

Share and Share Alike: Contributory Negligence and Contractual Claims

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Introduction

This article considers the apportionment of contractual damages under the Law Reform (Contributory Negligence) Act 1945 ('the 1945 Act'). The first part of the article examines the operation of the 1945 Act in concurrent liability situations. At present, these are the only instances in which contractual damages will be reduced because of contributory negligence. It will be argued that the availability of a comparative fault defence in these situations is desirable, and that a 'conduct focused' interpretation of the 1945 Act provides the best means of justifying its application to contractual claims in this scenario. It will be shown that this 'conduct focused' construction of the 1945 Act is preferable to one which confines apportionment to tortious damages alone; the latter approach is contrary to the plain wording of the statute and has been criticised as leading to 'bizarre consequences' in jurisdictions where it has been adopted.¹

The final section of the article advocates for the extension of apportionment powers in contract, so that damages flowing from the breach of all contractual duties will *prima facie* be apportioned on the basis of the parties' respective fault, irrespective of any corresponding liability in tort, unless they contract out of that arrangement. This approach would have three main benefits. First, it would provide a sounder justification for the apportionment of contractual damages in concurrent liability situations than the current statutory regime. Secondly, it would resolve the inconsistent treatment of damages flowing from breaches of contractual duties expressed in terms of taking care, which are at present apportioned arbitrarily depending on the presence of corresponding tortious liability. Finally, it would remedy the 'all or nothing' injustice often present in claims arising solely in contract.²

1. The Structure of the 1945 Act

The 1945 Act provides for a reduction in damages in situations where the claimant is partly responsible for their own loss. It applies both when the claimant is at fault in causing the event which gives rise to the loss, and also when the claimant exacerbates loss resulting from an event for which he is not causally responsible (a classic example being where damages otherwise payable to a passenger in a car accident are reduced because their injuries were compounded by failing to wear a seatbelt³). Apportionment is effected by section 1(1), which provides that:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason

¹ James Davis, 'Contributory Negligence and Breach of Contract: *Astley v Austrust Ltd* (1999) 7 TLJ 117, 121.

² Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 141.

³ See *Froom v Butcher* [1976] 1 QB 286, [1975] 3 W.L.R. 379.

of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.⁴

For the purposes of the present analysis, it is necessary to distinguish between the application of the 1945 Act to: (a) claims in tort; (b) claims in contract arising independently of claims in tort; and (c) claims in contract arising concurrently with claims in tort.

A. Application to Claims in Tort

The 1945 Act directs the courts to apportion damages arising out of certain torts,⁵ in situations where the claimant is partially at 'fault' for his own loss. Section 4 defines 'fault' for the purposes of section 1(1) as:

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

The established approach to the 1945 Act in the United Kingdom is that the section 4 definition of fault contains two distinct 'limbs':

- (1) The '**claimant limb**' of fault refers to that which is 'partly of his [i.e. the claimant's] own', and is constituted by 'negligence, breach of statutory duty, or other act or omission which [...] would, apart from this Act, give rise to the defence of contributory negligence.' This has been interpreted as meaning conduct which would have given rise to the defence of contributory negligence at common law before the introduction of the Act.⁶
- (2) The '**defendant limb**' refers to the fault 'of any other person or persons', and is constituted by 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort'.

Accordingly, taking the example of the victim of a car accident who exacerbates her injuries by failing to wear a seatbelt, any damages she would otherwise be entitled to receive in the tort of negligence are liable to be reduced. Applying the two-limbed test, the claimant limb is satisfied because damage is suffered 'as the result partly of [the claimant's] own fault', and that 'fault' (namely failing to wear a seatbelt) would have given rise to the defence of contributory negligence at common law. Moreover, the defendant limb is also satisfied because the accident was partly caused by the fault of the driver, whose conduct gives rise to liability in tort.

⁴ Law Reform (Contributory Negligence) Act 1945, s 1(1).

⁵ The 1945 Act does not apply to torts to which contributory negligence was not a defence at common law such as assault and deceit. See, e.g., *Pritchard v Co-operative Group Ltd* [2012] QB 320; *Standard Chartered Bank v Pakistani National Shipping Corpn* [2003] 1 AC 959 (HL(E)).

⁶ *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL), 369 (Lord Hoffmann) and 382 (Lord Hope); aff'd *Standard Chartered Bank v Pakistani National Shipping Corpn* [2003] 1 AC 959 (Lord Hoffmann) (HL(E)).

B. Application to Claims in Contract Arising Independently of Claims in Tort

The question of the 1945 Act's applicability to contractual damages is more complex. In *Vesta v Butcher*, Hobhouse J identified three discrete categories of cases in which the question of whether the 1945 Act applies to contractual claims might arise.⁷

Category (1): where the defendant's liability arises from the breach of a contractual provision that does not depend on the defendant's negligence. These are cases involving what the Law Commission has referred to as 'strict' contractual duties.⁸

Category (2): where the defendant's liability arises from a contractual obligation expressed in terms of taking care, but which does not correspond to a duty of care in tort arising independently of the contract.

