

CONCURRENT LIABILITY IN CONTRACT AND TORT: A SEPARATION THESIS

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I. Introduction

Prior to the landmark decision in *Henderson v Merrett Syndicates Ltd*,¹ there were conflicting lines of authority on the question of whether there could be concurrent liability in tort and contract for pure economic loss in English law.² Their Lordships in that case put an end to this uncertainty by making clear that there could indeed be such liability.³ Yet so holding naturally prompted jurists to consider whether there might also be concurrent liability in other areas, such as where contract and equity overlap, and where contract and unjust enrichment coincide. Those *broad* questions have now been tackled ably enough by others, along with the issue of whether concurrent liability should generally be welcomed (given that it can blur the boundaries between the familiar legal categories according to which the common law is ordinarily learnt and applied⁴). None of these matters, however, concern us here. Instead, we address a series of *narrower* questions that arise in connection with concurrent tortious and contractual liability.

Before we enumerate those narrower questions, however, it is perhaps helpful to make clear from the outset the central argument of this article. This is that, notwithstanding the concurrency of liability, the available actions in tort and contract should be regarded as sufficiently different that, ordinarily, there will be no transposition of incidental rules concerning, or elements of, one action to the other. So, for example, we resist the idea that it is appropriate routinely to apply the contractual remoteness rules to a negligence action; and, equally, we see no *general warrant* for allowing tort defences to be invoked in connection with actions for breach of contract. That said, we are not completely hostile to the occasional transposition of aspects of tort law to contract (and vice versa). It is, rather, that we think that such transpositions – of, say, contract rules to a tort action – should be possible only where this can be achieved in accordance with some well-established method of common law reasoning, *and* only then at no avoidable risk to the coherence of the law. We label this argument ‘the separation thesis’.

The separation thesis is animated by the fact that, even where concurrent liability exists, there remain three key differences between contract and tort that deserve to be respected. To begin with, although in concurrent liability cases both the contractual and tortious duties will arise from an assumed responsibility on the part of the defendant, the responsibilities actually assumed may differ significantly. Not only may tortious assumptions of responsibility arise from something

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¹ [1995] 2 A.C. 145.

² Notable cases in which there was actual or obiter rejection of such liability include *Groom v Crocker* [1939] 1 K.B. 194; *Bagot v Stevens Scanlon* [1966] 1 Q.B. 197 and *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] A.C. 80, at 107 (Lord Scarman). By contrast, cases containing dicta accepting such a possibility include *Midland Bank Trust Co v Hett Stubbs and Kemp* [1979] Ch. 384; *Ross v Caunters* [1980] Ch. 297 and *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All E.R. 488.

³ [1995] 2 A.C. 145, at 194.

⁴ See, e.g., A. Burrows, “Solving the Problem of Concurrent Liability” (1995) 48 C.L.P. 103; P.S. Davies, “Concurrent Liability: A Spluttering Revolution” in S. Worthington *et al* (eds.), *Revolution and Evolution in Private Law* (Oxford: Hart Publishing, 2018), 273; R. Jackson, “Concurrent Liability: Where Have Things Gone Wrong?” (2015) 23 Tort L. Rev. 3; A. Taylor, “Concurrent Duties” (2019) 82 M.L.R. 17.

qualitatively different from the kinds of promises that ground contractual obligations,⁵ but (more importantly, as will be seen in due course, there is no reason to assume that the scope and duration of the contractual and tortious duties thereby created will overlap precisely.

Secondly, although many judges and jurists appear happy to transpose the contractual remoteness rules to the tort setting, they typically do this without giving due recognition to (1) the fact that the contract remoteness rules are intimately bound up with assumptions about the way contracts are formed, and (2) the fact that these assumptions have no traction in relation to tort law.⁶ Thirdly, although it was accepted in *Forsikringsaktieselskapet Vesta v Butcher*⁷ that a plea of contributory negligence may sometimes be made in relation to contract actions, this case should not be seen as licensing generally the transposition of tort defences, like *volenti*, to the contract setting. The operation of defences in tort law is well-known and is often uncontroversial; but it is a matter for debate whether there is really any such thing as a ‘contractual defence’.⁸

As already noted, there is no need for us in this article to revisit the broad question of whether concurrent liability in tort and contract can occur, for that matter was put beyond doubt in *Henderson* in the following terms:

the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.⁹

Nor are we attentive to the normative question of whether concurrent liability in tort and contract is to be welcomed. Rather, we are concerned only with a series of secondary questions that arise once one accepts the possibility of concurrent liability.¹⁰

Although the excerpt from Lord Goff’s speech just cited makes clear that no action in tort may be pursued where any such action would be inconsistent with the contract, it does not impinge upon a set of secondary questions concerning remoteness, the availability of defences and service out of the jurisdiction. True, Lord Goff did go on to provide an answer to the question of which limitation rules should apply in a case of concurrent liability,¹¹ but he expressly put to one side (and therefore left open) all other such secondary questions saying that “it would be quite wrong

⁵ For an example, see *Holt v Payne Skillington & De Groot Collis* [1996] P.N.L.R. 179 (discussed in Section III, below) where there was a non-promissory assumption of responsibility. For three different senses of “assumption of responsibility”, see K. Barker, “Unreliable Assumptions in the Modern Law of Negligence” (1993) 109 L.Q.R. 461; see also A. Robertson and J. Wang, “The Assumption of Responsibility” in K. Barker *et al* (eds.), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford: Hart Publishing, 2015); Taylor “Concurrent Duties” (2019) 82 M.L.R. 17.

⁶ The rule in *Hadley v Baxendale* (1854) 9 Ex. 341 makes recoverable losses that were “in the contemplation of both parties, at the time they made the contract”: *ibid*, 354. Critically, the remoteness rule is premised upon the idea that the parties engaged in pre-contractual negotiations. By contrast, there is no reason to suppose that the parties to a tort action will have negotiated anything. Of course, many modern-day contracts – like those concluded on standard forms – will not have been negotiated either. But this merely suggests that the assumption which underpins the contract remoteness rules is often misplaced. It does nothing to support the idea that a similar assumption can be made about party negotiations in the context of a tort action.

⁷ [1986] 2 All E.R. 488.

⁸ See discussion in K. Barker, “What Is a Contractual Defence (and Does It Matter)?” in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds), *Defences in Contract* (Oxford: Hart Publishing, 2017).

⁹ [1995] 2 A.C. 145, at 194. Although his Lordship was influenced in so saying by what Oliver J said in the *Midland Bank* case, the two judges were not exactly at one on the matter. Lord Goff thought that a tort action would be unavailable if it were in some unspecified way “inconsistent with the applicable contract” whereas for Oliver J the crucial question was the narrower one of whether there were “contractual terms excluding or restricting the general duties which the law implies”: *Midland Bank Trust Co v Hett Stubbs and Kemp* [1979] Ch. 384, at 411.

¹⁰ For criticism, see, e.g., Burrows “Solving the Problem of Concurrent Liability” (1995) 48 C.L.P. 103 at 111; P Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997), 23-24.

¹¹ It was held that the more generous tort limitation rules will apply if the claim is framed in tort rather than contract.

to embark upon the examination of questions which do not arise”.¹² On the other hand, he did express regret that that, prior to *Henderson*, there had been very little scholarly consideration of concurrent liability. He bemoaned the fact that “the courts in this country have grappled with the problem [of concurrent liability] very largely without the assistance of systematic academic study”.¹³ We therefore treat this statement as an invitation to explore the secondary questions that he himself chose not to consider.

As we shall see, *some* of these secondary questions that Lord Goff left untouched have been the subject of subsequent judicial and juristic analysis. But the consideration they have received has, in our view, been limited. To meet this analytical deficit, we aim here to provide a thoroughgoing analysis of these matters. But we also discuss a set of entirely novel secondary questions that, in our view, are equally worthy of consideration.

In Section II of this article, we revisit *Wellesley Partners v Withers*¹⁴ and examine the question of whether there exists a principled (as opposed to merely pragmatic) basis for the decision in that case that, where concurrent liability in tort and contract exists, it is the contractual remoteness rules that will apply *even if* the claimant elects to sue in tort.

In Section III we consider two problems associated with concurrent, but not coextensive, duties. The first of these concerns the fact that concurrent duties may not be coextensive in the sense that they come into existence at different points in time. Aaron Taylor has provided an excellent example of how this may occur. It involves a professional who, having assumed a responsibility towards a client provides her with negligent advice for a period of time, but without having finalised a contract (the completion of which does not occur until some months later).¹⁵ We think, however, that the analysis provided by Taylor is incomplete. It overlooks the fact that, depending on how one treats pre- and post-contractual breaches of the tortious duty, there may occur a clash with the rule of law principle that like cases be treated alike.¹⁶ The second problem addressed in Section III concerns concurrent duties that are not coextensive in the more straightforward sense that the tortious duty turns is broader in scope than the contractual one.¹⁷ Again, we attend to the fact that the question of remoteness in such cases has not been fully thought through – by judges or by jurists.

