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Concurrent liability in tort and contract: An analysis of interplay, intersection and independence

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This article examines the understanding of concurrent liability in tort and contract, through a detailed analysis of the interplay, intersection and independence of the law of torts and the law of contract. The central argument that will be advanced is that the present understanding of the 'incident rules' in concurrent liability in tort and contract, such as the applicable rules of remoteness or limitation, is inconsistent with the rationale for concurrence laid down in Henderson v Merrett Syndicates Ltd. Rather than analyse concurrence as a single situation, that is, conceiving it as a contest between rules of tort or contract rules, we argue that the better way forward is to differentiate between the different situations in which liabilities in tort and contract may arise and to apply the correct analysis to each situation accordingly.

Introduction

This article seeks to resolve the concurrent liability puzzle under English law.[1] Through examining recent English developments, we offer an analysis on how tortious and contractual liabilities conceptually intersect. We argue that the present English understanding of the 'incident rules' in concurrent liability in tort and contract, such as the applicable rule of remoteness or limitation, is flawed and inconsistent with the rationale for concurrence laid down in *Henderson v Merrett Syndicates Ltd*.[2] Rather than analyse 'concurrence' as a straight contest between rules of tort or contract, we argue that the better way is to distinguish between the different situations in which tortious and contractual liabilities may arise and analyse each situation accordingly. Ultimately, we argue that a plaintiff should be able to choose the most advantageous cause of action and that a defendant cannot resort to 'trumping' arguments to restrict the plaintiff's choice.

This article consists of four main parts. After this introduction, the second part considers the 'interplay' between torts and contract, with particular emphasis on the fundamental conceptual question of whether there ought to be concurrent liability between tort and contract in the first place and what 'concurrence' entails. This part of the discussion further traces the historical development of concurrent liability under English law. While English law is said to have 'fully accepted'[3] concurrent liability since *Henderson v Merrett*,[4] there is clear indication in the case law that English law adopts a 'trumping' model. That is, where liability arises concurrently in tort and contract, contract rules will trump tort rules, even if the claim is brought in tort.

The third part of this article commences crafting an analytical framework for English law to deal with the intersection between contract and tort. The analysis starts by first looking into Australian jurisprudence for inspiration. The prevailing Australian position accepts 'complete' concurrence of actions -- a plaintiff is entitled to strategically choose between alternative claims and thereby avoid the application of the rules of the cause of action not proceeded upon. The Australian 'complete' concurrence model makes a strong case that the 'trumping' model is neither the only option available nor the most logical one. Australian law therefore provides a starting point for considering an alternative framework.

The fourth part of the article puts forward an alternative framework based on a critical analysis of the 'intersection' between torts and contract. It focuses on resolving the current controversy under English law when discussing concurrent liability: which set of 'incidental rules' should apply to a claim? We suggest that the current English approach is overly focused on the legal issue at hand and misses analysing the factual situation from which concurrent liability arises. It then proceeds to apply the proposed framework to the issues that raise problems of concurrence and suggests how they should be resolved.

Interplay: Should there be concurrent liability?

Torts and contract: Differences and similarities

Whether there should be concurrent liability in tort and contract is a question that must be answered with a historical perspective in mind. Torts law developed together with criminal law in the 12th and 13th centuries.[5] Unlike the modern-day emphasis on negligence, torts law in the mediaeval period was focused more on trespass and other intentional conduct.[6] The role of the law of torts in the regulation of daily life was rather limited until the courts formulated general principles of negligence in the 20th century, which greatly increased the number of situations where tortious liability arises. In contrast, the development of contract law was driven by the growth of trade and the consequent necessity of

enforcing contracts between private businesses.[7] By the 18th century, English judges had begun to formulate the foundations of modern contract law to protect business interests.[8] This state of affairs had by the 19th century led to the distinction between an action in a form *ex contractu* or a form *ex delicto* being used to explain the common law material. This changed the distinction between tort and contract from one of form to one of substance. It was further amplified by English law's acceptance of the 'will theory' of contractual obligation, which helped to explain the voluntary nature of contractual obligations, in contrast to tortious duties, which were not.[9] Tortious liability and contractual liability are hence conventionally distinguished on two bases.[10]

First, tortious duties are imposed by law, whereas contractual duties arise based on the parties' consent. Accordingly, contract law is underpinned by the principle of freedom of contract: that is, parties are the best judges of their own interests, and if they freely and voluntarily entered into the contract, the only function of the law is to enforce it. The validity of the contract should not be challenged on the ground that its effect was unfair[11] or socially undesirable, as long as it was not actually illegal or immoral, understood in a restrictive sense.[12] This distinction is not unassailable, however. For example, it can be said that many tortious duties are voluntarily 'assumed' by the defendant choosing to enter into a relationship with the plaintiff[13] -- most notably, when one considers cases of negligent misstatements by professionals.[14] Moreover, it may be said that some contractual duties, such as the duty of trust and confidence in the employment context,[15] arise by terms implied by law and are thus imposed by law rather than agreed between the parties.[16] Another example would be the contractual duty of care. The contractual duty, in the absence of express provision, is implied in law, as an incident of that type of contract. A term implied in law is *imposed* on the parties, as opposed to being derived from the parties' will and consent. Nonetheless, the understanding that tortious duties are imposed and contractual duties are assumed is helpful for purposes of general analysis.

Second, contractual duties are undertaken towards a specific person or persons (in personam), whereas tortious duties are owed to persons generally (in rem).[17] Burrows stresses the remedial distinction between contractual and tortious liabilities, stating that the function of contract law lies in fulfilling 'the expectations engendered by a binding promise' which involves protecting the plaintiff's expectation interest by putting him 'into as good a position as if the contract had been performed'.[18] In contrast, the aim of the law of torts in compensating for the plaintiff's 'wrongful interference' involves protecting the plaintiff's status quo interest by putting him 'into as good a position as if no wrong had occurred'.[19] According to Burrows, the justification for this difference follows from the distinction discussed above: as tortious liability is imposed, liability for failure to benefit would represent too great an infringement upon personal liberty.[20] Yet this distinction cannot be taken too far or as an absolute truth. In particular, it has been pointed out that some instances of tortious liability can only be sensibly described as being owed to one individual or a class of persons, such as a duty not to convert a chattel which is owed only to the person in possession of the chattel or who has a right of possession to it.[21]

These conceptual distinctions account for the different rules that apply to tortious and contractual claims, for example, the assessment principles governing compensatory awards for each regime of liability or the limitation periods for enforcement of the claims. Accordingly, once we accept the possibility of mounting concurrent claims, we need to then consider the posterior question of which set of rules should apply -- commonly referred to as the issue of incidental rules in concurrent liability literature. To be clear, when we say 'cases of concurrent claims', we do not only refer to cases where the plaintiff is bringing both contractual and tortious claims. Although a plaintiff may do so, the principle against double recovery[22] will require the plaintiff to elect between the remedies that he or she may derive from the two claims. We also include cases where the plaintiff has made that strategic election -- based on which set of rules is most favourable -- before commencing legal proceedings such that only one claim is ultimately brought against the defendant. Even in such instances, there is a need to consider the issue of 'incidental rules'. The interplay between the incidental rules in contract and torts is therefore the crux of the present state of uncertainty regarding concurrent liability. To fully appreciate the current state of English law and where the thorny issues lie, it is necessary to consider the historical development of concurrence, to which we turn in the next section.

The evolution of concurrence

The recent history of concurrent liability under English law can be broadly categorised into three stages: no concurrence, acceptance of concurrence and most recently, uncertainty regarding concurrence. All three stages of development arise from the judicial insistence on treating torts and contract separately, though each stage is characterised by a different understanding of what separation entails.

No concurrence: Only one (contract) claim would arise

The first stage of development centred on the idea that torts and contract are entirely distinct sources of legal obligation and should accordingly be kept separate.[23] The practical consequence of this understanding was that where parties had an underlying contractual relationship governing their rights and liabilities, they should be confined to a contractual claim, rather than being able to concurrently mount a claim in tort as well.[24] In other words, the contract had an absolute 'trumping' effect -- the law did not permit concurrent causes of action in tort and contract to arise on the same set of facts. In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*, [25] Lord Scarman gave two reasons for the 'no concurrence' position. The first, based on principle, is that since the parties have defined their rights and liabilities voluntarily by contract, torts law should not intervene and graft additional rights and liabilities otherwise unintended by the parties. The second, based on policy, is to avoid confusion because concurrent liabilities could result in overlapping consequences, such as the applicable limitation period. Although Lord Scarman said that concurrence should be avoided 'particularly so in a commercial relationship', his analysis, based as it was on principle, extended to exclude tortious liability where a contractual claim existed in all fact situations.

