

Contributory Negligence: Is the Law of Contract Relevant?

by

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I. INTRODUCTION

Several recent cases in other jurisdictions¹ have raised the question whether statutes similar to our Contributory Negligence Act 1947² apply to contract actions. These statutes were enacted to mitigate the often harsh effects of the doctrine of contributory negligence. At common law, this doctrine provided a complete defence, if successfully pleaded, to an action for damages for injuries arising from the defendant's negligence. Negligence is used in a much wider sense in contributory negligence than its usual meaning of a breach of a legal duty to take care to include the failure of a plaintiff to take reasonable care of himself thus contributing, by his want of care, to his injury. It is common to see the effect of the defence summarised thus:³ "If

¹ English cases: *Quinn v. Burch Bros. (Builders) Ltd.* [1966] 2 Q.B. 370; *O'Connor v. B.D.B. Kirby and Co.* [1972] 1 Q.B. 90; *Sole v. Holt* [1973] 1 Q.B. 574; *De Meza and Stuart v. Apple, Van Straten, Shena, and Stone* [1974] 1 Lloyd's Rep. 508. Australian cases: *Queens Bridge Motors and Engineering Co. Pty. Ltd. v. Edwards* [1964] Tas. S.R. 93; *Smith v. Buckley* [1965] Tas. S.R. 210; *Belous v. Willetts* [1970] V.R. 45; *James Pty. Ltd. v. Duncan* [1970] V.R. 705; *Hopes v. Ashton Circus Pty. Ltd.* [1972] 2 N.S.W.L.R. 395.

² The Law Reform (Contributory Negligence) Act 1945 (United Kingdom); Tortfeasors and Contributory Negligence Act 1954 (Tasmania); Wrongs Act 1958 (Victoria); Law Reform (Miscellaneous Provisions) Act 1965 (New South Wales).

³ *Winfield on Tort* (8th ed.), 102. This statement will suffice as an introduction to the subject. However, the High Court of Australia stated in *Alford v. Magee* (1952) 85 C.L.R. 437, 451: "If one thing in this unhappily confused field is clear, it is that the modern common law as to contributory negligence is not . . . completely stated by saying simply that, if a plaintiff's negligence has been a cause of the damage of which he complains, he cannot recover from a defendant whose negligence has also been a cause of that damage".

the plaintiff's injuries have been caused partly by the negligence of the defendant and partly by his own negligence, then at common law, the plaintiff can recover nothing." Obviously, this doctrine was capable of working grave injustices. Yet, attempts by the courts to mitigate the effects of the operation of the doctrine only led to further complexity and confusion. Consequently, various Commonwealth legislatures eventually enacted legislation allowing an apportionment of damages between the parties when contributory negligence was successfully pleaded.

This paper can be conveniently divided up into four parts. The first part deals with the defence of contributory negligence and its relationship to contract actions at common law. It will be submitted that the defence has never been applied to contract at common law and an attempt will be made to explain why this has been so. It will be submitted that the development of negligence in the 19th century introduced the distorting element of fault into the essentially causative defence of contributory negligence. As a result, this made the defence appear inappropriate to the law of contract which is based on causation not fault. The second part of the paper examines the provisions of the Contributory Negligence Act 1947 to determine whether, as a question of statutory interpretation, the Act applies to contract. It will be submitted that the Act does not so apply. The third aspect of this paper examines the limited amount of relevant case law. It will be seen that there is no binding authoritative decision in either England or Australia which is conclusive; while the weight of case law in England favours the Act applying to contract, the Australian cases are to the contrary.³ It will be submitted that the Australian decisions reflect a keener appreciation of the problems involved in applying the Act to contract. Lastly, in the conclusion it will be suggested that the application of the Contributory Negligence Act to contract actions is both contrary to the canons of statutory interpretation as well as undesirable in principle.

II. AT COMMON LAW

An understanding of the common law background is vital to an understanding of the Acts and the case law as there is considerable doubt as to whether the defence of contributory negligence applied to contract at common law. While there is no decided case on this point, there are some dicta to the effect that the defence does not apply to contract.⁴ On the other hand, Glanville Williams in his classic work⁵

⁴ *Martin v. Great Northern Railway* (1855) 16 C.B. 179, 139 E.R. 724; *Burrows v. March Gas Co.* (1872) L.R. 7 Ex. 96; *Mowbray v. Merryweather* [1895] 2 Q.B. 640; *Valie Bros. v. Hobson Ltd.* (1933) 149 L.T. 283.

⁵ *Joint Torts and Contributory Negligence* (1951), xlv.

asserts that the defence applied, at common law, to breaches of contract. He relies almost entirely on a series of 19th century cases involving negligence actions against railways to support this view.⁶ All these cases were decided on the basis of negligence. He claims that there is no reason why the courts could not have applied the defence to contract in these cases.⁷

If a passenger in a railway carriage knows that a door is defective and yet leans upon it and falls out, it is difficult to see why the defence of contributory negligence should not be available, and this whether the action be framed in contract or tort.

