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RELEVANCE OF RULES OF CONTRACT

IN

TORT SITUATIONS

THESIS FOR

B.C.L. OF

UNIVERSITY OF DURHAM

SUBMITTED BY F.C. DIKE

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P R E F A C E

The table of statutes of a modern text book on the law of torts or contract will contain a large number of statutes but it will be found that in this thesis there are few mentions of statutes and thus this exercise is devoted largely to the Common Law and is therefore concerned with what is generally known as case law.

The fascination with the Common law goes back to my student days at Birmingham University when one struggled to grasp the ratio of a case and to distinguish it from another. Such great masters as the late Professor J.U. Unger could stress the finer points of a case with so much ease that as one's perception developed the beauty of the Common law unfolded. One of the aspects of this beauty was the realisation of how the same result may be approached by different routes each competing for ascendancy. Such results may not cause much controversy as when by applying different reasoning divergent results are achieved on the same issue. Probably this is to me the greatest fascination of the Common law and which without being accused of bias has made it to me a great system of law that its reception in distant lands has been less difficult. A system of law that can produce many answers can satisfy different needs of different peoples or of different generations.

It is regretted that with the increased intrusion of Parliament into all branches of law subsequent generations may not have cause to get embroiled in the controversies generated by this branch of the law as legal history is becoming to a large extent the interest of few. Thus soon we may be saying 'Here lies the Common Law - Rest in Peace'. This thesis is therefore an attempt to identify some of the controversies before statute swallows them.

I have to express my gratitude to Professor F.E. Dourick of Durham University and Mr. R.L. Purvis of the Law Department of the Polytechnic of Newcastle-Upon-Tyne for their encouragement during the period when I was so awed by the prospect of trying to discuss a subject which many legal luminaries have high-lighted.

I am indebted to my Supervisor Professor M.J. Goodman for his sympathy and tolerance throughout the preparation of this thesis. Without his guidance and kind attention this thesis would never have been completed. To these persons and many others I cannot name here I am deeply grateful.

Finally the Common Law still is dynamic and is changing to meet new challenges. For example after the decision in *Hedley Byrne & Co. v. Heller & Partners* (1964) AC 465 the Misrepresentation Act 1967 came belated and was regarded in some quarters as a fifth wheel. Recently in *Sparham-Souter v Town Development* Lord Denning M.R. expressed the opinion that the common law principle enunciated in that case is preferable to the Defective Premises Act 1972.

Bearing these constant changes in mind it is therefore stated that this thesis has only considered the law as it existed in December 1976.

A B S T R A C T

The historical origins of tort and contract have left some technical rules which separate them and may make it advantageous for a plaintiff to sue in tort or in contract. For example the duty in contract is generally strict while that in tort is not generally so. A plaintiff who has alternative cause of action in tort and contract may thus sue in contract. But this advantage is not limited to the law of contract for generally the damages that are recoverable in tort are wider than in contract. Also under the limitation of actions it is submitted that given the same circumstances arising from breach of duty, time may begin to run or may expire in contract when it has not begun to run in tort.

This conflict between tort and contract raises the problem as to what law should be given primacy in a conflict situation. Three possible answers exist:

- (1) To give primacy to contract as creating the relationship;
- (2) To give primacy to tort on the basis that to exclude tort is to allow a wrongdoer benefit by committing two wrongs instead of one;
- (3) To give primacy to none and allow the plaintiff choose his cause of action.

Some systems have made a choice between these but at common law only the second answer has not been adopted. Thus a Plaintiff may in some cases bring his action in tort or in contract or in contract alone depending on the capacity in which the contractual relationship is entered into. This conflict has extended to Private International Law and it is interesting to observe that the Courts have gone off in all directions to find an answer.

The answers have been supported and criticised on principle or policy. No doubt the conflict will continue until the Common Law is regrettably swallowed up by Statute Law.

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1. Crown Proceedings Act 1947
2. Fatal Accidents Act 1846 - 1908
3. Finance Act 1960
4. Law Reform (Miscellaneous Provisions) Act 1934
5. Law Reform (Frustrated Contracts) Act 1943
6. Law Reform (Contributory Negligence) Act 1945
7. Limitation Act 1939
8. Limitation Act 1963
9. Supreme Court of Judicature (Consolidation) Act 1925.

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CHAPTER 1

For a long time after the conquest the royal courts were mainly concerned with maintaining law and order and defining the system of land tenure. The writ of trespass from which the law of tort and subsequently the law of contract were to develop was at its inception of criminal nature. The royal courts were not concerned with the private grievances of tort and contract. Tort was the first to evolve and little wonder for that, as it was more closely associated to criminal law than contract. But within the remedy provided by tort a sharp distinction was drawn between misfeasance and non-feasance. Where a defendant undertook to do something and did it badly a redress may be found within the context of tort. But if the defendant did nothing, this was non-feasance and the courts held that 'not doing was no tort'. The attempt to overcome this was long and fruitless until assumpsit was evolved and the answer was given not within the law of tort but within contract.

This result was to create some conceptual difficulties for while the classification into misfeasance and non-feasance may be simple in theory it proved difficult within the forms of action. Thus where the same facts manifest a cause of action in tort as well as in contract a plaintiff who sued in contract when the cause of action was classified in tort had his action struck off. The County Courts Acts did not help matters for they classified causes of actions as either "founded upon contract", or "founded upon tort". For example in PONTIFEX v M.R. CO.¹ the seller of goods directed the carrier not to deliver to an insolvent buyer. The carrier nevertheless delivered to the buyer. It was held that the action against the carrier was one in tort and not contract under the County Courts Act 1867. The carrier by not meeting the demand for

the return of the goods had terminated the contract of carriage and his retention of the goods from then on became tortious. But for this Act the natural thing would have been to treat the claim as one of breach of contract resulting also in tort.

Thus from its inception the law of contract vied with the law of tort as a cause of action in some given situations. Although the forms of action have long been abolished, the interplay between tort and contract is still much in evidence today. For example, there is no doubt that a relationship which springs out of privity of contract between the parties may give rise to an action in tort for negligence. The principle from such cases is that the contract creates the duty and the neglect to perform the duty or the non-feasance is a ground for an action in tort.² Of-course the plaintiff cannot recover damages in both tort and contract. The plaintiff may in the circumstances have alternative claims in tort and contract and in the case of doubt he may plead both causes of action. This has been the case with carriers³ and also with innkeepers⁴ who by "the custom of the realm" owe duties to the public. But the Courts have not been consistent in holding that the same circumstances may give rise to an action in tort or in contract and in some professional negligence situations the contract has been held to displace the tort liability. Thus such professional advisers as solicitors⁵ stock-brokers⁶ and architects⁷ are not liable otherwise than in contract. It has been justified on the basis that the plaintiff may not enrich himself by framing his action in tort where the damages are arguably generally wider than in contract. It may however be argued against this that why should a defendant benefit merely because he commits two wrongs instead of one. The only general proposition that emerges

From these cases seems to be that if the duty imposed is solely based on the plaintiff's consideration for the defendant's promise the action will be in contract and contract alone. This is typical of the constant friction that exists between the two laws.

There are however instances where the basis of liability is clearly cut and it has been long recognised that every breach of contract does not create an action in tort. This was so even before the abolition of the forms of action by the Common Law Procedure Act 1852. Thus in Courtenay v Earle⁸ it was held that counts alleging non-payment of money are counts in assumpsit and cannot be joined with counts in case. But where alternative causes of action exist there are advantages which may be derived by framing an action in tort or in contract.

For example, a predominant view is that damages are wider in tort than in contract. Also exemplary or vindictive damages are possible against a tortfeasor but in contract the general rule is the other way. The rationale had been that the aim of contract law is the protection of commercial interests while exemplary damages are an attempt to assuage injured feelings or dignity of the plaintiff. However recently the House of Lords in ROOKES v BARNARD⁹ has opened to the law of contract this type of damages, and exemplary damages may be granted where the defendant "with a cynical disregard to a plaintiff's rights has calculated that the money to be made out of his wrong doing will probably exceed damages at risk"¹⁰. Similar difference exists in the scale of costs to be awarded in the County Courts. This varies according to whether the action is in tort or in contract. Another difference lies in the service of writ out of jurisdiction. This will depend on the nature of the action. If the cause of action is in tort then under Rules of the Supreme Court Order II rule I(a), a writ

cannot be served out of jurisdiction.

This friction between the rules of contract and tort are not confined to contracting parties. In Winterbottom v Wright¹¹ it was held by the Court of Exchequer that a third party cannot maintain an action in contract against a contracting party for damage sustained from breach of contract between the defendant and the other contracting party. This decision was correct but it induced the erroneous belief with some quarters that because a contract exists between A and B; C cannot sue A in tort on the facts which disclose a breach of contract between A and B.

In Alton v M.R. & Co.¹² the plaintiff's servant was injured by a Railway Company as carriers of passenger for hire. This was breach of contract between the servant and the Railway Company to carry the servant safely. The plaintiff as master of the servant sued for loss of the servants services. The Court turned down the claim on the grounds of privity. Willes, J. who sat with three other judges confused two independent and quite compatible propositions when he acknowledged the rules that in

- (1) no stranger to a contract can in general sue on it; and
- (2) a master can sue for the loss of services from injury done to his servant.

The result of this decision was to submerge the second rule in the first.

Donoghue v Stevenson¹³ has gone a long way to remedy this inconsistency but to a large degree the anomaly still exists today.

More recently in Esso Petroleum Co. Ltd. v Mardon¹⁴ the Court of Appeal faced the issue whether a negligent pre-contractual statement founded an action in contract as well as in tort under Hedley Byrne v Heller.¹⁵ The facts of the case are that in 1961 the plaintiffs

Esso Petroleum Co. Ltd. wished to open a petrol filling station in Southport. They acquired a site in East-bank Street, Southport for this and entered into contract with the defendant to let the filling station to him. Esso Petroleum estimated and informed the defendant that the through put, that is the estimated annual consumption of the East bank Street site, in its third year of operation, would amount to 200,000 gallons. Esso had contemplated that when the station was developed it would be in full view of passing traffic. But when planning consent was granted it was for a development which screened the pumps from the road and this was bound to adversely affect the stations potential. Esso nevertheless, adhered to their original estimated annual consumption of 200,000 gallons. The result said the trial judge was a 'tragic story of wasted endeavour and financial disaster' to the defendant¹⁶. The defendant put capital into the station and incurred a bank overdraft but despite his hard work, the station only sold 78,000 gallons of petrol in the first 15 months. In July 1964 the defendant tendered notice to quit the tenancy but was persuaded to remain at a reduced rent by a tenancy agreement dated 1st September 1964. This did not help matters and in August 1966 the defendant was unable to pay Esso for petrol supplied. In December 1966 Esso issued a writ against the defendant claiming possession of the station, money due for petrol and mesne profits. The defendant continued trading at the station until March 1967 when he gave up possession. By his defence and counterclaim the defendant alleged inter alia that the representation as to the through put amounted to negligent misrepresentation and a breach of warranty. The trial judge rejected the claim for breach of warranty but held that Esso were liable for breach of their duty of care to the defendant. The defendant appealed and Esso cross-appealed.

The plaintiffs in their cross-appeal argued that Hedley Byrne's case cannot be used to impose liability for pre-contractual statements. They argued that the remedy in such situations (at any rate before 1967 Misrepresentation Act) was only in warranty or nothing. They relied particularly on *Clark v Kirby Smith*¹⁷ and on *Groom v Crocker*.¹⁸ There are other authorities to support this contention. Lord Reid in Hedley Byrne's¹⁹ case said: "where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty." In *Oleificio Zuckhi SPA v Northern Sales Ltd.*²⁰ McNair J. said: "... as at present advised, I consider the submission advanced by the buyers - that the ruling in Hedley Byrne applies as between contracting parties is without foundation."

The Court of Appeal unanimously rejected this argument. Lord Denning M.R. reiterated his earlier statement in *McInerney v Lloyds Bank Ltd.*²¹ where he said: "... if one person, by a negligent misstatement, induces another to enter into a contract - with himself or a third person - he may be liable in damages" The learned Lord went on to state that the cases cited by counsel for Esso were in conflict with other decisions of high authority which were not cited in them. He stated that the duty of a professional person existed in contract and in tort and cited the cases of *Brown v Boorman*²² and *Norton v Bard Ashburton*²³ in support. In the latter case Viscount Haldane L.C. held that a solicitor may be liable in tort as well as in contract. The duty in this situation was analogous to that owed by a master to his servant or vice versa.

Omrod L.J. felt the argument that the Hedley Byrne's²⁴ case had no application where the negotiations resulted in a contract attractive, but he nevertheless rejected it. He stated: "There is no magic in the phrase 'special relationship'; it means no more than a relationship

the nature of which is such that one party for a variety of possible reasons, will be regarded by the law as under a duty of care to the other²⁵ Hedley Byrne's case therefore applied to govern the relationship.

The tort or contract analysis is not confined to the situations above and it is therefore intended to inquire into other circumstances in which the rules of contract may be relevant in tort situations.

CHAPTER 2MASTER AND SERVANT

Today the master and servant relationship is normally founded upon contract. This however need not be the basis of the relationship in every case. For example, a child living at home may be a servant of the father by the fact of rendering services to the father.¹ Similarly a volunteer who gives his services to another has been held to be a servant.²

The relationship creates certain rights and duties between the parties.³ These obligations are normally classified into three groups. Strictly only two groups of obligations exist from the very fact of the relationship, the third group only applies where the parties have in a contract expressly or by necessary implications, agreed upon them.

Classified the obligations are:-

- (1) Those obligations imposed by the Common Law on both parties. These are known as the common duty of care.
- (2) Statute has also imposed certain obligations on both parties. These may derogate from or amplify the common law duty of care or the contractual duty. The duties are normally personal.⁴
- (3) Where the relationship arises ex contractu the parties may create certain obligations expressly or by necessary implication. These obligations may be relevant to the other obligations for they may derogate from or amplify them. The statutory duties are however generally couched in absolute terms and may limit the scope of contract obligations.

With respect to the statutory and contractual obligations the legal consequences are clear. Statute generally provides the penalty for breach of statutory duty. The rules determining the liability

is tortious. Thus in Davie v New Merton Board Mills,⁶ Lord Reid stated that the masters duty to provide safe plant should be regarded as part of the law of tort. Denning L.J. in a dissenting judgment⁷ took the same view. There is academic support for this view. Munkman on Employers Liability⁸ believes that this is the correct interpretation although he is prepared to accept the Court of Appeal's decision in Matthews v Kuwait Betchel⁹ which goes the other way. In support of his contention he argues that the employer owes a duty to persons who are not employed by him e.g. doctor who has come to rescue and also he relies on the provision of Section 2 of the Crown Proceedings Act, 1947. This includes under the heading "Liability of the Crown in Tort", "breach of those duties which a person owes to his servants or agents at common law by reason of being their employer". With due respect the arguments are not convincing. In the first case that I owe a duty to X in a given situation does not mean that given that same situation, I owe the same type of duty to Y. The relationships may not be the same and there is no reason why this should not make difference to the nature of the duty.

In the second place, Section 2 of the Act merely begs the question. It acknowledges that the duty can be tortious and on this there is no argument but the Act does not say whether this is exclusively the case. The dogma that the duty is always tortious may be attributable to the fact that in certain situations devoid of contract, a duty of care has existed and to adherents of this dogma it is difficult to see how the duty can be contractual. The contract does not create the relationship but in some case may be incidental to it. This contention however does not explain why an action may be brought in contract for the same breach of duty.

2. The duty is purely contractual

This view is not seriously held because of its self-contradiction. Once it is admitted that the relationship may exist independent of contract and that the common law imposes the duty of care by reason of the relationship alone it becomes difficult to maintain that where no contract exists the duty of care may nevertheless be contractual. The premise in no way compels the conclusion. There is no contract from which the duty may be implied.

It can however be argued that, certainly, the duty of care between master and servant is different from the duty of care owed to a third party e.g. a consumer. So far as the latter is concerned the duty must be tortious and generally one in negligence under Donoghue v Stevenson.¹⁰ Therefore the former which is different from the latter must be contractual. This is not convincing for two reasons:-

- (a) It has been shown above that the premise does not warrant such a conclusion.
- (b) At bottom the difference may be the content and not the nature of the duty. Thus the duty in tort for physical injury is generally that in negligence. Similarly the duty for nervous shock is in negligence but as the cases amply show the contents of the duties are not the same. This has not prompted any re-classification of their nature and there seems no reason why the same should not apply to master and servant duty of care.

3. The duty is in tort and in Contract:

It is submitted that this is the correct answer. Historically it is not certain how the duty came to be based in tort and in contract. It is however speculated that the origin of the duty must have been in tort. In fact, in view of the development of contract from tort this is self-evident. But, in time, situations arose where apart from the pure tort relationship between the master and the servant a contract

existed between them and a rigid separation of the common duty of care from the contract duties may have become unnecessary. Gradually the tort duty became assimilated with the contract. A useful vehicle for such assimilation was the doctrine of implied term in contract for once the common duty of care had become notorious it was assumed to have been implied in all contracts creating master and servant relationship. It was immaterial whether the duty was recited as founded in tort or in contract. What was material was that the plaintiff can sue in both. Thus in Brown v Boorman¹¹ the House of Lords held that wherever there is a contract and something to be done in the course of the employment which is the subject of that contract, and there is a breach of duty in the course of that employment, the plaintiff can sue in tort or in contract. This assimilation led to some confusion in thought. For example the defence of common employment which was based on the fact that a servant "must be supposed to have contracted on the terms that as between himself and his master, he would run [this] risk," of injury by fellow servant in common employment¹² was applied to a situation manifestly devoid of contractual intention.¹³ In effect the law of contract which had evolved from the law of tort was now controlling tort and still does so in many respects even today.

APPLICATION OF TORT OR CONTRACT RULES

In practice most claims by servants for breach of duty are framed in tort but there may be procedural or other advantages in framing the action in contract. For example in Matthews v Kuwait Betchel¹⁴ the plaintiff contracted with the defendants to work abroad for them. He was injured by falling into a trench when he avoided an object which swung towards him as a result of negligence of the employers. This negligence also constituted a breach of the contract of employment.

The issue before the court was whether the plaintiff can avoid the provisions of R.S.C. Ord. II rule 1 and serve his writ out of jurisdiction. He could do this if his writ disclosed a cause of action in contract but he could not do so if it disclosed a cause of action in tort alone. The plaintiff brought his action alleging breach of contract and served his writ out of jurisdiction. The defendants contended that the cause of action was in tort and the writ could not be served out of jurisdiction. The court of Appeal rejected this contention and held that the plaintiff could frame his action in contract or in tort. As he alleged a breach of contract the writ could be served out of jurisdiction.

