THE NEGLIGENCE OF THE PLAINTIFF IN CONVERSION

BY JOHN GOLDRING*

[*The manifest injustice of the old common law rule that contributory negligence was a complete defence in actions such as negligence and breach of statutory duty, led to its replacement by the enactment of apportionment legislation in virtually all Commonwealth jurisdictions. However, only conduct which would have constituted contributory negligence of the plaintiff at common law is sufficient to bring the apportionment legislation into operation. A recent N.S.W. decision would suggest that at common law contributory negligence was not available as a defence to actions in conversion. Mr Goldring, in light of the use by the courts of the tort of conversion as a 'proprietary' remedy, considers a number of ways in which a plaintiff's negligence might afford some defence, or means of reducing the damages recoverable, in an action in conversion. In concluding, the author contends that the defence of contributory negligence did, at common law, extend to actions in conversion, and thus the appropriate apportionment legislation may be applicable where the plaintiff fails to take reasonable care of his own property.*]

1. THE GENERAL NATURE OF THE PROBLEM

The question of whether the negligence of a plaintiff in an action for conversion can ever be raised against him as a defence, and if so under what circumstances, has long hovered about the fringes of the law, but only recently has been the central issue in a decided case.[1]

The action of trover is an ancient one, but has maintained its position as a cause of action because it is the principal action in which questions of title to personal property can be decided. It is of particular importance in the areas of law relating to cheques, and in relation to secured financing transactions. The essence of the cause of action has been described as

> a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the *property* or *special property* in the chattel. It may take the form of a disposal of the goods by way of sale, or pledge or other intended transfer of an interest followed by delivery, of the destruction or change of the nature or character of the thing, as for example, pouring water into wine or cutting the seals from a deed, or of an appropriation evidenced by refusal to

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[1] *Wilton v. Commonwealth Trading Bank of Australia* [1973] 2 N.S.W.L.R. 644.

> deliver or some other denial of title. . . . An intent to do that which would deprive 'the true owner' of his immediate right to possession or impair it may be said to form the essential ground of the tort. . . .[2]

The proprietary nature of the tort of conversion has given to it a rather special character, and this has influenced the circumstances in which the courts have been prepared to allow particular types of defences in actions for conversion.

The question whether contributory negligence may be a defence in conversion was raised in *Wilton v. Commonwealth Trading Bank of Australia*.[3] The receiver of a solicitor's practice sued the bank for conversion of a number of cheques payable to the solicitor. The cheques had been misappropriated by the solicitor's clerk, and handed by him to a third party. The third party had paid the cheques into its account with the defendant bank. As the cheques were crossed and payable to a party other than the customer, the bank was clearly liable in conversion, and unable to take advantage of the statutory protection afforded by s. 88 of the Bills of Exchange Act 1909 (Cth) which has now been repealed and replaced by provisions inserted by the amending Act of 1973. It was conceded that the solicitor had continued to employ the clerk in the knowledge that he had previously been dismissed from a similar position for dishonesty, and, even with this knowledge, had allowed him access to cheques and other money in the care of the solicitor. The defendant bank alleged that this conduct constituted negligence of a type which would allow the Court to apportion any damages recoverable by the receiver under the provisions of the Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.), the N.S.W. statute providing for apportionment of damages in cases of contributory negligence. The bank relied on two cases and a quantity of learned writing to support its contention. In a most thorough judgment, Samuels J. considered the question of whether the negligence of a plaintiff in an action of conversion could constitute a defence of some kind. In this article it is proposed to consider a number of ways in which the negligence of the plaintiff in conversion might found some defence or means of reducing the damages recoverable. Some, but not all of these were canvassed by Samuels J.; His Honour was, of course, confined by the facts of the case before him.

At common law, the contributory negligence of the plaintiff in actions of negligence, and probably also of nuisance, was a complete defence.[4] It was also, at common law, a defence to actions for breach of statutory duty,[5] and for breach of an innkeeper's duty.[6] Because of the obvious

[2] Dixon J. in *Penfold's Wines Pty Ltd v. Elliott* (1946) 74 C.L.R. 204, 229. (Emphasis supplied.)

[3] *Supra* n. 1.

[4] As to the defence of contributory negligence, see Glanville Williams, *Joint Torts and Contributory Negligence* (1951) 11, 13.

[5] *Caswell v. Powell Duffryn Associated Colleries Ltd* [1940] A.C. 152; *Piro v. Foster & Co. Ltd* (1943) 68 C.L.R. 313. In the latter case the High Court of Aus-

injustice of this rule, it has been replaced, in virtually all Commonwealth jurisdictions, by statutes based on the Law Reform (Contributory Negligence) Act 1945 (Eng.).[7] This statute provides for the apportionment of damages in proportion to the 'fault' of the parties. The common law remains important, for only conduct which would have constituted contributory negligence of the plaintiff at common law is sufficient to bring the apportionment legislation into operation.

Negligence of the plaintiff may also be a defence if it is such as to estop the plaintiff, but such estoppels are extremely rare in cases where a plaintiff is asserting his rights to personal property, and establishes that he is the owner of that property. Negligence may possibly also constitute a ratification of the defendant's conduct, rather than an estoppel, in certain cases.

The circumstances which give rise to an action in conversion may also found an action by the defendant against the plaintiff. This is a completely separate cause of action, and as such would give rise to a counter-claim or cross-action in negligence rather than to a defence of contributory negligence.

2. CONTRIBUTORY NEGLIGENCE AT COMMON LAW

The first case to be reported in which the 'contributory negligence' of the plaintiff was found to be a defence to his claim was not plainly an action framed in negligence, but, apparently, one which was pleaded as an action on the case, which in modern times could be described either as negligence or nuisance.[8]

The rule that contributory negligence was a complete defence led to considerable injustice where the act of the plaintiff, as a cause of his loss, was relatively insignificant compared to the act of the defendant. Particular injustice and arbitrariness was occasioned by the 'last oppor-

tralia reluctantly followed the decision of the House of Lords in the former case rather than their own decision in *Bourke v. Butterfield & Lewis Ltd* (1926) 38 C.L.R. 354, in the interests of unity of the common law rather than logic. The effect of *Bourke's* case was promptly reinstated by Statute in New South Wales, and the Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.), s. 9, specifically states that the apportionment legislation will not apply in cases of breaches of statutory duty, reinforcing the statutory rule that contributory negligence is, in New South Wales, no defence.

[6] *Shacklock v. Ethorpe Ltd* [1939] 3 All E.R. 372, *per* Lord Macmillan at 374. Contributory negligence is also a defence to the action, founded on the strict liability of the defendant created by the Animals Act 1969 (Eng.). See *Cummings v. Granger* [1975] 1 W.L.R. 1330.

[7] *E.g.* Law Reform (Contributory Negligence) Act 1945 (U.K.), Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.), Contributory Negligence Act 1947 (N.Z.).

[8] *Butterfield v. Forrester* (1809) 11 East 60; 103 E.R. 926. For the development of the law see Fleming, *The Law of Torts* (4th ed. 1971) 216 ff., Glanville Williams, *op. cit.* Part Two.

tunity' rule.[9] This may have led to the development, before the passage of the apportionment legislation, of a different test of 'negligence', as used in the phrase 'contributory negligence' from that used to determine whether the plaintiff had a cause of action in negligence. This became part of the common law, but remains very important because of the wording of the apportionment legislation. This matter will be considered in the next section.

What, then, was contributory negligence at common law? In a recent case, Lord Denning M.R. described it thus:

> Negligence depends on breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to *others*. Contributory negligence is a man's carelessness in looking after *his own* safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself. . . .[10]

On the other hand, the tort of negligence is an actionable wrong to the plaintiff, constituted by (i) the existence of a duty of care owed by the defendant to the plaintiff; (ii) the breach of that duty; and (iii) a causal connection between the breach of that duty and some certain and provable damage suffered by the plaintiff.[11]

A passage from the judgment of Lord Ellenborough C.J. in *Butterfield v. Forrester*[12] is usually taken as the foundation of the defence of contributory negligence. In that case the defendant, who had been painting his house, left some poles which he had been using leaning against the wall of the house in such a way that they intruded into the street. In broad daylight the plaintiff left a public house (the report does not describe his activities there), mounted his horse and rode along the street, not keeping a proper lookout. The horse collided with the poles and the plaintiff was injured. His action was one on the case, arising out of the obstruction of the highway. Today, on such facts, an action in nuisance for obstruction of the highway might lie; but equally, following *Donoghue v. Stevenson*,[13] it could be argued that to leave poles lying so that they intrude into the street is a breach of a person's duty not to injure his neighbour. In either case it might be relevant to determine to what extent the plaintiff's own actions contributed to his injury, and were in breach of whatever duty he himself bore. In *Butterfield v. Forrester* the Lord Chief Justice found that, if the plaintiff had exercised reasonable care for his own safety, he would have seen the poles and could have taken action to avoid them. He directed the jury:

[9] See *e.g. The Volute* [1922] 1 A.C. 129; *Alford v. Magee* (1952) 85 C.L.R. 437 and subsequent Australian cases. For discussion of the rule, see Fleming, *op. cit.* 223 ff.; Glanville Williams, *op. cit.* Chapters 9 and 10; Goodhart, (1949) 65 *L.Q.R.* 237; Fridman (1953) 27 *A.L.J.* 451; Keeler (1967) 41 *A.L.J.* 148.

[10] *Froom v. Butcher* [1975] 3 W.L.R. 379, 383. (Emphasis mine.) Cf. Gresson J. in *Helson v. McKenzies (Cuba Street) Ltd* [1950] N.Z.L.R. 878, 920.

[11] Fleming, *op. cit.* 104-5.

[12] (1809) 11 East 60; 103 E.R. 926.

[13] [1932] A.C. 562.

> A party is not to cast himself on an obstruction which has been made by the fault of another, and avail himself of it, if he do not use common and ordinary caution to be in the right.[14]

In the earlier cases of contributory negligence it seemed that a *duty* to exercise care for his own safety was imposed on the plaintiff, and that this duty was constituted in a similar way to the general duty of care imposed by the law of negligence. Contributory negligence would be a defence only if such a duty were established, and that it were also established that there had been a breach of this duty which was causally related to a loss suffered by the plaintiff which was provable and substantial, and which a reasonably prudent man would have foreseen.

In 1940 the House of Lords hinted[15] that this was not necessarily the case. Lord Wright and Lord Atkin suggested that in such a case the defendant would succeed if he proved either that the plaintiff had broken some duty of care owed to him, or that the plaintiff had merely failed to take such care of his person or property as would be expected of a reasonably prudent man.

