Can Parties in Contractual Relations be Liable to Each Other in Tort?

by

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I. INTRODUCTION

As there has been confusion engendered in this area of the law by imprecision in the use of language, it would be beneficial to define clearly the nature of the topic. The central question is whether a person can be liable for breach of the same duty in both contract and tort. That is, owing a duty under the contract, can he also be liable for breach of the same duty in tort? Before proceeding further, it is also necessary to clarify the limits of the discussion. It is not a discussion as to whether parties in precontractual negotiations can be liable to each other in tort.[1] It is not a discussion of the effect a contract between two parties has on the tortious liability of one of those parties to a third party.[2] It is not a discussion as to whether a contract is needed to exclude liability in tort.[3] Though all these areas are related to the present topic they will receive only brief mention which, though doing injustice to the complexity of their subject matter, is necessitated by practicality.

As there seems to be a quite reasonable insistence in vogue, on justifying academic discussions of this kind on their application to legal realities, it is noted with some regret that there is no New Zealand equivalent of Poulton's[4] lengthy listing of the practical applications of the law on this point. However, limitation of actions and remoteness of damage are two areas where it will be crucially important whether the breach of the duty/obligation is in contract or tort. If the defence of contributory negligence is available in tort but not in contract, then contributory negligence is a third area where this point of law is

[1] See *Capitol Motors Ltd* v. *Beecham* [1975] 1 N.Z.L.R. 576; *Esso Petroleum Co.* v. *Mardon* [1976] Q.B. 801.
[2] See *Bowen* v. *Paramount Builders Ltd* [1977] 1 N.Z.L.R. 583.
[3] See *Midland Silicones Ltd* v. *Scruttons Ltd* [1962] A.C. 446; *New Zealand Shipping Co.* v. *Satterthwaite Ltd* [1974] 1 N.Z.L.R. 505.
[4] "Tort or Contract" (1966) 2 L.Q.R. 346, 346-350.

important. Finally the liability of minors could be added to the list.

The reason the discussion centres around the tort of negligence is, as Winfield[5] observed, that:

> there is no tort more likely to coexist with breach of contract than negligence. In a great number of instances a contractor fails in what he has promised because he has acted incompetently.

Bringing this comment from Winfield's old but still invaluable work up to date, Symmons[6] adds:

> Just as the potentiality of this tort/contract overlap has been enhanced by the continuing process of the expansion of the categories of 'duty' situations in the sphere of negligent acts, so too has the same process been more enhanced since *Hedley Byrne* in the sphere of negligent words.

Owing to the importance of this, the fastest expanding area of the law of torts, negligent misstatement will be discussed separately following the general discussion of negligence.

II. The General Rule

The test most often quoted in cases in which the point of law is specifically raised is that of Greer L.J. in *Jarvis* v. *Moy, Davies, Smith, Vandervell and Co.*[7]

> 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 tort and may be tort even though there may happen 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 a duty arising out of the obligations undertaken by the contract.

This has been adopted by Diplock L.J. in *Bagot* v. *Stevens, Scanlan and Co. Ltd,*[8] Edmund Davies J. in *Chesworth* v. *Farrar*[9] and by Beattie J. in *Bevan Investments Ltd* v. *Blackhall and Struthers.*[10]

Diplock L.J. in *Bagot* summarises it neatly:[11]

> the complaint that is made against them [the defendants] is of a failure to do the very thing they contracted to do.

This encapsulates the essential doctrine that generally, once there is a contractual duty owed, there can be no similar tortious duty – if there is a duty under the contract that is the only duty. For a tortious duty to coexist, it must be independent of the contractual duties.

There is another test which, because of its unsatisfactory nature, it was hoped had been relegated to legal oblivion. However, it has reappeared in *Jackson* v. *Mayfair Window Cleaning Co.*[12] (predictably it lead to an

[5] The Province of the Law of Contract, 63.
[6] "The Problem of Applicability of Tort Liability to Negligent Misstatements in Contractual Situations" (1975) 21 McGill L.J. 79, 80.
[7] [1936] 1 K.B. 399, 405.
[8] [1966] 1 Q.B. 199, 204.
[9] [1967] 1 Q.B. 407, 414.
[10] [1973] 2 N.Z.L.R. 45, 81.
[11] Supra, 204.
[12] [1952] 1 All E.R. 215.

unsatisfactory decision) and calls for comment. This is the test in *Turner* v. *Stallibrass*,[13] where A.L. Smith L.J. said:

> if in order to make out a cause of action, it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort. But on the other hand if, in order successfully to maintain his action, it is necessary to rely upon and prove a contract, the action is one founded upon contract.

