The tort/contract boundary: great divide or grand illusion

Branson, David J.

D.J.Branson

The tort/contract boundary: great divide or grand illusion?

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This thesis considers the difference between contract and the tort of negligence. It compares the traditional view of the distinction with a more contemporary view, and concludes that the two areas of law are becoming interrelated.

Three main aspects of contract and tort are compared; the nature of the liability, the scope of the liability and the extent of the remedy. The historical origins of the two areas of law are explored, as are the ideological concepts which underpin them. There is also an investigation of how the courts in the UK deal with the relationship between contract and tort in both contracts for services and contracts of service; these being two areas where there is a considerable overlap between contractual and tortious liability.

The thesis argues that contract and the tort of negligence are based on common historical roots and underpinned by common ideologies. In both cases, the courts seek to decide liability on the basis of 'reasonableness', a subjective concept which is determined according to their own criteria. This is seen as related to such factors as the bargaining power of the litigants, and their opportunities to secure alternative means of protection against liability. It is suggested that this is more important than whether the action is brought in contract or tort.

The nature of the contract/tort divide is considered in the alternative jurisdiction of New Zealand, in order to see how it deals with the problems posed. The thesis concludes by considering whether an alternative model could be constructed in order to explain the current nature of the relationship between contract and tort, and what type of relationship should exist.

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THE TORT/CONTRACT BOUNDARY: GREAT DIVIDE OR GRAND ILLUSION ?

An exploration of recent developments in the relationship between the Law of Contract and the Tort of Negligence

by David J. Branson

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Chapter 1

INTRODUCTION

1. The Problem stated

1.1 The traditional distinction between contract and tort

1.1.1 According to legal writers there is a clear distinction between contract and tort, what could be considered to be a 'great divide'. This can be seen if we compare the traditional definitions of contract and tort. One of the standard definitions of contract is that given by Treitel which states;

> 'A contract is an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contract from other legal obligations is that they are based on the agreement of the contracting parties' **(1)**

1.1.2 The essential element here is the concept of an agreement between two or more parties. It is this which defines the nature of the liability and its extent. In contrast, one of the best known definitions of the Law of Tort is that laid down by Winfield;

> 'Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages' **(2)**

1.1.3 This definition argues that the liability is unrelated to any agreement but is imposed by law and applies to all persons. As such it derives from the idea that a person is legally responsible for injury or loss caused to others.

1.1.4 There are other ways of analysing the difference in approach between contract and tort. It has been argued that contract focuses on promise whilst tort focuses on injury to the plaintiff **(3)**. Similarly it could be said that contract protects future interests whilst tort protects present interest, or alternatively that tort is protective and contract is productive **(4)**. These ideas reflect a view of contract and tort as being essentially different in nature.

1.2 The alternative viewpoint

1.2.1 Despite these apparent conflicting aims and ideas, several legal writers have argued that the differences between contract and tort are becoming less important, even to the extent that it may soon become impossible to distinguish between them. According to Gilmore;

> 'We seem to be in the presence of the phenomenon which in the history of comparative religion is known as syncretism - that is, according to Webster "the reconciliation or union of conflicting beliefs" ....this line, if it continues to be followed, may ultimately provide the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation'**(5)**.

1.2.2 Other legal writers have taken a similar view. Atiyah sees the development of a 'unifying conceptual structure for the law of obligations' based on the 'concepts of reciprocal benefits, acts of reasonable reliance and voluntary human conduct' **(6)**. Similarly Markesinis finds it difficult to distinguish between the two areas of law in practice **(7)**.

1.2.3 Essentially we have a conflict of opinion over whether these two areas of law are effectively *different doctrines*, or different aspects of the same doctrine. In this thesis I wish to explore the nature of the contract/tort divide, especially in respect of the tort of negligence. This is because the two areas of law often impinge on the same set of circumstances, as in contracts for services, and so provide greater possibilities for overlap.

2. The Traditional Framework

2.1 Areas of analysis

2.1.1 In order to analyse the difference between contract and tort I would like to begin by considering the way in which the difference was traditionally defined in the last century. To this end I feel it is useful to look at three main areas where the two types of law are seen to be quite different. These I refer to as the 'nature of the liability', the 'scope of the liability' and the 'extent of the remedy'. I have defined these as three separate areas but we will see that they are to a great extent interrelated. For ease of reference I have summarised the differences on Table 1 at the end of the Chapter.

2.2 The Nature of Liability

2.2.1 In contract law, legal liability is seen as based upon a reciprocal agreement between the contracting parties, and from this stems the idea that the liability is restricted to the contracting parties alone, the foundation of the doctrine of privity. Similarly, the need for an agreement presupposes that both parties freely consented and so it is important to show consensus. In English Law the idea of reciprocity also requires the existence of consideration and disallows the enforcement of 'mere promises'. From this we can see the reason for the development of the doctrines of privity and consideration. Moreover, in order to ensure that the wishes of the contracting parties are actually adhered to, then it is argued that it is necessary to interpret the terms of the contract strictly, unless the contracting parties define their liability in fault based terms.

2.2.2 In tort, liability is imposed by society through the medium of the law. This liability is based on the need to protect members of that society and it arises in respect of the injury suffered by the plaintiff. The defendant is liable if he is seen to be at fault in causing the injury. In this respect there is no need for a preexisting arrangement and so no need to show privity, consensus or consideration. Moreover, the nature of the liability is defined by society, not by the individuals involved, and to this extent it will be fault based and grounded upon the principles of fairness and reasonableness.

2.3 The Scope of the Liability

2.3.1 The traditional view is that contractual liability will take priority over other forms of liability such as that arising in tort, so that the wishes of the contracting parties are enforced by law. As a result, it is sometimes argued that where there is a contractual liability it will extinguish the right to a tortious liability, in effect denying the principle of concurrent liability.

2.3.2 Even if concurrent liability is accepted, the primacy of contract is asserted by stating that the express terms of a contract are sacrosanct and cannot be modified or limited in any way. Moreover, the right of a contract breaker to seek apportionment of damages on the grounds of contributory negligence is also denied, as this is seen as a purely tortious principle and as such subordinate to contractual rights and liabilities.

2.4 The extent of the Remedy

2.4.1 In contract, as the nature of the liability is defined by the contracting parties, so is the extent of their remedy. As such the parties can only claim for damages within their own contemplation **(8)**. This will effectively be expectation losses such as lost profits, as the commercial origins of contract law tend to define losses in commercial terms . However, it will not include injury to feelings, which is not seen as a commercial loss. It should be noted that the limitation period for claims runs from the breach of agreement and not the occurrence of damage, thereby reflecting the fact that liability here relates to the breach of the agreement and not occurrence of the injury.

2.4.2 In tort the extent of the liability is defined by society and relates to the injury. The defendant is liable for all reasonably foreseeable losses **(9)**, but these are calculated according to the actual loss incurred and not expectation losses. Nevertheless, this can sometimes be a wider liability than that in contract **(10)**, and will often include losses for distress or injured feelings. Similarly, the time for the commencement of the limitation period runs from the occurrence of the injury or when the plaintiff becomes aware of it, which itself can be more beneficial to the plaintiff.

2.4.3 It can be seen that the damages in contract and tort as traditionally defined are essentially complementary. Whilst compensation for economic loss is usually unrecoverable in tort, this is the essential measure of contractual damages. Similarly, damages for pain or injured feelings can be compensated in tort, but contract only looks to the commercial implications such as loss of earnings. It is true that there is an element of overlap in the traditional model with regard to loss of earnings which can be seen as lost profits; but this is only recoverable in respect of earnings which are certain and not those based on expectation.

3. The underlying ideology of contract and tort law

3.1 The traditional framework

3.1.1 The underlying ideological framework upon which the traditional distinction between contract and tort is based, is a product of the 19th century. As regards contract law, this is seen as based on the rights of individuals to determine their own legal liabilities without the intervention of the state. This is the concept of 'freedom of contract' which relates to an atomistic view of society in which individual free will and the market place are the key determinants of legal rights and duties. As such it can be seen as morally neutral, in that the law does not overtly seek to impose any overall moral criteria in judging the validity of such contracts, so long as they are based on consent and are made for a legal purpose. Such ideas are related to the 19th century concept of 'laisser faire', whereby the state considered that it was not its duty to regulate commercial activity but that this should be left to market forces. This ideological approach has been referred to by some academics as 'market individualism' **(11)**.

3.1.2 The ideological basis of tort is to be found in the criminal law from which it developed. The key issue is that society seeks to protect its members who suffer harm by way of penalising the wrongdoers for their actions. Such penalties were originally punitive as well as compensatory and in early medieval times it was difficult to disentangle the criminal from the civil liability. By the 19th century, tort had become an essentially civil remedy, the main concern of which was to provide a remedy for the injured party. However, this was based still on the idea of 'corrective justice' whereby the punishment of the tortfeasor was a key issue. The main difference from contract was that the state believed that part of its role was to determine the extent of the remedy, and in so doing imposed its own ideas of what was just and fair.

3.2 Changing ideologies

3.2.1 In the 20th century, there has been a considerable change in attitude as to the role of the state in contractual relationships. This has been noted by many writers and has been referred to by Collins as 'the transformation thesis' **(12)**. This involves a move away from the idea of the law leaving such relationships to be determined by contracting parties, and involves instead the desire to import into such relationships the morally charged ideas of fairness and good faith. This has also included a growing concern for the plight of the weaker bargaining party, a development referred to as 'Consumer Welfarism' **(13)** or sometimes as 'Communitarianism' **(14)**.

3.2.2 In addition, there is a growing concern that the tortious liability should fall on the shoulders of the party who is most able to bear the burden. This is the concept of 'distributive justice' whereby courts now consider the importance of insurance factors in spreading the loss amongst a variety of parties, instead of loading it upon the tortfeasor. As such, it involves a move away from the idea of 'corrective justice' whereby the law was mainly concerned to rectify the original wrong, and instead takes into consideration social and economic relationships including the bargaining power of the parties involved. In this way the courts have begun to define the idea of fairness and justice in relation to wider societal aims.

3.2.3 These changes have had an impact on both contract and tort but particularly on the former, as this was more clearly based on contrary principles which eschewed any idea of an externally imposed idea of fairness. However, I would argue that they have been instrumental in breaking down the barriers between contract and tort, because they have both led to the courts imposing their own ideas of what is reasonable, and in so doing, they have blurred the distinction between these areas of law.

4. The impact on the traditional framework

4.1 Contract Law

4.1.1 This change in ideological viewpoint has impacted upon contract law in various ways and has effectively altered its relationship with tort. We can see the key areas of change are likely to have an important effect on important aspects of contract law.

4.1.2 Traditionally, the basis of the contractual liability is the agreement between two parties from which are derived the twin requirements of privity and consideration. Yet both of these doctrines are likely to lead to unreasonable results which to some extent negate the intentions of the contracting parties. The requirement for privity means that third parties cannot enforce a contract even if it is made for their benefit, or where one of the contracting parties acts inequitably to frustrate the wishes of the other contracting party. In addition, the requirement for consideration can defeat a claim for enforcement of a promise where both parties could reasonably expect such a promise to be honoured. It is difficult to understand why legal liability should depend on an exchange of promises where one party's promise may be quite nebulous.

4.1.3 The traditional view that liability should be strict as regards express terms also conflicts with the idea of reasonableness, as it can lead to unconscionable bargains usually at the expense of the weaker party. This also affects the use of exclusion or limitation clauses as they could be used to escape liability even where the courts think this is unreasonable. The impact of the above changes is likely to blur the distinction between contract and tort as the courts would wish to import the same ideas of reasonableness into both areas of law. If this does happen we might consider whether other tortious concepts such as contributory negligence might begin to affect contractual liability.

4.1.4 Finally, it could be argued that if the nature of the liability is to be underpinned by concepts of reasonableness, the extent of the damages should also be so affected. This would involve the need to redefine the extent of contractual damages so that it is not purely tied to the expectations of the parties.

4.2 Tort Law

4.2.1 The impact on tort law has been more indirect and less dramatic. This reflects the fact that the ideological drift has been towards concepts more clearly at home in tort law than in the traditional areas of contract.

4.2.2 However, we might expect to see an effect as regards the extent of the remedies so as to ensure that the traditional limitation on tortious damages would be overridden. It is difficult to justify the restriction of tortious damages to actual loss, be this direct or consequential, rather than allowing expectation loss. Such losses have been accepted for negligent misstatement under the heading of 'economic loss' since the case of HEDLEY BYRNE v HELLER (1963) **(15)**. Moreover such losses are claimable for fraudulent misrepresentation as part of the total loss as in EAST v MAURER (1991) **(16)** and even for negligent misrepresentation as in ESSO v MARDON (1976) **(17)**. Given the availability of damages to cover loss of expectation in these areas it would be unreasonable to restrict these damages in areas of negligent action.

4.3 Overall effect

4.3.1 Overall we can see that there are various factors here which suggest that the nature of contractual and tortious liability may well become similar. The move to base liability on external concepts of 'reasonableness' is likely to affect the nature of both contract and tortious liability but it is also likely to blur the differences between the two.

5. Contradictions in the law

5.1 The basic problem

5.1.1 We have seen how the area of contract law in particular, and tort to some extent, have been affected by changes in the law's perception of the underlying values. It should be noted that these changes have not been total and so this has created a tension within the law that leads to contradictions within it. This can be seen most clearly in contract law, but also affects tort law.

5.2 Contradictions in contract law

5.2.1 These contradictions arise as a result of the conflict between the traditional view of contract (or 'classical' contract law as it is sometimes referred to), and the modern concepts outlined above. This can lead to a number of problems in contract law.

5.2.2 Let us take, for example, the issues of consensus and strict liability. The traditional view looks only for outward signs of consent and then imposes strict liability according to the contract terms. The modern view looks for real evidence that the parties freely wish to consent to the particular terms involved, and also ensures that those terms are fair. In BUTLER MACHINE TOOL CO v EX-CELL-O CORP (1979) **(18)** the courts found an agreement on the terms of the buyer which involved a fixed price clause, as opposed to the price variation clause which was in the seller's terms. The court decided this by applying traditional contract law rules of offer and acceptance, even though it was clear that there was never any real consensus between the parties. Moreover, the issue of fairness was never really addressed.

5.2.3 Contrast this case with INTERFOTO v STILETTO VISUAL PROGRAMMES LTD (1988) **(19)** where the courts refused to enforce the strict terms of the contract in respect of an onerous clause. In this case the courts discussed the issue in terms of exclusion clauses, although it was effectively an onerous term. It is clear that the court took into consideration the modern concepts of fairness and good faith rather than relying on traditional views of offer and acceptance. We can see here the views of Bingham LJ:

> '...In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith....its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upward on the table'. It is in essence a principle of fair and open dealing. In such a forum it might, I think, be held on the facts of the case that the plaintiffs were under a duty in all fairness to draw the defendants' attention specifically to the high price payable if the transparencies were not returned in time...'**(20)**.

5.2.4 There are various issues which are notable about these two cases. Firstly, in both cases we have a commercial contract with no special case for protection. In both cases the clause was an onerous clause which was not brought to the attention of the other party, although in neither case was there a suggestion of fraud or deception. Yet in the first case the courts considered the issue in purely traditional contract law language, whilst in the second case it is clear that the issues of fairness and good faith were of crucial importance, as well as the reality of consent.

5.3 Contradictions in tort law

5.3.1 The same kind of problems occur to a lesser degree in tort law. This is mainly due to the incursion of tortious actions into traditional contract law territory, particularly the actions for 'economic loss' which have grown from HEDLEY BYRNE v HELLER

5.3.2 This has led to conflicting approaches to similar problems. In MURPHY v BRENTWOOD DISTRICT COUNCIL (1990) **(21)** the courts refused to find a duty of care in respect of a negligent misstatement by a local authority. Nevertheless, in the jointly heard cases of SMITH v BUSH and HARRIS v WYRE DISTRICT COUNCIL (1989) **(22)** the court found a valuer liable to the house purchaser in respect of a negligently made valuation, even though this was essentially a similar case of negligence by the defendant.

5.3.3 The two cases were decided without reference to one another and the discrepancy between the two has excited the interest of academics. Various arguments have been put forward to resolve the apparent contradiction, including the idea that ability to provide contractual protection was a key factor **(23)**, or that it related to the size and bargaining power of the plaintiff **(24)**.

5.3.4 In fact it would appear that tort law has become confused as a result of its attempt to provide a remedy for the faults of the contract law system. As such, it is still not clear what the rationale behind SMITH v BUSH actually is.

6. Conclusion

6.1 The basic problem

6.1.1 We can see how the change in the underlying ideology of law has posed problems for both contract and tort and has led to conflicting cases. The move away from the traditional rules of 'classical' contract law to deciding cases on the basis of ideas such as 'fairness' raises many complex questions. As both of these terms are highly subjective, there will be a tendency to base decisions on a separate agenda which may concern itself with the bargaining power of the two parties. This of course raises the crucial issue of how we define bargaining power in the first place.

6.2 The aim of the thesis

6.2.1 The aim of this thesis is to examine the relationship between contract and tort and see to what extent the change in ideology has affected the traditional contract/tort divide. I will also consider the issue of how that divide should be drawn, if at all.

6.2.2 In order to do this I shall consider the three key aspects outlined earlier in this chapter, namely; the nature of the liability, the scope of the liability and the extent of the remedy. It is intended to follow these themes through the next chapters where I shall look initially at the contract/tort divide in its historical context to see how it arose. I shall then look at the ideological context in which contract and tort operate and discuss their respective purposes. This will be followed by an analysis of how the UK courts deal with the operation of the contract/tort divide in the area of contracts for services and contracts of service. Finally I shall be drawing comparisons with another jurisdiction to see how the contract/tort divide operates there.

6.2.3 Ultimately, it is intended to draw together some conclusions on the present state of the contract/tort divide and to analyse how it has been affected by the changing ideology which underlies the law.

Notes

1. G.H.Treitel, The Law of Contract, (1995) pp.1

2. W.V.H.Rogers, Winfield and Jolowicz on Tort, (1994) pp.4

3. Fried, Contract as Promise, (1981)

4. Markesinis, 'An Expanding Tort Law - The Price of a Rigid Contract Law' (1987) 103 LQR 354

5. Gilmore, The Death of Contract, (1994) pp. 89/90

6. Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 LQR pp 193-223

7. Markesinis, op.cit.

8. See CZARNIKOW LTD v KOUFOS (THE HERON II) (1966) 1 AC 350

9. See OVERSEAS TANKSHIP (UK) LTD v MILLER STEAMSHIP CO. PTY LTD (THE WAGON MOUND) (No.1) (1961) AC 388

10. Whincup, 'Remoteness Reconsidered' (1992) NLJ pp. 389 and 433

11. Adams and Brownsword, 'The Ideologies of Contract' (1987) 7 Legal Studies pp. 205

12. Collins, 'The Transformation Thesis and the Ascription of Contractual Responsibility' in Perspectives of Critical Contract Law, Edited by Wilhelmsson, (1993)

13. Adams and Brownsword, op.cit.

14. Collins, op.cit.

15. (1964) AC 465

16. (1991) 2 All ER 733

17. (1976) 2 All ER 5

18. (1979) 1 All ER 965

19. (1988) 1 All ER 348

20. ibid at pages 352/3

21. (1990) 2 All ER 908

22. (1989) 2 All ER 514

23. Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR pp. 301-345.

24. Martin, 'The Duty of Care of Professional Advisors: Further Applications' (1990) 6 PN 176

TABLE 1 - TRADITIONAL ANALYSIS

Nature of Liability	CONTRACT	TORT (NEGLIGENCE)
Basis of liability	Reciprocal agreement from which are derived the need for privity and consideration.	Liability imposed by law in order to remedy wrongs done to plaintiff which are seen as requiring reparation. No requirement for agreement.
Type of liability	Based on express intentions of parties and so strict in nature. Terms implied in on basis of necessity.	Liability is fault based, related to objective norm of "reasonableness" determined by the courts on behalf of society.
Expectation or reliance based	Based on expectations of the parties involved according to terms of agreement.	Based on reasonable reliance according to norms defined by society.

Scope of Liability	CONTRACT	TORT (NEGLIGENCE)
Extent of liability	Contractual liability seen as more extensive than tort.	as per contract law
Primacy of liability	Express terms of a contract take priority over tortious duty of care. Contracting parties can limit their liability by express exemption clauses. No role for contributory negligence.	Contractual express terms take priority even in contract with tortious duty of care. Contributory negligence acts to reduce liability of defendant.

Extent of Remedy	CONTRACT	TORT (NEGLIGENCE)
Measure of losses	These will include expectation losses as well as reliance and restitution losses. The losses can be defined and limited by the contract.	Losses are defined by law and will not include expectation losses except in unusual cases.
Limits on recoverability	Remoteness rule based on "reasonable contemplation of parties". No claim for pecuniary losses. Limitation period of six years from breach of contract.	Remoteness rule based on "reasonable foreseeability" as defined by law. Non pecuniary losses can be claimed. Limitation period runs from occurrence of damage/injury to plaintiff.

Chapter 2

THE HISTORICAL DEVELOPMENT OF CONTRACT AND TORT

1. Introduction

1.1 General Overview

1.1.1 In this chapter, I intend to examine the origins of the modern law of contract and tort, or more specifically the tort of negligence. It is in these origins that I will argue that the confusion between contract and tort first arises, and that this problem has never really been resolved. I will look at the development of contract and tort using the analytical framework first developed in chapter 1. To this end I will consider the differences in the nature of liability, the scope of liability and the extent of the remedy. This offers a useful way of considering the relationship between the two areas of law, because the scope of the liability as well as the extent of the remedy are different but interrelated aspects, both of which are dependant on the nature of the liability.

1.1.2 We need to consider various factors when looking at the development of law in a historical context. In particular we must always be aware that legal developments often look obvious or inevitable in retrospect, but at the time they often arise out of a desire to solve practical problems **(1)**. We should not impart too great a prescience to medieval lawyers; it is arguably only in the 19th century that we see the development of a coherent ideological framework for contract or tort.

1.2 The Writ System

1.2.1 An important factor in the development of the law in medieval times was the writ system. This required all actions in the common law courts to be commenced by issuing a particular writ. Moreover, different forms of action had different requirements of proof and methods of judgement. For example, an action in covenant required written proof of agreement under seal; whilst an action for debt was decided by 'wager of law' and an action in trespass was decided by jury trial.

1.2.2 All of these requirements caused problems. Written evidence under seal was rarely available for most minor agreements. The 'Wager of Law' required the defendant to swear on oath that he was not liable and to obtain eleven other persons to do the same. This method of trial ceased to be effective as feudal society broke down, and the alternative method of trial by jury was increasingly preferred by the plaintiff and judiciary **(2)**. However, this method also had its problems, as juries could be subject to pressure, until the judiciary were able to take the legal decisions out of the hands of the jury by the late 18th century.

1.2.3 With regard to the development of the law, we have a fluid situation, where new legal issues were arising which an increasingly rigid writ system could not cope with. The problem was avoided by the use of legal fictions such as that which allowed the development of the action on the case of trespass, providing a remedy which met the needs of the conflicting parties and the wishes of the judiciary. It is against this background that we must consider the way in which the development of the action on the case emerged, as a means of providing a much needed legal remedy for breach of promise.

2. The nature of legal liability

2.1 Introduction

2.1.1 The origins of both contract and tort lie in the same area of law, which is the action on the case of trespass. However, the two legal remedies developed along different lines, providing the modern day contrast in the nature of the legal liability.

2.1.2 The action on the case originally developed from the action for trespass. Trespass was a wrong as its name implies (as from the Latin 'transgressio'), and as such it had quasi-criminal connotations. Originally such cases would only be heard in the royal courts if there was a threat to the king's peace because of the use of violence. This involved the claim that the defendant had acted 'contra pacem' or against the peace. In many cases the wrong was caused by the negligent actions of the defendant, and the claim that this was 'contra pacem' was a fiction designed to bring the case before the royal courts, which the plaintiffs often preferred to local courts **(3)**. The reason for the injury would not be clear in a case of negligence, as opposed to wilful action, so it was necessary to outline the facts in more detail. This was done by means of a special clause which was the origin of the action on the case of trespass and became a specialised form of writ in its own right.

2.1.3 By the late 14th century the need to prove 'contra pacem' had ceased, but the action on the case had emerged as a quite separate action from trespass. Whilst trespass involved direct forcible injury, the action on the case involved misfeasance (or wrongdoing) by the defendant, which was sometimes wilful, but was usually the result of negligence. This liability often arose out of a prior agreement between plaintiff and defendant to carry out some task and as such has much in common with modern day actions for professional negligence. This can be seen in the case of BUCKTON v TOWNSEND (THE HUMBER FERRYMAN) 1348 where the liability arose from the defendant's negligent performance of an agreed task. Here the liability was essentially reliance based **(4)**, and related to the loss caused to the plaintiff as a result of his reliance on the defendant. However, there was an aspect of assumed responsibility, which would become a central feature in the development of assumpsit from which contract law emerged.

2.2 Development of assumpsit

2.2.1 The development of assumpsit as a legal remedy was due to the inadequacies of the existing remedies for breach of a promise, which lay in covenant, debt and detinue. An action in covenant was the main form of remedy for breach of promise, but this had to be evidenced by way of deed, and in any case did not provide adequate damages as it would not compensate for loss of bargain. The alternative actions for debt and detinue did not require written evidence but were subject to judgement by 'Wager of Law' which was disliked by many plaintiffs. Moreover, the remedy was limited in scope and did not cover loss of bargain.

