckland in 1984,<sup>3</sup> but that paper, like several others, has long been overtaken by developments both judicial and academic. The great increase of interest in the topic was caused, as Professor Fleming points out, by *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>4</sup> in 1964 (though as with *Donoghue v Stevenson*<sup>5</sup> the full significance of the decision in the contract sphere took some time to emerge<sup>6</sup>). So long as the potential overlap between tort and contract was largely confined to a few situations of personal injury and property damage it did not attract much discussion. But once it was established that there could be an action in tort for pure economic loss not arising directly from such damage, the possibilities of interaction greatly increased and required serious practical and academic attention.

We learn from Mr Weir’s writing<sup>7</sup> and elsewhere that in leading civil law systems the attitude to this problem is likely to be conditioned by fixed features of civil codes. Thus in French law the scope of contract is restricted, but that of tort is expressed principally in a single article<sup>8</sup> of the *Code Civil* which is potentially of great broadness. Hence there is reluctance to allow tort actions to intervene in the contractual sphere (the so-called principle of *non-cumul*) which they might otherwise swamp. In German law, on the other hand, the availability of a tortious remedy for economic loss is restricted by a more specifically drafted general provision of the civil code:<sup>9</sup> hence there has been less reluctance to deploy tort remedies, although in some cases their limitations have forced the law back into contract and promote an extension of contract rather than tort.<sup>10</sup>

As often, the common law is here in the (perhaps) enviable position of having a more or less clean slate. Both contract and tort are judge made.<sup>11</sup> If there is any similarity, it is perhaps to the situation in French law, where

1 Vol XI, *Torts*, Chap 12.

2 Guest, “Tort or Contract?” (1961) 3 *Malaya L Rev* 191; Poulton, “Tort or Contract” (1966) 82 *LQR* 346; also Winfield, *Province of the Law of Tort* (1931) chap IV.

3 “Tort Actions in Contractual Situations” (1985) 11 *NZULR* 215.

4 [1964] *AC* 465.

5 [1932] *AC* 562.

6 The first major upset of established commercial arrangements which was caused by *Donoghue v Stevenson* occurred in *Adler v Dickson* [1955] 1 *QB* 158.

7 *Op cit*, n 1.

8 Article 1382.

9 No 823.

10 The so-called “contract with protective effect towards third parties”, discussed below.

11 Subject in New Zealand to statutes which control, at least on their face, the relevant remedies: principally, in this context, the Contractual Remedies Act 1979.

the potential of tort law is wide. It is equally wide in common law but in common law the law of contract also is capable of development, although apt to be regarded as more set in its ways, at any rate in some jurisdictions. So there is plenty of scope for the boundaries to be drawn appropriately or even eliminated.

Sometimes the interaction is presented in terms almost of rivalry, and expressed in phrases such as “primacy of contract”.<sup>12</sup> Such terminology tends to come from specialists in tort law and this is not surprising because, at any rate since *Hedley Byrne*, the governing principle of the tort of negligence can be expressed in a very general way. Negligence can be said to be based on the simple idea of a duty or liability to compensate for loss negligently caused to another. From such a broad starting-point it may be difficult to see why any other branch of law should “take out”, even in part, a particular type of act which could be called a wrong.<sup>13</sup> Hence some writers on tort appear to seek not criteria for interaction but, rather, limiting or displacing considerations on this general principle<sup>14</sup> which prove to be of a loose and (to some at least) rather unsatisfying sort.

Contract law cannot be formulated in such a broad way and can have no “take-over” ambitions. It is directed towards two-party (in the broad sense) transactions and their implications. Attempts to remedy wrongs on the margin of this area by the detection or invention of contracts are usually unsatisfactory,<sup>15</sup> and off the margins such remedies can hardly be achieved at all.<sup>16</sup> But this does not remove the validity of the category. The aim of the law should be to devise principles which provide a way of solving disputes between private persons (including of course corporations); *rivalry* between principles, as opposed to a study of their interaction and interrelation, is unlikely to be productive. We are used to such interaction of the principles of restitution with contract and (subject to problems of integration) equity. We should accept it also in the case of tort.

Of more immediate practical significance is the view that we should not consider interaction but now move beyond the Romanistic categories of contract, tort and (although Roman law did not recognise it fully) restitution and stress the overarching notion of obligation, also Romanistic, which may be said to unite them. We should thus consider all three categories within one great head of Obligation, or Civil Liability, and take a step towards ridding ourselves of the confusing distinctions which now puzzle or even mislead us.<sup>17</sup> Some universities now have courses which go under the title of Obligations, although the content of these differs. More important, judges sometimes express irritation with the existing categories and a determination to get to what they perceive as the merits of the disputes before them, notwithstanding any conceptual limitations which they may find in the received techniques for solving such disputes.<sup>18</sup>

<sup>12</sup> See Cane, *Tort Law and Economic Interests* (1991) 496.

<sup>13</sup> Hence reports of the “death of contract”, which, as has often been said and is apparent from any general set of law reports, have been much exaggerated.

<sup>14</sup> Eg Stapleton, “The Condition of the Law of Tort”: paper for SPTL Seminar, Oxford, July 3, 1993 (to be published); Cane, *op cit*, n 12 at 208, 501.

<sup>15</sup> As, for example, *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154.

<sup>16</sup> But see *De la Bere v Pearson* [1908] 1 KB 280.

<sup>17</sup> See Deane J in *Hawkins v Clayton* (1988) 164 CLR 539, 584; Sir Robin Cooke’s comprehensive paper on “The Condition of the Law of Tort” delivered at the SPTL Seminar, n 14; and Birks, *op cit*, n 30. The view is not new: see, eg Grandmoulin, *De l’unité de responsabilité* (1892).

<sup>18</sup> Eg Cooke P in *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39, 43.

It is worth remembering at this point that in Roman law the idea of obligation referred to a continuing bond and was primarily applicable to contract situations. Taking in tort (delict) was actually a further step in classification which can be said not to have shed any great light; all it did was make a case for the application of some general principles supposedly found in one category to the other. The real unifying factor was no more than that both contract and delict gave rise to actions *in personam* as opposed to actions *in rem*, as indeed did restitutionary claims where available. On this basis there is not much to be expected of the larger category. Furthermore, as regards restitution, the intervention of equity creates a special problem for our law, for it introduces the possibility of deploying property rather than obligation reasoning. Indeed, the proper analysis of this area of the law is one of the great juristic problems of the present time. So it is not clear that the overarching category is going to get us far.

There is of course no reason why we should be bound by the classification at which Roman or civil law had arrived by a certain time; civil law has always developed just as ours does. But human beings do not change that much, even if the details of their activities do, and the ordering of private relationships may remain in fairly stable categories. The Romanistic distinction within actions *in personam* between contract, tort and (more controversially) restitution has survived through many centuries of western culture. Even if it has sometimes been overstated in the past, it is in common law not entirely the work of narrow-minded English judges of the middle and late nineteenth century.<sup>19</sup> The mere fact that it is old, or has sometimes been overemphasised, does not mean that it is necessarily to be abandoned. If, with iconoclastic zeal, one throws all the cards which are set out on the table into the air, it seems in this area not unlikely that they will come down again in much the same sort of arrangement,<sup>20</sup> for the categories and divisions which we use represent real situations which have arisen and continue to arise. As Mr Tony Weir wrote,<sup>21</sup> "It is not obvious that the formal categories are accidental, and if they are traditional, the tradition might yet be a good one, founded in continuing moral views related to private justice".

