The contributory negligence doctrine: four commercial law problems

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The law of contributory negligence is often treated as an afterthought by academics. This tendency is particularly pronounced in the sphere of commercial law, apparently on the assumption that the contributory negligence doctrine is for the most part confined to "accident cases". As a result, learning regarding the law of contributory negligence in the commercial law setting is particularly underdeveloped. The goal of this article is to advance learning with respect to the contributory negligence doctrine by engaging with four issues that arise in relation to it in the commercial law context. It argues, first, that the decision in Forsikringsaktieselskapet Vesta v Butcher *has been implicitly overruled by recent decisions of high authority, with the result that apportionment for contributory negligence is unavailable in all types of contractual claims. Second, the merits of rules for which* Vesta *provides and alternatives thereto are critically considered. Third, it is asked whether the apportionment statute applies in proceedings against auditors. Legislation arguably excludes it, which is a point that has hitherto been overlooked. Finally, the article addresses the intersection between the reflective loss principle and the law of contributory negligence.*

I. INTRODUCTION

The law of contributory negligence, while often treated cursorily in textbooks and university courses, is of immense practical significance. As WVH Rogers put it, "[c]ontributory negligence is a core element in tort law in England … [It] is of considerable, day to day importance".[1] Paradoxically, the impact of this area of the law has increased considerably since the abrogation of the common law all-or-nothing

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1. WVH Rogers, "Contributory Negligence Under English Law", in U Magnus and M Martín-Casals (eds), *Unification of Tort Law: Contributory Negligence* (Kluwer, The Hague, 2003), 57 (footnote omitted). Similarly, Jenny Steele writes that the law of contributory negligence "is used on a daily basis. It is applied regularly by courts, but is used much more frequently by parties (including of course insurers) negotiating settlements": J Steele, "Law Reform (Contributory Negligence) Act 1945: Collisions of a Different Sort", in TT Arvind and J Steele (eds), *Tort Law and the Legislature* (Hart, Oxford, 2013), 165.

rule, pursuant to which contributory fault of any magnitude was fatal to the claimant's action. According to conventional wisdom, the common law rule was kept on a tight rein because of its harshness.[2] It has been argued that juries were generally reluctant to find that it applied,[3] and it is well known that judges devised various devices to contain it, the best known of which was the "last opportunity" rule.[4] However, following the installation of the apportionment regime by the Law Reform (Contributory Negligence) Act 1945 (the "1945 Act"), the law of contributory negligence came to play a very prominent role in practice. Contributory negligence is pleaded almost by default in negligence cases (whether the case is brought in tort alone or also in contract). The plea is regularly established. The latest evidence suggests that it succeeds 40 per cent of cases.[5] Furthermore, when the claimant is at fault it is not uncommon to see damages discounted by large amounts.[6] One study puts the average discount at 60 per cent.[7]

Relative to its practical significance, the law of contributory negligence has been woefully under-explored. Relatively little progress has been made advancing understanding of it since Glanville Williams published his pioneering book on the subject, *Joint Torts and Contributory Negligence*.[8] Although that treatise was written at the dawn of the age of apportionment, it remains the leading contribution in the area in the common law world by a considerable margin.[9] Consequently, significant scope exists for original analysis of virtually every facet of the law in this field.

This article addresses four problems regarding contributory negligence that are particularly relevant to commercial law. It concentrates on the commercial law setting for two main reasons. The first is that the lack of academic engagement with the law of contributory negligence is particularly pronounced in this context.[10] It seems generally to be assumed that the contributory negligence doctrine is concerned almost exclusively

2. For illuminating discussion of how the common law rule was kept on a short leash, see J Fleming, *The Law of Torts*, 9th edn (Law Book Co, Sydney, 1998), 305.

3. "Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence": W Prosser, "Comparative Negligence" (1953) 41 Calif L Rev 1, 4.

4. The *fons et origo* is *Davies v Mann* (1842) 10 M&W 546; 152 ER 588.

5. J Goudkamp and D Nolan, "Contributory Negligence in the Twenty-First Century: An Empirical Study of First Instance Decisions" (2016) 79 MLR 575, 594.

6. Recent illustrations include *Stephens v Peters* 2005 SCLR 513 (OH) (90%); *Yetkin v Mahmood* [2010] EWCA Civ 776; [2011] QB 827 (75%); *Malasi v Attmed* [2011] EWHC 4083 (QB) (80%); *Burton v Evitt* [2011] EWCA Civ 1378 (80%); *Ringe v Eden Springs (UK) Ltd* [2012] EWHC 14 (QB) (80%); *Trebor Bassett Holdings Ltd v ADT Fire & Security Plc* [2012] EWCA Civ 1158; [2012] BLR 441 (75%); *Paramasivan v Wicks* [2013] EWCA Civ 262 (75%); *Train v Secretary of State for Defence* [2014] EWHC 1928 (QB); [2014] RTR 28 (80%); *Smith v Bluebird Buses Ltd* 2014 CSOH 75 (85%); *Ferguson v Ferguson* 2015 CSIH 63 (85%).

7. Goudkamp & Nolan (2016), *supra*, fn.5, 592.

8. G Williams, *Joint Torts and Contributory Negligence* (Stevens, London, 1951).

9. "Glanville Williams['s] … text on contributory negligence … remains, arguably, the best analysis available today of this difficult area of law": *Chae v Min* [2001] ABQB 1071; (2001) 100 Alta LR (3d) 65, [14], *per* Veit J. Other works with a similar scope to Williams's include H Woods and B Deere, *Comparative Fault*, 3rd edn (Thomson Reuters, Illinois, 1996); V Schwartz, *Comparative Negligence*, 5th edn (LexisNexis, New Providence, 2010).

10. Eg, the contributory negligence doctrine makes only a single, fleeting appearance in A Burrows (ed), *Principles of English Commercial Law* (Oxford University Press, Oxford 2015), 134. Similarly, there are merely scattered references to it in S Degeling, J Edelman and J Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, Sydney, 2011) and S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Thomson Reuters, Sydney, 2017).

with personal injury cases.[11] Although it is of course true that the doctrine is of great practical importance in the personal injury context, it also has significant commercial law applications. As Rogers properly observed, the law of contributory negligence is "not confined to 'accident' situations".[12] Indeed, certain important features of the law of contributory negligence (to which this article will draw attention) emerge only in commercial cases. Thus, if a comprehensive understanding of the contributory negligence doctrine is to be obtained, it is necessary to turn attention to the commercial law context.

The other main reason why this article focuses on the commercial law setting is that the courts may apply the contributory negligence doctrine differently in this area from the way in which they handle it in certain other contexts. If this is the case, it makes sense to explore the doctrine specifically in the commercial arena. Consider the following, which uncovers one reason to think that the law of contributory negligence might be context-dependent. Patrick Atiyah observed that claimants in personal injury cases who are found guilty of contributory negligence will usually be saddled with uninsured losses, while, owing to the ubiquity of liability insurance, defendants to such cases rarely bear personally the cost of responsibility for damage that is assigned to them.[13] The law of contributory negligence therefore tends to affect claimants disproportionately. It has often been suggested, including by Atiyah,[14] that this fact influences how judges decide contributory negligence issues in the personal injury context. However, there is no reason to suspect that the doctrine has any consistent differential impact in the commercial law setting. Accordingly, it is reasonable to hypothesise that the contributory negligence doctrine is applied differently in commercial cases from the way in which the courts wield it in personal injury litigation. There is some empirical evidence that suggests that this is so.[15]

The four problems that this article addresses are as follows. The first is whether the famous decision in *Forsikringsaktieselskapet Vesta v Butcher*[16] remains good law. *Vesta* established, controversially, that damages can be reduced for contributory negligence where the defendant is concurrently liable in the tort of negligence and for breach of a contractual term requiring the exercise of reasonable care. It will be argued that *Vesta* is fundamentally incompatible with the reasoning in subsequent decisions of high authority and that it has, therefore, been impliedly overruled. The second problem is whether, regardless of whether *Vesta* remains good law, the approach that it endorses is justified. This problem is engaged with at two levels: are the rules for which *Vesta*

11. One writer even suggests that the 1945 Act "generally does not apply to contract claims": A Kramer, *The Law of Contract Damages* (Hart, Oxford, 2014), 364.

12. Rogers, *supra*, fn.1, 57.

13. P Cane, *Atiyah's Accidents, Compensation and the Law*, 8th edn (Cambridge, CUP, 2013), 52–53.

14. *Ibid*, 52. See also Fleming, *supra*, fn.2, 309.

15. Goudkamp & Nolan (2016) 79 MLR 575, 592 (observing that the success rate of the plea of contributory negligence in a sample was markedly lower in pure economic loss cases (22%) relative to personal injury cases (64%)), 595 (noting that the average discount was higher in the sample for pure economic loss cases (48%) than it was for personal injury cases (40%)).

16. [1986] 2 Lloyd's Rep 179 (QBD); affd [1989] AC 852 (CA); [1988] 1 Lloyd's Rep 19; affd [1989] AC 852 (HL); [1989] 1 Lloyd's Rep 331.

provides justified in view of the 1945 Act, and are those rules justified irrespective of that statute? It will be argued that *Vesta* is inconsistent with the 1945 Act. It will further be contended that the issue of *Vesta*'s justifiability regardless of the 1945 Act may have been approached from the wrong direction to date. A novel way of looking at the question will be articulated. The third problem is whether s.532(2) of the Companies Act 2006 excludes the contributory negligence doctrine in claims against auditors. While the issue is finely balanced, it will be contended that the 1945 Act survived the enactment of s.532(2). The final problem concerns the intersection of the law of contributory negligence and the principle of reflective loss. Various justifications for the bar on recovering damages for reflective loss are canvassed and consideration is given to how those justifications suggest that the contributory negligence doctrine should interlink with the reflective loss principle.