2.2.2 The action on the case avoided all of these problems. It covered misfeasance by the defendant but did not require any special proof. The action was decided by jury trial and the damages for injury were flexible enough to cover loss of bargain. The action of assumpsit developed from the action on the case and was confined to situations where a pre-existing arrangement had been created between the two parties. The essence of the action was that the defendant undertook to do something (assumpsit) but had performed this task negligently. This involved an amalgam of modern day contractual and tortious concepts which can be seen in some of the earliest assumpsit cases. In the SURGEONS CASE (1364), for example, it was alleged that...

> '...(R) having undertaken the aforesaid cure and having received part of the aforesaid fee in hand, so carelessly negligently or maliciously performed his cure ...that (the plaintiff) completely lost her aforesaid hand by the fault...' **(5)**.

2.2.3 It can be seen that at this stage the liability was essentially reliance based, in other words, it was related to the fact that the plaintiff had relied upon the defendant to perform his task properly and had been injured due to the negligence of the defendant. In effect, there was a duty of care on the defendant to act without negligence. However, it is also clear that liability was related to a prior agreement **(6)**, and this agreement could become the source of an alternative promise based liability.

2.2.4 The reason for the move to a promise based liability from a reliance based liability were the limitations of the assumpsit action. Although it would cover misfeasance, it would not lie in cases of non feasance (or non-performance) as shown by WATTON v BRINTH (1400) **(7)**. Yet it is difficult to distinguish between the two, as in the minds of the parties involved there was little difference between performing an act badly and not performing it at all; both were essentially seen as a wrong.

2.2.5 In order to deal with this problem assumpsit developed the concept of deceit. Liability was based on the idea that the plaintiff had relied upon a promise which had turned out to be false as in DIOGES CASE (1442) **(8)**. Although the liability was still seen as reliance based, it was now reliance upon a promise, rather than the performance of an action **(9).** The promise provided the formal basis of the liability, but the duty was still seen as linked to misfeasance, the defendant having committed a wrong.

2.2.6 Essentially the action for deceit provided a bridge between liability based on a duty to act without negligence, and liability based on a breach of promise **(10)**. By the late 16th century the focus had switched from the breach of duty to the breach of the promise, and such a promise need not be express but could be implied from the initial agreement, as in MANWOOD v BURSTON (1587) **(11)**. During the next century, the action of assumpsit became the main remedy for breach of informal promises, superceding the actions in covenant and debt **(12)**. By the 18th century the courts had begun to allow actions for breach of future promises with the development of executory contracts, effectively signalling the break with the idea of liability related to performance alone **(13)**.

2.2.7 The main problem with the action for assumpsit was that it was a difficult concept to limit. The idea of liability for breach of promise was a powerful one, but it would become unworkable if applied to all promises. It was seen as necessary to limit assumpsit to certain types of promises where there was a clear intention to be legally bound. In English law this was effected by means of the doctrines of consideration and privity of contract.

2.2.8 The doctrine of consideration required that only certain types of promises could be enforceable and this was where the other party had given something in return **(14)**. By the end of the 18th century the existence of consideration was seen as essential to the enforceability of a contract as stated in RANN v HUGHES (1778) **(15)**, where Lord Mansfield's idea of moral obligation was decisively rejected. The idea that mutual exchange was the basis of legally enforceability of contracts, seems to have been firmly accepted by the 19th century when consideration was seen as the linchpin of contractual liability **(16)**. This differentiated the English and Common law systems from the civil law system in the rest of Europe, where the idea of a moral basis for legal liability was preferred.

2.2.9 The doctrine of privity of contract arose later and can be seen as a logical development from the doctrine of consideration. As liability in contract now centred on the exchange of promises, it could be argued that only the parties who had made a promise could enforce the contract, and not third parties. Nevertheless, the position was uncertain until the key decision of TWEDDLE v ATKINSON (1861) **(17)** which finally decided in favour of the privity rule. Possibly the actual decision was actually based on consideration rather than privity **(18)**; but the case was seen as decided on the basis of lack of privity, and this interpretation was the one which became the accepted view by the time of DUNLOP v SELFRIDGE (1915) **(19)**.

2.2.10 By the 19th century, the basic elements of contractual liability had been established, and they were honed into a logical theory of obligation by academic writers; often referred to as the 'classical' contract law theory. Contractual liability was seen as being based on the mutual will of the contracting parties, as well as being related to the exchange of promises **(20)**. This linked in with the prevailing political and economic theory of 'laissez faire' which encouraged the idea that contracting parties should be left to determine their own legal liability. As a result, the concept of 'freedom of contract' emerged, by which the courts became more reluctant to intervene in defining contractual liability. This meant that the liability in contract was often strict and related to the express terms of the contract rather than any external idea of fairness. Moreover, the requirements of the doctrines of privity and consideration could cause considerable problems, limiting the ability of some parties to obtain a remedy in contract law and forcing them to turn to alternative remedies.

2.3 Development of the tort of Negligence

2.3.1 The evolution of assumpsit in the 16th century had a profound effect on the development of the action on the case. Many of the original actions on the case had involved prior agreements and these now became part of assumpsit. This left only those actions where no prior agreement existed, such as wilful actions, or negligent actions by specific groups of persons such as common carriers or persons in charge of animals **(21)**.

2.3.2 The further development of this area was complicated by several key issues. The main problem was the confusion between the boundaries of trespass and the action on the case. The former covered direct injury, and the latter, indirect or consequential injury. In reality it was often difficult to decide into which action a situation fell, yet if the plaintiff initiated the wrong cause of action he would suffer a non suit. The problem was resolved by the decision in WILLIAMS v HOLLAND (1833) **(22)** which finally allowed both types of injury to be brought under the action on the case **(23)**.

2.3.3 A second problem was that the courts focused on the actions of the plaintiff to see if he could have avoided the injury, rather than considering whether the defendant had been negligent. It was not until the 19th century and the emergence of dangerous activities relating to mechanised industry and transport, that the focus switched to the actions of the defendant **(24)**. As a result, it was in the 19th century that we see the beginnings of a general tort of negligence, based on the idea of a duty of care, arising from the original idea of liability for misfeasance **(25)**. This can be seen most clearly in cases against utility companies such as BLYTH v BIRMINGHAM WATERWORKS Co. (1856)**(26)**.

2.3.4 However, it is arguable that the main problem was that the courts were unwilling to impose legal liability in respect of parties who were not in a contractual relationship, and in the latter case would expect an action to be brought in contract. The courts restricted actions for negligence by means of the 'privity of contract fallacy' dating from WINTERBOTTOM v WRIGHT (1842) **(27)**, which claimed that an action in tort could not be brought where there was an existing contractual relationship. In effect, the courts preferred parties to resort to contractual remedies where a contract existed and were prepared to find contractual liability in cases which we would now see as tort based such as the classic case of CARLILL v CARBOLIC SMOKEBALL CO. (1893) **(28)**. In the case of employees, actions for negligence were restricted by the doctrine of 'common employment' which saw personal injury as one of the risks of the job and therefore implied into the contract. The key problem was that the stronger party could often impose onerous conditions on the other party and exclude or limit his own liability.

2.3.5 The development of tortious liability was an attempt to bypass the limitations of the contract law approach, and its success was a reflection of the growing power of consumers and employees. Consumers who sought remedies from the manufacturer of defective goods turned to the tort of negligence and finally succeeded in the seminal case of DONAGHUE v STEVENSON (1932). This case exploded the 'privity of contract fallacy' and formulated a general theory of liability based on the 'Neighbour Principle' as laid down by Lord Atkin. Employees were also able to use the tortious action for personal injury as the courts undermined the doctrine of common employment and limited the defence of volenti **(29)**. In this way, the growth of negligence cases marked a key development in the use of tortious actions to avoid the limitations of contract law, particularly in the case of weaker parties who could not expect to negotiate adequate contractual protection. It also allowed the courts to import its own ideas of fairness and justice instead of adopting the 'laissez faire' approach of contract law.

2.4 Conclusion

2.4.1 Overall, we can see that contract and tort originated from the same area of law and were originally reliance based types of liability related to the misfeasance of the defendant. In order to accommodate the need for a remedy for non feasance, the action of assumpsit developed from the action on the case, with a liability based on the mutual exchange of promises. Essentially the legal basis of the two actions remained the same in that they related to the idea of a wrong. The breach of a duty was a wrong, as was the breach of a promise. Although these two different aspects of liability could lead in different directions, there remained an element of interrelationship which still causes problems in defining the modern boundary between contract and tort.

2.4.2 I now wish to look at how the historical development of contract and tort has impacted upon the nature and scope of the liability as well as the extent of the remedy.

3. The nature of the liability

3.1 Contract Law

3.1.1 The original nature of liability in assumpsit was fault based, reflecting its link to misfeasance. This continued to be the case, even with the move away from reliance on the conduct to reliance on the promise, as breach of the promise was seen as a wrong or alternative form of misfeasance. However, the development of the idea of mutual exchange of promise in the 17th century, with the emergence of consideration, meant that the exchange of promises became the mainspring of liability rather than any idea of fault, and this tended to lead to strict liability as the promises of the parties were meant to be strictly enforced.

3.1.2 Nevertheless, it would be true to say that a conflict continued to exist in contract between fault based and strict liability. The fault based liability remained with the idea that contract was still partly based on reliance rather than mutual exchange of contract promises **(30)**. In this respect the contracting parties could expect the other to perform the contract and would rely on that performance. The alternative view was that contract was essentially promise based liability which meant that the nature of liability would be strict, modified only by mistake, frustration or implied term. This was seen as being the way that 'classical' contract law operated in the 19th century **(31)**.

3.1.3 Yet the idea of fault based liability is related to the ideas of fairness and reasonableness which have always existed in contract law, even in its classical phase. Such aspects as the imposition of fair prices for services predated the imposition of statutory protection **(32)**. In the 19th century the courts would often strike down contracts seen as oppressive where they affected minors or persons acting under duress. Yet it was possible for this attitude to run 'hand in hand' with a more 'laissez faire' approach in respect of contracts entered into between other parties. This is reflected in the famous quotation of Sir George Jessell in PRINTING & NUMERICAL REGISTERING Co v SAMPSON (1875) where he stated....

> '...if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice' **(33)**.

3.1.4 In reality, the courts tended to take into consideration the power of the parties involved. Stronger parties, or parties who were contracting on an equal footing, were always likely to have to comply with the strict requirements of the contract; whereas the courts were ready to protect weaker parties by not imposing a strict liability but allowing them to avoid the contract on the basis that they had not freely entered into it **(34)**. However, the number and categories of weaker parties was much more limited in the 19th century and did not usually include employees or consumers.

3.2 The tort of Negligence

3.2.1 The removal of assumpsit actions from actions on the case, meant that what remained of the tort of trespass related to indirect damage where there was no element of prior agreement. Liability here was often strict and linked to specific liability for particular groups of defendants such as owners of animals. The tendency of the court to consider how the risk occurred, rather than to focus on the action of the defendant, could lead to the imposition of strict liability as in RYLANDS v FLETCHER (1856) **(35)**.

3.2.2 The move to a fault based liability was a development of the 19th century as the focus of the liability in the action on the case began to switch to the actions of the defendant. The development of the concept of the duty of care was linked to the idea of the reasonable man and this became the basis upon which the nature of the liability was based. This concept was first developed in cases such as BLYTH v BIRMINGHAM WATERWORKS CO. (1856) where negligence was defined by Alderson B as follows...

> '..the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do' **(36)**

3.2.3 The nature of the liability was also conditioned by the greater willingness of the court to balance the risks involved against the benefit to the community, so focusing upon the value to society of the defendant's actions. These factors would also be considered in determining whether liability should lie, and so the idea of reasonableness incorporated a wider aspect than the reasonable man but imported into this an element of the law's concept of whether the activity was valuable to society as a whole. In addition, it became acceptable to consider extraneous factors such as the nature of the danger posed by the activity and the ability of the defendant to protect himself by means of insurance. This is a trend which has led to the greater willingness of courts to impose liability on more powerful parties such as manufacturers and employers.

3.3 Conclusions

3.3.1 In the development of both contract and the tort of negligence, we can see the tension between fault based and strict based liability. Although in general, contract tended to the former and negligence to the latter, there was always an element of both types of liability in contract and tort. This allowed the courts to impose their own ideas of fairness in both areas of law and tended to mean that they could, if necessary, intervene on the part of the weaker party. The nature of the liability often owed more to the nature of the parties and the circumstances involved, than to the type of legal action commenced.

4 The scope of the liability

4.1 Contract Law

4.1.1 The position as regards the scope of liability is a logical development from the nature of liability. The strict nature of contractual liability could only be upheld if it was the prime source of liability. This was achieved by the development of the 'privity of contract' fallacy which prevented parties outflanking contractual liability by resorting to tortious actions. The collapse of this doctrine in the mid 19th century led to the rise of concurrent liability which threw into focus the differences between contract and tort, and drew attention to the limitations of the contractual remedy in particular. Moreover, the ability of contracting parties to limit or exclude liability for breach of the duty of care was controlled by the use of statute such as the UNFAIR CONTRACT TERMS ACT 1977.

4.1.2 The problem was exacerbated by the failure to allow the use of tortious principles such as contributory negligence, which were clearly relevant to duty of care type situations. The doctrine of common employment prevented actions for breach of the duty of care by imposing a strict limitation on the liability of the employer. However, once that restriction was overcome in tort, it was impossible to maintain it in contract. As a result, the courts had to consider whether the employee had a corresponding duty of care, and imported thus the idea of contributory negligence. In consumer actions against manufacturers this would be reflected in the limitation of damages.

4.2 The tort of Negligence

4.2.1 The tortious remedy expanded to meet the needs of litigants who sought to outflank the limitations of contract law. New areas of liability were developed, such as Negligent Misstatement, which often replicated liability in contract. The rapid development of such areas of liability has served to put pressure on contract law in order to remove some of its more restrictive aspects, especially the rule on privity.

4.3 Conclusion

4.3.1 The development of concurrent liability in the present century has done much to undermine the separate areas of contract and tort. As such it has become impossible in many cases to determine which action should have priority. In areas such as employment law, where concurrent liability has long been established, the expansion of tortious liability has effectively driven the expansion of the contractual one. This can be seen in the emergence of the contractual action for loss of opportunity in SCALLY v SOUTHERN HEALTH AND SOCIAL SERVICES BOARD (1991) **(37)**.

5. Extent of the Liability

5.1 Contract Law

5.1.1 Originally, liability in contract law lay in respect of the injury or damage caused, and so the extent of the liability was also related to the recompense for such injury. In effect, the liability was reliance based and so the damages claimed related to the losses directly incurred as a result of the non performance or bad performance of the promise. However, as we have seen, one of the advantages of the writ of assumpsit was that it was possible to claim wider damages than the action for covenant or debt and these covered consequential damages rather than mere reimbursement. As such, they could include within them an element of compensation for loss of bargain.

5.1.2 The move to a promise based liability meant that it was possible to detach the concept of damages from the specific injury and to move to wider expectation damages. This can be seen in the case of ORWELL v MORTOFT (1505) **(38)**, a case involving non feasance, where it was possible to recover damages for loss of bargain. With the emergence of the executory contract in the 18th century, it became possible to claim compensation in respect of failure to perform a future action, where the damages were of course more speculative. Some academics see such a development dating from the 16th century **(39)** whereas others would look to the end of the 18th century or the 19th **(40)** with a case like GAINSFORD v CARROLL (1824) **(41)** allowing for expectation loss as we would now define it. The fact that many contracts disputed at law would be business contracts, where a party could expect to contract for future resale, may have been an important factor here; whilst the rise of credit based deals would also lead to a need to provide compensation related to future expectations. In particular, Simpson sees the cases arising from the South Sea Bubble debacle as important in developing the trend to expectation losses **(42)**.

5.1.3 In addition to the development of expectation losses, the courts increasingly saw the losses as being determined according to the contemplation of the parties involved, rather than based on any notion of reasonableness or fairness **(43)**. This reflected the idea that the basis of contractual liability was the promise of the parties and so they should be able to define the extent of their own liability. This linked in to the 19th century idea of 'freedom of contract' and the unwillingness of the courts to intervene with contractual terms. In HADLEY v BAXEDALE (1854) **(44)**, it was made clear that the remoteness rule in respect of damages was to cover naturally arising losses or those within the reasonable contemplation of the parties. However, whilst the courts would tend to find the level of damages related to the contemplation of the parties in most cases, they could impose damages related to reliance loss or losses similar to reasonable foreseeability as in KOUFOS v CZARNIKOW (THE HERON II) (1969) **(45)**.

5.2 The Tort of Negligence

5.2.1 Here the damages initially awarded in the action on the case were for the injury or loss, including consequential losses. In this area of law the courts decided the extent of the damages, and they tended to award damages to cover the reasonably foreseeable losses in the case of negligence, which would include non pecuniary loss such as loss of amenity, and distress. However, these would not extend to expectation loss which was seen as the prerogative of contract law.

5.2.2 The main complication came in the 20th century with the development of liability for deceit and misrepresentation. Here the loss incurred by the plaintiff could include expectation losses. In recent cases, the courts have begun to award damages to cover such losses within the scope of all consequential losses as in EAST v MAURER (1981) **(46)**. The problem is related to the flexibility of the term 'consequential losses' which was available from the earliest cases of misfeasance. Such a term is capable of a wide interpretation and can be expanded to cover losses which may be seen as essentially expectation losses. In this way it reflects the position in the earliest misfeasance cases where the extent of the liability was similarly extensive.

5.3 Conclusion

5.3.1 If we look at the extent of the remedies we can see how easy it is for confusion to arise. The idea of consequential loss or even reasonably foreseeable loss is a vague concept, which can easily allow for pure expectation losses. In that respect, we can see how the extent of damages in contract and tort has become increasingly similar **(47)**.

5.3.2 The similarity of the extent of the remedy in contract and tort owes much to the confusion as to the nature of the liability. In both contract and tort there is an element of reliance based liability and this allows for similar levels of damages. Similarly, the wide extent of the damages available in early misfeasance cases allows for a wide interpretation of loss, and so allows both contract and tort to develop damages which cover expectation losses.

6. Overall Analysis

6.1 Historical Origins

6.1.1 If we look at the historical development of contract and tort law, we can see how the present confusion has arisen as to the boundary between the two areas of law. At all stages there has been a close interrelationship between contract and tort, as regards the nature of liability, the scope of liability and the extent of the remedy. In this respect, it is wrong to see contract and tort as two completely distinct areas of law, but rather as different elements in a general law of civil obligation. The idea that contract law was a completely distinct type of law, is largely a result of the fact that it was given an ideological and theoretical framework in the 19th century, which happened to coincide with the period of maximum differentiation between the two areas of law.

6.1.2 We can see that contract and tort developed from the same basis of liability, this being a wrong committed by the defendant, originally by way of misfeasance and then by non feasance. Although the basis of the liability in contract moved from the injury to the promise made, in both contract and tort the nature of the injury or loss still remained the key element in the liability. Unlike civil law jurisdictions, English law never fully developed the idea that contract law obligation was based on a moral imperative; instead, the idea of mutual exchange of promise underlies the legal liability, and ties it indirectly to the performance or non performance of the task.

6.2 Consequences for contemporary law

6.2.1 The consequences of this historical interrelationship can be seen in the confusion between contract and tort, as regards the nature of the liability and the extent of the remedy. In all cases, we can see that the idea of fairness is imported into contract and tort as it reflects the idea of remedying a wrong, the issue which lies at the heart of the action on the case. Moreover, the same confusion exists in the uncertainty over the extent of the remedy, where the traditional distinction between contractual and tortious damages is becoming difficult to sustain. This is a reflection of the fact that the two areas of law are essentially trying to remedy a similar type of wrong, namely the misfeasance of the defendant, which is difficult to distinguish from non feasance.

6.2.2 During the last few years the boundary between contract and tort has seemed to come under strain. This is partly because the boundary was never clearly defined in the first place. It also reflects the resurgence of tortious liability to fill the gap left by the inability of 'classical' contract law to meet the needs of weaker parties such as consumers and employees. Finally, it reflects the change in our underlying ideologies, which we referred to in the introduction, with its greater emphasis on externally imposed norms, an aspect which more closely reflects the principles of tortious liability. The key factor here is the perception of the role of contract and tort; what their function was, and what it should be. In this respect we need to consider the underlying ideologies upon which contract law and tort appear to be based.

Notes

1. Milsom, 'Reason in the Development of the Common Law' (1965) 81 LQR 496

2. Simpson, A history of the Common Law of Contract (1975) at page 298 and also Stoljar, A history of Contract at Common Law (1975) at page 78

3. See the case involving adulteration of wine YB 10 Ed.II (Selden Society, Vol 54) quoted by Milsom in Historical Foundations of the Common Law at page 289

4. Stoljar, A History of Contract at page 29. Also note Milsom, Historical Foundations at page 338 where he states '

> ..that reliance in a general sense was the original basis of assumpsit is almost certain..'

5. KB 27/414 M37d in Selden Society Select cases of Trespass 1307-1399 Vol II at pp 422

6. Simpson, A History of the Common Law of Contract at page 205

7. YB 2 Hen 4, fol 3, pl 9 as quoted in Cheshire, Fifoot and Furmston Law of Contract (1991) page 5

8. (1442) YB 20 Hen 6, Trin., fol 34, pl 4

9. Milsom, Historical Foundations at pp 321-322 and also Ibbotson, 'Assumpsit and debt in the early 16th Century: the Origins of the Indebitatus Count' (1982) 41 Camb L.J. 142

10. Stoljar, A history of Contract at Common Law at page 33

11. (1587) 2 Leon 203

12. See SLADE'S CASE (1602) 4 Co. Rep 91a, Yelv. 20, Moo. K.B. 433

13. Atiyah, The Rise and Fall of Freedom of Contract (1979) especially Chapter 7

14. Some academics have seen this as deriving from the canon law concept of 'causa', ie. the idea that a promise must be made with good reason, see Simpson A History of the Common Law of Contract at page 384. Others believe that it derived from the concept of 'quid pro quo' which was to be found in the action for debt, see Ibbotson, op.cit.

15. 7 T.R. 350 n.a., 4 Brown P.C. 27

16. Gilmore, The Death of Contract at page 18

17. (1861) 1 B & S 393

18. Flannigan, 'Privity - the end of an Era (Error)' (1987) 103 LQR 564

19. (1915) AC 847

20. See Atiyah, Rise and Fall at pp 398-419

21. Pritchard, 'Trespass, Case and the Rule in Williams v Holland' (1964) Camb L.J. pp 234-253

22. (1833) 10 Bing 112

23. Pritchard, 'The Rule in Williams v Holland' op. cit.

24. Baker, An introduction to English Legal History (1990) at pp 455

25. Pritchard, 'Scott v Shepherd (1773) and the Emergence of the Tort of Negligence', Selden Society Lecture July 4th 1973

26. (1856) 11 Exch 781

27. (1842) 10 M & W 109

28. (1893) 1 QB 256

29. See SMITH v BAKER & SONS (1891) AC 325

30. Fuller & Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale L.R. 52

31. Gilmore, The Death of Contract at pp 47-48

32. Atiyah, Rise and Fall op.cit. at page 146

33. (1875) LR 19 Eq 462, quoted in Cheshire Fifoot & Furmston, The Law of Contract (1991) at page 11

34. See Atiyah, Rise and Fall at pp 169-177

35. (1868) LR 3 HL 330

36. op.cit (note 26 above) at page 784

37. (1991) 4 All ER 563

38. (1505) B & M 406

39. Simpson, 'The Horowitz Thesis and the History of Contracts'(1979) 46 Univ Chicago L.R. 533

40. Atiyah, Rise and Fall at pp 419-448

41. (1824) 2 B & C. 624., 107 E.R. 516

42. Simpson, op.cit. pp 533

43. Horowitz, 'The Historical Foundations of Modern Contract Law' (1973/4) 87 No.5 Harvard L.R. pp 917

44. (1854) 9 Exch 341

45. (1969) 1 AC 350

46. (1991) 2 All ER 733

47. Gilmore, The Death of Contract at page 88

Chapter 3

THE IDEOLOGICAL BASIS OF CONTRACT AND TORT

1. Introduction

1.1 General Overview

1.1.1 In order to understand the way in which contract and tort differ from each other, it is essential to understand their underlying ideological basis. This is to some extent derived from the historical origins of the different areas of law, but it is also a reflection of modern day ideas of morality and justice and their impact on legal liability. In this respect, such underlying ideologies must always be subject to change and development, which means that perceptions of the role of law will also change.

1.1.2 What we need to be aware of, in defining an ideological framework into which to fit the law, is that we are really answering two questions. We are stating 'this is how the law is', in other words this is why the courts come to a particular decision; and we are also stating 'this is how the law should be'. This confusion between 'is' and 'ought' underlies a great deal of writing on ideological concepts and it can be difficult to distinguish between the two. In this thesis I would like to consider whether the particular area of law does correspond with a particular ideological concept and then go on to state whether I think it should be so.

1.1.3 In considering the ideological concepts we can distinguish between instrumental and non instrumental ideologies. The former seeks to relate the purpose of the law to a specific societal purpose, whereas the latter does not have such external aims, although it may be based on a coherent moral framework. I would argue here that the courts tend to base their decision on one of two underlying instrumentalist ideologies.

