CONTRIBUTORY NEGLIGENCE AS A DEFENCE TO A CLAIM FOR BREACH OF CONTRACT *ARTHUR YOUNG & CO V WA CHIP & PULP CO PTY LTD*

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The Western Australia Law Reform (Contributory Negligence & Tortfeasors' Contribution) Act 1947 ("the WA Act") effected a major alteration in the law by, inter alia, abolishing the common law rule that contributory negligence was a complete defence to an action for negligence. The long title of the WA Act, in so far as it relates to that alteration, is "An Act relating to the Common Law Doctrine of Contributory Negligence". By section 4(1) of the WA Act, the damages award for a plaintiff in "any claim for damages founded on an allegation of negligence" is to be reduced "to such extent as the Court thinks just in accordance with the degree of negligence attributable to the plaintiff". "Negligence" is defined to include breach of statutory duty.[1]

Prior to the commencement of the WA Act, it does not appear to have been settled whether contributory negligence was available as a defence to an action for damages for breach of contract.[2] As the WA Act makes no express reference to the issue, lawyers in this state have long wondered whether the WA Act had any effect upon the availability of this defence to an action in contract.[3] Until 1988

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1. The WA Act, s 3.
2. See G L Williams *Joint Torts and Contributory Negligence* (London: Stevens, 1951) 214ff.
3. Eg, S Penglis "Liability in Contract and Tort: Distinctions and Dilemmas" Law Summer School, University of Western Australia, Perth (WA) February 1988, 1-9.

no reported Western Australian case dealt with the question.

Similar but not identical legislation was introduced in many other jurisdictions. The relevant provisions in other Australian states and in the United Kingdom are, however, expressed to be applicable "[w]here any person suffers damage as a result partly of his own fault and partly as the result of the fault of any other person or persons". In these statutes, "fault" is defined to mean negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort.[4] It has been said that "it is impossible to find any authoritative interpretation" of these provisions in relation to the issue of whether contributory negligence is a good defence to a contract claim.[5] Nevertheless, a trend appears to have developed in very recent cases to allow defendants to actions for breach of contract to plead contributory negligence in certain circumstances.

In *Forsikringsaktieselskapet Vesta v Butcher & Ors ("F Vesta v Butcher")*, Hobhouse J analysed the issue at some length and discerned three classes of case where this question may arise:

> (1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.
> (2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
> (3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.[6]

His Lordship held that contributory negligence was available as a defence to actions in tort and in contract in cases falling within the third category provided the parties have not varied that position in their contract.

In *Walker & Ors v Hungerfords & Ors*[7] a case involving a claim that a firm of accountants had negligently prepared the plaintiff's

4. (UK) Law Reform (Contributory Negligence) Act 1945 ss 1(1), 4, (NSW) Law Reform (Miscellaneous Provisions) Act 1965 ss 9, 10(1), (Vic) Wrongs Act 1958 ss 25, 26(1); (Qld) Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952 ss 4, 10, (SA) Wrongs Act 1936 ss 27a (3), 27a (1); (Tas) Tortfeasors and Contributory Negligence Act 1954 ss 2, 4(1); (ACT) Law Reform (Miscellaneous Provisions) Ordinance 1965 ss 14(1), 15(1); (NT) Law Reform (Miscellaneous Provisions) Act 1956 ss 15(1), 16(1).
5. K E Lindgren et al *Contract Law in Australia* (Sydney: Butterworths, 1986) 703
6. [1986] 2 All ER 488, 508. Affirmed on appeal; [1988] 3 WLR 565
7. (1987) 44 SASR 532.

tax returns, Bollen J held that contributory negligence was available as a defence to a claim in contract where the breach of contract and tort were co-extensive, although on the facts he held that the plaintiffs had not been contributorily negligent.[8] In reaching this conclusion, Bollen J endorsed, as according with common sense, the remarks of Crisp J in *Queens Bridge Motors & Engineering Co Pty Ltd v Edwards*:

> If the total damage suffered by the defendant be considered as "Z" of which he was the cause of "X", while the plaintiff was responsible for "Y", it is at least startling to be told that he should recover X + Y from the plaintiff merely because of the ancient habiliments into which counsel may have managed to fit the action.[9]

In this context, it might have been thought that a Western Australian court would, at least in relation to a case within the third category of case outlined by Hobhouse J in *F Vesta v Butcher*, uphold a defendant's contributory negligence plea to a claim for breach of contract. In *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd*[10] however, the Full Court of the Supreme Court of Western Australia, by a majority, ruled that the WA Act had no application to contract claims, rejecting decisions in other jurisdictions on the basis that the wording of the WA Act was different from that appearing in the relevant statutes elsewhere.