The following passage occurs in the speech of Lord Atkin, after an allusion to *Butterfield v. Forrester* and to the fact that in that case no negligence was alleged by the plaintiff against the defendant who had admittedly obstructed the highway:

> [T]he omission by the plaintiff to use ordinary care may be the sole cause of injury as was held in *Butterfield's* case, or have contributed to cause the injury as in the numerous cases which appear in the books. It may be said finally that if contributory negligence is not regarded from the point of view of causation it is difficult to see how damages comes to be divided under the Admiralty rule which is adopted in ordinary cases of injury in other systems of jurisprudence, and which persons in authority think should be adopted in ours.
> I cannot therefore accept the view that the action for injuries caused by breach of statutory duty differs from an action for injuries caused by any other wrong. I think that the defendant will succeed if he proves that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in the circumstances.
> But having come to that conclusion I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain and manifold risks of factory or mine. . . .[16]

It was to this speech that the members of the Court of Appeal turned for guidance when, in *Davies v. Swan Motor Co. (Swansea) Ltd*,[17] they were faced by a claim by the estate of a deceased garbageman. The deceased, at the time of the events giving rise to the claim, was riding on a step provided on the side of a garbage truck for the purpose of enabling garbagemen to empty garbage-bins over the side of the truck. Riding on these steps was prohibited by the deceased's employers. The defendant's

[14] (1809) 11 East 60, 61; 103 E.R. 926, 927.
[15] In *Caswell v. Powell Duffryn Associated Collieries Ltd* [1940] A.C. 152.
[16] [1940] A.C. 152, 165-6. Cf. Wright, 'Contributory Negligence' (1950) 13 *M.L.R.* 2.
[17] [1949] 2 K.B. 291.

bus negligently struck and killed the deceased. While it was admittedly stupid for the deceased to be riding on such steps on the side of the garbage truck furthest from the kerb, it was argued on behalf of his estate that he owed no duty of care to any other person not to ride in that way, so that the claim ought not to be barred by the defence of contributory negligence. This case arose after the passage of the apportionment legislation applicable to England (and to Wales, where the events took place), but, as Denning L.J. said,[18] this Act did not alter the substance of the law, but merely the manner of its application. All the members of the court found that the damage suffered by the deceased was partly his 'fault', within the meaning of the apportionment legislation and therefore reduced the claim by the estate accordingly. Bucknill L.J. said:

> [W]hen one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care for his own safety.[19]

The defence is most commonly raised in actions of negligence, now, of course, in accordance with the apportionment legislation, to reduce the damages payable by the defendant, in those cases where contributory negligence would have been a defence at common law.

At common law the defence was available in actions other than actions for negligence. *Butterfield v. Forrester* itself was not clearly a case of negligence. Perhaps this may be explained by the common origin, in the writ of trespass on the case, of the modern torts of negligence, nuisance and conversion (or trover).[20] In such actions the intention of the defendant was irrelevant.[21] However, the action of conversion or trover developed a particular role in relation to personal property,[22] with some fictional aspects which were clearly recognisable.[23] Given the historical similarity of the three torts, and the common characteristic that liability was 'strict', there would seem to be no reason why, if the failure of the plaintiff to take reasonable care for his own person or property is a defence to one of the torts, it should not be a defence to all.

Contributory negligence is a defence to actions which have developed from, or by analogy with, the action of negligence. Where the breach is of a statutory duty, rather than a duty imposed by the common law,

[18] *Ibid.* 322.
[19] *Ibid.* 308-9.
[20] On the development of negligence as an action of trespass on the case, Holdsworth, *A History of English Law* (4th ed. 1935, Vol. III 379-82; C. H. S. Fifoot, *History and Sources of the Common Law* (1949); similarly, the action of trover or conversion developed as an action on the case, supplementing, and then to some extent supplanting the action of detinue (Holdsworth, *op. cit.* 350; Fifoot, *op. cit.* 102 ff.).
[21] *E.g.* Fifoot, *op. cit.* 108, referring to *Cooper v. Chitty* (1756) 1 Burr. 20; 97 E.R. 166, a case of trover.
[22] *Bishop v. Montague* (1601) Croke Eliz. 824; 78 E.R. 1051. *Isaack v. Clark* (1614) 2 Bulstrode 306; 80 E.R. 1143.
[23] *E.g.* Lord Mansfield in *Cooper v. Chitty* (1756) 1 Burr. 20, 31; Kiralfy, ed. *Potter's Historical Introduction to English Law* (4th ed. 1958) 409, 410.

Caswell's case[24] and *Piro v. Foster & Co. Ltd*[25] show that contributory negligence was a defence. Similarly, where a defendant has broken a duty imposed upon him by a statute directly for the benefit of a class of persons which includes the plaintiff, the English courts have held, in cases of the statutory liability of innkeepers[26] and the owners of animals,[27] that contributory negligence is a defence.

The action on the case gave rise not only to trover, but also to assumpsit.[28] In theory, an action for breach of a contractual duty owed by the defendant to the plaintiff might be met by the defence that the plaintiff's damage flowed from his failure to take reasonable care of his own person or property, even though, by his contract, he was not expressly obliged to take such care. If the common law imposes an obligation to act reasonably in the interests of one's person and property (even though not amounting to a 'duty of care' in the strict sense) a contractual obligation seems superfluous. The law is not entirely clear, though there is some authority that the defence of contributory negligence may be available in actions for breach of contract.[29]

This question requires some amplification, as one significant consequence of the availability of contributory negligence as a defence in actions of conversion would be its application in cases of the conversion of cheques.[30] If the drawer of the cheque is still the true owner of it, and the drawee bank has converted it, the action of the owner may be framed in conversion, for the bank has acted inconsistently with the rights of the owner, who is entitled to immediate possession of it. Alternatively, if the bank has paid the cheque in breach of the customer's mandate, it may be sued for breach of its contractual duty.[31]

It would be illogical to apply a defence of contributory negligence to facts where, if the plaintiff had sued in conversion rather than for damages for breach of contract, the defence of contributory negligence could not be applied. How, then, may a defence of contributory negligence be raised in an action in contract?

[24] [1940] A.C. 152.
[25] (1943) 68 C.L.R. 313.
[26] *Shacklock v. Ethorpe Ltd* [1939] 3 All E.R. 372, especially *per* Lord Macmillan at 374.
[27] *Cummings v. Granger* [1975] 1 W.L.R. 1330.
[28] Holdsworth, *op. cit.* 350.
[29] *E.g. DeMeza v. Apple* [1974] 1 Lloyd's Rep. 508; the point was not commented upon when the case went on appeal ([1975] 1 Lloyd's Rep. 498); also *Queen's Bridge Motors and Engineering Co. Ltd v. Edwards* [1964] Tas. S.R. 93. Cf. *Quinn v. Burch Bros (Builders) Ltd* [1966] 2 Q.B. 370; *Belous v. Willetts* [1970] V.R. 45 (discussed by O'Hare, 'Negligence in Tort and Contract' (1971) 2 *A.C.L.Rev.* 125).
[30] In the report of the appeal to the High Court in *Colonial Bank of Australasia v. Marshall* (1904) 1 C.L.R. 632, it is stated that the trial judge had left the issue of negligence to the jury, but there is no report of this direction. The case dealt with the relation of banker and customer, rather than conversion. As to the rights, duties and liabilities *inter se* of banker and customer, including the right to sue in conversion, see Ellinger, 'Collection and Payment of Cheques' (1969-70) 9 *West. Aust. L. Rev.* 101.
[31] Ellinger, *op. cit.*

The suggestion that the defence might be available in actions for breach of contract, like those that it might be available in actions of conversion, have arisen only in cases decided since the enactment of the apportionment legislation so that it is, in a sense, academic to postulate what the common law, independent of statute, might have been. The apportionment legislation, of course, specifically provides that it will not apply 'to defeat any defence arising under a contract'.[32] But it has been held that there are situations where the defence may apply. The case law has been reviewed by Brabin J. in *DeMeza v. Apple*[33] (and on this point the Court of Appeal did not overrule His Lordship). The cases in which the issue has arisen are cases in which it has usually been alleged that the plaintiff was under a duty of care both under a contract and, because of the nature of the relationship between himself and the defendant, by the general principles of the law of torts. Alternatively, the plaintiff's contributory negligence may be described as a 'negligent breach of contract'.[34] Courts in Australia have adopted varying approaches. While the point remains open, it would seem confined to cases where there is an element of breach of a duty of care arising both under the contract and independently of it.

In the tort of conversion liability is strict; there is no requisite duty of care. As Glanville Williams states, any act of a defendant in relation to a chattel which is inconsistent with the rights of the true owner in that chattel will render the defendant, no matter how innocent, liable to the true owner in conversion, even though the true owner has been careless or unbusiness-like in respect of the chattel.[35] Dr Williams says that this rule is one which can only be altered by the legislature, though he later suggested a way in which a legislative intent to change the law might be found.[36]

Prior to the enactment of the apportionment legislation, there appears to be no reported case in which the defence of contributory negligence was argued, let alone accepted.

It is true that there are a number of cases in which the negligence of the plaintiff was relied upon by the defendant,[37] and in two cases in the House of Lords,[38] there are statements which indicate that the negligence of the plaintiff can *never* be a defence to an action in conversion. However, all the cases, with the exception of *Wilton's* case[39] and two other

[32] Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.), s. 10(1)(a).
[33] [1974] 1 Lloyd's Rep. 508; see n. 29 *supra.*
[34] *Ibid.* 519.
[35] *Infra,* n. 60.
[36] *Infra,* n. 67.
[37] Most of these cases are considered in the lengthy judgment in *Wilton v. Commonwealth Trading Bank of Australia* [1973] 2 N.S.W.L.R. 644.
[38] *Bank of Ireland v. Trustees of Evans' Charities* (1855) 5 H.L.C. 389; 10 E.R. 950; *Lloyd's Bank Ltd v. E.B. Savory & Co.* [1933] A.C. 201.
[39] [1973] 2 N.S.W.L.R. 644.

cases considered below,[40] are cases which deal with, or proceed on the basis that they deal with, the 'negligence' required to raise an estoppel against the plaintiff. It is suggested that the considerations which affected those decisions have no place in a discussion of whether contributory negligence might, at common law, have been a defence in an action of conversion, because of the difference in the meaning of the term 'negligence' when it is used in the two quite distinct contexts. However, the two statements need to be considered because of the weight which Samuels J. placed upon them in *Wilton's* case. The first is a statement of Lord Cranworth L.C. in *Bank of Ireland v. Trustees of Evans' Charities*,[41] the relevant part of which reads '[T]here must be something that amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer'.