1.2 The two ideological approaches

1.2.1 The first type is concerned with the idea of functional efficiency of the economic system and involves two different strands. On the one hand, there is the so-called 'Law and Economics' school of thought represented by academics such as Posner, Kronman, Harris and Veljanowski **(1)**. Their ideas are based on the belief that the legal process should operate to ensure the maximisation of wealth in society and the minimisation of cost. Their main concern is to ensure that resources are not wasted by parties having to incur excessive 'transaction costs'. This includes making unnecessary contracts or incurring excessive insurance, as a result of the need to obtain adequate information and to arrange the necessary financial cover. The second strand is the idea that legal liability should be related to the needs of business. This is particularly so of contract law where this approach is referred to as the 'market individualist' approach by Adams and Brownsword **(2)**.

1.2.2 In both cases, there is a greater concern for the interests of business parties and the more effective functioning of the market. There is a basic belief that the parties are best able to protect their own interests, and there is little concern with other societal aims such as burden spreading or the distribution of power and wealth. It is not true to say that this approach is amoral as such, but there is certainly a belief that the state should not seek to impose external moral ideas where they conflict with the reasonable expectations of business parties. In effect, the moral underpinning is much more individualistic in nature.

1.2.3 The second type of instrumentalist theory is that which seeks to consider the impact of legal decisions in relation to the economic power of the parties. This has been referred to by Adams and Brownsword as the 'Consumer Welfarist' approach, or by Collins as 'Communitarianism'**(3)**. The essence of this approach is that the law should take into consideration the economic power of the parties involved, to ensure that the law does not impose too great a burden on the weaker party. In effect, it is based on the ideas of distributive justice, whereby the losses incurred are loaded onto the shoulders of the party best able to bear them, or redistributed amongst society as a whole through the medium of insurance. This approach is sceptical of the benefits of an unregulated market place, and sees the needs for intervention by the state to ensure a fairer result by means of legislative action, or if necessary the action of the courts. As such this type of approach can be seen as based on a moral imperative which is related to the perceived needs of society, rather than the more individualist morality of the first approach.

1.2.4 For ease of identification I propose to refer to these two main approaches as respectively 'efficiency orientated' and 'socially orientated'. I realise that these are not mutually exclusive approaches and that there is considerable overlap between them. For example, it could be argued that the reasonable expectation of business parties would include the belief that a weaker party should not be taken advantage of by an unscrupulous party in a stronger position. However, I would argue that these are essentially distinct approaches and underlie the way in which academics and practitioners approach the idea of legal liability in contract and tort.

1.2.5 In the rest of this chapter I would like to analyse how these different approaches impact upon contract and tort, in respect of the nature of the liability, the scope of the liability and the extent of the remedy. I will then seek to consider to what extent contract and tort differ in the way these approaches impact on the liability of the respective parties.

2. The efficiency orientated approach

2.1 The Nature of the liability

2.1.1 This approach can lead to complex variations as regards the nature of liability. In contract, the liability is seen as based on the exchange of promises between individual parties, as in this manner they define their liability to each other and also the risks they wish to take. The efficiency orientated approach seeks, amongst other things, to minimise transaction costs. Therefore it should be possible for contracting parties to define rights and liabilities in respect of third parties, which can be enforced by them. This also accords with the reasonable expectations of business parties who see contract as a means of allocating risk. This approach is at variance with the doctrine of privity, which requires contracting parties to make additional contracts to provide sufficient cover. In complex contractual arrangements such as construction projects, we have a system of interlocking contracts where rights and liabilities are defined, an arrangement referred to as a 'network contract' **(4)**. This system cannot function effectively if we have a strict privity rule, and so courts taking the efficiency orientated approach have been ready to relax the rules here.

2.1.2 The efficiency orientated approach also tends to play down the traditional concern for consideration, where this does not accord with the reasonable expectations of business parties. This attitude can be seen in the view taken by the courts in the recent decision in WILLIAMS v ROFFEY BROTHERS (1990) **(5)**. This also incorporates the idea that business parties do not usually wish to enforce the strict requirements of law, but instead rely upon the goodwill of other business parties to ensure that they do not renege on agreements **(6)**.

2.1.3 The type of liability in contract law is more likely to be strict under the efficiency orientated approach, as there is a greater concern for certainty in commercial arrangements. The view is that the parties should be allowed to allocate liability in the way which is most cost effective to themselves, and this can only be achieved if the operation of the market is the key determinant, not the intervention of the state through the medium of the courts. However, the efficiency orientated approach will be prepared to allow the overriding of the strict requirements in the contract, where they are seen as being so unreasonable as to no longer accord with the reasonable expectations of business parties. This can be seen as a factor underlying the decision in INTERFOTO v STILETTO VISUAL PRODUCTS (1988) **(7)**.

2.1.4 When we consider the position in tort, the law and economics model tends to focus upon a form of cost benefit analysis. The basis of liability is usually taken as the formula laid down by Judge Learned Hand in the case of UNITED STATES v CARROLL TOWING CO. (1947) **(8)**. This involves a mathematical computation of the cost and risk, whereby the defendant will only incur liability if the expected cost of the accident, multiplied by the probability of it occurring, exceeds the cost of avoidance. This basis of liability is an economic one, and is based on considerations of functional efficiency involving the ultimate goal of maximisation of wealth in society. This approach will take into consideration extraneous factors such as the availability of insurance cover, and can thus undermine any sense of moral obligation by loading the loss onto the least-cost option. However, it is very difficult to precisely calculate the costs and risks, so that the courts are unwilling to operate this model in practice but fall back on more limited aims, such as deterrence of the individual tortfeasor, which allows for an element of moral approbation.

2.2 The Scope of the Liability

2.2.1 In this approach, the definition of liability will be the prerogative of contract, as this most clearly identifies the intentions of the parties involved. The efficiency orientated approach is essentially market driven, and will see the contract model as having a clear superiority over the tortious one, because it allows the parties to define their own liabilities, rather than this being done by the state. In theory, it should be possible for the state to effect an efficient allocation of resources by imposing its own ideas of efficiency, but the proponents of the market driven approach tend to see the contracting parties as more capable of performing this task. As a result, contract will be allocated a position of primacy, and tortious principles such as contributory negligence will be excluded from the domain of contract.

2.2.2 When we consider the area of tort then there is a greater willingness to allow the influence of external ideas of efficiency as outlined above. However, this approach is often not followed by the courts who find it difficult to determine their own definition of efficiency and instead fall back on ideas of corrective or distributive justice.

2.3 The Extent of the Remedy

2.3.1 The extent of the remedy in contract law will tend to follow the expectations of the parties, in much the same way as the traditional framework. This approach allows for an appreciation of the impact upon commercial contracting and the relative expectations of the parties in respect of the bearing of losses. This can be seen in the case of PHOTO PRODUCTION v SECURICOR (1980) **(9)**, where the court upheld the validity of a limitation clause, because it would avoid catastrophic damages being imposed upon a party who was only obtaining a limited payment under the contract. This decision was seen as being based on the commercial realities of business contracting as per the words of Lord Wilberforce;

> '...the nature of the contract has to be understood. Securicor undertook to provide a service of periodical visits for a very modest charge....In these circumstances nobody could consider it unreasonable that as between these two equal parties the risk assumed by Securicor should be a modest one, and that Photo Productions should carry the substantial risk of damage or destruction' **(10)**.

2.3.2 Where the suppliers of the goods or service are seen as being in a better position to provide insurance cover, then the courts may be unwilling to allow them to rely on exclusion or limitation clauses. Instead they will impose full liability upon them, including expectation losses, as in GEORGE MITCHELL v FINNEY LOCK SEEDS (1983) **(11)**. In both of these cases the key underlying philosophy is that the commercial realities of the situation should determine where liability should fall and the extent of the remedy available.

2.3.3 The position in tort as regards the law and economics model is that the damages should be based on the need to reduce the overall cost to society. This can lead to a balancing of the costs and benefits involved, as imposing excessive liability on one party would lead to excessive insurance cover being sought or a tendency to discourage necessary risk taking. Yet it is also argued that damages could be imposed on parties to influence future behaviour, on the basis that this will be to the overall benefit of society **(12).** In this respect there is an element of deterrence built into the system.

3. The Socially Orientated approach

3.1 The Nature of the Liability

3.1.1 In contract law, the nature of the liability is based upon the agreement between the parties, but in this approach the concern of the law is to ensure that the parties deal fairly with each other. This means that there is a greater willingness to intervene in the drawing up of the contract, both in terms of implying in terms and preventing one party from using onerous terms at the expense of the other. The underlying concern is to ensure that one party does not obtain an unfair advantage because of superior bargaining power **(13)**. This approach can be seen most clearly in the case of SCHROEDER MUSIC PUBLISHING Co. LTD v McCAULEY (1974) in respect of a clause seeking to restrain the freedom of the weaker party. Here the court's position was summarised by Lord Diplock as follows;

> '..The fact that the appellants' bargaining power vis-a-vis the respondent was strong enough to enable them to adopt this take-it-or-leave-it attitude raises no presumption that they used it to drive an unconscionable bargain with him, but in the field of restraint of trade it calls for vigilance on the part of the court to see that they did not.' **(14)**

3.1.2 The socially orientated approach is more concerned with the issue of distributive fairness, rather than the idea of certainty or market efficiency. Again, there is a tendency to play down the importance of formalised rules such as privity or the need for consideration, if they obstruct the attainment of a fair result. The underlying concern is that the law should intervene where a party has suffered a wrong, but in deciding whether this is the case, the courts will be more concerned with issues of substantive fairness, rather than a simple analysis of the contractual position.

3.1.3 With regard to the type of liability, this is more akin to fault based liability. This is achieved by implying terms into the contract which are based upon the court's requirements for fairness and reasonableness. As such it is the courts which determine the nature of the liability, not the contracting parties **(15)**. We can see this in the key case of LIVERPOOL CITY COUNCIL v IRWIN (1976) where Lord Wilberforce stated the main reason for the decision to impose liability on the Council in the following terms;

> '...To imply an absolute obligation to repair would go beyond what is a necessary legal incident and would indeed be unreasonable. An obligation to take reasonable care to keep in reasonable repair and usability is what fits the requirements of the case. Such a definition involves...recognition that the tenants themselves have their responsibilities. What it is reasonable to expect of a landlord has a clear relation to what a reasonable set of tenants should do for themselves' **(16)**.

3.1.4 Although it was argued in the case that the term was implied on the basis of 'necessity', it would seem that the real reason is to ensure that the contract is fair, in that the two parties have reasonable expectations placed upon them. The central underlying concept of reasonableness in this case has been acknowledged by Atiyah **(17)**.

3.1.5 In tort law, the liability is based on the need to rectify a wrong. The idea of a wrong derives from the concept of misfeasance here and provides a common link with contractual liability. The ability of the parties to determine their liability does not really exist in tort, because the liability is imposed by the law in order to achieve societal ends, rather than deriving from the terms of an agreement entered into by the two parties. But in the socially orientated approach, the difference is often not particularly clear, because there is a much greater willingness to intervene and imply terms into the contract in order to achieve similar societal ends. In this way, the basis of tortious liability and contractual liability is quite similar.

3.1.6 The main societal end which this approach seeks to attain is distributive justice. This means that the law will try to ensure that parties do not have excessive liability imposed upon them, because they are in a weaker position. This involves a concern for loss spreading, to ensure that the burden is distributed to those parties who are in a stronger position or who have more financial resources. This is a factor behind the desire to impose near strict liability in motor accident claims as the liability will be born by the insurance company. As a result, this concern for distributive justice may conflict with ideas of corrective justice, by placing liability on the shoulders of parties who themselves are not really responsible for the wrong. A classic example is the employer, who is usually made liable for the wrongs of an employee under the doctrine of vicarious liability. The key concern here is to provide compensation for the injured plaintiff, rather than impose a financial penalty on the perpetrator.

3.2 The Scope of the Liability

3.2.1 In contract law, the socially orientated approach will tend to allow a much greater intrusion of tortious based concepts such as reasonableness. As a result, there is a greater unwillingness to allow the contracting parties to rely upon exclusion or limitation clauses which are unfair or unreasonable. This has now found statutory expression in the UNFAIR CONTRACT TERMS ACT 1977, but the same effect can be achieved by the courts arguing that the terms have not been incorporated into the contract. This approach can be seen in cases where contracting parties have sought to impose onerous terms upon the other party, and the courts have struck them down on the basis of lack of notice. Although this is the reason given for rejecting the term, it is clear that the underlying reason is a feeling that the term is unfair. An example is THORNTON v SHOE LANE PARKING (1971) where Lord Denning made clear his dislike of a term excluding liability for personal injury when he stated;

> '...I do not pause to enquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way' **(18)**

3.2.2 It is arguable that this approach is more concerned with issues of fairness and reasonableness, rather than the specific terms of the contract. As a result, there is an unwillingness to be bound by exclusion or limitation clauses imposed by the stronger party. Similarly there is a greater readiness to allow the intrusion of tortious concepts such as contributory negligence. Consequently, the scope of contract law is limited and tortious principles are allowed to play an important part.

3.2.3 In tort, the socially orientated approach will also tend to focus on fault based liability, but also there is a desire to ensure the allocation of loss in a fair manner, so that it is concerned with issues of distributive justice. A key issue here will be the ability of the parties to provide alternative safeguards especially in contract **(19)**. Where this is not possible, then there is a greater readiness to impose liability. This can be seen in cases involving liability for negligent misstatement, where the weaker party is more likely to succeed because it is not practical for him to have obtained alternative modes of protection, as in the case of SMITH v BUSH (1989) **(20)**.

3.3 Extent of the Remedy

3.3.1 The extent of the remedy in contract law will be based on the idea of what is fair between the parties. This will tend towards awarding damages which are reliance based rather than expectation based. However, the courts will be prepared to award expectation damages if they think this is fair in the circumstances; and if the plaintiff is seen as likely to be involved in commercial activity, this will be more likely. In effect, the court will decide the extent of the liability, rather than looking at what was in the contemplation of the contracting parties, especially if the latter approach would give unfair advantage to a party with greater knowledge or bargaining power.

3.3.2 The key problem here is that it is difficult to distinguish between the different types of damages awarded as reliance and expectation damages are often confused. Moreover, there is uncertainty over whether to compensate for the difference in value as opposed to the cost of cure as seen recently in the case of RUXLEY ELECTRONICS & CONSTRUCTION LTD v FORSYTH (1995) **(21)**.

3.3.3 In the area of tort the socially orientated approach will usually lead to reliance based losses. However, these will be designed to compensate the plaintiff for the loss incurred, and so may involve a loss of profits, which means that it will cover expectation losses **(22)**. Moreover, there will be a greater willingness to allow parties to claim for economic loss, where to deny this would place an unfair burden on the shoulders of the party involved. To this end, such an approach would tend to compensate the victims of negligent misstatement by valuers as in SMITH v BUSH (1989), but would not compensate corporate investors who incur losses due to negligent misstatement by auditors as in CAPARO v DICKMAN (1990) **(23)**. The key factor here is the greater ability of the corporate investor to shoulder the burden or to have taken out adequate insurance.

4. Conclusion

4.1 Critique

4.1.1 I would argue that the way in which legal decisions are made owes more to the specific ideological approach taken by the court, than to whether the action is brought in contract or tort. The two main ideological approaches which I have analysed in this chapter are common to both contract and tort and impact in different ways on the respective legal liabilities. However, both of these approaches have their own inherent weaknesses.

4.1.2 The efficiency orientated approach sees liability as dependent on the need to ensure the maximisation of wealth in society. In general, the tendency is to rely upon the market to achieve this result, rather than the state, and to a large extent this fits in with the traditional idea of contract law as being determined by the contracting parties alone. The problem is that too great a reliance on the will of the contracting parties can lead to unfair conditions being imposed on the weaker party involved. If this means that the whole area of contract law is seen as unfair, it would undermine the whole principle of contract law and as such respect for the idea of allowing parties to define their own legal rights and liabilities at all.**(24)**

4.1.3 When we consider the socially orientated approach the focus moves to the result of the liability and there is much less willingness to rely upon the market. Instead it is left to the state to define liability, allowing it to impose its own ideas of fairness and reasonableness. The key problem here is defining what we mean by 'fairness' or 'reasonableness', as these are inherently subjective concepts. In addition it also begs the question of how we define who is the 'weaker' party when this concept too is relative.

4.2 The Attitude of the Courts

4.2.1 I have sought to argue here, that the main reason for the differences in the nature and scope of liability and the extent of the remedy in contract and tort, owes more to the approach taken by the courts than to whether the case is brought in contract or tort. In the next two chapters I wish to consider two key areas of interest; these being contracts for services and contracts of service. Here I would like to analyse recent decisions to examine how the courts have approached the issues relating to the nature and extent of liability; and to see how, and if, they relate to a specific ideological approach.

Notes

1. Posner, Economic Analysis of the Law (1972); Kronman and Posner, The Economics of Contract Law (1979); also Harris and Veljanowski, 'Liability for Economic Loss in Tort' in The Law of Tort by Furmston

2. Adams and Brownsword, Understanding Contract Law (1994) especially Chapter 8

3. Adams and Brownsword, op.cit. and also Collins, 'The Transformation Thesis and the Ascription of Contractual Responsibility' in Perspectives of Critical Contract Law Edited by Wilhelmsson (1993)

4. Adams and Brownsword,'Privity and the Concept of a Network Contract' (1990) 10 L.Stud. 12

5. (1990) 1 All ER 512

6. Beale & Dugdale, 'Contracts between Businessmen: Planning and Use of Contractual Remedies' (1975) 2 Journal of Law and Society 45

7. (1988) 1 All ER 348 especially Bingham LJ at page 353

8. 159 F2d.169 (2d Cir 1947)

9. (1980) 1 All ER 556

10. Ibid at 564

11. (1983) 2 All ER 737

12. Harris and Veljanowski op.cit.

13. Collins, The Law of Contract (1997) especially at Chapter 2

14. (1974) 3 All ER 616 at 624

15. Nicholas, 'Fault and Breach of Contract' in Good Faith and Fault in Contract Law Edited by Beatson and Friedman, (1995)

16. (1976) 2 All ER 39 at 45

17. Atiyah, 'Contracts and Fair Exchange' in Essays on Contract, by the same author (1986)

18. (1971) 1 All ER 686 at 690

19. Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301

20. (1989) 2 All ER 514

21. (1995) 3 All ER 268 and also see Poole, 'Damages for Breach of Contract - Compensation and "Personal Preferences": RUXLEY ELECTRONICS AND CONSTRUCTION LTD v FORSYTH (1996) 59 MLR 272

22. Bridge, 'Expectation Damages and Uncertain Future Losses' in Good Faith and Fault in Contract Law op.cit.

23. (1990) 1 All ER 568

24. Raz, 'Promises in Morality and Law. A review of "Promises, Morals and Law" by Patrick Atiyah' (1981/2) 95 Harvard L.R 916

Chapter 4

THE APPROACH OF THE COURTS IN THE UK

(1) CONTRACTS FOR SERVICES

1. Introduction

1.1 In the next two chapters, I wish to consider how the courts have dealt with the contract/tort divide in cases involving contracts for services and contracts of service. Although these two types of contract have significant differences, they also have key similarities which make them useful comparators.

1.2 The key element here is that there is usually a contractual relationship existing between the parties who take legal action. It is now clear that the courts will accept a concurrent liability in contract and tort following HENDERSON v MERRETT (1994) **(1)**. Moreover, in this case, it was also made clear that the duty of care in respect of negligent acts or statements, was essentially the same for contract and tort;

> '...it was an implied term (of the contract between the names and their agents) that the agents would exercise due care and skill...and that duty of care was no different from the duty of care owed by them to the names in tort' **(2)**

1.3 The main issue here is the interrelationship between contract and tort. The duty of care arises out of the contractual relationship, but is largely coterminous with the tortious duty of care. However, the position is more complicated where there is no direct contractual relationship, but the parties operate in a 'contractual nexus' such as that existing between a developer, the main contractor and any subcontractors. Here the courts may see the relationship as 'quasi-contractual', and imply in contractual remedies and protection.

1.4 The secondary issue is the nature of the relationship between the parties. In the case of a contract for services or a contract of service, it is possible to have parties with very similar levels of bargaining power or substantially different ones. This means that the courts are likely to tend towards favouring the weaker party if they adopt the socially orientated approach.

1.5 In this chapter, I wish to look at the relationship between contract and tort in respect of contracts for services. I intend to use the tripartite analysis outlined in chapter 1; namely, the nature and scope of the liability, and the extent of the remedy. Yet we must always remember that these categories often overlap and we should not seek to segregate them too completely.

2. The Nature of the Liability

2.1 Introduction

2.1.1 If we consider the traditional distinction between contract and tort, the key difference, as regards the nature of the liability, derives from the fact that contract is based on agreement between the parties and tortious liability is imposed by law. From this we can discern the distinguishing characteristics of contractual liability, which are the doctrine of privity, the need for consideration and the idea that contract enforces the free will of the parties so that liability will be strict.

2.2 Doctrine of Privity

2.2.1 This doctrine states that only the contracting parties can enforce the contract, and are able to obtain its benefits or are subject to its obligations. This restrictive approach has been subject to considerable criticism from the judiciary **(3)** and from academics **(4)**.

2.2.2 Yet, the reality in English law is that the privity doctrine has not been followed consistently as regards contracts for services. A classic example, is the concept of 'vicarious immunity', which arises in a situation where the plaintiffs and defendants do not have a direct contractual relationship, but are linked by means of a series of interlocking contracts. In this case, the defendant may be able to utilise an exclusion or limitation clause, provided for his benefit, in a contract to which he was not privy. This can be seen in the cases of SOUTHERN WATER AUTHORITY v CAREY (1985) **(5)** and NORWICH CITY COUNCIL v HARVEY (1989) **(6)**.

2.2.3 These decisions have been justified on the grounds that there was a 'contractual setting', of which the plaintiff and the defendant were both aware, and which was seen by both as defining their rights and liabilities. This is referred to by Judge Smout in SOUTHERN WATER where he states;

> '...The contractual setting may not necessarily be overriding, but it is relevant in the consideration of the scope of the duty in tort for it indicates the extent of the liability which the plaintiff's predecessor wished to impose' **(7)**

This position has been supported by academic opinion such as Adams and Brownsword and their concept of the 'network contract' **(8)**.

2.2.4 This relaxation of the privity doctrine was justified by the courts in the above decisions, on the grounds that it was 'just and reasonable'; but in fact such words merely mask a policy decision. The courts are motivated by an appreciation of the underlying commercial realities of the situation, including the knowledge and expectations of the parties involved, and a judgement as to whether the parties should have arranged appropriate insurance cover **(9)**. It also involves an appreciation of the fact that all the parties were aware of the terms of the contracts involved, and reflects the view of the court that commercial parties should be able to protect their own interests accordingly. I would argue that the courts are effectively adopting an efficiency orientated approach here, by allocating liability according to commercially accepted norms.

2.2.5 The position is rather different where a party seeks to enforce a positive contractual term in a contract binding on the defendant, to which the plaintiff is not privy. Here the privity rule would prevent a right of action as in SIMAAN GENERAL CONTRACTING v PILKINGTON (1988) **(10)**, although we arguably still have a contractual nexus. The inconsistency of this approach with the concept of 'vicarious immunity', has already been noted. **(11)** A similar situation occurred in the case of LEIGH & SILLAVAN LTD v ALIAKMON SHIPPING CO LTD (THE ALIAKMON) (1985) **(12)**. Here the contractual nexus was seen as providing the opportunity for an alternative contractual remedy; and as the plaintiff had failed to take this, the court denied them a tortious remedy.

2.2.6 Nevertheless, it is clear that the existence of a contractual nexus will not always negate liability in tort. The crucial issue here seems to be the ability of the plaintiff to avail himself of any contractual remedy. Here the main criteria are likely to be the knowledge and bargaining power of the relevant parties. This is recognised by Stapleton in her article on the duty of care where she states;

> '...If a consistent attitude were to be adopted by courts in examining in every case what the plaintiff could reasonably have done to protect itself, we would find that a substantial differential would emerge in the protection available in tort (and in terms implied by law) between plaintiffs who were ordinary private citizens and commercial plaintiffs with substantial bargaining power'. **(13)**

2.2.7 This argues that we have a bifurcated approach to legal liability, as regards the positive enforcement of a duty of care in a contract to which a party is not privy. This can be seen in the very different approach taken in THE ALIAKMON and the case of SMITH v BUSH (1989) **(14)**. In both cases, the plaintiff sought to take a tortious action for breach of a duty of care which was expressly or impliedly stated in a contract to which they were not privy. In THE ALIAKMON, the tortious liability was negated because it was possible for the plaintiff to arrange alternative contractual protection. However, in SMITH v BUSH, which involved the purchase of a house by a non commercial party, their Lordships saw the plaintiff as effectively unable to secure that alternative protection. This point was made by Lord Templeman where he stated;

> '...In considering whether the exclusion clause may be relied on in each case, the general pattern of house purchases and the extent of the work and liability accepted by the valuer must be borne in mind....The building society, which is anxious to attract borrowers, and the purchaser who has no money to waste on valuation fees, do not encourage or pay for detailed surveys' **(15)**

2.2.8 The case of THE ALIAKMON was similar to SMITH v BUSH, in so far as the party who could take action suffered no loss, whilst the party who suffered the loss had no contractual claim. A similar situation existed in the case of WHITE v JONES (1995), **(16)** where the plaintiffs were beneficiaries of a will which the defendant solicitors had negligently failed to draw up in time, thereby depriving them of their inheritance. In all three cases, the privity rule prevented an action in contract, and the plaintiff turned to tort. This remedy was denied in the case of THE ALIAKMON, but not in the subsequent cases. It appears that the ability of the party to secure alternative protection was seen as a key factor here, and I would argue that the courts are adopting an efficiency orientated approach as regards the commercial party in THE ALIAKMON, but a socially orientated approach as regards the non commercial parties in the other cases. This means that the courts are taking into consideration the bargaining power of the two parties, when deciding whether there should be legal liability in tort.

