Professional Negligence: Contribution and Contributory Negligence

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1. Introduction

It is now becoming clear that a professional may be liable to a client in both tort and contract in respect of the same act done or omission made in the course of the professional employment.[1] This development in the general law has out-paced thought on the application of statutes allowing contribution amongst joint tortfeasors and modifying the defence of contributory negligence.[2]

At law, a joint tortfeasor could not claim contribution from other joint tortfeasors in respect of a judgment which he alone had satisfied.[3] The contribution statute changes this rule, but only reaches cases of tortious liability. Application of the statute to cases where liability is concurrently in tort and contract is uncertain.

Formerly, the defence of contributory negligence operated as a complete defence to an action that lay in trespass on the case.[4] The statute has made the defence only a partial answer to liability in case. The application of this defence to breach of contract and to other torts is complex.

This paper explores the nature of concurrent liability. It develops a framework for the administration of the contribution statute and the modified statutory defence of contributory negligence in the context of concurrent liability in contract and tort.

2. Meaning of Concurrent Liability

At law, the distinction between actions arising ex contractu and those arising ex delicto is unclear at the margin. Indeed, at the fundamental level, of form, there was no marginal distinction in Blackstone's time.[5] Both tortious negligence and breach of contract

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1. *Central Trust Co.* v. *Rafuse* (1986) 31 D.L.R. (4th) 481 (Sup.Ct, Can.); *Aluminium Products (Qld) Pty Ltd* v. *Hill* [1981] Qd R. 33 (FC); *MacPherson & Kelley* v. *Kevin J. Prunty & Associates* [1983] 1 V.R. 573 (FC). In *Hawkins* v. *Clayton* (1988) 62 A.L.J.R. 240 (HCA) the High Court held that there was no contractual term breached, and thus no liability under that head.
2. Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952 (Qd), hereafter the Law Reform Act 1952 (Qd). All further references will be to this Act, unless otherwise indicated.
3. *Merryweather* v. *Nixan* (1799) 8 Term 186; 101 E.R. 1337.
4. *Butterfield* v. *Forrester* (1809) 11 East 60.
5. Blackstone's Commentaries on the Laws of England, Book III, Chapters 8 & 9, (Oxford, Clarendon Press) pp. 122–3, & 153 et seq.

were pleaded as actions on the case;[6] although, formally, an action on a simple contract[7] would allege some "assumpsit" (undertaking), given for consideration by the defendant, which the defendant had breached.[8]

The later development of tortious liability was distinct from the development of liability on contracts, especially insofar as contract law purported to abstract from the particular circumstances of each case and raised breach of a contractual term to strict liability.[9]

Because an action in contract now differs conceptually from an action on the case, the law may imply a tortious duty of care, on the part of the professional, which is owed to his client, irrespective of contractual relations. The contract merely provides the circumstances wherein liability might be found in tort. This has long been the position in the United States of America. Carter J., delivering the judgment of the Supreme Court of California (in Banc), in *Eads* v. *Marks*[10] states:

> "Here, the duty of care arose by reason of the contract, and the plaintiff has sued in tort for breach of that duty. *The contract is of significance only in creating the legal duty,* and the negligence of the defendant should not be considered as a breach of contract, but as a tort governed by tort rules." [my emphasis]

The acceptance of such a concept of concurrent liability into the law of the British Commonwealth has not gone unchallenged. Lord Scarman delivering the advice of the Privy Council in *Tai Hing Cotton Mill* v. *Liu Chong Hing Bank Ltd*[11] said:

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships . . . either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences follow ac-

6. Ibid.
7. Apart from assumpsit, under which promises not made under seal, or promises implied from the parties arrangements, could be sued out; a writ of indebitatus lay to recover a debt due and payable, and a writ of covenant lay for breach of promise made under seal.

   The action on the case for breach of an assumpsit will be the main concern here, as the plaintiff would allege breach of an implied promise by a professional to exercise reasonable care in acting for plaintiff.
8. Prichard, M.J., *Scott* v. *Shepherd (1773) & the Emergence of the Modern Tort of Negligence*, (London, Seldon Society, 1976) pp.22 et seq.
9. Gilmore, Grant, *The Death of Contract*, (Columbus, Ohio State University Press, 1974).
10. 249 P.2d 257 at 260 (1952).
11. [1986] A.C. 80 at 107.

cording to whether liability arises from contract or tort, for example, in the limitation of action."

While Keith Mason Q.C. (1987) described his Lordship's words as a "belated attempt to turn the clock back" and "delphic" [12], the fact remains that a well-regarded member of the Privy Council — then one of Australia's ultimate appellate tribunals — had stated that only parties to a contract should be allowed to determine the rights and obligations arising in their relationship. His Lordship restricted the role of the court to the implication of contractual terms.

It is significant that Lord Scarman applied his remarks particularly to the commercial setting. This accords with the decision of the Australian Capital Territory Supreme Court in *Frederick W. Neilsen (Canberra) Pty Ltd* v. *PDC Construction (ACT) Pty Ltd* [13]. There, Kelly J. decided that:

> "Where . . . parties to a building agreement enter into a detailed written agreement intended to regulate the performance of the contract, the relationship between the parties is governed by that written agreement, subject only to the implication of such terms as are necessarily to be implied . . . ". [14]

His Honour therefore decided that the parties to a detailed commercial agreement were not in a relationship of proximity that could give rise to liability in tort for negligence.

This leaves open the possibility that the court would consider the application of tort law to cases where there is uneven bargaining power — where the contractual "agreement" is not a bargain, ". . . but a forced acquiescence in terms set by a powerful commercial, or state entity". [15] This would be a concession, compared to the hard-line of *Groom* v. *Crocker* [16], which decided that the solicitor-client relationship was purely contractual and that the client lacked the protection of a general law tortious action.