Section IV focuses on two matters that have been completely unexplored by the courts, but which may nonetheless prove to be of considerable practical significance. The first of these centres on the question of whether it should be possible for a defendant to invoke the defence of *volenti non fit injuria* (“*volenti?*”) where, in a situation of concurrent liability, the claimant elects to sue for breach of contract.¹⁸ The question, we think, requires an answer for a couple of reasons. First, it seems natural to enquire whether the *volenti* defence may be transposed from the tort setting to the contractual one given that, in *Vesta v Butcher*, it was held that a plea of contributory negligence may be raised where a defendant is sued for breach of a concurrent contractual duty to take reasonable care. In other words, the migration of contributory negligence to the contract setting is evidence that incidental rules can sometimes be transferred from tort to contract and that the contract does not always enjoy a “trumping” effect.¹⁹ Secondly, where concurrent liability exists, a

¹² [1995] 2 A.C. 145, at 195.

¹³ [1995] 2 A.C. 145, at 185.

¹⁴ [2016] Ch. 520, followed in, e.g., *Wright v Lewis Silkin LLP* [2016] EWCA Civ 1308.

¹⁵ Taylor, “Concurrent Duties” (2019) 82 M.L.R. 17, at 30.

¹⁶ Neil Duxbury explains the principle’s relationship to the rule of law in this way: “[t]here are, of course, consequentialist arguments for treating like cases alike. Since decision-makers who do so are dispensing the same justice to everyone [and thereby] help secure and maintain basic rule of law values such as consistency and impartiality in adjudication”: N. Duxbury, *The Nature and Authority of Precedent* (Cambridge: CUP, 2008), 171.

¹⁷ See, e.g., *Holt v Payne Skillington & De Groot Collis* [1996] P.N.L.R. 179 and Taylor, “Concurrent Duties” (2019) 82 M.L.R. 17, 26.

¹⁸ We assume, here, that the circumstances are such that, had the action been brought in tort, the defendant would have been able to invoke this defence.

¹⁹ This helpful phrase, referring to the way that differences between incidental contract and tort rules may be resolved, belongs to Y. Goh and M. Yip, “Concurrent Liability in Tort and Contract” (2017) *Torts L.J.* 148, at 152.

claimant will usually prefer to sue in contract (for reasons we shall give in a moment). Accordingly, in a case of concurrent liability in which the *volenti* defence would be available were the action to be framed in tort, it seems eminently possible that a defendant might well seek to invoke that defence in relation to the corresponding contractual action. It certainly seems improbable that that all such defendants would simply resign themselves to the loss of that defence on the fortuitous basis that the claimant thought it more expedient to sue in contract. The second unexplored issue in Section IV concerns situations in which the standard of care required by the contract diverges from the familiar standard of reasonable care that one encounters in the law of negligence.

In Section V, we conclude. We summarise our analysis of the series of un(der)explored issues just adumbrated, and in so doing suggest how the legal landscape should look once concurrent liability's "spluttering revolution"²⁰ comes to an end. Our conclusion is underscored by the separation thesis sketched earlier. As a reminder, before we get properly underway, this posits that the transposition of incidental rules of law from one setting to another should not occur unless this can be achieved in accordance with a well-established method of common law reasoning, *and* only then at no avoidable risk to the coherence of the law.

II. *Wellesley Partners v Withers* Revisited

As noted already, one would generally expect a defendant faced with concurrent tortious and contractual liability to be sued in contract rather than tort because contract will ordinarily furnish damages designed to place the claimant in the position that she expected to occupy upon successful completion of the contract.²¹ Put otherwise, since contracts are made with a view to advancing our position in the world, damages based on expectation losses will normally be regarded as preferable to those available in the typical negligence case, for these latter will do no more than restore the claimant to the position she was in prior to the wrong being committed.²²

On occasion, however, the claimant will prefer to sue in tort. *Henderson* itself provides one example. In that case, it was the fact that the tort limitation period outlasted the one applicable to a breach of contract that was key. Another instance in which a claimant might prefer to sue in tort would be where tort would allow recovery for a type of loss – such as mental distress – that would not usually be covered by contract. A third *conceivable* reason for preferring to sue for negligence might be that, in order to recover a particular loss, that loss need only have been reasonably foreseeable at the time the tort was committed whereas, in contract, unless a loss can be said to arise naturally from the breach, it must have been reasonably within the contemplation of *both parties* at the time the contract was concluded in order to be compensable. In relation to this third point, there exists both scholarly and judicial opposition to the idea that, in a case of concurrent liability, the tort remoteness rules should apply where an action in negligence is preferred by the claimant to one in contract.

Four possible reasons for such opposition can be extracted from the relevant juristic and judicial literature. The first stems from the fact that the parties in concurrent liability cases will not be strangers but will, rather, have a sufficiently close prior relationship to justify the application of the contract remoteness rules. The fact of this prior relationship, they argue, makes it appropriate to apply the contract remoteness rules *even though* the claimant sues in tort. The second possible reason for applying the contract remoteness rules is that there is, allegedly, an implied term in the parties' contract to this effect. Thirdly, there is also support for idea that the importation of the contract remoteness rules can be attributed to the fact that the defendant voluntarily assumed a duty with a defined scope. The fourth and final reason is that the application of the contract rules

²⁰ The term belongs to Davies, "Concurrent Liability: A Spluttering Revolution" in S. Worthington *et al* (eds.), *Revolution and Evolution in Private Law* (2018), 273.

²¹ *Robinson v Harman* (1848) 1 Exch. 850.

²² *Livingstone v The Ranyards Coal Company* (1880) 5 App. Cas. 25.

is justified on grounds of pragmatism. It is, therefore, ultimately outcome-driven. We think none of these reasons withstands scrutiny and that (consistently with the separation thesis) there is no warrant for transposing the contract remoteness rules to the tort setting.

1. Existing Prior Relationship

The importance attached to the fact that the parties are not strangers in a case of concurrent liability featured prominently in the Court of Appeal decision of *Wellesley*. In that case, a firm of solicitors appealed against the quantum of damages awarded in connection with the negligent drafting of a certain agreement. The claimant, a headhunting firm, instructed the defendants to draft an agreement that would, among other things, give an investor an option to withdraw half its capital *after* 42 months. But, according to the negligently drafted instrument, the investor was in fact given the right to withdraw the capital any time during the first 41 months. The drafting error came to light only when the investor exercised this option after just 12 months. The claimant then sued the defendant for the loss of profits it would have made by opening an office in the USA had the capital not been withdrawn. At first instance, Nugee J allowed the claim. The defendants then appealed arguing that the judge had wrongly applied the tort remoteness rule in relation to the lost profits. They submitted that, since this was a case of concurrent liability, the appropriate remoteness test was the contractual one. On that footing, the defendants argued, the loss of profits from the planned expansion in the USA ought to have been treated as irrecoverable because those profits could not reasonably be supposed to have been in the contemplation of both parties at the time the contract was concluded.

The Court of Appeal agreed that the contract remoteness test was applicable (but the appeal itself failed, with the court finding that the lost profits were in fact within the contemplation of the parties at the relevant time). Floyd LJ was persuaded by the reasoning in the then current edition of *McGregor on Damages*. It ran thus: “[w]here the claim in tort is in the context of a contractual relationship, the parties are not strangers, as most tortfeasors and tort victims are” so “they should be bound by what they have brought to their contractual relationship in terms of what risks have been communicated by the one and undertaken by the other”.²³ Davies, too, signs up to the apparent logic here arguing that there is “no reason to depart from the contractual rules when the parties are not strangers”.²⁴

However, we think that this involves getting things the wrong way round. The key question in a case of concurrent liability in which the claimant opts to sue in tort as opposed to contract is not whether there is “no reason to depart from the contractual rules” by virtue of the parties not being strangers. Rather, it is why those rules should ever be applied to a tort action in the first place. It is certainly not obvious why they should be so applied. The idea that this can be done in cases of concurrent liability *because the tortious duty arises from exactly the same assumption of responsibility* that grounds the defendant’s contractual liability is a non-starter because not all cases of concurrent liability turn upon (or emphasise) the assumption of a responsibility.²⁵ And yet the idea that the

²³ H. McGregor, *McGregor on Damages*, 19th edn (London: Sweet and Maxwell, 2014), [22-009].

²⁴ Davies, “Concurrent Liability: A Spluttering Revolution” in S. Worthington *et al* (eds.), *Revolution and Evolution in Private Law* (2018). For a third adherent to this line of thinking: see A. Burrows “Comparing Compensatory Damages in Tort and Contract: Some Problematic Issues” in S. Degeling *et al* (eds.), *Torts in Commercial Law* (2011), 371-2.

²⁵ Burrows, “Solving the Problem of Concurrent Liability” (1995) 48 C.L.P. 103, at 115 supplies the example of *Jackson v Mayfair Window Cleaning Co Ltd* [1952] 1 All E.R. 215 in which the claimant’s chandelier got smashed whilst being cleaned by the defendants who had been contracted to clean it. Barry J said (at 217): “[t]he plaintiff does not complain ... that the defendants failed to clean her chandelier at the time or in the manner stipulated by their contract. Her case is based on a broader duty, independent of any contractual obligation ... She says that if the defendants, through their workmen, interfere with her property – whether with or without her permission and whether in pursuance of a contract or otherwise – they are under an obligation not to damage that property as a result of their negligence”.

contractual remoteness rules come fitted as standard in assumed responsibility cases, persists. According to Floyd LJ in *Wellesley*:

Whether or not one calls it an implied term of the contract, there exists the opportunity for consensus between the parties, as to the type of damage ... [and] [t]he parties are assumed to be contracting on the basis that liability will be confined to damage of the kind which is in their reasonable contemplation. It makes no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that the tortious duty arises out of the same assumption of responsibility as exists under the contract.²⁶

A number of possible justifications for the application of the contract remoteness rules get mixed up together in this passage, but the idea that significance should be attached to the fact that the parties knew one another and that the first assumed a responsibility towards the second comes through very clearly.