2.2.9 There is now pressure to reform this whole area of law, and this is reflected in the final report of the Law Commission on the doctrine of privity, entitled 'Privity of Contract: Contracts for the benefit of third parties **(17)**. The suggested reforms of the privity rule will seek to remove some of the present restrictions, and to allow a limited right of third parties to enforce contracts made for their benefit. It is proposed that third parties should have the right to enforce contracts in one of the two following situations; either where there is an express term to that effect, or where the contract purports to confer a benefit on third parties, and there is nothing to suggest that there was no such intention. The presumption of third party rights in the second situation is rebuttable by the contracting parties. In both cases, it is necessary that the third party is identified, either as a named individual, or as part of a class of potential beneficiaries.

2.2.10 This reform is based on protecting the 'reasonable expectations' or 'legitimate expectations' of the contracting parties, as well as their intentions. However, to some extent, these two objectives are in conflict, and this is reflected in some of the problems of the proposed reforms, as identified by Adams, Beyleveld and Beatson in their recent article **(18)**. They argue that the intentions of the contracting parties are given too great a priority over what they refer to as the 'legitimate expectations' of the third party. This can be seen in the fact that the contracting parties will be able to exclude the rights of the third party to enforce, even though the whole aim of the contract was to create a benefit for that party, which is of no value unless it is enforceable. In addition, the contracting parties will be able to rely on any clauses restricting or excluding liability, without being subject to the requirements of the UNFAIR CONTRACT TERMS ACT 1977, in respect of a contractual claim **(19)**. Finally, it is noted that the proposals for reform will not apply to situations like WHITE v JONES where there is a disappointed beneficiary, as the Law Commission states that this is does not fall within the two situations outlined above.

2.2.11 As we can see, the issue of privity has not been fully dealt with, and it seems that there will still be situations where the plaintiff will be forced to turn to the tortious remedy. The Law Commission has not based liability upon 'reasonable expectation' in all cases, but has allowed the traditional concept of contractual intention to defeat such ends. Yet we could argue that the contractual intentions of the contracting parties should really be based on reasonable expectation, and as such the dichotomy between the two approaches can be seen as illusory. Nevertheless, despite this continuing conflict, it is clear that the doctrine of privity has already been considerably eroded in English Law, and will be largely overridden if the above reforms are implemented.

2.3 Consideration

2.3.1 A key defining element of contractual liability, as opposed to tortious liability, is that it is based upon the concept of a reciprocal agreement. This means that both parties must provide something in return for what the other party provides or promises to provide; an idea represented by the doctrine of consideration. However, it is now clear that the doctrine of consideration is under attack as a result of recent judicial decisions.

2.3.2 The leading case here is WILLIAMS v ROFFEY BROTHERS (1990) **(20)**, where contractual liability was seen as based on concepts of fairness and commercial realities, rather than a rigid attachment to the doctrine of consideration. Although the court believed it was discovering consideration, in the readiness of the plaintiff to continue the contract, in reality it was creating a liability based on fairness, reasonableness and commercial utility **(21)**. This approach can be seen as similar to the doctrine of promissory estoppel, as first developed in CENTRAL LONDON PROPERTY v HIGH TREES HOUSE (1947) **(22)**. Even though in WILLIAMS v ROFFEY, the court said that it did not base its decision on the doctrine of promissory estoppel **(23)**, in both cases liability seems to be based upon reliance on a promise rather than reciprocal exchange. As such, this bears close resemblance to the basis of tortious liability, especially liability for negligence.

2.3.3 The issue of consideration has recently been discussed in the case of Re SELECTMOVE (1995) **(24)**. Here the courts refused to enforce an agreement between the appellant company and the Inland Revenue, on the grounds that a promise to pay an existing sum was not good consideration, thus affirming the principle in FOAKES v BEER (1884) **(25)**. This decision may be seen as affirming the classical theory of consideration, but in effect, the decision was reached because the courts refused to allow the operation of the doctrine of promissory estoppel, on the grounds that the appellant company had behaved in an inequitable manner. In this case, they had failed to honour their promises to pay Inland Revenue the tax and national insurance payments as they fell due, as part of the new agreement. It is for this reason, that Gibson LJ was able to state at page 539;

> '...it was not inequitable or unfair for the Crown ...to demand payment of all the arrears'

2.3.4 As such, the decision in Re SELECTMOVE, can be seen as similar to WILLIAMS v ROFFEY, with the deciding factor being the idea of fairness. In WILLIAMS v ROFFEY, the argument of lack of reciprocity was also negated by the fact that the courts believed that this would be unfair to the plaintiffs, as per Russell LJ;

> '... Can the defendants now escape liability on the ground that the plaintiff undertook to do no more than he had originally contracted to do....it would certainly be unconscionable if this were to be their legal entitlement' **(26)**

2.3.5 In effect, it can be argued, that liability in contract is now based more on the idea of reasonable reliance, rather than the traditional concept of reciprocity. This allows the courts to impose their own idea of when liability is due, instead of looking to the formal actions of the contracting parties. Similarly, the development of the duty of good faith in pre contractual negotiations, as seen in PITT v PHH ASSETT MANAGEMENT LTD (1993) **(27)**, can also be seen as based on reasonable reliance, rather than traditional contract law concepts of consideration. **(28)**

2.3.6 In all these cases, I would argue that the courts are taking an efficiency orientated approach, and reflecting the attitudes of commercial reality in what are purely business contracts. This involves a rejection of the more traditional concepts of contract law, in place of seeking to determine the real intentions of the contracting parties; a point made by Russell LJ in WILLIAMS v ROFFEY BROTHERS (1990);

> '...Consideration there must still be but in my judgement the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intentions of the parties'. **(29)**

It is clear here that the intention of the parties is to be determined by commercial realities, rather than a search for a specific consideration as defined by traditional contract law.

2.4 Strict Liability

2.4.1 The final aspect of contract law liability, which I wish to consider here, is the idea that it is based on the free will of the contracting parties, and so requires strict liability in the terms of the contract. I would argue that this idea is incorrect on two counts; firstly because the courts decide whether a contract exists at all, and secondly because they often determine the terms upon which it is made.

2.4.2 The courts will sometimes decide, not only whether there is an agreement in the first place, but also what terms it is on. In this respect, they will often be in conflict with the opinion of at least one of the parties. This can be seen in the approach taken by the courts, in the classic case of BUTLER V EX CELLO CORPORATION (1979) **(30)**. Here the courts decided that there was an agreement, and that it was on the buyer's terms, even though these terms were clearly not agreed to by the seller. The courts here preferred objective certainty, instead of seeking to ensure that there was an actual meeting of minds. It is difficult to see how this decision can be based upon a consensus of will.

2.4.3. The courts determine the terms of the contract in various ways. Sometimes they will imply terms into contracts, as in the case of LIVERPOOL CITY COUNCIL v IRWIN (1976) **(31)**, where the courts intervened by implying in terms which imposed extra liability on the Council. Alternatively, the courts have rewritten contracts, by striking down unreasonable clauses as being in restraint of trade, a tactic used in SCHROEDER v MACAULEY (1974) **(32)**. The courts have often taken similar action, on the grounds of incapacity, mistake, duress or undue influence **(33)**. Finally, they have refused to enforce onerous terms, on the grounds that they have not been brought to the attention of the other party, as in the case of INTERFOTO v STILETTO VISUAL PRODUCTS (1988) **(34)**.

2.4.4 It is argued that the court is intervening here, to ensure that the contract is clearly understood, or simply implying in terms on the basis of necessity. However, I think it is quite clear that the underlying reason is that the courts think the contract will otherwise be unreasonable. This was acknowledged in INTERFOTO by Bingham LJ where he states at page 353;

> '...The well-known cases on sufficiency of notice are in my view properly to be read in this context. At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual or stringent nature'.

2.4.5 The position has been further developed by the introduction of statutory implied terms relating to the provision of services, in the SUPPLY OF GOODS AND SERVICES ACT 1982. Such services are to be carried out in a with 'reasonable' care and skill **(35)**, and this requirement cannot be excluded or limited by an express term to the contrary, as it is subject to the UNFAIR CONTRACT TERMS ACT 1977.

2.4.6 What we can see here is that the concept of reasonableness underpins the nature of contractual liability, at least as regards contracts for services. This is very similar to the concept of 'reasonable foreseeability', which underpins the duty of care in the tort of negligence. In reality, the concept of 'reasonableness' allows the courts to decide cases on policy grounds; and here I would argue that the courts will tend to base their decision on either an efficiency orientated approach, or a socially orientated approach.

2.4.7 In deciding what is 'reasonable', the courts will take into consideration such factors as the knowledge of the parties, their bargaining power, and the ability of the parties to secure alternative contractual cover. In INTERFOTO, the key issue was the lack of knowledge of the party affected; whilst in SCHROEDER it was the lack of bargaining power of that party. In SCHROEDER, the courts tended towards a socially orientated approach, and it has been argued that this ignored the commercial realities of the situation **(36)**. However, in the case of INTERFOTO, it could be argued that the result was one which corresponds to the reasonable expectations of business parties, and as such, this could be seen as an efficiency orientated approach. What is interesting is how this difference in approach is seen again in cases of negligence involving 'economic loss'.

3. The Scope of the Liability

3.1 Introduction

3.1.1 Here we need to consider the relationship between the extent of contract and tort. This is important in contracts for services, because the provider of the service is usually under a duty of care to perform the service with reasonable care and skill. As such, the nature of the liability is the same as in the tort of negligence; and it will be of interest to see the extent to which a contract can vary this duty, so that it is different from the tortious duty.

3.1.2 In this respect, I wish to focus on three key areas which determine the scope of the liability in contract and tort, namely; concurrent liability, exemption clauses and contributory negligence.

3.2 Concurrent Liability

3.2.1 As concurrent liability is now accepted in contract and tort, the key issue is whether contractual liability and tortious liability can limit each others extent. The traditional view is that contractual terms will take priority, as the contracting parties have the right to define the extent of their own liability **(37)**. However, some academics think that the liability in tort should not be so restricted, but should be completely independent of the contractual duty **(38)**.

3.2.2 Indeed, it is now argued that the tortious duty of care may well exceed the contractual duty of care, where the contractual duty is framed in respect of more limited liability. This can be seen in the case of HOLT v PAYNE SKILLINGTON (1995) **(39)**, where the Court of Appeal agreed that they could envisage a situation in which the duty of care in tort and contract was concurrent, but not coextensive. In the words of Hirst LJ at page 702;

> '...In their Lordships' opinion there was no reason in principle why a Hedley Byrne type of duty of care...could not arise in an overall set of circumstances where, by reference to certain limited aspects of those circumstances, the same parties entered into a contractual relationship involving more limited obligations than those imposed by the duty of care in tort'.

3.2.3 It can be argued that the extent of the contractual duty does not in itself define the tortious liability, and that instead the two areas of liability are effectively independent of each other.

3.3 Exemption Clauses

3.3.1 Exemption clauses can be used to define the limits of the legal liability, and so it would seem that the contracting parties could use such clauses to limit the extent of the tortious duty of care. However, the UNFAIR CONTRACT TERMS ACT 1977 requires that such clauses must be 'reasonable', if they are to be used in a consumer contract or a standard form contract, otherwise the clause will be invalid as per Section 3(2). In most cases, a commercial contract will be on a standard form, and so this means that almost all contracts will be covered by this requirement. The definition of 'reasonableness' is further developed in Section 11 and Schedule 2 of the Act. Section 11 refers to the ability of the parties to meet their liability, and their ability to arrange insurance cover; whilst the criteria in Schedule 2 refer to the knowledge of the parties and their bargaining power.

3.3.2 The approach of the courts can be seen in leading cases such as GEORGE MITCHELL v FINNEY LOCK SEEDS (1983) **(40)** and the more recent CITY OF ST ALBANS DC v INTERNATIONAL COMPUTERS (1994) **(41)**. In both cases, the courts found that the exemption clauses were unreasonable, because the party relying on them was in a better position to prevent the damage occurring, and also in a better position to arrange adequate insurance to deal with it. Effectively the courts were taking into consideration the bargaining power of the contracting parties, as this determined the terms on which the contract was made, a point made by Lord Bridge in GEORGE MITCHELL v FINNEY LOCK SEEDS at page 744;

> 'The question of relative bargaining strength...and of the opportunity to buy seeds without a limitation of the seedsman's liability...were interrelated'.

3.3.3 It is important to note that the same controls exist over disclaimers of liability for negligence, except that Schedule 2 does not apply. However, in the case of SMITH v BUSH (1990), Lord Griffiths laid down his own criteria in place of Schedule 2, and these have become the accepted tests of reasonableness for tortious liability. The most significant aspect of them is that they are very similar to those in Schedule 2, and in particular refer to the bargaining power of the parties. In effect, the key criteria in defining reasonableness are the same in contract as in tort. It seems that in both types of actions, they will take the same bifurcated approach. In cases involving weaker parties, the courts will tend to take a socially orientated approach; but where the parties are of equal bargaining power, the courts are more likely to take an efficiency orientated approach. We can see an example of the courts taking a socially orientated approach, in the case of SMITH v BUSH, where the court struck down the exemption clause because they felt it was unfair on the weaker party.

3.3.4 Any attempt to define the scope of tortious liability in a contractual term, will be seen as a form of exemption clause. As such it will be subject to the regime of the UNFAIR CONTRACT TERMS ACT 1977, as outlined above. As a result, any term limiting or excluding liability in the duty of care, whether contractual or tortious, must satisfy the requirement of 'reasonableness', in almost all cases. As this concept underlies the duty of care in the tort of negligence, then it would seem that contract terms cannot limit the tortious liability but at best will be coterminous with it. The idea that the contract can define the duty of care in advance, so that there are no exemption clauses to be subject to the UNFAIR CONTRACT TERMS ACT 1977, is an act of sophistry ruled out of order in PHILLIPS v HYLAND (1987) **(42)**, as reaffirmed in SMITH v BUSH (1989).

3.4 Contributory Negligence

3.4.1 A further intrusion of tortious principles into the domain of contract can be seen in the area of contributory negligence. This has long been accepted as a factor limiting the liability of the defendant in tort, with the LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT 1945, allowing courts to apportion damages between the defendant and the plaintiff. In contract, it is possible to achieve similar results under the doctrine of mitigation of losses, but this only comes into effect after the breach, and does not cover any prior negligence by the plaintiff.

3.4.2 However, it now appears that contributory negligence is accepted as a defence to contractual liability, where it is based upon a duty of care similar to that in tort. This is because the statute refers to 'fault' in Section 1, and this is later defined as including negligence in Section 4. This position was affirmed in the case of FORSKRINGSAKTIESELSKAPET v BUTCHER (1988) **(43)** where it was held that the LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT 1945 would apply to such liability even though the claim was brought in contract, as the contractual duty was paralleled by that in tort. This view was recently confirmed in BARCLAYS BANK v FAIRCLOUGH BUILDING (1995) **(44)**, where the court held that contributory negligence would apply to contractual duties analogous to the tortious duty of care, but not to strict contractual duties, such as executing the work in an 'expeditious, efficient and workmanlike manner'.

3.4.3 The role of contributory negligence in contract has now been considered by the Law Commission, in their consultation paper entitled 'Contributory Negligence as a defence in Contract'**(45)**. This took the view that liability for strict contractual duties should not be affected, but that contributory negligence should apply where there was a duty of reasonable care. In this way, the Law Commission recognised that the contractual and tortious duty of care were effectively the same;

> '...there is a clear similarity in substance between an action for breach of a contractual duty of care and an action for breach of a tortious duty of reasonable care. Whether a duty of reasonable care is classified as tortious or contractual does not affect the content of that duty.' **(46)**

3.4.4 I would argue that the provision of a service requires that there be an underlying duty of reasonable care, which means that liability is really fault based. Only where the service is defined specifically, can we really argue for a strict liability **(47)**. Therefore, it is essential that contributory negligence should be available, to apportion losses in both contract and tort, as regards contracts for services. This effectively erodes another of the key divides between contract and tort.

4. The Extent of the Remedy

4.1 Introduction

4.1.1 When discussing the extent of the remedy, we need to consider such factors as the measure of damages, the type of damages claimable, and the impact of limitation periods. In contract, the extent of contractual liability is defined by the parties themselves, and relates to the consequences of the breach of contract. As a result, the remedy by way of damages should cover expectation loss as well as reliance loss, but they will not include non-pecuniary losses. These losses should be capable of limitation or exclusion by express term of the contract, so long as this is reasonable under THE UNFAIR CONTRACT TERMS ACT 1977. Moreover, the loss should arise from the time of the breach of the contract, and so any limitation period will run from that date.

4.1.2 In tort, the extent of the liability is defined by law, and will be related to the injury caused. As a result, the remedy claimable should compensate for the injury or loss and will not usually include expectation losses, but should include non pecuniary loss. Moreover, as the injury is the determining factor in tortious liability, then the limitation period will run from the time of the injury. We should note here, that in tort the term 'economic loss' is used to denote 'expectation loss'.

4.2 The Measure of Damages

4.2.1 A key problem here is that it is difficult to distinguish between the different types of loss. The traditional rule is that the damages available in tort cover direct physical loss and consequential economic loss, but do not cover pure economic loss as in SPARTAN STEEL & ALLOYS LTD v MARTIN & CO LTD (1973) **(48)**; yet in reality, this is a difficult distinction to make **(49)**. In recent cases, this distinction has been questioned, as per Saville LJ in MARC RICH & CO AG v BISHOP ROCK MARINE CO LTD (1994), where he states;

> '...In recent years there have been several cases which deal with situations where no physical damage has resulted from the carelessness in question but where the claimant has sustained financial loss or expense. To my mind the law draws no fundamental difference between such cases and those where there is damage to persons or property' **(50)**

4.2.2 If we consider the area of tortious liability, we could argue that the plaintiff will be claiming pure economic loss when he claims loss of earnings, especially where the plaintiff is self-employed. It is essentially very difficult to draw a line between consequential economic loss and pure economic loss, and it is interesting that the whole topic was ignored in SMITH v BUSH (1989). The position is complicated by the fact that it has long been possible to claim economic loss for a negligent misstatement, following HEDLEY BYRNE v HELLER **(51)**. It is very difficult to draw a distinction between a negligent misstatement, and negligent action, especially when the statement is effectively based on a series of preceding actions, such as in HENDERSON v MERRETT (1994) or SMITH v BUSH (1990). Indeed, the illogicality of this distinction has already been recognised by academics such as Markesinis and Deakin **(52)**.

4.2.3 In reality, the courts have tended to allow economic loss in tort, where they believe that it is reasonable to do so. In coming to these decisions, they are motivated by a number of factors. These may reflect an efficiency orientated approach, or a more socially orientated approach, depending upon the circumstances.

4.2.4 The recent case of WHITE v JONES (1995), can be seen as being based on two key issues. The first one was the inability of the plaintiff to obtain legal redress in contract, because of the restrictions of the privity rule. According to Lord Browne-Wilkinson;

> '...To my mind it would be unacceptable if, because of some technical rules of law, the wishes and expectations of beneficiaries generally could be defeated by the negligent action of solicitors without there being any redress' **(53)**

4.2.5 The second issue was the belief that there was a need for a negligent solicitor to be liable for his failings. This is referred to by Lord Goff where he states;

> '...I respectfully agree with Nicholls VC when he said that the court will have to fashion "an effective remedy for the solicitor's breach of his professional duty to his client" in such a way as to repair the injustice to the disappointed beneficiary'. **(54)**

4.2.6 These two reasons are based on various underlying approaches, but both of them seek to uphold the reasonable expectations of the parties involved. The requirement that the solicitor should be liable reflects the view that providers of a service should be responsible for their actions, and this fits into the efficiency orientated approach, as the failure to penalise poor performance would undermine the effectiveness of the whole profession. The need to provide a remedy for the plaintiff is arguably based on the socially orientated approach, as such parties will often be of limited means, and cannot be expected to make alternative contractual provisions.

4.2.7 We can see the socially orientated approach, taking the key role in the case of SMITH v BUSH (1989) **(55)**. Here the courts were influenced by the fact that the plaintiff was of limited means, and not in a very good bargaining position, compared to the defendants, the latter of whom were in a much better position to take out insurance cover. This is referred to by Lord Templeman at page 528 where he states;

> '...The public are exhorted to purchase their homes and cannot find houses to rent. A typical London suburban house, constructed in the 1930's for less than £1000 is now bought for more than £150,000 with money largely borrowed at high rates of interest and repayable over a period of a quarter of a century. In these circumstances it is not fair and reasonable for building societies and valuers to agree together to impose on purchasers the risk of loss arising as a result of incompetence or carelessness on the part of the valuers'.

4.2.8 Later in the same case, Lord Griffiths makes it clear that he would not take the same approach if the plaintiff was in a different bargaining position, so that imposing a duty of care might be inappropriate for...

> 'different types of property...such as industrial property, large blocks of flats or very expensive houses'. **(56)**

I would argue that the courts are taking the socially orientated approach here, and relating the legal liability to the bargaining position of the plaintiff.

4.2.9 If we consider those case where the plaintiff is in a stronger bargaining position, the courts have tended to deny liability. In CAPARO v DICKMAN (1990) **(57)**, the House of Lords based its decision on the argument, that the statutory purpose of the audit meant that the auditor was liable to the shareholders as shareholders, and not as potential investors. This line of reasoning is hard to follow, and has been subject to criticism elsewhere **(58)**, as it is difficult to distinguish between the two roles of a shareholder.

4.2.10 In CAPARO, the court did not explicitly state that their decision was based upon the bargaining power of the two parties. However, this reasoning is alluded to in various remarks, the most notable of which, is that of Lord Oliver at page 593, where he states;

> '...It is not, however, suggested that the auditors, in certifying the accounts, or Parliament, in providing for such certification, did so for the purpose of assisting those who might be minded to profit from dealings in the company's shares'.

This view, suggests that the court should not be too ready to intervene on behalf of economically powerful parties, such as investment companies, as the statutory protection was not designed to protect them in the case of speculative ventures. Instead, such companies should be prepared to secure their own protection by contractual means, such as arranging adequate insurance cover.

4.2.11 This approach was taken by Hoffmann J when hearing the case of MORGAN CRUCIBLE CO LTD v HILL SAMUEL BANK Ltd at first instance. He made the point that the court should take into consideration the relative economic power of the parties involved. He compared the decisions arrived at in SMITH v BUSH and CAPARO v DICKMAN where he stated;

> '...the typical plaintiff in a SMITH v BUSH type case is a person of modest means and making the most expensive purchase of his or her life. He is very unlikely to be insured against inherent defects. The surveyor can protect himself relatively easily by insurance. The take-over bidder, on the other hand, is an entrepreneur taking high risks for high rewards and while some accountants may be able to take out sufficient insurance, others may not. Furthermore, the take-over bidder is a limited liability company and the accountants are individuals for whom, save so far as they are covered by insurance, liability would mean personal ruin' **(59)**

It is clear here that Hoffmann J sees the bargaining power of the two parties as a key aspect and he believes that the courts should not ignore the 'economic realities' of the situation. For this reason he feels that he courts should take a different line depending upon the nature of the parties involved.

4.2.12 It should be pointed out that this view was not shared by the Court of Appeal when they considered MORGAN CRUCIBLE v HILL SAMUEL (1991) **(60)**. In particular Slade LJ argued that the court should not make a decision by reference to 'economic considerations' **(61)**, and then went on to allow the plaintiff to pursue his case despite the fact that he was of a similar bargaining power to the plaintiff in CAPARO. Similarly, the decision in MURPHY v BRENTWOOD (1990) **(62)**, still stands out as a clear example of the weaker party being denied a remedy, whilst the party who was best able to secure insurance cover, was exonerated from liability. However, I would argue that this decision is now in need of re-evaluation, in the light of the decisions in SMITH v BUSH. Also, we should note the recent cases, involving claims by Lloyd's names against their investment advisers, such as HENDERSON v MERRETT (1994) **(63)**. Here the court was influenced by the fact that the plaintiffs were usually persons of modest means, whilst the defendants were in a better position to provide insurance cover.

4.2.13 A further area of confusion as regards tortious damages, can be seen in the cases involving claims for economic loss, arising from a fall in the market. This is effectively pure economic loss, and has been claimed in cases of negligent misstatement by valuers. In BANQUE BRUXELLES v EAGLE STAR (1995) **(64)**, the court decided that the valuer would be liable for all the consequential damages, including the fall in the market price; it was clear that the plaintiff would not have entered the contract had the advice been correct. On appeal, the House of Lords reversed the decision in the renamed case of SOUTH AUSTRALIA ASSETS v YORK MONTAGUE (1996) **(65)**, and found the valuers liable only for the difference between what they did lend and what they would have lent, and not the losses due to the fall in the market. As such, the scope of the liability has been narrowed, but it still appears analogous to contract, in so far as it still relates to the loss made by entering into the contract **(66)**.

