TOWARDS A PRAGMATIC APPROACH TO THE CONTRACT OR TORT DEBATE IN THE SOUTH PACIFIC

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Introduction

Increasingly there appear to be areas of contract law which overlap with those of tort; where clear distinction is more a matter of academic debate than practical application and where it might well be asked, 'Does it matter whether the route is by way of tort or contract, as long as a just solution is reached?' This is particularly so in the case of liability for negligent advice or information resulting in economic loss. Here the relationship between the parties might well be one of contract, often, but not always, in circumstances where one party is relying on the expertise or professional skill of the other. Implied into the contract but generally not stipulated, is the idea that the expert or professional will conduct themselves in accordance with the standards generally associated with that profession or expertise. Where the expected standard is not met and loss results, there is the question not so much of who is liable but on what grounds? Where the damage is physical an action will lie in tort, even if there is no contract – for example because the surgeon is not employed by the patient but by the State, or the builder contracted with the previous but not current owner of the building. If, however the loss or damage is not only or solely physical but financial there is reluctance in the law of tort to recognise a claim and again there may be no action in contract if there is no privity. The consequence is that the victim risks going uncompensated.

In recent times, many jurists have advocated rejection of artificial legal distinctions between contract and tort.[1] Indeed in 1931 Winfield wrote:

... there is no tort more likely to co-exist with breach of contract than negligence. In a great number of instances a contractor fails in what he has promised because he has acted incompetently .....[there are] a large number of cases in which the foundation of the action springs out of privity of contract between the parties, but in which nevertheless the remedy is alternatively in contract or in tort".[2]

In the South Pacific, prevailing economic and social circumstances lend force to the argument that things should not be unduly complicated. Commercial dealings are often less complex than in more developed societies. In most countries of the region, a high proportion of people gain their livelihood from subsistence agriculture. 'Daily life revolves around families, land, sea and religion'.[3] The simple life could be said to demand simple rules of law. The more complex the rules the less likely the community is to understand and respect this introduced law. In Samoa, the rejection of the distinction between contract and tort in favour of a more pragmatic approach was neatly expressed by Ryan CJ in Australia and New Zealand Group Limited v Ale:[4]

The debate as to whether all civil disputes must fall either into contract or tort or whether quasi-contract is a legitimate category it seems to me must be rather bemusing for the pragmatic bystander in the South Pacific half a world away from the esoteric discussions taking place in the Courts of England ... For my

part I am quite satisfied that the Courts in Western Samoa should not be bogged down by academic niceties which have little relevance to real life.

This paper commences by summarising the historical evolution of the English common laws of contract and tort that have been introduced in the South Pacific from the law of obligations and looks at some areas where the laws still overlap. It proceeds to consider the attitude of regional courts to concurrent liability and to examine the principle remaining distinctions between tort and contract and some of the problems that concurrency causes. It then explains the extent to which the English laws of contract and of tort still apply within the small island countries of the South Pacific.[5] This includes an explanation of the ability of local courts to apply or reject overseas developments in the common law, thereby either integrating or separating the laws of contract and tort. Finally the paper considers whether or not it is appropriate to maintain the distinction between contract and tort in the South Pacific or whether, at least in some circumstances, a common law of obligations might be more suitable.

THE EVOLUTION OF TORT AND CONTRACT

Historically, both tort and contract derive from the action of trespass on the case, which appeared originally as a claim based on a breach of the King's peace, seeking compensation by way of damages.[6] The Judicature Acts, 1873–5, finally 'buried' the forms of action by introducing a new code of civil procedure. Although the intricate procedures attaching to forms of action were abolished, the legislation, and the practice arising from it, created new differences in procedure based on the nature of the action. This legislation had the unintended effect of segregating contract and tort. For example, in claims based in contract for a liquidated amount, a special procedure existed for judgment by default. Accordingly, differences in the substantive rights of contract and tort grew to be emphasised in a way unlikely to have been envisaged when the legislation was drafted.[7]

While the law of tort remained relatively unchanged until the twentieth century, the doctrine of laissez faire in the 19th century added impetus to the growth and development of contract law, with the emphasis being on the concept of contractual freedom and the dominance of the parties' intentions.[8]Whereas, in tort, obligations were imposed not on particular parties, but as a general rule, parties to a contract voluntarily assumed obligations towards each other. However, this approach has always been restricted by the need to protect those who were not of 'full age and competent understanding', such as minors and persons of unsound mind. The common law introduced in the South Pacific carried with it these trends.

During the current century, contractual freedom has become further circumscribed by legislation.[9] In the Pacific region, examples can be found in the Motor Vehicles (Third Party Insurance) Acts of Fiji[10] and Solomon Islands,[11] which compel a motorist to insure against third-party risks, and the Land and Titles Act[12] of Solomon Islands, which prohibits the owner of customary land from contracting to dispose of any interest in that land other than to a Solomon Islander. It has also become clear that the notion of freedom of contract does not take into account inequality of bargaining power. For this reason, contractual freedom has long been recognised as illusory for many individuals.[13] In the Pacific, the arguments in support of a shift away from the paradigm of contractual freedom are even more compelling. First because, as discussed later in this article, the courts have the flexibility to depart from English common law and to develop a regional jurisprudence that is not bogged down in preconceived notions of laissez faire. Secondly, because statistics suggest that in the developing countries of the region there is such a significant gap between the general populous and the more sophisticated commercial sector.[14]

As has happened overseas, some regional countries have redressed the unequal balance in negotiation of contracts by legislation. For example, the Niue Act 1966 (NZ),[15] provides a discretion to refuse to enforce a contract made by a Niuean, if the court regards the contract as oppressive, unreasonable, or

improvident. Similarly, the Cook Islands Act 1915(NZ),[16] provides that the High Court has the discretion to alter a contract made by a Cook Islands Maori, if the court is of the opinion that it is oppressive, unreasonable, or improvident. The court may either refuse to enforce it or may enforce it only to such an extent and on such terms as it thinks fit. Examples can also be found in the Fair Trading Decree 1992 of Fiji, which prohibits misleading or unconscionable conduct by a person involved in trade or commerce.[17] The Consumer Protection Act[18] of Solomon Islands prohibits the making of false representations in the course of trade or business in connection with the supply or use of goods or services. A further example is the Consumer Protection Act of the Marshall Islands.[19]

Inequality of bargaining power and the increased use of standard form contracts are both reasons why the agreement may not address all relevant rights and duties between the parties. Once it is accepted that the contractual terms agreed by the parties may be insufficient to govern all the consequences of their relationship, then there is no need to exclude the application of the general law. It may of course be the case that the common law duty of care has been negated by the contract, excluded, or modified – either explicitly or by necessary implication. To recognise concurrent claims, therefore, does not render the law of contract obsolete, or submerge voluntarily assumed obligations in the general law.

Overlapping boundaries

The Duty of care in contract

Recognition of elements of tort in contract can be found in the concept of duty of care. Initially this might be an express or implied term of particular contracts. Once the general principle was established in tort, through the development of the tort of negligence, the duty of care extended further.

Prior to 1930 application of the strict doctrine of privity excluded non-contracting parties from any cause of action where the subject matter of the contract had caused harm. The judgment in the case of Donoghue v Stevenson,[20] provided a solution in cases where there was sufficient proximity through the development of a general duty of care to those who could forseeably be harmed regardless of any contractual link. Although initially limited to physical harm the principle was sufficiently general to extend to consequential, and then pure, economic loss. Privity or proximity provided the necessary nexus between the parties to give rise to obligations, breach of which would provide a remedy.