Towards concurrence: Both tortious and contractual claims could arise

The second stage towards concurrence started just as the view that tortious and contractual liabilities should be kept completely separate was taking root. At this stage, a different and perhaps more advanced understanding of the non-commingling of contract and torts emerged: concurrent causes of action should be allowed as the two branches of law are independent and neither is subsidiary to the other. The emergence of this view was in part occasioned by the House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[26] which gave rise to the possibility of tortious liability even in the absence of a contractual relationship, if the defendant had 'assumed responsibility' to the plaintiff. It could therefore be argued that the plaintiff should be able to recover in tort even where there was a contract, since it made little sense for the plaintiff to be worse off where he had provided consideration to the defendant. That argument was considered extensively by Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*[27] in the context of the applicable limitation period. Oliver J had to decide whether the plaintiffs' action -- founded on the defendant solicitor's failure to register an option as land charge over property -- was in tort (negligence), contract, or both, because the nature of the cause of action would determine whether the action was time-barred.[28] His Lordship cast doubt on the old cases frequently cited in support of the proposition that the solicitor-client relationship was governed exclusively by contract, as the authorities were decided at a time when English law was still affected by the different forms of action and when the general tort of negligence was still developing.[29] As such, many of those cases simply did not lay down the proposition that a contractual claim precluded all tortious claims. Moreover, Oliver J saw no sense in excluding the broad principle stated in *Hedley Byrne* from applying even where the parties were in a contractual relationship.[30]

Concurrence was later fully accepted in *Henderson v Merrett*. Two classes of underwriting members sued their underwriting agents for negligent advice. One class had a direct contractual relationship with the underwriting agents, and the other class only had a contract with an intermediate agent, who in turn had a contractual relationship with the underwriting agents. The House of Lords confirmed that the duty to give proper advice arose concurrently in tort and contract, and second, that the lack of a direct contractual relationship did not mean that the parties intended to exclude any direct claim in tort.

Lord Goff, who delivered the leading speech, proffered three reasons in support of concurrence. First, regardless of the historical problems,[31] the common law had already begun to move towards concurrence. The most important example of this development was *Hedley Bryne*, which established a basis for tortious liability independently of a contractual relationship. As a matter of logic, liability under this principle arises whether the services are rendered gratituously or under a contract.[32] It also shattered contract law's exclusive domain of allowing claims for pure economic loss unaccompanied by physical damage to a person or property.[33] As such, it did not make sense to exclude tortious liability just because there was a contract. This was clearly a rebuke of Lord Scarman's point in *Tai Hing Cotton Mill* that the parties' choice in entering into a contract should be taken as indicating an intention to exclude tortious liability. Second, there were practical reasons in support of concurrence of actions: the most important of which was to prevent defendants from relying on limitation defences, especially where the plaintiff may well have been unaware of the existence of the cause of action.[34] Again, this was a dispproval of Lord Scarman's point of the need to avoid confusion as a result of the application of different incidental rules. To Lord Goff, the need to avoid unfairness caused by the possibility of a defendant taking advantage of more 'generous'[35] limitation rules in contract trumped the practical concern of avoiding confusion. Third, the experience of jurisdictions that have adopted concurrence had not been negative.[36] In sum, the guiding principle after *Henderson v Merrett*, in so far as concurrent liability is concerned, is that an assumption of responsibility can give rise to tortious liability and that liability can be excluded by contract, but only if the parties specifically intended for that outcome and not simply by the existence of the contract alone. Tort law, being the general law and not supple-

mentary to contract, must be independently considered and may impose a wider duty than that in contract.[37] On this view, if contract is to 'trump' tortious liability, it must be pursuant to the parties' agreement.[38]

The acceptance of concurrent causes of action occasioned the need to consider how the 'incidental rules' in tort and contract interact with each other.[39] Generally speaking, conventional thinking has proceeded on 'assimilation'[40] -- there is a straight choice between the rules of tort and contract, and that one must prevail with regard to a given legal issue. For example, it is said that the *Hedley Bryne* principle can bypass the doctrine of consideration as it allows an action to be brought for negligent advice in the absence of a contract.[41] It is also said that the doctrine of privity in contract is under assault by cases such as *Ross v Caunters*[42] and *Junior Books Ltd v Veitchi Co Ltd*.[43] Other incidental rules involving remedies, such as remoteness, the measure of damages, the type of loss recoverable, the availability of contributory negligence as a defence, contribution between defendants, and the applicable limitation periods, also require resolution when concurrent liability is recognised.[44] The choice of one set of rules over the other will affect the plaintiff or defendant in a very practical manner. For example, in a case of negligent advice, it may well be that the contractual measure of damages will yield a higher quantum than the amount the plaintiff had lost acting on the advice.[45]

Concurrence: uncertainty regarding incidental rules

In more recent years, there has been a renewed consideration of the desirability of concurrent liability. Sir Rupert Jackson has commented extrajudicially that at least some of Lord Goff's reasons in support of concurrence are 'dubious'.[46] In particular, he takes issue with Lord Goff's emphasis on the practical need to prevent defendants from unfairly relying on limitation defences. Sir Rupert argues that if it is felt that the contractual limitation periods are unsatisfactory, then the solution should be to reform the law of limitation, rather than resolve that by mangling the law of torts.[47] He stressed that limitation periods serve a valuable social purpose by extinguishing claims that are too old and the courts should therefore not go out of their way to circumvent the existing limitation rules through concurrence.[48] Sir Rupert also disagrees with Lord Goff's assessment based on the experience of foreign jurisdictions, for the same may not be borne out under English law, given the jurisdictional distinctions.[49]

Sir Rupert thus attacks concurrence at the most fundamental level. If accepted, his arguments will preclude concurrent liability -- in the sense of concurrent actions -- altogether simply by the presence of a contract, returning the law to Lord Scarman's approach in *Tai Hing Cotton Mill*. In a similar vein, there may be concern that English law is signalling a retreat from concurrent liability, in view of the UK Supreme Court's decision in *AIB Group (UK) plc v Mark Redler & Co Solicitors*.[50] The case concerned equitable compensation for breach of a commercial bare trust where there was also an underlying contract between the parties to a commercial remortgage transaction. Lord Toulson and Lord Reed, writing separately,[51] restated the basic remedial principle for trust law and held that equitable compensation is strictly compensatory in nature. As such, after *AIB*, the inquiry is simply whether the losses have been suffered but for the breach of duty. *AIB* therefore abrogated the application of the traditional accounting rules in the assessment of equitable compensation, in particular, the falsification of account that specifically redresses a breach of trust by way of misapplication of trust property.[52] More interestingly, Lord Toulson held[53] that 'the extent of equitable compensation should be the same as if damages for breach of contract were sought at common law' in cases such as *Target Holdings Ltd v Redferns*.[54] On such an analysis, concurrence of actions is retained only in form. The substantive appeal of separate streams of liability, which lies in allowing the plaintiff to strategically 'cherry-pick' the more favourable liability regime, has been removed. It does not matter whether the claim is framed as breach of trust or breach of contract; the errant trustee's liability is the same. This may suggest that contract rules 'trump' equitable rules in the assessment of compensation.

The better view, however, is that there is insufficient evidence presently to support the conclusion that English law is indeed moving away from concurrence. Notably, in *AIB*, Lord Reed expressly refuted the view that liability for breach of trust, even 'where the trust arises in the context of a commercial transaction which is otherwise regulated by contract, is not generally the same as a liability in damages for tort or breach of contract'.[55] He merely endorsed the view that there are structural similarities in the assessment of the awards of compensation in law and in equity and, further in the commercial context, the underlying contract is a relevant factor to be taken into account in the assessment of equitable compensation for breach of trust. Whether it is Lord Reed's judgment or Lord Toulson's judgment that will prevail awaits the Supreme Court's further review.[56] Moreover, it must not be forgotten that the Supreme Court's task in *AIB* was to work out the remedial principles for the assessment of equitable compensation for breach of trust, given the confusion that has been generated by the woefully neglected equitable accounting rules and the decision in *Target Holdings*. The issue was not one of working out the incidental rules between contract law and trust law in a case of concurrent liability. And it was certainly not to work out how concurrence between tort and contract is to be understood.