Category (3): where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the contract.⁹

The present law is that damages in category (1) and (2) cases cannot be apportioned.¹⁰ Again, applying the two-limbed test, the claimant limb of 'fault' is not satisfied because contributory negligence could not have been pleaded as a defence to breach of contract at common law. Neither is the defendant limb of 'fault' fulfilled, because the defendant's breach of contract does not by itself give rise to tortious liability.

C. Application to Claims in Contract Arising Coextensively with Claims in Tort

For Hobhouse J in *Vesta v Butcher* it was 'absurd' to suggest that contractual damages could not be apportioned in category (3) cases.¹¹ Conversely, in *Astley v Austrust*, the High Court of Australia¹² took the view that decisions which had held apportionment legislation to be applicable in concurrent liability situations displayed 'substantial flaws of reasoning' and were not consistent with a proper construction of the relevant statutes.¹³ That some of the most senior courts in the common law world could reach such fundamentally different conclusions in respect of near-identical legislation is an indication that this area merits further analysis. A re-evaluation of this area is especially timely given the Court of Appeal's recent decision in *Wellesley Partners LLP v Withers LLP*, in which the shared 'foundation' of contractual and tortious liability in a concurrent liability case was heavily emphasised.¹⁴

⁷ *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488, 508.

⁸ Law Commission, *Contributory Negligence as a Defence in Contract* (Law Com No 219, 1993) para 2.12.

⁹ See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

¹⁰ *Forsikringsaktieselskapet Vesta v Butcher* [1988] 3 WLR 565, 586; *aff'd* on a different point [1989] AC 880 (HL).

¹¹ *Vesta* (n 7) 511.

¹² Australia's highest appellate court.

¹³ *Astley v Austrust Ltd* [1999] HCA 6; [1999] 197 CLR 1, [66].

¹⁴ *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146; [2016] 2 WLR 1351, [157] (Roth J).

Three views as to the operation of the 1945 Act in concurrent liability situations can be readily identified. The first is the ‘conduct focused’ interpretation adopted by the Court of Appeal in *Vesta v Butcher*, so labelled because it interprets the 1945 Act as a direction to apportion damages in situations where the conduct involved possesses certain characteristics, rather than to reduce damages generated by a particular cause of action. The second is the ‘cause of action specific’ construction advanced by the High Court of Australia in *Astley v Austrust*, which confines apportionment under the 1945 Act to only those damages deriving from an action in the tort of negligence. The third is the often overlooked ‘interstitial’ approach taken by Hobhouse J in the first instance decision in *Vesta v Butcher*.

2. The Conduct Focused Interpretation

Given its status as the leading English authority on the applicability of contributory negligence to contractual claims, it is worth considering the decision of the Court of Appeal in *Vesta v Butcher* in greater detail.¹⁵ The defendant brokers had negligently failed to act after Vesta telephoned them requesting that an onerous condition in their reinsurance policy be renegotiated. Vesta later sought to claim under the policy. However, the underwriters refused to indemnify them, citing the breach of that condition. Vesta’s primary claim was against the underwriters, but, in the alternative, it brought an action against the brokers for their failure to act on the telephone call. The brokers contended that, even if they had been negligent in forgetting about the call, Vesta’s failure to follow up on it amounted to contributory negligence. As Vesta had brought their claim in contract, a key issue was whether the 1945 Act applied such that the damages could be apportioned.

O’Connor LJ¹⁶ endorsed the approach of Prichard J in *Rowe v Turner Hopkins*,¹⁷ a case concerning the proper construction of the equivalent apportionment legislation in New Zealand.¹⁸ On Prichard J’s interpretation, section 1(1) of the 1945 Act constitutes a direction to courts to apportion damages in relation to claims deriving from particular acts and omissions, regardless of the particular cause of action in issue. On this view, in a concurrent liability case, there is nothing in the wording of the 1945 Act that prevents its application to the contractual claim. Because contractual damages in a concurrent liability case derive from the same act or omission as tortious damages, both constitute damage suffered as a result of conduct constituting ‘negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort’ on the part of another person.¹⁹ Likewise, because the claimant has done some act or omission which (had the claim been brought in tort) would have given rise to the defence of contributory negligence at common law, the effect of subsection 1(1) is to reduce damages claimed in respect of that conduct, whether sought in tort or contract:

In other words, the Act applies only when the plaintiff’s cause of action is in respect of some act or omission for which the defendant is liable in tort. Conceivably, the defendant may be concurrently liable in contract — but that is immaterial [...] if the defendant’s

¹⁵ *Vesta* (n 10) 586.

