

## THE NEGLIGENT CONTRACT-BREAKER

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A vexing problem which frequently arises when there is a breach of a contract for work requiring reasonable care is whether the injured party is restricted to his remedies in contract, or whether he may also pursue those remedies available to a claim in tort for negligence. Actions for negligent work done by lawyers, accountants, architects, engineers, builders and many others are constantly haunted by this persistent distinction. It must be considered whenever there are issues of remoteness or measure of damages, limitation periods, and apportionment or contribution between various parties, as well as in connection with several other subsidiary matters.<sup>1</sup>

Three recent cases have dealt with this issue. In *Batty v. Metropolitan Property*<sup>2</sup> the English Court of Appeal met the matter directly and gave the unequivocal answer that liability lies concurrently in tort and contract. In *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*<sup>3</sup> and *Smith et al. v. McInnis et al.*<sup>4</sup>, the Supreme Court of Canada offered some intriguing suggestions about the problems of contribution and apportionment in this context, while avoiding a direct consideration of the issue by resolving the disputes on other grounds. The effect of the judgments in these two cases, however, is to cast a cloud over the possibility of concurrent or alternative liability. In his dissenting opinion in *Smith v. McInnis*, Pigeon J. bluntly rejected the concept, and the majority did not even cast an encouraging dictum toward it. In the *Giffels* case, while expressly disclaiming the need to decide the issue, Laskin C.J. offered an alternative solution which would be quite unnecessary if the concept of concurrent liability were accepted. The majority of the Ontario Court of Appeal had endorsed concurrent liability in its decision in the *Giffels* case<sup>5</sup>, but at best this endorsement now lies in an uncertain state. With the English position now substantially similar to that in the United States, this doubt about the possibility of concurrent liability would appear to place Canadian courts apart

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<sup>1</sup> See, e.g., Poulton, *Tort or Contract* (1966), 82 L.Q. Rev. 346; and Prosser, *Selected Topics on the Law of Torts* (1953), pp. 402 *et seq.*

<sup>2</sup> [1978] 2 All E.R. 445 (C.A.).

<sup>3</sup> (1978), 84 D.L.R. (3d) 344 (S.C.C.).

<sup>4</sup> (1978), 91 D.L.R. (3d) 190 (S.C.C.).

<sup>5</sup> Reported *sub nom.* *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 12 O.R. (2d) 201, 68 D.L.R. (3d) 385.

from courts in these other jurisdictions. It would also appear to be at odds with the underlying policy goal of providing remedial flexibility and removing technical barriers to recovery would also certainly appear to point in this direction.

In *Batty v. Metropolitan Property*, Mr. and Mrs. Batty bought a 999 year lease from a development company for a new house, constructed by a builder under contract with the developer. The house was built on a plateau at the top of a steep slope which fell away to a stream running in the bottom of a valley below the house. The garden extended down the slope. The contract between the couple and the development company contained a warranty that the house had been built "in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation".<sup>6</sup> Three years later there was a severe slip of the natural strata of the hillside. Only the garden part of the property was directly damaged, but it quickly became apparent, the trial judge concluded,<sup>7</sup> that the house was doomed to slide down the hill in ruins within ten years. The couple sued the development company, the builder, and the local authority which had inspected the house.

At trial the claim against the local authority was dismissed, but the other two defendants did not fare so well. The court found that the cause of the landslide was the presence of a layer of varved clay in the boulder clay of the hillside. Surface symptoms of the danger, such as cracks in the soil, had existed prior to construction, but no investigation of the stability of the land had been undertaken. In these circumstances, the trial judge held, the development company and the builder should have brought in experts to investigate. The instability of the hillside would then have been detected and the house would almost certainly not have been built. As a result, the builder was held liable in negligence and the development company was held liable for breach of contract on the ground that the house was not fit for habitation as warranted. The couple had also advanced a concurrent claim in tort against the development company for negligence. The judge indicated that he would have upheld this claim, but that he was prevented from doing so because it was impossible to enter judgment in tort for a plaintiff who on the same facts had obtained judgment in contract.

The development company and the builder appealed, and Mr. and Mrs. Batty cross-appealed against the development company claiming liability in tort as well as contract. The Court of Appeal<sup>8</sup>

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<sup>6</sup> *Supra*, footnote 2, at p. 451.

<sup>7</sup> *Ibid.*, at pp. 449-450.

<sup>8</sup> Megaw, Bridge and Waller, L.JJ.

had no difficulty in dismissing the appeals by the developer and builder. Megaw L.J., with agreement from the other members of the court, then went on to give full consideration to the issue of concurrent liability in tort against the development company, allowing the cross-appeal. At trial, the judge had based his decision in this issue on *Bagot v. Stevens Scanlan & Co.*<sup>9</sup>, and had stated without explanation that *Esso Petroleum Co. Ltd. v. Mardon*<sup>10</sup> did not apply. Megaw L.J. disagreed, stating:<sup>11</sup>

There can, I think, be no doubt, subject to one possible distinction which counsel for the first defendants sought to persuade us in his reply to be a relevant distinction, that the ratio decidendi of *Esso Petroleum Co. Ltd. v. Mardon* necessarily requires that in a case such as the present we should hold that the mere fact that the plaintiffs have obtained judgment for breach of contract does not preclude them from the entitlement which would have existed, apart from contract, to have judgment entered in their favour also in tort.

Megaw L.J. also noted that in *Esso Petroleum Co. Ltd. v. Mardon* Lord Denning M.R. had expressly disapproved of the decision in *Bagot v. Stevens Scanlan & Co.* as having been decided without the citation of relevant authorities.

