TORT OR CONTRACT?

The English law of civil obligations is traditionally divided into two categories: obligations in tort and obligations in contract.[1] Treatment of these obligations in separate textbooks encourages us to think of them in terms of mutually exclusive causes of action. In practice, however, the same set of facts will frequently give rise to a claim both in contract and in tort.

In this article, it is hoped to give some account of those situations in which an English court will be compelled to place such concurrent causes of action into one or other category, and also to examine the different approaches which a court can adopt towards the problem of characterisation. Some apology must be made for covering ground which has already been more competently surveyed by the late Professor Sir Percy Winfield in his *Province of the Law of Tort*[2] and by Dean Prosser in his famous essay on *The Borderland of Tort and Contract.*[3] But a view of the present day position in English law may not be without interest to lawyers elsewhere who are confronted with similar problems in their own jurisdictions.

The distinction between the two causes of action is by no means a purely academic one and the choice of one or the other may produce very disparate results. There is no consistency in the selection. "It cannot be said that either action is necessarily more advantageous than the other, and the decision may turn upon a number of factors."[4]

HISTORICAL CONFUSION

Before the abolition of the forms of action, the threads of tort and contract were inextricably woven together. There was no single concept of an action founded on tort, but merely a number of separate forms of action such as libel, deceit, trespass, trover, and so on, which might be (but seldom were) classified as "tortious". The actions of debt and detinue were *sui generis,* being real in origin. And the position was further complicated by the fact that the action of *assumpsit,* which

1. A third category, restitution, may be about to emerge, but it is doubtful whether its existence can be predicated with any certainty. *Cf.*, *Nelson* v. *Larholt* [1948] 1 K.B. 339, at p. 343 *per* Denning J.
2. Cambridge (1931).
3. *Selected Topics on the Law of Torts* (1953), p. 380.
4. *Ibid.*, at p. 422.

became the general remedy for the breach of a contract, was originally tortious, being a branch of the action on the case.[5] It might have been supposed that the old rules as to joinder of parties [6] and joinder of causes of action: "that an action on a tort and on a contract cannot be laid together", [7] would have led to some clarification of the position. But so distinguished a legal historian as the late Professor Winfield was forced to admit that "there is not a trace of any reasoned distinction of the one from the other. The judges and writers constantly assume that the distinction exists and never say what it is." [8]

In many situations it was possible to sue in *assumpsit* or upon the delictual action which existed before *assumpsit* made its appearance.[9] Thus, in the case of a breach of duty by a person exercising a common calling, such as an inn-keeper, farrier, surgeon, common carrier or attorney, an action on the case might be brought "on the custom of the realm." [10] As late as 1844, in *Brown* v. *Boorman*[11] where an action against an oil broker was brought on a simple allegation of a breach of professional duty, Lord Campbell said "wherever there is a contract and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract." [12] This *dictum* was later rejected when it was sought to apply it to all cases of professional negligence,[13] but it serves to high-light the irrationality of any distinction drawn between tort and contract in terms which we would acknowledge today. Indeed, if literally applied, it would have obliterated any boundary line between the two causes of action.[14]

5. See Fifoot, *History and Sources of the Common Law,* p. 330. *Cf*., *Battley* v. *Faulkner* (1820) 3 B. & Ald. 668.

6. See post, p. 212.

7. *Dalston* v. *Eyenston* (1694) 12 Mod. 73; *Denison* v. *Ralphson* (1681) 1 Vent. 365; *Corbett* v. *Packington* (1827) 6 B. & C. 268.

8. *Province of the Law of Tort,* p. 47.

9. *Salmond on Torts* (12th ed.), p. 12.

10. *Dickson* v. *Clifton* (1766) 2 Wils. 319; *Ansell* v. *Waterhouse* (1817) 2 B. & P. 365; *Bretherton,* v. *Wood* (1821) 3 B. & B. 54; *Knights* v. *Quarles* (1820) 2 B. & B. 102; *Pozzi* v. *Shipton* (1838) 8 A. & E. 963; *Tattan* v. *Great Western Ry.* (1860) 2 E. & E. 844; *Morgan* v. *Ravey* (1861) 6 H. & N. 265; *Constantine* v. *Imperial Hotels, Ltd.* [1944] K.B. 693.

11. (1844) 11 Cl. & Fin. 1, affirming *Boorman* v. *Brown* (1843) 9 A. & E. 487.

12. At p. 44.

13. *Bean* v. *Wade* (1885) 2 T.L.R. 157; *Wood* v. *Jones* (1889) 61 L.T. 551; *Steljes* v. *Ingram* (1903) 19 T.L.R. 534; *Jarvis* v. *Moy* [1936] 1 K.B. 399; *Groom* v. *Crocker* [1939] 1 K.B. 194; *Bailey* v. *Bullock* [1950] 2 All E.R. 1167.

14. *Courtenay* v. *Earle* (1850) 10 C.B. 73, at p. 83.

Examples of historical confusion could be multiplied, but they would only be of antiquarian interest. One or two, however, must be cited since the treatment accorded to them will be used to support arguments later in this article. The liability of a bailee to his bailor could be founded on a special contract,[15] but it was normally unnecessary for the bailor to plead such a contract since he had a delictual action in any event.[16] It was also the common practice until the beginning of the nineteenth century to sue in *tort* for the breach of an express warranty, *e.g.*, on the sale of goods, without any necessity for the plaintiff to prove or plead deceit.[17] Again, an action by a customer against his banker for dishonour of a cheque could be laid in *tort,* although he also had an action for breach of contract.[18]

Any reasoned distinction between tort and contract is therefore the product of nineteenth, if not twentieth, century jurisprudence. It was only when the judges had shaken free of the forms of action that the true nature of an obligation could be analysed. Perhaps the best analysis is that put forward by Winfield[19] "At the present day, tort and contract are distinguishable from one another in that the duties in the former are primarily fixed by the law, while in the latter they are fixed by the parties themselves. Moreover, in tort the duty is towards persons generally, in contract it is towards a specific person or specific persons."

CONCURRENCE OF ACTIONS

Despite the more rational nature of this distinction, there are nevertheless many situations to-day where the same set of facts will give rise to a claim both in contract and in tort. Negligence is the tort which most frequently coincides with a breach of contract; but there are others, as may be seen from the following examples.

A contract for the carriage of goods may give rise to an action in contract for breach of the agreement or in tort for negligence, conversion or detinue, or in quasi-contract for the value of the goods.[20] A contract for the carriage of a passenger may found an action for breach of an

15. Y.B. Hil. 2, Hen. VII, f.ll, pl. 9; *Legge v. Tucker* (1856) 1 H. & N. 500. See Holdsworth, *H.E.L.*, iii. 336-349; vii. 448-455; Winfield, *Province of the Law of Tort,* pp. 92 *et seq.*

16. *Symons* v. *Darknoll* (1628) Palmer 523; *Turner* v. *Stallibrass* [1898] 1 Q.B. 56.

17. *Williamson* v. *Allison* (1802) 2 East 446; *Brown* v. *Edginton* (1841) 2 M. & G. 279. *Cf.*, *Weall* v. *King* (1810) 12 East 452; *Green* v. *Greenbank* (1816) 2 Marsh. 485; *Battley* v. *Faulkner* (1820) 3 B. & Ald. 668.

18. *Marzetti* v. *Williams* (1830) 1 B. & Ad. 415.

19. *Province of the Law of Tort,* p. 40.

20. *E.g.*, *Pontifex* v. *Midland Ry.* (1877) 3 Q.B.D. 23 (conversion); *Fleming* v. *Manchester, Sheffield & Lincs. Ry.* (1878) 4 Q.B.D. 81 (contract).

implied term to carry him safely, or there may be an action for negligence at the suit of the passenger, his personal representatives or dependants, if he is killed or injured *en route.*[21] A fraudulent warranty may give rise alternatively to a claim in contract for breach of warranty or in tort for damages for deceit.[22] A bailment can still exist independently of any contract[23] so that a delictual action lies against the bailee[24] or an action on the special contract of bailment.[25] Also the bailee may be liable to a claim in conversion or detinue, and, if he has sold the goods, to an action for money had and received.[26] A contract for work and labour, if negligently performed, may give rise to an action for breach of the contract or in tort for negligence.[27] The breach of an employer's duty to provide a safe system of working may be pleaded alternatively in tort or as the breach of an implied term in the contract of service.[28] And there are many other examples.[29]

ATTITUDE OF THE COURTS

The courts may therefore be confronted with a situation where, owing to the divergent rules governing contract and tort, or because of the wording of a particular statute, a choice has to be made between the two causes of action. From an examination of the decided cases, it appears that they can adopt one of four possible approaches.

First, they can look at the way the case is *pleaded.* If, for example, the action is pleaded in contract, the contractual rule will apply; if in tort, the rule of tort.[30] In the older cases, where the forms of pleading

21. *Ansell v. Waterhouse* (1817) 6 M. & S. 385 (negligence); *Adams* v. *Lancashire & Yorkshire Ry.* (1869) L.R. 4 C.P. 739 (contract); *Bradshaw* v. *Lancashire & Yorkshire Ry.* (1875) L.R. 10 C.P. 189 (contract); *Taylor* v. *Manchester, Sheffield & Lincolnshire Ry.* [1895] 1 Q.B. 134 (negligence); *Kelly* v. *Metropolitan Ry.* [1895] 1 Q.B. 944 (negligence); *re Great Orme Tramways Co.* (1934) 50 T.L.R. 450 (contract).

22. *Jack* v. *Kipping* (1882) 9 Q.B.D. 113 (contract); *Peek* v. *Derry* (1887) 37 Ch. D. 541 (deceit); *Tilley* v. *Bowman, Ltd.* [1910] 1 K.B. 745 (contract).