This test begs the question. No plaintiff seeking to found an action in tort will find it necessary to rely on a contract. Any duty to take care can be most plausibly pleaded as tortious. The whole point is that if the duty is owed under the contract, then whether or not the plaintiff thinks it necessary to rely on the contract, it is his only cause of action. Barry J. in *Jackson*[14] misconstrued the whole matter when he called Greer L.J.'s test a restatement of the *Turner* v. *Stallibrass* test. It is a different test and the correct one. In *Steljes* v. *Ingram*[15] Phillimore J. calls *Turner* a case not plain of comprehension. However in *Chessowrth* v. *Farrar*,[16] a case on bailment, *Turner*, itself a bailment case, is cited with approval. Perhaps it is to be restricted to this field in the future (despite the fact that Barry J. regarded it as a case of general application). Whatever its fate, the decision it led to in *Jackson* v. *Mayfair Window Cleaning Co.* does not sit comfortably with the other law on this point, and will be discussed in detail later.

The old law on this issue is no longer being cited in recent cases (or at least the inconsistent old law, it is tempting to add, as Diplock L.J. in *Bagot* cited *Howell* v. *Young*[17] an 1826 case on solicitor's liability, in support of his decision). However, as late as 1966 Poulton seemed to hold out some hope that *Brown* v. *Boorman*[18] was still a leading case. The clearest of the three judgments in the House of Lords is that of Lord Campbell. He quite clearly held that a broker could be liable in either contract or tort and that a duty under a contract could be sued in either. However Phillimore J. in *Steljes* v. *Ingram* has reservations, which Slesser L.J. in *Jarvis*[19] echoes, as to whether the decision was as wide as that. Be that as it may, the prevailing judicial attitude seems to be that in approaching this question, all the old learning is to be regarded as "useless or worse than useless"[20]or at least" it has to be kept in its proper place".[21]

III. The Recognised Exceptions

The general rule has then been stated. There are a number of exceptions to it. That is, there are cases where the same duty is owed both under the

[13] [1898] 1 Q.B. 56, 58.
[14] Supra, 217.
[15] (1903) 19 T.L.R. 534.
[16] [1967] 1 Q.B. 407.
[17] (1826) 5 B. & C. 259.
[18] (1844) 11 Cl. & F. 1.
[19] [1936] 1 K.B. 399.
[20] *Bryant* v. *Herbert* 3 C.P.D. 389, 392, Bramwell L.J.
[21] *Jarvis* v. *Moy, Davies, Smith, Vandervell and Co.* Supra, 406, Slesser L.J.

contract and independently of the contract. Diplock L.J. in *Bagot* claims to list these exceptions exhaustively. The first group is the common callings. The second is bailment, which His Lordship includes in the common callings, but which will be dealt with separately here. The third is cases of the master and servant relationship.

A. *The Common Callings*

Historically, certain persons were recognised at common law as exercising a common or public calling and thereby owing special duties to the public. These people were liable even when no consideration had been given because their liability did not depend on the contractual relationship, but on their status. The maxim of Fitzherbert:[22]

> . . .it is the duty of every artificer to exercise his art rightly and truly as he ought

is much bandied about when the common callings are discussed, but Fifoot casts very serious doubts on its relevance in this context.[23]

The disagreement does not stop there by any means. None of the commentators can agree exactly which are the common callings. Salmond[24] supports the carrier, innkeeper and surgeon. Street[25] would agree with these and add the farrier, smith and public officer. Winfield[26] would disagree with Street on the public officer but would add the veterinary surgeon and then in a decreasing scale of probability, the ferryman, carpenter, shepherd and barber.

If these unlucky few are to bear the burden of dual liability it could result, as Poulton comments,[27] in lawyers having to ransack the histories or thumb their way through the Year Books, especially if, as Street[28] argues, the rule applies *ejusdem generis*. There seems to be something just a little ridiculous in these prospects which demonstrates that this area of the law has been affected by outdated learning.

B. *Bailment*

This paper is not the place to become involved in legal debate as to whether bailment is solely a contractual relationship. Some of the authorities on either side are handily collected in Edmund-Davies L.J.'s judgement in *Chesworth* v. *Farrar.*[29] It seems settled that the bailment relationship can exist independently of contract, when it is created by the voluntary taking into custody of goods which are the property of

[22] *Natura Brevium* 94D.
[23] *History and Sources of the Common Law*, 157.
[24] *Salmond on Torts* (16th ed.), 10.
[25] *Street on Torts* (6th ed.), 210.
[26] (1926) 42 L.Q.R. 184, 185-190.
[27] "Tort or Contract" (1966) 82 L.Q.R. 346, 267.
[28] *Op. cit.*, 210.
[29] [1971] 1 Q.B. 407, 415.

another.[30] Usually however, there is delivery of the chattels under a contract of bailment. The common law duty of bailee is to take reasonable care of the bailor's goods. Of course if he breaches the duty, the bailee could be liable in conversion or detinue, as well as negligence. Though it is always open to the bailor and bailee to alter this liability by contract, it must be remembered that the duty to take reasonable care can exist independently of the contract.