Indeed, in so far as concurrent liability between tort and contract is concerned, it may be said that the law has moved too far along for it to be turned back so hastily on the first hints of scepticism. However, Sir Rupert, and similarly more recent academic commentaries expressing varying degrees of doubt,[57] also questions concurrence at a more *specific* level, which is the application of the so-called 'incidental rules' in tort and contract in instances of concurrent liability. To recall, the most forceful reason advanced by Lord Goff in support of concurrence in *Henderson v Merrett* was that the general imposition of tortious liability occasioned by *Hedley Bryne* logically requires that concurrent liability with contract be recognised. Sir Rupert, however, argues that there are potential inconsistencies in relation to the specific application of tortious or contractual rules. For example, in *Wellesley Partners LLP v Withers LLP*,[58] the English Court of Appeal held that where a duty of care arises in tort and contract, the narrower contractual rules of remoteness should trump those of tort. Yet, if there were true concurrence of liability, the analytical process ought to be that each cause of action should be assessed separately by reference to their respective rules of remoteness. Similarly, Sir Rupert argues that there are problems in defining damage 'when tortious duties of care are super-imposed upon what is essentially a contractual relationship'.[59] Again, if there were true concurrence, each type of damage would be recognised and defined independently. This must be the starting point of analysis.

Put another way, taking Sir Rupert's argument to its logical conclusion, the law merely upholds 'concurrence' in form, in the sense of permitting both causes of action to be pleaded but the law does not allow substantive concurrent liability in tort and contract to be assessed. The label 'concurrent liability' is, on such an approach, misleading. The acceptance of 'concurrent liability' in *Henderson v Merrett* is consequentially rendered far less monumental than it is conventionally touted to be. We argue that concurrence in form only is neither the natural nor rational consequence of *Henderson v Merrett*. What needs to be done is to properly work out the application of the incidental rules in tort and contract. In the next two sections, we offer a more refined analysis to the seemingly straightforward 'trumping' analysis that current English law presents.

Current English understanding of concurrence: The 'Trumping' model

In our view, the current English understanding of concurrence is overly simplistic. Concurrence is conceived as a head-on clash between tort and contract, which requires a straight choice between their respective incidental rules. The English Court of Appeal's conclusion in *Wellesley Partners LLP* is a recent testament to such an understanding. The Court ruled that the narrower contractual remoteness test would apply over the tortious test in a situation involving concurrence. For some time before the case was decided, there was uncertainty as to which rule (or both) should apply in the case of concurrent liability.[60] In that case, Wellesley sued its solicitors, Withers, for negligence in the drafting of a partnership agreement. To improve its chances of success, Wellesley relied on the broader remoteness rules in tort. As is well accepted, the test for remoteness in contract is stricter. The contractual test, originating from *Hadley v Baxendale*,[61] is that if a defendant could reasonably contemplate the type of loss at the time of contracting, then the loss will not be too remote.[62] On the other hand, the tortious test, as established in *The Wagon Mound [No 1]*, is more generous. By this test, if a defendant could reasonably foresee the type of loss at the time of breach, that loss will not be too remote.[63] The differences between the two tests have been explained as arising from the lack of opportunity for parties involved in a tort action to allocate unusual risks beforehand, unlike the position of contracting parties.[64]

This explanation found favour with the Court of Appeal in *Wellesley Partners LLP*. Floyd LJ, delivering the leading judgment, explained that parties in a contractual relationship could not rely on the more generous tortious test because they had an opportunity to agree on the likehood and type of recoverable loss.[65] The Court stressed that in cases of 'parallel liability'[66] such as in the dispute before them, it would not be sensible to consider different consequences based on how a claim was framed when in fact only a single breach of duty -- a duty that arose from the same assumption of responsibility -- had occurred.[67]

To recall, Lord Goff said in *Henderson v Merrett* that the presence of a contract did not by itself exclude tortious liability and for contract to 'trump' tortious principles, the parties must have agreed to that.[68] However, the conclusion in *Wellesley Partners LLP* seems to be exactly that which had been disapproved of by Lord Goff: the rules of remoteness in contract trump those of tort, in the absence of parties' agreement to such an outcome. Underlying the prevailing English 'trumping' model is a hierarchal approach to obligations.[69] The consensual obligation -- which allows parties an opportunity to protect themselves -- is accorded primacy in governing the parties' rights and liabilities. This may be most readily justified by the principle of parties' will. But if so, as Tilbury and Carter have forcefully argued, the focus should be on 'whether or not the parties have dealt with the issue' and their intentions ought to be paramount.[70] They stressed that whether the duty of care arises by way of parties' express agreement (that is, actual intention) or by implication of term in law (that is, imposed on their relationship) is therefore crucial. As Robertson has pointed out, implication of

terms in law involves the imposition of external standards of reasonableness and fairness and do not necessarily accord with parties' actual intentions.[71] The English cases, regretably, do not grapple with this deeper level of analysis.

Intersection: A better understanding of 'Concurrence' and how should it affect the application of the incidental rules of tort and contract?

The Australian model: 'Complete' concurrence

A better understanding of 'concurrence' may be gleaned by examining the Australian approach. Australian law has taken a different approach and offers an alternative model for consideration. In the landmark decision of *Astley v Austrust Ltd*,[72] the High Court of Australia, by a majority, ruled that a South Australian legislation, which allows for apportionment of damages on the basis of the plaintiff's contributory negligence (the 'apportionment legislation'),[73] does not apply to a contract claim. The dispute concerned professional negligence. In that case, the plaintiff trustee company, prior to accepting appointment as a trustee for a trading trust, sought general advice from its long-time advisor, the defendant solicitors firm, in relation to its proposed appointment. The request for advice was phrased in very general terms: 'let us have your comments on it in due course'.[74] After receiving advice from the defendant, the plaintiff was appointed as the trustee of the trading trust. The trust venture, however, failed and steps were taken to wind up the trust. The plaintiff became liable for extensive losses as a result of the lack of assets to fully meet the liabilities of the trust. The plaintiff sued the defendant in both contract and tort for failing to advise that it should not have accepted the appointment without inserting a term in the trust documentation to exclude personal liability for losses incurred in the course of administering the trust. Notably, the claim in contract for breach of duty of care was based on a term implied in law to exercise reasonable care and skill. The defendant denied liability and alternatively argued contributory negligence on the part of the plaintiff.

The High Court of Australia, reversing the decision below,[75] found that the plaintiff was contributorily negligent for failing to exercise reasonable care to protect itself from losses. Gleeson CJ, McHugh, Gummow and Hayne JJ (the majority) held that the apportionment legislation was, however, not applicable to a contractual claim.[76] Their decision was based on legislative construction and their Honours delved into an analysis of the text, history and purpose of the legislation. They observed that the natural and ordinary meaning of statutory wording did not support the interpretation that the apportionment legislation applied to a contractual claim. Further, historicially, their Honours could not find a case in which the defence of contributory negligence had been applied to a cause of action in contract. Moreover, the purpose of the legislation is to allow recovery of damages in cases where contributory negligence had operated as a complete defence to a tortious action. [77] The majority considered it strange that the legislation would have the effect of diminishing the rights of a plaintiff suing in contract.

The majority further drew on policy considerations to buttress their favoured interpretation of the apportionment legislation.[78] Essentially, they analysed the conceptual distinctions between contract and tort. It is said that in contract, the plaintiff has provided consideration for the defendant's promise to exercise reasonable care and the parties have agreed to be regulated by the contractual model of apportioning responsibility.[79] There is thus no justification for disallowing the plaintiff's recovery to be assessed based on contractual rules. If the defendant wished for a different model to apply, he could have bargained for it. In tort law, on the other hand, the duty to take reasonable care is imposed by law on the parties and in the absence of parties' agreement, general law defines their rights and liabilities. The majority concluded by saying that for the apportionment legislation to be applicable to contractual claims, it would require legislative amendment.[80]

Astley has since stood for the position that Australian law accepts the 'complete' concurrence of actions. The significance of accepting 'complete' concurrence of actions can be better appreciated in the wider context of commercial litigation where it is commonplace for concurrent actions to arise in contract, tort, equity and statute. In Australia, there may be more than one statutory provision addressing the same underlying conduct that results in the same loss. In *Selig v Wealthsure Pty Ltd*,[81] the High Court of Australia has unanimously ruled that the statutory defence of proportionate liability that is designed to be applicable to one statutory claim[82] will not be applied to other parallel statutory claims brought for the same underlying conduct resulting in the same loss. The combined effect of *Astley* and *Selig* is that plaintiffs in Australia are encouraged to continue the practice of pleading alternative claims in the hope that one or more of them will prove to be advantageous.