This statement appears to refute any suggestion that the assertion of contributory negligence or lack of care on the plaintiff's part, not sufficient to found an estoppel, would assist the defendant. However, the *Evans' Trustees* case was not an action for conversion, but one for breach of an obligation, either fiduciary or contractual, owed by the bank to the plaintiffs. An employee of the trustees fraudulently applied their seal to documents, which enabled him to mislead the bank. The bank contended that the negligence of the trustees in allowing the employee to have access to the seal was a cause of their loss. It is suggested that the *ratio decidendi* of the case concerned causation of the loss, not the negligence of the plaintiffs. It is to be found not in the words of the Lord Chancellor, which were not necessary for the decision, but rather in the judgment delivered by Parke B. who expressed the opinion[42] that if, in fact, the trustees had been negligent in the custody of the seal, that negligence was remotely, if at all, connected with the fraud committed by the servant. That fraud was the cause of the loss, and it was not related to the obligation, if any, owed by the bank to the plaintiffs. It is consistent with the view that Scrutton L.J. took of this case in *Lloyd's Bank Ltd v. The Chartered Bank of India, Australia and China*[43] that it (the *Evans' Trustees* case) is authority for the proposition that there must be some act or omission on the part of the plaintiff which *caused* the loss, before that act will estop the plaintiff from asserting the wrongful act of the defendant. On this view, any statement made in the *Evans' Trustees* case relating to the *degree* of want of care on the part of the plaintiff required to defeat his claim is *obiter*. The question of the degree of want of care does not appear to have been argued in the case. Burnett,[44] whose consideration of the case is extremely thorough, takes this view.

[40] *Helson v. McKenzies (Cuba Street) Ltd* [1950] N.Z.L.R. 878 and *Lumsden v. London Trustee Savings Bank* [1971] 1 Lloyd's Rep. 114.
[41] (1855) 5 H.L.C. 389, 413; 10 E.R. 950, 960. Passage set out in full ff. p. 107.
[42] *Ibid.* 410, 989.
[43] [1929] 1 K.B. 40, 60.
[44] Burnett, 'Conversion by an Involuntary Bailee' (1960) 76 *L.Q.R.* 364.

The second statement which might be read as supporting a view that contributory negligence cannot be a defence in actions of conversion comes from the speech of Lord Wright in *Lloyd's Bank Ltd v. E.B. Savory & Co.*[45] In that case the plaintiffs were a firm of stockbrokers. Two of their employees maintained accounts with the defendant bank. The employees fraudulently paid cheques drawn by the plaintiffs into their own accounts with the bank. The decision turned upon whether the bank had acted 'without negligence' in the words of s. 82 of the Bills of Exchange Act 1882 (Eng.). This depended on the view which the courts took of the procedures used by the bank where cheques were paid into one branch of the bank for the credit of the customer's account at another branch. The statement of Lord Wright should, it is submitted, be taken as a broad statement made only for the purposes of illustration, and not in any way necessary for the decision. Nevertheless, it does reflect a view which was common, and indeed, was that of Donaldson J. in *Lumsden v. London Trustee Savings Bank*[46] until convinced to the contrary by counsel in that case. It should perhaps be added that although the facts of *Lloyd's Bank v. Savory*[47] were in some ways similar to those in *Lumsden's* case no question of contributory negligence was raised.

Samuels J. in *Wilton v. Commonwealth Trading Bank of Australia*,[48] after considering the reported cases, said:

> In my opinion, there is no ground for the conclusion that before 1965 [the year in which apportionment legislation came into force in N.S.W.] contributory negligence was a defence at common law to an action in conversion. *It is true that this conclusion rests primarily upon silence or dicta* rather than upon any case which precisely decides the point. It cannot always be said that because an argument has never been put in circumstances where it might be supposed it was available, it must therefore lack substance, but it is of great significance that in the cases to which I have referred no hint of any defence of contributory negligence can be discovered. *The dicta are universally directed to showing that mere carelessness on the part of the owner of property*, even though it may facilitate the fraud which has placed the property ultimately in the hands of a third person, *is not effective to divest the true owner of his right to recover his goods.*[49]

This statement is, therefore, the only judicial pronouncement which is directly on the subject and which was necessary for the decision in the case. It is respectfully suggested that the last sentence of the passage quoted indicates that an insufficiently clear distinction has been made between cases where the negligence of the plaintiff is alleged to have estopped him from maintaining his action for conversion, and those where the issue is simply one of contributory negligence. As will be shown below, the negligence of a plaintiff which will give rise to an estoppel is of a very different type from the mere failure to take that degree of care of person or property which a reasonably prudent man would take, and

[45] [1933] A.C. 201, 228-9. (Set out ff. p. 106.)
[46] [1971] 1 Lloyd's Rep. 114.
[47] [1933] A.C. 201.
[48] [1973] 2 N.S.W.L.R. 644.
[49] *Ibid.* 666. (Emphasis mine.)

which gives rise to the defence of contributory negligence. It is clear that mere carelessness does not give rise to an estoppel; it is equally clear that where the plaintiff's action is framed in certain torts, such as negligence or nuisance, mere carelessness is enough to give rise to the defence of contributory negligence. It is conceded by Samuels J.[50] that a finding of contributory negligence, and the resulting apportionment of damages, would lead to a more just result. There appears no reason in principle, nor any decided authority, why contributory negligence could not, *at common law*, be a defence in actions of conversion.

It appears to have been accepted by a number of learned writers that the defence is available in actions for conversion. To a large extent these writers, and the court in the one case in which their reasoning was adopted, follow Dr Glanville Williams' suggestion in his *Joint Torts and Contributory Negligence*, that the apportionment legislation has affected a change in the law.[51] For reasons to be discussed shortly, it is suggested that this argument begs the question. What is vital is the position of the defence of contributory negligence *at common law*. The most acceptable of the views of the learned writers is that of Burnett,[52] who suggests that, except in the case where the action of conversion is of a proprietary nature, the defence was available (or, more properly, would have been available, since the defence was never argued). Even Burnett's exception in respect of 'proprietary' actions of conversion, is, it is respectfully suggested, wrong, for it too fails to distinguish between that 'negligence' which is necessary to give rise to an estoppel by negligence, and the failure to take reasonable care of one's person *or of one's property*, which will enable a defence of contributory negligence to succeed.

The defence of contributory negligence, then, is one which might, in theory, have been available in actions of conversion at common law.

3. CONTRIBUTORY NEGLIGENCE AND THE APPORTIONMENT LEGISLATION

As stated above, the strict rule that the contributory negligence of the plaintiff defeated his claim no matter how relatively insignificant as a cause of his damage, led to some harshness. It also led to a degree of artifice in application of the rules of negligence. One such example is

[50] *Ibid.* 667.

[51] *Salmond on Torts* (16th ed. 1973) 530; *Street on Torts* (5th ed. 1972) 77; Fleming, *op. cit.* 227; Davis, *The Law of Torts in New Zealand* (2nd ed. 1959) 150; Holden, *The Law and Practice of Banking* Vol. 1 (1970) 215; Glanville Williams, *Joint Torts and Contributory Negligence* (1951) 210; Burnett, 'Conversion by an Involuntary Bailee' (1960) 76 *L.Q.R.* 364. On the other hand, *Paget's Law of Banking* (8th ed. 1972) 443 and Chorley, *The Law of Banking* (6th ed. 1974) 135, do not accept that contributory negligence is a defence to actions in conversion: they doubt the authority of *Lumsden v. London Trustee Savings Bank* [1971] 1 Lloyd's Rep. 114, and *Helson's* case which it purports to follow.

[52] *Supra*, n. 44.

provided by the much-criticised 'last opportunity' rule in *Davies v. Mann.*[53] Another example was given by Denning L.J. in *Davies v. Swan Motor Co. (Swansea) Ltd* where he said:

> Previously, in order to mitigate the harshness of the doctrine of contributory negligence, the courts in practice sought to select, from a number of contributing causes, which was *the* cause — the effective or predominant cause — of the damage and to reject the rest. Now [after the enactment of the Law Reform (Contributory Negligence) Act 1945] the courts have regard to all the causes and apportion the damages accordingly. This is not a change in the law as to what constitutes contributory negligence. The search in theory was always for all the causes.[54]

It was for this reason that in 1939 the English Law Revision Committee recommended[55] the changes which subsequently found expression in the English Law Reform (Contributory Negligence) Act of 1945 (now adopted by most common law jurisdictions). The relevant provisions of the legislation may be found in sections 9 and 10 of the Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.) which were the provisions considered in *Wilton's* case.[56] Section 10(1) provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Section 9 defines 'fault' as follows:

> Fault means negligence, or other act or omission which gives rise to a liability in tort or would, apart from this Part, give rise to a defence of contributory negligence. . . .

It follows from these provisions that if the defence of contributory negligence was not available at common law, then, unless the acts of the plaintiff would give some separate cause of action in tort, there is no 'fault' in the sense used in the apportionment legislation, and that legislation cannot operate. Thus it has been argued that where no defence of contributory negligence would have been available at common law because of the operation of the 'last opportunity' rule,[57] there is no 'fault' within the meaning of the apportionment legislation. This argument is not of central concern in this discussion.

In the central operative provision of the apportionment legislation, though 'fault' is itself defined in the legislation, that term is used in two different senses. The definition permits this. When used in the expression

[53] (1842) 10 M. & W. 546; 152 E.R. 588.
[54] [1949] 2 K.B. 291, 322.
[55] Cmnd. 6032 (1939). (Commons Papers Vol. 12, 1938-39, 691.)
[56] *E.g.* Law Reform (Contributory Negligence) Act 1945 (U.K.); Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.). Contributory Negligence Act 1947 (N.Z.).
[57] Keeler, '*Alford v. Magee* and the Apportionment Legislation' (1967) 41 *A.L.J.* 148: for discussion of the 'last opportunity rule', *The Volute* [1922] 1 A.C. 129; *Alford v. Magee* (1952) 85 C.L.R. 437; Fleming, *op. cit.* 223 ff.; Glanville Williams, *op. cit.* Chapters 8 and 10; Goodhart (1949) 65 *L.Q.R.* 237; Fridman (1953) 27 *A.L.J.* 451.

'as the result partly of his own fault', 'fault' obviously encompasses such failure to take care of the plaintiff's own person or property as would give rise at common law to the defence of contributory negligence. Where 'fault' is used in the expression 'partly of the fault of any other person or persons', i.e. in reference to the wrongdoing of the defendant, it is used in a different, narrower, sense. In this sense 'fault' can mean only such conduct as would, at common law, be such 'negligence, or other act or omission which gives rise to a liability in tort', as would *found* a cause of action. It would not include conduct which 'would, apart from this Part, give rise to a defence of contributory negligence . . .' because 'fault' of that nature would, at common law, not furnish a sword for use against the defendant, merely a shield to protect the defendant against the failure of the plaintiff to take reasonable care of his own person or property. The apportionment legislation does not provide a cause of action in negligence or any other tort where none existed previously.

To quote again from the judgment of Denning L.J. in *Davies v. Swan Motor Co. (Swansea) Ltd*

> The legal effect of the Act of 1945 is simple enough. If the plaintiff's negligence was one of the causes of this damage he is no longer defeated altogether . . . [t]his is *not a change in the law as to what constitutes contributory negligence*. . . .[58]

The conditions which allowed the defence of contributory negligence to be raised at common law must be fulfilled before any apportionment can be made. *A fortiori*, it is suggested, the Act has made no change in the law as to what conduct constituted negligence or any other tort, or in the circumstances in which a plaintiff may sue.