23. *R.* v. *Robson* (1861) 31 L.J.N.S. (M.C.) 22; *R.* v. *McDonald* (1885) 15 Q.B.D. 323; Winfield, *Province of the Law of Tort,* p. 98.

24. *Turner* v. *Stallibrass* [1898] 1 Q.B. 56.

25. *Legge* v. *Tucker* (1856) 1 H. & N. 500.

26. *Lamine* v. *Dorrell* (1784) 2 Ld. Raym. 1216 (quasi-contract); *Bryant* v. *Herbert* (1877) 3 C.P.D. 389 (conversion); *re Hopkins* (1902) 86 L.T. 876 (contract); *Beaman* v. *A.R.T.S., Ltd.* [1948] 2 All E.R. 89 (conversion or contract).

27. *Edwards* v. *Mallan* [1908] 1 K.B. 1002; *Jackson* v. *Mayfair Cleaning Co., Ltd.* [1952] 1 All E.R. 215.

28. *Matthews* v. *Kuwait Bechtel Corporation* [1959] 2 Q.B. 57.

29. *E.g. re Polemis, & Furness, Withy & Co.* [1921] 3 K.B. 560 (negligence in course of charterparty).

30. See *post,* pp. 200, 207, 210, 212, 214.

were much more strict than they are today, this might be the only course open to the court. Such precedents must therefore diminish in importance according to their age.

Secondly, they can allow a party *a full and free choice* which remedy he will pursue. If he has pleaded both a tort and a breach of contract (and sometimes if he has pleaded only one of them), he may nevertheless "waive" the less advantageous remedy and elect that which is more favourable to his cause.[31]

Thirdly, they can enquire which is the *substantial* cause of action, or, in Dean Prosser's words,[32] the "gist" or "gravamen" of the action. Here the pleadings or the choice of a party may be relevant factors, but they do not determine the issue. The judge must ascertain the substance of the action from the facts of the case.[33]

Finally, they can simply enquire whether *the requirements of a particular statute* have been met, that is to say, if the statute refers to an "action in tort" or to "an action in contract", and the facts disclose such an action (whether this is expressed in the pleadings, or is the substance of the action or not), the provisions of the statute will apply.[34]

Let us now consider the situations in which these approaches have been used.

BANKRUPTCY

In English law, except in the case of demands in the nature of unliquidated damages against the insolvent estate of a deceased person, [35] it is essential for the court to characterise as tortious or contractual the breach of any legal duty where the plaintiff seeks to prove in bankruptcy or upon the winding up of an insolvent company.[36] Section 30(1) of the Bankruptcy Act, 1914, provides that "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy." A creditor must therefore establish that his claim arises by reason of a contract and not in respect of a tort *simpliciter*.

The courts have shown considerable indulgence in those cases where claims may be made in either contract or tort. They have allowed the

31. See *post*, pp. 202, 215, 218.

32. *Selected Topics on the Law of Torts*, p. 429.

33. See post, pp. 202, 210, 213, 216, 217, 220, 221.

34. See *post*, pp. 196, 213.

35. Law Reform (Miscellaneous Provisions) Act, 1934, s.l(6).

36. Companies Act, 1948, s.317.

creditor to waive the tort and to lodge a proof on the contract. In *re Great Orme Tramways Co.*[37] the appellant was a paying passenger on a tramcar. She suffered serious injuries owing to the tramcar getting out of control. She lodged a proof on the winding up of the tramway company based on a breach of the contract to carry her safely. This proof was refused by the liquidator on the ground that her cause of action lay in tort, but, on appeal, the Divisional Court held that it arose by reason of a contract and that the proof was admissible.

There has been no attempt by the judges to discover the substance of the action; nor will the court hold itself bound by the pleadings. If there is a cause of action in contract, the proof will be admitted. Even if the creditor has commenced an action in tort, he will be permitted to discontinue and to prove in the bankruptcy instead.[38] He is not irrevocably committed to his pleadings in the action.[39]

At first sight, then, it might seem that bankruptcy provides an example of a situation where the plaintiff is allowed freely to choose the more advantageous remedy. But the corollary of this proposition is by no means established. Debts which are provable in bankruptcy are normally released by the discharge of the bankrupt.[40] Demands in the nature of unliquidated damages for a tort are therefore not released since they are not provable. They survive the bankruptcy proceedings. So where, for example, a discharge bankrupt is once again worth powder and shot, it might be more advantageous for a person who had not proved in the bankruptcy to allege that the wrongful act constituted a tort. There seems to be no English decision as to whether the creditor will be permitted to "waive the contract" and claim in tort. American jurisdictions, however, have inexorably held that, wherever the creditor might have maintained an action of contract, express or implied, his claim is a provable debt and is released even though he has in fact elected to bring his action in tort.[41]

This would seem to be the logical solution: that a creditor cannot blow both hot and cold. The courts will simply enquire whether *the requirements of the statute have been met.*

37. (1934) 50 T.L.R. 450. See also *Jack* v. *Kipping* (1882) 9 Q.B.D. 113 and *Tilley* v. *Bowman, Ltd.* [1910] 1 K.B. 745, where claims were made in respect of fraudulent misrepresentations in the course of a contract. It was held that this was "not a personal tort, but a breach of the obligation arising out of the contract of sale."

38. (1902) 86 L.T. 676.

39. Until judgment is given: see *United Australia, Ltd.* v. *Barclays Bank, Ltd.* [1947] A.C. 1.

40. Bankruptcy Act, 1914, s.28(2).

41. Prosser, *Selected Topics on the Law of Torts,* p. 302.

SURVIVAL OF ACTIONS

Until 1934, the general rule of English law was that the executor or administrator of the estate of a deceased person could not sue or be sued in respect of torts committed by or against the deceased in his lifetime. The maxim *actio personalis moritur cum persona* applied. [42] This rule was, however, subject to considerable qualification where injuries to the property of the deceased were concerned. Thus a personal representative could sue for any injury in respect of the personal estate of the deceased in his lifetime [43] and for any injury committed to the real estate of the deceased within six months before his death.[44] An action could also be maintained against the personal representatives of a deceased person for any wrong committed by the deceased within six months before his death to another person in respect of his property real or personal.[45] But otherwise no action by or against the deceased in tort would survive.

In contract, however, the maxim was very much less strictly applied. Indeed, it had originally been thought that all actions of *assumpsit* by or against the deceased would survive,[46] although it was later established that personal representatives could not sue or be sued for a breach of contract which was in itself merely a personal injury, such as a breach of promise to marry, at any rate if no special damage could be proved.[47] The general rule was nevertheless applied that an action would lie in respect of any loss or benefit to the deceased's estate arising out of a breach of contract in his lifetime.[48] And this rule also extended to an action in quasi-contract for money had and received.[49]

By section 1(1) of the Law Reform (Miscellaneous Provisions) Act, 1934, the distinction between actions in tort and actions in contract was swept away. It was there provided that on the death of any person, all causes of action (with certain exceptions specifically named) subsisting against or vested in him should survive against, or, as the case may be,

42. *Hambly* v. *Trott* (1776) 1 Cowp. 371; *Kirk* v. *Todd* (1881) 21 Ch. D. 484.

43. Administration of Estates Act, 1925, s.26(l); Civil Procedure Act, 1833, s.2.

44. Administration of Estates Act, 1925, s.26(2). The action had to be brought within one year of the death.

45. Administration of Estates Act, 1925, s.26(3). The action had to be brought within six months of taking out representation. See also 3 & 4 Will. 4, c. 42, s.4.

46. *Pinchon's case* (1611) 9 Rep. 86b, 87a, 89a; *Morley* v. *Polhill* (1689) 2 Vent. 56; *Hambly* v. *Trott (supra),* at p. 375.

47. *Chamberlain v. Williamson* (1814) 2 M. & S. 408; *Bradshaw* v. *Lancashire & Yorkshire Ry.* (1875) L.R. 10 C.P. 189; *Finlay* v. *Chirney* (1887) 20 Q.B.D. 494; *Quirk v. Thomas* [1916] 1 K.B. 516.

48. *Raymond v. Fitch* (1835) 2 C.M. & R. 588; *Ricketts v. Weaver* (1844) 12 M. & W. 718.

49. *Phillips* v. *Homfray* (1883) 24 Ch. D. 439.

for the benefit of his estate. However, section 1(3) of the Act went on to provide [50] that "No proceedings shall be maintainable in respect of a cause of action in *tort* which by virtue of this section has survived against the estate of a deceased person unless either— (a) proceedings against him in respect of that cause of action were pending at the date of his death; or (b) proceedings are taken in respect thereof not later than six months after his personal representatives took out representation." A very short period of limitation is thus laid down in the case of an action in tort against the estate of the deceased, whereas no such provision is made in the case of an action in contract.

There seems to have been no judicial pronouncement on the meaning of the words "a cause of action in tort." [51] If, therefore, the act complained of constitutes both a tort and a breach of contract, it will be necessary to look to the old law to see how the courts would have characterised the action. The sub-section of course applies only to causes of action in tort *against* the estate of a deceased person, but it is relevant to consider cases involving actions both against and on behalf of the estate.

(i) *Actions against the estate*

In regard to actions against the estate of the deceased, the courts appear to have allowed the plaintiff to pursue the more favourable remedy if he pleaded his action in contract. In *Hambly* v. *Trott* [52] an action of trover was brought against an administrator *cum testamento annexo* for a conversion of goods committed by the testator in his lifetime. It was held that the action arose *ex delicto* and that it died with the person. But Lord Mansfield pointed out that it would have been possible to succeed by suing in *assumpsit:* ". . . . . in most, if not in all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. — An action on the custom of the realm against a common carrier, is for a tort and supposed crime; the plea is not guilty; therefore, it will not lie against an executor. But *assumpsit,* which is another action for the same cause, will lie. — So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor." [53]

50. As amended by the Law Reform (Limitation of Actions) Act, 1954, ss.4, 8(3), Schedule.

51. Except that a claim for contribution from a joint tortfeasor is not an action in tort: *Harvey* v. *R.G. O'Dell, Ltd.* [1958] 2 Q.B. 78.

