Contributory Negligence and Breach of Contract: The Implications of Astley v Austrust Ltd

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The High Court in Astley v Austrust Ltd *held, by a majority, that an award of damages for breach of contract could not be reduced under the South Australian apportionment of liability legislation despite the plaintiff's contributory negligence. This was the case even where the defendant was concurrently liable in tort and contract for breach of a duty of care. This article examines the High Court's reasoning, which appears to be contrary to the trend of judicial authority as well as to developments in legal doctrine. The article also examines the practical implications for professional defendants who have been made more vulnerable to their careless clients by the High Court's decision. Particular reference is made to Western Australia in view of the text of its apportionment legislation and in light of two Western Australian appellate cases in point which closely preceded the High Court's ruling.*

THE High Court decision in *Astley v Austrust Ltd*[1] has been criticised on a number of counts: 'regrettable ... adopt[ing] a conservative, mechanical, even formalistic construction of the legislation...',[2] 'unfortunate',[3] having 'bizarre consequences'[4] and 'a spur to law reform bodies',[5] but it has never been criticised for its lack of clarity. The Court had to answer two questions which it did

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1. (1999) 161 ALR 155.
2. 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.
3. N Seddon 'Contract Remedies where both Parties are at Fault' *Remedies Teacher Conference* (Melbourne, 28-29 Aug 1999) 7.
4. JLR Davis 'Contributory Negligence and Breach of Contract: *Astley v Austrust Ltd*' (1999) 7 TLJ 117, 121.
5. Ibid 128.

emphatically and unambiguously, tantalising with its first response and disappointing with its second.

The first question was 'whether a plaintiff can be guilty of contributory negligence where the defendant has contractually agreed to protect the plaintiff from the very loss or damage which the plaintiff has suffered as a result of the defendant's breach of duty'.[6] The second was whether an award of damages for breach of contract could be reduced under the apportionment of liability legislation[7] because of the plaintiff's contributory negligence, where the defendant was concurrently liable in tort and contract for breach of a duty of care.

The answer to the first question was a resounding and unanimous yes,[8] with the Court acknowledging that even where a defendant has promised the plaintiff particular protection against loss, where such loss occurs, the defendant is not precluded from claiming that the loss may be at least in part due to the plaintiff's failure to take reasonable care for the protection of its own interests. The Court clearly contemplated an expanded role for contributory negligence and a consequent advantage for defendants in their attenuated liability.[9]

The negative answer to the second question[10] rendered the effect of this newly acknowledged wider operation of contributory negligence almost nugatory in a practical sense by disallowing the application of the apportionment legislation to a damages award for breach of contract where there is concurrent liability in tort and contract. Thus, where a plaintiff chooses to sue in contract, any contributory negligence will be irrelevant to the damages calculus, with the defendant bearing the plaintiff's entire loss.

This article is concerned with the High Court's answer to the second question. Its stated reasons for its response were the 'text, history and purpose'[11] of the apportionment legislation, which it reviewed in some detail. However, an analysis of the majority judgment makes it clear that the Court was not simply engaging in an exercise of statutory construction in an objective sense. Rather, there was a non-negotiable premise underlying the Court's interpretation of the legislation and

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6. *Astley v Austrust* supra n 1, 157.
7. In this case the High Court was concerned with the Wrongs Act 1936 (SA) s 27A. There are equivalent provisions in other jurisdictions: see infra n 12.
8. Callinan J did not consider this question.
9. The High Court approved the decision of the NSW Court of Appeal in *Daniels v Anderson* (1995) 16 ACSR 607 (sub nom *AWA v Daniels* (1992) 7 ACSR 759), which held that even where a defendant, in breach of his or her duty, has failed to protect the plaintiff from the loss the defendant was employed to avoid, the plaintiff may be found to be contributorily negligent.
10. This was given by a majority of the Court, Callinan J dissenting.
11. *Astley v Austrust* supra n 1, 171.

critique of past authorities: the distinctiveness and separateness of tort and contract. The implications of this will be considered. Particular reference will be made to Western Australia for two reasons. First, the wording of the apportionment legislation[12] is significantly different in this State from that in other jurisdictions and this raises the question as to whether the decision in *Astley v Austrust*, based on the South Australian statute, is applicable to Western Australia. Secondly, the first two full Supreme Court cases which considered the issue of contributory negligence in a contractual setting on appeal were Western Australian and closely preceded *Astley v Austrust*.[13] Finally, in light of the emphasis the Court placed on the parties' contractual relationship, contractual mechanisms which might assist defendants where there is also fault on the plaintiff's part will be considered.

THE FACTS

Austrust Ltd, a trustee company, accepted appointment as trustee of a proposed trading trust which was to be set up to establish a piggery in New South Wales. Astley, a South Australian firm of solicitors, was retained by Austrust to give general advice concerning the trust deed and other trust documents. Austrust acquired two properties on behalf of the trust, entering into various loans giving rise to substantial liabilities. Six months later, the trust venture failed and the unit holders resolved to terminate the trust. The assets of the trust were insufficient to meet its liabilities and Austrust incurred extensive losses as trustee.

Austrust sued Astley for breach of contract and negligence in carrying out its retainer to give legal advice. Austrust claimed the solicitors were at fault in failing to advise that it should not have accepted the office of trustee without excluding personal liability for losses arising in the course of carrying out the trust. Astley denied liability and, in the alternative, pleaded contributory negligence on the part of Austrust, in its failure to investigate the viability of the venture.

