ASTLEY v AUSTRUST LTD*

DOWN BUT NOT OUT: CONTRIBUTORY NEGLIGENCE, CONTRACT, STATUTE AND COMMON LAW

In 1809,[1] the common law took an appalling turn which no one today deigns to support. Notwithstanding that a plaintiff suffered harm as a result of a defendant's negligent conduct, failure of the plaintiff to care adequately for his or her own safety, a failure which also played a part in the loss, resulted in the plaintiff being denied any compensation from the defendant. This 'contributory negligence' of the plaintiff was a complete defence to a claim against the negligent defendant. In 1945, legislation was passed in the United Kingdom which put an end to this abomination, substituting a regime of apportionment of damages between plaintiff and defendant based on their respective degrees of responsibility for the damage suffered.[2] The *Law Reform (Contributory Negligence) Act 1945* (UK) served as a model for similar legislative reform in Australia and elsewhere, and these statutes are commonly referred to as the 'apportionment legislation'. For some time, doubt attended the question of whether a plaintiff who suffered loss as a result of a defendant breaching a *contractual* duty of reasonable care would be subject to the apportionment legislation, although the clear trend was in favour of an affirmative answer. With its decision in *Astley*,[3] the High Court has now authoritatively ruled the other way. The Court also addressed certain factual aspects of the contributory negligence defence.

I THE FACTS AND LOWER COURT HISTORY

Astley, the senior partner of the firm of appellant solicitors, had for many years acted for the respondent Austrust Ltd ('Austrust'), a trustee company established in 1910 (originally under the name Elders Trustee and Executor Co Ltd). In 1983 Austrust decided to embark upon a new business venture of acting as trustee for trading trusts. It commenced negotiations to become the trustee of a trading trust which had been established to set up the business of a piggery in New South Wales. Land was to be purchased by the trust and was to be financed by quite substantial borrowings secured against the properties to be acquired. Prior to Austrust becoming trustee of this trust, its officers gave a general retainer to Astley to examine the proposed deed of trust and to give them his comments on it. Astley did so and in due course Austrust became the trustee of the trust. The trust subsequently failed and was wound up, with extensive liabilities over and

* (1999) 161 ALR 155 ('*Astley*').
1 *Butterfield v Forrester* (1809) 11 East 60; 103 ER 926 (KB).
2 *Law Reform (Contributory Negligence) Act 1945* (UK) 8 & 9 Geo 6, c 28.
3 (1999) 161 ALR 155.

above the value of the trust assets. Austrust was left to bear these liabilities owing to the creditors.

Austrust sued the appellants in contract for breach of retainer and in negligence. Its claim in the Supreme Court of South Australia was upheld at first instance by Mullighan J who found that Astley 'failed to advise [Austrust] of the need to protect itself from personal liability for the debts of the Trust.'[4] This failure to give full advice as to the legal implications of Austrust accepting the trusteeship was a breach of the duty of care owed, concurrently in contract and in tort, by Astley to Austrust. However, Mullighan J also found contributory negligence on the part of Austrust in that, in making a judgment as to the business implications of accepting the trusteeship, Austrust failed to assess the commercial viability of the proposed piggery business.[5] Rather than evaluating the chances of the business succeeding if there was no substantial public investment, Austrust's officers

> blindly accepted that there were sufficient investors standing by to purchase units when the new trust was established and the prospectus issued, and that sufficient capital would be obtained to resolve all of the financial ills of the trust, which was plainly not the case.[6]

Adopting the view that the apportionment legislation[7] applied 'where the duty of care is the same in contract and in tort and both causes of action are pleaded',[8] his Honour apportioned responsibility equally between the parties.[9]

On appeal the Full Court held, for reasons to be discussed below, that there had been no relevant contributory negligence on the part of Austrust.[10] Accordingly, it did not fall to the Full Court to consider whether the apportionment legislation applied, and their Honours refrained from expressing any opinion on that issue. The Full Court allowed Austrust's appeal and increased the award of damages.[11]

Upon further appeal by the solicitors, the High Court reinstated the trial judge's finding of contributory negligence on the part of Austrust.[12] However, the majority[13] held that the apportionment legislation did not apply to claims for breach of contract, even where the obligation breached was one of reasonable care for which there was concurrent liability in contract and in tort.[14]

4 *Austrust Pty Ltd v Astley* (1993) 60 SASR 354, 376.
5 Ibid 380–1.
6 Ibid 380.
7 *Wrongs Act 1936* (SA) s 27A.
8 *Austrust Pty Ltd v Astley* (1993) 60 SASR 354, 380.
9 Ibid 381.
10 *Austrust Pty Ltd v Astley* (1996) 67 SASR 207, 234 (Doyle CJ and Olsson J; Duggan J agreeing).
11 A cross-appeal lodged by the solicitors against Mullighan J's finding of liability was dismissed.
12 *Astley* (1999) 161 ALR 155 (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ). This was the view of all five judges.
13 Gleeson CJ, McHugh, Gummow and Hayne JJ in a joint judgment; Callinan J dissenting.
14 The High Court took the opportunity to reject, as had the House of Lords in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, Deane J's view in *Hawkins v Clayton* (1988) 164 CLR 539, 583–5 that liability for breach of a duty to take reasonable care should be found exclusively in tort where the only basis for liability in contract is through the implication

Accordingly, no reduction of damages in the contract action was authorised by the apportionment legislation. Austrust therefore retained its full award of damages, but for different reasons from those relied upon by the Full Court.

II EXISTENCE OF CONTRIBUTORY NEGLIGENCE

The High Court majority judges first gave attention to whether Austrust had been contributorily negligent. In outlining the factual background and lower court history, their Honours identified two reasons put forward by the South Australian Full Court for concluding in the negative:

> First, while Austrust might well be open to criticism for failing to take proper account of the interests of the beneficiaries of the trust, it did not fail to give due consideration to its own interests. That was because it had no reason to think that its own interests were at stake. There was no evidence that a reasonably competent trustee would have been aware of the risk of 'personal' liability, and there was no basis for concluding that Austrust, acting reasonably, ought to have known of that risk. Secondly, the risk of personal liability to which Austrust was exposed was the very risk against which Astley, in the discharge of his professional responsibility, should have protected it.[15]

But in its subsequent analysis, the majority seemed to ignore, or at least give short shrift to, the first of the Full Court's reasons, and to re-interpret the second.

A *Eventuation of the 'Very Risk'*

Dealing first with this second point, much of the analysis offered by the majority was directed to the question of whether it is impossible in law for a plaintiff to be guilty of contributory negligence when the defendant is under a duty to guard against the very risk which ultimately eventuated. There had been some obiter comments in earlier cases which lent support to such a notion, the high water mark being the 'implicit adoption'[16] of such a rule by Rogers CJ Comm D in *AWA Ltd v Daniels*:

> There is a respectable body of authority for the proposition that ... a defence of contributory negligence against a company, based on the allegedly negligent conduct of a servant or director, is not available to an auditor whose duty it is to check the conduct of such persons.[17]

But this approach had been rejected on appeal,[18] and the majority of the High Court in *Astley* expressly accepted the correctness of the reasoning of Clarke and Sheller JJA in that appeal. The majority in *Astley* concluded:

> There is no rule that apportionment legislation does not operate in respect of the contributory negligence of a plaintiff where the defendant, in breach of its

of a term creating a parallel and concurrent contractual obligation: *Astley* (1999) 161 ALR 155, 168–70.