VOLUNTEER, COMMON EMPLOYMENT AND VOLENTI

Under the doctrine of common employment a servant was deemed to have impliedly agreed in the contract of service not to sue the master for injury resulting from the act of fellow servants in common employment. What emerges from this is that the defence depended on the existence of a contract between the master and the injured servant.¹⁵ Volenti on the other hand does not require a contract to apply. Thus the defence of common employment had no application where the injured servant was not a contractual servant but a volunteer. This is because of the absence of a contract on which to imply the consent. Volenti which does not require a contract may on the other hand apply. But in *DeGgs v Midland Rail Co.*¹⁶ the defence was maintained against a volunteer and on this basis the validity of that decision can be questioned. How can a volunteer who is not a contracting party be regarded as having impliedly agreed in the contract of service to run the risk of injury by fellow servants? The defence should have been one of volenti non fit injuria. This distinction is supported by the decision in *Corry v Olsen.*¹⁷

There the defence of common employment failed on the grounds that the contract between the plaintiff infant and the defendant employers was void for not being wholly to the benefit of the infant. The fact that the court went on to consider the question of volenti not in the context of the contract but of knowledge and consent shows that it drew a line between the two defences and this line depended on the existence or otherwise of a contract. Thus where the duty was merely tortious as in Degg's Case common employment should be inapplicable because of the absence of contract. Conversely in situations where the contractual servant was injured by a volunteer the defence of common employment would be applicable. This is because of the existence of contract between the master and the servant from which the defence can be implied. This case is however of mere historical importance for the position has changed by the abolition of the defence of common employment by the Law Reform (Personal Injuries) Act 1948. This Act did not affect the defence of Volenti non fit injuria.

Suppose X enters into contract of service with Y and there is an exemption clause in the contract. The clause may fulfil a double role. If Y is damaged and brings his action in contract the exemption clause may be used as a defence. The issue here will be one of construction and such rules as the contra proferentem and doctrine of fundamental breach will apply. If Y sues in tort, again the exemption clause may be used as a defence of volenti non fit injuria and the issue will be the same as in contract and thus one of construction, although it is not certain whether the contra proferentem rule or doctrine of fundamental breach will apply. In *Birch v Thomas*¹⁸ the court considered the question of fundamental breach and it would appear from the judgment that had the contract been broken in a fundamental way the defence of volenti would not have applied. In effect the contract rule again.

supervenes the tort rule. In Hedley Byrne v Heller & Partners Ltd.¹⁹

Lord Reid and Lord Pearce were of the opinion that these developments in contract had no application to the Hedley Byrne principle.

Lord Pearce stated:

"I do not, therefore, accept that, even if the parties were already in contractual or other special relationship, the words would give no immunity to a negligent answer."²⁰

To their Lordship therefore, the rules of contract and tort should be kept separate and applied according to whether the action was brought in tort or in contract. The submission is that this is correct and as no conceivable difference exists between a disclaimer and volenti the consent can nevertheless apply to the tort even where it is rejected in contract. This would not be a new proposition for there are already situations where the same facts may disclose a cause of action exclusively in tort or in contract. Why should this principle not apply to the defence to such actions? Thus the distinction between tort and contract becomes critical. Such a situation will exist in an infant's contract of service which will be void if it imposes onerous terms on the infant.

In Olsen v Corry²¹ the plaintiff infant entered into a contract with his employers who are the defendants. The contract exempted the defendants from liability for negligence and also provided that the employers will to the best of their power teach him. As a result of a system which was found to be defective the plaintiff was injured when the plane was switched on without adequate warning. He brought an action and the employers sought to rely on the defence of common employment and volenti non fit injuria.

As already stated the judgment proceeded on two grounds:

- (1) The defence of common employment being contractual was inapplicable because the contract was void.

- (2) On the question of volenti the fact that the contract was void was not regarded as essential and the court rejected the defence purely on the grounds that the infant plaintiff being a mere pupil had no knowledge and appreciation of the risk of swinging the propeller in such circumstances. To the court therefore this question was one of consent and to be answered on the basis of the facts as known to the plaintiff and not on whether the contract was valid or not.

Support is lent to this contention from the judgment of Stephenson, J. in Buckpitt v Oates²² another case on volenti. He said:

"I cannot see any objection in law to drawing that conclusion in the case of an infant. It is a question of fact and not of law whether he has assented."

Thus the crucial issue in Corry v Olsen²³ was whether the infant's consent was to be inferred from the facts of the case. Where as in that case the risk was so conjectural it is difficult to see how the defence could have succeeded. The submission therefore is that the defence may still apply where it is given in a void contract unless it infringes a clearly defined rule of public policy as where the consent apart from being given in a void contract also related to the commission of a crime.²⁴

For example X allows Y to commit a criminal assault on him. On grounds of public policy in any criminal action Y cannot plead X's consent as a defence to the prosecution. But between X and Y there will exist some contradictions. If X sues Y should Y be allowed to raise the consent? Such a result would amount to allowing Y to get up his criminal act as defence to tort action. Or should X in spite of his consent be allowed to benefit from his criminal act? The answer has been found in a maxim which has its origin in contract and that is the maxim; *ex turpi causa non oritur actio*. X cannot plead his own disgraceful act as a cause of action. Today however the maxim has been extended to tort and is interchangeable with volenti non fit injuria.

To return to Birch v Thomas, in Kenyon, Son & Craven Ltd v Baxter, Hoare & Co. Ltd.,²⁵ it was held that where there is a fundamental breach an exemption clause is inapplicable and therefore necessarily volenti is inapplicable. Dicta in Birch v Thomas²⁶ supported this contention. It is respectfully submitted for the reason advanced above that this is not correct for the issue being one of consent and therefore question of fact, the construction given to the clause should apply to the tort even though its contractual application has been displaced by the breach. A discernible ratio from Hedley Byrne's²⁷ case is that the disclaimer negated liability. Even if that part of the judgement on special relationship is treated as obiter, it cannot be denied that the issue of the disclaimer was a fact on which the House of Lords reached their decision. It has already been stated from the judgment of Lord Pearce that the fact that a contract exists or not is not material to the operation of the disclaimer. It would be an argument of last resort to apply this to words and not acts.

If the argument stated appears to be a wide generalisation it is submitted that a contrary rule would lead to absurdity. For example, X enters into a contract with Y. An exemption clause limits liability of X for negligence. The contract is void. If the rule that the contract being void the clause is inapplicable is adopted, X cannot rely on the clause. If X without a contract includes the exemption clause in his relationship with C, there being no contract with X, X can rely on it. Such a conclusion does not make commonsense.

CONTRIBUTORY NEGLIGENCE

Before 1945 a plaintiff's action in tort was barred if he was contributorily responsible for the tort. The law was altered by the

Law Reform (Contributory Negligence) Act 1945 which provides that where the damage results partly from the plaintiff's "fault" and partly from the defendant's "fault" the plaintiff can nevertheless recover but the court in awarding damages will apportion it between the parties according to their degree of fault.

In contract the common law rule was that a plaintiff was generally not bound to guard against breach but against the consequences of known breach. So far as the latter is concerned this only relates to mitigation of damages and such allied questions as remoteness of damage.

The question here is, does the Act of 1945 apply to contract? For example if a servant is injured partly as a result of his own fault and partly as a result of the fault of the master or of a servant for whom the master is vicariously liable, to what extent would the Act of 1945 apply where the circumstances disclose a breach of contract and also of tort?²⁸ The answer to this question must necessarily be determined in the light of the recent decision in Lumsden & Co. v London Trustee Savings Bank.²⁹ It was stated in this case that for the 1945 Act to apply to any given situation it has to be shown that contributory negligence was a defence prior to 1945. It was never doubted that it applied to tort actions.

The answer to the question will be divided into two in accordance with the nature of the duties in a contract:

- (1) Strict Contractual Duty
- (2) Ordinary Duty of Care

1. STRICT CONTRACTUAL DUTY

In Quin v Burch, Paull, J. said:

"I cannot think that in contract it matters whether the breach is brought about deliberately or negligently or per incuriam." "You could have avoided the breach by acting carefully" is of no account in the law of contract."³⁰

This statement was restricted to strict contractual duties. Once the duty is determined the question to be asked is, has the defendant broken that duty? If the answer is yes, he is liable. Thus a repairer who repairs defectively will be liable although there has been no want of care.³¹ Similarly a seller who sells defective goods cannot escape liability by showing that he exercised care.³²

Admitting then that negligence of the defendant is irrelevant when determining breach of strict duty, does the same rule apply to where the damage in question is also contributed by the negligence of the plaintiff? Chitty on Contract says: "It still awaits authoritative determination by the courts."³³ It is submitted that so far as the authorities stand the conclusion to be drawn must be in the affirmative and it is that in strict contractual duty situation the Act of 1945 has no application. Negligence when taken into account in contract relates to causation and at the close of the day the verdict will be one of liable or not liable. In Quin v Burch it was stated that "in contract it has long been held that it is good defence to an action founded on a breach of contract that the party suing has chosen himself to act in a way in which a reasonable man would not act and so brought about the damage claimed. Such an act breaks the chain of causation leading to damage."³⁴

In this case it was implied in the contract to carry out certain building works that the defendants should supply any equipment necessary for the work within reasonable time. The defendants broke this by not supplying suitable ladder and the plaintiffs to get the work done used a trestle, which he knew was unsuitable unless footed by another person. The plaintiff was injured by using it without it being footed. He therefore contributed to his injury.

He brought his action in contract. Paull, J. held that the action must fail because of the plaintiff's contributory negligence. To the learned judge the issue was therefore one of causation. By "fault" in Section 4 of the 1945 Act is meant the purely tortious definition but this definition is wide enough to apply to situations of contractual duty of care. The plaintiff's action had broken the chain of causation. To quote again from the judgment of Paull, J. He said:

"In my judgment, in looking to see whether there was fault within the meaning of the Act of 1945, one cannot look at the manner in which a contract has been broken; only the terms of the contract and the consequences of a breach of any such term. In order to apply the Act of 1945, one has to find that there was some term which imported a duty not to be negligent and a breach of that term. There is no general duty to put or leave equipment on a site where men are working. The obligation can only arise under the terms of some contract."³⁵

In effect this was a breach of strict contractual duty and is distinguishable from a contractual duty of care which is same as "duty not be negligent." It is submitted therefore that the Act of 1945 has no application to strict contractual duty.

The case of Cork v Maclean³⁶ may at first sight appear to stand opposed to this submission. The plaintiff in this case brought an action in her capacity as administratrix of the deceased. Her claim was for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846-1908 for breach of statutory duty. The deceased, an epileptic, was employed by the defendants as a painter. This necessitated working at a height of about twenty feet above the ground. The deceased's doctor had warned him against taking such employment and he did not inform the employers of this and was found as of fact to be negligent. The defendants on the other hand had infringed the statutory regulations requiring the provision of adequate platform.

At first instance, Donovan J. held that as the defendants could not discharge the burden of proof i.e. show that the deceased would nevertheless have fallen despite adequate platform. They were therefore liable for all the damages. The question to him was therefore one of causation.

In the Court of Appeal he was reversed, the court holding that the Act of 1945 applied and the damages were to be apportioned. The accident was attributable to the deceased and to the defendants. Singleton C.J. referred to Section 4 of the 1945 Act and adopted the statement of Alderson B. in Blyth v Birmingham Waterworks Co. that:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."³⁷

This definition he held applied to the case and it is conceded is wide enough to cover the situation in Quin v Burch.³⁸ The inference therefore would be that where the duty is strict in contract if the "fault" of the plaintiff fits the above definition then the Act of 1945 applies. Such a conclusion will however be too wide. No decision however suggest is a proposition for a point of law that was not considered. It was not disputed in this case that the Act of 1945 did apply to actions for breach of statutory duty and the whole decision proceeded on this assumption. The court did not consider strict contractual duty and on the findings it is difficult to see how the decision below could have been affirmed.

A similar issue arose in Lavender v Diamints Ltd.³⁹ The facts are that the defendants owners of a factory employed the plaintiff window cleaner as an independent contractor. The roofing of the factory did not comply with statutory provisions under the Factories Act 1937. While the plaintiff was working he fell through the asbestos sheet which could not support his weight and he brought this action for damages.

At first instance Denning, J. held that his action must fail. No doubt the defendants were in breach of statutory regulation but the accident was attributable to the negligence of the defendant. Thus to the learned judge the question was one of causation and he saw no reason to apportion the damages merely because there was some breach by the defendants.

On appeal he was reversed the Court of Appeal taking a different view on the evidence. Turker C.J. could find "nothing in the evidence to support his view that the plaintiff's failure to provide the planking might have obviated the accident or the fact that he slipped constituted negligence on his part."⁴⁰

Singleton L.J. also did not agree that the evidence established "that it was the duty of window cleaners to take all planks necessary to make a roof safe."⁴¹ The issue therefore was still one of causation and supports the submission already advanced. It will however be conceded that later in his judgment Singleton L.J. stated that it "was for the defendants to show that the plaintiff was negligent in a way which caused, or which contributed to, the accident."⁴² This will imply that contributory negligence Act would have applied. But this is mere speculation. Paul J. above canvassed the same idea and answered that "such an act breaks the chain of causation leading to damage."

There is an eminent academic opinion which seems to oppose the conclusion advanced. Professor Glanville Williams on Joint Torts and Contributory Negligence gave the whole question a good consideration and concludes that the Act of 1945 should apply to breach of contractual duty. He argues:

"Even if the interpretation just advanced is thought to be too spun, it is submitted 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 Act even in its contract aspect. The Act is paramount. Hence the new tort rule ought to be regarded as a matter of policy as exclusive of the old contract rule, where both issues arise in the same case."⁴³

With due respect this argument is not convincing for the following reasons:-

1. The illustrations he gives are all cases where the duty in contract is one of duty of care and on this there is no argument that the Act applies.

2. The authorities are against the proposition. In Quin v Burch⁴⁴ the plaintiff's action being in contract failed on the grounds that the Act would not apply. Had the action been in tort the Act would have applied and damages apportioned. Also the judgment in Lumsden & Co. v London Trustee Saving Bank⁴⁵ is against his contention for as seen in that case it was stated that for the Act of 1945 to apply it must be shown that contributory negligence applied in similar situations before 1945.

3. His argument is hypothetical and is not intended to be a statement of existing law. He admits that before 1945 contributory negligence would not have applied and this admission reduces his case to a vanishing point. He however argues that as a matter of policy the Act should apply. Here is not a place to consider policy but suffice it to say that it is difficult to see what substantial change such a reversal of principle can bring. In Quin v Burch⁴⁶ an action in tort would have succeeded and the paucity of cases where this rule in contract has been critical to an action does not make a change so compelling. If a change need be, it ought to be left to Parliament.

2. THE CONTRACTUAL DUTY OF CARE

In the above discussion it has been admitted that the Act of 1945 applies where the contractual duty is one to take care. Here again the authorities are barren, but the judgment of Paul, J. in Quin v Burch⁴⁷ contains dictum in support. The cause of the action here will be, he said, "negligence ex contractu, a cause of action well known and which has many of the characteristics of an action in pure tort."⁴⁸ Treitel in *The Law of Contract* gave a flinching support to the dictum by stating, "it is certainly hard to see any good reason of policy why it should not apply."⁴⁹ To him however, such a conclusion will depend on the interpretation given to "fault" in Section 4 of the 1945 Act, and is, that it is not restricted to the purely tortious meaning. At issue then is the question whether the contractual duty of care is co-extensive with that in negligence? There is no reason to suggest that it is not. The dictum in Quin v Burch⁵⁰ supports this conclusion.

CHAPTER 3
THIRD PARTY RIGHTS

The issue to be considered in this chapter will be divided into two:-

(1) Whether a defendant can rely on the defence of *volenti non fit injuria* where a contract between the plaintiff and a third party anticipates the defendant's participation and an exemption clause in the contract expressly or by necessary implication gives the defendant some protection.

(2) Can a third party sue a contracting party where he is damaged as a result of breach of the contract by the defendant.

Both issues come under the question as to what extent is the rule in contract that a stranger to it cannot sue or be sued under it relevant to a tort action? At first sight the answer may appear simple but as will be seen it has not been answered satisfactorily on both sides of the fence and much unwarrantable attempts have been made to press the doctrine of privity of contract beyond its limits.

1. Where the defendant is stranger to the contract

The criterion for liability in negligence under Donoghue v Stevenson¹ is that the defendant can foresee the plaintiff as likely to be affected by the consequences of his conduct. This therefore creates the relationship. The corollary to this is that the plaintiff can also foresee the defendant as one likely to damage him. Thus a motorist foresees that some other motorist's negligence may injure him. The defendant may therefore be described as "foreseen defendant". The issue therefore is whether this

"foreseen defendant" can rely on an exemption clause which has been drafted in his favour. It is submitted that he should rely on the exemption clause and that it makes no difference whether there is a contract or not. The House of Lords decision in Elder Dempster v Patterson Zochonis² is relied upon for this submission.

VOLENTI NON FIT INJURIA

Generally a person who knows of a risk and consents to it cannot complain if the risk materialises. His action will be met by the defence of volenti non fit injuria³. To this principle there are exceptions:

(1) The defence does not apply where the complainant merely knows but does not consent to the risk. The defence is one of volenti and not scienti non fit injuria.⁴

(2) Where the duty of the defendant is a statutory duty public policy demands that he cannot exonerate himself by shifting the duty on the plaintiff or to another person. Otherwise the authority of Parliament will be undermined.⁵

It has been urged that the same rule should apply to where the consent is given in a contract which is void. It is submitted that there is no reason of policy or principle why this should be so.

Exemption clauses and volenti

Where a contract exists between A and B the same act may give rise to a cause of action in tort or in contract. As far back as 1844 the House of Lords acknowledged this principle in Brown v Boorman⁶ Lord Macmillan reiterated this in Donoghue v Stevenson⁷ when he said that, "the fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract,

does not exclude the co-existence of a right of action founded on negligence as between the same parties; independently of the contract, though arising out of the relationship in fact brought about by the contract."⁸

This however has not been the rule for all times for as Sir Frederick Pollock stated "it appears that there has been (though perhaps there is no longer) a certain tendency to hold that facts which constitute a contract cannot have any other legal effect."⁹ Today therefore the hypothetical situation above can offer two defences depending on whether the action is in tort or in contract. In contract as an exemption clause and in tort as defence of *volenti non fit injuria* and the contract between A and B is merely incidental and of evidential purposes only. The issue then is one of construction. However while the courts have maintained the freedom of parties to enter into contract on one hand they have been astute to check the abuse of exemption clauses by construing them narrowly.