In English law, the line of cases which followed Donoghue v Stevenson, such as Hedley Byrne & Co Ltd v Heller & Partners,[21] Dorset Yacht Co.Ltd v Home_Office,[22] and Anns v London Borough of Merton,[23] established that a finding of a duty of care was not limited to particular situations. The question was first, whether there was a relationship of sufficient proximity, and secondly, whether there were any considerations which ought to limit or reduce the scope of the duty, or the class of persons to whom it was owed. Subsequent case law, particularly that concerned with economic loss, refined the proximity test and developed considerations that might limit the duty of care, but did not fundamentally alter the general principle. Indeed, in a House of Lords decision in 1996, it was stated by Lord Hoffman that:

the law implies into the contract a term that the valuer will exercise reasonable care and skill. The relationship between the parties also gives rise to a concurrent duty in tort ... But the scope of the duty in tort is the same as in contract.[24]

Defences

There is also overlap between tort and contract in that certain defences to claims in contract require proof of absence of negligence to succeed, for example, the equitable defence of non est factum. In very rare

circumstances a person who signs a document may be able to allege that there was a substantial or radical difference between the document signed and the document the signatory thought they were signing.[25] The courts are reluctant to allow this plea and a person relying on it bears the burden of adducing convincing evidence of lack of real consent.[26] In addition to proving lack of consent, lack of negligence in signing the document must be shown.[27] In Maeaniani v Saemala,[28] the defendant signed a document stating that he had received money from the plaintiff as full settlement for his land. He later refused to execute the transfer document and the plaintiff sued for specific performance. The defendant said that he had not read the document, as he was illiterate. He alleged that it had been explained to him as being a document concerning a loan by the plaintiff to the defendant to purchase tools and equipment to build a house on the land as a joint enterprise. Daly CJ agreed with the view of Lord Wilberforce in Gallie v Lee[29] that:

The law ought ... to give relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents.[30]

In this case the plea of non est factum was not established. Daly CJ took account of the fact that the defendant was a carpenter and builder, who had lived and worked in the capital for twenty-five years, before returning to Malaita Island. He operated a number of taxis in the capital, was articulate and intelligent, and could be described in the broader sense as a business man.[31]

Misrepresentation

Perhaps the topic of greatest overlap between contract and tort is misrepresentation, as it has roots in both. Whilst frequently dealt with in theoretical works on contract, it is impossible to understand misrepresentation without regard to tort. Misrepresentation is part of the law of contract in that it deals with the remedy for statements of fact made to induce the representee to enter into a contract. It is only concerned with statements that do not form part of that contract or a collateral contract.

In contract, as in tort, the law distinguishes the situation where the representor holds himself out as having specialist knowledge and the situation where he does not. In the former case, facts misrepresented are more likely to become terms of the contract so that on discovery the representor will be liable for breach of contract. Where the representation is fraudulent and induces a party to enter the contract or becomes a term of the contract then the remedy lay originally in tort not contract – the tort of deceit.[32] Indeed, in common law damages were only available if the misrepresentation was fraudulent.[33] The expansion of the law of negligence stemming from Hedley Byrne v Heller,[34] to impose liability for negligent misstatements, led to the extension of misrepresentation in contract.[35] The common law, which still applies in most countries of the South Pacific region, now recognises a category of negligent misrepresentation for which damages are available. However, the measure of damages, even if the action is brought in contract, is in tort[36] and is governed by the rules of remoteness.[37]

In Fiji Islands, the common law has been superceded by the Sale of Goods Act.[38] Section 76(1) provides that damages may be awarded for negligent misrepresentation. Under section 76(2) damages may also be awarded for innocent misrepresentation but only in cases where recission is not a fitting remedy. In England, similar provision is made by the Misrepresentation Act (UK) 1967, which appears to apply in Nauru, Tonga and Vanuatu.[39] The measure of damages under the legislation remains tortious.[40]

Causation

In contract the test for establishing whether the breach of contract caused the loss, is whether it was the

effective or dominant cause. There can be no damages for breach if the breach did not cause the loss, whether this is loss of profits or loss of expenditure.[41] If the loss was caused only partly by the breach, damages may still be recoverable without assessing which cause was most effective. For example, in Taubmans Paints (Fiji) Ltd v Faletau and Trident Heavy Engineering[42] the defendant was successful in suing for loss of profits caused by the plaintiff's wrongful repudiation of a sole agency contract even though a third party had taken out an injunction prohibiting the defendant from access to the first consignment of paint sent by the plaintiff.[43] If however the loss is excessive, due to a combination of factors then the issue may be not just one of causation but also one of extent and therefore be decided according to the rules of remoteness.[44]

Where a claim is brought in tort, under the principle of Hedley Byrne the causative link is the reliance. The test of causation is often said to be the 'but for' test, established in Barnett v Chelsea & Kensington Hospital Management_Committee[45] that is, but for the tort the loss or injury would not have been suffered. The 'but for' test is not appropriate in contract. For example, in Galoo Ltd. v Bright Grahame Murray,[46] it was held that, although the breach of contract by the companies' auditors related to the fact that the audited accounts of the plaintiff companies contained substantial inaccuracies, this merely provided the opportunity to incur further trading losses. It did not actually cause those losses.

Whilst this would appear to be a differentiating factor between contract and tort, it is only in the most straightforward negligence cases that the 'but for' test will be sufficient. In claims for non-pecuniary loss or consequential economic loss, the test is a combination of the factual 'but for' test and the test of forseeability. Where there are a number of possible causes then the test in tort is not dissimilar to that in contract, namely whether the breach of the duty of care materially contributed to the loss or injury.[47] Thus the cause need not be the actual or only cause of the loss or harm.

Causation, whether in tort or contract, involves taking account of recognised legal principles, but is also a question of fact. The related principles are: remoteness of damage, contributory negligence and mitigation of damage, which are discussed below.

Recoverable Loss

In both contract and tort distinctions are made between different types of loss, for example, physical injury or damage, loss of profit, and direct consequential economic loss. Recoverable loss is that which the law admits through the imposition of liability on the offending party. There is therefore, a close relationship between the legal construction of liability and recoverable loss. Such legal construction may be influenced by policy consideration, fear of opening a floodgate to claims, and considerations of loss-spreading or risk-allocation.

Economic Loss

In both tort and contract a claim may be made for economic loss. In both, different tests may be applied not only to consequential economic loss and loss of profit, but also differences are made between loss arising from conduct and that arising from professional advice. In the law of tort, the decision in the case of Hedley Byrne v Heller, developed from general principles deriving from Donoghue v Stevenson. Hedley Byrne marked the recognition of liability for economic loss where there was no contract, but a special relationship between the provider of information and the person relying on that information. The assumption of responsibility by a professional or quasi-professional provider of services gave rise to a duty of care and skill in the exercise of the professional function. In subsequent cases it was established that the relationship did not have to be gratuitous, the principles could be applied in contractual as well as non-contractual situations, and to quasi-professional as well as professional service providers. Thus Hedley Byrne was applied to solicitors[48], surveyors and valuers,[49] accountants[50] and insurance

brokers.[51] By this route, third parties prevented from suing in contract by the privity rule were able to sue in tort for breach of duty of care in performance of a contract to which they were not a party.