However, Lord Scarman's possible restriction of his opposition to concurrent liabilities to the commercial sector may be difficult to apply. As Garry Nolan (1987) notes: "It is possible to give a definition of 'commercial relationship' that would include all professional and client relationships. It is equally possible to define the opposite result." [17]

It is for this reason that it may be preferable to speak in terms of the proximity of the parties under tort law, rather than complicate the analysis by introducing an additional element of "a commercial relationship". It may be that a general law duty of care simply does not arise in many situations in which the parties are of roughly

12. Mason, Keith, "Contract & Tort: Looking Across the Boundary from the Side of Contract", (1987) 61 A.L.J. 228 at 230 & 231.
13. (1987) 71 A.C.T.R. 1.
14. (1987) 71 A.C.T.R. 1 at 5.
15. Critique of Law Editorial Collective, "Critique of Law: A Marxist Analysis", (Sydney, UNSW Critique of Law Society, 1978), pp.47-52.
16. [1939] 1 K.B. 194.
17. Nolan, G.A., "The Liability of Foreign Currency Lenders and Foreign Exchange Risk Advisers and Managers: Contract or Tort?", Unpub'd BCom (Hons) thesis, 1987, University of Queensland, p.69 n.6.

equal bargaining strength. There may be insufficient proximity between the parties. However, when one party is in a considerably weaker position to negotiate terms of a contract, the court may find a duty of care imposed upon the stronger party.

Perhaps it is because courts did not express themselves in terms of a tortious analysis in deciding whether a duty of care could arise in a professional-client relationship, that there remained some doubt in Australia until recently. There were strong dissents in *Aluminium Products (Qld) Pty Ltd* v. *Hill & O'rs*[18] and *MacPherson & Kelley* v. *Kevin J. Prunty & Associates*[19] Further, obiter dicta of Derrington J. in *Gillespie* v. *Elliot*[20] suggested that there remained academic doubt as to concurrent liability, sufficient to found an arguable defence for a solicitor.[21] Dicta of Kirby P. in *Hawkins* v. *Clayton*[22] showed that the fact that parties were in a contractual relationship was a sufficient complicating factor to prefer to assume liability in tort (rather than affirmatively finding it), before the Court of Appeal disposed of the action as statute-barred. The High Court of Australia's finding of negligence in *Hawkins* v. *Clayton*[23] removes doubt as to the application of tort to the professional-client relationship. However the reasons of Deane J., and Mason C.J. and Wilson J. dissenting, pose interesting problems of philosophy and pleading.

In that case, the retainer under which the testatrix employed the defendant solicitor did not contain any term (express or implied) that the professional should seek out the executor on notification of the testatrix's death. The majority found that there did exist a free-standing duty of care owed to the executor under the general law. On the particular facts, then, there was mere tortious liability, not concurrent liability in contract. In the light of difficulties in the reasons of the Court, it is suggested that the application of the case be restricted to that circumstance.

Deane J. saw no benefit, ordinarily, in implying contractual terms that simply repeat the content of any common law duty of care relevant in the circumstances. His Honour would imply such a term if it was implicit in the specification of the professional's task, or where it was necessary that one of the incidents of breach of contract[24] be available to the plaintiff. The only other way in which liability in negligence and contract could co-exist, in respect of the same act or omission, would be if the contract expressly included a term similar in content to the tortious duty of care.[25] Apart from these exceptional circumstances, there would be no breach of contract — all the incidents of liability in negligence would follow.

18. [1981] Qd R. 33, per Connolly J. at 36 et seq.
19. [1983] 1 V.R. 573, per Murphy J. at 582 et seq.
20. (1986) Aust. Torts Reports 67,644 at 67,645.
21. In that case, a concession of tortious liability was made for the purpose of argument as to the application of the Statute of Limitations.
22. (1986) 5 N.S.W.L.R. 109 at 114B; (1986) Aust. Torts Reports 67,650 at 67,655.
23. (1988) 62 A.L.J.R. 240 (HCA).
24. For example, the right to terminate for breach of condition.
25. (1988) 62 A.L.J.R. 240 at 257–8.

Mason C.J. and Wilson J., dissenting, apparently concur in Deane J.'s philosophy, though to a different end.[26] They too are unable to imply any relevant contractual term according to the ordinary tests. That is to say, a relevant term was ". . . neither necessary for the reasonable or effective operation of the contract in the circumstances nor so obvious that it [went] without saying".[27] However their Honours were also unable to find a relationship of sufficient proximity, between the solicitor and the client, to enable a claim of negligence to succeed in respect of the solicitor's failure to locate the executor. The solicitor did not assume that responsibility, and neither the client nor her executor relied upon any alleged assumption of responsibility.[28]

The difficulty inherent in this approach is that it increases the distinctions between contract and tort, rather than decreasing them, being philosophically more akin to the requirements of form before the Common Law Procedure Acts. A plaintiff alleging breach of implied contractual terms would need to plead carefully, if *Hawkins* v. *Clayton*[29] represents a general restriction of the court's ability to imply terms with similar content to a tortious duty of care.

In as much as Deane J. is internally inconsistent by indicating a preparedness to imply contractual terms similar to a tortious duty of care where the plaintiff needs to avail himself of an incident of contractual liability, his Honour has abandoned principle without substituting other workable rules. For instance, if a plaintiff raises a duty of care to a contractual term, to take advantage of the right to termination, why cannot he do this also to avoid the defence of contributory negligence?

Overall the results of this decision are unsatisfactory. It is best regarded as being off-point to this discussion, due to failure to find concurrent liability.