These four problems are not, of course, the only issues that arise in relation to the contributory negligence doctrine as it applies in the commercial law setting (and, conversely, not all of these problems are confined to the commercial law context). Why, then, have these problems been selected for analysis? This article engages with the first, third and fourth problems primarily because they have not previously been addressed. Indeed, their very existence seems not even to have been acknowledged. Limited aspects of the second problem have been investigated previously. But those treatments are reasonably dated. Furthermore, as will be argued, they are deficient in important respects. The second problem therefore also merits consideration.

In order that its objectives can be properly understood, it is important to explain clearly at the outset what this article does not do. This article does not address other than fleetingly the rationales for the contributory negligence doctrine. It refrains from doing so because the justifiability of the law on contributory negligence is not an issue that is specific to commercial law. In any event, engagement with the reasons for the existence of the contributory negligence doctrine could not, in the space available, be sensibly addressed alongside the issues that are targeted in this article. Nor does this article address what might be thought to be a key issue concerning the operation of the contributory negligence doctrine in the commercial law context, namely, how it intersects with the so-called *SAAMCO* principle.[17] That principle has been described as establishing that "loss is irrecoverable if outside the scope of the duty broken".[18] This article says nothing about the *SAAMCO* principle, for the simple reason that that principle has already been addressed at great length, both generally[19] and in relation

17. *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL).

18. A Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (Oxford University Press, Oxford, 2004), 110.

19. See, eg, A Alcock, "Limiting Contractual and Tortious Damages" [1997] LMCLQ 26; D McLauchlan, "Negligent Valuer Liability: The Paradox Remains?" (1997) 113 LQR 421; J Stapleton, "Negligence Valuers and Falls in the Property Market" (1997) 113 LQR 1; J O'Sullivan, "Negligent Professional Advice and Market Movements" (1997) 56 CLJ 19; J Wightman, "Negligent Valuations and a Drop in the Property Market: The Limits of the Expectation Loss Principle" (1998) 61 MLR 68; F Illett, "Damages: SAAMCO and Platform Home Loans—An Accountant's Perspective" (1999) 15 PN 29; A Dugdale, "The Impact of SAAMCO" (2000) 16 PN 203; D McLauchlan and C Rickett, "SAAMCO in the High Court of Australia" (2000) 116 LQR 1; J Murdoch, "Riding the Market: 20 Years of Valuation Negligence" (2005) 21 PN 233, 245–246.

to the contributory negligence doctrine specifically.[20] Nor is it the purpose of this article to consider the connection between the law of contributory negligence and the rules governing mitigation of damage. That relationship is obviously of considerable commercial law significance. However, a not insubstantial literature already exists on that point.[21] This article seeks to break new ground, rather than retread a well-worn path. The four problems selected for treatment (unlike those mentioned in this paragraph) have been isolated precisely because they been either wholly or largely unaddressed to date.

II. THE ESSENTIALS OF THE LAW OF CONTRIBUTORY NEGLIGENCE

The basics of the law of contributory negligence are well known. Accordingly, this article does not offer a detailed excursus of the key principles prior to grappling with the four problems with which it is concerned. Instead, it merely outlines the fundamental rules of law in this area.

A claimant will be guilty of contributory negligence if two conditions are met. The first is that the claimant must have failed to take as much care for his or her own interests as the reasonable person would have taken in the circumstances. The other is that the claimant's failure to take reasonable care must have been causally connected to the damage.[22] The test for contributory negligence is objective. Therefore, the claimant's personal qualities are in principle excluded from consideration when asking whether the claimant took reasonable care.[23] It is necessary that the claimant's fault be self-regarding.[24] It follows that the mere fact that the claimant endangered someone else's interests is immaterial. It is also irrelevant, again for the same reason, whether the claimant owed the defendant a duty of care.[25] The defendant carries the burden of pleading[26] and proving[27] contributory fault.[28]

20. See, eg, A Bowen, "Professional Negligence and the Mountain Climbers Knee" (1999) 31 SLT 271; D McLauchlan, "Contributory Negligence and the SAAMCO Principle" [1999] LMCLQ 355.

21. See, eg, A Adar, "Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion" (2013) 31 Quinnipiac L Rev 783; J Goudkamp, "Rethinking Contributory Negligence" in S Pitel, J Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart, Oxford, 2013), 330–332.

22. "If the plaintiff were negligent but his negligence was not a cause operating to produce the damage there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation": *Caswell v Powell Duffryn Associate Collieries Ltd* [1940] AC 152 (HL), 165, *per* Lord Atkin.

23. "In determining [the issue of contributory negligence], the law eliminates the personal equation": *Froom v Butcher* [1976] QB 286 (CA), 294; [1975] 2 Lloyd's Rep 478, 483, *per* Lord Denning MR.

24. "Contributory negligence is a man's carelessness in looking after *his own* safety": *Froom v Butcher* [1976] QB 286 (CA), 294; [1975] 2 Lloyd's Rep 478, 481, *per* Lord Denning MR (emphasis in original).

25. "When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued": *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 (PC (Can)), 611, *per* Viscount Simon.

26. *Fookes v Slaytor* [1978] 1 WLR 1293 (CA), 1297–1298, *per* Sir David Cairns; *UCB Bank Plc v David J Pinder Plc* [1998] CLC 1262 (QBD), [17], *per* HHJ Hicks QC.

27. *Flower v Ebbw Vale Street, Iron and Coal Co Ltd* [1936] AC 206 (HL) 216, *per* Lord Wright.

28. The courts cannot consider the issue of contributory negligence on their own motion: *Fookes v Slaytor* [1978] 1 WLR 1293 (CA).

The machinery in the 1945 Act will be activated if (and only if) the claimant is guilty of contributory negligence. In that event, the claimant's damages must be reduced[29] by an amount that is "just and equitable" having regard to the parties' shares of responsibility for the damage.[30] The courts take cognisance of two factors in this regard, these being the parties' relative blameworthiness and the causal potency of their conduct in question.[31] The 1945 Act does not specify how, precisely, the discounting process operates. However, by judicial convention the courts identify the parties' shares of responsibility for the damage as percentages.[32] These percentages must add up to 100 per cent.[33] The claimant's damages are then reduced by the percentage that is ascribed to him or her. The apportionment process has been described as "a somewhat rough and ready exercise".[34]

III. HAS *VESTA* BEEN IMPLIEDLY OVERRULED?

In *Vesta*, Hobhouse J distinguished between three categories of case in which the issue of contributory negligence might arise for consideration in proceedings for breach of contract.[35] Category 1 comprises cases in which the defendant breached a strict contractual duty. Category 2 concerns cases in which the defendant breached a contractual term that required him or her to exercise reasonable care but the defendant did not incur concurrent liability in the tort of negligence (because, for example, no duty of care was owed).[36] Category 3 involves cases in which liability arises concurrently in respect of a breach of a contractual duty to take reasonable care and in the tort of negligence.

Hobhouse J said that the 1945 Act applies only to Category 3 cases.[37] His Lordship made it clear that the Act operates in such cases irrespective of whether the claimant sues in tort,[38] with the result that a claimant cannot avoid having his or her damages reduced for contributory negligence by suing only in contract. An appeal to the Court of Appeal was dismissed.[39] O'Connor LJ essentially agreed with Hobhouse J's analysis.[40] Sir Roger Ormrod disagreed with it. He concluded that the 1945 Act did not apply to

29. The legislation leaves no scope for the courts to decline to reduce damages where the claimant is guilty of contributory negligence: *Boothman v British Northrop Ltd* (1972) 13 KIR 112 (CA), 121–122, *per* Stephenson LJ.
30. s.1(1).
31. *Jackson v Murray* [2015] UKSC 5; [2015] 2 All ER 805, [26], *per* Lord Reed. There has been little analysis of these factors, although see I Fagelson, "The Last Bastion of Fault? Contributory Negligence in Actions for Employers' Liability" (1979) 42 MLR 646, 657–663; J Goudkamp and L Klar, "Apportionment of Damages for Contributory Negligence: The Causal Potency Principle" (2016) 53 Alberta L Rev 1.
32. Regarding the situation where there are multiple defendants, see *Fitzgerald v Lane* [1989] AC 328 (HL).
33. The percentages cannot exceed 100%: *Black v McCabe* [1964] NI 1 (CA).
34. *Jackson v Murray* [2015] UKSC 5; [2015] 2 All ER 805, [28], *per* Lord Reed.
35. [1986] 2 Lloyd's Rep 179, 196.
36. Category 2 cases, as a result of the acceptance of concurrent liability in *Henderson v Merrett Syndicates Ltd* [1994] 2 Lloyd's Rep 468; [1995] 2 AC 145 (HL), are rare. Contemporary examples include *Raflatac Ltd v Eade* [1999] 1 Lloyd's Rep 506 (QBD); *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549.
37. [1986] 2 Lloyd's Rep 179, 198.
38. [1986] 2 Lloyd's Rep 179, 197.
39. [1989] 1 Lloyd's Rep 331; [1989] AC 852 (CA).
40. See, especially, [1989] AC 852 (CA), 867; [1988] 1 Lloyd's Rep 19, 28.

proceedings in contract.[41] Neill LJ[42] doubted that the 1945 Act applied to contractual claims but nevertheless concurred reluctantly with O'Connor LJ and so yielded a majority on the issue. The case went to the House of Lords[43] but the Lords' decision is not presently relevant as it concerned different aspects of the proceedings.

