Ariel Porat

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To: porata@post.tau.ac.il
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THE CONTRIBUTORY NEGLIGENCE DEFENCE AND THE ABILITY TO RELY ON THE CONTRACT

Ariel Porat.

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Abstract: Whether recognition of defence of contributory negligence undermines reliance and planning ability of contract.

*228 IN December 1993, the Law Commission published its report on the applicability of the defence of contributory negligence in contract law. In its report, the Commission advised that this defence should only apply when the breach concerns a contractual duty of care. One of the main reasons behind the recent recommendation was the Law Commission's apprehension that a blanket recognition of the defence of contributory negligence would hamper the ability to rely on a contract. The Commission believed, however, that this concern was less prominent when a contractual duty of care was breached (para. 4.7):

> "Where the defendant undertakes only a contractual duty of reasonable care, he has not (in contrast to the case where he has *229 accepted a strict contractual obligation) guaranteed to produce a particular outcome. Thus it is unfair to assume that he has undertaken to compensate the plaintiff even where the plaintiff has contributed to his own loss" (emphasis supplied).

The purpose of this note is two-fold. First, I suggest, as did the Law Commission, that the reliance and planning argument, commonly used to justify a rejection of contributory negligence as a defence in contract, is not as powerful when the breach concerns a contractual duty of care as it is in other cases. In contrast to the Law Commission however, which based this argument on considerations of fairness, I argue

that, from a factual perspective, recognition of the contributory negligence defence in cases of contractual duty of care does not undermine reliance and planning ability. I then proceed to claim that this defence should also be available in certain categories of cases in which it would not substantially harm reliance and planning ability.

The reliance and planning argument provides the main ground for rejecting contributory negligence as a defence in contract law. The gist of this argument is that this defence is at odds with the very essence of the contractual agreement, namely, the parties' ability to rely on the contract and to plan for their future accordingly. Were the defence of contributory negligence applicable, the promisee would 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 fulfills his contractual obligation, as he might in a legal regime that rejects this defence. He would have to assist, or supervise, and possibly even take precautionary measures regarding the other party's performance of the contract. A contributory negligence regime thus places an additional burden on the contractual party, a burden he had not intended to assume when concluding the contract.

Two features of the contractual duty of care might show that the recognition of the contributory negligence defence in case in which such a duty is breached would not substantially harm reliance and planning ability.

First, a contractual duty of care entails an obligation to behave in a particular way (hereinafter "a behavioural duty") rather than to attain a particular result (hereinafter "a result duty"). Recognising the contributory negligence defence is usually less harmful to the reliance and planning ability of the aggrieved party when a behavioural, rather than a result duty is at stake.

When a party to a contract undertakes to attain a particular result, the defence of contributory negligence obviously impairs the reliance and planning ability of the promisee. The situation is different in cases where a behavioural duty is at stake. In such cases, the promisee understands from the very start that the result for which he *230 entered the contract will not necessarily be attained, even when the contract is diligently performed. Hence, he cannot rely absolutely on the fact that, if the said result is not attained, he will receive damages that will place him in an economic position equivalent to the one he would have occupied had this result in fact been attained.
Therefore, it may safely be assumed that, in such cases, the promisee will often take steps in anticipation of the possibility that this result will not be reached, regardless of whether the defence of contributory negligence is available. In such cases, recognition of the contributory negligence defence will not seriously impair the promisee's reliance and planning ability.

The second feature characterising a contractual duty of care is that, often, the question of whether this duty has been breached is also dependent on the behaviour of the promisee. In other words, even in a legal regime that does not recognize the contributory negligence defence, the promisee's potential right to damages in the case of breach by the other party, is frequently conditional upon his assuming a burden to behave (or to refrain from behaving) in a reasonable manner. As is shown below, the defence of contributory negligence does not add further burdens to the promisee.

Suppose a court has to decide a case involving a contractual duty of care in which the promisee has behaved unreasonably and has contributed to the loss. In a legal regime that does not recognise the contributory negligence defence, courts must reach one of the following conclusions:

> (1) Although the promisee has behaved unreasonably, the behaviour of the promisor cannot be considered reasonable either. Hence, the promisor is in breach and the promisee has a cause of action against him for his own losses. Since the promisee is not in breach, the promisor has no cause of action against him.
>
> (2) Because of the promisee's unreasonable behaviour, the behaviour of

the promisor cannot be considered unreasonable. Hence, the promisor is not in breach, and the promisee has no cause of action against him. However, since the promisee is not seen as the party in breach either, the promisor has no cause of action against him.

(3) Because of the promisee's unreasonable behaviour, the behaviour of the promisor cannot be considered unreasonable. Hence, the promisor is not in breach, and the promisee has no cause of action against him. Furthermore, since the promisee is seen as the party in breach, the promisor has a cause of action against him for the losses he has suffered.

(4) The promisee's unreasonable behaviour amounts to a breach of contract, but so does the behaviour of the promisor. *231 Neither one of the parties seems to have cause of action here, and each bears his own losses.

Recognising a contributory negligence defence will allow the court to reach intermediate solutions, as opposed to the "all or nothing" solutions described above. The following conclusion will then be possible: the promisee's unreasonable behaviour, which contributed to the breach of contract and, indirectly, to his own losses, does not exempt the other party from his own obligation to perform. Hence, the promisee has a cause of action against the promisor, who is in breach, but is only entitled to reduced damages because of his own contributory negligence.

