Contributory Negligence: A Comparison between the South African, Australian and New Zealand Legal Systems

MICHAEL SPISTO* AND LES ARTHUR+

In this paper the authors argue that there are two limbs to achieving a just and equitable allocation of damages pursuant to apportionment legislation.

First, prosaic arguments concerning causation should be rejected in favour of a pragmatic approach, which focuses on the extent of the plaintiff's responsibility for his/her misfortune. It is argued that future Courts could also distinguish at the outset between divisible and indivisible harm in order that the assessment of damages be in line with the responsibility of the parties for any damages caused by them.

Second, and more controversially, the application of apportionment legislation should not be thwarted by privileging contractual claims in circumstances where the scope of the defendant's duty is identical in contract and in tort. This approach which is grounded in the concept of concurrent liability in tort and contract elevates substance above form and avoids arid interpretation issues which have confounded the underlying purpose of apportionment legislation.

> [S]hort of contract to the contrary, surely none of us should be wholly free of responsibility for consequences to ourselves to which we have carelessly contributed.[1]

This paper considers how the South African and Australasian courts have approached the nexus between the plaintiff's fault and causation so as to reduce the plaintiff's damages by having regard to the plaintiff's share in the responsibility for that damage. In these jurisdictions, the difficult concept of causation has played a key role in ensuring that the apportionment legislation is applied in such a way as to

* BSC, LLB, LLM (in Commercial Law) *UCT*; Attorney of the High Court of the Republic of South Africa; Lecturer in Commercial Law Department of Accounting, University of Waikato

+ BA (Waikato), LLB (Auckland); Barrister and Solicitor of the High Court of New Zealand; Lecturer in Law, School of Law, University of Waikato

1 *Mouat v Clark Boyce* [1992] 2 NZLR 559, 566 (Cooke P as he then was).

achieve a result that is 'just and equitable'. The words 'just and equitable' have been interpreted to mean that a blameworthy plaintiff should not be able to avoid responsibility for the consequences to which he or she has carelessly contributed.[2] In order to achieve this purpose, courts in both jurisdictions have reasoned that it is not necessary for the plaintiff to contribute to the event itself which causes the damage. Applying this reasoning, the damages sustained by a plaintiff in South Africa, for example, by his or her failure to wear a seatbelt, will be reduced to the extent that the plaintiff is responsible for his or her loss, even though the accident would not have happened 'but for' the defendant's negligence.[3] It is submitted that this broad analysis of causation has considerable force and ensures that the purpose of the legislation is attained.

At the heart of this approach is the proposition that, subject to the factual issue of remoteness,[4] the plaintiff's failure to meet the standard of care required of him or her for his or her own protection, should be reflected by a reduction in the damages awarded to the plaintiff.

The vexed issue as to whether or not apportionment legislation should apply to contractual claims, is considered. In contrast to the recent decision of the Australian High Court in *Astley v Austrust*,[5] New Zealand case law supports the view that apportionment legislation applies to contractual claims provided that the scope of the defendants duty is identified in contract and tort.[6] The theoretical basis for this reasoning is that the law of obligations should be based on the division between strict obligations and obligations of reasonable care,[7] rather than upon historical causes of action derived from contractual (voluntary) or tortious (imposed) obligations. If the defendant's scope of the duty of care is coextensive in contract and tort, that is, if the defendant's tortious obligations are not modified by the contract, then there appears to be no good reason why the relation-

2 *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 (Hereinafter *Dairy Containers Case*).

3 This is not applicable in New Zealand because of the New Zealand accident compensation system currently in place.

4 *Dairy Containers Case* 114-115 where Thomas J comments 'Put shortly, neither of the parties' blameworthy act must be too remote. Remoteness is the ultimate test'.

5 (1999) 161 ALR 155.

6 *Mouat v Clark Boyce* [1992] 2 NZLR 559; *Dairy Containers Case*.

7 This view is advanced by Lord Cooke in 'Tort and Contract' in P Finn (ed), *Essay on Contract* (1987) 222, 228-32.

ship between the parties should be exclusively regulated by the contract.

The concept of concurrent liability, that is dual liability in tort and contract, is of considerable importance with regard to the application of apportionment legislation to contractual claims. If the concept of concurrent liability is accepted,[8] then, *prima facie*, the apportionment legislation applies in circumstances where the plaintiff's 'fault' has contributed to his or her loss. If, however, the defendant's contractual duty is conceived as displacing the parallel duty in tort, it is arguable that, as a matter of statutory interpretation, apportionment legislation is not applicable.[9] The result of this latter analysis, which asserts the primacy of contract as a cause of action, is that no matter how blameworthy the plaintiffs may have been, the defendants must bear the entire loss. As noted by Callinan J in *Astley* such a result does 'not really accord with the modern tendency to eschew form and prefer substance'.[10]

More particularly, such an outcome, which completely ignores the plaintiff's contribution to his or her loss, is hardly consistent with the 'just and equitable' purpose of apportionment legislation.

We now turn to consider the South African approach to contributory negligence which, in particular, focuses on a broad approach to the issue of causation. It is argued that such a broad approach is required

8 The concept of concurrent liability has been accepted in the following cases; *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 (HL); *BG Checo International Ltd v British Columbia Hydro & Power Authority* [1993] ISR 12 (Canadian Supreme Court); dicta in *Mouat v Clark Boyce* [1992] 2 NZLR 559 and *Riddell v Porteous* [1999] 1 NZLR 1.