I suggest also that a strategy of "organising reasoning", which reflects known and easily comprehended value judgments, makes the law much more acceptable to those whose disputes are resolved by it. Without going into the well-known jurisprudential implications of this sort of assertion, to some extent recourse to the law is voluntary; private law can be seen as a form of dispute resolution, not the result of the exercise of sovereign power. Litigants will be more willing to accept a decision from a judge, or advice from a lawyer, if it appears to derive from justifiable principles. The law of contract develops principles to facilitate the interactive transactions of persons; the law of tort imposes more obviously general norms relating

19 In this respect I would respectfully doubt the dictum of Thomas J that (in substance) the legal techniques deployed by the English courts were more satisfactory "for some centuries before [the courts] were gripped by a passion to draw lines of demarcation between contract and tort": *Rowlands v Collow* [1992] 1 NZLR 178, 183.

20 I owe this simile to Mr P P Craig. A recent example is *Coxhead v Newmans Tours*, New Zealand Court of Appeal, April 7, 1993, dealing with the flexible remedies permitted on cancellation by s 9 of the Contractual Remedies Act, and affirming in this respect the decision of Fisher J, sub nom, *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68. Although the existence of wide powers in the court is confirmed, the well-established lines of reasoning as regards damages play a considerable role in the decision, and while exceptions may be made, no real substitute for the underlying principles is suggested.

21 Op cit, n 1 at 4.

to the conduct of persons towards each other, whether they were previously connected or not.<sup>22</sup> These are different objectives.

We can get further support from the origins of the categories. Contract in Roman law developed from various discrete but well-known relational transactions (such as sale, hire and formal obligations) and proceeded towards generalisations which are even now the subject of discussion and refinement. It is not possible to encapsulate all that the law of contract contains under any one word such as “agreement” or “promise”, but this does not detract from the validity of its organising reasoning.

The same is true of tort. Tort (delict) started in Roman law by providing remedies in respect of obvious duties that we all share: not without justification to destroy or damage the person or property of others. One can say that it has always dealt with economic loss, but the economic loss dealt with was that arising out of the above causes. One can also say that even if protection against personal injuries is special and different, a basic need, destruction of or damage to property is just a form of economic loss. But basic value judgments would, I suggest, quite quickly proceed to the idea that protection of tangible property is another basic need. The law then moved via marginal cases where it was not clear whether a particular complaint concerned damage to property or pure economic loss,<sup>23</sup> and cases where the loss of property was caused without damage to or destruction of it,<sup>24</sup> towards a (doubtless) restricted liability for causing loss without these elements being present.<sup>25</sup> This liability has required and requires discussion and refinement. I suggest that these categories of interests in one’s person and property,<sup>26</sup> because they take starting points which can be readily understood and seem cogent as interests to protect, are still highly relevant in the determination of how the law of contract and tort should interact.<sup>27</sup>

## II. HOW DOES TORT INTERACT WITH CONTRACT?

To a person looking at the institution of contract, whether from the other side of the fence or from within the fence (assuming in the latter case that the observer is reasonably objective), the law of contract may appear to suffer from the following gaps or defects. Any of them may be potentially remediable by a tort action. The question then is whether they should be, or whether some other technique (equity, restitution) should be deployed, or whether the solution lies more fundamentally within the grouping of rules called “Contract Law” itself.

First, there have been thought to be imprecise and unsatisfactory restrictions on the actual commencement of contractual liability; it has been thought that there is a grey area around the moment of formation which may require filling out by actions in tort. Indeed, to some extent it has been.

22 “The postulate of the law of contracts was that a person was entitled to receive what another has promised her or him or promised another for that person; the law of torts was based on the premise that a person has a right not to be harmed by another, with respect to that person’s personality and interests in things and in other persons; as to restitution, a person had the right to be restored a benefit gained at her or his expense by another, if the retention of the benefit ‘would be unjust’, and, ‘in most cases’, the retention of the benefit would ‘unjustly enrich the recipient’”: Seavey and Scott (1938) 54 LQR 185, as summarised by Gummow, *Essays on Restitution*, ed Finn (1990), 48.

23 Eg sowing weeds in another’s crop (D.9.2.27.14), mixing sand and corn (D.9.2.27.20).

24 Eg releasing an imprisoned slave, from compassionate motives (D.4.3.7.7).

25 J Inst IV 3.16.

26 “Event based” in Professor Birks’ reasoning: “Civil Wrongs: a New World” in *The Butterworth Lectures 1990–1991* (1992) at 111.

27 The distinction is rejected without reasons by Cane, *op cit*, n 12 at 501–502; and see 208, text to n 288.

Secondly, the requirement of consideration has excluded some situations where there is arguably an agreement, and a remedy may seem to be required; a tort action can be and has been considered, and occasionally allowed, in some such situations.

Thirdly, the law of contract, at least in some jurisdictions, has been reluctant to imply terms into contracts, largely on the basis that it should not try to make a contract for the parties and that the omission by the parties of any such term may be significant. The general duties which are the subject-matter of the law of tort may be invoked to fill gaps here. They may also, and more frequently, be invoked because they may have more satisfactory side-effects (for example, as to accrual of limitation periods) than contract rules.

Fourthly, the rule of privity of contract has produced situations where a third party has on first impression been unaffected by a contract or a term in a contract which arguably ought to affect him or her in some respect. Most of the cases have concerned the applicability of exclusion clauses, or other restrictions on, or monetary delimitations of, liability in connection with third parties such as employees or subcontractors. These cases almost all concern actions in tort against those employees or subcontractors and therefore bring the interrelation between contract and tort into sharp focus. Sometimes however it is argued that a third party can actually sue in tort for loss arising in connection with a contract. Occasionally such actions have succeeded; more often the presence of the contract has been a restricting factor on the availability of the tort action. I shall suggest that it seems unlikely that the formal allowing of third party contract rights would make much difference in this area. The picture is developing all the time but is still far from clear.

For the solution of these and other problems the common law (using that term in its broadest sense in comparison with the civil law) has available at its disposal two "secret weapons" quite apart from the law of tort, which are unknown, at any rate in the same form, to the civil law; these can sometimes be used to modify the results that would otherwise obtain. They are the law of bailment, and equity. Bailment is a notion antedating in common law the establishment of the Romanistic distinction between contract and tort. By virtue of the remedies available in respect of it, it may be nearer to tort than contract, and perhaps it should ideally be assimilated into the existing law.<sup>28</sup> But it seems to remain separate, and provides a useful, although often highly puzzling,<sup>29</sup> source of further reasoning. Equity is of course a "third" (or fourth) force which has a totally separate origin. Whatever view one takes of its standing — whether it should remain as a separate body of reasoning with its own internal consistency, or flow together with the stream of common law to generate, by virtue of the combination, results which could not hitherto have been achieved at all<sup>30</sup> — it certainly makes available further reasoning which does not require use of the law of tort.

It is now appropriate to go further and take these situations separately, bearing in mind primarily the interaction of tort, but not ignoring other techniques, of which equity is the most conspicuous.

<sup>28</sup> See Weir, book review, [1993] LMCLQ 275.

<sup>29</sup> Eg *The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395.