52. (1776) 1 Cowp. 371.

53. At p. 375.

The cases also show that the court was prepared to allow the plaintiff to "waive the tort" and sue in quasi-contract where this was available. In *Powell* v. *Rees*[54] the plaintiff sued the deceased's executors for the wrongful removal by the deceased of coal from beneath the plaintiff's land. The statute 3 & 4 Will. 4, c.42, s.4, allowed the plaintiff to recover damages in trespass for the coal abstracted within the six months next preceding death. But the plaintiff also sued for an account in respect of the coal abstracted before that time. The Court of Queen's Bench allowed him to do so. The deceased, they said, had been guilty of a series of trespasses, and not of a single act, so that the plaintiff might "waive the tort" and sue for an account in respect of the earlier acts.

(ii) *Actions on behalf of the estate*

In regard to actions brought on behalf of the estate, there too the personal representatives were allowed to recover by pleading in contract where there were concurrent causes of action. In *Knights* v. *Quarles*[55] the administrator of the estate of a deceased person brought an action against the defendant, a solicitor, claiming damages for failure properly to investigate the title of an estate conveyed to the deceased. The action was framed in contract, but the defendant demurred on the ground that the cause of action arose *ex delicto* for breach of professional duty.[56] The Court of Common Pleas held that, though the testator might have brought case or *assumpsit* on these facts at his election, *assumpsit* being the only remedy open to an administrator, the action should be allowed to recover the loss to the estate.

This rule was also applied to cases involving personal injuries.[57] In *Bradshaw* v. *Lancashire and Yorkshire Railway*[58] where a passenger for reward on the defendants' railway was injured in an accident and died, his personal representatives brought an action for damages for loss of business profits, medical expenses, etc. from the date of his injury to his death. The action was pleaded as a breach of a contract to carry the deceased safely. The objection was taken that the only right of action which survived was that given by the Fatal Accidents Acts,[59] since at

54. (1837) 7 A. & E. 426. See also *Phillips v. Homfray* (1883) 24 Ch. D. 439.

55. (1820) 2 B. & B. 102.

56. See *ante,* p. 192.

57. See *Knights* v. *Quarles (supra),* where the bench gave the facts of *Bretherton* v. *Wood* (1821) 3 B. & B. 54 which was decided in the next year. In that case, it was held for the purpose of joinder of parties (see *post,* p. 212) that the action was in tort, not contract.

58. (1875) L.R. 10 C.P. 189. This case was doubted in *Leggott* v. *G.N. Ry.* (1876) 5 Q.B.D. 599, but referred to with approval in *The Greta Holme* [1897] A.C. 596, at p. 601. See also *Potter* v. *Metropolitan District Ry.* (1874) 30 L.T., N.S. 765.

59. See *post,* p. 200.

common law an action for personal injuries died with the person, but it was held that the action was maintainable since it existed independently of the death of the deceased and was brought in contract for the benefit of his estate.

It is therefore submitted that the words of the Law Reform statute "cause of action in tort" will be construed according to the *pleadings* in the case.[60] If the case is pleaded as a breach of contract, the short limitation period will not apply. In the old cases it was not of course possible as a general rule for the plaintiff to join in one and the same action causes in contract and tort. But now, where both are concurrently pleaded, though the cause of action in tort may be barred by the Act, that in contract will remain unaffected.

FATAL ACCIDENTS CLAIMS

At common law no action in tort lay at the suit of third parties who had suffered loss as the result of the killing of a human being. The principle was established[61] as the result of the rule laid down by Lord Ellenborough in *Baker* v. *Bolton*[62] that "In a civil court the death of a human being cannot be complained of as an injury." In that case an action was brought by the plaintiff against the defendants as proprietors of a stage coach, on the top of which the plaintiff and his wife were travelling from Portsmouth to London. The coach was overturned, allegedly by the negligence of the defendants' servants. The plaintiff himself was bruised and his wife so severely injured that she died a month later. Lord Ellenborough instructed the jury that they should, in assessing damages, take into account the plaintiff's own injuries and the loss of his wife's society until her death, but not such loss occurring after that event.

It is to be noted that the plaintiff could have sued in contract for the breach of an implied term to carry himself and his wife safely to their destination. The action was, however, pleaded in tort.[63] The question was therefore bound to arise whether a plaintiff would be permitted to evade the rule in *Baker* v. *Bolton* by suing in contract instead of in tort. It was not finally answered until a hundred years later in *Jackson* v. *Watson & Sons*[64] where the plaintiff purchased some tinned salmon from

60. In the United States, the courts appear to have decided according to the "gravamen" of the action: Prosser, *Selected Topics on the Law of Torts,* p. 437.

61. *Osborn v. Gillett* (1873) L.R. 8 Ex. 88; *Clark* v. *London General Omnibus Co.* [1906] 2 K.B. 648; *Admiralty Commissioners* v. *S.S. Amerika* [1917] A.C. 38.

62. (1808) 1 Camp. 493.

63. *Jackson* v. *Watson & Sons* [1909] 2 K.B. 193, at pp. 197, 202.

64. [1909] 2 K.B. 193. See also *Preist v. Last* [1903] 2 K.B. 148; *Frost* v. *Aylesbury Dairy Co., Ltd.* [1905] 1 K.B. 608; *Square* v. *Model Farm Dairies (Bournemouth), Ltd.* [1939] 2 K.B. 36.

the defendants, a firm of provision merchants. He and his wife ate the salmon which proved to be poisonous. As a result the plaintiff became seriously ill and his wife died. He sued the defendants for breach of contract, claiming damages for the loss of the services of his wife caused by her death. It was held that he was entitled to recover. The rule in *Baker* v. *Bolton* applied only to cases where the cause of action was the wrong which caused the death *(i.e.* the tort) and did not apply where there was a cause of action (in this case, a breach of contract) independent of such wrong.

It might be thought that this distinction between actions in tort and actions in contract was merely of academic interest owing to the operation of the Fatal Accidents Acts, 1846 – 1959 (Lord Campbell's Act) which give to the personal representatives of the deceased an action for the benefit of dependants who suffer pecuniary loss as a result of his death if caused "by wrongful act, neglect or default" of the defendant.[65] But certain important points of difference exist.

In the first place, an action lies under the Fatal Accidents Acts only in respect of loss caused to certain near relatives of the deceased.[66] It does not lie for example, at the suit of a master in respect of loss caused by the death of his servant; [67] nor does it extend to cases where the loss caused to a near relative arises out of a professional relationship. [68] But an action in contract will lie for such loss, provided it is not too remote.[69]

Secondly, if the deceased's own action would have been affected by his own contributory negligence, the damages awarded under the Fatal Accidents Acts will be reduced proportionately.[70] No reduction will, however, be made if the claim is in contract, since the cause of action is independent of the contributory negligence of the deceased.[71]

Thirdly, in most cases it will be necessary to prove negligence on the part of the defendant in any claim under the Fatal Accidents Acts.[72]

65. This will include a negligent breach of a contract made between the defendant and the deceased: *Grein v. Imperial Airways, Ltd.* [1937] 1 K.B. 50, at p. 70, but not where an action is brought against the Crown, for *(semble)* the Fatal Accidents Acts only bind the Crown where there is liability in tort: Crown Proceedings Act, 1947, s.2.

66. The classes of dependants have been extended by s.1 of the Fatal Accidents Act, 1959.

67. *Admiralty Commissioners* v. S.S. *Amerika* [1917] A.C. 38.

68. *Burgess* v. *Florence Nightingale Hospital for Gentlewomen* [1955] 1 Q.B. 349.

69. *Square* v. *Model Farm Dairies (Bournemouth), Ltd.* [1939] 2 K.B. 36.

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

71. *Mallett* v. *Dunn* [1949] 2 K.B. 180.

72. Even, it seems, if the deceased's action is in contract: *Grein* v. *Imperial Airways, Ltd.* [1937] 1 K.B. 50, at p. 70.

But if the claim is in contract, his liability will frequently be strict, as, for example, in the case of a breach of warranty on a contract of sale of goods.[73]

It may be anomalous that the result of a case should depend on whether the plaintiff can establish a direct contractual relationship with the defendant,[74] but the courts have exhibited no signs of wishing to limit this anomaly. It is suggested that, where the plaintiff has alternative claims in contract and under the Fatal Accidents Acts, he will be permitted to *choose the more favourable remedy.* Nevertheless it should not be supposed that cumulative damages could be obtained. As the basis of the action in both cases is the loss suffered by the claimant, it follows that all pecuniary advantages arising from the death must be taken into account. Thus, in an action on the contract, any sum awarded under the Fatal Accidents Acts will have to be deducted; and, in any action under the Acts, any damages awarded for breach of contract can legitimately be pleaded in diminution of the claim.[75]

COUNTY COURT COSTS

An example of an entirely different approach by the courts to the problem of characterisation is provided by a review of those cases, decided before the passing of the County Courts Act, 1959, where an action was brought in the High Court which could have been brought in a county court.

By section 47(1) of the County Courts Act, 1934,[76] where an action was commenced in the High Court which could have been commenced in a county court, the plaintiff was not entitled to any costs of the action if, in the case of an action "founded on contract", he recovered less than £40, and, in the case of an action "founded on tort", less than £10. The courts showed no inclination, when confronted with this provision, to allow the plaintiff to elect the form of his remedy. Nor did they hold themselves bound by the pleadings. They insisted upon looking at the *substance of the action* in order to reach a conclusion. The test which came

73. *Lockett* v. *Charles* [1948] 4 All E.R. 170.