9 In *Astley v Austrust* (1999) 161 ALR 155 the majority held that as a matter of statutory construction and given the remedial purpose of apportionment legislation, such legislation does not apply to claims arising in contract. For a contrasting view see Professor Glanville Williams who, in *Joint Torts and Contributory Negligence* (1951) 80, argues that in the definition of fault in the Act, the word 'negligence' is not to be cut down by the later words, those being 'which gives rise to liability in tort'. In *Dairy Containers Case*, Thomas J accepts (at 74) that the interpretation is redundant following the decision in the House of Lords in *Henderson's case* (ibid) where the Court approved the concept of concurrent liability and thus the interpretation issue had been rendered redundant. In 'Judicial Reasoning by Analogy with Statutes: The Case of Contributory Negligence and the Law of Contract in New Zealand' (1993) 14(2) *Statute Law Review*, Gehan N Gunasekara develops the argument that, even assuming that the Act does not apply to contracts, it can be helpful as an analogy in developing the law of contractual negligence. That is, the principles underpinning the Act can equally be applied to parties in a contractual relationship: *Day v Mead* [1987] 2 NZLR 443, 451 and *Mouat v Clark Boyce* [1992] 2 NZLR 559, 565 (Cooke P).

10 *Astley*, ibid, 193 (Callinan J).

in order to achieve a 'just and equitable' result as proposed by the apportionment legislation.

Contributory Negligence: The South African Perspective

Apportionment of Damages Act No 34 1956 (South Africa)

Chapter 1

Contributory Negligence

1. Apportionment of liability in case of contributory negligence.

(1)(a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

(2) Where in any case to which the provisions of subsection (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted or notice should have been given in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of the said subsection, be entitled to recover damages from that claimant.

(3) For the purposes of this section "fault" includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.

Until recently, it was a rather controversial issue in South African law as to whether a plaintiff's failure to take reasonable precautions in minimizing his or her damage, both before and after the event causing the harm, could constitute 'fault', notwithstanding the fact that the event would nevertheless have occurred, had the precautions been taken, though the harm would have been less.

The court in the case of *Bowker's Park Komga Co-operative v SAR & H*[11] considered the decision in *King v Pearl Insurance Co Ltd*,[12] which

[11] 1980 (1) SA 91 (E).

[12] 1970 (1) SA 462 (W).

stated that the plaintiff's failure in wearing a crash helmet *in casu*, could not be regarded as 'fault' in terms of s1(1) of the Apportionment of Damages Act 34 of 1956, and therefore a reduction in the damages awarded to the plaintiff was precluded. The court in *King's Case* stated that 'fault' means simply conduct that would allow the defence of contributory negligence at common law.

Addelson J in *Bowker's Case*[13] was now faced with a legal question of a 'comparatively new one', but had to decide the issue one way or the other, so that future courts would know whether they could consider the fact that a plaintiff's contributory negligence increased his or her loss.

In casu the plaintiff claimed damages from the defendant as a result of damage to its property. It was alleged that a fire began on the defendant's property and then spread onto the plaintiff's adjoining property. The plaintiff further contended that this fire was caused by a locomotive engine owned by the defendant. Thus, it was alleged that the fire was caused by the negligence of the defendant. The defendant contended, however, that even if the court found that this fire damaged the plaintiff's buildings and materials on the plaintiff's property, the resultant damage to the plaintiff's property was partly due to the fault or negligence of the servants of the plaintiff acting in the course and within the scope of their employment. That is to say, the defendant alleged that the said servants of the plaintiff permitted grass and other vegetation to grow on the property and between creosoted poles near the boundary. It was argued that, because of its inflammable nature, this constituted a fire hazard that resulted in the spread of the fire. Furthermore, the defendant alleged that the conduct of the plaintiff was also such that it failed to extinguish and/or take adequate steps to ensure that the said fire did not flare up again. Thus, as a consequence thereof, the defendant pleaded that any damages suffered by the plaintiff should fall to be reduced to such extent as the Court deemed just and equitable having regard to the degree that the plaintiff was at fault.[14]

The plaintiff denied the fact that in law the alleged conduct of itself constituted 'fault' within the meaning contemplated in terms of s 1(1)(a) of the *Apportionment of Damages Act 34 1956*. Thus, the Court had to consider whether the plaintiff's conduct constituted 'fault' in terms of the said Act.

[13] 1980 (1) SA 91 (E), 91 C.

[14] Ibid.

The Court *in casu* noted that the court in the *King's Case* was of the view that the wording of s 1(3) of the Act was intended to restrict, rather than to extend, the purview of 'fault' of the plaintiff. Thus, the Court in *King's Case* further noted that if 'fault' was not contributory negligence at common law, then it was not the intention of the legislature to include any other form of 'fault'.[15]

Addelson J decided the issue affirmatively and noted that:

> In so far as the learned Judge ought to base his conclusion on the necessity for there being a causal connection between the plaintiff's negligence and "the event" (the accident) I am respectfully constrained to disagree with that conclusion for the reasons given above, namely that it does not reflect a correct interpretation of the effect of s 1(1) of the Act. The event with which the present case is concerned, is the starting of a fire and the spread of that fire; the damage which the plaintiff has suffered, is the destruction or diminution in value of its property which resulted from that event. If there is found to be a causal connection between any negligent acts or omissions on the part of the plaintiff and that damage, then in my view it is open to a court to hold that such acts or omissions constitute "fault" as contemplated by s 1(1) of the Act. On hearing the evidence the Court will have to determine whether the plaintiff ought to have foreseen the harm which could ensue if a locomotive owned and operated by the defendant started a fire where it did and whether the plaintiff ought to have taken steps to guard against, or minimise, such harm if it occurred. That will of course be a factual decision in the first instance and will depend on whether the harm was reasonably foreseeable and the precautions such that a reasonable man should have taken them. If both such conditions are fulfilled it does not seem to me that a finding that the plaintiff was at 'fault' offends either against the ambit of s 1(1) of the Act or ... against "one's sense of justice".[16]

Thus, the emphasis is 'on the importance of the causal relationship between the negligence of the plaintiff and the harm' and 'not the "event"' itself. Thus, the causal link must be established 'between the negligence and the damage; not the "accident", or the "event", or "damages", but the damage itself, which in my view was clearly intended to refer to the "harm" caused'.[17]

What is interesting is the fact that the decision of Addelson J was based on what he thought would be best for the law of delict (tort) in the future with respect to the issue of contributory negligence. He notes that if there is found to be a causal connection between any

[15] Ibid 94 F.

