CONTRIBUTORY NEGLIGENCE IN CONTRACT LAW: TOWARD A PRINCIPLED APPROACH

ARIEL PORAT†

Introduction

Many legal systems have contended with the question of whether, and in what circumstances, a defence of contributory negligence should be recognized in the realm of contract law.

Courts in Commonwealth countries dealing with this issue have tended to focus their inquiry on the question of whether a statute admitting this defence in tort claims should apply in contractual claims as well.

English decisions of first instance on this issue can be grouped in three main categories: cases where a defence of contributory negligence was found to be inapplicable to contract law;[1] cases where this defence was held to apply only when the breached contractual obligation was a duty of care;[2] and cases where this defence was held to apply to contractual claims only if the defendant was concurrently liable in both torts and contract.[3] A recent decision of the Court of Appeal, albeit in *obiter dicta*,[4] belongs to the third category.[5]

† Senior Lecturer, Faculty of Law, Tel Aviv University. I am deeply grateful to Professors Daniel Friedmann and Nili Cohen for their helpful comments on a previous draft of this article. Thanks are also due to Ms. Kim Treiger and to Ms. Batya Stein for their careful editing work.

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1 *Sole* v. *Hallt*, [1973] 1 Q.B. 574; *Basildon District Council* v. *J. E. Lesser (Properties) Ltd.*, [1985] 1 All E.R. 20; *A. B. Marintrans* v. *Comet Shipping Co. Ltd., The Shinjistu maru No. 5*, [1985] 3 All E.R. 442.

2 *Quinn* v. *Burch Bros. (Builders) Ltd.*, [1966] 2 Q.B. 370 (C.A.); *DeMeza* v. *Apple*, [1974] 1 Lloyd's Rep. 508. In both cases the question of contributory negligence was decided by the High Court and left open by the Court of Appeal. For the appeal of *DeMeza* case, see [1975] 1 Lloyd's Rep. 498.

3 *Forsikringsaktieselskapet Vesta* v. *Butcher*, [1986] 2 All E.R. 488. The Court of Appeal affirmed the decision of the High Court, albeit in *obiter dicta*: [1988] 3 W.L.R. 565 (C.A.). On appeal to the House of Lords, the question of contributory negligence was not considered: [1989] 2 W.L.R. 290 (H.L.). See also *Gran Gelato Ltd.* v. *Richliff (Group) Ltd.*, [1992] 1 All E.R. 865 at p. 875; *Lipkin Gorman* v. *Karpnale Ltd.*, [1992] 4 All E.R. 409 at p. 425 (C.A.); *Youell* v. *Bland Welch & Co. Ltd.*, [1990] 2 Lloyd's Rep. 431 at pp. 459-60 (the issue of contributory negligence was not

Australian courts, mostly of first instance, have rendered decisions in all three categories,[6] whilst in New Zealand, a decision of first instance belongs to the third category.[7]

Canadian courts have handed down decisions in all three categories.[8] Other decisions, however, suggest a willingness to accept a defence of contributory negligence without any limitations,[9] and an opinion to this effect was even issued in a Canadian Supreme Court decision.[10]

French and German courts tend to allow this defence in contractual claims, although contributory negligence is still seen as applying mainly

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discussed in the appeal, [1992] 2 Lloyd's Rep. 127). *Sayers* v. *Harlow Urban District Council*, [1958] 1 W.L.R. 623 (C.A.) was also understood in *Forsikringsaktieselskapet Vesta* v. *Butcher*, *ibid.* at p. 509, as belonging to the third category, while in *DeMeza* v. *Apple*, *supra* note 2, it was interpreted as falling in the second category. Legal scholars mention several variants to the third category. See C. Bennett, "Contributory Negligence and Contractual Claims" (1985) 4 Litigation 195; N. E Palmer & P. J. Davies, "Contributory Negligence and Breach of Contract—English and Australian Attitudes Compared" (1980) 29 Int'l & Comp. L.Q. 415, 443-47.

4 *Forsikringsaktieselskapet Vesta* v. *Butcher*, [1988] 3 W.L.R. 565 (C.A.).

5 A 1990 Law Commission working paper recommended that the defence of contributory negligence be applied generally, unless it is excluded in the contract, either expressly or implicitly: *Contributory Negligence as a Defence in Contract*, The Law Commission, Working Paper No. 114, pa. 5.1 [hereinafter The Law Commission, Working Paper No. 114]. Recently however, the Law Commission departed from its provisional conclusion, and recommended to adopt the defence of contributory negligence only in the second category: *Contributory Negligence as a Defence in Contract*, The Law Commission No. 219 (December 1993) pa. 1.4. [hereinafter The Law Commission No. 219].

6 In the first category: *Belous* v. *Willets*, [1970] V.R. 45; *James Pty Ltd.* v. *Duncan*, [1970] V.R. 705; *Harper* v. *Ashtons Circus Pty. Ltd.*, [1972] 2 N.S.W.L.R. 395. In the second category: *Smith* v. *Buckley*, [1965] Tas. S.R. 210. In the third category: *Queen's Bridge Motors & Engineering Co. Pty Ltd.* v. *Edwards*, [1964] Tas. S.R. 92. See also J. Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract" (1981) 55 A.L.J. 278.

7 *Rowe* v. *Turner Hopkins & Partners*, [1980] 2 N.Z.L.R. 550. A bill making a defence of contributory negligence generally applicable has been considered in New Zealand. See A.M. Dugdale, "Proposals to Reform the Law of Civil Contribution" (1984) 2 Can. L. Rev. 171. For an opinion belonging to the second category, see *Mouat* v. *Clark Boyce*, [1992] 2 N.Z. L.R. 559 (per Cooke J.). See also *Day* v. *Mead*, [1987] 2 N.Z. L.R. 443 (C.A.), ruling that, when damages are granted in equity for a breach of a fiduciary duty, reduction of the damages for contributory negligence is justified by principles of fairness.

8 In the first category: *Henuset Bros. Ltd.* v. *Pan Canadian Petroleum Ltd.* (1977), 82 D.L.R. (3d) 345 (Alberta). Although this decision dealt with contribution among debtors, one may infer from it that the defence of contributory negligence does not apply in contract. In the second category: *Caines* v. *Bank of Nova Scotia* (1978), 90 D.L.R. (3d) 271 (N.B.). (Only the minority opinion dealt with the question of contributory negligence.) In the third category: *Canadian Western Natural Gas* v. *Pathfinder Surveys*, [1980] 2 Alta L.R. (2d) 135 (C.A.).

9 *Doiron* v. *Caisse Populaire Dinkerman Ltee* (1985), 17 D.L.R. (4th) 660 (N.B.); *Coopers & Lybrand* v. *H. E. Kane Agencies Ltd.* (1985), 17 D.L.R. (4th) 695 (N.B.). See also *West Coast Finance Ltd.* v. *Gunderson* (1974), 44 D.L.R. (3d) 232 (B.C.); *Carmichael* v. *Mayo Lumber Co. Ltd.* (1978), 85 D.L.R. (3rd) 538 (B.C.). The last two decisions involved a contractual duty of care, although their holdings were not limited only to this type of case.

10 *Smith* v. *McInnis* (1978), 91 D.L.R. (3rd) 190. This was the minority opinion of Pigeon J., and the majority did not take a stand on this matter.

in torts claims.[11] In the United States, legislation in most states allows a defence of comparative negligence in torts.[12] While some courts have at times refused to apply this defence in contractual claims,[13] others have ruled that it only applies when liability is concurrent in torts and contract,[14] or when the contractual liability pertains to bodily injury or property damage resulting from the breach of an implied warranty.[15] In certain rulings, this defence has been applied even more broadly.[16] In states without contributory or comparative negligence legislation, some courts have ruled that this defence is not applicable in contract law,[17] while others have ruled it is.[18]

The reluctance to recognize contributory negligence as a general defence in the field of contract law has been justified on several counts. It has been argued that this defence is superfluous because others render it redundant;[19] that it would introduce an alien and unknown element of culpability into contract law,[20] making its application problem-

11 France: G. H. Treitel, *International Encyclopedia of Comparative Law* (Remedies for Breach of Contract) (1976) vol. 7, chap. 16, s. 106; B. Nicholas, *French Law of Contract* (London, 1982) at 50-51. Germany: *International Encyclopedia of Comparative Law, ibid.*; *Munchen Kommentar zum Burgerliches Gesetzbuch*, Band II (Munchen, 1985), Grunsky, 254, s. 14 [hereinafter Grunsky].

12 Comparative negligence is the American term for a defence of contributory negligence resulting in the apportionment of the damages between the parties.

13 *Federal Savings & Loan Insurance Corporation* v. *Huff*, 704 P. 2d 372 (1985).

14 *Cline* v. *Sawyer*, 600 P. 2d 725 (1979).