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12. In this State the relevant legislation is the Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA) s 4(1). The corresponding legislation in other Australian jurisdictions is: Law Reform (Miscellaneous Provisions) 1955 (ACT) ss 14(1), 15(1); Law Reform (Miscellaneous Provisions) Act (NSW) 1965 ss 9, 10(1); Law Reform (Miscellaneous Provisions) Act (NT) 1956 ss 15(1), 16(1); Law Reform (Tortfeasors' Contribution, Contributory Negligence and Division of Chattels) Act 1952 (Qld) ss 4, 10; Wrongs Act 1936 (SA) ss 27A(1) and (3); Tortfeasors and Contributory Negligence Act 1954 (Tas) ss 2, 4(1); Wrongs Act 1958 (Vic) ss 25, 26(1). The template for most of these provisions was the Law Reform (Contributory Negligence) Act 1945 (Eng) ss 1(1), 4.
13. *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd* [1989] WAR 100; *Craig v Troy* [1997] WAR 96.

HISTORY

The trial judge, Mullighan J, found the solicitors had been negligent in not advising Austrust to exclude personal liability for losses incurred by the trust, limiting its liability to the extent of the trust assets. His Honour also found that Austrust had been contributorily negligent in failing to assess properly the financial viability of the trust.

The judge held that where the duty of care was the same in contract and tort, and both causes of action were pleaded, responsibility could be apportioned between the parties under section 27A of the Wrongs Act 1936 (SA). In this case he apportioned responsibility equally between the parties. The damages payable by Astley were thus reduced by 50 per cent.

Section 27A of the Wrongs Act 1936 relevantly provides:

> (3) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: Provided that —
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> (a) this subsection shall not operate to defeat any defence arising under a contract;
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> (b) this subsection is subject to subsection 4 of this section.[14]

The Full Court of the South Australian Supreme Court allowed Austrust's appeal against the finding of contributory negligence on two grounds. First, there was no evidence that a reasonably competent trustee would have been aware of the risk of personal liability, and secondly, the risk of personal liability was the very risk against which the solicitors, in the discharge of their professional responsibility, should have protected their client.

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14. S27A continues:

> (4) Where damages ... are recoverable by virtue of subsection (3) ... and a contract or enactment providing for a limitation of liability is applicable to the claim or the jurisdiction of the court is limited, the amount of the damages recoverable shall be arrived at as follows: ...
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> (b) the total damages so found shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in responsibility for the damage ...
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> (c) if the amount of damages as reduced under paragraph (b) of this subsection exceeds the limit provided for in the contract or enactment or the limit of the jurisdiction of the court, the court shall award the maximum amount of damages permitted by the contract, enactment, or limit of the court's jurisdiction.

THE HIGH COURT'S DECISION

1. Concurrent liability

The High Court[15] was clear in its recognition that concurrent liabilities in both contract and tort can arise between professional and client, although its acknowledgment of the existence of tortious liability was grudging. In such contracts there is a term implied by law that the professional promises to act with reasonable skill and care and, although the professional also owes the client a duty of care in tort, this is superfluous since the contract entirely defines the relationship of the parties[16] — according to the Court the tortious duty can be modified or excluded according to the agreement of the parties. The Court implicitly alluded to the fact that if the parties so agree, liability for negligence can also be excluded by the contract. The Court was at pains to emphasise the differences between tort and contract, practically and theoretically,[17] harking back nostalgically to the time when, long before 'the imperial march of modern negligence',[18] contracts of service included a term that they would be performed with reasonable skill and care. It thus rejected Deane J's view in *Hawkins v Clayton*,[19] that where there is a common law duty of care there is no justification for implying a contractual term of the same content. Rather, it preferred to align itself with the House of Lords which, in *Henderson v Merrett*,[20] held that where there is concurrent liability a plaintiff can choose to sue in tort or contract, whichever is more advantageous. This is consistent with the High Court's view of the distinctiveness of the two causes of action, a refrain repeated often throughout the judgment.[21]

The Court repeatedly emphasised the freedom of the contracting parties to make agreements as contrasted with duties imposed without consent in tort. It did so in this context as a justification for the existence of concurrent liability. Callinan J, in the minority, argued that the implied term that a professional act with reasonable skill and care cannot reasonably be in the contemplation of the parties when their agreement is formed and therefore the care obligation is more akin to an imposed tort duty.[22] With respect, this overlooks the fact that in contracts

15. In this article the 'High Court' or the 'Court' refers to the majority judgment. References to Callinan J's judgment will be made specifically.
16. *Astley v Austrust* supra n 1, 170.
17. The Court focused on differences in rules of remoteness, limitation periods and apportionment.
18. *Astley v Austrust* supra n 1, 170.
19. (1988) 164 CLR 539, 585.
20. [1995] 2 AC 145, 193-194.
21. See infra pp 24, 25, 33.
22. *Astley v Austrust* supra n 1, 192.

for professional services, there is an unspoken expectation by the client of the performance of the implied obligation by the professional, and this has historically been factored into the client's consideration. This implication may change over time according to community expectations. The Court, however, did not discuss the existence of serious fetters on the parties' freedom such as non-excludable implied terms in consumer contracts, the doctrine of unconscionability and specific statutory regimes governing certain types of contract.[23]

2. The case law on the application of the apportionment legislation to actions for breach of contract

In the introduction to its detailed review of the case law on this topic, the High Court noted that these decisions provided little help in the resolution of the issue as no clear trend was evident from them.[24] This neutral observation soon gave way to a clear preference for those decisions which denied the applicability of the legislation to actions for breach of contract.[25] The reason advanced for their adoption was that the original purpose of the legislation was solely to ameliorate the plight of plaintiffs who, when suing in negligence before the enactment of the legislation, would have been denied any damages at all if they were contributorily negligent. The Court distinguished this situation from that of a plaintiff who sues in contract, going to some length to prove that contributory negligence was never judicially recognised as a defence to actions in contract.[26] The cases which support the application of the legislation to breach of contract actions were discarded because of statutory misinterpretation as well as insufficient appreciation of the purpose of the legislation.