¹⁶ *Vesta* (n 10) 573 (O’Connor LJ).

¹⁷ *Rowe v Turner Hopkins & Partner* [1980] 2 NZLR 550, 555-556. Prichard J was bound for other reasons to hold that the solicitors in that case were liable solely in contract.

¹⁸ Contributory Negligence Act 1947, s 3(1).

¹⁹ Law Reform (Contributory Negligence) Act 1945, s.4.

conduct meets that criterion, the Act can apply — whether or not the same conduct is also actionable in contract.²⁰

One advantage of this ‘conduct focused’ construction is that it does not stretch the definitional limits of the term ‘fault’ in order to achieve apportionment. Other interpretations of apportionment legislation derived from the 1945 Act have attempted to equate contractual breach with ‘fault’ by construing the word ‘negligence’ in a broad colloquial sense.²¹ These approaches have been criticised as ‘strained to say the least’;²² as completely disregarding the definition of ‘fault’ expressly provided for in section 4;²³ and as ignoring the word ‘other’ qualifying the phrase ‘act or omission giving rise to liability in tort’, which on conventional rules of construction would suggest that all of the preceding expressions, including the reference to negligence, were similarly references to ‘liability in tort’.²⁴

However, this is not a problem for the ‘conduct focused’ account of the 1945 Act, which interprets the word ‘negligence’ as being confined to tortious negligence alone. It instead reconciles the use of the word with the Act’s application to contractual claims in concurrent liability by viewing tortious negligence as a feature of certain conduct, in respect of which any resulting damages must be apportioned. In this manner, the ‘conduct focused’ account also circumvents the problem of having to show that contributory negligence could have been pleaded as a defence to breach of contract at common law (a much criticised view for which there has been little judicial support,²⁵ but which was notably advanced by Professor Glanville Williams).²⁶

Another significant benefit of the ‘conduct focused’ interpretation is that it avoids artificial distinctions being drawn between essentially similar cases. In a collision caused by the negligence of a taxi driver in which both the taxi’s passenger and the other driver are not wearing seatbelts, it scarcely seems satisfactory that the failure to wear a seatbelt will involve a substantial reduction in damages for those in the other car, but not for the taxi’s passenger who sues in contract. It also avoids attempts to ‘contractualise’ conduct in an effort to avoid the application of the Act: for example, someone engaged in a lift share, or who makes a contribution to the driver’s petrol costs. In circumstances in which the Act directs courts to apportion damages by reference to what is just and *equitable*, it seems counterintuitive that the issue of whether such an apportionment is permissible should depend on considerations of this kind.

3. The Cause of Action Specific Construction

The main challenge to the orthodoxy of the ‘conduct focused’ interpretation came from the High Court of Australia’s decision in *Astley v Austrust Ltd*. Austrust had been negligently advised by its solicitor in relation to its appointment as trustee to a trust. When then the trust became insolvent, Austrust brought a claim against the solicitor for breach of contract and in the tort of negligence. The solicitor denied liability, but alternatively contended that Austrust has been contributorily negligent by its poor management of the trust, and therefore, any damages should be reduced under the Wrongs Act 1936(the

²⁰ *Vesta* (n 10) 557 (O’Connor LJ), citing *Rowe* (n 17) 555-556.

²¹ *Queen’s Bridge Motors & Engineering Co Pty Ltd v Edwards* [1964] Tas SR 93, 96.

²² *Astley* (n 13) [70].

²³ *ibid*.

²⁴ Burrows (n 2) 136. The *ejusdem generis* rule of construction.

²⁵ *Astley* (n 13) [77]; *Vesta* (n 10) 589 (Sir Roger Ormrod).

²⁶ Glanville Williams, *Joint Torts and Contributory Negligence* (1st edn, Stevens 1951).

relevant parts of which are materially identical to the United Kingdom's 1945 Act).²⁷ As in *Vesta v Butcher*, because Astley was liable coextensively in contract and tort, the issue was whether the Wrongs Act was applicable to the contractual claim. The majority held that the 1936 Act was not applicable to contractual damages, instead adopting a construction of the apportionment legislation which confined its application solely to damages in tort. In reaching that conclusion, the reasoning in *Rowe*,²⁸ and both the first instance and Court of Appeal decisions in *Vesta v Butcher*,²⁹ was heavily criticised.³⁰

A. The Cause of Action Specific Construction Mischaracterises the Effect of the Legislation

The 'cause of action specific' construction of the High Court of Australia in *Astley* was mistaken, and was rightly criticised as 'regrettable' at the time.³¹ The first problem with this construction is that it reduces the question of the legislation's application to the issue of whether or not a claim for damages would have otherwise been defeated at common law. This is too binary an analysis, and misinterprets the mechanisms at work in the legislative scheme. The Court in *Astley* reasoned that, because the 1945 Act was designed to aid claimants in tort, a purposive approach to the legislation would exclude its application to contractual damages.³² However, while it is true that the legislation was introduced to aid plaintiffs whose claims would previously have been defeated in their entirety owing to contributory negligence (which, prior to 1945, was a complete defence), the solution to this problem 'not only abolished the rule that contributory negligence defeated the whole claim', but crucially also 'made a very wide extension of the power to apportion liability so as to permit recovery of a proportion of the damage sustained'.³³