<sup>30</sup> See Beatson, *The Use and Abuse of Unjust Enrichment* (1991), chap 9; Birks, *op cit*, n 26 at 1, referring to the "old dualism between the common law and equity ... unequivocally the work of the devil".

### III. PROBLEMS ARISING BETWEEN CONTRACTING PARTIES.

#### 1. Pre-contractual situations: the zone of negotiation.

Here there were 30 years ago uncertainties caused by the parol evidence rule and the lack of remedy in respect of precontractual statements. Equity had come to the aid of the common law with its remedy of rescission, but this proved too limited. An action in damages was required, and a wrong turn had been taken in *Derry v Peek*.<sup>31</sup> It was these difficulties that inspired the original (1967) report of the Contracts and Commercial Law Reform Committee in New Zealand, which was later taken out of wraps and led to the Contractual Remedies Act of 1979. The problems were met by section 6 of the 1979 Act, which virtually abolishes the distinction between terms and representations and extends the domain of contract. This may cause some surprising results in connection with the measure of damages,<sup>32</sup> although only if the normal principles are adhered to. At present it would appear that this provision and other judicial relaxation of common law categories still attract attention away from legislation (the Fair Trading Act) similar to the Australian legislation next referred to.

In Australia the problems were swept up into what has become a much greater reform, the Trade Practices Act (Cth) 1974 and corresponding State legislation, which not only provide varied remedies in respect of misrepresentations (on, it seems, the basic analogy of tort) but in practice extends a lot further in providing remedies in some situations where it might previously have been, or in England still is, appropriate to sue for a straight breach of contract (as well as in cases where there would have been, and in some jurisdictions still might be, no remedies at all).

In England the difficulties were met by more subdued methods; by the Misrepresentation Act 1967 (an unattractive but ultimately successful piece of legislation), the decision in *Hedley Byrne* and the liberalising later decision of *Esso Petroleum Co Ltd v Mardon*,<sup>33</sup> a greater willingness to infer collateral contracts, and the virtual suppression of the parol evidence rule.<sup>34</sup> This was a case where tort came to the aid of contract, whether by way of *Hedley Byrne* or section 2 of the 1967 Act (which is a statutory tort action<sup>35</sup>), but in a way not in the end productive of any great interrelational problems.<sup>36</sup>

There is no great difficulty with the interface here, although views can be held on the merits of different ways of dealing with such fact situations; there is some parallel with the notion of *culpa in contrahendo* in civil law, the classification of which has been controversial. Argument is also possible as to the extent to which certainty on contract terms should be required before an enforceable agreement is found, and as to the enforceability of a contract to negotiate and the like. There may also be circumstances in which equitable duties and remedies arguably arise.<sup>37</sup> Time will tell how well, in comparison with each other, these different methods of dealing with the problems work.

Where it is sought to claim against a third party intermediary it may be necessary anyway to have recourse to the previous law and sue in tort.

31 (1889) 14 App Cas 337 (which surprisingly does not appear in the table of cases of Cane, op cit, n 12).

32 See *Walsh v Kerr* [1989] 1 NZLR 490, 493 per Cooke P.

33 [1976] QB 801.

34 See Law Com No 154 (1986); for an example, *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078.

35 *Roycot Trust Ltd v Rogerson* [1991] 2 QB 297.

36 Such problems loomed larger before the bold decision in *Esso Petroleum Co Ltd v Mardon* [1976] QB 801.

37 See *United Dominion Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1; *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574; (1989) 61 DLR (4th) 14.

## 2. Undertakings without consideration.

The first thing to be noted here is that the fact that there can be no binding contract without consideration is of course a historical accident deriving from the way in which the common law of contract developed. Words like "bargain" help little in assessing the merits of this requirement, which is taken much less seriously by common lawyers than by civil law observers. I suggest that the fact that the requirement is more or less accidental invalidates some of the reasoning of tort lawyers when they justify particular results on the basis that contract law only deals with paid-for obligations.<sup>38</sup> What it deals with is rather transaction-based obligations,<sup>39</sup> although this is not to say that the fact that a transaction is entirely gratuitous has no relevance.

Although the reasoning in the English decision of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*<sup>40</sup> cannot be admired, its overall effect may be beneficial, and the decision shows that judges are reluctant to be overcome by technical problems of consideration if these can be avoided. It is however convenient to have some way of marking off purely gratuitous promises, for most if not all legal systems would hesitate to enforce these except in recognised situations or under special formalities or both.<sup>41</sup>

There are nevertheless a few intermediate situations where it seems appropriate that a responsibility seriously assumed should be enforceable, at least to the extent of reliance, and yet no consideration can be found. Civil law systems, free of the requirement of consideration, may find it easier to deal with many of these situations as straight contracts; and it need not follow (any more than it would at common law) that the damages award would on this basis have to be of what is often referred to as the expectation interest. In common law systems the obvious way to cover such situations is by allowing an action in respect of a representation that is relied on, not in tort but in equity, by way of estoppel reasoning. This can operate by way of a fringe supplement to the general doctrine of consideration, as was suggested by section 90 of the *Restatement*. Outside (many) cases involving land, the most famous current example where this has been avowedly done is the decision of the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher*.<sup>42</sup> The working out of this principle will obviously take time. Here is another example of interplay of the "secret weapon" of equity, supplementing rather than amending the basis of contract.<sup>43</sup>

Yet we find a few cases which seek to solve such problems by actions in tort for pure economic loss based in the idea of assumption of responsibility, rather as in the case of the person who intervenes at an accident. One to which I drew attention in 1984 was the decision of Hobhouse J in *The Zephyr*,<sup>44</sup> where a Lloyd's broker was held liable on the basis of an undertaking to procure further signatures on an insurance slip to reduce the exposure of the first signer. Subsequently the English Court of Appeal,<sup>45</sup> in rather complex proceedings, preferred the idea of a contractual under-

<sup>38</sup> Eg Cane, *op cit*, n 12, at 330.

<sup>39</sup> Cf Inst G III 91 (person who pays money by mistake seeks to discharge a transaction rather than form one).

<sup>40</sup> [1991] 1 QB 1. But cf *Re Selectmove Ltd* (English CA, December 21, 1993).

<sup>41</sup> See *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 104-107 Robert Goff J; *affd* on other grounds *ibid*.

<sup>42</sup> (1988) 164 CLR 387.

<sup>43</sup> Pace those who think otherwise.

<sup>44</sup> *General Accident Fire & Life Ins Corp Ltd v Tanter (The Zephyr)* [1984] 1 Lloyd's Rep 58.

<sup>45</sup> [1985] 2 Lloyd's Rep 529.

taking in return for the signature, and Mustill LJ referred to tort as involving the idea of a duty to “avoid doing something, or to avoid doing something badly”.<sup>46</sup>

The case of *Al-Kandari v J R Brown & Co*,<sup>47</sup> where a husband’s solicitor undertook to the wife to hold the husband’s passport, on which the children of the marriage were included, and subsequently improperly allowed the husband to have it, cannot be solved in contract because of the peculiarity of the doctrine of consideration; nor would it help if contracts were enforceable by third parties, for the duty undertaken to the wife was actually inconsistent with the existing contractual duty to the husband. It could conceivably be resolved by the other secret weapon, the notion of gratuitous bailment, although the claim was necessarily for consequential loss, which might be difficult to justify under this head. Estoppel, unless operated very flexibly indeed, does not fit in easily here either. Only tort will do.<sup>48</sup> There are also cases on gratuitous agency such as *Chaudhry v Prabakhar*<sup>49</sup> which are difficult to explain except on the basis of failure to carry through an undertaking. If they are correct, they should really be contract cases; they can only be justified in tort on the basis of failure to carry through what was undertaken or assumed, as in *Ross v Caunters*,<sup>50</sup> *White v Jones*,<sup>51</sup> *Gartside v Sheffield Young & Ellis*,<sup>52</sup> *Hawkins v Clayton*<sup>53</sup> and similar cases discussed below. The difficulty of accommodating such situations seems a small but significant defect caused by the doctrine of consideration, for which other techniques do not easily make up.