4.2.14 The key factor underlying these decisions is the concept of reasonable reliance. It is not therefore surprising to find that the courts will take a different view of the extent of that reliance, according to the economic bargaining power of the plaintiff. A party of limited means will often be totally dependent on the advice given, or service rendered, by the other party, and quite unable to provide alternative means of protection. This was recognised by Lord Oliver in CAPARO where he referred to the reason for the decision in SMITH v BUSH. According to Lord Oliver;

> '...the adviser knows or ought to know that (the advice) will be relied on by a particular person or class of persons in connection with that transaction'. **(67)**

4.2.15 The extent to which a person is dependent on advice given, relates to their ability to obtain alternative sources of advice, and to secure alternative protection, usually by means of insurance. In cases like SMITH v BUSH, the dependence is greater, because neither of these approaches are really possible. This is acknowledged by Lord Griffiths in SMITH v BUSH, where talking about proximity, when he states;

> '...The necessary proximity arises from the surveyor's knowledge that the overwhelming probability is that the purchaser will rely on his valuation, the evidence was that surveyors knew that approximately 90% of purchasers did so...'. **(68)**

In contrast, this position of total reliance is absent from the CAPARO case, where the court acknowledged that the defendants would not expect the plaintiffs to rely on their information alone. This is implied in the words of Lord Oliver as mentioned above. In CAPARO, the plaintiff was a corporate investor, and could not expect the courts to compensate him when his investment went sour. In the same way, in the BANQUE BRUXELLES case, the courts would not allow the plaintiff to recover damages to cover the fall in the market, as this was the kind of risk an investor would expect to take, and should have provided cover by way of insurance. However, where the investor was an individual of limited means, the courts have been willing to take a different view, as they did with the cases involving Lloyds investors **(69)**, or arguably in SMITH v BUSH.

4.2.16 The issue of reliance leads to the courts taking a dual approach, dependent on the bargaining position of the plaintiff. Where the plaintiff has sufficient knowledge, and the ability to secure alternative protection, the courts tend to take an efficiency orientated approach, and allow the burden to fall on that party. This is the position taken in shipping cases such as THE ALIAKMON **(70)** and MARC RICH v BISHOP ROCK MARINE **(71)**, as well as the corporate investor cases outlined above. However, where the plaintiff is in a weaker position, the courts tend to find liability for the plaintiff. This can be seen in the house purchasing case of SMITH v BUSH, as well as the individual investor cases such as HENDERSON v MERRETT. In effect, the extent of the damages has more to do with the type of plaintiff, rather than the type of action. This is a view supported by academics, such as Markesinis and Deakin, as well as more recently Dugdale and Stapleton **(72)**

4.3 Non-Pecuniary Loss

4.3.1 A further issue regarding the extent of the contractual remedy, is the question of non-pecuniary loss, such as damages for inconvenience and mental stress. The traditional view is that such losses are not available in contract, as established in the case of ADDIS v GRAMOPHONE CO LTD (1909) **(73).** However, we can see evidence of a relaxation of this position, in the so-called 'holiday', cases, such as JARVIS v SWAN TOURS (1973) **(74)** and JACKSON v HORIZON HOLIDAYS (1975) **(75)**, whilst damages were allowed for mental distress in the purely commercial case of PERRY v SIDNEY PHILLIPS & SON (1982) **(76)**.

4.3.2 This trend was sharply criticised in WOODAR v WIMPEY LTD (1980) **(77)**, and BLISS v SOUTH EAST THAMES RHA (1985) **(78)**. In the latter case, Dillon LJ, said that such damages should only be awarded in contracts where the main purpose was to provide peace of mind. In HAYES v JAMES & CHARLES DODD (A FIRM) (1990) **(79)** Staughton J reiterated that view, when he stated;

> '...it should not, in my judgement, include any case where the object of the contract was not comfort and pleasure, or the relief of discomfort, but simply carrying on a commercial activity with a view to profit'. **(80)**

4.3.3 One interpretation of the Staughton view is that we need to distinguish between commercial and non commercial contracts, and this can be a difficult task **(81)**. However, we could argue that we should take a different approach, depending on the purpose for which the party entered into the contract. Thus in a contract providing services for a non commercial party, the party obtaining those services could claim, but not the party providing them. This would seem to reflect the underlying views of Staughton J, and would mean that a bifurcated approach would be taken here; with the courts adopting a socially orientated approach in the first case, and an efficiency orientated approach in the second case.

4.4 Remoteness

4.4.1 The difference between the remoteness rule in contract and tort, has long been a source of confusion. Lords Scarman and Orr were unsure of the difference, in the case of PARSONS v UTTLEY INGHAM & CO LTD (1978) **(82)**. In the same case, Denning LJ, held that a different rule should operate in contract, depending upon whether the damage was physical or economic, with the tortious remoteness rule applying in the former case.

4.4.2 In recent cases, the courts have tried to emphasise the difference between the contractual and tortious rule, as for example in the remarks of Stuart Smith LJ, in BROWN v KMR SERVICES LTD (1995) **(83)**. However, it appears from other cases that the courts find real difficulty in establishing a difference. This was made clear by Lord Bingham MR, in BANQUE BRUXELLES LAMBERT v EAGLE STAR INSURANCE CO LTD, where he stated;

> '...Somewhat different language has been used to define the test (of remoteness of damages) in contract and tort but the essence of the test is the same in each case'. **(84)**

4.4.3 It would appear that there is still uncertainty here, but the difficulty in distinguishing between the contractual and the tortious rule on remoteness is evidence that the rules are gradually being assimilated.

4.5 Limitation Periods

4.5.1 It is in the area of limitation periods, where we can see the most enduring distinction between contract and tort. In contract, the limitation period runs for six years commencing from the date of the breach of contract **(85)**. The period for tort is also six years, but it commences from the date at which the damage occurs, or three years from when the plaintiff knew or should have known sufficient facts to commence proceedings **(86)**.

4.5.2 In the case of a latent defect, in a person or a building, the contractual limitation period may well have expired. However, if the claim can be brought in tort, then the period will only commence when the plaintiff is aware of the damage, and so it is unlikely that the claim will be time barred. It is this factor, which has been the reason for many claims brought in tort, where a contract exists, such as in LANCASHIRE AND CHESHIRE v HOWARD & SEDDON and HENDERSON v MERRETT (1994) **(87)**. Indeed, it is this distinction between contract and tort, which is the reason for cases being brought in the tort of negligence to recover loss of profits. As such, the existence of the different limitation rules, has a destabilising effect on the relationship between contract and tort, as it leads to attempts to obtain contract type remedies, by way of tortious actions.

5. Conclusion

5.1 We can see that the developments in the law have tended to erode the traditional distinction between contract and the tort of negligence, as regards the nature and scope of the liability, and the extent of the remedy. It is important to note how the interrelationship between these areas has affected the contract/tort divide. For example, the existence of a relatively strict privity rule in English Law, has led to pressure on the courts to allow economic loss in tort, for both negligent statements and negligent actions **(88)**. In effect, where the divide is strong in one area, it leads to a breach being made in the other.

5.2 Overall, it can be seen that we now have considerable overlap between the two areas, based on several factors. As regards the nature of the liability, we can see how the privity rule has been undermined by the concept of 'vicarious immunity', whilst consideration is being replaced by the tortious based idea of reasonable reliance. The nature of liability is seen as being based on objective criteria of 'reasonableness', rather than strictly related to the terms agreed between two parties; in effect, a liability similar to that in tort. It is for this reason that contributory negligence is now beginning to limit contractual liability. Finally, the confusion over defining the measure of loss has led to the erosion of the difference between contractual and tortious remedies.

5.3 I would argue that the courts are now more concerned with the nature of the relationship between the two parties, and their relative bargaining power, rather than the nature of the action commenced. Where the parties are of similar bargaining power, the tendency is to see the relationship as 'commercial', and to take an efficiency orientated approach, putting the liability onto the party who is in the best position to arrange alternative remedies. Where the parties are more unequal, the tendency is to take a socially orientated approach, and put the burden on the stronger party.

5.4 In the next chapter, I would like to analyse the approach of the courts to contracts of service, where the two parties are usually in an unequal relationship. In this respect, I wish to compare their approach with the approach taken with contracts for services.

Notes

1. (1994) 3 All ER 506

2. Ibid at pp 507-8

3. See the remarks of Lord Wilberforce in WOODAR v WIMPEY (1980) 1 All ER 571 and also Steyn LJ in DARLINGTON v WILTSHIER NORTHERN LTD (1995) 1 WLR 68

4. Markesinis, 'An Expanding Tort Law - the Price of a Rigid Contract Law' (1987) LQR 354; Adams and Brownsword, 'Privity and the Concept of a Network Contract' (1990) 10 Legal Studies 12

5. (1985) 2 All ER 1077

6. (1989) 1 All ER 1180

7. Ibid (note 5 above) at 1086

8. Adams and Brownsword op.cit.

9. Markesinis, 'Eternal and Troublesome Triangles' (1990) 106 LQR 556

10. (1988) 1 All ER 791

11. Brownsword, 'Contractual Settings, Structures and Strictures' (1989) 133 Sol J. 682

12. (1986) 2 All ER 145

13. Stapleton, 'Duty of Care: Peripheral Duties and Alternative Opportunities for Deterrence' (1995) LQR Vol 111 pp 301

14. (1989) 2 All ER 514

15. Ibid at 524

16. (1995) 1 All ER 691

17. Law Commission Report No.242 (July 1996)

18. See Adams, Beyleveld and Brownsword, 'Privity of Contract - The Benefits and Burdens of Law Reform' (1997) 60 MLR 238

19. Law Commission report op.cit. para 13.12

20. (1990) 1 All ER 512

21. Adams & Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 MLR 536

22. (1947) KB 130

23. See Glidewell LJ in WILLIAMS v ROFFEY BROTHERS at 520

24. (1995) 2 All ER 531

25. (1881-5) All ER Rep 106

26. (1990) 1 All ER 512 at 523

27. (1993) 4 All ER 961

28. Collins, 'The Transformation Thesis and The Ascription of Contractual Responsibility' in Perspectives of Critical Contract Law edited by Wilhelmsson (1993)

29. Op cit at 524

30. (1979) 1 All ER 965

31. (1976) 2 All ER 39

32. (1974) 3 All ER 616

33. For examples of undue influence see BARCLAYS BANK v O'BRIEN (1993) 4 All ER 417 or NATIONAL WESTMINSTER BANK v MORGAN (1985) 1 ALL ER 821

34. (1988) 1 All ER 348

35. Section 13

36. See Tiplady, 'Judicial Control of Contractual Unfairness' (1983) 46 MLR 601

37. Markesinis, 'An Expanding Tort law' op.cit.

38. French, 'The Contract/Tort Dilemna' (1982) Otaga Law Review 237

39. Times Law Reports 22 December 1995 page 701

40. (1983) 2 All ER 737 (HL)

41. (1995) FSR 686 affirmed (1996) 4 All ER 481

42. (1987) 2 All ER 620

43. (1988) 2 ALL ER 43

44. (1995) 1 All ER 289

45. Law Commission Report No. 219 (December 1993) entitled 'Contributory Negligence as a Defence in Contract'

46. Ibid at para 4.7

47. See in particular Lord Edmund Davies in RAINERI v MILES (1981) AC 1050 at 1086

48. (1972) 3 ALL ER 557

49. Cooke R, 'An Impossible Distinction' (1991) LQR 46

50. (1994) 3 All ER 686 at 691

51. (1963) 2 All ER 575

52. Markesinis and Deakin, 'The Random Elements of their Lordships Infallible Judgement: An Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphys' (1992) 55 MLR 619

53. Op.cit (note 16 above) at page 718, also note Lord Goff at 702

54. Ibid at page 703

55. Op.cit. (note 14 above)

56. Ibid at page 532

57. (1990) 1 All ER 568

58. See Martin R, 'Professional Liability - What Price Caparo Now?' (1993) PN (9) (3) 119

59. (1990) 3 All ER 330 at 335

60. (1991) 1 All ER 148

61. Ibid at page 161

62. (1990) 2 All ER 908

63. (1994) 3 All ER 506

64. (1995) 2 All ER 769

65. (1996) 3 All ER 365

66. See Wilkinson, 'Negligent Valuation - the Proper Measure of Damages (1996) NLJ 1316

67. Op.cit. (note 57 above) at page 592

68. Op.cit. (note 14 above) at page 536

69. See here HENDERSON v MERRETT SYNDICATES LTD (1994) 3 All ER 506 and BROWN v KMR SERVICES LTD (1995) 4 All ER 598

70. (1986) 2 All ER 145

71. (1995) 3 All ER 307

72. See here Markesinis and Deakin op.cit. and Stapleton op.cit. as well as Dugdale, 'A Purposive Analysis of Professional Advice: Reflections on the BBL Decision' (1995) JBL 533 at 550

73. (1908-10) All ER Rep 1

74. (1973) 1 All ER 71

75. (1975) 3 All ER 92

76. (1982) 3 All ER 705

77. (1980) 1 All ER 571

78. (1985) IRLR 308

79. (1990) 2 All ER 815

80. Ibid at 824

81. Andrew Phang, 'Subjectivity, Objectivity and Policy - Contractual Damages in the House of Lords (1996) JBL 362 at 379

82. (1978) 1 All ER 525 as referred to by Cane in 'Contract ,Tort and Economic Loss' in The Law of Tort Edited by Furmston

83. (1995) 1 All ER 598 at 621

84. (1995) 2 All ER 769 at 841

85. Section 5 LIMITATION ACT 1980

86. Section 14A(4) LIMITATION ACT 1980 as amended by the LATENT DAMAGES ACT 1986

87. See LANCASHIRE & CHESHIRE ASSOCIATION OF BAPTIST CHURCHES INC v HOWARD AND SEDDON PARTNERSHIP (A FIRM) (1993) 3 ALL ER 467 and HENDERSON v MERRETT op.cit.

88. See Markesinis, 'An Expanding Tort Law' op.cit

Chapter 5

THE APPROACH OF THE COURTS IN THE UK

(2) CONTRACTS OF SERVICE

1. Introduction

1.1 Key factors of the relationship

1.1.1 When we deal with contracts of service, we are dealing with a significantly different situation from contracts for services, in a number of respects. Firstly, there is no problem in identifying the contract between the two parties and so the issues of privity and consideration are not usually a problem. Moreover we can see that there is a clear overlap between contractual and tortious liability in a number of key areas, such as the duty of care and the duty of confidentiality. Finally, we have a relationship in which one party is usually in a stronger economic bargaining position than the other, usually the employer. As a result, it is not surprising to find that the courts have tended to take the side of the employee in cases where they feel the employer is abusing his position of power.

1.2 Interrelationship of contractual and tortious duties

1.2.1 The interrelationship between contractual and tortious duties in the employment contract is the result of historical developments. As we have seen, in the early evolution of contract there was a confusion between tortious and contractual liability, especially in contracts for personal service. By the 18th century contract had become the main type of legal liability for employment relationships **(1)**, but the development of the defence of common employment made it very difficult for an employee to take legal action for injury sustained at work. As a result, the courts developed the parallel tortious liability in negligence under the personal duty of care of the employer for the employee. The main aspects of this duty were outlined in the leading case of WILSON & CLYDE COAL v ENGLISH **(2)**. This tortious liability was developed by the virtual disappearance of volenti in SMITH v BAKER **(3)** and the avoidance of the issue of contributory negligence.

1.3 Economic bargaining power of the parties

1.3.1 Another key aspect is the imbalance of economic bargaining power between the two contracting parties. Not only is the power usually in the hands of the employer, it is the employer who will invariably draw up the terms of the contract of employment, which will usually be standard terms applying to all employees of a certain grade. It is because of this that courts may be prepared to take a more socially orientated approach and to treat employees in the same way as consumers, in effect a protected category of contracting party. This can be seen in their willingness to disallow contractual terms which are seen as unfair on the weaker party.

1.4 Analytical framework

1.4.1 Again I wish to consider the contract for services with respect to three main areas; the nature of the liability, the scope of the liability and the type of remedy offered. In this way we can identify the similarities and differences between the contractual and tortious liability.

2. The Nature of the Liability

2.1 The Basis of Liability

2.1.1 The contract of service is based upon a reciprocal agreement but the terms included are often derived from the tort of negligence. This involves the duty of care to the employee, which is wider than merely a duty towards his safety, but has been widened in recent years to include an employee's economic well-being and a requirement to treat the employee reasonably as can be seen in cases such as UNITED BANK v AKHTAR (1989) **(4)**. This is balanced by corresponding duties on the employee of confidentiality and the duty to perform his job in a reasonable manner.

2.2 Type of liability

2.2.1 The issues of privity and consideration are not a problem here, so that the key issue we need to consider is whether the type of liability is strict or fault based. If it is fault based, then we are essentially founding liability on the concept of 'reasonableness', which is the basis of the tort of negligence, rather than the strict liability in traditional contract law.

2.2.2 The problem with contracts of service is that they are seen as limited by the personal attributes of the parties, and not the strict requirements that may be expected in the exchange of inanimate objects. The essence of this problem can be seen in the judicial debate in the seminal case of JOHNSTONE v BLOOMSBURY HA **(5)**. Here the Health Authority had a contract which allowed it to call on the plaintiff to work up to 88 hours a week on average if required. Of the three Court of Appeal judges who heard the case, one of them (Leggatt LJ) took the view that the term should be interpreted strictly, however unfair the result;

> '...It may indeed be scandalous that junior doctors should not be offered more civilised terms of service in our hospitals...(but) (t)hey do not constitute means by which those bound by current contracts can be enabled by the ingenuity of their lawyers to derogate from obligations freely assumed'. **(6)**

2.2.3 Legatt based his opinion to a large extent on an efficiency oriented approach. He believed it was necessary to uphold the express terms of the contract, because otherwise the employer would have to tailor his work requirements to the health of the individual doctor **(7)**. This would mean that the employer would not know how many hours he could require his employees to work, and this would inject a considerable level of uncertainty into the arrangement, which would be detrimental to the efficient operation of the business.

2.2.4 On the other hand, the other two judges (Browne-Wilkinson V-C and Stuart-Smith LJ) took the view that such terms had to be based on reasonableness. Browne-Wilkinson felt that the contractual right to call for overtime was subject to the requirement that the right was exercised reasonably, so as not to breach the duty of care;

> '...In my judgement, the authority's right to call for overtime...is not an absolute right but must be limited in some way. There is no technical legal reason why the authority's discretion to call for overtime should not be exercised in conformity with the normal implied duty to take reasonable care not to injure their employee's health. **(8)**'

This view was broadly supported by Stuart-Smith LJ in his judgement.

2.2.5 This alternative position is based on a socially oriented approach, which involves much greater concern for the well being of the individual employee, rather than the efficient operation of the business. The employee is seen as the weaker party because the employer has a monopoly power, and as such the employee is in need of the court's protection. This is clear from the comments of Stuart-Smith LJ in JOHNSTONE where he states;

> '...Any doctor who wishes to practice has to serve at least one year as a house officer in a hospital; the national health service (NHS) is effectively a monopoly employer. Is the aspiring doctor who has spent many years in training to this point to abandon his chosen profession because the employer may exercise its power to call upon him to work so many hours that his health is undermined? I fail to see why he should not approach the matter on the basis that the employer will only exercise that power consistently with its duty to have proper regard to his health and safety'. **(9)**

2.2.6 This conflict between strict and fault based liability essentially revolves around the way in which the duty of care is implied into the contract of service. In the case of contracts of employment, implied terms are seen as a 'necessary incident of a definable category of contractual relationship' as in SCALLY v SOUTHERN HEALTH AUTHORITY (1991) **(10)**. This would suggest that the duty of care is implied into a contract because it is necessary for it to work properly, and not because it is reasonable. Yet the duty of care itself is based upon 'reasonableness' as made clear in WILSON & CLYDE COAL v ENGLISH (1937), so it is difficult to see how it can only be implied on the grounds of necessity. In reality it is implied on the grounds of 'reasonableness'. This can be seen in the remarks of Lord Bridge in SCALLY where he sees necessity and reasonableness as interlinked;

> '...I fully appreciate that the criterion to justify an implication of this kind is necessity, not reasonableness. But I take the view that it is not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefit'. **(11)**

2.2.7 We can see this confusion arising in the case of UNITED BANK v AKHTAR which was held before the Employment Appeal Tribunal. The tribunal held that the employee could not be expected to move to a new post at a completely different location, and the decision was seen as based upon necessity;

> '...the basis upon which we find the implied terms as to notice and as to the provision of relocation or other allowances...is that they are not just reasonable but necessary in order for the rest of the contract to operate according to its terms'. **(12)**

Yet it can be argued that the deciding factor here was really 'reasonableness', as the employee could have relocated when required, although this would have caused considerable problems both for himself and his wife. This was not a case of physical or even practical impossibility, it was that the tribunal felt it was unreasonable for the employee to be asked to move at such short notice. Indeed, the tribunal admitted that there was little difference between the need to give reasonable notice, and a duty on both sides to co-operate so as not to frustrate performance of the contract. As such, necessity can be seen as based upon reasonableness.

2.2.8 In the later case of WHITE v REFLECTING ROADSTUDS, also held before the Employment Appeal Tribunal **(13)**, it was stated that the liability was based upon necessity, rather than reasonableness, and that the AKHTAR decision should be read in that light. Yet the tribunal acknowledged that a purely 'capricious' decision would not be allowed, and that a decision to move someone would have to be made on 'reasonable or sufficient grounds' **(14)**. In the WHITE case the employer was able to transfer the employee to a new department, because it was in the interests of the firm, as the employee could not perform his original job efficiently. This right to transfer might be seen as based upon necessity, but it was also reasonable in the circumstances. After all, in the law of unfair dismissal, a dismissal on the grounds of incapacity is automatically reasonable. **(15)**

2.3 Conclusion

2.3.1 We can see that the nature of liability in the contract of employment is different from ordinary contractual liability, because of the personal nature of the relationship. Moreover, we can see that the underlying nature of the liability in contract is based on the concept of reasonableness rather that strict liability. This means that a term implied into the contract will be implied on the grounds of reasonableness and that the key requirement is that the contract will be fair overall, even if not always fair in the particular circumstance **(16)**. As such, it means that there is little difference between the contractual and tortious liability with regard to the nature of liability.

3. The Scope of the Liability

3.1 Introduction

3.1.1 There is a clear interrelationship here between the nature of the liability and its scope. In particular, the issue of whether liability is strict or fault based, is reflected in the issue of whether contractual terms override tortious liability. If contractual liability is fault based, as in tort, then there is no real clash. However, if it is believed that liability is strict in contract, and any term is implied in only on the grounds of necessity, then it will be in conflict with a fault based tortious liability, and the extent to which contractual or tortious liability predominates will be seen as crucial.

3.1.2 It is therefore important to determine the extent of contractual and tortious liability, and to see how this relates to the issue of exclusion and limitation clauses. Moreover, we need to consider the effect of the tortious principle of contributory negligence on contractual liability. In doing this, it is useful to consider the underlying ideological approaches which we identified in Chapter 3.

3.2 The extent of contract and tort liability

3.2.1 The traditional view is that contractual terms will define the liabilities of the parties, and will override any tortious based liabilities imposed by law. This view was expressed in the much quoted case of TAI HING COTTON MILL LTD v LUI CHONG HING BANK LTD (1985) **(17)**. It was followed in a number of other cases, and is reflected in the views of Leggatt LJ in JOHNSTONE where he states;

> '...the parties' mutual obligations in tort cannot be any greater than those to be found expressly or by necessary implication in their contract'. **(18)**

3.2.2 This view was also followed by Browne-Wilkinson in the same case, where he referred to the TAI HING case in the same way as Leggatt. The underlying reasoning here is that the contract is freely negotiated between the two parties, and to allow this express contractual duty to be overridden by tortious liability based upon different principles, would be to deny the right of freedom of contract. This is a point made forcibly by Leggatt LJ in the JOHNSTONE case where he states that although the conditions of the contract may be 'scandalous' and possibly in need of amelioration by the legislature, it is not possible for the courts to avoid them **(19)**.

3.2.3 The same reasoning is used to defeat the idea that an express term can be limited by an implied term effectively imposed by the courts. Leggat LJ at the beginning of his judgement in JOHNSTONE states;

> '...it is axiomatic that the scope of an express term cannot be cut down by an implied term; and that is as true of terms implied by law as it is of terms which depend on the intentions of the parties'. **(20)**

3.2.4 A quite different approach is taken by Stuart-Smith in the same case. He takes the view that the duty of care, which is implied into the contract by law, will override any contrary express term of the contract. The implied duty of care is analogous, and indeed often identical to, the tortious duty of care. He sees this duty imposed by law as taking priority over the terms agreed between the parties. In this respect, I would argue that he is taking the more socially orientated approach, which is more in tune with the tortious nature of liability.