The Court in *Astley* cited the words 'a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage' as evidence for a legislative intention that the 1945 Act should be inoperative in cases of contract.³⁴ However, nothing about these words is prohibitive in nature. Thus, it is not immediately clear why they should preclude the application of the provision to claims in respect of conduct fulfilling the two limbs of 'fault' contained in the statute, merely for the reason that the claim is framed in a manner that would not otherwise have been defeated at common law. Moreover, the text must be interpreted not only in light of its history, but also having regard to the subsequent developments in the law of tort, in particular the recognition of the possibility of concurrent liability in contract and tort.³⁵ The reactionary interpretation adopted by the High Court of Australia turns a blind eye to these developments, in what may fairly be labelled an 'originalist' construction.

²⁷ Wrongs Act 1936, s 27A.

²⁸ *Rowe* (n 17).

²⁹ *Vesta* (n 7); *Vesta* (n 10).

³⁰ *Astley* (n 13) [58], [70].

³¹ Jane Swanton, 'Contributory Negligence is not a Defence to Actions for Breach of Contract in Australian Law: *Astley v Austrust Ltd* (1999) 14 JCL 25 1, 260.

³² *Astley* (n 13) [81].

³³ *Vesta* (n 10) 574 (O' Connor LJ).

³⁴ *Astley* (n 13) [80].

³⁵ *Henderson* (n 9).

B. The Cause of Action Specific Interpretation Mischaracterises the Relationship Between Tortious and Contractual Damages

The second issue with the ‘cause of action specific’ approach is that ignores the close relationship between tortious and contractual damages in concurrent liability situations. The Court in *Astley* made this error in three striking ways. Firstly, it insisted that, as contractual and tortious liability are conceptually distinct (one enforcing promises and the other compensating for loss caused by fault) it would not be correct to apportion damages in the former using legislation enacted to deal with the latter.³⁶ However, this overlooks the special relationship between the two types of damages in a category (3) case, in which the claimant's primary rights in both tort and contract come into existence by the same act. That is to say, it is the act of entering into the contract which constitutes the ‘assumption of responsibility’ necessary to create a duty of care in tort.³⁷ In addition to having their origins in an identical right-generating event, the infringement of the tortious and contractual rights takes place through the same act, namely the defendant’s careless conduct.

Secondly, the Court emphasised the fact that contractual obligations are voluntarily assumed, whereas tortious duties are externally imposed.³⁸ This is a somewhat artificial distinction in concurrent liability cases where, like tortious duties, contractual duties to take care are themselves often ‘imposed’ upon the parties by legislation.³⁹ There are many other elements of contracts which are imposed involuntarily upon the parties (the prominent example being terms implied by law). In fact, there is a strong case that the trend of the development of contract law has been to move away from freedom to contract in a *laissez faire* manner, and toward imposition and regulation, with a liberty to opt-out of default rules which may be carefully controlled by legislation such as the Unfair Contract Terms Act 1977, the Consumer Rights Act 2015, and context-specific enactments in areas such as landlord and tenant and consumer credit.⁴⁰ Further, particularly in the context of economic loss, many tortious duties of care can be fairly characterised as having been assumed similarly to contractual duties.

Thirdly, the Court argued that the application of apportionment legislation to contractual claims in category (3) cases was particularly erroneous given the differences between contractual and tortious remedies. It was noted, for example, that a claim in tort might still be brought when a contractual action was time barred, and that an action in contract could be maintainable in other jurisdictions where an action in tort could not.⁴¹ However, while procedural remedial rules may differ in each case, the substantive damages in a concurrent liability situation will often be identical for both claims, because the performance interest of contractual duties expressed in terms of taking care will usually be the avoidance of loss (which coincides with the tortious reliance measure). Moreover, the contractual and tortious remedies are conceptually similar in the sense that both are substitutive damages for the infringement of rights generated and transgressed by the same conduct. It is precisely for this reason that the Court of Appeal has now held that there should be a single test of remoteness in cases of concurrent contractual and

³⁶ *Astley* (n 13) [47]-[48].

³⁷ *Henderson* (n 9), 193 (Lord Goff).

³⁸ *Astley* (n 13) [84].

³⁹ See, e.g., Supply of Goods and Services Act 1982, s 13 and Consumer Rights Act 2015, s 49(1).

⁴⁰ A thesis famously developed by Professor Atiyah in *The Rise and Fall of Freedom of Contract* (1st edn, OUP 1979).