Although Hobhouse J's reasons in relation to the issue of contributory negligence are *obiter* (*Vesta* was not actually a Category 3 case, because there was no concurrent liability in the tort of negligence, as no damage was caused[44]), and although neither Hobhouse J nor O'Connor LJ or Neill LJ in the Court of Appeal said anything directly about the applicability of the 1945 Act to cases within Categories 1 and 2, Hobhouse J's reasons have been understood as establishing that damages can be reduced for contributory negligence in Category 3 cases but not in cases within Categories 1 and 2. So interpreted, *Vesta* has been applied repeatedly[45] and is widely regarded as accurately stating the law. For example, Paul Davies recently wrote that *Vesta* "clearly represents the law in this jurisdiction today".[46] Many other scholars share this view.[47]

It is debatable, however, whether this is correct. At a minimum, a considerably more guarded position is warranted. This is because it is strongly arguable that *Vesta* has been impliedly overruled. *Vesta* is fundamentally inconsistent with the reasoning in two recent decisions of high authority: *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)*[48] and *Co-operative Group (CWS) Ltd v Pritchard*.[49] One of the questions that arose for consideration in *Standard Chartered Bank* was whether the 1945 Act applies to proceedings in deceit. The House of Lords unanimously held that it did not. The leading speech was given by Lord Hoffmann. His Lordship said:[50]

"conduct by a plaintiff cannot be 'fault' within the meaning of the [1945 Act] unless it gives rise to a defence of contributory negligence at common law. This appears to me in accordance with the purpose of the Act, which was to relieve plaintiffs whose actions would previously have failed and not to reduce damages which previously would have been awarded against defendants."

41. "The context of the Act of 1945, and the language of section 1, to my mind make it clear that the Act is concerned only with tortious liability and the power to apportion only arises where the defendant is liable in tort and concurrent liability in contract if any, 'is immaterial'": [1988] 1 Lloyd's Rep 19, 35; [1989] 1 Lloyd's Rep 331; [1989] AC 852 (CA), 879.

42. [1988] 1 Lloyd's Rep 19, 33; [1989] AC 852 (CA), 875.

43. [1989] 1 Lloyd's Rep 331; [1989] AC 852 (HL).

44. [1986] 2 Lloyd's Rep 179, 195.

45. See, eg, *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 (QBD), 720–721; [1987] 1 Lloyd's Rep 69, 106–107, *per* Steyn J; *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, 573–574, *per* Sir Donald Nicholls VC; *Barclays Bank Plc v Fairclough Building Ltd* [1995] QB 214 (CA), 228–229, *per* Beldam LJ, 232–233, *per* Simon Brown LJ; *Greenwich Millennium Village Ltd* [2014] EWCA Civ 960; [2014] 1 WLR 3517, [100], *per* Jackson LJ; *Saga Cruises BDF Ltd v Fincantieri SPA* [2016] EWHC 1875 (Comm), [182], *per* Sarah Cockerill QC.

46. PS Davies, *JC Smith's The Law of Contract* (Oxford University Press, Oxford, 2016), 407.

47. See, eg, RH Stevens, "Should Contributory Fault Be Analogue or Digital?" in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford University Press, Oxford, 2015), 258; A Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, Oxford, 2016), § 21(1)(d). See also Law Commission, *Contributory Negligence as a Defence in Contract* (No 219, 1993), para.1.2.

48. [2002] UKHL 43; [2003] 1 Lloyd's Rep 227; [2003] 1 AC 959.

49. [2011] EWCA Civ 329; [2012] QB 320.

50. [2002] UKHL 43, [12]. See also at [42], *per* Lord Rodger of Earlsferry.

Since contributory negligence was not a defence to deceit at common law,[51] and since the 1945 Act applies only where there is "fault" on both sides, it followed that the 1945 Act did not apply to claims in deceit.

The question in *Pritchard* was whether the contributory negligence doctrine extended to proceedings in battery.[52] The Court of Appeal unanimously held that it did not. Aikens LJ (with whom Sir Anthony May P and Smith LJ concurred) said:[53]

"when deciding whether, as a matter of principle, the defence of contributory negligence is available to meet a claim against a claimant for the torts of assault and battery, it is necessary to ask: at common law was there a defence of 'contributory negligence' to a claim against a defendant for damages for those torts?"

The court held that contributory negligence was not an answer at common law to liability in battery.[54] This meant that the 1945 Act was inapplicable.

The implications of *Standard Chartered Bank* and *Pritchard* for present purposes are obvious. Almost without exception, it is thought that the contributory negligence doctrine did not apply to proceedings for breach of contract at common law.[55] It follows inexorably on the logic endorsed in *Standard Chartered Bank* and *Pritchard* that the 1945 Act does not apply to such proceedings. Put differently, because the 1945 Act extends only to actions to which the contributory negligence doctrine extended at common law,[56] and as, according to the clear weight of opinion, proceedings in breach of contract are not among those actions, the 1945 Act cannot apply to contractual claims. *Vesta* is

51. "In the case of fraudulent misrepresentation, … there is no common law defence of contributory negligence": *ibid*, [18], *per* Lord Hoffmann. See also at [42–45], *per* Lord Rodger. For recent discussion regarding the intersection of the tort of deceit and contributory negligence, see J Murphy, "Misleading Appearances in the Tort of Deceit" (2016) 75 CLJ 301, 324–331.

52. Regarding, *Pritchard*, see J Goudkamp, "Contributory Negligence and Trespass to the Person" (2011) 27 LQR 518.

53. [2011] EWCA Civ 329, [32]. See also at [61].

54. "There is no case before the 1945 Act which holds that there was such a defence in the case of an 'intentional tort' such as assault and battery. There are many pointers indicating that there was no such defence": [2011] EWCA Civ 329, [61].

55. Sir Roger Ormrod observed in *Vesta* [1988] 1 Lloyd's Rep 19, 35; [1989] AC 852 (CA), 879, that, "[h]ad contributory negligence been a defence at common law to a claim for damages for breach of contract the reports and the textbooks prior to 1945 would have been full of references to it". Similarly, the Law Commission wrote without qualification: "At common law, contributory negligence is not a defence to an action for breach of contract": Law Com No 219 (*supra*, fn.47), para.2.6 (footnote omitted). Likewise, in *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1, [76] Gleeson CJ, McHugh, Gummow and Hayne JJ pointed out that "No case can be found in the books where contributory negligence … was ever held to be a defence to an action for breach of contract". According to Andrew Burrows, "contributory negligence was not a defence at common law … to [an action for] breach of contract": Burrows, *supra*, fn.18, 138 (*cf* at 129). By contrast, Williams contended that the common law admitted contributory negligence as an answer to liability to liability arising for breach of contract generally: Williams, *supra*, fn.8, 215–222.

56. It is regrettable that the 1945 Act operates in this way. It means that the permissibility of apportioning damages for contributory negligence depends on accidents of history rather than the merits of extending the apportionment regime to a given cause of action. Precisely the same wrong turn was taken in the law governing punitive damages. At one time, the rule was that punitive damages could be awarded only if the cause of action in which the claimant sued was one in respect of which the courts had recognised the award of punitive damages prior to the decision in *Rookes v Barnard* [1964] 1 Lloyd's Rep 28; [1964] AC 1129 (HL); see *AB v South West Water Services Ltd* [1993] QB 507 (CA). Following a torrent of criticism, this "cause of action" test was eventually removed: *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29; [2002] 2 AC 122.

fundamentally at odds with this analysis, which is a point that has been overlooked by all of the leading works on contract law.[57] The stunning conclusion, therefore, is that *Vesta* has been overruled *sub silentio*.[58] If this is correct, the 1945 Act does not apply to Category 3 cases.

IV. IS THE PRINCIPLE IN *VESTA* JUSTIFIED?

This Part asks whether the rules that *Vesta* establishes are justified. This question fractures into two. The first is whether *Vesta* is faithful to the 1945 Act, and the other is whether the principles that it establishes are justified irrespective of the statute.

1. Is *Vesta* faithful to the 1945 Act?

The relevant question in *Vesta* was whether the 1945 Act applies to actions for breach of contract. The correct starting (and finishing) point in answering that question is a close examination of the statutory text. Bizarrely, however, the legislative text hardly features in Hobhouse J's reasons in *Vesta*. There are only glancing references to it.[59] A sustained search for the legislature's intention is conspicuous by its absence. The Court of Appeal was similarly insouciant. While there are references to the 1945 Act scattered throughout the court's reasons, there is no real engagement with it. Overall, there is a striking indifference to the question of Parliament's intention regarding the applicability of the 1945 Act to proceedings in contract.

