# The best of both worlds - contributory negligence in contract and tort

Ken Stanton, Launceston

### Introduction

*On 4 March, 1999 the High Court held in Astley v. Austrust Ltd. [1], that contributory negligence by a plaintiff does not lead to a reduction of an award of damages based on a claim for breach of contract.*

The decision has significant implications for the way in which plaintiff lawyers pursue compensation for their clients. Plaintiffs often frame their claims to incorporate as many sustainable causes of action as possible, often based on negligence, for a breach of statutory duty and breach of contract. The factual situations giving rise to the various legal characterisations of the plaintiff's cause of action are usually the same. Practically speaking, often little attention is paid to the legal differences between the causes of action. This decision means that wherever a breach of a contract can be relied on, there should be no reduction for any contributory negligence on the part of the plaintiff.

### Facts

The Golden Grove Piggery was operated by QFP Properties Pty. Ltd. as Trustee of the GGI Pig Trust. Austrust was in the business of acting as a trustee company and it decided to enter a new arena by acting as a trustee for trading trusts.

Eventually Austrust became trustee of the GGI Rural Income and Growth Trust which was effectively a substantial expansion of the business and assets of the GGI Pig Trust.

In taking the appointment as trustee Austrust sought the advice of Michael Astley, a solicitor.

Astley apparently overlooked advising Austrust about its 'personal' liability. Austrust said, had it been aware of the possibility of its 'personal' liability it would have required all relevant documents to exclude such liability or would not have agreed to act as trustee of the trading trust.

The business of the trust failed and was wound up, its liabilities substantially exceeding its assets and Austrust was left with extensive losses in its capacity as trustee. Austrust sued Astley, et al, in respect of its losses.

Astley alleged contributory negligence on the basis that Austrust had not taken sufficient care of its own interests in agreeing to act as trustee of the trust.

***In Australia there have been differing views about whether the apportionment 'defence' of contributory negligence is available in contract cases. The High Court has now resolved that dispute.***

### The Position in the Past

Prior to the introduction of the various state *Wrongs Acts*, contributory negligence by a plaintiff was a complete defence to a claim in negligence.[2] The *Wrongs Acts* were introduced to ensure that where a plaintiff had contributed to the injury or loss caused by the defendant, the plaintiff was able to succeed at least to the extent of the defendant's contribution to the injury.[3]

In Australia there have been differing views about whether the apportionment 'defence' of contributory negligence is available in contract cases[4]. The High Court has now resolved that dispute.

### The Position after *Astley v. Austrust Pty. Ltd.*

This decision is clearly favourable to Plaintiffs. Where the Plaintiff can succeed in recovering damages for breach of contract, contributory negligence will not lead to any apportionment for contributory negligence and subsequent reduction in the amount of the judgment. Defendants will therefore be forced to focus more closely on defeating the contractual claim which will lead to concentration on the differences between the causes of action in contract and tort. Some of the matters which might be targeted are:-

1. The differences in limitation periods between negligence and breach of contract.
2. The differences in the elements of the causes of action in negligence and breach of contract.
3. The differences in the measure of damages in the two types of action.
4. The circumstances in which the Plaintiff's conduct might break the chain of causation.
5. A counterclaim for negligence or breach of contract may be available even where contributory negligence is not available as a defence.

These matters are discussed below.

Such matters will make a substantial difference in the end result if contributory negligence does not lead to a reduction in damages awards for breach of contract, especially when reductions for contributory negligence as high as 90% have been known.[5]

### The Differences in Limitation Periods

The cause of action in contract accrues upon the breach.[6] It can be maintained (albeit with probable

adverse costs consequences) even though no loss is suffered. In negligence, the cause of action does not accrue until damage is suffered.[7]

When damage is suffered is itself often a difficult question. Practically however, it is usually the loss which triggers the plaintiff's desire to pursue recovery. This can cause difficulties when the loss does not occur until some time after the breach.[8] If delay leads to proceedings outside the limitation period for the contractual cause of action, the plaintiff will be left with a tortious remedy and the consequent possibility of apportionment for contributory negligence.

### Damages in Contract and Tort

In personal injuries cases there is often little, if any, practical difference in the primary measure of damages whether the cause of action is based on breach of contract or the tort of negligence. That may well change as Defendants seek to overcome the effects of this decision because there are different rules applying to the assessment of damages in contract and tort. Often these differences are not well understood. But in a number of cases there can be substantial differences.[9]

In contract the plaintiff is put in the same situation (so far as money can do) as if the contract had been performed. Damages for negligence see the plaintiff put in the position they would have been in had the wrong not occurred.

Differences also lie in the tests of remoteness. In contract, losses which are the natural or usual consequence of the breach and which were in the contemplation of the parties are claimable.[10] In tort it is losses which are reasonably foreseeable that are claimable.[11]

It is therefore important to ascertain which cause of action will produce the most advantageous result, taking account of the reduction for contributory negligence in the negligence claim, and have damages assessed in accordance with that cause of action.

### Differences in the Causes of Action

In contract the extent of any duty of a defendant is governed by the terms of the contract. In negligence the existence and extent of the duty is governed by the "neighbour" principle using the test of reasonable forseeability.[12]

This may mean a claim in negligence can succeed when a claim in contract would fail. For instance in a professional negligence claim the contractual claim may be less likely to succeed. The terms of the retainer might be limited so that under the contract the professional is required only to perform limited duties. Those duties may be performed with reasonable skill and care. The tortious duty of care may be more wide ranging and require action not required by the contract. Both duties may require reasonable skill and care, but the extent of the duties may differ.