⁴¹ *Astley* (n 13) [60].

tortious liability.⁴² Even if the damages can be held to be conceptually distinct, the financial loss in each case is quantitatively and factually identical (a fact which the law recognises through prohibitions on double recovery and reflective loss).⁴³

C. The High Court of Australia's Analysis of Policy Considerations Was Inadequate

The High Court of Australia's 'cause of action specific' approach was adopted on the basis of an inadequate analysis of the relevant policy considerations.⁴⁴ First, it failed adequately to take into account the parties' ability to opt out of apportionment of contractual damages in category (3) cases. The Court reasoned that because commercial parties prefer the certainty provided by fixed rules, the risk should be borne by the party whose breach of contract is causally related to the damage and not on the basis of respective fault according to 'vague' concepts of fairness.⁴⁵ However, under the 'conduct focused' interpretation, commercial parties may still opt for the certainty of 'all or nothing' damages if they so desire by inserting an 'express contractual provision which defines the parties' rights and liabilities in a different way'.⁴⁶ The 1945 Act merely ensures that apportionment is the default arrangement for contractual damages in concurrent liability situations — its effects are not unavoidable.

Secondly, the Court mischaracterised the relationship between apportionment and consideration. It argued that plaintiffs in contract who give consideration in exchange for defendants' promises to take care may have bargained for contractual protection precisely because they wished to protect themselves against the consequences of their own negligence.⁴⁷ However, this overlooks the fact that an option expressly to contract out of apportionment ensures that the assignment of risk can still be 'bargained' for. Indeed, by explicitly drawing the question of risk assignment to the parties' attention, they are able to make a more informed bargain, and account for the value of not bearing that risk in the consideration they provide.

Thirdly, in resolving the inconsistency between category (2) and category (3) cases, the Court paid insufficient regard to the fact that category (2) cases rarely arise. The majority reasoned that to recognise apportionment in concurrent liability cases would mean a plaintiff's damages in contract would be reduced merely because they were also liable in tort.⁴⁸ They considered this unacceptable, and sought to resolve the asymmetry between the remedy available to plaintiffs in purely contractual actions and concurrent actions, by holding that apportionment was not available to the contractual claim in either scenario. That said, the majority's approach eliminated one asymmetry by creating another, namely between concurrent liability cases and cases where there is a liability in tort in circumstances which are 'equivalent to contract' but in which no contractual cause of action is available.⁴⁹ In practice, relatively few cases will involve a contractual obligation to take care in the absence of a corresponding duty in tort, meaning the Court prioritised

⁴² *Wellesley* (n 14) [80], [163] and [186].

⁴³ *Johnson v Gore Wood* [2002] 2 AC 1, 35F (Lord Bingham).

⁴⁴ *Astley* (n 13) [84].

⁴⁵ *ibid* [85].

⁴⁶ *Vesta* (n 7) 510.

⁴⁷ *Astley* (n 13) [85].

⁴⁸ *ibid* [58].

⁴⁹ Lord Devlin's description in *Hedley Byrne v Heller* [1964] AC 465 at 530; and used to justify tortious liability for economic loss in cases such as *Smith v Eric S Bush* [1990] 1 AC 831, *Henderson v Merrett* (n 9), and *BP Plc v Aon Ltd (No. 2)* [2006] EWHC 424 (Comm).

formal justice for a very small number of claimants at the expense of substantive justice for the majority. The proper solution to the inconsistency identified by the High Court of Australia is not to deprive defendants of a benefit which they had hitherto enjoyed by limiting the application of contributory negligence in concurrent liability, but rather to extend the 1945 Act to cover all situations where there has been a breach of contractual duty to take reasonable care, whether or not there is corresponding liability in tort.

4. The Interstitial Approach

A third, often overlooked, approach to the 1945 Act is that articulated by Hobhouse J in the first instance decision in *Vesta v Butcher*. This novel approach reconciles the application of apportionment to contract not through the wording of the 1945 Act itself, but by invoking the relationship between contract and the general law. Contrary to what some commentary has suggested,⁵⁰ the reasons given by Hobhouse J for the apportionment of contractual damages were not affirmed by the Court of Appeal. Although both decisions ultimately reached the same conclusion on the question of the 1945 Act's applicability to contractual damages, they did so on markedly different bases.

Hobhouse J's view was that, in concurrent liability cases, the parties' relationship in the law of tort affects the starting point of their relationship in contract. This is because he regarded tortious liability as the *general* law out of which parties are expected to contract to the extent that they want to avoid its effects. It was therefore said that, '[i]f the contract does not on its true construction disclose an intention to redefine or vary [...] the legal incidents of the common law relationship that exists, those incidents remain.'⁵¹ As such, where the parties' common law relationship gives rise to tortious liability which falls to be apportioned under the 1945 Act, 'the relevant question in any given case is whether the parties have by their contract varied that position'.⁵² Thus, on Hobhouse J's approach, where a contract is silent on the question of contributory negligence, it is left to the general law to fill the gaps such that contractual damages would be liable to be apportioned in accordance with the 'legal incidents' of the parties' relationship in tort. This is quite different from the Court of Appeal's 'conduct focused' approach, which emphasised the tortious element of the defendant's act or omission, and characterises the contractual damages as deriving from 'a claim in respect' thereof.