Chesworth v. *Farrar* is an example of the dual liability. In that case a landlord took possession of an antique shop when the tenant fell into arrears with the rent. After doing so, he sold more of the antiques than was necessary to recover the arrears. At the time of the action other antiques were presumed lost. The tenant brought an action for breach of contract of bailment or alternatively, conversion for the additional goods sold, and detinue as regards those lost. Edmund-Davies J. said that if the claim could be pleaded in contract or tort, the plaintiff had a choice. Here however, the substance of the action for goods lost was in tort, and for those sold, in contract. There is an apparent link between bailment and the other common callings, in that before and independent of any contractual obligations, a relationship imposing a duty of care can exist.

C. *The Master and Servant Relationship*

The duty of the master to the servant will be discussed first and a brief treatment of the duty of the servant to the master will follow. Diplock L.J. in *Bagot* regarded the House of Lords decision in *Lister* v. *Romford Ice and Cold Storage*[31] as authority for the proposition that a servant's duty of care to his master can create a cause of action in either contract or tort. Certainly there are dicta to this effect though the case was decided on an implied term in the contract of service. Viscount Simonds said:[32]

> It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example.

There was also a statement by Lord Radcliffe that the obligation:[33] "is as much contractual as tortious".

However Professor Hamson thought that the matter was less than settled.[34] Thus, while a breach of the duty by a servant gives rise to an action in contract whether it can also give rise to an action in tort is not yet decided with any certainty.

Some indication of a trend may be taken from the recent British Columbia Court of Appeal decision, *D.H. Overmyer Ltd* v. *Wallace*

[30] *Halsbury's Laws of England* (4th ed.) Vol. 2 para. 1501.
[31] [1957] A.C. 555.
[32] *Ibid.*, 573.
[33] *Ibid.*, 587.
[34] [1959] C.L.J. 157.

Transfer Ltd.[35] In this case an employee who failed to give the required notice of termination of a lease, thereby causing his employer to pay an extra month's rent, was held liable for his negligence. *Lister* was heavily relied on, but the majority judgement of MacLean J.A. is so terse that it is unclear whether he envisaged the duty as an implied term of the contract or as a coexisting tort duty. In *Halsbury*[36] it is regarded as the latter.

The matter of the master's duty of care towards the servant is more clear cut. In the English Court of Appeal decision of *Matthews* v. *Kuwait Bechtel Corporation,*[37] Sellers L.J. held that an action for breach of the duty could be pleaded in either contract or tort. In his note on the case Jolowicz[38] regarded it as finally settling this question (as did Webber[39]). However, Jolowicz could not resist adding:[40]

> there seems to be no reason for holding that where there is a tortious duty and also a contract the same duty cannot also be contained in the contract.

He repeated these ideas in a note[41] critical of *Bagot.* The argument on principle is to be dealt with in detail later in this paper.[42] However suffice to say here, that it would be a sorry state of affairs if, instead of going to prove the rule the exception was to replace it.

After listing the recognised exceptions to the general rule, it is proper to examine how they stand together in principle. The explanation Diplock L.J. gives is that, in the three exceptional cases, there existed from their special status recognised by the law, a relationship independent of contract which imposed a duty of care.[43] Examining this proposition closely, it is apparent that while the bailment and common callings relationships can exist apart from contract, the master and servant relationship cannot. When the contract of service is formed, then and only then independent duties may arise. Therefore, Diplock L.J. in his explanation, is giving something of a gloss to the true position. In all three cases there are relationships which arise from the mere status recognised at common law, but all three relationships are not truly independent of contract. The master and servant relationship cannot be independent of contract as a contract is a condition precedent to its existence.

It can only be to the detriment of a legal proposition to attempt to disguise inconsistencies with glosses. The general rule is basically sound, and the exceptions to it should be recognised as having their foundation in public policy. These exceptional cases are perhaps anomalies from the old learning. This sort of development has always been an unavoidable part of

[35] (1976) 65 D.L.R. (3rd) 717.
[36] *Halsbury's Laws of England* (4th ed.) Vol. 16, para. 547.
[37] [1959] 2 Q.B. 57.
[38] [1959] C.L.J. 163.
[39] (1959) 22 M.L.R. 521.
[40] *Loc. cit.*, 164.
[41] [1965] C.L.J. 27.
[42] Part VI, post.
[43] Supra, 204-205.

the doctrine of *stare decisis*, and will continue to be, as long as caution is advanced before purity of principle.

It would then seem to be settled law that, apart from the three stated exceptions, the existence of a duty under a contract will exclude any possibility of the same duty arising in tort. The run of the cases caused the learned editor of Salmond to remark:[44]

> There seems to be a certain unwillingness to hold professional men liable to their clients in tort as distinct from contract, and this unwillingness has increased rather than diminished since a new duty to take care in making statements has been recognised.