### 3. Tort actions within the contract: concurrence of actions.

The question here is whether, when parties are in a contractual relationship, one can sue the other in tort. It is clear that the contractual relationship cannot exclude liability in respect of a tort unrelated to it, such as (normally) defamation. There is also no reason why the fact that the parties are in a contractual relationship should exclude liability as to the basic tort duties of damage to person or property,<sup>54</sup> although the tort duty might well be modified by the contract terms. *Hedley Byrne* however created the possibility of more regular concurrent liability.

It was, until quite recently, orthodox doctrine that where the parties were in a contractual relationship, no action in tort could be brought for what was in substance a breach of contract. It is now accepted that a negligence action can in principle be so brought,<sup>55</sup> and indeed any view that it should not be available may now appear illiberal.

<sup>46</sup> At 538.

<sup>47</sup> [1988] QB 665.

<sup>48</sup> See also *Allied Finance & Investments Ltd v Haddow* [1983] NZLR 22; *Connell v Odlum* [1993] 2 NZLR 257; cf *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, in none of which was inconsistency with the main retainer so clear.

<sup>49</sup> [1989] 1 WLR 29 (person who agreed to look over car for friend liable for doing so negligently; but the liability turned on a concession which perhaps should not have been made: see 28–29). See also *Gomer v Pitt & Scott* (1922) 10 Ll L Rep 668; 12 Ll L Rep 115.

<sup>50</sup> [1980] Ch 297.

<sup>51</sup> [1993] 3 WLR 730.

<sup>52</sup> [1983] NZLR 37.

<sup>53</sup> (1988) 164 CLR 539.

<sup>54</sup> Eg D 9.2.7.8; *Thake v Maurice* [1986] QB 644 (both cases of medical practitioners).

<sup>55</sup> *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384; *Central Trust Co v Rafuse* [1986] 2 SCR 147; (1986) 31 DLR (4th) 481; *Hawkins v Clayton* (1988) 164 CLR 539; *Puniab National Bank v De Boinville* [1992] 1 Lloyd’s Rep 7; *The Merrett, Gooda Walker and Feltrim cases*, English CA, December 13, 1993. The position in New Zealand is not yet completely clear: see *Rowlands v Collov*, supra, n 19; *Mouat v Clark Boyce* [1992] 2 NZLR 559 (actual decision revsd, [1993] 3 WLR 1021).



The best established cases concern solicitors and other professionals. Since there is here only (in most situations) economic loss rather than physical damage, the case for a tort action is not in such cases unanswerable. The main justification seems to be historical; that the liability was actually established before the notion of contract, and the Romanistic distinction between contract and tort, was worked out in common law, and indeed before the special problem of pure economic loss was identified.<sup>56</sup> Once it was worked out, there was little to be gained from not assimilating the duty into contract — except later-discovered self-inflicted advantages of a technical nature such as those connected with limitation of actions. But there is probably no harm in allowing a tort action in such a case, and certainly now plenty of authority for it. Equally, there is no objection to the superimposition of fiduciary duties over and above contract terms in appropriate cases.<sup>57</sup> Nevertheless the law of contract ought to be, and is, capable of working out the appropriate undertakings made to each other by the parties to a bilateral or multilateral transaction. It is surely inappropriate that the general principles of the law of tort, with their notions of negligence, proximity, perhaps reliance and so forth, which are geared towards determining duties towards strangers, should be needed to determine the extent of the obligations of contracting parties to each other.

Thus I suggest that the unpopular dictum of Lord Scarman in *Tai Hing Cotton Mills Ltd v Liu Chong Hing Bank Ltd*<sup>58</sup> is directed to the extent of liability and was in principle correct. The duty of a customer to his or her banker should be a matter for the law of contract, and if that has been worked out as not extending to a duty to check bank statements, it should not be extended by the application of a general duty derived from the law of tort and primarily relevant to the position of people unconnected to each other before the commission of the tort.<sup>59</sup> Although this may in fact be an unlikely case for the existence of a duty of care in tort anyway,<sup>60</sup> the dictum does not necessarily mean that tort actions for economic loss cannot be brought at all where there is a contract between the parties. It indicates only that the duty owed by one party to a transaction to the other will not, at any rate as regards economic loss, often be different. Thus I respectfully disagree with Deane J in *Hawkins v Clayton*,<sup>61</sup> who said that the liability of a solicitor to his client should be determined by tort principles. If it really is necessary to have recourse to these, the law of contract is deficient and should be improved. The implied terms may well, in a case like *Hawkins v Clayton*, be the same as the tort duty, but in that very case an implication was required that there should be payment, and the law of tort could not

56 See French, (1982) 5 Otago L Rev 236.

57 See the discussion in *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41; see also *Nocton v Ashburton* [1914] AC 932; *Canson Enterprises Ltd v Boughton & Co Ltd* [1991] 3 SCR 534; (1991) 85 DLR (4th) 129. For a case where this might have been done, but was not, see *Kelly v Cooper*, [1993] AC 205; and see *Clark Boyce v Mouat* [1993] 3 WLR 1021, 1029.

58 [1986] AC 80, 107.

59 See, eg *Sinclair, Harder, O'Malley & Co v National Insurance Co of New Zealand Ltd* [1992] 2 NZLR 706, 720–721 per Tipping J; *Willis v Castelein* [1993] 3 NZLR 103; see also *Kavanagh v Continental Shelf Co (No 46) Ltd* [1993] 2 NZLR 648 (tort might have created vicarious liability: *sed qu*); cf *Rowlands v Collow*, *supra*, n 19 per Thomas J. *Quaere* however whether this principle was not applied too strictly in *Greater Nottingham Cooperative Society Ltd v Cementation, Piling and Foundations Ltd* [1989] QB 71, where the contract was a side affair and the potential tort liability could perhaps have been considered as separate. It is also not clear why tort liability was in the end excluded in *Lancashire and Cheshire Assn of Baptist Churches Inc v Howard & Seddon Partnership* [1993] 3 All ER 467.

60 This was also true in *Scallly v Southern Health and Social Services Board* [1992] 1 AC 294.

61 (1988) 164 CLR 539, 582–587. See Swanton (1992) 5 JCL 127.

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provide it.<sup>62</sup> The law of contract is directed towards, and should be and is capable of providing the relevant implied undertakings.