The plaintiff in *Arthur Young v WA Chip & Pulp*, a company which operated a wood chip mill, sought damages for the alleged negligence of the defendant, a firm of accountants, in auditing the plaintiff's accounts. The plaintiff's statement of claim alleged that the defendant had breached an implied term in the contract to take reasonable care in performing the contract and, alternatively, that the defendant had been negligent. Amongst the defences raised by the defendant was that the plaintiff had by its own negligence contributed to its loss and that any damages award should be reduced accordingly.

From 12 December 1976 a Mr Johnson was the plaintiff's manager

8. On appeal, the Full Court of the SA Supreme Court held that contributory negligence was not, on the facts, established and it was therefore not necessary to consider whether contributory negligence was available as a defence to a claim for breach of contract; (1987) 49 SASR 93. The issue does not appear to have been raised on appeal to the High Court; (1989) 63 ALJR 210.
9. [1964] Tas SR 93, 97. Endorsed by Bollen J, supra n 7, 533.
10. [1989] WAR 100.

of finance and administration. Amongst his responsibilities were keeping the plaintiff's financial accounts and the provision and disbursement of all company funds. The plaintiff allowed its employees to use its name for purchases for their own personal purposes and thereby avail themselves of the company's trade discount. The plaintiff's general rule was that such purchases were to be made only after a supervisor's approval but in Johnson's case no approval was apparently required from the plaintiff's general manager before he made such purchases.

In July 1976, a Mr Livingstone was employed as the plaintiff's accountant and he instituted a system of accounting which included raising a ledger card for employee debtors. When the defendant conducted its audit of the plaintiff for the 1978-79 financial year, Johnson's indebtedness to the plaintiff amounted to $10,212.52. In conducting the audit, the defendant questioned Johnson and Livingstone regarding Johnson's indebtedness and was told that Johnson had authority from the chairman of the plaintiff's board to use the company's name to purchase replacement furniture for his home as, due to a matrimonial dispute, Johnson's wife had taken his furniture. No further inquiries were made by the defendant regarding Johnson's indebtedness and the defendant did not notify the plaintiff's managing director about the matter.

Johnson subsequently disappeared owing the plaintiff $64,644.64 and the plaintiff's claim related to this sum. As well as denying the allegation of negligence, the defendant pleaded that Livingstone's failure to report Johnson's indebtedness to the plaintiff's general manager amounted to contributory negligence. In relation to the claim in negligence, the defence of contributory negligence was clearly open to the defendant but the issue arose as to whether that defence was available to the defendant with regard to the contract claim.

At first instance it was held that:

(i) the defendant had been negligent and had thereby breached its contract with the plaintiff; and

(ii) the plea of contributory negligence was not available as a defence to a claim for damages for breach of contract.

On appeal, the defendant attacked both these findings of the trial judge. The judge's finding that the defendant breached its contract with the plaintiff was upheld by the Full Court. As this finding turn-

ed essentially on questions of fact, it will not be addressed in this note. In relation to the second of the trial judge's findings, the Full Court, by a majority, upheld the first instance decision.

Brinsden J referred to the three categories of case outlined by Hobhouse J in *F Vesta v Butcher* and concluded that this case fell within the third category of case.[11] Brinsden J then cited a large number of the other relevant cases decided in other jurisdictions but stated that:

> [I] do not believe that any of them can be regarded as deciding the matter so far as this case is concerned because the wording of the Act seems to be different from the wording of a number of the Acts under discussion in the aforementioned cases.[12]

After quoting the title and section 4(1) of the WA Act, Brinsden J concluded that:

> In view of the history of the Act it seems to me inescapable that it cannot be applied to a claim arising under contract, even for breach of duty coincident with a duty imposed upon the defendant by common law.[13]

Brinsden J acknowledged the force of the reasoning of Hobhouse J in *F Vesta v Butcher* in relation to cases in the third category as defined therein but stated that:

> [A]s Hope JA remarks in *Harper v Ashtons Circus Pty Ltd* (supra) Swinfen Eady LJ in *Cox v Coulson* [1916] 2 KB 177 at 181 pointed out that the law of contract need not be regarded as inadequate to meet the situation since the implication of a duty to take care into a contract may be made coincident with the other party exercising reasonable care on his own behalf.[14]

In this case, however, the appellant did not argue that the implied term in its contract with the respondent was so qualified and hence, Brinsden J held, the respondent was entitled to the damages awarded by the trial judge.

Wallace J dealt with the contributory negligence point very shortly. His Honour cited the long title of the WA Act and then stated that neither the long title of the WA Act nor the "terminology (etc) used in s 4(1) support the appellant's contention that contribution will lie where the breach of duty is contractual".[15]

11. Ibid, 114.
12. Ibid, 115.
13. Ibid
14. Ibid. *Harper v Ashtons Circus Pty Ltd* is reported at [1972] 2 NSWLR 395
15. Supra n 10, 108.