Nevertheless, it should not be missed that the majority's approach in *Astley* came as a surprise to many. As Callinan J, the dissenting judge in the case, observed, the then prevailing authorities and academic views pointed towards allowing

contributory negligence to operate as a partial defence in cases of concurrent liability in tort and contract.[83] Notably, the State and Territory legislations were quickly amended, post-*Astley*, to reverse the effect of the decision,[84] which to some degree demonstrates that the decision was not warmly received in Australia. The decision has also received considerable criticisms from scholars.[85] There are three main lines of attack. First, it is disputed that the majority's construction of the apportionment legislation is the only fair reading of the statutory provision.[86] Second, it is said that the majority wrongly assumed that contributory negligence has no role in contract law, especially because the common law is an evolving enterprise.[87] Third, it has been argued that while the plaintiff may generally choose from any of the concurrent causes of action, there are circumstances in which the choice should be limited by 'sound and articulated policy reasons'.[88] It is suggested that the policy reason that contract is based on parties' will -- unlike tort law which imposes duties on parties -- does not apply to the facts of *Astley* as the contractual duty of care in that case was implied as a term in law.[89]

This is not to say that the *Astley* approach is without merits. It is simple and avoids the difficulties of trying to harmonise the 'incidents' of legal liability, a project which English law is presently engaged in but not without complication. Importantly, *Astley* recognises that where the circumstances generate more than one cause of action, the plaintiff should be allowed to choose amongst the alternative claims. This, we say, is a logical starting point that is also faithful to the decision in *Henderson v Merrett*. Given the criticisms that *Astley* has attracted, however, particularly in light of the third line of attack, we do not think that the analysis under English law should stop at the position taken in *Astley*.

A more principled understanding of concurrence

We therefore put forward a more principled understanding of concurrence. This understanding is inspired not only on the Australian approach, but also in part by Floyd LJ's observation in *Wellesley Partners LLP*. He said: '[i]t makes no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that *the tortious duty arises out of the same assumption of responsibility as exists under the contract*.'[90] In other words, Floyd LJ recognised that in a case such as *Wellesley Partners LLP*, the tortious duty was fully derived from the contractual relationship. We label such a scenario as a case of 'derivative duty' because the fact that one duty was derived from the other is crucial to the legal analysis that we are advancing, which is premised on the fundamental starting point that contractual and tortious liabilities must be analysed separately, even if the outcome may well be that only one set of rules eventually applies.

Under our proposed analytical framework, the starting point is that tortious liability and contractual liability are parallel, sitting side-by-side and therefore subject to the rules of their respective liability regimes. This is therefore the *Astley* position. But we do not propose for the analysis to stop there. This is because the facts of the specific case may affect the application of a particular rule to the claim, in particular, where there are policy justifications. In a 'derivative duty' case[91] such as *Wellesley Partners LLP*, Taylor suggests that applying the tortious test for remoteness, namely, what are the reasonably foreseeable losses, would lead to the answer that reasonably foreseeable losses are those that are within the parties' reasonable contemplation at the time of contracting.[92] As he explains, 'the reasonably foreseeable consequences of any subsequent negligent act are only those provided for in the contract'.[93] Our analysis, in agreement with Taylor's suggestion, is that the court ought to apply the tortious remoteness test to the tortious claim. We suggest, however, that the reasonably foreseeable losses of the tort are limited -- in this sense, 'those provided for in the contract', as Taylor has argued -- by the reasonably foreseeable losses under the contract regime. In other words, the tort enquiry leads to the same answer as the contract enquiry. This is because the tortious duty is derived from the contractual duty. It also does not matter that the contractual duty may be a term implied by law. When parties have entered into a contract, they have voluntarily signed onto the contractual regime of risk allocation, including rules on implication of terms by law.

Our analysis, while generating the same practical outcome as the English Court of Appeal decision in *Wellesley Partners LLP*, avoids the simplistic understanding that contract somehow 'trumps' tort. It also does not depend on the erroneous but oft-held proposition that the contractual test ought to apply because the only duty is contractual, and not tortious. Finally, this analysis also sits more comfortably with the central reason for allowing concurrent liability in *Henderson v Merrett*, which is that tortious and contractual liabilities arise independently and separately.

One objection to our proposed analysis may be that the judicially endorsed 'trumping' approach -- that is, only the contractual rule applies in so far as remoteness is concerned -- is far more efficient, straightforward and simple. Our response, in addition to the merits highlighted above, is that the objection is most forceful in respect of the remoteness issue, but the remoteness issue is only part of the operation of our proposed framework. The force of the objection diminishes and the weakness of the 'trumping approach' becomes evident in respect of other issues, to which we turn mo-

mentarily, after we explain our analytical framework further by referring to the different fact situations to which it might apply.

Moreover, it should not be missed that the 'trumping' approach is inherently problematic as it encourages the coalescence of the tortious and contractual tests as a result of the lack of explanation of why one test 'trumps' the other in concurrent claims. For example, in *Thake v Maurice*,[94] the plaintiffs sued the defendant surgeon for a failed vasectomy. Before performing the operation, the defendant failed to warn the plaintiffs that there was a small chance after the operation that there could be a recanalisation of the vas such that the first plaintiff could fall pregnant again. One of the questions raised was whether the defendant was liable for failing to warn the plaintiffs of the possibility of recanalisation. Kerr LJ, whose opinion on this point the rest of the English Court of Appeal agreed with, recognised that the plaintiffs had framed their claim in both tort and contract, but held that it was not necessary to distinguish between them.[95] The consequence was that it became unclear what test the judge applied to determine whether the duty had been breached. In deciding that the defendant's breach amounted to negligence both in tort and contract, Kerr LJ seemed to have assumed that the broader tort principles applied exclusively. Ultimately, it is useful in this regard to heed Burrows' reminder that the restrictions on compensation (being an example of the incidental rules) should not differ as between tort and contract simply due to the different cause of action; instead, as Burrows states, '[o]ne needs to examine whether there is a rational reason for there being a difference.'[96]

Independence: A proper understanding of concurrence and its effect on incidental rules

The proposed analytical framework

We propose an analytical framework to determine the applicable incidental rule for concurrent liability in contract and tort that is consistent with the reasoning in *Henderson v Merrett*. [97] Thus, if the key holding in that case is that concurrent liability arises because both tortious and contractual liabilities arise separately unless excluded, then the relevant incident rules, be it in tort or contract, must apply respectively to each, unless otherwise excluded. Furthermore, our proposed analytical approach sheds the idea that the choice of the correct incidental rule is about a contest between tort and contract rules. Rather, it is about formulating a new set of rules that apply to claims involving concurrent liabilities in tort and contract. As Reynolds so pertinently put it, 'rivalry between principles, as opposed to a study of their interaction and interrelation, is unlikely to be productive'.[98] The key to resolving the apparent differences is to pay attention to the inherent characteristics of tort and contract, and to consider, based on those characteristics, which policy should prevail in the situation involving concurrency.

With these points in the background, one major problem with the current approach as regards concurrent liability, in our view, is that all too often questions asked about the application of incidental rules in cases of concurrence have solely focused on the *legal issue* rather than the particular *fact situation* that is being considered.[99] However, there is no one-size-fits-all answer as to the applicable incidental rule in relation to a legal issue. While it is of course important to be clear what the relevant legal issue is -- since the objectives of the relevant regime of rules that is invoked by the relevant issue are not the same -- we suggest that there is a need to go further.

