CONCURRENT LIABILITY: WHERE HAVE THINGS GONE WRONG?[1]

Lecture by Lord Justice Jackson to the Technology & Construction Bar Association and the Society of Construction Law on 30th October 2014 (tecbarpaper)

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1. INTRODUCTION

1.1 Purpose of this paper. The general purpose of this paper is to examine the boundary between contract and tort in four different legal systems. The specific purpose is to argue that the common law took a wrong turning in *Henderson v Merrett* [1995] 2 AC 45 and that the House of Lords drew an inappropriate conclusion from its use of comparative law. If the law of limitation is reformed as the Law Commission has proposed, then it might be possible to redefine the law on concurrent liability. In particular, it is submitted that contracts should not, and generally do not, generate duties of care in tort which mirror the contractual obligations.

1.2 Historical context. Before discussing the central issue, I must first look briefly at the historical background. It is unwise to tackle any issue concerning the structure of the law without having regard to the broader context.

1.3 Tort and contract. The law of tort or delict requires D to refrain from injuring C's person or property, alternatively to compensate C for any injury or loss caused. The law of contract requires D to fulfil his promises to C or, in default, to make compensation. The rules of contract and tort are now an essential feature of every civilised and prosperous society.

1.4 Tort is older than contract. It may be thought that tort and contract are the twin foundations of every legal system, both ancient and modern, but not so. The notion of tort is of ancient origin, being the sibling of crime. Criminal offences were directed

[1] I am grateful to Marie-Claire O'Kane and Peter Morcos, pupils at 4 New Square, Lincoln's Inn, for their assistance in researching French and German law; also to Professor Hugh Beale and Dr Janet O'Sullivan for reading this paper in draft and for stimulating discussions with them about the issues.

against the state or the community, whereas torts were directed against individuals.[2] The law of contract is a more recent arrival on the scene. Sir Henry Maine famously described social history as "a movement from status to contract".[3]

1.5 Abbreviations used. The abbreviations "C" and "D" mean claimant and defendant.

2. ROMAN LAW

2.1 Rome leads the way. The Romans led the way in clearly differentiating between the law of contract and the law of tort. The Institutes of Gaius[4] classified obligations as arising under two headings. These were *ex delicto* and *ex contractu*. The Institutes of Justinian[5] added two more categories, namely *quasi ex delicto* and *quasi ex contractu*. These two additional categories, which have enriched many modern academics, are not relevant for present purposes.

(i) Tort

2.2 Overlap between crime and tort. There is an obvious overlap between crime and tort, since many acts, e.g. theft or assault, are both crimes and torts. In Rome the criminal courts only dealt with and punished the most serious offences, such as murder. Delict was left to deal with numerous matters which we would regard as more appropriate for the Crown Court.

2.3 Categories of delict. Both Gaius and Justinian identified four categories of delict:

- *Furtum*, theft: taking away someone's goods with intent.
- *Rapina*, robbery: violent damage to property or theft with violence.
- *Iniuria* (literally meaning absence of right)[6]: assault or insult.
- *Damnum iniuria datum*: loss wrongfully caused. This included damage caused by negligence. It also included damage indirectly caused, for example cutting the painter of a boat so that it was subsequently wrecked.

(ii) Contract

2.4 Ahead of their time. The Romans were ahead of their time in recognising a version of contract law. The original Roman conception of a contract was little more than a debt arising from a solemn promise to pay (*stipulatio*). By the first century BC the Romans recognised bilateral contracts, i.e. arrangements under which each party owed obligations to the other. Such contracts rested on *bona fides* and were enforced by *bonae fidei* actions. Gaius said that contractual obligations arose in one of four ways, namely r*e* – by transfer of a thing; v*erbis* – by uttering formal words; *literis* – by a document; c*onsensu* – by a consensual contract.

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[2] See Sir Henry Maine, *Ancient Law* (John Murray, 1897), chapter 10, 'The early History of Delict and Crime'.
[3] *Ibid* at page 170
[4] Mid-second century AD
[5] Sixth century "Roman" emperor based in Constantinople, now Istanbul. Justinian recently sprang to fame once more as a result of the British Museum's *Byzantium* exhibition.
[6] *Non iure*

2.5 Consensual contracts. A consensual contract did not mean anything that the parties might agree. It meant a contract falling into one of four recognised categories:

- *Emptio venditio*, meaning sale and purchase.[7]
- *Locatio conductio*, meaning hire. In this context hire included the provision of services, such as building a house.
- *Societas*, meaning partnership. This included any joint commercial venture, whereby each party contributed financially or otherwise and they all shared in the outcome: i.e. the ancient precursor of the modern JV.
- *Mandatum*, meaning mandate. This meant an agreement to perform a service for no reward, other than payment of expenses.

Any agreement which did not fall into one of the four recognised categories was of no effect.

