

The Overlap of Tort and Contract

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Introduction

To a common law lawyer, Crépeau's distinction between the theoretical unity and technical duality of civil liability,¹ which points to the difference for purposes of suit between contractual and extra-contractual duties even as it affirms that both are components of the umbrella category of legal obligation, is a nice paradox to tease the mind but does not serve as a practical guide for the solution of problems. If the common law lawyer, however, were to reply in the same vein, he might be tempted to advert to the theoretical duality and technical unity of his own system of civil liability. Indeed, such a response could claim to have some rough-and-ready correspondence to the state of his law — a point I hope to develop in the course of this paper.

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¹Crépeau, *Des régimes contractuel et délictuel de responsabilité civile en droit civil canadien* (1962) 22 R. du B. 501.

Common law lawyers are not accustomed to thinking in terms of a compendious subject of civil liability or obligations, nor is there yet any serious attempt by any treatise writer to that end. Putting aside statute, a common law lawyer would fill out the rubric of civil liability with various obligations culled from contract, tort, restitution, equity, bailment and the common callings — and that is hardly a comprehensive list. Theoretical unity is wholly absent, but it would be quite misleading to assert the existence of categorical stability among the various groups mentioned above, for they exhibit a dynamism which is quite at odds with any attempt to fit them into separate, hermetically-sealed compartments. The extent to which they interact with and overlap each other may yet compel even the unscientific common law lawyer to give attention to their location in the broad pattern of civil liability.

No discussion of the present position of the categories of civil liability at common law is comprehensible without reference to their historical evolution, which will be attempted in outline in the next section. After all, a system of law without a code has no obvious starting point. The categories of civil liability at common law have to be approached by way of the forms of action, namely the original writs granting relief in the King's courts, which, in Maitland's memorable phrase, though dead still rule us from their graves.²

I. The Evolution of the Categories of Civil Liability before the Nineteenth Century³

If contract law is recognized as emerging when the law first enforces mutual promises, it can be said that the common law of contract was born in *Norwood v. Read* (1558)⁴ where the Court recognized that "every contract executory is an *assumpsit* in itself".⁵ An understanding of the significance of these words is dependent on a discussion of the prior evolution of the forms of action in what we would now call contract cases.

Starting at the beginning of the fourteenth century, the available writs in this area were account, covenant and debt. The first required the

²"The forms of action we have buried, but they still rule us from their graves": F. Maitland, *The Forms of Action at Common Law* [:] *A Course of Lectures*, 2d ed. (1965), 2.

³See F. Pollock & F. Maitland, *History of English Law*, 2d ed. (1898); W. Holdsworth, *History of English Law* (1903-66), 16 vols; J. Ames, *Lectures on Legal History* (1913), Lectures VIII, IX and XI; C. Fifoot, *History and Sources of the Common Law: Tort and Contract* (1949); T. Plucknett, *A Concise History of the Common Law*, 5th ed. (1956); S. Milsom, *Historical Foundations of the Common Law*, 2d ed. (1981); A. Simpson, *A History of the Common Law of Contract* (1975); J. Baker, *An Introduction to English Legal History*, 2d ed. (1979).

⁴(1558) 1 Plow. 180, 75 E.R. 276 (K.B.).

⁵*Ibid.*, 279.

defendant to account to the plaintiff for a money sum but lay only in a limited class of cases involving guardians, bailiffs and receivers. It was unpromising stuff for the development of a general theory of contractual liability in view of its material limitations and the time and expense taken up by the proceedings it necessitated. Indeed, it was eventually superseded by an equitable action of the same name: a court of equity was the appropriate resort for a plaintiff who "felt the urge to scrape the conscience of the defendant as closely and painfully as the law would permit".⁶

More significant were the writs of debt and covenant. It would be inaccurate to characterize the former as contractual since it was a real rather than a personal action: its essence lay in the plaintiff's grant of a *quid pro quo*, not in any promise to pay by the defendant. As a vehicle for the expansion of a general law of contract, it was crippled by at least two serious shortcomings: it lay only for the recovery of a liquidated sum and it was subject to what has been called "a form of licensed perjury",⁷ namely the defendant's right to wage his law. This was a process whereby the defendant could plead the general issue and elect for trial by a process of oaths. If he swore an oath of innocence and could produce the requisite number of compurgators to swear that he was a credible person, this was a conclusive defence to the action.

If contract is viewed as a mutual and consensual transaction, covenant was no more contractual than debt. The writ lay at the behest of a promisee in the case of a promise made under seal. Given the absence of any need for the promisee to show that there had been a *quid pro quo* for the promise, and in view of its immunity from the later development of the general doctrine of consideration,⁸ the non-contractual character of covenant becomes evident. Covenant, in a word, was not consensual. Furthermore, its formality and inability to adapt itself to circumstance meant that it could never carry the burden of bringing the law into an increasingly mercantile economy.

Curiously — indeed ironically, in view of twentieth century developments — the source of what later became our modern law of contract was the law of tort, in particular the writ of trespass. For our purpose, it is not necessary to decide whether trespass was the original source or whether this was trespass on the case after its separation from trespass.⁹

⁶Fifoot, *supra*, note 3, 275.

⁷Salmond, *Observations on Trover and Conversion* (1905) 21 L.Q.R. 43, 45.

⁸Promises under seal have always posed difficulties for those advocating an omnibus theory of consideration, leading to attempts to argue that consideration reposes in the form of the promise.

⁹See Milsom, *supra*, note 3, 305-13.

The *Humber Ferryman's* case (1348)¹⁰ is the earliest example of the writ of trespass being used to support liability for the negligent breach of a contractual undertaking. According to the plaintiff's complaint, the defendant had undertaken to carry the plaintiff's mare safe and sound across the River Humber, but the mare had perished because the defendant had overloaded the ferry. Despite the defendant's plea that the case properly sounded in covenant, the Court of King's Bench adjudged it to lie in trespass. Liability for negligent undertakings was consolidated in *Waldon v. Marshall* (1370)¹¹ where the plaintiff alleged that the defendant, a horse doctor, had undertaken to cure his horse but, owing to the negligent performance of his task, the horse had died. Again, it was argued that the case sounded in covenant since it was based on a promise by the defendant, but the Court held that the action was properly laid in trespass on the case. Thereafter, it could be said that an action on the case would lie where an express undertaking had been breached by a negligent act of commission. Except in the case of the common callings, such as common carriers and innkeepers, who were charged upon the common custom of the realm, it would be more than two hundred years after *Waldon v. Marshall* before actions of a similar nature could be brought where no express undertakings to act were given.¹²

The cases referred to above reveal more clearly today than they did at the time of their decision that they stood at the junction of case and its offshoot, *assumpsit*, which was on the point of striking a separate course. It is worth noting too that negligent breaches of contractual undertakings are central to the modern overlap of tort and contract. But the penetration of trespass on the case into what we would now call contract went beyond the modern overlap of contract and tort and into an area which in general is purely contractual in modern terms, namely, liability for failure to perform an undertaking at all, in other words, liability for an omission.

Liability in case for non-performance begins to appear in the fifteenth century. The first decisions are based on the special form of action on the

¹⁰(1348) Lib. Ass. 22 Ed. III, pl. 41. See the discussion of the case in Plucknett, *supra*, note 3, 470-1. See also Simpson, *supra*, note 3, 623-4.

¹¹(1370) Y.B. Mich. 43 Ed. III, f. 33, pl. 38. The case is translated in Fifoot, *supra*, note 3, 81.

¹²The line between nonfeasance and misfeasance seems a natural one to divide trespass and covenant; to some extent, it separates contract and tort even today. According to Milsom, *supra*, note 3, 317: "Covenant was about the enforcement of promises in an almost literal sense: it was aimed at people who did not do what they had promised to do. The ferryman had of course failed to carry the mare over the river. But he was sued, not because it was left behind, but because it was dead. He was not naturally liable in covenant, any more than the borrower who damaged what he had borrowed was liable in detinue. The complaint was not failure to carry out the 'contractual' obligation, but of damage actually caused."

case for deceit. In *Somerton's* case (1433),¹³ Somerton had retained Colles as counsel in the purchase of a manor from Botelor. Despite his undertaking to act for Somerton, Colles "falsely and fraudulently" procured the manor for Blunt. The judgment of Babington C.J. makes it plain that a mere failure to perform the undertaking would not give Somerton an action on the case: the appropriate form of action would be covenant and this would require a seal. But it was different where the lawyer "betrays his counsel and becomes of counsel for another" for here deceit would lie. Likewise, Cottesmore J. asserts: "And I say that matter which lies wholly in covenant can by malfeasance *ex post facto* be converted into deceit. For if I warrant to purchase for you a manor, notwithstanding that I fail to do this for you, no action will lie for these bare words without a deed to this effect."^{13a}

A similar decision is *Doige's* case (1442),¹⁴ in which Doige undertook to enfeoff the plaintiff within fourteen days but instead enfeoffed a third party. Again, the defendant demurred to the plaintiff's bill of deceit on the ground that the action should have been in covenant but again the verdict went in favour of the plaintiff. By enfeoffing the third party, Doige had rendered himself liable in deceit.

Liability in case for a simple refusal to perform, uncompounded by any act of disablement, had to wait until the sixteenth century. When it did emerge, however, it was more obviously contractual in temper than liability for misfeasance since "the idea of trespass or quasi-trespass was no longer helpful".¹⁵ As Plucknett also says, "the habit grows of discussing these matters in terms of promises rather than deceits, of contract rather than tort".¹⁶ It was in this climate that the Court of King's Bench was able to assert in *Norwood v. Read* (1558)¹⁷ that "every contract executory is an *assumpsit* in itself",¹⁸ and hold the executors of Gray liable in an action on the case for Gray's failure to supply a quantity of wheat. The plaintiff was held entitled to recover damages for non-delivery, in which award a debt claim for the recovery of money paid in advance was included.

The consequence of focussing attention on the undertaking rather than on the injury was that the common law developed a doctrine of mutual

¹³(1433) Y.B. Hil. 11 Hen. VI, f. 18, pl. 10: Pasch. pl. 1: Trin. pl. 26. The case is translated in Fifoot, *supra*, note 3, 343-4.

^{13a}*Ibid.*

¹⁴(1442) Y.B. Trin. 20 Hen. VI, f. 34, pl. 4. The case is translated in Fifoot, *supra*, note 3, 347-9.

¹⁵Plucknett, *supra*, note 3, 639.

¹⁶*Ibid.*, 643.

¹⁷*Supra*, note 4.

¹⁸*Supra*, note 5.

promises which provided the foundation for a general theory of consideration. This in turn led over a protracted period to the development of a theoretical framework of remedies for breach of contract based on the dependence or independence of contractual promises. At the same time as the doctrine of consideration began to evolve, *assumpsit*, which by now was an independent species of action on the case, produced an offshoot, *indebitatus assumpsit*. This process led to the development of a body of restitutionary actions within a developing law of contract — a not altogether beneficial process whose effects are still being felt in the twentieth century. It is worth examining the rise of *indebitatus assumpsit* as it involved the supersession of the writ of debt.

About the middle of the sixteenth century it became established that, if a party indebted to another subsequently promised to pay the amount owing, the other party could recover this sum either in debt or in the variant of the action on the case called *indebitatus assumpsit*.¹⁹ Laying the action in *indebitatus assumpsit* freed the plaintiff of some of the drawbacks of debt, including wager of law. What enabled *indebitatus assumpsit* to outflank debt was the willingness of the Court of Queen's Bench to dispense with the need to show an actual subsequent promise by the debtor to pay; rather, this promise was treated as an untraversable allegation.²⁰ Over a period of years this practice, which had the consequence of breaking the monopoly possessed by the Court of Common Pleas over debt actions, led to the reversal of Queen's Bench decisions in a Court of Exchequer Chamber drawn from judges of the Courts of Exchequer and Common Pleas. The matter finally received a definitive ruling from a Court of Exchequer Chamber comprising judges of the Courts of Exchequer, Queen's Bench and Common Pleas in *Slade's case* (1602).²¹

Slade agreed to sell to Morley for £16 all the wheat and rye grown on Slade's estate at Rack Park. Morley promised to pay on the feast of St John the Baptist but failed to do so, and declined to pay when payment was later sought by Slade. A jury found that only the original bargain stood between the parties: there had been no subsequent promise by Morley to pay. Despite this finding, the Court held that Slade had the choice of suing either in debt or in an action on the case (*indebitatus*

¹⁹*Norwood v. Read*, *supra*, note 4. The beginnings of this development can be seen in *Jordan's case* (1528) Y.B. Mich. 19 Hen. VIII, f. 24, pl. 3, translated in Fifoot, *supra*, note 3, 353-5. As to the distinction between an *indebitatus* count and a special *assumpsit* count, see Simpson, *supra*, note 3, 305-7.

²⁰See Fifoot, *supra*, note 3, 359.

²¹(1602) 4 Co. Rep. 91a, 76 E.R. 1072 (K.B.). See Lücke, *Slade's Case and the Origin of the Common Counts* (1965) 81 L.Q.R. 422, 539 and (1966) 82 L.Q.R. 81; Baker, *New Light on Slade's Case* [1971] Cambridge L.J. 51, 213.

assumpsit) at his election. Words similar to those used in *Norwood v. Read*²² were repeated by the Court:

It was resolved, that every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money as [sic] such a day, in that case both parties may have an action of debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt...²³

Moreover, the plaintiff's damages in *indebitatus assumpsit* could include the debt itself as well as any special damage suffered.