Whether or not the contractual duties of a customer to his banker were correctly determined by the court in *Tai Hing* seems to me quite a different matter. It may well be that the duty attributed was too limited for modern times. The English courts at least have been extremely reluctant to imply terms into contracts. One can see in general why. It is for the parties to make their contract, not the court, and cases have arisen where the court has been asked to imply, and may even have implied, a term on which, it can be established, the parties in negotiation had failed to agree.<sup>63</sup> Lord Denning's general claim to imply terms wherever it would be reasonable<sup>64</sup> may therefore well have, like some of his formulations of the basis of the doctrine of frustration, claimed more power for the court than would be although appropriate, at least by some. But Lord Wilberforce's more cautious formulation in terms of drawing out the implications of known types of contracts<sup>65</sup> can be taken a long way. Recent English cases have not been unduly hesitant to imply terms into the contracts of doctors and health authorities,<sup>66</sup> and into the contract of an estate agent,<sup>67</sup> without reference to pessimistic general dicta elsewhere.

The main reasons for suing in tort seem to involve the securing of purely collateral advantages — a different operation of the limitation period, the application of apportionment under contributory negligence legislation, and so forth. It is unsatisfactory that claims should have to be formulated in this way — and attract thereby pages of judicial discussion of fundamental issues — for such marginal reasons. As Mr Weir suggested some time ago,<sup>68</sup> limitation statutes could be reconsidered on the basis that a distinction might be made between different types of harm as opposed to different categories of liability. The application of contributory negligence legislation simply enables the court to make an avowedly discretionary apportionment where the application of causation principles proves too complex, and to lead in any case to a black or white decision. If it ought to apply to more situations than its words cover, the legislation can be altered, although there are new factors to take into account if it is applied to contract.<sup>69</sup> But perhaps the court can itself make a causation assessment of a more flexible nature, and differentiate between what was caused by the plaintiff's negligence and what was not.<sup>70</sup>

Another difference is as to the method of calculating damages. If one looks, as I suggest one should, to the nature of the duty for breach of which

62 (1988) 164 CLR 539 at 586–587. It is worth noting that the case in point involved bailment. See also *Rowlands v Collow*, supra, n 19 on this point. For another case where the tort duty, even if it existed, would not have helped, see *Scally's* case, supra, n 60.

63 See *Mason J in Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352–353.

64 *Shell (UK) Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 at 1196–1197.

65 *Liverpool City Council v Irwin* [1977] AC 239.

66 *Eg Johnstone v Bloomsbury Health Authority* [1992] QB 333; *Scally v Southern Health and Social Services Board*, supra, n 60.

67 *Kelly v Cooper* [1993] AC 205 (but the judgment seems to pay insufficient attention to the possible importation of *fiduciary* duties).

68 *Op cit*, n 1 at 19–21.

69 The question may arise as to the extent to which one party should foresee a breach of contract and act to avoid it or minimise its consequences: see, eg *The Kanchenjunga* [1990] 1 Lloyd's Rep 390; *The Batis*, [1990] 1 Lloyd's Rep 345. See Eng Law Com No 219, "Contributory Negligence as a Defence in Contract" (1993).

70 *Cf Day v Mead* [1987] 2 NZLR 443; and see Cooke P in *Mouat v Clark Boyce*, supra, n 55; also *Beatson*, *op cit*, n 30, at 255–256. But cf *Gummow, Equity, Fiduciaries and Trusts* ed Youdan (1989), 82–87; *Canson Enterprises Ltd v Boughton & Co Ltd*, supra, n 57, per McLachlin J.

the action is brought, the loss which arises from breach of the contract, or assumptive duty, may well differ from that which would be regarded as arising from breach of the more general tort duty. That is to say, the distinction is a genuine one.<sup>71</sup> But another, and tenable, view is that the damages award should not be linked so specifically to the principles governing liability but should simply be a matter of fact for the court.<sup>72</sup> In Australia and New Zealand one has to bear in mind also the possible applicability of Trade Practices/Fair Trading legislation.

Granted the difficulties of law reform, it may well be desirable to keep the alternative liability in contract and tort where it exists; but its incidence should be regulated where necessary by a greater willingness to imply terms into contracts.

#### IV. THIRD PARTY SITUATIONS

It is of course here that the most controversial situations for the application of tort doctrine arise. A person who is not a party to a contract between other parties is obviously going to owe tort duties to them like anyone else, but the existence of a contract near to, but not parallel with, his or her activities may raise a possibility that that contract is relevant to those activities.

Can the idea of a contract in favour of a third party help with these problems? Although I suggested the contrary in 1984,<sup>73</sup> it now seems doubtful. Recent work on the doctrine of privity suggests (or reaffirms) that if it is desired to give a third party the right to sue on a contract, while there is no difficulty in doing so, the requirements for such an action must be fairly stringent; it must be the intention of both parties not only that the third party should benefit, but also that that party should have a right of action.<sup>74</sup> So the benefit of such legislation is largely for drafters, who can designate parties as beneficiaries entitled to sue. It is not necessary, however, that the same stringency should apply in respect of the benefit of contractual exclusion and limitation clauses; I return to this point below. All this suggests, perhaps disappointingly, that the amount of help which will be accorded to these situations by amendment of the rule as to privity in those jurisdictions still affected by it is small. The problems which are now so familiar have not gone away in jurisdictions allowing third party rights, nor will they go away in jurisdictions that decide to change the law. Where legal systems go beyond designated beneficiaries, they encounter problems of definition of who can sue<sup>75</sup> that have not yet been resolved.<sup>76</sup>

71 This is not to exclude the possibility of moulding the damages rules to allow recovery of a contract-breaker's profit in some cases.

72 See Cooke P in *McElroy Milne v Commercial Electronics Ltd*, supra, n 18; and extrajudicially in "Remoteness of Damage and Judicial Discretion" [1978] CLJ 288 (written in the aftermath of the confusing decision in *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791). To a considerable extent this is the position in French law: see Nicholas, *The French Law of Contract* (2nd ed), 224-232.

73 Op cit, n 3.

74 See English Law Com CP No 121, "Privity of Contract: Contracts for the Benefit of Third Parties" (1991) and material there cited: Beaton, "Reforming the Law of Contracts for the Benefit of Third Parties" [1992] CLP 1, 22-26.

75 As to French law, see Nicholas, op cit, n 72, 189-193; as to German law Zweigert and Kötz, *Introduction to Comparative Law* (2nd ed), vol II, at 127-130; Markesinis, op cit, n 87. For a strong statement of the view that the common law should move in this direction see Eisenberg, "Third Party Beneficiaries" (1992) 92 Col L Rev 1358.

76 The applicability of the New Zealand Contracts (Privity) Act 1982 is however virtually untested in this respect. Perhaps the New Zealand courts could follow the ideas of Professor Eisenberg, *ibid*. Could it have been applied in *Deloitte, Haskins & Sells v Mational Mutual Life Nominees Ltd* [1993] 3 NZLR 1? (I owe this point to Mr Francis Dawson.)

Three situations will be discussed.

### 1. Employees and subcontractors: relevance of the main contract

A person who contracts with another may know or anticipate that the other will perform by means of employees or subcontractors. The main contract may contain exclusions of the other party's liability, or a limitation of it to a specific sum. If the person entitled to the services sues the employee or subcontractor, what should happen?