2.6 Pros and cons. This system had certain advantages. In particular, the law could specify the rights and duties of the parties in each category of contract. Busy Roman centurions, traders and slave dealers would not have time to spell out all the details of what they were agreeing. The system also had its disadvantages. In particular, there were gaps. People might wish to agree things falling outside the recognised categories, but there was no effective mechanism for such agreements. Over all the advantages seem to have outweighed the disadvantages. The Romans successfully administered Europe, the Middle East and North Africa for several centuries. They maintained a vibrant economy with much cross-border trade, major infrastructure works and massive building projects. Some may say that *denarii* and *sesterces*[8] were a more stable European currency than the euro.

2.7 Privity of contract. Privity was an essential feature of Roman contract law. A third party could not acquire rights under a contract. This was so, even if the third party was identified in the contract as the intended beneficiary. The privity rule was subject to one limited exception. Purchases made by a slave belonged to the *paterfamilias*. But that was hardly an exception: slaves were regarded as items of property like furniture. It would be illogical for one piece of property to own another.

2.8 Concurrent liability was not an issue. The law of contract and the law of delict were separate domains. The thorny modern problems of concurrent liability did not trouble Roman jurists.

2.9 Britain rejects Roman law. In 409, after four centuries of subjection, Britain threw off the shackles of Roman law.[9] Thereafter it was the other former provinces, in particular Gaul and Germany, which preserved the principles of Roman jurisprudence. It is to these jurisdictions we must now turn.

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[7] Even though there were formal legal rules, self help sometimes prevailed especially on the outer fringes of the Empire. A foreign merchant who delivered sub-standard goods to the Roman fort at Vindolanda in Northumberland was summarily flogged; his entire stock of merchandise was then confiscated and poured down the drain: see *Tab Vindol* II, 180.

[8] There was a modest devaluation in the late first century AD, but this did not cause anything like the chaos which followed within a few years after the introduction of the euro.

[9] According to Zosimus, the Britons ejected the magistrates and resolved to "live by themselves, no longer obeying Roman law": *Historia Nova* 6.5. In those days, sadly, judges had no security of tenure.

3. FRENCH LAW

3.1 France follows Rome. The French Civil Code ("CC") is built upon the foundations of Roman law. Many of the rules by which Roman law defined specific contracts, such as sale and hire, were retained in the CC, but these now became examples of the general concept of contract. The draftsmen of the CC subjected the Roman law of delict to a similar process of generalisation.

3.2 Contract. Article 1101 CC defines a contract as an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not do something.[10] After this general provision there follow numerous specific articles dealing with consent, capacity, damages for breach and other incidents of the law of contract.

3.3 Privity rules relaxed. French jurists, departing from their Roman heritage, have substantially relaxed the rules of privity of contract. Under articles 1121 and 1165 CC a third party who would benefit under a contract may enforce its terms. Manufacturers of products are liable in contract not only to the immediate purchasers, but also to subsequent purchasers. Likewise under article 1792 CC builders are liable to future purchasers of buildings. The French courts have generally construed these and similar provisions broadly.[11]

3.4 Tort/delict. Article 1382 CC provides that any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.[12] Article 1383 CC provides that everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.[13] After these general provisions there follow more specific articles dealing with vicarious liability, product liability, limitation and other such matters. The tort provisions are widely drawn. There is no restriction upon recovering pure economic loss.[14]

3.5 The *non-cumul* principle. In the late nineteenth century there was a debate about the classification of civil liability. Some argued that liability for non-performance of contracts and delictual liability were essentially the same. Others argued that there was a fundamental difference, namely that delict applied to everyone whereas contracts only bound the parties.[15] The latter view prevailed.[16] The principle *non-cumul des responsabilités contractualle et délictuelle* was established and remains

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[10] "Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose."
[11] See S. Whittaker, 'Privity of contract and the law of tort: the French experience' (1996) 16 Oxford Journal of Legal Studies 327 at 337-367.
[12] "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer."
[13] "Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence."
[14] See S. Whittaker, 'Privity of contract and the law of tort: the French experience' (1996) 16 Oxford Journal of Legal Studies 327 at 331.
[15] E. Bonnet, 'Responsabilité délictuelle et contrats' (1912) *Rev crit de lég et jurisp* 418.
[16] See S. Whittaker, 'Privity of contract and the law of tort: the French experience' (1996) 16 Oxford Journal of Legal Studies 327 at 333-334.

part of French law. The contracting parties cannot bring a separate or alternative delictual claim in respect of the same subject matter.