We would submit, however, that there is no magic in the *mere fact* that the parties in assumed responsibility cases are not strangers *even though* this point was emphasised (without any elaboration as to why) at two separate junctures in Floyd LJ's judgment.²⁷ We prefer the view that it is a red-herring.²⁸ By itself, the fact that the parties enjoyed a proximate relationship prior to the commission of the wrong, cannot be determinative for in the remarkably common case of negligence in the workplace (where the parties will also typically be known to one another) the usual negligence remoteness test applies.²⁹

Possibly, the real idea at work here is not *simply* that the parties were not strangers, but rather that they had ample opportunity to draw to each another's attention any unusual or abnormal risks at the time of contracting. Davies certainly endorses this idea and attaches significance to the fact that the parties are "able to make one another aware of special risks at the time of entering into their relationship."³⁰ But even this facility to reveal particular vulnerabilities is not enough. For, the ability to disclose particular risks and sensibilities to another with whom one has a prior relationship will also exist in a typical case of nuisance between two neighbours where, again, the reasonable foreseeability test of remoteness will apply.

So wherein lies the significance of the prior relationship and the ability of the parties to draw to one another's attention particular risks? Arguably, it inheres in the idea that the parties could *not just* alert one another to abnormal risks or particular susceptibilities, but that there was some sort of implied agreement about the risks that each would shoulder in the context of their relationship. We consider this possibility next.

2. *An Implied Term?*

The idea that, in a case of concurrent liability, the contract remoteness rules might be applied to a claim in tort on the basis of an implied term was also mentioned by Floyd L.J. Admittedly, it is not entirely clear from what he said whether he saw this possibility as being a separate justification or whether he considered it to be inextricably bound up with (or perhaps even part of) his "existing

²⁶ *Wellesley Partners v Withers* [2016] Ch. 520, [80].

²⁷ *Wellesley Partners v Withers* [2016] Ch. 520, [75]-[76] and [80].

²⁸ Aaron Taylor seems also to be unconvinced by this reasoning: see Taylor, "Concurrent Duties" (2019) 82 M.L.R. 17, at 35.

²⁹ Cane and Goudkamp record that, although "there is significant under-reporting" of industrial accidents, there were still "200,000 reportable non-fatal injuries to employees in 2015/16 – and only more serious injuries are reportable": P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (Cambridge: CUP, 2018), 188-9.

³⁰ Cane and Goudkamp, *Atiyah's Accidents, Compensation and the Law* (2018), 283.

prior relationship” point.³¹ Either way, he certainly raised the suggestion and its justificatory potential requires analysis.³²

To the passage cited earlier, in which Floyd L.J. clearly countenanced the possible existence of an implied term requiring the application of the contract remoteness rules to an action brought in tort, might be added the following one in which there was thought to be (just as there is with implied terms) something volitional at work. He said:

[w]hilst the two causes of action in contract and tort are independent, it is nevertheless significant that the tortious liability normally arises because one party has assumed a responsibility towards another ... It would be anomalous, to say the least, if the party pursuing the remedy in tort in these circumstances were able to assert that *the other party has assumed a responsibility for a wider range of damage than he would be taken to have assumed under the contract* ... given that the tortious duty arises out of the same assumption of responsibility as exists under the contract.³³

Naturally, any express stipulation in a contract that the contractual remoteness rules should govern a claim based on the breach of a concurrent tortious duty is unobjectionable. But on what grounds can the parties be “assumed to be contracting on the basis that liability will be confined to damage of the kind which is in their reasonable contemplation” where they have not expressly stated this in their agreement? On what grounds, in other words, may we base the conclusion that there is a “consensus” on the matter, that there really is an implied term along the lines envisaged by Floyd L.J.: that is, that the contract remoteness rules will apply to a claim brought for breach of the concurrent tortious duty?

To be clear, such a term would be one according to which the parties can be said to be “contracting on the basis that liability will be confined to losses that were within their reasonable contemplation”. But when one considers closely the suggestion that there may be such an implied term, it soon becomes apparent how strange this term would be. Its content would be something like this: the parties agree that (i) where one of them breaks a contractual duty to take reasonable care, and (ii) the undertaking which spawned that duty also gave rise to a corresponding duty in tort, and (iii) the party who suffers loss as a consequence elects to sue in tort rather than contract, then (iv) the relevant remoteness test for the tort action should be the one that is ordinarily used in contract law, and not the one usually applied to negligence actions.

It is a combination of the peculiarity and complexity of this term that renders it an unlikely candidate for implication on the first of the accepted bases on which terms are implied in fact: the so-called officious bystander test. In *Shirlaw v Southern Foundries*, MacKinnon L.J. made clear that such implication was only possible where the term to be implied “is something so obvious that it goes without saying”.³⁴ Such a convoluted term as the one set out above is anything but obvious, especially to mere bystanders who have no legal education behind them.

Nor does it seem likely that the term could be implied on the alternative basis of the business efficacy test laid down in *The Moorcock*.³⁵ That, after all, supports the implication of terms associated with the feasibility of the contract being performed in accordance with the parties’ expectations. As Bowen L.J. explained, any such term is implied “with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side”.³⁶ In *The Moorcock* itself, the concern was that the “business could

³¹ See the text accompanying fn 26.

³² Ultimately, it makes no difference how we treat it. Since it is the only way it makes no difference to

³³ *Wellesley Partners v Withers* [2016] Ch. 520, [68] (emphasis added).

³⁴ [1939] 2 K.B. 206, at 227. This test has arguably only become stricter: see *Marks and Spencer plc v B.N.P. Paribas Securities Services Trust Company (Jersey) Ltd* [2016] A.C. 742.

³⁵ (1889) 14 P.D. 64.

³⁶ *The Moorcock* (1889) 14 P.D. 64, at 68.

not be carried on unless there was an implication [that the jetty could be used safely]”.³⁷ By comparison, it is hard to see how a term concerning the remoteness rules to be applied in a negligence action that is chosen in preference to an action for breach of contract can possibly be cashed out in terms of business efficacy. Any such term would be designed to apply *after the contract has been broken*, after something has gone wrong. For this reason, it is hard to conceive of it as being concerned with efficacious performance. Yet this is exactly how “*Moorcock*” implied terms must be understood: they are intimately bound up with things going just as the parties had hoped. A term associated with things going wrong is a very different beast indeed.

Given that neither method implication appears viable,³⁸ it is hard to see why Floyd L.J. should have entertained the idea that the contract remoteness rules could be applied to an action framed in tort on this basis.³⁹ Without interrogating this question, Davies applauds the decision in *Wellesley*, and in particular its “careful reasoning”.⁴⁰ But Floyd L.J.’s suggestion that there may be an implied term at work is certainly not buttressed by sedulous reasoning. In the space of just a single paragraph, the learned judge moved from talk of implied terms (in the first sentence) to speaking (just a few sentences later) about the “range of damage that he [ie, the party in breach] would be taken to have assumed under the contract”. Yet talk of the “range of damage” – which is clearly reminiscent of the tortious scope of duty principle – does nothing to support the idea that there may be an implied term in play. This is because the scope of duty principle has nothing to do with implied terms and is, in any case, only linked to (but not a surrogate for) the remoteness test. If the scope of duty principle has any relevance, it must be as a separate possible justification for the application of the contract remoteness rules to a negligence claim in a case of concurrent liability.

3. *Scope of Duty and Remoteness*

Is there, then, any mileage in the idea that the scope of duty principle may supply the elusive justification for applying the contract remoteness rules to a claim framed in tort? In our view, there is not. The mere fact that the defendant assumed a responsibility to perform a duty of limited scope carries with it no implications about *where* the contract remoteness rules should be applied for the simple reason that the scope of duty principle is quite separate from (and does not strictly speak to) the question of remoteness in contract. While the former focuses upon the purposes for which the defendant owes a duty to the claimant (and thereby identifies the *heads of loss* that are recoverable), the latter serves to place limits on the extent of liability for heads of loss that are not in dispute.

³⁷ *The Moorcock* (1889) 14 P.D. 64, at 71.

³⁸ A further potential difficulty with the implied terms analysis is that implied terms are derived from an interpretation of the contract, while the remoteness rules are not so derived. In *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 W.L.R. 1988, at [21], Lord Hoffmann said regarding implied terms that “the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean”. Similarly, in *Marks & Spencer plc v BNP Paribas* [2016] A.C. 742, Lord Neuberger accepted (at [26]) that “implying terms into the contract, involve[s] determining the scope and meaning of the contract”. By contrast, the remoteness have nothing to do with interpretation of the contract. They are, as Burrows puts it, “externally imposed”: see A. Burrows, “Lord Hoffmann and Remoteness in Contract” in P. Davies and J. Pila (eds.), *The Jurisprudence of Lord Hoffmann* (Oxford: Hart Publishing, 2015), 262. And for concurrence with, and reinforcement of, this point, see A. Robertson, “The Basis of the Remoteness Rule in Contract” (2008) 28 *Legal Studies* 172.