3. Contribution Amongst Tortfeasors

The rule in *Merryweather* v. *Nixan*[30] prevents a joint tortfeasor from recovering contribution from other joint tortfeasors in respect of a judgment that he has satisfied. The injustice of this rule has been remedied throughout the British Commonwealth by Acts such as the Law Reform Act 1952 (Qld). Under that Act, joint tortfeasors in Queensland may recover contribution from other joint tortfeasors[31], and the contribution is to be just and equitable

26. (1988) 62 A.L.J.R. 240 at 241.
27. (1988) 62 A.L.J.R. 240 at 241.
28. (1988) 62 A.L.J.R. 240 at 242. Gaudron J. did not consider contractual liability. Brennan J. saw no relevant contract at all in this case. (at p. 243).
29. (1988) 62 A.L.J.R. 240.
30. (1799) 8 Term 186; 101 E.R. 1337.
31. Law Reform Act 1952 (Qd), s.5(c). All further references will be to the Queensland Act unless otherwise stated.

according to the extent of a person's responsibility for the damage.[32]

The statute has however caused other problems and has been criticised by the full bench of the High Court of Australia as ". . . a piece of law reform which seems itself to call somewhat urgently for reform".[33]

The difficulty with which this paper is concerned is the restriction of the application of Part II of the Act to damage suffered "as a result of a tort", and to contribution amongst "tortfeasors" [34].

It is clear that a mere liability in contract will not permit a Part II contribution action.[35] However, contribution may be had if the tort of negligence (at least) is established, notwithstanding that the plaintiff's relations with the various defendants were set in a contractual factual matrix. This principle was established by the Victorian decision, *MacPherson & Kelley* v. *Kevin J. Prunty & Associates*.[36]

In *Macpherson & Kelley's* case, a plaintiff sued two firms of solicitors in relation to their handling of the plaintiff's previous litigation. That litigation was an attempt to sue a third party for personal injury. The action had become statute-barred due to delay in prosecution.

Due to one firm's perceived sloth in prosecuting the plaintiff's personal injuries claim, its retainer had been discharged and the matter placed in the hands of another firm. However the first firm negligently failed to inform either the plaintiff or the second firm that no process had been issued. The second firm negligently failed to discover this fact itself, before time ran out.

At first instance, the plaintiff succeeded against the defendants on the basis that each had broken an implied term of their contracts of retainer, that they would exercise reasonable skill and care in the prosecution of the personal injuries claim and in giving the plaintiff advice in respect of it.

The second firm claimed that the defendant's liability also lay in tort. On this basis, the second firm claimed contribution from the first under the Wrong's Act 1958 (Vic) s.24(1)(c). This claim was denied at trial, the learned judge deciding that liability of solicitors to clients lay only in contract, on the basis of *Groom* v. *Crocker*.[37] On appeal, the majority of the Full Court [38] held that there was concurrent liability:

32. Ibid. s.6.
33. *Bitumen Oil Refineries (Australia) Ltd* v. *The Commissioner for Government Transport* (1955) 92 C.L.R. 200 at 211.
34. Law Reform Act 1952 (Qd) s.5.
35. *Forty-Second Report of the Law Reform Committee of South Australia Relating to Proceedings Against and Contribution Between Tortfeasors and Other Defendants*, (1977), pp.10–11.
36. [1983] 1 V.R. 573 (FC). A later case of contribution, between a solicitor and an accountant, in respect of a transaction of their mutual client which they had negligently handled, is *Thorpe Nominees Pty Ltd* v. *Henderson & Lahey* [1988] 2 Qd R. 216 (FC).
37. [1939] 1 K.B. 194 (CA).
38. Lush and Beach JJ.

(a) in contract for breach of an implied term that the defendants would exercise reasonable skill and care; and

(b) in tort, for breach of an implied duty of care to exercise reasonable skill and care.

The Full Court therefore applied the statute on the basis that these solicitors were tortfeasors, in ordering contribution against the first firm. With respect, this was the correct conclusion in these circumstances. However, it is not clear that parties would be entitled to seek an order under the contribution statute in all relationships where there were breaches of contract.

An act in breach of a term of a contract which would not be a breach of a duty implied by the general law is not tortious. The actor is not a tortfeasor. The statute does not apply. The sort of "contractual term", breach of which will also lead to tortious liability, has already been exampled in *MacPherson & Kelley's* case. Note that the "term" is one which the court implies, and that it is expressed in the same general way as the tortious duty of care.

Application of the contribution statute to cases where there is concurrent liability in negligence and contract is consistent with current legal thought. There is no magic in the words "contractual term", if that term is an implication made by a court expressed in terms similar to those used to express a general law duty to take care, other than where ". . . a Court is merely reading in what is already logically implicit in the language of the contract".[39] Indeed, Gilmore's[40] central thesis is that the courts have been enforcing these sorts of "contracts" ever since there have been courts. It was only in the Nineteenth Century that rigid, abstract rules, that took no account of parties or subject matter, began to be applied.[41]

While such abstract, absolute rules work efficiently and justly where the parties to a contract are able to negotiate their bargain: the same inflexible rules cannot be justly applied to a case where for instance a contractual term that is breached is implied by law and is to the effect that the party in breach "promises" to take reasonable care and skill. This is no part of the parties' bargain. The "classical law of contract", which was developed for the benefit of certainty in exchange transactions, would see as anathema this wholesale implication of terms: and the enforcement of such terms as *absolute obligations* would make a mockery of freedom of contract. Rather, in the modern age, when the dominant trend is for the courts to write the parties' "agreement" for them, it is more appropriate to treat the breach of such a "term" as essentially tortious.

This finds support in marxist thought. Collins[42] asserts that to place these implications of law within the consensual framework of

39. Atiyah, P.S., *An Introduction to Contract Law*, 3rd ed., (Oxford, Clarendon Press, 1981), p.178.
40. Grant Gilmore, *The Death of Contract*, (Columbus, Ohio State University Press, 1974).
41. Grant Gilmore, *The Death of Contract*, (Columbus, Ohio State University Press, 1974).
42. Collins, Hugh, *The Law of Contract*, (London, George Weidenfeld and Nicholson Ltd, 1986).

classical contract law is to ignore the impact that the courts are having upon traditional power relationships. These implications of duties or contractual terms, essentially according to the tort rules that take account of the parties' relative standing, negate differences in bargaining power, allowing members of the proletariat greater freedom to realise their potentials.[43]