3.6 Justification of the *non-cumul* rule. The rationale of the rule is that the parties have chosen to be bound by the terms of their contract and the legal rules attaching to a contract of that type. Therefore the law of contract, not delict, should govern their rights and remedies. A separate justification is that the tort provisions are so wide that if concurrency were not prohibited, contracting parties would at all times be able to resort to a tort claim.[17]

3.7 Exception for professional negligence. As an exception to the rule, French law recognises concurrent liability in the context of professional negligence. If a lawyer, doctor, architect or similar professional acts in breach of his "obligations professionelles" he will be liable to his client in both contract and delict.[18] A builder may also have concurrent liability in both contract and delict if his breach is classified as 'faute professionelle'. However, if there is a complete or partial collapse of the building, then the builder's liability is solely contractual under article 1792 CC.[19]

4. GERMAN LAW

4.1 German Civil Code. The German Civil Code, *Bürgerliches Gesetzbuch* (BGB), came into force on 1st January 1900, following the unification of the German state in 1871. It adopted many principles of Roman Law, both good and bad.[20] The BGB has undergone many revisions and additions over the last tumultuous century.

4.2 Contract. It must be conceded that the German law of contract is somewhat cumbrous. Article 311 (1) GMB, the general provision, states:
"In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute."[21]
Subsequent provisions deal with the legal incidents of different categories of contract.[22]

4.3 Privity of contract and its exceptions. Article 328 BGB and the following articles provide for exceptions to the privity rule. A contract may specifically confer rights on a third party. Also there are specific provisions covering annuity contracts and similar matters. Overall it can be seen that Germany has departed substantially from the Roman concept of privity of contract, but has not gone as far as France in relaxing that rule.

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[17] See Van Rossum, 'Concurrency of contractual and delictual liability in a European perspective' (1995) 3 European Review of Private Law, 539 at page 7 of the online version.
[18] Van Rossum, *ibid* at 8-9
[19] Van Rossum, *ibid* at 10
[20] See Markesinis, Unberath and Johnston, *German Law of Contract*, 2nd edition (Hart Publishing, 2006), pages 6-12 'The genesis of the Code'.
[21] "Zur Begründung eines Schuldverhältnisses durch Rechtsgeschäft sowie zur Änderung des Inhalts eines Schuldverhältnisses ist ein Vertrag zwischen den Beteiligten erforderlich, soweit nicht das Gesetz ein anderes vorschreibt."
[22] For an excellent commentary on these provisions, see Markesinis, Unberath and Johnston, *German Law of Contract*, 2nd edition (Hart Publishing, 2006).

4.4 Tort/delict. Articles 823–853 BGB are the delict provisions of the Code.[23] These contain three important general provisions. Article 823 (1) provides that anyone who wilfully or negligently injures the life, body, health, freedom, property or other right of another contrary to law must compensate him for any damage caused.[24] Article 823 (2) imposes similar liability on anyone who breaches a statutory duty intended for the protection of another. Article 826 provides that anyone who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to compensate him for the damage.[25] These three articles in conjunction with other more specific provisions, e.g. article 824 re defamation, capture most of what we would classify as torts. It should be noted that the German tort provisions are narrower than those of France. They do not generally permit recovery of pure economic loss caused by negligence.[26]

4.5 Concurrent liability. Unlike Roman and French law, German law allows concurrent liability. If D acts in breach of contract and his conduct also fulfils the definition of a tort, C may sue in contract and/or tort.[27] There are, however, exceptions to this general rule (just as there are exceptions to the reverse rule – *non-cumul* – in France). Sometimes the contractual relationship between the parties imposes restrictions upon what C can recover in tort. The caselaw in this area is not entirely consistent, but is broadly favourable to claimants.[28]

4.6 Exceptions. One exception is if the tort claim exactly corresponds to a contractual warranty for defects. Also there are rules to prevent evasion of a contracting party's privileged position. If a high degree of culpability is required for contractual liability, then the same degree of culpability is required for the corresponding tort law claim.

4.7 Overall comment. The study of comparative law plays, or should play, a vital part in any consideration of law reform. When considering the issues surrounding concurrent liability, it is instructive to analyse the opposing approaches of France and Germany. But merely to say that France "has" or Germany "does not have" concurrent liability is a barren comment. It is necessary to look at the context in which France's *non-cumul* rule and Germany's concurrent liability rule sit. In France the rules of both contract and tort are more expansive than in Germany. Accordingly, it may be said that France has less need of concurrent liability. Also, as a matter of principle, the *non-cumul* rule has much to commend it.

5. COMMON LAW

(i) Development of the law of tort and contract

[23] For an excellent commentary on the provisions, see Markesinis and Unberath, *German Law of Torts*, 4th edition (Hart Publishing, 2002). At the time of writing a new edition is expected.
[24] "Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet."
[25] "Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet."
[26] See Markesinis and Unberath at pages 52-55.
[27] See *International Encyclopaedia of Laws*, Vol 1, *Tort Law* (2011), Germany.
[28] See Van Rossum, 'Concurrency of contractual and delictual liability in a European perspective' (1995) 3 European Review of Private Law, 539 at pages 11-14 of the online version.