Megaw L.J.'s reliance on *Esso Petroleum Co. Ltd. v. Mardon*, however, was regrettably terse. As is well known, the *Esso* case concerned pre-contractual statements made to the prospective tenant of a service station by a representative of Esso about the potential throughput of gasoline. The statements were held to constitute a contractual warranty that the forecast had been made with reasonable skill and care. Esso was held liable in contract for breach of this warranty. It was also held liable in tort for negligent misrepresentation under the doctrine of *Hedley Byrne*.<sup>12</sup> However this finding was made only as an alternative basis of liability, if, the judges said, there was in fact no contractual warranty of care.<sup>13</sup> In terms of strict ratio, it was not a case where the court found liability in tort in respect of an act which concurrently constituted a breach of contract. Nevertheless, on close examination, the analysis in *Esso* probably does support the reasoning in *Batty*. The essential issue is whether the law of contract and the law of tort can operate concurrently to determine the availability or absence of remedies in respect of the very same act or event. The alternative bases of liability in *Esso*

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<sup>9</sup> [1964] 3 All E.R. 577 (Q.B.D.).

<sup>10</sup> [1976] 2 All E.R. 5 (C.A.).

<sup>11</sup> *Supra*, footnote 2, at p. 453.

<sup>12</sup> *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.).

<sup>13</sup> *Supra*, footnote 10, at p. 14, per Lord Denning M.R., at p. 22, per Ormrod L.J. and at p. 26, per Shaw L.J.

were: (i) that the statements made in negotiations gave rise to a contractual term requiring reasonable care, and (ii) that the statements did not give rise to such a term. In either case, the negotiations resulted in a contract between the parties to lease the service station. Even if a statement made in negotiations does not become a contractual term, it does come under the umbrella of the law of contract if a contract is consequently formed. The granting or denying of remedial consequences for the statement is determined by the law of contract: for example, rescission of the contract if there has been material misrepresentation inducing the contract.<sup>14</sup> It was the more general proposition of the exclusive territoriality of tort and contract that Lord Denning M.R. rejected in *Esso*. His formulation of the argument advanced by counsel made this clear. He stated:<sup>15</sup>

In arguing this point, counsel for Esso took his stand in this way. He submitted that, when the negotiations between two parties resulted in a contract between them, their rights and duties were governed by the law of contract and not the law of tort. There was, therefore, no place in their relationship for *Hedley Byrne*, which was solely a case of liability in tort.

In other words, counsel had argued that even when the negotiations did not give rise to a contractual term requiring reasonable care, the only remedies available were those determined by the law of contract, by virtue of the fact that the negotiations resulted in a contract between the parties. It was this proposition that Lord Denning M.R. then rejected in the ratio of his decision: assuming there was no term requiring reasonable care, there could be liability in tort for negligent misrepresentations made in negotiations in addition to any remedies provided by the law of contract in respect of these same statements.

If both the law of contract and the law of tort can operate concurrently to determine the remedies consequent on a pre-contractual statement, then there is no logical barrier to concurrent operation in respect of an act which is a breach of a term of a contract as well as of a co-existing duty in tort. Such a co-existing duty in tort would exist whenever there would be a duty to use reasonable care if the same act were done gratuitously without a contract. When there is gratuitous performance, the relationship between the parties is governed exclusively by tort. When there is a contract, there should be additional rights and duties. There should not be a subtraction from the rights and duties which exist apart from the contract, unless

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<sup>14</sup> See, e.g., Fridman, *The Law of Contract in Canada* (1976), pp. 611-613; Waddams, *The Law of Contract* (1977), pp. 248 *et seq.*; Chitty on Contracts (1977), at para. 392, pp. 389 *et seq.*; and Cheshire and Fifoot's *Law of Contract* (1976), pp. 262 *et seq.*

<sup>15</sup> *Supra*, footnote 10, at p. 15.

there is express or implied provision to that effect. Indeed, there is something of an irony about the position that the person who pays for performance should be worse off than the person who receives gratuitous performance. If a term of the contract restricted his other rights, of course, the situation would be entirely different.

Whatever may be strict ratio in Lord Denning's judgment, there is no doubt that he addressed his mind to the issue and expressly endorsed the principle that there may be liability in tort for negligence in situations where there is a contractual term of reasonable care. He disapproved of *Bagot v. Stevens Scanlon & Co.*,<sup>16</sup> as well as *Clark v. Kirby-Smith*<sup>17</sup> and *Groom v. Crocker*,<sup>18</sup> which had supported the proposition that the liability of a solicitor for negligence was a liability in contract only and not in tort. Other decisions of high authority, not cited in these cases, he stated, were in conflict with them:<sup>19</sup>

These decisions show that, in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract, and is therefore actionable in tort. It is comparable to the duty of reasonable care which is owed by a master to his servant, or vice versa. It can be put either in contract or in tort: see *Lister v. Romford Ice & Cold Storage Co. Ltd.*, [1957] 1 All E.R. 125 (H.L.) at p. 139, by Lord Radcliffe, and *Matthews v. Kuwait Bechtel Corpn.*, [1959] 2 Q.B. 57.

After also citing *Boorman v. Brown*,<sup>20</sup> he continued:<sup>21</sup>

To this is to be added the high authority of Viscount Haldane L.C. in *Nocton v. Lord Ashburton*, [1914] A.C. 932 at p. 956: "... the solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him."

That seems to me right. A professional man may give advice under a contract for reward; or without a contract, in pursuance of a voluntary assumption of responsibility, gratuitously without reward. In either case he is under one and the same duty to use reasonable care: see *Cassidy v. Ministry of Health*, [1951] 2 K.B. 343 at 359, 360. In the one case it is by reason of a term implied by law. In the other, it is by reason of a duty imposed by law. For a breach of that duty, he is liable in damages; and those damages should be, and are, the same, whether he is sued in contract or in tort.

In *Batty v. Metropolitan Property*, Megaw L.J. felt obliged to deal with only one possible distinction advanced by counsel to persuade the court that *Esso* did not apply to the case before it.<sup>22</sup> This

<sup>16</sup> *Supra*, footnote 9.

<sup>17</sup> [1964] Ch. 506.

<sup>18</sup> [1939] 1 K.B. 194.

<sup>19</sup> *Supra*, footnote 10, at p. 15.