Once economic loss has been established under the principles of Hedley Byrne it would seem that there is no need to apply the further tests for duty of care as set out in Caparo v Dickman,[52] namely whether it is fair just and reasonable to find a duty of care or whether there are any policy reasons for not holding the defendants liable.[53]

The greater difficulty in tort arises where the claim is not brought under the principles of Hedley Byrne but falls under the general tort of negligence. Here liability for the loss may be avoided as a result of it being harder to establish the duty of care under the rules of Murphy v Brentwood District Council.[54] In English law the decision of the House of Lords in Murphy, overruled that of the earlier decision in Anns v Merton London Borough Council.[55] Whereas in Anns liability for negligent construction resulting in economic loss had been expanded by holding that a duty of care was owed by anyone involved in the process of building a house to avoid risk of damage to the occupier of the house – unless there were policy reasons to limit either the extent of the duty of care, the type of harm or the category of claimant – the approach in Murphy was considerably narrower. Even where the local authority had been negligent in ensuring that the building complied with required standards, they would not be liable to the owner or occupier for the cost of remedying the defect. However, the Murphy approach has not been followed elsewhere in the common law world,[56] with the consequence that the impact of Murphy_restricting liability for negligently caused economic loss has been considerably less in those jurisdictions where liability stems from the precedent of Anns v Merton London Borough Council.[57]

The Anns approach has been followed in the South Pacific, for example, in the case of Lal and Suva City Council v Chand.[58] In that case, the plaintiff sued defendant who had built and sold him a house, which later collapsed after heavy rain. It was held that the duty of care owed by builders lay in contract and tort and the case was decided on the principles of both Anns and Dutton v Bognor Regis UDC.[59] However, this case was decided before Murphy and courts in Fiji may take a different approach if a similar case arises now. Anns was also followed in Samoa in Lauofo Meti Properties v Morris Hedstrom Samoa Ltd[60] and in Tonga, in Tonga Flying Fish Co v Kingdom of Tonga,[61] Clark v Pikokivaka,[62] and Kauhala v Ministry of Police and Another.[63] However, all these cases were decided before Murphy except Clark and Kauhala, and those cases may have been decided per incuriam as there is no mention of Murphy in the judgments, rather, it seems to have been assumed that Anns is still good law.

Non-pecuniary Loss

Claims for non-pecuniary loss, such as distress or mental suffering were traditionally brought in tort, where they would succeed provided a duty of care and breach thereof could be established. Recovery for this type of loss was not normally regarded as recoverable in contract. However, this distinction is not as marked as it once appeared to be. Recognition that damages for the breakdown of the plaintiff's health might be recoverable, whether the claim arose in tort or in contract, can be found in Groom v Crocker.[64] In fact, the claim in that case for various manifestations of ill-health ultimately failed on the ground that the harm was not forseeable and therefore too remote. In Heywood v Wellers[65], however, the plaintiff succeeded in obtaining damages for the anxiety suffered as a result of a solicitor's negligence. While these cases may be restricted to their facts, or the type of contract involved, if the test for harm is foreseeability there is no good reason why such a claim should not succeed in tort or contract as long as the harm is not too remote and the causation element is satisfied.

Recent cases support the view that the gap is narrowing. Where the contract is one with the main object of providing comfort, pleasure, or relief from discomfort the courts have been willing to award damages in

contract for non-pecuniary loss. An obvious example is a contract for a holiday and in Jarvis v Swan Tours Ltd[66] the English Court of Appeal awarded general damages for disappointment suffered when a holiday did not live up to the promised standard. In Jackson v Horizon Holidays Ltd[67] the court went further than this and allowed the plaintiff to recover, not only for his own discomfort and distress, but also for that of his wife and children, when their holiday was ruined by reason of the breach.

In the South Pacific, courts appear to take a less rigid view as to the type of damages that can be awarded. There are cases where damages have been awarded for anxiety and ill-health caused by breach of contract in the form of wrongful dismissal, for example, the Samoan case of Matatumua v Public Service Commission.[68] Further, in the Solomon Islands case of Beti v Aufiu,[69] damages have been awarded for frustration and disappointment after breach of a contract for sale of a residence.

The Recognition of Concurrent Claims in Contract and Tort

Until the latter part of this century there was little consideration of concurrent liability in contract and tort. The case of Hedley Byrne & Co. Ltd. v Heller & Partners,[70] marked the turning point. Although the claim failed on the facts, the court recognised in principle that there could be a claim in tort even where there was a contractual remedy available. This was followed by Esso Petroleum v Marden,[71] in which Lord Denning MR held that negligence in pre-contractual statements could also attract liability on the grounds that: in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed apart from contract, and is therefore actionable in tort.

In English law this trend continued.[72] The principle, enunciated in Hedley Byrne, that tortious negligence arose out of special relationships was expressed by the court to be a principle of general application in the case of Midland Bank Trust Co. Ltd v Hett Stubbs and Kemp (a firm).[73] Oliver J stated that the enquiry on which the court should embark in deciding whether the principle was applicable was: what is the relationship between the plaintiff and defendant and not how did the relationship (if any) arise?

The final decade of the 1990s has seen general acceptance of concurrent claims in tort and contract where the facts of the case justify the protection of economic interests by finding duties in tort and contract. The leading case in this development was Henderson v Merrett Syndicates Ltd,[74] where it was held that where there is an assumption of responsibility and reliance on professional or quasi-professional services there is a tortious duty of care irrespective of a simultaneous contractual relationship. Where the duty of care is breached the plaintiff has a choice to sue in contract or tort. The general rule will be that the plaintiff can sue in tort unless he or she has contracted out of tortious liability.

There have also been some dissenting views, for example, that of Lord Scarman in the case of Tai Hing Cotton Mill Ltd. v Lin Chong Hing Bank Ltd.[75] Lord Scarman, while recognising the possibility of suing in contract and tort expressed doubt that in commercial relations at least – here between a corporate customer and a bank – 'there is anything to the advantage of the law's development in searching for liability in tort where the parties are in a contractual relationship'.[76]

There has also been some confusion as to whether concurrent liability means simply that the plaintiff may choose to sue in contract or tort where both are available, or whether there is dual liability. In Midland Bank Trust Co. Ltd. v Hett, Stubbs and Kemp,[77] solicitors were held liable for breach of contract and in also in tort, independently of any liability in contract for the same omission.

Recognition that there may be concurrent claims in tort and contract in certain situations moves the legal focus from the formation of the relationship to the consequences of the relationship when things go wrong. Once there is a relationship between the parties its origins become less significant. For example, in the

case of Henderson v Merrett Syndicates Ltd[78] it was suggested that where there is a contract or a case equivalent to a contract[79] an objective test can be applied when asking the question whether responsibility should be held to have been assumed by the defendant to the plaintiff. In other words is the relationship one which is sufficiently 'special' or 'proximate'? Evidence of a contract may facilitate such a finding but is not essential.