5.1 Development of the law of tort. In the twelfth and thirteenth centuries tort law developed alongside, but subordinate to, the criminal law.[29] Throughout the mediaeval period the common law was focused upon trespass and similar deliberate torts. Negligence appeared on the scene in the eighteenth century. In *Coggs v Bernard*[30] Holt CJ, citing Roman law principles,[31] held that the liability of a bailee for loss of or damage to goods was based upon negligence. Blackstone, citing Justinian,[32] stated that persons injured through "neglect or want of skill in physicians or surgeons" could recover damages in tort: *Commentaries* book 3, chapter 8. As is well known, the law of negligence developed through the nineteenth century by identifying duties of care which were owed in particular situations. It was only in the twentieth century that the courts formulated the general principles of negligence.

5.2 Development of the law of contract. Roman theories of contract did not take root in the common law either during or following the mediaeval period.[33] Even Blackstone's *Commentaries*, published in 1765-9, only dealt briefly with agreements.[34] Nevertheless the growth of trade and the coming of the industrial revolution highlighted the importance of classifying and enforcing contracts. JS Mill was the first economist to identify that enforcing and regulating contracts was the responsibility of the state.[35] Judges, pre-eminently Lord Mansfield, started to lay the foundations of modern contract law in the late eighteenth century. Textbooks on the law of contract did not appear until the turn of that century.[36] It was only in the nineteenth century that wholly executory contracts became the paradigm.[37]

5.3 The challenges of the twentieth and twenty first century. It can be seen from the foregoing that Britain took about one and a half millennia to catch up with the legal principles which it roundly rejected in 409. One of the challenges of the twentieth and twenty first centuries is to establish the proper relationship between contract and tort. On one view, the two categories of civil liability are closely linked.[38] On the alternative view, the two domains are entirely separate sources of legal obligation and they should be kept as such.[39]

5.4 The proper use of comparative law in that exercise. The task of judges and jurists is not to "choose" between the French and German rules. The experience of those two jurisdictions serves to illumine the options, as well as the benefits and pitfalls of the two approaches. Our objective must be to adopt an approach which fits with the

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[29] See generally Holdsworth's History of English Law vol. II, pages 357-367 and vol. III, chapter III.
[30] (1704) 2 Ld Raym. 909.
[31] As set out by Bracton
[32] *Institutes* 4.3.6-7: physician liable for killing a slave through negligent treatment. Obviously it was only the slave owner who could claim for such an inconvenient mishap.
[33] See Holdsworth's *History of English Law* pages 412-454
[34] Blackstone discusses contracts in volume II chapter XXX as a means of acquiring title to property and in volume III chapter IX as part of the law of private wrongs.
[35] *Principles of Political Economy*, 1848.
[36] Powell, *Essay Upon the Law of Contracts and Agreements*, 1790; English translation of Pothier, *Law of Obligations*, 1806; Chitty, 1826.
[37] See Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) at pages 419-448. This magisterial work traces the development of the law of contract from the 18th to 20th centuries against the background of political/social history and the changing intellectual climate.
[38] As argued by Atiyah at page 505 of *The Rise and Fall of Freedom of Contract*
[39] See the discussion of French law above.

common law principles of contract and tort as developed in England and Wales.[40]

(ii) The two streams of authority

5.5 Over the last century there have been two distinct streams of authority. Neither has yet prevailed, so as to vanquish the other.

5.6 Cases excluding concurrent liability. It is not feasible to compile a comprehensive inventory of such cases. The following decisions are illustrative:
Jarvis v Moy, Davies, Smith, Vandervell & Co [1936] 1 KB 339: Stockbrokers liable to client only in contract.
Groom v Crocker [1939] 1 KB 194: Solicitor liable to client only in contract.
Bagot v Stevens Scanlan & Co Ltd [1966] 1 QB 197: Architect liable to client only in contract.
Murphy v Brentwood DC [1991] 1 AC 398: Builders liable in contract but not tort for the costs of repairing defects.[41]
Payne v John Setchell Ltd [2002] BLR 489: Builders did not owe a concurrent duty of care to protect their employers against economic loss.
Robinson v P E Jones (Contractors) Ltd [2012] QB 44: Absent assumption of responsibility (and there was none in this case) builder/vendor of house did not owe to purchaser a concurrent duty of care co-extensive with its contractual obligations.

5.7 Rationale for excluding concurrent liability. In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, 107 (a case concerning the relationship of banker and customer) Lord Scarman, delivering the opinion of the Judicial Committee of the Privy Council, articulated most clearly the reasons for keeping contractual and tortious liabilities separate:

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action".