Glanville Williams, in discussing the availability of the defence of contributory negligence in actions of conversion, suggested that 'Conceivably, however, the [Contributory Negligence Act 1945] may be taken as an excuse for readjusting the common law principles of contributory negligence in conversion, which were not altogether satisfactory'.[59] It has been pointed out above that Dr Williams reached the conclusion that carelessness on the part of the plaintiff in conversion would not allow the defendant to plead contributory negligence, and that this was a rule which required legislative action for change.[60] The question would seem to be, in Dr Williams' terms, whether the enactment of apportionment legislation would provide sufficient indication of the intent of the legislature to change the position. The suggestion has already been made that the defence of contributory negligence would have been, in theory, available as a defence to actions of conversion at common law. If that is a wrong assumption, can it be said that the enactment of the apportionment legislation has affected the position in any way?

[58] [1949] 2 K.B. 291, 322. (Emphasis mine.) See also Bucknill L.J. at 310.
[59] *Joint Torts and Contributory Negligence*, 328.
[60] *Ibid.* 210-12; see Samuels J. in *Wilton v. Commonwealth Trading Bank of Australia* [1973] 2 N.S.W.L.R. 644, 656.

Since the enactment of the apportionment legislation in three reported cases it has been argued that the defence is available. In the first of these, *Helson v. McKenzies (Cuba Street) Ltd*,[61] neither the trial judge, nor any member of the Court of Appeal in New Zealand gave any detailed consideration to whether, at common law, the defence of contributory negligence was available in actions of conversion. In that case the plaintiff left a handbag on a counter in the defendant's shop. The bag was handed to a servant of the defendant, and another servant subsequently delivered it to a fraudulent third party. The action was framed alternatively in conversion and in negligence as a bailee. In the Court of Appeal, the dissenting judge, Finlay J., discussed the issue of contributory negligence as if it were limited to the claim in negligence against a bailee. However, his Honour considered that the defence would not have succeeded on the facts of the case because he found they were sufficiently analogous to those in *Davies v. Mann*[62] in that the necessary causal relation between the plaintiff's negligence and her loss was not established. His Honour suggested that no act or omission of the plaintiff could bring the apportionment legislation into operation unless, before the enactment of that legislation, it would have constituted a defence of contributory negligence. This approach it is submitted, is entirely consistent with those parts of the legislation discussed above. However, neither the trial judge, who simply accepted that the apportionment legislation applied in such a way as to reduce the damages recoverable in the action of conversion, nor the other members of the Court of Appeal, who adopted the reasoning of the trial judge on this point, considered the apparent requirement of the legislation that the act or omission which constituted the plaintiff's 'fault' should be such as would have given rise to the defence of contributory negligence at common law. Damages in the action for conversion would be reduced under the Contributory Negligence Act 1947 (N.Z.) if the plaintiff had failed to take reasonable care. In the words of Gresson J. (as he then was):

> To constitute contributory negligence under the Act, it is not necessary that the conduct should have been a breach of the duty owed, but it is sufficient if it amounted to a lack of reasonable care for the safety of person or property.[63]

Certainly this view is quite consistent with the law relating to the nature of the 'negligence' which constitutes 'contributory negligence', but it begs the question of whether or not that defence is available.

The result in the case was that the plaintiff's damages were reduced. Although it appears that the question of whether contributory negligence was a defence to actions of conversion at common law was not considered fully, the case has been cited[64] as authority that the defence was available, at least under the apportionment legislation, in actions of conversion.

[61] [1950] N.Z.L.R. 878.
[62] *Supra*, n. 53.
[63] [1950] N.Z.L.R. 878, 920.
[64] In *Lumsden v. London Trustee Savings Bank* [1971] 1 Lloyd's Rep. 114.

In *Lumsden & Co. v. London Trustee Savings Bank*,[65] the plaintiff, a firm of stockbrokers, sued the defendant bank which had collected a number of cheques for its customer. The customer was in fact a fraudulent employee of the plaintiffs. The plaintiffs were in the habit of making out cheques in favour of certain creditors, filling in the name of the payee of the cheque with an abbreviation of the creditor's name. Thus a cheque in favour of 'Brown Mills & Co.' would be written payable to 'Brown'. The fraudulent clerk opened an account with the defendants, in the name of J. Brown, in circumstances which amounted to negligence by the defendants, depriving them of the protection of the Cheques Act. He paid the plaintiffs' cheques into the account and the defendants collected them. The issue for decision by Donaldson J. concerned the applicability of the protection of the Cheques Act. Counsel for the plaintiffs *conceded* that the defence of contributory negligence was available in the action, so that the damages recoverable by the plaintiff could be reduced under the apportionment legislation. Donaldson J. was at first reluctant to accept the correctness of this concession, but was persuaded to do so on the authority of *Helson's* case and a passage from Glanville Williams' *Joint Torts and Contributory Negligence*. He did not consider the precise wording of the apportionment legislation, nor the vital issue flowing from that consideration, namely, whether, at common law, the defence was available in actions for conversion.

Both *Helson's* case and *Lumsden's* case were relied upon by counsel for the bank in *Wilton v. Commonwealth Trading Bank of Australia*.[66] Of course, neither decision was binding on Samuels J., and he decided to follow neither. His reasons for so doing, it is respectfully suggested, were sound. His Honour pointed out that two relevant passages in Dr Glanville Williams' book avoided a basic issue, and that, in his view, rendered the decision in *Lumsden's* case of little worth, because that decision appeared to adopt Dr Williams' reasoning. The matter was, in any case, *obiter*. As stated above, Dr Williams had said clearly that as conversion is a tort of strict liability, the intention of the converter was irrelevant, as was the carelessness or unbusiness-like behaviour of the plaintiff. Any change in this rule must be made by the legislature.[67] Yet Dr Williams had also suggested that the apportionment legislation '[M]ay be taken as an excuse for readjusting the common law principles of contributory negligence in conversion . . .'.[68] Samuels J. after quoting these passages referred to the provisions of the apportionment legislation. His Honour said:

> It seems to me, with respect, that Dr Williams has overlooked the real nub of the definition [of 'fault'], which excludes the application of apportionment in any case where contributory negligence would not have been a defence at common law. It is not a question of discretion, but a question of statutory exclusion.[69]

[65] *Ibid.*
[66] [1973] 2 N.S.W.L.R. 644.
[67] *Joint Torts and Contributory Negligence*, 210-12.
[68] *Ibid.* 328.
[69] [1973] 2 N.S.W.L.R. 644, 656.

For similar reasons, His Honour rejected *Helson's* case as authority for the proposition that contributory negligence was a defence in actions for conversion. He pointed out[70] that in that case counsel for the appellant, Mrs Helson, had argued that contributory negligence had never before been set up as a defence to an action in conversion, Counsel for the defendant shopkeeper had argued that there was no conversion, and dealt with the issue of contributory negligence only in so far as it applied to the alternative claim for negligence as a bailee. None of the Judges, His Honour said, gave any attention to this fundamental question raised by the argument of counsel for the appellant, an argument which Samuels J. found convincing.

It would appear, therefore, that none of the cases decided since the enactment of the apportionment legislation are binding authority that, by virtue of that legislation, contributory negligence can be argued by a defendant to reduce the amount of damages recoverable by the plaintiff in conversion. The suggestion made by Dr Glanville Williams, that the legislation evinces an intent to change the common law, does not appear to be tenable. It is necessary to look at the state of the law as it existed before the enactment of the apportionment legislation to determine whether the defence may now be raised to reduce the damages recoverable, because the apportionment itself requires that this be done. As shown above, the definition of 'fault' clearly does not extend the type of conduct which brings apportionment into operation beyond that conduct which would have given rise to the defence of contributory negligence at common law.

4. 'ESTOPPEL BY NEGLIGENCE' IN ACTIONS FOR CONVERSION

The following passage from the speech of Lord Wright in *Lloyd's Bank Ltd v. E.B. Savory & Co.* expresses a common view:

> In an ordinary action in conversion, once the true owner proves his title and the act of taking by the defendants, absence of negligence or intention or knowledge are alike immaterial as defences. Section 82 [of the Bills of Exchange Act (Eng.)] is therefore not the imposition of a new burden or duty on the collecting banker, but is a concession affording him the means of avoiding a liability in conversion to which otherwise there would be no defence. As it is for the banker to show that he is entitled to this defence, the onus is on him to disprove negligence. *And just as in an action for conversion it is an immaterial averment that the conversion was only possible because of want of ordinary prudence on the part of the true owner,* so that averment is equally immaterial if the issue arises under s. 82.[71]

This statement appears to be a development of a statement of the Lord Chancellor (Lord Cranworth) in the earlier case, *Bank of Ireland v. Trustees of Evans' Charities.*[72] The trustees sued the bank, which raised, as a defence, the alleged negligence of the trustees in permitting a fraudu-

[70] *Ibid.* 654.
[71] [1933] A.C. 201, 228-9. (Emphasis mine.)
[72] (1855) 5 H.L.C. 389; 10 E.R. 950.

lent servant to deal with the securities which were the subject matter of the case. Unlike *Lloyd's Bank Ltd v. E.B. Savory & Co.*,[73] the statutory protection afforded to banks collecting cheques for customers by the Bills of Exchange Act was not the central issue in the case. Lord Cranworth L.C. said:

> The direction [of the trial judge] was that if the transfer [of the securities] was caused by such negligence on the part of the trustees as that of which evidence has been given, then the Bank was absolved. I apprehend that there is no such principle of law. I think it has been fairly put, that *there must be either something that amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer.*[74]

These statements were not part of the *ratio decidendi* of either case, and they were made in the absence of any suggestion that contributory negligence might be raised as a defence to an action in conversion. However, they do show that there may be, in very limited circumstances, a possibility that the act or omission of the plaintiff may afford a defence to the defendant. Such acts or omissions have been described as 'estoppel by negligence'.

At this stage a word of explanation is required. It is best given in the words of Spencer Bower and Turner, in their discussion of the term 'estoppel by negligence':

> It is relevant at this point to make mention of the expression 'estoppel by negligence', the use of which has encouraged some to consider this so-called variety of estoppel as a separate class. It is conceived that there is no justification whatever for such a special classification. The term 'estoppel by negligence' is used, both in the decisions and in the textbooks, to signify those examples of estoppel in which the silence of one under a duty in the circumstances to speak will be taken to estop him from denying the truth of the assumption which by his silence he has allowed to be made. It is this *breach of a duty* to speak which is the negligence which is alluded to in the term 'estoppel by negligence' . . . [emphasis supplied] it [use of the term] involves an absolute untruth. It implies that it is the negligence of the party which estops him, whereas negligence in itself can never have this effect. The neglect of a legal duty gives a cause of action; it cannot *as such* operate as an estoppel.[75]

Thus two things are made clear: when we speak of 'estoppel by negligence', we are really referring to one particular class of circumstances which give rise to an estoppel by conduct, or by representation; and 'negligence' in the phrase is used in the same sense as it is used in references to the tort of actionable negligence, which involves a breach of duty.[76] Such 'negligence' is in no way comparable to 'negligence' as used in the phrase 'contributory negligence', which, as has been shown, does not involve necessarily the breach of any duty owed to another person, but merely a failure to take reasonable care of one's person or property.