In the South Pacific region, the contract/tort debate has been acknowledged in the Samoan Supreme Court case of Australia and New Zealand Bank Group Ltd. v Ale,[80] referred to above. In that case, Linda Ale purchased a bank draft for AUD$800 from one of the plaintiff's Australian branches in favour of her father, the defendant. The amount of the draft should have been WST$1,496, but in fact it was made out for WST$17,506. The defendant presented the draft to the Bank of Western Samoan and received WST$17,506, which he spent. In an action by the plaintiff for money had and received the court dismissed as 'esoteric' the debate as to whether civil claims should be categorised in contract or in tort. Instead the court preferred to concentrate on the simple issue of whether the defendant had unjustly enriched. The flexible attitude advocated in that case appears to be echoed in other parts of the region. In Hunt v The Australasian United Steam Navigation Company Limited,[81] the plaintiff delivered a cargo of bananas to the defendant for shipment to Fiji Islands. In spite of the existence of a contract of carriage between the parties, the plaintiff was permitted to sue in negligence. Another example can be seen in Lal and Suva City Council v Chand,[82] where the plaintiff successfully sued the first defendant, who had built and sold him a house, in contract and tort in respect of the negligent building work. He was also successful in his claim against the City Council for negligence in failing to ensure that the building work complied with the filed plans.

Continuing differences

Despite the emergence of a more flexible approach towards claims, some important differences between contract and tort remain, and these will now be considered.

Calculation of Loss:

The Purpose of the Award of Damages

The basic purpose of damages for breach of contract is to compensate the innocent party for the loss suffered, not to punish the wrongdoer.[83] The object is to place the plaintiff, as far as money can do it, in the same position as he or she would have been in if the contract had been performed. This means that plaintiffs can recover gains they have been deprived of by the breach, for example, loss of profits due to failure to deliver machinery. It also entitles plaintiffs to damages for loss of bargained-for performance assessed by reference to 'expectation' or 'performance' loss.

In tort, on the other hand, whilst damages are compensatory, the object is, as far as possible, to put the plaintiff back in the position he or she would have been in had the tort not been committed. Whilst damages may be awarded for loss of profits, for example, due to damage or destruction to property, loss of particularly lucrative benefits bargained for cannot normally be recovered. Further, punitive damages may be awarded in tort in the three types of circumstances as set out in Rookes v Barnard.[84] Thus, for example, they were awarded in the Tongan case of Kaufusi v Lasa and Others[85] where the plaintiff had been wrongfully arrested and seriously assaulted by police officers.

Remoteness of Damage

In tort, while consequential economic loss caused by physical damage may be claimed solely on the basis of causation, further economic loss, or loss of profit, can only be claimed it is sufficiently foreseeable and

not too remote. Limitation on the extent of the claim may be argued in terms of duty of care or forseeability.[86] Although Lord Denning in Spartan Steel & Alloys Ltd v Martin and Co (Contractors) Ltd,[87] suggested that the real boundary to liability was based in policy and criticised the duty/remoteness test as being too elusive and one that should be abandoned, arguing that the court should simply take into account the particular circumstances of the parties, the nature of the relationship and policy,[88] the test of remoteness remains a useful tool for limiting liability. Forseeability and proximity remain the generally accepted tests for recoverable loss in tort in the South pacific region.[89]

The test for losses which may be claimed in contract is one of remoteness as formulated in Hadley v Baxendale,[90] and Koufos v Czarnikow Ltd (the Heron II).[91] That is, were the losses caused by the breach the usual type of losses which might be presumed to have been in the contemplation of the parties at the time the contract was formed because they would be a natural consequence of the breach? Or, were the losses, even if unusual, within the contemplation of the parties at the time of the breach? In this latter case, if the reasonable man, knowing what the defendant knew or ought to have known in the circumstances, would have had such losses in contemplation then they will not be too remote, even if the likelihood of them occurring was limited.

Restrictions on liability for loss in contract are formulated slightly differently, although there are some similar features, particularly if one takes into account the arguments expressed by Lord Denning. As pointed out by Asquith LJ in Victoria Laundry (Windsor) Ltd v Newman Industries Ltd,[92] if the plaintiff were to be compensated for all loss flowing from a breach of contract then liability might be indeterminate.[93] Accordingly, liability is limited by a dual-limbed test: first, damage must arise naturally from the breach – in other words it must arise in the usual course of things; secondly, damage must reasonably be supposed to have been contemplated by, at least, the defaulting party, as the probable consequence of the breach. Liability rests, therefore on actual and imputed knowledge at the time the contract was made. Both tests include an objective assessment: the “reasonable man’s contemplation” in the latter and “the natural course of things” in the former.

The distinction between the tests applied in tort and contract to limit liability has, however, been criticised, notably by Scarman LJ in the case of H. Parsons (Livestock) v Uttley Ingham & Co.[94] There, His Lordship suggested that the tests of forseeability or reasonable contemplation provided sufficient safeguards against excessive compensation however the claim was framed.

The test in tort is also one of remoteness for loss caused through negligence, as formulated in Overseas Tankship (UK) Ltd. v Morts Dock Engineering Co. Ltd (the Wagonmound (No. 1)).[95]

In the House of Lords decision in the Heron II it was held that there was a difference between contract and tort on the question of remoteness. In breach of contract cases the question was, ‘were the consequences of such a kind that a reasonable man at the time of the contract being made would have contemplated them as being substantially probable?’ In tort the question was, ‘were the consequences such that a reasonable man would foresee them as being probable?’ It was suggested that the degree of probability in tort was lower than that of contract. However the language used by the judges varied from judgment to judgment and no clear principles emerge from the case as to how varying degrees of probability are to be assessed, a point commented upon by Lord Denning in the case if H. Parson (Livestock) v Uttley Ingham & Co.[96]

In both contract and tort there is an objective element in judging remoteness. In tort, the standard of forseeability is that of the reasonable man. In contract, the imputed contemplation is judged by the standard of the reasonable man. In both cases, this objective assessment may be modified by the particular ability of the defendant to foresee or contemplate the type of loss in the circumstances. In tort, the test takes the reasonable man in the circumstances pertaining at the time the tort occurs. In contract, the

circumstances are those within the contemplation of the parties at the time the contract was made. Whether this test is fundamentally different is debatable. Certainly in the case of Banques Bruxelles Lambert SA v Eagle Star Insurance Co Ltd.[97] Sir Thomas Bingham seemed prepared to apply a similar test whether the claim was grounded in tort or contract. This approach echoes an earlier one. Lord Denning MR in Esso Petroleum v Marden[98] suggested that where the defendant was found to owe a duty of care, whether under a contract or not, and was liable for damages as a result of breach of that duty: those damages should be, and are, the same whether he is sued in contract or in tort. Similarly, in the case of Beoco Ltd. v Alfa Laval Co Ltd & Another,[99] it was held that the principles for assessing the measure of prospective or hypothetical economic loss in tort were equally applicable where the claim arose out of breach of contract.

When considering the extent of the harm there appears to be little distinction between tort and contract. If the harm is not too remote then the extent of it does not have to be foreseen so long as it is of a type which could have been foreseen. This has been established for some time in tort.[100]

In contract this was first suggested in the case of H. Parsons (Livestock) v Uttley Ingham & Co.[101] There, it was held that where the plaintiff suffered physical harm to his person or property as a result of breach of contract, the test of recoverability of damages was the same as in tort. With economic loss, however, liability was limited to loss which at the time of the contract could reasonably have been contemplated by the defendant. Lord Denning and Lord Scarman suggested that, where all the parties had the same actual or imputed knowledge, the amount of damages recoverable does not depend on whether the plaintiff's cause of action arose in contract or tort, for: in principle, the test of remoteness of damages is the same in contract as in tort. Indeed, Lord Scarman went on to say that:

... the law is not so absurd as to differentiate between contract and tort save in situations where the agreement, or the factual relationship, of the parties with each other requires it in the interests of justice.