15 Breach of implied warranty is perceived to be on the borderline of torts and contracts. *Haysville U.S.D. No. 261* v. *GAF Corporation*, 666 P. 2d 192 (1983); *Broce-O'Dell Concrete Products Inc.* v. *Mel Jarvis Construction Co.*, 634 P.2d 1142 (1981).

16 Some decisions have held that it is possible to apply the statute when liability arises due to any sort of consequential loss: *Lesmeister* v. *Dilly*, 330 N.W. 2d 95 (1983); *Mike's Fixtures Inc.* v. *Bombard's Access Floor Systems Inc.*, 354 N.W. 2d 837 (1984); *Peterson* v. *Bendix Home System Inc.*, 318 N.W. 2d 50 (1982); *Zontelli & Sons Inc.* v. *City of Nashwauk*, 353 N.W. 2d 600 (1984). In fact, the statute was applied even more broadly in the first two cases.

17 *Fortier* v. *Dona Anna Plaza Partners*, 747 F. 2d 1324 (1984); *Danca* v. *Taunton Savings Bank*, 429 N.E. 2d 1129 (1982); *Federal Savings & Loan Insurance Corporation* v. *Huff*, *supra* note 13; *Arcon Corp.* v. *Liberty Mutual Ins. Co.*, 591 F. Supp. 15 (1983).

18 *American Mortgage Investment Co.* v. *Hardin-Stoctkton Corp.*, 671 S.W. 2d 283 (1984); *Elan* v. *Smithdeal Realty & Ins. Co.*, 109 S.E. 632 (1921); *U.S. Fidelity & Guaranty Co.* v. *Franh Industries Inc.*, 241 N.W. 2d 421(1976).

19 On this argument, see Palmer & Davies, *supra* note 3 at 447-51; M. Bridge, "The Overlap of Tort and Contract" (1982) 27 McGill L.J. 872; J. G. Fleming, *The Law of Torts*, 8th ed. (Sydney, 1992) at 282-83; *James Pty Ltd.* v. *Duncan*, *supra* note 6; The Law Commission, Working Paper No. 114, *supra* note 5, pa. 4.8; The Law Commission No. 219, *supra* note 5, pa. 3.4-3.5.

20 *Basildon District Council* v. *J. E. Lesser (Properties) Ltd.*, *supra* note 1 at 30; A. S. Taylor, "Contributory Negligence—A Defence to Breach of Contract?" (1986) 49 M.L.R. 102, 108; The Law Commission, Working Paper No. 114, *supra* note 5, pa. 4.12-4.13. *Cf.* A. Burrows, "Contributory Negligence in Contract: Ammunition for the Law Commission" (1993) 109

atic,[21] and that contract law requires adherence to clear and simple rules, which would be undermined by this defence.[22]

The most significant argument against the adoption of this defence, however, is that it would conflict with the very essence of the contractual agreement, *viz.*, to enable the parties to rely on the contract and plan for their future accordingly (hereinafter "the reliance and planning argument").[23] Were a defence of contributory negligence applicable, a contractual party could no longer be absolutely certain of full compensation for an unfulfilled contractual promise. No longer could one party "sit back and wait" until the other fulfils his contractual obligation, as he might have in a regime that rejects this defence, but would have to assist, or supervise, and possibly even take precautionary measures regarding the performance of the other. A contributory negligence regime thus places an additional burden on the contractual party that he had not assumed when concluding the contract which, if left unattended, is liable to cause him partial or full loss of his right to compensation.

The contrary viewpoint, favouring the adoption of contributory negligence defence in contract law, can also adduce several valid claims. It has been argued that this defence leads to fair and just results, in that it prevents situations wherein a loss brought by the aggrieved party upon itself befalls the party in breach.[24] Adopting this defence would also be consistent with a trend generally considered positive, striving to unify the remedies available in both contract and tort law.[25] Furthermore, a defence of contributory negligence would encourage caution, cooperation, and solidarity between parties to a contract,[26] and could

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L.Q.R. 175, 177 [hereinafter Burrows, Ammunition]; The Law Commission No. 219, *supra* note 5, pa. 3.5.

21 N. H. Andrews, "No Apportionment for Contributory Negligence in Contract" [1986] Camb. L. J. 8; The Law Commission No. 219, *supra* note 5, pa. 3.5, 3.23, 3.30.

22 The Law Commission, Working Paper No. 114, *supra* note 5, pa. 4.14; The Law Commission No. 219, *supra* note 5, pa. 3.5, 3.31-3.33, 3.40, 4.6.

23 See The Law Commission, Working Paper No. 114, *ibid.*, pa. 2.4-2.5; The Law Commission No. 219, *ibid.*, pa. 4.2-4.4, 4.11-4.12.

24 *Doiron* v. *Caisse Populaire Dinkerman Ltee, supra* note 9 at 679; *Coopers & Lybrand* v. *H. E. Kane Agencies Ltd., supra* note 9 at 707ff.; J. S. Ballas, "Use of the Comparative Negligence Doctrine in Warranty Actions" (1984) 45 Ohio St. L. J. 763; The Law Commission, Working Paper No. 114, *supra* note 5, pa. 4.20. See also A. S. Burrows, *Remedies for Torts and Breach of Contract* (London, 1987) 74-75. A defence of contributory negligence would be fair not only to defendants but also to plaintiffs, who may lose the case without it. *Schering Agrochemical Ltd.* v. *Resibel NV SA* (26 November 1992), (C.A.) [unreported], and Burrows, Ammunition, *supra* note 20.

25 On some support for this argument, see Taylor, *supra* note 20 at 108; The Law Commission, Working Paper No. 114, *supra* note 5, pa. 4.28.

26 On these goals in modern contract law, see P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979) 681-779; I. R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven & London, 1980).

thus lead to the fulfilment of contracts that might have been breached otherwise.[27]

These countervailing arguments have yielded the intermediate approaches endorsed in Commonwealth countries, where contractual breaches are classified in line with two questions: Is the duty breached one of care or an absolute one? Is there concurrent liability in torts and contract?

The purpose of this article is to suggest a different method of classification. This method presents a range of situations in which it would seem unjustified for the aggrieved party to "sit back and wait" for the other party's performance, thus supporting the recognition of a contributory negligence defence. This analysis also shows that, in some of these cases, the courts have traditionally attached legal effects to the actions of the aggrieved party, and a recognition of this defence might thus serve to make court decisions more discerning.

"Contractual" versus "Tortious" Contributory Negligence

In the typical case of contributory negligence in torts, the victim's carelessness is assumed to have contributed directly to his loss, a loss he could have avoided merely by changing his behaviour, without influencing that of the tortfeasor. In the parallel case in contract law, it is assumed that the plaintiff failed to take reasonable steps prior to the breach of contract so as to prevent the loss he eventually incurred, and that he could have avoided this loss had he changed his own behaviour, without affecting that of the party in breach.

In the realm of contract law, however, another type of unreasonable behaviour on the plaintiff's part might also be defined as contributory negligence: the failure of the aggrieved party to take reasonable steps to prevent the other party's breach, thus indirectly contributing to his own loss.

The second type of contributory negligence is unique to contract law as, for several reasons, it is rare for the aggrieved party in a torts case to have a share (whether by act or by omission) in the injurious actions of the tortfeasor.[28]

First, the contractual relation enables the aggrieved party to identify, prior to the occurrence, the party whose eventual breach of contract might cause him a loss; he may thus be able to take precautionary

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27 At the same time, it may be argued that a contributory negligence defence may encourage the performing party to delay contract performance until assistance is forthcoming from the other party, as required by the principle of contributory negligence.

28 Although rare, such circumstances may nevertheless be present in torts, as is true in instances of provocation by the victim.

measures to prevent the breach and not merely its injurious effects. In the typical torts case, however, the injured party does not know the tortfeasor,[29] and is hence unable to take steps that might prevent the tortfeasor's injurious behaviour, although he might prevent or mitigate its effects.

Second, unlike the circumstances prevailing in a typical torts case, contractual relationships can sometimes create mutual trust, and one party can plausibly be expected to aid the other, even though not contractually bound to do so.

Third, one party may breach the contract in reaction to the other's actual or anticipated behaviour, as a result of a factual or legal mistake, or due to some difficulty or inability to perform the contract; in some cases, the aggrieved party can control, or even prevent, the influence of these factors. Obviously, it is not the case that whenever the aggrieved party is in a position to prevent a breach and fails to do so, his behaviour constitutes contributory negligence; in fact, the aggrieved party is not required to act in order to prevent a breach, even when he might have. Nevertheless, as the aggrieved party can often exert some measure of control over the causes of the breach, he becomes, factually, a direct cause of it, and an indirect cause of his own loss. This factual relationship between the aggrieved party and the breach that eventually causes him a loss, which is a necessary condition for finding him contributorily negligent, is absent in torts; tort victims are generally powerless to control the circumstances leading to the tortious conduct.