Nevertheless, it has been argued that the rule, that breach of a contractual term involves strict liability of the party in breach to the other party, has some utility justifying non-application of the Law Reform Act 1952 (Qd). This argument has particular force where the innocent party might otherwise be liable to have his damages reduced for contributory negligence (considered infra). But it also has serious consequences when contribution amongst defendants is attempted. Kutner[44] sees the argument against the application of contribution statutes to contractual actions as largely pragmatic, and arising from the complexity that such application might introduce to litigation, and from the uncertainty in the law that might be induced:

> "Contracts involve planned transactions, in which it is necessary for the parties to predict their exposure to liability; the existence of contribution would complicate the negotiation and performance of contracts; the parties' expectations may not be fulfilled should an action for breach of contract be instituted; devices which limit liability for damages — waivers of liability, monetary ceilings and time limitations — might not be effective to limit liability for contribution and would frequently present courts with problems difficult of satisfactory solution; issues irrelevant to liability for breach of contract, such as degree of relative "fault" or "responsibility", would loom large in litigation of contribution claims, consuming much time and expense." [45]

Kutner has raised several issues. First he asserts that contracts are planned, loss-allocating devices, that contribution among defendants would needlessly complicate contractual negotiation and performance, and that parties expectations may be defeated by allowing it.

Allowing contribution does not decrease certainty, in the context of contractual liability for breach of an implied term of reasonable care, any more than it does in tort. However, to the extent that contracts *are* planned allocative devices, such as in commercial agreements, Lord Scarman has indicated, in *Tai Hing Cotton Mill*[46] that the court would be less ready to adopt tortious analysis. There is no effect upon contractual certainty if contribution cannot operate through lack of tortious liability. Gilmore (1974, supra) could not complain in such circumstances, that strict rules as to liability, in the style of the "classical law of contract", were being applied. He apparently accepts that such certainty is justifiable as between commercial entities.

43. Collins, Hugh, *The Law of Contract*, (London, George Weidenfeld and Nicholson Ltd, 1986).
44. Kutner, P.B., "Contribution Among Tortfeasors", (1985) Can. Bar Rev. 1.
45. Kutner, P.B., "Contribution Among Tortfeasors", (1985) Can. Bar Rev. 1 at 53.
46. [1986] A.C. 80 at 107.

Many transactions do not fall into that category. The contract of retainer between professional and lay-client is virtually without explicit terms. The lay-client would not be qualified to negotiate terms, even if he were allowed the opportunity. This is a situation in which an abstract set of formulae, developed in the Nineteenth Century to govern mercantile sales of goods[47] do not provide the answers. The law will imply a duty of care (whether formulated in contract or in tort) in recognition of the particular facts.

It would take the common law into unfathomed depths to follow the suggestion of Deane J.[48] that the law abandon the pretence of implying contractual terms, except where one may be implied according to the ordinary rules concerning implication of terms, and restrict itself to deciding points ungoverned by explicit contractual terms under general negligence principles. There is merit in Deane J.'s reasoning, however, if it is read as merely stating that some of the incidents of breach of contract should in such cases be abandoned to the extent that they differ from incidents of tortious liability. Such incidents include rights of contribution, and contributory negligence as a defence (infra).

Secondly, Kutner raises the issue of application of the contribution statute where one or more defendants purport to limit their liability by a clause in the contract. As between the plaintiff and a tortfeasor, there is no difficulty. A valid limiting clause, operating in tort and contract would be an essential part of the relationship between the contracting parties, and there is no reason why it cannot be given effect as between those parties. This would do justice as between the plaintiff and the limited defendant, enabling risk to be planned.

The difficulty arises as between a party seeking contribution and a limited defendant. This appears to be the problem to which Kutner refers as being "difficult of satisfactory solution" (supra). The objection is answered in two ways. If the rule at which the courts arrive were treated as arbitrary — like the side of the road on which it is legal to drive — this does not per se make it bad. On the contrary, an arbitrary rule may be an improvement over a lack of rules because of decreased uncertainty. Further, there is arguably a rational basis for preferring one rule over another.

The South Australian Law Reform Commission in 1977 concluded that a party seeking contribution from a limited defendant should only be able to do so up to the extent of the contractual limitation. The Commission considered that the considerable advances made in the field of liability for negligently caused economic loss, and the deliberate way in which a contract managed risk as between parties thereto, justified this conclusion.[49] This may appear hard on unlimited defendants, who would bear the residue of the damage irrespective of relative fault. However, it would not

47. ie classical contract rules: Grant Gilmore, *The Death of Contract*, (Columbus, Ohio State University Press, 1974).
48. *Hawkins* v. *Clayton* (1988) 62 A.L.J.R. 240 at 259 & 260.
49. *Forty-Second Report of the Law Reform Committee of South Australia Relating to Proceedings Against and Contribution Between Tortfeasors and Other Defendants*, (1977), pp.11-12.

accord with justice if a party who had entered a relationship expressly on condition that his liability be limited could be liable beyond that limit. Further, under the Commission's recommendation, there is only uncertainty as to extent of liability in respect of the unlimited defendants. These defendants entered the relationship of proximity on the basis that they submitted to the common law the resolution of disputes regarding matters not expressly dealt with in any contract.[50] It could be assumed that they would rationally expect the outcome, and entered the contract because it *ex ante* increased their wealth.[51]

Finally, Kutner suggests that issues of "relative fault" (supra) would become part of litigation for breach of contract. Kutner correctly asserts that such concepts have no place in deciding contractual liability. However, where the liability has all the hallmarks of that for breach of tortious duty of care, the statute *makes* these concepts relevant. Effectively, this is tort litigation.

In summary, it is in accordance with principle to allow contribution between parties, if their respective liabilities arose from a breach of an implied contractual term that would have also been a breach of a tortious duty of care. However, where no duty of care would be implied by law[52] or where the duty of care owed to a plaintiff is not breached by a breach of a contractual term, there can be no right to contribution amongst defendants because they are not tortfeasors.