On the whole, recognising this fifth option adds no further burdens to promisees. As we have seen, even without the defence of contributory negligence, the law imposes burdens on promisees who wish to ensure their potential right to damages (possibilities 2 to 4). Recognising the defence of contributory negligence broadens the range of possible consequences assigned to the failure to assume burdens already present. The promisee will, at all events, find it extremely difficult to anticipate the exact legal consequences of his unreasonable behaviour. Therefore the addition of the intermediate fifth option seems to have no effect on the promisee's behaviour; its advantage lies in the fact that it provides the court with an instrument through which it can reach balanced results in appropriate cases.

The two characteristics suggested above as typical of the contractual duty of care strongly suggest that the reliance and planning ability is not weakened when the contributory negligence defence is recognised in contractual duty of care cases, although, as is shown below, this also holds true for other categories of cases.

When a strict contractual duty is breached, recognition of the contributory negligence defence often impairs the reliance and planning ability. Under three conditions, however, it will hardly affect this ability:

(1) The aggrieved party is neither required to invest nor to give up economic resources beyond those he is obligated to invest according to the contract.

(2) The aggrieved party is not required to adopt any measures to test whether the contract was performed, is performed, or will be performed, beyond those he is obligated to adopt according to the contract.

(3) The aggrieved party is not required to infer from the data in his possession whether the contract was performed, is performed, or will be performed, beyond the conclusions that might easily be reached by almost any person in his position *232 (which are not co-extensive with the conclusions that would be reached by any reasonable person).

The defence of contributory negligence will often be compatible with the three conditions stated above. I suggest elsewhere categories of cases in which the contributory negligence defence is worth considering (A. Porat, "Contributory Negligence in Contract Law: Toward a Principled Approach," (1994) 28 U.B.C.L. Rev. 141); in all these categories, the reliance and planning argument as a ground for rejecting the contributory negligence defence is weakened. I present here

only three such instances, representing three categories of cases which, in my view, clarify the argument in favour of recognising the defence of contributory negligence beyond the contractual duty of care cases.

Example 1. John and Peter enter a contract committing John to perform construction work. Peter undertakes to pay John certain sums of money at various stages of the work. At some point, the parties disagree: John believes he has concluded a stage that entitles him to payment, while Peter believes that John's right has not yet materialised. John asks Peter to meet him so as to explain his position. Peter refuses. The contract is at an impasse, work ceases, and the parties suffer losses. Post factum, it emerges that John was in breach, and that Peter was justified. Nevertheless, it also emerges that, had Peter agreed to meet John and had he explained his position, the breach could apparently have been avoided.

Recognising the contributory negligence defence in this case would abide by the three conditions detailed above: Peter's agreement to meet John would have required no investment, except for a small amount of time. It would not have required Peter to take any steps so as to inspect whether the other party is performing the contract, as he clearly knew that John had no intention of doing so; nor was Peter required to draw any conclusions, except for the rather trivial one that the probability of a breach of contract could be estimated as high if he refused to meet John or to clarify his own position in some reasonable fashion.

Example 2. The facts are similar to those described in Example 1, except that John breaches the contract by delaying performance because of geological problems. Post factum, it emerges that Peter knew about these problems at an early stage, although after the contract was concluded; had he reported them to John in due course, the breach would have been avoided.

In this case too, recognising a contributory negligence defence would not have impaired Peter's reliance and planning ability. Telling John of the geological obstacles would have involved only negligible *233 financial investment, e.g. a telephone call. Peter is not required to inspect whether the contract was, is, or will be performed, nor is any significant burden of drawing conclusions placed on him, as the relevance of the geological problems to the performance of construction work is obvious.

Example 3. Paul undertakes to sell an apartment to Steven. As the time of performance approaches, it becomes clear that the chances of meeting the agreed schedule regarding delivery are quite low, because the tenant living in the apartment announces he has no intention of leaving the premises on time.
Although Steven knows this, he leases the apartment to a third party, promising possession from the performance date fixed in his contract with Paul. Due to Paul's breach of contract--a significant delay in the delivery date of the apartment--Steven is forced to breach his contract with the third party and pay damages for consequential losses (it is assumed that these damages were foreseeable, and therefore not too remote). Can Steven recover from Paul, in addition to his lost profits from the leasing contract, the damages he had to pay to the third party, as losses resulting from Paul's breach of contract? A possible answer to this question is that Paul must compensate Steven, but damages relating to the consequential losses must be reduced because of Steven's contributory negligence. Indeed, the first of the three conditions ensuring that recognition of the contributory negligence defence will not hamper reliance and planning ability might not be fulfilled in this example:
Steven is forced to postpone realisation of profits coming to him from the lease, thus giving up economic resources that might have been available to him in a legal regime where a contributory negligence defence was not recognised.
The counter-argument is that, had Steven postponed leasing the apartment, he would have been entitled to demand from Paul the losses he incurred because of this delay. Undoubtedly, this would have been true if the contract had actually been breached but, in some cases, this should also be the case when there are grounds for an apprehension of a breach, which, in the final analysis, failed to materialise.

As mentioned, these three examples represent categories of cases in which

recognition of the contributory negligence defence does not significantly impair reliance and planning ability. Needless to say, additional examples can also show that this ability is only marginally affected by the recognition of the contributory negligence defence. Thus, the Law Commission would have done better had it drawn a distinction between cases where recognising the defence of contributory negligence impairs reliance and planning ability, and cases in
*234 which the adoption of this defence has little or no effect on this ability, and had it recommended that this defence be adopted in the latter category of cases.

ARIEL PORAT. [FNa1]

FNa1. Tel Aviv University.

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