Plucknett thought the decision in *Slade's* case was "indefensible, for it obliterates the distinction between debt and deceit, between tort and contract".²⁴ It is difficult, however, to see the force of this criticism: an allegation of debt had already become a *pro forma* averment in an action on the case; deceit would have to wait nearly three hundred more years before acquiring the tightness of definition we recognize today.²⁵ Furthermore, given the evolution of *assumpsit* and its *indebitatus* offshoot from the action on the case, it is hard to see any distinction between contract and tort that *Slade's* case helped to obliterate. While the writ of debt was effectively stultified by *Slade's* case, we have seen that it did not possess a character that we would recognize today as contractual. Indeed, nothing like a systematic distinction between contract and tort emerged until the nineteenth century.²⁶

What *Slade's* case did, however, was to prevent the drawing of a distinction between contractual and restitutionary actions. Since liability in *indebitatus assumpsit* was posited on an antecedent debt, whose genesis did not necessarily lie in any bargain, and the averment of a subsequent promise to pay was an untraversable fiction, it followed that no sharp distinction could be drawn between promises implied from the parties' conduct and promises imputed to the parties by the dictates of justice.²⁷ In the seventeenth century, actions developed for the recovery of money (money had and received) and for reimbursement for goods supplied

²²*Supra*, note 4.

²³*Supra*, note 21, 1077.

²⁴*Supra*, note 3, 647.

²⁵*Derry v. Peek* (1889) 14 App. Cas. 337 (H.L.).

²⁶A flourishing forms of action system could not have nurtured the conceptualism necessary for such a systematic distinction to be drawn.

²⁷"If [*indebitatus assumpsit*] was to be used as a general alternative to debt, it must, of necessity, accept the legacy of claims outside the limits of agreement": Fifoot, *supra*, note 3, 363.

(*quantum valebat*) or services rendered (*quantum meruit*).²⁸ It later became common for plaintiffs not to plead the terms of the actual agreement of the parties, but to terminate the contract and frame a claim in one of the simplified forms of action known as the common counts, which were offshoots of *indebitatus assumpsit*.²⁹ It suffices here to say that this tendency, which suppressed any distinction between implied and imputed promises, has left its mark on the common law by slowing down the emergence of a mature body of restitutionary principles.³⁰

At this point, it becomes pertinent to step back in time and observe the relationship of bailment to the emergent law of *assumpsit*. If one defines bailment as a transaction whereby a bailor entrusts a bailee with possession of goods on terms providing that the goods are to be redelivered to the bailor after the expiry of a term or the occurrence of an event, the transaction appears as a consensual entity with an evident similarity to contract. Tracing the location of bailment in the old forms of action is directly relevant to the placing of any boundary between contract and tort in the twentieth century.

In the early days, a bailee could be called on to account for goods by the writ of detinue, which showed a common ancestry with the writ of debt. Gradually, the two writs separated so that debt concerned itself with liquidated money claims while detinue dealt with the case where the debtor had the plaintiff's goods.

Ames³¹ asserts that detinue was founded on bailment and that it was contractual in nature. The first assertion is countered by Milsom who points to a number of cases where detinue lay otherwise than upon a bailment.³² The second assertion is effectively demolished by Fifoot³³ whose view is more acceptable in the twentieth century than it would have been in the nineteenth, when attempts were made to force bailment into a contract mould:

Bailment, in truth, is *sui generis* — an elementary and unique transaction, the practical necessity of which is self-explanatory, and if in later years it is most often, though not invariably associated with a contract, this is not, and never has been, its

²⁸See Simpson, *supra*, note 3, 489-505.

²⁹“One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff needs not state the special circumstances from which he concludes ‘that ex aequo & bono, the money received by the defendant, ought to be deemed as belonging to him:’ he may declare generally, ‘that the money was received to his use;’ and make out his case, at the trial”: *Moses v. Macferlan* (1760) 2 Burr. 1005, 97 E.R. 676, 679 (K.B.) *per* Lord Mansfield C.J.

³⁰See R. Goff & G. Jones, *The Law of Restitution*, 2d ed. (1978), 5-11.

³¹*Supra*, note 3, Lecture VI.

³²*Supra*, note 3, 269-75.

³³*Supra*, note 3, 24-34.

essential characteristic. It was a familiar fact, as Detinue and Debt were familiar words, before contract was a generic conception.³⁴

Detinue, like debt, permitted the defendant to wage his law and the emergence in the fourteenth century of an action on the case against parties undertaking to exercise due care had the effect of setting up an alternative to the detinue action. Unlike debt, however, detinue was never superseded by the action on the case and has retained a definite, if at times exiguous, existence to this day.³⁵

Until the seventeenth century, whenever an *assumpsit* action was laid against bailees, it was necessary, just as for other *assumpsit* actions, to show that the bailee who was negligent in looking after goods had expressly undertaken to exercise care. This express undertaking, however, was never required of bailees exercising the common callings, such as common carriers and innkeepers, since they were charged, not on the basis of any undertaking whether express or implied, but upon the common custom of the realm. Subsequently, the rise of *indebitatus assumpsit* and its triumph in *Slade's* case meant that implied undertakings could be laid against all types of bailees. Furthermore, it became clear in the early part of the seventeenth century that *assumpsit* also lay in the case of gratuitous bailments.³⁶ Bailment, in other words, thus escaped the net of the general theory of consideration in the sense of this element being necessary to the successful prosecution of an *assumpsit* as opposed to a detinue suit. This development bears out the accuracy of Fifoot's view that bailment should not be forced into a contract mould. It also impresses us with the fact that the notion of an undertaking is by no means a monopoly of the contract action.

Bailment resisted absorption into contract for two reasons: it was never wholly immersed in the general theory of consideration and, unlike debt, detinue was never wholly superseded by *indebitatus assumpsit*. Even today, its precise location between tort and contract is not easy to establish.³⁷ Essentially, bailment is a proprietary relationship governed by a body of law, personal property law, in which title is relative and

³⁴*Ibid.*, 24-5.

³⁵Detinue has, however, disappeared in American jurisdictions and has recently been legislated out of existence in England by the *Torts (Interference with Goods) Act, 1977*, c. 32. Section 2 (1) in full states: "Detinue is abolished."

³⁶*Wheatley v. Low* (1623) Cro. Jac. 668, 79 E.R. 578 (K.B.). See Ames, *supra*, note 3, Lecture XIII.

³⁷The problem is posed in an acute form in the case of exception clauses and the vicarious immunity of third parties. See *Morris v. C.W. Martin & Sons, Ltd* [1966] 1 Q.B. 716 (C.A.); *New Zealand Shipping Co. v. A.M. Satterthwaite & Co.* [1975] A.C. 154 (P.C.N.Z.); *Port Jackson Stevedoring Pty Ltd v. Salmond and Spraggon Pty Ltd* [1981] 1 W.L.R. 138 (P.C. (Austl.)).

which therefore never attained a significant degree of reification. Until 1854,³⁸ there was no writ of specific delivery to compel a defendant in detinue proceedings to surrender goods, and even today the remedy is seldom granted,³⁹ though recovery of the goods can more frequently be obtained by indirect and interlocutory proceedings in replevin.⁴⁰ These exceptions apart, property interests in personalty are typically vindicated in proceedings culminating in a damages liability on the part of the defendant. Consequently, the property torts of trespass *de bonis asportatis*, conversion, detinue and replevin are normally considered as pertaining to the law of torts, though their migration in the law school curriculum to and fro between torts and personal property is some evidence of the difficulty lawyers have in classifying them. The availability of the property torts and the readiness with which the consensual relationship of bailment could be laid in *assumpsit* guaranteed a future of overlapping contractual and tortious liability in bailment cases.

The common callings, which frequently involved a bailment relationship, also resisted assimilation with contract for the additional reason that an express *assumpsit* was not necessary when defendants were charged on the custom of the realm. As it involved the notion of imposed liability, the subject matter of the common callings would find a natural niche in tort law when that body of law emerged as an integrated entity. Nevertheless, as a result of developments set in train by *indebitatus assumpsit*, common callings transactions could be readily rationalized in terms of implied contract. Thus the stage was also set here for overlapping liability in contract and tort.

II. The Categories of Civil Liability in the Modern Law

A legal system based on the forms of action could hardly draw a doctrinal distinction between contract and tort, especially a legal system in which these two bodies of law grew from a common writ, namely, trespass on the case. Of course, such a system requires a plaintiff to choose the right writ if he is to be successful, but this is a long way from establishing a systematic distinction between different bodies of law.

³⁸*Common Law Procedure Act, 1854*, 17 & 18 Vict., c. 125, s. 78.

³⁹*Cohen v. Roche* [1927] 1 K.B. 169 (C.A.). This case involved a suit in detinue, though the headnote is drafted in terms of specific performance of a contract of sale; the principle appears to be applied the same way whether specific delivery or specific performance is sought.

⁴⁰Unlike English law, replevin is not confined in Canada to cases of unlawful seizure or distress. See Ontario Law Reform Commission, *Report on Sale of Goods* (1979), 439-40, where its advantages over detinue are stated.

The boundary between contract and tort assumes shape with the contemporaneous developments of the abolition of the forms of action⁴¹ and the emergence of a body of contract doctrine. This last event owes much to the systematization and rationalization of contract law by treatise writers in a movement starting with Powell's treatise in 1790.⁴² Doctrinal innovation was particularly influential in delineating an integrated law of contract in the areas of formation, consideration and privity. The introduction of offer and acceptance analysis⁴³ in the formation of contracts encouraged the belief that contract was an integrated and separate entity springing into existence at a definite moment and transfiguring the parties' relationship when acceptance matched offer, rather than a legal inference drawn from a continuum and making no absolute distinction between the legally relevant and irrelevant.

Tightness in the definition of contract was also fostered by developments in consideration which, in the first half of the nineteenth century, was delineated in doctrinal terms instead of merely as a catalogue of instances in which the courts would enforce certain promises.⁴⁴ *Eastwood v. Kenyon* (1840)⁴⁵ spelt the end of the principle that the existence of a moral obligation on a promisor is good consideration for a promise. The doctrine acquired an economic shape with the assertion in the contemporaneous decision of *Thomas v. Thomas* (1842)⁴⁶ that consideration must be a thing of value. Pollock's famous definition of consideration as the price which is paid to buy a promise⁴⁷ may be seen as neatly summarizing this doctrinal shift.

⁴¹In the case of the personal forms of action, abolition was a gradual process. See *Uniformity of Process Act, 1832*, 2 & 3 Will. IV, c. 39; *Common Law Procedure Act, 1852*, 15 & 16 Vict., c. 76, s. 3; *Supreme Court of Judicature Act, 1873*, 36 & 37 Vict., c. 66, ss. 23-4. Real and mixed actions were abolished by the *Real Property Limitations Act, 1833*, 3 & 4 Will. IV, c. 27, s. 36.

⁴²J. Powell, *Essay upon the Law of Contracts and Agreements* (1790). Subsequent works included: J. Chitty, *A Practical Treatise on the Law of Contracts* (1826); C. Addison, *A Treatise on the Law of Contracts* (1847); S. Leake, *Principles of the Law of Contracts* (1867); F. Pollock, *Principles of Contract* (1875); W. Anson, *Principles of the English Law of Contract and of Agency in its Relation to Contract* (1879).

⁴³See *Payne v. Cave* (1789) 3 T.R. 148, 100 E.R. 502 (K.B.) (contract concluded *inter praesentes*); *Kennedy v. Lee* (1817) 3 Mer. 441, 36 E.R. 170 (Ch.) (exchange of letters); and *Adams v. Lindsell* (1818) 1 B. & Ald. 681, 106 E.R. 250 (K.B.).

⁴⁴This produced a major parting of the ways with the civil law doctrine of cause. The arguments of P. Atiyah, *Consideration in Contracts: A Fundamental Restatement* (1971) in effect amount to an attempt to turn back the clock and reproduce the pre-bargain theory doctrine of consideration.

⁴⁵(1840) 11 Ad. & E. 438, 113 E.R. 482 (Q.B.).

⁴⁶(1842) 2 Q.B. 851, 114 E.R. 330 (Q.B.).

⁴⁷This definition was relied on by Lord Dunedin in *Dunlop Pneumatic Tyre Co. v. Selfridge and Co.* [1915] A.C. 847, 855 (H.L.).

Closely related to these innovations in contractual formation and consideration was the introduction of the privity of contract rule⁴⁸ by which only parties to a contract may sue or be sued on it. Privity gave an exclusive definition of the parties to a contract while offer and acceptance and consideration defined the material of which a contract was made.

These developments in formation, privity and consideration did more than merely identify the material on which a general law of contract could be brought to bear: they accentuated the distinction between contract and tort, which at this stage lagged behind contract in terms of doctrinal development and treatise-writing.⁴⁹ Two further consequences pertaining to the contract and tort relationship also flowed from these doctrinal innovations. First, problems were posed in classifying undertakings, not all of which could be fitted into the new contractual mould; consequently, no clear distinction between contract and tort was drawn along the line separating assumed from imposed liability. This point can be illustrated by reference to bailment law.