4. Contributory Negligence

The judgment of Bollen J. in *Walker* v. *Hungerfords*[53] recognised that the plea of contributory negligence was available where an action framed in contract could have been brought in tort. However, in the circumstances, the auditor defendant was required to shoulder the whole responsibility for failing to check incorrectly prepared interest calculations which were supplied by the plaintiff for the purpose of determining income tax liability. The plaintiff's clerk was held not to have been negligent. He had merely prepared workings for submission to the defendants who were experts in taxation.

This decision illustrates the two essential points in respect of liability of a professional's client to have his damages reduced by his contributory negligence. First, where the implied contractual

50. For example, the issue of extent of liability.
51. Posner, Richard A., *Economic Analysis of Law*, 2nd ed., (Boston, Little, Brown & Co., 1977).
52. As in the case of equally powerful corporate entities who have set out all the terms of their agreement formally.
53. (1987) 44 S.A.S.R. 532 at 553; (1987) Aust. Torts Reports 68,780 at 68,798. Upheld in the Full Court of South Australia, (1987) Aust. Torts Reports 69,120 at 69,124. Application for special leave to appeal to the High Court of Australia was denied, on 19 February 1988, in respect of a contributory negligence point raised by Hungerfords, Wilson J. saying, "We see no reason to take that question on board." [1988] 3 Leg. Rep. S.L. 2.

term sued on is, in substance, an ordinary, tortious duty of care, the court will treat the party who is negligent as a tortfeasor for the purposes of the statutory defence of contributory negligence. Secondly, however, in many factual circumstances, the client will reasonably rely so completely upon the professional's skills that the defence will not succeed.

4.1 Responsibility of Contracting Party for Contributory Negligence

The Law Reform Act 1952 (Qd) s.10 abolishes the common law rule that contributory negligence constitutes a complete defence to an action on the case. The Act substitutes a scheme of apportionment of damages according to the extent to which a party's "fault" has caused the damage.

"Fault" is defined in s.4 as "negligence, breach of statutory duty, or other act or omission which gives rise to the defence of contributory negligence."

Breach of Contract — Not "Fault" per se

Breach of contract is not, per se, "fault" within the meaning of the Act. It is neither tort, nor apt to give rise to a defence of contributory negligence at law. However, a view consonant with the general thesis of this paper is that, where an act or omission could equally have been sued on as tort or as contract, the plaintiff cannot escape liability to have his damages reduced for contributory negligence by framing his action in contract.[54] Similarly, Glanville Williams (1951) argues ". . . that where the same act or omission constitutes both a tort and a breach of contract, so that in its tort aspect the case is subject to the provisions of the Act, then the case is subject to the provisions of the Act even in its contract aspect." [55]

Jane Swanton[56] develops three broad categories of contractual liability which will serve as a useful dichotomy for this paper.

(a) breach of contract with concurrent, co-extensive breach of tortious duty of care;

(b) breach of contract, simpliciter, where —

(i) the term was that the party in breach would take reasonable care;

(ii) the term made the degree of care exercised by the party in breach irrelevant.

54. Opinions to similar effect can be found in:- Jane Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract", (1981) 55 A.L.J. 278; and Andrew S. Burrows, "Contributory Negligence — A Defence to Breach of Contract", (1985) 101 L.Q.R. 161. A.M. Dugdale & K.M. Stanton, *Professional Negligence*, (London, Butterworths, 1982) express qualified support at pp.296–7 due to lack of Eng. authority at time of writing — cf *Forsikringsaktieselskapet Vesta* v. *Butcher* [1986] 2 All E.R. 488; [1986] 2 Lloyd's Rep. 179. N.H. Andrews [1986] C.L.J. 8 agrees but goes further to extend the statute to negligent breaches of contract where there was no tortious liability (see infra).

55. Glanville Williams, *Joint Torts and Contributory Negligence*, (London, Stevens, 1951) p. 330.

Category (a) will be dealt with below. Briefly, Swanton[57] would agree with the philosophy expressed in this paper. Where a court implies a contractual term, in the nature of a duty of care, whose breach leads to concurrent liability in contract and tort, the defence of contributory negligence is available.

Breach of Contract Simpliciter

Cases where a mere breach of contract is alleged and no tortious duty of care arises — Swanton's category (b) — cause greater difficulty. Until recently, some authors argued that a breach of contract, that did not give rise to a concurrent and co-extensive breach of tortious duty, could also fall under the Act.[58] Glanville Williams[59] argues that the definition of "fault" in s.4 of the Act should be read by dissociating the opening phrase, "negligence, breach of statutory duty", from the following words, "or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to a defence of contributory negligence".[60] This would leave the word "negligence" unqualified by a requirement that the negligence lead to tortious liability or could give rise to a defence of contributory negligence at common law. Under this interpretation, the prosecution for a negligent breach of any contractual term would be susceptible to a defence contributory negligence, whether or not a concurrent liability arises in tort.

This interpretation of the definition of "fault" is relevant to negligent breach of contractual terms in category (b). However, in proving breach of category (b)(ii) terms, the plaintiff need not prove negligence — merely that the state of nature exists which entitles the plaintiff to his remedy. Glanville Williams answers this objection in two ways. First, he develops a general theory of reduction of damages, ". . . whether in terms of causation, or of implied duty of care on the part of the plaintiff to use care . . ., or of estoppel by negligence or of the duty to mitigate damages . . ., or of contributory negligence *eo nomine* . . .".[61] He concludes that the duty to mitigate of damage is a specie of contributory negligence, and thus that contractual liability falls within that part of the definition of "fault" in s.4 that includes "other act or omission which . . . would, apart from this Act, give rise to a defence of contributory negligence".[62]

An alternative, related argument is that the definition of "fault" in s.4 is not exclusive of the scope of the word as used in s.10 of the Act which creates the statutory defence. Thus, fault would encom-

56. Jane Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract", (1981) 55 A.L.J. 278.
57. Jane Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract", (1981) 55 A.L.J. 278.
58. Glanville Williams (1951) pp.214-222; Andrews [1986] C.L.J. 8 at 10.
59. Glanville Williams, *Joint Torts and Contributory Negligence*, (London, Stevens, 1951) p.330.
60. Ibid., p.329; Andrews [1986] C.L.J. 8 at 9-10.
61. Ibid., pp.214-5.
62. Ibid., pp.292-4.

pass breach of contract *eo nomine*[63] and possibly a failure to mitigate damage[64].