15 *Astley* (1999) 161 ALR 155, 161.

16 Ibid 163.

17 (1992) 7 ACSR 759, 842, quoted in the majority judgment in *Astley* (1999) 161 ALR 155, 162.

18 *Daniels v Anderson* (1995) 37 NSWLR 438 (NSWCA).

> duty, has failed to protect the plaintiff from damage in respect of the very event which gave rise to the defendant's employment. A plaintiff may be guilty of contributory negligence, therefore, even if the 'very purpose' of the duty owed by the defendant is to protect the plaintiff's property. ... A finding of contributory negligence turns on a factual investigation of whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property.[19]

In the area of *causation* as it applies to a defendant's liability, a 'very risk' argument of the type described above does have some force. When an event occurs which is the very thing that a defendant is under an obligation of care to prevent or guard against, that is strongly suggestive, if not conclusive, that the event cannot be regarded as an intervening cause, or novus actus interveniens, breaking the chain of causation between the defendant's breach and the plaintiff's loss. In this regard, Mason CJ stated in *March v E & M H Stramare Pty Ltd*:

> As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff to a third party as a superseding cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things.[20]

Accordingly, in *Duke Group Ltd (in liq) v Pilmer*,[21] the plaintiff company (then known as Kia Ora Gold Corp ('Kia Ora')) proposed a takeover of another company. Accountants were engaged to prepare a report as to whether the proposed takeover price was fair and reasonable, it being known that such a report was required by the Australian Stock Exchange Listing Rules and would be placed before a meeting seeking the approval of Kia Ora shareholders for the takeover. The accountants were under a duty of care to Kia Ora in preparing this report, one of the purposes of which was to guard against the risk of Kia Ora's directors proposing, because of their own self-interest, a takeover at a price that was not fair. This was indeed what occurred. But the actions of those directors found to have breached their duties in this regard, and of Kia Ora through them, did not prevent a finding that the breach of duty by the accountants still constituted a legally relevant cause of Kia Ora's losses.[22]

A similar conclusion was reached recently by the House of Lords, albeit in a very different factual scenario. In *Reeves v Commissioner of Police of the Metropolis*,[23] Martin Lynch was taken into police custody. He was a known suicide risk.[24] Within two hours,[25] Lynch hanged himself by tying his shirt through an open hatch in his cell door and died a week later as a result. It was found at trial, and subsequently conceded by the Police Commissioner, that the police owed Lynch a duty to take reasonable care to prevent him from

[19] (1999) 161 ALR 155, 163.
[20] (1991) 171 CLR 506, 518–19 ('*March*').
[21] (1999) 31 ACSR 213 ('*Duke*').
[22] Ibid 285.
[23] [1999] 3 WLR 363 ('*Reeves*').
[24] In fact, he had tried to kill himself earlier that same day in a cell at the Magistrates' Court.
[25] Within eight minutes of being observed lying on his bed in his cell.

committing suicide while in custody, and that this duty of care was breached by the hatch being left in an open position. One defence asserted to the claim, brought pursuant to fatal accidents legislation, was that this breach was not an operative cause of the death because the chain of causation had been broken by Lynch's voluntary act of suicide, making that act a novus actus interveniens. The House of Lords rejected this defence on the basis that suicide was the very act which the police ought to have taken reasonable care to prevent.[26]

One may not wish to express the concept quite as did Lord Jauncey, who said of the deceased's suicide: 'as an actus it was ... neither novus nor interveniens'.[27] But it is clear that none of the Law Lords in the majority could seriously contemplate the idea that the precise event to which the duty of care was directed could ever eliminate the breach of that duty as a legally operative cause of the loss sustained.[28]

The reason is clear. If one is obliged to take care to prevent something happening and, through want of care it happens, it 'makes no sense',[29] or is 'self-contradictory',[30] to treat the latter as entirely negativing the causative effect of the former on the consequences. One may be entitled to argue that even if appropriate care had been taken, that would not have prevented the event and resulting harm from occurring in these circumstances; if true, such an argument would negative causation. But otherwise, to hold the breach of duty not to be a cause of the harm 'would be to deprive the duty of meaningful content'.[31]

But turning to contributory negligence, there is nothing nonsensical about accepting that the plaintiff's own acts or omissions, even those which the defendant is obliged to take care to prevent, might contribute *along with* the defendant's negligence to causing the harm or loss. For example, a plaintiff may have such personal expertise or experience that it would be careless of him or her not to supervise or check the defendant's work. It would be wrong to insulate, through a legal rule, such a plaintiff from a share of the responsibility for the loss.[32]

Accordingly, where professional accountants were engaged by a client to advise as to the fairness of a proposed takeover bid and through negligence incorrectly asserted that the price was fair, but the client had the knowledge and experience to form its own view of the soundness of the accountants' advice and

[26] Lord Hoffman, Lord Mackay, Lord Jauncey and Lord Hope; Lord Hobhouse dissenting.

[27] *Reeves* [1999] 3 WLR 363, 375. One hopes his Lordship was inwardly chuckling as he wrote these words.

[28] Even Lord Hobhouse in dissent accepted that Lynch's suicide could not be regarded as a novus actus interveniens; his Lordship's reasoning against a finding of causation was grounded on the separate notion that free, unconstrained, autonomous choice is an individual right, the consequences of which, for that individual, must always be sheeted home to the individual alone.

[29] *March* (1991) 171 CLR 506, 518 (Mason CJ); see also *Environment Agency v Empress Car Co (Abertillery) Ltd* [1998] 1 All ER 481 (HL).

[30] *Reeves* [1999] 3 WLR 363, 368 (Lord Hoffman).

[31] *Reeves v Commissioner of Police of the Metropolis* [1999] QB 169, 196 (Lord Bingham CJ); see also *March* (1991) 171 CLR 506, 518 (Mason CJ).

[32] See Law Commission (Great Britain), *Contributory Negligence as a Defence in Contract*, Report No 219 (1993) [4.12].

failed to do so, the client was found to be contributorily negligent.[33] Similarly, in *Reeves*,[34] the House of Lords, having determined that the deceased's suicide did not break the chain of causation, nevertheless proceeded to find that the very same act constituted contributory negligence which justified a 50 per cent reduction in the damages awarded to his dependants in the fatal accidents action.

Unlike the situation with respect to causation, holding the plaintiff contributorily negligent in the circumstances presently under discussion does not empty the defendant's duty of all meaningful content. At least that is true where the loss is not apportioned 100 per cent to the plaintiff — something which the High Court has authoritatively held cannot happen.[35]

In light of the above, it can readily be accepted that

> [t]here is no rule that apportionment legislation does not operate in respect of the contributory negligence of a plaintiff where the defendant, in breach of its duty, has failed to protect the plaintiff from damage in respect of the very event which gave rise to the defendant's employment.[36]

And there is no need to quibble that the High Court took the opportunity to make and explain this point forcefully. But the judges who sat below in the South Australian Full Court are perhaps entitled to feel aggrieved if the manner in which the High Court dealt with this suggests that their Honours had erred in law. For in their joint judgment, Doyle CJ and Olsson J made it quite plain that they were also of the view that no such rule existed:

> In our opinion the risk of exposure to personal liability was the very matter which Astley should have identified. His failure to do so meant that the appellant was unaware of the risk. ... In that setting we consider that the appellant's failure cannot relevantly be regarded as fault ... *In so concluding we do not proceed on the basis that in an action for professional negligence there is a rule of law that a professional adviser may not claim contributory negligence by the client, even in respect of matters on which the adviser has given or should have given advice.* We agree with what was said on this topic in *Daniels v Anderson* by Clarke JA and by Sheller JA. In the end, *each case has to be decided on its own facts*.[37]

[33] *Duke* (1999) 31 ACSR 213, 325–6.