This approach has been approved in the recent case of Brown v KMR Services Ltd.[102] There, the Court of Appeal dismissed the claim that the loss was too remote, on the grounds that the type of loss in the circumstances was foreseeable, even if the scale or amount of loss could not have been foreseen. However, if the type or class of loss is not foreseeable then the loss may be too remote. This was illustrated in the case of Kpohraror v Woolwich Building Society.[103] In this case the plaintiff sued for the wrongful dishonour of a cheque by the building society, in breach of contract, and for special damages for trading losses due to the consequent delay in a shipment overseas. It was unclear whether the building society had been aware that the plaintiff was a trader. The fact was important in as much as traders have traditionally been entitled to sue for substantial – rather than nominal – damages where their credit-worthiness has been damaged. The Court approved the view that a claim for substantial damages need no longer be limited to traders. It also made it clear that in the case of traders the law had never required a defendant to actually know of the plaintiff's status to be found liable. Evans LJ went on to suggest that the claim for special damages in such cases was analogous to a claim for damage to business reputation in tort. This suggests that the approach should, therefore, be one based on common sense, regardless of how the claim was framed. Here the claim failed because the harm complained of had been too remote.

Apportionment

At common law, contributory negligence barred an action in negligence. This position has been changed in many common law countries, by legislation introducing apportionment. In those countries, there is now a right of contribution in tort where the plaintiff has himself been negligent, for example, under the Law Reform (Contributory Negligence) Act 1945 (UK), the Law Reform Act 1968 (Cook Islands),[104] the Civil Procedure Act (Marshall Islands),[105] the Contributory Negligence Act 1964 (Samoa), and the Law

Reform (Contributory Negligence and Tortfeasors) Act, (Fiji).[106] For example, in the Fiji case of Dhapel v Arjun[107] the plaintiff's son was killed when the tractor in which he was travelling as a passenger overturned in a ditch. The defendant was held liable in negligence for allowing the deceased to travel on the tractor, which was not constructed for passengers. However the deceased's action in clutching hold of the plaintiff when the tractor swerved had contributed to the accident. It was held that the negligence must be apportioned between the defendant and the deceased having regard to the age of the deceased, and the knowledge which the deceased might reasonably be expected to have of the perils to which the defendant's negligence exposed him. In this case the damages were reduced by 25% in respect of the contributory negligence.[108]

Generally, contributory negligence is not a defence to actions for breach of contract.[109] However, it is a defence to claims for negligent misrepresentation.[110] Further, in England, it has been suggested that the Law Reform (Contributory Negligence) Act 1945 may apply where there is concurrent liability. This proposition was first considered in the case of Sayers v Harlow Urban District Council,[111] where the cause of action was brought in contract and tort and apportionment allowed. It was also considered in the case of Forsikringsaktieselskapet Vesta v Butcher.[112] There it was held that if the defendant's liability in contract was the same as his independent liability in the tort of negligence, then the court had the power to apportion blame under the 1945 Act and reduce the damages recoverable by the plaintiff even though the claim was brought in contract. The application of the Act to concurrent claims has also received academic support from the English legal author, Glanville Williams.[113]

Where there is no negligence in issue and no question of concurrent liability it has been held that the Act does not apply. In Barclays Bank Plc v Fairclough Building Ltd,[114] for example, the court confirmed that the Act could be applied where liability for breach was the same as and co-extensive with a similar liability in tort, independently of the existence of the contract. In this case, this could not apply, as the claim was one of a breach of strict contractual liability. It should be noted that this approach was in line with the recommendations of the English Law Commission, which published its report on 'Contributory Negligence as a Defence in Contract' in 1993.[115]

Where there is no separate duty of care but a duty to perform a contractual undertaking with reasonable care and skill, there are conflicting decisions as to whether or not the Act should apply. For instance, in the case of AB Marintran v Comet Shipping Co Ltd,[116] it was held that it did not. However, in De Meza and Stuart v Apple Van Staten,[117] at first instance, it was held that it did. Here, solicitors claimed damages in negligence and in contract against a firm of auditors. Brabin J had no difficulty in holding that apportionment applied.

Mitigation of Loss

In tort and, usually, in contract a victim will have a duty to mitigate and failure to so in contract might be seen as contributing to the harm. However, as Coote points out, the moment at which the duty to mitigate arises is different.[118] In tort it is before the harm occurs and is relevant to causation. In contract it is once the harm has occurred and is relevant to the award and measure of damages. A further difference is that if the claim in contract is for a debt or liquidated sum the duty to mitigate does not apply.[119]

Limitation of actions

The most significant area of difference between contract and tort, from the point of view of the plaintiff seeking a remedy through the courts, is the operation of limitation periods. In contract the running of time starts from when the right of action accrues,[120] whereas in tort it is when the harm is discovered,[121] so

that although the statutory time limits may be the same in practice the period of time could be considerably different. A claim in tort may, therefore, be available long after one in contract has become time barred. The unsatisfactory effect of this has been criticised. Notably by Mustill LJ in Société Commerciale de Réassurance v ERAS (International) Ltd.,[122] who stated that the different treatment for limitation purposes between claims brought in contract or tort offended common sense, forced the law into unnatural complications and:

... pushed the evolution of substantive law in the wrong direction. In most if not all cases a plaintiff will be better off framing his action in tort, whereas in our judgment if a contact is in existence this is the natural vehicle for recourse.

PERSISTING problems with concurrent claims

If concurrency of claims is recognised and found to be applicable in a case this tends to favour the plaintiff. In order to balance the rights of the parties it should follow that the defendant can raise defences which would be open to him in contract or tort. This would include contributory negligence. There is also the question of whether it is just to hold a person wholly liable for the harm when in fact, if not law, they are only partially liable?

One way round this is to allow the claim to proceed in tort even if it originates in contract. For example, in the case of Youell v Bland Welch & Co Ltd,[123] the court held that there was a breach of the duty of care in tort and a breach of contract. Concurrent remedies were available to the plaintiff. The Law Reform (Contributory Negligence) Act 1945 applied, not because the action was primarily based in tort but because the issue of contributory negligence arose at a point when the breach of the duty of care arose independently of the breach of contract.

More difficult, perhaps is the question of limitation, which normally operates in favour of the defendant. If the plaintiff brings concurrent claims he or she may take advantage of whichever is the more favourable time period. For example, in the case of Midland Bank Trust Co. Ltd v Hett Stubbs and Kemp,[124] where a negligent solicitor had failed to register an option to purchase, if the plaintiff had been restricted to suing in contract the six year limitation period under the Limitation Act 1939, would have effectively barred any claim before the harm occurred and before the victim could have taken any steps to prevent it.

There is much to be said for removing discriminatory time periods. This could be achieved by modest legislative reform. Alternatively to include in limitation statutes provision for the exercise of judicial discretion. Where there is no legislative provision then it is suggested that there are sufficiently different approaches in case law to justify judicial activism.