It is suggested that a failure to distinguish clearly the senses in which the word 'negligence' is used, may have been misleading; in particular, it

[73] [1933] A.C. 201.
[74] (1855) 5 H.L.C. 389, 413; 10 E.R. 950, 960. (Emphasis mine.)
[75] *Estoppel by Representation* (2nd ed. 1966) 69.
[76] See *Moorgate Mercantile Co. Ltd v. Twitchings* [1975] 3 W.L.R. 286, especially *per* Lord Denning M.R. at 295; on appeal [1976] 2 All E.R. 641.

is possible to discern in the judgment in *Wilton v. Commonwealth Trading Bank of Australia*[77] and also in Mr Burnett's article,[78] a tendency to use the term 'negligence' without regard to the context in which it appears. This tendency may have caused some inadvertent error which has led to the conclusion, incorrect, as submitted here, that contributory negligence is not available in actions of conversion. However, what is certain is that in some circumstances the act or omission of the plaintiff may create an estoppel against him, and it is proposed now to deal with those circumstances.

Cases which are often described as 'estoppel by negligence' most usually arise where the true owner of a chattel seeks a remedy (most often, though not invariably, in conversion) against a defendant who has acquired, or dealt with, a chattel in good faith, without notice of any defect in title, and for valuable consideration. The defendant has usually taken the chattel from or through another who has either obtained possession of it, or disposed of it, by fraud or in excess of authority. The similarities which arise in this area between such circumstances and those which give rise to problems of whether or not a relation of agency exists will be obvious. The situation is one in which the courts must decide which of two innocent parties must suffer as a result of the wrongdoing of a third. Despite the well-known *dictum* of Ashhurst J. in *Lickbarrow v. Mason*,[79] that he who has occasioned the loss must suffer it, the courts have traditionally limited this approach, and adopted a different approach which upholds rights of property rather than the validity of commercial transactions. The courts have done so, in relation to actions of conversion, in a way which has 'distorted' the law of torts. It is the emphasis given to the proprietary nature of the action in conversion which has led to the problem of depriving the defendant of any means of holding the carelessness of the plaintiff against him in terms of damages; and it is this emphasis also which has given rise to confusion.

The following passage from the judgment of Samuels J. in *Wilton's* case may be taken to illustrate the difficulty. It follows a reference to the *dictum* of Ashhurst J. in *Lickbarrow v. Mason* and a consideration of the limitations which the courts have placed upon it.

> The dicta are universally directed to showing that mere carelessness on the one part of the owner of property, even though it may facilitate the fraud which placed the property ultimately in the hands of a third person, is not effective to divest the true owner of his right to recover the goods. I think too that the path which the law appears to have taken *in excluding a defence of contributory negligence* can be illuminated by principle; at least by the principle of established policy. It may be true that English law, having no real action for chattels, is forced to distort the law of torts to enable an owner to assert his ownership. Be that as it may, for a very long period of time the law has given particular sanctity to the doctrine *nemo dat quod non habet* and the action for conversion of chattels has always had a proprietary nature which does not merely come into play when the defendant has

[77] [1973] 2 N.S.W.L.R. 644.
[78] (1960) 76 L.Q.R. 364.
[79] (1787) 2 Term Rep. 63, 70; 100 E.R. 35, 39.

> obtained some unjust enrichment from the plaintiff. The courts have always favoured the original owner at the expense of the innocent purchaser. The proprietary nature of the action has always been so strong and so powerfully nourished by the courts, that the law will not permit mere carelessness on the part of the owner so as to deprive him of the property in his goods. Any 'innocent' third person who gets the goods through a fraudulent intermediary must go further than proving the true owner's negligence. He must establish that the conduct of the true owner was such as to invest the fraudulent intermediary with the apparent right to deal with the goods as his own: that this conduct was in breach of a duty owed to the defendant or to a class of which the defendant is one: and was proximate to the innocent purchaser's acquisition of the goods.
> It may be that the policy of the common law may run counter to the needs of the commercial community: and it has indeed been restrained by the introduction of statutory provisions such as the Factors Act 1889 and, for example, s. 28 of the Sale of Goods Act 1923 (N.S.W.).
> It may also be that some apportionment of blame would in certain cases work a more just result than that which the present rule, as I take it to be, provides; but that is not, in this case, a question for me. I have to decide whether contributory negligence was at common law prior to 1965 a defence to an action in conversion. I am of the opinion that it was not. Hence I reject the defence of contributory negligence.[80]

This passage has been quoted in full because, it is suggested, some parts of it do not fit easily with others. It is certain that the policy of the law, in actions of conversion which have a proprietary nature, was to uphold the rights of the true owner as against those of the innocent *bona fide* purchaser, unless that purchaser could establish either an estoppel or some statutory protection. It is true that this approach is *consistent* with a view that contributory negligence was not a defence to conversion (or, at least, actions where the proprietary nature of it was paramount); but it does not follow from the analysis of the law relating to estoppel that contributory negligence might not have been a defence to at least some actions of conversion at common law. For this reason, it will be necessary to examine the situations in which the carelessness or lack of business-like behaviour on the part of the plaintiff will give rise to an estoppel against him. Those situations will be compared to situations in which a lack of reasonable care for his person or property might arguably expose the plaintiff to a defence of contributory negligence.

As Lord Wright once said, 'There are very few cases of actions for conversion in which a plea of estoppel by representation has succeeded'.[81] The cases in which that representation is constituted by negligence are even rarer, because 'negligence, to constitute an estoppel, implies the existence of some duty which the party against whom the estoppel is alleged owes to the other party'.[82] The requirements have been summarised as follows by Pearson L.J. in *Mercantile Credit Co. Ltd v. Hamblin*:

> In order to establish an estoppel by negligence the finance company [the plaintiffs] have to show (i) that the defendant owed to them a duty to be careful, (ii) that in breach of that duty she was negligent, (iii) that her negligence was the proximate or real cause of the plaintiff's loss.[83]

[80] [1973] 2 N.S.W.L.R. 644, 666-7. (Emphasis mine.)
[81] *Mercantile Bank of India Ltd v. Central Bank of India* [1938] A.C. 287, 302.
[82] *Per* Kennedy J. in *Lewes Sanitary Steam Laundry Co. Ltd v. Barclay Bevan & Co. Ltd* (1906) 11 Com. Cas. 255, 266.
[83] [1965] 2 Q.B. 242, 271.

In this case the court found that the owner of the goods (who was the defendant, the issue of conversion being raised on a counter-claim) did owe a duty of care to the public to protect her property. However, she had not broken that duty. The defendant was anxious to arrange a loan secured by her car. She approached a dealer, who, until that time at least, had enjoyed a good reputation, and at his suggestion completed an offer to enter into a hire-purchase agreement with the plaintiff in respect of the car. She left the forms with the dealer. They contained several blanks, and her instructions were that the forms were not to be filled in or used except in specified circumstances, a practice which would have been normal, honest and reputable. The dealer fraudulently filled in the forms, sent them to the plaintiffs, and received the cash price. Thus it was found that the defendant, Mrs Hamblin, had not broken any duty, and even if she had done so, the breach would not have been the 'real and proximate' cause of her loss, which resulted solely from the fraud of the dealer. It could be said that in a sense the owner here was in a position analogous to that of the householder who leaves his door open, thus enabling a thief to enter (the illustration used by Donovan J. in *Jerome v. Bentley & Co.*);[84] but it remains difficult to distinguish the conclusion in this case from other decisions based on similar facts.[85]

That duty to which Pearson L.J. referred need not be owed to the plaintiff personally; it is sufficient that it be owed to a class of persons of which the plaintiff is, or might reasonably be expected to be, a member.[86] It is also clear that not only the original 'representee', but also his 'privies' will be bound by the representation; and in some cases the representation will be taken to have been made to all the world.[87]

In each case it is necessary to determine whether the facts show the existence of a duty. In relation to bills of exchange there is no duty to protect against forgery under the general law,[88] though the contract between banker and customer may impose a more onerous duty upon an English, though not upon an Australian, customer. There appears to be no duty to keep or guard the possession of goods or documents.[89]

[84] [1952] 2 All E.R. 114, 118.

[85] Particularly *Eastern Distributors Ltd v. Goldring* [1957] 2 Q.B. 600. In *Moorgate Mercantile Co. Ltd v. Twitchings* [1975] 3 W.L.R. 286 both Lord Denning M.R. (at 297) and Browne L.J. (at 300) appear to suggest that *Hamblin's* case should be confined to those cases where the estoppel is based on ostensible authority. There was no comment when *Twitchings'* case reached the House of Lords; [1976] 2 All E.R. 641, of their Lordships only Lord Fraser (at 644) mentioned *Hamblin's* case.

[86] *Swan v. The North British Australasian Co. Ltd* (1863) 2 H. & C. 175, 182; 159 E.R. 73, 76, *per* Blackburn J.

[87] *Eastern Distributors Ltd v. Goldring* [1957] 2 Q.B. 600, 607.

[88] *Scholfield v. Earl of Londesborough* [1896] A.C. 514, applying *Young v. Grote* (1827) 4 Bing 253; followed, in relation to cheques, by the High Court of Australia and the Privy Council in *Colonial Bank of Australasia Ltd v. Marshall* (1904) 1 C.L.R. 632 (H.C.); [1906] A.C. 559, (P.C.), but distinguished by the House of Lords in *London Joint Stock Bank Ltd v. Macmillan & Arthur* [1918] A.C. 777.

[89] *Jerome v. Bentley & Co.* [1952] 2 All E.R. 114; *Central Newbury Car Auction Ltd v. Unity Finance Ltd* [1957] 1 Q.B. 371.