There is now substantial judicial authority in Australia and England rejecting these views. In *Tennant Radiant Heating Ltd* v. *Warrington Development Corporation*[65] the Court of Appeal ruled that the Act has no application to claims in contract that could not be equally formulated in tort. In that case, the plaintiff had sued in tort in respect of water damage negligently caused to its stock-in-trade in premises leased from the defendant. The defendant counter-claimed, alleging breach of a covenant to repair. The reasons of Dillon L.J. amount to a comprehensive answer to the contentions of Glanville Williams[66] and Andrews[67]. His Lordship looks at the mischief that the Act was to remedy. This was identified as the operation of contributory negligence at law as a complete defence. A claim in contract was not completely defeated by want of care by the plaintiff. Thus the counter-claim in contract[68], respecting a covenant to repair leased premises, was not "fault" within the meaning of the Act. The appropriate analytical tool was causation.

Appellate courts in Australia have not yet had cause to consider the matter directly. In *Harper* v. *Ashtons Circus Pty Ltd*[69] the plaintiff had been sitting on wooden benches in a circus tent, but fell over the back when he attempted to move, suffering personal injury. He sued the circus, alleging breach of warranty, in that there was no rail at the back of the seats to stop him falling.[70] The trial judge directed the jury to find specifically the extent of the plaintiff's contributory negligence and the reduction that should be made to his award in consequence thereof. The New South Wales Court of Appeal considered that, where there was concurrent and co-extensive liability in contract and tort, but the plaintiff framed his action in contract, the Act did not apply.[71] This conclusion would make the defence irrelevant for both category (a) and (b) cases, and is regrettable in that a plaintiff would escape reduction in a category (a) case by simply framing his claim in contract.[72] However, the decision must be viewed in light of the doubt at that time as to whether contract and tortious negligence could legally occur concurrently.

To the extent that their Honours rely on *A.S. James Pty Ltd* v.

63. Ibid., p.330.
64. Ibid., pp.292–4.
65. The Times, 19 December 1987
66. Glanville Williams, *Joint Torts and Contributory Negligence*, (London, Stevens, 1951).
67. N.H. Andrews [1986] C.L.J. 8.
68. Nothing turns on the fact that, at law, the counter-claim would have been in covenant if the lease was formal.
69. [1972] 2 N.S.W.L.R. 395.
70. A count alleging tortious negligence was abandoned at trial.
71. Manning J.A., at 401 F & at 402C, makes it clear that he found concurrent liability on the facts, but considered his conclusion impossible in law.
72. Manning J.A. at 402. Naturally, the defence could allege want of causation as is suggested by Hope J.A. at 404.

Duncan[73], where McInerney J. followed previous English authority restricting the finding of concurrent liability[74], the decision in *Harper's case* is of limited value today. However, if *Harper's case* can be read as a case where a court found no liability apart from on a contract, the reasons of their Honours are a useful indication of how a court faced with purely contractual liability will approach a warranty to be careful.

Hope J.A. says that the negligence of the plaintiff may be relevant, when he sues for breach of warranty, to determine causation, not contribution to the damage.[75] This accords with the ratio decidendi of Dillon L.J. in *Tennant Radiant Heating*, supra. Hope J.A. saw the importation into the law of contract of contributory negligence as ". . . both unjustified and unnecessary". The principles of recovery in contract could do justice, without resort to tort principles.[76]

Unfortunately, the example given by Hope J.A. of how contract principles could cope is, with respect, singularly clumsy and unconvincing. His Honour suggests that, in the instant case, the jury might have been asked to imply a term, that "the premises are warranted reasonably fit for use by customers using them with reasonable care." The cumbersome and confusing nature of such an implied "term" is the best argument for allowing recovery concurrently in tort and contract where the jury has implied a term similar in content to a tortious duty of care.

However, where there can be no tortious liability on the part of one of the parties, this may be the only practical means of doing justice It is also submitted that a proper analytical technique would be to enquire as to the causation of the damage as Hope J.A. had initially suggested. In *Tennant Radiant Heating*, Dillon L.J. was reported[77] as having expressed the appropriate questions in that case thus:

> "The problem which the court faced, on claim and counter-claim alike, was a problem of causation of damage. On the claim, the question was how far the damage to the plaintiff's goods was caused by the defendants' negligence notwithstanding the plaintiffs' own breach of covenant.
>
> On the counter-claim, the question was how far the damage to the defendants' building was caused by the plaintiffs' breach of covenant. The effect was that on each question apportionment was permissible. That was the same result as [Law Reform Act] would produce but it was not reached through the Act, because the obstacle which the [Law Reform Act] was passed to override [that is, the nature of the defence of contributory negligence at law] was not there on either claim or counter-claim in the present case."

Appellate courts in New South Wales and England have therefore decided that the word "fault", as used in s.10 of the Law

73. [1970] V.R. 705.
74. *Groom* v. *Crocker* [1939] 1 K.B. 194; *Clark* v. *Kirby* [1964] Ch. 506; *Bagot* v. *Stevens, Scanlan & Co.* [1966] 1 Q.B. 197.
75. [1972] 2 N.S.W.L.R. 395 at 404.
76. [1972] 2 N.S.W.L.R. 395 at 404 & 405.
77. The Times, 19 December 1987.

Reform Act, does not include contractual liability *eo nomine*. However, there are some other Australian first instance decisions apparently contrary to this treatment of the statutory defence. Tasmanian authority reads the statute as also applying to purely contractual liability. Victorian decisions deny the defence even when there is concurrent and co-extensive liability in tort and contract. However, both lines of authority can be read as compatible with the views expressed here.