74. *Salmomd on Torts* (12th ed.), at p. 624. See also Fleming, *The Law of Torts* (2nd ed.), p. 629; Report of the Law Revision Committee (Cmnd. 4540), p. 4.

75. *Grand Trunk Ry.* v. *Jennings* (1888) 13 App. Cas. 800, at p. 804.

76. See the County Courts Act, 1846, s.129; County Courts Act, 1850, s.11; County Courts Act, 1856, s.30; County Courts Act, 1867, s.5; County Courts Act, 1888, ss.62, 161; County Courts Act, 1919, ss.l, 11. Also where the plaintiff recovered — (i) in the case of an action founded on contract, a sum of £40 or upwards but less than £100, or (ii) in the case of an action founded on tort, a sum of £10 or upwards but less than £50, he was (subject to the discretion of the court) not entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in a county court.

ultimately to be applied was stated as follows: "If, in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on the other hand, if, in order successfully to maintain his action, it is necessary to rely upon and prove a contract, the action is one founded upon contract." [77]

The operation of this test may be illustrated by a brief examination of some of the cases in which it was employed.

(i) *Carriage of goods*

It has already been pointed out that an action against a common carrier could be brought in tort "on the custom of the realm." [78] In *Tattan* v. *Great Western Ry.*[79] an action was brought on the custom of the realm against a common carrier for loss of the goods carried. It was categorically stated that the action was delictual in substance and in form since "there was no contract with the plaintiff on which it could have been framed."[80] Subsequently, however, it was realised that a plaintiff could normally plead in contract or in tort[81] and also that it was not altogether satisfactory if the plaintiff could, by declaring in one particular form rather than the other, alter the liability of the defendant in respect of costs.[82] The courts therefore began to search for the substance of the action and finally decided to characterise an action against a carrier for the negligent loss of the goods carried as "founded on contract." [83] Thus in *Fleming* v. *Manchester, Sheffield and Lincolnshire Ry.*[84] the Court of Appeal held that such an action was an action for the breach of a contractual duty to carry the goods safely to their destination. "Whether we are to decide this question," said Bramwell L.J.[85] "by looking at the form of pleadings or the facts, it is clear that this action is 'founded on contract'."

(ii) *Carriage of passengers*

In the case of the carriage of passengers, however, the courts adopted the attitude that an action in respect of personal injuries was an action

77. *Turner* v. *Stallibrass* [1898] 1 Q.B. 56, at p. 58; *Jarvis* v. *Moy Davies Smith Vandervell & Co.* [1936] 1 K.B. 399, at p. 405; *Jackson* v. *Mayfair Window Cleaning Co., Ltd.* [1952] 1 All E.R. 215, at p. 217.

78. See *ante,* p. 192.

79. (1860) 2 E. & E. 844. See also *Pontifex* v. *Midland Ry.* (1877) 3 Q.B.D. 23.

80. At p. 855.

81. Contracts for the carriage of goods had long before been characterised as contractual for the purpose of joinder of parties. *Buddle* v. *Wilson* (1795) 6 T.R. 369; *Powell* v. *Layton* (1806) 2 B. & P. 365.

82. *Baylis v. Lintott* (1873) L.R. 8 C.P. 345, at p. 349.

83. *Bullen on Pleadings* (3rd ed.), p. 121; *Baylis* v. *Lintott (supra)*, at pp. 348, 349.

84. (1878) 4 Q.B.D. 81.

85. At p. 83.

"founded on tort". The path by which this conclusion was reached was that the negligent infliction of injury upon a passenger by a positive act of misfeasance was in itself a tort and so the passenger did not have to rely upon the contract to establish his case. In *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry.*[86] a porter employed by the defendants negligently shut the door of a railway carriage on the plaintiff's thumb. It was held that the action was founded on tort. The Court of Appeal did not dispute that, as a matter of pleading, the plaintiff could plead alternatively in tort and contract; but this was not the governing factor in the characterisation of the claim. The contract of carriage was "merely part of the history of the case";[87] it showed simply that the plaintiff was lawfully on the train. The positive act of misfeasance alleged gave rise to a claim in tort and this was therefore the substance of the action.

The test thus formulated appeared to involve a distinction between a positive act of misfeasance (or commission) on the one hand and, on the other, a mere nonfeasance (or omission) for which contract was the only remedy.[88] But this proposition was quickly challenged. In *Kelly* v. *Metropolitan Ry.*[89] a passenger was injured in a railway accident by the negligent failure of the train driver to shut off steam so that the engine hit the buffers at a station. It was contended that there was here a mere nonfeasance so that the substance of the action was contractual. But the Court of Appeal rejected this argument. The relationship of the passenger to the railway company was such that a duty arose from that relationship, irrespective of the contract, to take due care; and since the defendants were negligent, the act was one of tort.

(iii) *Bailment*

In cases of bailment, the courts were similarly confronted with alternative actions in contract and tort. Where the bailee was in breach of a common law duty to take due care, as, for example, where he failed to ensure that the field in which a horse was kept was reasonably safe, the action was "founded on tort" because there was a tort independent of the contract.[90] But where his liability depended upon the special terms of the contract of bailment, for example, to keep a horse in a separate stall, the action was "founded on contract" because without the contract, it was doubtful if any cause of action would exist.[91]

86. [1895] 1 Q.B. 134.

87. At p. 139.

88. This has always proved an unsatisfactory distinction. *Cf.*, Prosser, *Selected Topics on the Law of Torts,* p. 411.

89. [1895] 1 Q.B. 944.

90. *Turner v. Stallibrass* [1898] 1 Q.B. 56.

91. *Legge* v. *Tucker* (1856) 1 H. & N. 500.

Moreover, an action for wrongful conversion or detention of the goods bailed was characterised as tortious. Even though the old form of action might be *detinue sur bailment* — a contractual remedy — the question of characterisation depended, not on the form of action, but on the facts with reference to which the form of action was to be applied.[92] These, it was concluded, despite the prior agreement, gave rise to an action founded on tort.

(iv) *Breach of professional duty*

Some difficulty was caused by the *dictum* in *Brown* v. *Boorman*,[93] already referred to, that any breach of a professional duty would give rise to an action in tort. When this principle was canvassed in relation to costs it met with an unsympathetic reception. An action against an architect for damages for failure to use due care and skill in the erection of a building was held to be founded on contract[94] and an action against a stockbroker for breach of a client's instructions whereby the client suffered loss was similarly held to be contractual.[95] The cases were decided on the narrow ground that these two professions did not create a duty situation; but it is clear that the courts were unwilling to accept the idea that such breaches arose *ex delicto,* at any rate where the damage was purely pecuniary. Had an action been brought against a surgeon, however, it might well have been held to be tortious on the more modern ground that the negligent infliction of injury on a patient is a tort independent of any agreement to operate.[96]

Some support for this may be gained from the case of *Jackson* v. *Mayfair Window Cleaning Co., Ltd.* [97] There the plaintiff employed the defendants to clean a chandelier in her flat. Owing to their negligence, it fell and was damaged. Both on the writ and in the statement of claim the plaintiff pleaded in tort, claiming damages for negligence. But Barry J. held that this did not conclude the matter, since his duty was to discover the substance of the action. Nevertheless, he held that there was a claim in negligence independent of the contract and so the action was "founded on tort."

(v) *Conclusion*

The interpretation thus placed upon this section of the County Courts Act, 1934, provides an illustration of the way in which a court

92. *Bryant* v. *Herbert* (1877) 3 C.P.D. 189, 389.

93. (1843) 9 A. & E. 487; (1844) 1 Cl. & Fin. 1.

94. *Steljes v. Ingram* (1903) 19 T.L.R. 534.

95. *Jarvis* v. *May Davies Smith Vandervell & Co.* [1936] 1 K.B. 399.

96. *Edwards* v. *Mallan* [1908] 1 K.B. 1002 *(infra,* p. 206); *Fish* v. *Kapur* [1948] 2 All E.R. 76. *Cf.*, *Groom* v. *Crocker* [1939] 1 K.B. 194, at p. 222.

97. [1952] 1 All E.R. 215.

may set about determining the substance or "gravamen" of the action. But it is not the only way. The courts might, for example, have held that wherever there had been some prior agreement between the parties, the action was "founded on contract" [98]. By asking the question "Was there a tort independent of the contract?" they were enabled to categorise more situations as tortious and so to relieve a plaintiff from the severe consequences which would attend his failure accurately to assess the damages in an action. This indulgence may possibly be the reason for its formulation.

SECURITY FOR COSTS

The provisions as to deprivation of costs have now been repealed. [99] But there is still one instance in which the tort-contract distinction is still of relevance. By section 46(1) of the County Courts Act, 1959,[1] where any action *founded on tort* is commenced in the High Court, the defendant may apply to have it transferred to the county court if he can show that the plaintiff has no visible means of paying his costs should he succeed in his defence. It might have been thought that this section would have received the same interpretation as the provision already discussed and that the courts would have looked at the substance of the action. But this is, in fact, not the case.

In the only decision which appears to have been reported on the application of this section, the court decided that the *pleadings* were the determining factor. In *Edwards* v. *Mallan* [2] the plaintiff alleged in her statement of claim that she had employed the defendant, a dentist, for reward to extract a tooth by a painless process, but that the tooth was so unskilfully extracted that a portion of it was left in her mouth causing her pain and suffering thereby. The Court of Appeal held that the action was founded on tort since there was no allegation in the pleadings of a breach of contract. Vaughan Williams L.J. distinguished the cases on costs, saying "[This section] deals with proceedings that happen before the trial of the action, and when we are considering whether the action is one of tort for the purposes of that section we must have regard to the statement of claim; after trial of an action in the High Court, when the question of costs arises, we may have regard to other matters in determining whether it is an action of contract or tort . . . ." [3]

98. See *Prosser on Torts,* (2nd ed.), Ch. 16, § 81.

99. By the County Courts Act, 1959.

1. See also County Courts Act, 1888, s.66; County Courts Act, 1919, s.2; County Courts Act, 1934, s.46(1).

2. [1908] 1 K.B. 1002.