In these circumstances, it should come as no surprise that the threefold taxonomy of cases promoted in *Vesta* is unfaithful to the 1945 Act. Whereas *Vesta* isolates three categories of case and rolls out different rules for Category 3 from those that apply to Categories 1 and 2, it is impossible to discern in the 1945 Act any justification for proceeding in this way. The simple fact is that *Vesta*'s three categories are an impermissible judicial artefact. In *Astley v Austrust Ltd*[60] the High Court of Australia (in the course of considering a materially identical statutory text[61]) was highly critical of *Vesta* for this reason. Gleeson CJ, McHugh, Gummow and Hayne JJ observed that "the tripartite division adopted by the United Kingdom cases is unacceptable. The legislation does not hint at such a distinction".[62] The High Court[63] consequently (and correctly) refused to

57. Eg, no trace of it can be found in either H Beale (ed.), *Chitty on Contracts*, 32nd edn (Sweet & Maxwell, London, 2015) or E Peel, *Treitel on the Law of Contract*, 14th edn (Sweet & Maxwell, London, 2014). *Pritchard* is not mentioned in either of these works. *Standard Chartered Bank* is cited but its potential implications for *Vesta* have gone unnoticed.

58. According to M Zander, *The Law-Making Process*, 6th edn (Cambridge University Press, Cambridge, 2004), 279, "Implied overruling occurs when it is arguable that the decision cannot stand with a later decision of a higher court." For the reasons that have been given, it is strongly arguable that this test is satisfied in relation to *Vesta*.

59. [1986] 2 Lloyd's Rep 179, 196–198.

60. [1999] HCA 6; 197 CLR 1.

61. Wrongs Act 1936 (SA), s.27A. This provision has since been repealed, and there are now, bizarrely, two apportionment provisions in South Australia: Civil Liability Act 1936 (SA), s.50; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), s.7.

62. [1999] HCA 6, [69].

63. Callinan J dissenting.

follow *Vesta*. It held that the apportionment regime did not apply to proceedings for breach of contract generally.[64]

It is not simply the case, however, that the approach embraced in *Vesta* does not find support in the 1945 Act. The differential treatment of the three categories of case that *Vesta* espouses is *contrary* to the legislation. The statutory text strongly suggests that Parliament intended to confine the 1945 Act to the law of tort.[65] Section 1, which contains the apportionment provision, applies only where there is "fault". "Fault" is defined in s.4 as "negligence, breach of statutory duty *or other* act or omission which gives rise to a liability *in tort*".[66] The italicised words reveal that the legislature did not intend the 1945 Act to extend beyond the tort context. For these reasons, Hobhouse J's threefold division, far from being a "valuable classification" for the purposes of determining the scope of the 1945 Act,[67] is anything but helpful.

Moreover, the rules enunciated in *Vesta* are fundamentally inconsistent with the 1945 Act's purpose.[68] As is well known, the statute's aim was, by removing the all-or-nothing rule, to *augment* not to *curtail* the circumstances in which damages can be recovered. The 1945 Act improved the lot of those claimants who had previously been completely barred from recovering damages by permitting them to obtain a partial award. *Vesta* defies the legislature's objective by introducing apportionment (ie, in Category 3 cases) in circumstances where, at common law, claimants were not prejudiced by the law of contributory negligence in the first place.[69]

2. Are the rules established by *Vesta* justified regardless of the 1945 Act?

The 1945 Act will now be left behind and attention turned to whether the rules laid down in *Vesta* are justified irrespective of the legislation. This issue (unlike the others addressed in this article) has provoked a limited amount of discussion.[70] There is little, if any, support for the rules that *Vesta* established, although there is no agreement as to with

64. The Australian legislatures, in a rare display of uniformity, swiftly enacted statutes that reversed the effect of *Astley*: Law Reform (Miscellaneous Provisions) Amendment Act 2001 (ACT); Law Reform (Miscellaneous Provisions) Amendment Act 2000 (NSW); Law Reform (Miscellaneous Provisions) Amendment Act 2001 (NT); Law Reform (Contributory Negligence) Amendment Act 2001 (Qld); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA); Tortfeasors and Contributory Negligence Amendment Act 2000 (Tas); Wrongs (Amendment) Act 2000 (Vic); Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2003 (WA). The legislatures were prompted to intervene, at least in part, by the insurance crisis that had engulfed Australia at the start of the twenty-first century (regarding this crisis, see P Cane, "Reforming Tort Law in Australia: A Personal Perspective" (2003) 27 MULR 649; J Spigelman, "Tort Law Reform: An Overview" (2006) 14 Tort L Rev 5). There was plainly a concern that *Astley* might place greater pressure on premiums. Needless to say, the fact that the pre-*Astley* position was restored by statute in Australia has no bearing on whether the High Court was correct in *Astley* in its construction of the apportionment legislation.

65. Note, however, that a draft of the legislation included a proviso that specified that the statute would not "affect" any claim in contract. The fact that this provision did not survive might be thought to be suggestive. For discussion, see Steele, *supra*, fn.1, 182–183.

66. Emphasis added.

67. [1988] 1 Lloyd's Rep 19, 33; [1989] AC 852 (CA), 875; *per* Neill LJ.

68. See the remarks by Lord Hoffmann in *Standard Chartered Bank* [2002] UKHL 43, [12] (*supra*, fn.50).

69. Regarding the inapplicability at common law of the contributory negligence doctrine to proceedings in contract, see *supra*, fn.55.

70. Relevant contributions include N Andrews, "No Apportionment for Contributory Negligence in Contract" (1986) 45 CLJ 8; A Burrows, "Contributory Negligence in Contract: Ammunition for the Law Commission"

what should replace those rules. This section of this article engages with the relevant literature. For the most part, its aims are modest. It does not commit to any particular conclusion regarding the justifiability of *Vesta*. Rather, it argues that both criticisms of the rules that *Vesta* installed and reasons offered in support of alternative solutions are unsatisfactory. More ambitiously, it is contended that the existing literature looks at the issue of how the law should respond to contributory negligence in the contractual context through just one end of the telescope (and, arguably, the wrong end). Approaching the problem from a different perspective may point the way towards its resolution.

(i) Criticism of the status quo

Vesta limits the application of the contributory negligence doctrine to Category 3 cases. Should the status quo be maintained? Three broad criticisms of this approach are offered in the literature. All three are of limited force.

The first criticism is that *Vesta* perversely and anomalously puts claimants in a worse position if they are the victims of negligence as opposed to a faultless breach of contract.[71] A claimant who suffers negligently inflicted loss ordinarily will have his or her damages discounted if he or she is guilty of contributory negligence. This is because such a case will usually fall within Category 3 (Category 2 being reserved for unusual cases in which there is liability in contract for breach of a term that requires that reasonable care be taken but no concurrent liability in the tort of negligence[72]). If, however, the claimant was the victim of a breach of a strict contractual duty, the case will fall within Category 1, and any contributory negligence on his or her part will be irrelevant, however significant it may be. This situation is the reverse, so this criticism goes, of what one would expect.

One objection to this criticism is that the law often treats victims of negligence less favourably than victims of faultless wrongs, meaning that there is nothing anomalous about *Vesta* in this regard. For example, some types of damages are unavailable in proceedings in negligence, such as aggravated[73] and (probably) punitive damages,[74] yet

(1993) 109 LQR 175; J O'Sullivan, "Contributory Negligence and Strict Contractual Obligations Revisited", in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Contract* (Hart, Oxford, 2016); A Porat, "The Contributory Negligence Defence and the Ability to Rely on the Contract" (1995) 111 LQR 228; Stevens, *supra*, fn.47, 261–263.

71. See, eg, Stevens, *supra*, fn.47, 258–259.

72. See the text accompanying *supra*, fn.36.

73. *Kralj v McGrath & St Teresa's Hospital* [1986] 1 All ER 54 (QBD), 60–61, *per* Woolf J; *Ashley v Chief Constable of Sussex Police* [2008] UKHL; [2008] 1 AC 962, [23], *per* Lord Scott of Foscote; *cf* at [102], *per* Lord Neuberger. John Murphy writes: "It is generally thought that aggravated damages cannot be awarded in the context of … a negligence action": J Murphy, "The Nature and Domain of Aggravated Damages" (2010) 69 CLJ 353, 368.

74. Despite the demise of the "cause of action" test (as to which, see *supra*, fn.56), there is no reported case in which punitive damages have been awarded in proceedings in negligence. In *Re Organ Retention Group Litigation* [2004] EWHC 644 (QB); [2005] QB 506; [2005] Lloyd's Rep Med 1, [261], [263], the claimant conceded that punitive damages are unavailable in negligence and Gage J arguably suggested that that concession was correct. In *McGregor on Damages* the position is taken that, while punitive damages are not strictly unavailable in proceedings in negligence, the nature of that wrong means that it is unlikely to attract punitive damages: "It would not of course be expected that actions in negligence would lead to exemplary damages, either before or after *Rookes* [*supra* fn.56], since the necessary mental element is not present; and it is thought that this would be true even of gross negligence": H McGregor, *McGregor on Damages*, 19th edn (Sweet & Maxwell, London, 2014), para.13.015. *Cf* the view expressed in *Clerk & Lindsell on Torts*: "[t]he removal of the cause of action test in *Kuddus* [*supra*, fn.56] means that, apart from infringement of a Convention right under the Human Rights

these types of damages may be awarded in respect of certain strict liability wrongs.[75] Damages are recoverable in an action in negligence only if there is a duty of care, whereas the same restriction does not apply to proceedings in respect of wrongs of strict liability. The action in negligence is complete only on proof that the claimant suffered damage, while wrongs that can be committed faultlessly are often actionable per se.[76] Additional examples could be given. In short, the suggested anomaly that *Vesta* creates is apparent rather than real.