[34] [1999] 3 WLR 363.

[35] *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 149 ALR 25.

[36] *Astley* (1999) 161 ALR 155, 163. English law accords with this view: see *Reeves* [1999] 3 WLR 363.

[37] *Austrust Pty Ltd v Astley* (1996) 67 SASR 207, 234 (citations omitted) (emphasis added); Duggan J agreed with the reasoning of the joint judgment: at 243. What we can see here is that the Full Court adopted exactly the same reasoning from the very same authority as did the High Court itself: *Astley* (1999) 161 ALR 155, 163. The suspicion of a sense of grievance in the South Australian court is not lessened by the fact that in *Duke*, the Full Court referred to their *own* statement in *Astley* as support for the absence of any rule of law in this context, pointedly ignoring the High Court's conclusion on the same matter, notwithstanding that the High Court's decision had been available and had in fact been relied upon for other purposes elsewhere in the Full Court's judgment: (1999) 31 ACSR 213, 325.

B *The Purpose Lying Behind a Plaintiff's Standard of Care*

We therefore return to the other reason identified by the High Court as a basis for the Full Court's decision, namely that Austrust had no reason to think that its own interest was at stake. Without that link, a conclusion that Austrust failed to take steps to protect itself from loss does appear strange.[38]

Yet all members of the High Court[39] were of the view that Austrust, through its officers, should reasonably have been aware that failure to act carefully could put its own position at risk. Mention is made of this judicial disagreement between the High Court and the South Australian Full Court in two case notes. Swanton explains it as reasonable minds differing on the question of whether Austrust's conduct should be 'branded' as contributory negligence.[40] Davis suggests that 'the High Court put the standard of diligence and care for [Austrust's] own interests ... rather higher than the members of the Full Court'.[41] But neither commentator takes this particular matter much further.

The view of the Full Court was that Austrust did not believe, and more importantly, had no reason as a trustee to believe, that the proposed venture placed its own interests at risk. That Austrust should have investigated the commercial and financial viability of the scheme and had been careless in failing to do so can be, and was by the Full Court judges,[42] readily admitted. But this was a failure to look after the interests of trust beneficiaries, who obviously would be vulnerable to loss if their trustee invested funds without due scrutiny as to the quality of the investment.

However, contributory negligence is routinely described in terms of a plaintiff failing to take reasonable care for his or her *own* protection. The High Court, in this very case, puts it in similar terms.[43] It seems logically to follow that before one can fail to meet this standard of care, one must have reason to believe that there is some relevant interest of one's own at stake. But there was no evidence or finding to this effect. The High Court majority judgment does state that a

[38] The Full Court did consider whether a plaintiff not guilty of failing to take care of itself might still in law be found contributorily negligent for failing in a duty of care owed to another: *Austrust Pty Ltd v Astley* (1996) 67 SASR 207, 233–4. Their Honours referred to two High Court cases, *Jackson v Goldsmith* (1950) 81 CLR 446 and *Ramsay v Pigram* (1968) 118 CLR 271, where several judges made obiter remarks to the apparent effect that breach by the plaintiff of a duty of care owed to the defendant would constitute contributory negligence (the Full Court made no reference to Sholl J's decision in *Noall v Middleton* [1961] VR 285 which appears to be direct authority for that view). But it was clear that Austrust owed no relevant duty of care to its solicitors and as the remarks did not extend to duties owed to others, the Full Court felt unconstrained by these cases.

[39] Including Callinan J: *Astley* (1999) 161 ALR 155, 195. See also Mullighan J at trial: *Austrust Pty Ltd v Astley* (1993) 60 SASR 354, 380–1.

[40] Jane Swanton, 'Contributory Negligence is Not a Defence to Actions for Breach of Contract in Australian Law' (1999) 14 *Journal of Contract Law* 251, 260.

[41] J L R Davis, 'Contributory Negligence and Breach of Contract: *Astley v Austrust Ltd*' (1999) 7 *Torts Law Journal* 117, 118.

[42] *Austrust Pty Ltd v Astley* (1996) 67 SASR 207, 231–2.

[43] 'At common law, contributory negligence consisted in the failure of a plaintiff to take reasonable care for the protection of his or her person or property': *Astley* (1999) 161 ALR 155, 161. Contrast the approach taken in a recent case from the New Zealand Court of Appeal which seems to equate contributory negligence with a lack of care on the plaintiff's part which contributes to the defendant's failure to take care: *Gilbert v Shanahan* [1998] 3 NZLR 528.

reasonable person in Austrust's position, borrowing a large sum of money to be secured by mortgage over properties being acquired, would have investigated the viability of the venture.[44] But this gives insufficient weight to the fact that Austrust's 'position' was that of a trustee. It certainly fails to address squarely the Full Court's point. The closest the High Court comes to doing so is its 'scepticism' that 'the officers of a trustee company in business for over 70 years believed that it could borrow more than $1 million in its own name without any primary liability to repay the moneys'.[45]

In judging the relevance of a plaintiff's careless conduct, it is useful to keep in mind the purpose of the standard of care which the plaintiff failed to meet. If the loss suffered was unrelated to that purpose, the plaintiff's carelessness ought not to count against it. To illustrate, in both *Marshall v Batchelor*[46] and *Gent-Diver v Neville*,[47] the plaintiffs had carelessly accepted rides on motorcycles knowing that the lights were not operating either properly or at all. But there was no relevant contributory negligence held against them when they suffered injuries because of collisions resulting from excessive speed, failure of drivers to keep a lookout or vehicles being on the wrong side of the road.