In White v John Warrick & Co.¹⁰ the defendants hired a tricycle to the plaintiff. The contract provided that, "nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired." The machine was defective and as a result the plaintiff was thrown off and was injured. In his action the unanimous Court of Appeal held that in the absence of a clear and unambiguous assertion that the exempting clause should apply to tort damages it must be restricted to contractual liabilities. Denning L. J. stated that,

"if there are two possible heads of liability on the defendant, one for negligence and the other a strict liability, an exempting clause will be construed, so far as possible, as exempting the defendant only from his strict liability and not as relieving him from his liability for negligence."¹¹

This raises some difficulty for it implies that where duties exist in tort and contract something near to two exemption clauses will be drafted to cover the party seeking to escape liability. It is generally said that the duty in contract is always strict and negligence is only relevant when that duty is one under the common duty of care (*Frost v Aylesbury*). Thus to exclude liability generally will not be sufficient, for on the interpretation of Denning's decision, this will apply to strict liability. Conversely to mention negligence alone will not cover the contractual duty unless presumably the duty of care in contract.

Benefit to third parties, privity and consideration:

In *Dunlop v Selfridge*¹² Lord Haldane said that English law knows nothing of *jus quaesitum tertio* arising by way of contract and that for a person with whom no contract under seal has been made to be able to enforce it he must show that he has given consideration and is a party to the contract. These two requirements have been echoed by judges and academic writers without question but in recent years their validity has been questioned in two respects:

1. In the first place it has been objected that strictly the two requirements are not separate but just variations of one rule, that is, that for a person to sue under a contract he must give consideration. The word 'sue' is used advisedly in preference to the phrase 'take benefit' under a contract. English law idea of contract is based on bargain and thus requires reciprocal promises between the contracting parties. The exceptions to this requirement of mutuality are clear. It is submitted that those situations where a person merely seeks to take a benefit under a contract are not really applications of the rule and the requirement of consideration has no application here. Consideration only applies to situations where

a person seeks to sue on a contractual promise. Where the promise relates to tortious liability a different issue is in question and mutuality or consideration has no application.

2. The second criticism is that even on the hypothesis that both requirements are separate the requirement of privity of contract was never a part of English law and was introduced into English law by a misinterpretation of the case of Tweddle v Atkinson.¹³ F.E.

Dowrick points out:

"But looking to the various reports of Tweddle v Atkinson it is significant that, according to four versions of the judgments (Best & Smith, Jurist, Law Times, Weekly Reporter: aliter Law Journal) all the Judges, Wightman, Crompton and Blackburn J.J., based their judgements squarely on the principle that no action can be maintained on a promise by a stranger to the consideration and held that even a son is a stranger to consideration provided by his father. The court clearly relied on the old rule of Assumpsit that consideration must move from the plaintiff. Again it transpires that the principal obstacle to third party rights doctrine is not that the leading cases preclude the possibility of jus quaesitum tertio by way of contract, but that on the authorities even a tertius must provide consideration to acquire a contractual right."¹⁴

It is submitted that this is the correct interpretation of Tweddle v Atkinson¹⁵ and that support can be found in the old cases on this.

Thus the only obstacle to third party rights is the requirement of consideration and as already submitted this requirement only applies where a person seeks to sue he must show consideration but need not do so where he merely seeks to take a benefit under the contract.

VOLENTI AND THIRD PARTIES:

It has already been seen that an exemption clause may play two roles in an action between contracting parties and that in the

second role of defence to tort action the existence of contract between the parties is merely incidental. Thus volenti is not a contractual term requiring consideration. Volenti in this second role has more affinity to the doctrine of promissory estoppel than the contractual exemption clause from which it may be inferred. Thus Smith & Thomas Casebook on Contract¹⁶ states that the defence of quasi-estoppel, (which in essence is that in Hughes v Metropolitan Ry (1877) whereby one party, having intimated to the other that he will not insist upon his strict legal rights under a contract, he cannot thereafter bring an action against the other party for breach of contract, if that other has acted upon the intimation, would seem to be in essence an application in the law of contract the defence of volenti non fit injuria which is well established in the law of tort: having agreed not to insist upon his rights, the plaintiff cannot complain if they are not forthcoming. Both defences are very much similar.

1. Promissory estoppel does not require consideration and therefore a contract, for the promise to be binding. Promissory estoppel is a shield and not a sword. Volenti as seen above is similar.
2. Both defences apply to situations where a person freely consents to limit his strict legal rights.

Therefore in action in tort arising out of contractual relations it is possible for a party to the contract to plead volenti or promissory estoppel with equal success. The defence will be "you promised me that you will not insist on your strict legal rights, I acted on the strength of this promise. You were therefore volens. It would be inequitable for you to go back on the consent."

THIRD PARTY PARTICIPATION

Quite often a contract anticipates the participation of a third party. For example in a contract of carriage of goods (or persons) it is anticipated by owners and carriers that the servants of the

carriers may participate in the performance. The issue then is where the contract purports to exempt the servants from certain liabilities can they rely on it in view of the fact that they had offered no consideration. There is no doubt that by naming them they are parties to the contract although strangers to the consideration. The answer to this, it is submitted, will depend on nature and applicability of the defence of *volenti non fit injuria*. It has already been stated above that *volentia* is not the same as contract, and it is therefore submitted that the answer must be in the affirmative and it is that the servants can rely on the clause. The issue is one of consent to be inferred by the circumstances.

The House of Lord's decision in Elder Dempster v Paterson Zochonis¹⁷ is relied upon to support this contention. Under a Bill of Lading the plaintiffs shipped a quantity of palm oil in casks for carriage from West Africa to Hull. The usual method adopted for this was to have 'tween decks to relieve pressure from cargo on top. This was not done with the result that when extra cargo was received the pressure on the casks broke them causing a heavy loss of oil. The cargo owners sued the ship-owners in tort.

The argument proceeded on two grounds:-

1. Was the loss due to unseaworthiness or bad stowage?
The Bills of Lading exempted liability "for any damage (to the goods shipped) arising from other goods by bad stowage or contact with the goods shipped hereunder."
2. If damage resulted from bad stowage, were the owners of the ship protected by the exemption clause? They were not parties to the contract between the charterers and the owners of the goods.

Both at first instance and in the Court of Appeal (by majority decision) it was held that the damage resulted from unseaworthiness and therefore the defendants were liable. This was sufficient to dismiss the appeal.

Scrutton L.J. dissented and held that the damage was due to bad stowage. On this finding he proceeded to consider whether the ship-owners were entitled to the protection of the bills of lading. His lordship was of the view that the shipowners are to be regarded as being in possession of the goods as the agent of the charterer with whom the goods owner made a contract defining his liability. He stated that the real answer to the claim is that the shipowner was not in possession as a bailee, but as the agent of a person, that is the charterer, with whom the owner of the goods had made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer.

In the House of Lords Scrutton L.J. decision that damage resulted from bad stowage was affirmed. They also agreed that the ship-owners were entitled to the protection in the bills of lading. This part of the judgment was so compressed and as they did not arrive at this conclusion by the same reasoning the ratio of this decision has been difficult to ascertain.

Lord Cave and Lord Finlay (who dissented on the finding of the manner of damage) attached importance to the fact that the bills of lading exempted the "ship-owners" from liability for bad stowage. Under the terms of the bills of lading responsibility for bad stowage was on the master and officers of the ship and to hold that it did not exempt these would be tantamount to declaring it redundant. Lord Finlay pointed that the charterer specifically agreed that the ship-owner would not be liable for bad stowage and stressed the point that the negligence of the shipowner was committed in the course of rendering the very services provided for in the contractual document, namely, the bills of lading. Lord Sumner whilst being sympathetic to the theory that the ship-owners must be taken to be acting as agents

for contractual duties are also clear. Difficulty however exists with the common duty of care. The difficulty is whether the duty is to be regarded as exclusively tortious or contractual or is it possibly tortious and contractual? The answer to this question is very important for different rules apply to tort and contract. For example, if the duty is tortious then negligence will be the determining factor and such maxims as *res ipse loquitur* will apply. On the other hand where the duty is contractual the liability in contract being strict except in so far as a duty to take care exists, negligence will not be relevant. The determination of nature of the duty will also be crucial where the duty of the master is to maintain equipment. Despite the provisions of Employer's Liability (Defective Equipment) Act, 1969, the common law duty of care still applies where the breach complained of relates to the maintenance as opposed to supply of equipment. It has already been pointed out that the damages recoverable in tort are generally wider than in contract. The foreseeability test in tort still admits certain glosses of the directness test e.g. the egg-shell skull cases on personal injuries.⁵ It would also seem that if the duty is in tort vicarious liability will apply but this is not the case if it is contractual. This is implicit in the scope of liability for independent contractors. In contract an obvious advantage is the serving of writ out of jurisdiction under R.S.C. Ord. II rule 1.

NATURE OF DUTY OF CARE

Three possible answers exist as to the nature of the common duty of care:

1. The duty is in tort

It had been generally assumed that the employers duty of care

however preferred the view that they were not liable because they took the goods upon an implied bailment on the terms of the bills of lading.

Whatever interpretation that may be given to these judgments whatever the conflicts that may exist between them, certain points are clear. In the first place, this case was not decided as falling on one of the accepted exceptions to the rule of consideration. The proposition of agency does not fit into the general law of agency. Secondly, the concept of bailment relied upon by Lord Sumner is too wide for it covers any situation where a third person receives another's property without knowledge of the exemption clause. The fundamental issue decided by this case was whether the shipowners who were not party to the contract can take the benefit intended for them in the contract. The House of Lords answered this in the affirmative. This is the ratio of the case and on analysis is an application of the defence of *volenti non fit injuria*. The shipowners could not establish a contract but they could use the contract to show that the plaintiff consented to the risk which materialised.

Scrutton L.J. in a later case Mersey Shipping & Transport Co. Ltd. v Rea Ltd.¹⁸ gave a very wide interpretation of Elder Dempster's case, when he said that the reasoning of the House of Lords in the Elder Dempster case shows that where there is a contract which in effect means that once an exemption clause has been found to exist between the owner of goods and the carriers any person who acts on behalf of the carriers gets the protection of the exemption which contained in the contract; the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting. "I think that is the result of the second point in the judgments

of Lord Cave and Lord Summer with whom Lord Dunedin concurs in the Elder Dempster case."¹⁹ Thus if the master is immune the servant who performs the duty is immune and it would seem that this will be so even where the servant is a volunteer who acts without any knowledge of the contract between the owner of the goods and the carriers. This is vicarious immunity and it is submitted it is too wide for it has nothing to do with the consent of the plaintiff. The theory of vicarious immunity was rejected at first instance by Diplock J. in Midland Silicones Ltd. v Scrutton²⁰ and by the House of Lords on appeal.²¹ It has been suggested that it is possible that Scrutton L.J. did not contemplate such a wide application and in his enthusiasm may have omitted his proposition in complete language. It is arguable that his Lordships proposition is readily intelligible in the context in which it was offered and, at least in its simpler instances, is, as one might expect evidently correct. For example, if an owner of barrels agree that they should be unloaded by being rolled down an incline and the Stevedores applied such a method, the owner cannot sue for damages caused by applying the very method specified. Whether or not this is dangerous in the abstract or contrary to good stevedoring practice. If this is correct then whatever metaphysical construction, if any, is to be used to justify the conclusion - implied bailment upon terms, implied agency, transferred licence or other largely fictitious device on the level of plain sense it is both exact and sufficient to use Scrutton L.J.'s own words i.e. the stevedores "cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting." If this is to be regarded as amounting to vicarious immunity that is just too bad, and to such a sense there is at least vicarious immunity.²²

In Adler v Dickson²³ the issue was argued again but this time within the scope of personal injuries. The plaintiff was a passenger in a ship. The contract provided that "passengers are carried at passengers' entire risk and "the Company will not be responsible for and shall be exempt from all liability in respect of any ... injury whatsoever ... whether the same shall arise from or be occasioned by the negligence of the company's servants ... in the discharge of their duties."

The plaintiff was injured by the negligence of the servants and sued the Captain and boatswain. They pleaded in defence the exemption clause and relied upon Elder Dempsters²⁴ case. Both at first instance and in the Court of Appeal it was held that the contract did not expressly or by necessary implication deny the plaintiff of any right to sue the defendants. It is difficult to see how the decision can be otherwise for on the wordings of the exemption clause the shipowners were the only party exempt. The Court of Appeal went on to consider obiter whether the defendants could have relied on the exemption clause if it purported to exempt them. On this point the decision in Elder Dempster's²⁵ case became relevant.

It is obvious that some judgments in Elder Dempster's²⁶ case are inapplicable. Thus Lord Sumner's implied bailment theory is inapplicable to contract of carriage of persons and the very phrase "bailment of person" is so inelegant that this point is not worth pursuing any further.

Morris L.J. preferred the agency theory. Where the company contracts as agents for its servants, the servants can claim immunity under the contract for their personal torts. It has already been objected that this proposition does not fit with the general law of agency. Some reasons may now be given: In the first place, no

contract can be spelled out between the servants who are the "principals" and the plaintiffs and how can the company act as agents when manifestly no contractual relationship exists between the "principal" and the plaintiff. This would be because the "principal" would have given insufficient consideration.²⁷

In the second place, where the contract was made before the defendant is identified, for example, A and B enter into contract purporting to exempt X who is not identified at the time of the contract, it would be stretching the concept of agency beyond its limits to say that B is contracting as X's agent. More important is that you cannot have consent in vacuo and to this extent a consensus ad idem is required between the principal and the agent who must both be identifiable.

Jenkin L.J. was uncompromising. He said, that even if the clause had purported to exclude the liability of the Company's servants they could not have successfully pleaded the exclusion clause in the action against them for their tortious conduct. The reason is that the servants are not parties to the contract.²⁸ It is conceded that the exclusion clause did not purport to exempt the servants. Presumably by 'party to the contract' he meant persons giving consideration for it is difficult to be party without being privy to the contract. Consideration by the servants was therefore essential. Such a requirement is against principle and is alien to the law of tort under which after all the action was brought. It has already been argued that this is a question of privity and not consideration.

In Winterbottom v Wright²⁹ it was held that a third party cannot sue a party to a contract in contract for injury sustained as a result of breach of contract between the contracting parties.

This decision is correct but it introduced some misconception that because there is privity of contract between A and B, C cannot sue in tort against A if the fact discloses a breach of contract between A and B.³⁰ The argument amounts to this:

- (1) A has committed a tort on C
- (2) A has broken a contract with B
- (3) C cannot sue A.

This result confuses two distinct and consistent rules. There is no reason why the existence of a contract between A and B should determine the relationship between A and C. To do so is to impose a contract on C. Donoghue v Stevenson³¹ is in point.

To consider some hypothetical situations:-

1. C is an infant. B who is C's father contracts with A to repair C's car. A does it negligently that the brake fails and C is injured. On Donoghue v Stevenson³² C can recover.
2. The position is the same as above but C informs A to hurry the job and consents to run risk of a temporary repair and C is injured.

The relationship between C and A is the same as in one and the consent will apply to the tort action. The contract between A and B cannot benefit A and there is no reason why it should hinder C.

In Adlers case Jenkin L.J. canvassed the idea on how the master if he were so minded can exempt the servant. He said that:

"The answer is simple. He should have seen that the contract was so framed as to exempt his servant from liability as well as himself."³³

Certainly the only way to do so is by making the servant's party to the exempting clause without him giving any consideration. To require consideration will stretch the doctrine beyond its limits because there cannot be sufficient consideration.

Holmes has stated in "The Common Law", "in many cases a promisee may incur a detriment without thereby furnishing consideration. The detriment may be nothing but condition precedent to performance of the promise."³⁴ This is the rule with promissory estoppel and should apply to third party rights. Volenti is of the same application and should also apply. If the plaintiff in Adler v Dickson³⁵ had written to the defendants accepting to run the risk of injury, volenti would have applied. Why should it then make any difference that this consent is given in a contract with a third party except that the contract produces a better evidence. To deny this is to say that the more a person enshrines his consent in legal form the less he is bound by it.

Glanville Williams correctly states that there may be an effective consent to the risk of negligence without consideration required for contract. The determination of this is a question of fact to be inferred from the wordings of the clause.

In Hedley Byrne v Heller³⁶ the plaintiff's action failed because of the disclaimer. There is nothing to suggest that the outcome would have been different if the disclaimer was part of a contract. Similarly if the defendants had been a third party advising contracting parties e.g. a solicitor or architect the contract between the parties would not have made any difference to the third party liability or otherwise. In Adler's case Denning, L.J. was of the opinion that basically no distinction should be drawn between contracts of carriage of goods and those for carriage of person. If the exemption clause included the defendant he should take the benefit. In support he cited the case of Hall v N.E. Railway Co.³⁷ In this case a drover obtained a free ticket to take some sheep from Scotland to England. The ticket was issued by a Scottish company

the North British Co. This free ticket provided that the driver "travelled at his own risk". While on the line of the North Eastern Railway he was injured by the negligence of the servants of the English Company and brought an action against the Company.

Blackburn, J. held that the action must fail. The driver "must be taken to have assented that the ticket should protect the North Eastern Company just as much as the North British" The only possible explanation to this statement is that the plaintiff consented to the risk that may flow from the third party operation and this is consistent with the view advanced above. Adherents to the contrary view may argue that no contract existed between the plaintiff and the first Company i.e. Scottish Railway Company. Therefore the relationships between the plaintiff and both companies must be one in tort and that such a decision is inevitable and logical. The answer is that, even admitting that no contractual relationship existed the pertinent question is why should the existence of a contract with a third party make all the difference? To quote Stephenson, J. in Buckpitt v Dales "It is a question of fact and not of law whether he has assented."³⁷

The decision of the House of Lords in Scrutton v Midland Silicones may seem to oppose the conclusion reached.³⁸ In a contract between the plaintiffs and the shipowners s.4(5) of the United States Carriage of Goods by Sea Act, 1936 was incorporated. This limited the liability of the "carriers" for loss or damage to the goods, to 500 dollars. The bill provided that "carrier" included the ship..... her owner, operator and demise charterer, and also any person to the bill of lading and provided that the term "carrier" included the owner or charterer who entered into a contract of carriage with the shipper. The shipowners for some years employed the defendant

stevedores to discharge their vessels in the port of London. The contract between them provided that the defendants should have "such protection as is afforded by the terms of the bills of lading". The plaintiff did not know of this contract. The defendants damaged the plaintiff's goods, and they brought on action. The defendants sought to rely on the clause limiting liability to 500 dollars.

Two issues were involved in the judgment:

- (1) Were the defendants "carriers" under the bills of lading?
- (2) If the answer to the first is in the affirmative, were the defendants entitled to seek the protection of the limiting clause?

They unanimously answered the first question in the negative.