The additional level of differentiation concerns the *fact situations* giving rise to that particular 'concurrent liability' issue. The facts of each case need to be reviewed and carefully distinguished to determine *how* the concurrent liability in question has arisen. Through this exercise, one might conclude that there was no concurrent liability to begin with. In *Wellesley Partners LLP*, Roth LJ was cognisant of the importance of this differentiation exercise. He distinguished between a 'parallel liability' case such as *Wellesley Partners LLP*, where both tortious and contractual claims arose from the same facts against the same defendant, and cases where only tortious liability arises but are 'equivalent to contract'.[100] The latter cases include 'where a client receives gratuitous advice from a solicitor, or where the loss is attributable to the concurrent negligence of two defendants only one of whom owes a duty in contract, such as where a client claims against both its solicitor and barrister but has no contractual relationship with the barrister'.[101] The latter cases are not 'concurrent liability' cases -- at no point was there a contractual claim or contractual relationship. Whether these cases should be subject to contractual rules for being similarly concerned with 'assumption of responsibility' is to be considered separately.[102] Apart from those cases, true concurrent liability cases involving torts and contract may arise in differents ways, as we elaborate below.

The different fact situations raised by concurrent liability in torts and contract

Situation (1): Tortious duty derived from contractual relationship

First, tortious liability can derive from the contractual relationship. For example, in *Wellesley Partners LLP*, the two duties of care arose from the 'same assumption of responsibility as exists under the contract'.[103] The terms of the contract define the rights and liabilities assumed by the parties and so the tortious liability, while an independent source of liability, has the same content as that defined by the contract.[104] Here, the contractual relationship forms the basis for ascertaining the extent of the duty owed at common law.[105] This situation will usually include those where the parties have set out their rights and liabilities clearly in the contract concerned. Where they have not done so, such rights and liabilities can still be implied into the contract. Either the express or implied stipulation of those rights and liabilities will be sufficient for the tortious liability to be derived from the contract. This is an example of a 'derivative duty' case. Professional negligence cases, where there is a tortious duty of care alongside a direct contractual relationship between the parties, readily illustrate 'derivative duty' cases. These are also the most commonly analysed concurrent liability cases and about which debates are frequently generated. As noted above, although the tort remoteness rules therefore apply, their application leads to the same outcome as though the contractual remoteness rules apply.

Situation (2): Contractual relationship arising after the tortious duty has arisen

Second, the contractual relationship may arise after the tortious duty has arisen. This may happen where the parties decide subsequently to govern their dealings by contract, after a duty in tort arose in the first place. What the contract says regarding the parties' rights and liabilities is crucial to the proper legal analysis. In relation to negligence which arose before any contract was formed, it is essentially a purely tortious case. Straightforwardly, tortious rules would govern the claim. At that point, therefore, there is no issue of concurrent liability.

Where the tortious duty had arisen before the contract was formed, but action is being pursued for conduct that occurred post-contract, the court needs to first consider how the contract arose. The contract may be implied by the court. This is of course a relatively rare instance, for a court will only imply a contract based on necessity and the intentions of the parties.[106] For example, a solicitor might have given advice to a client and assumed a responsibility towards him. A court could find that a contract had expressly arisen between the parties from their conduct a few months into their relationship.[107] Indeed, had a contract been implied between the parties in the recent English Court of Appeal decision of *Lejonvarn v Burgess*,[108] that would be within the situation currently contemplated. In that case, an architect had supplied her professional services to her friends free of charge. The Court found that while a contractual relationship did not exist between the parties since the normal elements of contractual formation were absent, the trial judge had been correct to find that the parties' relationship was akin to contract. This in turn justified a finding of a duty of care in tort in respect of the economic loss suffered by the plaintiffs. The Court reasoned that the scope of duty assumed was reasonably certain. Also, even though the services were provided for free, the architect had done so in the expectation of further business. It is conceivable that had the court implied a contract, that would fall within the situation presently being considered, that is, a contractual relationship arising after the tortious duty had arisen. Indeed, in the unlikely event that a court implies a contract based on the assumption of responsibility in tort ('tortious relationship'), then the contents of the implied contract will be derived from the 'tortious relationship'. If so, even if the incidental rules of contract were to apply, there is some scope to argue that, in effect, they may lead to the tortious outcome. This is because the contractual liability has been derived from the tortious relationship such that, in applying the contractual incidental rules, the tortious context must be relevant. In particular, in relation to remoteness, what may fall within the parties' reasonable contemplation in contract would be what was reasonably foreseeable to the parties in the context of their tortious relationship.

If the contract is not implied but express, a court must then proceed to consider the content of the contract. The contract may expressly exclude tortious liability arising before and during the term the contract -- if so, contractual rules will govern solely (see Situation (4) below). Alternatively, the contract may say that the terms of the contract shall strictly govern the parties' relationship (contractual claims or otherwise) from the time the contract has been formed. In such a case, the pre-contractual tortious relationship would be governed by tortious rules and post-contractual tortious relationship would be governed by contractual rules.

At this point, a deeper normative question may be asked: why do we give effect to party autonomy in matters concerning non-contractual liability? In particular, the law of torts is generally perceived as regulatory and policy-based and these functions may be undermined if we allow consensual modification. Our response is simple. Giving effect to party autonomy enables contracting parties to better plan their transactions and their risks (including assessing insurance coverage, etc). Moreover, the concept of risk allocation permeates not only tort law but also equity where the courts allow a great degree of contractual modification.[109] The real question is what are the limits of contractual modification.

Situation (3): Tortious duty of care arising from a contractual background? -- a less straightforward case

More unusually, there may be cases where there is no direct contractual relationship between the plaintiff and the alleged defendant tortfeasor, but the contractual relationships form the factual background from which a tortious duty of care may arise. The facts of *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*[110] illustrate this exceptional scenario. In that case, a contract was entered into between the employer and the main contractor, Genesis, to construct a building (Contract 1). Genesis then subcontracted part of of the work to a subcontractor, Rolls Royce (Contract 2). There was no direct relationship between the employer and Rolls Royce. There was a term in Contract 1 that enabled the employer to compel Genesis to sue Rolls Royce under Contract 2 to enforce Rolls Royce's obligations thereunder. This, in other words, provided an *indirect* contractual avenue for the employer to sue Rolls Royce.

The plant failed to operate in accordance with the contractual specifications set out in Contract 2. The employer sued Genesis for breach of contract and Rolls Royce directly in the tort of negligence for causing economic loss.[111] The NZ Court of Appeal was confronted with the issue of whether a duty of care not to cause economic loss in tort should be imposed on Rolls Royce in the circumstances. By reference to policy considerations as well as the contractual terms (in particular, the limitation clauses), the Court found that a duty of care ought not be imposed on Rolls Royce.[112] We are not concerned with the reasons here.

No issue of concurrent liability arose in *Rolls-Royce* as a result of the Court's finding. The contractual setting thus negatived a tort duty, which is likely to be the outcome in most such cases.[113] If the parties desire a more direct means of pursuing liability for poor performance or non-performance, they could have bargained for that, instead of using the law of torts to achieve the same. But assuming that the Court found that a tortious duty of care should be imposed, then there is a more nuanced issue of 'concurrent liability' -- a tortious claim as well as an 'indirect' contractual claim arising concurrently. This is unlike Situation (1) because the tortious duty is not derived from a contract between the same two parties and is thus not a classic case of concurrent liability. Nevertheless, the contracts between A and B as well as between B and C may affect the tort claim between A and C. For example, contractual limitation clauses found in the contract to which A (plaintiff suing in tort) was a party (but C (the defendant) was not) could be relevant.[114] The defendant may be able to rely on these contractual terms by arguing that he is a specifically designated beneficiary pursuant to the *Contracts (Rights of Third Parties) Act 1999* (UK). [115] These clauses may operate to limit the extent of tortious liability owed by the defendant. In that sense, this is akin to Situation (4) to which we now turn.

Situation (4): Tortious liability excluded by contract

Third, regardless of how tortious liability arose, the parties can by contract, subject to statutory regulation,[116] exclude tortious liability. For there to be contractual exclusion of tortious liability, the parties must expressly provide so in the contract; it is not sufficient to point to the presence of the contract in itself as indicating that the parties impliedly intended to exclude an otherwise independent basis of liability. An example is the well-known *Hedley Byrne* case, where the parties had by contract excluded any tortious liability for negligent misstatement. We call these 'contractual exclusion' cases.[117]

Situation (5): Overriding policy consideration independent of tort or contract

Finally, regardless of how the contractual and tortious liabilities have each arisen, the presence of any overriding policy consideration will always bar either claim. The only exception is if the policy consideration can be specifically constrained to either tortious or contractual liability, in which case the policy consideration will only affect that particular claim. We call these 'overriding policy exclusion' cases.