3. At p. 1004.

An impecunious plaintiff would therefore be well advised to plead a contract and the breach of it if he wishes to avoid the application of this section. But if he pleads both in tort and in contract, then presumably the court would be forced to determine the *substance* of the action and would do so (we may suppose) according to the test of "a tort independent of the contract".

LIMITATION

Before the passing of the Limitation Act, 1939, variant periods of limitation were in force in English law for actions for breach of contract and with respect to different torts.[4] But by section 2(1) of that Act, it is provided that "the following actions shall not be brought after the expiration of six years[5] from the date on which the cause of action accrued, that is to say: . . . . actions founded on simple contract or on tort." It was clearly the intention of the legislature that the periods of limitation in cases of contract and tort should now be identical. This aim, however, has not been entirely achieved. The limitation period begins to run "from the date on which the cause of action accrued."[6] This date may vary according to whether the action is framed in contract, in tort, or in quasi-contract.

(i) *Contract*

In contract, it is clearly established that the cause of action accrues when the breach of contract takes place, not when damage is suffered, still less when it is discovered.[7] In *Battley* v. *Faulkner*[8] winter wheat was delivered to a buyer under a contract for the sale of spring wheat. After a suit in Scotland, which lasted for many years, the buyer was compelled to pay damages to a sub-purchaser to whom he had sold the wheat. He brought *assumpsit* against the seller for breach of the agreement. It was held that "the breach of the contract was the very gist of the action," and since the contract had been broken when winter wheat was delivered, the limitation period had expired.

4. See Winfield, *Province of the Law of Tort,* pp. 219, *et seq.*

5. By section 2(1) of the Law Reform (Limitation of Actions) Act, 1954, a period of three years is substituted where the damages complained of by the plaintiff consist of or involve damages in respect of personal injuries to any person. Also under s.2(3) of the 1939 Act, a period of twelve years is to be applied to actions on a specialty.

6. The same phrase is used in s.3(l) of the Law Reform (Miscellaneous Provisions) Act, 1934 (interest on damages) and in s.2 of the Law Reform (Personal Injuries) Act, 1948 (deduction of benefit under the National Insurance Acts).

7. *Gibbs* v. *Guild* (1881) 8 Q.B.D. 296, at p. 302. See also *Short* v. *M'Carthy* (1820) 3 B. & Ald. 626; *Lynn* v. *Bamber* [1930] 2 K.B. 72.

8. (1820) 3 B. & Ald. 288.

The rule that the cause of action accrues on breach is capable of working considerable hardship where the breach is, by the very nature of things, unlikely to cause damage or even to be discovered until many years later. Suppose, for example, that a jeweller buys a safe which is warranted to be "burglar proof." Seven years later, it is broken open by burglars and the contents stolen. The jeweller would have no remedy since the limitation period runs from the delivery of the safe in breach of the warranty, and not from the time the loss occurs.[9] In the case of a married man who goes through a form of bigamous marriage with a woman who is unaware of his status, this result has been avoided by supposing a continuing breach of warranty *die in diem* upon which she can sue many years after the ceremony.[10] But it is unlikely that this principle could be extended to cases, *e.g.,* concerning the sale of goods. So where concurrent actions exist in tort and contract, it may be of considerable importance for the plaintiff to endeavour to postpone the accrual of a cause of action to some time later than the breach of the contract. Can he do so by pleading in tort?

(ii) *Tort*

In tort, where the cause of action consists of a libel, trespass, conversion, or other wrong which is actionable *per se,* time begins to run from the moment of the wrongful act.[11] But where the tort is actionable only on proof of damage, the cause of action does not accrue until damage is suffered.[12] It is therefore surprising that there should still be some doubt in English law as to the time when the statute begins to run in an action of negligence. Since negligence is not actionable *per se*, but only on proof of damage, the cause of action should accrue when damage is suffered.

The source of the difficulty is the case of *Howell* v. *Young.*[13] A solicitor was alleged negligently to have represented that certain mortgages were sufficient security for a loan. They were, in fact, insufficient, but this was not discovered until more than six years had elapsed. He was sued on a declaration which charged that he had neglected to use

9. *Walker* v. *Milner* (1866) 4 F. & F. 745.

10. *Shaw* v. *Shaw* [1954] 2 Q.B. 429.

11. *Saunders* v. *Edwards* (1662) Sid. 95 (slander actionable *per se)*; *Fitter* v. *Veal* (1701) 12 Mod. 543 (battery); *Strange* v. *Atthowe* (1628) Het. 116 (trespass).

12. *Roberts* v. *Read* (1812) 16 East 215; *Bonomi* v. *Backhouse* (1859) E., B. & E. 646; *Whitehouse* v. *Fellowes* (1861) 10 C.B., N.S. 765; *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App. Cas. 127.

13. (1826) 5 B. & C. 259. See also *Smith* v. *Fox* (1848) 6 Hare 386; *Bean* v. *Wade* (1885) 2 T.L.R. 157; *Hughes* v. *Twisden* (1886) 55 L.J. Ch. 481; *Wood* v. *Jones* (1889) 61 L.T. 551.

"due and proper care or diligence." [14] The Court of King's Bench held that the substance of the action was "a breach of duty" and that the Statute of Limitations had begun to run, not from the time that damage was suffered, but from the time this breach of duty took place. "It appears to me," said Bayley J.,[15] "that there is not any substantial distinction between an action of *assumpsit* founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly upon a breach of duty. Whatever be the form of action, the breach of duty is substantially the cause of action."

This decision has given rise to the heresy that in *all* actions of negligence the cause of action accrues at the time of the breach of duty, *i.e.* the negligent act, and not when the damage is suffered.[16] But *Howell* v. *Young* is easily distinguishable either on the ground that the action between the client and his solicitor was in substance contractual[17] or, if delictual, on the ground that the breach of the solicitor's professional duty was actionable *per se*.[18] It is certainly no authority for the general proposition that a cause of action in negligence runs from the time of the act complained of. Moreover, it is submitted that this view has been rejected by the House of Lords in the recent Scottish case of *Watson* v. *Winget, Ltd.*[19] There a workman was injured by a defective tool which had been negligently supplied by the defendants to his employers. Under section 6(1) of the Law Reform (Limitation of Actions) Act, 1954, an action for personal injuries must be begun in the courts of Scotland within three years of the "act, neglect, or default giving rise to the claim." The workman brought his action more than three years after the supply of the defective tool, but less than three years after the accident. The House of Lords held, by a bare majority, that there was no "act, neglect, or default" until the damage occurred.[20]

14. In his *Province of the Law of Tort,* p. 222, *Winfield* states, "The action appears to have been framed alternatively in *assumpsit* (contract) and upon the case for negligence (tort)." But this does not emerge from the report cited, nor from that in (1825) 2 C. & P. 238, 241.

15. At p. 266.

16. Charlesworth, *Negligence* (3rd ed.), p. 610; *Archer* v. *Catton & Co., Ltd.* [1954] 1 W.L.R. 775. *Cf.,* Franks, *Limitation of Actions* (1959), p. 194.

17. *Howell* v. *Young* (1825) 2 C. & P. 238, at p. 243, *per* Bayley J.; Winfield, *Province of the Law of Tort,* p. 222; Preston and Newsom, *Limitation of Actions* (3rd ed.), p. 39.

18. *Howell* v. *Young* (1825) 5 B. & C. 259, at p. 265 *per* Bayley J.; Street, *The Law of Torts* (2nd ed.), p. 468.

19. 1960 S.L.T. 321.

20. Their Lordships who dissented did so on the ground that the wording of the statute compelled them to this conclusion.

(iii) *Tort or contract?*

If the cause of action in contract accrues upon breach, but the cause of action in negligence (and certain other torts) only upon damage, what is the position where the wrong complained of is both a breach of contract and a tort actionable only on proof of damage? In so far as any authority exists, it seems that the courts might approach the problem by endeavouring to ascertain the *substance* or "gravamen" of the action.[21] In *Battley* v. *Faulkner*,[22] already referred to, the argument was advanced on behalf of the plaintiff that, since an action in *assumpsit* was an action on the case, the period should run from the time when damage was suffered. But Holroyd J. said, "According to that argument, the action ought to have been brought for the tort. Supposing, however, that the pleadings had been differently framed, I do not know that the party would have benefited, for it seems to me, in this case, that the damage has originated substantially out of a breach of contract, and, therefore, the plaintiff could not have gained any advantage by changing the form of the remedy."[23] Again, one explanation of the case of *Howell* v. *Young* [24] is that the court found the action to be in substance contractual.

Nevertheless it is submitted that the correct approach should be to treat each cause of action as separate and independent. The action in contract would be barred after six years from the breach; but the action of negligence only after six years from the damage. The *dicta* cited above are by no means conclusive, for they deal with "torts" of a technical and obsolete character (breach of warranty; breach of professional duty). Where there are concurrent actions in tort and for breach of contract, if the plaintiff *pleads* a tort actionable only on proof of damage, time should begin to run from the occurrence of such damage, whether or not the action for breach of contract has been statute barred.

(iv) *Conversion*

Some authority for this approach may be gleaned from a case concerning the conversion of bailed goods. In the instances so far cited, it would have been more advantageous for the plaintiff to rely on the tort than on the breach of contract. But where there has been a conversion of bailed goods, the reverse may be the case. The cause of action in conversion normally accrues at the time of the conversion, *i.e.* at the time

21. Winfield, *Province of the Law of Tort,* p. 221; Prosser, *Selected Topics on the Law of Torts,* p. 440.

22. (1820) 3 B. & Ald. 288; *ante,* p. 207.