3.2.5 The conflict which arose in JOHNSTONE has been played out in various other cases. In REID v RUSH TOMPKIN (1989) **(21)**, the court refused to allow any duty of care in respect of the economic well-being of the plaintiff, to be implied into the contract. The court felt that the express terms overrode any tortious liability, and it was not possible to imply in any similar duty of care. In the words of Ralph Gibson LJ;

> '...on the facts alleged, it is not open to this court to extend the duty of care owed by these defendants to the plaintiff by imposing a duty in tort which, if I am right, is not contained in any express or implied term of the contract'. **(22)**

3.2.6 It can be argued that this interpretation was based upon an efficiency orientated approach to the problem, whereby the crucial issue was that the contracting parties should be fully aware of their potential liability under the contract, so that they could arrange appropriate insurance. To impose a wider liability would place considerable requirements upon business, a point emphasised by Ralph Gibson LJ where he states;

> '...It seems to me that it would require of the employers, many of whom may have no such resources of advice or experience as may be available to these defendants, and who may employ only one or two servants, to discover much information about foreign legal and social systems in order to decide whether such a term (imposing liability) requires action on their part'. **(23)**

Here the court does not wish to impose too great a burden upon small businesses, and instead would rather the risk in this case fell upon the employee. Even if this present employer did have the necessary resources to obtain the relevant advice, not all businesses would be able to. Therefore, it was seen as preferable not to impose such a requirement on business as a whole.

3.2.7 The subsequent case of SCALLY v SOUTHERN HEALTH AND SOCIAL SERVICES BOARD (1991), was decided on the basis that there was a duty of care to the employer, to bring important information on pension entitlement to the attention of the employees. It was made clear by Lord Bridge that this duty was not derived from tort when he stated;

> '...If a duty of the kind in question was not inherent in the contractual relationship, I do not see how it could possibly be derived from the tort of negligence'. **(24)**

Yet the implied term is effectively based upon the same concepts of reasonableness as the duty of care in tort.

3.2.8 Moreover, if we consider the more recent case of SPRING v GUARDIAN ASSURANCE PLC (1994) **(25)** we can see how the court now sees the duty of care in respect of economic well-being as deriving independently of contract. There is no longer any suggestion that the duty of care in tort is subordinate to any contractual duty, as made clear by Lord Goff;

> '...Where the relationship between the parties is that of employer and employee, the duty of care could be expressed as arising from an implied term of the contract of employment....But in the present case this adds nothing to the duty of care which arises under the HEDLEY BYRNE principle, and so may be applicable as a tortious duty, either where there is no contract between the parties, or concurrently with a contractual duty to the same effect'. **(26)**

3.2.9 It can be seen that the tortious duty of care now appears to be acting quite independently of the contractual duty, and cannot be overridden by it. Even where he court does consider that the express terms of as contract should apply, it seems that such terms must be interpreted in a 'reasonable' manner, as per the views of Browne-Wilkinson in JOHNSTONE.

3.3 Exemption clauses

3.3.1 The extent to which an exclusion or limitation clause will be legally valid is a key issue, because if such clauses are not controlled in any way, then they can impose a strict liability which may be unreasonable. Here we need to consider the impact of the UNFAIR CONTRACT TERMS ACT 1977, which controls such clauses, and will apply to contracts of employment. We should note that the UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1994 will not apply, because contracts of employment are definitively excluded from the scope of the regulations in Schedule 1.

3.3.2 The UNFAIR CONTRACT TERMS ACT 1977 has been held to apply to contracts of employment both in respect of the liability in negligence under Section 2, and the liability in contract under Section 3. Under Section 2, it is impossible to exclude or limit liability for death or personal injury, and liability for other loss can only be so restricted if reasonable. According to Schedule 1 paragraph 4 of the Act, Section 2 will not apply to contracts of employment except where it is in favour of the employee. There is no reference to section 3, but the natural conclusion is that section 3 applies to both parties. Although an employee is not a consumer, as defined in Section 12 of the Act, he will usually contract on the other parties standard terms, and so Section 3 will apply. It was the opinion of Stuart-Smith LJ in JOHNSTONE that contracts of employment were covered **(27)**.

3.3.3 As the UNFAIR CONTRACT TERMS ACT will apply, it is clear that any contract term which can be construed as an exclusion or limitation clause, will be subject to the requirement of reasonableness. Criteria for determining what is reasonable are laid down in Schedule 2 of the Act. Although it states that these only refer to breaches of Sections 6, 7, 20 and 21, it is now clear that these criteria will be applied to any breach of the Act. Similar guidelines can also be found in cases such as SMITH v BUSH (1990) **(28)**. In both statute and case law, it is clear that the bargaining position of the parties is a key factor in determining liability, essentially a socially orientated approach. The fact that the bargaining position is so important, reflects the view that Section 2 only applies where it works to protect the employee not the employer.

3.3.4 The key factor here is that any express term of the contract which seeks to exclude or limit liability, will be subject to the requirements of the test of reasonableness. This test is essentially the same as the underlying basis of tortious liability, so that with regard to exclusion and limitation clauses, there is little to chose between the two areas of law.

3.4 Contributory Negligence

3.4.1 In contract law, we can see no evidence of contributory negligence in employment cases. However, as the remedy is usually in the form of damages, it is arguable that this is reflected in the size of the award. The Law Commission report on contributory negligence as a defence in contract, issued in 1993, may well lead to a more flexible approach, which could affect contracts of employment **(29)**.

3.4.2 In respect of actions in tort, there is of course no problem with contributory negligence, as this will reduce the amount of damages claimable, whether for physical injury or loss of opportunity.

3.5 Conclusion

3.5.1 The extent of the liability *in* contract and tort must be considered in the light of the nature of the liability. The underpinning liability seems to based on reasonableness, and this relates to the tortious principle. It would appear that the tortious duty of care is now clearly accepted as equal to, if not superior to, the contractual duty of care.

3.5.2 The effect of statute on the use of exemption clauses, means that liability here cannot be strict, at least against the interests of the employee. We are therefore in a situation not unlike the tortious duty of care, where any strict liability is imposed by statute for the benefit of employees **(30)**.

4. The Extent of the Remedy

4.1 Introduction

4.1.1 When we consider the extent of the remedy, we need to look at the measure of damages, the type of loss claimable, and any limits on recoverability. If we look at these factors, we can then see whether there is a relationship between liability in contract and liability in tort.

4.2 The Measure of Damages

4.2.1 Where there is a breach of the duty of care, leading to injury to the plaintiff or other loss, the remedy will inevitably be in the form of damages. This can cover various types of loss, both reliance loss and expectation loss.

4.2.2 Most actions for breach of the duty of care leading to personal injury are brought in the tort of negligence, and the damages here will cover loss of earnings. This is effectively expectation loss as it covers future potential earnings and is thereby similar to lost profits. It should be noted that the courts will calculate the loss on the basis that the injured party would have continued in employment, and that he would have received some form of incremental rise over the period projected forwards. This is effectively putting the plaintiff into the position he would have been in, had the tortfeasor not breached the duty of care, and this is the case with the implied term to this effect in the contract of employment. This is not really reliance based loss, but rather expectation loss.

4.2.3 Moreover, in recent cases such as SCALLY, the damages have been extended to compensate for loss of opportunity in respect of a pension scheme. This case was brought in contract, but a similar claim was brought in tort in the SPRING case, for loss of opportunity in future employment prospects. Here the loss was economic loss, or loss of opportunity as per contract law, and as such was seen as a logical extension of the duty of care for the physical wellbeing of the employee. This is made clear by Lord Woolf in the SPRING case where he states;

> '...it also appears to be uncontroversial that if an employer, or former employer, by his failure to make proper enquiries, causes loss to an employee, it is fair just and reasonable that he should be under an obligation to compensate that employee for the consequences. This is the position if an employer injures an employee physically by failing to exercise reasonable care for his safety, and I find it impossible to justify taking a different view where an employer, by giving an inaccurate reference about his employee, deprives an employee, possibly for a considerable period, of the means of earning a livelihood' **(31)**.

4.2.4 It can be seen that actions in tort and contract now achieve the same ends, effectively a claim for loss of expectations. There is essentially no difference in the claim made in SCALLY from that made in SPRING, and both are based on an extension of the duty of care to cover economic well-being.

4.3 Non-Pecuniary Loss

4.3.1 If we look at non-pecuniary loss, we can see that the main actions are brought in tort. There is no real problem with claiming for pain and suffering as a result of a physical injury, or for grief in the case of a relative. We do not have any recent contract based claims for personal injury, so it is not possible to state whether non-pecuniary loss would be claimable here. However, in cases where an action has been brought in contract for breach of the duty to treat employees with respect, it seems that non-pecuniary loss is not claimable, as per the case of BLISS v SOUTH EAST THAMES REGIONAL HEALTH AUTHORITY (1985) **(32)**. In this respect, a difference still exists between contractual and tortious liability.

4.4 Remoteness

4.4.1 With regard to remoteness, it would appear that the rule in contract and tort is now very similar. In both situations, the liability is essentially based upon the tortious principle of reasonable foreseeability. We can see this if we compare the two cases of SCALLY and SPRING, brought in contract and tort respectively. In both of these cases, the damages recovered were those which the courts felt were reasonably foreseeable. In the case of SCALLY, the damages could not be those within the contemplation of the contracting parties, as the injured party was completely unaware of the possibility of a benefit under the pension scheme. In this way, the assimilation of the rules for remoteness, is much the same as can be found in contracts for services.

5. Conclusion

5.1 Introduction

5.1.1 If we look at contracts of service, we can see how the principles of contract and tort have overlapped in respect of the duty of care. Here we are concerned with the duty of care for the physical and economic well-being of the employee, and well as the wider duty of treating employees with respect. It would appear that in all cases, there is now concurrent liability in contract and tort. This is clear in the case of economic well-being as per SPRING, and by analogy can be extended to the duty to treat employees with respect, which is also touched upon in SPRING.

5.1.2 In all of these cases, the essential nature of the liability is fault based, and therefore related to the concept of reasonableness. This is long established as regards the tortious duties, but I have sought to show that contractual duties are essentially based upon this same underlying principle, rather than being based upon necessity.

5.1.3 In addition, it is now arguable that the courts will not allow an express contractual term to take priority over the implied duty of care, and any express clause which seeks to exclude or limit that duty of care will be struck down by the UNFAIR CONTRACT TERMS ACT 1977. As far as positive express terms are concerned, the judges will sometimes state quite clearly that the express term must be subject to the implied duty of care, as per Stuart-Smith in JOHNSTONE. In other cases they will argue that the express term must be applied in a reasonable manner, as in AKHTAR and WHITE v REFLECTING ROADSTUDS. In both cases, the result is essentially the same.

5.2 The Legal Consequences

5.2.1 The confusion of contractual and tortious liability in this area of law has significant consequences. The duty of care is seen as based upon the concept of reasonableness, and in determining this the courts will tend to chose between two different approaches, namely; the efficiency orientated and the socially orientated approach. The former approach will lead to a tendency towards strict interpretation of the contract terms, so as to ensure that the terms agreed are implemented. As it is the employer who usually determines what the terms will be, so they will tend to be to his benefit. Alternatively, if the courts take the socially orientated approach, they will tend to take the part of the employee and thereby limit the effect of the express terms. The former approach will maintain the difference between contract and tort, whilst the latter approach will tend to obscure the difference.

5.2.2 We can see an example of the conflicting approaches in the SPRING case during the judicial debate over the issue of the reference system in employment. Here Lord Keith sought to limit liability for negligently prepared references, on the grounds that imposing liability on the basis of HEDLEY BYRNE would effectively destroy the reference system as a whole. This is made clear at page 137 where he states;

> '...If liability in negligence were to follow from a reference prepared without reasonable care...(t)hose asked to give a reference would be inhibited from speaking frankly lest it should be found that they were liable in damages through not taking sufficient care in its preparation. They might well prefer, if under no legal duty to give a reference, to refrain from doing so at all'. **(33)**

Essentially the judge is putting the economic benefits of the reference system above the interests of the individual employee. The benefits to the economy and the insurance business are seen as more important here.

5.2.3 On the other hand, Lords Goff and Woolf take the socially oriented approach in the SPRING case. They put the interests of the employee first, rating this as more important than the problems it creates for the employer. Lord Goff, for example, is less concerned with the need to protect the reference system, than he is with the potential effect on an employee's career of a negligently prepared, unflattering reference. He makes this clear when he states;

> '...In considering this issue it is necessary to take into account contemporary practices in the field of employment; the fact that nowadays most employment is conditional upon a reference being provided....A development of the law which does no more than protect an employee from being deprived of employment as a result of a negligent reference would fully justify any limited intrusion on freedom of speech'. **(34)**

It is clear that the main concern of Lords Goff and Woolf is with the interests of the weaker party. This is in clear contrast to Lord Keith, who is more interested with the problems faced by the employer and business in general.

5.2.4 It seems to me that the courts are taking the socially orientated approach in more recent decisions, and this is taking priority over issues of economic efficiency. The underlying concept of reasonableness has been used as the justification for this, and so the boundary between tortious liability and contractual liability has to a large extent been eradicated. As the tort of negligence is usually more helpful to the weaker party, in comparison to contract law, we can now see why the tortious liability has taken priority. Should the courts revert to the earlier efficiency orientated approach, the position would be reversed.

5.3 Conclusion

5.3.1 I have tried to argue that the real difference in the courts' approach to the duty of care is related to whether they take the efficiency orientated or the socially orientated model. In this way, the differences between contract and tort have effectively been removed. I would tend to argue, that a contract for personal service is quite different from a contract for goods, and so different criteria can be used to determine compliance. The use of the underlying concept of reasonableness means that this area of law is rather different from normal contract law, and has more in common with the tort of negligence, a phenomenon already remarked upon by other academics **(35)**.

5.3.2 In order to assess whether this situation is unique to English Law, it is necessary to look at a comparative legal system to see how it has dealt with the same problems. It is this issue which I shall address in the next chapter.

Notes

1. Cooke and Oughton, Common Law of Obligations (1993) at page 495

2. (1938) AC 57 HL

3. (1891) AC 325

4. (1989) IRLR 507

5. (1991) 2 All ER 293. See also the discussion of the case by Dolding and Fawlk 'Judicial Understanding of the Contract of Employment' (1992) 55 MLR 562

6. Ibid at page 303

7. Ibid at page 302

8. Ibid at page 305

9. Ibid at pp 299-300

10. (1991) 4 All ER 563

11. Ibid at page 572

12. Op.cit (note 4 above) at page 512 paragraph 53

13. (1991) IRLR 331

14. Ibid in the judgement paragraph which states

> 'Where organisation and reorganisation are concerned, it is for management to reach the decisions, provided they do so responsibly. This principle can be given effect within the legal framework of a clear contractual term on mobility or job transfer in that, as was emphasised in AKHTAR, a purely "capricious" decision would not be within the express clause. If there were no reasonable or sufficient grounds for requiring the employee to move there would be a breach of the clause'

15. EMPLOYMENT RIGHTS ACT 1996 Section 98(2)(a)

16. ALI v CHRISTIAN SALVESON (1997) 1 All ER 721

17. (1985) 2 All ER 947

18. Op.cit (note 5 above) at 302

19. Ibid at 303

20. Ibid at 302, also see the comments of Browne-Wilkinson at 302 where he states

> '...The implied term does not contradict the express term of the contract'

21. (1989) 3 All ER 228

22. Ibid at 244

23. Ibid at 240

24. Op.cit (note 10 above) at 568

25. (1994) 3 All ER 129

26. Ibid at page 147

27. Op.cit. (note 5 above) at 300

28. (1989) 2 All ER 514

29. Law Commission Report No.219 (December 1993) entitled 'Contributory Negligence as a Defence in Contract'

30. EMPLOYER'S LIABILITY (DEFECTIVE EQUIPMENT) ACT 1969

31. Op.cit. (note 25 above) at 168

32. (1985) IRLR 308 CA

33. Op.cit. (note 25 above) at 137

34. Ibid at pp 177-8

35. Stapleton, 'A New "Seascape" for Obligations: Reclassification on the Basis of the Measure of Damages' An essay produced for the SPTL Seminar of 1996 entitled The classification of obligations

Chapter 6

A COMPARATIVE ANALYSIS

1. Introduction

1.1 Reason for comparative analysis

1.1.1 I now wish to draw comparisons with the treatment of contract and tort in another jurisdiction. My aim is to bring into focus how these areas overlap in the other legal system, and to see how this is dealt with. We can then consider whether the approach of this other system provides any insight into our own treatment of these problems, as well as suggesting whether there are any lessons to be learnt. To this end, I have chosen to look at the legal system in New Zealand.

1.1.2 The New Zealand system has been chosen, because it is a common law system like our own, and as such the basis of contract law is the same. Moreover, there is still a right of appeal from the New Zealand Court of Appeal to the Privy Council, and this has meant that the United Kingdom and New Zealand systems continue to interact. Nevertheless, we will see that in many respects the courts in New Zealand have developed a more expansive approach to the claiming of economic loss in tort, and a more liberal interpretation of contract law principles **(1)**.

1.1.3 In this chapter, I wish to use the analytical scheme already developed and to apply this to the comparative systems, in order to draw out their similarities and differences. For ease of comparison, I have indicated the main points of difference in Table 2 at the end of the chapter. I intend to refer to the law of the United Kingdom as English Law from now on, as this is a more recognisable term, even though I appreciate that some of the key cases are not actually English.

2. The Nature of the Liability

2.1 The basis of the liability

2.1.1 Contractual liability in English law is based on the existence of an exchange of promises, involving a reciprocal agreement between the parties involved. This is to be contrasted with tort law liability, which is based upon the idea of a general duty imposed by law, independent of the wishes of the parties involved. As regards contract law, the law in New Zealand operates on a similar basis, except that there is a greater willingness to look outside the mechanistic principles of offer, acceptance and consideration; as well as a greater readiness to consider other factors such as duress and capacity in determining whether there is a contract in the first place **(2)**.

2.1.2 When we consider the basis of liability in tort law, we can also see a significant element of consensus. In both systems, the legal duty is seen as being imposed by law and deriving from the need to protect the individual. The legal principles here are grounded upon the development of the duty of care arising from leading cases such as DONAGHUE v STEVENSON (1932).

2.2 Privity of Contract

2.2.1 In English law, the development of the doctrine of privity, along with that of consideration, was a crucial factor in differentiating contract from tort. The rule in English law is quite strict, and prevents a third party from enforcing a contract even if it is made for his benefit. As we have seen, the doctrine has been much criticised and is currently subject to review by the Law Commission.

2.2.2 New Zealand law originally followed the line set down by English law, but this was modified by the CONTRACTS (PRIVITY) ACT 1982. This allows a third party to enforce a term of a contract made for his benefit, so long as he can show that it was the intention of the contracting parties to confer such a benefit, either expressly or by implication **(3)**. The contracting parties can vary the third party rights, provided they act before that party has altered his position in reliance on the contract, or another party has so acted **(4)**. The New Zealand reforms are seen as a model for the proposed reforms to English Law proposed by the Law Commission.

2.2.3 With regard to the situation in tort, the position is the same in both jurisdictions, in so far as there is no privity rule as such. However, the liability of the defendant is limited by law to a certain number of potential plaintiffs, by using other legal concepts as controls. In the legal systems of England and New Zealand, the duty of care in negligence is limited by the requirements of proximity as well as what the courts believe is just and reasonable.

2.3 Consideration

2.3.1 In both common law systems, the doctrine of consideration is a central feature in contract law, yet the definition of what constitutes consideration is extremely vague. In the English law case of WILLIAMS v ROFFEY BROTHERS (1990) **(5)**, we have seen that consideration is often very easy to prove and this is the position in New Zealand law.

2.3.2 The common law jurisdictions have also seen the development of the concept of 'promissory estoppel', which has allowed contractual liability to be based on reasonable reliance, rather than on the idea of reciprocal exchange. We can see how this concept has been developed in other common law systems such as Australia **(6)**. In New Zealand, the doctrine has been extended in a number of decisions, so that it will now be allowed even where there is no pre-existing contractual relationship, and will act as a cause of action, not merely as a defence **(7)**. Moreover, it has been made clear that the concept of unconscionability is the justification for the application of estoppel, and that it is dependent on the court deciding what is fair, rather than enforcing the wishes of the contracting parties **(8)**.

2.4 Strict or fault based liability

2.4.1 The position in English law is that liability in contract is usually strict, in so far as it relates to express terms. However, this is subject to implied terms, which may import in an element of fault based liability **(9)**. In theory, this is based upon the requirements of business efficacy or necessity **(10)**, but I have sought to argue that it is really based upon reasonableness. Nevertheless, there is an uncertainty here over the essential nature of the liability, and to some extent it is still seen as strict.

2.4.2 The New Zealand situation, although deriving from English contract law principles, now accepts that reasonableness is the basis of the implied terms **(11)**. This is still seen as related to necessity **(12)**, but it also allows for the idea of 'good faith' **(13)**. To some extent, the New Zealand approach reflects the fact that they have no equivalent of the UNFAIR CONTRACT TERMS ACT 1977, and instead the concept of fairness is imported into the contract itself. This can be seen in a raft of legislation which has sought to base liability on concepts of fairness, such as the ILLEGAL CONTRACTS ACT 1970, the CONTRACTUAL MISTAKES ACT 1977 and the CONTRACTUAL REMEDIES ACT 1979 **(14)**. In all of these areas of law, a wide role is given to the concept of reasonableness in a manner which is not evident in English law. In addition, it has been supplemented by the common law, which has developed the concept of unconscionability to provide a restriction on contracts which are seen as unfair **(15)**.

2.4.3 When we look at the nature of tortious liability, there is a greater degree of consensus. Both English and New Zealand tort law are based upon the concept of fault based liability, except in particular cases where liability is strict, when the plaintiff is in a weaker position, such as a consumer or an employee **(16)**. An example here in UK law is the strict liability under the FACTORIES ACT 1961 and associated legislation.

2.5 Expectation or Reliance based

2.5.1 The liability in contract in English law and New Zealand law, is based in theory on the expectation principle; in other words the contracting parties expect a certain result to occur if the contract is properly performed. However, the liability is often reliance based, and linked to the idea of the plaintiff relying upon the promises and actions of the defendants. The existence of the reliance principle in the common law systems has been noted by various academics **(17)**. In this way, the liability in contract can be seen as based upon similar principles as the law of tort.

2.5.2 It would seem that the English and New Zealand systems follow similar lines with regard to contract and tort as regards the basis of the liability. This reflects the common origin of the two systems of legal liability, both of which evolved in English law, before being transplanted to New Zealand.

2.6 Overview of the Nature of Contractual Liability

2.6.1 When we compare the two legal systems in respect of the nature of contractual liability compared to tort, we can see a number of key differences. These stem from the different bases upon which contract law is derived. In common law, contractual liability is based upon a reciprocal agreement, and as such liability is defined and restricted by the twin doctrines of consideration and privity which are related to the actions of the contracting parties. The liability is generally strict, with reasonableness implied in by various means such as implied terms. Moreover, we can see that damages are still often related to expectation loss. Yet despite these similarities, we can see significant differences in approach between English law and New Zealand law as regards contractual liability.

2.6.2 The New Zealand approach to contract law is more holistic, and takes into consideration the subjective intentions of the contracting parties, to a greater degree than in English law. This means that they are more concerned with issues of fairness and reasonableness as defined by the courts, compared to issues of certainty deriving from the operation of strictly interpreted rules of contract formation. With regard to the nature of the liability, this leads to a tendency to award damages on the basis of reasonable expectation or reasonable reliance, rather than the bargain principle of traditional contract law. This effectively means that the nature of contractual liability is fault based and as such becomes indistinguishable from tort **(18)**.

2.6.3 The result of this development can be seen in the attitude of New Zealand to the doctrines of privity and consideration. Its more liberal privity rules mean that there is no need to resort to legal fictions, such as 'vicarious immunity', to achieve the intentions of the contracting parties in respect of third party interests. It also reduces the need to take an alternative action in tort, because the contractual action is frustrated by the privity rule.

2.6.4 In both systems, we can see that the courts will allow a different approach to liability depending upon the nature of the contracting parties. Where a weaker party is involved, there is a tendency to take a more socially orientated approach and to ensure that the agreement is fair. The main difference here is that the concept of fairness and reasonableness is internalised to an extent within New Zealand contract law, whereas English contract law depends to a much greater extent on external factors such as implied terms or statutory controls.

3. The Scope of the Liability

3.1 Introduction

3.1.1 When we consider the scope of the liability, we are looking at the extent of liability and which has primacy over the other. As regards the extent of liability, we are essentially concerned with the issue of concurrent liability; whereas in considering which type of liability has primacy, we need to consider the effect of exemption clauses and the issue of contributory negligence.

3.2 Concurrent Liability

3.2.1 In the common law systems, concurrent liability is now accepted following such cases as HENDERSON v MERRETT (1994), having previously been doubted **(19)**. However, it is still argued that contractual liability will take priority over tort. The position in New Zealand was originally determined by English law, with concurrent liability being effectively rejected in MCLAREN MAYCROFT v FLETCHER **(20).** This position was roundly criticised by various academic writers such as Francis and French **(21)**, as well as by legal developments in English law cases such as MIDLAND BANK v HETT STUBBS (1979) **(22)**. The end result is that concurrent liability has now been accepted in New Zealand, in cases such as ROWLANDS v COLLOW (1992) and MOUAT v CLARK BOYCE (1992) **(23)**.

3.3 Exemption Clauses

3.3.1 In English law, the rule is that express contract terms will override legal liability in tort, this being the much-quoted maxim that 'contract trumps tort'. However, the effect of the UNFAIR CONTRACT TERMS ACT 1977 and various consumer protection legislation, has effectively limited the use of such clauses in respect of both contractual and tortious liability.

3.3.2 In New Zealand there is no equivalent of the UNFAIR CONTRACT TERMS ACT, and so the courts use common law controls to effect the same result. This involves a more robust use of interpretation to limit the effect of such clauses, and the use of consumer protection legislation such as the CONSUMER GUARANTEES ACT 1993 **(24)**. Also there is the development of the equitable doctrine of unconscionability to which we have made reference above at Section 2.4.2.