In section 27A(1) of the Wrongs Act 1936 (SA), 'fault' is defined as:[27]

> Negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

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23. See Trade Practices Act 1974 (Cth) ss 68, 70-74, pt IV A; Uniform Consumer Credit Code.
24. This was so even though the majority of the cases cited were themselves evidence of a trend in favour of the application of the legislation to contract.
25. *Belous v Willetts* [1970] VR 45; *Harper v Ashtons Circus Pty Ltd* [1972] 2 NSWLR 395; *AS James Pty Ltd v Duncan* [1970] VR 705.
26. The Court highlighted the absence of any supporting pre-legislation case law, as well as the general omission of any mention of the defence in a contractual context in the 'great works on pleading': *Astley v Austrust* supra n 1, 178-179. The Court expressly rejected Professor Glanville Williams' thesis for the existence of the defence as flying in the face of clear evidence, or lack of it: see NE Palmer & PJ Davies 'Contributory Negligence and Breach of Contract: English and Australasian Attitudes Compared' (1980) 29 Int & Comp LQ 415.
27. For jurisdictions other than SA: see supra n 12.

The High Court was of the view that the first limb of this definition, namely 'negligence ... which gives rise to a liability in tort', refers to the defendant's fault, which clearly has to be tortious; the second limb, namely 'negligence ... which give[s] rise to the defence of contributory negligence', refers to a plaintiff who could only be suing in tort since, historically, contributory negligence had application exclusively to tort. It disagreed with those cases which held either that 'negligence' could refer to a negligent breach of contract[28] or those which held that simply because a defendant was liable in tort, where there was concurrent liability and a plaintiff sued in contract, the operation of the apportionment legislation would be attracted.[29] In both cases, the Court opined, too little attention had been paid to the purpose of the legislation, which was overshadowed by an unwarranted assumption of the paramountcy of the principle of apportionment. In this context, the Court emphasised the practical differences between tort and contract actions, highlighting the fact that, because of the terms of the contract and the rules of remoteness, damages for breach of contract may be different from those in tort. The Court also drew attention to jurisdictional and limitation period differences between the two. These differences, which have been acknowledged by the lower courts, made it illogical, according to the High Court, for the apportionment legislation to apply to both tort and contract. With respect, the High Court failed to explain satisfactorily how these differences preclude apportionment in the case of contract.

3. The High Court's interpretation of the apportionment legislation

In addition to interpreting the definition of 'fault' in section 27A(1) so as to exclude breach of contract,[30] the Court highlighted other parts of the legislation which it said evidence the fact that damages for breach of contract are unaffected by apportionment. In particular, it referred to the provisos to sections 27A(3) and (4): defences arising under contract were not to be defeated by the apportionment provision,[31] and damages were to be limited to the maximum allowed under contract.[32] In the Court's opinion it was significant that there is no section

28. *Queen's Bridge Motors & Engineering Co Pty Ltd v Edwards* [1964] Tas SR 93; *W & G Genders Pty Ltd v Noel Searle (Tas) Pty Ltd* [1977] Tas SR 132.
29. See *Rowe v Turner Hopkins & Partners* [1980] 2NZLR 550, *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488; *Bains Harding Construction & Roofing (Aust) Pty Ltd v McCredie Richmond & Partners Pty Ltd* (1988) 13 NSWLR 437; *AWA v Daniels* (1992) 7 ACSR 759; *Craig v Troy* supra n 13.
30. See supra p 23.
31. S 27A(3)(a): see supra p 21.
32. S 27A(4)(c): see supra n 14.

addressing the reverse situation where contract damages would be larger than those resulting from the operation of the Act. This was regarded as a clear indication not only that the legislature envisaged the independence of actions in contract and tort, but also of the primacy of the contractual agreement over tortious claims.

The Court reiterated the original and abiding purpose of the apportionment legislation which was to 'abate the rigour' of the historical rule that disallowed a plaintiff from recovering any damages in tort where the plaintiff had been contributorily negligent and noted how bizarre it would be if a measure designed to improve the plaintiff's rights was at the same time used to diminish them. The Court's view of the purpose of the legislation accords with the generally accepted one at the time of its enactment,[33] although it would have been open to the Court to construe the purpose more expansively. The Court could have taken notice of the fact that, at the time the legislation was enacted, there was a much clearer demarcation between tort and contract. In contracts where there was an implied term to take care; historically, this could give rise to an action for damages for breach of contract, but not to a concurrent action in negligence.[34] In accepting the notion of concurrent liability which has developed, it was open to the Court to reason that, as the situation has altered since enactment, the legislation would now also apply to actions in contract.[35] It could also have interpreted the legislation according to its spirit as generally allowing for a plaintiff's carelessness to be a factor in any damages calculus whether it be in tort or contract,[36] for in contract, as formerly in tort, the plaintiff's carelessness may result in no recovery for him or her. This will be the case if the carelessness is regarded as a cause of the loss in the legal sense even though, in a scientific sense, the defendants conduct may have contributed to the loss.[37] Conversely, in contract, a plaintiff may be entitled to complete compensation because its conduct, although careless, is causally irrelevant.[38] The Court chose to adopt a narrow interpretation of the legislation when a broader one would have offended neither history, logic nor considerations of fairness.[39]

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33. In the Second Reading speech of the SA Attorney-General which dealt with the Wrongs Act, there was no suggestion that the legislation would have any impact on contract damages: see Palmer & Davies supra n 26, 417.
34. Swanton supra n 2, 278-279.
35. WPM Zeeman 'Contributory Negligence: A Defence Limited to Actions in Tort?' (1994) 2 Tort L Rev 16, 18-19.
36. Davis supra n 4, 122-123; M Legg 'The High Court's Decision on Concurrent Liability and Contributory Negligence in *Astley v Austrust Ltd*' (1999) 17 Aust Bar Rev 262, 274.
37. *Lexmead Ltd v Lewis* [1982] AC 225; *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310.
38. *Arthur Young* supra n 13.
39. Seddon has proposed that apportionment of liability in contract (and s 52 of the Trade Practices Act) can be achieved using existing notions of causation: N Seddon 'Misleading Conduct: The Case for Proportionality' (1997) 7 ALJ 146.