The essence of Dr Williams' argument is that it would be unjust to apply the defence to tort but not to contract. His "injustice" argument appears superficially attractive because in the railway negligence cases the law allows a choice of actions⁸—either in contract or in tort.⁹ It is this co-existence of the actions that illustrates the injustice because in one action it is a complete defence while in the other it is no defence at all. However, where the law allows a choice of action it is an exception to the general rule stated by Greer L.J. in *Jarvis v. Moy, Davies, Smith, Vanderwell, and Co.*:¹⁰

The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is a tort, and it may be a tort even though there may appear to be a contract between the parties, if the duty in fact arises independently of the contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract.

Clearly in this normal situation there is no injustice because the law does not allow a tort action to exist where there is a contract action.

It is clear that in the class of cases which are exceptions to the general rule¹¹ Dr Williams' "injustice" argument is more strongly

⁶ See Halsbury, *Laws of England* (3rd ed.) v. 28, 87, note r.: "The former defence of contributory negligence was not confined to claims in negligence . . . but included . . . an implied contractual duty to take care (as in the case of railway passengers carried for reward)."

⁷ *Op. cit.*, 214.

⁸ "There are in the reports, numerous railway cases in which a passenger has, so far as the report indicates, sued in negligence rather than in contract, for breach of an implied obligation to take reasonable care . . ."; *James Pty. Ltd. v. Duncan*, supra, 719, per McInerney J.

⁹ Otto Kahn-Freund, *The Law of Carriage by Inland Transport* (4th ed.), 450; "The rights of fare-paying passengers in contract and in tort exist side by side".

¹⁰ [1936] 1 K.B. 399, 405; see also *Jackson v. Mayfair Window Cleaning Co.* [1952] 1 T.L.R. 175; *Mathews v. Kuwait Bechtel Corporation* [1959] 2 Q.B. 57; *James Pty. Ltd. v. Duncan* [1970] V.R. 705.

¹¹ As to such cases it has been commented: "Now I could accept there may be cases where a similar duty is owed under a contract and independently of contract. I think that on examination all those will turn out to be cases where the law in the old days recognised either something in the nature of a status like a public calling (such as common carrier, common innkeeper, or a bailor or a bailee) or the status of master and servant"; *Bagot v. Steven Scanlon and Co.* [1966] 1 Q.B. 197, 204, per Diplock L.J. (sitting as an additional judge on the Kings Bench).

based. It does seem wrong to deny the defendant a defence because the plaintiff astutely chooses one action instead of the other co-existing action. Why then were the judges of last century and this century (until the Act was passed) reluctant to apply the defence of contributory negligence to contract, at least where tort and contract actions co-existed? The High Court of Australia suggested the answer to this question in *Alford v. Magee*.¹² Historically, the original common law rule of contributory negligence was solely based on causation. "At that time [prior to the 19th century] the basis of civil liability was conceived to be simply an act causing damage."¹³ The so-called defence of contributory negligence was merely a claim by the defendant that he did not cause the damage. If the law had continued to view causation as the basis of liability, the defence would be appropriate in both contract and tort because in both the same question is relevant: "Who caused the damage?" However, in the 19th century "the idea of negligence (with its connotation of blameworthiness) as a basis of liability was developed."¹⁴ The High Court pointed out that there was difficulty harmonising the original common law rule of contributory negligence with the concept of negligence because the former was based on causation while the latter involved connotations of blameworthiness (as well as causation). The idea developed that the plaintiff could not recover because he was in some way to blame for the accident. The application of the concept of fault can be seen in the Marine Conventions Act 1911¹⁵ as "Holdsworth¹⁶ . . . [pointed] out 'the Admiralty lawyers, being civilians, naturally grounded liability upon dolus or culpa; and the logical consequence of this conception is the modern application of the rule of division of loss to the case where both ships are at fault.'"¹⁷ Similarly, the Contributory Negligence Act allows apportionment of damages "to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." It is clear today that blameworthiness (or fault) is much more important in the operation of the Contributory Negligence Acts than causation,¹⁸ a reflection of the developments of the 19th and early 20th centuries.

The connotation of blameworthiness is a stranger to the law of

¹² (1952) 85 C.L.R. 437. It was a strong court consisting of Dixon, Williams, Webb, Fullagar and Kitto JJ.

¹³ *Ibid.*, 453.

¹⁴ *Idem.*

¹⁵ This legislation was the model for the Contributory Negligence Acts.

¹⁶ Sir William Holdsworth, *History of English Law*, v. III, 268.

¹⁷ (1952) 85 C.L.R. 437, 453.