In both situations, the plaintiffs would not have been injured had they acted with care for their own safety and refrained from riding on the defective motorcycles. To that extent, their injuries could be said to be attributed to their conduct. But as is true in respect of the requirement for causation when it comes to ascertaining a defendant's liability for breach,[48] the 'but-for' test ought not to be the exclusive criterion. It is, or ought to be, as much a matter of common sense for the purposes of contributory negligence as it is for primary liability. Speaking of this issue in the context of a defendant's liability, Lord Hoffman has remarked that 'one cannot give a common sense answer to the question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule.'[49] Significantly for present purposes, his Lordship has since extended this sentiment to the analysis applied to the contributory negligence issue.[50]

Returning to the present case, Austrust failed in its responsibility to exercise care to investigate the commercial viability of the venture it proposed to undertake as a trustee. But for this failure to exercise proper care, Austrust would not have suffered its loss. But it cannot be doubted that the purpose underlying Austrust's responsibility to investigate was to safeguard the interests of trust beneficiaries. Any failure on Austrust's part to investigate properly, rendered it

[44] *Astley* (1999) 161 ALR 155, 164–5.
[45] Ibid 165.
[46] (1949) 51 WALR 68.
[47] [1953] QSR 1.
[48] See the line of High Court cases stretching at least from *March* (1991) 171 CLR 506 to *Chappel v Hart* (1998) 156 ALR 517.
[49] *Environment Agency v Empress Car Co (Abertillery) Ltd* [1998] 1 All ER 481, 488. The passage was relied upon by Gummow J in *Chappel v Hart* (1998) 156 ALR 517, 534.
[50] *Reeves* [1999] 3 WLR 363, 365–72.

accountable to the beneficiaries for breach of that obligation.[51] But as a matter of common sense, taking this underlying purpose into account, personal liability to the creditors went beyond the scope of the risk of the careless lack of investigation, at least in the absence of evidence or finding to suggest that Austrust's officers should have realised that Austrust's personal interests were at stake. This is just as a collision caused by excessive speed, inadequate lookout or driving on the wrong side of the road went beyond the scope of the risk of passengers carelessly riding on motorcycles knowing that the lights were not working.[52]

It behoves the courts to exercise considerable caution before determining that any plaintiff has been contributorily negligent. The general soundness of a regime of apportionment, especially one which replaced a situation where plaintiffs often were denied any recovery at all, ought not to be equated with a licence to approach the question in a robust manner. It must be remembered that, typically, a negligent defendant is likely to be able to absorb its share through insurance. But a plaintiff found to be contributorily negligent must usually bear the consequences of any apportionment and corresponding reduction in damages by itself.[53]

III CONTRIBUTORY NEGLIGENCE AND CONTRACT

Upon concluding the existence of the contributory negligence point against Austrust, it became necessary for the High Court to determine whether the solicitors could rely upon this finding as a basis for reducing damages. There was no doubt that they could do so in respect of their liability in tort. But Austrust was also entitled to succeed in contract for breach of the implied term in the retainer that the solicitors would act with reasonable care. The existing state of authorities was inconclusive on whether, as a matter of law, apportionment was available in a contract action. But in every Australian, English and New Zealand case reported since 1980 in which a concluded (if not necessarily authoritative) view was expressed, that view, with one exception, was that apportionment should be regarded as available where the liability in contract was grounded on the breach of an obligation which was parallel to and concurrent with the tortious obligation of reasonable care.[54] That view was widely supported.[55] But it is a

[51] See, eg, the surrounding context of *Trust Co of Australia v Perpetual Trustees WA Ltd* (1997) 42 NSWLR 237.

[52] *Marshall v Batchelor* (1949) 51 WALR 68; *Gent-Diver v Neville* [1953] QSR 1. See generally John Fleming, *The Law of Torts* (9th ed, 1998) 314.

[53] Fleming, above n 52, 309.

[54] Some of these cases, and earlier ones, are reviewed in the joint judgment: *Astley* (1999) 161 ALR 155, 171–6. English law is so settled on this point that the possibility that it might matter in this respect whether an action is framed in tort or contract seems to have escaped the attention even of the Law Lords: see *Platform Home Loans Ltd v Oyston Shipways Ltd* [1999] 1 All ER 833 (discussed by Davis, above n 41, 121–2). The exception mentioned in the text is the decision of the Full Court of the Supreme Court of WA in *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd* [1989] WAR 100 which, to some extent, was purportedly justified on the ground that the wording of the WA apportionment legislation differed from that in force elsewhere. The Full Court subsequently recanted in *Craig v Troy* (1997) 16 WAR 96.

view which the High Court has now, by majority, rejected as 'display[ing] substantial flaws of reasoning'.[56]

A *The Majority's Reasoning*

The majority judgment treated the issue as 'one of statutory construction which is to be resolved by reference to the relevant text, history and purpose of the statute.'[57] The 'statute', of course, is the apportionment legislation, specifically in this instance s 27A of the *Wrongs Act 1936* (SA). It is desirable to set out the relevant portions of the sub-section which create the mechanism for apportionment as well as the crucial definition of 'fault' which brings that mechanism into operation. Section 27A(3) reads in part:

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

The definition of 'fault' is contained within s 27A(1):

> [F]ault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

The gist of the majority's reasoning may be summarised as follows:

1 On its face, the text of the statute is concerned only with claims in tort.[58] Nothing in its terms suggests that 'fault' 'includes rights and obligations arising from a breach of contract.'[59] The statute expressly provides that the fault of the person making a claim shall not defeat the claim.

2 As a matter of history, at common law the fault of the plaintiff, in the form of 'contributory negligence', was a complete defence only to an action in tort.[60] It was never a defence in contract,[61] as can be seen from its complete absence as such from the case law and from 'the great works on pleading written in the nineteenth century'.[62] Accordingly, '[t]o what, other than a common law action in tort, can s 27A(3) be referring when it says that a claim in respect of

55 J W Carter and D J Harland, *Contract Law in Australia* (3rd ed, 1996) 783–5; D W Greig and J L R Davis, *The Law of Contract* (1987) 1405–7, 1409; M J Tilbury, *Civil Remedies: Volume 1 — Principles of Civil Remedies* (1990) [3143]; Bruce Kercher and Michael Noone, *Remedies* (2nd ed, 1990) 149; G H Treitel, *The Law of Contract* (9th ed, 1995) 890; Donald Harris, *Remedies in Contract and Tort* (1988) 50.

56 *Astley* (1999) 161 ALR 155, 176.

57 Ibid 170–1.

58 Ibid 167.

59 Ibid; see also 177.

60 Ibid 178.

61 Ibid 178–9.

62 Ibid 178.

damage "shall not be defeated by reason of the fault of the person suffering the damage"?'[63]

3 The purpose of apportionment legislation was to allow plaintiffs to recover damages when contributory negligence would have defeated the claim entirely.[64] Speaking in reference specifically to s 27A(3), the majority stated: 'The subsection was designed to remedy the evil that the negligence of a plaintiff, no matter how small, which contributed to the suffering of damage, defeated any action in tort in respect of that damage.'[65]

The majority judges were convinced 'to the point of near certainty'[66] that the apportionment legislation did not comprehend the reduction of damages on account of the plaintiff's negligence in an action for breach of contract.

B *Legislative Text and Clarity*

The absolute conviction of the majority on this matter may be viewed with some surprise. This is not only because, as noted above, the balance of judicial and academic views went the other way. Indeed, as Callinan J noted in his dissent: 'That there is a tide of authority and texts flowing in [that] particular direction is reassuring ... [T]heir existence instills confidence in the making of a decision in accordance with them.'[67] It is rather that one is astonished that the text of such a poorly drafted legislative provision could produce any confidence that it has a clear, natural and ordinary meaning of any description.

Each of the relevant provisions of s 27A reproduced above can be seen to have two limbs. Let us refer to the limbs of s 27A(3) as 'Limb A' and 'Limb B', and those of the definition of 'fault' as 'Limb 1' and 'Limb 2'. In this analysis, we see that:

- Limb A is concerned with the person who suffers damage as the result 'partly of his own fault'. The 'fault' referred to in Limb A is therefore the fault of the plaintiff;
- Limb B is concerned with the same person suffering damage as a result 'partly of the fault of any other person'. The 'fault' referred to in Limb B is therefore the fault of the defendant;
- Limb 1 defines 'fault' as 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort'; and
- Limb 2 defines 'fault' as 'negligence, breach of statutory duty or other act or omission which ... would, apart from this Act, give rise to the defence of contributory negligence'.