This 'interstitial' approach is fraught with problems. Indeed, its underlying premise is false. It is not generally the case that should parties fail to make some provision in their contract, the gaps in that contract are filled by the law of tort. This is so even where a party's liability in tort is coextensive with their liability in contract. The parties have entered into a new arena of law by the instrument they have used. Where a contract is silent on an issue, the question falls to be answered by reference to 'default rules' of contract law,⁵³ not by the law of tort. For example, where a contract does not expressly provide the time limit within which a claim for breach may be instigated, it is not the case

⁵⁰ See, e.g., Burrows (n 2) 136: '[t]he correct approach to construing [the 1945 Act] in relation to breach of contract was first put forward judicially as late as 1989 in obiter dicta by the Court of Appeal, confirming Hobhouse J's reasoning'; and Sirko Harder, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (1st edn, Hart 2010) 148: 'The Court of Appeal [...] expressly approved Hobhouse J's approach to contributory negligence.'

⁵¹ *Vesta* (n 7) 510.

⁵² *ibid.*

⁵³ e.g. through implied terms, or contractual legislation such as the Consumer Rights Act 2015, Sale of Goods Act 1979, Supply of Goods and Services Act 1982, or the Law Reform (Frustrated Contracts) Act 1943.

that the tortious limit applies.⁵⁴ Similarly, many elements of the law of contract, such as its test for remoteness of damages,⁵⁵ have developed along separate lines from the corresponding test in tort.⁵⁶ Indeed, it has recently been held that in cases of concurrent liability, it is the contractual law of remoteness which has 'default' application to both claims, rather than vice versa.⁵⁷

If the parties' contract does not address the issue of apportionment of damages according to fault, then in respect of the contractual claim the position must be the same as in a category (2) case (i.e. that no apportionment is permitted); this is the default 'legal incident' of the parties' contractual relationship. As such, the justification for the application of the 1945 Act to contractual damages in concurrent liability cannot be found by examining the interplay between contract and the general law. Rather, it is found by considering the suspensory effect that the provisions of the 1945 Act, when properly construed, have on the usual rules relating to contractual damages. Accordingly, the 'conduct-focused' approach, with its emphasis on statutory construction, is to be preferred.

5. An Expanded Role for Contributory Negligence in Contract

Notwithstanding the flaws elsewhere in its reasoning, the Court in *Astley* was correct to point out the inconsistency inherent in apportioning damages resulting from breaches of contractual duties to take care when those breaches arise concurrently with tortious duties, but not apportioning damages resulting from breaches of contractual duties to take care in the absence of a concurrent tortious duty. It should be noted that the majority in *Astley* did not make definite statements as to the desirability of the fault-based apportionment of contractual damages. Their policy considerations were listed merely to demonstrate why it was 'by no means evident' that their conclusion was anomalous or unfair.⁵⁸ If it had been open to the Court plausibly to resolve the inconsistency by extending apportionment under the Act, rather than by limiting it, they may well have done so. The majority stated:

Perhaps the apportionment statute should be imposed on parties to a contract where damages are payable for breach of a contractual duty of care. If it should, and we express no view about it, it will have to be done by amendment to that legislation.⁵⁹

There are undeniable problems with all three identified interpretations of the 1945 Act so far as category (2) cases are concerned. If the 'conduct focused' (or, for that matter, 'interstitial') interpretation is adopted and the 1945 Act is applied to contractual claims only in concurrent liability cases, it is not immediately clear why a claimant should have their damages in contract reduced merely because they were also owed a duty in tort. Conversely, if the 'cause of action specific' approach is adopted, and the 1945 Act is confined to tortious damages alone, it may be difficult to justify why a claimant should be permitted to recover in full in contract law, notwithstanding that they may have substantially contributed to their own loss. It has been suggested that to permit full recovery in such situations emphasises the legal form of a relationship at the expense of its

⁵⁴ Limitation Act 1980.

⁵⁵ *Hadley v Baxendale* (1854) 9 Ex 341.

⁵⁶ *The Wagon Mound (No 1)* [1961] AC 388, [1961] 2 W.L.R. 126.

⁵⁷ *Wellesley* (n 14).

⁵⁸ *Astley* (n 13) [84].