¹⁸ Two New Zealand cases that illustrate this point are *Helson v. McKenzies (Cuba Street) Ltd.* [1950] N.Z.L.R. 878 (C.A.) and *Hoerberger v. Koppens* [1974] N.Z.L.R. 597.

contract as it has never mattered how a term of a contract is broken.¹⁹ It is submitted that with the development of negligence, the judges no longer considered the defence of contributory negligence appropriate to the law of contract. The misconstruing effect the introduction of fault (i.e. negligence) had on the originally causative defence is illustrated by an extract from *Harper v. Ashtons Circus Pty. Ltd.*:²⁰

... the importation into the law of contract of contributory negligence as a defence seems both unjustified and unnecessary. The true question at issue in a case such as the present is whether the damage suffered by the plaintiff was caused by the defendant's breach of warranty or by the plaintiff's own negligent act or omission.

Clearly, the New South Wales Court of Appeal thought the defence was inappropriate to the question of causation that must be answered in contractual actions. Gillard J. in *Belous v. Willetts* summed up the position: "Whatever was the origin of the doctrine of contributory negligence and its early history, in modern times it became an appropriate defence in an action for negligence, as developed during the 19th century."²¹

III. THE CONTRIBUTORY NEGLIGENCE ACT

Regardless of the appropriateness of the defence to contract actions, if such actions come under the Contributory Negligence Act 1947 then those statutory provisions apply. The major textbook writers agree that the question whether the Act applies to contract "has not yet been clearly determined".²² Except for one ambiguous decision of the English Court of Appeal,²³ all the other decisions are of little authority.

The relevant provision in the Contributory Negligence Act 1947 is section 3(1) which provides:

Where any person suffers damage as the result of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that—

(a) This subsection shall not operate to defeat any defence arising under a contract.

(b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

¹⁹ See *Quinn v. Burch Bros. (Builders) Ltd.* [1966] 2 Q.B. 370, 379. This creates difficulty when considering whether a breach of contract comes within the definition of "fault" in the Contributory Negligence Act 1947; post n. 25.

²⁰ [1972] 2 N.S.W.L.R. 395 (headnote).

²¹ [1970] V.R. 45, 46.

²² *McGregor on Damages* (13th ed.), 92; *Charlesworth on Negligence* (5th ed.), 616, para. 1019; Harry Street, *Law of Torts* (6th ed.), 444-445.

²³ *Sayers v. Harlow U.D.C.* [1958] 1 W.L.R. 623.

As Glanville Williams observed,²⁴ whether the Act applies to contract depends largely upon the wording of the definition of "fault". Section 2 defines "fault" as meaning "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this act, give rise to the defence of contributory negligence". Dr Williams argues that "negligence" may occur by way of a "negligent breach of contract" as well as by a negligent tort. Paull J., at first instance, in *Quinn v. Burch Bros. (Builders) Ltd.* criticised the use of the phrase "negligent breach of contract".²⁵

I confess that I do not myself understand the phrase 'a negligent breach of contract'. Such a phrase seems to import that liability in contract depends upon the manner of the breach. I cannot think that in contract it matters whether the breach is brought about deliberately or negligently or per incuriam. . . . The phrase is . . . merely a way of saying that the breach was a breach of a term not to be negligent.

Paull J. (like Dr Williams) did not think "negligence" was limited by the phrase "other act or omission which gives rise to a liability in tort". McInerney J. in *James Pty. Ltd. v. Duncan* fully discussed this point:²⁶

Dr. Williams concedes that the use of the word 'other' preceding the words 'act or omission' in the definition presents difficulties. Or ordinary principles of construction the 'act or omission' referred to must be regarded as one which gives rise to a liability in tort. This suggests that the words 'negligence' and 'breach of statutory duty' are to be construed ejusdem generis with the acts and omissions which give rise to a liability in tort. Dr. Williams suggests that this construction may be escaped by reading the word 'negligence' as applying to all cases of negligence, whether giving rise to a liability in tort or in contract, and that the Act also applies to other acts or omissions provided they give rise to a liability in tort. . . . This seems a forced construction and it is not easy to understand why the words 'act or omission' must be read as limited to those acts or omissions which give rise to a liability in tort while the words 'negligence' and 'breach of statutory duty' are not to be regarded as similarly limited.

The writer agrees that the wording of the definition will not bear the strain Dr Williams' approach would put on it. However, several other arguments of varying degrees of persuasiveness may be put forward to support the view that the Act applies to contract.

Glanville Williams claims that where the same act or omission constitutes both a tort and a breach of contract so that in its tort aspect the case is subject to the provisions of the Act, the Act applies also to its contract aspect. The Act is to be regarded as paramount. Hence the new tort rule ought to be regarded as a matter of policy as exclusive of the old contract rule where both issues arise in the same case.²⁷ The writer knows of no such canon of statutory interpretation

²⁴ *Op. cit.*, 329.

²⁵ [1966] 2 Q.B. 370, 379. The origin of this phrase is credited to Greer L.J. in *Grein v. Imperial Airways Ltd.* [1937] 1 K.B. 60, 71.

²⁶ [1970] V.R. 705, 725-726.