The majority concluded its judgment with an unequivocal insistence on the difference between tort and contract. No area of overlap was conceded, with the Court regarding the two types of obligation as discretely compartmentalised within the legal system. This is to be contrasted with Deane J's holistic approach as enunciated in *Hawkins v Clayton*, according to which the 'law of contract and the law of tort are ... but two of a number of imprecise divisions, for the purpose of classification, of a general body of rules constituting one coherent system of law.'[40] Later, in *Commonwealth v Amann Aviation Pty Ltd,*[41] Deane J commented that the general principle governing the assessment of compensatory damages was the same in contract and tort. His Honour noted that any differences in the rules governing the application of the principle were due to history rather than 'reasoned development' and were of 'diminishing significance'. He highlighted the 'gradual assimilation' of the contract and tort remoteness tests.[42] The Court in *Astley v Austrust* failed to acknowledge this.

The Court emphasised that in contract, obligations are assumed voluntarily in return for consideration. More particularly, the implied contractual obligation by one party to take reasonable care is owed because it has been paid for by an obligation undertaken by the other party. Any damage caused by breach of the former obligation will be borne solely by the party in breach unless the parties have stipulated that the risk should be allocated differently. If the parties want to apportion liability in a situation where the plaintiff's actions contribute to the damage, they can provide for it in the contract, also setting the appropriate consideration.

In a tortious relationship, the Court noted, by way of contrast, that obligations to take reasonable care are imposed on the parties by law. In this situation apportionment of liability is appropriate since neither party has negotiated for any assumption or alleviation of risk. The Court compared a scenario involving the gratuitous services of a defendant, where it confirmed that it would be fair to apportion liability in the event of the negligence of both parties, with that of a defendant who promises to exercise reasonable care in return for a reward. In the latter case it would be antithetical to the parties' bargain for there to be apportionment simply because of the plaintiff's contribution to the damage suffered. Thus, the Court reasoned, because of the fundamental difference between tort and contract, there is no anomaly in confining the operation of the apportionment legislation to tort. The Court bolstered this argument by referring to the preference of commercial people for certainty over such vague concepts as justice and equity,[43] which are applied to the apportionment of damages under the legislation.

40. Supra n 19, 584.
41. (1991) 174 CLR 64, 116.
42. *Parsons Ltd v Uttley Ingham & Co* [1978] QB 791.
43. Wrongs Act 1936 (SA) s 28A(3) and its equivalents in other jurisdictions.

Unexpectedly, at the conclusion of the Court's exposition of the difference between tort and contract, their Honours remarked that, for contract to be covered by the apportionment legislation, Parliament would need to amend that legislation. However, they 'express[ed] no view' about the desirability of any such amendment.[44] In view of their preceding arguments, a statement that statutory amendment was undesirable or unnecessary would have been more logical. Had they concentrated on the 'text, history and purpose' of the statute in their analysis, as was their stated intention,[45] rather than on doctrinal differences between contract and tort, their concluding comments would have been unremarkable. As it stands, a reader of the judgment is left to ponder whether the Court is committed, as a matter of principle, to the distinction between tort and contract, or whether the difference between the two is emphasised as a matter of convenience to justify a literal interpretation of the legislation.

The High Court's depiction of the contract relationship is curious. It has an air of nostalgia about it, harking back 25 years. It is true that the parties can negotiate about price and mutual obligations, but only up to a point. As mentioned earlier,[46] there are serious constraints on the freedom of contracting parties, including doctrines which are eroding the traditional rules of contract. This makes the Court's reference to the advantages of the 'fixed rules' of contract, as compared with the uncertainties in the application of the apportionment legislation, an unusual observation. Clearly, the boundaries between tort and contract are becoming more blurred. This is no more evident than in the doctrines of promissory estoppel, unjust enrichment, unconscionability, relief against penalties, and non-excludable implied terms, as well as the trend towards the coalescence of rules of remoteness and damages assessment in tort and contract.[47] This particular trend has been acknowledged by the High Court in the past.

It is true, in theory, that the parties to a professional services contract could agree to include an apportionment of liability clause in their contract, but the reality is that if the client, who is usually in an inferior position in terms of bargaining power and understanding, were to impugn the clause afterwards, it could be negated on the ground of unconscionability (or as being contrary to an imposed professional standard).[48] The focus of the law of contract in the 19th and most of the 20th century was on identifying mutual promises in an exchange equation. More recently its function has been to decide which promises should be enforced, which detriments

44. *Astley v Austrust* supra n 1, 182.
45. Ibid, 171.
46. Supra p 23.
47. K Mason 'Contract and Tort: Looking Across the Boundary from the Side of Contract' (1987) 61 ALJ 228.
48. See infra pp 36-37.

suffered should be compensated, and which benefits conferred should be paid for. *Astley v Austrust* suggests that the High Court is still primarily concerned with identifying promises.

As a result of the Court's decision, any professional who is sued by a client in contract for failing to exercise reasonable skill and care will not be able to contend that damages should be reduced because of that client's contributory negligence. Clearly, wherever possible, a client should be advised to sue in contract rather than tort,[49] thus ensuring that the professional will be compelled to rely on a limited range of contract mechanisms for relief in the event of the client's carelessness.[50]

WESTERN AUSTRALIAN LEGISLATION

In Western Australia, the relevant apportionment legislation is the Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947. Its long title is, 'An Act relating to the Common Law Doctrine of Contributory Negligence; and to the liability of joint and several tortfeasors to make contribution in damages'. Section 4(1) provides:

> Whenever in any claim for damages founded on an allegation of negligence the Court is satisfied that the defendant was guilty of an act of negligence conducing to the happening of the event which caused the damage then notwithstanding that the plaintiff had the last opportunity of avoiding or could by the exercise of reasonable care, have avoided the consequences of the defendant's act or might otherwise be held guilty of contributory negligence, the defendant shall not for that reason be entitled to judgment, but the Court shall reduce the damages which would be recoverable by the plaintiff if the happening of the event which caused the damage had been solely due to the negligence of the defendant to such extent as the Court thinks just in accordance with the degree of negligence attributable to the plaintiff:
> Provided that —
> (a) this subsection shall not operate to defeat any defence arising under a contract;
> (b) where any contract or enactment providing for the limitation of liability is applicable to the claim the amount of damages recoverable by virtue of this subsection shall not exceed the maximum limit applicable.