The second criticism of the rules for which *Vesta* provides is that they bizarrely encourage defendants to argue that they acted negligently and incentivise claimants to show that defendants acted faultlessly. Burrows writes that *Vesta* "encourages an odd reversal of roles".[77] This reversal occurs because, as Burrows explains, a defendant who can show that they acted unreasonably will usually bring the proceedings within Category 3 and thereby open the door to apportionment, while a claimant who establishes the absence of fault on the defendant's part ensures that that door remains closed. While *Vesta* certainly has this effect, the strength of this second argument is questionable. This is because it does not explain what, specifically, is wrong with creating the incentives concerned. Thus, Robert Stevens claims that so incentivising litigants "brings the law into disrepute" but does not explain why this is the case.[78] In any event, it is noteworthy that the law frequently gives litigants incentives to argue that they are guilty of wrongdoing and that their opponents are not. A plum illustration is found in the law regarding bad character evidence. Defendants in criminal law proceedings are incentivised to argue that evidence of misconduct on their part amounts to "an offence or other reprehensible behaviour"[79] because, if so characterised, such evidence has to pass through the so-called "gateways"[80] before it can be admitted.[81] It follows that it is doubtful that the "reversal" that results from *Vesta* is particularly odd.

The third criticism of *Vesta* is that it derogates from the principle[82] that claimants are ordinarily entitled to exploit differences in the relief afforded by different causes of action.[83]

Act 1998 (where the wording of the Act and the jurisprudence of the European Court of Human Rights indicate that no exemplary damages can be awarded), exemplary damages can be awarded for *any tort* provided the facts fall within the *Rookes v Barnard* categories": A Dugdale (ed), *Clerk & Lindsell on Torts*, 21st edn (Sweet & Maxwell, London, 2014), para.28.142. In *A v Bottrill* [2002] UKPC 44; [2003] 1 AC 449, the Privy Council, applying New Zealand law, held that negligence that did not involve intentional or conscious wrongdoing may attract punitive damages. As the Privy Council emphasised (see especially at [41]), the law of New Zealand on punitive damages differs from English law in several important respects.

75. Trespass to land (*McMillan v Singh* (1985) 17 HLR 120 (CA)) and false imprisonment (*Thompson v Commission of Police of the Metropolis* [1998] QB 498 (CA)) are among the strict liability torts for which aggravated damages have been awarded. Strict liability torts in respect of which punitive damages have been awarded include battery (see, eg, *AT v Dulghieru* [2009] EWHC 225 (QB)) and defamation (see, eg, *John v MGN Ltd* [1997] QB 586 (CA)).

76. Peter Cane perceives a fundamental connection between at least certain types of strict liability and wrongs that are actionable per se: see P Cane, *The Anatomy of Tort Law* (Hart, Oxford, 1997), 47–49.

77. Burrows, *supra*, fn.18, 141.

78. Stevens, *supra*, fn.47, 263.

79. See the Criminal Justice Act 2003, s.112(1).

80. The relevant gateways are provided for *ibid*, s.101.

81. See, generally, J Goudkamp, "Bad Character Evidence and Reprehensible Behaviour" (2008) 12 IJE&P 116.

82. *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL).

83. This complaint is advanced by, eg, Stevens, *supra*, fn.47, 262. The same line of reasoning is offered in a different context in J Stapleton, "Duty of Care Factors: A Selection from the Judicial Menus" in P Cane and J Stapleton (eds), *The Law of Obligations* (Oxford University Press, Oxford, 1998), 71.

The strength of this argument is questionable considering the recent decision of the Court of Appeal in *Wellesley Partners LLP v Withers LLP*.[84] In this landmark case,[85] it was decided that a claimant who has concurrent actions in contract and the tort of negligence cannot avail himself or herself of the more generous remoteness rule that applies to most torts (ie, "reasonable foreseeability"[86]). Rather, it was held that the more exacting contract remoteness rule (ie, "reasonable contemplation"[87]) applies to both actions.[88] *Wellesley* is important in evaluating this third argument. It suggests that the law may not actually be as deeply committed to permitting litigants to exploit distinctions between causes of action as the third criticism suggests.

(ii) The case for alternative rules

The question whether the rules for which *Vesta* provides are justified cannot be determined without considering the alternatives. Three have been suggested in the literature. The first extends the contributory negligence doctrine to Category 2 cases (but not to Category 1 cases). The second allows the doctrine to be offered in answer to cases falling within all of Hobhouse J's categories. The third withholds the doctrine from proceedings in contract altogether. This section exposes defects in the arguments that have been made in support of all three solutions. None of these has previously been noticed.

The first alternative, which would see the contributory negligence doctrine apply also to Category 2 cases, would involve a very modest change in practice. This is because, as is widely acknowledged, few cases fall within Category 2.[89] This alternative rule was favoured by the Law Commission.[90] The Law Commission contended, conversely, that admitting the plea of contributory negligence in Category 1 cases would require consideration of the quality of the defendant's conduct and that this "would increase the number of issues which have to be determined, and would lead to undesirable complexity".[91] The Law Commission also suggested that, if the defendant has agreed to comply with a strict liability obligation (as is the situation in Category 1 cases), the claimant "should be able to rely on him [sic] fulfilling his obligation and should not have to take precautions against the possibility that a breach may occur".[92] Neither argument is convincing. The first argument does not explain, among other things, why apportionment is available in Category 3 cases as well as in (certain) actions in tort. The second argument is not, in fact, a reason. It is simply an assertion. The Law Commission did not explain *why* it is right that, where the contractual duty is strict, claimant fault should be irrelevant. The result is that the Law Commission

84. [2015] EWCA Civ 1146; [2016] Ch 529.
85. The decision is treated in A Tettenborn, "Professional Liability and Remoteness: Contract v Tort" (2016) 32 PN 68; A Taylor, "Wither Remoteness? *Wellesley Partners LLP v Withers LLP*" (2016) 79 MLR 678; M Balen [2016] LMCLQ 186.
86. *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1966] 1 Lloyd's Rep 657; [1967] 1 AC 617 (PC (NSW)).
87. *Koufos v C Czarnikow Ltd (The Heron II)* [1967] 2 Lloyd's Rep 457; [1969] 1 AC 350 (HL).
88. [2015] EWCA Civ 1146, [80], *per* Floyd LJ.
89. See the discussion in and accompanying *supra*, fn.36.
90. Law Com No 219 (*supra*, fn.47), para. 1.4. See also at paras 4.7–4.8.
91. *Ibid*, para.4.5.
92. *Ibid*, para.4.2 (footnote omitted).

did not justify its proposal to extend the contributory negligence doctrine to Category 2 cases but no further.

The second alternative rule would permit the contributory negligence doctrine to be invoked in all types of contractual claim.[93] Davies favours this approach.[94] He claims that it "ha[s] the advantage of 'fairness' in taking into account a claimant's faulty conduct".[95] Davies also reasons that "Such an approach might derive some support from the fact that contributory negligence applies to strict liability torts, so why not strict liability in contract as well?"[96] The idea is that it is anomalous that the contributory negligence doctrine is withheld from actions in respect of breaches of strict contractual duties. Neither argument is compelling. As to the first, Davies does not explain why he thinks that "fairness" requires that the law in contractual claims take cognisance of carelessness by the claimant in relation to his or her own interests. With respect to the second reason, Davies is wrong to say without qualification that the contributory negligence doctrine applies to strict liability torts.[97] It is true that the doctrine extends to some strict liability torts. It applies, for example, to proceedings under the Consumer Protection Act 1987[98] and for breach of statutory duty.[99] However, there are many strict liability torts to which it does not extend, including defamation[100] and certain torts that protect property rights[101] (such as conversion[102] and trespass to goods[103] and to land[104]). Given the array of strict liability torts to which the contributory

93. This is the law in Ireland. See the Civil Liability Act 1961 (Ireland), s.34 (providing for apportionment wherever the defendant commits a "wrong" and the claimant is guilty of contributory negligence) and s.2 (defining "wrong" to include, *inter alia*, a breach of contract).

94. See also Burrows, *supra*, fn.18, 141–144.

95. Davies, *supra*, fn.46, 408.

96. *Ibid*.

97. The same error is committed in Burrows, *supra*, fn.18, 141. Burrows writes, without qualification, that "contributory negligence is applicable to torts of strict liability" (footnote omitted).

98. s.6(4).

99. Eg, *Mullard v Ben Line Steamers Ltd* [1970] 2 Lloyd's Rep 121; 1970] 1 WLR 1414 (CA).

100. The leading text on defamation, A Mullis, R Parkes and G Busuttil (eds), *Gatley on Libel and Slander*, 12th edn (Sweet & Maxwell, London, 2013), contains just a single (and currently irrelevant) reference to contributory negligence: at para.19.28, fn.191. It is not even contemplated that actions in defamation might be met with a plea of contributory negligence.

101. As Cane observes, in relation to such torts, "the law has consistently followed the principle that people should not be expected to take care of their own property": Cane (1997), *supra*, fn.76, 60.

102. Interference with Goods Act 1977, s.11(1).

103. *Ibid*.