Coggs v. Bernard (1703),⁵⁰ which prescribed the liability of various classes of bailees, was an action on the case against a gratuitous bailee⁵¹ who had undertaken to carry goods from one cellar to another and had damaged the goods in the course of so doing. The defendant pleaded in arrest of judgment entered for the plaintiff that the plaintiff had failed to aver that he, the defendant, was a common carrier, in which case he could have been charged on the custom of the realm, or that he had received any consideration for his undertaking. The Court of Queen's Bench nevertheless held that the plaintiff's declaration was good and a critical distinction, so significant in the previous history of *assumpsit*, was taken between failure to perform a gratuitous undertaking and a negligent performance thereof. The reasons given by the Court for its decision are

⁴⁸*Price v. Easton* (1833) 4 B. & Ad. 433, 110 E.R. 518 (K.B.); *Winterbottom v. Wright* (1842) 10 M. & W. 109, 152 E.R. 402 (Exch.); *Tweddle v. Atkinson* (1861) 1 B. & S. 393, 121 E.R. 762 (Q.B.). The *Price* and *Tweddle* cases apply the rule that consideration must move from the promisee. As to whether this rule is truly different from the privity rule, see Coote, *Consideration and the Joint Promisee* [1978] Cambridge L.J. 301.

⁴⁹"[T]he first real monograph on the English law of tort was written by Addison and was published in 1860": P. Winfield, *A Text-Book of the Law of Tort*, 5th ed. (1950), 4.

⁵⁰(1703) 2 Ld Raym. 909, 92 E.R. 107 (Q.B.).

⁵¹It is probably more accurate to say that the case went off on a pleading point since the defendant moved to arrest judgment on the ground that the plaintiff failed to aver that the defendant was a common carrier or had been paid for his services. The case therefore squarely raised the question whether a gratuitous bailee who did not exercise one of the common callings could be liable in an action on the case for damage done to goods: even on this assumption, the Court was prepared to uphold the jury's verdict against the defendant who had pleaded the general issue.

various though the Court was united in its conclusion that an undertaking to exercise the appropriate degree of care was fairly to be implied from the nature of the bailment. Gould J. seemed to think that the bailee could be charged on his undertaking *simpliciter*, since the goods were entrusted to him on the strength of that undertaking.⁵² Powell J. saw the bailee's undertaking in terms of a warranty which could be sued on in the absence of consideration provided the plaintiff reposed a trust in the undertaking.⁵³ And Holt C.J. put the bailee's liability on two grounds, namely, that the bailor had been deceived by the bailee's pretence of care⁵⁴ and that the mere entrustment of goods to the bailee's possession was sufficient consideration for the bailee's undertaking.⁵⁵

The consideration factor, weak in *Coggs v. Bernard*, was emphasized more strongly in *Bainbridge v. Firmstone* (1838)⁵⁶ where the bailor, at the request of the bailee, had surrendered two boilers to the latter for weighing. The bailee took the boilers apart and declined to return them whereupon the bailor brought action against him on his undertaking to surrender the boilers after weighing them. The report of the case tells us little of the economic purpose of the bailment but any attempt to fit a transaction of this kind into the economic bargain theory of consideration launched by cases like *Thomas v. Thomas*⁵⁷ and *Eastwood v. Kenyon*⁵⁸ seems procrustean to say the least.

Some examples of liability based on undertakings outside bailment, however, are next to impossible to fit within the nineteenth century contract model. *Wilkinson v. Coverdale* (1793)⁵⁹ is such a case. The defendant sold certain premises to the plaintiff and was alleged, on being given the premium, to have undertaken to renew the existing fire insurance policy with the Phoenix Fire office. The defendant's failure to inform the fire office that the premises were being transferred to the plaintiff and to secure the necessary endorsement on the policy invalidated the insurance. The premises burned down and the plaintiff brought an action against the defendant on his undertaking. Though initially inclined to doubt the availability of an action on such a gratuitous undertaking, Lord Kenyon allowed it to proceed whereupon the plaintiff

⁵²*Supra*, note 50, 107.

⁵³*Ibid.*, 108.

⁵⁴*Ibid.*, 113.

⁵⁵*Ibid.*

⁵⁶(1838) 8 Ad. & E. 743, 112 E.R. 1019 (Q.B.).

⁵⁷*Supra*, note 46.

⁵⁸*Supra*, note 45.

⁵⁹(1793) 1 Esp. 75, 170 E.R. 284 (*Nisi Prius*). The case is also reported at 53 R.R. 256, in the preface to which volume (v-vi) Pollock makes plain his disapproval of the decision.

was nonsuited for his failure to prove the undertaking. It is hard to see how the plaintiff could be said to have provided consideration for the defendant's alleged undertaking, unless one were prepared to go so far as to say that mere reliance on the undertaking would be sufficient, which admittedly is suggested by Lord Holt's judgment in *Coggs v. Bernard*.⁶⁰ In *Wilkinson v. Coverdale*, however, the plaintiff did not argue the point; indeed, he admitted there was no consideration whatever for the defendant's undertaking. Finally, it is worth noting that the tort of negligent misstatement as defined in *Hedley, Byrne & Co. v. Heller & Partners Ltd* (1964)⁶¹ is posited, *inter alia*, on an assumption of responsibility by the defendant.⁶² Lord Devlin saw this species of liability as being equivalent to, though not identical with, contract.⁶³ He was of the view that, with the emergence of tortious liability, the doctrine of consideration would no longer need to be distorted to accommodate liability in certain cases of negligent words and drew support from *Wilkinson v. Coverdale* itself in establishing the principle of liability in tort.

The second consequence of the nineteenth century innovations in contract law was the inhibiting effect they had on the development of tortious liability. Strengthening the walls of a legal category not only serves to impress the contents with a unity of design but can also blight external development. The decision of the Court of Exchequer in *Winterbottom v. Wright* (1842)⁶⁴ provides an illustration of this. The plaintiff was a coachman who was crippled in consequence of defects in a coach which the defendant was obliged to maintain in a fit and proper state under his contract with the Postmaster-General for the carriage of mails. In denying liability, the Court could simply have said that, outside the common callings, where duties were imposed according to the custom of the realm, duties of such a kind would rest on a party only if he undertook them. But the Court went further and held that the plaintiff was seeking to take the benefit of a contract to which he was not privy.⁶⁵

⁶⁰*Supra*, note 50.

⁶¹[1964] A.C. 465 (H.L.).

⁶²This is to be found, *ibid.*, 486-7 and 492 *per* Lord Reid, 494-5 and 502-3 *per* Lord Morris of Borth-y-Gest, 514 *per* Lord Hodson and 528-9, 531, 533 *per* Lord Devlin.

⁶³*Supra*, note 61, 529-30.

⁶⁴*Supra*, note 48.

⁶⁵*Ibid.*, 405 *per* Abinger C.B.: "The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? It would, at all events, have defeated his claim altogether. By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the

Admittedly, the plaintiff's declaration was fulsome in its reliance on the terms of the defendant's contract with the Postmaster-General to the extent that he did not point to any alternative source of obligation, but the decision turned out to have a baneful effect on the growth of a tort of negligence centred on a general duty of care and it certainly impeded the development of manufacturers' liability in negligence to the ultimate consumers of their products.⁶⁶

One particular area where tortious liability made little headway in the nineteenth century was economic loss, probably due at least in part to the identification of economic loss liability with a resurgent law of contract. Indeed, in the course of the century, economic loss liability in tort would appear to have receded for it is not at all easy to see how the *Wilkinson v. Coverdale* principle could have survived restrictive decisions such as those in *Cattle v. Stockton Waterworks* (1875),⁶⁷ and *Le Lievre v. Gould* (1893).⁶⁸ It was in fact the awareness that there were areas of loss which it was unwise for tort law to penetrate that led to the demise of Brett M.R.'s attempt to generalize a duty of care in *Heaven v. Pender* (1883)⁶⁹ and delayed until quite recently the full acceptance of the principle of liability laid out by Lord Atkin in *Donoghue v. Stevenson* (1932).⁷⁰ The recent growth of negligence in the area of economic loss,⁷¹ coupled with the earlier abandonment of the so-called privity of contract fallacy, has

footing of their contract, we should subject them to be ripped open by this action of tort being brought against him." *Ibid.*, 405 per Alderson B.: "The contract in this case was made with the Postmaster-General alone... . If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty."

⁶⁶Apart from the dubious case of *George v. Skivington* (1869) L.R. 5 Ex. 1, which was vindicated in *Donoghue v. Stevenson* [1932] A.C. 562 (H.L. (Sc.)), liability on the part of the manufacturer would arise if the manufacturer were guilty of fraudulent misrepresentation — *Langridge v. Levy* (1837) 2 M. & W. 519, 150 E.R. 863 (Exch.) — or, possibly, had put into circulation an inherently dangerous chattel.

⁶⁷(1875) L.R. 10 Q.B. 453.

⁶⁸[1893] 1 Q.B. 491 (C.A.). The best discussion of these case law developments is still to be found in Atiyah, *Negligence and Economic Loss* (1967) 83 L.Q.R. 248.

⁶⁹(1883) 11 Q.B.D. 503, 509.

⁷⁰*Supra*, note 66.

⁷¹The case law is much too prolific to recount in full here. The following examples, however, may usefully be consulted: *Hedley Byrne, supra*, note 61; *Seaway Hotels Ltd v. Consumer Gas Co.* [1959] O.R. 177 (H.C.), *aff'd* [1959] O.R. 581 (C.A.); *Rivtow Marine Ltd v. Washington Iron Works* [1974] S.C.R. 1189; *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd* [1973] 1 Q.B. 27 (C.A.); *Anns v. Merton London Borough Council* [1978] A.C. 728 (H.L.) (elastic characterization of loss as physical); and *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad"* (1976) 136 C.L.R. 529 (H.C. Austl.).

been responsible for the growth of a substantial overlap of contractual and tortious liability. The judicial response to this phenomenon is grounded mainly on nineteenth century authorities decided when overlap was a less extensive phenomenon than it is today.

A. Overlapping Contractual and Tortious Liability

The potential for overlapping contractual and tortious liability was always present in a system of law where the tradition of *indebitatus assumpsit* encouraged actions on implied undertakings: the line between implied and imposed liability is never an easy one to draw. Common callings liability illustrates this particularly well even though, based as it is on the custom of the realm, it might at first sight seem to be readily and exclusively assimilable by tort law, which is still seen, though in an overgeneralized way, as a species of imposed liability. Indeed, liability in certain cases where the services of the common calling are refused cannot repose in contract and, moreover, is not easily classified in the internal categories of tortious liability. Thus, in *Constantine v. Imperial Hotels Ltd* (1944),⁷² the defendants were held liable for their failure to provide accommodation, which as innkeepers they were obliged to do at common law, to the plaintiff, a West Indian cricketer. If a tortious label has to be pinned on the decision, it could be described as a species of the action on the case which resisted assimilation by the all-conquering tort of negligence; it is impossible to see how a refusal to contract could import contractual liability.

Certain instances of liability stemming from the common callings, however, appear to have migrated to contract law. This seems particularly true in cases where economic loss has been caused. *Hadley v. Baxendale* (1854),⁷³ which established the modern rule of remoteness of damage in contract, concerned a common carrier. The plaintiff failed in his efforts to prove a special *assumpsit* by the carrier⁷⁴ and rested his case on the carrier's imposed obligation to carry the goods with reasonable dispatch. The treatment of the case as a contract authority is nevertheless understandable in the light of the ready implication of contracts encouraged by *indebitatus assumpsit*.⁷⁵ A further reason why *Hadley v.*

⁷²[1944] K.B. 693.

⁷³(1854) 9 Ex. 341, 156 E.R. 145 (Exch.). See Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law* (1975) 4 J. of Leg. Stud. 249.

⁷⁴The plaintiff's first count declared a special *assumpsit*, to which the defendant pleaded *non assumpserunt*; the plaintiff then entered a *nolle prosequi* as to the first count: *ibid.*, 146-7.

⁷⁵It seems accurate to say that much of the difficulty experienced in setting the test for implied terms, sometimes imposed on the agreement and sometimes genuinely to be inferred therefrom, is the legacy of this development.

Baxendale has readily been seen as a contract authority may well be that it concerned a claim for economic loss which effectively became the preserve of contract law in the nineteenth century.⁷⁶

Apart from these exceptions, common callings liability was ripe for classification in both contract and tort. A number of early nineteenth century authorities raise the question whether an action on the case can be brought when a contract exists between the parties. On close examination, however, most of them reveal that this is not a contentious matter at all. It is taken for granted or stated with certainty that, if overlapping liability does exist, the plaintiff can choose his writ. What is contentious, nevertheless, is whether an action on the case exists at all, a logically separate question from and anterior to the one dealing with the plaintiff's ability to elect between overlapping liabilities. The sequence starts with *Govett v. Radnidge* (1802),⁷⁷ where an action was brought against common carriers for negligence in the loading of a hogshead of treacle. The action was laid in case against three defendants who pleaded the general issue; the jury acquitted two of them and found the third guilty. The convicted defendant then sought a motion for a new trial on the ground that a joint contract existed with all three defendants so that all were answerable or none at all; a separate verdict, in other words, could not be entered against him. The Court held that, since he was a common carrier, an action properly lay against him in case and the judgment of Lord Ellenborough C.J. leaves no doubt at all that on these facts the plaintiff could have declared either in case or in *assumpsit*.⁷⁸ It is interesting to note that the Court's tolerance of an implied contract in the absence of an express *assumpsit* illustrates the slide from an imposed customary obligation to an implied actual obligation, the primary source of overlapping contractual and tortious liability before the rise of the duty of care in negligence in the twentieth century.