Their Lordships however considered the second question. Viscount Simmonds cited the "fundamental" principle stated by Viscount Haldane L.C. in Dunlop Pneumatic Tyre Co., Ltd. v Selfridge & Co. Ltd.³⁹ and concluded that this is settled law which only Parliament can change. He stated that the question whether there is to be extracted from Elder Dempster's⁴⁰ case a particular exception to the fundamental rule in favour of all persons including stevedores and presumably other independent contractors must clearly, be answered in the negative. His Lordship however agreed with the Elder Dempster case⁴⁰ "that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading". With due respect there is some self-contradiction here. To require the so-called "fundamental" principle where a third party seeks to take a benefit under a contract and to admit that the exemption clause

applies without contract between cargo owners and the ship owners is apt to confuse the issue. Lord Denning dissented from this judgment. He refused to accept the proposition that Elder Dempster's⁴⁰ case was an instance when Homer for once nodded and the House of Lords overlooked the "fundamental principle". This principle was a discovery of the nineteenth century which Lord Mansfield and Buller J. knew nothing of. It was sustained because in the 19th century an independent law of negligence was not evolved and accordingly where a duty of care arose by way of contract no one can sue or be sued if he is a stranger. He cited Winterbottom v Wright⁴¹ and Alton v Midland Railway Co.⁴² If the present case were brought then, he said, the plaintiff would be required to show a special relationship creating a duty of care. As none would exist the defendant would not be liable at all. If the plaintiff can show a relationship existing by other means e.g. defendant inviting him to defendant's premises then he may sue in tort. The "through transit" cases developed on this line of reasoning. Thus the defendant who escaped liability because no relationship existed between him and the plaintiff was now liable for some relationship which the court readily spelt out. But the courts still left the defendant with the power to exempt himself and the courts did nothing to this power. The result was that if goods were carried entirely at "owners risk" the third party may escape liability. This was not by way of contract as none conceivably existed between the third party and the plaintiff.

He concluded that the means of escaping liability "is that the second carrier falls within Scrutton L.J.'s proposition, being an "agent", that is, a subcontractor employed to carry out the contract of first carrier, and so entitled to the benefit of the conditions." As submitted above this theory of vicarious immunity is too wide and too much reliance on it may have to an extent contributed to the failure of defendants in subsequent cases.

It is submitted that his second line of reasoning is more consistent with the contention advocated. He said "even though negligence is an independent tort, nevertheless it is an accepted principle of the law of tort that no man can complain of injury if he has voluntarily consented to take the risk of it on himself. The consent need not be embodied in contract. Nor does it need consideration to support it."⁴³

It is regrettably admitted that for the time being the scale is heavily tilted against the defendant. This is difficult to justify on principle. Policy considerations are also difficult to justify. For example it is said that as between an innocent party and a careless one, the party at fault should bear the loss. This is persuasive principle by its force, but only so if the defendant can bear the burden. It is observed that the law of tort is assuming a different role. Compensation of a victim is becoming more prominent with the effect that principle is becoming secondary to policy. Thus more and more, the rule is becoming, who can best bear the loss or who can distribute the loss more evenly? This trend however does not compel the

answer that the courts have provided. The obvious reason being that normally the plaintiff is better equipped to take out the necessary insurance. He has the knowledge of the risk in case of goods.

The Law Reform (Contributory Negligence) Act 1945 has also contributed to the reluctance of the courts to infer consent. A court will more likely apportion the loss than put a total ban on recovery. Thus in the American case of Texas Tunneling v City of Chattanooga⁴⁴ the defendants were consultant engineers under a contract with the City of Chattanooga. The defendants as part of the performance of their contract produced a geological report which was distributed to prospective bidders for the construction of a sewage system. This report omitted pertinent geological information. The plaintiff, a tunneling subcontractor, had no dealings with the defendants but did rely on their report in making his bid. It took plaintiff three weeks longer to complete the work than had been anticipated and he sued the defendant for the loss suffered. The defendant sought to escape liability by pleading the disclaimer which provided that, "this information is furnished for the convenience of bidders and is not a part of contract. This information is not guaranteed and any bids submitted must be based on the bidders own investigation and determination." It was shown that it was customary to rely on such survey and Wilson, J. held that: "the disclaimer would ... not operate to eliminate a duty of due care as between the defendants and the plaintiff, but rather would go to the issue as to whether the plaintiff himself exercised due care in relying upon the drawing and the disclaimer will be considered further with regard to the issue of contributory negligence."⁴⁵

In Snelling v Snelling Ltd.⁴⁶ the plaintiff and his two brothers the second defendants were co-directors of John Snelling Ltd., the

first defendants. The company was in difficulties and efforts were made to raise a loan. At this time dissension developed between the plaintiff and the two brothers. To raise the money they covenanted with the mortgagees of the company that so long as any part of the loan advanced to the company was unpaid they would not reduce their respective loans to the company below the amount shown in the accounts of the company on March 31, 1966. The plaintiff's loan to the company at that date was £6,443. In another agreement the brothers agreed between themselves that "in the event of any director voluntarily resigning or without reasonable cause neglecting his duty he would immediately forfeit all moneys due to him from any of the companies by way of loan account "or similar."

It was also provided that on such an event the remaining directors might use the moneys "in furtherance of the intention ... but not in such a way as to benefit themselves personally."

The plaintiff subsequently resigned and sued the company claiming payment of £16,268 as due to him at the date of his resignation. To quote the trial judge, "the resulting situation is at once simple and complex. To the layman the position is that the plaintiff having agreed to forfeit his loan account i.e. to forego the debt due to him by the company, if he resigned ... is now suing the company to obtain payment of the debt which he had agreed to forego." To the lawyer, however the difficulties are formidable for if the agreement between the brothers is capable of enforcement at law can the company "for whose benefit it was made rely upon it." The plaintiff claimed that the company cannot rely upon the agreement and cited Midland Silicones v Scrutton Ltd.⁴⁷ in support. The defendants argued in reply that some of the broad statements of principle in that case went too far and relied upon the later case of Beswick v Beswick⁴⁸ Omrod, J. distinguished the two

cases stating that the critical difference between them is the status of the person seeking to enforce the promise. Thus is he a promisee in a contract or is he a beneficiary? In Beswick v Beswick⁴⁸ where the action succeeded the plaintiff was acting as a promisee and the fact that she was the beneficiary was merely incidental. In Midland Silicones case⁴⁹ the party seeking to enforce the promise was merely doing so as a beneficiary. In effect a contract is essential. Nevertheless his Lordship was of the opinion that the action against the company must fail.

1. To give judgment for the plaintiff against the defendant company for the amount claimed in the statement of claim and judgment for the second and third defendants (i.e. the parties to the contract) on the counterclaim would be absurd. Such a solution though effective would however acknowledge a rule against third party rights and would favour the wide interpretation given to Midland Silicones case⁴⁹

2. To enter a speculation, if the contract had been stated in positive terms on the authority of Beswick's case⁵⁰ specific performance would have been ordered. This still leaves a further speculation and that is, at whose instance would it be ordered? If it is at the instance of the promisee no distinction may be made between this case and Beswick's case⁵⁰ and the broad interpretation of Midland Silicones case⁵¹ applies.

If on the other hand it is at the instance of the beneficiary the requirement of existence of a contract for third party reliance is not essential. The only requirement presumably is that there is an enforceable promise against the promisor. Privity and not consideration will be the requirement.

3. A third solution was the inherent jurisdiction of the court to protect its process from abuse. Had the second and third defendants taken action to prevent the anticipated breach they would have been

entitled to an injunction restraining the plaintiff from demanding payment by the company of his loan account. "Had he subsequently started an action against the company it would presumably have been as an abuse of the process of the court." By combining the first and third situations the court held against the plaintiff.

One point emerges then and it is that to a certain extent at least where there is an enforceable promise between the promisor and the promisee the promisor cannot break the promise by suing a beneficiary named in the promise. This will be the case where all the parties are in the court as in the present case or the promisee is willing to enforce the promise. On this analysis Midland Silicones case⁵¹ was therefore correctly decided. In that case it will be recalled the promise was not given by the plaintiff. Infact he knew nothing of the promise. It is therefore difficult to see any binding promise. It is therefore submitted that trust and agency are not the only means whereby a third party can rely on promise. A third party can rely on a promise where the promisee is willing to enforce the promise. A difficulty however arises where the promisee is unwilling to enforce the promise. It is submitted that this should not make any difference and that the important requirement should be whether the promise is enforceable against the promisor.^A There seems no reason why a promise should be made binding or not binding depending on the presence in court or otherwise of the promisee. It is further submitted that where the promise is given in a contract, it should make no difference except that the contract is the best evidence of the promise. In West Yorkshire Darracq Agency Ltd. v Collieridge⁵² all the directors of a company in liquidation agreed to forego their claims to outstanding directors fees. The liquidator was a party to the oral agreement. Horridge, J. held that the company can rely upon the agreement in an action by one of the directors for his fees.

His reasoning was that the company through the liquidator was a party to the agreement although it had given no consideration to the plaintiff. There is nothing esoteric between this reliance on the consent of the promisor and the defence of volenti non fit injuria. The definition and classification of such fundamental terms as right and duty depend upon results reached and not upon the formalities of procedure used in asserting them. The problem is whether a third party can take a benefit. Whenever he succeeds in doing so his right is recognised and enforced. In Snelling v Snelling⁵² the common law recognised such right.

The Privy Council has faced this problem in the New Zealand case of N.Z. Shipping Co. v Sattenthwaite Ltd.⁵³ and while the result is welcome it is regretted that the court adopted a circuitous reasoning to arrive at the majority decision. The facts of the case are:-

An expensive drilling machine was transported from Liverpool to Wellington. The bill of lading was issued by the carrier and clause 1 on which the case turns provided inter alia that:

"It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss or damage or delay of whatsoever kind."

It further provided that:

"... the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants."

The question before the court was whether the stevedores can take the benefit of the limiting clause. Lord Wilberforce who delivered the majority decision referred to Midland Silicones case⁵⁴ as the starting point in the discussion of this question. That case cannot be questioned in so far it affirms the proposition that

a third party cannot sue on a contract between two parties. This proposition however did not affect the situation where one of the parties was contracting as agent for the third party. Lord Reid's judgment in Midland Silicones case⁵⁴ would be relevant in such situation. The learned Lord had spelt out in four propositions, the prerequisites of the validity of such agency contract:-

1. The bill of lading makes it clear that the stevedore is intended to be protected by the limiting clause.
2. The bill makes it clear that the carrier while contracting on his own behalf is also contracting as agent for the stevedore.
3. That the carrier has authority by the stevedore to contract for him or the stevedore ratified the contract.
4. That any difficulties of consideration is overcome.

In the present case there is no doubt that the first three requirements were fulfilled. The difficulty was whether there was consideration moving from the stevedore to the consignee. The majority decision evoked the idea of commercial reality of the transaction and held that there was consideration and therefore the stevedore could take the benefit of the limiting clause.

It is regretted that the majority had to resort to the fourth proposition in order to arrive at their decision. The result is that there must exist a contract before the stevedores can rely on the limiting clause. Their Lordship did not consider whether Lord Reid's first, three propositions were sufficient for a consent in tort and preferred "to express no opinion upon this argument: to evaluate it requires elaborate discussion." This is regretted for it must be confessed that their Lordship in their enthusiasm for the fourth proposition may have stretched the doctrine of consideration to a breaking point. To their lordships "the bill of lading brought

into existence a bargain initially unilateral but capable of becoming mutual between the shipper and the appellant, made through the carrier as agent the performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading".

It is submitted that this approach creates much conceptual difficulty between executory and executed type of consideration contracts. Its result is that the same terms may give rise to executory or executed consideration depending on the party. There is no doubt that the contract between the carrier and the consignee is executory and therefore bilateral. It is difficult to accept that the same terms have given rise to a unilateral offer to the stevedores. This product is literal and not substantive and as Lord Simon of Glaisdale stated in his dissenting judgement "would seem to provide a revolutionary short cut to a jus quaesitum tertio." The general formulation of unilateral offers is that performance should be in response to an offer but the analysis adopted in this case is that of a promise in return for an act. Although this may appear to be the same principle it is submitted that the later analysis is more of bilateral contracts than unilateral. These apart the majority glossed the issue of sufficiency of consideration and approved Scotson v Pegg⁵⁵ as good law without further discussion on it.

Viscount Dilhorne in his dissenting judgment depreciated the attempt to give the Elder Dempster case⁵⁶ a wider interpretation than it was supposed to have and approved Fullagar J. judgement in Wilson v Darling Island Stevedoring & Lighterage Co. Ltd.⁵⁷

With respect Fullager J. confused two issues in that judgement:-

- (1) the question of consent;
- (ii) the contra proferentem rule.

He had assumed erroneously that the application of the contra proferentem rule was such that it can be equated to the rule of law that the promisee must show consideration. This in effect made the rule a rule of law and not one of construction based on public policy.

Thus Fullager J. referred to Peek v North Staffordshire Ry Co.⁵⁸ and said that the court held "that a condition relieving a carrier from all liability for the neglect or default of his servants was neither just nor reasonable within the meaning of a statute."

Such consideration is based on policy and it should be borne in mind that the same policy allows fully grown adults to make what arrangements they would to govern their relationship. Thus the contra proferentem rule cannot be used to re-write a contract between parties. It is therefore submitted that Fullager J. judgement does not affect the proposition that a third party may plead a limiting clause by way of volenti non fit injuria in a tort action.

Section 41 of the Supreme Court of Judicature (Consolidation) Act, 1925

Most judges will no doubt continue to follow the old fashioned principle and require consideration in all instances. Few on the other hand will from time to time appeal to the older principle and seek to abolish this requirement of contract. Probably, hopefully, some middle ground will be found. Such inquiry ensued in the case of Gore v Van der Lann⁵⁹ where the above section

was discussed. The section forbade the old practice of restraint of action by prohibition and injunction, subject to the proviso that any interested person may by summary motion apply to the High Court for stay of proceedings in an action. Section 103 of the County Courts Act, 1959 extends this provision to the County Courts.

In the earlier case of Cosgrove v Horsfall⁶⁰ an employee was issued a pass to travel on the employers omnibus. The pass was subject to the condition that neither the employers nor their servants will be liable to the holder of the pass for, inter alia, personal injury, however caused. The plaintiff was injured by the negligence of another servant who was driving the omnibus. The plaintiff sued the servant.

The Court of Appeal held that the action must succeed. The defendant was not a party to the licence or contract and had no right under them. Du Parcq L.J. in his judgement stated: "I will express no opinion on the question which counsel for the defendant told us he had considered, whether the board could have applied successfully to stay the present action under S. 41 of the Supreme Court of Judicature (Consolidation) Act, 1925. We are not now concerned with the rights of the board, but it must not be assumed that if the plaintiff caused them to suffer loss by breach of the condition, they were without remedy and are now necessarily without redress. I doubt, however, whether the board are in any way affected by what the plaintiff has chosen to do."⁶¹

In Gore v Van der Lann⁶² this remark was taken up by the Liverpool Corporation intervening in an action against their employee. The plaintiff Mrs. Margaret Gore applied and was issued a free pass by the Liverpool Corporation. The application form contained as follows:

"In consideration of my being granted a free pass for use on the buses of Liverpool Corporation, I undertake and agree that the use of such pass by me shall be subject to the conditions overleaf, which have been read to or by me prior to signing." The conditions overleaf provided that neither the Corporation nor any of its servants shall be liable to the holder for inter alia, loss of life, injury however caused. The pass included a similar provision.

While the plaintiff was boarding the Corporation bus, it moved, causing her to fall and being dragged along the ground. She no doubt sustained injury and sued the bus Conductor alleging negligence by him in ringing the bell and causing the bus to move while she was in the act of boarding. The defendant denied negligence and relied in the alternative on the conditions subject to which the plaintiff had received her free pass. The Corporation now intervened and applied for a stay of proceeding under S. 41. This was refused by the Registrar at Liverpool County Court and their appeal against the refusal was dismissed by his Honour Judge Stansfield. The Corporation appealed to the Court of Appeal.

The Court of Appeal was unanimous in holding that the appeal must fail. Harman, L.J. was of the opinion that the Corporation had no interest which entitled them to relief under Section 41. They were not obliged to pay the damages awarded to the plaintiff and therefore no fraud was committed by the plaintiff's action.

Salmon, L.J. was of the same view. Had there been a contract with the plaintiff the Corporation could have stayed the proceedings. This is mere speculation for the contract would have been void.⁶³ The fact however remains that at least to them wherever the promise between the plaintiff and the promisee is binding it is capable of conferring a benefit on third party. In the present case it would have done so by means of Section 41.

Wilmer L.J. held that on the true construction of the document the plaintiff had not undertaken not to sue the employee. Thus all the judges in the Court of Appeal were of the view that the plaintiff's action would have failed if there was a binding agreement.

In the earlier case of Genys v Mathew⁶⁴ the presiding Judge in Liverpool Court of Passage adopted the Court of Appeal decision in Wilkie v L.P.T.B.⁶⁵ and held that the pass did not create a contract but a mere licence. It was held that although the Corporation was protected by the licence, the defendant was not a party to it and therefore could not take any benefit under it. There is no authority as to whether a stranger to a licence can enforce any of the terms of the licence or whether a stay can be granted in an action arising out of a licence.⁶⁶

With due respect this decision is unfortunate. It has been shown *supra* that the relationship must necessarily be tortious. It is difficult to see how consent given in a situation entirely dependent on tort can be made to depend on the rules of contract. It cannot be argued against this contention by stating that the relationship between the licensor and the licensee is a personal and therefore cannot admit a third party. In reply it may be said that the fact still remains that the relationship between the third party and the promisor can always be in tort and nothing else. The promisor's action must be one in tort. To take an example from the French system, an action that can be framed in tort or in contract must be framed in contract. Where the cause of action does not evidence contract then the action must of course be in tort alone. If such a rule applied to licences the

CHAPTER 4DAMAGERS

Damages may be defined as the monetary compensation given for loss or harm which the law recognises. This definition implies on an essential point which in many respects is overlooked. It is that the award of damages implies the existence of liability for a wrong which the law recognises. Therefore if in tort the plaintiff can recover for a head of damages but cannot do so in contract then the inference is that the liability in tort is wider than in contract in that respect.

Damages in Tort and Contract

The general concern of the law of tort is to give redress to the plaintiff for damage caused by the defendant not leaving him alone. Although the compensation is calculated in monetary terms the law of tort is generally disinclined to compensate for mere economic loss.¹ Tort is concerned with actual physical damage either to person or to property. Trespass, nuisance or the rule in Rylands v Fletcher² confirm this rule. Even within the tort of negligence the concept of foresight is demonstrably limited to protecting actual physical damage than mere economic loss. The reason is generally one of policy.