[16] Ibid 97 H – 98 B.

[17] Ibid 96 F - G.

negligent acts or omissions by the plaintiff, then such acts or omissions would constitute 'fault' as contemplated by s 1(1) of the Act. Thus, the court stated that it is the causal relationship between the negligence of the plaintiff and the harm, and *not* the 'event' itself, which must be considered.

Thus, the cCourt *in casu* found that the conduct of the plaintiff amounted to 'fault' in terms of s 1(1)(a) of the Act, notwithstanding that it occurred subsequent to the event and did not contribute to the event itself. Thus, it is submitted that Addelson J is recommending that future courts should take cognisance of the plaintiff's conduct or omission in the reduction of damages.

Before proceeding to more recent cases on the question of contributory negligence, let us consider how future courts may decide the question of damages. Boberg[18] noted that future courts should perhaps award damages in accordance with the methods proposed by Anglo-American law. He states that:

> If ... the harm is indivisible, the causes ... incur joint and several liability for the whole harm. The presumption is that the harm is indivisible, so that any cause which seeks to escape liability for the whole harm [must prove] that it caused only part of the [harm]. [Thus, in this case], the plaintiff's total harm [would have] two causes:
>
> a) the defendant's negligence; and
>
> b) the plaintiff's contributory negligence.
>
> Hence, the plaintiff's contributory negligence affects his [or her] whole recovery ... and in terms of s 1(1)(a) of the ... Act, [his or her claim] must be reduced according to the degree of his [or her] fault.
>
> [However, if the plaintiff can prove the harm to be divisible], in the sense that portions of it can be attributed to particular causes, each cause ... is liable only for that portion of the harm which it caused.

By way of a hypothetical example, let us consider how this scheme may contribute to the overall process in clarifying the issue for future courts.

If the plaintiff's damage is R20,000 and he or she can prove that the damage would have been R12,000 without his or her contributory negligence, then the plaintiff is only partly liable for R8,000. If the court then assesses the degree of fault at 50%, then the plaintiff recovers R4,000 of the R8,000, plus the R12,000 portion in full. Thus,

[18] Boberg, 'Multiple Causation, Contributory Negligence, Mitigation of Damages, and the Relevance of these to the Failure to Wear a Seat Belt' (1980) 97 *South African Law Journal* 204, 206.

the plaintiff should recover R16,000. However, if the plaintiff is unable to prove that the harm was divisible, his or her contributory negligence would reduce his or her recovery to R10,000.

Therefore, Boberg is suggesting a possible way that South African courts could award damages based on contributory negligence. He suggests that this depends upon whether the harm is divisible or not. If divisible, each party would be solely liable for the harm it caused. If indivisible, the harm caused by the parties would be apportioned by the courts in accordance with the courts' assessment of the degree of fault of each of the parties. This reasoning can be further illustrated in the following way. If there is a sign-post indicating that a wall is unstable and that pedestrians should not venture too close to it, if the plaintiff, however, stands near to the said wall negligently and suffers injuries and/or damages as a result of the negligent collision of a motor vehicle with the said wall, then the damages caused to the plaintiff would most likely be apportioned between the plaintiff and the defendant in accordance with the court's assessment of the respective fault of the parties. This is the indivisible element of the total harm in terms whereof the causes incur joint liability. However, the plaintiff would not be responsible for damages to the actual wall itself. This part of the damages is divisible and can thus be separated out as such by courts at the outset of the proceedings. There is no question of any apportionment of damages between the parties in so far as this aspect of the harm is concerned. This analysis fits in with the pragmatic approach to damages advocated in this paper.

It is submitted that this method is logical and sound and that it should be taken into account when future courts decide that the plaintiff's contributory negligence did increase the loss. Thus, Addelson J has decided upon a principle of vital social importance because, by doing so, he has to a large extent set a precedent and thus clarified the issue for future courts in reducing a plaintiff's damages through his or her own contributory negligence in failing to comply with safety legislation. However, this will not be so in every case, and it will have to be shown in each case that the plaintiff's omission amounts to negligence in that the reasonable man would have acted otherwise.[19]

The next question to be considered is *how* recent courts have in fact addressed the problem. In this regard one would have to consider the criteria which the courts have used to apportion damages for contributory negligence.

[19] Ibid 207.

In *Union National South British v Victoria*,[20] the Court noted that it *was* possible, in *some* cases of contributory negligence, for fault to exist in respect of an act or omission that caused the damage. Thus, there can be fault in relation to the event causing the damage. The Court further noted that the legislature specifically used the words 'just and equitable' to allow *all* relevant factors connected to the fault to be considered. Thus, one must distinguish the situation where the passenger or driver of a motor vehicle *forgot* to wear a safety belt from that situation where the passenger or driver *refused* to wear one.

Hence, the Court noted further that, in South African law, where it is proven that the plaintiff, because of an omission on his or her part, suffered more damages than he or she ordinarily would have done without there being this omission, there would be no problem in proving contributory causation on the part of the plaintiff. That is, in *every* situation, the respective faults of the plaintiff and of the defendant must be determined. Only then can the claim for damages be reduced in a 'just and equitable' manner.

Therefore, the Appellate Division *in casu* did not in fact base their decision on a causal type approach (that is, to establish what portion of the damage could be attributed to what particular cause) in respect to the assessment of damages. It could be argued, therefore, that the approach of the Appellate Division is in accordance with the assessment scheme proposed by Boberg in this paper. That is, in so far as the damages in the case of *Victoria* can be said to be 'divisible' (as proposed above), *Victoria's Case* confirms this approach. Thus, the decision of the Appellate Division would, it is submitted, be considered very authoritative for future courts to take into account.