³⁹ For the sake of completeness, it may also be noted that a term implied in law is also a non-starter. This is because the idea that the contract remoteness rules should apply *whenever there is concurrent tortious liability* is clearly incompatible with the requirement for terms implied in law that there be “a contract of a defined type”: see *El Awadi v B.C.C.I.* [1990] 1 Q.B. 606, at 624. Concurrent liability is not confined to a defined class of contracts.

⁴⁰ P. Davies, “Concurrent Liability: A Spluttering Revolution” in Worthington *et al* (eds.), *Revolution and Evolution in Private Law* (2018), 283.

Lord Hoffmann's famous mountaineer example in the *SAAMCO* case offers perhaps the clearest illustration of the scope of duty principle. In that hypothetical, any injury that befell the mountaineer in consequence of his knee having been negligently certified as sound would be compensable. But no damages would be available if his injury were attributable to "an entirely foreseeable consequence of mountaineering [that had]... nothing to do with his knee", even if he would not have made the particular expedition had the state of his knee been correctly diagnosed.⁴¹

True, scope of duty analysis is not irrelevant in the contract setting, for as Lord Hoffmann made clear in *The Achilles*, "one must *first decide* whether the loss for which compensation is sought is of a 'kind' or 'type' for which the contract breaker ought fairly to be taken to have accepted responsibility".⁴² But any such scope-of-duty talk must be distinguished from what the contract remoteness rules are fundamentally designed to do, namely, place limits on heads of loss already identified as being compensable. The famous case of *Victoria Laundry (Windsor) v Newman Industries*⁴³ amply illustrates the point.

The key question in that case, it will be recalled, was not whether the defendant could be sued for loss of profits. That was accepted. Rather, the case turned ultimately on the question of whether the defendant could be sued for certain exceptional profits that would have been earned from an especially lucrative dyeing contract had there been no breach of contract. In other words, the case was not about whether a particular head of loss – profits – was compensable. It concerned, instead, the extent of the defendant's liability: the level of profits recoverable. To put it another way, the case makes plain the distinction between the scope of a defendant's duty and the remoteness of damage; and it is a distinction that has been reiterated by Lord Hoffmann himself in more recent years. Writing extra-judicially, he said: "[t]he scope of the duty of care ... has nothing to do with the extent of the consequences".⁴⁴

From this, we suggest, it follows, that, because the scope of duty is conceptually separate from the remoteness of damage in contract, any reference to the former cannot be interpreted as impinging upon the latter. And if that is correct, it must also follow that any talk about scope of duty (or "range of damage" in the language of Floyd L.J.) cannot supply a suitable explanation or justification for the application of the contract remoteness rules in a case of concurrent liability in which the claimant elects to sue in tort.⁴⁵ Indeed, far from being well-reasoned in this connection, the relevant passage in Floyd L.J.'s judgment displays a rather confused understanding of the relationship between the *SAAMCO* scope of duty idea and the contract remoteness rules. Neither has anything to do with implied terms. And nothing is gained by adding to the mix, as Floyd L.J. did, the observation that the "tortious duty arises out of the same assumption of responsibility as exists under the contract". So saying amounts to a mere iteration of the factual circumstances out

⁴¹ *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191, at 213.

⁴² [2009] A.C. 61, at [15] (emphasis added).

⁴³ [1949] 2 K.B. 528.

⁴⁴ L. Hoffmann, "Causation" (2005) 121 L.Q.R. 592, at 596. See also *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1997] 1 W.L.R. 1267, at 1638 (distinguishing between (1) heads of loss that come within the scope of a given duty and (2) any caps placed on damages associated with those heads of loss). What is regrettable is his attempt in *The Achilles* to portray of the would-be profits from the particularly lucrative dyeing contracts in *Victoria Laundry* as "a different type of loss": [2009] A.C. 61, at [22]. That was not how they were treated in *Victoria Laundry* itself. In that case they were treated as germane to a special circumstance of which the defendant had not been made aware. But they were nonetheless handled under the general rubric of "loss of profits" by Asquith L.J. (who delivered the judgment of the entire court): [1949] 2 K.B. 528, at 543. The single head of loss (i.e., loss of profits) was referred to no fewer than 14 times in his judgment.

⁴⁵ For a fuller account of the way in which remoteness in contract diverges from the tortious "scope of duty" idea in *SAAMCO*, see M. Stiggelbout, "Contractual Remoteness, 'Scope of Duty' and Intention" [2012] L.M.C.L.Q. 97, at 100. Cf Burrows, "Comparing Compensatory Damages in Tort and Contract: Some Problematic Issues" in S. Degeling *et al* (eds.), *Torts in Commercial Law* (2011), 373-374.

of which the tortious duty often arises and does not constitute a reason why a contractual remoteness rules should be transposed to the tort setting.⁴⁶

4. Pragmatism

The fourth and last possible basis for transferring the contract remoteness rules to a negligence action – also in evidence in *Wellesley* – is that this can be achieved on the basis of pragmatism. The argument here is that the migration of the contract remoteness rules to a claim framed in tort allows us to avoid an outcome that “makes no sense at all” as Floyd L.J. put it (echoing a point made by Burrows some years earlier⁴⁷).

The suggestion that the transposition of the contract remoteness rules is warranted as a matter of good sense has attracted a fair amount of academic support.⁴⁸ Davies, for example, has questioned whether, on pragmatic grounds, it would be appropriate to afford the claimant an unwarranted advantage by allowing her to sue for more in tort than she could obtain in contract. He writes:

[w]here the tortious duty arises out of an assumption of responsibility and exists concurrently with an identical contractual duty, it seems unduly generous to permit the claimant to rely upon the more favourable rules that have been developed in the tortious sphere.⁴⁹

It is perfectly true that a claimant should not be worse off where she has entered into a contract with the defendant *and provided consideration* than where she can invoke only a tortious duty arising from an assumption of responsibility for which she has given nothing in return.⁵⁰ But on what grounds might Davies think that such a claimant would in fact be worse off than the person able only to sue in tort? A situation characterised by concurrent liability involves – by definition – one in which *two* possible avenues of recourse are open to the claimant. Just because the claimant has concluded a contract with the defendant will not mean that she has thereby surrendered the facility to sue in tort. Accordingly, it does not follow from the fact that a contract has been agreed that the tort remoteness rules should be adjusted in order to address a supposed advantage flowing to the claimant who can sue only in tort. The claimant who has entered into a contract will also have

⁴⁶ It has been suggested that a suitable justification can be traced to the fact that the “one duty was derived from the other”: Goh and Yip “Concurrent Liability in Tort and Contract” (2017) *Torts L.J.* 148, at 161. Yet this is merely a conclusory statement of the very thing that needs shown, namely, why the contractual principles should be thought to hold sway. It is also contradicted by logic and authority. As a matter of logic, one would ordinarily say that, in order to derive *x* from *y*, *y* must exist before *x*. But in the concurrent liability cases with which we are concerned, this is not so: the relevant contractual and tortious duties arise simultaneously from a single assumption of responsibility. In terms of countervailing authority, the Court of Appeal made clear in *Lejonvarn v Burgess* [2017] EWCA Civ 254 that a relationship of the required kind for tort purposes may arise even though a supposedly concurrent duty in contract does not exist. In that case, the putative contractual link turned out to be invalid; but a valid tortious duty was held to arise from the (supposedly) contractual promise that was made. It did not depend on (and thus could not be derived from) a contractual duty.

⁴⁷ Burrows, “Solving the Problem of Concurrent Liability” (1995) 48 *C.L.P.* 103, at 122 considers it “hard to see why restrictions on damages, such as remoteness ... should be less favourable to plaintiffs suing for breach of contract than for the tort of negligence” and thinks also that “[t]he pragmatic solution is to allow plaintiffs to evade these unwarranted disadvantages by framing what is in essence a contractual claim as a claim in tort”. He asserts (at 111) that “the rules governing contractual claims, as a matter of logic, should apply”. He deployed essentially the same line of argument 15 years later in Burrows “Comparing Compensatory Damages in Tort and Contract: Some Problematic Issues” in S. Degeling *et al* (eds.), *Torts in Commercial Law* (2011), 370 arguing that “rationality not formalism should here govern”.

⁴⁸ See, e.g., A. Tettenborn, “Professional Liability and Remoteness: Contract v Tort” (2016) 32 *Journal of Professional Negligence* 68; Davies, “Concurrent Liability: A Spluttering Revolution” in S. Worthington *et al* (eds.), *Revolution and Evolution in Private Law* (Oxford: Hart Publishing, 2018); Taylor “Concurrent Duties” (2019) 82 *M.L.R.* 17.

⁴⁹ Davies, “Concurrent Liability: A Spluttering Revolution” in S. Worthington *et al* (eds.), *Revolution and Evolution in Private Law* (2018), 281.

⁵⁰ Davies, “Concurrent Liability: A Spluttering Revolution” in S. Worthington *et al* (eds.), *Revolution and Evolution in Private Law* (2018), 285.

the option of suing in tort if she so wishes. Furthermore, it is not inevitably the case that the application of the more generous tort remoteness test will *always* make it more advantageous to sue in tort. One possibility is that – on either remoteness test – the exact same losses would be recoverable (as was in fact the case in *Wellesley*). Another possibility is that the contract may include a liquidated damages clause which would produce a larger compensatory award than any available damages in tort,⁵¹ even if that tort action attracted the application of the tort remoteness test.