Thus a solicitor is only liable in contract: *Clark* v. *Kirby-Smith*,[45] as is an architect: *Bagot* v. *Stevens, Scanlan and Co. Ltd*,[46] followed in *Bevan Investments Ltd* v. *Blackhall and Struthers*;[47] a stockbroker: *Jarvis* v. *Moy, Davies, Smith, Vandervell and Co.*,[48] and an estate agent: *Barrington* v. *Lee*.[49] The odd man out is the barrister, who is not liable for any negligence in his conduct of cases (though *Rondel* v. *Worsley*[50] does make it quite clear that this is for public policy reasons).

A case like *Edwards* v. *Mallan*[51] does not sit happily with this view of the case law. In that case the plaintiff went to the defendant dentist to have her tooth extracted by his "painless process". The extraction was performed so incompetently that broken portions of the tooth were left, causing illness and pain to the plaintiff. Vaughan Williams L.J., in the English Court of Appeal, treated it as a claim in tort. Though the learned judge cited no authority, counsel for the plaintiff featured *Turner* v. *Stallibrass* prominently in their argument. It appears that Vaughan Williams L.J. applied the 'does the plaintiff need to rely on the contract' test and of course the plaintiff did not. The learned judge's disregard of the argument that the duty could be an implied term of the contract between dentist and patient, was facilitated by the fact that the "painless process" was a special contract, quite apart from the ordinary dentist-patient relationship. While this case could be dismissed as being an old decision out of step with other authority, depending on its special facts, and decided before negligence became a separate tort, others are not so easily dismissed. There are relatively recent decisions where the general rule has been circumvented without coming within the exceptional special relationships.

[44] *Op. cit.*, 10.
[45] [1964] 1 Ch. 506.
[46] [1966] 1 Q.B. 199.
[47] [1973] 2 N.Z.L.R. 45.
[48] [1936] 1 K.B. 399.
[49] [1972] 1 Q.B. 326.
[50] [1969] 1 A.C. 191.
[51] [1908] 1 K.B. 1002.

IV. The Other Exceptions

A. *Misfeasances*

A new exception would have to be recognised if *Jackson* v. *Mayfair Window Cleaning Co.*[52] was regarded as establishing a general rule. In this case the second defendant had overhauled the plaintiff's cut glass chandelier, having been instructed to put it in good condition. When the first defendant was cleaning it five months later, it fell to the floor and was damaged. Both were found to have exercised insufficient care in their work. The issue was whether the action was founded in contract or tort for the purpose of assessing costs under the County Courts Act 1934.

As has been noted, Barry J. cited the *Turner* test and then referred to the test of Greer L.J. in *Jarvis*[53] as a restatement of it. But when Barry J. said:[54]

> the action might well have been pleaded as a breach of that contract

he has obviously parted company with Greer L.J., for how can a duty which arises under the contract, be said to arise:[55]

> independent of the personal obligation undertaken by the contract?

Barry J. in fact applied the 'does the plaintiff need to rely on the contract' test with new subtlety.

He said that the contract can be treated as a matter of mere history explaining the presence of the defendant's workmen on the premises. One could just as easily say a contract is a matter of mere history explaining the presence of the client in his solicitor's office, or the architect on his client's building site.

Then followed a mixture of two notions; that of misfeasance giving rise to dual liability; and the notion of a broader liability than that owed under the contract. As to the latter proposition, Barry J. had only shortly before said that the breach of duty could be pleaded as a breach of contract. Now within the same paragraph, the duty has become much broader than any owed under the contract. As to the former proposition, Street[56] briefly raises this argument, relying solely on *Jackson*, but goes on to concede rather lamely, that the principle is no different for nonfeasances. The dual liability will not arise as often for nonfeasances simply because a duty of care in tort for them is less frequently imposed. This idea has been arising in this context for over 100 years, but as far back as *Boorman* v. *Brown*[57] it has been disapproved. Significantly, of the leading text books, only Street adopts it.

Barry J. then sought to reinforce his conclusion by the proposition that

[52] [1952] 1 All E.R. 215.
[53] N. 7 ante.
[54] *Ibid.*, 217.
[55] *Jarvis* v. *Moy, Davies, Smith, Vandervell and Co.* [1936] 1 K.B. 399, 405.
[56] *Op. cit.*, 211.
[57] (1844) 11 Cl. & F. 1.

even if there was no contract and the work had been done gratuitously, the decision would be the same. This is to misconstrue the matter entirely. The basis of the case law on the point is that the tort duty does not arise because there has been an agreement as to liability. If there was no agreement of course, in many situations the tortious duty would arise. One example is a painter helping paint his friend's roof without accepting any consideration. The house owner would certainly owe the painter a duty of care in tort to tell him of live electric wires exposed on the roof or a dangerously unstable roof beam. Yet if the same painter was working under contract with the house owner, the only duty of care in those circumstances would be under that contract. But Barry J. has entirely begged the question by his reasoning due in no small measure to his reliance on *Turner* v. *Stallibrass.*

To his credit Barry J. confronted the problem posed by *Steljes* v. *Ingram*[58] and *Jarvis* v. *Moy, Davies, Smith, Vandervell and Co.* His reasoning can be taken a step at a time. Step 1: The public callings have special positive duties imposed on them apart from contract. Step 2: This does not mean that all other trades and professions cannot have the negative duty of not damaging other person's property through negligence. Step 3: Cases like *Steljes* and *Jarvis* are distinguishable from the present one. In *Jarvis* for example, in the absence of the contract, the architect was under no duty to supervise the erection of the building. The damage therefore, arose from the breach of a positive duty imposed by the contract. Step 4: Very different considerations would apply if the architect negligently destroyed some valuable document belonging to the plaintiff i.e. breached a negative duty.