3.4 Contributory Negligence

3.4.1 When we look at the impact of contributory negligence in the two systems, we find a similar pattern. In English law, we have seen that contributory negligence is not available in contract law, unless the liability is fault based, such as a contractual duty of care **(25)**. The New Zealand situation is similar to that in the UK, with statutory apportionment provided for in the CONTRIBUTORY NEGLIGENCE ACT 1947 based on the UK LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT 1945. This limits contributory negligence to fault based contractual liability **(26)**, and it is seen as necessary that negligence should be 'an essential ingredient' of the case, even if it is not the actual source of the duty **(27)**. However, the New Zealand Law Commission has recently recommended that the Act be amended to allow for a statutory right of apportionment for all breaches of contract **(28)**.

3.5 Conclusion

3.5.1 In the case of exemption clauses, it would seem that there is a greater need for a formal system of control in English law, where the liability of the contracting parties is related to their promise. In the New Zealand system, where liability is more related to fault, such clauses would not be allowed to operate in the first place.

3.5.2 Similarly, we can see that contributory negligence acts as an express countervailing factor in contract law, but it is limited in its scope. Where applicable, it is effectively limiting liability to what is reasonable.

4. The Extent of the Remedy

4.1 Introduction

4.1.1 In assessing the extent of the remedy available in contract and tort we are looking at various aspects which define and limit the damages available. These include the measure of loss; as well as limiting factors such as the ability to claim for non-pecuniary loss, the remoteness rule and limitation periods.

4.2 Measure of loss

4.2.1 The measure of loss is related to the nature of the liability, either expectation based or reliance based. The English law position is that damages for contract law are assessed on the basis of either expectation or reliance loss, depending upon the circumstances of the breach, whilst damages for tort are usually based upon reliance loss. There is a possibility to claim expectation loss in tort by way of economic loss, where it falls within the bounds of negligent misstatement as defined in HEDLEY BYRNE v HELLER (1963) **(29)**. This is not usually allowed for negligent actions, as per MURPHY v BRENTWOOD (1990) **(30)**. Nevertheless this area of law is now uncertain following the decision in HENDERSON v MERRETT (1994), where claims for economic loss have been allowed in respect of negligent actions.

4.2.2 The developments in New Zealand are the same as regards contractual damages, although some legislation such as the FAIR TRADING ACT 1986 would seem to limit losses to reliance loss as in tort. However, in the case of tortious liability, a significant divergence has occurred, with New Zealand being much more willing to allow claims for economic loss, even in cases of negligent actions. In effect, the courts have continued to follow the principle set in ANNS v MERTON LBC (1978) **(31),** rather than to take the line set in MURPHY v BRENTWOOD (1990) **(32)**. This difference of approach was recently confirmed and approved by the Privy Council, when hearing an appeal from the New Zealand Court of Appeal in INVERCARGILL CITY COUNCIL v HAMLIN (1996) **(33)**, a case which was almost identical to MURPHY. The reason for the difference in approach was seen as clearly due to policy factors **(34)**.

4.3 Non-Pecuniary Loss

4.3.1 The English law position here is in a state of flux. The general view is still that damages for non-pecuniary loss cannot be claimed in contract but only in tort, following ADDIS v GRAMOPHONE CO LTD (1909) **(35)**. However, it is now accepted that such damages can be claimed where the purpose of the contract includes providing peace of mind as in the so-called 'holiday cases' **(36)**. Moreover, a more liberal approach can be seen in some employment cases, such as the recently decided MALIK v BANK OF CREDIT & COMMERCE INTERNATIONAL SA (IN LIQUIDATION) (1997) **(37)**.

4.3.2 In the above respect, English law is simply following the lead set in New Zealand, where such losses have been claimable in contract for several years, both in contracts for services **(38)** and in contracts of service **(39)**. The more advanced position in New Zealand has already been noted by academic writers **(40)**. Nevertheless, the evidence is that the New Zealand courts would not allow such losses in the case of strict contractual duties, such as in the sale of goods, or where the plaintiffs were a purely commercial organisation **(41)**. The situation for tort law is the same as in English law.

4.4 Remoteness

4.4.1 In English law, we have seen that there is a difference between the remoteness rule for contract and tort. In contract, it is based upon the reasonable contemplation of the parties, and in tort it is based on reasonable foreseeability **(42)**, even though the difference is often confused.

4.4.2 The English law position is still broadly followed in New Zealand, although there is more evidence of the rules being confused, and even assimilated. For example, Cooke P in McELROY MILNE v COMMERCIAL ELECTRONICS **(43)** uses the phrase 'not unlikely' to define the contractual remoteness rule, a term which suggests an objective test similar to that in tort. In addition, there are suggestions in ROWLANDS v COLLOW (1992), that the remoteness rule should vary according to the nature of the parties involved, rather than the nature of the liability **(44)**. Overall, there is evidence that the distinction drawn in English law between the different remoteness rules is not seen as a useful one, and that the tortious rule should be adopted in both contract and tort **(45)**.

4.5 Limitation Periods

4.5.1 A key difference between contract and tort in English law is the different limitation period. Although usually six years for contract and tort, the limitation period starts to run from a different time. In contract the time limit runs from the breach of contract, whilst in tort it runs from the time when the damage occurs. The latter often occurs at a later date, thereby allowing a longer period of time before the limitation period elapses, and making it an advantage to take an action in tort.

4.5.2 In New Zealand law, the rules on limitation traditionally followed the English law pattern with a different commencement time in contract and tort **(46)**. However, in recent cases, the courts have started to alter the rules in various ways. Firstly, there is a move towards starting the commencement of the limitation period at the same time for contract and tort. Also, in the recent INVERCARGILL case, it was argued that the commencement time for latent damage should begin when the damage was discovered and not when it occurred, in effect challenging the principle laid down in PIRELLI GENERAL CABLE WORKS V OSCAR FABER & PTNRS (1983) **(47)**. The position is that the limitation rules are becoming more flexible in contract and tort, so removing the need to take a tortious action in order to avoid the problems of a restricted contractual limitation period.

4.6 Conclusion

4.6.1 When we look at the extent of the remedies, we can see how the differences between contract and tort are being eroded. As far as the measure of damages is concerned, the right to claim expectation loss in tort is being developed in New Zealand, as well as arguably in English law. The area of non-pecuniary loss is also one of change, with both New Zealand and English law gradually allowing such claims in contract. Finally, the remoteness rule for contract is increasingly being based upon reasonable foreseeability, the rule normally associated with tort.

4.6.2 The main differences which still apply are in the area of limitation periods, where English law still operates very different rules in contract and tort, whilst these are being assimilated in New Zealand. Other than this, the issue of economic loss is still far from clear in English law as the rule in MURPHY v BRENTWOOD still limits the tortious remedies, whilst the position in New Zealand appears more clear cut.

5. Conclusion

5.1 General Overview

5.1.1 When we compare the systems operating in English Law as well as in New Zealand, we can see certain interesting trends. These relate to the basis of liability, which in the common law systems relies to a large extent on the courts enforcing the freely negotiated promises of the contracting parties, rather than imposing their own ideas of right and wrong. In English law, there is a tendency to give greater scope to the impact of market forces by basing liability on the terms agreed by the parties, whether or not they are negotiated from an equal bargaining position. Also, there is more emphasis on the need for a rule of privity as well as the existence of consideration. In New Zealand Law, there is a greater willingness to import in ideas of fairness and justice into the contract **(48)**, as well as a greater willingness to relax the rule on privity. This means that the courts are able to take a socially orientated approach, and to support the weaker party where they think that this is appropriate.

5.1.2 Nevertheless, the two systems ultimately achieve similar results but by different means **(49)**. English law seeks to ground liability on a strict adherence to the terms of the agreement, but this is modified by implying terms into the contract, both in common law and in statute, which tend to introduce the concept of reasonableness. In the New Zealand system, this concept is introduced into contract by virtue of the fault based nature of the liability, and the use of equitable notions such as unconscionability. In effect, the controls in English law are externalised, whilst those in the New Zealand system are more often internalised.

5.1.3 The internalising of the controls in the New Zealand system has various consequences. Firstly, it effectively reduces the difference between contract and tort, as the liability is essentially based upon similar principles. This can be seen in the fault based nature of liability and the dispensing of the need for privity and consideration. It can also be seen in the fact that damages for contract and tort are usually based upon the same principles, so that the type of legal liability is not really important. This can be seen in the comments of Gault LJ in MOUAT v CLARK BOYCE where he states;

> 'It would be artificial if in a case such as this where one breach of duty arose in effect upon the entering into a contract of retainer the remedy should be different depending upon whether this is regarded as tortious or contractual negligence'. **(50)**

5.1.4 A second factor is that the approximation of contract and tortious liability, and the extent of their remedies, reduces the need to take one type of action instead of the other. In the common law jurisdictions this is a problem, now that concurrent liability has been accepted. The main problems arise where the gap between contract and tortious liability is greatest, namely in the areas of privity, non-pecuniary loss, contributory negligence and the rules on limitation. An approximation of the two types of liability, at least as regards duty of care type liability, would prevent the need to take the alternative action, and would avoid many of the legal uncertainties that perplex common law jurisdictions.

5.1.5 Where there is a narrower difference between the contractual and the tortious systems of liability, there is a greater tendency to concentrate on the nature of the relationships between the parties. This is because the common underlying theme of reasonableness, focuses the judicial mind on what is fair or reasonable; and this is likely to be determined according to how the courts perceive the nature of the relationship between plaintiff and defendant. This can be seen in New Zealand, where the courts have raised the issue of taking a different approach in relation to the nature of the contract, as with the issue of non-pecuniary loss **(51)**.

5.1.6 What we can see here are two different approaches, both of them effectively achieving a similar result. In general, I would argue that the New Zealand system is to be preferred, because it enables the court to base liability upon the principles of reasonableness in both contract and tort, and so provides a system which is both fairer and more logical. The English law system suffers from the tension between its strict market-driven contract law liability, and the attempt to make it fairer by imposing external restrictions. In effect we are bringing in concepts of reasonableness 'by the back door'. This can lead to problems where the attempt to imply in the concept of reasonableness is restricted, such as in the case of non standard-form commercial contracts, where it may be possible to exclude the operation of both common law and statutory controls.

5.1.7 Moreover, the problem of differing regimes for contract and tort causes unnecessary litigation, due to the availability of concurrent liability. The New Zealand system avoids some of the problems of English law, as a result of its more liberal rules on privity, and the ability to claim 'economic loss' in tort. However, it still does not obviate the need to take alternative action in order to deal with the problem of different limitation periods, and the requirement for consideration in contract. As a result, litigants still continue to exploit their right to take actions in the alternative, causing the law to remain unsettled.

5.2 Conclusion

5.2.1 I hope that this comparative analysis has thrown into relief some of the ways in which English law operates, and the alternative options available. I have argued that the New Zealand system has much more to commend it than the English system, and it may be possible for English law to develop more along these lines, given the similar nature of our legal systems. In this respect, I would argue that the key issue will be the continuing availability of concurrent liability in contract and tort, and in particular its destabilising effect on the overall framework of legal liability.

Notes

1. McLaughlan, 'The "New" Law of Contract in New Zealand' New Zealand Recent Law Review (1992) Pt IV pp 436

2. See here BOULDER CONSOLIDATED LTD v TANGAERE (1980) 1 NZLR 560

3. Se ction 4

4. Section 5(1)(a)

5. (1990) 1 All ER 512

6. WALTONS STORES (INTERSTATE) LTD v MAHER (1988) 164 CLR 387

7. BURBERY MORTGAGE AND FINANCE v HINDSBANK HOLDINGS LTD (1989) 1 NZLR 356, see here the discussion in Cheshire and Fifoot's Law of Contract (Eighth New Zealand Edition Edited by Burrows, Finn and Todd at pp 134-5

8. MORTENSEN V NZ HARNESS RACING CONFERENCE High Court Auckland CP 1812A/90 7 December 1990 Thorpe J

9. See Section 13 SUPPLY OF GOODS AND SERVICES ACT 1982

10. See in particular Lord Wilberforce in LIVERPOOL CITY COUNCIL v IRWIN (1976) 2 All ER 39 at 44

11. MOUAT v CLARK BOYCE (1992) 2 NZLR 559 and also see DEVONPORT B.C. v ROBBINS (1979) 1 NZLR 1

12. LEISURE CENTRE LTD v BABYTOWN LTD (1984) 1 NZLR 318

13. LIVINGSTONE v ROSKILLY (1992) 3 NZLR 230

14. Mc Laughlan ' The "New" Law of Contract' op.cit.

15. O'CONNOR v HART (1985) 1 NZLR 159 and NICHOLS v JESSUP (1986) 1 NZLR 226. Also see McLaughlan 'Contract and Commercial Law Reform in New Zealand' (1985) 11 NZULR 36

16. See for example in the UK the CONSUMER CREDIT ACT 1974 and the CONSUMER PROTECTION ACT 1987 as well as the EMPLOYMENT RIGHTS ACT 1996 and in New Zealand the SALE OF GOODS ACT 1908 and the HIRE PURCHASE ACT 1971.

17. Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 LQR 193; Reynolds, 'Tort Actions in Contractual Situations' (1985) 11 NZULR 215, and as for reliance in Negligence see Smillie, 'Principle, Policy and Negligence' (1984) 11 NZULR 111

18. Barton, 'Whither Contract' (1981) 11 NZLJ 369

19. (1994) 3 All ER 506

20. (1973) 2 NZLR 100

21. Francis, 'The McLaren Maycroft Rule - Is Tai Hing the Solution'(1993) NZLJ 135 and also notably French, 'The Contract/Tort Dilemna' (1982) Otaga LR 237

22. (1978) 3 All ER 571

23. (1992) 1 NZLR 178 and see note 11 above

24. Fraser, 'The Liability of Service Providers under the Consumer Guarantees Act 1993' (1994) 16 NZULR 23

25. BARCLAYS BANK PLC v FAIRCLOUGH BUILDING LTD (1995) 1 ALL ER 289

26. MCLAREN MAYCROFT CO LTD v FLETCHER DEVELOPMENT CO (1973) see op.cit (at note 20 above)

27. ROWE v TURNER HOPKINS (1982) 1 NZLR 178 at 181

28. New Zealand Law Commission Preliminary Paper No.19 Apportionment of Civil Liability (1992) at para 191

29. (1964) AC 465

30. (1990) 2 All ER 908

31. (1978) AC 728

32. See in particular SCOTT GROUP v McFARLANE (1978) 1 NZLR 663 and ROWLING v TAKARO PROPERTIES (1986) 1 NZLR 22

33. (1996) 1 All ER 756 and also see Martin, 'Diverging Common Law - INVERCARGILL goes to the Privy Council' (1997) 60 MLR 94

34. See in particular Lord Lloyd in INVERCARGIll at page 766 where he states;

> 'In truth, the explanation for divergent views in different common law jurisdictions...is not far to seek. The decision whether to hold a local authority liable for the negligence of a building inspector is bound to be based at least in part on policy considerations'.

Also see Allin, 'Negligent Actions and Pure Economic Loss' (1985) NZLJ 405; Hogg,'Negligence and Economic Loss in England, Australia, Canada and New Zealand' (1994) 43 ICLQ 116; and also Smillie op. cit. (at note 17 above)

35. (1909) AC 488

36. Such as JARVIS v SWAN TOURS (1973) 1 ALL ER 71 and JACKSON v HORIZON HOLIDAYS (1975) 3 All ER 92

37. (1997) 3 All ER 1

38. See ROWLANDS v COLLOW (1992) 1 NZLR 178

39. See WHELAN v WAITAKI MEATS LTD (1991) 1 NZLR 74

40. See Todd in Cheshire and Fifoot Law of Contract op.cit. at page 677

41. See views of Cooke P in MOUAT v CLARKE BOYCE (1992) 2 NZLR 559 at 569

42. Respectively KOUFOS v CZARNIKOW (THE HERON II) (1967) 3 All ER 686 and OVERSEAS TANKSHIP (UK) v MILLER STEAMSHIP CO PTY LTD (THE WAGON MOUND) (1961) AC 388

43. (1993) 1 NZLR 39

44. (1992) 1 NZLR 178 particularly Thomas J 207

45. Whincup, 'Torts and Contracts in New Zealand' (1993) 90 Law Soc Gaz 22

46. See MCLAREN MAYCROFT op.cit.(note 20 above)

47. (1983) 1 ALL ER 64

48. Whincup op.cit.

49. Markesinis op.cit

50. (1992) 2 NZLR 559 at 575

51. See here again Cooke P in MOUAT v CLARKE BOYCE at 569

TABLE 2- COMPARATIVE LEGAL SYSTEMS

NATURE OF LIABILITY		ENGLISH LAW	NEW ZEALAND LAW
Basis of liability	Contract	Based on reciprocal agreement with privity and consideration required	As per English law but modified privity rule allowing third part enforcement rights under CONTRACTS (PRIVITY) ACT 1982.
	Tort	Based on a legally imposed duty of care. No prior agreement required instead limited by rules on proximity and what is fair and reasonable	As per English law.
Type of liability	Contract	Based on strict express terms modified by implied terms based on reasonableness or necessity.	As per English law but clear acceptance that implied terms are based on reasonableness in most cases.
	Tort	Fault based liability related to underlying principles of reasonableness but with some areas of strict liability.	As per English law.
Expectation or reliance	Contract	Based on expectation and reliance.	As per English law.
	Tort	Based on reliance but also now reasonable expectation.	As per English law.

SCOPE OF LIABILITY	ENGLISH LAW	NEW ZEALAND LAW
Extent of liability	Contract law seen as more extensive but in duty of care area this may not be the case as per HOLT v PAYNE SKILLINGTON	As per English law.
Primacy of liability	Contractual express terms take priority over tortious duty of care but only so far as is reasonable in most cases. The UNFAIR CONTRACT TERMS ACT 1977 requires contractual exemption clauses to be reasonable.	Contract terms must be reasonable. Here this is ensured by common law through implied terms and effect of ILLEGAL CONTRACTS ACT 1970 and CONSUMER GUARANTEES ACT 1994. As a result tortious duty of care will also be paramount if contractual terms are unreasonable.

TABLE 2 - COMPARATIVE LEGAL SYSTEMS continued

EXTENT OF THE REMEDY		ENGLISH LAW	NEW ZEALAND LAW
Measure of loss	Contract	Will cover expectation reliance and restitution losses. It can be limited by the contracting parties.	As per English law but some contractual losses are calculated on a tort basis where the FAIR TRADING ACT 1986 applies.
	Tort	Will cover restitution and reliance losses and now some expectation loss following development of economic loss under HEDLEY BYRNE. Still in dispute for negligent actions.	No problems with claiming expectation loss as decision in ANNS v MERTON LBC is followed. It is allowable for negligence statements and actions.
Remoteness Rule	Contract	Was reasonable contemplation of parties but now reasonable foreseeability accepted.	Will cover damages which are "not unlikely".
	Tort	Reasonable foreseeability.	As per English law.
Non pecuniary loss	Contract	Limited right to claim where contract promises "peace of mind".	Wider rights to claim non pecuniary loss.
	Tort	Can be claimed in general.	As per English law.
Limitation period	Contract	Six years from breach of contract under LIMITATION ACT 1980	As per English law.
	Tort	Six years from injury/damage, longer period if latent damage under LATENT DAMAGES ACT 1986.	As per English law.

Chapter 7

CONCLUSION

1. Introduction

1.1 General Points

1.1.1 In concluding my study of the overlap between contract law and the tort of negligence, I should like to consider three main issues. Firstly, I wish to draw attention to the areas where contract and tort have become interlinked, as well as remaining distinct, and to explain why this has happened. Secondly, I wish to consider alternative frameworks which seek to draw a boundary between contract and tort. Finally, I would like to suggest how the boundary could be drawn, and how that links into my understanding of the difference between these two areas of law.

2. The Similarities between Contract and Tort

2.1 Introduction

2.1.1 In this thesis, I have been focusing on the interrelationship between contract and tort, in the area where they both involve a duty of care. To this extent, I have only been looking at contracts involving a duty of care, such as contracts for services and contracts of service. As regards tortious liability, I have only looked at the tort of negligence in so far as it is based upon a duty of care, and not where the liability is strict.

2.1.2 Inherently, the legal liability for contract and tort is different because of the different nature of the legal duty. In contract it arises from a breach of promise, whilst in tort it arises from a breach of the duty of care **(1)**. Yet we can see a considerable overlap between the areas of contract and tort, when we look at the nature and scope of the liability and the extent of the remedy. The differences which were identified in the traditional approach have to a large extent disappeared, and we can see this when we compare the present position on Table 3, at the end of the chapter, with the earlier Table 1 at the end of chapter 1.

2.1.3 A key reason for the confusion between the two areas of law is the manner in which they originally developed. Both contract and tort can be traced back to the action on the case for misfeasance, which arose from the commission of a wrong by the defendant. Although there was not always a pre-existing relationship, there was an expectation that the tortfeasor would act with care so as to look after the interests of the plaintiff. In effect, we can see liability here based upon reasonable reliance. The development of the promise based contractual remedy also embraced the idea of reasonable reliance, although in the period of 'laissez faire' economic philosophy, this was not often clearly identified. In the 20th century, the idea of reliance has reasserted itself, and the similarities between contract and tort have emerged once more.

2.1.4 A second key factor is the common ideological base which underpins contract and tort. I have identified two main ideological approaches which apply across the contract/tort divide, these being the efficiency orientated approach and the socially orientated approach. I believe that the courts tend to take one or other of these approaches when determining their idea of reasonableness, and in so doing, take into consideration the nature of the parties involved and the context in which they operate. The extent to which they will take the one approach or the other, will depend not only on the nature of the parties, but the attitude of the judges. There is evidence that in the late 1980's, judges tended to take a more efficiency orientated line with greater concern for certainty and business efficiency, as illustrated in decisions such as MURPHY v BRENTWOOD and REID v RUSH TOMPKIN. There is now evidence that the courts are moving against this trend, and towards a more socially orientated approach in cases such as SMITH v BUSH and SPRING v GUARDIAN ASSURANCE.

2.2. Similarities in the Nature of the Liability

2.2.1 When we consider the nature of the liability, we can see how the traditional differences between contract and tort have been effectively minimised. The key factors in the traditional analysis which differentiated contract from tort, were privity, consideration and the strict type of liability. These reflected the fact that liability was seen as expectation based, and not reliance based.

2.2.2 We can see the gradual erosion of the doctrine of privity in English law, with the development of various exceptions to the rule, including most recently the concept of 'vicarious immunity' **(2)**; whilst the proposed reform of this area of law suggested by the Law Commission, will effectively undermine the whole principle itself **(3)**. Under the proposed reform, a third party will be able to enforce a contract if he can show that it purports to confer a benefit upon him, and that the contracting parties intended the third party to be able to enforce the contract. **(4)**. The contracting parties cannot modify the contract once the third party can show he has relied upon it **(5)**, so that the liability is essentially based upon 'reasonable reliance'**(6)**.

2.2.3 As such, the contractual liability is analogous to the tortious duty of care where liability is decided upon similar principles, and the courts use the concepts of proximity, foreseeability and their own idea of what is just and reasonable, simply as means of determining where reasonable reliance should end **(7)**. I would argue that it is very difficult to distinguish between the 'reasonable reliance' referred to by Adams, Beatson & Beyleveld, as well as Atiyah **(8)**, and the concept of 'reasonable expectation' which is asserted as the underpinning concept of contract law **(9)**.

2.2.4 The doctrine of consideration has always been a problem, not least because it is not clearly quantified and so can become quite nebulous **(10)**. The result is that the courts have tended in recent years to look for an element of reliance in determining whether there is any consideration, rather than looking for simply an exchange of goods or promises. Again, it would seem that liability is based on reasonable reliance, where the courts consider whether the contracting party could have expected the other party to believe that it was legally bound. This is seen as the idea of 'reasonable expectation', but it is intrinsically related to reliance, as the parties' expectations are based upon their reliance on how the other party will act. So if we consider WILLIAMS v ROFFEY BROS, it is clear that the plaintiffs relied upon the other party making the extra payment, as this is what they had been led to expect would happen. In the seminal tort case of HEDLEY BYRNE v HELLER, the reasonable reliance arises from the fact that the plaintiff could expect the defendant bank not to give him important information, without ensuring that it was correct. Again we can see the analogy between contract and tort.

2.2.5 Once we see liability based upon reasonable reliance, then there is a tendency for liability to become fault based and related to the underlying concept of 'reasonableness'. This is not necessarily true, as it could be argued that it is reasonable for a party to rely upon the other party conforming to the strict requirements of an agreed contract, however unreasonable those terms might be. Nevertheless, the tendency is for the courts to see reasonable reliance as based upon compliance with reasonable terms, and to see unreasonable terms as ones to which the other party could not have been expected to agree. The whole battery of common law rules in contract is then turned upon those terms in order to modify them, using the concepts of mistake, duress or undue influence. Onerous terms are dealt with in the same way as exemption clauses, as they are often seeking to achieve a similar end by placing the burdens onto the other party. The fact that exemption clauses are controlled on the basis of reasonableness, has meant that onerous clauses are controlled in the same way **(11)**. The end result is that the strict nature of liability is undermined, and replaced by a fault based liability underpinned by the concept of reasonableness.