⁷⁶It should, however, be noted that in *Brown v. Boorman* (1844) 11 Cl. & Fin. 1, 8 E.R. 1003 (H.L.), where the plaintiff brought an action on the case against a broker for ignoring his instructions not to part with goods before receiving cash payment from the customer, it seems not to have occurred to court or counsel that there might be difficulties in framing an action in case for what was in truth economic loss. Nevertheless, *Brown* is a dangerous authority to rely on since it represents a path the law did not later follow to the extent that it proposes that breaches of contract are automatically torts.

⁷⁷(1802) 3 East 62, 102 E.R. 520 (K.B.).

⁷⁸*Ibid.*, 523: "What inconvenience is there in suffering the party to allege his gravamen, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire. By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided..."

Like *Govett v. Radnidge*, *Bretherton v. Wood* (1821)⁷⁹ raised an issue of joinder of parties. Again, it concerned a common carrier and his duty imposed by the custom of the realm which, in the Court's view, needed no contract to support it. Whether an action could also have been maintained in *assumpsit* was said to be immaterial, the Court expressing no opinion on the availability of such an action though observing that the practice of pleading such cases in *assumpsit* was relatively modern.⁸⁰

The same approach is evident in cases not dealing with joinder of parties. In *Marshall v. The York, Newcastle and Berwick Railway Co.* (1851),⁸¹ a valet was held entitled to recover in case against the defendant common carrier for the loss of his portmanteau, notwithstanding that the tickets for the journey had been purchased by his employer. Privity of contract was no defence for the railway company when the duty laid on it was also imposed by the custom of the realm, a point conceded also by *Winterbottom v. Wright*.⁸²

The plaintiff's freedom of choice, asserted in *Govett v. Radnidge*, was not confined to common callings cases. *Brown v. Boorman* (1844),⁸³ which reveals the primitive state of the law in respect of any general principle uniting actions on the case, concerned an action on the case against a broker for negligently contravening his instructions. The defendant pleaded that the action should have been laid in *assumpsit* and brought proceedings in error to arrest the jury's verdict in favour of the plaintiff on the ground that the declaration contained insufficient averments of the contract and its breach. The actual decision went in favour of the plaintiff on the ground that enough of the contract was set out in the declaration and that it did not matter that the action was nominally in case. As for whether any duty at all could be laid against the defendant in case, Lord Brougham expressed no opinion while Lord Cottenham and Lord Campbell were prepared to go so far as to say that case would lie where there was a breach of duty arising under an express contract.⁸⁴ This extraordinary proposition, that a breach of contract is

⁷⁹(1821) 3 Brod. & B. 54, 129 E.R. 1203 (C.P.).

⁸⁰*Ibid.*, 1206 *per* Dallas C.J. See also *Pozzi v. Shipton* (1838) 9 Ad. & E. 963, 112 E.R. 1106 (Q.B.).

⁸¹(1851) 11 C.B. 655, 138 E.R. 632 (C.P.).

⁸²*Supra*, note 48.

⁸³*Supra*, note 76.

⁸⁴Lord Campbell is very explicit on this point, *ibid.*, 1018-9: "But wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract." Lord Cottenham is not quite so clear, *ibid.*, 1018: "The contract was specially made; and... the broker's duty must depend upon the contract expressed or implied into which he entered... . It is said that the proper form of

tantamount to a tort, is far from being the law even today⁸⁵ though it might be said to foreshadow the rise of the duty of care in negligence.

Apart from *Brown v. Boorman*, the cases in the first half of the nineteenth century reveal no trace of a tortious duty of care arising in a contractual context and outside the common callings. Decisions later in the century, however, begin to point the way. Thus in *Foulkes v. The Metropolitan Railway Co.* (1879),⁸⁶ the plaintiff, having purchased his ticket from another railway company, was injured in descending from the defendant company's train. The defendant was negligent in employing unsuitable rolling stock which necessitated too great a descent onto the platform. The plaintiff brought an action in negligence against the defendant which denied any contractual link with the plaintiff and pleaded that its failure to replace the unsuitable rolling stock was in the nature of an omission for which it could be impleaded only in contract. No mention is made in the case of any status possessed by the defendant as a common carrier. This can be attributed to the ease with which a case of common callings liability could be dressed up as implied contract and to the concomitant practice of dropping particulars of the defendant's status from the plaintiff's declaration.⁸⁷ Hence the decision, like the pleadings in cases similar to this, is studiously vague as to the nature of the plaintiff's action. The majority of the Court, however, seems to have regarded the defendant's duty as arising from an implied contract to exercise care when the defendant accepted the plaintiff on its train,⁸⁸ though it was quite prepared to tolerate the laying of the action in negligence. But Bramwell L.J. found the defendant liable on the basis of "that duty which the law imposes on all, namely, to do no act to injure another"⁸⁹ — an obvious straw in the wind.

The same inkling of a general tortious duty of care is presented by the judgment of Blackburn J. in *Austin v. The Great Western Railway Co.*⁹⁰ (1867), where an infant, whose carriage should have been paid for by its

proceeding is by an action of assumpsit, and not an action on the case. The cases... disprove that proposition altogether; and... this is a proper remedy where there are duties imposed upon the party, though they are imposed by an express contract, and are not what are called the ordinary duties imposed on brokers as such."

⁸⁵*Perera v. Vandiyar* [1953] 1 W.L.R. 672 (C.A.); *Chapman v. Honig* [1963] 2 Q.B. 502 (C.A.). The tort of intimidation in its two-party form could well undermine the position taken by these cases. See *Central Canada Potash Co. v. The Government of Saskatchewan* [1979] 1 S.C.R. 42.

⁸⁶(1879) L.R. 4 C.P.D. 267 (Div. Ct), *aff'd* (1880) L.R. 5 C.P.D. 157 (C.A.).

⁸⁷See, e.g., *Pozzi v. Shipton*, *supra*, note 80.

⁸⁸The consideration problem presents difficulties for this line of analysis.

⁸⁹*Supra*, note 86, 159 (C.A.).

⁹⁰(1867) L.R. 2 Q.B. 442.

mother, was injured by the defendant's negligence. While the majority was prepared to allow the infant to recover under the defendant's contract with its mother, Blackburn J. ruled in favour of liability on the different ground that "the right which a passenger by railway has to be carried safely, does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely".⁹¹ This case again makes no mention of the defendant's status, perhaps for the additional reason that a common carrier's liability arises when carriage takes place for reward, a problem in the instant case where no fare had been paid for the child. But *Austin*, like *Foulkes*,⁹² points to the evolution of a duty of care which is no longer confined to the old categories of the common callings. This in turn heralds an increasing degree of contract and tort overlap, a phenomenon viewed with tolerance by the cases so far reviewed.

B. The County Court Costs Cases

The existence of overlapping regimes of liability, established in the cases surveyed above, was already under a remote threat from a development starting some years before the decisions in *Austin* and *Foulkes*. It began with the *Small Debts Act, 1846*⁹³ which, together with its successor legislation, required English courts for more than a hundred years afterwards to decide whether actions pursued in superior courts were founded on contract or founded on tort.⁹⁴ If the damages fell below a certain level, the plaintiff would either lose all entitlement to costs⁹⁵ or have his costs assessed on the lower county court scale.⁹⁶ Had the legislature seen fit to enact the same minimum damages figure for both contract and tort, the common law would have been spared much fascinating case law: unfortunately, it enacted a lower figure for tort than for contract so that it paid plaintiffs recovering damages between the tort and contract *minima* to claim they were suing in tort.

⁹¹*Ibid.*, 445-6.

⁹²*Supra*, note 86.

⁹³9 & 10 Vict., c. 95.

⁹⁴Section 129; *County Court Extension Act, 1850*, 13 & 14 Vict., c. 61, s. 11 (distinction between (a) covenant, debt, detinue and *assumpsit*; and (b) trespass, trover and case); *County Courts Act Amendment Act, 1867*, 30 & 31 Vict., c. 142, s. 5 (actions founded on contract and on tort); *County Courts Act, 1888*, 51 & 52 Vict., c. 43, s. 116; *County Courts Act, 1919*, 9 & 10 Geo. V, c. 73, s. 11; *County Courts Act, 1934*, 24 & 25 Geo. V, c. 53, s. 47. The costs rules for contract and tort actions were merged by the *County Courts Act, 1959*, 7 & 8 Eliz. II, c. 22, s. 47.

⁹⁵This was the case for the pre-1888 statutes, *ibid.*

⁹⁶Both possibilities were available under the 1888 and successor statutes, *supra*, note 94, depending on the damages actually recovered.

This legislation encouraged the belief, at least in this context of county court costs, that a cause of action could be classified as one thing or the other — contractual or tortious.⁹⁷ The earlier cases in particular, however, clearly recognized that there were two separate questions: first, whether the existence of a contract between the parties precluded the existence of a duty which could be vindicated in an action on the case or in tort, in other words, whether the plaintiff could choose between overlapping liabilities; and secondly, according to which of the two extant forms of liability should the cause of action be characterized for the purpose of the legislation. As will be shown, there is no real disagreement in the county court costs cases on the first question: the plaintiff was in principle free to elect to frame his action either in contract or in tort. On the second question, however, the cases divide with the majority taking the view that the cause of action is founded on tort if a duty exists in tort as well as in contract.

The reasoning in these cases is disappointing: the courts are united in holding that a cause of action is founded on tort or on contract as the case may be if in substance it possesses that character. What this test of substance means is not easily to be gleaned from the cases. Nor is there any analysis in either line of cases as to why the plaintiff or the defendant should be favoured in the application of the costs rule. The majority of the cases simply assume without argument that if a tortious action is available, the action is in substance tortious, perhaps thereby reflecting inarticulately the sentiment that in some cases contract is a relationship grafted on to a residual base of tortious liability.⁹⁸

In *Legge v. Tucker* (1856),⁹⁹ the plaintiff recovered damages against a livery stable keeper for his failure to take proper care of the plaintiff's horse which was kicked by other animals. The Court of Exchequer held that the plaintiff's action lay in *assumpsit* so as to deny him the costs of his action. It should, however, be noted that the defendant was not exercising one of the common callings and that the Court clearly believed that no action lay at all in case.¹⁰⁰ The plaintiff was therefore unable to overcome the first hurdle requiring him to establish the existence of

⁹⁷In *Taylor v. The Manchester, Sheffield and Lincolnshire Railway Co.* [1895] 1 Q.B. 134, 138 (C.A.), Lindley L.J. recognized the artificiality of this choice: "Very often a cause of action may be treated either as a breach of contract or as a tort. But here we are compelled to draw the line hard and fast and put every one of the actions into one class or the other."

⁹⁸See, e.g., *Burnett v. Lynch* (1826) 5 B. & C. 589, 108 E.R. 220, 227 (K.B.) *per* Littledale J.

⁹⁹(1856) 1 H. & N. 500, 156 E.R. 1298 (Exch.).

¹⁰⁰The case dates the immaturity of any general attempt to posit negligence liability outside the common callings.

tortious liability; consequently, the Court was spared the task of classifying the action as contractual or tortious under the legislation. According to Pollock C.B.: "Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of *assumpsit*; but where there is a duty ultra the contract, the plaintiff may declare in case."¹⁰¹ Alderson B. stated: "The right of the plaintiff to sue at all depends on a contract, and consequently it is an action of contract."¹⁰² Watson B.'s judgment is to the same effect: "Here a contract is stated by way of inducement, and the true question is, whether, if that were struck out, any ground of action would remain: *Williamson v. Allison*¹⁰³... There is no duty independently of the contract, and therefore it is an action of *assumpsit*."¹⁰⁴

Legge v. Tucker, the first reported case on the county court provision, is therefore no authority on the characterization of a cause of action as contractual or tortious where there is overlapping liability. There was no duty at all established in tort: this is the significance of Watson B.'s reference to a duty arising "independently" of a contract, a point which should be noted with care in view of the later difficulties caused, particularly in Canada, by the notion of "independent" torts.¹⁰⁵ Another factor to be borne in mind in considering Watson B.'s choice of language is that it can be regarded as a calculated attempt to scotch the proposition put forward in *Brown v. Boorman*¹⁰⁶ and referred to above, that a breach of contract was *per se* a tort.

Tattan v. The Great Western Railway Co. (1860)¹⁰⁷ concerned the liability of a common carrier who lost a bale of canvas. The Court observed that a duty was imposed on the carrier independently of the contract by the custom of the realm. Furthermore, the plaintiff had elected to frame his action in tort, thereby securing his costs. The matter was taken further in *Taylor v. The Manchester, Sheffield and Lincolnshire Railway Co.* (1895)¹⁰⁸ where the plaintiff's thumb was crushed when a servant of the defendant negligently closed the carriage door. Though the Court made no reference to the status of the defendant,

¹⁰¹*Supra*, note 99, 1299.

¹⁰²*Ibid.*

¹⁰³(1802) 2 East 446, 102 E.R. 439 (K.B.). The case concerned an allegation of *scienter* in a warranty action about the unfitness of a quantity of wine. Knowledge of the unfitness was held to be unnecessary to establish liability, whether the action were based on case or *assumpsit*, but if averred in case it would have to be proved.

¹⁰⁴*Supra*, note 99, 1299.

¹⁰⁵*Infra*, note 161 and accompanying text, *et seq.*

¹⁰⁶*Supra*, note 76; see also, *supra*, note 85 and accompanying text.

¹⁰⁷(1860) 2 E. & E. 844, 121 E.R. 315 (Q.B.).