Furthermore, in *Vorster and Another v AA Mutual Insurance Association Ltd*,[21] it was noted that contributory negligence at common law relates to negligence which contributes causally to the consequences of the event (the harm or the damage). Thus, if the negligence of a person, although in no way contributing to and having no causative effect on the incident itself, relates to the damage sustained by the victim, this, according to the court, would nevertheless constitute 'fault in relation to the damage' as contemplated in s 1(1)(a) of the *Appointment of Damages Act No 34 1956*.

In casu, the Court found that the plaintiff's carelessness in the circumstances was 'almost forgivable'. Thus, the court in apportioning

20 1982 (1) SA 444(A).

21 1982 ISA 145(T).

damages in terms of s 1 of the Act, approached the matter on the basis that the defendant had to bear by far the greater share of responsibility as it was his negligence which had caused the accident. *In casu*, therefore, the defendant had been 80% at fault in relation to the damages in question and that they should therefore be reduced by 20%.

With regard to more recent cases, in *General Accident Versekeringsmaatskappy SA Bpk v Uijs No*,[22] it was common cause that the plaintiff had refused to wear his seatbelt despite having been specifically asked to do so by the driver. However, it was common cause between the parties that the driver of the vehicle had caused the accident in a grossly negligent fashion.

Regarding s 1(1)(a), the Court noted that this section was usually applied where both parties had been negligent and both had suffered damages as a result thereof. However, where one party alone had been at fault with regard to the causation of the accident, this was much more difficult. In this respect the Court, however, did note that s 1(1)(a) did not provide that a claimant's damages had to be reduced in relation to the degree to which he or she was at fault, but to such extent as the court, having due regard to the degree to which he or she was at fault, deemed just and equitable. The Court further noted that, although justice and equity in the present case demanded that allowance be made for the fact that the plaintiff had in no way contributed to the accident, his fault was of a different kind to that of the defendant. Thus, the plaintiff's damages were accordingly reduced by one third.

Interestingly, regarding the question of contributory negligence, the Court noted that it was a trite rule of law that a court of appeal will not interfere with a trial court's estimation of the extent to which an injured person's damages had to be reduced in terms of s 1(1)(a) of the *Apportionment of Damages Act No 34 1956*, unless the trial court had materially misdirected itself, or unless its assessment differed strikingly from that of the appeal court.

It would therefore appear that *Uijs's Case* considers the issue of acting in a 'just and equitable' manner as significant as *Victoria's Case* when it comes to assessing the degree of fault of the respective parties.

However, in the case of *Minister van Wet en order en 'n ander v Ntsane*[23] the Court came to vastly differing conclusions. *In casu*, a po

22 1993 (4) SA 228(A).

23 1993 (1) SA 560(A).

liceman shot and wounded an escapee without properly warning the escapee in terms of the requirements as laid down in s 49(1) of the South African *Criminal Procedure Act No 51 1977*. The Court *in casu* noted that where the legislature in s 1(1)(a) of the *Apportionment of Damages Act* makes use of the phrases 'his own fault' and 'by the fault of any other person' alongside each other, the legislature had the *same* type of fault in mind. Thus, if the fault of the plaintiff was negligence, the legislature, by the use of the second phrase, refers *only* to the negligence aspect of the fault. Accordingly, the Court found *in casu* that where the defendant (the policeman) has *intentionally* wounded the plaintiff, the defendant could not rely on the contributory negligence of the respondent, and therefore was not entitled to an apportionment of damages in terms of the Act.

We do not, with respect, agree with the decision and reasoning of the Court *in casu*. Firstly, it would appear that, if a prisoner is attempting to escape, he or she is in fact *intending* to do so. This would mean that both the policeman and the escapee had the same type of fault, that is of intention, if one were to adopt the language and reasoning of the court. Thus, would it not be possible for fault, in terms of s 1(1)(a) of the *Apportionment of Damages Act*, to be extended in its interpretation to include 'intention' as well. Secondly, even if one were to assume that the various parties had different types of fault, it would be logically unsound to bar an action based on contributory negligence on this basis. It would therefore appear that the court in *Ntsane's Case*, with respect, did not take cognisance of the 'just and equitable' issues as enunciated in the aforementioned cases.

Thus, it is submitted that future courts, in deciding where and when to draw the line, should judge each case on its own merits and hence award damages for contributory negligence accordingly based on what is 'just and equitable'.

Thus, to illustrate this point, although it may be socially undesirable to accept that pedestrians and pedal-cyclists, who have not worn safety helmets or protective clothing, should be deprived of part of their damages on that ground, a motor cyclist, who does not wear a crash helmet or an occupant of a motor car who does not wear a safety belt, should, it is submitted, have their damages reduced accordingly.

Additionally, it may be asked whether a negligent party to a collision may be entitled to claim an apportionment against a blameless occupant of a motor car on the ground that, if he or she had been travel-

ling in a heavier or better designed vehicle, he or she would not have been so badly injured.[24] Our moral convictions answer the question negatively, but the courts may decide that in the specific circumstances, such as in a truck rally, the plaintiff may be guilty of contributory negligence.

It would also appear in the aforementioned cases that the courts have tended to move away from the concept that causation must exist on the part of the plaintiff before the defendant can have a reduction in the quantity of damages that is owed to the plaintiff. That is to say, if the negligence of the plaintiff, although in no way contributing to nor having any *causative* effect on the incident itself, relates to the damage sustained by the victim, this should and would constitute the meaning of 'fault' as contemplated in s 1 of the *Apportionment of Damages Act.*

It is submitted that this approach by the courts is to be greatly welcomed as this will certainly be a sound basis which will facilitate any court in deciding, in the circumstances, what is *in fact* to be regarded as 'just and equitable'. That is to say, in every situation, the respective faults of the plaintiff and the defendant will have to be determined in regard to the factual circumstances surrounding each party.