The argument can be criticised a step at a time. Step 1: While Barry J's positive/negative distinction among duties is superficially attractive, on closer inspection it is found to be spurious. The positive duties of the common callings do not appear to be very numerous. Certainly for example, a common carrier is, apart from contract, bound to carry goods offered to him unless he has a lawful excuse. However many of his duties apart from contract seem to be of a negative variety; for example his so-called insurer's liability for loss or damage to goods entrusted to him which, a fortiori, includes a duty of care to avoid damaging goods through his own negligence. Thus the distinction is so easily broken down, that its application in this context is of doubtful worth. It is clearly not the distinction between the common callings and other trades and professions.

Step 2: Other trades and professions may have a negative duty imposed on them certainly, but if it is owed under the contract, that is the only duty. The unworkable positive/negative distinction does not justify a different conclusion.

[58] (1903) 19 T.L.R. 534.

Step 3: Again Barry J. is begging the question. Of course the architect would not be under an obligation to supervise the erection of the building but for the contract, and that is a positive duty. But he is not being sued for a failure to supervise; he is being sued for breach of an ancillary duty[59] to use reasonable skill and care in the supervision. By the same analysis the cleaner is under a positive duty to clean the chandelier, but he is not being sued for breach of that duty. He is being sued for breach of an ancillary duty to use reasonable skill and care in doing the job. Barry J. himself admits that the duty is part of the contract. If a negative duty is owed under the contract the distinction breaks down again in this second context.

Here it would be pertinent to observe that there exists a fault which has always plagued the line of reasoning adopted by Barry J. – the practical difficulty of applying it. In other words, is a duty of care in a difficult case a positive one to do something or a negative duty not to do something? That is the reason for judicial disapproval of the distinction. But it would be insufficient to say merely that the reasoning was impracticable; it is also incorrect on principle in the present context.

Anyhow, once it is established that the duty is owed under the contract, the question of a similar tort duty, negative or positive, is irrelevant. The only duty is the duty under the contract because that is what the parties have agreed.

Step 4: The example chosen by Barry J. is a difficult one. But it can be dealt with either as an implied term of the contract (which is not stretching that concept too far) or as a duty independent of any liability in the contract. It is also worth noting that the documents would be the subject of a separate bailment agreement, and so liability in tort is a recognised incident. Whichever it is, this duty is far removed from the ancillary duty in the cleaner's contract to use care in his work, which is so obviously an implied term of that contract.

This lengthy criticism is necessitated by the very plausibility of Barry J's reasoning. Acceptance of his reasoning could lead to more than a new exception to the established rule. Some commentators, notably Symmons,[60] are seizing upon it as capable of swallowing the whole rule.

B. *The "Negligence is the only liability" Rule*

Equally plausible reasoning, which also has the potential to seriously undermine the general rule, is being applied in another area of the law. That area is the "negligence is the only liability" rule, established in *Rutter* v. *Palmer*[61] and *Alderslade* v. *Hendon Laundry Ltd*,[62] for construction of

[59] This method of analysis is used by Lord Greene M.R. in *Alderslade* v. *Hendon Laundry Ltd* [1945] K.B. 189.
[60] (1975) 21 McGill L.J. 79.
[61] [1922] 2 K.B. 87.

exception clauses. The gist of the rule taken from those cases is this: very clear words are required to exempt a party from liability for his negligence, but if his only liability is for negligence, then the exception clause will more readily operate to exempt him. It would appear from the cases[63] that generally judges have taken the word "negligence" as meaning negligent breaches of contract. It is to be hoped that this is because they intuitively rejected the idea of similar duties coexisting in both contract and tort. However the idea of dual liability resurfaced in the case of *White* v. *John Warwick Ltd.*[64]

There, the plaintiff hired a tricycle from the defendant, the contract of hire specifically stating that the owner took no responsibility for personal injuries suffered by any rider. While riding the tricycle the plaintiff fell off as a result of the faulty seat, and was injured. At first instance it was held that the exception clause protected the defendant even if he was negligent (which was not decided).