The following analysis suggests, in my view, that a persuasive argument can be made for a recognition of contributory negligence as an appropriate defence in the cases discussed in the next sections. In some of these cases, the negligence of the aggrieved party contributes directly to the loss while, in others, it contributes to the contract breach and only indirectly to the loss. In none of these cases does the reliance and planning argument require us to reject this defence.

Group 1: Non-Cooperation in Contract Performance

In a contractual situation, the party entitled to performance (hereinafter "the recipient"), can often assist the party bound to perform. It is not thereby implied that the recipient is either obligated to help or that, if he fails to do so and a breach of contract ensues, he loses the remedies available to an aggrieved party. Often, cooperation should not be

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29 This is not the case, however, when the tortfeasor and the injured party had a previous relation, as is the case with accidents in the workplace.

expected; in fact, the recipient may have entered the contract expecting to be released from any demands, and is entitled to require that the other party fulfil his part in the contract unassisted.

Nevertheless, in some cases, it may become clear when the contract is created that performance is either impossible or extremely difficult without some measure of cooperation from the recipient. In such circumstances, it is a matter of interpretation whether a duty of cooperation is implied.[30] If the contract is interpreted to mean that the recipient was required to cooperate, and that his failure to do so prevented the other party's performance, it is the recipient who will be considered the party in breach. The performing party will not be liable, and his non-performance will not constitute a breach of contract. If, however, the contract is not interpreted to require the recipient's cooperation, it is the performing party who will be in breach and the recipient will be entitled to all the remedies available to an aggrieved party. Cooperation may also be a condition precedent to the obligation of the performing party; in this case, rather than constituting a breach of contract, non-cooperation will serve to legitimize non-fulfilment on the part of the performing party.[31]

It may not be possible, however, to resolve the issue of cooperation under the terms of the contract. Let us presume, for instance, that the parties did not anticipate the need for cooperation when the contract was created. According to the traditional approach of contract law, the courts will interpret the contract and decide on the basis of what the intention of the parties would have been had they considered the issue of cooperation. The court can then choose to assign full responsibility for the loss due to non-fulfilment of the contract to the performing party or, alternatively, to leave the recipient to carry the entire loss.

I will argue that, in these cases, it is appropriate to recognize an additional option, whereby non-cooperation might be seen as an instance of contributory negligence, resulting in reduced damages to the aggrieved party, namely, the recipient. This option would enable the court to reach fair and just results in apportioning damages when the court feels that, on the one hand, the recipient should have cooperated and not stood idly by but, on the other, it would be inappropriate to use non-cooperation so as to release the performing party from all respon-

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30 *Chitty on Contracts—General Principles*, 26th ed., vol. I (London, 1989) at 911.

31 On the general issue of co-operation between the parties to a contract see *Chitty, ibid.*; *Restatement Contracts* 2d 205, comment d; E. A. Farnsworth, *Contracts*, 2d ed. (Boston, 1990) 551, 592-93, 637; Y. F. Burrows, "Contractual Co-operation and the Implied Term" (1968) 31 M.L.R. 390; S. J. Stoljar, "Prevention and Co-operation in the Law of Contract" (1953) 31 Can. Bar Rev. 231.

sibility for the loss. Admitting this defence would not only be fair, but would also encourage cooperation between contractual parties, thus inducing fulfilment of their contractual obligations.

A case brought before the Supreme Court of the State of Minnesota illustrates the use of a contributory negligence defence when the aggrieved party failed to cooperate in the fulfilment of a contract.[32] A building was built by a professional team with the active participation of the plaintiff owner. The building was found to be defective and, as a result, consequential loss was incurred by the plaintiff (damage to the corn stored in the building), as well as expectation loss (expressed in the difference between the building's actual and expected value, had it been built in accordance with the contract terms). It became apparent that the plaintiff had stored corn in the building prior to the end of construction; moreover, he obstructed the work of the building team by giving them confusing directions. This behaviour, however, does not qualify as a breach of contract on the plaintiff's part. The court held that the defendants were the party in breach, but applied a law originally intended to enable apportionment of damages in cases of contributory negligence in torts, and reduced the plaintiff's damages. By adopting the contributory negligence defence, the court was able to imply that the plaintiff's non-cooperation constitutes inappropriate behaviour, which should be discouraged, without entirely releasing the defendants from their obligation to perform the contract.[33]

The burden of cooperation should not, as a rule, be placed on the recipient; as long as the contract does not specify otherwise, the onus of performance usually rests solely on the party who assumed the obligation to perform. Nevertheless, if cooperation is urgent, and if the burden of cooperation does not substantially encumber the recipient, damages awarded to a non-cooperating plaintiff should be reduced. Keeping these two factors in mind, particularly the second, will ensure that recognizing a defence of contributory negligence will encourage

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32 *Lesmeister* v. *Dilly, supra* note 16.

33 The court used the phrase "failure to mitigate the damages" instead of contributory negligence. Another example in which a defence of contributory negligence would have been legitimate is *A. B. Marintrans* v. *Comet Shipping Co. Ltd., The Shinjistu Maru No. 5, supra* note 1. In this case, the ship's charterers suffered losses due to deficient loading of their cargo. The shipowners were responsible for the loading, but stevedores employed by the charterers had also participated in the loading. The stevedores were negligent, and contributed to the loss. The court held that the *Law Reform (Contributory Negligence) Act, 1945* does not apply in this instance, and liability was placed entirely on the owners. Indeed, the issue of cooperation in this case did not hinge on non-cooperation (an omission), but rather on negligent cooperation (an act). A defence of contributory negligence is more easily admissible in the latter than in the former instance, even if the plaintiff was not, *ab initio*, obliged to cooperate.

fulfilment of contracts when the parties encounter difficulties in performance and, at the same time, will not unduly undermine reliance and planning ability.

Group 2: Refusal to Clarify Misunderstandings

Parties sometimes disagree regarding what constitutes fulfilment of the contract: what are their rights and duties, what actions constitute a breach, etc. These disagreements, which may jeopardize the contract's performance and result in loss to one or both parties, may be the result of their own actions; had they shown greater flexibility and tolerance toward one another, they might have enabled performance as planned. Problems tend to escalate as contracts become more complex, as performance times extend, and as unexpected obstacles arise due to issues left open in the contract. Should any legal significance be ascribed to the parties' behaviour when the misunderstanding between them becomes apparent? Should the legal system encourage certain modes of behaviour and discourage others during negotiations on contract performance?

These questions arise whenever the aggrieved party chooses not to help the party in breach to understand his obligations, although he could easily have done so. For instance, one party may simply forget to perform her duties on the date required by the contract and the other, although aware of it, stands idle; or one party may inadvertently render a defective performance on a matter that is a precondition for the performance of the other, who then fails to deliver counter-performance without offering explanations. It is assumed that, had the first party drawn the second party's attention to the defect, the latter could have corrected it or changed it in time.

Negotiations between the parties during contract performance, or the absence of such negotiations due to the unreasonable behaviour of one of the parties, are generally ignored in traditional contract law. Outcomes are determined only in line with the substantial rights of the parties as specified in the contract. When a misunderstanding arises during performance, both parties are at risk of having mistaken the nature of the legal relations between them. The conventional view of contract law could reject a contributory negligence defence in this case, on the grounds that it is untenable: the failure of the right party to draw the other's attention to a mistake, even if a breach of contract could thereby have been prevented, cannot be grounds for granting partial compensation, or for denying compensation altogether. Were the legal system to allocate burdens in this way, the argument continues, the parties would need to engage in constant clarification of their legal

relations and would be required to "supervise" each other's understanding and performance of the contract. These burdens would lessen their reliance and planning ability.

This argument, however, is not persuasive. Reliance and planning ability would indeed be substantially impaired if a defence of contributory negligence were to imply that one party bears the burden of spotting the other's mistakes concerning the nature of the legal relations between them, or of continuously clarifying his position to the other party so as to prevent future misunderstandings, or of persuading the other party not to breach the contract. This objection, however, loses force if a defence of contributory negligence is only recognized when a misunderstanding between the parties was apparent to the aggrieved party, and clarifying it would not have placed a significant burden upon him. If the aggrieved party himself contributed to the vagueness of the legal situation, the argument in favour of a contributory negligence defence becomes even stronger.

The potentially aggrieved party should not be required to go to unreasonable lengths to clarify misunderstandings, nor is she the other party's guardian. If one party, however, refuses to meet with or speak to the other without a reasonable justification, even when the other party appears to be acting in good faith, and knowing that clarification might prevent a breach, admitting a defence of contributory negligence would not substantially infringe the reliance and planning ability of the potentially aggrieved party. Furthermore, if a defence of contributory negligence is recognized, the burden on the potentially aggrieved party will only be created if the contract is clearly in danger of being breached; in such circumstances, the reliance and planning argument is particularly weak. Finally, the burden of clarifying the situation tends not to involve substantial resources and, therefore, recognizing a defence of contributory negligence would have no significant effect on the agreed exchange under the contract. If this is not the case, and were clarification to place an unduly heavy burden on the potentially aggrieved party, there is no place for recognizing a defence of contributory negligence.