23. At p. 295.

24. (1826) 5 B. & C. 259; *ante,* p. 208.

of an act inconsistent with the plaintiff's title to the goods.[25] A conversion may, however, occur in the course of a contract of bailment.[26] In such a case, the breach of the contract to return the bailed goods may occur at a later time than that of the conversion.

In *Beaman* v. *A.R.T.S., Ltd.*[27] the plaintiff deposited some packages with the defendants for storage while she went abroad. The storage charges accumulated, but the defendants were unable to communicate with the plaintiff owing to the outbreak of war. In August 1940 they gave the packages to the Salvation Army for disposal. Six years later the plaintiff became apprised of this fact and complained that the packages had contained over £3,500 worth of jewellery and other objects. In November 1946, she commenced an action for conversion. The defendants pleaded the Limitation Act. Denning J. held that the claim was barred by the passage of six years from the date of the conversion. But in his judgment he said: "At the outset, I desire to point out that the action is not brought for breach of contract but for conversion. If it had been founded on breach of contract, *i.e.,* a contract to store the goods and to redeliver on demand, and then charged as the breach the failure in 1946 to deliver on demand, the period of limitation in respect of that breach would only begin to run from the date that the cause of action accrued, *i.e.,* from the earliest date at which the defendants failed to deliver on demand. . . . ."[28]

(v) *Quasi-contract*

An action in quasi-contract is not specifically referred to in the Limitation Act, 1939, but it is generally agreed that the six year period for actions "founded on a simple contract" will apply.[29] In cases where an account is claimed, section 2(2) of the Act provides that the action "shall not be brought in respect of any matter which arose more than six years before the commencement of the action." It would seem that, in both cases, a quasi-contractual action will accrue or arise when the plaintiff is damnified or the defendant unjustly enriched.[30] Suppose, there-

25. *Edwards* v. *Clay* (1860) 28 Beav. 145. In the case of successive conversions, or a conversion followed by a wrongful detention, the action accrues at the time of the original conversion: Limitation Act, 1939, s.3.

26. Or *e.g.,* a contract for the carriage of goods.

27. [1948] 2 All E.R. 89, reversed on other grounds [1949] 1 K.B. 550.

28. At p. 91. It could be argued that no action in contract would lie because s.3(2) of the Limitation Act, 1939 extinguishes the title to the goods after six years. But (i) Denning J. expressly states that this would not preclude the allegation of a breach of contract, and (ii) the title might not yet be extinguished when the breach of contract occurred.

29. See Franks, *Limitation of Actions* (1959), pp. 166-167.

30. *Baker* v. *Courage & Co.* [1910] 1 K.B. 56; *Croyden, Hincks* v. *Roberts* (1911) 55 Sol. J. 632; *Stanley Bros., Ltd.* v. *Nuneaton Cpn.* (1913) 108 L.T. 986; *Maskell* v. *Horner* [1915] 3 K.B. 106; *Anglo-Scottish Beet Sugar Cpn.* v. *Spalding U.D.C.* [1937] 2 K.B. 607; *re Diplock* [1948] K.B. 465, at p. 514.

fore, that A converts the goods of B and, three months later, sells them. An action for money had and received will not accrue until the time of the enrichment, *i.e.* when A receives the proceeds of sale. It is suggested that B could, by waiving the tort and suing in quasi-contract, postpone the operation of the limitation period.[31] He is entitled to rely on the limitation period applicable to the form of action which he has chosen.

JOINT OBLIGATIONS

Many of the old cases which involved the question of alternative actions in contract and tort were concerned with the rule that all parties to a joint contract had to be joined as parties to the action[32] whereas this was not always so in the case of joint torts.[33] Failure to proceed against all joint contractors is now no longer fatal to the action[34] but it is still true to say that a joint contractor should be, and has a right to be, joined in the action.[35] But all joint tortfeasors need not be sued.[36]

A more important distinction which still remains is that the recovery of judgment against one joint contractor will bar any action against the others even though the judgment is unsatisfied.[37] This used also to be the rule in regard to joint tortfeasors, but it occasioned so much criticism that the law was changed by section 6(1) of the Law Reform (Married Women and Tortfeasors) Act, 1935. Subject to certain safeguards, successive actions may now be brought against joint tortfeasors who are liable in respect of the same damage. Recovery of judgment against one joint tortfeasor does not therefore bar an action against the others if it is wholly or partly unsatisfied.

The question therefore arises, in those cases where the same act is both a breach of contract and a tort, whether the plaintiff will be permitted to take advantage of the provisions of the 1935 Act should judgment against one of several joint defendants be unsatisfied. The old

31. *Cf.*, *Denys* v. *Shuckburgh* (1840) 4 Y. & C. 42, at p. 48.

32. Com. Dig. i, 45, 72; *Kendall* v. *Hamilton* (1879) 4 App. Cas. 504, at p. 542. Failure to do so would allow the other party to defeat the action by a plea in abatement. This put an end to the action, but did not prevent the plaintiff from suing again. See Glanville Williams, *Joint Obligations* (1949), § 15; Winfield, *Province of the Law of Tort,* pp. 54, *et seq.*

33. *Dickson* v. *Clifton* (1766) 2 Wils. 319; *Govett* v. *Radnidge* (1802) 3 East 62; *Ansell* v. *Waterhouse* (1817) 6 M. & S. 385; *Bretherton* v. *Wood* (1821) 3 B. & B. 54; *Pozzi* v. *Shipton* (1838) 8 A. & E. 963. See Glanville Williams, *Joint Torts and Contributory Negligence* (1951), G 13.

34. R.S.C. Ord. 21, r.20; Glanville Williams, *Joint Obligations,* § 18.

35. R.S.C. Ord. 16, rr.11 & 12; Bullen & Leake, *Precedents of Pleadings* (11th ed.), p. 15.

36. But they may be joined: R.S.C. Ord. 16, r.4.

37. *King* v. *Hoare* (1844) 13 M. & W. 494; *Kendall* v. *Hamilton* (1879) 4 App. Cas. 504; *Hammond* v. *Schofield* [1891] 1 Q.B. 453; *Parr* v. *Snell* [1923] 1 K.B. 1; Glanville Williams, *Joint Obligations,* § § 43 et *seq.*

cases indicate that the courts would characterise the proceedings according to the *substance* of the action.[38] In *Weall* v. *King*[39] an action was brought against two defendants alleging that they had fraudulently warranted the soundness of some sheep, joint property, which they had sold to the plaintiff. The plaintiff was non-suited on the ground that there was no evidence of fraud against one of the defendants. On appeal, it was argued that the facts disclosed a tort and that torts were in their nature both joint and several. Thus one defendant might be acquitted of fraud while the other was held guilty. The Court of King's Bench rejected this argument. They held that the claim was substantially on a joint contract and that a joint contract was entire and indivisible. The plaintiff had therefore been rightly nonsuited.

On the other hand, the wording of section 6(1) of the Act does not require the action to be in tort; it merely requires that damage should be suffered "as a result of a tort" and that judgment should be recovered "against a tortfeasor."[40] It is therefore arguable that a plaintiff who has a cause of action in tort against a tortfeasor will not be barred from suing those who are jointly liable with that tortfeasor, even though he has in fact sued in contract or, for example, in an action for money had and received. The provisions of the statute could be applied since *its requirements have been met.*

SERVICE OUTSIDE THE JURISDICTION

In *Matthews* v. *Kuwait Bechtel Corporation*[41] an application was made for leave to serve a writ outside the jurisdiction under R.S.C., Ord. 11, r.1(e).[42] The plaintiff stated that he had been working as a foreman millwright for the defendants in Kuwait under a service agreement made in England which was to be "construed and have effect in

38. *Boson* v. *Sandford* (1689) 3 Salk. 203; *Buddle* v. *Wilson* (1795) 6 T.R. 369; *Powell* v. *Layton* (1806) 2 B. & P. 366; *Max* v. *Roberts* (1807) 2 B. & P. 454; *Corbett* v. *Packington* (1827) 6 B. & C. 268; *Bradley & Cohn, Ltd. v. Ramsay* (1912) 106 L.T. 771, and see the cases cited in note 33, *supra. Cf.*, Glanville Williams, *Joint Obligations,* § 13.

39. (1810) 12 East 452.

40. See Glanville Williams, *Joint Torts and Contributory Negligence,* § 10.

41. [1959] 2 Q.B. 57.

42. " . . . . service out of the jurisdiction of a writ of summons may be allowed by the court or judge whenever . . . . (e) the action is one brought against a defendant .... to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or for relief for or in respect of the breach of a contract (i) made within the jurisdiction or (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or (iii) by its terms or implication to be governed by English law."

all respects in accordance with the law of England." He suffered personal injuries by falling into a trench, and he alleged that this was due to the negligence of the defendants in failing to provide a safe system of working. His writ (as amended) stated that the injuries were the result of breaches by the defendants of the contract of employment between them and the plaintiff. The defendants contended that the plaintiff's true cause of action lay in tort, not in contract, and that he was therefore not within the terms of the order.[43] The Court of Appeal, however, rejected this argument. They held that an action would lie both in tort and in contract, since it was an implied term of the contract of service that the employers would provide a safe system of working.[44] The plaintiff having elected to sue in contract was entitled to serve his writ outside the jurisdiction under the terms of the order.