The law of contract on the other hand is concerned with monetary loss. Actions for physical damage are rare and damages are seldom given for injury to reputation even where the loss is pecuniary and where they have been allowed for example, the wrongful dismissal of an actor³ failure to advertise properly for the plaintiff's business,⁴ the loss has been one that was particularly contemplated by the contract. This 'contemplation' has a self-evident implication when compared with foresight in tort for it shows that the rule that

the defendant must take the plaintiff as he finds him has more relevance to tort than to contract and this involves a wider liability in tort than contract.

It may now be asked to what extent if any do damages differ in tort and contract in any given set of facts? Generally there is no limiting factor peculiar to either law on assessing compensatory damages. The rules relating to mitigation, certainty of proof and to what extent past and prospective damages are recoverable evidence no difference. Thus the Court of Appeal in Easo Petroleum Co Ltd. v. Mardon⁵ did not draw any distinction between the damages recoverable by the defendant in tort or in contract. Lord Denning M.R. said, "... the damages in either case are to be measured by the loss he suffered." Despite this judicial opinions have differed and some have stated that damages are wider in tort and some that they are wider in contract.⁶

It is submitted that the clearest distinction lies in those situations where compensation is not the basis of damages as in Easo Petroleum's case⁷. Thus liquidated damages being based on agreement applies to contract and not to tort. On the other hand, exemplary damages are confined to tort but it is suggested that Rooges v Barnard⁸ has opened this type of damage to the law of contract. Also nominal damages has its application to tort and not to contract.

Apart from these the general rule for assessing damages is wide enough to cover tort and contract equally. This is that the plaintiff should be put in same position, as far as money can do it, as he would have been but for the defendants breach of duty whether or not the duty is tortious or contractual. But the origin of the respective duties is distinct. Contract is based on agreement and a claim in contract is therefore a claim for failure to perform the agreement. The consensual nature therefore means that liability is

limited to the contemplation of the parties and the rule that you take the plaintiff as you find him is out. The rule in contract is you take the plaintiff as you know him and the evidence is the consideration as promised by the defendant. In this way it is arguable whether strictly remoteness of damage has any relevance in contract. If the basis of damages is the failure to perform the consideration promised and this in turn is based on agreement then the scope of the damages is the agreement which in turn centres on the consideration. No party to a contract can sue on a promise that is not a term of the contract and this is implicit on the rule relating to past consideration. The determining factor is therefore the agreement as evidenced by the consideration.

In tort on the other hand no such agreement exists and the duty is created by law. The plaintiff's complaint is that the defendant has not left him alone and his compensation is therefore the disturbance caused by the defendant. The repercussions may be limited to some extent by applying the foreseeability test nevertheless this limiting factor is not as restrictive as in the contract rule which is based on agreement. Quite often the defendant does not know the plaintiff before the event. This tort rule therefore evidences a wider scope of liability than contract.

These divergent roles between tort and contract apply separately in a large number of cases. In some however they become concurrent and the question is what rule or rules should apply. For example apart from contract a professional person may be liable in tort. Because of the difference in damages can a plaintiff impose a greater liability on the professional person? Conversely should the professional person escape the wider liability merely because he has committed two wrongs instead of one?

Three possible answers exist:

1. The rule of contract should supervene. The French system adopts this and under it where separate actions exist the plaintiff must sue in contract. English law adopts this to some extent. For example in conversion flowing from breach of contract the damages are calculated on the basis of the loss suffered by the breach of contract.^{8a} There is however a line of authorities which maintain that as the basis of damages in conversion is to restore to the owner the value of the goods converted the damages must be calculated on the value even though the owner's actual loss may have been less. Again where contract exists between a plaintiff and solicitor then the cause of action must be in contract even though it may sound in tort.^{8b}
2. The liability exists in tort only. This answer has no following. One argument against it is its contradiction. Thus because the contract creates the relationship it is wrong to adopt the tort to its exclusion.
3. The liability exists in tort and in contract. This rule applies in English law especially with professional negligence and sale of goods.

Relevance of Contract to Tort Liability

It has been shown above that tort is mainly concerned with physical damage than economic loss. One of the earliest cases to lay the principle on economic loss is Cattle v Stockton.⁹ The plaintiffs in the case failed to recover economic loss suffered when the defendant flooded the site of a tunnel they were under contract to construct. But where the economic loss is immediately consequential upon physical damage the economic loss is recoverable.¹⁰ It has been urged but denied that in this way economic loss is parasitic.¹¹ This non-recovery for economic loss is however confined to pure tort situation. The existence of a contract can transform the pure economic loss into a recoverable head of damage in tort.

1. Hire Purchase

The effect of a hire purchase is to create a bailment between the parties. The result of this is to confer the right of bailor or bailee to sue for the damage to the goods. Therefore if A hires a car to B for £1000 B has paid a deposit of £500. The respective interest of A and B in the car is £500. If in the circumstances the car is damaged as a result of the negligence of C, A or B can sue and recover from C the whole amount of the car even though as far as A or B is concerned their interest is half the amount recovered and the rest is pure economic loss of the other.

Another variation which does not depend on hire purchase and bailment is where a contract determines who is to bear the loss in the event of damage to the subject-matter of the contract. If A hires a ship to B and C damages the ship and it is laid idle the extent of recovery will depend on the charter party. In the *Mergus*¹² an addendum to a charter party provided that:

"notwithstanding anything to the contrary contained in this charter party, in the event of loss of time arising from collision, neither hire ... as would otherwise be payable by the charterer under this charter party shall be payable by the charterer to the extent to which the owner would have a right to recover."

The defendants negligently damaged the ship and the charterers paid up in full but were later reimbursed by the owners of the vessel who now sued the defendants claiming the re-imbusement. The defendants in denying liability for the re-imbusement argued that the loss fell on the charterers when they paid up. They contended that the loss on the charterers was pure economic loss and was irrecoverable. Thus if the charterers had sued for the loss they would have been met with the argument that their loss was pure economic loss and therefore irrecoverable. The plaintiffs would have suffered no loss in the circumstances and were therefore wrong in reimbursing the charterers the loss suffered by them.

The defendants argument was rejected on the ground that the charter party had shifted the loss from the charterers to the plaintiff owners. Because they had suffered the physical damage they could recover the economic loss. Had the charter party not so provided the defendants argument would have succeeded.

Frustrated Contracts

Negligence by a third party can interfere with the contractual relationship between A and B with the result that the contract is frustrated. The damages recoverable by the parties may depend on the precise terms of the contract.

For example, if A employs B to perform at a concert. A expends money to make the necessary arrangement. B is injured by the negligence of C. The loss lies where it falls and B cannot sue for the money expended for he has suffered no financial damage. A cannot recover because he has suffered mere economic loss. But if the contract between A and B provides that B should indemnify A to the extent of his loss if B is unable to appear then A's loss is recoverable in an action by A. Thus the contract has latched-on the financial damage to the physical damage to B and these will be recoverable in tort.

The Law Reform (Frustrated Contracts) Act 1943:

Suppose A hires a hall for a concert from B and A pays B £100 as deposit. If B having incurred expenses to adapt the hall which is then burnt down by the negligence of C. The result is that the contract is frustrated and A can apply to recover the £100 advanced to B. B may also ask the court to exercise discretion and allow him to set off against £100 part or all his expenses. The court can refuse this if it is convinced that there is a good chance of B recovering all his expenses from C. In this way the financial loss is thrown on the negligent party despite the frustration. This

principle however has limited application for it operates only where the 1943 Act applies and has no relevance to the hypothetical situation advanced before i.e. of the performer.

This result can be arbitrary and it is suggested that the test for recovery for economic loss should be the occurrence of physical damage. The difficulty with this is where to draw the line for liability.

Another illustration of the principle is British Transport Commission v Gourley.¹³ If A is injured by X and suffers loss of earning with the result that he pays no tax the inland revenue has suffered pure economic loss and cannot recover because of this (and the loss is very indirect). If A is bound to pay tax on the amount he recovers as is the case for damages over £5,000 under ss. 37-38 Finance Act 1960 then the loss is A's and he can recover in full. The result is that the financial loss does not vary with the amount but the defendant X's liability varies with the amount. The principle applies equally to contract of employment. Apart from the limited scope of the application of the rule of *actio per quod servitum amittit* the general rule is that a master cannot recover for loss of services or loss resulting from injury to the servant. If the master continues to pay the servant wages while the servant is away, be it as a good employer or because the contract of employment stipulates so the loss lies where it falls and the employer cannot recover the sum from the tortfeasor. The servant cannot sue for it because he has suffered no damage also.

But if the employer is astute enough to provide that the servant is to reimburse him from his damages the loss is shifted and the wages are recoverable on behalf of the employer. This result has been criticised as arbitrary because it postulates that the precise terms of a contract which are designed to allocate risks between the contractin

parties should govern the liability of a third party. It has been suggested above that the basis of liability should be the occurrence of damage and not foreseeability of physical damage. While the ideas and factors conveyed by foresight are clear enough the determination of whether a damage is too remote or not is not an exact science. The search for such an elusive quantity as a person foreseeable damage can scarcely be governed by that particular formula. For example suppose the plaintiff in Donoghue v Stevenson had bought the ginger beer and had not suffered any physical damage but financial loss by expending money to put things right, can she recover for her expenses? In the Diamantis Peteras¹⁴ Lawrence J. was of the opinion that in some cases a manufacturer may be liable for pure financial loss if they are negligent and he observed that "foresight may not be the sole criterion." Another reason why the occurrence of damage is preferred is that as the rule stands the contract widening the liability of third party seems inconsistent with the doctrine of privity and consideration. It allows contracting parties to impose an obligation on a third party.

Bankers Card

A new and widespread feature of modern economic life is the use of Bankers Card. Under this a person issued with one can obtain credit from the bank either by cash or by the purchase of a material. The usual condition of issue of the card is that the issue of the card does not create a contract until it is signed.

Suppose A is issued a card and fails to sign it before he negligently loses it ... If in the circumstances X, a fraud, comes into possession of the card, the liability of A for credit obtained by X will depend on whether a contract exists or not. If a contract exists then A can contemplate the consequences of his act and will therefore be liable for the credit obtained by X. If on the other

hand no contract exists then the bank's action can only be in negligence. It has already been seen that this loss being pure economic loss will not be recoverable.

Again suppose the card was signed. Another condition of issue of the card is that the holder remains liable for any credit until he reports the loss. Suppose the bank gives the wrong address to report the loss. A, reports to this address and before the bank or A discovers the mistake a further credit has been drawn by X. The question of contributory negligence becomes relevant and there again the difference between tort and contract will become critical.

If as already stated earlier¹⁵ that contributory negligence is inapplicable to contract, the result will be one of causation and on this A's conduct will be the cause of the fraud and he would be liable for all the consequences. In tort on the other hand, there is no doubt that the fault of the bank will break the chain of causation.

CHAPTER 5REMTENESS OF DAMAGE AND
MEASURE OF DAMAGES

In tort two views compete for the rule that should govern the remoteness of damage. To a varied extent both have received acceptance.

1. The directness principle

Under this if a defendant can foresee injury to the plaintiff he is liable for all the damages that flow directly from the act. The leading case is *The Re Polemis*.¹

2. Foreseeability

Under this a person may only be liable for the kind of damage he can foresee as likely to result from his act. Thus foresight of injury is not enough, the damage must be foreseen. The leading case is *The Wagon Mound*.²

In contract although remoteness of damage has been the subject of judgments the rules have occasioned much less conceptual difficulty as the tort rules.

The rule in contract is stated in two parts:-

Damages are recoverable for breach of contract if they are:

(a) Those damages which might naturally and usually arise from breach or

(b) damages which may reasonably be supposed to have been in contemplation of the parties at the time they made the contract as being the probable result of its breach.

Test (a) provides an ex post facto determination and is objective. Test (b) is subjective and strictly speaking has no

relevance to remoteness of damage. The reason is that the basis of liability in contract is the breach by one party of the consideration he undertook to provide under the contract. This is normally concerned with the determination of the terms of the contract i.e. what the parties agreed upon and the answer arrived at by giving evidence of such matters as:-

- (1) statutory or other rule of law;
- (2) express or implied terms in the contract, custom or other usage of their common trade;
- (3) Previous course of business dealings between them, and otherwise only if;
- (4) there has been an express communication of the relevant knowledge and intentions of one party to the other prior to or when the contract was made.

It has already been argued above that this has no relevance to remoteness for it all hinges on the doctrine of consideration and is implicit on the rule on past consideration.³ E.g. if in Heron II⁴ the charter party had only provided that the ship should go to Jeddah and the plaintiff after the charter party had been signed intimated that the defendant may unload at Basrah such a request would have been based on past consideration and would not have been actionable. It will follow therefore that where damage has been calculated on this hypothesis i.e. contemplation of the parties, it is wrong to regard it as being based on remoteness of damage. Thus in Heron II⁵ both McNair J. at first instance and Sellers L.J. in the Court of Appeal emphasised test (b) and held that the shipowner was not

liable for the loss claimed. The test adopted by their lordships was the prevision of the parties and this worked in favour of the shipowners. The majority in the Court of Appeal and a unanimous House of Lords adopting test (a) found in favour of the plaintiff. This is the objective test of the hypothetical reasonable man. What the House of Lords did was to impute the subjective intention of the plaintiff upon the defendant. This in effect meant that test (b) is absorbed into (a) and it has been regarded as widening the scope of remoteness in contract.

Scope of remoteness of damage in Tort and Contract

This issue has raised all the discussions and all the difficulties. Dicta are not unanimous on the issue. In The Notting Hill⁶ Bret M.R. said that they are precisely the same and that this is settled law. There are dicta that remoteness of damage is wider in tort than in contract⁷ and dicta that liability is wider in contract⁸. These may now be considered.

Liability is wider in Contract than in Tort

This point of view has its origin in the adoption of second test under Hadley v Baxendale⁹. Thus where a party communicates his intention before hand this widens the scope of liability of the defendant for this communication can include damage which from point of tort may be indirect. In tort there is no such communication and the tests for remoteness whether the directness or foreseeability test may produce a narrower liability. For example in the Liesbosch Dredger v S.S. Edison¹⁰

the plaintiffs were unable to recover for extra expenses caused by their impecuniosity. But in contract loss arising from impecuniosity is recoverable if the fact is communicated to the defendant at the time of the contract. Thus in Muhammad v Ali¹¹ damages resulting in part from impecuniosity were allowed, because they were held to be in contemplation of the parties and therefore not a separate and concurrent cause.

In The ARPAD¹² it was held that the plaintiff cannot recover in conversion for the loss of exceptionally high profit he made by selling to a third party. He could not also recover this in contract. This conclusion would have been different, but different in contract only, if the plaintiff had communicated this information to the defendant at the time of the contract and thus bring it within the contemplation of the parties.

In Trans Trust S.P.R.L. v Danubian Trading Co.¹³ the plaintiff contracted to sell to the defendants steel. The plaintiffs were to buy the steel from X. Both defendants and plaintiffs were impecunious and it was agreed between them that the defendants were to pay by cash against shipping documents from a confirmed credit to be opened in favour of X by F. The defendants failed to do this. If the plaintiffs had money and had paid for the steel they would have suffered no loss, for the market price at the time of the defendants breach was higher than the contract price. It was held that the plaintiffs can recover for loss in profit they had failed to make under the contract. "The real question is what was the loss contemplated by the parties rather than the reason for it."

The conclusion is that within the second rule of Hadley v Baxendale¹⁴ the principles of remoteness is wider in contract than

in tort. This is because the contemplation of the parties can extend the scope of recoverable damage to an extent which in tort cannot be regarded as foreseeable or direct consequences of the breach. It should however be added that although this 'contemplation' generally works to the benefit of the plaintiff in some cases it can work to his disadvantage.¹⁵ For example, where the 'special circumstances' evidence a sub-sale then this sub-sale is the measure of damages whether it works in favour or against the plaintiff. Thus in France v Gaudet¹⁶ the plaintiff recovered his resale price which was well in excess of the market price. If the resale price had been lower the plaintiff would have lost.

Remoteness is wider in tort than in contract

This view originates from the decision in Re Polemis.¹⁷ The proposition is largely true but it has been suggested that in practice, it creates much less divergence between tort and contract than is assumed. The all important issue is whether in contract the damage was within the contemplation of the parties. If the exceptional physical susceptibility of the egg shell skull plaintiff is known or that the plaintiff is an eccentric millionaire who dresses shabbily this will be within such contemplation and will be recoverable. This apart it is submitted that no basic difference exists between remoteness in tort from remoteness in contract. This is so despite dicta to the contrary contained in Heron No. 11.¹⁸ Lord Reid in that case stated that "the modern rule of tort is quite different and it imposes a much wider liability."¹⁹

It has been shown that the members of the House of Lords relied on the first rule to arrive at their decision. It may therefore be asked what esoteric difference exists between the foreseeability test in tort and the contemplation of the parties in contract? This is very important. For example although mere delivery due to delay sounds in contract only, a delay due to negligent handling by the master's servant can make the master vicariously liable in tort. Similarly a misdelivery or loss or non-delivery would normally amount to conversion. Would the modern *Baxendale* therefore be liable for the stoppage of *Hadley's* mill if he lost the shaft in transit or if his servant damaged it by dropping it? Lord Reid answered in the affirmative and so did the rest of their Lordships. The distinction was stated to be one of degree. The reasonable man does not "contemplate" liabilities in the event of a breach of contract which are as extensive as those "foreseen" by the reasonable man in tort. Thus foreseeability should be confined to tort and contemplation of the parties to contract. With respect this merely begs the question and cannot in practice be of help in border line cases. Lord Upjohn acknowledged this.²⁰ How would *Baxendale's* prevision vary if his servants lost the shaft in transit according to whether the action is in tort or contract?

This play on words is largely the result of expressing the rule in *Hadley v Baxendale*²¹ in two terms. It has been shown above that strictly the second rule can only be applied to what the parties said or agreed at the time of the contract. An inquiry along this line has no relevance to remoteness of damage. An analysis

of *Heron II*²² will show that their Lordships did not apply any of these two rules for by imputing knowledge of the plaintiffs intention which is effect is the second rule, on the defendants the pretence of adopting the first rule was reduced to a vanishing point. *McNair, J.* applied exclusively the second rule and arrived at opposite decision and from his view point it is submitted that his decision is impeccable.

In conclusion therefore the foreseeability test in tort will produce the same result as the contemplation test in contract. It is submitted that difference in degree is merely policy rather than principle. In tort the main obstacle to a plaintiff is the causation hurdle. Once this is overcome the courts award damages that flow from it. In contract on the other hand the agreement between the parties is a limiting factor on the scope of liability.