The main argument in favour of adopting a defence of contributory negligence in this category of cases is that it would promote suitable behaviour in contract performance, and lead to more contracts being fulfilled. In fact, increasing the chances of fulfilment regarding a contract where performance has been riddled with misunderstandings will strengthen the parties' reliance and planning ability. They will be less fearful of drifting into ambiguous situations, and will trust each other's help and support if and when such situations do emerge. Legal theories

that emphasize the moral basis of modern contract law and the role of good faith and cooperation between the parties should support the recognition of contributory negligence defence in this group of cases.[34] Even when advocating the view that the burden of contract performance should always rest on the performing party and that it is acceptable for the other not to cooperate, it is still possible to agree with the view that cooperation in the clarification of misunderstandings—rather than in actual contract performance—is to be encouraged.

Group 3: Failure to Warn of the Danger of Significant Loss or of Special Circumstances

A breach of contract is likely to cause significant loss. Let us assume that this potential loss was anticipated by the aggrieved party but not by the party in breach and, furthermore, let us assume that, had the party in breach been aware of the potential extent of the damage, he would not have breached the contract. Should the failure of the aggrieved party to warn the party in breach of the danger of a significant loss resulting from the latter's actions, or of particular circumstances known only to him, constitute contributory negligence?

This question may, at first, appear puzzling. Under the *Hadley* v. *Baxendale* rule, the aggrieved party is not entitled to compensation for a loss that was not reasonably foreseeable as a likely result of the breach. Does this then imply that the party in breach is not liable in all cases of failure to warn?

A determination of contributory negligence due to failure to warn may be appropriate in two types of cases. In the first type, the aggrieved party foresaw loss as a possible consequence of the breach at the time the contract was made, and became certain or almost certain of it prior to the breach, whilst the party in breach continued to view loss as merely a distant possibility. The aggrieved party could easily have warned the party in breach, but chose not to do so. In the second type, the party in breach did not foresee the possibility of the specific loss, either when drawing the contract or at any other time, although a reasonable person could have done so at all relevant times. The aggrieved party, however, did foresee the loss and, although he knew the party in breach had not, chose not to warn him. In both types of cases, the *Hadley* v. *Baxendale* rule does not deny the aggrieved party a right to compensation. Apply-

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34 On such theories see Atiyah, *supra* note 26 at 681-779; P. S. Atiyah, *Promises, Morals, and Law* (Oxford, 1981); Macneil, *supra* note 26; C. Fried, *Contract as Promise* (Cambridge, 1981).

ing a defence of contributory negligence in such a case, however, would lead to reduced damages.[35]

It would indeed be appropriate to adopt a defence of contributory negligence in both types of cases. The demand that the aggrieved party persuade the other to refrain from breaching the contract might seem odd at first glance. The aggrieved party cannot be seen as either responsible or accessory to the breach in this group of cases, unlike the two previous ones (non-cooperation and non-clarification). Nevertheless, as a contributory negligence defence is meant, *inter alia*, to encourage caution and lead to the fulfilment of more contracts, an aggrieved party withholding vital information concerning his potential loss as a result of a breach of contract may be seen as subverting these two critical goals.[36]

Even when this defence is considered appropriate, however, it should only be applied with great care. Courts should begin with the proposition that, in accordance with the *Hadley* v. *Baxendale* rule, the aggrieved party is entitled to full compensation for any loss that could have been reasonably foreseen. Generally, the aggrieved party is not required to warn the party breaching the contract of the consequences of such action. Were it not so, the reliance and planning ability of the aggrieved party would be unduly impaired, as she would be required to be constantly on guard and continuously report to the party in breach the potential effects of his actions. Hence, I believe it is inappropriate to recognize a contributory negligence defence when the aggrieved party

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35 Failure to warn may also be relevant when the breach has already occurred and the party in breach could have prevented its damaging effects. For a good example of a failure to warn that constituted contributory negligence, see *Barclay's Bank Plc* v. *Fairclough Building Ltd.*, Q.B.D. (Official Referee's Business) (13 May 1993). The defendants, who did cleaning work for the plaintiffs, breached the contract by causing serious asbestos contamination that resulted in losses to the plaintiffs. It was held that the plaintiffs could and should have warned the defendants of the dangers and, in failing to do so, they negligently contributed to their own losses. Accordingly, their damages were reduced by 40%.

36 In legal systems that do not use a foreseeability test regarding the remoteness of damages we do find a larger group of cases where the negligence of the aggrieved party is expressed in failure to warn. Such is the case in the German legal system, where the remoteness of damage test is one of "adequate cause." Article 254 of the BGB, which establishes the contributory negligence defence in torts as well as in contract law, makes it clear that the defence also applies "if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of unusually high damage which the debtor neither knew nor should have known" (*The German Civil Code*, trans. I. S. Forrester, S. L. Goren and H. Ilgen (Amsterdam & Oxford, 1975). In Germany, this article is often interpreted to mean that the party in breach is released from all liability for damages, and as applicable even when the aggrieved party's failure to warn stems from negligent ignorance of the foreseeable consequences of a breach of the contract. Note that, in German law, even when the loss foreseen by the aggrieved party due to breach of contract is not particularly heavy, the burden of warning applies as long as the party in breach could not, as a reasonable person, anticipate the occurrence of the type of loss that actually came about. Grunsky, *supra* note 11, ss. 39-42.

failed to warn the party in breach because of her own negligent failure to realize her potential loss. This defense should certainly be considered inadmissible in the following cases: When both the party in breach and the aggrieved party should have, as reasonable persons, understood the potential for loss, and yet failed to do so;[37] when warning entails high costs as, for instance, when warning the party in breach would require the injured party to reveal privileged information and, finally, when it might be reasonably foreseen that warning will have no effect on the behaviour of the party in breach.[38]

Group 4: Fraud and Non-Disclosure of Information Essential to Contract Performance

Lack of information essential to contract performance is sometimes liable to result in a breach. If the aggrieved party possesses such information but fails to convey it to the party in breach, even knowing it to be essential to performance, it might be appropriate to reduce damages to the aggrieved party on account of contributory negligence. In extreme cases, when non-disclosure is either deliberate or fraudulent, the conduct of the aggrieved party should be viewed as justifying the full exoneration of the party in breach. Although a party undertaking to perform a contract assumes responsibility for obtaining all the information needed to ensure performance, and although the recipient need not take any steps to obtain this information or update the party obliged to perform, there should be exceptions to this rule.

Before we turn to these exceptions, a substantial difference between non-disclosure at the contract-formation and at the performance stages should be noted, reflecting different types of conflicts of interest found in these two phases. At the stage of contract-formation, a balance must be struck between the interest of the performing party (not to be misled by non-disclosure) and that of the recipient (utilizing the information and entering the contract under the most profitable terms).[39] Balance is to be sought not only, or even predominantly, between private interests, but also between social interests, and perhaps even between two ideologies: on the one hand is a liberal ideology encouraging individuals to act in pursuit of their self-interest as they see it and allowing them to reap the benefits of their success; on the other is a "moral" ideology that

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37 On German Law see Grunsky, *ibid.*, s. 40.

38 On German Law see Grunsky, *ibid.*, ss. 41-42.

39 Note the balancing criterion suggested by A. T. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts" (1978) 7 J. Leg. Stud. 1.

generally views parties to a contract as partners working together for their mutual benefit rather than as rivals.[40]

The interests to be taken into account at the performance stage will necessarily be different.[41] It would appear that the recipient could have no legitimate interest in denying the other party information that might contribute to performance and prevent a breach. Performance would seem to be a shared concern, well-served by disclosure. Furthermore, the conflict between social interests is not as apparent here as at the stage of contract-formation: both the liberal and the "moral" ideologies would seem to be interested in providing the parties to a contract with the necessary incentives for mutual disclosure of all information necessary to ensure performance.

Nevertheless, imposing a burden of disclosure at the performance stage is liable to encumber a party to a contract, to the point of impairing his reliance and planning ability: while disclosure is beneficial, *ex post*, to both parties (which is not the case at the formation stage), it may, *ex ante*, place a heavy burden on a party to a contract. It is therefore important to retain the general rule that the performing party must obtain all the necessary information for performing the contract, and refrain from routinely shifting this burden to the recipient.

A decision that non-disclosure in a particular case constitutes contributory negligence is a function of several variables: (1) The aggrieved party's knowledge of this information *per se*, as well as of its importance to the performance of the party in breach. (2) The cost of communicating this information to the party in breach. (3) The degree to which the party in breach needs this information. (4) The nature of the relationship between the parties, including the closeness and trust between them. (5) The parties' relative degree of access to the relevant information. An adequate evaluation of these variables is required in order to attain an adequate balance between the parties' private interests, as well as between the social interests of encouraging the fulfilment of contracts and facilitating reliance and planning.