<sup>20</sup> (1842), 3 Q.B. 511, at pp. 525-526.

<sup>21</sup> *Supra*, footnote 10, at p. 15.

<sup>22</sup> *Supra*, footnote 2, at p. 453.

distinction was that where the facts giving rise to a breach of contract would also constitute a breach of common law duty apart from contract, the right of a plaintiff to have judgment entered in tort as well as contract is limited to cases where the common law duty is owed by one who conducts a common calling and thus is under a special type of legal liability, and to cases where the duty is owed by a professional man in respect of his professional skill. This distinction was sensibly rejected as being artificial and without foundation either in logic or on practical grounds. In this particular case, it was held, the development company owed a common law duty to all prospective purchasers of the house to examine the land with reasonable care to determine whether the site was one on which a house could safely be built. This duty was owed to the first owners of the house as much as to subsequent owners, quite apart from any contractual warranty. Thus there was liability for negligence in tort as well as for breach of contract.

In spite of the uncertainties which may exist regarding the exact status of Lord Denning's statements in *Esso*, there can be no doubt that the ratio in *Batty* of the decision to allow the cross-appeal was that there may be concurrent liability in tort in respect of the same act which constitutes a breach of contract between the parties. The act in *Batty* was in no way independent of the breach of contract: it was the very same act, done in the course of performance of the contract.

There are several factors which illustrate the utility of concurrent liability in a case like the *Batty* case. The court in that case based the contractual liability of the defendant on a breach of the express term of the contract that the house would be fit for habitation. By also finding liability in tort for negligence, the court precluded the argument that the amount of damages payable was less than that which would be payable because the house was not built with reasonable care. If liability had been based solely on the failure of the house to be fit for habitation, it might have been possible to argue that the requirement of fitness for habitation was a lower standard than the requirement that the house be built in all respects with reasonable care, and therefore that the amount of damages payable should be less. In most such cases, the plaintiff would argue that there was a contractual term of reasonable care in addition to an obligation in tort to use reasonable care. The utility of a finding of concurrent liability would then be to eliminate any difficult debates as to whether the amount of damages payable in contract for breach of an obligation to use reasonable care is different from the amount which would be payable in tort for negligence. If wider recovery is indicated by cases in tort dealing with remoteness and quantum of damages, the plaintiff would simply claim recovery under the principles in these cases. He would not be restricted to finding cases

in contract to support his position. A practical aspect of the utility of concurrent liability is that the existence of a duty in tort to use reasonable care (except if excluded or modified by the contract) simply eliminates the need to go through the exercise of finding such an implied contractual term in the usual case where there is no express requirement of reasonable care.

There is further utility to concurrent liability in a case like the *Batty* case where there are several defendants, some with a contract and others without. The two defendants in the *Batty* case were liable for identical failures to take proper steps to determine the stability of the land. The developer had a contract with the plaintiffs; the builder did not. With the developer concurrently liable in tort, if the builder had turned out to be insolvent, Mr. and Mrs. Batty would have had as full a right of recovery against the developer alone as they had against the builder. With the acceptance of concurrent liability, there is also a similarity of proof and analysis of liability in respect of such defendants, thus simplifying the trial process.

Finally, there may be utility in concurrent liability from the point of view of the defendant. Even if there is no difference as between tort and contract with respect to a defendant's liability to the plaintiff in a particular situation, there may be a difference with respect to principles regarding contributory negligence of the plaintiff or contribution between different negligent defendants. This is the issue raised by the recent Canadian cases on this matter, discussed later.

Most noteworthy about the decision in *Batty* is probably the ease with which the English Court of Appeal accepted concurrent liability. With an attitude of flexibility and an eye toward the substance of the plaintiff's claim, it was prepared to give whatever remedies might be available in either area of law for this type of wrong. The analysis of the court had a certain encompassing breadth about it, avoiding technical distinctions to achieve remedial justice.

With the easy acceptance of concurrent liability in England, it is perhaps instructive to examine briefly the position in our other primary common law neighbour, the United States, before turning to examine the recent Canadian cases. In the American courts we find an endorsement of concurrent liability for the negligent contract-breaker that stretches back for many years.

A leading case is *Flint & Walling Manufacturing Co. v. Beckett*,<sup>23</sup> which concerned an action in tort against a contractor for the negligent construction of a windmill. The main argument advanced on behalf of the contractor was that the duty it owed arose

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<sup>23</sup> (1906), 79 N.E. 503 (Ind. S.C.).

out of the contract and that enforcement could only be by an action for breach of contract. In rejecting this contention, the court stated:<sup>24</sup>

It is, of course, true that it is not every breach of contract which can be counted on as a tort, and it may also be granted that if the making of a contract does not bring the parties into such a relation that a common-law obligation exists, no action can be maintained in tort for an omission properly to perform the undertaking. It by no means follows, however, that this common-law obligation may not have its inception in contract. If a defendant may be held liable for the neglect of a duty imposed on him, independently of any contract, by operation of law, a fortiori ought he to be liable where he has come under an obligation to use care as the result of an undertaking founded on a consideration. Where the duty has its roots in contract, the undertaking to observe due care may be implied from the relationship, and should it be the fact that a breach of the agreement also constitutes such a failure to exercise care as amounts to a tort, the plaintiff may elect, as the common-law authorities have, to sue in case or in assumpsit.

The issue was also considered in *Harzfeld's Inc. v. Otis Elevator Co.*,<sup>25</sup> an action against an elevator company for loss of profits from negligent work on a passenger elevator in the plaintiff's store. The court noted that it was not concerned with a contract controlled by public policy, such as one with a carrier, doctor or bailor, but simply with contractual provisions which stood by themselves and placed the parties in such a relationship that a duty to perform carried with it an obligation to exercise due care in so performing. In such a case, it stated, if a breach of the contract is occasioned by negligent performance, as distinguished from mere failure to complete such undertakings, then the party injured has the right to elect to sue in tort or in contract for his damage: "If he sues in tort, then the contract is mere inducement, creating the state of things which furnished the occasion for the tort."<sup>26</sup>

In another action against a negligent construction contractor, *National Fire Insurance Co. of Hartford v. Westgate Construction Co.*,<sup>27</sup> the court recognized<sup>28</sup> that inherent in every construction contract is the implied duty to do the work in a careful and workmanlike manner. A breach of this duty, it stated, can support an action based either on contract or tort.<sup>29</sup>

<sup>24</sup> *Ibid.*, at p. 505.