In the Court of Appeal all three judges delivered judgments. Singleton L.J. argues from first principles, using as a corner stone of his argument a quotation from Lord Macmillan's speech in *Donoghue* v. *Stevenson.*[65] Lord Macmillan clearly did not envisage the fact that a duty owed under a contract would prevent a similar duty being owed in tort. With respect, it can only be said that subsequent judges have not seen fit to follow his obiter statements. It should also be noted that His Lordship used as an example for his proposition, the liability of a railway company for carriage of persons. He must have known full well of the special liability of the common carrier, but it was the only example of the dual liability he could find. Thus, even when *Donoghue* v. *Stevenson* was decided, Lord Macmillan's was not the accepted position. Similarly Singleton L.J. in *White* v. *John Warwick* cites as authority two cases involving common carriers. He then uses *Olley* v. *Marlborough Court Ltd*[66] as an example of the "negligence is the only liability" rule. In that case the plaintiff was suing on the contract under which the hotel proprietors had insurer's liability because they held themselves out as common innkeepers. The exemption contained in a notice displayed in the foyer did not protect them from liability for negligence under the contract, but only from the stricter insurer's liability. There was no mention of tort liability at all in that case.

From this point Singleton L.J. proceeds to apply the rule to the facts before him. Though this is a novelty, he gives no further justification than that 'the primary object' of the clause is to exclude liability under the

[62] [1945] K.B. 189.
[63] The cases referred to are those listed in *Halsbury's Laws of England* (4th ed.) Vol. 9 para. 373, ns. 1-5.
[64] [1953] 2 All E.R. 244.
[65] [1932] A.C. 562.
[66] [1949] 1 K.B. 532.

contract. It does not protect against liability in tort. This reasoning, though apparently sound, would lead to a strange result. The error is that there is no liability in tort to consider. The agreed upon liability being the only liability, there is no liability outside the contract to consider.

Denning L.J. is a little more robust in his approach. His reply to the argument of counsel for the defendant that this negligence is not an independent tort but a breach of an obligation arising out of the contract, is that he simply does not agree. To demonstrate his point he uses the example of the servant of the hirer riding the tricycle and being injured. There the exception clause would not protect the owner from liability in tort for his negligence, so a fortiori, the owner owes a like duty of care to the hirer himself.

The answer to this is quite simple. The owner has no contract with the servant. Aside from all questions of vicarious immunity and whether the exception clause could protect the owner, Denning L.J.'s reason is a *non sequitur.* There is a major difference between the hirer and the hirer's servant, which is that one has a contract with the owner and one does not. It is logical that you are not liable to those who agree to that, but you *are* liable to those with whom you have no such agreement.

Other inconsistencies in Denning L.J.'s judgment are first, his evasion of an argument by counsel based on *Elder, Dempster* v. *Paterson, Zachonis.*[67] Though this case has been discredited as supporting the doctrine of vicarious immunity, there still remain clear statements by Viscount Finlay[68] and Lord Sumner[69] that any tortious liability must be entirely independent of the obligations undertaken under the contract. Secondly, his Lordship misconstrues a statement by Scrutton L.J. in *Hall* v. *Brooklands Auto Racing Club.*[70] Scrutton L.J. briefly but clearly rules out the possibility of tortious liability apart from the contract, where the contract protects a party to it. How Denning L.J. interprets this as a reference to very wide exception clauses, where there was no exception clause at all in the case, is difficult to see.

In a note on *White* v. *John Warrick,* Gower seeks to explain it as one of the cases where a relationship can exist quite apart from the contract. But still he voices doubts:[71]

> It is surely fanciful to ascribe to the parties an intention to contract out of negligence pleaded one way but not the other.

The case cannot be satisfactorily explained on the basis of a special relationship, for it is a bailment for hire of chattels. Though under such a bailment there is an implied warranty of fitness,[72] this is undoubtedly solely contractual.

[67] [1924] A.C. 522.
[68] *Ibid.*, 548.
[69] *Ibid.*, 564-565.
[70] [1937] 1 K.B. 213.
[71] (1954) 17 M.L.R. 154, 157.
[72] *Halsbury's Laws of England* (4th ed.), Vol. 9, para. 1554.

The basis of the decision is in fact a judicial inclination which has led to confusion in the past; i.e. the desire to escape the effects of a harsh exception clause. If the exception clause had been absent, the decision would surely have been reasoned differently. For example, if there was no such clause and Mr White, having slept on his rights so that his action was statute barred, came to Court, how much time would he have got in the Court of Appeal, with the argument, "I entered a contract of hire for a tricycle with John Warrick and Co. and the tricycle proved dangerous. I have lost my remedy in contract so I would like to plead in tort instead"? Quite obviously this is another case where in their eagerness to circumvent an exemption which they felt harsh, the judges have deviated from sound principles.