¹⁰⁸*Supra*, note 97.

it found that there had been a misfeasance which could be sued on in the absence of a contract. A.L. Smith L.J. made it very clear that the plaintiff had the option of declaring either in contract or in tort¹⁰⁹ but that, for the purpose of the legislation, the substance of the action had to be considered. Accordingly, the defendant's major argument that the plaintiff's statement of claim was contractual in form fell down, though this decision, like so many others, fails to clarify the meaning of the substance theory. One is, however, left with the suspicion that a cause of action is substantially tortious if the plaintiff says it is, though he is not estopped by the state of his pleadings in making this assertion.

Kelly v. The Metropolitan Railway Co. (1895)¹¹⁰ concerned a passenger injured when his train ran into a station wall. Again, the Court assumed that the existence of a separate duty which needed no contract to support it made the action in substance tortious. Emphasis is again laid on the plaintiff's free election and on the prevalence of substance over form. Thus, Lord Esher M.R. said: "At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and pursues it on another, he is not now embarrassed by any rules as to departure."¹¹¹ *Kelly* is also significant for rejecting the argument that, if the defendant's negligence consisted of an omission, a nonfeasance instead of a misfeasance, it was to be considered as founded on contract. It was the defendant's contention that the driver's negligence lay in his omission to turn off the steam. A.L. Smith L.J. stressed that, regardless of how the negligence was characterized, if a duty apart from the contract existed, the action was in tort for the purpose of the legislation.¹¹²

Later cases like *Turner v. Stallibrass* (1898),¹¹³ which concerned the bailment of a horse for agistment, and *Sachs v. Henderson* (1902),¹¹⁴ where a landlord wrongfully removed fixtures before a tenant took up occupancy under a lease, are in line with *Taylor* and *Kelly*. Both held the action to lie in tort. The determination in these cases to give the plaintiff his costs is particularly marked in *Sachs* since it is not at all easy to see the source of the landlord's tortious liability. But what is apparent about later cases in the series is that, by virtue of their elliptical reasoning, they fostered the attitude that if a cause of action was located in tort it could not also be contractual and *vice versa*. The failure of this whole line of

¹⁰⁹*Ibid.*, 139-40.

¹¹⁰[1895] 1 Q.B. 944 (C.A.).

¹¹¹*Ibid.*, 946.

¹¹²*Ibid.*, 947.

¹¹³[1898] 1 Q.B. 56 (C.A.)

¹¹⁴[1902] 1 K.B. 612 (C.A.)

cases to give meaning to the substance test encouraged the tendency to believe simply that a cause of action was tortious because it was not contractual. Even the substance test itself could be explained away as saying nothing more than that the mere form of the pleadings was not determinative.

Jarvis v. Moy, Davies, Smith, Vandervell and Co. (1936)¹¹⁵ is one of the most important twentieth century cases on the distinction between tort and contract. The plaintiff suffered financial loss in consequence of his stockbroker's failure to abide by instructions as to the purchase of certain shares. On this occasion, the Court concluded that the action was founded on contract but the decision is not at all difficult to reconcile with earlier decisions in this sequence of county court costs cases: the facts, particularly the plaintiff's financial loss, were most unpromising for the inference of any tortious duty. Thus, according to Greer L.J.: "[I]t is only by proving that a term of the contract was broken that any cause of action can be established."¹¹⁶ The following oft-quoted *dictum* by the same judge is quite in line with decisions going back to *Legge v. Tucker*:¹¹⁷ "[W]here the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract."¹¹⁸

Jarvis, therefore, is no authority denying the existence of overlapping liability since the plaintiff never succeeded in making out a cause of action in tort, nor does it lend support to the paramountcy of contract over tort. Indeed, Greer L.J.'s latter *dictum* appears to be the product of the elliptical reasoning in the nineteenth century cases in so far as it would deny any contractual liability where tortious liability existed. *Jarvis* also fails to yield support for anything like a merger principle whereby tortious duties automatically merge in a contract as soon as it is concluded. One of the plaintiff's arguments, discussed in the case, is worthy of note: he sought to establish that a stockbroker could be regarded, like the ferryman and innkeeper of old, as exercising a common calling. The object of the argument was to establish a duty imposed by law. The Court, however, declined to add stockbrokers to the list of common callings, but could just as easily have said that any attempt to apply or extend common callings liability to cases of pure economic loss could not have survived a number of decisions in the last quarter of the nineteenth century¹¹⁹ imposing severe restrictions on recovery in tort for

¹¹⁵[1936] 1 K.B. 399 (C.A.).

¹¹⁶*Ibid.*, 405.

¹¹⁷*Supra*, note 99.

¹¹⁸*Supra*, note 115, 405.

¹¹⁹*Supra*, note 67 *et seq.* and accompanying text.

such loss. It would, moreover, be tantamount to turning the clock back to the period before *Hadley v. Baxendale*¹²⁰ when it had not become the practice to plead such losses in implied contract.

Jackson v. Mayfair Window Cleaning Co. (1952)¹²¹ applied both Greer L.J.'s independent tort *dictum* and the substance test set out in cases like *Turner v. Stallibrass*.¹²² Barry J. held an action for damages was founded on tort where it concerned a firm of cleaners through whose negligence a chandelier fell to the ground some months after a cleaning operation. The significance of the case lies in the defendant's unsuccessful attempts to persuade the Court that a tortious duty independent of contract could not exist outside the common callings. The following *dictum* of Barry J., it is submitted, faithfully recounts the developments in the cases discussed above:

The facts in *Steljes'* case and *Jarvis's* case were quite different from the present one. In the absence of a contract, the architect, in the one, was under no duty to supervise the erection of the house, nor was the stockbroker, in the other, to buy or sell shares on any particular date or at all. The complaint in each case arose from the breach of a positive obligation imposed by contract and by contract only. Very different considerations would have arisen in the latter case if, for example, the stockbroker had negligently burned some valuable document belonging to the plaintiff.¹²³

Canadian cases on the contract and tort distinction were few in number until recent years. There are, however, at least two significant decisions in areas similar to those under discussion in the English county court costs cases. In *Tetef v. Riman* (1926),¹²⁴ an action was brought by a guest against a boarding-house keeper for the loss of certain valuables entrusted to the latter. One of the issues was whether the successful plaintiff was entitled to his costs on the county court scale or on the lower division court scale¹²⁵ and this in turn depended on whether the action was to be regarded as contractual or tortious. In the end, the Ontario Appeal Division followed the English cases dealt with above, though Riddell J.A. expressed a degree of dissatisfaction¹²⁶ with their reasoning and Middleton J.A. stated that, had the question been one of first impression, he would have held the action to be in contract so as to discourage the bringing of an action in the superior of the two courts with its heavier costs.¹²⁷

¹²⁰*Supra*, note 73.

¹²¹[1952] 1 All E.R. 215 (K.B.).

¹²²*Supra*, note 113. See also *Edwards v. Mallan* [1908] 1 K.B. 1002 (C.A.).

¹²³*Supra*, note 121, 218.

¹²⁴(1926) 58 O.L.R. 639 (App. Div.)

¹²⁵*The County Courts Act*, R.S.O. 1914, c. 59, s. 40 (d); *The Division Courts Act*, R.S.O. 1914, c. 63, s. 61.

¹²⁶*Supra*, note 124, 647.

¹²⁷*Ibid.*, 642.

Williams v. Fox Johnson and Co. (1942)¹²⁸ was concerned with the jurisdictional limits of a division court. The upper limit was higher in the case of contract than in tort¹²⁹ so it paid the plaintiff to argue that the action was contractual in nature, a reversal of the position taken by plaintiffs in all the other cases of this type. Without pausing to reflect on the difference between this case and the costs cases or to consider whether their dominant philosophy was to give the plaintiff his choice, Henderson J.A. mechanically applied a *dictum* of Middleton J.A. in *Tetef v. Riman*¹³⁰ and held the action to be a tortious one. The plaintiff in this bailment case, having elected to bring his action in a division court, was therefore confined to the lower level of recovery appropriate in tort cases.

As mentioned above, there is a minority line of county court costs cases that does not fit in with the rationalization of the majority cases given above. Thus, in *Baylis v. Lintott* (1873),¹³¹ an action against a hackney carriage owner for insecurely fastening luggage which was lost, the Court held that the action was contractual. All three judges found for the defendant on the formalistic ground that the case was pleaded in contract: there is nothing apart from this in the decision suggestive of the Court's preference for contract over tort. *Fleming v. The Manchester, Sheffield, and Lincolnshire Railway Co.* (1878)¹³² concerned the loss of a parcel of goods. Again, the decision went in favour of the defendant on the ground that the action was pleaded in contract, though the portions of the statement of claim reproduced in the report hardly point to this conclusion.

Baylis and *Fleming* seem to imply the existence of overlapping regimes of liability in so far as the plaintiff loses because of the state of his pleadings, but they give no reason for the paramountcy of contract if one reads them as using a formalistic ground as a pretext for reaching a result they desired anyway. Even though it is difficult to locate the logic inspiring them, these two cases remind us that the majority decisions in this area appear to be motivated, albeit mutely, by the conviction that a successful plaintiff should not be denied his costs just because there also happens to be a contract between the parties.

Another lesson that can be drawn from *Baylis* and *Fleming* is that it is dangerous to transplant cases dealing with a specific problem into the

¹²⁸[1942] O.W.N. 527 (C.A.).

¹²⁹*The Division Courts Act*, R.S.O. 1937, c. 107, s. 54.

¹³⁰*Supra*, note 124.

¹³¹(1873) L.R. 8 C.P. 345.

¹³²(1878) 4 Q.B.D. 81 (C.A.).

treatment of radically different issues: a court's attitude to the contract and tort division is likely to be coloured by the particular issue before it. The authorities relied on in these cases were *Morgan v. Ravey* (1861)¹³³ and *Alton v. The Midland Railway Co.* (1865).¹³⁴ *Morgan* concerned an action against the estate of a deceased innkeeper for loss caused when goods were stolen owing to his negligence. If the action were contractual, it could be laid against his executors; if tortious, the action died with the innkeeper. Unlike the county court costs plaintiffs, the plaintiff here argued that the action was contractual. The Court simply stated that the action could be prosecuted in contract: it did not say that the innkeeper, if alive, could not have been sued in tort on the custom of the realm. Like the county court costs cases, *Morgan* gives the plaintiff his choice.

Alton is an even clearer example of the perils of transplantation. It concerned an action by a brewery against a carrier for the loss of the services of an employee injured by the carrier's negligence. It was assumed by the Court that the plaintiff's *actio per quod servitium amisit* could only be asserted if the employee could have laid a claim against the carrier in tort. The Court found in favour of the carrier and was heavily influenced by *Winterbottom v. Wright*¹³⁵ in its belief that the plaintiff was seeking to take the benefit of the carriage contract to which he was not privy.¹³⁶ Indeed, the case is best read as something of an over-exuberant response to the earlier decision and perhaps also as reflecting a certain resistance to the extension of the *actio per quod* from domestic to commercial employees.¹³⁷ *Alton* also contains a number of observations somewhat out of line with the mainstream of authorities on the contract and tort division. Thus Willes J. states that the plaintiff's power to elect between contract and tort is a fiction,¹³⁸ though he does hedge this somewhat by saying that it is not for the employer to exercise the employee's power of election.¹³⁹ Erle C.J. also articulates the view that an action is in substance contractual if a contract is part of the history of

¹³³(1861) 6 H. & N. 265, 158 E.R. 109 (Exch.).

¹³⁴(1865) 19 C.B. (N.S.) 213, 144 E.R. 768 (C.P.).

¹³⁵*Supra*, note 48.

¹³⁶According to Erle C.J., *supra*, note 134, 779: "The liabilities of parties by reason of their contracts can be foreseen. As a general rule, they are under their own control. The liabilities arising out of them are bounded by the considerations affecting the two contracting parties. Upon that general view I found my opinion that for the consequential damages claimed on the present occasion the plaintiffs cannot sue."

¹³⁷For English law, the point was authoritatively settled much later in *I.R.C. v. Hambrook* [1956] 2 Q.B. 641 (C.A.). But *Hambrook* was not followed in *Nykorak v. A.-G. Canada* [1962] S.C.R. 331 (loss of soldier's services).

¹³⁸*Supra*, note 134, 779.

¹³⁹*Ibid.*

the action.¹⁴⁰ In other words, if a contract is circumstantially, as opposed to legally, necessary to maintain the action, the action is in substance contractual. Like Willes J., Erle C.J. was therefore able to dismiss the argument that the defendant was a common carrier and thus incurred tortious liability to the employee. Erle C.J.'s argument, however, is quite inconsistent with the reasoning in decisions like *Taylor*¹⁴¹ and *Kelly*¹⁴² and should be read within its particular context. As will be seen, the argument is at the root of the difficulties experienced in this century, particularly in Canada, in locating the division between contract and tort.

C. *The Legacy of the County Court Costs Cases*¹⁴³

A case holding that an action is founded on contract because there is no extant duty of care — *Legge v. Tucker*¹⁴⁴ for example — is open to misinterpretation. The subject of solicitors' liability provides an excellent illustration of this. In *Bean v. Wade* (1885),¹⁴⁵ a large sum of money was lost to a trust fund by the professional negligence of solicitors. Dealing with a limitation of actions problem, the Court held that the right of action was contractual. Given the limits on tortious liability for economic loss, any other result would have been surprising. When *Bean v. Wade* surfaced in *Groom v. Crocker* (1939),¹⁴⁶ it was taken as support for the blanket proposition that the liability of solicitors is invariably contractual. It is one thing to assert this when there is no or little prospect of a tortious action at all: it is quite another to deny the plaintiff any election at all on the ground that, as a matter of status, solicitors can only be sued in contract. The Court in *Groom v. Crocker* ignored a *dictum* of Tindal C.J. in *Boorman v. Brown*¹⁴⁷ and the decision of the House of Lords in

¹⁴⁰*Supra*, note 134, 778.