Also, however attractive outcome-driven thinking may ostensibly appear, it is difficult to justify. So long as one respects the idea that the law should develop on a principled basis – either by extending recognised principles to new contexts, or by accepted modes of common law reasoning (such as reasoning by analogy) – then pragmatic decision making must be considered objectionable. This is because it is, in essence, decision-making according to a judicial hunch about what good sense or reasonableness demands. In *Wellesley*, the Court of Appeal merely *suspected* that a refusal to transpose the contract remoteness rules could produce results that would “make no sense”. But by what yardstick might we judge whether such results would make no sense? No indication was supplied in that case.

At the same time, and as further ammunition against this approach, one might plausibly argue that leaving the resolution of such cases to unarticulated judicial perceptions of what pragmatism demands is an unprincipled step in the direction of what Burrows has described as “a potentially disastrous regime of decision-making by pure intuition”.⁵²

Although four apparent justifications for the decision in *Wellesley* to apply the contract remoteness rules to a concurrent action in tort can be teased out of Floyd L.J.’s judgment in that case, none of them withstands proper scrutiny. For this reason, we think it deserves to be regarded as a precarious authority. It is certainly a decision on stilts from a formalist perspective. Furthermore, it left open two important, related questions about which remoteness rule to apply in cases in which there are partially overlapping contractual and tortious duties. To these, we now turn.

III. Concurrent but not Coextensive Duties

1. Concurrent Duties that Arise at Different Points in Time

As already noted, a key premise for the decision in *Wellesley* was that “the tortious duty arises out of the same assumption of responsibility as exists under the contract”.⁵³ Yet, importantly, this factual premise does not exist in all cases of concurrent liability.

Suppose that D (a professional) assumes a responsibility towards potential client C and proceeds to offer C negligent advice for a number of months before finally completing a contract with C. Suppose further that D continues to supply C with the same negligent advice after concluding the contract (under which D agrees to exercise reasonable care in advising C). In such a case, after the contract has been concluded, D will be under concurrent but not *temporally* coextensive duties.⁵⁴ Taylor suggests that where this occurs – where, in other words, there have been breaches of duty both before and during the currency of the contract – “the ‘reasonably foreseeable’ test should apply to all negligent acts committed before the completion of the contract, and the ‘reasonable contemplation of the parties at the time of contracting’ test to

⁵¹ This is particularly the case since the Supreme Court decision in *Cavendish Square Holding BV v Makdessi* [2015] 3 W.L.R. 1377 widened the potential scope of liquidated damages clauses.

⁵² Burrows, “Solving the Problem of Concurrent Liability” (1995) 48 C.L.P. 103, at 104. See also N. McBride, *The Humanity of Private Law: Part I* (Oxford: Hart Publishing, 2018), ch 6.

⁵³ This phrase appears in *Wellesley Partners v Withers* [2016] Ch. 520, at [68] and [80].

⁵⁴ Such a situation was specifically envisaged by Hirst L.J. in *Holt v Payne Skillington & De Groot Collis* [1996] P.N.L.R. 179, at 195.

negligent acts after that point”.⁵⁵ This conclusion strikes us as being rather hastily reached since there are two particular problems that beset Taylor’s proposal.

To be clear, we agree with Taylor that, “the ‘reasonably foreseeable’ test should apply to all negligent acts committed before the completion of the contract”.⁵⁶ And this is exactly what happened in *Riyad Bank v Ahli United Bank (UK) Plc*⁵⁷ where the defendant bank deliberately declined to conclude a contract with the defendant for reasons associated with its public image which need not concern us here. The idea that the contract remoteness rules can and should be applied to an action based on the breach of a tortious duty that arose before the contract was concluded is, we think, deeply unpalatable *even if* the relationship between the parties can be regarded as being very close to a contractual one.⁵⁸ But this is not what Roth J thought in *Wellesley*. Admittedly, he was careful to point out that, in the case before him, it was “unnecessary to explore the position where the liability for negligent advice or professional services arises only in tort, such as ... where a client receives gratuitous advice from a solicitor”.⁵⁹ But he nonetheless indicated that he was “incline[d] to the view that where there is such a relationship ‘equivalent to contract’... the contractual test should apply”.⁶⁰ We think it was a mistake to express this view.

Even though the tortious duty is said to arise from an assumed responsibility, it is still, in our view, misleading to say (as Roth J did) that the relationship between the parties is “equivalent to contract”. First, this is so because our most senior courts formally treat such cases as tort cases.⁶¹ And secondly, the suggestion presupposes that there is a genuine assumption of responsibility in all such cases. In fact, many of the leading authorities on tortious assumed responsibilities turn on imputed duties rather than ones that were volitionally shouldered by the defendant.⁶²

Where we part company with Taylor is in relation to what we consider to be his overly-simplistic distinction between cases involving negligent acts committed before the contract was concluded and those turning on negligent acts committed after the contract was formed. The first problem with dividing the cases according to whether they turn on pre-contractual or post-contractual wrongs centres on the rule of law principle that like cases be treated alike. The second, calls into question the feasibility of drawing that distinction in the first place.

Imagine a case in which the tortious duty arose before a contract was concluded. Suppose, also, that the subsequent contract imposes on the defendant a duty that is in substance identical to the one that arose earlier in tort. Finally, imagine that, right from the outset, the defendant has regularly breached this duty to the claimant by repeatedly offering negligent advice upon which the claimant has relied to her cost. In such a case, it would be impossible to distinguish *in kind* the wrongs committed prior to, and those committed after, the conclusion of the contract. And yet, on Taylor’s analysis, the pre-contractual wrongdoing would attract the application of the tort remoteness rules whereas, if identical wrongdoing after the conclusion of the contract formed the basis of the tort action, the contract remoteness rules would apply. To proceed in this way would run the risk of treating identical wrongs differently, of abrogating, in other words, the rule of law principle just mentioned.⁶³

⁵⁵ Taylor “Concurrent Duties” (2019) 82 M.L.R. 17, at 42.

⁵⁶ Taylor “Concurrent Duties” (2019) 82 M.L.R. 17, at 42.

⁵⁷ [2006] 1 C.L.C. 1007.

⁵⁸ A situation that is very close to being contractual is still, however, not contractual. Accordingly, no migration can logically occur from contract to tort *because* there is no contract!

⁵⁹ [2016] Ch. 520, at [163].

⁶⁰ *Wellesley Partners v Withers* [2016] Ch. 520, at [163].

⁶¹ See Taylor “Concurrent Duties” (2019) 82 M.L.R. 17, at 22-24 and the many sources cited therein.

⁶² The classic example is *Smith v Eric S Bush* [1990] 1 A.C. 831 where the defendant actually tried to disclaim responsibility for the accuracy of the survey and valuation he produced. Another famous example is *White v Jones* [1995] 2 A.C. 207.

⁶³ For this risk to materialise, there would still need to be a difference between what was reasonably foreseeable and what was within the reasonable contemplation of the parties at the time of the contract.

A related problem would arise in a slightly different scenario. Suppose the defendant commits a single act of negligence which takes place *before* the conclusion of the contract, but which does not result in any loss until after the contract has been completed. In such a case, the negligence action would rely on facts that straddle the completion of the contract. The breach of duty (the wrong) would take place before the making of the contract, while the resulting harm – itself a necessary ingredient of the tort – would not occur until after that time. In such a case, we think that it would be impossible to describe the case as one involving either a pre-contractual tort or a post-contractual tort.⁶⁴ It is certainly well established that a negligence action will not accrue (because the tort is not complete) until harm occurs.⁶⁵ So even if we accepted Taylor’s suggested approach, it isn’t at all clear which remoteness test should apply in a case of this kind.

By contrast, the case is unproblematic if the separation thesis for which we argue is applied. On our approach, it will be recalled, there should be no transposition of the incidental rules from the contract sphere to the tort sphere (and vice versa) *unless* this can be achieved by use of an established technique of common law reasoning, *and* at no avoidable risk to the coherence of the law. We would, therefore, apply the tort remoteness test in both of the above scenarios. So doing would certainly avoid the problems just considered as well as the sometimes fiendishly difficult evidential task of identifying exactly when harm occurred in some economic loss cases.⁶⁶

2. *Concurrent Duties that Differ in Scope*

In *Holt v Payne Skillington & De Groot Collis*,⁶⁷ the material facts were as follows. The claimants, with a view to minimising certain tax liabilities, wanted to acquire a building to be used for short-term holiday letting. The second defendants, who were estate agents, found seemingly appropriate premises in Mayfair. Prior to the completion of the purchase, the claimants raised a concern that the property could not lawfully be used as holiday accommodation. An employee of the second defendants gave a non-contractual assurance that he would investigate the matter, and he subsequently advised the claimants that the premises could in fact be put to this use. It later transpired that this was untrue: the property could not be so used according to the relevant planning laws. The claimant bought the premises and suffered loss as a consequence of their not being able to be used as intended.