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40 See generally, Atiyah, *supra* note 26 at 681-779; Macneil, *supra* note 26; G. Gilmore, *The Death of Contract* (Columbus, 1974).

41 See G. H. Treitel, *The Law of Contract*, 8th ed. (London, 1991) at 359, for a duty of disclosure at the performance stage. See also H. Collins, "Implied Duty to Give Information During Performance of Contracts" (1992) 55 M.L.R. 556. Generally, courts are not willing to recognize one party's implied duty to provide the other with information during the performance of the contract. See Collins, *ibid. Cf. Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd., The Good Luck*, [1989] 3 All E.R. 628, 664 *et seq.* (C.A.). Recognition of the burden entailed in providing information necessary for contract performance is less drastic in its outcomes than the recognition of a duty to provide this information: whereas the former may result in reduced damages due to contributory negligence, the latter could lead to a denial of compensation altogether.

Non-disclosure has been an issue in several cases, mostly malpractice suits, and court decisions have sometimes allowed and sometimes rejected a defence of contributory negligence on this count. The client's burden of disclosure has been at issue in all these cases, which share a number of factual characteristics: The professional was unaware of the true factual situation; the information required by the professional was either available to, or easily obtainable by, the client; disclosing this information to the professional would have prevented the breach and the loss arising thereof; the client knew, or could reasonably have been expected to know, that the professional lacked this information, which was vital to the performance of the contract; the contract did not explicitly require the client to disclose this information, and the duty of performance incumbent on the professional was apparently unlimited.

One such case is *DeMeza* v. *Apple*.[42] Auditors breached the contractual duty of care they owed to their client, a law firm, by providing the firm's insurer with erroneous information regarding the firm's profits. As a result, the law firm was under-insured and, following a fire, was not compensated for the whole extent of its loss. The lawyers then sued the auditors for this loss. The High Court found that the lawyers' failure to discover the error and alert the auditors to it in due time, although they had reviewed the auditors' report to the insurers, constituted contributory negligence; damages were reduced by 30%. In other words, as the lawyers failed to disclose information easily accessible to them (the fifth variable), which could have corrected the auditors' mistake, and as the auditors' mistake was overt and conspicuous (the first variable), the court admitted this defence.[43]

Circumstances were slightly different in *Rowe* v. *Turner, Hopkins & Partners*.[44] In this case, tried in New Zealand, an apartment was sold in execution proceedings to realize a mortgage. The proceeds of the sale were below the market price and, on this account, the plaintiff-owner of the apartment sued his legal advisers. The plaintiff claimed that the defendants should have advised him to continue the mortgage payments, thereby preventing the forced sale of the apartment. The lawyers claimed in their defence, *inter alia*, that the owner of the apartment had shown contributory negligence by abstaining from making the mortgage payments, although he knew that this would lead to the forced sale of the apartment. From the facts stated by the court, it is also apparent

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42 *Supra* note 2.

43 *Cf. West Coast Finance Ltd.* v. *Gunderson, supra* note 9.

44 *Supra* note 7.

that the plaintiff had not disclosed to the defendants that he had stopped the payments. The New Zealand High Court considered the issue of contributory negligence but ruled that this defence is not applicable to contract law when the contractual duty breached is one requiring to act with reasonable care, and when there is no concurrent liability in torts; hence, it found the defendants liable for the plaintiff's entire loss.

In *Rowe*, the lawyers did not have all the information required to give proper counsel, and thus failed to give the kind of advice they could have given had all the relevant knowledge been at their disposal; *Rowe* thus differs from *DeMeza*, where the defendants could have insured the firm properly had they not been negligent in their use of the relevant information available to them. *Rowe* and similar cases raise the issue of whether a lawyer, when giving advice, is obliged to obtain all the relevant information from his client, or is entitled to rely on the information that the client supplies. Whilst traditional contract law places liability wholly on one of the parties, recognizing a contributory negligence defence allows for intermediate situations wherein the lawyer is obliged to obtain the information, but the client is also held negligent for failing to disclose it. *Rowe* might well have been such a case.[45]

Group 5: Creating Apprehensions in the Mind of the Party in Breach

A party may breach a contract due to reasonable apprehensions regarding the other party's performance. The other party's conduct may indeed be partly responsible for these apprehensions and, at times, creating these apprehensions amounts to an anticipatory or actual breach, justifying rescission of the contract. The aggrieved party, however, is not obliged to choose this option; he can affirm the contract and demand further performance. In principle, he is also entitled to continue fulfilling his own part of the bargain, as a means of acquiring the right to counter-performance.[46]

What is the rule concerning a party who breaches a contract on account of apprehensions that the other party is partly responsible for creating, in the absence of anticipatory or actual breach?[47] Or when a breach entitles a party to rescind the contract but he chooses not to do so? These questions are likely to arise when the parties' obligations

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45 For further instances of non-disclosure contributing to breach, see *O'Connor* v. *B. D. B. Kirby & Co.*, [1972] 1 Q.B.D. 90; *Canadian Western Natural Gas* v. *Pathfinder Surveys, supra* note 8; *Crude Oil Contracting Co.* v. *Insurance Co. of North America*, 118 F. 2d 476 (1941).

46 See text accompanying notes 56-59.

47 To qualify as an anticipatory breach, a forthcoming breach must have a high degree of probability. *Cf. Chitty, supra* note 30 at 1713.

are independent.[48] The prevalent approach in traditional common law is that, as long as there is no cause to rescind the contract—or even if there is cause, but the aggrieved party fails to exercise this option—both parties are obliged to continue performance and are not entitled to deviate from its terms.[49] This approach rests on the belief that the party fearing that his own performance does not guarantee counter-performance in return, only has himself to blame; he could have protected himself at the contract-formation stage, either by conditioning his performance on that of the other party, or by obtaining other appropriate assurances.

In contrast, the current approach of American law, reflected in section 251 of the Restatement Contracts 2d, allows a party who has reasonable grounds for suspecting that the other will not perform her contractual obligations, to demand adequate assurance of due performance.[50] A party is thus entitled to suspend, for a reasonable lapse of time and until receiving the required assurance, any performance for which he has failed to receive the agreed-upon exchange. Section 251 specifically applies in the absence of actual or anticipatory breach. When the other party fails to provide the required assurance within a reasonable time, her conduct will be viewed as a repudiation of the contract, and all the necessary remedies will be available to the party adversely affected by this repudiation.

Commentary on this Section points out situations that might constitute reasonable grounds for suspecting that a party to a contract will fail to perform. Thus, the Section applies when the other party has committed minor breaches of the contract in the past, when she has breached other contracts, or when other past events would tend to indicate her apparent inability or unwillingness to perform the contract, even if these events were involuntary and thus cannot constitute repudiation.[51]

The Restatement does not explicitly discuss cases in which the apprehensive party does not act in accordance with its requirements (demanding adequate assurance and reasonably suspending the contract); in such circumstances, however, this party would probably be considered in breach and liable for the ensuing consequences. American case law tends to reject the claim that it would then be justified to reduce

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48 When the parties' obligations are concurrent, this issue can be easily resolved: in the absence of performance or, at least, of clear indications of one party's willingness to perform the contract, the other has no duty to perform his part.

49 *Cheshire, Fifoot & Furmston's Law of Contract*, 12th ed. (London, 1991) at 541.

50 To a certain extent, this is also the case in German and French law. See Article 1613 of the French Civil Code and Article 321 of the German BGB.

51 *Restatement Contracts* 2d, 251, comment c.

compensation to the aggrieved party because he has contributed to the breach,[52] although this view has gained some support in the legal literature.[53]

When faced with an aggrieved party who has contributed to the breach by creating reasonable apprehensions in the mind of the party in breach, the legal system might respond by endorsing the approach of the American Restatement. It might also award the aggrieved party reduced damages because of contributory negligence, even if this conduct neither constitutes an actual or anticipatory breach, nor legitimizes nonperformance. The same is true when the plaintiff creates apprehensions in the defendant's mind that amount to an actual or anticipatory breach but the defendant, although he ceases performance, does not rescind the contract. Moreover, even when the Restatement approach is adopted, a defence of contributory negligence may still apply when the apprehensive party has deviated from the Restatement's stipulations, *viz.*, he has stopped performance without demanding assurances of performance from the other party. Although this deviation constitutes a breach of contract that makes him liable for the aggrieved party's loss, it may still be desirable for the court to take into account the aggrieved party's contribution to the breach and reduce damages accordingly.