¹⁴¹*Supra*, note 97.

¹⁴²*Supra*, note 110.

¹⁴³Attributable to county court legislation is the tendency to believe that contract and tort are alternative, rather than frequently cumulative or overlapping, sources of liability. *Chesworth v. Farrar* [1967] 1 Q.B. 407, a case dealing with bailment in the context of survival of actions and limitations, shows some evidence of this tendency.

¹⁴⁴*Supra*, note 99.

¹⁴⁵(1885) 2 T.L.R. 157 (C.A.).

¹⁴⁶[1939] 1 K.B. 194 (C.A.).

¹⁴⁷(1842) 3 Q.B. 511, 114 E.R. 603, 608: "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions: and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff."

*Nocton v. Ashburton*¹⁴⁸ in propounding the curious and inverted anachronism that solicitors, unlike innkeepers, can be sued only in contract.

Bold rules inspire confidence and *Groom v. Crocker* was followed in a number of later English cases, two of which blunted the impact of the case by extending the scope of damages recovery in contract to something like the tortious range.¹⁴⁹ *Groom v. Crocker* was also followed by the Ontario Court of Appeal in *Schwebel v. Telekes* (1967),¹⁵⁰ which concerned limitation of actions and a solicitor's professional negligence. The judgment of the Court, delivered by Laskin J.A. (as he then was), distinguishes the *Hedley Byrne*¹⁵¹ decision and lays emphasis on the fact that, circumstantially, only a contract could produce a duty owed by the defendant to the plaintiff, which was the argument put forward by Erle C.J. in *Alton*.¹⁵² "The only circumstance that could bring any duty of the defendant to the plaintiff herein into operation was her contracting for the defendant's assistance."¹⁵³ In the end, the classification of the action was not decisive since the limitations problem would have been disposed of in the same way whether the action was labelled as contractual or tortious. The general question of a solicitor's liability was not canvassed by the Supreme Court of Canada in the later case of *Smith v. McInnis* (1978),¹⁵⁴ though Pigeon J., dissenting on the issue of whether insurance counsel had actually been negligent, stated his belief that solicitors could be sued only in contract.¹⁵⁵

Meanwhile, tortious developments in the area of economic loss and negligent misstatement were giving the lie to the forgotten premise on which the *Groom v. Crocker* rule was based, namely, that given the circumstances in which solicitors are negligent and the type of loss they cause, solicitors exercising their office are not promising tortious defendants. This point seems to have been missed completely by Diplock L.J. (as he then was) in *Bagot v. Stevens, Scanlan & Co.* (1966),¹⁵⁶ which concerned limitation of actions and the liability of architects who were negligent in supervising the laying of drains. Though the actual

¹⁴⁸[1914] A.C. 932 (H.L.).

¹⁴⁹*Clark v. Kirby-Smith* [1964] Ch. 506; *Cook v. Swinfen* [1967] 1 W.L.R. 457 (C.A.); *Heywood v. Wellers* [1976] Q.B. 446 (C.A.).

¹⁵⁰[1967] 1 O.R. 541 (C.A.).

¹⁵¹*Supra*, note 61.

¹⁵²*Supra*, note 134.

¹⁵³*Supra*, note 150, 543.

¹⁵⁴[1978] 2 S.C.R. 1357.

¹⁵⁵*Ibid.*, 1377.

¹⁵⁶[1966] 1 Q.B. 197.

decision did not turn on whether the action lay in tort or in contract, Diplock L.J. stated his opinion that the architects' liability was contractual on the ground that they were sued for failing to do what they agreed to do. On the subject of independent torts, he had this to say:

I accept that there may be cases where a similar duty is owed both under a contract and independently of contract. I think that upon examination all those will turn out to be cases where the law in the old days recognised either something in the nature of a status like a public calling (such as common carrier, common innkeeper, or a bailor and bailee) or the status of master and servant... I do not think that that principle applies to professional relationships of the kind with which I am concerned here, where someone undertakes to exercise by contract his professional skill...¹⁵⁷

This represents a clear attempt to fix the twentieth century division between contract and tort by reference to the nineteenth century boundaries of tortious liability and is a perfect example of the fallacious use of the historical method. Besides lumping together a number of relationships which do not have a great deal in common, this *dictum* ignores altogether the rise in modern times of the tort of negligence and compares unfavourably with *Jackson v. Mayfair Window Cleaning Co.*,¹⁵⁸ discussed above.

With the wisdom of hindsight it is possible to say that developments in negligent misstatement, which exposed certain professionals to tortious liability for the first time, would inevitably demolish the proposition forwarded by cases like *Bagot* that, apart from certain anachronistic categories, a contractual relationship between parties excludes the possibility of a tortious duty. This proposition was swept aside, or more accurately totally ignored, in *Esso Petroleum Co. v. Mardon* (1976),¹⁵⁹ a case dealing with a negligent misstatement concerning the expected volume of business of a service station, where the Court held the appellants liable both in tort and in contract for breach of a warranty that care had been taken in formulating the prediction. The relationship between the parties of oil company and station tenant did not fit any of the anachronistic categories mentioned by Diplock L.J. in *Bagot*. *Esso Petroleum* was later followed in *Batty v. Metropolitan Property Realisations Ltd* (1978),¹⁶⁰ where the plaintiff acquired a defective property on a long lease from the defendant company. Liability on the part of the defendant existed both in tort and in contract and the plaintiff was not even put to his election, being permitted to have judgment entered in both categories of liability.

¹⁵⁷*Ibid.*, 204-5.

¹⁵⁸*Supra*, note 121.

¹⁵⁹[1976] Q.B. 801 (C.A.).

¹⁶⁰[1978] Q.B. 554 (C.A.).

The development set in train by *Esso Petroleum* has recently been rationalized by the monumental judgment of Oliver J. in *Midland Bank Trust Co. v. Hett, Stubbs & Kemp* (1978),¹⁶¹ which marks a return to first principles by treating as an independent tort one that is legally, not circumstantially, capable of arising in the absence of a contract. It also underlines the plaintiff's freedom to elect between tort and contract and explores the flawed logic of the rule that solicitors can be sued only in contract. The case concerned a solicitor's negligence in failing to register as a land charge an option to buy a farm which was alienated to a third party before the option could be exercised. A limitations problem arose but Oliver J. (as he then was) took the view that the action was not statute-barred, whether the solicitors were sued in contract or in tort. The case is particularly significant in Canada for the way Oliver J. refuted the argument that the existence of a contract between the parties necessarily disposes of tortious liability. Referring to the *Hedley Byrne*¹⁶² principle of liability for negligent misstatement, the learned judge stated:

The principle was stated by Lord Morris of Borth-y-Gest as a perfectly general one and it is difficult to see why it should be excluded by the fact that the relationship of dependence and reliance between the parties is a contractual one rather than one gratuitously assumed, in the absence, of course, of contractual terms excluding or restricting the general duties which the law implies. Logically, as it seems to me, this could be so only if there is read into every contract not only an implied term to employ reasonable care and skill in the performance of the contract, but a further term to the effect that the contract shall be the conclusive and exclusive source of all duties owed by one party to the other to the exclusion of any further or more extensive duties which the general law would otherwise impose.¹⁶³

This *dictum* is particularly apposite when the decision of the Supreme Court of Canada in *J. Nunes Diamonds Ltd v. Dominion Electric Protection Co.* (1972)¹⁶⁴ is considered.

The plaintiff was a diamond merchant whose safe was protected by the defendant's alarm system. The contract between the parties contained a limitation clause whereby liability was fixed at fifty dollars for any case of failure to perform the protection service. The contract also provided: "No conditions, warranties and representations have been made by Dominion Company, its officers, servants or agents other than those endorsed hereon in writing." The plaintiff's safe was broken into and a number of diamonds stolen. All three courts involved in the litigation agreed that there had been no breach of contract: the system had functioned properly but had been expertly bypassed by the burglars and

¹⁶¹[1979] Ch. 384.

¹⁶²*Supra*, note 61.

¹⁶³*Supra*, note 161, 411.

¹⁶⁴[1972] S.C.R. 769.

the contract did not guarantee that the system was burglar-proof. But the plaintiff argued that certain post-contractual statements engaged the defendant in tortious liability for negligent misstatement. On the facts, however, his case was weak. One oral representation was given by an unidentified representative of the defendant that “[e]ven our own engineers could not go through the system without setting an alarm”. The second representation was contained in a letter addressed to a third party, a copy of which was sent to the plaintiff, to the effect that, on the occasion of an earlier robbery at another jeweller’s, “[t]he system performed its functions properly”.

For the majority,¹⁶⁵ Pigeon J. gave judgment in favour of the defendant. The defendant had not assumed any responsibility for its statements. Moreover — and here Pigeon J. relied on the restrictive statement of liability for negligent misstatement made by the Privy Council in *Mutual Life & Citizens’ Assurance Co. v. Evatt* (1971)¹⁶⁶ — the defendant company was not in the business of giving advice. But the learned judge also took objection to what he regarded as an attempt to exploit tortious liability so as to subvert an agreed risk allocation under the contract and continued:

Furthermore, the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as ‘an independent tort’ unconnected with the performance of that contract... This is specially important in the present case on account of the provisions of the contract with respect to the nature of the obligations assumed and the practical exclusion of responsibility for failure to perform them.¹⁶⁷

Going back to the words of Oliver J. quoted above, *Nunes Diamonds* could quite easily have been decided on the ground that the contract intentionally limited the tortious liability of the defendant: that would have been sufficient. But in going beyond that and articulating his independent tort test, Pigeon J., like Laskin J.A. in *Schwebel*,¹⁶⁸ and unlike decisions such as *Taylor*¹⁶⁹ and *Kelly*,¹⁷⁰ was thinking in terms of circumstantial, rather than legal, independence. Thus he said:

¹⁶⁵For the minority, Spence J., *ibid.*, 781, simply declined to accept the argument that a pre-existing contractual relationship could *per se* foreclose tortious liability. Moreover, in his view, the contract on its construction did not exclude or limit tortious liability.

¹⁶⁶[1971] A.C. 793 (P.C. (Austl.)). It seems fair to say that, apart from *Nunes Diamonds*, the *Evatt* case has received a very frosty reception in Canada. It was interpreted out of existence, for example, by the Supreme Court of Canada in *Haig v. Bamford* [1977] 1 S.C.R. 466, 480 *per* Dickson J.

¹⁶⁷*Supra*, note 164, 777-8.

¹⁶⁸*Supra*, note 150.

¹⁶⁹*Supra*, note 97.

¹⁷⁰*Supra*, note 110.

In my view, the representations relied on by appellant cannot be considered as acts independent of the contractual relationship between the parties. This can be readily verified by asking the question: Would these representations have been made if the parties had not been in the contractual relationship in which they stood? Therefore, the question of liability arising out of those representations should not be approached as if the parties had been strangers, but on the basis of the contract between them.¹⁷¹

Pigeon J. relied on only one case,¹⁷² which was irrelevant, in formulating his independent tort principle. In view of the authorities discussed above, it is submitted that the principle is a heterodoxical one which was quite unnecessary to the disposal of the issue at hand.¹⁷³

Nunes Diamonds was distinguished by McKay J. in *Sealand of the Pacific Ltd v. Ocean Cement Ltd* (1973),¹⁷⁴ which concerned the negligent misstatement of a supplier of cement, on the briefly stated ground that the misrepresentation in question occurred some months before the formation of the contract. This is certainly a convincing argument against the circumstantial independence test formulated by Pigeon J., though it would not meet the argument, criticized in *Midland Bank*¹⁷⁵ but apparently not relied on in *Nunes Diamonds*, that tortious rights automatically merge in any contract made between the same parties. When the *Sealand* case was appealed to the British Columbia Court of Appeal under the name of *Sealand of the Pacific Ltd v. Robert C. McHaffie Ltd* (1974),¹⁷⁶ the cement supplier's appeal was dismissed and judgment was also entered for the first time against a firm of naval architects for its negligent failure to make certain inquiries about the cement. The judgment of the Court plainly rests the architects' liability in contract: indeed, it is hard to see how a failure to make inquiries could be the subject of *Hedley Byrne* liability. Seaton J.A., delivering the judgment of the Court, followed Pigeon J.'s judgment in *Nunes Diamonds* in concluding that the architects' liability was contractual and pointed to the danger of changing the bargain made between the parties by any finding of additional rights and duties.¹⁷⁷ One response to this argument is to concede that tortious rights can be truly excluded or limited by the contract but to deny that this automatically occurs

¹⁷¹*Supra*, note 164, 778.

¹⁷²*Elder, Dempster & Co. v. Paterson, Zochonis & Co.* [1924] A.C. 522 (H.L.) which concerned the question whether shipowners were entitled to the protection of an exception clause in bills of lading issued under a contract of carriage to which they were not privy.

¹⁷³See the discussion of Pigeon J.'s judgment in Schwartz, *Hedley Byrne and Pre-Contractual Misrepresentations: Tort Law to the Aid of Contract?* (1978) 10 Ottawa L. Rev. 581, 587-92.