The Tasmanian decisions in *Queen's Bridge Co.* v. *Edwards* and *Smith* v. *Buckley*[78] have been rejected, insofar as they construe the statute as allowing a plea of contributory negligence to an allegation of breach of contract simpliciter, in *Belous* v. *Willetts*[79] and *James Pty Ltd* v. *Duncan*.[80] In *Belous* v. *Willetts*, Gillard J. rejects both the means of construction used by Crisp J. in the Tasmanian cases, and Glanville Williams' (1951) argument that mitigation is a species of contributory negligence at law.

The latter contention, by Glanville Williams, would allow the application of the statute, as breach of contract would be an ". . . other act or omission which . . . would, apart from [the Law Reform Act], give rise to a defence of contributory negligence".[81] Glanville Williams uses the now well-known example of the cook who buys eggs to use in a cake. In breach of the warranty of merchantable quality,[82] the shop-keeper sells bad eggs. The cook does not inspect them before use, in consequence of which the cake is spoilt. The question asked is whether the cook may recover the whole of the loss of the cake. If a jury were to find that he contributed to the loss by carelessly not examining the eggs, Glanville Williams would apply the Act, diminishing the damages.[83]

Doubtless, Gillard J. was correct in analysing the example of the rotten egg that spoils the batter as an instance of failure to mitigate damage.[84] Gillard J. points to the fundamental distinction between the two concepts of contributory negligence and mitigation of damage at common law. Breach of a promise that the eggs were merchantable was actionable per se (without proof of damage). The action was not defeated by the purchaser's careless use of the eggs without inspecting them. That is, even were it found that the purchaser failed to mitigate his damage, he would still be entitled to at least nominal damages at law. Contrast this with the effect of contributory negligence at law, which is a complete defence.[85]

The Victorian cases cited have their own difficulties. In each, an implied contractual assumpsit of due care is alleged. These would be cases where it has been suggested that the Act may apply — category (a) cases.

78. Respectively [1964] Tas. S.R. 93 & [1965] Tas. S.R. 210. Followed in *W. & G. Genders P/L* v. *Noel Searle (Tas.) P/L* [1977] Tas. S.R. 132.
79. [1970] V.R. 45.
80. [1970] V.R. 705.
81. Refer to Law Reform Act 1952 (Qd) s.4 definition of "fault".
82. As under Sale of Goods Act 1896 (Qd) s.17.
83. Glanville Williams (1951), pp.215–6.
84. *Belous* v. *Willetts* [1970] V.R. 45 at 49.
85. [1970] V.R. 45 at 49.

However, the reasons of the learned trial judges, who refuse to consider a concurrent tortious liability when a breach of contractual promise to be careful is alleged, make it clear that they treat these cases as purely contractual. Therefore, while both cases appear to reject the application of the Act in category (a) cases, in fact these cases must be read as category (b) cases — that is, as if no concurrent tortious liability was present.

Another method of dealing with the Tasmanian authorities is to characterise them as being off-point, merely applying the statute to cases where there was clearly concurrent contractual and tortious liability in respect of the same act or omission.[86] So restricted in effect, *Queen's Bridge Co.* v. *Edwards, Smith* v. *Buckley* and the later Tasmanian decision in *W. & G. Genders P/L* v. *Noel Searle (Tas.) P/L*[87] can stand beside the appellate court decisions in *Tennant Radiant Heating* and *Harper's case*.

Both *Tennant Radiant Hearing* and *Harper's case* can be regarded as authority for the proposition that the word "fault" as used in s.10 of the Law Reform Act does not include contractual liability, per se. *Tennant Radiant Heating* is a ruling with respect to contractual liability arising from a strict contractual term, where negligent behaviour need not be proved for liability to follow. *Harper's case*, relying on authority that restricted the occurrence of concurrent liability, is regarded as authority in respect of a contractual undertaking of care in the absence of tortious liability. This encompasses all category (b) cases. First instance decisions in Victoria and Tasmania can be read as compatible with the views expressed here.

Negligent Breach of Implied Assumpsit of Care

Walker v. *Hungerfords*[88] is clear authority for the proposition that only a negligent breach of an implied term that is coincidental with a breach of a tortious duty of care is liable to be considered susceptible to a plea of contributory negligence. In *Walker* v. *Hungerford*, Bollen J. explains *Queen's Bridge Motors*[89] and *Smith* v. *Buckley*[90] as precisely that sort of case. This also now appears to be the position in England, following *Forsikringsaktieselskapet Vesta* v. *Butcher.*[91] That case overruled single judge decisions contra in *Basildon District Council* v. *J.E. Cesser (Properties) Ltd*[92] and *A.B. Marintrans* v. *Lomet Shipping Co. Ltd.*[93] This position is confirmed by *Tennant Radiant Heating Ltd* v. *Warrington Development Corporation.*[94]

86. *Walker* v. *Hungerfords* (1987) 44 S.A.S.R. 532; (1987) Aust. Torts Reports 68,780.
87. Respectively [1964] Tas. S.R. 93, [1965] Tas. S.R. 210 & [1977] Tas. S.R. 132.
88. (1987) 44 S.A.S.R. 532; (1987) Aust. Torts Reports 68,780.
89. [1964] Tas. S.R. 93.
90. [1965] Tas. S.R. 210.
91. [1986] 2 All E.R. 488; [1986] 2 Lloyd's Rep. 179; [1988] 2 All E.R. 43 (CA).
92. [1984] 3 W.L.R. 812.
93. [1985] 1 W.L.R. 1270.
94. The Times, 19 December 1987 (English Court of Appeal).

Speaking generally, the common law knows the defence of contributory negligence where some otherwise strict torts (such as trespass) are committed negligently. However, when such a tort is committed intentionally, the defence does not apply. Thus, in *Horkin* v. *North Melbourne Football Club*[95], the bouncer could not claim that the plaintiff, whom he had injured, was contributorily negligent by getting drunk and offering provocation. The trespass to the person of the plaintiff had been intentional.[96] The explanation for this is that the policy of the law is to prevent intentional wrong-doing, even if only nominal damages are awarded. However where a negligent tresspass occurs, the action could just as well have been framed as an action on the case alleging negligence. So framed, the action would have been liable to a counter-claim of contributory negligence.