If the wrong consists in destruction of or damage to person or property of the plaintiff, the employee or subcontractor has broken one of the central duties imposed by the law of tort. One view is that the person concerned must be taken to have been aware of this danger, and has relied on the main contracting party for protection. So he or she must pay, and recoup from the main contracting party. If the person concerned has not contracted for such protection, he or she cannot recoup unless an implied obligation that the main contractor will indemnify in such circumstances can be discovered.<sup>77</sup>

Another view is that the person entitled to the services impliedly authorises the use of employees or subcontractors, at least unless there are indications that only personal performance is permissible. This must be true in so far as those persons cannot be sued in trespass; the main contractor has actual or apparent authority to consent to what would otherwise be a trespass. But that authorisation cannot, without more, extend to the terms of employment of those persons, for authority in respect of contract terms is only relevant where the main contractor acts as agent to create contracts with his employees or subcontractors; only in bailment can the argument be pursued further.<sup>78</sup> In particular, there is no reason to assume that the beneficiary of the main contract assents to negligence by such persons which affects his person or property.

If, however, a clause in the main contract actually stipulates for protection, and extends the claim for protection to employees and/or subcontractors, it would be unsatisfactory if the general principles of tort nevertheless made the employees or subcontractors liable beyond what was stipulated. There are various ways of justifying their protection, which are elaborately discussed by the Supreme Court of Canada in the *London Drugs* case.<sup>79</sup> The most drastic is to say that employees (as opposed to independent contractors) owe no duty of care at all in such situations. A person seeking contractual performance from another does not expect side rights in contract against the persons actually doing the work, for they have (normally) given no undertaking. Why should such rights arise in tort? Thus La Forest J, in an impressively researched judgment, held that the employees were not liable at all.

This solution is attractive as a matter of initial impression, and gains some support from cases where it has been sought to sue the directors of small companies personally.<sup>80</sup> But it proves to have difficulties. It depends on the distinction between employees and independent contractors. It

<sup>77</sup> As to which see the dissenting judgments of Lord Radcliffe and Lord Somervell in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.

<sup>78</sup> See *Singer v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164; *K H Enterprise v Pioneer Container* [1994] 4 All ER 250.

<sup>79</sup> *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299; (1992) 97 DLR (4th) 261.

<sup>80</sup> Especially *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517; but these cases are affected by special problems of company law.

requires a theory to justify the employer's liability in tort being different from that normally adopted, for if the employees commit no torts when acting in the course of their employment, how can the employer be vicariously liable for them? One returns to the controversies over the "master's tort theory" of former years.<sup>81</sup> And finally it amounts to the removal of what has been called a common law right which can only be abrogated in clear language;<sup>82</sup> that a person has normally the right to sue in tort for (in this context) damage to or destruction of his or her property unless this has been modified by a direct arrangement with the tortfeasor.<sup>83</sup> This approach has, however, no difficulty with a claim in respect of economic loss; duties in this respect are not automatic and the employee need not be fixed with any duty.

A less drastic solution is again to approach the matter through tort, but this time to say that the duty owed by the employee or independent contractor is limited by the main contract. This however has difficulties when the position of the defendant is considered. Of the terms of the contract that person may know nothing; yet that person is held to be subject to a limited duty of care. Even if duty of care in such cases is not to be based on assumption of responsibility, it normally assumes some knowledge of the relevant facts in the person bound.

The preferable solution is probably to do what the majority of the Supreme Court of Canada did and create a special contract rule for this situation; that persons intended to benefit from exclusion or limitation clauses can do so. This short-circuits the straight promissory reasoning route to that result, which would require a promise not to sue such persons, perhaps enforceable by them, which could of course be broken even if that breach would have consequences in damages. It seems to me however that such a rule as to the applicability of exclusion and limitation clauses to third parties cannot be swept into the sort of general reform of the privity rule which law reform agencies are apt to contemplate. As I have already suggested, all the indications are that where it is desired to confer rights on a third party to sue in respect of a contract to which he or she is not a party, the requirements to qualify as a beneficiary entitled to sue are stringent. Exclusion clauses seem to me to be a different commodity. Beneficiaries of exclusion clauses should be more easily established, although it is not clear that the implication should be so easily established as it was in the *London Drugs* case, where the employees were not mentioned in the exclusion clause at all.

## 2. Employees and subcontractors: relevance of the subcontract

The matter can however be approached, alternatively or cumulatively, from the point of view of the subcontract. Here the relevant figure is really the subcontractor, for an employee is unlikely to be able to stipulate in respect of the liability regime under which the work is to be done. Can it be argued that the subcontractor's duty is limited to what is undertaken towards the main contractor?

In a previous article<sup>84</sup> I argued that this was in effect a third party contract situation; that the plaintiff was suing as third party beneficiary of the

<sup>81</sup> See, eg *Glanville Williams* (1957) 20 MLR 220, 437.

<sup>82</sup> See *Tasman Pulp & Paper Co v Brambles* [1981] 2 NZLR 225, 235 per Prichard J; see also *Gatewhite v Iberia Lineas Aereas de Espana SA* [1990] 1 QB 326 (actions in tort against air carriers).

<sup>83</sup> Perhaps not where the damage is not caused by act; see the *Trevor Ivory* case, *supra* n 80.

<sup>84</sup> *Op cit*, n 3.

subcontract, and could only do so subject to its terms. But further thought and subsequent developments suggest again that third party beneficiaries need to be more specific than this — rare would be the case where the plaintiff would expect to be able to sue the subcontractor for complete non-performance. Lord Rodger, junior counsel for the losing party in the case, has explained how in *Junior Books*<sup>85</sup> the plaintiffs, although suing in a jurisdiction (Scotland) which recognises third party contract rights, would have been unlikely to succeed in a contract action.<sup>86</sup>

In this connection it has been suggested that such situations could be approached as giving rise to a duty to third parties, founded on contract, not to carry out the contract, but rather, not to cause them loss in the performance of it. This is something like the German notion of “contracts with protective effect towards third parties”.<sup>87</sup> But it appears that this doctrine was developed because of shortcomings of German law relating to vicarious liability in tort. This suggests that the solution should really lie in tort-based doctrine, and it is in any case difficult to see how the common law can use such reasoning in contract.

It could, however, use something like it in tort. It could be said that the duty undertaken by the subcontractor in tort is conditioned by the régime of the contract which the subcontractor is performing. Here again, however, we encounter the key “common law right”<sup>88</sup> that a person should be entitled to sue for destruction of or damage to his or her person or property. If it is this right that is in issue, I suggest that the terms of the subcontract should not avail the subcontractor, who must obtain relief in other ways. The person suffering injury of this sort should not be affected by the terms of a contract of which he or she may know nothing. But the duty of care in respect of pure economic loss is much more obviously limited anyway, and can acceptably be controlled by the terms of the transaction under which the subcontractor is working. Extension of tort beyond this starting point of physical damage (an extension which is much more easily here achieved than extension of contract) requires careful thought, and should proceed on the basis that it needs appropriate justification. In the case of the subcontractor operating on terms, there is no justification for imposing liability to third parties for pure economic loss arising beyond the scope of those terms.<sup>89</sup>

### 3. Actions by third parties in a contractual context.

We must suppose here a plaintiff who sues another for loss caused by that other while that other is operating under a contract with a third party.

If the plaintiff is sufficiently clearly designated to sue as third party beneficiary of a contract, he or she can do so in jurisdictions permitting this. But, as has been said, it seems unlikely that many plaintiffs would in fact qualify in this way.<sup>90</sup>

Again, if the loss arises from destruction of or damage to the person or property of the plaintiff then the defendant is (subject to the rules of

<sup>85</sup> *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

<sup>86</sup> “Some Reflections on *Junior Books*”; paper delivered at SPTL Seminar, *supra*, n 14. He also makes the point that reliance would have been difficult to establish.