For instance a doctor may be engaged simply to treat high blood pressure. The terms of his retainer may require him only to consider treatment of high blood pressure. The doctor may advise the patient to cease smoking, lose weight, reduce alcohol consumption and implement a low fat diet. That may be all that is required in the performance of the contract for the treatment of high ▶

blood pressure. It was all he was engaged to do under the terms of the contract. However in tort the doctor may be negligent by not undertaking further investigations and providing specialist referral where there is a history of chest pain which has in the past required hospitalisation.[13]

It may also be that the terms of the contract exclude certain liabilities which would not be excluded by a cause of action in negligence.

### Contributory Negligence and Breaking the Chain of Causation

It may also be possible that contributory negligence which would lead only to a reduction in a negligence claim might sufficiently break the chain of causation in contract to lead to no damages being awarded.[14]

When might the plaintiff's contributory negligence break the causal chain? Presumably it will not break the chain where there are dual contributing factors with some responsibility from the defendant and some responsibility from the plaintiff, at least where those contributing factors are reasonably equal. Perhaps the next question the High Court will have to determine, is whether there can be action on the part of the plaintiff which is sufficient to break the chain of causation and disentitle the plaintiff from receiving damages in contract which, in a claim for negligence, would be considered to be contributory negligence and lead only to a reduction in the damages awarded.

### Defendant's Counterclaim for the Plaintiff's Negligence or Breach of Contract

It may be possible that a defendant faced with the prospect of failure on a contract claim, rather than seeking an apportionment under the *Wrongs Acts* for contributory negligence will make a counterclaim for breach of contract, negligence or breach of statutory duty.

Most states have Occupational Health & Safety legislation which imposes a duty on employees to take care for their own and others health and safety. Employees are under contractual obligations to their employers to exercise reasonable skill and care in the performance of their duties.[15] It may be arguable that an employee has a common law duty to take care for his own health and safety.[16]

Where a defendant owes a duty to a plaintiff, that does not exclude a duty owed by the plaintiff to the defendant.[17] It is possible that a breach of that duty by the plaintiff which leads to loss being suffered by the defendant, allows the defendant to counterclaim and thereby potentially avoid the effects of an inability to seek an apportionment where they have failed in defending a claim for breach of contract. In fact it may be possible for a defendant to counterclaim for breach of contract with the quantum of the defendant's counterclaim being the value of the plaintiff's claim.[18]

### Conclusion

It therefore seems that the present practice of pursuing both contract and tort claims is to the advantage of plaintiffs. Certainly the position seems to be that both claims can be pursued and the plaintiff can obtain judgment on the most favourable claim.[19] The contractual claim should be primarily pursued because there will no reduction for contributory negligence but the tortious claim should always be kept in mind in case there are barriers to the success of the contractual claim. ■

**Ken Stanton** is a Partner at Shields Heritage, Launceston, **phone** (03) 6331 3844, **fax** (03) 6334 0351

### Footnotes

1. [1999] 161 ALR 155.
2. *Butterfield v. Forrester* (1809) 11 East 60 [103 ER 926].
3. Gleeson CJ, McHugh, Gummow & Hayne JJ ("the majority") @ para. 41.
4. See the discussion of the authorities @ paras 50 to 70 of the majority judgment.
5. *Podrebersek v. Australian Iron & Steel Pty. Ltd.* (1985) 59 ALR 529.
6. See Starke, Q.C. JG, Seddon, NC. & Ellinghans, MP. *Cheshire & Fifoot's Law of Contract* 6th Australian Edition Butterworths p. 818.
7. *Glasson v. Fuller* [1922] SASR 148.
8. *Forster v. Outred & Co.* [1982], 1 WCR 86 (solicitor's negligence); *Ward v. Lewis* (1896) 22 VLR 410 (solicitor's breach of contract).
9. See *Holmes v. Jones* (1907) 4 CLR 1692; *Gates v. City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 and see Gaudron J. in *Marks v. GIO Australia Holdings Ltd.* (1998) 158 ALR 333 @ 338-339.
10. *Amann Aviation Pty. Ltd. v. Commonwealth* (1990) 92 ALR 601.
11. *The Wagon Mound (No.2)* [1967] 1 AC 617 @ 643-644.
12. *Donoghue v. Stevenson* [1932] AC 562 (if citation needs to be given).
13. See for example in relation to solicitor's negligence *Micarone & Ano. v. Perpetual Trustees & Ors.* (Unreported South Australian Supreme Court, 19 November, 1997, per Duggan J. @ 89)
14. The majority in Astley para. 53.
15. See *Lister v. Romford Ice* [1957] AC 555.
16. See *Nicol v. Alyacht Spars Pty. Ltd.* [1987] 163 CLR 611, a negligence claim only, where the possibility was left open in cases where the plaintiff is the sole author of their loss in line with *Ginity v. Belmont Building Supplies Ltd* [1959] 1 AllER 414 at 424.
17. *Nance v. British Columbia Electric Railway Company Ltd.* [1951] AC 601; *Noall v. Middleton* [1961] VR 285.
18. Such a claim would not be without its difficulties. Is the liability of the defendant to the plaintiff a loss which the defendant would be able to recover? Would such a claim be disallowed because of the need to avoid circuity of action? While there may be difficulties such a course is reasonably arguable. There would also be difficulties with this approach in New South Wales and any other states with the equivalent of Section 2 of the *Employees Liability (Indemnification of Employer) Act* 1982 (NSW).
19. The majority in *Astley* @ para. 84.