<sup>25</sup> (1953), 114 F. Supp. 480 (U.S.D.C., Mo.).

<sup>26</sup> *Ibid.*, at p. 484.

<sup>27</sup> (1964), 227 F. Supp. 835 (U.S.D.C., Del.).

<sup>28</sup> *Ibid.*, at p. 837.

<sup>29</sup> Other examples in American cases include: *Jackson v. Central Torpedo Co.* (1926), 246 P. 426 (Okla. S.C.) (action against a negligent oil well "shooter"); *Colton v. Foulkes* (1951), 47 N.W. 2d 901 (Wisc. S.C.) (action against a negligent repairer of porch railing); *Lewis v. Scott* (1959), 341 P. 2d 488 (Wash. S.C.) (action against a negligent oil furnace installer); *Lembke Plumbing & Heating v. Hayutin* (1961), 366 P. 2d 673 (Colo. S.C.) (action by house owners against negligent plumber).



In summary, the basic American position appears to be that the same act may constitute both a breach of contract and a tort as between the same parties, and, subject to the limitation that he cannot recover twice for the same wrong, the injured party may then sue either in contract or in tort.<sup>30</sup> Such a situation exists where the type of work would, if performed gratuitously, give rise to a common-law duty of care for which liability would lie in tort. As is stated in Prosser's *Handbook of the Law of Torts*:<sup>31</sup>

The principle which seems to have emerged from the decisions in the United States is that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract—which is to say, whenever such misperformance involves a foreseeable, unreasonable risk of harm to the interests of the plaintiff.

Thus whenever a person commits a breach of contract by an act which would be actionable as negligence in tort if there were no contract, the injured party may pursue whatever remedies are available to him in tort or in contract.<sup>32</sup>

None of the judges in these cases endorsing concurrent liability appears to perceive any source of difficulty for the courts if concurrent liability is accepted and the contract is attacked sideways, say on the ground of lack of consideration. The reason is that the standard put forth for the existence of concurrent liability is that there will be liability in tort for the negligent performance of a contract whenever there would be such liability for gratuitous performance without the contract. If the defendant successfully attacks the contract, on the ground of lack of consideration from the plaintiff or any other similar ground, then he is left in the legal position of having rendered gratuitous performance. Since this is the starting position to determine whether there is concurrent liability in tort where a valid contract does exist between the parties, there is no problem with such liability in tort where there is in fact merely gratuitous performance.

The key factor is that liability in tort in these situations, whether or not there is a contract between the parties, is only for reasonably foreseeable damage caused by acts committed without reasonable care. Mere failure to complete the contractual undertakings is quite a

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<sup>30</sup> See also Corbin on Contracts (1964), vol. 5, ch. 56, s. 1019, pp. 116-117: "Not infrequently the conduct of a defendant may be properly regarded as both a tort and a breach of contract; and under modern procedure in most jurisdictions, the form of the plaintiff's complaint is not required to show for which kind of a wrong the plaintiff thinks he is suing."

<sup>31</sup> (4th ed., 1971), s. 92, pp. 617-618.

<sup>32</sup> See also 1 Corpus Juris Secundum, Actions, s. 47, pp. 1104-1105; 1 American Jurisprudence 2d, Actions, s. 32, p. 567; and 57 American Jurisprudence 2d, Negligence, s. 47, pp. 395-396.

different matter. A defendant who attacks a contract sideways for lack of consideration could escape liability for simple non-performance or incomplete performance. He could not escape liability for negligent acts causing damage to the plaintiff or his property.

In substance, the effect is that, unless he properly excludes this duty, a person must always act with reasonable care, whether he is acting in performance of a valid contract, or in performance of an apparent contract which in fact is non-existent or vitiated, or simply in a situation totally unconnected with any contract. Whatever the inducement to act, a person must not create an unreasonable risk of harm to the interests of others. If he does so, and thereby causes damage to others, he will be answerable in tort.

In contrast to the position in both England and the United States, Canadian courts have had greater difficulty in accepting concurrent liability, as is apparent from the recent cases touching this matter. In the *Giffels* case,<sup>33</sup> the roof of a factory developed serious leaks five years after construction. The owner sued the contractor and the supervising engineers. The action against the contractor was dismissed at trial<sup>34</sup> on the ground that under the contract the issuance of the final certificate by the engineers constituted a waiver of all claims by the owner (other than those concerning liens). No appeal was taken from this part of the decision. The engineers were found liable at trial, but they were allowed to claim contribution against the contractors under section 2(1) of the Ontario Negligence Act,<sup>35</sup> which provides as follows:

2. (1) Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, except as provided by subsections 2, 3 and 4 [dealing with the situations where the plaintiff is a passenger in a motor vehicle or a spouse of the negligent person], where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

Lerner J. held that section 2(1) of the Negligence Act applied because both defendants were negligent in tort, apart from breach of contract. He went on to hold that it was not necessary for each tortfeasor to be found liable to the plaintiff in order to be liable to make contribution to the other. On appeal, the members of the

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<sup>33</sup> *Supra*, footnote 3.

<sup>34</sup> (1974), 3 O.R. (2d) 481.