5.8 Academic support for keeping contract and tort separate. There is strong

[40] See Dworkin's discussion of integrity at chapter 6 of *Law's Empire* (1986, Fontana Paperbacks).
[41] See Lord Bridge (with whom Lords Mackay, Ackner and Oliver agreed) at 475.

academic support for keeping contract and tort separate. See e.g. B. Markesinis, *An expanding tort law – the price of a rigid contract law* (1987) 103 LQR 354; S.Whittaker, *Privity of contract and the law of tort: the French experience* (1995) 15 OJLS 57; P. Birks, *Wrongs and remedies in the twenty-first century*, Clarendon Press 1996, chapter 2, "Professional and client, the duty of care" by John Powell QC. Powell points out that considerations which negative a duty of care in a statutory or regulatory context are often brushed aside when the issue arises in a contractual context. In cases such as *Caparo v Dickman* [1990] 2 AC 605 the statutory context limits and sometimes excludes any duty of care. Also, the existence of other remedies is often held to militate against imposing a duty of care, even if those other remedies are of no assistance to the claimant in the current case: see e.g. *Jones v Department of Employment* [1989] QB 1 at 25-26; *X v Bedfordshire CC* [1995] 2 AC 633 at 751 A-B per Lord Browne-Wilkinson, with whom the other members of the Appellate Committee agreed.[42] This is allied to the "overkill" argument, which also may negative a duty of care: see e.g. *Rowling v Takaro Properties* [1988] 1 AC 473 at 502. Powell argues that similar considerations should militate against injecting tortious duties into a contractual relationship. These considerations should be relevant when the court is considering the third limb of the well-known threefold test, viz whether it is "fair, just and reasonable" to impose a duty of a given scope upon a party (see *Caparo* at 617-8). I agree with that analysis.

5.9 Cases allowing concurrent liability. Again it is not possible to compile a comprehensive list, but the following decisions are illustrative:
Midland Bank v Hett Stubbs & Kemp [1979] 1 Ch 384: Solicitor liable to client in both contract and tort for negligently failing to register an option.
Pirelli v Oscar Faber & Partners [1983] 2 AC 1: Engineers designing a chimney owed concurrent duties in contract and tort to their client.
Storey v Charles Church Developments Ltd (1995) 73 Con LR 1: Design and build contractor owed concurrent duties in contract and tort for negligent foundation design.
Henderson v Merrett [1995] 2 AC 145: Managing agents at Lloyd's owed concurrent duties in both contract and tort to direct Names. The tortious duty was based upon a *Hedley Byrne* assumption of responsibility.
Riyad Bank v Ahli United Bank plc [2006] EWCA Civ 780; [2007] PNLR 1: Bank advising claimant re setting up investment fund owed a duty of care in tort; although contractual framework could negative a tortious duty, it did not do so in this case.

5.10 Rationale for asserting concurrent liability. Lord Goff's speech in *Henderson v Merrett* contains the most well known articulation of the case for concurrent liability. He contrasted the approach of France with that of Germany and commented that "no perceptible harm has come to the German system from admitting concurrent claims". He argued that there were good practical reasons for imposing tortious liability, in particular to overcome limitation defences. He noted that the Latent Damage Act 1986 applied to tortious claims, but not to claims in contract. From this he argued that the courts should favour concurrent liability in order to defeat limitation defences. [For reasons discussed below these are dubious arguments.] Lord Goff criticised the approach in *Tai Hing* and said that courts should resist "the temptation of elegance". He embarked upon a scholarly review of English and overseas authorities, warmly

[42] The Court of Appeal applied this line of reasoning in *Green v Royal Bank of Scotland* [2013] EWCA Civ1197; [2014] PNLR 6.

commending those which favoured concurrent liability.

(iii) Where are we now?

5.11 An ambivalent position. The proposition that a contractual relationship displaces any tortious duty of care is at least for the time being, untenable. Equally untenable, I would suggest, is the opposite proposition, namely that (absent disclaimer) every contract generates tortious duties of care co-extensive with the contractual duties. That would result in an absurd commingling of contractual and tortious liabilities. No-one would say that a purchaser owes a duty to take reasonable care to pay the vendor or that he is liable in negligence if he loses the funds set aside for payment. To graft a tortious duty of care onto every contractual obligation would be contrary to principle. Also such an approach would generate excessive limitation periods, because time may start to run in tort at the end of the contractual limitation period, when D "negligently" fails to perform his contractual obligation.

5.12 It is therefore necessary to determine in each case whether the relationship between contracting parties also gives rise to a tortious duty of care and, if so, what is its scope.

5.13 Determining whether a duty of care arises and what is its scope. Here there are a range of tests to apply, including of course the threefold *Caparo* test. At the moment fashion favours the *Hedley Byrne/Henderson* assumption of responsibility test. It is by no means certain that this approach will remain pre-eminent for ever. Whichever test the court applies, the existence of the contract and its terms will form part of the circumstances to be taken into account.

5.14 The impact of the contract. As stated above, I accept that there are two streams of authority on the effect which the contract will have. It is submitted, however, that the better view is that the existence of a contract defining the obligations and liabilities of the participants should be a pointer (although not conclusive) against finding parallel duties of care in tort. The recent Australian High Court decision *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 provides some support for that viewpoint.