Regarding the question of the actual assessment of damages, we submit that the approach adopted in Anglo-American law is sound and logical. In fact, it would appear that the courts today are in essence adopting a similar style, if not the same approach, when apportioning damages between the plaintiff and the defendant in terms of the *Apportionment of Damages Act.* What is important, though, is for the courts to remember that a solid basis must develop for the assessment of and the awarding of damages. Consistency in respect thereto is the key for a successful system to operate and be maintained. Only *then* can we pride ourselves of a workable model for assessing and awarding damages for contributory negligence.

It has been seen that the South African courts have relied on the 'just and equitable' requirement of apportionment legislation to reflect the plaintiff's share of the responsibility of his or her damage by applying a broad approach to the causation issue. This general approach is, for similar reasons, evident in New Zealand.

[24] Curiae, 'Contributory Negligence and the Crash Helmet'(1972) 89 *South African Law Journal* 238.

The Effect of the *Apportionment of Damages Act No 34 1956* (South Africa) on Contractual Claims

With regard to the question of whether the said *Apportionment of Damages Act* applies to contractual claims for breaches of contract, the courts in the cases of *Barclays Bank DCO v Straw*[25] and *OK Bazaars (1929) Ltd v Stern and Ekermans*,[26] which followed the *Barclays Bank Case*, noted that the said apportionment legislation does not apply. In the decision of *OK Bazaars (1929) Ltd v Stern and Ekermans*, the Court per Water-Meyer J noted that he did

> not think that the Legislature in our Act intended to introduce the principle of apportionment of damages in contractual claims. Nor do I think that it intended to introduce it in respect of certain contractual claims, namely those in which it could be said that there was a degree of fault on the part of the defendant in that he had failed to comply with a contractual term not to be negligent.[27]

In casu the plaintiff sued the defendant, a firm of land surveyors, for damages. The plaintiff alleged that the defendant had been instructed to proceed with the preparation of an up-to-date site diagram. The plaintiff alleged further that it was an implied term of the agreement that:

> the defendant would exercise due care and skill in the performance of its obligations;
>
> the defendant would make all such inquiries as were necessary to enable it to prepare a site diagram which, *inter alia*, reflected the correct boundaries to the said property; and
>
> the defendant would reflect on the said diagram the pegs and/or beacons in their correct positions.[28]

The plaintiff alleged that the defendant was in breach of its said obligations insofar as it had failed to set out the correct boundaries or to have any regard to a subsequent second road widening scheme which had been approved in 1964.[29]

The plaintiff further alleged that as a result of the defendant's conduct, the building had been constructed too far forward and thus, as a consequence, the plaintiff had suffered damages.[30]

25 1965 (2) SA 93 (O).
26 1976 (2) SA 521 (C).
27 Ibid 530 E.
28 Ibid 522 D–E.
29 Ibid 522 H–523 A.
30 Ibid 523 B.

The defendant averred, however, that it 'was not the sole cause of such damage' and that the plaintiff was partly at fault; as a result thereof the plaintiff's damages should be apportioned in terms of the *Apportionment of Damages Act No 34 1956*. The plaintiff contended, however, that although the defendant raised the defence of contributory negligence, the 'Act deals only with delictual claims and not claims based on breach of contract'.[31] Furthermore, it was contended by the plaintiff that

> The defendant's breach of the ... implied obligations to exercise due care of skill in performance of its obligations [ie preparing in the site diagram] was [a] breach of a contractual obligation and not a delictual obligation as alleged,[32]

and that therefore the *Apportionment of Damages Act No 34 1956* 'has no application to contractual claims'.[33]

Thus, the Court had to decide whether the plaintiff's claim was based on a breach of contract or on delict. The Court found that the plaintiff was alleging a breach of a contractual term and therefore that the cause of action was one based on contract.[34] The Court also pointed out that there were good reasons why s 1 of the said Act should not be held to apply to claims based on a breach of contract. That is, if the meaning of s 1 is not entirely clear, the 'canons of construction' are in favour of interpreting it 'in such a way as to conform to the existing law' and 'that in cases of obscurity' the long title may be considered.[35] In this case the Court noted that the 'long title makes it clear that the Act is one to amend the law relating to contributory negligence'.[36]

The Court further said that:

> [I]nasmuch as prior to the passing of the Act contributory negligence was not one of the recognised common law defences to a claim based on a breach of contract it seems to me unlikely that, had the Legislature intended to introduce a radical change in the law ... it would have done so in an oblique way and without using clear language to express such intention.[37]

31 Ibid 524 D.
32 Ibid 524H-525A.
33 Ibid 525 A.
34 Ibid 526 H.
35 Ibid 529 A.
36 Ibid 529 A.
37 Ibid 529 G.

In the *Barclays Bank Case* above, the Court simply noted per Hofmeyr J that, with regard to the said *Apportionment of Damages Act*, 'since this is not a case where the plaintiff is claiming damages the Act is not applicable to the plaintiff's claim'.[38]

Contributory Negligence: The New Zealand Perspective

Contributory Negligence Act 1947 (New Zealand): Apportionment of Liability In Case of Contributory Negligence

> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:
>
> Provided that
>
> (a) This subsection shall not operate to defeat any defence arising under a contract:
>
> (b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

'Fault' is defined in s 2 as:

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

In *Dairy Containers Ltd v NZI Bank Ltd*[39] (*Dairy Containers Case*) Thomas J was confronted with the 'prosaic' argument that the plaintiff's fault must be the fault which causes the event which, in turn, causes the plaintiff's loss. Applying this reasoning, in an action by a company against an auditor, the company's failure to protect its own interests, is not regarded as 'fault' requiring a reduction in its damages, unless the fault hindered the auditor in carrying out his or her duties. Thomas J rejected this narrow approach to causation as being contrary

> to the fundamental notion of contributory negligence. It means the failure by persons to use reasonable care to protect their own interests so

[38] 1965 (2) SA 93 (O), 99 F.