Consider some of the ambiguities and problems which may be seen on the face of these provisions:

63 Ibid 179.
64 Ibid.
65 Ibid 167.
66 Ibid 177.
67 Ibid 197.

1 The meanings of 'fault' are separated by the word 'or' and are therefore alternative. Are both alternatives, ie both Limb 1 and Limb 2 together, substituted each time the word 'fault' is used in Limb A and Limb B? In other words, are there really two limbs in the definition of 'fault', or merely one comprehensive definition?[68]

2 If both Limb 1 and Limb 2 together are not substituted each time the word 'fault' is used in Limb A and Limb B, does the definition of 'fault' in Limb 1 mean the fault of the plaintiff as set out in Limb A, with the definition of 'fault' in Limb 2 meaning the fault of the defendant as set out in Limb B?

3 Or is it the reverse, such that the definition of 'fault' in Limb 1 means the fault of the defendant as set out in Limb B, with the definition of 'fault' in Limb 2 meaning the fault of the plaintiff as set out in Limb A?

4 If the answer to the preceding question is 'yes', one is led to wonder why there is a reversal of what might be considered the natural or most logical order? In other words, why does the first limb of the definition of 'fault' apply to the second limb of the operative apportionment provision, and vice versa?

5 Does the phrase 'which gives rise to a liability in tort' in Limb 1 modify only the words which immediately precede it, ie 'other act or omission', or is it distributed back to modify 'negligence' and 'breach of statutory duty' as well?[69]

6 If the latter, does this mean that 'a claim in respect of' the damage, being the claim referred to in s 27A(3) subject to apportionment, must be a claim asserting that 'liability in tort', or does the use of the words 'a claim' rather than 'the claim' mean that 'liability in tort' is a threshold which once crossed activates the apportionment mechanism regardless of the form of the claim which the plaintiff asserts in respect of the defendant's 'fault'?[70]

7 Does the phrase in Limb 2 'which ... would, apart from this Act, give rise to the defence of contributory negligence' mean that in each case it must be determined *on the facts of that particular case* whether the plaintiff would, apart from the Act, be defeated by a contributory negligence defence, or is it sufficient that the plaintiff's 'fault' be of a kind which *in general* might support a contributory negligence defence?

[68] If the definition is comprehensive, the text is capable of supporting apportionment to contract actions because it would be enough to show that the plaintiff acts in a way which gives rise to a liability in tort, and any problem whether a contributory negligence defence could arise is obviated.

[69] If the former, all the plaintiff would need to show at this point is that the defendant acted without due care in the attempted performance of a contractual obligation, regardless of whether that made the defendant liable in tort.

[70] The latter interpretation would support apportionment in a breach of contract action so long as the defendant acted in a way which would create liability in tort, regardless of whether the plaintiff asserts such liability in his or her action. It would be to *this* (possibly unasserted) liability in tort that the plaintiff's 'fault' would, apart from the apportionment legislation, give rise to a defence of contributory negligence, thereby satisfying Limb A and providing an answer to the High Court majority judges' question '[t]o what, other than a common law action in tort, can s 27A(3) be referring when it says that a claim in respect of damage "shall not be defeated by reason of the fault of the person suffering the damage"': *Astley* (1999) 161 ALR 155, 179.

This is not to say that there are not answers to the above questions which are, in light of circumstances or context, better or more sensible than others. For example, in relation to questions 1–3 above, it is difficult to understand why the 'fault' of the defendant should potentially comprise acts or omissions which would give rise to the defence of contributory negligence at common law, as it was always a plaintiff's acts or omissions which were material to that defence, never a defendant's.[71] Accordingly, the generally accepted view,[72] now confirmed by the High Court in *Astley*, is:

> When first used in s 27A(3), the 'fault' is that of the plaintiff and the term 'fault' identifies 'negligence, breach of statutory duty or other act or omission' which would, apart from the Wrongs Act, 'give rise to the defence of contributory negligence'. ... When used for the second time in s 27A(3), the 'fault' is that of the defendant and the term 'fault' identifies the 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort'.[73]

But to admit that some of the literal ambiguities generated by the text of the legislation are, upon careful consideration and analysis, capable of resolution is a far cry from stating that the legislation is absolutely clear or that a natural and ordinary meaning is virtually self-evident. Put another way, text which acquires a meaning only after the resolution of a host of underlying ambiguities seems hardly to be 'clear to the point of near certainty'.[74]

C *History and Legislative Purpose*

To be fair, although convinced by the text as to the meaning of s 27A, the majority judges in the High Court gave equal consideration to the history and purpose of the legislation in construing the provision. We outlined their Honours' approach above. But part of that history, as Davis notes,[75] is that at the time apportionment legislation was passed, there were only a few relationships, master and servant included, of concurrent contract and tort liability. Despite this, it is clear that negligent employees could be met with a contributory negligence defence.[76] Whether or not the legislatures should then be 'attributed with [an] enlightened view'[77] in anticipation of 'the imperial march of modern negligence law'[78] into professional and other relationships of concurrent liability, there is

[71] See, eg, *Noall v Middleton* [1961] VR 285, 290–1; cf *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, 111–12 ('*Dairy Containers*').

[72] Though not a universal one: see the discussion in Tilbury, above n 55, [3133]–[3135].

[73] *Astley* (1999) 161 ALR 155, 167.

[74] Ibid 177.

[75] Davis, above n 41, 122, citing Jane Swanton, 'Contributory Negligence as a Defence to Actions for Breach of Contract' (1981) 55 *Australian Law Journal* 278, 278–9.

[76] *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24. For English law, see *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152. For the situation following the commencement of apportionment legislation, see, eg, *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529.

[77] *Dairy Containers* [1995] 2 NZLR 30, 112 (these words were used in the judgment in a related but not identical context to the point we make in the text).

[78] *Astley* (1999) 161 ALR 155, 170.

nothing which suggests that the legislatures intended to isolate the existing relationships as the ones where one party would have to suffer the consequences of his or her own fault contributing to the loss.[79]

A further aspect of that history is that the common law developed its own palliative to the harshness of the contributory negligence complete defence. This 'last opportunity' doctrine 'permitted full recovery to a plaintiff notwithstanding his own negligence if the defendant had the last opportunity of avoiding the accident but negligently failed to avail himself of it.'[80] Although eventually coming to be seen more properly as 'qualifications' to the contributory negligence defence, as opposed to a doctrine or rule as such,[81] the point nevertheless is that prior to the apportionment legislation, damage arising partly from the fault of both plaintiff and defendant would ultimately be borne completely either by one of them or the other, rather than shared between them. A purpose of that legislative reform, accordingly, may well have been to put an end to that common law approach, that is, to ensure that 'the principle of compensation [in the law of damages] is qualified by the principle that responsibility for the consequences of a wrong should be in proportion to the degree of fault.'[82]

D *Policy*

Enough has been said, we hope, to demonstrate that a wider vision of the background to the apportionment legislation and its possible objectives, coupled with a different, but still open, reading of the text of the legislation, renders the *Astley* majority judges' interpretation somewhat less than a 'near certainty'. In other words, the legislation is, consistent with text, history and purpose, at least open to a construction that could bring damages for breach of contract within its apportionment ambit. And while we would in no way be so presumptuous or foolish as to suggest that the majority judges' interpretation is wrong or implausible, the approach to statutory interpretation adopted by their Honours may be said to be very traditional and narrow. It looks backwards rather than forwards. To quote Tilbury:

> [T]o determine the applicability of the [legislation][83] solely by a quasi-mechanical investigation of authority is hardly likely to prove satisfactory. ... The court must, therefore, ultimately face the question whether contributory negligence ought, as a matter of policy, to reduce the damages in the case at hand.[84]

[79] See, eg, *Challenge Bank Ltd v V L Cooper & Associates Pty Ltd* [1996] 1 VR 220, 237–8, 240.