Application of common law in the region – freedom to reject or adopt

The relevance of developments in the common law with regard to bringing concurrent claims in contract and tort lies in the scope of choice available to judges, legislators and lawyers in the region, as regards the jurisprudence and legislation to be followed. The legal heritage of the region is essentially common law. At independence, none of the countries of the region rejected existing laws outright.[125] Instead, these laws were ‘saved’. Saved laws included:

· legislation in force in England (and in some cases its former colonies of Australia and New Zealand) at a particular date,[126]

· common law and equity; and

· ‘colonial’ legislation (made by the legislature of the country before independence).

Whilst this was intended as a transitional step, to avoid a vacuum pending the creation of 'local' laws by the new legislature and jurisprudential adaptation by the courts, to date there is little sign of change. In practice common law and equity continue to apply throughout the region.[127]

In most countries it is the English common law (and equity) which have been adopted as part of the law.[128] However, in Samoa it has been held that the courts are free to choose from amongst common law principles as developed throughout the Commonwealth.[129] The courts in Fiji Islands have also shown an inclination to follow Australian and New Zealand contract precedents in preference to the English law.[130] In Nair v Public Trustee of Fiji and the Attorney-General of Fiji,[131] Lyons J said in the course of a discussion as to the relevant rules of estoppel to be applied in the Pacific:

In my opinion the future of the law in Fiji is that it is to develop its own independent route and relevance, taking into account its uniqueness and perhaps looking to Australia and New Zealand for more of its direction.

In all cases there are conditions on the application of common law. Generally, these are that:

· The principles must be consistent with the Constitution and/or other local Acts of Parliament.

· They must be appropriate/suitable to local circumstances.[132]

This means that the principles of common law may be altered by local statute. They may also be discarded or modified by regional courts, if they are inappropriate to the country in question.[133]

Theoretically, this renders the distinction between English common law and Commonwealth common law mentioned above, largely academic, as a regional court which preferred a Commonwealth authority to an English authority could justify following the latter on the grounds that it was more appropriate to local circumstances.[134] In practice, courts rarely consider whether common law principles are suitable to local circumstances.

In addition to the general conditions mentioned above, there is usually a specified date after which, theoretically, new English judicial decisions will not form part of the law. This is sometimes referred to as the 'cut-off date'.[135] English decisions made after the date specified are highly persuasive, and in practice, the regional courts will nearly always follow them.[136] Further, the Solomon Islands Court of Appeal has held that English decisions made after the cut-off date will be binding if they are merely declaratory. According to this view, recent decisions relating to contract and tort made after a regional country's 'cut-off' date, which overrule an earlier case and declare the true state of the common law will be binding in the region. Further, once a superior regional court has followed an English decision it will be binding on lower courts of that country in accordance with the doctrine of precedent, whether it was decided before or after any cut-off date.

This flexibility means that it is open to the courts of the region to, for example, adopt the Australian approach to factual causation,[137] to merge the tests of reasonable contemplation and forseeability of loss,[138] and to adopt an indiscriminate approach to the measure of damages.[139] Similarly it is open to the courts to find a wide range of professional and non-professional advisers liable for failing to take sufficient care, by preferring the approach to economic loss of Anns rather than Murphy, and adopting the more robust approach of judges such as Cook P in South Pacific Manufacturing Co. Ltd. v New Zealand Security Consultants & Investigations,[140] or Deane CJ in Hawkins v Clayton.[141] It would also be open to legislators in the region to amend applicable limitation statutes so as to take on board the remarks of Tipping J in New Zealand, that a cause of action – however it arises – should not be deemed to have

accrued until the plaintiff discovers the wrong or harm complained of.[142] Statutory provisions governing the law of contributory negligence could also be modified so that a person sued in contract would have as much right to invoke the plaintiff's conduct as a ground for reducing damages as a person sued in tort.[143]

The Case for a Law of Obligations in the South Pacific

Where facts give rise to concurrent claims in contract and tort, it may be in the interests of justice to concentrate on the fulfilment of the parties' obligations to each other rather than on the niceties of how their relationship arose. If a pragmatic approach to the law is to be adopted in the South Pacific[144] then it is suggested that there is indeed a place for the recognition of concurrent claims in contract and tort. Scope for this is allowed by the freedom to adopt, reject or modify principles of English common law discussed above. While this may not always be appropriate in the case of commercial contracts between parties of equal bargaining strength who are well able to encompass all foreseen eventualities within the terms of their contract, the position where an individual or small business relies on the skill and expertise of a professional will often be marked by inequality, especially in developing economies. There is a danger, illustrated by some of the cases discussed above, that insistence on the distinction between contract and tort can lead to injustice, for example, where breach of contract gives rise to strict liability regardless of the degree of fault, or where the type of harm was such that a third party could have foreseen it but the contracting parties had not provided for it.

To allow a plaintiff to sue in both tort and contract in such situations might attract criticism of protectionism. As has been indicated, however, protective measures of other sorts are already found in the South Pacific region, particularly in the commercial context.[145]

These measures are summarised below and divided into legislative measures and common law approaches.

Protection through Legislation

· Legislation based on overseas developments, protecting the consumer, such as the Fair Trading Decree 1990 of Fiji.

· Legislation protecting ownership of customary land, for example the Land and Titles Act146 of Solomon Islands.

· Legislation protecting indigenous people from unconscionable dealings, for example, the Niue Act 1966 (NZ), s 711 and the Cook Islands Act 1915(NZ), s 645.

However, whilst legislation such as the Fair Trading Decree has been hailed as reflecting 'a new environment of competition and consumer protection',[147] existing legislation[148] is a far cry from a codification of the law, rendering the common law of contract and tort obsolete. Further, whilst the Fair Trading Decree has the advantage of putting the focus on the conduct rather than the intention of the wrongdoer it is restricted to transactions in the course of trade or commerce. Similarly, whilst the Act increases the available remedies, most of those remedies are only available to a consumer and they have to be pursued through the court, whereas under the common law rescission may be an option.[149]

Protection by the Courts

· Relaxation of English common law contract principles by the courts as, for example, in Australia and New Zealand Group Limited v Ale,[150]

· A more relaxed approach by the courts to the establishment of liability in negligence, following Anns v Merton London Borough Council,[151] rather than Murphy v Brentwood District Council,[152]

· A less rigid view as to the type of damages that can be awarded, for example, the willingness to award damages for anxiety and ill-health caused by breach of contract in the form of wrongful dismissal (Matatumua v Public Service Commission)[153] and the award of damages for frustration and disappointment after breach of a contract for sale of a residence (Beti v Aufiu).[154]

Within the context of regional common law it would be possible to provide a loose framework of principle, which allows for scope for the courts to develop their own version of the common law.[155] However, there is little evidence of the development of such jurisprudence. Judicial activism is perhaps inhibited by the fact that the common law still operates within former colonial judicial institutions and because judges and lawyers lack an awareness of the choice of possible approaches open to them.

As discussed, regional legislatures and courts are empowered by the respective Constitutions to reject the introduced law if it is unsuitable to the circumstances of the region.[156] Further, received legislation may be replaced by more appropriate local legislation.[157] The introduction of a law of obligations is a worthy object for the wielding of this power. Like Ryan CJ in Australia and New Zealand Group Limited v Ale,[158] the authors find themselves 'quite satisfied that the Courts in [the South Pacific] should not be bogged down by academic niceties which have little relevance to real life'.