[39] [1995] 2 NZLR 30.

> that they became blameworthy in part as the author of their own misfortunes.[40]

His Honour observe that, quite apart from the purposes of the statute, the wording of the statute did not merit such an interpretation.

An important consequence of this reasoning is that a plaintiff may be found guilty of contributory negligence in circumstances where the defendant, in breach of its duty of care, had failed to protect the plaintiff from damages arising from the very event that gave rise to the defendant's employment. These were the circumstances in the Australian case of *Astley v Austrust*.[41]

Briefly, the facts of *Astley* were that the defendant solicitors were retained to provide advice to a professional trustee company concerning a deed of trust. The trust venture failed and the trustees became personally liable for losses that exceeded the value of the trust property. The High Court found that there were two factors which caused *Austrust's* loss:

- the failure to obtain a covenant against personal liability; and
- the failure of *Austrust* to investigate the viability of the venture.

In relation to the causation issue, the court applied the reasoning adopted by Thomas J in the *Dairy Containers Case*[42] and, accordingly, the plaintiff's failure to protect its assets constituted contributory negligence at common law. In contrast to the decision of Thomas J, the majority (Gleeson CJ and McHugh, Gummow and Hayne JJ) held that, notwithstanding the fact that the plaintiff's fault contributed to its loss, apportionment legislation did not apply to claims in contract.

The second part of this article contrasts the reasoning of the majority in the *Astley* case with the approach adopted by the New Zealand courts to the application of apportionment legislation in contractual claims. It is suggested that the New Zealand approach is preferable because it acknowledges the fundamental point that, short of contractual terms to the contrary, persons have a duty to use reasonable care to protect their own interests. The juridical basis of this approach is that the defendant's common law tortious obligations remain intact, unless varied by agreement between the parties. This

[40] Ibid 114.

[41] *Astley v Austrust* (1999) 161 ALR 155.

[42] [1995] 2 NZLR 30.

reasoning is strengthened by the acceptance of concurrent liability in contract and tort.[43]

The Effect of the *Contributory Negligence Act 1947* (New Zealand) on Contractual Claims

It is trite to observe that the purpose of contributory negligence Acts[44] is to overcome deficiencies in the common law principle. The remedial purpose of the legislation is concisely explained by the South Australian Attorney General as follows:

> By the common law of England a person who causes damage to another by negligence is guilty of a tort or wrong and, in general, liable to pay damages to the injured person. But if the injured person has contributed to his injury by his own negligence, or by want of proper care for his own safety, he is said to be guilty of contributory negligence and cannot recover damages from the other negligent party. He must bear the whole of his loss even though his fault was relatively small and that of the other party great.[45]

Given the remedial context of the legislation, it is perhaps unsurprising that the majority decision in *Astley v Austrust*[46] concluded that

> on any fair reading of the apportionment legislation against the background of the mischief it was intended to remedy, it is clear to the point of near certainty that the legislation does not and was never intended to apply to contractual claims.

The majority were fortified in their reasoning to reject the Act's application to contractual negligence by their observation that 'no case can be found in the books where contributory negligence as such, was ever held to be a defence to breach of contract'.[47]

This decision, which appears to give plaintiffs suing in contract the opportunity to recover the whole of their loss, notwithstanding the

[43] See in particular *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506.

[44] Similar legislation has been enacted in Canada, England, Australia and South Africa.

[45] South Australia, *Parliamentary Debates*, South Australian Legislative Council, 6 November 1951, 1082-3. See also United Kingdom, *Eighth Report of the Law Revision Committee* (1939).

[46] *Astley v Austrust* (1999) 161 ALR 155, 177.

[47] Ibid 179. In 'Judicial Reasoning by Analogy with Statues', above n 9, Gehan N Gunasekara develops the argument that, even assuming that the Act does not apply to contracts, it can be helpful as an analogy in developing the law of contractual negligence. That is, the principles underpinning the Act, can equally be applied to parties in a contractual relationship: *Day v Mead* [1987] 2 NZLR 443, 451. Also *Mouat v Clark Boyce* [1992] 2 NZLR 559, 565.

plaintiff's negligence, appears to be wrong in principle in so far as it asserts the primacy of contract as a basis for disregarding the plaintiff's negligence. This approach, which can produce a result that is contrary to the principle that *prima facie* liability should coincide with the responsibility of the parties for the damages in issue, is unlikely to be followed in New Zealand.

In *Mouat v Clark Boyce*,[48] a case involving a solicitor acting in a conflict of interest situation, Cooke P considered *obiter* the issue of the jurisdiction of the Court when apportioning damages and thought that the Court should be in position to do so in circumstances where the source of liability arose, *inter alia*, in tort and contract. It is submitted that his Honour's reasoning is informed by two interrelated principles. Firstly, the Court should ensure that liability coincides with the responsibility of the parties for the damages in issue. Secondly, and in order to achieve the first principle, apportionment legislation should be available in order to reduce the plaintiff's damages where the scope of the defendant's duty of care is identical regardless of the theoretical source of the defendant's obligation.

In *Dairy Containers Case*[49] Thomas J observed that the *Contributory Negligence Act 1947* requires the Court to recognise the plaintiff's failure to meet the standard required of him or her for his or her own protection where that failure is partly the cause of the plaintiff's loss. His Honour concludes that, following the decision of their Lordships in *Henderson v Merrett Syndicates Ltd*,[50] which confirmed the existence of concurrent sources of obligation in contract and tort, concurrent liability must now be accepted as representing the law in New Zealand. Clearly, the decision in *Henderson* strengthens the view that contributing negligence may be available to reduce the plaintiff's damages, where such damages arise in contract. It will be observed that the New Zealand cases cited, focus on the nature of the defendant's duty to take care rather than classifying the source of the obligation as tortious or contractual.