MEASURE OF DAMAGES

From the argument above it has been shown that the rule is the same in tort and in contract. The only exception being where directness principle applies to tort. There is however another exception and this applies to measure of damages for conversion. Situations may exist where the carrier of goods may be liable in conversion as well as for breach of contract. In tort the measure of damages for conversion is generally the value of the goods. In contract the measure is the loss suffered by the plaintiff, and this in many respect may be less than the tort award. Is therefore the plaintiff to be denied the higher award

of damages simply because he has alleged alternatively in his action a breach of contract? The answer may be considered under two headings.

1. Where the action is between the parties to the contract:

In France v Gaudet²³ the plaintiff purchased champagne lying at the defendant's wharf at fourteen shillings per dozen and resold them at twenty-four shillings per dozen to the captain of a ship about to leave for England. The defendants refused to deliver the champagne with the result that the plaintiff lost a favourable market.

The plaintiff sued for the loss of profit. It was held that the measure of damages in conversion is the market value at the time of the conversion and the plaintiff's resale at twenty-four shillings was taken as the reference to determine this market value. In The Arpad²⁴ the action was for misappropriation by conversion which deprived the plaintiff of the exceptional high profit he would have made by resale. The Court of Appeal held by majority that in contract the plaintiff's measure of damages would be the market value at the date of non-delivery. Also in tort the measure of damages has to be calculated on the contract principle. The court distinguished France v Gaudet²⁵ by holding that in that case the measure was the market value and that the resale price was taken to represent the market value. It may be asked why should that not apply here. What the Court of Appeal therefore did in this case was to absorb the tort rule into the contract. If the plaintiff had communicated the special circumstances, it was not doubted that the exceptional profit would

have been recoverable in contract and presumably in tort.

Scrutton L.J. dissented, holding that where there is unjustified breach of contract, and the tort of conversion the good owner can sue in conversion and bring the loss in the contract of resale without proving notice of it to the carrier; unless there is some special feature in the contract. It is submitted that this judgment is to be preferred to the majority decision.

In the first place it may be asked why should a defendant profit by the fact that he has committed two wrongs instead of one. The majority decision is in effect that where the two separate causes of action exist the plaintiff must sue in contract.

Secondly at the time when this case was decided *Re Polemis* was the rule relating to damages and in view of this the argument of the majority was not sound for the rules relating to remoteness in contract had no application to the *Re Polemis* doctrine.

Thirdly even though the *Wagon Mound* may be regarded as confirming the majority decision in one sense it has left the decision untouched in another sense. This is because liability in conversion is strict and is not based on fault. The foreseeability test applies to negligence in particular and not to torts where the liability is strict as in conversion.

Finally, it is submitted that *Heron II* has overruled the *Arpad* for as already seen the House of Lords imputed the special knowledge of the re-sale on the defendant when manifestly he did not know. This result is to make the liability the same as

in tort and this goes the other way to The Aspada.²⁶ The Aspada²⁷ may therefore be regarded as overruled by Aheron II.²⁸

2. Where the action is between one party to contract and 3rd party

This is generally encountered in hire purchase agreements. Thus if the hirer contrary to the hire purchase agreement sells the goods to X; X is liable for conversion. As there cannot be any contract between X and the owner the only cause of action will be in tort. Will the special value be the measure of damage or will it be the market value. The answer will depend on whether the contract or the tort view point is preferred.

In Belsize Motor Supply Co. v Cox²⁹ clause 4 of a hire purchase agreement provided that "The hirer shall not re-let sell or part with the possession of the said motor-taxi-cab ... without the previous consent in writing of the owners." The hirer pledged the cab without the owners consent.

The owners sued the pledgee in conversion. It was held that the pledge whether wrongful or rightful a pledgee or purchaser takes what interest the pledgor or vendor has in goods and accordingly the plaintiffs were entitled to the outstanding payments. The method by which this conclusion was arrived at was not spelt out in the judgment but presumably the hirers breach did not terminate the hire purchase and he could assign his contractual right to the defendant.

Prompted by this decision draftsmen sought to make a prohibition on assignment of the option to purchase by express agreement.

United Dominions Trust (Commercial) Ltd. v Parkway Motors Ltd.³⁰

The facts are that the total hire purchase price for a van was £626,13s. The owners had received £530.3s. by way of instalments

so that only £96.10s was outstanding. The hirer sold the van to the defendants in breach of the clause which provided that "the hirer ... shall not sell, offer for sale, assign or change the goods or the benefit of this agreement."

The owners sued the defendant for the value of the van. They recovered £350 which was the value of the van and thus made a profit of £250. Now how did the trial judge arrive at this conclusion in view of Belzize Motors Case?³⁰ The distinction lay on whether the benefit of the contract was assignable or not. The Belzize Motors Case³¹ created an assignable right but this was not so in the present case. The defendant was therefore a person without any interest in the property and accordingly was liable for the full value of the van.

This reasoning can be criticised on the grounds that it concludes that because a contract states that the rights are non-assignable they cannot be assigned. There are dicta to support that this is not necessarily so. In Spellman v Spellman Danckwerts L.J. stated "It is plain ... that the fact that there is prohibition in the document creating the chose in action against assignment is not necessarily fatal."³² Why should not an assignment be made in equity or by trust? This apart the judgment in principle is impeccable although the result cannot be said to be fair.

In Wickham Holdings Ltd. v Brooks House Motors Ltd.³³ the Court of Appeal returned to the issue. The defendants before they bought the car from hirer phoned the plaintiffs to ask for the "settlement figure". The plaintiff told them it was £274.10s but they would accept £270 if paid within seven days. The defendants failed to do so, apparently they forgot. Twelve weeks later the plaintiffs went to collect their car. The defendants offered

£290 which the plaintiffs refused.

The plaintiffs brought the action for the return of the car or its value which was assessed at £365. At first instance they recovered this. The defendants appealed. The Court of Appeal held that the plaintiffs were entitled to £274. Lord Denning M.R. stated that the United Dominion case was wrongly decided. Winn L.J. did not go this far but preferred to rest his decision on "the business reality" of the transaction. Denning M.R. felt that the United Dominion case was inconsistent with the Belsize Motors case.³⁴ The only distinction was the United Dominion's case³⁵ included the extra words "or the benefit of the agreement." He did not agree that this should make all the difference to the cases. With due respect it is fanciful to impeach the logic of the United Dominions case³⁶ by merely referring to the distinction as "too fine" without discarding the pretence that parties are bound by the terms of their contract.

Denning M.R. relied on Mayne and McGregor on Damages.³⁷ The learned authors agree that where the defendant is the person holding the remaining interest in the goods the plaintiff is entitled to compensation for loss of his limited interest. This much is agreed but where the defendant holds no interest at the time of the conversion it becomes necessary to investigate the contract to see whether there has been an assignment. If there is none then on principle the plaintiff should recover all and United Dominions³⁸ case is consistent with principle. Mayne & McGregor admit this principle but deal with the United Dominion³⁹ case under the wrong heading. They deal with it under the heading "Where the defendant is the person holding the remaining interest in the

goods" instead of "Where the defendant is a stranger with no interest in the goods." For this reason Dennings reliance on the criticism of the United Dominion⁴⁰ case by Mayne & McGregor is unjustified.

Most of the conceptual difficulties encountered here have resulted from concentrating on the contract or tort aspect without recourse to the first principles on damages which is to put the plaintiff "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation." In the instant case the sum of £274.10s "is all that the finance company has lost and all that it should recover." This reasoning is not inconsistent with the rule that the value of the goods is the measure of damages. It is merely the guideline to quantify the plaintiff's loss which is the interest he has in the goods. The tort or contract analysis is to be regarded as merely a step in the enquiry for the damages suffered by the plaintiff.

CHAPTER 6LIMITATION OF ACTIONS

Before July 1st, 1940, the general law relating to limitation of civil actions was embodied in a series of statutes. After that date almost all the law is to be found in the Limitation Act 1939. This Act (with its amendment 1954 Limitation Act) applies to "actions" which are defined to include any proceedings in a court of law including an ecclesiastical court. From our point of view the important provisions are:-

S.2(1)(a) which provides that actions founded on simple contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. By Law Reform (Limitation) Act 1954 S.2(1) the period is three years if damages are claimed for personal injuries caused by negligence, nuisance or breach of duty whether the duty arises out of contract or tort.

By the Limitation Act 1963 S.2 this period may be extended if certain conditions are fulfilled.

Accrual of cause of action

This is in practice the most important factor for the limitation period will begin to run from this moment. For example although the relationship between professional men and their clients generally springs out of privity of contract it may give rise to an action in case upon tort. Because the accrual of cause of action may be different in tort from contract within the same set of facts the limitation period may expire in one and not the other depending on accrual of cause of action.

Similarly where the relationship in quasi-contract is delictual then it would seem that the running of time may not commence at the same time. In Letang v Cooper¹ accrual of cause of action was defined as the factual situation stated by the plaintiff which if it is substantiated, entitles him to a remedy against the defendant. It may be added that this should not be taken that the action must succeed for all that is required is that a state of affairs exist from which the plaintiff can sue the defendant.

What is required therefore is the existence of a plaintiff who can sue and a defendant against whom he may succeed. The fact however that the plaintiff could not at the first possible moment identify his opponent does not prevent the cause of action accruing. For personal injuries the 1963 Limitation Act S.1(3) has made identity of the defendant essential for time to run against the plaintiff.²

Running of Time

It is well settled that once time has started to run, it does so continuously and matters which might have prevented it from accruing in the first place if they subsequently arise will not operate to prevent time running. In Pridenoux v Webber³ it was held that the closing of the courts during the civil war did not suspend the running of time.

In Rhodes v Smethurst⁴ the cause of action had accrued in 1829 against a person who died in 1830. His personal representative was not constituted until 1835 due to dispute over his will. The court declined to accept the suggestion that the interval between 1830 and 1835 should be omitted in calculating time.

There are however exceptions - some statutory and some case law - In Seagram v Knight⁵ it was held that where a person, entitled to a right of action dies before the action is brought and the person to be sued under the right is made the deceased's administrator, the running of time is thereupon suspended so long as this dual capacity continues. This case has been criticised but the contrary opinion can only lead to fraud. It would however appear from Bowring Hanbury's Trustee v Bowring Hanbury⁶ that this exception is only limited to administrators and has no application to where the tortfeasor is made an executor of deceased.

Cessing of Running of Time

This will occur when proceedings in which the statute is material have been commenced. The law's delays in bringing proceedings to a conclusion neither prejudice nor assist the parties. Time will normally cease on the date of the issue of writ but as "action" is defined under S.31(c) of the Act to include any proceeding in a court of law, including ecclesiastical court, time will cease to run from the date of the appropriate originating process. The originating process must however not be a nullity for this will not prevent time from running.

Finally, time will only cease to run in connection with the cause of action to be enforced in the proceedings and will not operate in other causes of action against the defendant.

Effluxion of the limitation period

Statute has in some cases provided that the effect of effluxion of time is to extinguish the right. Thus S.3 of 1939 Limitation Act provides that title to personality may be extinguished after the limitation period has expired. This apart the general effect of the Limitation Act is merely procedural and therefore only

affects the remedy and not the right. Thus a defendant who wishes to rely on the limitation period must specifically plead it. The courts may by its rules under s. 99(1)(a) of the Supreme Court of Judicature (Consolidation) Act 1925 allow a plaintiff who issued a defective writ within time to amend it after the expiration of time.

Accrual of Cause of Action - Tort and Contract

In Gibbs v Guild it was stated that it is settled that in assumpsit that "time ran from the breach of contract, for that was the gist of the action, and that subsequent damage ... did not prevent the application of the statute."⁷ Thus in Battley v Faulkner⁸ the plaintiff contracted to buy spring wheat in 1810 from the defendant. The defendant delivered winter wheat which the plaintiff without knowing of this sold to third party as spring wheat. This fact did not emerge until 1811 when the third party sowed the wheat. The third party brought an action against the plaintiff and obtained judgment against him in 1818. The plaintiff then started proceedings against the defendant. It was held that as the breach to deliver spring wheat occurred in 1810 this was the date that the cause of action accrued. The fact that the plaintiff was "damaged" in 1818 was not the date of accrual. It may be questioned here whether actually a separation can possibly exist between the date of the breach and the damage in a contract action? Can it not be argued that here the damage occurred at the same time as the breach and that no distinction can be drawn between the breach which gives rise to cause of action and damage which is mere quantification of the plaintiff's loss from the breach. Thus wherever the consideration in contracts

is tangible then the breach and damage always occur the same time. To build a defective house is a breach of contract and thus a damage to the party and this is so whether he knows it or not.⁹ In contract the cause of action is breach of duty. This point is essential for it has introduced much of the confusion in the law as to running of time in tort and contract especially where the defendant is a professional person.

It is therefore suggested that in most contracts breach and damage occur the same time. Thus in executory contracts the breach and necessarily the damage occur when the defendant fails to perform his obligation. This is also the case with unilateral contracts for unless the plaintiff performs his obligation there can be no breach and necessarily no damage until the defendant fails to perform his.

In tort on the other hand apart from those actionable per se damage is essential for the cause of action to accrue. There can be no question of an occupier of premises being liable for the state of his premises or by virtue of the rule in Rylands v Fletcher¹⁰ unless damage is proved. Similarly there cannot be negligence in vacuo and a plaintiff to succeed has to show damage. Consequently in these torts damage determines the time from which a cause of action accrues, The legislature has impliedly approved this view by s.1(4) of the Law Reform (Miscellaneous Provisions) Act 1934 which provides that:

"Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered."

There is eminent support for this by Clerk & Lindsell on Torts.¹¹ They stated: "When the tort is actionable only on proof of damage, then there is no cause of action, and time does not begin to run & until some damage actually occurs." They support this by stating that in cases of withdrawal of support each subsidence gives an independent cause of action which may be sued for within the six years following the occurrence.¹² Similarly where negligence is the cause of action a person injured by negligently manufactured chattel may sue the manufacturer within three years of sustaining the injury even though more than three years have elapsed since the chattel left the manufacturers.¹³

There is however respectable authority which take a contrary view. Charlesworth on Negligence¹⁴ states that "in an action of negligence, the cause of action accrues at the time of the negligence because it is then that the damage is caused, even though its consequences may not be apparent until later." The question raised may be treated under two headings in accordance with the nature of the damage:-

1. Where the injury occurred outside the Limitation period but is discovered within the Limitation period

In Archer v Catton¹⁵ Streatfield J. cited this passage with approval. The plaintiff was employed by the defendants between 1923 and 1940. The work entailed the casting off of fine dust and in October 1943 the plaintiff for first time found himself to be suffering from chest condition which he alleged had been caused by the fine dust. On September 27, 1949 he issued a writ against the defendants claiming damages for negligence and breach of statutory duty.

It was held applying Howell v Young¹⁶ that the plaintiff's cause of action accrued up to 1940 and the writ not having been issued until more than six years thereafter his claim must fail.

The difficulty always encountered in these cases was stated by Lord Reid in Cartledge v Joplin¹⁷ when he said that:

"It appears ... unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action."

Lord Reid however went on to explain why he was unable to help an injured plaintiff to escape the fetters of the Limitation Act 1939. Thus he went on:

"If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result."

As the question before the court depended on interpretation of statute, the Limitation Act 1939, it was impossible for the learned Lord to reach the result he wished.

Lord Pearce in Cartledge v Joplin's case¹⁸ cited Lord Halsbury in Darley Main Colliery Co v Mitchell¹⁹ where it was said:

"No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and forever. A house that has received a shock may not at once show all the damage done to it, but it is damaged nonetheless to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the damage done, and consequent upon the injury sustained."

Following this reasoning his lordship held that the time began to run at the time of damage and not at the time of knowledge of the damage. It is submitted that the learned Lord in his ruling may have confused the issues. Earlier in his judgment he cited the case of *Fitter v Veal* or *Fetter v Beale* or *Ferrer v Beale*²⁰ where the plaintiff after recovering damages for assault and battery discovered that after all his injuries were more serious than he supposed them to be. He then sought to bring a second action for the discovered damage. It was held that he had one cause of action which had been extinguished by the judgment in the former case. This principle has never been doubted and Lord Halsbury's dictum must be confined to where a plaintiff seeks to bring a second action. The issue before the House of Lords in *Cartledge v Joplin* was separate and distinguishable because the appellant did not seek to bring a second action for fresh damage but was suing to recover for damage which was discovered long after its inception. On this basis Lord Reid's judgment by treating the issue as based on the Limitation Act is to be preferred to that of Lord Pearce who treated it as essentially a common law question, but relied on the authorities on where the plaintiff after bringing his first action subsequently discovered that he was damaged more than he thought and seeks to sue for this newly discovered damage. It is submitted that if Lord Reid had viewed the issue in *Cartledge v Joplin*'s case as governed by the common law he would have held that time can only begin to run when the damage was discovered. This is expressed in his judgment cited above.

2. Where the breach of duty occurred outside the Limitation period but the damage occurs within the Limitation period

Lord Reid in Cartledge v Joplin cited

Davie v New Merton Board²¹ as raising the problem and answered that accrual is at time of damage. He said:

"Such cases as Davie v New Merton Board show that under the law ... several years may not infrequently elapse between the last negligent or wrongful act of the defendant and the date when the cause of action first accrues. In Davies case the period was seven years. That is because in those cases the danger created by the defendant only causes damage to the plaintiff at a much later date."

There was no doubt to him that accrual was the later date.

Much confusion as to accrual in tort has undoubtedly arisen from use of "negligent" to describe breaches of contract at a time when no independent tort of negligence had been recognised and the tendency to rely on those cases where the duty has always been regarded as contractual. Howell v Young²² which was relied by Streatfield Jones as an action against a solicitor and thus one in contract even though sounding in tort. It is therefore submitted that where a separate cause of action exists independent of the contract but arising out of the same facts as the breach of contract the cause of action will not accrue in contract and in tort at the same time. The breach will be the accrual in contract and the damage the accrual in tort.

It has never been denied that as under Donoghue v Stevenson²³ a manufacturer owes a duty of care to ultimate consumer of his goods quite apart from the duty owed to the purchaser. Time will only run against the consumer from the date of damage although the breach of contract and accrual in contract may have taken place earlier. Now the ultimate consumer may also be the purchaser and it is difficult how if he has a separate

action in tort time would begin to run against him in tort from the time of breach of contract. Such a conclusion would be to apply Winterbottom v Wright²⁴ in reverse and will have no more merit in modern law than would that case in itself.

In Bagot v Stevens Scanlan & Co.²⁵ the defendant architects were employed in 1955 by the plaintiff to supervise the construction of drains. The supervision continued until February 1957. In or about the end of 1961 as a result of various failures in the construction of the drainage several pipes burst and damaged the premises.