104. It is sometimes said that the torts of trespass and conversion are torts of intention rather than strict liability torts (consider, eg, the passage quoted in *supra*, fn.54). If this were true, some of the examples that have been chosen here would be bad. However, the fact of the matter is that torts of trespass and convention *are* strict liability torts. Admittedly, they require proof of "intention". But this does not mean that they do not impose strict liability. The term "intention" here simply denotes that the defendant's conduct in issue must be "deliberate" or "wilful". It does not indicate that the consequences must be intended. Because it is irrelevant for the purposes of the torts in issue whether the defendant was at fault in relation to the consequences of his conduct, the torts are strict liability wrongs. For compelling analysis to this effect, see Cane (1997), *supra*, fn.76, 32–33 (referring to the suggestion that trespass to land is an intentional tort as "obviously untrue"). See also Fleming (1998), *supra*, fn.2, 316 (drawing attention to the distinction between torts that require an intention to injure and strict liability torts that impose liability in respect of the "unintended consequences of wilful wrongdoing" (footnote omitted)) and N McBride and R Bagshaw, *Tort Law*, 5th edn (Pearson, Harlow, 2015), 42 ("trespass torts are torts of strict liability") and 512 (emphasising that fault is not an element of conversion).

negligence doctrine does not apply, Davies's suggestion that it is anomalous not to extend the doctrine to all types of contractual cases is unconvincing.[105]

The final alternative rule would withhold the contributory negligence doctrine from contractual claims generally. Stevens favours this position. He writes that "the best solution would be for the Supreme Court to overturn the [decisions affirming *Vesta*], and to deny the application of contributory negligence to all claims for breach of contract".[106] It is important to note that it is not a satisfactory reply to Stevens to say that this would lead to the absurd situation whereby, in a Category 3 case, the claimant could avoid apportionment by suing only in contract. That is because Stevens similarly calls for the elimination of the contributory negligence doctrine in relation to the action in negligence.[107] However, one difficulty in proceeding as Stevens proposes is that it would likely see damages being reduced informally where there is contributory fault out of an impulse to acknowledge the existence of fault on both sides. Scholars have regularly observed that such informal adjustments in the quantum of awards occurred under the common law's all-or-nothing rule.[108] There is no reason to suppose that the result would be different were the law to disregard contributory fault. Consequently, such disregard would likely be notional only.

(iii) A different approach to the problem

The discussion so far in this Part has shown that criticisms of both the rules provided for in *Vesta* and arguments in support of alternative regimes are problematic. This situation may stem from the fact that all previous studies of *Vesta*, perhaps in the thrall of the threefold taxonomy of cases, have tended to focus on the nature of the contractual obligation in issue. Thus, as the analysis in the immediately preceding sections demonstrates, theorists have concentrated on whether there is something peculiar about strict contractual duties that distinguish them from contractual duties to take reasonable care in a way that is relevant for the purposes of the law of contributory negligence.

There is another way of looking at the problem. The alternative approach focuses instead on the contributory negligence doctrine and, in particular, its rationales. This way of analysing things differs from the prevailing analysis in that it puts the doctrine front and centre. Questions that arise include what is the purpose of the law on contributory negligence, and does its rationale (whatever it is) warrant extending the apportionment regime to proceedings in contract (or to certain types of contractual claim). This alternative way of approaching the problem immediately runs, of course, into a hurdle. The difficulty is that there is no consensus, academic or judicial, regarding the rationale for the contributory negligence doctrine. It is obviously impossible within the scope of this article to embark on an extended treatment of the philosophical foundations of

105. Davies's second reason does not, in any event, support extending the contributory negligence doctrine to all types of contractual claims. It does not explain why the doctrine should apply to Category 2 cases, as cases within that category are not premised on strict liability.

106. Stevens, *supra*, fn.47, 263.

107. *Ibid*, 248–251.

108. See, eg, Fleming, *supra*, fn.2, 305.

the law in this area.[109] Instead, it will suffice to offer a few words about whether the rules for which *Vesta* provides are sound from the perspective of two leading theoretical attempts to explain the law of contributory negligence. The purpose of doing so is simply to demonstrate how the proposed refocusing might suggest fresh ways of thinking about how the law of contributory negligence should operate in conjunction with actions for breach of contract.

The first explanation is that offered by Ernest Weinrib. Weinrib contends that private law's rules are supportable only in so far as they are consistent with the demands of corrective justice. He considers that corrective justice requires, among other things, that rules be "expressive of transactional equality in that by being equally applicable to the party realizing the gain and to the party suffering the loss [as a result of the wrong committed], they accord a preferential position to neither".[110] Weinrib contends that the contributory negligence doctrine is consistent with the demands of corrective justice. He writes that the doctrine "expresses an idea of transactional equality: the plaintiff cannot demand that the defendant should observe a greater [sic] care than the plaintiff with respect to the plaintiff's safety".[111] On this analysis, apportionment for contributory negligence should be available in actions for breach of contract whenever the claimant asserts that the defendant was obliged to exercise reasonable care.[112]

Another school of thought perceives the contributory negligence doctrine (and private law generally) as being concerned with the maximisation of efficiency. On this approach, the issue of whether apportionment for contributory negligence should be available in proceedings in contract depends solely on whether apportioning damages would maximise utility. Proponents of this analysis claim, for example, that the contributory negligence doctrine is justified where it encourages the claimant to take cost-efficient precautions in respect of the loss that befell him or her.[113] The claimant will be so positioned where he or she is the lower cost-avoider. From this perspective, the *Vesta* categories of case are nonsensical. Instead, the contributory negligence doctrine should potentially be available to all cases of action, and applied whenever the claimant would otherwise rely excessively on the defendant to take care of his or her interests.

(iv) Summary

The goals of this Part of this article have been, in some ways, modest. No particular approach to the application of the law of contributory negligence to contractual claims has been promoted or rejected. Instead, efforts to justify the *Vesta* rules and their alternatives have been probed on their own terms. The arguments have been found wanting.

109. Leading discussions include V Schwartz, "Contributory and Comparative Negligence: A Reappraisal" (1978) 87 Yale LJ 697; K Simons, "The Puzzling Doctrine of Contributory Negligence" (1995) 16 Cardozo L Rev 1693.

110. E Weinrib, *The Idea of Private Law* (Harvard University Press, Cambridge, MA, 1995), 119.

111. *Ibid*, 170, fn.53.

112. For doubts that the contributory negligence doctrine promotes transactional equality, see J Goudkamp and J Murphy, "Tort Statutes and Tort Theories" (2015) 131 LQR 133, 149–152.

113. The *locus classicus* is R Posner, "A Theory of Negligence" (1972) 1 JLS 29, 39–40, 45.

More ambitiously, it has been suggested that previous analyses of the problem may have approached it from the wrong angle. To date, scholars, apparently in the grip of the *Vesta* categories, have asked whether there is something important about one category that requires cases within it to be treated differently from those that pertain to another category in terms of the contributory negligence doctrine. By contrast, it has been suggested in this section that attention might usefully be turned instead to the rationale for the law of contributory negligence, with the crucial question being whether, according to that rationale, the doctrine should be engaged.

V. PROCEEDINGS AGAINST AUDITORS

Contributory negligence is often a central issue in professional negligence cases.[114] Although it appears to be hard to make the plea stick in this setting,[115] when it succeeds the average discount is reasonably high.[116] This last fact is particularly important in the auditor context as the losses that are in issue in proceedings against auditors are frequently astronomical. The effect of a finding of contributory negligence can, therefore, be highly significant in terms of the value of awards.[117] As anyone who has even passing familiarity with this area of the law knows, the contributory negligence doctrine is usually a key problem in the auditor context. Despite the foregoing, the operation of the contributory negligence doctrine in the auditor setting has been little explored.[118] One likely reason for this situation is that until relatively recently it was thought in some quarters that the doctrine did not apply in auditor cases.[119] This understanding rested on the logic that the very purpose of an audit was to detect and prevent contributory negligence by the company and that this meant that there was no room in which the contributory negligence doctrine could sensibly operate.[120]

114. "In the common law world recent years have seen a substantial growth in the volume and complexity of litigation, particularly in the field of professional negligence. The nature of these disputes has brought into new prominence the defence of contributory negligence": A Bartlett, "Attribution of contributory negligence: agents, company directors and fraudsters" (1998) 114 LQR 460, 460; "Contributory negligence [is a] common theme … in professional negligence claims …": S Charlwood, "Contribution and Professionals: An Overview of the 1978 Act, Alternatives to it, and its Relationship with Contributory Negligence" (2007) 23 PN 82, 82.

115. Goudkamp & Nolan (2016) 79 MLR 575, 593 (reporting that in a sample the plea had a success rate of 29%).

116. *Ibid*, 595–596 (reporting that the average discount in a sample was 58%).

117. See, eg, *Barings Plc v Coopers & Lybrand* [2003] EWHC 1319 (Ch); [2003] Lloyd's Rep IR 566. Damages were not assessed in this case, but the quantum was plainly enormous. The litigation was triggered by losses of more than £791m from unauthorised trading. It was held that the claimant's share of responsibility for the damage ranged between 50% and 80% in respect of different time periods: see at [7], *per* Evans-Lombe J.

118. "[T]here has been little consideration of the difficulties in adopting … the defence in cases involving auditors": PS Marshall and AJ Beltrami, "Contributory Negligence: A Viable Defence for Auditors?" [1990] LMCLQ 416, 416.

119. See, eg, C Butcher, "Management fault, causation and scope of duty in auditors' negligence cases" (2004) 20 PN 248, 255 (commenting on the fact that there "was, until recently, a remarkable absence of authority" as to whether auditors could rely on the contributory negligence doctrine).