The decided cases show also that it is difficult for a defendant in an action of conversion to establish a breach of the duty, as well as its existence. Merely to part with the possession of a chattel, or of the *indicia* of title to that chattel, is not by itself a breach of any duty.[90]

At one stage it did seem that the courts might have opened the way for a plaintiff to be held responsible in law for the consequences of his own carelessness. In *Moorgate Mercantile Co. Ltd v. Twitchings*[91] the majority of the Court of Appeal (Lord Denning M.R. and Browne L.J.) appeared more ready to find that at least one class of property owners had a special obligation to take care of their property. For many years, the leading English finance companies had maintained a register of hire-purchase agreements, so that motor-vehicles which were subject to hire-purchase could readily be identified. At the time the events which gave rise to this case occurred, there was evidence that 98% of English finance companies registered their interests in vehicles in which they had an interest. The plaintiff company's usual practice was to notify the interest of vehicles which it owned, but the evidence disclosed that, in respect of the vehicle concerned in this case, it had failed to do so. When the fraudulent hirer offered the car for sale to the defendant, he made the usual inquiry, but was informed that no hire-purchase interest was registered in respect of the vehicle. Thereupon the defendant bought the vehicle, which was in fact owned by the plaintiff, and subsequently resold it. He was sued in conversion. He sought to establish that the plaintiff finance company, by its conduct, was estopped from maintaining its interest in the vehicle, either by its failure to register its interest (estoppel by negligence) or because the company formed by the finance houses to maintain the register was the agent of the plaintiff to inform prospective purchasers whether or not the vehicle was subject to any hire-purchase agreement, and had informed the defendant that the vehicle was not subject to any such agreement. As the defendant had acted on this representation to his detriment, he claimed that the plaintiff was estopped by it. The defendant also maintained that the failure of the plaintiff to register its interest in the vehicle was a breach of a duty of care owed to such persons as himself, and gave rise to a counter-claim in negligence, which would offset the plaintiff's claim exactly. In both the Court of Appeal and the House of Lords, the arguments relating to estoppel by negligence and the counter-claim in negligence were treated as being identical. The majority in the Court of Appeal accepted that there was a duty imposed on finance companies, in the circumstances, to take the reasonable precaution of registering its interest in each hire-purchase agreement. Their Lordships found that the failure to register was a breach of the duty which had the

[90] *Central Newbury Case, ibid.;* also *Farquharson Bros & Co. v. King & Co.* [1902] A.C. 325; *Mercantile Bank of India Ltd v. Central Bank of India* [1938] A.C. 287; cf. *Commonwealth Trust Ltd v. Akotey* [1926] A.C. 72.

[91] [1975] 3 W.L.R. 286; on appeal [1976] 2 All E.R. 641.

requisite causal connection with the defendant's loss. Therefore they found that the plaintiff was estopped. By a majority of three to two the House of Lords reversed this decision. All of their Lordships found that the failure of the finance company to register its interest in the vehicle was the proximate and real cause of the defendant's loss. However, only Lord Wilberforce and Lord Salmon were prepared to find that the failure to register the agreement was in breach of any legal duty owed by the plaintiff to a class of persons of which the defendant was a member, even though all (except Lord Russell) admitted that it was a measure which a reasonably prudent businessman would take. It was accepted also that the defendant had done all that could reasonably have been expected of him, though there was some indication (though not evidence) that he had previously suffered from a similar fraud. Of the members of the House of Lords, only Lord Salmon accepted the contention that the information bureau which maintained the register was the agent of the plaintiffs for the purpose of making the representation.

The opinions expressed both in the Court of Appeal and in the House of Lords do not contribute greatly to the body of established principle, and the case may be taken as confirming the traditional attitude of the law in cases of injury to property rights. *Twitchings'* case should, it is submitted, be treated as having been decided on its particular facts. However, it is suggested that the readiness of the Court of Appeal, and of the minority in the House of Lords, to infer a duty to take prudent steps in the preservation of one's property, is to be preferred to the views of the majority who were unwilling to infer such a duty.

The principles which govern this area of law were laid down prior to the establishment of the principle that, in order to succeed in a defence of contributory negligence, it was not necessary to establish that the negligence of the plaintiff was analogous to the negligence required to give a cause of action in negligence. This may be one reason why, rather than arguing that the existence of a duty in the plaintiff and the breach of that duty causally related to the damage constituted 'contributory negligence', which is a relatively recent development in the law, a defendant would be more inclined to say that the same factors amount to a representation by which the plaintiff was estopped from setting up his cause of action. This matter did not escape Samuels J. in *Wilton's* case;[92] he mentions it in relation to *Jerome v. Bentley & Co.*[93] and *Central Newbury Car Auctions Ltd v. Unity Finance Ltd.*[94] But neither in those cases nor in the more recent cases of *Eastern Distributors Ltd v. Goldring*,[95] *Mercantile Credit Co. Ltd v. Hamblin*[96] and *Moorgate Mer-*

[92] [1973] 2 N.S.W.L.R. 644, 665.
[93] [1952] 2 All E.R. 114.
[94] [1957] 1 Q.B. 371.
[95] [1957] 2 Q.B. 600.
[96] [1965] 2 Q.B. 242.

cantile Co. Ltd v. Twitchings[97] was the issue of contributory negligence raised; those decisions rested solely on the principles relating to estoppel.

The most difficult matter for a defendant to raise in order to estop the plaintiff is the causal relationship between the plaintiff's actions and his loss. This follows from a statement of Parke B., giving the opinion of the judges, in *Bank of Ireland v. Trustees of Evans' Charities*:

> The negligence which would deprive the Plaintiff of his right to insist that the transfer was invalid, *must be negligence in or immediately connected with the transfer itself*.[98]

Thus, even if parting with the goods or the *indicia* of title to them is a breach of the plaintiff's duty, the courts have found, with one exception,[99] that it is not causally related to his loss. Merely 'enabling' the loss to be sustained is not enough, though it was in such terms that Ashhurst J. in *Lickbarrow v. Mason*[1] suggested that the courts would decide which of two innocent parties must suffer for the wrongdoing of a third. It is not enough that the plaintiff's act or omission be a necessary condition of his loss; it must be both a necessary and a sufficient condition. In *Jerome v. Bentley & Co.*, in referring to the *dictum* of Ashhurst J., Donovan J. (as he then was) said:

> Everything, however, depends on the construction to be put on the word 'enabled' in this passage. . . . If I carelessly leave my front door unlocked so that a thief walks in and steals my silver, I have in a sense enabled him to steal it by not locking my door, but that does not prevent my recovering it from some innocent purchaser from the thief otherwise than in market overt. 'Enabled' in this context means the doing of something by one of the innocent parties which in fact misled the other. . . .[2]

In *Commonwealth Trust Ltd v. Akotey*[3] the Privy Council accepted that merely by parting with possession of the goods the plaintiff had 'enabled' the loss to be suffered by him; and though the reasoning in this case appears inconsistent with almost all other decisions, including subsequent decisions of the Privy Council;[4] it has received some support from academic writers.[5] Nevertheless, in order to found the representation which will give rise to an estoppel, something more, some act or omission by the plaintiff which creates an apparent authority in the person dealing

[97] [1976] 2 All E.R. 641.

[98] (1855) 5 H.L.C. 389, 410; 10 E.R. 950, 959. (Emphasis mine.) To similar effect see *Freeman v. Cooke* (1848) 2 Ex. 654; 154 E.R. 652; *Swan v. The North British Australasian Co. Ltd* (1863) 2 H. & C. 175; 159 E.R. 73; *Mayor, etc., of Merchants of the Staple of England v. Bank of England* (1887) 21 Q.B.D. 160 and such recent cases as *Mercantile Credit Co. Ltd v. Hamblin* [1965] 2 Q.B. 242.

[99] *Commonwealth Trust Ltd v. Akotey* [1926] A.C. 72, which was criticised by a differently constituted Judicial Committee in *Mercantile Bank of India Ltd v. Central Bank of India* [1938] A.C. 287. In *Motor Credits (Hire Finance) Ltd v. Pacific Motor Auctions Pty Ltd* in the High Court, Taylor J. saw no apparent inconsistency between the two cases; (1963) 109 C.L.R. 87, 98.

[1] (1787) 2 Term Rep. 63, 70; 100 E.R. 35, 39.

[2] [1952] 2 All E.R. 114, 118.

[3] [1926] A.C. 72; *supra* n. 99.

[4] *Ibid.*

[5] *E.g.* Greig, *The Sale of Goods* (1974), 53-8.

with the goods, or with the *indicia* of title to goods, is required. Thus in a situation such as arose in *Mercantile Credit Ltd v. Hamblin*[6] or in *Central Newbury Car Auctions Ltd v. Unity Finance Ltd*[7] the courts tend to find that the real or proximate cause of the plaintiff's loss is not the parting with possession by the plaintiff of the goods or of the *indicia* of title, but the fraudulent act of the rogue. Therefore the necessary element of an 'estoppel by negligence' is not established.

There may be an analogy here with the law of negligence and with the rules relating to the defence of contributory negligence. A plaintiff in negligence must prove a causal connection between the defendant's breach of duty and his loss. If the defendant can establish a *novus actus interveniens* he will avoid liability.[8] Similarly, even if the plaintiff was admittedly careless for his own safety and was injured by the negligence of the defendant, if the plaintiff's carelessness was not such as would naturally expose him to the risk created by the defendant's negligence, the defendant will not be able to plead contributory negligence.[9] Thus, to use Fleming's example,[10] if the plaintiff accepts a lift on the pillion seat of a motor cycle, knowing that the headlights are defective, and is injured when the defendant negligently collides with the motor cycle from the rear, the defendant may not say that the lack of care for his own safety by the plaintiff was the cause of his injury. However, as Denning L.J. pointed out in the passage from *Davies v. Swan Motor Co. (Swansea) Ltd* quoted above,[11] if the plaintiff's lack of care is one of a *number of* contributing causes to his loss (not the case in Professor Fleming's example) *that* situation does fall within the words of the apportionment legislation, which has obviated any need to seek a single act or omission as *the* cause of the damage.

Where the 'negligence' of the plaintiff is raised in order to *estop* him from maintaining a cause of action, it appears necessary to isolate a single act or omission which is causally related to the damage. It must also be established that that act or omission constitutes a breach of the plaintiff's duty to the class of persons to which the defendant belongs.[12]

In *Moorgate Mercantile Co. Ltd v. Twitchings*[13] the pleadings made the distinction between estoppel by representation, estoppel by negligence, and the cross-action in negligence. The facts which gave rise to the alleged estoppel by representation were different from those which gave

[6] [1965] 2 Q.B. 242.
[7] [1957] 1 Q.B. 371. Cf. *Moorgate Mercantile Co. Ltd v. Twitchings* [1976] 2 All E.R. 641.
[8] Fleming, *op. cit.* 191 ff.; *Commissioner for Railways v. Stewart* (1936) 56 C.L.R. 520; *The Oropesa* [1943] P. 32.
[9] Fleming, *op. cit.* 225 ff.; cf. *Gent-Diver v. Neville* [1953] Q.S.R. 1; *Jones v. Livox Quarries Ltd* [1952] 2 Q.B. 608.
[10] Fleming, *op. cit.* 226.
[11] [1949] 2 K.B. 291; *supra*, n. 58.
[12] *Supra*, n. 98.
[13] [1975] 3 W.L.R. 286; on appeal [1976] 2 All E.R. 641.

rise to the other two pleas. Contributory negligence was not pleaded, though it is suggested that such a plea would have been arguable in the circumstances of the case. The pleadings did not distinguish between the breach of duty which is a necessary ingredient of estoppel by negligence, and that which was said to found the cross-action. All the learned judges treated the arguments in the same way, and accepted that in both cases it was necessary to establish both the existence of a duty of care and a breach of it. The plaintiff succeeded because the majority of the House of Lords found that no duty of care existed. Yet both Lord Edmund-Davies and Lord Fraser conceded that there may have been carelessness on the part of the plaintiff; both[14] were, however, insistent that mere carelessness by the owner of property with that property should not constitute a tort. (The other member of the majority, Lord Russell of Killowen, did not express a view on the subject.) It is not suggested anywhere in this article that mere carelessness by the owner of property in respect of possession of that property, or similar matters, should render him liable in an action of tort. It is suggested merely that, as in other cases of tortious liability, where a person is in part the author of his own misfortune, through want of reasonable care for his person or property, the damages which he may recover should reflect that want of care. *Twitchings'* case was not one where the Court had to decide which of two *equally* innocent parties should suffer from the fraud of a third, for it was clear that the defendant had done what was reasonably prudent in the circumstances, and the plaintiff and failed to do so. It is submitted, with respect, that on the facts of this case, a successful plea of contributory negligence to the action in conversion, with a consequent apportionment of damages, would have achieved a more just result.