<sup>87</sup> See Markesinis, (1987) 103 LQR 354; *The German Law of Tort* (2nd ed), 42 et seq; Kötz, (1990) 10 Tel Aviv Univ Studies in Law 195.

<sup>88</sup> *Supra*, n 82.

<sup>89</sup> See *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd’s Rep 215; reasoning doubted in *K H Enterprise Ltd v Pioneer Container* [1994] 2 All ER 250.

<sup>90</sup> See *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 42 per Cooke J; 49 per Richardson J.

negligence) prima facie liable. He or she will only be protected if the plaintiff is, in accordance with the principles already discussed, party to a contract the benefit of which is extended to the defendant in some effective way, in accordance with the discussion in the *London Drugs* case,<sup>91</sup> or it is (perhaps exceptionally) possible to say that the general matrix negatives a duty of care.<sup>92</sup>

But if the loss is purely economic it seems that there should normally be no duty of care to an extent greater than that undertaken contractually by the defendant to the other party to the contract, and that this may not be owed to all foreseeable plaintiffs even if there can be said to be a relationship of proximity with them.

It has been argued here again that a special contract rule should be adopted, similar to the German notion of contracts with protective effects towards third parties. But this doctrine seems first, as already stated, only to be placed within contract under German law because of difficulties with the vicarious liability rules of tort, secondly, to have difficulty with complete non-feasance cases, but thirdly, and most significantly, to lead to rather more extensive liability than common law judges might think appropriate. In any case, it is not easy to see how such a rule could be adopted by judicial development in common law. It seems again more practical to bear in mind such reasoning, but to proceed in tort.

On a general assessment of the present case law, and bearing in mind that different views may be taken in different jurisdictions and that fact situations vary infinitely, the following conclusions as to the availability of tort actions may be hazarded.

The third party may occasionally be permitted to sue for loss caused by another by means of misperformance or even nonperformance of the contract if he or she incurs a loss which could not otherwise be recovered at all, as in the case of the negligent solicitor.<sup>93</sup> It is worth noting here that the damages may in effect be for loss of expectation, which looks contractual. Also, there may be held to be a duty of care if some form of reliance by the third party is to be anticipated and excused, even if imprudent, and the social pressure for such liability seems strong, as in the case of reliance by a third party of modest means on a surveyor's report relating to property of modest value.<sup>94</sup>

A duty of care may not, however, arise if the plaintiff is judged too far away from the contemplation of the main contract to be owed a duty, as in some of the auditor cases,<sup>95</sup> or also has a contract with the person with whom the defendant is in contract, so set up as to provide protection against the defendant's failures by different means.<sup>96</sup> It may be held not to arise if

91 *Supra*, n 79. See *La Forest J* at 379–334 (SCR), 270–280 (DLR).

92 *As in Norwich C C v Harvey* [1989] 1 WLR 828.

93 See *Ross v Caunters* [1980] Ch 297 (misfeasance); *Gartside v Sheffield, Young & Ellis*, *supra*, n 90; *White v Jones* [1993] 3 WLR 730 (non-feasance); cf *Balsamo v Medici* [1984] 1 WLR 951 (sub-agent). In *Australia Seale v Perry* [1982] VR 193 is against liability, but the tone of *Hawkins v Clayton*, *supra*, n 17, which is not directly in point, is favourable. See also the reasoning of Robert Goff LJ in *The Aliakmon* [1985] QB 350, 399, although this is confined to physical damage, which I submit below was not appropriately invoked in the case itself.

94 *Smith v Eric S Bush* [1990] 1 AC 831, a surprising if benevolent decision, in that it is not easy to mark out the situations in which such reliance is excusable and hence remediable. It seems that the House was determined to apply the Unfair Contract Terms Act 1977 (UK) despite the terms in which the duty was undertaken.

A duty of care may also arise from the commencement of an undertaking towards the third party, as in *Al-Kandari v Brown*; but this seems a separate relationship and, as stated above, unaffected by the other contract involved.

95 *Eg Caparo Industries Plc v Dickman* [1990] 2 AC 605, and the *Deloitte* case, *supra*, n 76.

the imposition of liability in negligence would cut across other rules, such as those relating to defamation and malicious prosecution, as in the *South Pacific* case in New Zealand.<sup>97</sup> It has also been held, on final appeal from New Zealand to the Privy Council, not to arise where equity provides for the relevant relationships; this, if correct, gives a limiting role to equity, like the limiting role of contract and a contrast to the normal expanding function of that branch of the law.<sup>98</sup>

All these propositions arise from specific decisions, highly arguable on their merits, determining the care that requires to be taken in connection with pure financial loss. It is in this area of interaction that the most careful discrimination is required. Cases of physical damage are easier and more a matter of routine. The extension to economic loss, logical although it is, goes beyond the elemental guidelines and can only be conducted with great care.

#### V. A POSTSCRIPT ON THE ALIAKMON.

In contexts such as these, the refusal of a tort action in *The Aliakmon*<sup>99</sup> comes in for much criticism. It is certainly true that some of the dicta in the case are strongly hostile to the extension of negligence liability, although it has always seemed to me that *The Mineral Transporter*<sup>100</sup> got off lightly in this context. Whether or not such restrictions are justified is a question not addressed here except within the limited scope of the topic of this paper. There are also dicta regarding limited duties of care which are open to question. But the technical background of the case is usually passed over, and this may lead to false estimations of the actual decision.

It appears that the actual claim was pretty clearly one that could have succeeded against the *carrier* only in contract. The goods were damaged while being loaded on the ship by persons working for a charterer (Retla); the carrier, Aliakmon Shipping Co Ltd, seems to have had no control over those persons and indeed the chief officer protested as to the method of loading.<sup>101</sup> Thus the goods were probably damaged before they came into the charge of the carrier, and the carrier *ex facie* committed no tort nor was in breach of contract regarding them. No doubt someone else committed a tort, but that was in Korea and would have raised problems of the conflict of laws.

However, the master on behalf of the carrier issued a “clean bill of lading”, viz, a document acknowledging that the goods had been received on board the ship in apparent good order and condition (which they had not).<sup>102</sup> Perhaps there could have been an action by the plaintiff in respect of a wilful or negligent statement by the carrier; this would have raised

<sup>96</sup> As in *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758 and *Pacific Associates Inc v Baxter* [1990] 1 QB 993.

<sup>97</sup> *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282, but the contract was although relevant too; see per Richardson J at 308–309. That seems a stronger consideration; the defamation argument may lead to a decision like *Spring v Guardian Assurance Plc* [1993] 2 All ER 273 (negligent reference). The *South Pacific* case contains particularly valuable discussion of the issues.

<sup>98</sup> *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513. The New South Wales Court of Appeal decided a similar case in the same year; *Wickstead v Browne* (1992) 30 NSWLR 1.

<sup>99</sup> *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785.

<sup>100</sup> *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd (The Mineral Transporter)* [1986] AC 1.

<sup>101</sup> See [1985] QB 350, 400.