5.15 The builder conundrum. Commentators have criticised the distinction which emerges from some of the authorities between (a) the position of building contractors and (b) building professionals. I accept that if assumption of responsibility is the touchstone, it may be argued that a builder 'assumes responsibility' to his employer. Indeed it may be said that every contracting party in every situation 'assumes responsibility' to the other party for the performance of his promises. But that would be to stretch the assumption of responsibility test too far. Whilst there are always problems in drawing the line, there is a discernable distinction between those who design buildings and those who construct buildings. The former provide a service and are subject to the implied term contained in s. 13 of the Supply of Goods and Services Act 1982. I doubt that the latter are providing a service within the meaning of s. 13.

5.16 In 'design and build' contracts the contractor embraces both functions. He provides professional advice/design. He also carries out work in accordance with his own design. The House of Lords' discussion of the position of builders in *Murphy*

seems to be directed to those who physically carry out the building work.

6. ANALYSIS

(i) What is to be learnt from the comparative law exercise?

6.1 The universal features of contract and tort. Despite their different historical trajectories, the law of contract and tort have certain universal features across both civilian and common law systems:

- Tortious duties are imposed by the general law. Contractual obligations are voluntarily undertaken.
- The law of tort is based on notions of moral culpability, so that 'fault' is usually a pre-condition of liability. Contractual obligations (having been undertaken voluntarily) are strict, so that 'fault' is not usually a pre-condition of liability.
- The law of tort is primarily concerned with compensation for harm caused. The law of contract is concerned with ensuring that each contracting party receives the benefits promised by the other party, alternatively their monetary equivalent.

6.2 The underlying differences. Those universal features are all at a high level of generality. The actual incidents of contract and tort vary starkly between different legal systems. The rules governing privity of contract, scope of duty in tort, remoteness of damage and limitation defences are useful illustrations.

6.3 Privity of contract. As explained in sections 3 and 4 above, **France** has substantially relaxed the privity rule, so that third parties intended to benefit under contracts have extensive rights. **Germany** allows limited exceptions to the privity rule. These apply to parties who are identified as beneficiaries under contracts. **England** has, until the turn of the millennium, enforced the privity rule more strictly.[43] In this respect, curiously, we have stuck more closely to the orthodoxy of Roman law than our civilian colleagues. Recently however, following a Law Commission report, Parliament has enacted the Contracts (Rights of Third Parties) Act 1999, which introduced limited exceptions to the privity rule. In essence, and subject to specified exceptions, a third party may enforce a contractual term, if (a) the term expressly so provides or (b) the term purports to confer a benefit on him.

6.4 Scope of duty in tort. In **France** the scope of a person's tortious duty is broad. The "dommage" he which must not cause (alternatively for which he must pay compensation) embraces pure economic loss. Judges do not restrict recovery by reference to the 'purpose' of the duty which article 1382 imposes.[44] In **Germany** the "Schaden" which a person must not cause (alternatively for which he must pay compensation) is primarily personal injury or damage to property. Article 823 BGB does not include financial loss amongst the types of injury for which a tortfeasor must

[43] See *Tweddle v Atkinson* (1861) 1 B & S 393 and numerous authorities following *Tweddle*.
[44] Bussani and Palmer, *Pure Economic Loss in Europe* (2011), pages 126-128.

pay compensation.[45] In **England** and other common law jurisdictions the law of tort restricts recovery for economic loss, as graphically illustrated in *Spartan Steel & Alloys Ltd v Martin & Co* [1973] QB 27. The law of tort also restricts recovery by reference to the scope of the duty which the tortfeasor undertook: *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191.

6.5 Remoteness of damage in contract and tort. In **France** the rules of remoteness are broadly similar in contract and tort. The principle of full compensation ("réparation intégrale") governs the assessment of damages for both breaches of contract and torts. This is subject to limitations, of which the most important is that C cannot recover for damage which was not foreseeable.[46] In **England** there is a stark difference between contract and tort. The rules of remoteness are much tougher in contract. In contractual claims the well known rule in *Hadley v Baxendale* (1854) 9 Ex 341 restricts the recoverable heads of loss. The operation of this rule substantially reduced the amount of damages for late redelivery of a vessel under a charterparty in *The Achilleas* [2008] UKHL 48; [2009] AC 61. On the other hand, in tort claims C need only establish that the type of harm which he suffered was foreseeable. This is a much less stringent test, as exemplified in *Hughes v Lord Advocate* [1963] AC 837 and *Page v Smith* [1996] 1 AC 155.