It is possible to conclude from the decided cases that in an action for conversion, a defendant may seek, in closely defined circumstances, to raise an estoppel against the plaintiff. This estoppel is an estoppel by representation, and the representation is constituted by some act or omission by the plaintiff. The act or omission must be more than mere carelessness; it must amount to a breach of a duty which the plaintiff owes to the defendant personally or to a class of persons to which the defendant belongs. The breach of duty must be the proximate cause of the plaintiff's loss; no estoppel will be created if the loss can be traced to some other cause such as the fraudulent act of a third person. An estoppel will not be created if the plaintiff merely fails to take reasonable care of his person or property. In such a case, the policy of the law, as Samuels J. pointed out in *Wilton's* case,[15] has been to uphold the proprietary rights of the true owner at the expense of the third party. However, it is suggested that this policy, while it may continue to operate in respect of

[14] [1976] 2 All E.R. 641, 659 (Lord Edmund-Davies), 664 (Lord Fraser).
[15] [1973] 2 N.S.W.L.R. 644, 666.

actions of conversion, need not necessarily influence the law relating to contributory negligence and the apportionment of damages, from which it is conceptually quite separate. Nor, it is suggested, ought reasons appropriate to the rules relating to estoppel, be applied to the rules relating to apportionment of damages.

5. NEGLIGENCE OF THE PLAINTIFF AMOUNTING TO RATIFICATION OR ACQUIESCENCE

In *Bank of Ireland v. Trustees of Evans' Charities*[16] the Lord Chancellor suggested that in certain cases the act or omission of the plaintiff may prevent him from recovering damages where that act or omission amounts to a ratification of the acts of some third party. This principle, if in fact it is a principle, has a number of features in common with the principles of estoppel, namely, that it applies, if at all, by analogy with the law of agency. The act or omission amounting to ratification must relate to the acts of some other party who has dealt in some way with the defendant, and must have given an unauthorised or fraudulent act of that third party a validity which otherwise it would not have. The principal distinction is that acts which suffice to raise an estoppel occur prior to or contemporaneously with the acts of the third party, and need not require full knowledge by the true owner of the nature, and especially the consequences, of what the fraudulent or unauthorised party is doing. Ratification, on the other hand, by definition, can take place only after the party has committed the wrongful act, and then only in circumstances where the plaintiff knew, or ought reasonably to have known, the consequences of the act or omission of the other.[17]

Mere negligence, even in the strict legal sense where this expression connotes the breach of some legal duty, when it occurs after the event cannot be a *ratification*. It cannot, *ex hypothesi*, be a cause of the event: and it is suggested that it cannot give to the event, or to the act of another, a lawful authority which otherwise that event or act would not have.[18]

In the agency cases, where a principal has failed to act in full knowledge that his agent has acted without authority, the cases have been decided not on the basis of a ratification by the principal, but because the law appears to impose upon a principal a duty to disavow the unauthorized acts of the agent within a reasonable time if he is not to be bound by them. This duty is owed to those who may contract with the agent. If, in breach of that duty, the principal fails to disavow the unauthorized act

[16] (1855) 5 H.L.C. 389, 414; 10 E.R. 950, 960.

[17] *E.g. Banque Jacques Cartier v. Banque d'Epargne de Montreal* (1887) 13 App. Cas. 111.

[18] By definition, this is the nature of ratification. See *Wilson v. Tumman* (1843) 6 M. & G. 236: and *Bowstead on Agency* (13th ed. 1968) 34 ff.

of the agent, he is bound by the contract made on his behalf by the agent with the third party, not because he has ratified the agent's act, but because he is estopped by his conduct from denying the authority.[19] In *Spiro v. Lintern*[20] it was held, apparently by analogy, that in such circumstances silence is a breach of duty and thus may ground an estoppel by negligence.

This reasoning is in accordance with *Greenwood v. Martins Bank Ltd*, where Lord Tomlin said:

> Mere silence cannot amount to a representation, but where there is a duty to disclose deliberate silence may become significant and amount to a representation.[21]

This language is language consistent with the defence founded on estoppel by conduct: that, it seems, was the basis of the decision in *Greenwood's* case. All these then, are cases, not of ratification, but of estoppel.

In one case of conversion where the negligence of the plaintiff was in issue, *Morison v. London County and Westminster Bank Ltd*,[22] the decision of the Court was squarely founded on ratification, though an argument based on estoppel was raised. The plaintiff had, for many years, employed a manager in his business as an insurance broker. The manager had authority to draw cheques on the plaintiff's account and had possessed such authority since 1888. In 1905 the manager opened an account with the defendants in his own name. From time to time the manager paid into this account cheques drawn on the plaintiff's account with another bank, but signed by him, purporting to exercise his authority. It was in respect of these cheques that the action was brought. The defendant bank relied on s. 82 of the English Bills of Exchange Act, saying that it had acted without negligence in collecting cheques on behalf of a customer. The defendants alleged also that the plaintiff had ratified the transaction and was estopped from denying the authority of his manager.

Lord Coleridge J. at the trial rejected all these defences, but on appeal, a Court of Appeal consisting of Lord Reading C.J., Buckley and Phillimore L.JJ., decided that the statute gave protection because the defendants were entitled to assume that the manager had acted within his authority. The Court also found that, because of investigation of the plaintiff's books, the plaintiff knew of the manager's acts. Nevertheless, he took no action in respect of the fraud, but continued to employ him. These circumstances constituted a ratification of the manager's unauthorized acts.

[19] See *Depot Realty Syndicate v. Enterprise Brewing Co.* (1918) 171 Pac. 223 (S.C., Oregon); *West v. Dillicar* [1920] N.Z.L.R. 139, affirmed [1921] N.Z.L.R. 617; *Spiro v. Lintern* [1973] 3 All E.R. 319.

[20] [1973] 3 All E.R. 319, 326.

[21] [1933] A.C. 51, 57.

[22] [1913] W.N. 84; on appeal [1914] 3 K.B. 356.

The case may be seen not, in any way, as an example of estoppel by negligence: rather, the plaintiff had authorized his agent to draw cheques, and, by his failure to act when placed in full possession of the facts, was found to have ratified the unauthorized acts of the manager.

This decision was criticised by Scrutton L.J. in *Lloyd's Bank Ltd* v. *The Chartered Bank of India, Australia and China*,[23] as an incorrect application of the doctrine of 'estoppel by negligence', as it was inconsistent with the principles laid down in *Bank of Ireland v. Trustees of Evans' Charities*[24] and *Swan v. North British Australasian Co.*[25] namely that, in order to constitute an estoppel, the negligence must be the proximate cause of the loss. This criticism would be justified if *Morison's* case were to be taken as a case of estoppel rather than as one of ratification, but it must be pointed out that in the *Bank of Ireland* case, although his statement was not essential to the decision, the Lord Chancellor did refer to the possibility of the act of the plaintiff being a ratification. This possibility would be confined to cases where the failure of the plaintiff to act is in relation to a prior act of an agent acting without authority. The requirement that the plaintiff's act or omission be the cause of the loss while it should, it is argued, be taken as the *ratio decidendi* of the case, cannot, in logic, relate to ratification; and thus *Morison's* case[26] is consistent with the general policy of the law.

There seems nothing in either *Morison's* case[27] nor in *Lloyd's Bank v. Chartered Bank*[28] to lend support to the conclusion drawn by Samuels J. in *Wilton's* case[29] that contributory negligence, at common law, was not a defence to actions in conversion. These cases do not deal with contributory negligence at all. They may express a general policy of the law which is consistent with the policy applied in the estoppel cases, but, like those cases, they add little to the argument relating to contributory negligence. It is suggested that there may be cases where the act or omission of the plaintiff in knowledge of the circumstances amounts to ratification of the acts which will prevent him succeeding in his action; but the rarity of such circumstances is shown by *Morison's* case[30] being apparently the only case to be reported which was decided on such grounds.

6. COUNTER-CLAIMS IN NEGLIGENCE

It is virtually superfluous to state that if the plaintiff is under a duty of care to the defendant, whether the duty arises under the rules of the law

[23] [1929] 1 K.B. 40.
[24] (1855) 5 H.L.C. 389; 10 E.R. 950.
[25] (1863) 2 H. & C. 175; 159 E.R. 73.
[26] [1914] 3 K.B. 356.
[27] *Ibid.*
[28] [1929] 1 K.B. 40.
[29] [1973] 2 N.S.W.L.R. 644.
[30] [1914] 3 K.B. 356.

of torts or under some contractual obligation, and the plaintiff breaks that duty, if the breach of duty causes damages to the defendant, then the defendant would have an action independent of the conversion of the plaintiff's chattels which the defendant may have committed. If the rights of action arise out of the same transaction, then it is both possible and desirable that the actions will be heard together.

One instance where such a situation is likely is that where a person, X, maintains an account with the Y Bank. X leaves a cheque form signed by him for a stated sum with Z, having given Z precise instructions as to the issue of the cheque. Z, in excess of his authority, misappropriates the cheque, which is paid by the Y Bank. In the absence of any statutory protection for the bank, it is clear that the bank has converted the cheque, which may not have been 'issued'.[31] The bank, however, may contend that X, in acting as he did, irrespective of any question of estoppel by representation, is in breach of his obligations under the terms of the implied contract between banker and customer,[32] which oblige the customer to take reasonable care. Situations where the duty is imposed upon the plaintiff by the rules relating to negligence may be slightly more difficult to imagine, but they are quite conceivable.