²⁷ *Op. cit.*, 330.

that allows a court to interpret statutes on the basis of policy when the words in the statute do not allow this interpretation.²⁸ McInerney J. in *James Pty. Ltd. v. Duncan* thought Dr Williams' argument was based on his view that at common law the defence applied to contract. As he was unable to accept that view, he did not find this argument forceful. The judge concluded: "I think it altogether unlikely that the Act was ever intended to apply to any other actions than those founded in tort."²⁹

An alternative argument advanced by Dr Williams is that the definition ought not to be taken as restrictive of the word "fault" in its usual meaning. He claims there are dicta (which unfortunately he does not cite) to support this view. However, he admits that in all those cases "the interpretation clause provided that X should 'include' Y, not that X should 'mean' Y as the Contributory Negligence Act does."³⁰ The leading authority *Craies on Statute Law* rejects Dr Williams' proposition.³¹ It has been elsewhere stated that there is an obvious difference between a clause which provides that X shall include Y and a clause which provides that X shall mean Y.³² Once again Glanville Williams' sense of injustice over-reaches his legal reasoning. He seems to admit this when he claims that "if such a reading gives the right result it should be permissible".³³

A further argument of Dr Williams' is based on section 1(7)³⁴ of the U.K. Act which states that Article 21 of the Convention set out in the First Schedule in the Carriage by Air Act 1932³⁵ "shall have effect subject to the provisions of this section". The Convention applies to contracts of international carriage by air, and regulates, inter alia, actions against a carrier for negligence. Such actions would be in the view of English law indifferently actions in contract or tort. Dr Williams infers from this that section 1(7) "is a clear indication that Parliament meant the scheme of the Act to apply to what may now be called mixed cases of contract and tort".³⁶ Clearly this argument may support his other arguments, but it cannot stand alone.

Dr Williams' last argument is that the legislature intended the Act to cover contract as well as tort. The Contributory Negligence Bill, in its original form, provided that it should not apply to any claim arising under contract. This provision was deleted and replaced by the

²⁸ This is assuming that "negligence" in the definition of fault is limited to tort.

²⁹ *Supra*, 726. See also *McGregor on Damages* (13th ed.), 92: "The Act was of course passed with tort rather than contract in mind. . . ."

³⁰ *Op. cit.*, 331.

³¹ (6th ed.), 212.

³² *James Pty. Ltd. v. Duncan*, *supra*, 727.

³³ *Op. cit.*, 330, note 2.

³⁴ Section 1(7) corresponds *mutatis mutandis* with s.3(7) of the Contributory Negligence Act 1947 (N.Z.).

³⁵ Carriage by Air Act 1940 (N.Z.).

³⁶ *Op. cit.*, 330.

present paragraph 6 of section 1(1).³⁷ Dr Williams infers from this that Parliament intended contract to come under the Act. Even if Dr Williams' inference is correct, it is for the legislature to state its intention in clear words and this has not been done. However, he correctly admits that this argument cannot be raised in court.³⁸

With the exception of his first point, Dr Williams' arguments are either not strongly based (if at all) in law or are inadmissible in a court of law. However, there are two other arguments that could be seen as supporting the view that the Act applies to contract.

The definition of "fault" contains two distinct meanings. "Fault" may mean either "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort" or "any act or omission which . . . would, apart from this Act, give rise to the defence of contributory negligence". Finlay J. in *Helson v. McKenzies (Cuba Street) Ltd.* said that the expression "contributory negligence" in the definition of the word "fault" in section 2 of the Act must not be interpreted as limited to actions for negligence, but must be construed as applicable to all those actions to which before the enactment of that statute, it was recognised to raise a defence of contributory negligence.³⁹ So if at common law the defence applied to contract, this second meaning in the definition would bring contract actions under the ambit of the Act.⁴⁰ As discussed earlier the writer does not accept that the defence applied to contract at common law so the point loses its force.⁴¹

³⁷ Section 3(1) (b) in New Zealand Act.

³⁸ In *James Pty. Ltd. v. Duncan*, supra, McInerney J., who discussed Dr. Williams' other arguments fully, could not consider this argument.

³⁹ [1950] N.Z.L.R. 878 (C.A.). The other members of the Court of Appeal (Gresson and Northcroft JJ.) expressed no opinion on this point.

⁴⁰ Crisp J. in *Queens Bridge Motors and Engineering Co. Pty. Ltd. v. Edwards*, supra, 96, supports this view: "The disjunctive form of the last part of the definition makes it at least clear that in those actions in contract, where prior to this act, the defence of contributory negligence had been recognised, this Act does nothing to disturb it".

⁴¹ It is indeed difficult to see how this dual definition of "fault" fits into the words of s.3. McInerney J. explained it in the following way in *James Pty. Ltd. v. Duncan*, supra: "There are many cases of contributory negligence which give rise to no liability in tort, in that the contributory negligence in question consists of a failure to take reasonable care for one's own safety and not a breach of a legal duty to take care for the safety of some other person. . . . The definition of 'fault' must be construed having regard to the fact that the word 'fault' is used in the opening words of s.26(1), viz. 'where any person suffers damages as the result partly of his own fault and partly of the fault of any other person or persons'. Where first used in that context the word 'fault' must refer to an act or omission which gives rise to the defence of contributory negligence. Where secondly used, viz. in the phrase 'and partly of the fault of any other person or persons', the word 'fault' means 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort'". But see *Charlesworth on Negligence* (5th ed.), 616 where the first "fault" in s.3(1) (N.Z.) is footnoted to mean "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence".