Take for example a claim for upkeep costs occasioned by the wrongful birth of a child. Assuming that both contractual and tortious actions are available (thereby ignoring the English context where there might be no contract to sue on), academics have largely suggested that the outcome should *not* differ whether framed as a contractual or tortious action. The explanation given for this view is that, if the reason for disallowing the claim is one of the broad public policy considerations accepted in *McFarlane v Tayside Health Board*,[118] then that should apply equally regardless of how the action is framed. Indeed, Jones has pointed out that the factors that led the House of Lords to reject an award of upkeep expenses in *McFarlane* would 'seem to be just as relevant to contractual claims as to tort claims'.[119] Thus, if the law treats the birth of a normal, healthy baby as a blessing and not a detriment capable of compensation (per Lord Millett), or that the benefits to the parents of having a healthy child are incalculable and therefore it cannot be established that the costs of rearing the child will exceed the value of the benefits (per Lord Hope), or that distributive justice does not permit such losses to be awarded (per Lord Steyn), then 'the existence of a contractual relationship between the parties would not obviously alter the outcome of such an approach, whether the obligation was to exercise reasonable care or to achieve a specific result'.[120] This may be an example of a broad public policy consideration that applies across tort and

contract; in this case the same result should be obtained regardless of whether the action was framed in tort or contract, and regardless of the general acceptance of concurrence.

The one exception to this broad operation of policy consideration across concurrent liability in tort and contract is if the particular policy consideration can be confined to either tort or contract. For example, if it is thought that damages for mental distress cannot be recovered in contract, and that that policy is particular to contract, then it should not carry over to prohibit the same claim in tort.[121] This of course oversimplifies matters because, as Burrows points out,[122] it is not the case that tort law, in particular by the tort of negligence, awards damages for mental distress all that easily. It is also not true that contract denies recovery of damages for mental distress, especially in the light of *Farley v Skinner*.[123]

Some possible answers to the applicable incident rule in certain fact situations

Having set out the different fact situations in which concurrent liability can arise, it is now apposite to consider how various legal issues will be analysed within this framework. This is not a call for a return to analysing the applicable incidental rule in concurrence by reference to the legal issues, but simply an acknowledgement that the legal issue will be the starting point of any analysis. The point about remoteness has already been covered above, so we will not repeat our analysis in respect of that incidental rule.

Type of recoverable losses

It has been suggested that the ease by which damages for mental distress are recovered in tort should be reconciled with the greater difficulty that such damages are recovered in contract, especially where there is concurrent liability in tort and contract. However, recent developments in contract law have made the recovery of such damages easier. On the contrary, recent developments in the tort of negligence have made such recovery harder.

In contract, such damages, or damages for 'loss of amenity', can be recovered if an important object of the contract was to give pleasure or amenity. That lost amenity is *directly* connected with the value that the promisee ascribes to the promised product or service. For example, in *Ruxley Electronics and Construction Ltd v Forsyth*,[124] the plaintiff had contracted with the defendant to build a swimming pool. The defendant, in breach of contract, built a pool whose depth was only 6 ft as opposed to the promised 7 ft 6 inches. The House of Lords awarded £2500 for loss of amenity even though the market value of the pool was unaffected. This sum represented the plaintiff's own valuation of the worth of the pool above the market value. Similarly, in *Farley v Skinner*, the plaintiff specifically asked the defendant surveyor to investigate whether his property would be adversely affected by aircraft noise. The defendant, in breach of contract, said that the property was not affected when in fact it was. The House of Lords awarded £10 000 for loss of amenity even though the market price of the property was not less than what the plaintiff paid. Again, this sum related to the plaintiff's own valuation of the property above its market value. Finally, following similar principles, the Singapore High Court in *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd*[125] awarded $50 000 for loss of amenity so as to compensate the plaintiff for the inconvenience experienced from undersized bedrooms. In contrast, the position is slightly different in tort law. In *White v Chief Constable of the South Yorkshire Police*,[126] Lord Hoffmann said that damages can only be awarded for a 'recognised psychiatric harm', as opposed to a mere mental distress occasioned by everyday consequences such as shock, fear, anxiety or grief. The position is likewise in Singapore.[127]

The contrast between the recovery of damages for mental distress in tort and contract has led Burrows to ask the significant question of whether, when there is concurrent liability, 'a plaintiff can invoke *Farley v Skinner* to evade the normal denial of liability in the tort of negligence for mere mental distress'.[128] And perhaps the corollary question might also be asked: 'can a plaintiff invoke the tort of negligence to avoid the general prohibition against damages for mental distress if *Farley v Skinner* does not apply?' As Burrows points out,[129] the most important case touching on this issue is *Hamilton Jones v David & Snape*,[130] in which a claim was brought against solicitors in both tort and contract for the recovery of mental distress said to be caused by the solicitors' negligence that had resulted in the plaintiff losing custody of her sons. Neuberger J concluded that the narrower rules of tort should not, in this case, preclude the application of the wider contract rules. His Lordship said this:

> [I]f a head of claim, in a case such as this, is recoverable in contract, the fact that it may not normally be recoverable in tort should not prevent it being recoverable in contract. The logic of the reasoning in [*Verderame v Commercial Union Assurance Co* [1993] BCLC 793] suggests, if anything, that the approach to damages in tort in such a case as this is governed by the approach to damages in contract.[131]

Burrows supports this reasoning in terms of principle and policy. In his view, the arguments in favour of narrowing liability for mental distress in tort, such as the need to avoid a flood of litigation, do not apply if the parties are in a contractual relationship, which will, by its very nature, restrict the reach of the claim.[132] However, it is also possible to analyse the problem as coming within fact Situation (5) above, that is, the policy considerations that restrict (or not restrict) the claim for damages for mental distress are particular to each body of law. Allowing one does not, to use Birks' expression, 'stultify'[133] legal development as a whole. Thus, because the policy considerations are particular to each, neither would trump the other, and the plaintiff should be allowed the freedom to take advantage of the rule that is more favourable to him. As for the converse situation of using tort to overcome the contractual restriction in *Farley v Skinner*, it is submitted that the present analysis would also result in the plaintiff being able to make use of tort to do so since the policy considerations for/against the recovery of damages for mental distress are peculiar to each area of law.

Contributory negligence

As for the defence of contributory negligence, Hobhouse J had held in *Vesta v Butcher*[134] that it would operate as a defence to breach of contract only where the defendant was concurrently liable for in breach of contractual duty of care as well as the tort of negligence. The reasoning appears to be that the defendant should not lose his right to the defence in tort just because the plaintiff has chosen to plead his claim in contract. However, there may be a concern that this has a bizarre effect in practice: it would encourage the defendant to argue he has breached *both* a strict contractual duty, as well as a fault-based tortious duty. The defendant would in effect be better off (by being able to plead contributory negligence) by saying that he is more at fault (by arguing that he has breached a tortious duty in addition to a contractual duty).

At present, there are two options that the law can take. The first is simply to say that contributory negligence applies in contract as well as tort;[135] and the second is to say that contributory negligence does not apply in contract at all,[136] that is, the *Astley* position. Where the defence is found in legislation, this involves an exercise of statutory interpretation. Where the legislation is silent on the matter and either option is thus plausible, we suggest to inquire into the fact situation from which the concurrent liability arises. By our analysis, if the tortious duty is derived from the contractual relationship, then the defence of contributory negligence should be available with respect to both claims, unless is precluded by the contractual arrangement (subject, of course, to legislation that controls such exclusion clauses), then there is good reason to exclude the defence for both types of claim. However, if the respective liabilities had arisen independently, then the plaintiff could cause the defendant to be unable to rely on the defence by pleading his case in contract only. This is a more principled approach that is tied to the parties' factual situations, rather than an arbitrary choice between contributory negligence being available in contract or tort.

Limitation periods

There are some fundamental differences between how limitation periods differ for contract and tort, even though a period of 6 years is imposed for both under, for example, the provisions of the *Limitation Act 1980* (UK). The difference lies in the way the start of the 6 years is calculated. Because breach of contract is actionable without proof of damage, the time starts accruing at the date of breach. In contrast, because the tort of negligence is actionable only upon proof of damage, the cause of action accrues only when damage is suffered. For the tortious claim, time only runs from the date of damage.[137] This is usually more favourable to the plaintiff, as more time may pass before the claim is time-barred.