7. CONVERSION OF CHEQUES — A SPECIAL CASE?

Reference has already been made to the argument of Burnett[33] in support of the proposition that, at common law, contributory negligence might have been a defence to actions in conversion. To the extent that this argument rests upon some statements made by Dr Glanville Williams[34] which avoid the issue, his argument fails. It is, however, useful in establishing that *Bank of Ireland v. Trustees of Evans' Charities*[35] is not binding authority that contributory negligence cannot be a defence in conversion. Burnett also makes the following point:

> Our discussion of contributory negligence and conversion at common law was begun with the object of ascertaining to what cases of conversion the doctrine of contributory negligence will not apply at common law, since it is probable that in these cases the court will not avail itself of the discretion conferred by the 1945 Act. The conclusion seems to be that there is only one class of case to which the doctrine would not apply at common law and that is the type of case where the proprietary nature of the action for a conversion asserts itself. In all other cases of conversion the court would seem free to avail itself of its statutory discretion.[36]

As suggested above, there seems no reason in theory why the defence should not apply in all actions in conversion. *A fortiori* where the conversion is not one which involves the proprietary nature of the action, Burnett's suggestion, though perhaps not precisely correct, does suggest

[31] *Smith v. Prosser* [1907] 2 K.B. 735.
[32] *E.g. Varker v. Commercial Banking Co. of Sydney Ltd* [1972] 2 N.S.W.L.R. 967.
[33] 'Conversion by an Involuntary Bailee' (1960) 76 *L.Q.R.* 364.
[34] *Joint Torts and Contributory Negligence* (1951) 210-12.
[35] (1855) 5 H.L.C. 389; 10 E.R. 950.
[36] (1960) 76 *L.Q.R.* 364, 377.

at least one situation where the defence ought to be available, and that is the case of conversion of cheques and other negotiable instruments.

The piece of paper upon which a cheque is written is undoubtedly a chattel; but the principle use in law of cheques is to provide evidence of a series of contractual relationships, albeit relationships of a special type, and to which special rules apply (for example rules relating to consideration and, as against a holder in due course, exceptions to the rule *nemo dat quod non habet.*) The worth of the cheque is not the value of the paper, but the value of the chose in action of which the paper and the writing on it are evidence.[37] A party to a cheque who wishes to sue on it will generally bring an action upon one of the contracts evidenced by it. The action of conversion is a residual right so that any person entitled to the chose in action evidenced by the instrument may recover damages which he has suffered because some third party, who is not a party to any of the contracts evidenced by the instrument, has acted so as to interfere with the contractual rights evidenced by the instrument.[38] Where there is an action for conversion of a cheque, the plaintiff usually has a choice as to potential defendants. If he is the drawer of a cheque which, by definition, is drawn on a bank,[39] he may be able to rely on breach of his contract with the bank, as well as his right to sue in conversion, if he is still the owner of the cheque when the bank pays the cheque other than in accordance with the terms of the contract, whether express, implied or arising by operation of some statutory provision. This is so even if the breach of the bank's obligation is the result of a fraudulent or unauthorised act of a third party. If the plaintiff's loss is the result of his own failure to take care, then the bank may counter-claim for breach of contract[40] or, it is suggested, raise a defence of contributory negligence. It has been suggested that it would be capricious to allow a defence to the true owner of the cheque who is the drawer of it, while denying that defence to the true owner who is a payee or indorsee of it, in cases where the true owner's loss flows from the act of a third party coupled in some way with his own lack of care. Unless the strict rules requiring causal connection between lack of care and loss which are part of the law relating to estoppel apply here — and it is suggested that there is no good reason why they should — so long as the plaintiff's lack of care is one contributing cause of the loss, then his right to be compensated for the loss should be reduced proportionally.

[37] See *Lloyd's Bank Ltd v. Chartered Bank of India, Australia & China* [1929] 1 K.B. 40, 55, 56.

[38] As to the nature of actions which may be brought in relation to cheques, see Ellinger, 'Collection and Payment of Cheques' (1969-70) 9 *West Aust. L.Rev.* 101.

[39] Bills of Exchange Act 1909 (Cth) (as amended), s. 78(1).

[40] This is a possible inference to be drawn from *London Joint Stock Bank Ltd v. Macmillan & Arthur* [1918] A.C. 777 (in England — and also in New Zealand, see *National Bank of New Zealand Ltd v. Walpole and Patterson Ltd* [1975] 2 N.Z.L.R. 7) and probably in Australia, *Varker v. Commercial Banking Co. of Sydney Ltd* [1972] 2 N.S.W.L.R. 967.

It seems that a more logical right for a person who has suffered because a third party has fraudulently appropriated the benefit of a contract belonging to the plaintiff would be in tort, for interference with contractual relations. Though a party to a contract may have a right against a third party for inducing a breach of contract,[41] it is not at all clear that such an action exists in respect of this type of behaviour. If it did, it would be more logical than the artificial nature of the action of conversion in relation to cheques. The proprietary nature of that action is unsuited to the wrong done when a cheque is fraudulently misappropriated. If there were an action available other than an action in conversion, it might also be free from any doubt as to whether the failure of the plaintiff to take reasonable care for his own property would lead to apportionment of damages. If there is no such action, and the action for conversion is the only remedy open to the plaintiff, then it is desirable that the rules relating to the availability of contributory negligence be sufficiently flexible to permit apportionment where a plaintiff, by his own lack of care for the safety of his property, has contributed to his own loss.

It may be argued that the legislation already gives to banks an undue degree of protection, by allowing them a defence to most actions in conversion if they establish that they have acted without negligence.[42] However this type of argument relates really to the need for amendment of the Cheques Act rather than to a denial of the availability of the defence of contributory negligence in actions of conversion. Commercial convenience would be served by a clarification of the law that the defence was available. However, unless the courts were clear-sighted as to the distinction between cases of contributory negligence and those of estoppel by negligence, and particularly between the different meanings of the word 'negligence' used in those phrases, legislation clarifying the situation could be counter-productive, especially as there does seem to be a tendency in courts to uphold the rights of property and to limit exceptions to the rule *nemo dat quod non habet*.[43]

In the United States, until recently, a negligent drawer of cheques would succeed if he sued a person who took a cheque from a third person who had altered it or otherwise dealt with it in a fraudulent or unauthorised way, because the courts would find that the negligence of the drawer was not the 'proximate' cause of the plaintiff's loss.[44] To remedy what was seen as a shortcoming of the law, section 3-406 of the United Commercial Code was drafted, and has been adopted in some states. It reads:

[41] *Lumley v. Gye* (1853) 2 E1 & B1. 216; 118 E.R. 749; Fleming, *op. cit.* 603.

[42] See Cheques Act 1957 (U.K.); Bills of Exchange Act 1971 (Cth) which altered the already significant protection given by the Bills of Exchange Act 1909 (Cth).

[43] See *Folkes v. King* [1923] 1 K.B. 282, *per* Scrutton L.J. at 306; *Wilton v. Commonwealth Trading Bank of Australia* [1973] 2 N.S.W.L.R. 644, 665-6.

[44] D. J. Whaley, 'Negligence and Negotiable Instruments' (1974) 53 *North Carolina L.Rev.* 1.

> Any person who by negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

This section, of course, would not have availed the bank in a situation such as that in *Wilton's* case[45] because there the cheques were not altered. Though the worth of the section as framed has been doubted,[46] it does recognize an area of inadequacy in the law, and if the courts in England and Australia are unable or unwilling to remedy the inadequacy, then perhaps the legislature may.

Even if, as a general rule, it should be held conclusively that contributory negligence would not have been a defence to an action of conversion at common law, it would seem that some special considerations relate to the actions for conversion of cheques. The action is artificial; it may be unjust in preventing a defendant from having his liability reduced on account of the lack of care in the plaintiff, which may have been a contributing cause to the loss. The action of conversion in relation to cheques appears to be less of a proprietary action than is an action for conversion of other classes of chattel. It would seem that there may be some reasons, including those advanced by Burnett, why the defence of contributory negligence might be available to actions for conversion of negotiable instruments, as such actions do not appear to fall wholly within the class of 'proprietary' actions in conversion.

8. CONCLUSION

It is suggested that where a person fails to take reasonable care for the safety of his property, there is no reason in principle why any damages recoverable by him in an action of conversion against another who has dealt with the property in a manner inconsistent with the rights of the plaintiff should not be apportioned under the appropriate legislation. This flows from the proposition that, at common law, contributory negligence was available as a complete defence to an action in conversion. That proposition is not supported by authority; it appears that it was never argued before the passage of the apportionment legislation. However, there is authority that the 'negligence' which is required to establish the defence of contributory negligence is merely a failure to exercise reasonable care for one's person or property. There is also authority that the defence of contributory negligence is not confined to actions which are framed in negligence, or even to actions which are defined in terms of some breach of duty.

The difficulty of establishing a defence of contributory negligence in an action of conversion lies more in the establishment of the necessary causal

[45] [1973] 2 N.S.W.L.R. 644.
[46] Whaley, *op. cit.* n. 138.

relationship between the plaintiff's want of reasonable care and his loss. Where the cause of the loss is occasioned by the intervening act of some third party, it may be possible to say that the plaintiff's want of care is not even one of the causes of the loss.

The problem of the causal relationship between the plaintiff's want of care and his loss is more marked in the other class of case where the negligence of the plaintiff may defeat his action in conversion. That is the class of case where the conduct of the plaintiff raises an estoppel against him, so that he cannot be heard to assert his claim against the convertor of his property. In that class of case also, the defendant has the onus of establishing, not only that the conduct of the plaintiff was *the* cause (and not merely one of several causes) of his loss, but also that the plaintiff owed a duty to the defendant or a class of persons to which the defendant belonged; that the conduct of the plaintiff amounted to a breach of that duty; that the defendant relied upon the conduct in some way, and that such reliance was to the detriment of the defendant.

For these reasons, it is extremely difficult for a defendant in conversion to succeed in raising an 'estoppel by negligence'. Yet it does seem unreal, given present day commercial realities, that the negligence of the plaintiff should be, in effect, totally discounted where it contributes to his own loss. This is particularly true in relation to negotiable instruments.

While the policy of the law has tended to the protection of property rights, this policy does not, it is respectfully submitted, necessitate a conclusion that *contributory* negligence should not lead, in appropriate cases, to an apportionment of the damages recoverable by a plaintiff in an action in conversion.

It would seem, then, with great respect, that the conclusion reached by Samuels J. in *Wilton's* case[47] was not correct. His Honour found that even if his conclusion (that contributory negligence was not available as a defence to actions of conversion) should be reversed on appeal, the negligence of the solicitor was not the proximate cause of the loss.[48] It is suggested that this issue was not relevant. If, for the reasons given above, it is accepted that contributory negligence was, in theory, a defence to actions of conversion at common law, and that the apportionment legislation may be applied in appropriate cases, so long as the solicitor's negligence amounted to a failure to take reasonable care of his own property, if that failure was even only one of several contributing causes to his loss, then the bank would be entitled to have its damages reduced under the apportionment legislation. However, the case has squarely raised a difficult issue, and has cleared away much, though unfortunately not all, of the confusion which surrounds the issue.

[47] [1973] 2 N.S.W.L.R. 644.
[48] *Ibid.* 670.