It seems from this decision that, where there are alternative claims in tort or contract, the plaintiff will be entitled to rely upon either cause of action, provided the writ is so framed, in order to bring himself within the rules governing service outside the jurisdiction.[45] In other circumstances it might be more advantageous for him to state in his writ that the damage he has suffered is the result of a tort committed within the jurisdiction.[46] This choice may have far reaching consequences, for example, in the case of contracts for the international carriage of persons or goods[47] or contracts for the purchase of goods by or from a foreign firm.[48] The plaintiff will be able to plead that cause of action which will allow him to serve his writ outside the jurisdiction and the courts will decide the issue *on that pleading*.[49]

43. Counsel referred to the case of *Kelly* v. *Metropolitan Ry.* [1895] 1 Q.B. 944; *ante,* p. 14.

44. *Davie* v. *New Merton Board Mills, Ltd.* [1959] A.C. 604.

45. The rules under Ord. 11 are to be read disjunctively, each sub-section being complete in itself and independent of the others: *Tassell* v. *Hellen* [1892] 1 Q.B. 321.

46. R.S.C. Ord. 11, r.l(ee).

47. *E.g., Naftalin* v. *L.M.S. Ry.* 1933 S.C. 259.

48. *George Monro, Ltd.* v. *American Cynamid and Chemical Cpn.* [1944] K.B. 452.

49. It should be noted, however, that the court has a discretion to refuse leave. Dicey, *Conflict of Laws* (7th ed.), p. 200, comments "the court will not exercise jurisdiction if the *real ground of complaint* is not tort, but breach of contract, and for some reason he cannot bring his case within the contract rule." But the cases cited do not support this proposition. *Waterhouse* v. *Reid* [1938] 1 K.B. 743 merely states that, where leave has been granted to serve a writ claiming damages for tort, the plaintiff cannot subsequently deliver a statement of claim based on a contract which would not satisfy the rules. And *George Monro, Ltd.* v. *American Cynamid and Chemical Cpn.* (*supra*) held that it was not proper to allow the application in tort simply because the damage was done here.

MEASURE OF DAMAGES

"During many years when I was a junior at the Bar," said Lord James of Hereford in *Addis* v. *Gramophone Co., Ltd.*,[50] "when I was drawing pleadings, I often strove to convert a breach of contract into a tort in order to recover a higher scale of damages. . . . ." It is still true today that damages are generally more liberal in tort than in contract, but the freedom of counsel to convert one cause of action into the other may be circumscribed to a greater or less extent according to the nature of the problem.

(i) *Exemplary damages*

It is trite law that exemplary damages, and damages for loss of present reputation, can be awarded in tort, but, with one or two exceptions, cannot be awarded in contract. "The reason for this distinction," says Winfield, "is hard to find," but he offers as a possible justification that "common experience shews that men are much less likely to outrage the feelings of one against whom they break a contract than those of one upon whom they inflict a tort." [51] At any rate it seems clear that if the plaintiff can establish that the facts which constitute a breach of contract also disclose a tort, he will be entitled to claim exemplary damages in appropriate circumstances. In *Perera* v. *Vandiyar*[52] a landlord cut off a tenant's gas and electricity supplies. The county court judge awarded exemplary damages for the eviction, but this was overruled by the Court of Appeal since there was no trespass, only a breach of contract. But in *Lavender* v. *Betts* [53] where a landlord removed his tenant's doors and windows in breach of a covenant of quiet enjoyment, exemplary damages were awarded because the facts disclosed a trespass as well as a breach of the lease.

Where damages are sought for loss of reputation, however, it may be that the court will be more disposed to enquire into the *substance* of the action. In *Groom* v. *Crocker* [54] an action was brought against a solicitor for breach of professional duty. The statement of claim was expressed alternatively in contract and in tort. The breach of duty alleged was that the solicitor had wrongfully admitted negligence in a road accident on the part of the plaintiff, his client, so that the plaintiff's

50. [1909] A.C. 488, at p. 492.

51. *Province of the Law of Tort,* p. 40. *Cf., Wood* v. *Leadbitter* (1845) 13 M. & W. 838.

52. [1953] 1 W.L.R. 672.

53. [1942] 2 All E.R. 72.

54. [1939] 1 K.B. 194. See also *Marzetti* v. *Williams* (1830) 1 B. & Ad. 415 (dishonour of cheque by banker); *Bailey* v. *Bullock* [1950] 2 All E.R. 1167 (solicitor's breach of duty).

reputation had suffered thereby. The Court of Appeal held that, whatever might be the form of the pleadings, the substantial cause of action was in contract, not in tort, and so no damages could be recovered for injury to the plaintiff's reputation.

(ii) *Conversion and the sale of goods*

A failure to deliver goods which are the subject-matter of a contract of sale may give rise alternatively to an action for breach of contract or, if the property in the goods has passed to the buyer, to an action for conversion. The question will then arise as to the measure of damages applicable to the situation. Where there is an available market for the goods in question, the measure of damages for failure to deliver is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered.[55] But damages for conversion are normally assessed at the value of the goods at the time of the conversion.[56] The measure of damages may therefore differ in each case. Is the plaintiff entitled to rely on that remedy which carries with it the greater measure of damages ?

It seems that he is not entitled to do so. In *Chinery* v. *Viall*[57] the plaintiff bought from the defendant forty-eight sheep which the defendant subsequently refused to deliver to him. The plaintiff sued the defendant alternatively for breach of contract and for conversion. The jury awarded him £5 damages, being the loss which they considered that he had actually suffered as a result of the breach. The plaintiff, however, contended that he was entitled to £118, being the value of the sheep at the time of the conversion. In the Court of Exchequer, the damages awarded by the jury were upheld. The action was in *substance* contractual. "A man cannot," said Bramwell B.,[58] "by merely changing the form of the action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of the case and the real nature of the transaction."

55. Sale of Goods Act, 1893, s.51(3).

56. The measure of damages in conversion is, of course, one of the "old chestnuts" of the law of tort, depending on the interpretation of *Greening* v. *Wilkinson* (1825) 1 C. & P. 625; *Sachs* v. *Miklos* [1948] 2 K.B. 23. See the variant solutions given in *Salmond on Torts* (12th ed.), p. 275; Winfield, *The Law of Tort* (6th ed.), p. 441; Street, *The Law of Torts* (2nd ed.), p. 54; Fleming, *The Law of Torts* (2nd ed.), p. 73. In any event, whichever solution is adopted, the measure of damages will differ materially from those awarded for breach of contract.

57. (1860) 5 H. & N. 288.

58. At p. 295.

The conflict between the rules of tort and contract was similarly considered in *The Arpad*.[59] The plaintiff bought wheat from the defendant at 36*s*. a quarter and immediately resold it for 36*s*. 6*d*. The wheat was shipped for delivery on the defendant's steamship, the defendant being unaware of the resale. When the ship arrived at the place of delivery, it was found that the wheat had been mixed with barley and that there was also a short delivery. By that time the price of wheat had fallen to 23*s*. 6*d*. The plaintiff sued for damages for non-delivery and for conversion. The Court of Appeal, by a majority, held that contract rules should be applied and that damages should be assessed at the value of the wheat at the time of failure to deliver. The plaintiff could therefore recover only 23*s*. 6*d*. The court rejected the view, held by Scrutton L.J., that the measure of damages was the market value of the wheat at the time of the conversion (30*s*.).

The result of these two decisions is that, where there are alternative claims in conversion and for non-delivery, the rule of contract prevails.[60] This conclusion has been severely criticised by Winfield on the ground of unfairness to the plaintiff: "if he has really established a claim which carries the greater amount of damages, he ought to be entitled to that."[61] Such a view would allow the plaintiff to elect the more advantageous cause of action; but, as the law now stands, the substance of the action prevails.

(iii) *Deceit and breach of warranty*

The resolution of this conflict in favour of contract makes it even more interesting to consider the disparity between the measure of damages for deceit and for breach of warranty. A fraudulent assurance given in the course of a contract of sale of goods may give rise alternatively to an action in tort for deceit or to an action in contract for breach of warranty. Each must be separately pleaded, but, paradoxically, it may be more advantageous for the plaintiff to rely on the contract than the tort.

In deceit, the measure of damages seems to be the loss sustained by the plaintiff, that is to say, the difference between the actual value of the goods sold and the price paid by the purchaser.[62] In the case of a breach of warranty, however, if it relates to the quality of the goods sold, the measure of damages is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would

59. [1934] P. 189; *Heskell* v. *Continental Express, Ltd.* [1950] 1 All E.R. 1033. *Cf*., *France* v. *Gaudet* (1871) L.R. 6 Q.B. 199.

60. It is doubtful whether the rule could be more widely applied: see Greer L.J. at p. 221 and Maugham L.J. at p. 234.

61. *Law of Tort* (6th ed.), p. 812; *Province of the Law of Tort,* p. 81.

62. *Peek* v. *Derry* (1887) 37 Ch. D. 541, reversed on other grounds *sub. nom. Derry* v. *Peek* (1889) 14 App. Cas. 337. The "out of pocket" rule: see Prosser, *Law of Torts* (2nd ed.), p. 568.

have had if they had answered to the warranty.[63] In *Ashworth* v. *Wells* [64] the plaintiff purchased an orchid, warranted by the seller to be of a white variety, for £20. It produced not white, but purple flowers. The purple variety was worth only a few shillings; the white would have been worth £50. It was held that the plaintiff could recover damages of £50 and not merely the difference between the price he had paid for the orchid and its actual value.

There is no authority on this point, but there seems to be no reason why the plaintiff should not "waive" the deceit and take advantage of the more favourable remedy.

(iv) *Remoteness of damage*

Some mention must also be made of the problem of remoteness of damage in tort and contract.[65] It is, of course, settled law that, under the rule in *Hadley* v. *Baxendale,*[66] the damages recoverable in contract depend upon a principle of reasonable foreseeability. Supporters of the reasonable foreseeability test in tort have frequently urged that, since the same act may at once constitute a tort and a breach of contract,[67] the same criterion of remoteness of damage should be applied lest disparate results should occur.[68] Now, at last, since the decision in the *"Wagon Mound"* case,[69] uniformity might seem to have been achieved.