[80] Fleming, above n 52, 304.

[81] *Alford v Magee* (1952) 85 CLR 437. See generally Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999) 562–3.

[82] Tilbury, above n 55, [3139].

[83] In the actual passage, Tilbury refers to what we have called above Limb 2 of the definition of 'fault', but he makes it immediately clear that he is of the same view in respect of Limb 1.

[84] Tilbury, above n 55, [3139].

The majority judgment does advert to policy considerations,[85] although not, as Tilbury suggests, to assist in determining whether the legislation applies but in an attempt to establish that 'it is by no means evident that there is anything anomalous or unfair in a plaintiff who sues in contract being outside the scope of the apportionment legislation.'[86] The following three passages from the joint judgment seem to capture the essence of their Honours' view:

> Tort obligations are imposed on the parties; contractual obligations are voluntarily assumed.[87]
>
> The terms of the contract allocate responsibility for the risks of the parties' enterprise including the risk that the damage suffered by one party may arise partly from the failure of that party to take reasonable care for the safety of that person's property or person. ... Rarely do contracts apportion responsibility for damage on the basis of the respective fault of the parties. Commercial people in particular prefer the certainty of fixed rules to the vagueness of concepts such as 'just and equitable'.[88]
>
> It is one thing to apportion the liability for damage between a person who has been able to obtain the gratuitous services of a defendant where the negligence of each has contributed to the plaintiff's loss. It is another matter altogether to reduce the damages otherwise payable to a plaintiff who may have paid a very large sum to the defendant for a promise of reasonable care merely because the plaintiff's own conduct has also contributed to the suffering of the relevant damage.[89]

Considered together, these passages seem to find no role for the well-known twentieth century developments in contract law theory[90] which challenge the classical model of self-reliant independent actors bargaining freely to reach a mutual consensus and planned certainty. Other judges have been more open in this regard:

> [T]here is no authority requiring the appliction [*sic*] of absolutist common law tort notions of responsibility to contracts. ... [T]here does not seem to be any inherent requirement in contract law dictating an absolutist doctrine of liability. I suppose 19th century notions of a contract as a discrete 'meeting of minds' might have supported a divorce of the contract phenomenon from the world around it. But this scarcely accords with modern objective theories of contract or, if it ever did, with the realities of the market-place.[91]

It is, therefore, plausible that contracts rarely apportion responsibility for damage based on respective fault because parties assume that will be the default

[85] *Astley* (1999) 161 ALR 155, 181–2.
[86] Ibid 181.
[87] Ibid.
[88] Ibid.
[89] Ibid 182.
[90] Surveyed in Carter and Harland, above n 55, 10–12; and see especially Robert Hillman, 'The Crisis in Modern Contract Theory' (1988) 67 *Texas Law Review* 103.
[91] *Doiron v Caisse Populaire D'Inkerman Ltée* (1985) 17 DLR (4th) 660, 677 (NB CA) (La Forest JA) ('*Doiron*').

position[92] where the contractual obligation of one of them is to act with reasonable care rather than guarantee a result,[93] and they comfortably regard such an outcome as desirable.[94]

On the question of voluntariness in particular, the majority judges' policy outlook overlooks a matter of some significance — there exists a category of terms implied by law as a 'legal incident of a particular class of contract'[95] and the contractual obligation of reasonable care typically is of that nature. That this is correct was clearly acknowledged by their Honours at an earlier point in the joint judgment.[96] In light of that, it is very difficult to accept that an appropriate policy distinction exists based on a contract–tort dichotomy. In respect of the obligation to take reasonable care, not only is the content of that obligation the same in tort and in contract, so in reality is the source and the reason. Both obligations are imposed by operation of law with reference to a given relationship.[97] Further, even if one accepts that parties may 'voluntarily' enter into a contractual relationship for the provision of professional or other services, it strains the ordinary meaning of the word to say that they '*voluntarily*' agree on a term which is *imposed* by operation of law.

The idea that one who pays, sometimes 'a very large sum',[98] deserves better treatment than the person who receives services for free, may at first appear an attractive sentiment. However, if the content, source and reason for the service provider's obligation is the same, it is less easy to see that there is a basis for different treatment. The words of the Supreme Court of Canada are especially apposite here. Referring to contracts where an obligation to take reasonable care is implied, La Forest and McLachlin JJ stated:

> There is a contract. But the obligation under that contract is typically defined by implied terms, i.e, by the courts. Thus, there is no issue of private ordering as opposed to publicly imposed liability. Whether the action is styled in contract or tort, its source is an objective expectation, defined by the courts, of the appropriate obligation and the correlative right.[99]

Therefore, it is far from satisfactory to assert that the person who pays is entitled to be relieved either of an obligation to take care for his or her own

[92] Ibid 683, quoting Prowse JA in *Canadian Western Natural Gas Co Ltd v Pathfinder Surveys Ltd* (1980) 21 AR 459, 485; 12 CCLT 211, 240 (Alta CA): '[C]ontributory negligence ... is regularly applied by the business community in such circumstances'.

[93] Many lawyers certainly assumed that to be the case: see, eg, *NRMA Ltd v Morgan* (1999) 31 ACSR 435, 478.

[94] Law Commission (Great Britain), above n 32, [3.42].

[95] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 345; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 420; see generally *Liverpool City Council v Irwin* [1977] AC 239.

[96] 'The implied term of reasonable care in a contract of professional services arises by operation of law. It is one of those terms that the law attaches as an incident of contracts of that class.': *Astley* (1999) 161 ALR 155, 169–70.

[97] See, eg, *Mouat v Clark Boyce* [1992] 2 NZLR 559, 565–6.

[98] *Astley* (1999) 161 ALR 155, 182.

[99] *BG Checo International Ltd v British Columbia Hydro and Power Authority* [1993] 1 SCR 12, 29–30; 99 DLR (4th) 577, 585–6; L'Heureux-Dubé and Gonthier JJ concurred with the joint judgment of La Forest and McLachlin JJ; Iacobucci and Sopinka JJ dissented in the case.

protection or, in what amounts essentially to the same thing, of the tangible consequences of any failure to take such care. It is unlikely that people who pay for services think this way. Viewed from the perspective of the service provider who has agreed only to exercise reasonable skill and care rather than to guarantee a result, '[i]t cannot be assumed in such cases that he has undertaken to compensate the plaintiff fully, even where the plaintiff is part author of his own loss.'[100] Far more likely is the perception of the person who pays that he or she is entitled to *better service* than someone who pays nothing. It is this policy which the law might more justifiably reflect, through adjustment of the nature of the term which is implied into contracts. Even if one does not go quite so far as to suggest that the service provider should be taken to be guaranteeing a particular outcome,[101] it is not an implausible suggestion that the implied contractual term should hold the service provider to a higher standard than would be the case under the general law of negligence.