C. *Occupier's Liability*

Finally, an exception which Diplock L.J. does not mention but Gower[73] adverts to, is Occupier's Liability. In *A.M.F. International* v. *Magnet Bowling*[74] Mocatta J. had no difficulty holding the owner of a building liable both under his contract with a builder, for failing to have the building fit to receive the building materials (special timber damaged by flooding), and under the Occupier's Liability Act 1957. Furthermore, though he does not settle the point, he does not dismiss the argument that the owner would be liable under *Donoghue* v. *Stevenson* for negligence.

In New Zealand there is also statutory provision in the Occupier's Liability Act 1962. Section 4(1) of the Act states that the duty may be modified, extended or excluded by the contract. It seems unarguable that the mere existence of such a duty in a contract would negate the statutory duty. However, being a statute, the provision is not really within the ambit of this common law discussion. It is almost beyond doubt though, that even at common law, it formed another exception to the general rule.

V. Negligent Misstatement

The case of *Hedley Byrne* v. *Heller*[75] produced a prodigious response among commentators. Much of it was concerned with predicting the effect the decision would have on contract law. In the area of the law with which this paper is concerned Weir's[76] response is typical. Of Lord Devlin's remark that the duty of care for statements would arise where the relationship is 'equivalent to contract', he trenchantly commented:[77]

> The relationship most equivalent to contract is contract itself.

[73] Supra, 156.
[74] [1968] 2 All E.R. 789.
[75] [1964] A.C. 465.
[76] "Liability for Syntax" [1963] C.L.J. 216.
[77] *Ibid.*, 220.
[78] [1964] 1 Ch. 506.

Continuing in the same vein, he observed that the next relationship to qualify must surely be that of parties in pre-contractual negotiations. His powers of foresight proved accurate in the latter case but not in the former.

The reaction which was to set the tone for the decisions which followed was that of Plowman J. in *Clark* v. *Kirby-Smith*[78] who found in *Hedley Byrne* no authority compelling him to find a solicitor liable for his statements in tort as well as contract. *Hedley Byrne* went on to receive its most serious setback with the Privy Council decision in *M.L.C.* v. *Evatt.*[79] It is arguable that Lord Diplock, by his restriction of the duty situations to those in the business or profession of giving the advice sought, or holding themselves out as possessing skill and competence comparable to those in the business or profession, must have meant that a tortious duty could coexist with a contractual one. The very restrictiveness of that test made it seem plausible that a further restriction, in the form of "no tortious duty where a contractual duty existed", could not have been intended. On the other hand, the purpose of the judgment was to restrict, and this was the same judge who had earlier decided *Bagot* v. *Stevens, Scanlan.*[80]

In New Zealand any doubt has been removed: first by the decision of Beattie J. in *Bevan Investments* v. *Blackhall and Struthers*[81] where *Clark* v.*Kirby-Smith* and *Bagot* were specifically approved; then in the Court of Appeal decision of *McLaren, Maycroft* v. *Fletcher Developments*[82] where Richmond J., in a judgment with which Turner P. and White J. concurred, specifically approved everything said by Diplock L.J. in *Bagot.* He quoted a passage[83] from the judgment which leaves no doubt he was approving the 'if contract no tort' proposition of law in the context of negligent misstatements.

Commenting on this case McKenzies[84] recognised that courts have leaned against liability in tort for professional men in contractual relationships, and asked the obvious question:[85]

> Why should the builder be exposed to dual liability when the architect or engineer is not? The common duty set out in *M.L.C.* v. *Evatt* does not differentiate between the true professional and the quasi-professional and there would similarly appear to be no justification for making such a distinction here.

It appears from the recent Supreme Court of Canada decision, *J. Nunes Diamonds* v. *Dominion Electric Protection*[86] that the courts will not make this distinction.

In that case the plaintiff was a diamond merchant whose safe was protected by the defendant's alarm system. After a burglary at the

[79] [1971] A.C. 793.
[80] [1966] 1 Q.B. 199.
[81] [1973] 2 N.Z.L.R. 45.
[82] [1973] 2 N.Z.L.R. 100.
[83] [1966] 1 Q.B. 199, 204.
[84] "What Ever Happened to Hedley Byrne" [1974] N.Z.L.J. 543, 549.
[85] *Idem.*
[86] (1972) 26 D.L.R. (3rd.) 699.

premises of another diamond merchant using the same system, the plaintiff asked the defendant to inspect his system. The defendant's workman did so and assured the plaintiff the system was safe. There were also two letters from the defendant's general manager stating that further investigation was underway bút that the system was performing properly. Later, thieves circumvented the system, broke into the safe and stole a large quantity of diamonds. The plaintiff sued in contract and tort alleging the advice was negligent.

The majority judgment was given by Pigeon J. He found that there was no liability under the contract. He also found that the advice did not cause the damage. Further, he doubted that the advice was negligently given. In addition he seems to have said that the defendant was not within the duty categories of *M.L.C.* v *Evatt.* Thus, anything said about the possibility of a tort/contract overlap is strictly obiter.

What he did say is this:[87]

> It is a case in which, the parties having mutually established their respective rights and obligations by the contract, it is sought to impose upon one of them a much greater obligation than that fixed by the contract.