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49. Jane Swanton foreshadows eligibility distinctions between plaintiffs being based on formality rather than fairness — eg, a paying spectator at a sporting event compared with one who has received a free pass: see Swanton supra n 2, 261.
50. See infra p 34 et seq.

The language used in section 4(1) is different from that used in the corresponding English law which provided the precedent for the apportionment legislation in most other Australian States and Territories. In Western Australia, the provision is applicable where there is negligence on the part of the defendant and plaintiff. The word 'negligence' is defined in section 3 only to the extent that it is said to include breach of statutory duty. In jurisdictions other than Western Australia, the corresponding provision is based on fault. An example is section 27A of the Wrongs Act 1936 (SA).[51]

WESTERN AUSTRALIAN CASE LAW

Astley v Austrust concerned the South Australian apportionment statute.[52] Given the difference in wording between the South Australian and Western Australian legislation, it is important to inquire whether that case, and earlier case law from other jurisdictions, is relevant to this State. Two Western Australian cases have specifically considered the wording of the local Act as well as the appropriateness of the application of the doctrine of contributory negligence to contract: *Arthur Young & Co v WA Chip & Pulp Co*[53] and *Craig v Troy*.[54] These cases reached a decision different from that in *Astley v Austrust.*

1. Arthur Young

In *Arthur Young,* a firm of accountants, Arthur Young & Co, was sued by its client, WA Chip & Pulp Co ('the company'), in both contract and tort for negligent performance of its duties as auditor. The company claimed that its accountants should have detected the unauthorised borrowing of one of its senior officers in the course of the audit, thereby avoiding the losses the company incurred. Neither the trial judge nor a majority of the Full Court of the Supreme Court were in any doubt either about the existence in principle of the auditor's concurrent liability, or the existence in fact, in the circumstances of the case, of the auditor's negligence and breach of duty. The minority, albeit reluctantly, also accepted this analysis.[55] Asserted as a defence by the auditor, the issue of contributory negligence provoked a sharp division of opinion in the Full Court.

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51. 'Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons.' Fault is defined to mean 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would apart from this Act give rise to the defence of contributory negligence.'
52. The sections interpreted were ss 27A(1), 27A(3) and 27A(4) of the Wrongs Act 1936 (SA).
53. Supra n 13.
54. Supra n 13.
55. *Arthur Young* supra n 13, 102-103. Burt CJ preferred an analysis where the auditor was solely liable in negligence, although he felt constrained to hold there was concurrent liability in tort and contract.

The majority held that, historically, contributory negligence was irrelevant to an action in contract and the text of the Western Australian apportionment legislation made it clear that this position was not altered by that statute. Their Honours thought that the difference in wording between the Western Australian Act and the corresponding statutes in other States was significant. Wallace J specifically stated that the difference was clear from the long title of the Western Australian Act. Unlike the long titles of equivalent legislation, the Western Australian title seemed obviously to confine the application of the Act to tort, with its reference to 'contributory negligence and tortfeasors'. Brinsden J regarded previous English and Australian cases which had considered contributory negligence as a defence to an action in contract as irrelevant to the matter at hand because of the difference in wording between the apportionment legislation examined in those cases and the Western Australian legislation — specifically, the fact that the Western Australian legislation was negligence-based rather than fault-based made it qualitatively different in his Honour's view. The two majority judges also referred to the history of the Western Australian Act as supporting the exclusion of contributory negligence in contract claims although curiously they did not explain the singular features of the history of the Western Australian legislation that render it so different from comparable statutes in other jurisdictions.[56]

Burt CJ, dissenting, made no comment about the distinctiveness of the Western Australian Act. His first appeal was to common sense: he argued that, if a plaintiff fails to exercise reasonable care and this contributes to the loss sustained, damages should be reduced accordingly, regardless of whether the plaintiff's claim is in tort or contract. His Honour adopted 'the conventional approach'[57] to the question of the applicability of contributory negligence to contract, which was to construe the terms of the statute. Noting that the common law prior to the passing of the Act had not settled this question, he resorted to logic to sustain his interpretation of the statute: since the doctrine of contributory negligence was based on the notion of the plaintiff's conduct being to some degree responsible for the damage suffered, thus historically negating the effect of the defendant's negligence, there was no reason why the doctrine should not apply where the duty to take care arose both out of contract and in tort. His Honour concluded that section 4(1) of the Western Australian Act both reflected and addressed this issue by allowing contributory negligence as a partial (but not total) defence to an action for breach of contract when there was concurrent liability in tort — a 'claim for damages founded on an allegation of negligence' applies to both contract and tort.[58]

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56. See C Lockhart 'Contributory Negligence as a Defence to a Claim for Breach of Contract: *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd*' (1989) 19 UWAL Rev 411, 417.
57. *Arthur Young* supra n 13, 103.
58. S 4(1). On the evidence, Burt CJ found there had been no contributory negligence by the company.