<sup>35</sup> R.S.O., 1970, c. 296.

court<sup>36</sup> unanimously agreed that section 2(1) of the Negligence Act applied only to tortfeasors. After a thorough review of the authorities, Jessup J.A. (with whom Zuber J.A. concurred) concluded that the engineers and contractors were both liable in tort as well as in contract for the negligent construction of the roof. However he went on to hold that no claim for contribution could exist because the contractor was protected from liability to the plaintiff. Wilson J.A. rejected the possibility of concurrent liability, holding that the action lay only in contract. She thus concurred in allowing the appeal in respect of the claim for contribution, on the ground that since section 2(1) of the Negligence Act applied only to tortfeasors, it had no application, and as a result there was no basis to award contribution.

The appeal to the Supreme Court of Canada was dismissed by a unanimous bench. Despite the full discussion in the lower courts of whether the action lay properly in tort as well as contract, Laskin C.J. confined his judgment to the narrow ground that it was a precondition of the right to contribution under section 2(1) of the Negligence Act that there be liability to the plaintiff on the part of the party from whom contribution is sought.<sup>37</sup> Thus the engineers would be barred from a claim for contribution whether or not an action in tort was open to them, and it was not necessary, he stated, to come to a determination on this issue. On the matter of the scope of section 2(1) itself, he stated that this too did not require a decision here, but he added clearly that he favoured the view that the section encompassed only claims in tort.<sup>38</sup>

The most interesting part of the judgment, however, was a passage dropped in toward the end, unprovoked by argument of counsel. This passage indicated that having the action run tandem in tort and contract may not be the only line of attack when there is liability to the plaintiff. The general assumption had been that a claim for contribution could lie only under the Negligence Act. Thus the arguments in *Giffels* and similar cases had been directed toward showing either that the Negligence Act embraced contractual claims (which had gotten nowhere), or that the action lay in tort as well as in contract (which had received favour in *Giffels* at trial and in the Court of Appeal). The suggestion of Laskin C.J. was that a claim for contribution might well lie outside the Negligence Act altogether, based on general equitable principles. In any event, he stated, such a claim would have failed in this case for the same reason: the presence

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<sup>36</sup> Jessup, Zuber and Wilson JJ.A.

<sup>37</sup> *Supra*, footnote 3, at p. 349.

<sup>38</sup> *Ibid*.

of an effective shield against liability to the plaintiff by the defendant against whom contribution is sought. The passage is as follows:<sup>39</sup>

Moreover, whether *Giffels* bases its claim for contribution on s. 2(1) or outside of that provision, the same result adverse to *Giffels* must follow. I am prepared to assume, for the purposes of this case, that where there are two contractors, each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss, even where the plaintiff chooses to sue only that one and not both as in this case. It is, however, open to any contractor (unless precluded by law) to protect itself from liability under its contract by a term thereof, and it does not then lie in the mouth of the other to claim contribution in such a case. The contractor which has so protected itself cannot be said to have contributed to any actionable loss by the plaintiff.

No authority was cited for this proposition. It would appear to be an act of clothing with judicial legitimacy the thesis advanced by E.J. Weinrib in his article "Contribution in a Contractual Setting".<sup>40</sup> In his article Professor Weinrib developed this possibility from general principles of fairness and unjust enrichment, as well as from the statement of policy inherent in the legislative provisions for joint tortfeasors in the Negligence Act, but again without precedential support. The best he could say was that no Canadian or English appellate court had yet handed down a decision which irrevocably precluded allowing contribution in such a contractual situation.<sup>41</sup>

It is almost indisputable that contribution should be available in such situations. Its absence would be a lonely exception to the general trend of increasing precision in the fixing of responsibility for compensation or restitution when loss is suffered. The only issue is which technical barriers to its acceptance should be removed. The possibility of stretching the Ontario Negligence Act (or similar legislation in other provinces) to cover contractual situations of joint negligence has apparently fallen on barren ground. If there is further development of the suggestion in *Giffels*, it may now be possible for the courts to allow a claim for contribution in such a situation based on general equitable principles, apart from statute. It would not be necessary to strain to create this new basis of contribution, however, if the courts accepted the possibility of concurrent liability in tort where a breach of contract is caused by an act of negligence. Contribution would then be available under the Negligence Act as for any other joint tortfeasors.

The major obstacles to acceptance of this position, which caused the division in the Ontario Court of Appeal in *Giffels*, are

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<sup>39</sup> *Ibid.*, at p. 350.

<sup>40</sup> (1976), 54 Can. Bar Rev. 338

<sup>41</sup> *Ibid.*, at p. 342.

largely ones of precedent, not principle. Even their force has now been greatly undermined. The first is the decision of the Ontario Court of Appeal in *Schwebel v. Telekes*.<sup>42</sup> The issue in that case was whether the action against a notary public for alleged negligence in the settlement of a matrimonial dispute was barred by the Statute of Limitations.<sup>43</sup> Then in the Court of Appeal, Laskin J., delivering the judgment of the court, stated:<sup>44</sup>

A threshold consideration is whether the plaintiff's cause of action sounds in contract or in tort. She alleges negligence, but an examination of her pleadings and perusal of her examination for discovery show that she is relying on a breach of contractual duty by the defendant. The only circumstance that could bring any duty of the defendant to the plaintiff herein into operation was her contracting for the defendant's assistance. As was said by Sir Wilfred Greene, M.R., in *Groom v. Crocker*, [1938] 2 All E.R. 394 at p. 402 (dealing with a solicitor-client relationship where the solicitor was found negligent and damages were in issue), the duty of care arose by virtue of the contractual relationship and had no existence apart from that relationship: see also *Clark et al. v. Kirby-Smith*, [1964] 2 All E.R. 835 at p. 837. In this respect the present case is distinguishable from *Turner v. Stallibrass et al.*, [1898] 1 Q.B. 56, and it is also distinguishable from *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465. I am aware of a line of older authority indicating, as Lord Campbell put it in *Brown v. Boorman* (1844), 11 Cl. & F. 1 at p. 43, that a plaintiff may recover either in contract or in tort where there has been a breach of duty under a contract of employment: see William Lloyd Prosser, "Borderland of Tort and Contract" in *Selected Topics on the Law of Torts*, p. 380 at pp. 402 *et seq.* (1953), and see also W.D.C. Poulton, "Tort or Contract", 82 L.Q.R. 346 (1966). But this, for reasons stated below, does not help the plaintiff in the present case even if it be accepted in the plaintiff's favour.