As a matter of policy, a more appropriate distinction is found in the content of the obligation which the defendant bears. This lies behind the view expressed by Hobhouse J, as part of his tripartite categorisation of contractual duties, that apportionment legislation does not apply when the defendant's contractual obligation does not depend upon negligence,[102] ie where the obligation is strict such that the defendant has guaranteed a result.[103] In *Astley*, the majority judges of the High Court regarded Hobhouse J's approach as unacceptable on the basis that the apportionment legislation 'does not hint at such a distinction.'[104] But we have suggested above that the text of the legislation is open to the interpretation that the possibility of apportionment is triggered in part by any act or omission on the part of the defendant which gives rise to a liability in tort. If the defendant breaches a strict contractual duty without acting negligently, the trigger would not be pulled and there would be no cause for apportionment.

The problem is how to deal with the situation of a defendant who breaches the strict obligation by acting in a negligent fashion. How, since the trigger has been pulled, does one prevent apportionment, in line with Hobhouse J's view about his first category, so that the negligent defendant does not gain the advantage of apportionment over the defendant who breaches a strict obligation without negligence? The answer must be, drawing upon the later words of s 27A, that it

[100] Law Commission (Great Britain), above n 32, [3.22].

[101] Cf *Thake v Maurice* [1986] QB 644 (Peter Pain J); rev'd [1986] QB 670.

[102] *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488, 508 ('*Vesta*'); Hobhouse J's three categories were: (1) defendant's contractual liability arises from a contractual obligation which does not depend on negligence; (2) defendant's liability arises from a contractual obligation of care which does not correspond to an independent tortious duty of care; (3) defendant's liability in contract is the same as the liability in negligence arising independently of the contract. In Hobhouse J's view, the apportionment legislation applied to the third category of case but not the other two. These views were adopted, in obiter, by the Court of Appeal: *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, 865–6. The House of Lords upon further appeal did not consider this aspect of the case: *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 880.

[103] Direct authority for this interpretation of the English apportionment legislation can be found in the Court of Appeal's decision in *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214.

[104] (1999) 161 ALR 155, 176.

would not be just and equitable to apportion in those circumstances. Where fault on the part of the defendant is immaterial to the defendant's contractual obligation, it is immaterial to his or her liability and it is 'difficult and inappropriate to compare his [or her] blameworthiness with that of the plaintiff.'[105]

IV DEVELOPMENT OF THE COMMON LAW

Consider the following situation: The plaintiff pays $10 for admission to an arena to view a professional ice hockey match and sits at the rink side. Because of the lack of popularity of this sport in Australia, the rinks are not surrounded by the protective screens or plexiglass which are found in arenas in North America and Europe. While the plaintiff is engaged in animated conversation with another spectator, is reading a book explaining the rules of the game or is otherwise not paying adequate attention to the events taking place on the rink, he or she is injured by a flying puck or an errant hockey stick or skate. It is accepted that the occupier of a sporting venue impliedly undertakes in its contract with spectators that the venue is 'as safe for the purpose of enabling [them] to watch the [match] as reasonable care and skill could make [it]'.[106] The suggestion that the spectator escapes the consequences of his or her lack of care for his or her own safety because he or she has paid $10 to be admitted seems bizarre. More so if the inattentive injured person is a companion for whose admission the first spectator has paid, and who, being limited to a claim in tort, would be met with a reduction of damages on that account.

Alternatively, consider an illustration somewhat closer to the lawyer's heart. In *NRMA Ltd v Morgan*[107] the plaintiff alleged that its solicitors and barrister had carried out their tasks without due care. Both were sued, but of course the barrister was not in a direct contractual relationship with the client, whereas the solicitor was. Giles J stated:

> Given the decision in *Astley v Austrust Ltd*, the solicitors can not rely on contributory negligence to reduce their ... liability for breach of contract, and the defence is of no value to them. Mr Heydon [the barrister] can rely on contributory negligence, since he is sued only in tort.[108]

These illustrations are symptomatic of the law's ill health in this area. The majority judges in *Astley* recognised that the decisions which allowed apportionment were affected by particular views of policy, views with which their

[105] Law Commission (Great Britain), above n 32, [3.24]; cf *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214. The Law Commission has recommended that apportionment ought to apply not only to cases falling within *Vesta*'s third category, but also the second: Law Commission (Great Britain), above n 32, [3.41]. For a recent example of this second category case, with no apportionment occurring, see *Raflatac Ltd v Eade* [1999] 1 Lloyd's Rep 506. See also *Rowe v Turner Hopkins & Partners* [1982] 1 NZLR 178, 181 (apportionment legislation applies whenever negligence is an essential ingredient of the plaintiff's claim, whatever the source of the duty).

[106] *Australian Racing Drivers Club Ltd v Metcalf* (1961) 106 CLR 177, 182 (Owen J).

[107] (1999) 31 ACSR 435.

[108] Ibid 757.

Honours disagreed without expressly disclosing what they were.[109] It is instructive to set out the alternative views, expressed variously:

> [T]he form of the action should have a minimal effect. The trend to obliterate the distinction between a claim in contract and a claim in tort, in my view, is highly desirable.[110]

> As 19th century judges responded to the ethos of their times, so must we to ours. Contribution is now consistent with prevailing theories of both the law and the market-place. And it meets our sense of fairness. ... [P]arties simply do not contemplate what should be done when losses arise from a breach of contract flowing from negligent behaviour that is contributed to by negligent behaviour on the other side. The courts must do so for them.[111]

> [I]t would be strange if after all these centuries the common law (in the widest sense of the expression) had been able to produce only instruments of remedy so blunt and inefficient that apportionment of responsibility where it rightly belongs is impossible. ... [A]pportionment in accordance with true responsibility will always be available when required by the justice of the case.[112]

> The [apportionment legislation] was enacted to remedy the arbitrary consequences of the all-or-nothing approach which developed where the plaintiff was in part responsible for the loss which he or she suffered. It is now inappropriate to approach the application of the Act in a manner which would perpetuate arbitrary consequences, although less dramatic, of the kind which the Act was designed to remedy. It is for the Courts, in implementing the Act, to fashion a regime under the Act which is fair and efficient in apportioning responsibility for the loss to where it rightly belongs.[113]

These views go some way to explaining why the courts have 'pressed into service'[114] the apportionment legislation or otherwise '[used] one technical device or another'[115] to accomplish their ends. But what seems startling is how readily we have accepted that the common law came to a screeching halt in 1945 with the passing of the English apportionment legislation.

This has not been true elsewhere in the common law world. In the courts in Ontario some years ago, following a decision which ruled against the applicability of the apportionment and contribution of tortfeasors legislation to contract claims,[116] judges turned to the common law and accepted that its natural development permitted apportionment in contract claims in like manner as the

109 (1999) 161 ALR 155, 181.