2.2.6 Overall, we can see that the concept of reasonable reliance is now permeating contract law liability, and as such undermining some of the key defining aspects of contract law. As a result the difference between contract and tort is becoming more difficult to sustain **(12)**.

2.3 Similarities in the scope of the liability

2.3.1 The key problem here arises from the fact that the liability is often concurrent, as regards duty of care type liabilities. This means that both areas of law are likely to try and expand at the expense of each other. The problem is exacerbated by the fact that the problems of privity and limitation periods in contract have forced litigants to seek alternative remedies in the tort of negligence **(13)**.

2.3.2 The traditional view is that contract law determines the extent of the liability and so cannot be exceeded by tortious liability, but this leads to various problems. If we argue that the underlying basis of both contract and tort, with regard to the duty of care, is based on reasonable reliance, we could argue that they will be coextensive. Certainly contract law could not exceed the tortious liability, although it is arguable that it could be more limited, as the contract may not seek to cover liability in certain areas **(14)**.

2.3.3 This issue impinges on the primacy of liability, because the idea that contract can override tort is put in question if contracting parties cannot exclude tortious liability by seeking to exclude it by definition **(15)**; whilst the impact of common law and statute will require most exemption clauses to be reasonable. What contract law can do, is to reallocate liability within a framework determined by tort on the basis of reasonableness. For example, contracting businesses could agree to relocate insurance liability **(16)**, but they could not pass off liability in this way if it was seen as unreasonable **(17)**. The same approach is taken with onerous clauses, which cannot be relied upon if unreasonable, and will be struck down if they involve a breach of the tortious duty of care **(18)**.

2.3.4 Finally, we can note how the impact of tortious principles can be seen in the development of contributory negligence as a defence to contract law liability, where it is based upon the duty of care. We can see how this is analogous to mitigation of loss in contract law, as remarked on in recent cases **(19)**. Again we can see that the primacy of tort law is asserted.

2.4 Similarities in the Extent of the Remedy

2.4.1 The question of determining the extent of the remedy has been affected by two key problems. Firstly, it is not easy to distinguish between the different types of damages in either contract or tort. In contract, there is confusion between reliance, restitution and expectation damages, and in tort between damages for direct loss, consequential loss and economic loss. Moreover, it is clear that these definitions of damages overlap, so that economic loss is similar to, but not exactly the same as, expectation loss **(20)**. It is not surprising that the courts themselves have become confused as to the difference between the contract measure of loss and the tortious measure. In the case of SOUTH AUSTRALIA ASSET MANAGEMENT CORP v YORK MONTAGUE LTD (1996) **(21)** it has been argued that the courts imposed a contractual measure of damages, in a tortious duty of care situation **(22)**.

2.4.2 In addition, this confusion has been exacerbated by the increasing efforts of litigants to sue in tort in order to avoid the restrictions of contract law, such as privity and limitation periods. These plaintiffs have been trying to obtain damages similar to those which they would expect in contract, even though the traditional position was that damages were quite different and usually more restrictive. This distinction was weakened by the development of economic loss for negligent misstatement arising from HEDLEY BYRNE v HELLER (1963), as this allowed damages which covered loss of profits **(23)**. This led to the need to draw a distinction between negligent statement and negligent action, which proved to be very difficult to sustain **(24)**. Similarly, the distinction between direct loss, consequential losses and economic loss has also been difficult to define, and has led to problems with plaintiffs arguing that the damages were not economic loss but direct losses, and so claimable in negligence **(25)**.

2.4.3 The end result is that the distinction between contract and tort damages has become blurred. This can be seen in the case of HENDERSON v MERRETT (1994), as well as other cases arising from the Lloyds debacle **(26)**. Here the plaintiffs have been able to obtain contractual type damages for loss of profits, even though the action was for the negligent handling of an investment. It is difficult to see how this can be differentiated from other types of negligence in the provision of services, such as the installation of a faulty heating system or the construction of a faulty house. It is clear that the decision in MURPHY v BRENTWOOD is now in need of reconsideration.

2.4.4 The confusion we find with regard to the measure of damages is also reflected in other aspects of damages. The remoteness rule in contract and tort has often been confused in the past, and there is plenty of evidence to suggest that judges now effectively see the rule as the same in both **(27)**. In addition, the same confusion can be seen in the area of non-pecuniary loss, where the traditional position that such damages are not allowed in contract law has effectively been overturned, at least in those contracts where there is an underlying duty of care.

2.4.5 Indeed, the only area where the contract/tort divide has remained essentially unscathed is the differential limitation periods where the more advantageous situation is usually in tort. As we have seen, this difference is a key factor in seeking to outflank contract by taking an action in tort. The confusion in the extent of the remedy between contract and tort has led to some academics suggesting an alternative classification of the law of obligations **(28)**.

2.5 Problems arising from the similarities.

2.5.1 The growing confusion between contract and tort has caused several problems. Firstly, there is uncertainty over the basis of the 'duty of care', which arises in both contract and tort. In tort it is seen as based on the concept of 'reasonableness'; whereas in contract it is still argued that the duty of care is implied in on the basis of necessity **(29)**. I have argued that the basis is reasonableness in both cases, but this is still a matter of dispute.

2.5.2 There is also a question over the scope of contract and tort. The traditional idea that contract overrides tort is difficult to sustain, if we are referring to contracts involving a duty of care, such as the provision of services. Yet the recent Law Commission on privity of contract and the rights of third parties **(30)**, has suggested that the contracting parties should be able to exclude or limit liability by express term, and that the term would not be subject to the requirements of the UNFAIR CONTRACT TERMS ACT 1977. This means that it would be possible to exclude liability to a third party, in a contract based upon a duty of care, even if the exclusion clause would normally be seen as unreasonable. This does not accord with the idea that third party rights are based on '*reasonable expectations*', but instead elevates above this the contractual intentions of the parties. This has been attacked by academics **(31)** on the grounds that the basis of contract is legitimate expectations, which implies the requirement that the reasonable expectations of the parties should prevail. It is clear that the conflict between these two approaches has not yet been resolved.

2.5.3 Finally, the confusion over the extent of the remedies means that courts tend to confuse the nature of the damages. This in itself can lead to further attempts to weaken the divide, by persuading litigants to pursue the tortious action in the belief that they can secure contractual remedies. It is this type of action which has done most to undermine the barriers between contract and tort, by testing and exploiting the area of uncertainty opened by the HEDLEY BYRNE decision.

3. Alternative Frameworks

3.1 Introduction

3.1.1 In order to deal with the confusion engendered by the assimilation of contract and the tort of negligence, I wish to consider three possible alternative frameworks. These I have referred to as the contractual framework, the tortious framework and the integrated framework.

3.2 Contractual Framework

3.2.1 This framework sees the present confusion in the law as having arisen as a consequence of two main problems; the deficiencies of the traditional contract law remedy which forces litigants to turn to alternative forms of action, and the existence of concurrent liability which allows them to find a remedy in tort. The way to deal with the problem is to remedy the deficiencies in contract law, and to operate a strict rule of separation similar to the French rule of 'non cumul'. Such a view draws inspiration from developments in France and other civil law jurisdictions, as well as in the United States, and is supported by academics such as Markesinis and Burrows **(32)**.

3.2.2 The key reforms in contract law would be the removal of the restrictions of the privity doctrine, and eliminating the requirement for consideration where it could be shown that there is consensus between the parties. Liability here would be based on principles of reasonable reliance, which means that in duty of care situations it would be based on reasonableness, and even in contracts for the supply of goods it would accord with reasonable commercial expectations. The rules which define the extent of the remedies would be modified, to equate contract with tort in respect of non-pecuniary loss, contributory negligence, remoteness and limitation periods. The domain of contract law would be protected by the removal of the right of concurrent liability.

3.2.3 This framework would allow contract law to play a major role in the law of obligations, and restrict the role of tort to situations where there was no contractual nexus. However, there is still a problem, as to where the contractual nexus ceases to exist. Clearly it will cover parties involved in so-called 'network contracts', and this will include employees **(33)**. The problem is that the courts may be tempted to create a contractual nexus, in situations where it is not clear that it should exist at all, as in CLARKE v THE EARL OF DUNRAVEN (1897) **(34)**, so we could find that most duty of care situations would be fitted into a contractual context.

3.3 The tortious framework

3.3.1 An alternative framework would be to group all the duty of care type liability under one area of law, which would be part of the tort of negligence. This would expand the area of tortious liability at the expense of contract, limiting the latter to those areas of strict liability which are result based, such as the sale of goods. Again there would be no right of concurrent liability. Essentially this is the approach favoured by Stapleton **(35)**.

3.3.2 The main problem here is that it can be difficult in practice to distinguish between duty of care type liability, and strict liability in contract. This can be seen in the provision of a contract which involves the supply of goods and labour, such as the repair of a car or the installation of double glazing. The litigant would have to know in advance whether the fault arose from the quality of the goods, or the fitting of those goods, as he could not bring an action in the alternative. Even some contracts, which are purely service contracts, can be seen as based on expected results **(36)**.

3.3.3 A further consideration is how far even the contracts for the sale of goods should be seen as purely result based, and involving strict liability. Although this is the traditional view **(37)**, the SALE OF GOODS ACT 1979 is permeated by the idea of reasonableness. The definition of 'satisfactory quality' **(38)** implies the standard which a 'reasonable' person would expect of the goods, whilst 'fitness for purpose' **(39)** requires the goods to be 'reasonably' fit for the purpose specified by the buyer. Certainly some academics see a strong influence of the concept of reasonableness in this area of law **(40)**. It would seem that strict liability is only really applicable where the end results are specifically identified, such as a requirement to supply goods of a specific dimension **(41)**.

3.4 The Integrated framework

3.4.1 This arises from the view that the boundary between contract and tort is purely artificial. It seeks to create a general law of obligations, in which contract and tort are combined along with restitution. We can see this idea in the views of Cooke and Oughton **(42)**, as well as Cane **(43)**. However, it is best expressed in the work of Atiyah, who sees such a generalised law of obligation based upon the twin pillars of reciprocal benefit and reasonable reliance **(44)**. This idea of reasonable reliance is difficult to distinguish in practice from the idea of 'legitimate expectation' or 'reasonable expectation' used by other academics **(45)**. Indeed, it could be argued that the two concepts are effectively two sides of the same coin.

3.4.2 The key problem with the integrated framework is that it effectively eliminates the idea of free will by way of contractual intention. In effect, all liability is imposed by the law along the lines of reasonableness defined by the courts, and the role of the contracting parties is to make minor adjustments where these are accepted as reasonable. This framework still incorporates a separate role for contract and tort, but the line between them is very blurred.

3.4.3 To some extent, we can see this framework being developed in New Zealand law with its changes to contract and tort law, and the existence of concurrent liability. This system favours the plaintiff in extending his rights of action in contract and tort, but it correspondingly imposes upon the defendant a considerable degree of uncertainty, as he is less able to determine the extent of his liability. In particular, he cannot easily determine whether he is likely to be sued in contract or tort, and so he will find it difficult to arrange even a reasonable limitation of his liability.

4. A Possible Classification

4.1 Underpinning concepts

4.1.1 In order to arrive at a possible classification, we need to be aware of the purpose of the two areas of law. The law of contract seeks to enforce agreed arrangements between one or more parties, whilst the law of tort seeks to remedy general wrongs deemed to be actionable by society. It is for this reason that the basis of contract is seen as enforcing contractual intention or the reasonable expectation of the parties, whilst tort is seen as relating to reasonable reliance. Yet I have argued that the duty of care liability can be seen as relating to reasonable reliance or reasonable expectation, and to some extent the terms are easily confused. Arguably, the parties rely upon the other party doing what they would expect him to do, so that in effect reasonable reliance and reasonable expectation are analogous terms.

4.1.2 It could also be argued that in duty of care obligations, whether in contract or tort, the law implies that the intentions of the contracting parties are reasonable, and so contractual intention can also be equated with reasonable reliance or reasonable expectation. The difference arises where the liability is strict, as in the sale of goods or provision of a specified service. But in the area of the duty of care, the underlying nature of the liability is the same, and so the general legal framework should incorporate both of these concepts of liability. The role of contract law here is to enable the two parties to make some modification to the general legal liability determined by society, as long as that modification is reasonable. In this way, risk can be reallocated between parties, where they are of similar bargaining power, and the reallocation is not seen as unreasonable. We can adopt different levels of liability according to the willingness of the other party to pay a price, so long as there is a bottom line determined by the law. For example, a courier service may have a duty of care not to allow goods in its possession to be damaged, and should not be able to exclude liability entirely in respect of a consumer; but they could agree on a variety of levels of compensation, depending upon the price the consumer was prepared to pay.

4.1.3 In effect, I would argue that we must have a separate area of contract and tort, but that reasonableness must be the underpinning basis of both, at least as far as duty of care type liability is involved. In effect, this involves a hierarchy of systems, in which the primary framework of liability should be based on reasonable reliance or reasonable expectation similar to tort, whilst the secondary framework should be based upon bargain principles, similar to traditional contract law **(46)**. The tortious type liability should determine the all embracing nature of liability, but it should be possible for contracting parties to modify this within bounds set down by law.

4.1.4 As a result, it would be necessary for contract law to be reformed by removing the rule on privity and replacing the doctrine of consideration with one based on establishing consensus, where consideration would play an evidential role. In addition, the limitation periods should be assimilated in contract and tort, as should the rules for calculating damages, including the rules on remoteness and the claiming of non-pecuniary loss. This would remove the need to take action in tort, and so would allow us to introduce a 'non cumul' type rule preventing concurrent liability. The focus of the divide would then be the point at which we could see a contractual relationship existing. This would include contracting parties and third parties, who could reasonably be seen as being entitled to benefit. The courts would have to determine which parties could be brought within this relationship, and this could include beneficiaries of a network contract, or employees of a contracting party. It is also arguable that this could cover beneficiaries of a will, as in WHITE v JONES (1995). However, there would have to be a 'cut off' point, so that not all relationships would be construed as contractual. For example, occupiers of property would not be seen as having a contractual relationship with persons passing by their premises, so that any injury which may befall the latter would only be actionable in tort.

4.1.5 The key underlying principle here is that liability should be based on the concept of 'reasonableness'. This brings us back to the key problem of how this should be determined by the courts. I have tried to argue that when dealing with actions in contract or tort, the courts have tended to take one of two approaches, an efficiency orientated one or a socially oriented one. The main reason for adopting one approach or the other has often been the relationship between the parties involved. Consequently, an efficiency orientated approach has usually been taken where the two parties are of similar bargaining power, such as in PHOTO PRODUCTION v SECURICOR (1980) in contract, or CAPARO v DICKMAN (1990) in tort. In contrast, a socially orientated approach has been used where the parties are of differing bargaining power, such as in SCHROEDER v MACCAULEY in contract, and SMITH v BUSH in tort.

4.1.6 It is arguable that some judges tend to one approach rather than the other, so that Lord Keith and also Lord Bridge have tended to take the efficiency approach, whilst Lord Goff, Lord Templeman and Browne-Wilkinson have tended to take the socially orientated approach. It is also arguable that there has been a shift over time, with one approach being favoured at the expense of the other at different periods. It would appear that the efficiency approach was more prevalent in the earlier cases, such as LISTER v ROMFORD ICE & COLD STORAGE (1957) and REID v RUSH TOMPKIN (1979), but less so in the more recent cases such as SMITH v BUSH (1990) and SPRING v GUARDIAN ASSURANCE (1994).

4.1.7 Inevitably, the approach which prevails reflects the attitudes of the times, and whether there is greater concern with business efficiency or the interests of the weaker members of society. However, in general, I would argue that the socially orientated approach should be preferred in most cases, unless there is clear evidence that the parties involved were aware of their potential liabilities and able to take action to protect themselves. Usually stronger parties will not need to go to law to protect their interests, so it is often the weaker parties who turn to law for protection, such as consumers and employees.

4.1.8 I could argue that ultimately there is an interrelationship between both approaches to some degree. In all cases the court is deciding what it feels is reasonable in accordance with the circumstances, and it may feel that what is reasonable where the parties are of equal bargaining power, is different where they are not. In effect, reasonable businessmen would feel that it was fair for other parties on an equal footing to deliver strictly on their promises, but that this should not be required of a party who has been forced into a contract through ignorance or duress, or even lack of bargaining power. Certainly, when we refer to the idea of reasonable reliance and reasonable expectation, we are using terms which denote that the attitude of the parties has to be based on a set of principles related to reasonable behaviour, and this is far removed from a mechanistic system which enforces all promises, however obtained.

5. Concluding Remarks

5.1 Final Thoughts

5.1.1 Overall, we can see that the issue of the contract/tort divide is a complex one involving a whole number of interrelated issues. In this thesis, I have tried to show that the growing assimilation between the two areas of law is based not only on a common heritage, but common underpinning ideological principles. One of the problems of our case based system, is that we do not always consider the underlying principles in a logical manner, and instead allow the law to develop in a certain direction in response to specific problems, as with the rapid growth of actions for negligent misstatement.

5.1.2 I would argue that we need to consider a more logical codified system of law, so that we can see the underlying principles upon which law is based. I also feel that we need to ensure that these areas of law are more clearly defined, and less open to erosion by the development of unrestrained litigation. As such, we could learn much from the civil law systems of France and Germany, and develop a general law of obligations with different categories clearly marked out such as contract, tort and restitution. Given the problems which we have encountered in this area in recent times, perhaps it is time to codify our law of obligations.

5.1.3 Nevertheless, the present picture is one of confusion between contract and tort, with no clear boundary to be seen. The 'great divide' which existed between contract and tort in the traditional view, seems to have become a 'grand illusion' in recent times. I do not think that the divide can be or should be recreated, but perhaps it is time to lay down a few markers again, so as to prevent the present confusion from leading to even greater uncertainty in the law.

Notes

1. Smith, 'Rights, Remedies and Normal Expectancies in Tort and Contract' (1997) 113 LQR 426

2. See Adams and Brownsword, 'Privity and the Concept of a Network Contract' (1990) 10 Legal Studies 12

3. 'Privity of Contract:Contracts for the benefit of Third Parties' Law Commission Report No 242 (July 1996)

4. Clause 1(1)(b) of the Report as modified by clause 2(1)

5. Clause 2(1) of the Report

6. Adams, Beyleveld and Brownsword, 'Privity of Contract - the Benefits and the Burdens of Law Reform' (1997) 60 MLR 238

7. See Lord Oliver in CAPARO v DICKMAN (1990) 1 All ER 568 at page 585 where he states;

> '...Indeed, it is difficult to resist a conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing'

8. Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 LQR 193

9. Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433

10. CHAPPELL & CO v NESTLE CO (1959) 2 All ER 701

11. INTERFOTO PICTURE LIBRARY LTD V STILETTO VISUAL PROGRAMMES LTD (1988) 1 All ER 348

12. Cane, 'Contract, Tort and Economic Loss' in The Law of Tort Ed Furmston

13. LANCASHIRE & CHESHIRE ASSOCIATION OF BAPTIST CHURCHES INC v HOWARD & SEDDON (PTNR) (1993) 3 All ER 467 and also HENDERSON v MERRETT SYNDICATES LTD (1994) 3 All ER 506

14. HOLT v PAYNE SKILLINGTON (1995) Times Law Report December 22 1995

15. PHILLIPS PRODUCTS v HYLAND (1987) 2 All ER 620

16. BRITISH TELECOM PLC v JAMES THOMPSON & SONS LTD (1997) Times Law Report January 28 1997

17. See here GEORGE MITCHELL v FINNEY LOCK SEEDS (1983) 2 All ER 737 and also ST ALBANS D.C. v INTERNATIONAL COMPUTERS LTD (1996) 4 All ER 481

18. See JOHNSTONE v BLOOMSBURY HEALTH AUTHORITY (1991) 2 All ER 293

19. BROWN v KMR SERVICES LTD (1995) 4 All ER 598 Stuart-Smith LJ at page 617,

> '...The situation (mitigation of loss) is not unlike apportionment of liability between tortfeasors, or the assessment of the degree of contributory negligence'.

Also note comments of Beldam LJ in BARCLAYS BANK PLC v FAIRCLOUGH BUILDING LTD (1995) 1 All ER 289 at page 300 where the same analogy is drawn.

20. Stanton, 'The Recovery of Pure Economic Loss in Tort: The Current Issues of Debate' in The Law of Contract Edited by Furmston (1986 Edition)

21. (1996) 3 All ER 365

22. Stapleton, 'A new "Seascape" for Obligations: Reclassification on the Basis of Measure of Damages' Essay written for SPTL Conference on The classification of obligations December 1996. Also see 'Negligent Valuers and Falls in the Property Market' (1997) 113 LQR 1

23. Note this is available in Fraudulent Misrepresentation as per EAST v MAURER (1991) 2 All ER 733

24. See LANCASHIRE & CHESHIRE v HOWARD & SEDDON (note 13 above)

25. Cooke, 'An Impossible distinction' (1991) 107 LQR 46

26. See for example BROWN v KMR SERVICES LTD (note 19 above) HENDERSON v MERRETT op.cit. (note 13 above) and AIKEN v STEWART WRIGHTSON MEMBERS' AGENCY LTD (1995) 3 All ER 449

27. See Lords Scarman and Orr in PARSONS v UTTLEY INGHAM & CO LTD (1978) 1 All ER 525 as referred to by Cane in 'Contract, Tort and Economic Loss' op.cit. (note 12 above) and also note comments of Lord Bingham in BANQUE BRUXELLES LAMBERT v EAGLE STAR INSURANCE CO LTD (1995) 2 All ER 769 at 841.

28. See Stapleton op.cit.

29. As in LIVERPOOL CITY COUNCIL v IRWIN (1976) 2 All ER 39 and SCALLY v SOUTHERN HEALTH AND SOCIAL SERVICES BOARD (1991) 4 All ER 563

30. Op cit (note 3 above)

31. See Adams, Beyleveld and Brownsword op.cit.

32. Markesinis, 'An Expanding Tort Law - the Price of a Rigid Contract Law' (1987) 103 LQR 354 and Burrows, 'Solving the Problem of Concurrent Liability' (1995) Current Law Problems 103

33. See Adams and Brownsword, 'Network contract' op.cit. as well as 'Privity of Contract - that Pestilential Nuisance' (1993) 56 MLR 722

34. (1897) AC 59

35. See here Stapleton op.cit. especially at page 15 where she states,

> '...Were the new classification to be adopted we would classify all obligations of care as tort obligations (because their breach triggers the normal expectancies measure) including those that would not arise without consideration...'

Also see her article 'The Normal Expectancies Measure in Tort Damages' (1997) 113 LQR 1

36. See GREAVES & CO (CONTRACTORS) LTD v BAYNHAM MEIKLE & PARTNERS (1975) 3 All ER 99 as well as BARCLAYS BANK v FAIRCLOUGH BUILDING LTD (1995) 1 ALL ER 289

37. YOUNG & MARTEN LTD v McMANUS CHILDS LTD (1968) 2 All ER 1169

38. Section 14(2)(a)

39. Section 14(3)

40. Atiyah, 'The Binding Nature of Contractual Obligation' in Contract Law Today Ed Harris Donald and Tallon Denis

41. See HILLAS & CO LTD v ARCOS LTD (1932) All ER Rep 494

42. The Common Law of Obligations London (1993)

43. Op.cit (at note 12 above)

44. 'Contracts, Promises' op.cit (at note 2 above)

45. Smith, op.cit and Adams, Beyleveld & Brownsword op.cit.

46. See Cane op.cit. who argues here that externally imposed liability is the primary liability and bargained for liability is secondary

TABLE 3 - CONTEMPORARY ANALYSIS

Nature of Liability	CONTRACT	TORT (NEGLIGENCE)
Basis of liability	Based on agreement from which are derived the need for consensus. Privity still important but consideration now related to reasonable reliance rather than need for reciprocal promise.	Liability imposed by law to remedy wrongs done to plaintiff.
Type of liability	Based on express intentions but subject to terms implied in on basis of "reasonableness" in cases of duty of care type liability.	Liability is essentially fault based but growth of strict liability in areas involving weaker parties such as consumers and employees.
Expectation or reliance based	Based on reasonable expectation or legitimate expectation but can involve reasonable reliance.	Based on reasonable reliance as defined by society but widened to allow idea of reasonable expectation.

Scope of Liability	CONTRACT	TORT (NEGLIGENCE)
Extent of liability	Contractual liability coterminous with tortious liability except for non duty of care areas. Tortious liability may be wider.	Tortious liability may be wider than contractual liability.
Primacy of liability	Contractual terms generally take priority but are subject to requirement of reasonableness very similar to tortious principles.	Tortious principles may override contractual terms by way of implied terms affecting duty of care areas of law.

Extent of Remedy	CONTRACT	TORT (NEGLIGENCE)
Measure of losses	Plaintiff can claim expectation losses as well as reliance and restitution loss. The losses can be limited by contract term subject to compliance with "reasonableness" requirement of the UNFAIR CONTRACT TERMS ACT 1977.	Losses are defined by law and will include not only reliance and restitution losses but also expectation loss under the development of the principle in HEDLEY BYRNE v HELLER where it is referred to as pure economic loss.
Limits on recoverability	Remoteness rule effectively based on "reasonable foreseeability". Non pecuniary losses can be claimed where liability is related to duty of care. Limitation period of six years running from breach of contract.	As per contract law. Non pecuniary losses claimable in most cases. Limitation periods running from occurrence of damage/injury or when plaintiff could be expected to know of damage or injury.

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