The reason it would not have helped the plaintiff, he continued, was that in any event she had to bring her action "within six years after the cause of action arose",<sup>45</sup> and even if in tort the cause of action arose, he held, when the work was performed, not when it was or ought to have been discovered.

In *Giffels*, Jessup J.A. distinguished the *Schwebel* decision (as well as *Farmer v. H.H. Chambers Ltd.*,<sup>46</sup> which just followed *Schwebel*) on the ground that it depended simply on a determination of the commencement of the time for the running of the limitation period, whether the action was treated as one of contract or one in tort.<sup>47</sup> Wilson J.A. gave a somewhat fairer assessment when she said that although it was strictly unnecessary, "it is quite apparent that

<sup>42</sup> [1967] 1 O.R. 541.

<sup>43</sup> R.S.O., 1960, c. 214.

<sup>44</sup> *Supra*, footnote 31, at p. 543.

<sup>45</sup> *Supra*, footnote 43, s. 45(1)(g).

<sup>46</sup> [1973] 1 O.R. 355 (C.A.).

<sup>47</sup> *Supra*, footnote 5, at pp. 207, 215-216.

Mr. Justice Laskin applied his mind to the question whether the plaintiff's cause of action was properly framed in contract or tort and concluded it was properly framed in contract".<sup>48</sup>

Either way, the decision in *Schwebel* stands in a most unsatisfactory position, requiring reconsideration in the near future. If it is to be taken as holding that even if framed in tort, the cause of action for negligent work arises when the work is performed, then it is out of line with the recently accepted principle that the cause of action in tort arises (and the limitation period thus commences) when the damage suffered is or should have been discovered.<sup>49</sup> This principle merely gives effect to the fact that it is grossly unfair to a plaintiff to have time ticking away against him when he did not know and could not reasonably have known that he had a cause of action. Any attempt to establish a distinction between torts involving solely the performance of services (with time running from the date of performance) and those involving the performance of services in the construction of a structure (with time running from the date damage is or ought to have been discovered)<sup>50</sup> simply cannot stand up. Both situations are essentially similar ones of the negligent performance of work causing damage to the plaintiff. If both situations are actionable, there is no justification for different limitation periods for them. The only valid difference in respect of the bare provision of services without incorporation into a tangible product is the scope of actionability, not its duration.

On the other hand, if the *Schwebel* case is taken as holding that an action against a notary public or a solicitor is founded only in contract (which must be the basis of the decision if the limitation period for a claim in tort would properly commence later than one in contract), then it clearly must be examined anew. The conclusion that the action lay in contract was based on the decisions in *Groom v. Crocker* and *Clark v. Kirby-Smith*. With these decisions now discredited in the land of their origin (by *Esso Petroleum v. Mardon* and *Batty v. Metropolitan Property*), the precedential foundation for the conclusion in *Schwebel* has been knocked away. After the *Batty* case, there is even more strength to Jessup J.A.'s statement<sup>51</sup> that the

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<sup>48</sup> *Ibid.*, at p. 228.

<sup>49</sup> *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*, [1976] 2 All E.R. 65 (C.A.), approved in *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.).

<sup>50</sup> See Jessup J.A.'s statement to this effect in *Giffels*, *supra*, footnote 5, at p. 216.

<sup>51</sup> *Supra*, footnote 5, at p. 209.

anachronistic exemption of solicitors from concurrent tort liability has been ended in England.<sup>52</sup>

Even Wilson J.A. accepted that there were some relationships for which "historical reasons" justified the acceptance of concurrent causes of action in tort and contract (for instance doctors, surgeons, dentists, and those exercising "common callings" like common carriers, innkeepers and bailors).<sup>53</sup> However she thought it would be undesirable to expand the ambit of the principle to include professions causing merely pecuniary rather than physical damage, such as accountants, bankers, solicitors, architects and engineers. Why those injured by the one group of professions should be worse off than those injured by the other was not altogether clear. Victims of lawyers and accountants are sacrificed, while those of architects and engineers are saved. It appears to have been primarily Wilson J.A.'s view of the strength of contrary authority in the pure pecuniary damage type of case which led her to the opposite conclusion from that of the majority, once she had accepted that the same act could and did attract concurrent liability in some cases.

More ominous an obstacle to the acceptance of concurrent liability is the decision of the Supreme Court of Canada in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Company*.<sup>54</sup> In *Giffels*, Jessup J.A. interpreted that case as holding only that a plaintiff could not escape contractual provisions excluding or limiting liability for acts performed under the contract by framing his action in tort.<sup>55</sup> This can indeed be taken as the ratio of the case, but Pigeon J., speaking for the majority, stated expressly in *Nunes Diamonds* as follows:<sup>56</sup>

Furthermore, the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of that contract, as

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<sup>52</sup> The basis of a tort claim for negligence against a solicitor is the principle in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, *supra*, footnote 12. Apart from any contract or fiduciary relationship, a solicitor owes a duty of care to his client as someone he knows is relying on his skill and judgment for the information and advice given. In *Dutton v. Bognor Regis United Building Co. Ltd.*, [1972] 1 All E.R. 462 (C.A.), Lord Denning M.R. stated, at p. 473, that since *Hedley Byrne* it was clear that a professional person, including a solicitor, owes a duty of care both to the client who employs him and to others he knows are relying on him in respect of professional advice he gives.

<sup>53</sup> *Supra*, footnote 5, at pp. 224-225, and pp. 225-226.

<sup>54</sup> [1972] S.C.R. 769.

<sup>55</sup> *Supra*, footnote 5, at p. 215.