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Endnotes:

[1] As have the courts, see, for example, Rowlands v Collow (1992) 1 NZLR 178 at 190, Sealand of the Pacific Ltd. v Ocean Cement Ltd. (1973) 33 DLR (3d) 625, Ellul v Oakes {1972) 3 SASR 377 at 390, Dillingham Construction Pty v Downs [1972] 2 NSWLR 49.

[2] Winfield, The Province of the Law of Tort 1931, Cambridge University Press, p. 63. The literature on this field is extensive, see for example: Poulton Tort or Contract (1966) 82 LQR 346; French The Contract/Tort Dilemma (1982) 5 Otago LR 236; Holyoak Tort and Contract After Junior Books (1983) LQR 591; Reynolds Tort Actions in Contractual Situations (1985) 11 NZULR 215, among others.

[3] Solomon Islands Law Reform Commission, Annual Report, 1996, p10.

[4] [1980-93] WSLR 468 at 469.

[5] This article concentrates on the position within the member countries of the USP region, being Cook Islands, Fiji Islands, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. In this paper, the word 'region' is used to refer to the area covered by those countries, unless the context requires otherwise.

[6] See further Maitland, The Forms of Action at Common Law 1968, Cambridge: University Press.

[7] An excellent historical review of the interaction of tort and contract claims against solicitors in the nineteenth century can be found in Dwyer, 'Solicitor's Negligence – Tort or Contract?' (1982) ALJ 524.

[8] See, for example, the words of Jessell MR in Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq 462 at 465.

[9] For UK examples, see the Unfair Contract Terms Act 1977; Consumer Credit Act 1974; Fair Trading Act 1973 and Minors' Contracts Act 1987.

[10] Cap 177.

[11] Cap 83.

[12] Cap 133, s 241.

[13] Atiyah, The Rise and Fall of the Freedom of Contract 1979, Oxford University Press.

[14] See, for example, the statistics given in South Pacific Commission, Population and Demography Report, Noumea, New Caledonia (based on the latest census figures for the country in question).

[15] Section 711.

[16] Section 645.

[17] Sections 54 and 55. See also the Consumer Credit Act, Act No 15 1999 (Fiji), which came into force in full on July 1, 2000.

[18] Cap 63.

[19] 20 MIRC Cap 4.

[20] [1932] AC 562.

[21] [1964] AC 465.

[22] [1970] AC 1004.

[23] [1978] AC 728. Discussed further below.

[24] S. Australia Asset Corp. v York Montague [1996] 3 All ER 365 at 370.

[25] Foster v MacKinnon (1869) LR 4 CP 704.

[26] Gallie v Lee and Another [1971] AC 1004, 1084 and 1092.

[27] Gallie v Lee and Another [1971] AC 1004, 1091.

[28] [1982] SILR 70.

[29] [1970] 2 WLR 1078 at 1091.

[30] [1982] SILR 70, at 74.

[31] [1982] SILR 70, at 75.

[32] See the case of Doyle v Olby (Ironmongers) [1969] 2 QB 158.

[33] Derry v Peek [1889] 14 App Cas. 337 (HL).

[34] [1963] 2 All ER 575.

[35] See, for example Esso Petroleum v Mardon [1976] 1 QB 801.

[36] But see South Australia Asset Management Corp v York Montague Ltd [1997] AC 191 where damages for misinformation were limited by reference to the contractual bargain. This method of calculation has been criticised: Stapleton, The Normal Expectancies Measure in Tort Damages (1997) 113 LQR 257.

[37] Esso Petroleum v Marden [1976] QB 801; Saville Heaton Company Limited v United Apparel (MGF) Limited and the Attorney General, unreported, High Court, Fiji Islands, Civ Cas 410/1992, 9 April 1996, 18 and 20.

[38] 1979, s 76.

[39] See further Corrin Care et al, Introduction to South Pacific Law, 1999, London: Cavendish, chapter 4.

[40] See Sharneyford v Edge [1987] Ch 305; Royscott Trust Ltd v Rogerson [1991] All ER 294.

[41] C & P Haulage v Middleton [1983] 3 All ER 94.

[42] Unreported, Supreme Court, Tonga, civil case 456/1996, 15 January 1999.

[43] See also, for example, County Ltd v Girozentrale Securities [1996] 3 All ER 834.

[44] South Australian Asset Management Corporation v York Montague Ltd [1996] 3 All ER 365.

[45] [1969] 1 QB 428.

[46] [1995] 1 All ER 16

[47] McGhee v National Coal Board [1972] 3 All ER 1008.

[48] Ross v Caunters [1980] Ch 287.

[49] Smith v Eric Bush, Harris & Wyne Forest DC [1989] 2 All ER 514.

[50] Caparo Industries Plc v Dickman [1990] All ER 568.

[51] [1990] 2 Lloyds Rep. 431.

[52] [1990] 2 AC 605.

[53] See for example, Greatorex v Greatorex and Others [2000] TLR 6 June, 18, where the policy

considerations against there being a duty of care owed by a victim of self-inflicted injuries towards a secondary party and family member, who suffered psychiatric illness as a result of having witnessed the event, outweighed the arguments in favour.

[54] [1991] 1 AC 398.

[55] [1978] AC 728.

[56] For example, Bryan v Maloney (1995) 69 ALJR 375 in Australia, Winnipeg Condominium Corporation No. 36 v Bird Construction Co. Ltd (1995) 121 DLR (4^{th}) 193 in Canada, and Invercargill City Council v Hamlin [1996] 2 WLR 367 in New Zealand.

[57] [1978] AC 728.

[58] (1983) 29 FLR 71.

[59] [1972] 1 QB 373.

[60] [1980-93] WSLR 348.

[61] [1987] SPLR 372.

[62] [1993] Tonga LR 50.

[63] [1994] Tonga LR 119.

[64] [1939] 1 KB 194.

[65] [1976] QB 446.

[66] [1973] 1 All ER 71. See also Peninsular and Oriental Steam v Yowell [1997] Times LR 184.

[67] [1975] 3 All ER 92.

[68] [1980-93] WSLR 295.

[69] Unreported, High Court, Solomon Islands, civil case 170/1991, 4 July 1991.

[70] [1963] 2 All ER 575.

[71] [1976] 2 All ER 5 at 15.

[72] See, for example, Batty v Metropolitan Property Realization Ltd [1978] 3 All ER 571 at 592.

[73] [1978] 3 All ER 571 at 592.

[74] [1994] 2 All ER 506.

[75] [1985] 2 All ER 947 at 957.

[76] The cautious approach voiced by Lord Scarman in this Privy Council decision has been followed in Downsview Nominees Ltd. v First City Corporation Ltd [1993] 2 WLR 86.

[77] [1978] 3 All ER 571.

[78] [1994] 3 All ER 506 at 521 per Lord Goff.

[79] For example, an obligation arising in quasi-contract or thorough the doctrine of estoppel.

[80] [1980-93] WSLR 468.

[81] [1919] 2 FLR 72.

[82] (1983) 29 FLR 71 at 74.

[83] Addis v Gramophone Co Ltd [1909] AC 488.

[84] [1964] AC 1129. The three classes of cases specified were (1) where exemplary damages are authorised by statute; (2) where the defendant's conduct was calculated to make a profit which may exceed the compensation payable to the plaintiff; or (3) where the plaintiff has suffered from oppressive, arbitrary or unconstitutional action by government servants.

[85] Unreported, Supreme Court, Tonga, civil case 29/1989.