Actions against the second defendants were brought in both contract and tort. They were held not to be liable in contract because the retainer did not cover the investigation of planning matters. But it was held that there was no reason in principle why they could not be sued in tort in respect of loss caused by a negligent misstatement. On the facts, however, the court failed to find any sufficiently clear representation by the second defendants’ employee upon which the claimants relied. Even so, what is important for present purposes is the following passage taken from the judgment delivered on behalf of the entire court by Hirst L.J.

[T]here is no reason in principle why a *Hedley Byrne* type duty of care cannot arise in an overall set of circumstances where, by reference to certain limited aspects of those circumstances, the same parties enter into a contractual relationship involving more limited obligations than those imposed by the duty of care in tort. In such circumstances, the duty of care in tort and the duties imposed by the contract will be concurrent but not coextensive. The difference in scope between the two will reflect the more limited factual basis which gave rise to the contract and

⁶⁴ Goh and Yip contemplate tortious and contractual duties that arise at different points in time, but they do not seem to recognise that there may be no simple, binary division between what they call “the pre-contractual tortious relationship ... and post-contractual tortious relationship”: Goh and Yip, “Concurrent Liability in Tort and Contract” (2017) *Torts L.J.* 148, at 165-166.

⁶⁵ See, e.g., *Pirelli General Cable Works Ltd v Oscar Faber and Partners* [1983] 2 A.C. 758.

⁶⁶ For an account of these difficulties, see D. Nolan, “Rights, Damage and Loss” (2017) 37 *O.J.L.S.* 255, at 263-264.

⁶⁷ [1996] *P.N.L.R.* 179.

the absence of any term in that contract which precludes or restricts the wider duty of care in tort.⁶⁸

Despite its being decided in 1996, so far as we can detect, Taylor is the only jurist to have considered the case in any depth. His view is that it establishes that “it is possible ... for a *Hedley-Byrne* type duty of care to extend *beyond* the obligations undertaken in the contract”.⁶⁹ The situation, he maintains, can be characterised in terms of “two independent duties, which are concurrent but not coextensive”⁷⁰ given that concurrent duties are no more than “simultaneous private law duties ... the content of which may overlap in whole or in part”.⁷¹ These all seem to us to be unobjectionable remarks.

However, we think that it is also important to highlight a point that Taylor stops short of making. This is that, just because there are *concurrent duties* does not mean that there will be *concurrent liability*. Suppose that in *Holt* the retainer had required the second defendants to do *A* while the tortious duty required them to do the more expansive *A'*.⁷² Suppose also that the alleged negligence related to the more expansive part of the duty: the bit that was additional to what was required under the contract. In such a case, there would be no concurrent liability. Lord Goff was clear in *Henderson* that, at the heart of concurrent liability, is a situation in which the claimant has the option of framing his action in *either* contract or tort. He said: “the common law is not antipathetic to concurrent liability... [hence there being] no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy”; instead “the claimant may be entitled to take advantage of the remedy which is most advantageous to him”.⁷³ The hypothetical scenario just described seems to be of the kind that Hirst L.J. thought could conceivably be present in *Holt*. If this be right, then he was not in fact tackling a concurrent liability case, for there was never any option to sue in contract.

For the sake of completeness it is worth pointing out that there is another possible interpretation of the facts in *Holt*: one in which the contract required the defendant to do *A* while the tortious duty, quite independently, required the defendant to do *B* (a related but separate thing). The facts as they appear in the case are simply not clear enough to say which interpretation is the better one.⁷⁴ But even if this second interpretation were adopted, the situation would still be in one in which there were concurrent duties but no concurrent liability. So long as the only duty breached was the duty to do *B*, there would be a critical absence of the right to sue in *either* contract or tort.

The key point at work here – that concurrent duties must overlap in order for there to be concurrent liability – is by no means an unimportant one. This is because concurrent, but not overlapping, duties have the potential to give rise to a combination of remedies in contract and tort. Imagine a case like *Holt* in which there was a tortious duty to identify the relevant planning rules and a separate contractual duty to produce a careful valuation of the property. Imagine also that the claimant bought the property believing that it could be put to her intended use, that it later transpired that this could not be done and that the claimant went on to sell the property at a loss

⁶⁸ *Holt v Payne Skillington & De Groot Collis* [1996] P.N.L.R. 179, at 195.

⁶⁹ Taylor, “Concurrent Duties” (2019) 82 M.L.R. 17, at 26 (emphasis in original).

⁷⁰ Taylor, “Concurrent Duties” (2019) 82 M.L.R. 17, at 17.

⁷¹ Taylor, “Concurrent Duties” (2019) 82 M.L.R. 17, at 17. Paul Davies also appears to view situations of concurrent liability as being characterised by an “overlap” between the respective tortious and contractual duties: see Davies, “Concurrent Liability: A Spluttering Revolution” in S. Worthington *et al* (eds.), *Revolution and Evolution in Private Law* (2018), 275 and 281.

⁷² It is certainly the way that Aaron Taylor views it: see Taylor “Concurrent Duties” (2019) 82 M.L.R. 17, at 26.

⁷³ [1995] 2 A.C. 145, at 194.

⁷⁴ Quite what the employee had assumed a responsibility to do is unclear. Hirst L.J.’s dictum simply reproduced the claimants’ evidence on this matter to the effect that “they were relying on him [ie, the employee] to ‘hold our hands’”, that “he would help the plaintiffs find a suitable property” and that “he was fully conversant with the planning position and ... would be able to assist the plaintiffs”: *Holt v Payne Skillington & De Groot Collis* [1996] P.N.L.R. 179, at 183 and 188.

(given that the price she paid for it was based on a negligently produced overvaluation). In such a scenario, the claimant may have available to her (in theory, and subject to the established principles against double recovery⁷⁵) an action in tort for the loss associated with the negligent planning investigation, and an action in contract for the negligent valuation.

Not long after *Henderson* was decided, Burrows recognised such a possibility. He did not, however, discuss it in any detail. He began by observing (quite correctly) that “[t]he problem posed by concurrent liability is whether the plaintiff has a free choice as to which cause of action to pursue”.⁷⁶ He was also right to unpack concurrent liability in terms of “a claim for tort ... [that] is not independent of a claim for breach of contract”.⁷⁷ But in our hypothetical, the two claims are independent of each other. There is no reason in principle, then, why the claimant in that scenario should not combine (rather than choose between) the tortious and contractual remedies. Curiously, despite his acknowledgement of this possibility, Burrows said no more than this:

the free choice thesis does not touch on the question whether a plaintiff can *combine* remedies for more than one cause of action. Combining remedies raises different questions, and requires different answers, than does the problem of concurrent liability.⁷⁸

In our view, Burrows was right to say this. But we consider it to be slightly unfortunate that he failed to unpack in greater detail what he was saying. What needs to be stressed here, what is of fundamental importance is that the phrase “concurrent duties” not be used interchangeably with the phrase “concurrent liability”. The latter term presupposes not only that the two duties overlap but also that the relevant breach is of a common duty: one that is owed *both* contractually and as a matter of tort law. But where there are independent breaches of concurrent, but not overlapping, duties there is in principle scope for the claimant to combine the remedies.

IV. Unexplored Matters

1. *Volenti and Concurrent Liability*

One wholly unexplored issue is whether it is, or should be, possible for a defendant to invoke the defence of *volenti* when, although she is concurrently liable in contract and tort, the claimant prefers to base his claim on the breach of contract. According to orthodoxy, the *volenti* defence will be available in relation to a negligence action if the claimant voluntarily agrees to take the risk of suffering the harm that he in fact suffers, *and* he does so knowing the nature and extent of the risk involved.⁷⁹ By contrast, the defence is not one that has hitherto been used in the context of contract law. But might it be invoked in that setting when the relevant contract action exists concurrently with one in tort?

In theory, there are two possible analogies that could be drawn here; and, of course, analogical reasoning is just the kind of reasoning envisaged by the separation thesis. First, the courts could conceivably permit the use of the *volenti* defence in relation to the contractual claim by analogy with the treatment of contributory negligence in *Vesta v Butcher*. Alternatively, taking a lead from the way that the limitation of actions defence was treated in *Henderson*,⁸⁰ the courts could

⁷⁵ See, e.g., *Hodgson v Trapp* [1989] AC 807, at 819 (Lord Bridge).

⁷⁶ Burrows, “Solving the Problem of Concurrent Liability” (1995) 48 C.L.P. 103, at 104.

⁷⁷ Burrows, “Solving the Problem of Concurrent Liability” (1995) 48 C.L.P. 103, at 104.

⁷⁸ Burrows, “Solving the Problem of Concurrent Liability” (1995) 48 C.L.P. 103, at 112.

⁷⁹ *Morris v Murray* [1991] 2 Q.B. 7, at 15: “the *volenti* doctrine can apply to the tort of negligence, though it must depend upon the extent of the risk, the [claimant’s] ... knowledge of it and what can be inferred as to his acceptance of it... [He] cannot be *volens* ... in respect of acts of negligence which he had no reason to anticipate”.

⁸⁰ For an explanation of why limitation is a defence, see J. Goudkamp, *Tort Law Defences* (Oxford: Hart Publishing, 2013), 3-5.

instead seek to confine the *volenti* defence to claims framed in negligence and refuse to allow its migration to any action for breach of contract. In our view, it is not safe to reason by analogy either way. Seeking to draw a comparison with the treatment of contributory negligence in *Vesta* would be inapt because it would be based upon a false comparison. Attempting to draw an analogy with the treatment of the limitation defence in *Henderson* would also be inappropriate on two separate grounds explained below.