110 *Tompkins Hardware Ltd v North Western Flying Services Ltd* (1983) 22 CCLT 1, 16; 139 DLR (3rd) 329, 341 (Ont HCJ) (Saunders J).

111 *Doiron* (1985) 17 DLR (4th) 660, 679 (La Forest JA).

112 *Mouat v Clark Boyce* [1992] 2 NZLR 559, 563, 566 (Cooke P).

113 *Dairy Containers* [1995] 2 NZLR 30, 76 (Thomas J).

114 *Doiron* (1985) 17 DLR (4th) 660, 675.

115 Ibid 673.

116 *Dominion Chain Co Ltd v Eastern Construction Co Ltd* (1976) 12 OR (2d) 201; 68 DLR (3rd) 385 (Ont CA), affirmed on other grounds: *Giffels Associates Ltd v Eastern Construction Co Ltd* [1978] 2 SCR 1346; (1978) 84 DLR (3rd) 344.

statute.[117] As put by La Forest JA, then of the New Brunswick Court of Appeal:[118]

> With the modification [by apportionment legislation] of the law of contributory negligence in tort to permit contribution, however, why, there being no compelling precedent or *rationale*, should the courts extend 19th century notions into 20th century contract law? The demands of consistency that would once have suggested an absolutist solution now suggest contribution. ... It is ... not foreign to the history of the common law for a more appropriate remedy to displace an older one. Here the general public remedy (tort law) is applied to private arrangements (contracts) in cases where the parties have not adverted to the problem that has arisen and the nature of the contract does not dictate otherwise.[119]

Standard torts texts trace the history of the common law contributory negligence defence and the torturous attempts to ameliorate its impact through 'last opportunity' and even 'constructive last opportunity' artifices.[120] In 1952 in *Alford v Magee*,[121] the High Court brought, as best it could, some order to the common law position. Even then, one detects in the judgment a discontent with the common law and a recognition that comparative fault of plaintiff and defendant had been playing a covert part in attribution of responsibility for injury.[122] By 1952, of course, the process of statutory apportionment had commenced and the common law was effectively pursuing a 'mopping-up' function for incidents which had predated the legislation. In those circumstances, it is not surprising that the Court might exhibit conventional caution: 'Apart from the new statutes, it is not, of course, legitimate to enter upon any comparison [of the negligence of plaintiff and defendant] in point of degree.'[123] But is it beyond the realm of contemplation that if apportionment legislation had not been passed, the courts would not have become bolder? Consider the recent remarks of a New Zealand judge:

> The dynamic of the common law would not have recognised such a shut-off point. Apart from the Act, it would have continued to develop. ... [T]he common law would itself have mitigated the harsh finality of a finding of contributory negligence. ... Apart from the Act, the requirements and expectations of the community would almost certainly have led to a modified

117 *Tompkins Hardware Ltd v North Western Flying Services Ltd* (1982) 22 CCLT 1, 14–17; 139 DLR (3rd) 329, 339–41; *Ribic v Weinstein* (1983) 140 DLR (3rd) 258, 272–3 (Ont HCJ), aff'd without discussion of this point: *Weinstein v A E LePage (Ontario) Ltd* (1984) 47 OR (2d) 126; 10 DLR (4th) 717.

118 Now a Justice of the Supreme Court of Canada.

119 *Doiron* (1985) 17 DLR (4th) 660, 678 (emphasis in original). See also the New Zealand decisions, eg, *Mouat v Clark Boyce* [1992] 2 NZLR 559, 563, 565–6; *Dairy Containers* [1995] 2 NZLR 30, 110–11; and the situation in several of the states in the US, where so-called 'comparative negligence' apportionment in tort developed judicially without the need for statutory intervention: W Page Keeton et al (eds), *Prosser and Keeton on the Law of Torts* (5th ed, 1984) 471 fn 28.

120 Fleming, above n 52, 303–5; R P Balkin and J L R Davis, *Law of Torts* (2nd ed, 1996) 333. See especially *Alford v Magee* (1952) 85 CLR 437, 452–60.

121 (1952) 85 CLR 437.

122 Ibid 460–1, citing Evatt J in *Wheare v Clarke* (1937) 54 CLR 715, 743.

123 *Alford v Magee* (1952) 85 CLR 437, 460–1.

> common law regime under which contributory negligence would have ceased to be fatal to the plaintiff's claim.[124]

The fact that apportionment legislation came into being is not by itself any reason to deny any further role for common law development. The Canadian cases cited above support this view in regard to contributory negligence and contract specifically. But in addition, one sees an analogy elsewhere in Australian law. As reviewed in the High Court case of *Hungerfords v Walker*,[125] it was once the common law that damages in the form of interest were not available for loss of use of money arising from the commission of a civil wrong. As with contributory negligence, ways were found at common law to escape the rigours of this rule, plus legislation was passed in most common law jurisdictions[126] permitting courts a wide discretion to award interest on the amount of damages. In *Hungerfords v Walker*[127] the High Court held that the previously held view as to the common law was incorrect. Damages for loss of use of money could indeed be awarded at common law and, significantly, the intervening legislative corrective did not stand in the way of this development:

> The section is not intended to erect a comprehensive and exclusive code governing the award of interest. It is a provision intended to provide a plaintiff with some protection against the late payment of damages. ... Where a legislative provision is designed to repair the failings of the common law and is not intended to be a comprehensive code, the existence of that provision is not a reason for this Court refusing to give effect to the logical development of common law principle. It would be ironic if a legislative attempt to correct defects in the common law resulted in other flaws becoming ossified in the common law.[128]

The similarities in the history and in the potential for 'ossification' of the flaw in contract law in the cases of concurrent liability are striking. Even if the apportionment legislation might be seen as a legislative attempt to codify the appropriate legal response to a plaintiff's contributory negligence in a tort claim, on the *Astley* majority judges' own terms, that legislation has no application to contract claims and therefore cannot stand in the way of common law development there. Neither does *Astley* itself, which is clearly a case limited to the proper construction of the apportionment legislation.

In the bout for fair treatment of both parties when each is at fault, the *Astley* decision has clearly rendered statutory interpretation an illegal punch. So be it. But it is by no means clear that the judiciary has been knocked out of the ring. While we await a determination of the strength of the lobbying power of professional organisations and other 'managers' over the various 'promoters' in

[124] *Dairy Containers* [1995] 2 NZLR 30, 110–11 (Thomas J).

[125] (1990) 171 CLR 125.

[126] On the facts of the case itself, this was the *Supreme Court Act 1935* (SA) s 30C.

[127] (1990) 171 CLR 125.

[128] Ibid 147–8 (Mason CJ and Wilson J); Brennan and Deane JJ were in general agreement with the reasoning of Mason CJ and Wilson J in the case. Although there was a sub-section in the legislation which assisted their Honours to the conclusion that s 30C was not intended as a comprehensive code, the general force of the statement quoted in the text is not weakened.

the form of the State and Territory legislatures, perhaps a common law counter-puncher will be found among the lower court ranks.[129]

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[129] Cf *Duke* (1999) 31 ACSR 213, 383–93 (introducing apportionment into compensation for breach of fiduciary duty through development of principles of equity).

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