Wallace J then added that:

> [T]he legislation in Western Australia, as the long title reveals, is quite different from that which operates in other States. The whole history behind the legislation would deny that contribution should be forthcoming where a judgment in contract has been obtained.[16]

Burt CJ, in dissent, began by stating:

> The general approach to the question appears to accept as being sound doctrine...that a term should be implied in the contract whereby the appellant agreed to exercise reasonable care in carrying out the audit...[17]

Expressing his dissatisfaction with this approach, his Honour commented that:

> If I felt free to do so I would hold that that implication is unnecessary and that being unnecessary it should not be made. I would judge the case as being simply an action on the case for damages for negligence and if that were done then all the supposed difficulties would disappear.[18]

Addressing the issue as if such a term ought be implied into the contract in issue, Burt CJ then referred to the law relating to contributory negligence prior to the enactment of the WA Act, quoting Isaacs J in *Symons v Stacey*:

> A defendant is not liable at law for negligence unless his negligence is 'the cause' of damage to another. If the 'cause' of such damage is wholly or partly the conduct of the plaintiff himself or those who represent him, he is not at liberty to say the defendant's negligence is the 'cause'.[19]

In relation to whether contributory negligence was a good defence to an action for breach of contract prior to 1947, Burt CJ stated that:

> At the time of the passing of... [the WA Act] it seems not to have been finally decided whether the common law doctrine of contributory negligence applied to a case in which the damage sustained was caused by the breach of a duty to exercise reasonable care which arose by implication out of the contract as well as in tort.[20]

Burt CJ then proceeded to analyse the issue in terms of the theoretical basis of the law relating to contributory negligence prior to 1947:

> [I]f the idea sustaining the doctrine of contributory negligence was that: "if the 'cause' of such damage is wholly or partly the conduct of the plaintiff himself or those who represent him, he was not at liberty to say the defendant's negligence is 'the cause'", then there would appear to be no reason why the doctrine should not apply to "any claim for damages founded on

16. Ibid.
17. Supra n 10, 102.
18. Ibid, 102-103.
19 (1922) 30 CLR 169, 175-176 quoted by Burt CJ supra n 10, 103.
20. Supra n 10, 103-104.

> an allegation of negligence" when the duty to take care arises both out of contract and in tort because the statement that "a defendant is not liable at law for negligence unless the negligence is 'the cause' of damage to another" would be applicable to each.[21]

Applying these principles to section 4(1) of the WA Act, His Honour concluded that contributory negligence was available as a defence to an action for breach of contract, at least in relation to cases falling within Hobhouse J's third category:

> [(Section 4(1)] applies "in any claim for damages founded upon an allegation of negligence". An allegation that the defendant has failed to exercise reasonable care causing the plaintiff damage when the facts establish concurrent liability would seem to me to be an action "founded on an allegation of negligence" whether the duty to take reasonable care is pleaded to arise out of contract or in tort. In an action such as this, which is a cause of action however pleaded which can result in but one money judgement, I am unable to see how it could be otherwise.[22]

Though he found that contributory negligence was available to the appellant as a defence to the respondent's claim, Burt CJ concluded that the appellant had not established that the respondent was contributorily negligent.

With respect, it is submitted that the decision of the majority in this case is unsatisfactory, not so much because of the conclusions reached but due to the manner in which their Honours came to their decisions. Neither of the majority judges explains what it is about the "history" of the WA Act which renders it so different from comparable statutes in other jurisdictions. Nor do the majority judges explain why the relevant words in the WA Act, "any claim for damages founded on an allegation of negligence", are such that decisions in other jurisdictions where the word "fault" is used are of no relevance or why the wording in the WA Act necessarily excludes contract claims from the ambit of section 4(1) of that Act.[23] Indeed Burt CJ, proceeding from an analysis of the wording of the WA Act, came to the opposite conclusion suggesting that the majority's conclusion is by no means an "inescapable"[24] one. With respect, the reasoning of the majority judgments lack the coherence and force of Burt CJ's analysis.

21. Ibid, 104.
22. Ibid.
23. Brinsden J (at 115) noted that the word "fault" is not used in the WA Act but His Honour did not elaborate on this point.
24. Brinsden J, supra n 10, 115.

Further, it would seem that the decision in *Arthur Young v WA Chip & Pulp* has not settled the question of the role contributory negligence has to play in contract claims in Western Australia. First instance judges in this state are now bound to hold that the WA Act has no application to contract claims. Brinsden J however, complicated the matter with his obiter dictum that where a term is implied into a contract that one party should take reasonable care in performing the contract then that term may be qualified such that the other party must also take reasonable care of its own interests. Counsel pleading defences to contract claims, therefore, can be expected to test the scope of Brinsden J's qualification and it may be that contributory negligence will play a part in contract actions in this State by this alternative route rather than pursuant to the WA Act.