Paragraphs (a) and (b) of the proviso to section 3(1) refer to "any defence arising under a contract" and "any contract . . . providing for the limitation of liability". Do these paragraphs support the view that the Act applies to contract? Paull J., at first instance in *Quinn v. Burch Bros. (Builders) Ltd.*, did not feel he was precluded by the terms of paragraph (a) from finding the subsection applied to the contractual situation.⁴²

The words [of paragraph (a)] are not 'under the law related to contract'; the words are 'any defence arising under a contract', and the phrase can only relate to some express clause in a particular contract which governs the liability of the parties in the event of one of the parties being at fault. Such clauses are not uncommon in contracts between a contractor and a subcontractor.

With respect, the writer agrees with Paull J. that this is the natural reading of paragraph (a). There is, however, a world of difference between saying that this reading does not preclude the Act applying to contract and saying that this reading proves the Act does apply to contract. Paragraphs (a) and (b) are explainable as relating respectively to a defence (arising under a contract) to a claim in tort, and to a limitation of liability (arising under a contract) in respect of a claim in tort.⁴³

It will be apparent by now that the writer considers that as a matter of statutory interpretation the Contributory Negligence Act 1947 does not apply to contract actions. It is now necessary to turn to the cases in this area to see how the courts have approached this problem.

IV. THE CASE LAW

A. *The English Cases*

The first reported case in which the United Kingdom Act was invoked in a contract action was *Sayers v. Harlow U.D.C.*⁴⁴ In that case the plaintiff, having paid a penny, was locked in a toilet through the defendant's negligence. The Court of Appeal found that while it was reasonable for the plaintiff to try and climb out and also to return to ground level when she found the venture too difficult, she was nevertheless herself in part to blame for her injuries in using the paper roll as a foot-hold. The plaintiff sued in both contract and tort. Lord Evershed, Master of the Rolls, stated:⁴⁵

⁴² [1966] 2 Q.B. 370, 377. This approach was followed by Brabin J. in *De Meza v. Apple, Van Straten, Shena and Stone* [1974] 1 Lloyds Rep. 508.

⁴³ *James Pty. Ltd. v. Duncan*, supra, 728.

⁴⁴ [1958] 1 W.L.R. 623 (C.A.).

⁴⁵ *Ibid.*, 625 (emphasis added). The other members of the Court (Morris and Ormerod L.J.J.) did not mention the fact that the claim was in both contract and tort.

The plaintiff claimed that the damage which she suffered was due to the fault of the defendants, that fault being in the form of a breach of the duty of care owed to her, whether or not arising under the implied contract when she made use of the lavatory. *Nothing turns upon the foundation of liability. . . . The questions [are] . . . was her activity from which the damage then ensued not a natural and probable consequence of a negligent act of the defendants within the formula of Hadley v. Baxendale?* Secondly, if it was not remote, then was the plaintiff herself guilty of some degree of fault, of which is called contributory negligence so as to reduce the total liability to her of the defendants?

The Court of Appeal reduced the plaintiff's damages by 25 percent because of her contributory negligence.

Two recent English cases at first instance disagree over what Lord Evershed M.R. meant in the above-quoted passage. Paull J. in *Quinn v. Burch Bros. (Builders) Ltd.* relied on the finding of negligence by the trial judge in the *Sayers* case:⁴⁶

Although there is reference to the principles laid down in the classic case of *Hadley v. Baxendale*, the foundation of the action was negligence and the consequences of that negligence. The case was really a case of negligence *ex contractu*, a cause of action well known, and which has many of the characteristics of an action in pure tort.

On this interpretation of the *Sayers* case, Paull J. found the case of no help in deciding whether the act applied to contract actions. However, in *De Meza v. Apple, Van Straten, Shena and Stone* Brabin J. felt bound by this Court of Appeal decision to hold that the Act applied to contract.⁴⁷ He quoted from Lord Evershed's speech and continued:⁴⁸

In so far as it has been said that the case dealt with tortious liability for negligence, I disagree. I consider that the references to *Hadley v. Baxendale* show that the Court was in that case also applying the Act to the claim in contract, for the Court treated the fault in the claim both in contract and in negligence as being the same. It would not be open to me to say that such an important difference was missed by the Court.

Thus, the *Sayers* case is capable of two interpretations which tends to lessen the precedent value of this English Court of Appeal decision.

While the judges in *Quinn* and *De Meza* disagreed over the interpretation of the *Sayers* case, they came to the same conclusion that the Act applied to contract. Paull J. analysed what breaches of contract would constitute "negligence" under the Act. He accepted that breaches of terms to take reasonable care were covered but held that the breach in the case did not constitute negligence for the purposes of the Act. This decision was subsequently affirmed⁴⁹ but

⁴⁶ *Supra*, 380.