Like Sir Rupert, we do not believe that the difference between limitation periods for contractual and tortious claims should affect the law on concurrent liability.[138] The purpose of limitations is to enable both plaintiffs and defendants to know where they stand in relation to a claim, and thereby structure their litigation accordingly. If a wronged plaintiff is unable to claim because of the onset of limitation, the law on concurrence should not be changed to accommodate his or her claim. Indeed, if there is a concern with the rules relating to limitation, then the proper course of action should be to amend them. The application of our framework without permitting limitation periods to affect the law will lead to a more coherent understanding of the law.

In sum, the application of our proposed framework to the two issues of type of recoverable loss and contributory negligence demonstrates the importance of recognising the true essence of concurrent liability, which is that the two streams of liabilities should apply equally and independently. It is important not to mistake the outcome where one stream prevails to mean that one had trumped the other; rather, that result is better understood as a consequence of the application of two independent set of rules to a particular factual situation.

Conclusion

This article proposes a framework of analysing concurrent liability that is consistent with the central reasoning of *Henderson v Merrett*. We have shown that context is important in assessing the applicable incidental rule in instances of concurrent liability. The central argument advanced is that the present understanding of the 'incident rules' in concurrent liability in tort and contract, such as the applicable rule of remoteness or limitation, is inconsistent with the rationale for concurrence laid down in *Henderson v Merrett*. Rather than analyse concurrence as a single situation and engage in what is effectively an arbitrary choice between the rules of tort or contract, it has been suggested that concurrence should be analysed as encompassing several possible situations, each requiring proper analysis as to which the applicable incident rule should be. There is no one fixed incidental rule for each legal issue. Rather, there will be different answers depending on the context, that is, the precise fact situation in which concurrent liability in tort and contract has arisen. It is also important to recognise that, save for the limited instance where parties have by contract excluded tortious liability, the incidental rules of tort will always apply alongside contractual rules. At times the outcome will be the same as if the contractual rules only applied, but that is because the application of the tortious rules yield the same result, rather than that they are ousted by contract. This is an important conceptual realisation because it preserves the central rationale for concurrence set out in *Henderson v Merrett*.

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1 However, where appropriate, we also discuss the approaches taken by other jurisdictions, such as Australia. We confine our discussion in this article to concurrent liability between tort and contract, although we acknowledge that concurrence can also involve other areas of the law of obligations, as Burrows has outlined: Andrew Burrows, 'Solving the Problem of Concurrent Liability' in Andrew Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart Publishing, 1998). Thus when we refer to 'concurrent liability', 'concurrence' or similar terms, we refer only to concurrent liability between tort and contract, unless otherwise specified.

2 [1995] 2 AC 145 ('*Henderson v Merrett*').

3 Andrew Burrows, 'Comparing Compensatory Damages in Tort and Contract: Some Problematic Issues' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook Co, 2011) 367.

4 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

5 W S Holsworth, *History of English Law* (Methuen, first published 1903) vol II, 357-67, vol III, 357-67.

6 Sir Rupert Jackson, 'Concurrent liability: Where have things gone wrong' (2015) 23 *Tort Law Review* 3, 8.

7 Ibid.

8 Ibid.

9 Hugh Beale (gen ed), *Chitty on Contracts* (Sweet and Maxwell, 31st ed, 2012) 102.

10 See also Jane Swanton, 'The Convergence of Tort and Contract' (1989) 12 *Sydney Law Review* 40, 41, who identifies three distinctions.

11 Except where there has been legislative intervention in specific contexts: for instance, *Unfair Contract Terms Act 1977* (UK) and relevant consumer regulations.

12 Beale, above n 9.

13 Swanton, above n 10.

14 Andrew Tettenborn, '*Hadley v Baxendale*: Contract Doctrine or Compensatory Rule?' (2005) 11 *Texas Wesleyan Law Review* 505, 515.

15 See, eg, *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20.

16 Swanton, above n 10. See further Andrew Robertion, 'The Limits of Voluntariness in Contract' (2005) 29 *Melbourne university Law Review* 179.

17 Michael Jones (gen ed), *Clerk & Lindsell on Torts* (Sweet and Maxwell, 20th ed, 2010) 2.

18 Andrew Burrows, 'Dividing the Law of Obligations' in Burrows, *Understanding the Law of Obligations*, above n 1, 5.

19 Ibid.

20 Ibid 6.

21 Swanton, above n 10. It comes down to a question of framing the relevant duty. Swanton argues that 'on a more general plane, it can be said duties in contract are owed to the whole world, in the sense that one owes a duty to every person in the world not to break a contractual promise made to him should one choose to enter a contract with him'.

22 Of course, this principle will not be brought into play where the issue concerns which limitation period applies to the claim.

23 Jackson, above n 6, 9.

24 *Groom v Crocker* [1939] 1 KB 194.

25 [1986] AC 80, 107 ('*Tai Hing Cotton Mill*').

26 [1964] AC 465 ('*Hedley Bryne*').

27 [1979] Ch 384 ('*Midland Bank*').

28 For the purpose of calculating limitation, the time for a claim of breach of contract would begin to run at the point of breach, whereas the time for a tort would run only from the time damage was suffered.

29 *Midland Bank* [1979] Ch 384, 406.

30 Ibid 411.

31 See the analysis of these by Oliver J ibid.

32 *Henderson v Merrett* [1995] 2 AC 145, 187, 193.

33 Swanton, above n 10, 40.

34 *Henderson v Merrett* [1995] 2 AC 145, 185.

35 This is because the contract limitation period starts to run after breach has occurred even if the plaintiff is not yet aware of this due to the absence of damage at that time.

36 *Henderson v Merrett* [1995] 2 AC 145, 184 (Lord Goff).

37 Richard Glofcheski, 'Tort/Contract Concurrency: The Demise of *Tai Hing Cotton Mill Ltd*' (1996) 26 *HKLJ* 34, 44.

38 *Henderson v Merrett* [1995] 2 AC 145, 206.

39 Swanton, above n 10, 56.

40 Burrows, above n 3.

41 Swanton, above n 10, 56.

42 (1980) Ch 297.

43 [1983] 1 AC 520.

44 Swanton, above n 10, 56-73.

45 Glofcheski, above n 37, 37.

46 Jackson, above n 6, 10.

47 Ibid 13.

48 Ibid.

49 Ibid. For another comparative study, see Basil S Markesinis, 'An expanding tort law -- the price of a rigid contract law' (1987) 103 *Law Quaterly Review* 354.

50 [2015] AC 1503 ('*AIB*').

51 With both of whom Lord Neuberger, Baroness Hale and Lord Wilson agreed.

52 Jamie Glister, 'Equitable Compensation' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 143.

53 *AIB* [2015] AC 1503 [71]. See also *Purrunsing v A'Court & Co* [2016] 4 WLR 81 [42] ('*Purrunsing*').

54 [1996] AC 421 ('*Target Holdings*').

55 *AIB* [2015] AC 1503 [136].

56 In *Various Claimants v Giambrone & Law* [2015] EWHC 1946 (QB) (07 July 2015), Foskett J considered the combined effect of *Target Holdings* [1996] AC 421 and *AIB* ibid, given their inconsistencies, to be difficult to grasp and articulate. In *Purrunsing* [2016] 4 WLR 81 [42], Judge Pelling QC, referring only to Lord Toulson's judgment, interpreted *AIB* as being 'concerned with the measure of equitable compensation for breach of trust that applies where there has been a breach of a bare trust arising in the context of a commercial contract to which the trustee and beneficiary are parties'.

57 See, eg, Andrew Tettenborn, 'Professional liability and remoteness: contract v tort' (2016) 32 *Professional Negligence* 68.

58 [2016] 2 WLR 1351 ('*Wellesley Partners LLP*').

59 Jackson, above n 6, 14.

60 Burrows, above n 3, 371-2.

61 (1854) 156 ER 145.

62 Burrows, above n 3, 370.

63 [1961] AC 388. See also ibid.

64 *The Heron II* [1969] 1 AC 350, 386 (Lord Reid).

65 *Wellesley Partners LLP* [2016] 2 WLR 1351 [68], [80].

66 This is the terminology adopted by Roth LJ in *Wellesley Partnership LLP* ibid (see [163]). To the same effect, Floyd LJ used the language of duties existing 'side by side' (see [80]).

67 Ibid [80] (Floyd LJ), [163] (Roth LJ), [186]-[187] (Longmore LJ). The judges were particularly persuaded by the argument in *McGregor on Damages* that the contracting parties are not strangers and had an opportunity to contemplate on risks and losses: Harvey McGregor, *McGregor on Damages* (Sweet and Maxwell, 19th ed, 2016) [22-009].