2. Craig v Troy

In *Craig v Troy*,[59] the Craigs engaged an accountant, Troy, a person of apparent expertise in hotel development and management, to advise them on the feasibility of refurbishing their hotel. Troy was aware that the costs of refurbishment would have to be met from income earned by the hotel itself. Troy prepared a feasibility study which indicated that the project was economically viable, but he neglected to conduct market research which was vital to the assessment of the project's viability. Troy continued to advise and encourage the Craigs after his firm had merged with another (Nelson Wheeler), and later after he had formed a partnership with an employee of that firm (Troy & Bonavita). The Craigs commenced the refurbishment, but the hotel's income was insufficient to cover the owners' indebtedness. The family company went into receivership and the hotel and other assets had to be sold. Damages of $4 million were awarded by the trial judge against Troy & Bonavita.

On appeal, the Craigs argued that the damages award against Troy & Bonavita should have been entered concurrently against Nelson Wheeler. A majority of the Full Court (Malcolm CJ and Wallwork J) agreed. Troy, Bonavita and Nelson Wheeler all cross-appealed on the basis that there had been contributory negligence by the Craigs. On the facts, the Full Court unanimously rejected this contention. Malcolm CJ took the opportunity to examine the Western Australian apportionment legislation, and the question of whether the defence of contributory negligence was possible under the statute when an action was brought in contract.

According to Malcolm CJ, although the Western Australian legislation was 'idiosyncratic' and its 'origins ... obscure', the differences between it and other equivalent legislation were not material. In contrast to the majority in *Arthur Young,* his Honour considered that, where there was concurrent liability in contract and tort, a breach of a duty of care arising under contract could be characterised as 'an act of negligence'. In fact, during the course of his judgment, his Honour referred to the definition of 'fault' (a definition not found in the WA legislation but common to the legislation of other jurisdictions) in arguing for the existence of the defence of contributory negligence under the Western Australian Act in an action for breach of contract. He said that even if the defendant breached the implied term imposing a duty of care in contract, where there was concurrent liability in tort, the defendant's conduct amounted to fault, that is, to 'negligence ... which would give rise to a liability in tort ... or the defence of contributory negligence'. The application of this definition to the Western Australian Act was a clear indication that its omission from the Act was irrelevant. The references to tortious concepts in

59. Supra n 13.

the Western Australian Act in no way hindered the Chief Justice's interpretation of it as applying to contract. The long title of the Act, although including the word 'tortfeasors' could not be used to contradict 'any clear or unambiguous language'[60] in the provisions of the Act.

The fact that section 4(1), unlike the corresponding provisions in other States, refers to the irrelevance of the plaintiff's having the 'last opportunity' of avoiding the consequences of the defendant's act might seem to indicate that the legislation is confined to qualifying the common law defence of contributory negligence in tort.

The 'last opportunity' rule evolved at common law to mitigate the harshness of the doctrine of contributory negligence. Where a defendant could have avoided the consequences of a plaintiff's negligence but for the former's own negligence, the plaintiff could recover. The result was an all-or-nothing allocation of fault, not apportionment.[61] Malcolm CJ's silence on this point makes it clear he does not regard this expression as an impediment to his thesis that the provision covers breach of contract: as long as liability is concurrent, an 'act of negligence' will also amount to a breach of contract. His Honour was in no doubt that the different form of the Western Australian legislation signified no difference in substance from corresponding legislation in other jurisdictions.[62]

After bringing historical proof that professional liability, although based initially on breach of contract alone, developed into a dichotomous liability underpinned concurrently by tort and contract,[63] his Honour asserted that breach of either duty would attract the possibility of the defence of contributory negligence. The 'clear and unambiguous language of the statute'[64] was the basis for his assertion that 'negligence giving rise to a liability in tort'[65] could describe both a breach of a duty in tort to act with reasonable care as well as a breach of an implied contractual term to exercise reasonable care when the two operated concurrently; and 'negligence ... which would apart from this Act, give rise to the defence of contributory negligence'[66] could generally describe a plaintiff's negligent conduct. His Honour paid particular attention to the provisos to section 4(1) which supported the application of the legislation to contract. He argued that proviso (a),[67] in its reference to contract defences, clearly contemplated the provision's application to

60. Ibid, 152.
61. *Davies v Mann* (1842) 10 M & W 546.
62. See infra p 34 for the High Court's view.
63. *Craig v Troy* supra n 13, 155-157.
64. Ibid, 152
65. Ibid, 153.
66. Ibid.
67. 'Provided that: (a) this subsection shall not operate to defeat any defence arising under a contract.'

contract. He argued that defences to claims in tort do not normally arise 'under' a contract. Proviso (b) was even more explicit in its reference to contract.

Declining to follow the majority decision, the Chief Justice instead endorsed the dissenting judgment of Burt CJ in *Arthur Young*, agreeing with his Honour's conclusions and reasoning.[68] Malcolm CJ differed only in his assessment of the common law, demonstrating with the aid of 19th and 20th century cases that contributory negligence was applicable to cases where there was concurrent liability in contract and tort.[69] His Honour noted that since the decision in *Arthur Young*, there had been a clear trend of authority in different Australian jurisdictions supporting the availability of the statutory defence of contributory negligence in contract where there was also liability in tort. Malcolm CJ reviewed a number of cases, the great majority of which supported contributory negligence in contract, explaining that other cases commonly cited as authority for the non-availability of contributory negligence in contract were based solely on breach of contract, with no acknowledgment of concurrent liability in tort.[70] His Honour's interpretation of the legislation was not a radical one. It necessitated no violence to the text. It was consistent with the purpose of the enactment, as expanded over time, as well as the trend of authority. Endorsement of the Chief Justice's reasoning on this issue by Franklyn and Wallwork JJ gave this case the distinction of being the most authoritative Australian decision to date in favour of the application of the apportionment legislation to contract.