[86] Spartan Steel & Alloys Ltd v Martin and Co (Contractors) Ltd [1973] QB 27 illustrates the distinction.

[87] Ibid.

[88] In the Spartan Steel case, policy considerations meant taking into account the nature of the commodity supplied – electricity; the public supplier of the commodity; the hazards naturally associated with this commodity; dangers of "floodgates"; principles of loss-spreading across all consumers of the electricity; and adherence to the principle of liability based on fault not chance.

[89] See for example, Matauta v Schuster, unreported, Supreme Court, Samoa, Civ Cas 224/92.

[90] (1854) 9 Ex 341.

[91] [1969] 1 AC 350.

[92] [1949] 2KB 528.

[93] At 533.

[94] [1978] 1 All ER 598.

[95] [1961] AC 388.

[96] [1978] 1 All ER 525.

[97] [1995] 2 All ER 769, at 838f and 841e.

[98] [1976] 2 All ER 5 at 15.

[99] [1994] 4 All ER 464 (CA).

[100] See Hughes v Lord Advocate [1963] AC 873.

[101] [1978] 1 All ER 525.

[102] [1995] 4 All ER 598.

[103] [1996] 4 All ER 119.

[104] Section 3.

[105] 29 MIRC Cap 1, Part X.

[106] Cap 30.

[107] [1962] 8 FLR 74.

[108] See also Kori v Ali [1966} 12 FLR 108.

[109] Astley v Austrust Ltd (1999) 161 ALR 155.

[110] Saville Heaton Company Limited v United Apparel (MGF) Limited and the Attorney General, unreported, High Court, Fiji Islands, civil case 410/1992, 9 April 1996, 20.

[111] [1958] 2 All ER 342.

[112] [1988] 2 All ER 43.

[113] Joint Torts and Contributory Negligence 1951, Stevens & Sons, London.

[114] [1994] 3 WLR 1057.

[115] Law Com. No 219. Note that the negligence of a party not in breach may amount to a novus actus and break the chain of causation: Beoco Ltd v Alfa Laval Co. Ltd [1994] 4 All ER 464.

[116] [1985] 3 All ER 442.

[117] [1974] 1 Lloyds Rep. 508.

[118] Coote, Contract, Tort and Contributory Negligence, (1982) NZLJ 294.

[119] White and Carter (Councils) Ltd v McGregor [1962] AC 413

[120] See Limitation Act 1975 (Samoa,) s 6; Limitation Act 1971 (Fiji), s 4; Limitation Act 1991 (Vanuatu), s 3; Limitation Act 1984 (Solomon Islands), s 5; Civil Procedure Act (29 MIRC 1988), s 20; Limitation Act 1950 (NZ) (Nuie/Cook Islands), s 4; Limitation Act 1939 (UK), s 2(1)(a); Supreme Court Act (Cap 10) (Tonga), s 16.

[121] Ibid.

[122] [1992] 2 All ER 82 at 85.

[123] [1990] 2 Lloyds Rep. 431.

[124] [1978] 3 All ER 571.

[125] For details of the former status of the countries of the region see Crocombe, The South Pacific, 5th ed, 1989, Suva: IPS, USP, 231 et seq.

[126] Except in Tonga, where no 'cut-off' date was specified: Civil Law Act 1966, s 4.

[127] There are still many areas of uncertainty regarding the local application of common law and equity. See further Paterson, The Application of the Common Law and Equity in Countries of the South Pacific, (1997) 21 JPacS 1.

[128] In Marshall Islands American common law is more relevant. In cases involving French law decided in Vanuatu, decisions of French courts may be of persuasive value. See further Corrin Care et al, Introduction to South Pacific Law, 1999, London: Cavendish, chapter 4.

[129] Opeloge Ole v Police, unreported, Supreme Court, Samoa, m5092/80.

[130] See, for example, in Attorney-General of Fiji and Minister for Justice and Fiji Trade and Commerce and Investment Board v Pacoil Fiji Ltd, Court of Appeal, Fiji Islands, CAN ABU0014, 29 November 1996 at 16, the Court of Appeal cited with approval the Australian case law on estoppel. See also the reference to New Zealand case law, at 20.

[131] Unreported, High Court, Fiji Islands, civil case 27/1990, 8 March 1996, 24.

[132] See, for example, sch. 3,Constitution of Solomon Islands 1978.

[133] The Law Reform Commission of Papua New Guinea has expressed the view that the law of contract generally is unsuitable for the circumstances of Papua New Guinea: Law Reform Commission of Papua New Guinea, Fairness of Transactions, Report No 6, December 1977, 5.

[134] For Australian and New Zealand examples of circumstances justifying departure from English common law on the basis of inapplicability see Australian Consolidated Press v Uren [1969] 1 AC 118 and Invercargill City Council v Hamlin [1996] 2 WLR 367.

[135] Cook Islands Act 1915 (NZ), s 615; Supreme Court Ordinance 1876, s 35 (Fiji); Laws of Kiribati Act 1989, s 6(1); Custom and Adopted Laws Act 1971, s 4; Niue Act 1966 (NZ), s 672; Constitution of Samoa, Art 111(1); Constitution of Solomon Islands, sch 3, para 4(1); Tokelau Act 1948, s 4A; Civil Law Act 1966, s 3; Evidence Act s 166; Laws of Tuvalu Act, s 6(1); Constitution of Vanuatu, Art 93(2).

[136] Cheung v Tanda [1984] SILR 108.

[137] As stated in March v Stanmore (E & MH) Pty. Ltd (1991) 171 CLR 506 and Bennett v Minster of Community Welfare (1992) 175 CLR 506.

[138] Following the reasoning of Scarman LJ in H. Parsons (Livestock) v Uttley Ingham & Co [1978] 1 All ER 598.

[139] As suggested by Thomas J in Rowlands v Collow [1992] 1 NZLR 178, and also the Canadian case of Kienzb v Stringer (1982) 130 DLR (3d) 272.

[140] [1992] 2 NZLR 282.

[141] (1988) CLR 539. See also the New Zealand case of Day v Mead [1987] 2 NZLR 443.

[142] Simms Jones Ltd. v Petrochem Trading New Zealand Ltd [1993] 3 NZLR 369.

[143] Per Pritchard J in Rowe v Turner Hopkins [1982] I NZLR 178.

[144] As advocated in the case of Australia and New Zealand Group Limited v Ale [1980-93] WSLR 468.

[145] See the discussion above relating to the Niue Act 1966 (NZ) and the Cook Islands Act 1915(NZ).

[146] Cap 133, s 241.

[147] Attorney-General of Fiji and Others v Pacoil Fiji Ltd, unreported, Civ App ABU0014, 29 November 1996, 22.

[148] See also, for example, the Consumer Credit Act 1999 (Fiji) and the Consumer Protection Act, Cap 63 (SI).

[149] It should be borne in mind that, even where the Fair Trading Act does not apply the common law of misrepresentation has received statutory enhancement in the form of the Sale of Goods Act 1979 (Fiji), s 76.

[150] [1980-93] WSLR 468 at 469.

[151] [1978] AC 728.

[152] [1991] 1 AC 398.

[153] [1980-93] WSLR 295.

[154] Unreported, High Court, Solomon Islands, civil case 170/1991, 4 July 1991.

[155] As other Commonwealth countries have done to some extent.

[156] See note 199.

[157] See eg, s 76 and sch 3, Constitution of Solomon Islands 1978.