In fact, however, this is not so. In the first place, it has not yet been decided whether the test of reasonable foreseeability will be applied to torts of strict liability.[70] Secondly, and more important, the moment of reasonable foresight is different in tort and in contract. In tort, it is calculated from the time of the wrong; in contract, it is calculated, not from the time of the wrong, *i.e.,* the breach of contract, but from the time of the agreement. If, then, the existence of special circumstances is communicated by the plaintiff to the defendant after the contract is made, they must be disregarded for the purpose of assessing liability in contract. But if the breach of contract is also a tort, there is no reason why they should not be taken into account in a claim in tort.

63. Sale of Goods Act, 1893, s.53(3). The "loss-of-bargain" rule: see Prosser, *op. cit.*, p. 569.

64. (1898) 78 L.T. 136.

65. See James (1950) 13 M.L.R. 36; Wilson and Slade (1952) 15 M.L.R. 458.

66. (1854) 9 Exch. 341.

67. As in *re Polemis and Furness Withy & Co., Ltd.* [1921] 3 K.B. 560. See also the authorities cited by counsel in the *Wagon Mound* case (*infra*) at p. 399.

68. Goodhart (1960) 76 L.Q.R. 567, at pp. 587-588.

69. [1961] A.C. 388.

70. *Ibid.*, at p. 427. See also generally Glanville Williams (1961) 77 L.Q.R. 179.

SOME UNRESOLVED PROBLEMS

In the instances so far discussed there has been some indication, to be culled from decided cases, of the way in which the courts will approach the problem of characterisation. There are, however, many situations where the distinction between tort and contract is most material, but where the courts have not yet been faced with the necessity of deciding between competing causes of action.

(i) *Conflict of laws*

In the conflict of laws, for example, there is a remarkable dearth of authority on the question of the domestic characterisation of actions. In the American cases, so Dean Prosser tells us,[71] "as might be expected, the courts have gone off in all directions." Where there has been injury to a passenger in the course of a contract of carriage, they have sometimes treated the act as a tort to be governed by the *lex loci delicti*,[72] sometimes as a breach of contract to be governed by the proper law of the contract[73] and sometimes they have allowed the plaintiff to elect between the two.[74] In English law, a claim under the Fatal Accidents Acts would probably be characterised as tortious,[75] at any rate recovery would be allowed if there were sufficient English elements present.[76] In the case of foreign contracts for the sale of goods, where a breach of warranty merely causes damage in this country, the tendency is said to be to regard the claim as contractual.[77] But these situations give little guidance of the attitude which an English court would take to other problems involving concurrent actions.

(ii) *Conversion of foreign currency*

There is a similar lack of authority on the question of the conversion of foreign currency. Damages for breach of a contract must be converted into sterling with reference to the rate of exchange prevailing on

71. *Selected Topics on the Law of Torts,* p. 449.

72. *Pittsburg C.C. & St. L.R. Co.* v. *Grom* (1911) 142 Ky. 51.

73. *Dyke* v. *Erie Ry. Co.* (1871) 45 N.Y. 113.

74. *Williams* v. *Illinois Central Ry. Co.* (1950) 360 Mo. 501 (contract); *Rauton* v. *Pullman Co.* (1937) 183 S.C. 495 (tort).

75. *Naftalin* v. *L.M.S. Ry.* 1933 S.C. 259. Dicey (7th ed.), p. 832, says that a claim under the Law Reform (Miscellaneous Provisions) Act, 1934, might, for the purpose of the conflict of laws, be contractual.

76. See (1961) 24 M.L.R. 467.

77. Dicey (7th ed.), p. 200, relying on *George Monro, Ltd.* v. *American Cynamid and Chemical Cpn.* [1944] K.B. 432; see *ante,* p. 214, note 49.

the day when the contract was broken.[78] But damages for a tort must be converted into sterling with reference to the rate of exchange prevailing on the day when the loss was incurred for which compensation is claimed.[79] There has so far been no judicial consideration of the problem of concurrent actions.

(iii) *Assignment*

Claims in damages for a tort, whether against the person or property, cannot be assigned;[80] but rights of action in contract which arise out of or are incidental to rights of property may be assigned when the property is transferred.[81] It is a moot point, for example, whether an assignee could "waive the tort" and sue in respect of damage to property by an action for money had and received.[82]

(iv) *Contributory negligence*

By virtue of the provisions of the Law Reform (Contributory Negligence) Act, 1945, damages may be apportioned in cases of contributory negligence where the action is brought in tort. The wording of the statute is wide enough to embrace cases where the plaintiff's action is for the breach of a contract, since its provisions are to apply "where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons."[83] Dr. Glanville Williams has argued that "in many cases actions in tort and in contract concur, and it would be unfortunate if the principle of contributory negligence were to be different in the two cases."[84] It is difficult not to

78. Dicey, *Conflict of Laws* (7th ed.), Rule 177(2)(b); *Barry* v. *Van der Hink* [1920] 2 K.B. 709; *Lebeaupin* v. *Crispin* [1920] 2 K.B. 714; *Di Fernando* v. *Simon Smits & Co.* [1930] 3 K.B. 409.

79. Dicey, *op. cit.*, Rule 177(2)(b); *S.S. Celia* v. *S.S. Volturn* [1921] 2 A.C. 545; *The Swynfleet* (1948) 81 Ll.L. Rep. 116. These were cases of torts actionable only on proof of damage; the result might well be different where the tort is actionable *per se.*

80. *Prosser* v. *Edmonds* (1835) 1 Y. & C. Exch. 481; *Defries* v. *Milne* [1913] 1 Ch. 98.

81. *Dawson* v. *G.N. & City Ry.* [1905] 1 K.B. 260; *Defries* v. *Milne (supra); Ellis* v. *Torrington* [1920] 1 K.B. 399.

82. See *Powell* v. *Rees* (1837) 7 A. & E. 426; *Phillips* v. *Homfray* (1883) 24 Ch. D. 439; *ante,* p. 199.

83. The word "fault" is to be interpreted as meaning "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence." In his *Joint Torts and Contributory Negligence,* §§ 59, 80, Dr. Glanville Williams points out that the defence of contributory negligence was admitted obliquely in contract by the application of such principles as the duty to mitigate damage, remoteness of damage, estoppel by negligence, etc.

84. *Op. cit.,* § 80.

agree with this conclusion, even if it is not accepted that the Act applies to breaches of contract *simpliciter*. It would be surprising if a plaintiff who had a concurrent claim in contract and tort could, by pleading in contract, evade the apportionment provisions.

Yet the courts do not seem to have grappled with this problem in any decisive way. In the recent case of *Sayers* v. *Harlow U.D.C.*[85] the plaintiff paid for admission to a public lavatory. The lock of the cubicle jammed while she was inside and she could not get out. After vainly trying to attract attention for a quarter of an hour, she decided to resort to self help and climb out. While attempting to do so, she slipped and was injured. Judgment was given in her favour against the local authority, who owned the lavatory, but her damages were reduced by one quarter on the ground that she had been guilty of contributory negligence. The case appears to have been decided in contract, for the court discussed the rule of remoteness laid down in *Hadley* v. *Baxendale*.[86] But the judgments simply assume that apportionment is possible without any detailed consideration of the question. Nevertheless, the case clearly indicates the attitude which the courts would probably adopt: to apply the statute where its requirements have been met.

(v) *Capacity*

Capacity is similarly capable of producing a number of problems where there are concurrent causes of action. A tortious immunity exists between spouses (except where a wife sues for the protection of her separate property), but this does not extend to actions in contract.[87] An infant cannot normally be sued in contract, but is liable to an action in tort.[88] Trade unions are immune from liability in tort, but can be sued for the breach of an agreement, express or implied.[89] But, apart from the case of infants, where it is well established that "one cannot make an infant liable for the breach of a contract by changing the form of action

85. [1958] 1 W.L.R. 623.

86. (1854) 9 Exch. 341.

87. Married Women's Property Act, 1882, ss.12, 17. See *Larner* v. *Larner* [1905] 2 K.B. 539.

88. *Mills* v. *Graham* (1804) 1 B. & P. 140; *Burnard* v. *Haggis* (1863) 14 C.B., N.S. 45; *R.* v. *Mcdonald* (1885) 15 Q.B.D. 523; *Walley* v. *Holt* (1876) 35 L.T. 631; *Ballett* v. *Mingay* [1905] 2 K.B. 539.

89. *Hardie & Lane, Ltd.* v. *Chiltern* [1928] 1 K.B. 663; *Bonsor* v. *Musicians' Union* [1956] A.C. 104.

to one *ex delicto,"* [90] there seems to be little authority as to how the courts would approach the problem of characterisation in the event of a conflict between the rules of contract and tort.

CONCLUSION

Flexibility is the keynote of the treatment accorded by the courts to problems involving alternative actions in tort and contract. The fact that a number of different approaches have been adopted means that there is a considerable area of choice where a new situation arises for decision. Yet, despite its interest from the point of view of legal analysis, the subject as a whole can inspire little enthusiasm — except possibly in the chambers of some hungry practitioner — for any further statutory enactments establishing different rules for the two types of action.

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90. *Burnard* v. *Haggis* (1863) 32 L.J.C.P. 189, at p. 191; *Johnson* v. *Pye* (1665) 1 Sid. 258; *Jennings* v. *Rundall* (1799) 8 Term R. 335; *Green* v. *Greenbank* (1816) 2 Marsh. 485; *Fawcett* v. *Smethurst* (1914) 84 L.J.K.B. 473; *Leslie* v. *Sheill* [1914] 3 K.B. 607, at p. 611. Contrast the cases cited in note 88, *supra.*

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