⁴⁷ Professor Street, in *Street Law of Torts* (6th ed.), 445, note 1, agrees that the ratio of *Sayers v. Harlow U.D.C.* is that where the plaintiff is sued in both contract and tort, contributory negligence is a defence to either cause of action.

⁴⁸ [1974] 1 *Lloyds Rep.* 508, 517. The English Court of Appeal relied almost entirely on counsel's submissions. This may explain why the judges did not bring their minds to the question whether the Act applied to contract. It is probable that neither parties' counsel raised the point and so the judges assumed that it applied to both causes of action.

⁴⁹ [1966] 2 *Q.B.* 381 (C.A.).

without comment on the relevance of contributory negligence. The Court of Appeal was content to hold for the defendants on the ground that their breach of contract did not cause the plaintiffs injury. Brabin J. in *De Meza v. Apple* felt bound by the *Sayers* case and was also reassured by Paull J.'s approach in *Quinn v. Burch Bros. (Builders) Ltd.* Consequently, he applied the Act to contract. As previously, the Court of Appeal affirmed this decision on other grounds.⁵⁰

There are only two other reported English cases on this question. The first, *O'Connor v. B.D.B. Kirby and Co.*,⁵¹ is in some respects unsatisfactory. The plaintiff approached the defendant (an insurance broker) with the intention of insuring his new car. The broker erroneously entered a wrong answer in the proposal form and handed the completed form to the plaintiff so he could check the written answers and sign it. The plaintiff failed to notice the incorrect answer and the insurance company accepted the proposal and issued the policy. Subsequently, the plaintiff's car was extensively damaged, but the insurers repudiated liability on the ground that the proposal contained an incorrect answer. This the insurers were quite entitled to do.⁵² The plaintiff claimed against the broker for breach of contract and negligence for failing to fill out the proposal form correctly. It was held that the broker was negligent, but the judge reduced the plaintiff's damages by a third because of his failure to correct the error when the proposal was handed to him to check and sign. It is not clear from the brief summation of the case at first instance made in the headnote to the Court of Appeal case which cause of action was successful.⁵³ Neither Davies L.J. nor Karminski L.J. considered the cause of action while allowing the appeal. Megaw L.J. seems to have proceeded on the basis that the contractual claim was the relevant cause of action.⁵⁴

The reduction of damages was not mentioned in counsel's argument before the Court of Appeal, and only one of their Lordships referred to it. Counsel argued extensively on two issues: (1) the interpretation

⁵⁰ [1975] 1 Lloyds Rep. 498, 509 per Megaw L.J.: "But as stressed by both my Lords, we have not been asked to consider whether the judge was right or wrong in his conclusion on that possibly very difficult issue [i.e. contributory negligence and contract]. I express no view one way or the other on it."

⁵¹ [1972] 1 Q.B. 90 (C.A.).

⁵² The proposal contained a "basis of the contract" clause making the truth of every statement made in the proposal a condition of any contract of insurance that results. Any breach of condition (i.e. incorrect statements) allows the insurer to terminate the policy.

⁵³ It may be inferred from the following passage that the plaintiff succeeded in negligence, but it is far from clear: "... the damages for the brokers negligence should be reduced accordingly". It is possible that the judge was referring to a "negligent breach of contract".

⁵⁴ *Supra*, 101: "What was the duty owed by the broker under the contract with the assured?"

of the evidence on which the judge based his decision; and (2) the question of causation. In response to counsel's arguments the Court of Appeal, after a detailed examination of the evidence and the judge's findings, allowed the appeal. Davies and Karminski L.JJ. held that the sole, effective cause of the plaintiff's loss was his own breach of duty to supply correct information to the insurer.⁵⁵ Megaw L.J. held that the broker's inadvertence did not constitute negligence or a breach of contractual duty as he might reasonably rely on the assured to correct any error which had arisen because of a misunderstanding.

The Law Reform (Contributory Negligence) Act 1945 was not expressly referred to in counsel's argument, the summation of the case at first instance or the judgements. Only Davies L.J. referred to the reduction of damages:⁵⁶

The fact that the assured read that form and failed or omitted to read it properly, and did not notice, that the form was wrongly filled in with regard to the garage, was the ground upon which the judge found the assured one-third to blame for the loss. *A division of liability on those lines in a case of this kind is a somewhat novel thing, and I do not think it ought to have been a ground for a division of liability.*

Is this "somewhat novel thing" the application of the Act to a contract action? It is impossible to tell as it is not clear which cause of action succeeded at first instance. Once again the Court of Appeal avoided the question whether the Act applies to contract.⁵⁷