This is sound judicial common sense taken in isolation. Unfortunately, Pigeon J. did not do justice to the complexity of the problem, for he went on to say that liability under *Hedley Byrne* is inapplicable where the relationship is governed by a contract, unless the negligence is an independent tort. The statements were not independent of the contract, as but for contract, they would never have been made. The plaintiff accepted the system for what it was, and later statements do not alter this position by making the defendant an insurer, when it fails.

Symmons[88] subjects this decision to severe criticism but even he does not appreciate how confused the judgment is. First, the contract there applied to the alarm and its installation. Statements by the defendant's workman were not within its ambit. To say that the contract governed the relationship is a dangerous generalisation, for the contract covered only as much of their relationship as was the subject of its terms. It would seem that when the plaintiff contacted the defendant for advice it was not a dealing covered by their original contract. Any duty owed would be a tort duty. Pigeon J. surprisingly found that no such duty existed.

Second, the reasoning that the statements could not be independent of the contract because, but for it, they would never have been made, is novel in this area of the law. Basically, it must be criticised as being too sweeping. This is a much broader test than the accepted test of Greet L.J., under which, the statement if negligent, would certainly be an "independent tort".

Having criticised this judgment extensively, it is only fair to point out

[87] *Ibid.*, 727.
[88] (1975) 21 McGill L.J. 79, especially 84, 85, 86, 99, 100.

that these statements of Pigeon J. were obiter and of the most general nature. They represent an intuitive reaction to the proposition of dual liability. As such, it would not be placing undue weight upon them, to say that they indicate a trend by the courts to follow for non-professionals the position on dual liability which they have taken for professional men. That is to reject dual liability.

VI. In Principle

On the decided case law the matter is clear. However no legal doctrine will stand for long if it is not at its basis sound in principle. A handful of English decisions all at first instance, a few mentions in the English Court of Appeal, a disapproved House of Lords decision, some dicta in the Supreme Court of Canada, a New Zealand Supreme Court decision, and a mention in the New Zealand Court of Appeal, are all that support the doctrine. If it is to stand it must be on principle.

At the basis of the decisions is the principle that once parties agree what their legal liability will be for acts or omissions within a stipulated area, that agreed liability is their only liability. This is more than an aspect of the freedom to contract policy. It relates to the essential distinction between contract and tort.

Unless one agrees with Prosser and Fleming that:[89]

> the suggested distinction is illusory because all duties whether contractual or tortious are of course imposed by law,

the distinction is that in tort the duties are fixed by the law while in contract they are fixed by the parties themselves. If the parties have agreed what the obligations between themselves will be, there is no need for the law to impose any other similar duty for the protection of either party. Why should the law impose a duty on one party for the protection of the other which that other has himself agreed to give up? The law does not need to think of protecting one person from another when that person has already thought of his own protection and agreed with the other what it will be.

This would seem to accord with the expectations of the parties to a contract. When they agree that, as regards the area of their relations delimited by the contract, there will be no liability for certain acts or omissions, they mean simply no liability. To say that they only mean no liability in contract, is to require every man to think like a lawyer. The ordinary man, even a commercial man, does not think in terms of liability in tort or in contract. He thinks in terms of liability for acts or omissions. When he says no liability, that is what he means.

It should be added that it is upon this basis that he estimates costs and decides whether or not to insure. The person who suffers loss from the act

[89] Fleming, *Law of Torts* (4th ed.), 2. For a similar statement see Prosser, *Handbook on the Law of Torts* (2nd ed.), 613.

or omission has agreed for valuable consideration that the other party would not be legally liable. He had the opportunity to insure against the loss and perhaps paid a lower price because the other party did not have to include the costs of possible liability. The party suffering loss would no doubt be delighted to find he has a remedy (in tort), but he would not expect one.

All this of course does not apply with equal force to consumer contracts. There the "little man" is given a "take it or leave it" proposition, and there is certainly a temptation to advance consumer protection through a doctrine of dual liability. But to bring reform in through the back door by contortion of principle is not the answer. Something more fundamental is called for to solve that particular problem. Perhaps the only answer is legislative intervention differentiating between consumer and commercial contracts.

There is also a public policy argument. If the courts do not allow parties to contract out of liability for some acts, for example crimes, should the mere existence of a contract rule out a duty of care? The answer is simply that the courts decide when it is in the public interest to interfere in a certain area of the law. It is not a matter of principle; it is simply a matter of policy. The courts have made a distinction between crimes and negligence, the former being beyond exclusion of liability by agreement, the latter being within exclusion of liability. Whether the courts change their view, brings the argument back to where it began. Is the way the law stands at present sound in principle? If so, there is no need for change. There does not seem to be anything radically illogical or unjust in the principle that where a person *should* have thought of his neighbour the law will impose liability, but where a person *has* thought of his neighbour their agreed liability is the only liability.