6.6 Limitation defences. In **Germany** the limitation rules are set out in articles 194-218 BGB. The standard limitation period is three years, subject to numerous qualifications. Time starts to run at the end of the year in which the claimant acquired or ought to have acquired knowledge of the relevant facts. Significantly, the rules including the latent damage provisions are the same in both contract and tort. In **France** the limitation rules are set in out in articles 2219-2281 CC. In tort the limitation period is generally ten years after the occurrence of the injury or its manifestation. The limitation period for most contract claims is shorter. In **England** there is a stark difference between contractual and tortious limitation periods. Not only does time start to run later in a tort claim, namely when C suffers damage. But more importantly the latent damage provisions contained in section 14A of the Limitation Act 1980 only apply to tort claims. There is no similar indulgence towards contractual claimants.

6.7 Submission. In each legal system which we have looked at the rules of contract and tort are complementary. Together they cater for a wide range of situations in which lawmakers, reflecting the general sentiments of society, assert that there should be redress. Because the rules of contract and tort vary starkly between different jurisdictions, the boundaries of the two regimes will not be the same. Nor can they interrelate in the same way. Therefore, with all due respect to the reasoning in *Henderson v Merrett*, the fact that "no perceptible harm has come to the German system from admitting concurrent claims" is not a reason why we should follow Germany.

6.8 The true benefits from the comparative exercise. The real benefits which we gain from a comparative law study of contract and tort are more nuanced. The foreign

[45] See Bussani and Palmer, *supra* at 148-9. In certain exceptional situations outside article 823 BGB the court may award compensation in tort for economic loss.
[46] See article 1150 CC; also Bermann and Picard, *Introduction to French law*, Kluwer Law International BV at pages 234-236 re contract and 258-262 re tort.

systems which one examines (in this case Roman, French and German) expose the possibilities. They show how both "*non cumul*" and concurrent liability *can* work. They also reveal what are the *contexts* in which both doctrines sit. In other words, what are the other incidents of contract and tort (a) in jurisdictions which accept concurrent liability and (b) in jurisdictions which reject it? It is much easier to consider options for law reform, when you can see how they are actually working somewhere else. One can then ask the question, "is that what we want here?" On the other hand, the bare fact concurrent liability is accepted in Germany (a very different legal system from our own) is not an argument either for or against adopting it here.

(ii) Limitation

6.9 The driving force. The difference between the limitation periods for contractual and tortious claims has been the driving force behind many of the cases asserting concurrent liability.[47] This is unfortunate to say the least. If it is felt that the contractual limitation periods are unsatisfactory, then surely the remedy is to amend the law of limitation, not to mangle the law of tort. The fact that a contractual claim is time-barred is not a good reason to 'invent' a tortious claim.

6.10 The concern in individual cases. In any particular case there is always an understandable concern to ensure that the wronged claimant recovers redress. That concern should not drive the court into contortions. Either we have limitation periods for sound policy reasons or we do not. If the judiciary and Parliament really do not like limitation periods, then we could extend them or even get rid of them altogether. We could put civil law on the same footing as criminal law – viz anyone can be sued for anything irrespective of how long ago it happened.

6.11 Limitation rules serve a valuable purpose. For what it is worth, I think that limitation rules serve a valuable social purpose. They mean that people know where they stand and do not have potential claims hanging over them for ever. The more distant an event is in the past, the more difficult it is to prove what actually happened. Witnesses die. People forget what they saw, heard or said. Documents and other evidence are lost. It is a lottery which snippets of contemporaneous evidence survive. Putting it bluntly, as time passes it becomes more and more likely that the court will reach the wrong decision. Furthermore most people insure against their potential liabilities. They and their executors cannot be expected to go on insuring for ever.

6.12 A self-inflicted problem. The limitation problem, which has been the driving force behind some of the more dubious decisions on concurrent liability, is self-inflicted. There is no need for the wide divergence which currently exists between the limitation rules for contract and tort.

6.13 Law Commission proposal. In its report number 270, "Limitation of Actions", the Law Commission proposed a single core limitation regime which would apply to contractual, tortious and other claims. In essence, this would comprise (a) a primary limitation period of three years from the date of actual or constructive knowledge; (b) a long-stop period of ten years from the date of accrual of the cause of action or, in

[47] See J. O'Sullivan, "The meaning of 'damage' in pure financial loss cases – Contract and tort collide" 28 *Professional Negligence* (2012) 248-265.

the case of negligence etc, from the date of D's breach; (c) discretion to extend time for personal injury claims. In 2009 the Government rejected these recommendations.

6.14 Submission. The time has now come to take a fresh look at this issue and to consider implementing the Law Commission's recommendations. Once Parliament has removed the perceived anomalies and injustices of the Limitation Act 1980, judges will no longer need to stretch the common law in order to circumvent the statute.

(iii) Other objections to imposing tortious liabilities upon contracting parties

6.15 Evasion of contractual restrictions. If strangers deal with one another pursuant to a contract which they have freely entered into, that contract should govern their relationship. Specific provisions may exclude or limit liability for breach.[48] It would be wrong if contracting parties could evade the effect of exclusion or limitation clauses by suing in tort.