The reason why applying the *volenti* defence to actions for breach of contract in line with the treatment of contributory negligence in *Vesta* would rest upon a false analogy is as follows. It would not be a case of doing with a second *defence* what one has been done with a first *defence*, since, of the two principles, only *volenti* is a true defence. Defences, properly understood, are, as Goudkamp neatly puts it, “liability-defeating rules that are external to the elements of the claimant’s action”.⁸¹ Contributory negligence does not match this description. Where it is successfully invoked, it does not defeat liability. Once the defendant has been adjudged to be liable, she remains liable even after a successful plea of contributory negligence has been raised. The successful invocation of the contributory negligence legislation merely determines the fraction of the claimant’s damage or loss that must be made good by the defendant.

The 1945 Act is clear that successfully invoking contributory negligence does not exculpate the defendant. It states: “a claim ... shall not be defeated by reason of [contributory negligence]”.⁸² It then adds that “the damages recoverable ... shall be reduced to such extent as the court thinks just and equitable”.⁸³ Alighting upon this wording, and aided by the analysis of McBride and Bagshaw, Goudkamp concludes that contributory negligence “is a remedial rule” and not a “liability rule”.⁸⁴ He buttresses this claim by reference to a number of other observations about how contributory negligence works in practice. Prime among these, we think, is the fact that issues of contributory negligence are excluded from default and summary judgments which are, of course, only determinative in relation to liability. Yet as Goudkamp points out, the fact that a default or summary judgment has been entered against the defendant does not prevent her from subsequently invoking contributory negligence in order to reduce the size of the remedy to which the claimant is entitled,⁸⁵ when the quantum of damages comes to be decided. Taken together, we think that the wording of the statute and Goudkamp’s point about default and summary judgments make it hard to regard contributory negligence as a defence in the strict sense. Both points suggest instead that it is better seen as a *remedial rule*. And because it is a *remedial rule* rather than a defence, *Vesta* cannot properly be invoked as an analogical guide as to what should be done with *volenti* in a case of concurrent liability given that *volenti* is a defence.⁸⁶

The second option in relation to the question of whether concurrent contract and tort claims should both permit the *volenti* defence to be raised involves drawing an analogy with the treatment of the limitation defence in *Henderson*. But this too is problematic; indeed, doubly so. The first difficulty stems from the fact that Lord Goff specifically confined what he had to say in *Henderson* to the way in which the tort and contract limitation periods should be treated. He insisted that “it would be quite wrong to embark upon the examination of questions which do not arise”.⁸⁷ We take such words to be indicative of the fact that it would be unwise to treat *Henderson* as a guide as to whether the *volenti* defence can and should be transposed from the tortious to the contractual

⁸¹ Goudkamp, *Tort Law Defences* (2013), 2-7. Note, however, that Goudkamp is (at 55-58) non-committal about whether *volenti* is a defence given that it is often taken by the courts as a denial of the fault element in negligence.

⁸² Law Reform (Contributory Negligence) Act 1945, s 1(1) (emphasis added).

⁸³ Law Reform (Contributory Negligence) Act 1945, s 1(1).

⁸⁴ J Goudkamp, “Rethinking Contributory Negligence” in S. Pitel *et al* (eds.), *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013), 337.

⁸⁵ Goudkamp, “Rethinking Contributory Negligence” in S. Pitel *et al* (eds.), *Tort Law: Challenging Orthodoxy* (2013), 337.

⁸⁶ A further objection to drawing an analogy with *Vesta* would be that, as the High Court of Australia pointed out in *Astley v Austrust* [1999] H.C.A. 6, [66], there were “substantial flaws of reasoning” in that case.

⁸⁷ [1995] 2 A.C. 145, at 195.

setting. Lord Goff was arguably of the view that limitation as a *sui generis* matter, and one that ought to be dealt with in isolation.

The second problem with reasoning by analogy from *Henderson* stems from the fact that the limitation rules in contract and tort have statutory foundations. Accordingly, ousting one limitation rule in favour of the other in a case of concurrent liability might be seen as acting contrary to the will of the legislature. Yet, of course, no such obstacle could be said to impede the transposition of a defence such as *volenti* from the tortious sphere to the contractual one. This defence is entirely a creature of the common law. Accordingly, the fact that in *Henderson* it was held that *statutory* limitation rules should be confined to, and always applied within, their proper contexts, offers no real guidance on whether in a case of concurrent liability the *volenti* defence should “likewise” be confined to its familiar context, namely, actions framed in tort.

In the absence of any clear analogy, and in accordance with the separation thesis, we think that there should be no transposition of the *volenti* defence to an action framed in contract. In saying this we acknowledge a *potential clash* with that thesis insofar as it emphasises the importance of maintaining the coherence of the law. The potential clash we have in mind arises in the following way.

Allowing the defence of *volenti* in tort (where a claimant suffers physical injury) means, effectively, that a claimant will be bound to bear responsibility for their own seriously foolhardy behaviour. One could draft a contract containing a term to similar effect: that is, a term with a stipulating that the claimant should bear the risk of the defendant performing his side of the contract negligently. However, any such clause would be deemed ineffective under the Unfair Contract Terms Act 1977 or the Consumer Rights Act 2015. These statutes prohibit the use of terms designed to exclude liability for injury caused by negligence.⁸⁸ The end result would be private law sending out mixed messages. Tort law would convey the message that claimants must bear personal responsibility for their own foolhardy behaviour, but contract law would do the opposite. It would treat sympathetically claimants who were prepared to run the risk of being injured by the other party’s negligence.

For the purposes of concurrent liability, imagine a hypothetical situation in which C, a pilot, contracts with D for the latter to conduct an airworthiness inspection of her plane.⁸⁹ Imagine also that C is aware of unconfirmed rumours that D occasionally issues “dodgy” certificates when planes are not in fact airworthy. If D were to conduct a negligent inspection, issue a certificate and in due course an accident were to occur prompting C to sue D in negligence (fully able to prove all the elements of the tort⁹⁰) – then the *volenti* defence would conceivably be available. But if C were to rely on breach of contract and the contract contained a term effectively saying that C consented to the risk that the certification would be performed negligently, then the defence would be prohibited by statute. There would be concurrent liability, with the defence available in tort but not contract.

This divergence between what statute would allow in the context of a contract action, and what the common law would permit with respect to an action in tort, may be seen as regrettable. Indeed, as Burrows has argued very powerfully, statutes and the common law should, as far as practicable, develop and be interpreted in a manner that allows them to form a coherent and principled private law.⁹¹ It is therefore hard to defend the incoherence within private law that would arise by applying our separation thesis. But hard is not impossible. And as Barker has

⁸⁸ See specifically the Unfair Contract Terms Act 1977, s. 2(1); Consumer Rights Act 2015, s. 65(1).

⁸⁹ The scenario, while a hypothetical one, is clearly based loosely upon the facts of *Perret v Collins* [1998] 2 Lloyd’s Rep. 255.

⁹⁰ This is important in order to head off any complaint that there is a problem concerning causation in our scenario. Let us suppose then, that C has obtained – and reasonably relied upon – an assurance from D that D will not cut corners in performing the task.

⁹¹ A. Burrows, “The Relationship Between the Common Law and Statute in the Law of Obligations” (2012) 128 L.Q.R. 232.

observed, some measure of inconsistency in private law may be inevitable where it is caused by statutory provisions:

[The] increase in the level of statutory intervention and regulation both within and around traditional private law institutions, doctrines and remedies... [has] increased the overlap between common law and statutory norms, with attendant risks of redundancy, duplication, or contradiction between them.⁹²

If this be right, then there is no clash with the separation thesis which only requires the preservation of the coherence of the law *insofar as* the avoidance of incoherence is practicable. In any event, we would submit that the real problem here arises not because of any flaw in the separation thesis, but because the common law of torts still allows the defence of *volenti* despite its long history of powerful academic criticism⁹³ and its limited practical use.⁹⁴ In fact, the better solution to the incoherence in the law here would probably be to abolish the defence altogether given that it is objectionable on independent grounds, grounds, that is, that have nothing to do with concurrent liability. But this is not a suggestion that we defend here *precisely because* it has nothing to do with concurrent liability. We simply note that Parliament has already taken one significant step in the direction of its abolition,⁹⁵ and proffer the view that the legislature or courts ought to go further in future and entirely remove the defence from the tort law canon.

2. Divergent Tortious and Contractual Standards of Care

The final issue we consider is what the courts should do in situations where the contractual duty is either more or less demanding than the concurrent tortious duty. The question is far from academic given that it is quite common for contracting parties to stipulate a standard of care that differs from the one that ordinarily applies in cases of common law negligence. For example, contract clauses that require the parties to undertake actions to their “best endeavours” are common in many circumstances, including accounting and insurance broking⁹⁶ as well as in certain shipping contracts.⁹⁷

In such situations, assuming that there is a concurrent duty in tort, it has never been made clear by the courts whether the higher standard of care in the contract should trump the tortious duty if the claimant were to sue in tort (for reasons such as those in *Henderson*). If the court were to do this, then the defendant’s breach would be judged against the yardstick of the more demanding duty. But there is a very strong reason why this should in fact occur: the claimant should not be able to utilise tort to circumvent the standard of care agreed in the contract. It is, we think, a classic example of what Lord Goff had in mind when he said that he did not “find it objectionable that the claimant may be able to take advantage of the remedy which is most advantageous to him, *subject only* to ascertaining whether the tortious duty is ... inconsistent with the applicable contract”.⁹⁸

⁹² K. Barker, “Private Law as a Complex System: Agendas for the Twenty-First Century” in K. Barker *et al* (eds.), *Private Law in the 21st Century* (Oxford: Hart Publishing, 2017), 3.