68 See discussion above at text to and around nn 37, 39.

69 Our observation is inspired by the analysis of Tilbury and Carter in respect of the earlier English decision of *The Arpad* [1934] P 189. See Michael Tilbury and J W Carter, 'Converging Liabilities and Security of Contract: Contributory Negligence in Australian Law' (2000) 16 *Journal of Contract Law* 78, 87-9,

70 Michael Tilbury and J W Carter, 'Converging Liabilities and Security of Contract: Contributory Negligence in Australian Law' (2000) 16 *Journal of Contract Law* 78, 90.

71 Robertson, above n 16, 208-9.

72 (1999) 197 CLR 1 ('*Astley*').

73 *Wrongs Act 1936* (South Australia) s 27A.

74 *Astley* (1999) 197 CLR 1 8 [12].

75 The decision of the Full Court of the Supreme Court of South Australia: *Austrust Pty Ltd v Astley* (1996) 67 SASR 207. For trial decision, see *Austrust Pty Ltd v Astley* (1993) 60 SASR 354.

76 *Astley* (1999) 197 CLR 1, 31 [71]. Callinan J, dissenting, was of the contrary view that the legislation applied to such a claim.

77 Ibid 35 [81].

78 Ibid 36-8 [84]-[88].

79 Eg, through the causation inquiry, as well as exclusion or limitation of liability.

80 *Astley* (1999) 197 CLR 1, 37-8 [88].

81 (2015) 255 CLR 661 ('*Selig*'). See also *Perpetual Trustee Co Ltd v Milanex Pty Ltd (in liq)* [2011] NSWCA 367 (28 November 2011).

82 In this case, the High Court of Australia concluded that the defence of proportionate liability for misleading and deceptive conduct was only applicable to a contravention of s 1041H of the *Corporations Act 2001* and would not affect claims arising from conventions of ss 1041E-041G (contravention of any of these provisions constitutes an offence).

83 (1999) 197 CLR 1, 55-7 [152]-[158].

84 See, eg, the *Law Reform (Miscellaneous Provisions) Amendment Act 2000* (NSW); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA); *Law Reform (Contributory Negligence) Amendment Act 2001* (Qld).

85 J L R Davies, 'Contributory Negligence and Breach of Contract: *Astley v Austrust Ltd*' (1999) 7 *Torts Law Journal* 117; Gary Davis and Jane Knowler, 'Down but not Out: Contributory Negligence, Contract, Statute and Common Law' (1999) 23 *Melbourne University Law Review* 795; Tilbury and Carter, above n 70; David Logan, 'Contributory fault in contract -- A step back?' (2000) 10 *Scots Law Times* 81, 83.

86 See, eg, J Swanton, 'Contributory Negligence is Not a Defence to Actions for Breach of Contract in Australian Law -- *Astley v Austrust Ltd*' (1999) 14 *JCL* 251, 260-2.

87 See, eg, Davis and Knowler, above n 85, 812-16. See further Nicholas Seddon, 'Contract Damages Where Both Parties Are at Fault' (2000) 15 *Journal of Contract Law* 207.

88 Tilbury and Carter, above n 70, 89-93.

89 Ibid 93.

90 *Wellesley Partners LLP* [2016] 2 WLR 1351 [80] (emphasis added).

91 The terminology of 'derivative duty' is coined by us but Taylor's analysis (see below) proceeded on similar reasoning.

92 See also Aaron Taylor, 'Whither Remoteness? *Wellesley Partners LLP v Withers LLP*' (2016) 79 *Modern Law Review* 678, 685.

93 Ibid.

94 [1986] QB 644.

95 Ibid 679.

96 See, eg, Burrows, above n 3.

97 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

98 Francis Reynolds, 'Contract and Tort: The View from the Contract Side of the Fence' (1993) 5 *Canterbury Law Review* 280, 281.

99 See, eg, Burrows, above n 3.

100 *Wellesley Partners LLP v Withers LLP* [2016] 2 WLR 1351 [163].

101 Ibid.

102 Roth LJ was inclined to apply the contractual remoteness test to these 'contract like' tortious liability cases: see ibid [163].

103 Taylor, above n 92, 686.

104 Ibid 690.

105 John D Abraham, 'Concurrent liability in contract and tort -- Apportionment of damages: An update' (1981) 3 *Journal of Advocates Quarterly* 430, 436.

106 See K W Wedderburn, 'Collateral Contracts' (1959) 17 *Cambridge Law Journal* 58 and Paul S Davies, 'Anticipated Contracts: Room for Agreement' (2010) 69 *Cambridge Law Journal* 467.

107 Taylor, above n 92, 686.

108 [2017] EWCA Civ 354 (07 April 2017).

109 Eg, trust exemption clauses and duty exclusion clauses. See, in particular, *Armitage v Nurse* [1998] Ch 241; *Citibank NA v MBIA Assurance SA* [2007] 1 All ER (Comm) 475. See also Paul Finn, 'Fiduciary Reflections' (2014) 88 *Australian Law Journal* 127, 142-3; cf Andrew Eastwood and Luke Hastings, 'A Response to Professor Finn's "Fiduciary Reflections"' (2014) 88 *Australian Law Journal* 314.

110 [2005] 1 NZLR 324 ('*Rolls-Royce*').

111 No physical damage was suffered.

112 See the refreshing analysis in William Thomson, 'The Continuum: A New Approach to the Place of Tort in a Contractual Matrix' (2006) 37 *Victoria University of Wellington Law Review* 131.

113 It is likely that, in the construction context and in relation to defects, courts are unwilling to find such a tortious duty of care to have arisen in the first place. See *Simaan General Contracting Co v Pilkington Glass Ltd [No 2]* [1988] QB 758. Cf *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 ('*Junior Books*'). However, *Junior Books* has been severely criticised. Even the Court of Appeal in *Simaan*, technically bound to follow *Junior Books*, declined to do so on the basis of being able to distinguish the dispute (main contractor as plaintiff) from the facts in *Junior Books* (employer as plaintiff).

114 The converse situation of limitation clauses being found in a contract to which the defendant was a party but the plaintiff was not is more difficult. It seems unfair to impose a burden on the plaintiff who is not bound by the contract. However, the NZ Court of Appeal seems to sugest that such clauses may be relied upon in situations where the presence of the terms was known to the plaintiff: see *Rolls-Royce* [2005] 1 NZLR 324, 352 (Glazebrook J).

115 The defendant may be able to rely on these contractual terms by being a specifically designated beneficiary pursuant to the *Contracts (Rights of Third Parties) Act 1999* (UK). See further Thomson, above n 112, 149.

116 See, eg, the *Unfair Contract Terms Act 1977* (UK).

117 This is what Burrows has termed the 'exclusion principle': Burrows, above n 1.

118 [2000] 2 AC 59 ('*McFarlane*').

119 Michael A Jones, *Medical Negligence* (Sweet and Maxwell, 4th ed, 2008) 116.

120 Ibid. See also Andrew Grubb, Judith Laing and Jean V McHale, *Principles of Medical Law* (Oxford University Press, 3rd ed, 2010) 313 and Christopher T Walton (ed), *Charlesworth & Percy on Negligence* (Sweet and Maxwell, 13th ed, 2014) 121.

121 Burrows, above n 3.

122 Ibid.

123 [2002] 2 AC 732 ('*Farley v Skinner*').

124 [1996] AC 344, 372.

125 [2009] 1 SLR 385 [128].

126 [1999] 2 AC 455, 501.

127 *Ngiam Kong Seng v Lim Chiew Hock* [2008] SGCA 23 (29 May 2008).

128 Burrows, above n 3.

129 Ibid.

130 [2004] 1 WLR 924.

131 Ibid.

132 Burrows, above n 3.

133 Peter Birks, 'Recovering Value Transferred Under an Illegal Contract' (2000) 1 *Theroetical Inquiries in Law* 155, 155.

134 [1989] AC 852.

135 UK Law Commission, 'Contributory Negligence as a Defence in Contract' (Law Com No 219, 1993).

136 *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214.

137 Establishing the date of damage may raise difficulties, such as the issue of discoverability and what constitutes 'damage': see Andrew McGee, *Limitation Periods* (Sweet and Maxwell, 7th ed, 2014) [5.007].

138 Jackson, above n 6, 13.