The other reported English case on this question is *Sole v. W. J. Hallt Ltd.*⁵⁸ In this case the plaintiff, a labour-only contractor engaged in fixing the plasterboard ceilings in a house being built by the defendant had been injured when he fell into the unguarded stairwell of the house. The plaintiff relied on section 5(1) of the Occupiers' Liability Act 1957 and, alternatively, on section 2(1) of the same Act. Section 5(1) outlines the common duty of care owed by the occupier of premises to his visitors while section 2(1) outlines the common duty of care which is owed as an implied contractual term by such an occupier to persons entering the premises in the exercise of a right conferred by a contract. The question arose whether the plaintiff, being under a contractual relationship with the occupier, was confined to claiming under section 2(1) only or whether he could also claim in tort under section 5(1) as a visitor. Swanwick J. noted that "this may be highly material when considering the effects of contributory

⁵⁵ He had breached this duty by a failure to rectify the erroneous answer in the proposal form.

⁵⁶ *Supra*, 99 (emphasis added). See also Treitel, *Law of Contract* (4th ed.), 658.

⁵⁷ Perhaps the decision in *O'Connor v. B.D. Kirby and Co.*, *supra*, can be explained by the Court of Appeal's reliance on the arguments of counsel; see ante n. 48. This seems very likely considering the similarity between the issues argued before the court and the reasoning of the court.

⁵⁸ [1973] 1 Q.B. 574.

negligence, which vary, of course, according to whether the plaintiff is suing in contract or tort".⁵⁹ The learned judge held that the plaintiff could sue in contract or tort at his option.⁶⁰ The plaintiff was found contributory negligent and his claim in tort was reduced by one-third. Swanwick J. continued:⁶¹

If his claim had had to be pleaded in contract, I would have felt compelled by the authority of *Quinn v. Burch Bros. (Builders) Ltd.*, to hold that his contributory negligence was such as to amount to a novus actus interveniens and a break in the chain of causation, particularly as it occurred after the defendants negligent act in breach of their contract.

Because of his finding that the plaintiff's acts cut the chain of causation in contract, the learned judge did not have to consider whether the Law Reform (Contributory Negligence) Act 1945 applied to contract. *Sayers v. Harlow U.D.C.* was cited in counsel's argument but was not referred to in the judgement. While Swanwick J. expressed no opinion on this question, he was clearly influenced by the problems surrounding the contract action in allowing the plaintiff to bring the action in tort. The problem he expressly envisaged was that of causation, and it is possible to assume that the question whether the Act applied to contract was an unarticulated problem that troubled the judge.

How have the English Courts responded to the sometimes-raised question whether the Act applies to contract? It would not be too unfair to say that the Court of Appeal, after one ambiguous dabble in *Sayers v. Harlow U.D.C.*, has continued to avoid this "possibly difficult question" in the rare instances in which it comes before the Court.⁶² The first instance decisions, which in some aspects are conflicting, are of no precedent value.

B. *The Australian Cases*

In contrast to the English decisions, some of the Australian cases show a more thorough analysis of the problems involved. Crisp J. in the Tasmanian Supreme Court held that the equivalent statute⁶³ to the Contributory Negligence Act 1947 applied to contract in *Queens Bridge Motors and Engineering Co. Pty. Ltd. v. Edwards*.⁶⁴ This

⁵⁹ *Ibid.*, 578.

⁶⁰ The option existed unless there were particular circumstances which forced the plaintiff to rely solely on an implied term, and no such circumstances existed in this case.

⁶¹ *Supra*, 582. Swanwick J. must be referring to the Court of Appeal decision as he would not be "compelled" to follow the first instance judgement of Paul J. in *Quinn v. Burch Bros. (Builders) Ltd.*, *supra*.

⁶² *Quinn v. Burch Bros. (Builders) Ltd.*, *supra*, and *De Meza v. Apple*, *supra*, were both affirmed on other grounds on appeal while *O'Connor v. B.D.B. Kirby and Co.*, *supra*, was overturned on other grounds on appeal.

⁶³ Tortfeasors and Contributory Negligence Act 1954.

⁶⁴ [1964] Tas. S.R. 93.

interpretation was largely based on a comparison between the provisions of the statute that related to joint tortfeasors and those that related to contributory negligence.⁶⁵ He also relied on Dr Williams' thesis. In this particular case the contract and tort actions co-existed. However, in the following year Crisp J. in *Smith v. Buckley*⁶⁶ followed his earlier decision with no discussion of the fact that in this case there was only a contract action available.