⁹³ A.J.E. Jaffey, “Volenti Non Fit Injuria” (1985) 44 C.L.J. 87; R. Kidner, “The Variable Standard of Care, Contributory Negligence and Volenti” (1991) 11 Legal Studies 1.

⁹⁴ It only rarely succeeds when raised before the courts: see Kidner, “The Variable Standard of Care, Contributory Negligence and Volenti” (1991) 11 Legal Studies 1, at 12.

⁹⁵ See, e.g., s. 149(3) of the Road Traffic Act 1988 rendering the defence unavailable in road accident cases.

⁹⁶ *Channon v Ward* [2017] EWCA Civ 13.

⁹⁷ *Nitrate Producers’ SS Co v Wills & Co* (1905) T.L.R. 699; *Nelson v Dahl* (1879) 12 ChD 568, at 592 (Brett L.J.); *The Tojo Maru; Owners of motor tanker Tojo Maru (her cargo and freight) v N V Bureau Wijsmuller* [1971] 1 All ER 1110.

⁹⁸ [1995] 2 A.C. 145, at 194 (emphasis added).

In relation to the alternative scenario – that is, where the contractual duty is less demanding than the tort law counterpart – there is, happily, some judicial guidance to hand. In *Ratty v Hughes*,⁹⁹ a claim in contract for faulty workmanship was defended on the basis that the work had been carried out to the degree of care and skill required by the contract even though this fell below the standard of care that would be required by the law of negligence. The defender in that case was not a qualified electrician and the pursuer was aware of this fact. Whilst the final decision did not turn on this point, the Sheriff Principal nonetheless stated that “it was perfectly possible for parties to contract that work should be performed to a lower than normal standard”.¹⁰⁰ There was no prospect of the negligence standard migrating to the contract setting. Indeed, in such circumstances, it is once again the tortious duty which should be trumped by the contractual one, and for precisely the same reason. Lord Goff was only prepared to countenance one party taking advantage of a more useful cause of action in tort so long as the relevant tortious duty was not inconsistent with the one in the contract. Burrows advocated a similar approach over 20 years ago. He said, as something of a throwaway remark, that “the parties can normally be taken to have intended that no more onerous standard of performance liability should be imposed by tort than is laid down by the express or implied terms of the contract”.¹⁰¹

Superficially, it may seem that this approach to concurrent duties allows contract unfairly to undermine a party’s rights in tort. But the apparent problem is easily solved. If – as it is trite to say – one can completely waive one’s rights in tort,¹⁰² it must also be the case that one can relax or partially surrender them. And this, we think, is exactly what happens when a contract is concluded on terms that are extremely forgiving in terms of what is demanded by way of performance.

V. Conclusion

Goh and Yip have helpfully identified that the “history of concurrent liability under English law can be broadly categorised into three stages: no concurrence, acceptance of concurrence and most recently, uncertainty regarding concurrence”.¹⁰³ Our aim in this article has been to shed some light on just how uncertain this third stage is, and to argue – consistently with *Henderson* – for what we have called the separation thesis. This advocates that legal rules should not generally be transposed from one sphere to another in the absence of an established mechanism by which this can be done, such as analogical reasoning.

It seems obvious to state that contract and tort actions differ in a number of ways. Yet, in our view, is important to take seriously the differences that exist in cases of concurrent liability. Three important differences that persist even in cases of concurrent liability were sketched in the introductory section of this article,¹⁰⁴ and the separation thesis respects all of these differences by resisting the temptation to allow, without sound reasons, the transposition of bits of one body of law to another. Indeed, it is the very fact that these differences exist that forms the basis of our separation thesis. And such respect for these differences can be traced to *Henderson* itself, given that, ultimately, that case endorsed the idea that one form of action may be more advantageous than the other.

⁹⁹ (1996) S.C.L.R. 160.

¹⁰⁰ *Ratty v Hughes* (1996) S.C.L.R. 160, at 162.

¹⁰¹ Burrows, “Solving the Problem of Concurrent Liability” (1995) 48 C.L.P. 103, at 111.

¹⁰² As noted by Lord Goff in *Henderson v Merrett* [1995] 2 A.C. 145, at 194 (subject – of course – to the statutory and common law restrictions on doing so).

¹⁰³ Goh and Yip, “Concurrent Liability in Tort and Contract” (2017) Torts L.J. 148, at 151.

¹⁰⁴ As a reminder these were: the fact that (i) tortious assumptions of responsibility often arise from something qualitatively different from the kinds of promises that underpin contractual obligations; (ii) contractual remoteness rules are linked to an assumption about pre-contractual negotiations which do not apply to tort law; (iii) defences are well known within tort law, but it is far less straightforward to talk meaningfully of ‘contractual defences’.

Our engagement with *Wellesley* revealed that, despite the pragmatic arguments that can be made in favour of it, and despite the fact it has since been followed,¹⁰⁵ there is no compelling juridical reason for transposing the contract remoteness rules to a tort action where the relevant duties arise from a single, shared assumption of responsibility.

A further point we sought to highlight was that there is an important difference between concurrent liability and concurrent duties. Concurrent duties may arise at different times, and they may also diverge in terms of their scope. But however they diverge, we believe that the incidental rules of tort law should apply. The justification of this is obvious in cases where the tort has been completed before the contract was ever concluded. Yet for reasons associated with the principle that like cases be treated alike, we argued that the same approach should also be taken in cases where, fortuitously, an identical pre-contractual breach of the tortious duty only results in harm that occurs after the contract's completion. We also suggested that the tortious incidental rules should apply where the tortious and contractual duties differ in terms of their scope.

Penultimately, we explored the potential for applying the *volenti* defence to an action framed in contract in a case of concurrent liability. We concluded that neither *Vesta v Butcher* nor *Henderson v Merrett* provided sound analogical guidance in this respect and that, in accordance with the separation thesis, there is no justification for the transposition of this defence from tort to contract. Our final point concerned the question of what to do where, in a case of concurrent liability, there is divergence between the contractual and tortious standards of care. We argued that, in cases of this kind, the tortious standard should always be trumped by the one stipulated in the contract, because this is precisely what was mandated in *Henderson*.

Our overall position, then, is that there should be very little migration of rules of law from one setting to another. We labelled this approach the “the separation thesis” arguing that there should only be transposition of contract rules to tort (or *vice versa*) where this can be achieved in accordance with an established technique of common law reasoning, such as analogical reasoning, *and then* only where the result would pose no avoidable risk to the coherence of the law. In so arguing, we parted company with a good deal of existing juristic analysis, especially that which vaunts pragmatic solutions at the expense of orthodoxy and formalism. For all that pragmatic decision-making may possess the virtue of transparency, and for all that it may sometimes avoid outcomes that seem not to make sense, we nonetheless consider it an inferior approach to the orthodox, formalist one with which it cannot be mixed.¹⁰⁶ An inescapable flaw with the pragmatic approach to which we adverted is the fact that there is no obvious or fixed meaning to be attributed to pragmatic adjudication;¹⁰⁷ there are no clear criteria according to which pragmatic solutions might be measured.¹⁰⁸ And second problem with such decision-making, as pointed out by Lord Kerr in one recent case, is that even appellate court decisions based on pragmatic grounds provide relatively little guidance and stability in the law.¹⁰⁹

¹⁰⁵ The decision was applied in *Wright v Lewis Silkin LLP* [2016] EWCA Civ 1308; Jackson L.J. however acknowledged (at [61]) that the matter might yet merit consideration by the Supreme Court.

¹⁰⁶ As the President of the Supreme Court has pointed out, the difference between principle-based reasoning and pragmatic adjudication is ultimately one of either “starting at the beginning or starting at the end”: Lady Hale, “Principle and Pragmatism in Developing Private Law” <https://www.supremecourt.uk/docs/speech-190307.pdf> 10.

¹⁰⁷ Cf Richard Posner suggests that “[t]he ultimate criterion of pragmatic adjudication is reasonableness”: R. Posner, *Law, Pragmatism, and Democracy* (Boston, MA: Harvard University Press, 2003), 59. However, for criticism of the putative simplicity of this understanding see R.A. Epstein, “The Perils of Posnerian Pragmatism” (2004) 71 *Univ. Chicago L. Rev.* 639, at 643: “the problem with reasonableness in general is that it is a chameleon-like term that utterly fails to distinguish between sound and unsound approaches”.

¹⁰⁸ For elaboration of this problem (unpacked in terms of incommensurability), see R. Stevens, *Torts and Rights* (Oxford: OUP, 2007), 310.

¹⁰⁹ *Michael v Chief Constable of South Wales* [2015] A.C. 1352, at [161].