Accepting a defence of contributory negligence in these cases would encourage the fulfilment of contracts without adversely affecting reliance and planning ability in any significant way. In many situations, a party to a contract cannot be perceived as having a legitimate interest in creating apprehensions in the other party's mind, to the point where the latter desists from contract performance. A party is certainly not obliged to avoid all actions that might create such apprehensions, and unreasonable apprehensions in the mind of the party in breach do not typically justify recognition of a contributory negligence defence. Apprehensions due to circumstances present and known to the party in breach at the stage of contract-formation are not likely to justify such recognition either. A contributory negligence defence might be considered appropriate if, for instance, the aggrieved party has breached or attempted to breach the contract in the past, and if he denied a request by the party in breach to take certain measures meant to ensure contract performance, even when these were not unduly burdensome to him. Recognizing this defence may also constitute a fair result in certain cases, when the party in breach failed to demand assurances of counter-performance—although entitled to do so—and breached the contract instead.

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52 *Carfield & Sons Inc.* v. *Cowling*, 616 P. 2d 1008 (1980).

53 W. F. Young, "Half Measures" (1981) 81 Colum. L. Rev. 19.

In certain cases, a defence of contributory negligence might allow for constructive midway solutions between two extant extremes—one holding that apprehensions justify non-performance, and the other claiming that apprehensions have no legal consequences whatsoever.

Group 6: Failure to Mitigate Damages Despite Apprehensions as to Breach of Contract

The preceding section focused on situations in which the aggrieved party creates apprehensions in the mind of the party in breach, thus contributing to the breach of contract. In this section, the focus is on situations in which the aggrieved party does not attempt to mitigate his potential damages, although he had suspected that the other party might breach the contract and that he would sustain loss as a consequence. This group of cases, as well as those considered in the next two sections, differ from those discussed in previous ones in that the aggrieved party's negligence contributes only to the loss rather than to the breach.

After becoming aware of a breach of contract, the aggrieved party is required to act in a reasonable manner so as to mitigate his damages.[54] If he fails to do so, his damages will be reduced by the amount of damages he could reasonably have avoided. This is a radical outcome: although both parties contributed to a loss that could have been mitigated, the aggrieved party is made to bear the entire burden of this part of the loss. The requirement of mitigation thus encourages action on the part of the aggrieved party, who is usually in the best position to mitigate damages. This approach is justifiable on moral grounds: it would be unfair for an aggrieved party, capable of lessening damages without undue effort, to refrain from doing so when knowing that the party in breach will pay the price. This requirement does not impair reliance and planning ability either, as it only comes into effect after the breach is an accomplished fact, meaning that the aggrieved party cannot argue that he failed to mitigate damages because he relied on the fact that the contract would be performed.

Is the aggrieved party required to mitigate damages when the breach is only anticipatory, or even just a mere possibility not amounting to

54 See *Restatement Contracts* 2d 350, comment f; Treitel, *supra* note 41 at 849-54, 866. On the position that the aggrieved party is required to mitigate damages from the time of the breach, even if unaware of its occurrence, see G. Williams, *Joints Torts & Contributory Negligence* (London, 1951) at 290. However, as Williams maintains that when the aggrieved party is unaware of the breach he cannot be considered to have been negligent in failing to mitigate damages, this position hardly differs from the previous one. On the position that this defence is applicable from the time the party in breach should have known about the breach see Burrows, Ammunition, *supra* note 20 at 176.

anticipatory breach (hereinafter "possible breach")? If he is so required, what are the consequences of his failure to do so? Would a defence of failure to mitigate damages, or a defence of contributory negligence, be available to the party in breach if he were sued for loss due to an actual or anticipatory breach?[55] The same questions might be asked concerning an actual breach that could have been stopped in mid-course; the discussion that follows, dealing with anticipatory breach, is thus also relevant, *mutatis mutandis*, to this type of actual breach.

As was the case regarding an actual breach, the reliance and planning argument is weakened in a situation of anticipatory breach: if the aggrieved party foresaw a breach of contract as a real possibility, a claim of absolute reliance on contract performance is less persuasive than when no such breach was envisaged. A defence of failure to mitigate damages, however, might be problematic in a situation of anticipatory breach because the party in breach is entitled to insist on performance and, if he does so without mitigating damages, he is seen as acting reasonably. A defence of failure to mitigate damages might thus seem inapplicable in this case.

This argument is supported by the ruling of the House of Lords in *White and Carter (Councils) Ltd.* v. *McGregor*.[56] The House of Lords held that, even when a party to a contract does not desire the other party's performance, this does not preclude the latter's right to continue performing his part of the contract so as to acquire the right to the agreed-upon exchange. This is the case as long as two conditions are met: the cooperation of the party in breach is not required for contract performance, and the aggrieved party has a legitimate interest in the performance of the contract rather than in damages for non-performance.[57] It seems to follow from this ruling[58] that, in a situation of anticipatory breach, expenses incurred by the aggrieved party in order

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55 On the position that the defence of failure to mitigate damages is not applicable in anticipatory breach situations as long as the contract was not cancelled, see Cheshire & others, *supra* note 49 at pp. 616-17. On the position that the cancellation of the contract is not required for this defence to apply, see *Restatement Contracts* 2d 350; Farnsworth, *supra* note 31 at 669-70, 901-02.

56 [1961] 3 All E.R. 1178. *Cf.* The Law Commission No. 219, *supra* note 5, pa. 5.10-5.13.

57 The "legitimate interest" condition was stated by Lord Reid. The two other Lords joining him in the majority did not mention this condition in their opinions although, in later decisions, this condition was assumed to be an integral part of the *ratio decidendi* of the *White* case. See *Clea Shipping Corp.* v. *Bulk Oil International Ltd., The Alaskan Trader*, [1984] 1 All E.R. 129; *Cheshire, supra* note 49 at 618.

58 The principle emerging in *White* has been rejected in other jurisdictions: Farnsworth, *supra* note 31 at 669-70, 901-02; G. H. L. Fridman, *The Law of Contract in Canada*, 2d ed. (Toronto, 1986) at 711-12; G. H. Treitel, *Remedies for Breach of Contract—A Comparative Account* (Oxford, 1988) at 127.

to continue performance are not to be considered losses requiring mitigation. Indeed, the claim in *White* was for an agreed-upon sum and, as such, was not subject to a defence of failure to mitigate damages; however, legitimizing continued performance in circumstances of anticipatory breach rebuts the ruling that this would increase damages unreasonably. In sum, the *White* ruling would seem to imply the idea that, in an anticipatory breach situation, the principle of mitigation of damages is usually inapplicable.

In some situations of anticipatory breach, however, it is justified to attach legal consequences to the behaviour of an aggrieved party who increases, or fails to mitigate, his potential damages. As will be seen shortly, this does not necessarily contradict the *White* ruling, nor does it significantly impair planning and reliance ability. Moreover, a defence of contributory negligence might be more relevant in these cases than a defence of failure to mitigate damages.

The decision of whether to apply a defence of contributory negligence or a defence of mitigation of damages should depend on the type of loss potentially incurred by the aggrieved party. One type is expectation loss, consisting in the profits that could have accrued to one party to a contract from the other's performance, had the contract not been breached. Another is main reliance loss, incurred by one party on account of the expenses, work, and any other investment made in the course of performing the contract. A third type is incidental reliance loss, arising from expenditures undertaken, or any other loss incurred, upon reliance on the contract, but not for actual performance.[59]

When an aggrieved party continues to perform the contract in a situation of anticipatory breach, he increases his main reliance loss and may, after the breach, sue the party in breach for his loss. As long as continued performance was undertaken in the reasonable and sincere expectation that the party in breach would eventually perform, the aggrieved party cannot be required to mitigate his own damages. He is blameless, and there is no reason to deny him compensation. But what if the breach were a sure eventuality, and the aggrieved party persisted in a performance that led him to incur expenses? It could still be argued, pursuant to the *White* case, that the aggrieved party was entitled to do so for the purpose of acquiring the right to the agreed-upon exchange.[60]

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59 Consequential loss is a separate type of loss. See L. L. Fuller & W. Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale L. J. 52 at 75; Treitel, *supra* note 41 at 836.

60 When the agreed-upon exchange is a sum of money, the aggrieved party would generally be in the same position whether he had continued performing and acquired the right to the agreed-upon exchange, or cancelled the contract and sued for the difference between the agreed-upon exchange and the expenses he saved because he discontinued performance. In exceptional cases,

Similar conclusions can be drawn concerning expectation losses. A party to a contract should not be required, for instance, to mitigate his damages by engaging in a substitute transaction before the contract has been breached, or before it is no longer objectively possible for the party potentially in breach to fulfil his contractual obligations.