In *Belous v. Willetts*⁶⁷ Gillard J. of the Supreme Court of Victoria held that section 26 of the Wrongs Act 1958 did not apply to a claim for breach of contract. This case involved a negligence action against the defendant solicitors. After reviewing the authorities Gillard J. found that the proper cause of action to bring in the case of solicitors negligence was contract.⁶⁸ He distinguished the *Queens Bridge Motors* case because "no real assistance [could] be gained from comparing the terminology of these Acts".⁶⁹ For various reasons, most of which have been discussed already, he was unable to accept Dr Williams' thesis on this aspect of the law. McInerney J., sitting in the same court, in *James Pty. Ltd. v. Duncan*⁷⁰ found himself "immensely fortified" by the discovery of *Belous v. Willetts* after he had written his judgement.⁷¹ In his decision the learned judge thoroughly analysed the whole question of whether the Act applied to contract. In the most critical analysis of the problem to date, McInerney J. held that the Victorian equivalent of the Contributory Negligence Act 1947 (N.Z.) did not apply to contract.⁷² However, he found on the facts that the case did not come within section 26 of the Wrongs Act 1958, so the relevant parts of his judgement for our purposes are, strictly speaking, obiter.⁷³

More recently the question has been considered by the New South Wales Court of Appeal in *Harper v. Ashtons Circus Pty. Ltd.*⁷⁴ A resolution of the question was not necessary to decide the case, but the view adopted in the Victorian cases was preferred. The plaintiff was injured when he fell over the back of the top tier of seats at the

⁶⁵ Crisp J. described it as his most "striking argument"; supra, 96.

⁶⁶ [1965] Tas. S.R. 210.

⁶⁷ [1970] V.R. 45. The actual decision was given on 12th October 1965 which explains why Gillard J. only mentions the *Queens Bridge Motors* case, supra, and not *Smith v. Buckley*, supra. It also explains why the case was not brought to McInerney J.'s notice until late in 1970 after his judgement was written.

⁶⁸ For the contrary view see W. D. C. Poulton, "Tort or Contract" (1966) 82 L.Q.R. 346.

⁶⁹ Supra, 46.

⁷⁰ [1970] V.R. 705.

⁷¹ *Ibid.*, 729.

⁷² In *De Meza v. Apple*, supra, 519, Brabin J. states that *James Pty. Ltd. v. Duncan* was not referred to him in argument although shown to him. It is indeed unfortunate that he did not consider that this case merited discussion.

⁷³ McInerney J. found that the actions of one of the contracting parties was the real cause of the damage.

⁷⁴ [1972] 2 N.S.W.L.R. 395.

defendant's circus. He sued the defendant in contract and tort, but the tort plea was subsequently withdrawn at the hearing. At first instance the jury reduced the plaintiff's damages by 25 percent because of his contributory negligence. The plaintiff appealed against the reduction of damages, and the New South Wales Court of Appeal allowed the appeal as there was no evidence to support the jury's finding of contributory negligence.

Hope J.A., with whom Jacobs P. agreed, expressed the view that the importation of contributory negligence into the law of contract was "unnecessary and unjustified". He admitted that there may be cases of injustice where there are no circumstances justifying the discrimination between contract and tort, but he thought that the law of contract could provide an acceptable solution by application of its own principles. Yet, in answer to this claim, it has been stated:⁷⁵

And although, as Hope J.A. pointed out, the law of contract can, by application of its own principles, give substantial effect to defences arising out of the fact that the plaintiff was not taking reasonable care for his own safety, it appears it can do so only by denying the plaintiffs claim altogether. In other words it is difficult to see how the law of contract can ever provide for apportionment, unless the apportionment legislation is held to apply.

Manning J.A. agreed that the law was correctly stated by Hope J.A. but considered that Dr Williams' result was more satisfactory.

The Australian decisions are conflicting and of little binding authority. However, some of the cases, including *Belous v. Willetts, James Pty. Ltd. v. Duncan* and *Harper v. Ashtons Circus*, reflect a keener appreciation of the problems involved in applying the Act to contract than do the English cases. However, it is not possible to extract from the authorities a clear-cut conclusion one way or the other.

V. CONCLUSION

It may be thought that the writer is opposing a "just" result for no reason other than academic argument. This is not the case as there is much sympathy for those who claim that the Act should apply to contract at least where contract and tort actions co-exist. However, two compelling reasons will not allow the writer to accept this approach. First, the provisions of the Contributory Negligence Act 1947 do not cover contract actions. This difficulty can be overcome simply by amending the Act. The second reason for objecting to the application of the Act to contract is more fundamental as to do so would inevitably introduce fault into contract damages. As Barry

⁷⁵ (1973) 47 A.L.J. 204 (casenote).

Nicholas has pointed out, “[I]n the Common Law . . . fault is foreign to our way of thinking about contract”.⁷⁶ Fault was introduced into the defence of contributory negligence by the development of negligence in the 19th century, and the Contributory Negligence Act has confirmed this trend towards fault and away from causation. It is submitted that to apply the Act to contract now would inevitably result in confusion of contractual principles.

There is, however, no reason why the Act could not be amended to allow apportionment of loss on causation grounds when the contract action is chosen or succeeds rather than the co-existing tort action. Thus, justice could be done in deserving cases without the threat of the confusion of tortious and contractual principles. It is submitted that any such redrafting should be limited to those cases where there is co-existence of contract and tort actions for it is only in those cases that any injustice is done by not applying the Contributory Negligence Act to contract.

⁷⁶ “Rules and Terms—Civil Law and Common Law” (1974) 48 *Tulane L.R.* 946.