3. The High Court's response to the Western Australian decisions

The majority of the High Court disagreed emphatically with Malcolm CJ's interpretation of the Western Australian legislation in *Craig v Troy*. Unfortunately, the Court chose not to offer any response to the detailed arguments raised by the Chief Justice based on history, weight of authority and logic. Instead, its focus was narrow, centred on the Chief Justice's interpretation of the provisos, which it said was erroneous. Their Honours asserted that the function of the first proviso was to ensure that no damages award under the legislation in response to a claim in tort could override any contractual restriction. The contractual arrangement between the parties took precedence over any claim in tort. This was further evidenced by the fact that the legislation did not seek to regulate the situation where damages under contract would be larger than those awarded under the Act. *Craig v Troy* was, according to the High Court, part of the unsatisfactory case law[71] in the area,

68. *Craig v Troy* supra n 13, 155.
69. Ibid, 155-161.
70. *Belous v Willetts* supra n 25; *AS James Pty Ltd v Duncan* supra n 25.
71. *Astley v Austrust* supra n 1, 176.

displaying 'substantial flaws of reasoning'.[72] The majority decision in *Arthur Young*, on the inapplicability of the apportionment legislation to contract, was implicitly endorsed.

There was also implicit endorsement of Malcolm CJ's view that the difference in wording in the Western Australian Act from that in comparable legislation in other jurisdictions was immaterial. This seems clear from the omission by the High Court, in its reference to *Craig v Troy*, of any comment on the significance of the textual divergence of the Western Australian Act, coupled with the remark that the Western Australian provision was 'equivalent' to section 27A(3) of the South Australian Act.[73] This matter has, therefore, clearly and satisfactorily been put beyond doubt. By contrast, the Court's dismissive attitude towards Malcolm CJ's reasoning, as evidenced by its surprisingly brief treatment of the detailed and compelling arguments raised by him, leaves many questions unanswered.[74] The reader is left with the clear impression that the Court's commitment to the absolute distinction between tort and contract will remain impervious to any legal argument, no matter how cogent.

PROFESSIONALS SUED IN CONTRACT BY CARELESS CLIENTS

In light of the decision in *Astley v Austrust*, legal mechanisms which may provide some relief for professional defendants must be closely investigated.

1. Intrinsic limiting factors

The High Court noted that in contract the 'risk is borne by the party whose breach of contract is causally connected to the damage'.[75] Where the plaintiff's conduct is the effective cause of the loss despite the defendant's breach, either because the effect of the defendant's breach has been superseded by the plaintiff's conduct[76] or because there has been a break in the chain of causation,[77] the plaintiff will recover only nominal damages. The causation requirement may provide some relief for a defendant, but only in that limited range of circumstances where its own conduct ceases to be causally relevant. In situations where a plaintiff's conduct is negligent, but does not negate the causative impact of the defendant's breach, the

72. Ibid.
73. Ibid.
74. Note that *Astley v Austrust* was applied in the WA case of *Mouritz v Hegedus* (unreported, WA Sup Ct, Apr 1999).
75. *Astley v Austrust* supra n 1, 181.
76. *Alexander v Cambridge Credit Corp* supra n 37.
77. *Lexmead Ltd v Lewis* supra n 37.

defendant will be wholly liable.[78] The rules of causation do not allow for any apportionment of responsibility.[79]

The rules of remoteness in contract[80] will operate to limit a defendant's liability although not allowing for any formal apportionment of responsibility. For example, a client's carelessness in not appraising an adviser of the potential for special loss in the event of breach will serve to reduce the amount of damages recoverable.[81] A plaintiff's failure to act reasonably in mitigating its loss may also reduce the quantum of damages recoverable from the defendant, although there is no apportionment of liability. Mitigation is only relevant after breach has occurred.[82]

2. Apportionment clauses

It may be open to professionals to include clauses in their retainers which provide for apportionment of damages according to the respective fault of the parties. Although the High Court alluded to this possibility,[83] it may be more theoretical than practical for professional advisers. First, a client is unlikely to be impressed by a professional who, at the same time as promising a high standard of service, seeks to limit the consequences of any breach or to shift the risk back to the client. Such a clause may not be commercially viable.

Secondly, a clause which in effect seeks to limit the impact of the professional's negligence may be inconsistent with the standard of performance required of him or her. Lawyers, for example, are under a contractual duty at common law to exercise a reasonable and competent degree of skill,[84] and the standard may be higher for a specialist lawyer.[85] This duty has also been translated into a set of ethical standards required of lawyers in all jurisdictions. For example, according

78. In *Astley v Austrust* supra n 1, 181, although the causation issue was not argued, it seems to have been assumed by both parties that Austrust's conduct, though careless, did not disturb the causal impact of Astley's breach.
79. However, Seddon has suggested the law could develop so that damage recoverable by a plaintiff could be described as solely the damage caused by the defendant: Seddon supra n 3, 7.
80. The High Court was as pains to point out that the rules of remoteness in contract differed from those in tort, even though there has been significant case law signalling a merger of the two: see *Astley v Austrust* supra n 1, 174. See also *Parson v Uttley Ingham & Co* [1978] QB 791; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.
81. *Victoria Laundry v Newman Industries Ltd* [1949] 2 KB 528.
82. Legg notes that the principle of mitigation operates at a secondary level whereas apportionment deals with the plaintiff being a primary cause of its own loss: Legg supra n 36, 275.
83. *Astley v Austrust* supra n 1, 181.
84. *Lamphier v Phipos* (1838) 8 C&P 475, 479.
85. See eg *Toronto Dominion Australia v Saque Sc* (unreported, Vic Sup Ct, 26 Jul 1995).

to the Professional Conduct Rules formulated by the Law Society of Western Australia:

> A practitioner shall take such legal action consistent with his retainer as is necessary and reasonably available to protect and advance his client's interests....[86] A practitioner shall at all times use his best endeavours to complete any work on behalf of his client as soon as is reasonably possible.[87]

Even if the client agrees to an apportionment clause the lawyer must act according to a certain minimum standard, the one the law requires.[88] This argument can be countered on the basis that standards of professional practice can remain intact even with the inclusion of such a clause as it is only the client's independent carelessness which will bring the clause into play. Indeed, if such a clause were regarded as antithetical to professional standards, then apportionment legislation, even if amended to expressly include contract claims, could never apply to professionals for the same reason. Care will need to be taken to ensure that if an apportionment clause is inserted in a contract between a professional and client, it does not infringe any common law principle or statutory provision against unconscionability. This will be particularly relevant where clients are 'consumers'.[89] It may be prudent to ensure the client is independently advised as to the implications of the clause; however, this may well be impractical because of increased costs to the client as well as apprehension about the adviser's ability and inclination to protect the client's interests.