As for incidental reliance losses, legal consequences should be attached to the failure to avoid damages not only when an anticipated breach appears inevitable, but also when it is merely likely. Consider a person who enters a contract to purchase an apartment. At some point, he realizes that the seller is likely to breach the contract, but still undertakes transactions on the assumption that the contract will be performed—makes agreements with craftsmen to refurbish the apartment, or even contracts to sell it to a third party. Given that such incidental reliance losses were his own doing, it would be appropriate to deprive him of compensation, either wholly or partly. The potentially aggrieved party will thus be encouraged to mitigate damages in a situation of anticipatory breach, without impairing his interest in continued contract performance. This issue marks the difference between this case and another in which the potentially aggrieved party continues performing the contract in a situation of anticipatory breach so as to ensure the right to the agreed-upon exchange. In the latter case, depriving the aggrieved party of his right to compensation for expenses incurred in performance, either partly or wholly, would impair his interest in insisting on continued performance.

In these situations, a defence of contributory negligence is preferable to a defence of failure to mitigate damages. It may be unreasonable for an aggrieved party to rely on a contract and incur incidental reliance expenses when a breach is probable, even though it might still be avoided, and it may be desirable to discourage such behaviour. On the other hand, the rule in these circumstances should differ from that applied to a party who incurs expenses after the breach is an accomplished fact. Reducing damages that could have been mitigated but were not—the result of applying a defence of contributory negligence—would be a fairer outcome than denying damages to the aggrieved party altogether—the result of applying a defence of failure to mitigate damages. A defence of contributory negligence is also preferable when the aggrieved party fails to mitigate either his main reliance loss or his expectation loss, if such failure is deemed unreasonable.

The discussion has hitherto dealt with situations of anticipatory breach but, with certain modifications, it is also relevant to cases where

the aggrieved party may have a special interest in completing performance, such as the preservation of his good reputation.

apprehensions regarding contract performance do not reach the level of anticipatory breach. Although the law does not admit a defence of failure to mitigate damages in these cases, the use of a contributory negligence defence should be considered. When the breach is not "anticipatory" but only "possible," an aggrieved party who increases his potential loss may still be deemed unreasonable. Although a defence of contributory negligence against the aggrieved party will generally not hold in cases of "possible breach," as the aggrieved party was entitled to rely on the contract, it might be admissible in extreme situations. An analogous case—*Cains* v. *Bank of Nova Scotia*—was tried in Canada,[61] where the defendant bank undertook to insure the plaintiff's house. The plaintiff was told by the insurance agent that the premium had not been paid, and he also received notice to that effect from the insurance company; nevertheless, he accepted the defendant's assurance to the contrary. After the insured-against event took place, the plaintiff who, as it now became clear, was not insured, sued the bank for damages incurred through breach of contract. The court ruled that the plaintiff was only entitled to nominal damages, arguing that it would have been reasonable for him to verify that the house was indeed insured. The minority opinion was that the plaintiff's claim should be accepted but his damages should be reduced by 25%, in recognition of the bank's defence of contributory negligence. The plaintiff's unreasonable conduct, in light of apprehensions regarding a breach of contract and the severe damages liable to ensue, can serve to justify both the majority and the minority opinions.

Group 7: Failure to Take Particular Measures to Defend the Interest Protected by the Contract

Unlike the previous section, which considered cases where apprehensions were created regarding a breach of contract, in the present group of cases the aggrieved party has no particular reason to suspect that the contract will be breached. Generally, in such cases, a party is not required to take precautionary measures to defend the interests protected in the contract. However, although the party in breach is not entitled to claim that the aggrieved party had no right to rely on the contract, absolute reliance on contract performance may at times indicate lack of caution on the part of the aggrieved party. The recognition of a contributory negligence defence in contract law is meant, *inter alia*, to increase a party's caution in managing his own affairs. Hence, at

61 See *supra* note 8. This case is only analogous, because the breach was actual rather than "possible." Nevertheless, the plaintiff could not have known, at the relevant time, whether the contract had been breached and, therefore, from his point of view, it was a "possible" breach.

times, even in the absence of an indication of breach, it might be desirable to encourage the potentially aggrieved party to take precautionary measures, refrain from absolute reliance on the fulfilment of the contract, and seek protection from the consequences of a possible breach. In deciding whether or not the aggrieved party was negligent, a court should consider the value of the interest liable to be impaired if the contract were breached, the probability of breach, and the cost of undertaking additional protective measures.

This group may be divided into two sub-groups: cases where the principal aim of the contract is to protect the interest impaired by a possible breach, and cases where the aim of the contract was not to protect such interests, but where the foreseeable loss resulting from a potential breach is particularly high, thus justifying special precautionary measures.

The first sub-group is likely to include cases involving bailment, and cases where one party undertakes to see that someone is insured by a third party.[62] Consider a car owner who contracts to entrust his vehicle to a person in charge of a car-park. The owner leaves the keys in the ignition without informing the person in charge, and the car is stolen.

Even assuming that the person in charge breached the contract and caused the loss, it is plausible to argue that, in terms of the three factors itemized above (value of interest protected, probability of loss, and cost of other protective measures), the owner was contributorily negligent.[63]

The recent decision in *Forsikringsaktieselskapet Vesta* v. *Butcher*[64] also belongs in this sub-group. An insurance company instructed its brokers to take a certain action necessary for effecting reinsurance with their London underwriters. The brokers forgot to do so and, when the insured-against event occurred, the London underwriters claimed they were not obliged to indemnify the insurance company in view of the broker's omission. The insurance company brought action against the brokers too, and the court considered, *inter alia*, whether the company was entitled to indemnification from the brokers on either a contractual or tort basis. The court also considered whether a defence of contributory negligence was available to the brokers, on the grounds that the insurance company had conveyed instructions to them by phone and,

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62 *Cf.* text above accompanying note 61. In the case discussed above, it was probably assumed that the aggrieved party should have known that a breach of the contract was possible.

63 In German law, a defence of contributory negligence is frequently recognized in bailment situations: Grunsky, *supra* note 11, s. 30. The bailee's liability, however, is not clearly based on contract: *Chitty on Contracts—Specific Contracts*, 26th ed., vol. II (London, 1989) at 2641.

64 See *supra* note 3.

although eight months had meantime elapsed, had not bothered to verify that they had been carried out. The court held that the brokers had breached their contractual duty of care as well as their duty under the law of torts, but admitted their defence of contributory negligence which reduced their liability to the insurance company.[65] In terms of the three factors pointed out above, this result appears justified: Given the substantial value of the interest protected by the contract between the brokers and the insurance company, the likelihood that the contract would not be performed, and the fact that verifying contract performance would have cost almost nothing, a contributory negligence defence should be recognized.

A slightly different situation was considered in the Canadian case of *Cosyns* v. *Smith*.[66] An insurance agent undertook to insure property for the plaintiff and even assured him, orally, that he had done so. The property, however, had not been insured and, after it incurred damage, the plaintiff sued the insurance agent. The agent raised a defence of contributory negligence, arguing that the plaintiff should have made further inquiries and checked whether he was indeed insured and, having failed to do so, he had contributed to his loss. A first instance court accepted the agent's defence and reduced the plaintiff's damages by 25%. The appellate court, however, rejected this defence and held that the plaintiff's claim should be accepted in full, as the plaintiff had been entitled to rely on the agent's oral assurance. This assurance, missing in the *Forsikringsaktieselskapet* case, presumably explains the different outcomes in these two cases. A further contrast justifying the different outcomes is in the identity of the plaintiffs: an insurance company in *Forsikringsaktieselskapet* and, as such, well-acquainted with the risky consequences of a possible breach by the defendants, and a layman in *Cosyns*, and thus probably less aware of them.[67]

Cases included in the second sub-group involve situations where the contract was not primarily intended to protect the adversely affected interest. Nevertheless, it is deemed appropriate to encourage the parties to take precautionary measures against breach, although nothing indicates that a breach might be imminent. Cases involving contractual

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65 In this case, it was held that the defence only applies when liability is concurrent in torts and contract. For the appeal see *supra* note 4 and accompanying text.

66 (1983) 146, D.L.R. (3d) 622 (Ont. C.A.). For a similar case that may also belong in this group see *Caines* v. *Bank of Nova Scotia*, *supra* note 8, and the discussion above accompanying note 61.

67 A .M. Dugdale and K. M. Stanton, *Professional Negligence*, 2d. ed. (London, 1989) at 386. For additional Canadian cases that resorted to a defence of contributory negligence when the client failed to ensure his insurance coverage, see Dugdale & Stanton, *ibid.* at 386, note 4.

liability for defective products are likely to be included in this group,[68] because the foreseeable damage incurred from the use of a defective product might entail bodily injury or even death to the plaintiff or to others, and it is in the social interest to reduce such injuries to a minimum. One way of achieving this goal is to provide incentives to the public to refrain from absolute reliance on either implied or express warranties. Recognizing a defence of contributory negligence might be one such incentive, at least in certain cases.[69]

Group 8: Failure to Mitigate Damages Resulting from the Aggrieved Party's Ignorance of a Contract Breach

The assumption underlying the cases discussed in this section is that the aggrieved party was unaware of the breach of the contract and, therefore, failed to act so as to prevent or mitigate his losses. It is also assumed that, had the aggrieved party been aware of the breach and had he still failed to act, the defendant could have raised a defence of failure to mitigate damages. The question is whether the party in breach can raise as a defence the aggrieved party's failure to mitigate damages, when any reasonable person in his position would have been aware of the breach. If so, should this be a defence of failure to mitigate damages or one of contributory negligence?