A writ was issued on April 2, 1963 more than six years after the date of the last supervision. The defendants pleaded the Limitation Act 1939. It is important to note that in the preliminary question as to accrual of cause of action the argument centred on whether the cause of action was in:

- (1) contract alone;
- (2) tort alone;
- (3) tort or contract.

Diplock L.J. held that the duty here was purely a contractual duty and that the cause of action was purely in contract. On this finding the limitation period began to run from the date of the last inspection. He said:

"Having regard to the nature of the duty which is alleged to have been breached in this case, in effect, to see that the drains were properly designed and built, the damage from any breach of that duty must have occurred at the time when the drains were improperly built, because the plaintiff at that time was landed with property which had bad drains when he ought to have been provided with property which had good drains. What happened in 1961 was merely a consequence of the damage resulting from the original breach."²⁶

This case has been criticised not on the ruling on contract but for not inferring that a cause of action may exist in tort.

It has already been pointed in an earlier chapter²⁷ that Hedley Byrne v Heller²⁸ must have opened liability in negligence independent of contract, for such professional negligence.

More so it has been criticised on the holding that even if a cause of action existed in tort the damage and hence the accrual of cause of action in tort was at the same time as in contract. With due respect this is wrong. To supply a defective good can constitute a breach of contract without constituting physical damage for an action in tort by the plaintiff. If physical damage then occurs there seems no reason why this happening should not be additional cause of action in tort. Also to consider the damage to the property - as distinct from merely the breaking of the drain-pipes themselves was to treat the plaintiff as if the House of Lords said in Donoghue v Stevenson²⁹ that the plaintiff's complaint is that her ginger beer was less good than it ought to be. Her subsequent illness was merely a consequent of that and as she had no contract with the defendant her action fails. That exactly is what the House of Lords did not say and it is therefore submitted that Diplock was wrong in not inferring an independent tort and therefore a different accrual of action in tort. It is clear that the contract cannot affect a third party right of action in tort. Thus if the neighbour of the plaintiff in Bagot v Stevens³⁰ & case had been damaged by the flooding he can maintain an action in tort. If the ruling in Bagot v Stevens³⁰ is correct this will create some startling results. Because the damage and therefore the accrual of cause of action was said to be the same in tort and in contract the result would be that the third party would be in no better position than the plaintiff

in *Bagot v Stevens*.³⁰ To hold otherwise would amount to the mechanical jurisprudence that irrespective of occurrence of damage the accrual of cause of action will nevertheless depend on the contractual relationship between the plaintiff and the defendant. The more proximate the parties are by contract the more readily the causes of action will be fused into the breach. Either conclusion is wrong and it is submitted that the correct view is that damage and not breach of duty is the cause of action in tort.

This problem received considerable attention in the Court of Appeal in the case of *Sparham-Souter v Town Developments (Essex) Ltd.*³¹

In 1964 Town and Country Developments (Essex) Ltd. wished to build a new housing estate in Benfleet, Essex. They applied to the local authority, the Benfleet Urban District Council, for planning permission and the Council passed the plans subject to the builders complying with the building byelaws.

On May 6, 1965 the developers started work and the council surveyor inspected the work and passed it. On September 30, 1965, the houses were completed and passed by the council. On October 25 and November 29 1965 the developers agreed to sell one property to Mr. and Mrs. Sparham-Souter and one to Mr. Ryan. On December 15, 1965, the local council certified that the properties had been inspected and they found no reason to question the legality of the work carried out under the building byelaws. On November 12, 1965, and January 26, 1966, the conveyances to the purchasers were completed.

Two or three years later cracks appeared on the brick work and the houses became uninhabitable. The cause of these was that the foundations were inadequate to support the load.

On October 22, 1971, the plaintiffs issued the writ in this action for damages alleging negligence of the developers and also of the surveyor of the council in passing the work as satisfactory when he ought not to have done so. The plaintiffs relied on the decision of Cusack J. in *Dutton v Bognor Regis Urban District Council* which was affirmed by the Court of Appeal.³²

The Council denied liability and pleaded that the action was barred under the S.2(1) of the Limitation Act 1939. This provides that:

"The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued that is to say:- (a) actions founded on simple contract or on tort; ..."

Judge Norman Richards, at first instance, after considering the judgments in *Dutton v Bognor Regis Urban District Council*³² which decided that damage arising from breach of duty by the local authority in the circumstances was actionable in negligence, held, that time began to run from the last negligent act giving rise to the situation from which the damage flowed. He stated:

"The words in section 2(1) of the Act of 1939 'cause of action' are used to constitute and define different situations, such as the doing of the negligent act complained of and the occasion when damage ensues. But so far as the statute is concerned it must connote a situation where for the first time there is a potential plaintiff, and in the instant case that date is in my judgment when these plaintiffs took possession of their plots, namely, in December 1965 and January 1966, when completion took place, both of which are within the six-year period, as indeed are the dates when they respectively entered into their contract to purchase, and the question before me must therefore be resolved in favour of the plaintiffs."

The local authority appealed on the ground that the judge had erred in law by holding that the cause of action could not and did not accrue until the first purchasers took possession of the relevant premises.

To resolve this issue as to when the cause of action accrued and thus time began to run against the plaintiffs it is necessary to go back to first principles as to what is cause of action, for negligence. In Cartledge v Joplin³³ Lord Pearce said:

"... no cause of action arises unless and until the plaintiff can show some actual injury. Normally the injury is contemporaneous with the wrongful act, but it is not necessarily so. In the present case, therefore, the causes of action did not accrue until some actionable injury was caused to the plaintiffs by the defendants breach of duty."

It is further important to reiterate a point made earlier that a cause of action cannot exist in vacuo. There must be a plaintiff before a breach of duty can mature into a cause of action for the Limitation to begin. Thus Vaughan Williams L.J. in Thomason v Lord Clanmorrie³⁴ said:

"A statute of Limitations cannot begin to run unless there are two things present - a party capable of suing and a party liable to be sued."

Applying these two propositions to the present case Lord Denning M.R. held that the cause of action accrues, not at the time of the negligent making or passing of the foundations, nor at the time when the latest owner bought the house, but at the time the house began to sink and the cracks appeared. This would be the time when the owner of the house can reasonably be expected to know that he may have a cause of action.

Having adopted this view Lord Denning M.R. attempted to reconcile it with Cartledge v Joplin.³⁵ He said "there the damage to the man was in fact done when the dust was inhaled - even though it was not discovered till later. Here there was no damage to any purchaser of the house until it began to sink and cracks appeared."³⁶

This in effect is a question of fact and that is, at what time did the damage occur and Lord Denning M.R. explanation of *Cartledge v Joplin*³⁷ is consistent with the treatment given to it in the preceding heading i.e. where the damage occurred outside the Limitation period but is discovered within the Limitation period.

There is however a point of divergence between the views advanced and the judgment of Lord Denning M.R. He justified the different accrual of cause of action in *Sparham-Souter*'s³⁸ case by stating that "it would be most unfair that time should run against him before he knows - or has any possibility of knowing - that he has a cause of action;" and added that this is what Lord Reid said in *Cartledge v Joplin* when speaking of cases governed by the common law.³⁹ This explanation is not acceptable.

In the first place it is not convincing that *Cartledge v Joplin*⁴⁰ was governed entirely by Statute while the issue before the Court of Appeal in *Sparham-Souter*⁴¹ was one based on the common law. In both cases the issue was the same and that is at what time should the cause of action accrue for time to begin to run? To determine this depended on when the plaintiff suffered the damage.

Secondly Lord Denning M.R. explanation seems to regard the ruling in *Bagot v Stevens*⁴² as still good law even though later, in his judgment he recanted his earlier approval of that ruling in *Dutton v Bognor Regis U.D.C.*⁴³ Once the pretext that *Sparham-Souter*⁴⁴ and *Cartledge v Joplin*⁴⁵ are not governed by the same issue is removed and it is admitted that at the bottom of the issue is when did damage occur for time to begin to run it becomes difficult to see why the same policy considerations that aided

the plaintiff in Sparham-Souter's⁴⁶ case should not have aided the plaintiff in Cartledge v Joplin⁴⁷. In this chapter the submission has been that the damages occurred at different times. While in Cartledge v Joplin⁴⁸ the plaintiff suffered damage when he inhaled the dust in Sparham-Souter the negligence did not give rise to damage until the cracks appeared. That is when to all intents and purposes the house was less than what it ought to be. Therefore, to say that time begins to accrue when the plaintiff knows or ought to know of the defect is to imply that the damage occurred at an earlier time. If this is when the plaintiff was landed with a house with defective foundation the result is to adopt the decision in Bagot v Stevens⁴⁹ which is already discredited. It is therefore submitted that Sparham-Souter's⁵⁰ case should be treated as separate from Cartledge v Joplin.⁵¹ It should be treated as coming under where the breach of duty occurred outside the limitation period but the damage occurred within the limitation period. This is consistent with what Lord Reid said that in such cases as Davie v New Merton Board Mills,⁵² "the danger created by the defendant only causes damage to the plaintiff at a much later date."

It would appear that most of the difficulty encountered as to accrual of cause of action is attributable to referring damage as meaning both actual and contingent.⁵³ In Sparham-Souter's case the damage was merely contingent and this should make all the difference. Geoffrey Lane L.J. said that in Cartledge v Joplin damage was done to the plaintiff and the cause of action accrues from the moment of the first injury albeit undetected and undetectable. "That is not so where the negligence has caused unobservable damage not to the plaintiff's body but to his house. He can get

rid of his house before any damage is suffered. Not so with his body"⁵⁴ Thus if X buys a car with defective brakes this may give rise to breach of contract and thus time will begin to run at purchase. But until X is damaged or suffers physical damage as result of the faulty brakes his cause of action in tort does not accrue.

Limitation period in Bailment & Conversion

Action in tort lies for the wrongful detention or the wrongful conversion of the chattels of another. Conversion takes effect when the defendant deals with the property in a way amounting to denial of ownership. This therefore will be the accrual of cause of action and as knowledge of this is not essential it is possible that time may run out before the plaintiff knows. Beaman v A.R.T.S.⁵⁵

Section 3 of the Limitation Act 1939 adopts the Roman Law concept of usucapion to chattels and accordingly provides that on the effluxion of time calculated from the first act of conversion the title to property will be extinguished. It further provided, thus overruling Wilkinson v Verity⁵⁶ which was never regarded as good law, that time will not begin to run and therefore there is no new accrual, if within the Limitation period a further act of conversion of the same chattel takes place.

Bailment on the other hand generally rests on contract express or implied. The relationship consists of one party depositing article with another called bailee to be redelivered on demand. The refusal to re-deliver will therefore consist breach of bailment and time will begin to run from the refusal. Therefore demand is essential for breach of bailment.

Now this breach of bailment may give rise to an action in conversion or detinue. Suppose therefore that X bails articles to Y for 10 years. After two years Y sells the article. Eight years later X makes his demand. This situation arose in Beaman v A.R.T.S. Ltd.⁵⁷

In 1935 the plaintiff deposited goods with the defendants. In 1940 because of war conditions it became difficult to get in touch with the plaintiff or continue with the bailment. The defendants after inspecting the goods gave them away to the Salvation Army in August of that year. This amounted to conversion. In 1946 the plaintiff made her demand for the goods and in November issued writ; six years after the act of conversion by the defendants.

At first instance, Denning J. had no doubt on the preliminary question as to running of time that the action was barred in tort. This is because as the act of conversion is the accrual of cause of action this was in August 1940 and it was immaterial that the plaintiff did not know of it. But as to running of time if the action was brought in contract for breach of bailment he had this to say. The contract was "to store the goods and to re-deliver on demand, the period of limitation in respect of that breach would only begin to run from the date that the cause of action accrued, i.e. from the earliest date on which the defendants failed to deliver on demand, which was August, 1946."⁵⁸

He was reversed in the Court of Appeal but not on this point and it is submitted that his reasoning cannot be impeached. Demand is the essence for breach of bailment and time can only begin to run from refusal to deliver. This result produces an interesting double vision for it acknowledges certain right of action by the plaintiff in bailment when in conversion s.3 of the 1939 Act provides that the plaintiff has none.

Against this view it may be argued that why should the breach of contract not occur at the same time as the conversion? After all, the refusal to the demand is merely the consequence of the conversion. Thus when the bailee deals with article in a manner amounting to conversion he broke the contract and the breach is the accrual of cause of action. Knowledge after all is not essential. This is powerful argument but it fails on the essential requirement that demand is essential. Again it was argued above that the contract should not limit the tort and that the same reasoning should apply here so that the tort may not hinder the contract action. Therefore the rules of contract should be separate from tort actions. To attempt a conformity will only lead to rigidity in the law as witnessed already in the chapter on third party rights. It is healthy that a plaintiff may have his action statute - barred in tort when in contract he can still bring an action.

Also policy should apply to help the owner of goods to as far as possible recover the goods or the value. The principle supported here will not adversely affect third party rights after the limitation period has expired for third party relationship with plaintiff will always be tortious and therefore governed by the rule for conversion under which the action would be statute-barred.

In conclusion the cases so far establish the following submissions:

(1) Where the duty is based in contract alone the breach is the cause of action. The use of the word "negligent" in this context confuses rather than elucidates for it is merely in a notional sense to describe a manner of the breach of contract.⁵⁹

(2) Certain status create independent relationship in tort apart from contract e.g. common carrier, common inkeeper, bailor and bailee and dentist. The plaintiff may sue either in tort or in contract and here the accrual of cause of action may be different times.⁶⁰

(3) Where no contract exists between the parties the damage is the cause of action and therefore the accrual of the cause of action.⁶¹

(4) Where an action may be found in contract and in tort the decision of the Court of Appeal in *Esso v Mardon*⁶² confirms the view advocated and rejects dicta in *Bagot v Stevens*⁶³ that time begins to run in tort as in contract from the breach of duty. Damage is essential for time to begin to run in tort.

CHAPTER 7TORT OR CONTRACT IN PRIVATE INTERNATIONAL LAW

It has already been seen that in municipal law the historical origins of tort and contract have left some technical rules which separate them and may make it advantageous for a plaintiff to sue in tort or in contract. For example in a contract for carriage of goods, apart from the express and implied duties there may exist a duty in the general law of negligence.

In private international law this separation has been carried on and while attempts have been made in municipal law for consistency in application of principles the conflict of laws rule have lagged behind. Thus where different systems reveal concurrence of rights of action in one fact situation a court will have to decide whether to give primacy to one or the other or to none. For example, a duty may exist in tort which is modified by contract between the parties. The place of the contract and of the tort are not the same. One legal system may allow the modification and another may not allow it. The question of choice of law becomes relevant. The action may be brought in another legal system. To what extent should the *lex fori* apply? Lord Simonds in Lister v Romford Ice & Cold Storage Co. Ltd.¹ said that "where the questions of the conflict of laws arise, the courts, as might be expected, have gone off in all directions, and the character of the action as tort or contract has become entangled with other rules."

In Matthew v Kuwait Betchel² the plaintiff was injured when he fell into a trench in order to avoid a crane which swung towards him. The accident took place in Kuwait. The contract

of employment was signed in England and provided that English law should govern. The employers were resident in Panama. The question here was not one of proper law of tort or contract but whether the plaintiff for the purpose of the Rules of Supreme Court Ord. II r. 1(f) can bring his action in contract. The Court of Appeal held he could. It may however be asked what law should apply once the personal jurisdiction is applied. The answer will depend on whether English law is the *lex loci delicti*, or the proper law of the contract or the *lex fori*.

Proper law of Contract

In contract the English law rule for determining the proper law is internationally orientated and flexible. The courts will apply the law that essentially governs the contract. This may be inferred from the express provision of the parties or the law which they must be presumed to have submitted themselves or the law which the contract has its most substantial connection. Thus in *Re Missouri Steamship Company*³ a contract was made in Massachusetts between an American citizen and English shipowners to carry cattle from Boston to England in an English ship. The contract exempted the shipowners from liability for negligence of the master or the crew. This provision was valid under English law but not so under Massachusetts' law as being contrary to public policy. The cattle were lost owing to negligence of the master and crew and the plaintiff sued the shipowners.

It was held that the proper law of the contract was governed by English law for it had the most substantial connections with the contract. The exemption clause was therefore applied. If Massachusetts' law had applied the exemption clause would have been declared void.

Proper law in Tort

In tort the effect of the judgment in Phillips v Eyre⁴ is a distinct "homeward trend" because to be actionable the alleged act must be:

- (1) actionable if committed in England; and
- (2) "not justifiable" according to the lex loci delicti.

This dual test has been criticised and supported and when the House of Lords considered it in Chaplin v Boys⁵ they refused to substitute it with a proper law of tort along the same line as in contract. There was however a distinct preference for the use of "actionable" instead of "justifiable" under the second branch of the rule.

Conflict between Tort and Contract

This may be discussed under the following headings:-

- (1) Where English law is the proper law of the contract and the tort is committed out of jurisdiction.
- (2) Where the tort is committed within jurisdiction but the proper law of the contract is out of jurisdiction.
- (3) Where English law is the lex fori and the tort and the contract take place out of jurisdiction.

It should be pointed out that under the first and the second the actions are brought in England.

Generally provided a plaintiff has a sufficient cause of action in tort or contract he may bring his action in any and it is no business of the court to force him on to the other. Thus the choice of the relevant action will depend more on the plaintiff than on the judge.

1. Where English Law is the proper law of the Contract and the tort is committed out of jurisdiction

The rule here is that where a tort or contract action is brought under a contract governed by English law the rights and obligations of the parties will be determined by the contract.

In *Re Missouri's* case the plaintiff's action failed because English law being the proper law of the contract allowed the exemption clause to determine the extent of the obligation in its contract and tort aspect. It would have not aided the plaintiff's case if he sued in tort, for although he may have overcome the second branch of the rule in *Phillips v Eyre*⁶ i.e. the defendant's act was not a justifiable one under the *lex delicti* he would have failed to cross the first hurdle under the first branch of the rule which requires that the act should be actionable in England. If the tort had been committed in England the exemption clause would render it not actionable. There is American authority to support this in *Scott v American Airlines*.⁷ The facts are that the deceased was travelling in a plane from Detroit to Buffalo when the plane crashed in Ontario. His wife accepted compensation in Michigan under which she forfeited her common law right to sue in tort either in Michigan or Ontario. The court held that she could not sue in Ontario.

2. Where the tort is committed in England but the proper law is out of jurisdiction

Here again the conclusion to be drawn from the cases is that the proper law of the contract governs the tort action. English law recognises a foreign contract as a defence to a tort action.

In Zivnostenska Banks v Frankman⁸ the plaintiff's action for detinue was defeated because according to the proper law of the contract between him and the defendant the plaintiff had no immediate right to possession. In Kahler v Midland Bank⁹ the plaintiff had shares deposited on his behalf in a London Bank by a Czech bank. The London bank refused to hand over the certificates because the Czechoslovakian exchange control regulations did not permit the Czech bank to instruct the English bank to hand over the shares.