By analogy, the policy of the law might be characterised as to prevent breaches of strict terms of an agreement, the remedy for which sounds in damages, even though they be nominal. But a negligent breach of a "promise" to be careful, implied by law, is also able to be sued on in the tort of negligence. Thus such a claim is liable — however framed — to be met by the defence of contributory negligence.

Perhaps analogous to contractual actions are two classes of action for interference with chattels. Property rights are analogous with contracts — both give a claimant command over a resource, subject to the rights of others. Interference with property rights and *agreed* contractual rights is regarded very seriously by the law as threatening anarchy and social decay. An action lies for conversion and breach of contract respectively to defend these rights even if no damage is specially pleaded. In *Day* v. *Bank of New South Wales*[97], it was held that contributory negligence was no defence to conversion. It is submitted that a similar result would apply where the parties had specifically contracted that one should be liable to another, under specific circumstances, and those circumstances occurred. Contrast this result with an allegation of negligent trespass de bonis asportatis — that is, where interference with property rights is not an issue — and with breach of a contractual term to be careful. To the extent that in both cases there would be concurrent liability in trespass on the case, contributory negligence would be a defence.

It is important to distinguish between breach of an agreed contractual term, and breach of a term implied by law in the nature of a warrant of care. The former is actionable only in contract. The latter gives rise to liability in both contract and tort, and is thus subject to the defence of contributory negligence.

4.2 Professional-Client Relationship

While in principle contributory negligence is available where a

95. [1983] 1 V.R. 153. Also Glanville Williams (1951) pp.282 & 197-202.
96. contra are *Hoebergen* v. *Koppens* [1974] 2 N.Z.L.R. 597; *Barley* v. *Paroz* (1979) (Queensland Supreme Court, unreported.)
97. (1978) 18 S.A.S.R. 153.

breach of contract could also be characterised as a breach of a tortious duty of care, there is grave difficulty for the professional in showing unreasonable disregard by the plaintiff for the plaintiff's own safety.

Moffitt P. in *Simonius Vischer & Co.* v. *Holt & Thompson*[98] stated:

> "Where the action for professional negligence is against an auditor, it is difficult to see how a finding of contributory negligence, according to usual concepts, could be made. If, as where the audit is of a public company, the audit contract or the undertaking of an audit is found to impose a duty to be exercised so as to safeguard the interests of shareholders, it is difficult to see how the conduct of any servant or director could constitute the relevant negligence, so as to defeat the claim against the auditor, whose duty is to check the conduct of such persons and, where appropriate, report it to shareholders."

These words have been approved in both *Walker* v. *Hungerfords*[99] and *W.A. Chip & Pulp Co. Pty Ltd* v. *Arthur Young*[100], in relation to the accounting profession. In *Walker* v. *Hungerfords*, the proposition was applied to a case where the plaintiff's clerk had submitted incorrectly calculated interest figures to tax accountants. Bollen J. held that there had been no contributory negligence on the part of the company employing the clerk. The clerk lacked formal training, and the accountants had undertaken to prepare correct tax returns.

The Supreme Court of Canada recently came to a similar conclusion about the relationship between solicitors and the management of the Nova Scotia Trust Company, in respect of negligent advice as to the legality of a loan transaction.[101] Despite the presence of lawyers of greater and lesser eminence on the Board of the company, the Supreme Court rejected the solicitors' plea of contributory negligence. The responsibility of the Board was chiefly administrative, being concerned with the financial aspects of the loan. They fulfilled their responsibility with respect to the legal aspects of the transaction by consulting solicitors.[102]

These decisions may be generalised to much activity of professionals. Professions require specialist training, skills and judgment. By their nature, these qualities are costly to acquire, and thus are rarely seen among laymen-clients. For example, a client will often consult a professional because he *does not know whether* he has a problem. Further, professional societies, which assure certain minimum levels of competence, training and ethical conduct, were originally formed because of ignorance among the laity about how to judge the quality of professional services provided.[103] As in *Cen-*

98. [1979] 2 N.S.W.L.R. 322.
99. (1987) 44 S.A.S.R. 532; (1987) Aust. Torts Reports 68,780 (South Australian Supreme Court).
100. (1987) 12 A.C.L.R. 25, at 43 (Western Australian Supreme Court).
101. The loan was void under a statute, and the moneys were held irrecoverable in separate proceedings.
102. *Central Trust Co.* v. *Rafuse* (1986) 31 D.L.R. (4th) 481, at 528–530.
103. Watts, Ross L. & Zimmerman, Jerold L., *Positive Accounting Theory,* (Sydney, Prentice-Hall, 1986) p.316.

tral Trust Co. v. *Rafuse*, the client may fulfil his obligation to be careful for himself by merely retaining appropriate professional advisers, and acting on their advice. Certainly this will be a question of fact. However, Dugdale & Stanton who suggest that the court will look to both the "casual potency and the blameworthiness" of each party's behaviour, opine that the professional will often bear greater responsibility, as his opinion is likely to be relied on by others.[104]

4.3 Application of Contributory Negligence

Contributory negligence is available as a defence where the facts pleaded show a breach of a duty of care owed by the defendant to the plaintiff under the general law

However, the degree to which the public are accustomed reasonably to depend upon professional advice makes it difficult to prove that a plaintiff failed to take proper care to protect himself.

5. Conclusion

Professionals may be liable to clients concurrently in contract and tort. If the court finds breach of an implied tortious duty of care owed by the professional, which is concurrent and co-extensive with breach of an implied assumpsit of care, at least two of the usual incidents of tortious liability will follow. The professional may seek contribution from fellow tortfeasors and he may plead that the damages award should be reduced by reason of the client's contributory negligence. A plea of contributory negligence may not succeed in many cases, however, because of the professional's relative expertise in his field, and the reasonableness of the client following the advice of a retained expert.

104. Dugdale, A.M. & Stanton, K.M., *Professional Negligence*, (London, Butterworths, 1982) p.297.