<sup>56</sup> *Supra*, footnote 42, at p. 777-778.

expressed in *Elder, Dempster & Co. Ltd. v. Paterson, Zochonis, & Co. Ltd.*, [1924] A.C. 522 at p. 548.

Pigeon J. recently had another opportunity to express his views on this matter. Shortly after *Giffels* was heard, the issue came before the Supreme Court of Canada again in the *Smith v. McInnis* case.<sup>57</sup> This case involved an action for negligence against a solicitor for a missed limitation period in respect of claims to be made under an insurance policy. The primary solicitor had retained another more experienced counsel to advise him on the conduct of the matter. The primary solicitor was found negligent without difficulty both at trial and at both levels of appeal. The central issue thus became whether the advising counsel was liable on the third party claim over against him. The trial judge dismissed the third party claim, but the Nova Scotia Supreme Court, Appeal Division, reversed his decision on this point and held the advising solicitor liable to pay to the defendants one-third of the damages payable by them to the plaintiffs.<sup>58</sup> The majority of the Supreme Court of Canada held that the advising counsel was not liable, as the scope of his retainer was merely to advise on the proper procedures to follow in filing the proofs of claim. It did not involve responsibility for ensuring that time limitations were met or drawn to the attention of the other solicitor. Thus the majority found it unnecessary to canvass the other questions raised regarding the apportionment of liability between the two solicitors, particularly as to whether a solicitor's liability to his client lies in tort or only in contract, and the effect, accordingly, of the Tortfeasors Act<sup>59</sup> and of the Contributory Negligence Act.<sup>60</sup>

Pigeon J., however, disagreed with the majority. He was of the opinion that the advising counsel was in breach of his retainer. Thus Pigeon J. went on to consider the legal basis for the apportionment of liability. In the Nova Scotia Supreme Court, Appeal Division, this point had not been considered. After finding that the advising counsel had failed to discharge his duties to the solicitor who had retained him, Coffin J.A. had said only that he did not feel he "should have the sole responsibility" and would apportion one-third against his firm.<sup>61</sup> In the Supreme Court of Canada it was submitted that the liability was in contract, the Contributory Negligence Act was inapplicable to such liability and therefore there was no legal basis for an apportionment of liability.

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<sup>57</sup> *Supra*, footnote 4.

<sup>58</sup> *Sub nom. Webb Real Estate v. McInnis, Meehan & Tramble et al.* (1977), 20 N.S.R. 6.

<sup>59</sup> R.S.N.S., 1967, c. 307.

<sup>60</sup> R.S.N.S., 1967, c. 54.

<sup>61</sup> *Supra*, footnote 46, at p. 24.



In case anyone doubted what his position was on the issue of concurrent liability in tort and contract, Pigeon J. made it amply clear. He stated:<sup>62</sup>

I have to agree that the liability of a solicitor to his client for negligence in his duty to give advice, or otherwise, is in contract only, not in tort. I adhere to the view I have previously expressed in other cases, that a breach of duty may constitute a tort only if it is a breach of a duty owed independently of any contract with the claimant, "an independent tort" as I said in *Nunes Diamonds v. Dominion Electric Protection*, [1972] S.C.R. 769, at p. 777. In the case of a solicitor retained to give advice, his duty to advise properly arises only under contract and I do not see how liability can arise otherwise than on a contractual basis as was held in the case of a consulting engineer in *Halvorson v. McLellan Co.*, [1973] S.C.R. 65, at p. 74. Breach of contract appears to be the basis on which a solicitor was found liable by the House of Lords in *Nocton v. Ashburton*, [1914] A.C. 932, and by the English Court of Appeal in *Groom v. Crocker*, [1939] 1 K.B. 194.

Pigeon J. then proceeded on the assumption that the Contributory Negligence Act was inapplicable to contractual liability. However, just as in *Giffels* Laskin C.J. had offered some tantalizing remarks as to the possibility of a non-statutory basis for contribution between defendants, so Pigeon J. here outlined his view of a non-statutory basis for apportionment between plaintiff and defendant where the action is in contract and the fault of each is partly responsible for the plaintiff's loss. The situation as between a defendant and a third party linked by contract (as in *Smith v. McInnis*) would, of course, be the same as that as between a plaintiff and defendant in an action for breach of contract. In tort, Pigeon J. stated, apportionment had to be implemented by statute because contributory negligence was a complete defence at common law. It was never so in contract. The cases show that where the plaintiff's negligence was the cause of his loss, it could be set up as a defence to an action founded on a contract. However, they did not decide, Pigeon J. stated, that there could be no apportionment where both parties were at fault. In the civil law, in an action for breach of contract there is division of liability on the basis of the respective degrees of fault, effected by application of the principle of causality. To the extent that the damage suffered by a plaintiff is due to his own fault, it is held not to have been caused by the fault of the defendant. Pigeon J. concluded:<sup>63</sup>

In the case of liability in contract, I think that even if the *Contributory Negligence Act* was not applicable the same result would obtain at common law, because there never was in contractual liability the rule that prevented one tortfeasor from suing another. This I think was the true basis of the doctrine of contributory negligence: if the plaintiff was himself negligent he was in the situation of a joint tortfeasor. The loss having fallen on him he had to bear it in

<sup>62</sup> *Supra*, footnote 4, at pp. 204-205.

<sup>63</sup> *Ibid.*, at p. 207.

full. In my opinion the authors of *Corpus Juris Secundum* are correct in their view that the doctrine of contributory negligence, does not apply in contract liability. The result is that the principle of causality must be applied and, therefore, there has to be an apportionment in the rare case of separate breaches of contract having contributed to a single loss.

On this basis, quite apart from statute, in contractual situations there could be apportionment between plaintiff and defendant or between defendant and third party where the fault of each contributed to the loss suffered.