¹⁷⁴(1973) 53 D.L.R. (3d) 625 (B.C.S.C.).

¹⁷⁵*Supra*, note 161.

¹⁷⁶(1974) 51 D.L.R. (3d) 702 (B.C.C.A.).

¹⁷⁷*Ibid.*, 705.

whenever the parties are contractually bound. Another response is to point out that there was no question on the facts of trying to establish a tortious liability different from contractual liability, and consequently no need to invoke any theory of circumstantially independent tort to deny the existence of overlapping liability.

The *Sealand* litigation can therefore be regarded as giving only a heavily qualified support to *Nunes Diamonds* since the trial judge's distinction was not directly challenged by the Court of Appeal. Subsequent decisions, however, would appear to spell the demise of Pigeon J.'s independent tort principle.¹⁷⁸ Perhaps the most significant of these cases is the decision of the Alberta Court of Appeal in *Canadian Western Natural Gas Co. v. Pathfinder Surveys Ltd* (1980).¹⁷⁹

The case dealt with the negligent survey of a pipeline route and raises the issue of the plaintiff's own contributory negligence in failing to realize that the line was incorrectly plotted. The Court openly admitted the existence of overlapping liabilities in contract and tort outside the common callings and, following Oliver J. in *Midland Bank*, it deftly relied on the recent *dictum* of Lord Wilberforce in *Anns v. Merton London Borough Council* (1977)¹⁸⁰ that foreseeability of harm creates a duty of care in negligence unless circumstances exist to justify negating or limiting that duty. Concluding that no such circumstances existed, the Court held that the defendant surveyor owed the plaintiff a duty of care despite the existence of a contract between them. The following extract from the majority judgment of Prowse J.A. shows clearly how this was done:

The *Esso* case and the statement of Lord Wilberforce in the *Anns* case demonstrate the extension by the courts of the common law duty of care set out in *Donoghue v. Stevenson*. We have the courts recognizing that such duty is not dependent upon contract, although its consequences may be so limited, but is an independent duty imposed by law in circumstances where there is a sufficient relationship of 'proximity and neighbourhood' between the wrongdoer and the person suffering damages.¹⁸¹

There could be no clearer adoption of a principle of legally, as opposed to circumstantially, independent torts than this. Though hard to reconcile with the words of Pigeon J. in *Nunes Diamonds*, the judgment of Prowse

¹⁷⁸The *dictum* has come under a great deal of pressure from cases like *Walter Cabott Construction Ltd v. The Queen* (1974) 44 D.L.R. (3d) 82 (F.C.T.D.); *Dominion Chain Co. v. Eastern Construction Co.* (1976) 12 O.R. (2d) 201 (C.A.); *Sodd Corp. v. Tessis* (1977) 79 D.L.R. (3d) 632 (Ont. C.A.); *H.B. Nickerson & Sons Ltd v. Wooldridge* (1981) 115 D.L.R. (3d) 97 (N.S.S.C., App. Div.); *Canadian Western Natural Gas Co. v. Pathfinder Surveys Ltd* (1980) 12 Alta L.R. (2d) 135 (C.A.).

¹⁷⁹*Ibid.*

¹⁸⁰*Supra*, note 71, 751-2.

¹⁸¹*Canadian Western Natural Gas Co.*, *supra*, note 178, 145.

J.A. gives due recognition to the expansion of the duty of care evident since *Donoghue v. Stevenson* and returns the law on overlapping liability in Canada to first principles. If the judgment does secure the future trend, and if Pigeon J.'s aberrant judgment is treated reverently but unanalytically as the source of a legally independent tort doctrine, then Canadian and English law are aligned on the subject of overlapping liability.

III. Overlapping Liability and Practical Problems

Overlapping liability emerges as an issue in a number of different contexts.¹⁸² It has been demonstrated that the common law, for the most part, has been tolerant of overlapping regimes of liability though the suggestion has been made that the attitude of the courts to overlap is influenced by the particular issue under consideration. Thus the county court costs cases may be read as reflecting the view that, if the plaintiff can base his claim on an action that will give him his costs, he should not be denied them simply because his claim could have been asserted on a different basis. The *Alton*¹⁸³ case, on the other hand, which appears inimical to overlap, is indicative of the courts' firm adherence to the privity of contract principle and of their determination to prevent third parties from obtaining contractual benefits.

In this section, overlapping liability will be reviewed in its practical setting. The examples chosen will be limited in number. First of all, the principle that the plaintiff has the untrammelled right to choose his action will be scrutinized in the context of the defence of contributory negligence. Secondly, it will be shown that a tendency exists in the common law to reduce the significance of such choice by aligning contractual and tortious rules. The example chosen to illustrate this will be remoteness of damage.

A. Contributory Negligence and the Plaintiff's Power of Election

This writer has argued elsewhere that a case can be made for abridging the plaintiff's freedom of choice in the case of contributory negligence:¹⁸⁴ the arguments in favour of this will not be rehearsed at

¹⁸²See Poulton, *Tort or Contract* (1966) 84 L.Q.R. 346; Guest, *Tort or Contract?* (1961) 3 U. of Malaya L. Rev. 191. Other articles that can usefully be consulted on overlapping liability are Morgan, *The Negligent Contract-Breaker* (1980) 58 Can. Bar Rev. 299 and Fridman, *The Interaction of Tort and Contract* (1977) 93 L.Q.R. 422. See also P. Winfield, *The Province of the Law of Tort* (1931).

¹⁸³*Supra*, note 134.

¹⁸⁴Bridge, *Defective Products, Contributory Negligence, Apportionment of Loss and the Distribution Chain: Lambert v. Lewis* (1982) 6 Can. Bus. L.J. 184.

length here. Winfield once wrote that the plaintiff's power to elect between contract and tort should be unfettered except where this would be inconsistent with a "substantive rule of the law" or "independent legal rules".¹⁸⁵ Though no such rules have yet been formulated for contributory negligence, it is submitted that there is a need for them.

The old rule in tort was that a plaintiff's contributory negligence was a complete defence to an action based on the defendant's negligence: without the plaintiff's own fault, the accident would not have happened.¹⁸⁶ Where the defendant's negligence was greater than the plaintiff's, this rule produced injustice and was modified in the plaintiff's favour, first, by the last opportunity rule and secondly, by a sophisticated offshoot of the last opportunity rule referred to as the constructive last opportunity rule. Accordingly, a negligent plaintiff could still recover in full if the defendant had the last clear chance (last opportunity) of averting the accident¹⁸⁷ or would have had that chance (constructive last opportunity)¹⁸⁸ but for the defendant's antecedent negligence.

Even in its mitigated form, the contributory negligence rule compelled an all-or-nothing solution and was widely regarded as unsatisfactory. English¹⁸⁹ and Canadian jurisdictions¹⁹⁰ now have legislation permitting the courts to apportion loss in the event of a plaintiff's contributory negligence. This legislation has generally worked well and is greatly to be preferred to the clumsy and absolutist common law rule.

Unlike tort, contract law has never permitted the defence of contributory negligence. Indeed, the basic rule runs quite counter to the old

¹⁸⁵ Winfield, *supra*, note 182.

¹⁸⁶ *Butterfield v. Forrester* (1809) 11 East 60, 103 E.R. 926, 927 (K.B.) *per* Bayley J.: "The plaintiff was proved to be riding as fast as his horse could go... through the streets of Derby. If he had used ordinary care he would have seen the obstruction; so that the accident appeared to happen entirely from his own fault."

¹⁸⁷ *Davies v. Mann* (1842) 10 M. & W. 546, 152 E.R. 588 (Exch.) (defendant driving negligently down the highway could have avoided the plaintiff's donkey which had previously been negligently tethered in the highway).

¹⁸⁸ *British Columbia Electric Railway Co. v. Loach* [1916] 1 A.C. 719 (P.C.) (defendant could have applied brakes to avoid wagon on railway crossing but for negligent maintenance of brakes).

¹⁸⁹ *Law Reform (Contributory Negligence) Act, 1945*, 8 & 9 Geo. VI, c. 28.

¹⁹⁰ *Contributory Negligence Act*, R.S.A. 1980, c. C-23; *Negligence Act*, R.S.B.C. 1979, c. 298; *The Tortfeasors and Contributory Negligence Act*, R.S.M. c. T-90; *Contributory Negligence Act*, R.S.N.B. 1973, c. C-19; *The Contributory Negligence Act*, R.S. Nfld 1970, c. 61; *Contributory Negligence Act*, R.S.N.S. 1967, c. 54; *Negligence Act*, R.S.O. 1980, c. 315; *Contributory Negligence Act*, R.S.P.E.I. 1974, c. C-19; *The Contributory Negligence Act*, R.S.S. c. C-31; *Contributory Negligence Ordinance*, R.O.N.W.T. 1974, c. 16; *Contributory Negligence Ordinance*, R.O.Y.T. 1958, c. 21.

tortious defence in that a plaintiff is entitled to recover whenever he can establish that the defendant's breach of contract was a cause of the injury he suffered.¹⁹¹ Nevertheless, a number of contractual doctrines can be applied so as to scale down or eliminate a plaintiff's entitlement to recover damages for breach of contract.

The doctrine of factual causation, frequently applied in tandem with the remoteness of damage rule, can be invoked to deny recovery to a plaintiff whose fault contributes to his injury. *Mowbray v. Merryweather* (1895)¹⁹² was for a long time the leading authority. In that case, the plaintiff's failure to discover the defect in a chain supplied by the defendant in breach of warranty was held not to debar him from recovering damages: the accident caused by the chain was still a natural consequence of the breach of warranty and within the contemplation of the parties as a consequence of breach at the time of the contract. In *Lambert v. Lewis* (1981),¹⁹³ a farmer was involved in an accident when his trailer came adrift from his vehicle. The towing-hitch had failed but proper maintenance would have revealed its defective state to the farmer. Though the English Court of Appeal held that the chain of causation between the breach of warranty and the accident had not been broken so that the seller remained liable,¹⁹⁴ its decision was reversed by the House of Lords.¹⁹⁵ The primary reason given was that there had been no breach of warranty by the seller¹⁹⁶ but a secondary reason was that any breach of warranty by the seller could no longer be said to be causally relevant in view of the farmer's subsequent negligence.¹⁹⁷

Another example of contract law taking account of the plaintiff's fault is the doctrine of mitigation of damages which requires plaintiffs to take reasonable steps to limit the loss caused by a breach of contract and denies damages attributable to a failure to mitigate. Sometimes the doctrine will operate so as to scale down recovery in such a way as to bring about a result akin to apportionment. When, for example, a seller fails to deliver goods on a rising market and the buyer delays entering the market to purchase substitute goods, the buyer will be entitled only to the difference between the contract price and the market price prevailing at

¹⁹¹*Lambert v. Lewis* [1980] 2 W.L.R. 299, 323 (C.A.) per Lawton L.J., *rev'd, semble* on a different assessment of the facts, [1981] 1 All E.R. 1185 (H.L.); *A.S. James Pty Ltd v. Duncan* [1970] V.R. 705, 723 (S.C.) per McInerney J.; *Simonius Vischer & Co. v. Holt & Thompson*, [1979] 2 N.S.W.L.R. 322, 340 (C.A.) per Samuels J.A.

¹⁹²[1895] 2 Q.B. 640 (C.A.).

¹⁹³*Supra*, note 191.

¹⁹⁴*Ibid.*

¹⁹⁵*Ibid.*

¹⁹⁶*Supra*, note 191, 1191 per Lord Diplock.

¹⁹⁷*Ibid.* See the criticism of this decision in Bridge, *supra*, note 184.

the date of breach: he will not be entitled to the additional market loss caused by his own delay.¹⁹⁸ More frequently, mitigation of damages will produce an all-or-nothing solution. A recent example is the wretched decision of the New Brunswick Appeal Division in *Caines v. Bank of Nova Scotia* (1979)¹⁹⁹ where the Bank, which had negligently and in breach of contract failed to pay a fire insurance premium, was held liable to pay only nominal damages when the plaintiff's uninsured house burned down. The impoverished plaintiff, though making ineffectual inquiries of the Bank as to the payment of the premium, had failed to follow the Court's counsel of perfection by securing additional insurance on his own behalf: he had therefore failed to mitigate the effects of the Bank's breach of contract.

Sometimes the courts in contract cases will take account of a plaintiff's fault in more indirect ways. One method is to manipulate a warranty, usually an implied one, so as to hold that it was not breached in a particular case. For instance, in *Yachetti v. John Duff & Sons Ltd* (1942),²⁰⁰ the plaintiff bought pork sausages infected with trichinae parasites and herself contracted trichinosis when she consumed the sausages. From the evidence, the Court inferred that the plaintiff had not cooked the sausages properly, for this would have killed the parasites. Consequently, there was no breach of the implied condition in s. 15 (1) of the *Sale of Goods Act*²⁰¹ that the goods should be reasonably fit for their purpose: the plaintiff had failed to inform the seller of her intention to use the sausages in an abnormal way, namely, by cooking them improperly.

A case involving the same implied term is *Ingham v. Emes* (1955)²⁰² where the plaintiff suffered acute dermatitis after using a particular hair dye. She failed to inform the hairdresser who sold and applied the dye of a previous incident when she had reacted adversely to the dye and, despite the fact that the manufacturer's test carried out on the instant occasion failed to reveal her sensitivity, she was denied recovery against the hairdresser on the ground that the latter was not informed that the purpose of the dye was its use by a person who was allergic to it.