<sup>102</sup> See the judgment of Staughton J at first instance, [1983] 1 Lloyd's Rep 203, 209.



other problems in the law of tort.<sup>103</sup> But the receiver/buyer Leigh & Sillavan sued on the basis that the carrier was estopped from denying that the goods had been shipped in apparent good order and condition; hence it must be presumed that the damage occurred during the voyage. Had the damage been attributable to certain causes<sup>104</sup> the carrier would still not have been liable, but as the carrier did not establish this (presumably because the damage did not occur during the voyage at all) the carrier should have been liable. Hence, not surprisingly, an action in contract was brought; it is not clear that (apart from the possible misstatement) any tort had been committed by or on behalf of the defendant carrier at all.

It also seems probable that the sellers Kinsho–Mataichi Corporation were in breach of the sale contract in procuring the shipment of defective steel coils.<sup>105</sup> If this was so, the “true” liability lay here; any claim against the carrier would have been an undeserved bonus. But the possibility was not pursued, perhaps because of difficulties of proof.<sup>106</sup> The sellers did not give evidence,<sup>107</sup> and the circumstances of the loading were obscure.

Let us however pass over these (often ignored) facts and suppose that the carrier *had* committed a tort in relation to the goods; that through the crew he had during the voyage acted negligently in the care and custody of the goods, for example by opening hatch covers during a storm.

The cause of action in contract failed on a point of title to sue. The bill of lading contract *is* a contract for the benefit of a third party, and a very ancient one. Thus parties have been entitled to sue (and indeed, in addition, liable) by statute since the mid–nineteenth century. The statutory mechanism of 1855 conferred that right upon holders of the bill of lading who had property in the goods — not an unreasonable qualification to bring an action respecting them, at any rate under the simpler methods of dealing in use in the nineteenth century. In this unusual situation the plaintiff was held, by virtue of the interpretation put (by the Court of Appeal, reversing the judge at first instance) on an unclear document executed in pursuance of a meeting held at Macclesfield on November 25, 1976 between Mr Tolson of Leigh & Sillavan and Mr Yamashita of Kinsho–Mataichi to salvage the deal, never to have acquired property in the goods at all, or if he did acquire it, to have done so quite independently of the transfer of the bill of lading.

The sellers had (probably) made the original contract of carriage; if this was so and the carrier was liable they could (almost certainly) have sued in contract despite having parted with the bill of lading.<sup>108</sup> They could also have sued in tort. The fact that they retained property would have entitled them to sue for the full value of the goods regardless of the incidence of risk.<sup>109</sup> (If the carrier was not liable, they would have no action, but might well have been liable to the buyers themselves.) Was it really such an unsatisfactory proposition that the settlement effected at Macclesfield (recorded in quite a substantial letter prepared by Leigh & Sillavan)<sup>110</sup> to

103 Cf *The Saudi Crown* [1986] 1 Lloyd’s Rep 261.

104 The excepted perils listed in Article IV 2 of the Hague and Hague–Visby Rules.

105 See [1983] 1 Lloyd’s Rep 203, 204, 209.

106 It is believed that the papers passed earlier across the desk of Professor A G Guest QC in connection with a possible claim on the contract of sale.

107 See [1985] QB 350, 383.

108 Kötz, *op cit*, n 87 at 209, states (making unstated assumptions about the facts) that in German law the sellers would have had an action against the carrier. Making the same assumptions, the same would normally be true in English law.

109 *The Sanix Ace* [1987] 1 Lloyd’s Rep 465 (a salutary rule).

110 It occupies almost a full page of the Law Reports; see [1985] QB at 384–385.

salvage the deal should have taken the possibility of cargo claims into account? Or that if it did not, the question of assignment should be solved by considering whether a promise to pursue remedies or assign them should be implied?<sup>111</sup> It should really have made clear, which it did not, the full nature of the arrangement proposed.

The plaintiffs were not told by Lord Brandon that they should have protected themselves by making a contract; only that the contractual variation which they did make should have taken the possibility of a need to claim under the contract of carriage into account.<sup>112</sup> If this is a narrow view, it is narrow in respect of the terms which might have been implied into that transaction. Even so, the *sellers* could have sued the carriers had they been disposed, or had they been advised to do so, and either (probably<sup>113</sup>) in contract or in tort. Admittedly the carrier was only potentially liable once for the damage to the cargo: there was no danger of unlimited liability. But, contrary to what is sometimes said, there was no “black hole”; the carrier was already liable to the owner of the goods on two possible causes of action. It is far from clear that a further tort action for economic loss in favour of the person on risk was necessary, and it is not clear that an action in tort would cover all the losses that could be suffered.<sup>114</sup> Progress does not necessarily involve creation of actions to fit all situations where the normal channels of recourse have exceptionally failed to operate, particularly in a case such as this, where so many things appear to have gone wrong cumulatively.<sup>115</sup> It is worth noting finally that the plaintiff buyers had been paid by their insurers.<sup>116</sup>

In England the law has now been changed by the Carriage of Goods by Sea Act 1924 to vest the right of action in the “lawful holder”<sup>117</sup> of the bill of lading,<sup>117</sup> and it is provided that he can recover even although he himself was not on risk, and held the proceeds for the person who was.<sup>118</sup> This change was not a response to the unusual facts of *The Aliakmon*, but to practices in commodity trades where the transfer of the property may be effected by physical delivery from the ship and separated from the documents, which may pass down lines of commercial buyers and sellers.<sup>119</sup> The plaintiff in *The Aliakmon* would now be able to sue in contract; indeed, it is now specifically provided that the original shipper would not.<sup>120</sup> But the carrier would still be liable to an action by the seller/shipper, as owner of the goods, in tort. Is it necessary or appropriate to establish a further action in tort for the person on risk, in case that person is not the bill of

111 This would be the solution in German law: see Kötz, *op cit*, n 87 at 209 (who apparently assumes that it would not in English law); but see Robert Goff LJ, [1985] QB at 400A–B. Questions of the damages recoverable in situations of assignment are considered by the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] AC 85.

112 See [1986] AC at 818–819.

113 An argument is possible that the effect of section 1 of the Bills of Lading Act 1855 is to effect a statutory assignment of the benefit of the contract, thus leaving no rights in the consignor. The burden of the contract is dealt with in different words. See *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)*, *The Times*, May 5, 1994.

114 Eg by delay; see Lord Diplock in *The Albazero* [1977] AC 774, 864.

115 One of the only balanced references to the decision is to be found in the judgment of Cooke P in the *South Pacific* case, *supra*, n 97 at 298.

116 See [1983] 1 Lloyd's Rep at 204–205.

117 S 2(1). It must however be said that difficulties can still occur in connection with freight forwarders' bills of lading: see, eg *Carrington Shipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 NSWLR 745.

118 S 2(4).

119 See *The Delfini* [1990] 1 Lloyd's Rep 252 (the case which gave rise to most pressure for reform of the law).

120 S 2(5).

lading holder or the owner of the goods at the relevant time, the actual holder or the owner of the goods will not sue, and it is not practical to mount a claim on the contract of sale? I suggest that the contractual regime, reinforced by the general common law right to sue for destruction of or damage to one's property, is and was sufficient, and that there is no need for a new duty of care here. Whether, however, Lord Brandon's words were really intended to stand for much wider reasoning as to the non-availability of a tort action to a party who *could have* made a contract, as suggested in Professor Fleming's paper,<sup>121</sup> I would doubt.

<sup>121</sup> *Supra*, p 269.