Together the judgments in *Giffels* and *Smith v. McInnis* form a revealing pattern. In *Giffels*, while ostensibly leaving open the question of whether the action might lie in tort as well as contract, Laskin C.J. went out of his way, without support from past cases, to suggest a solution which would be superfluous if concurrent liability were accepted. In addition, it should be remembered that it was Laskin C.J. who, while in the Ontario Court of Appeal, wrote the *Schwebel* judgment expressly denying the possibility of concurrent liability, although as we have seen the authority for his statement now has lost most of its strength. In *Smith v. McInnis*, Pigeon J. firmly expressed his opinion that liability lies only in contract in such cases, but then he went on, again with virtually no support from common law cases, to create a justification for the same remedial consequences as if liability did lie concurrently in tort. Thus we are faced with an odd spectacle. While impliedly or expressly disapproving of concurrent liability, the judgments go to great pains to suggest other methods to give the same remedy as if it existed in the type of situations facing them. If concurrent liability in tort and contract were accepted, apportionment and contribution would be available under the appropriate provincial statutes governing contributory negligence and joint tortfeasors in a procedure which is familiar and frequently applied. Without such acceptance, other paths to the same goal must be found or the remedy denied—and there seems to be great reluctance to deny the remedy.

One of the striking aspects of the situation where there is a duty of care between parties linked by contract is the substantial similarity of the source of the duty, whether it is considered as arising in tort or in contract. There is almost never an express term in the contract that the work be done with reasonable care. If a contractual analysis is taken, the duty of care is simply taken as imposed by an implied term: for example, in *Giffels* there was merely an implied obligation to use proper care. The reason such a term is implied is because this type of activity must be done without negligence to be effective for the intended purpose. This is very curious. To require reasonable care because of the type of activity sounds very much like liability in tort. It is in effect a blanket liability that exists unless otherwise excluded, rather than a particular liability created by the individual

terms of the contract between the parties. It is a duty resulting more from status than choice, although it may be modified or removed by agreement. The essential similarity with tort is unmistakable. It is strange indeed that after implying a duty of care by a process that is more one of tort than contract, judges then turn around and insist that all the elements of liability are those of contract, not tort.

There is no question, of course, that if concurrent liability is accepted, any terms in the contract which provide limitation of liability or exculpation would apply equally to liability in tort. It is a general principle that liability in tort is subject to any limitation agreed to by contract:<sup>64</sup> this is one of the prime examples of accepted concurrence in tort and contract.

While the acceptance of concurrent liability provides a flexible and comprehensive method of determining the appropriate remedy for loss suffered from a breach of contract which would apart from the contract be negligence in tort, the solutions proposed in *Giffels* and *Smith v. McInnis* are uncertain and restricted. If contribution between defendants is based not on statute but on the ground that it would be "inequitable that one of the contractors bear the entire brunt of the plaintiff's loss", as was stated in *Giffels*,<sup>65</sup> does this mean that a new equitable remedy has been acknowledged and that all the usual equitable considerations come into play? For example, what time period is to apply? Under section 9 of the Ontario Negligence Act a defendant has one year from the date of settlement or judgment to sue a joint tortfeasor for contribution or indemnity, notwithstanding the passage of the limitation period in respect of the plaintiff's claim. How long would he have outside the statute? Would he be confined to the limitation period applicable to the plaintiff's action? Would he have a new six-year limitation period beginning at the date of judgment? If the equitable doctrine of laches or delay is the governing principle, how much delay is too much? The uncertainty is quite apparent. How would the doctrine of clean hands apply, if it is to apply at all? Would a defendant who has been at fault vis-à-vis the plaintiff, but not his fellow wrongdoer, have clean hands, while another who had also been at fault vis-à-vis his fellow wrongdoer be barred? How could such a determination be made in the frequent case where each is independently at fault toward the plaintiff, but the vigilance of one would have saved both?

In addition, the solutions are restricted. They speak only to contribution and apportionment, and leave unaffected the several

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<sup>64</sup> See, e.g., Linden, *Canadian Tort Law* (1977), pp. 425-426; Salmond on the Law of Torts (1977), p. 264 and pp. 498 *et seq.*; and Prosser, *op. cit.*, footnote 1, pp. 445-446.

<sup>65</sup> *Supra*, footnote 3, at p. 350.

other consequences of the basis of liability. There are different tests for remoteness and quantum of damages in tort and contract.<sup>66</sup> The general question of limitation periods also immediately arises once more. Even if the *Schwebel* case is good law, holding that the limitation period for actions for negligent provision of services commences at the same time whether the action is in tort or contract (which it has been suggested above should not be the case), we are still probably left with different starting times where there is negligent work in the creation or provision of a structure. If in such a situation time starts running in tort only when the damage is or ought to have been discovered, an action in tort may potentially be brought much later than one in contract. The victim with a contract has no remedy; the one without a contract has a remedy. He who pays is again worse off than he who does not. If concurrent liability is accepted, a person with a contract who is injured by this type of negligent work will merely be given the same remedial advantages as the person without a contract. The first buyer of the defective building will be in the same position as the subsequent buyer.

With the endorsement of concurrent liability now in both England and the United States, it is somewhat difficult to understand the troubled resistance of some Canadian judges to the concept. Its acceptance by the majority of the Ontario Court of Appeal in the *Giffels* case was carefully considered and based on sound policy reasons. Its denial is quite at odds with the remedial flexibility which is one of the great strengths of the common law. To try to pretend that tortious and contractual liability exist in mutually exclusive watertight compartments is to deny the continual interaction in the historical development of the two areas. To recognize concurrent liability is to provide a comprehensive means of giving the full range of available remedies to a plaintiff who has suffered loss from the negligent performance of a contract. Attempts to discover or create solutions to particular problems without acceptance of the wider conceptual basis of concurrent liability cannot help but be fragmentary and unsatisfactory. It is to be hoped that when the inevitable future case comes before the Supreme Court of Canada requiring a decision on this matter, the court will see fit to endorse rather than reject concurrent liability in tort and contract for the negligent contract-breaker.

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<sup>66</sup> The substantive difference, however, may largely be overestimated: see *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*, [1978] 1 All E.R. 525 (C.A.).