The House of Lords held that the claim in detinue was defeated by the proper law of the contract. Although the cases above refer to proprietary rights it does not make any difference whether the action was one in negligence arising out of contract. The conclusion to be drawn from these cases is that where English law is the *lex fori*, the proper law of the contract will determine the extent of liability in tort and the *lex loci delicti* does not apply. The Privy Council decision in Canadian Pacific Ry v Parent¹⁰ appears however to contradict this conclusion. In that case the deceased was travelling from Manitoba to Quebec. In Ontario he was killed in an accident. His passenger ticket had been issued at less than full fare and in return for this the deceased waived his right to claim for any personal injuries. This clause was not valid according to the laws of Quebec or Manitoba which governed the contract but was valid according to Ontario law which is the *lex loci delicti*. The Privy Council upheld the validity of the Ontario law which was the *lex loci delicti* and refused to consider the Manitoba or Quebec Law - the proper law of the contract. The temptation is to conclude

that the *lex fori* and the *lex contractus* are irrelevant if the *lex loci delicti* recognises the defence. But in this case one of the main hurdles against applying the proper law of the contract was whether the Quebec law should be given extra-territorial application. The Privy Council did not find any sufficient justification to do so.

3. Where English law is the *lex fori*

Here the inclination is to state that as English law recognises a foreign contract as limiting a tort committed in England it should make no difference when the tort is committed out of jurisdiction. Thus where A and B have by contract limited their liabilities the *lex loci delicti* should not modify that obligation for to do so is to frustrate the expectation of the parties. This conclusion creates no difficulty where the exculpatory clause is valid or void according to the proper law of the contract and according to the *lex loci delicti*. Conflict will however exist where it is valid in one but void in another or vice versa. The learned editors of Dicey on Conflict of laws have stated that in such situation the proper law of the contract should be allowed even though "according to the *lex loci delicti* the term is void, or if valid, not available as a defence to a delictual action."¹¹

The justification for this conclusion will be that as English law allows a foreign contract as a defence to a tort in England the court will visualise the tort as having been committed in England and then by noting that foreign contracts afford defence it would then extend this concept to the foreign tort. The implication of this is that the

proper law of the contract is applied to determine the actionability or otherwise of the plaintiff complaint in tort under the first branch of the rule in Phillips v Eyre.¹²

If the plaintiffs fail to cross this hurdle it matters not whether under the *lex loci delicti* the tort is not justifiable.

The criticism against such a result is that it extends the scope of the first branch of the rule which as the learned editors state "little can be adduced in its favour from point of view of justice or convenience." Similarly where the clause is void according to the *lex loci delicti*; if the proper law is allowed to determine the tort obligation the result would be to allow a plaintiff to sue for a tort which according to the *lex loci delicti* is justifiable. This result goes against the second branch of the rule in Phillips v Eyre¹² under which the act must not have been justifiable according to the *lex loci delicti*.

Thus on principle the submission that the contract should determine creates difficulties. But it is arguable that a universal and uncritical adherence to the *lex loci delicti* can lead to bizarre result and that the contract is preferred to the tort because of the basic difference between their duties. The contract affords the best indication of the expectation of the parties and that there is hardly any reason why a Scotsman who is travelling in his employers vehicle with another Scotsman and is injured through the negligence of the other should have the exculpatory clause declared void because the accident happened south of the border and English law does not allow such a clause. Such

an application of the *lex loci delicti* is just as fortuitous as the *locus contractus* doctrine which has been abandoned for the more flexible rule of the proper law of the contract. But it may be asked that, if the justification is the expectation of the parties why should this not be relevant where the exculpatory clause is void according to the proper law of the contract but valid according to the *lex loci delicti*. Where such a concurrence exists the *lex loci delicti* should apply and not the proper law of the contract.

These contentions serve to show that the rule in Phillips v Eyre¹² is unfortunate and that in its place should be a proper law of tort. In Babcock v Jackson¹³ the plaintiff a gratuitous passenger in the defendant's car was injured in an accident in Ontario due to the defendant's negligence. Both parties were resident in New York State where the car was licensed, garaged and insured. An Ontario statute absolved drivers for liability for gratuitous passengers but there was no similar provision under New York law.

Fuld J. asked: "Shall the place of the tort invariably govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?"

The alternative was accepted and New York law was adopted as having the most connection with the tort. This approach removes most of the conceptual difficulties of the rule in Phillips v Eyre.¹⁴ In doing so the Court deliberately preferred

the draft of the Second Restatement on Conflict of Laws according to which "the local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities."

Another related aspect of difficulty is where the *lex loci delicti* forbids claims by gratuitous passengers but the *lex fori* allows such a claim. There are no English authorities but some Canadian cases have shown an escape route by straining the concept of contract beyond its limits.

In Key v Key¹⁵ the Court suggested that by invoking an implied contract between the driver and the passenger the passenger can sue the driver for breach of the contract and thus avoid the law forbidding action by a guest passenger and which is the *lex loci delicti*.

With due respect it is difficult to see what consideration exists in such a situation to support a contract and it is conceivable that if English law is the forum such an outcome would have been avoided.

In Maclean v Pettigrew¹⁶ this result was rejected but the court proceeded to introduce a more bizarre escape route. By relying on a number of French cases it held that there was no contract. Turning to the tort it acknowledged that under the first rule in Phillips v Eyre the defendant's act was actionable. It also held that it was unjustifiable according to the *lex loci delicti* - Ontario law, because the defendant was criminally liable. The absurdity of this conclusion was that the defendant was acquitted.

A similar difficulty between tort and contract and which has exercised American courts is the direct action

statute. Under such statute a victim of an accident can sue the insurer of the driver without first proving negligence on the part of the driver. Assuming the driver was negligent the question whether the insurer is liable may depend on a cumulation of different rules. Thus whether the insurer was directly liable may be referred to the *lex fori* as a matter of procedure, to the *lex loci delicti* as a matter of tortious liability to the proper law of the contract as a matter of contractual liability. Rebel on the Conflict of Laws¹⁷ asserts however that in such a situation the issue should be determined by the *lex loci delicti*. The editors of Dicey on the other hand advocate that the plaintiff must prove that the insured act was actionable in England and not justifiable according to the *lex loci delicti* and then he must prove that the proper law of the contract allows direct recovery against the insurer.

Collins has pointed out that this appears to "involve an incorporation of the rule in Phillips v Eyre into a contract of insurance, but at least mitigates the severity of that rule by relaxing the dual requirement with regard to the insurer's liability."¹⁸

This view has been upheld by an Australian Court in Plozza v South Australian Insurance Co.¹⁹ The plaintiff was injured by the insured in Victoria which has no direct action statute. The insurance policy was taken out in South Australia which has such a statute. The defendants Insurance Company contended that as under the Victoria law it was not directly liable the second branch of the rule under Phillips v Eyre²⁰ applied. The court rejected

this contention and held that the proper law of the contract applied to determine whether the plaintiff can sue the defendants. The Victoria law was relevant to the question of liability of the insured.

In conclusion, it can be seen that the rule in Phillips v Eyre²⁰ does no more than apply a mechanical jurisprudence. A rule which can be avoided by invoking the *lex fori* to determine causes of action does no more than a discredit to the system of private international law. It is unfortunate that the House of Lords did not choose to do away with it in Chaplin v Boys²¹ and substitute in its place the more flexible and internationalist approach of Babcock v Jackson²²

GENERAL CONCLUSION

The common law has always been reluctant to impose new liability or to extend existing ones. This has also been applied to defences to common law action. Professor K.C. Denning in "The Future of Judge made Public Law in England: A Problem of Practical Jurisprudence"¹ has criticised this. He stated that the judges who "purport to limit themselves to precedents and logic; they purport to have no concern for the policies on which the law necessarily rests." The fundamental weakness of this is "that English judges deny responsibility for remoulding judge-made law in order to improve it, to keep it abreast of current conditions, and to make it better serve the needs of living people." There is much truth in this. For example Viscount Simonds in *Midland Silicones* case restated his belief in privacy in very severe language when he said: "For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent."²

In practice there is not so much rigidity to orthodoxy. *Hedley Byrne v Heller* can justify this although some of the recent applications seem to sound a retreat from possibilities opened by that case.³ The law should always follow changing conditions but it should not necessarily keep abreast with it. Such will obviously lead to confusion. It has to be pointed out that the views advanced have been based strictly on principle and

in some cases change is most welcome. Thus it may be advocated here that exemption clauses should be narrowed as far as possible but that the present rule relating to reliance by third party is not borne out by principle but by refusal to make sense. On the other hand it can be contended that the preference for the contract rules is justified on the basis that a contract probably expresses more clearly the reasonable expectations of the parties.

In other areas of the law the common law has not proved inadequate although comparison with other system may create such impression. The fact that there is a difference does not make the common law inadequate and it should be remembered that checks and balances ought to exist in this branch of the law if the courts are not to be flooded with would-be litigents. The fact that the law is certain helps settlements out of court. Thus only about 2% of tortious acts ever come before the court. Of this tiny percent a very small fraction even get to an appellate court where the issues of "law" as opposed to the issues of "fact" are likely to be discussed.

Such an outcome will not be possible if judges see themselves as essentially reformers.

GENERAL CONCLUSION

1. (1967) 61 Col. L. Review 201 at 210
2. Viscount Simonds in *Scruttons Ltd v Midland Silicones Ltd* (1962) A.C 446
3. See *Mutual Life Assurance v Evatt* (1971) 2 W L R 23

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1. 1877 3 QBD 23
2. Boorman v Brown 1842/ 3 QB 511; On appeal (1844) 11 CI & Fin I
3. Koufos v Czarndnikow 1969/1 AC 350; 1967/3 All ER 686
4. Constantine v Imperial London Hotels Ltd, 1944/ KB 693
1944/ 2 All ER 171
5. Clarke v Kirby-Smith 1964/Ch 506;
1964 2 All E.R. 835
6. Jarvis v May Davies & Co. 1936/ 1 KB 399 at 406
But see Brown v Boorman (1844) 11 CI & F 1 & E.R. 1003
7. Bagot v Stevens Scanlan & Co. Ltd 1966/ 1 QB 197
1964 3 All ER 577. But see now Esso Petroleum Co. Ltd v Mardon 1976 2 All ER 5
8. (1850) 10 CB 73
9. (1964) AC 1129, 1964/ 1 All ER 367
10. Ibid 1964/A.C. 1129 at 12227; 1964 1 All ER 367 at 410,
411. See also Cassell & Co. Ltd. v Broome 1972/
AC 1027; 1972 1 All ER 801
11. (1842) 10 M & W 109
12. (1865) 19 CBNS 213
13. (1932) AC 562
14. (1976) 2 All ER 5
15. (1963) 2 All ER 575, (1964) A.C 465
(1963) 3 WLR 101
16. (1975) 1 All ER 203 at 214
17. (1964) 2 All ER 835 (1964) CH 506
(1964) 3 WLR 239
18. (1938) 2 All ER 394 (1939) 1 KB 194
19. (1963) 2 All ER at 581, 1964 AC at 483
20. (1965) 2 Lloyd's Rep 496 at 519
21. (1974) 1 Lloyd's Rep 246 at 253
22. (1842) 3 QB 511, On appeal (1844) 11 CI & Fin 1
23. (1914) AC 932 (1914-15) All ER Rep 45
24. (1963) 2 All ER 575 (1964) AC 465
25. (1976) 2 All ER at 22

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2. *Degg v Midland Rail Co.* (1857) 1 H & N 773
3. *Lister v Romford Ice & Cold Storage Co.* (1957) A.C. 555
4. *I.C.I v Shatwell* (1965) A.C. 656
5. *Smith v Leech Brain & Co Ltd.* (1962) 2 QB 405
6. (1959) 1 All ER 346
7. *Lister v Romford Ice & Cold Storage* (1956) 2 QB 180
8. 5th Edition P. 76
9. (1959) 2 QB 57
10. (1932) A.C. 562
11. (1844) 11 Cl & Fin 1 ; 8 ER 1003
12. *Hutchinson v York, Newcastle & Berwick Rail Co.* (1850) 5 Exch 343
13. *Degg v Midland Rail Co.* (1857) 1 H & N 773
14. (1959) 2 QB 57
15. See *Corry v Dlaen* (1936) 3 All ER 241
16. (1857) 1 H & N 773
17. (1936) 3 All ER 241
18. (1972) 1 WLR 294
19. (1963) 2 All ER 575
20. *Ibid* at P. 618
21. (1936) 3 All ER 241
22. (1968) 1 All ER 1145 at 1148
23. (1936) 3 All ER 241
24. *R v Dono van* (1934) 2 KB 498
25. (1971) 1 WLR 519
26. (1972) 1 WLR 294
27. (1963) 2 All ER 575
28. This situation nearly arose in *I.C.I v Shatwell* (1965) A.C 656
29. (1971) 1 Lloyd's Rep 114

2 (Contd.)

30. (1966) 2 QB 370 at P. 379
31. *GH Myers & Co. v Brent Cross Service* (1934) 1 KB 46
32. *Frost v Aylesbury Dairy Co. Ltd.* (1905) 1 KB 608
33. 22nd edition para 1346
34. (1966) 2 QB 370 at 376
See also *Companie Naviera Maropen v Bowater Lloye Pulp and Paper Mills Ltd.* (1955) 2 QB 68
35. *Quin v Burch* (1966) 2 QB 370 at 380
36. (1952) 2 All ER 402
37. 11 Exch 781 at 784
38. (1966) 2 QB 370
39. (1949) 1 All ER 532
40. *Ibid* at 534
41. *Ibid* at 538
42. *Ibid* at 538
43. *Ibid* at 330
44. (1966) 2 QB 370
45. (1971) 1 Lloyd's Rep 114
46. (1966) 2 QB 370
47. (1966) 2 QB 370
48. (1966) 2 QB 370 at 380
49. 3rd Edition at 831
50. (1966) 2 QB 370

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2. (1924) A.C 522
3. I.C.I v Shatwell (1965) A.C 656
4. Smith v Charles Baker (1891) A.C 325
5. I.C.I v Shatwell (1965) A.C 656
6. (1844) 11 C & F 1
7. (1932) A.C 562
8. (1932) A.C 562
9. Law of Torts 13th edition p 570
10. (1953) 3 All ER 1021
11. Ibid at 1025
12. (1915) A.C 847 at 853
13. (1861) B & S 393
14. 1956 Vol 19 M.L.R at 383
15. (1861) B & S 393
16. 4th edition p 189
17. (1924) A.C 522
18. (1925) L.L.R 375
19. Ibid at 378
20. (1959) 2 QB 171
21. (1962) A.C 446
22. Hanson 1959 Camb L. J 150 etseq
23. (1955) 1 QB 158
24. (1924) A.C 522
25. (1924) A.C 522
26. (1924) A.C 522
27. But see, N. Z. Shipping Co v Sattenthwaite Ltd (1974) 1 All ER 1015
28. (1955) 1 QB 158 at 186
29. (1842) 10 M & W 108
30. Alton v M.R. Co (1866) 10 C.B.N.S 213

31. (1932) A.C.562
32. (1932) A.C 562
33. (1955) 1 QB 158 at 187
34. Holmes "The Common Law" at 292
35. (1955) 1 QB 158
36. (1964) A.C 465, (1963) 2 All ER 575
37. (1875) L.R 10 Q.B 437
38. (1962) A.C 446
39. (1915) A.C 847
40. (1924) A.C 522
41. (1842) 10 M & W 109
42. (1865) 10 C.B.N.S 213
43. (1962) A.C 446 at 488
44. 204 F. Supp. 821 (E.D. Tenn 1962)
45. Ibid at 832
46. (1973) 1 QB 87
47. (1962) A.C 446
48. (1968) A.C 58
49. (1962) A.C 446
50. (1968) A.C 58
51. (1962) A.C 446
52. (1911) 2 KB 326
53. (1974) 1 All E.R 1015
54. (1962) A.C 446 at 474
55. (1861) 6 H & N 295
56. (1924) A.C 522
57. (1956) 1 Lloyd's Rep 346, (1955) 95 C.L.R 43
58. Peek v North Staffordshire Rail Co (1863) 10 H.L. Cas 473
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60. (1945) 62 T. L. R 140
61. Ibid at 141
62. (1967) 2 QB 31
63. British Transport Act 1963
64. (1966) 1 W.L.R 758
65. (1947) 1 All ER 258
66. See generally Odgers Prof.: The Strange Case of Mrs. Sore
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3. *Clayton v Oliver* (1930) A.C 209
4. *Marcus v Myers* (1895) 11 T.L.R 327
5. (1976) 2 All E.R. 5
6. *The Argentino* (1888) 13 PD 191 at 200-201
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- 8^B *Clark v Kirby Smith* (1964) Ch 506
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10. *Lee v Sheard* (1956) 1 Q B 192
11. See Atiyah: *Negligence and Economic Loss* 1967 Vol 83 L.Q.R 248 et seq
12. Vol 81 LL.L.R 91
13. (1956) A.C 185
14. (1966) 1 Lloyds Rep 179
15. See Chapter 2. p 18 et seq

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6. (1884) 9 P D 105
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8. Scrutton L.J. *The Arpad* (1934) P 189 at 205
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31. (1914) 1 K B 244
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38. (1955) 2 All ER 557, (1955) 1 W L R 719
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20. (1701) 12 Mod 543, 1 Salk 11; 1 Ld Raym 692
21. (1959) A.C 604
22. (1826) 5 B & C 259
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26. (1964) 3 All E R 577 at 579
27. See Chapter 1
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29. (1932) A.C 562
30. (1966) 1 Q B 197
31. (1976) 2 W L R 493
32. (1972) 1 Q B 373
33. (1963) A.C 758 at 777
34. (1960) 1 Ch 718 at 728-729
35. (1963) A.C 758
36. (1976) 2 W L R 493 at 499
37. (1963) A.C 758
38. (1976) 2 W L R 493
39. (1976) 2 W L R 493 at 499
40. (1963) A.C 758
41. (1976) 2 W L R 493
42. (1966) 1 Q B 197
43. (1972) 1 Q B 373
44. (1976) 2 W L R 493
45. (1963) A.C 758
46. (1976) 2 W L R 493
47. (1963) A.C 758
48. (1963) A.C 758, Thus the release of the dust consisted the negligent act.
49. (1966) 1 Q B 197
50. (1976) 2 W L R 493
51. (1963) A.C 758
52. (1959) A.C 604
53. (1976) 2 W L R 493
54. (1976) 2 W L R 493 at 510
55. (1948) 2 All E R 89, (1949) 1 K B 550
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 22. 191 N.E 2 d 279 (1963)