3. Exclusion clauses

An exclusion clause purporting to exclude liability for any loss attributable to the client would be subject to the same considerations just canvassed. A clause purporting to exclude liability for any loss caused by the professional would offend requirements of professional standards, and, in the case of a consumer, such a clause might fall foul of statutory provisions.[90] In view of the fact that in both

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86. R 5.3.
87. R 5.4.
88. C Edwards 'Contributory Negligence Defence in Contract Left Hanging' (1999) 37(5) Law Society Journal (NSW) 56.
89. See Trade Practices Act 1974 (Cth) s 51AB and the State equivalents in the Fair Trading Acts. See also Contracts Review Act 1980 (NSW). In this context 'consumers' will be those who acquire services (ie, advice) for personal, domestic or household use.
90. Trade Practices Act 1974 (Cth) s 74 provides that in any contract for the supply of services to a consumer there is an implied warranty that the services will be rendered with due skill and care. This is non-excludable: s 68. See also s 68A in relation to non-consumer contracts.

New South Wales and Western Australia legislation has been enacted to provide for the limitation of liability of members of 'occupational associations', limitation clauses which do not comply with the requirements of a statutorily approved scheme are likely to be at best ineffective.[91] These legislative initiatives, which are identical in both States, will, when activated, provide professionals with much needed certainty in their efforts to limit liability.

4. Implied terms

It has been suggested in some cases that in contracts requiring the provision of services, there is an implied term that the recipient, as well as the provider, must take reasonable care. In *Harper v Ashtons Circus Pty Ltd*, Hope J posited the existence of a term implied by law in service contracts which gives some protection to a defendant who is sued for breach of duty to exercise reasonable care. The term imposes an obligation on the plaintiff to act with reasonable care.[92] For this reason the doctrine of contributory negligence as a defence in contract was considered by Hope J to be 'unjustified and unnecessary'.[93] Brinsden J in *Arthur Young v WA Chip & Pulp* referred with approval to Hope J's comments, but took them no further as in the instant case the appellant did not base its case on this notion.[94] Discussion of this idea was omitted entirely from the majority judgment in *Astley v Austrust*, although it featured briefly in Callinan J's dissenting judgment. His Honour mooted the possibility but dismissed it as not having any 'authoritative modern currency' and being not 'without difficulties in its application'.[95]

Hope J clearly referred to a term implied by law, but it is unclear whether Callinan J's reference was to a term implied by law or one implied in fact. Terms are implied by law when a contract is of a particular class and the term is essential to the enjoyment of rights conferred by the contract.[96] It is by no means clear that an implied term imposing an obligation to act with reasonable care on a client would meet these criteria. Further, such a term will not be implied where it is inconsistent with the agreement of the parties.[97] This requirement also makes the term's implication uncertain if the term is one to be implied in fact and the contract is

91. Professional Standards Act 1997 (WA); Professional Standards Act 1994 (NSW). But see *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 where a limitation clause in a brokerage contract was regarded as legitimate.
92. Supra n 25, 405, citing *Cox v Coulson* [1916] 2 KB 177.
93. Ibid.
94. Supra n 13, 115. In *Craig v Troy* supra n 13, 151, ground 12 of Troy's cross-appeal was based on the existence of an implied term requiring the Craigs to exercise reasonable care.
95. *Astley v Austrust* supra n 1, 193.
96. *Byrne v Australian Airlines Ltd* (1995) 131 ALR 422.
97. Ibid.

formal and complete. The term must be reasonable and equitable, necessary for business efficacy, so obvious that it goes without saying, capable of clear expression and consistent with express terms of the contract.[98] If the contract is informal, the implied term must be necessary for the reasonable or effective operation of the contract.[99] It is doubtful whether the implied term under discussion could fulfil either of these sets of criteria. One commentator has indicated that he is unaware of any contract between professional and client which includes such a term.[100] This may be because it has never been judicially tested.

Assuming at least the possibility of the inclusion of either a term implied at law or in fact, that term could be the basis of a cross-claim by the professional against the client in response to a suit in contract brought by the latter against the former.[101] Presumably, as the law now stands, breach of such a term would leave the plaintiff with nothing. The plaintiff's breach caused no damage but rather signified a failure to perform a concurrent obligation. It has been suggested that breach of the term could be used as a defence to resist a claim by the client for full damages — in effect, apportionment of loss.[102] This, however, would be a novel effect.

CONCLUSION

Possibilities for professionals, sued in contract, to limit their exposure to judgments for the whole of a careless client's loss are just that — possibilities, and remote ones too. Relief can only realistically come with amendment of the apportionment legislation. According to the High Court, there is no doctrinal imperative against this, even though its reasoning appears to belie that view. Its insistence on the absolute discreteness of tort and contract precluded it from allowing apportionment in contract even where there was concurrent liability in tort. This is disappointing for professional service providers. Of more concern is the process the Court adopted to reach this outcome. This is disappointing for students of the law.

98. *BP Refinery (Westernport) Pty Ltd v Shore of Hastings* (1977) 16 ALR 363, 365. The 5 criteria laid down in this Privy Council decision have been endorsed by the High Court: see eg *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 347.
99. See eg *Breen v Williams* (1996) 186 CLR 71, 90.
100. Legg supra n 36, 275.
101. Seddon supra n 3, 7-8.
102. Ibid.