Thus, as a consequence of this, in New Zealand law, unlike in Australian law, it is unlikely that a blameworthy plaintiff will avoid apportionment of damages on the ground that apportionment legislation does not apply to a claim in contract. However, following the decision in *Astley*, it appears that in Australia, a claim in contrac

48 Ibid.

49 [1995] 2 NZLR 30, 76.

50 [1994] 3 All ER 506.

will not be subject to apportionment legislation. Thus, regardless of the plaintiff's fault, the defendant's would have to bear the whole of the loss.

Contributory Negligence and Concurrent Liability in Australia

The majority in *Astley's Case* rejected the proposition that a voluntary contractual duty of care can run concurrently with an obligation imposed by the law of negligence. This approach asserts the primacy of contractual obligations over corresponding tortious obligations on the following basis:

> The theoretical foundations for actions in tort and contract are quite different. Long before the imperial march of modern negligence law began contracts of service carried an implied term that they would be performed with reasonable care and skill. Persons who give consideration for the provision of services expect those services will be provided with due care and skill. Reliance on an implied term giving effect to that expectation should not be defeated by the recognition of a parallel and concurrent obligation under the law of negligence.[51]

According to this view, the contractual duty is afforded primacy because such a duty is incurred voluntarily and is supported by consideration. Such reasoning is predicated on the assumption that the traditional division between voluntary and imposed obligations is a sound basis for the classification of obligations. It is submitted that a more principled approach of the classification of obligations, is to focus on the scope of the obligation in question. This approach emphasises the distinction between strict obligations and the obligation to take reasonable care.

It is, of course, possible for the contracting parties to agree that the obligation to act with reasonable care can be modified by the use of an express or implied term. The effect of an implied term, on the parties' obligations, is clearly illustrated in contracts governed by the New Zealand *Sale of Goods Act 1908*. Section 16(a) of that Act states[52] that in circumstances where the purchaser has made known to the seller the purpose for which the goods are required, then 'there is an

[51] *Astley v Austrust* (1999) 161 ALR 155, 170.

[52] The full text of s 16(a) is as follows:

> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose.

implied condition that the goods shall be reasonably fit for such purpose'.

A recent New Zealand example is provided for in the case of *Bullock v Matthews.*[53] Bullock supplied Matthews, commercial rose growers, with sawdust to create 'heeling in' beds for roses. When a large proportion of the roses failed to develop as expected, because of the defects with the sawdust, Matthews sued for breach in terms of s 16(a) of the *Sale of Goods Act 1908*. Matthews' claim was upheld by the Court of Appeal. Thomas J[54] held that 's 16(a) applies irrespective of fault'.

In such cases, there does not appear to be either a legal, moral or policy argument to support the notion that apportionment legislation should apply to reduce the plaintiff's damages. If, however, the contract between the parties does not, by virtue of an expressed or implied term, convert the duty of care required from a reasonable standard to strict liability, then it is difficult to see why apportionment legislation should not be available.

There is precedent in support of the New Zealand approach applying apportionment legislation to contractual claims. In *Forsikringsatstieselskape vestra v Butcher*,[55] Hobbhouse J stated that, where the defendant's liability in contract is the same as his or her liability in the tort of negligence, independently of the existence of any contract, then

> the correct analysis is that where there is independently of contract a status or common law relationship which exists between the parties and which can then give rise to tortious liabilities which fall to be adjusted in accordance with the 1945 Act the relevant question in any given case is whether the parties have by their contract varied that position.

It is submitted that the approach adopted by Hobbhouse J and by the New Zealand court in *Mouat v Clark Boyce*[56] and the *Dairy Containers Case*[57] is to be preferred to the Australian approach as enunciated in *Astley's Case.*[58] This is because of the anomalous result that can flow when completely disregarding the plaintiff's responsibility or fault in causing his or her loss.

53 CA 265/98 18 December 1998.
54 Ibid 3.
55 [1988] 2 All ER 43.
56 *Mouat v Clark Boyce* [1992] 2 NZLR 559.
57 [1995] 2 NZLR 30.
58 (1999) 161 ALR 155.

A broad approach to causation, together with the acceptance of the proposition that apportionment legislation applies to contractual negligence, is essential for apportionment legislation to achieve its purpose. If the acts or omissions of the plaintiff in part cause the resulting damage, then the defendant's tortious liability should be reduced accordingly. In considering apportionment of damages, the court will weigh the respective degree of causation and relative blameworthiness of each of the parties. These are issues of fact and quantum and will ultimately turn on the facts of each particular case and will thus include the relevant expertise of the parties. A professional client, like the trust company in *Astley's Case*,[59] should be expected to bear a greater proportion of its loss, to which it has carelessly contributed, than the elderly widow in *Mouat v Clark Boyce*.[60] The strength of the approach to apportionment of damages as advocated in this paper, is that it affords the court an opportunity to fashion a remedy that apportions responsibility for the loss where it rightly belongs.

Conclusion

In this article a comparison has been made between different legal systems with regard to the issues relating to the concept of contributory negligence in tort (delict). The South African and the Australasian legal systems have been seen to be similar in some areas, but also noticeably different in other areas in their application of law. There are, however, some differences in the language used in the sections of the two statutes cited. We do not feel that the definition and meaning created by the legislature in the one statute differ from the other in any significant manner. Thus, in this article, the major characteristics and features inherent in each system have been identified and analysed with due regard having been made to the shortcomings existing in each. It is interesting to note that contributory negligence issues are rather vexing and complicated; but the different legal systems have attempted to overcome their various problems by enacting legislation which it deems would best fit within the frameworks of their principles and values of the country. However, it has been seen from this paper that loopholes do exist in these legal systems.

In this conclusion, the major features unique to each system will be briefly outlined and a workable model will be proposed which will

[59] Ibid.