⁵⁹ *ibid* [88].

substance,⁶⁰ leading to cases in which results turn not on the merits of a claim, but instead on 'the forms of action and the skill with which these can be employed by members of the legal profession'.⁶¹

Reform in this area would resolve the problems inherent in both approaches. First, it would eliminate the inverse relationship between responsibility and liability created by the 'conduct focused' approach. Currently, where a claimant is only owed a duty to take reasonable care in contract, his damages will not be liable to be reduced if he carelessly, albeit *unknowingly*, contributes to his own loss.⁶² However, if the claimant, in addition to that duty, is also owed a duty of care in tort, his contractual damages will be liable to be so apportioned. This in turn leads to 'an odd reversal of roles' as defendants seek to limit their contractual liability by assuming additional responsibilities in tort.⁶³ This problem was considered by Simon Brown LJ in *Barclays v Fairclough*.⁶⁴

Is this contract really to be construed so that the defendant is advantaged by an assertion of its own liability in nuisance or trespass as well as in contract? Are we to have trials at which the defendant calls an expert to implicate him in tortious liability, whilst the plaintiff's expert seeks paradoxically to exonerate him?⁶⁵

Secondly, reform would prevent defendants in category (2) cases from being required to compensate in full claimants who contribute significantly to their own loss, in the absence of a contractual term to that effect. At present, defendants in category (2) cases are liable to compensate claimants for 100 per cent of any damage resulting from their breach, notwithstanding that a significant amount of said damage may have been carelessly caused by the claimant themselves. Where risk is not explicitly assigned between the parties, the natural assumption ought to be that responsibility for such damage should be assigned according to fault. To some extent this is already recognised, with an allocation exercise being undertaken by the courts behind the application of rules of causation, mitigation, or scope of duty. However, these devices tend to produce an 'all or nothing' result, in which the claimant is permitted to recover either in full or not at all.⁶⁶ Moreover, if apportionment is to be conducted by reference to relative fault, it is far better that this should be openly articulated and accurately labeled.

In a 1993 report, the Law Commission recommended that the application of contributory negligence in contract be expanded to include all situations in which there is a contractual duty to take reasonable care.⁶⁷ Nevertheless, despite resolving the inconsistent treatment of category (2) and (3) cases, the Law Commission's proposals have been regarded as 'largely cosmetic' for the reason that, in practice, very few cases will involve a contractual obligation to take care in the absence of a corresponding duty in tort.⁶⁸ Although they had contemplated such a change in their initial consultation paper, the Law Commission's recommendations stopped short of proposing the extension of

⁶⁰ Ann Taylor, 'Contributory Negligence: A Defence to Breach of Contract?' (1986) 49 MLR 102, 108.

⁶¹ *Bains Harding Construction & Roofing (Aust) Pty Ltd v McCredie Richmond & Partners Pty Ltd* (1988) 13 NSWLR 437, 444 (Smart J).

⁶² *Eley v Bedford* [1972] 1 QB 155, 158.

⁶³ Burrows (n 2) 141.

⁶⁴ Albeit in relation to the question of whether to allow apportionment in those category (1) cases where some tortious, but non-coextensive, liability is also present.

⁶⁵ *Barclays Bank Plc v Fairclough Building Ltd* [1995] QB 214, 233 (Simon Brown LJ).

⁶⁶ *ibid.*

⁶⁷ Law Com 219 (n 8) para 4.1.

⁶⁸ Burrows (n 2) 143.

apportionment of damages to category (1) cases. In the following section, the principal arguments against extending apportionment to category (1) are considered and rebutted, and the reasons why the need for apportionment in those cases is just as pressing as in categories (2) and (3) are outlined.

The first argument against apportionment in category (1) cases is that the notion of ‘fault’ is immaterial where duties are ‘strict’.⁶⁹ However, fault remains relevant to the calculation of damages, notwithstanding its immateriality to the breach itself, because loss resulting from the breaches of even strict duties can still be exacerbated by the claimant’s careless conduct. Although the doctrine of mitigation precludes the recovery of additional losses accrued unreasonably,⁷⁰ this only applies where the claimant is aware of the loss. Moreover, while causation and remoteness are capable of accounting for the effects of a claimant’s unwitting contribution to his own loss, the application of these rules produces an ‘all or nothing’ result in these cases in precisely the same way as in cases in category (2).⁷¹

The second argument against allowing apportionment in category (1) cases is that to take account of a claimant’s carelessness would be wrong *in principle* where a defendant has committed himself to a strict obligation regardless of fault.⁷² The concern is that claimants would effectively come under a duty to supervise defendants’ performance by having to take ‘precautions against the possibility that a breach might occur’.⁷³ In particular, the Law Commission was worried about situations involving consumers who rely on manufacturers’ strict promises.⁷⁴ However, this concern is misplaced. First, as Harder notes, reliance on a warranty where the claimant is a consumer will likely not be regarded as contributorily negligence behaviour in any event;⁷⁵ a fact which the Law Commission themselves acknowledged.⁷⁶ Secondly, a sub-division of business-claimant and consumer-claimant strict contractual duty categories (akin to those in legislation controlling unfair terms)⁷⁷ would overcome this objection in the cases with which the Law Commission was most concerned. It is apparent that such concerns do not arise in relation to commercial parties, most of whom recommended apportionment in category (1) cases in the Law Commission’s own consultation process.⁷⁸ In any event, it would remain the case that parties could opt-out of the ‘default setting’ of apportionment by making their own express arrangements regarding risk allocation.⁷⁹