120. See, eg, *Simonius Vischer & Co v Holt Thompson* [1979] 2 NSWLR 322 (CA), 329–330 (Moffitt P remarking that "Where the action for professional negligence is against an auditor, it is difficult to see how a finding of contributory negligence according to usual concepts could be made"); *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd* [1989] WAR 100 (SC), 104 (Burt CJ stating that "to say that [contributory negligence

Rightly or wrongly, this position has been firmly rejected,[121] with its having been clear from some time that the plea of contributory negligence is available in proceedings against auditors.[122]

One question of considerable practical importance that arises in the context of auditors' liability is whether the 1945 Act has been ousted by the Companies Act 2006, s.532(2). Respectable grounds exist for thinking that s.532(2) excludes the 1945 Act in claims against auditors. This possibility has, apparently, gone wholly unnoticed.[123] This section of this article remedies this oversight.

Section 532, like its predecessors,[124] provides:

"**Voidness of provisions protecting auditors from liability**

(1) This section applies to any provision—
  (a) for exempting an auditor of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company occurring in the course of the audit of accounts, or
  (b) …
(2) Any such provision is void …
(3) This section applies to any provision, whether contained in a company's articles or in any contract with the company or otherwise. …"

There are at least three arguments for thinking that s.532(2) ousts the 1945 Act in proceedings against auditors. First, s.532 applies to "provisions" that limit an auditor's liability. Section 1 of the 1945 Act is often referred to as the "apportionment provision",[125] and the legislature can fairly be assumed to have known of this fact when it enacted s.532.[126] Second, in answer to the suggestion that s.532 is directed solely at contractual provisions and provisions in a company's articles of association, it is worth noting that s.532(3) states that s.532 applies to "*any* provision" whether contained "in any contract with the company *or otherwise*". Prima facie, "provisions" are not, therefore, limited to provisions in contracts or articles of association.[127] What other provisions, therefore, does

was established] would seem … to deny the purpose of the audit …"); *AWA Ltd v Daniels* (1992) 7 ACSR 759 (NSWSC), 842 (Rogers CJ in Comm D observing that "There is a respectable body of authority for the proposition that … a defence of contributory negligence … is not available to an auditor").

121. See, eg, *Barings Plc v Coopers & Lybrand* [2003] EWHC 1319 (Ch); [2003] Lloyd's Rep IR 566.

122. "It has been held that the defence is available, not merely where the contributory negligence prevented or hindered an auditor from carrying out his own duties, but also where the claimant failed generally to look after its own interests": *Jackson & Powell on Professional Negligence*, 7th edn (Sweet & Maxwell, London, 2015), para.17.086 (footnote omitted). See also the discussion in *Charlesworth and Percy on Negligence*, 13th edn (Sweet & Maxwell, London, 2014), para.4.61.

123. Section 532 is not mentioned in *Jackson & Powell on Professional Negligence* (2015), *supra*, fn.122, which dedicates a chapter (ch.17) to auditors.

124. Companies Act 1929, s.152; Companies Act 1985, s.310.

125. See, eg, *Mulholland v McCrea* [1961] NI 135 (CA), 142, *per* Black LJ; *Ward v McMaster* [1985] IR 29 (SC), 44, *per* Costello J; *AB Marintrans v Comet Shipping Co Ltd* [1985] 1 WLR 1270 (CA), 1288; [1985] 1 Lloyd's Rep 568, 580, *per* Neill LJ.

126. "Parliament is presumed to know the common law, and to legislate by reference to it": *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB); [2016] QB 402, [44], *per* Warby J.

127. *Cf* Neuberger J's remarks in *Burgoine v Waltham Forest London Council* [1997] 2 BCLC 612 (Ch D), 626–627: "I consider that the words 'or otherwise' in s.310(1) [of the Companies Act 1985 (ie, a predecessor of s.532)] are to be construed eiusdem generis with the preceding words 'whether contained in a company's articles

s.532 contemplate? Arguably, the legislature, in enacting s.532, had in mind legislation such as the 1945 Act. The third argument concerns the Companies Act 2006, s.1157(1).[128] That sub-section provides:[129]

"**Power of court to grant relief in certain cases**

If in proceedings for negligence, default, breach of duty or breach of trust against—
(a) an officer of a company, or
(b) a person employed by a company as auditor (whether he is or is not an officer of the company),
it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

Section 1157(1) ensures that, were the 1945 Act excluded, there would not be a reversion to the all-or-nothing position that obtained at common law. An auditor who has acted negligently can nevertheless have his or her liability limited under s.1157(1) on the ground that he or she "acted honestly and reasonably". The courts have held that the word "reasonably" should be understood broadly such that it is possible for an auditor who had acted negligently for the purposes of s.1157(1) nevertheless to have behaved "honestly and reasonably" and thereby have his or her liability limited.[130] The possibility that a negligent auditor can have his or her liability limited under s.1157(1) is important for present purposes because it means that the all-or-nothing rule would not be resurrected if s.532(2) excludes the 1945 Act, an outcome that the legislature could hardly be thought to have intended. Section 1157(1) thereby moves out of the way a significant hurdle that would otherwise have obstructed the path to the conclusion that s.532(2) excludes the 1945 Act. Furthermore, s.1157(1) is more specific than the 1945 Act. The former is limited (relevantly) to proceedings brought against auditors by the material company or its shareholders,[131] whereas the latter is not similarly restricted. Section 1157(1)'s greater specificity suggests, according to familiar principles of statutory construction,[132] that it supplants the 1945 Act in proceedings against auditors. It is vital to note that it is not a moot point whether the 1945 Act is excluded in view of s.1157(1). This is because s.1157(1)

or in any contract with the company'. After all, the company's articles of association are, at least in a sense, contractual provisions between the company and its members. In those circumstances, it can be said with force that there is a genus, namely an arrangement between the company and its officers, which restricts what might otherwise be said to be a very wide meaning of the words 'or otherwise'."

128. The forerunners to s.1157(1) are s.372(1) of the Companies Act 1929 and s.727(1) of the Companies Act 1985.

129. A similar provision is found in s.61 of the Trustees Act 1925.

130. Thus, in *Re D'Jan of London Ltd* [1993] BCC 646 (Ch D), 649, Hoffmann LJ said with reference to the predecessor to s.1157(1): "It may seem odd that a person found to have been guilty of negligence, which involves failing to take reasonable care, can ever satisfy a court that he acted reasonably. Nevertheless, the section clearly contemplates that he may do so and it follows that conduct may be reasonable for the purposes of [the section] despite amounting to lack of reasonable care at common law." See also *Madoff Securities International Ltd (in liq) v Raven* [2013] EWHC 3147 (Comm); [2014] Lloyd's Rep FC 95, [335–336], *per* Popplewell J.

131. Section 1157(1) does not apply to claims brought by third parties: *Customs and Excise Commissioners v Hedon Alpha Ltd* [1981] 1 QB 818 (CA), 824, *per* Stephenson LJ, 826, *per* Ackner LJ, 827, *per* Griffiths LJ; *Park's of Hamilton (Holdings) Ltd v Campbell* 2011 CSOH 38, [34–36], *per* Lord Hodge.

132. *Lex specialis derogat legi generali*.

plainly differs from the 1945 Act (most obviously, s.1157(1) focuses on the defendant,[133] whereas the 1945 Act looks to both parties[134]). Therefore, discounts in damages wrought pursuant to s.1157(1) may well differ from discounts made under the 1945 Act.

Conversely, there are several reasons for thinking that s.532(2) leaves room for the 1945 Act. It is likely that s.532(2) is directed at non-legislative arrangements that would otherwise limit the responsibility of auditors. Tellingly, s.532 indicates that provisions that offend against it are "void". That language is not that which one would expect to see if s.532(2) were targeted at statutory provisions. Moreover, it is awkward to describe the 1945 Act as being in the nature of a (partial) "exemption", given the mischief at which it was aimed. The 1945 Act dispensed with the all-or-nothing rule that had obtained at common law. Therefore, it did not partially *exempt* defendants from liability but *exposed* to liability defendants who were previously not liable.[135]

While the contrary is certainly strongly arguable, the better view is that s.532(2) does not unseat the 1945 Act. To hold otherwise would involve an overly literal construction of s.532(2). If this conclusion is correct, it is necessary to consider the interaction between the 1945 Act and s.1157(1). There is no authority on the point. However, the stronger position would seem to be that the more specific rule in s.1157(1)[136] should be applied before the more general 1945 Act.

VI. CONTRIBUTORY NEGLIGENCE AND REFLECTIVE LOSS

1. The problem

The fourth problem to be addressed concerns the relationship between the contributory negligence doctrine and the reflective loss principle.[137] The reflective loss principle holds that, where a company suffers loss due to a defendant's wrong, the company's shareholders cannot sue the defendant in respect of the loss that they incur as a result of the damage sustained by the company. By way of illustration, if a tortfeasor wrongs a company and the value of the company's shares falls as a result, the shareholders are barred by the reflective loss principle from suing the tortfeasor in respect of their loss. Their loss is merely a reflection of the company's damage and consequently unactionable. The reflective loss principle, despite being of relatively recent origin,[138] is now a firmly established and significant part of English law.[139]

133. *Barings Plc v Coopers & Lybrand* [2003] EWHC 1319 (Ch); [2003] Lloyd's Rep IR 566 [1134] *per* Evans-Lombe J.

134. The 1945 Act "is premised on both parties being at fault. It is also impossible to consider the claimant's 'share' without also considering that of the defendant. … [T]he court has to do what is 'just and equitable' which includes being fair to the claimant as well as to the defendant. Realistically, therefore, the court has to compare the one with the other": *Eagle v Chambers* [2003] EWCA Civ 1107; [2004] RTR 9, [14], *per* Hale LJ.