In recent years, the question whether contributory negligence legislation with its apportionment provisions can be applied to contract actions has become a contentious matter.²⁰³ Though the statutes are

¹⁹⁸*Sale of Goods Act*, R.S.O. 1980, c. 462, s. 49 (3).

¹⁹⁹(1978) 90 D.L.R. (3d) 271 (N.B.S.C., App. Div.).

²⁰⁰[1942] O.R. 682 (H.C.).

²⁰¹R.S.O. 1980, c. 462.

²⁰²[1955] 2 Q.B. 366 (C.A.).

²⁰³Compare G. Williams, *Joint Torts and Contributory Negligence* (1951), 328-32, with Palmer & Davis, *Contributory Negligence and Breach of Contract — English and*

literally capable of application to contract actions, no such intention is apparent from their legislative history. Nevertheless, the existence of overlapping contractual and tortious liability raises the question whether plaintiffs should have the right to seek full recovery in a contract action when the loss in question would be apportioned in tort proceedings. Where the tort and contract duties both consist of an obligation to take care, a number of recent Canadian²⁰⁴ and English²⁰⁵ authorities support the application of apportionment legislation even though the action may be in form contractual. The reasoning in these cases is not strong and, with one exception, no rationalization is given for restricting the plaintiff's power to elect between tort and contract. That exception is *Canadian Western Natural Gas*,²⁰⁶ where Prowse J.A. justified the application of the legislation by stating that "the real question that arises is whether an injustice will be done if [the plaintiff] is given the real remedy which the facts justify".²⁰⁷ This suggests the existence of "independent legal rules", referred to above, limiting the plaintiff's choice, and in so far as it expresses a preference for the sensitive apportionment rule over the all-or-nothing solutions generally favoured by contract law, it is submitted that it should be applauded.

With few exceptions,²⁰⁸ this apportionment development is confined to cases where the duties arising in contract and tort are of the same degree of intensity in that both consist of a duty to take care. Where, however, the defendant is both negligent and in breach of a strict warranty obligation, a case can also be made for apportionment in limited circumstances. That case has been argued elsewhere²⁰⁹ and will not be pursued further here. It is sufficient to state that developments in the contributory negligence area have limited the plaintiff's freedom to elect between tort

Australasian Attitudes Compared (1980) 29 I.C.L.Q. 415, 416-8, and Swanton, *Contributory Negligence as a Defence to Actions for Breach of Contract* (1981) 55 A.L.J. 278. See also Bridge, *supra*, note 184.

²⁰⁴E.g., *Emil Anderson Construction Co. v. Kaiser Coal Ltd* (1972), unreported but noted in *Truman v. Sparling Real Estate Ltd* (1977) 3 C.C.L.T. 205, 205-8 (B.C.S.C.) per Berger J.; *Husky Oil Operation Ltd v. Osler* (1978) 87 D.L.R. (3d) 86 (Sask. Q.B.); *Canadian Western Natural Gas Co. v. Pathfinder Surveys Ltd*, *supra*, note 178.

²⁰⁵See, e.g., *Quinn v. Burch Bros (Builders) Ltd* [1966] 2 W.L.R. 430, 438 (Q.B.) per Paull J., *aff'd* on different grounds [1966] 2 Q.B. 370 (C.A.); *Sole v. W.J. Hallt Ltd* [1973] Q.B. 574; *Artingstoll v. Hewen's Garages Ltd* [1973] R.T.R. 197 (Q.B.); *De Meza v. Apple, van Straten, Shena and Stone* [1974] 1 Lloyd's Rep. 508 (Q.B.). In the last case, the point was explicitly left open by all three appeal judges: [1975] 1 Lloyd's Rep. 498 (C.A.).

²⁰⁶*Supra*, note 178.

²⁰⁷*Ibid.*, 154.

²⁰⁸*Smith v. Buckley* [1965] Tas. S.R. 210 (S.C.); *Carmichael v. Mayo Lumber Co.* (1978) 85 D.L.R. (3d) 538 (B.C.S.C.).

²⁰⁹Bridge, *supra*, note 184.

and contract and have reduced the significance of the distinction between the two categories of civil liability.

B. The Alignment of Contractual and Tortious Rules of Remoteness of Damage

Though the matter has not always been free from doubt, the orthodox view is that the tortious and contractual rules of remoteness are not identical.²¹⁰ In contract, the defendant is liable for those losses which in the reasonable contemplation of the parties at the date of the contract were liable, or not unlikely, to result from a breach.²¹¹ The tort rule, on the other hand, is that the defendant is obliged to answer for the reasonably foreseeable consequences of his actions.²¹² Though the tort rule is couched in terms of a lesser degree of probability than the contract rule, there is no reason to suppose that the laws of probability when applied by a court are any more value-neutral than the laws of factual causation. Indeed, it has been said that the difference between the formulae may well be more semantic than substantial.²¹³ This point was repeated very recently by the Ontario Court of Appeal in *Kienzle v. Stringer* (1981).²¹⁴

In that case, the plaintiff and his two sisters were the children of a deceased farmer. Letters of administration were issued to one of the plaintiff's sisters and she agreed to sell him the farm in her capacity of administratrix of her father's estate. However, at the time of the conveyance prepared by the defendant solicitor, who had been retained by the brother, the farm had vested in all three children of the deceased farmer; consequently, the conveyance signed only by the one sister *qua* administratrix was ineffectual. When the plaintiff later sought to sell the farm, he found he did not have a marketable title and, when the other sister refused to convey her interest to him, he suffered various forms of economic loss. The majority judgment, delivered by Zuber J.A., took its cue from *H. Parsons (Livestock) Ltd v. Uttley, Ingham & Co.* (1978)²¹⁵ in holding that there was no real difference between the tort and the contract rules,²¹⁶ and the test of reasonable foreseeability was applied to

²¹⁰*McGregor on Damages*, 14th ed. (1980), §§ 572-80.

²¹¹*C. Czarnikow Ltd v. Koufos* [1969] 1 A.C. 350 (H.L.).

²¹²*Overseas Tankship (U.K.) Ltd v. Morts Dock & Engineering Co. (The Wagon Mound)* [1961] A.C. 388 (P.C. (Austl.)).

²¹³*H. Parsons (Livestock) Ltd v. Uttley Ingham & Co.* [1978] Q.B. 791, 807 (C.A.) *per* Scarman L.J. (as he then was). A similar point is made by Lord Denning M.R. at p. 802.

²¹⁴(1981) 35 O.R. (2d) 85 (C.A.).

²¹⁵*Supra*, note 213.

²¹⁶*Supra*, note 214, 89.

each item of loss claimed by the plaintiff. Consequently, it was unnecessary to decide whether solicitors could be sued only in contract by their clients.

Additional support for the view that the two remoteness rules are in the process of aligning themselves is to be found, first, in the attempt made by Lord Denning M.R. in the *Parsons*²¹⁷ case to alter the axis of the two rules by substituting a distinction drawn from the nature of the plaintiff's interest invaded by the defendant for a distinction drawn from the formal category (contractual or tortious) of liability; and secondly, in the expanded range of interests protected by contractual damages and the correlative expansion of tort law in recent years in the area of economic loss.

In the *Parsons* case, a seller supplied and installed a hopper for the storage of pig nuts. The cowl on the ventilator shaft was inadvertently left in the closed position with the result that the nuts became mouldy. When fed to a herd of pedigree pigs, these mouldy nuts caused an outbreak of *E. coli* with devastating consequences. The buyer's own behaviour in feeding manifestly off-colour nuts to his pigs did not surface directly as a causation or contributory negligence issue²¹⁸ though it posed problems for the Court in applying the remoteness rule. While the majority held that the losses caused to the herd fell within the reasonable contemplation rule of contract, it did so only at the price of introducing a measure of jesuitical subtlety into the decision. First of all, the difference between the tort and contract rules was said to be more semantic than substantial,²¹⁹ and secondly, the issue of the buyer's behaviour was finessed by asking, not whether the seller should have known that mouldy nuts when fed to pigs would cause illness, but rather whether the supply of an unfit hopper would injure the herd.²²⁰

In a separate judgment, Lord Denning M.R. confessed his impatience with the semantics of the remoteness rule²²¹ but nevertheless proposed that the contract rule should henceforth be reserved for cases of economic loss, whether tortiously or contractually inflicted, while the tort rule would apply to cases of personal injury and property damage.²²² It is too early yet to say whether this represents the future path of the law: it may well be that Lord Denning's less constructive²²³ remarks about the

²¹⁷*Supra*, note 213, 802-4.

²¹⁸*Ibid.*, 809-10 *per* Scarman L.J.

²¹⁹*Ibid.*, 806 *per* Scarman L.J.

²²⁰*Ibid.*, 807 *per* Scarman L.J.

²²¹*Ibid.*, 802.

²²²*Ibid.*

²²³*Ibid.*

absence of any difference between the tort and contract rules will have more appeal, as they obviously did for the Ontario Court of Appeal in *Kienzle v. Stringer*.²²⁴

In another sense too, the tort and contract rules are in the process of merging: as a result of recent developments, tort and contract are increasingly to be seen as protecting the same range of interests. In view of the expansion of the tort of negligence in the last twenty years, it is no longer true to say that contract law alone exists to protect the plaintiff from economic loss. Although the majority view has always been that economic loss in negligence poses a duty of care problem, Lord Denning has consistently looked at it in terms of remoteness of damage.²²⁵

Nor is it any longer true to say that contract law is confined to the protection of economic interests. Cases against employees,²²⁶ travel agents²²⁷ and carriers²²⁸ in recent years have shown that contract law supports interests that once would have been seen as falling within the preserve of tort law in so far as they were to be protected at all, namely, mental anguish, disappointment and peace of mind.

Conclusion

In so far as they reduce the importance of the contract and tort distinction, developments such as those in remoteness of damage and contributory negligence lend support to those who would attack the nineteenth century contract model,²²⁹ which is productive of the contract and tort division at its widest. At such a time, it seems to the practical mind of a common law lawyer that any attempt to locate precisely the boundary separating contract and tort, or to chart the exact area of overlap of the two, is rather beside the point: it is doomed to be overtaken by events.

Consequently, it behooves any common law lawyer considering the relationship of contract and tort to concentrate on the problem

²²⁴*Supra*, note 214.

²²⁵See *S.C.M. (U.K.) Ltd v. W.J. Whittall and Son Ltd* [1971] 1 Q.B. 337 (C.A.); *Spartan Steel & Alloys Ltd*, *supra*, note 71.

²²⁶*Cox v. Philips Industries Ltd* [1976] 1 W.L.R. 638 (Q.B.); *Pilon v. Peugeot Canada Ltd* (1980) 114 D.L.R. (3d) 378 (Ont. H.C.); *Cringle v. Northern Union Insurance Co.* (1981) 124 D.L.R. (3d) 22 (B.C.S.C.).

²²⁷*Jarvis v. Swans Tours Ltd* [1973] 1 Q.B. 233 (C.A.); *Jackson v. Horizon Holidays Ltd* [1975] 3 All E.R. 92 (C.A.); *Keks v. Esquire Pleasure Tours Ltd* [1974] 3 W.W.R. 406 (Man. Co. Ct). See also *Elder v. Koppe* (1974) 53 D.L.R. (3d) 705 (N.S.S.C., T.D.) (rental of motor home).

²²⁸*Newell v. Canadian Pacific Airlines Ltd* (1976) 74 D.L.R. (3d) 574 (Ont. Co. Ct).

²²⁹G. Gilmore, *The Death of Contract* (1974); P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

immediately at hand, whether it raises a question of remoteness, limitation of actions, or contributory negligence. Even if it surfaces in an overt fashion infrequently in the case law, this has always influenced the courts and will continue to do so. While it still remains accurate to point to the theoretically dual nature of the two regimes of liability, notwithstanding the evolution of contract law from the tortious forms of action, it is difficult to deny their technical unity in the fact of developments reducing the significance of the distinction between contract and tort.

The decision of the Supreme Court of Canada in *Wabasso Ltd v. National Drying Machine Co.* (1981),²³⁰ permitting the plaintiff to make out a case in delict so as to qualify for service *ex juris* despite the existence of a contract between the parties, seems consistent with the orthodox position of the common law with regard to overlapping liability. But it cannot be said with any certainty that the decision is inspired by a common law philosophy, since no relevant authorities on the relationship between tort and contract are cited and the Court's reasons for giving the plaintiff its "option" or power of election are not overtly stated in the case. If one takes the view that the relationship between tort (or delict) and contract is not a "cosmic question",²³¹ but rather something to be considered in a practical setting, then the *Wabasso* decision can be isolated as an authority dealing with the relationship of these regimes of liability in the context of service *ex juris*. Without opening up that field for consideration, it can be said that this writer's preference is not for an inquiry as to whether a case falls within the letter of one or more sub-rules permitting service out of the jurisdiction, but rather for a consideration of the more general question, "Is this a proper case for service *ex juris* and trial before the courts of this jurisdiction?" This approach would of course bypass the distinction between tort (or delict) and contract and may well have been what most motivated the Supreme Court in *Wabasso*.

²³⁰[1981] 1 S.C.R. 578.

²³¹The phrase is Weir's. In a comparative survey, he warns against the dangers of an overgeneralized view of the subject of overlapping liability and argues the need for considering its ramifications within particular legal systems. See Weir, "Complex Liabilities" in *International Encyclopedia of Comparative Law* (1976), vol. XI, chap. 12.