The third argument against the inclusion of category (1) cases is that it would open the ‘floodgates’ to litigation by creating unnecessary uncertainty.⁸⁰ The fear is that what would previously have been simple claims would become complex disputes over blameworthiness, requiring greater investigation into the conduct of parties and complex arguments as to quantum of damages. However, this fear is unfounded. First, the current rules on causation and mitigation already require some factual investigation into the

⁶⁹ Law Com 219 (n 8) para 3.24.

⁷⁰ *British Westinghouse Electric v Underground Electric Railways* [1912] AC 673.

⁷¹ Burrows (n 2) 143.

⁷² *Barclays* (n 65) 233 (Simon Brown LJ): ‘The very imposition of a strict liability on the defendant is to my mind inconsistent with an apportionment of the loss.’

⁷³ Law Com 219 (n 8) para 4.2.

⁷⁴ *ibid* para 4.4.

⁷⁵ Harder (n 50) 162.

⁷⁶ Law Com 219 (n 8) para 4.3.

⁷⁷ See, e.g., the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.

⁷⁸ Law Com 219 (n 8) para 4.1.

⁷⁹ Harder (n 50) 163.

⁸⁰ Law Com 219 (n 8) para 4.6.

claimant's conduct. As Harder notes, directly addressing the issue of contributory conduct is far more straightforward than covertly carrying out this enquiry beneath the cloak of existing doctrines.⁸¹ With respect to uncertainty over quantum, one solution is the system of fixed brackets of apportionment proposed by Professor Burrows,⁸² which strike a balance between the fairness of apportionment and the certainty of an 'all or nothing' approach: in effect a '75%, 50%, 25%, or nothing' approach. In any event, the introduction of apportionment to tort cases in 1945 did not see the 'floodgates' open in this manner and there is no reason to think the case should be any different for apportionment in contract.

A final argument against the inclusion of category (1) cases is that to do so would exacerbate the problem of inequalities of bargaining power by giving 'economically more powerful defendants an extra means of resisting plaintiff's claims'.⁸³ The protection for consumer-claimants (where issues of inequality of bargaining power are likely to be most acute) and fixed brackets of apportionment outlined above would go some way in preventing this issue from arising. Moreover, it is wrong to characterise the issue as being unique to category (1) cases - it is equally present in categories (2) and (3). Granted, the extension of an apportionment power to category (1) cases would not eliminate inequalities of bargaining power, but neither would it disproportionately increase the problem to the extent feared by the Law Commission.

6. Conclusion

The development of concurrent liability has led courts to approach the 1945 Act in a way which respects its spirit without straining its language. This has resulted in the legislation having an asymmetrical and arbitrary effect in a minority of cases. The appropriate response is not to adopt a regressive interpretation that goes against the purpose and plain wording of the 1945 Act, but instead to enact new legislation which takes account of progressive developments made in the common law. As Jackson LJ stated in a lecture to the Technology & Construction Bar Association in 2014, the implementation of the Law Commission's recommendations in this area is now long overdue.⁸⁴ Indeed, he considered there to be a case for introducing a comparative fault defence across a wider spectrum of contractual claims; a sentiment with which the author, and more prominent commentators,⁸⁵ agree. Importantly, that statement was qualified by the reservation that any such changes should be enacted by Parliament, and not through further 'distortion' of the common law. While it is the development of the common law which has created the issue, it is beyond the power of the common law to fix it. The history of the defence of contributory negligence may be seen to illustrate the risks inherent in overlaying limited statutory reform on a still-developing common law. These difficulties are particularly acute in tort law where, as Professor (now Lord Justice) Beatson noted, 'obvious issues of broad social policy as to how to distribute risks and who should bear the costs of accidents can be at odds with the apparent demands of the logic of common law doctrine'.⁸⁶

⁸¹ Harder (n 50) 163.

⁸² Burrows (n 2) 143.

⁸³ Law Com 219 (n 8) para 3.5.

⁸⁴ Jackson LJ, 'Concurrent Liability: Where have things gone wrong?' (Technology & Construction Bar Association and the Society of Construction Law, London, 30 October 2014).

⁸⁵ Burrows (n 2) 143; Harder (n 50) 167.

⁸⁶ Jack Beatson, 'The role of statute in the development of common law doctrine' (2001) 117 LQR 242, 265.