[60] [1992] 2 NZLR 559.

draw on some of the unique elements of each system. This model could then be considered by both the South African, the New Zealand and other legislatures when reviewing their respective legal systems on this issue.

Considering the South African perspective with regard to contributory negligence issues in delict (tort), until recently, it was uncertain whether or not a plaintiff's failure to take reasonable precautions to minimise his or her damages, could constitute 'fault' in terms of s 1(1) of the *Apportionment of Damages Act No 34 1956*. This meant, therefore, that this lack of certainty could preclude a reduction in the plaintiff's damages even though there may have been some 'fault' on his or her side. However, in 1980, Addelson J set a precedent for future courts to follow in that the damages suffered by the plaintiff could be reduced through his or her own contributory negligence in failing to comply with the appropriate safety legislation in place. Thus, Addelson J noted that it was a causal relationship between the negligence of the plaintiff and the harm, and *not* the event itself, which must be considered. However, as was seen, this would only be so if it could be shown that the plaintiff's omission amounts to negligence in that the reasonable man would have acted otherwise.

A further development was the application by the courts of the 'just and equitable' doctrine in the Act that allowed all of the relevant factors connected to the fault to be considered. In this way, the respective faults of the plaintiff and of the defendant must be determined in order to reduce the plaintiff's claim for damages in a 'just and equitable' manner. Thus, as noted herein, s 1(1)(a) did not provide that a claimant's damages had to be reduced in relation to the degree to which he was at fault, *but* rather to such extent as the court deems 'just and equitable' having due regard to the extent to which the plaintiff was at fault.

Thus, although it is well argued that judging a case on its own merits and thereby awarding damages for contributory negligence based on a 'just and equitable' doctrine in terms of the said *Apportionment of Damages Act*, is sound legal practice, the doctrine is flawed in three noticeable ways:

It seems to take only into account acts that amount to the negligence aspect of the fault as discussed herein. Thus, it would seem that the intentional aspect of the fault would be precluded in situations where it accompanies the negligence of the other party. That is to say that because the legislature in s 1(1)(a) of the *Apportionment of Damages Act No* 34 *1956* had used the phrases 'his own fault' and 'by the fault of any other person' alongside each other, it required the same form of

fault to be present. Thus, if the fault of the plaintiff was negligence, the Legislature, by the use of the second phrase refers only to the negligence of the defendant. Consequently, where the defendant had acted intentionally, the defendant could not rely on the contributory negligence of the plaintiff.

It seems to preclude the application of the said *Apportionment of Damages Act* where the intentional aspect alone of the fault is found. Thus, should the purview of the said Act not be extended by the courts to include the intentional aspect of the fault as well?

It seems to ignore the possibility that, although a court may regard an act or acts as being 'just and equitable' in a particular situation, another court may not. Thus, should there not be some standardisation of criteria employed by the courts when judging each case on its own merits?

It can, therefore, be stated that the provisions of the said *Apportionment of Damages Act*, are far too uncertain in application. It may be prudent to redefine s 1 of the said Act in such a way that the notion of what is or is not 'just and equitable' does not form the basis of the consideration. This wording is too imprecise, vague and discretionary on the part of the courts which has, and will in the future, lead to inequality by them when reaching their decisions.

We now turn to the major features of the New Zealand legislation.

Section 3 of the *Contributory Negligence Act 1947* is applicable whenever the fault (negligence, breach of statutory duty or other act or omission) of the defendant and plaintiff has contributed to the damage suffered by the plaintiff. It was seen that the main purpose of this legislation was to overcome the deficiencies in the common law principle that stated that, where a plaintiff had contributed to his or her damage by his or her fault, that person was totally barred from recovering any damages whatsoever from a defendant who was the main cause of the fault. The problems outlined above with regard to the 'just and equitable' doctrine apply equally to the *Contributory Negligence Act* in New Zealand.

It has also been suggested in this article that case law supports the application of the apportionment legislation in circumstances where the duty to take care in contract and tort overlap. The main principle underlying the said legislation is the requirement for the plaintiff to meet the standard of care expected, and where this was not done, the court could apportion the fault between the parties. Thus, the apportionment legislation would seem to be applicable where the defendant's liability in contract would be the same as his or her liability in

the tort of negligence and independent of the existence of any contract. However, this is by no means clear and what is required is to amend the said Act so as to make it clear that contributory negligence should apply in order to reduce damages for the breach of a contractual duty of care. It is also not clear how the various courts will determine this standard of care and whether this yardstick will be applied consistently and correctly throughout.

Finally, New Zealand law unlike Australian law, seems to allow an apportionment of damages in contract. Furthermore, it is evident that the South African apportionment legislation does not apply to claims for damages based upon a breach of contract. This is due to the fact that the legislature did not, in the South African *Apportionment of Damages Act*, ever intend to introduce the principle of apportionment of damages into contractual claims. It also did not intend to introduce this principle of apportionment of damages in respect of certain contractual claims, namely those in which it could be said that there was a degree of fault by the defendant by virtue of the fact that the defendant had failed to comply with a contractual term and was, as a consequence thereof, negligent.

Summary

In summation, it is submitted that a model should be devised that draws on the major strengths and practices of both the South African and New Zealand systems of apportioning damages arising out of contributory negligence. The New Zealand idea of allowing apportionment legislation to apply in a contractual setting where there has been a breach of a contractual duty of care, is a good and useful concept. It is not necessary to always categorise claims into either delictual (tortious) liability or contractual liability. Thus, if a duty of care is breached by the plaintiff arising from a contractual relationship, the plaintiff's loss ought to be reduced by the application of the apportionment legislation, despite the fact that various other contractual remedies might exist. The methods employed in determining the apportionment of damages have been noted in this article. These methods are both logical and sound. It is suggested that these methods are to be given some consideration by both the courts and the legislature. Guidelines need to be set up which closely define what criteria need to be considered when deciding what the 'standard of care' should be or what is deemed to be 'just and equitable'.