6.16 Evasion of contractual rules re remoteness. As stated earlier, the rules governing remoteness of damage are much tougher in contract than in tort. This is because of the difference between the nature of the interests which – traditionally – have been protected by contract and tort. In a contractual situation it is wrong in principle that C should be able to evade the contractual remoteness rules by formulating a concurrent claim in tort. In *Wellesley Partners LLP v Withers LLP* [2014] EWHC 556 (Ch); [2014] PNLR 22 at [210] to [216] Nugee J felt understandable reluctance in allowing the claimant in a solicitors' negligence action to do precisely that. Nevertheless the judge concluded that he was obliged to do so, because there was concurrent liability in both contract and tort.

6.17 Defining damage. There are problems in defining what constitutes damage when tortious duties of care are super-imposed upon what is essentially a contractual relationship.[49] This is particularly so in cases where the claimant incurs contingent liabilities.

6.18 Standard of performance. Sometimes a contract specifies the standard of care required or the specific steps to be taken by D. If so, those provisions determine the extent of D's obligations. The universal standard of "reasonable care" demanded by the law of tort has no place in such a relationship.

6.19 Rights of third parties. If contracting parties desire to confer rights on third parties, they can now do so using the Contracts (Rights of Third Parties) Act 1999. If the parties choose not to do so, the law of tort should not ordinarily step in and impose such liabilities. If tort law does so, contrary to the will of the parties, it is effectively undermining their contract.

6.20 Construction contracts. In construction contracts parties sometimes use the 1999

[48] Subject to any statutory restrictions, such as the Unfair Contract Terms Act 1977

[49] See J. O'Sullivan, "The meaning of 'damage' in pure financial loss cases – Contract and tort collide" 28 *Professional Negligence* (2012) 248-265.

Act to confer rights of action on future purchasers or tenants.[50] Usually these rights are carefully delineated.[51] It would subvert the contractual scheme if the purchasers or tenants had wider remedies for economic loss in tort. The contractual provisions (extended to benefit purchasers/tenants under the 1999 Act) should determine what and against whom they can recover. This has the benefit of certainty. If prospective purchasers or tenants are dissatisfied with the extent of their contractual protection, they need not proceed. If they do proceed, then the extent of that contractual protection may be one of the matters affecting price. The purchasers or tenants should not get the benefit of both a reduced price and enhanced protection.

(iv) Contribution

6.21 The present law. The partial defence of contributory negligence under s. 1 (1) of the Law Reform (Contributory Negligence) Act 1945 is available where C sues in tort, not where C sues in contract. This is, however, subject to one exception. Where C has concurrent remedies available in both contract and tort, C cannot defeat the plea of contributory negligence by framing his claim in contract alone. In that situation, D can still rely upon a plea of contributory negligence: *Forsikringsakitielskapet Vesta v Butcher* [1989] AC 852.

6.22 Possible objection to the theme of this paper. It may objected that if the scope of concurrent liability is reduced, this will defeat meritorious defences of contributory negligence. There are two answers to this argument.
(i) Implementation of Law Commission Report No 219 (1993) is now long overdue. The 1945 Act should be amended so that a plea of contributory negligence is available in cases where D is in breach of a contractual duty to take care. Indeed there is a case for permitting the partial defence of contributory fault across a wider spectrum of contractual claims.[52] But that is an issue for another day.
(ii) The common law should not be distorted in order to circumvent statutory provisions. Parliament has decided that contributory negligence should only be available in actions based on tort. If contributory negligence is to be extended to contractual claims, then that is a matter for Parliament, not the courts.

(v) Overall conclusion

6.23 Implementation of Law Commission proposals. The previous Government in November 2009 rejected the proposals in Law Commission Report 270. May I suggest that this government or the next one might consider taking those proposals forward? The limitation rules are not simply a matter of "lawyers' law". They serve a valuable social purpose. For obvious reasons, it is not always easy for coalition Governments to establish full legislative programmes. The Law Commission's proposals on limitation might form a useful package on which a present or future Government would be able to agree.

6.24 Restore the integrity of the common law. The juridical arguments for keeping contract and tort separate are powerful. Judgments asserting concurrent liability have

[50] This is an alternative approach to using collateral warranties.
[51] See H. Beale, "A Review of the Contracts (Rights of Third Parties) Act 1999" in A Burrows & E Peel (eds), *Contract Formation and Parties* (OUP, 2010) 225, 242-244.
[52] See O'Sullivan and Hilliard, *The Law of Contract*, 6th edition (OUP, 2014), pages 414-415.

not satisfactorily answered those arguments. Instead they rest upon pragmatic considerations. If the Law Commission proposals are adopted, those pragmatic considerations will be swept away. The path will then be clear for the Supreme Court to look again at the issue of concurrent liability. In my view the rights and liabilities of contracting parties should generally be regulated by the contracts which they have made, not by some amorphous and ever expanding law of tort.