The prevalent opinion is that a burden to mitigate damages takes effect as soon as the aggrieved party becomes aware of the breach.[70] From then on, he is no longer entitled to assume that the contract will be performed. When the aggrieved party is unaware of the breach and, therefore, fails to take steps to mitigate damages, he might claim that the protection of the reliance and planning ability afforded by the law of contracts implies a right to be free from the need to inquire whether the contract has been breached. Making the principle of mitigation of damages inapplicable when the aggrieved party is unaware of the breach also encourages the party in breach to verify whether the aggrieved party

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68 Cf. *Schering Agrochemical Ltd.* v. *Resibel NV SA*, (26 November 1992), (C.A.) [unreported], and Burrows, Ammunition, *supra* note 20.

69 The economic analysis of accidents law assumes that, at least in certain circumstances, a person in danger of bodily injury will change his behaviour according to the extent of damages he expects to receive if injured. See R. A. Posner, *The Economic Analysis of Law* (Boston & Toronto, 1986) at 154-60; S. Shavell, *Economic Analysis of Accident Law* (Cambridge & London, 1987) 208-15; W. M. Landes and R. A. Posner, *The Economic Structure of Tort Law* (Cambridge & London, 1987) at 9-14. When the plaintiff himself is not at any risk of bodily injury, the incentive involved in a contributory negligence defence to refrain from absolute reliance on the warranty becomes much clearer. For an example, see *infra* note 73.

70 See *supra* note 54 and accompanying text.

knows of the breach, lest he be made to bear all the costs. One could object to this reasoning and argue that, for the sake of fairness to the party in breach, the aggrieved party should only be judged according to the "reasonable person" standard, and his subjective state of mind should not be taken into account. In other words, the aggrieved party's lack of awareness of the breach should count against him, and the party in breach should not be adversely affected by the other's negligence.

Given the advantages and drawbacks of applying a defence of mitigation of damages in this group of cases, a defence of contributory negligence emerges as the best approach against an aggrieved party who failed to mitigate damages because he negligently ignored a contract breach. This conclusion rests on two reasons. First, applying this defence would not significantly impair reliance and planning ability, at least as long as the courts resort to it only when the aggrieved party has been grossly negligent. Indeed, the burden of discovering an existing breach is borne by the aggrieved party, but there are also incentives to the other party to reveal that the contract has been breached, so as to create for the aggrieved party a burden of mitigation. The party in breach would obviously prefer the latter possibility, which would fully release him from the duty to compensate the aggrieved party for damages that could have been mitigated but were not, while applying a defence of contributory negligence would only ensure him partial release.

Second, applying a defence of contributory negligence leads to more equitable results than one of failure to mitigate damages. Rather than shifting the entire burden of the damages that could have been mitigated to one of the parties, a contributory negligence defence apportions the burden between the two parties, neither of which is guiltless. Releasing the party in breach entirely, and requiring that the aggrieved party mitigate damages although totally unaware of the breach, would disregard the responsibility of the party in breach for all the complications ensuing from his act. On the other hand, as the aggrieved party did not act as a reasonable person would have, it would be unfair to impose the entire burden of the damages on the party in breach.

The group of cases discussed in this section makes up a considerable share of the case law dealing with contributory negligence in a contractual context. Courts do not recognize a defence of failure to mitigate damages when the aggrieved party was unaware of the breach. Differences of opinion tend to focus on the question of whether a defence of contributory negligence is admissible and damages should be apportioned, or the entire burden of damages should be borne by the party in

breach.[71] Most court decisions dealing with these cases involve three contractual situations: building contracts,[72] warranties concerning the proper condition of a property,[73] and professional responsibility.[74] The problem of contributory negligence by reason of non-discovery of an existing breach arises in situations often sharing the following characteristics: first, the breach is not immediately apparent on performance of the contract, and only becomes manifest when the loss has occurred; second, the aggrieved party is in a better position than the party in breach to discover the breach before the loss occurs; third, the loss incurred is consequential, of the type characteristic of torts law, and courts are more willing to recognize a contributory negligence defence in tort-like situations; and fourth, concurrent tort liability is present, besides contractual liability, a situation that predisposes courts to recog-

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71 For a contrary example, where a defence of failure to mitigate damages was used, see the opinion of Nolan L.J. in *Schering Agrochemical Ltd.* v. *Resibel NV SA, supra* note 68; and Burrows, Ammunition, *supra* note 20. In this case, it was not clear whether the aggrieved party was aware of the breach.

72 *Basildon District Council* v. *J. E. Lesser (Properties) Ltd., supra* note 1; *Canadian Western Natural Gas* v. *Pathfinder Surveys, supra* note 8. In the first case, it was decided that the English statute establishing a defence of contributory negligence did not apply while in the second, a Canadian court reached the opposite conclusion on the basis of the relevant Canadian statute. For a critical comment on *Basildon* see A. S. Burrows "Contributory Negligence—A Defence to Breach of Contract" (1985) 101 L.Q.R. 161.

73 A case that may illustrate this category, albeit one in which the contributory negligence of the plaintiff was considered irrelevant, is *Mowbray* v. *Merryweather,* [1895] 2 Q.B.D. 640. The plaintiffs in this case were stevedores, who undertook to unload cargo from the defendant's ship, while the defendant undertook to supply the necessary equipment for this operation, including unloading chains. One of the chains was defective and, as a result, one of the plaintiffs' employees was injured. The plaintiffs compensated the employee on account of this injury, and demanded that the defendant indemnify them for a breach of warranty. The defendant claimed that the plaintiffs had been negligent, in that they did not examine the chain and thus failed to discover the deficiency. This defence was considered to be based on the doctrine of remoteness of damages but, in fact, it was a claim of contributory negligence. The Court of Appeal rejected this defence on the grounds that the plaintiffs owed no duty to the defendant—as opposed to their own employees—to examine the chain for defects. In relation to the defendant, the plaintiffs were entitled to rely absolutely on the warranty that the chain was not defective. Nevertheless, the holding of the court is open to criticism. The defects in the chain were readily discernible to trained eyes, such as those of the plaintiffs, and it is precisely in this type of cases, when a breach of contract is liable to cause bodily injury, that caution should be particularly encouraged. The court's firm rejection of this defence should perhaps be seen in the context of its time, the nineteenth century, when the ability to plan and rely on the contract was the central, or perhaps even the exclusive, feature of contract law ideology. See also *Sims* v. *Foster Wheeler Ltd.,* [1966] 1 W.L.R. 769; *Driver* v. *William Willet (Construction), Ltd.,* [1969] 1 All E.R. 665; *Lambert* v. *Lewis,* [1980] 2 W.L.R. 299 (C.A.) and, on appeal, *Lexmead (Basingstoke) Ltd.* v. *Lewis,* [1981] 2 W.L.R. 713 (H.L.).

74 *O'Connor* v. *B. D. B. Kirby, supra* note 45; See also *DeMeza* v. *Apple, supra* note 2, and the discussion above accompanying notes 42-43. Indeed, the group of cases discussed here is closely related to—and even overlaps with—the group of cases dealing with non-disclosure of information essential to contract performance. See also *Forsikringsaktieselskapet Vesta* v. *Butcher, supra* note 3; *Cosyns* v. *Smith, supra* note 66 (and discussion above accompanying notes 66-67); and *Doiron* v. *Caisse Populaire Dinkerman Ltee, supra* note 9.

nize a defence of contributory negligence. As mentioned, a recent decision of the English Court of Appeal supports the view that a prerequisite for applying a defence of contributory negligence to contractual claims is concurrent liability in torts and contract.

Conclusions

It is to be hoped that a defence of contributory negligence will be recognized as generally applicable in contract law. Decisions in Commonwealth countries tend to recognize this defence in quasi-torts cases only. This situation, however, is mainly a function of the language characterizing contributory negligence statutes, intended to apply to the law of torts only, rather than of a particular theory arguing that the scope of applicability of this defence should not be widened.

In this article, I have presented a series of cases where it would be appropriate to recognize a defence of contributory negligence, were this defence generally applicable.

In some of these cases, legal consequences are already attached to the unreasonable conduct of an aggrieved party, whether through a contributory negligence defence, or through other legal doctrines that lead to "all or nothing" results. Recognizing a contributory negligence defence in the types of cases discussed in this article would not significantly impair reliance and planning ability, would lead to just and fair results, and would encourage cooperation, solidarity and caution. It would also provide incentives toward the fulfilment of contracts and the mitigation of damages resulting from breach.