135. See the remarks by Lord Hoffmann in *Standard Chartered Bank* at the text accompanying *supra*, fn.50.

136. As to the greater specificity of s.1157(1), see the text accompanying *supra*, fnn 132–134.

137. A slightly dated study of the reflective loss principle, but still the best available, is C Mitchell, "Shareholders' Claims for Reflective Loss" (2004) 120 LQR 457. See also JLS Lin, "Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle" (2007) 66 CLJ 537.

138. The foundational case is generally regarded as being *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 (CA), especially at 222–223, *per* Cumming-Bruce, Templeman and Brightman LJJ.

139. Leading cases concerning the principle include *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL); *Day v Cook* [2001] EWCA Civ 592; [2001] Lloyd's Rep PN 551; *Ellis v Property Leeds (UK) Ltd* [2002] EWCA

This Part centres on the intersection between the contributory negligence doctrine and the reflective loss principle. This intersection presents a puzzle that is illustrated by the following example. Suppose that D, an auditor, negligently fails to detect unauthorised trading in which an employee of C1 engaged. C1 suffers massive losses when the trading is discovered and C1's sole shareholder suffers reflective loss. Imagine that D admits liability to C1 and that the parties agree that C1's damages are to be reduced by 80 per cent from £100m to £20m on account of C1's management failing to put in place proper systems to detect unauthorised trading.[140] C1's shareholder, C2, wishes to sue D. C2 is plainly barred by the reflective loss principle from recovering the £20m to which C1 is entitled. But can C2 recover £80m, this being the additional sum to which C1 would have been entitled but for C1's contributory negligence?

2. Authority

No English court has pronounced directly on the interaction between the reflective loss principle and the contributory negligence doctrine. Submissions were made in this connection in *Day v Cook*[141] but the Court of Appeal did not rule explicitly upon them. However, Arden LJ said:[142]

"It is not simply the case that double recovery will not be allowed, so that, for instance if the company's claim is not pursued or there is some defence to the company's claim, the shareholder can pursue his claim. The company's claim, if it exists, will always trump that of the shareholder."

If this is correct, C2 in the hypothetical example postulated above would not be permitted to recover anything. Arden LJ's remark has been referred to with approval in several cases.[143]

Relevant comments were also offered in a strike-out application in *Barings Plc v Coopers & Lybrand (No 4)*.[144] Evans-Lombe J, in the course of considering the interplay between the reflective loss principle and defences generally, said:[145]

"It is clear … that … the [reflective loss principle applies] where the defences of limitation and estoppel, at least, are available to the defendant [as against the company]. Beyond that, any general principle involves unsatisfactory distinctions between defences."

It seems fairly clear from this passage that Evans-Lombe J thought that the reflective loss principle is unaffected by the fact that the defendant has a defence good against the company, irrespective of the type of defence.

Civ 32; [2002] 2 BCLC 175; *Giles v Rhind* [2002] EWCA Civ 1428; [2003] Ch 618; *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452; [2003] Ch 350; *Gardner v Parker* [2004] EWCA Civ 781; [2005] BCC 46; *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCU 1381; [2009] 2 BCLC 82; *Webster v Sandersons Solicitors* [2009] EWCA Civ 830; [2009] 2 BCLC 542.

140. It is assumed for the purposes of this example that, as concluded in the previous Part of this article, the 1945 Act applies in proceedings against auditors.

141. [2001] EWCA Civ 592, [47], *per* Arden LJ.

142. *Ibid*, [38].

143. See, e.g., *Diamantides v JP Morgan Chase Bank* [2005] EWHC 263 (Comm), [25], *per* Morison J; *Barings Plc v Coopers & Lybrand (No 4)* [2002] Lloyd's Rep PN 127 (Ch D), [128], [132], *per* Evans-Lombe J.

144. *Ibid*.

145. *Ibid*, [128].

Perry v Day[146] is the most recent case to touch on the issue. Rimer J held that, where the measure of compensation that could be recovered by the shareholder "differs from, and exceeds" any claim that might be brought by the company, it "cannot be said that the entirety of the [shareholder's] claim … is merely reflective of" the company's loss.[147] This suggests, contrary to the other authorities mentioned, that C2 in the hypothetical example would be permitted to recover the difference between C1's recovery and the total damage caused. Rimer J was cognisant of the remarks made by Arden LJ in *Day v Cook*[148] but considered that his position was compatible with them.[149]

3. The rationales for the reflective loss principle

The rationale for the reflective loss principle ought to determine how that principle applies when the defendant establishes contributory negligence on the part of the company. Several rationales for the principle have been identified. One justification for it is that it prevents unfairness to the defendant by insulating the defendant from being held liable more than once in respect of what is essentially the same loss (the "unfairness rationale"). As Lord Millett put it, "Justice to the defendant requires the exclusion of one claim or the other".[150] A second rationale is that the principle protects the collective interests of the company's creditors and other shareholders.[151] By permitting only the company to sue, a given shareholder cannot deplete the defendant's assets and hence diminish the defendant's capacity to meet its other liabilities to the detriment of the rest of the company's shareholders and its creditors (the "protective rationale").[152] A third rationale is that the reflective loss principle recognises that shareholders whose shares fall in value due to a wrong committed against the company have not suffered any damage in the law's eyes.[153] A diminution in the value of shares does not constitute damage for the law's purposes because, technically, shares are only a right to participate in a company and that right is unaffected when a company suffers loss. Whereas the first and second rationales for the reflective loss principle are compelling, the third rationale is obviously highly suspect. It involves an excessively technical view of the concept of shares. It is artificial to say, as Charles Mitchell points out,[154] that a person whose shares fall in value does not suffer any loss because that decline in the shares' value does not affect his or her rights of participation in the company. Furthermore, the third rationale

146. [2004] EWHC 1398 (Ch); [2005] BCC 375.
147. *Ibid*, [71].
148. *Ibid*, [44].
149. *Ibid*, [65].
150. *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL), 62.
151. *Ibid*, 36, *per* Lord Bingham of Cornhill, 54, *per* Lord Hutton, 62, *per* Lord Millett.
152. It is worth noting, *en passant*, that this rationale does not support the reflective loss principle in its present form. The rationale demands only that the interests of the company's creditors and other shareholders are not imperilled by the claim of one shareholder. That result could be achieved not by giving the defendant a defence against the shareholder but by *suspending* all claims against the defendant until *after* the company was able to prosecute its action to its conclusion. The fact that the reflective loss principle does not comply fully with the protective rationale is, of course, no criticism of the protective rationale.
153. Endorsed in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 (CA), 222; *Perry v Day* [2004] EWHC 3372 (Ch), [41].
154. Mitchell (2004) 120 LQR 457, 459.

cannot explain why, when a defendant engages in conduct that wrongly diminishes the value of the claimant's shares, the damages are measured by reference to the extent to which the value of the shareholding has been diminished.[155] This third rationale can be dismissed.

4. What result is demanded by the rationales for the reflective loss principle?

If priority is given to the unfairness rationale, it prima facie follows that C2 should be able to recover losses that C1, due to C1's contributory negligence, cannot recoup. This is because D would not, at least at first glance, be being held liable for the same loss more than once. This prima facie position might be resisted, however. It is arguable that a defendant who benefits from the contributory negligence doctrine remains liable for the full extent of the loss and that an action simply cannot be pursued in respect of the portion of the loss that is affected by the doctrine (in much the same way that a limitation bar affects actionability rather than liability[156]). On this analysis, the reflective loss principle, understood in terms of the unfairness rationale, would preclude C2 from recovering. Unfairness would still be done to the defendant because, but for the reflective loss principle, the defendant would, technically, still be being held liable for the same loss more than once.

Is this analysis compelling? Ultimately, the resolution of this issue turns on the proper construction of the 1945 Act. The legislation relevantly provides that in a claim in respect of damage that was caused by the fault of both parties, "the damages recoverable in respect thereof shall be reduced …".[157] Arguably, the fact that the statute provides that the *recoverable* damages shall be reduced points in favour of understanding the contributory negligence doctrine as going to actionability. The defendant remains liable in the full amount of the damages but the claimant's ability to recover damages is partially impaired. The legislature could have provided, instead, that *the damages* shall be reduced where there is contributory negligence. That phrasing would have supported understanding the contributory negligence doctrine as going to the extent of the defendant's liability. However, this appeals to a fairly technical construction of the 1945 Act. Perhaps importantly, there is no suggestion in the literature or case law that there is an analogy to be drawn between the contributory negligence doctrine and limitation bars in terms of their mode of operation. In these circumstances, the prima facie position is preferable.

What result does the protective rationale demand? According to that rationale, the reflective loss principle exists in order to prevent shareholders from putting themselves in a superior position relative to that of other shareholders and the company's creditors. It is fairly clear that, on the protective rationale, recovery by C2 should be precluded by the reflective loss principle. Were C2 permitted to sue D, D's assets would be

155. See *McGregor*, *supra*, fn.74, para.27.003.

156. "[T]he effect of the expiry of the limitation period is generally said to be that the remedy is barred, but the plaintiff's right is not extinguished": A McGee, *Limitation Periods*, 7th edn (Sweet & Maxwell, London, 2015), para.2.025.

157. s.1(1).

diminished to the advantage of C2 and the disadvantage of C1's creditors. A race between C2 and C1's creditors to reach D's assets may well ensue and, according to the protective rationale, the reflective loss principle exists in order to prevent such races from taking place.

In summary, the question whether C2 should be allowed to recover damages depends on whether the unfairness rationale or the protective rationale for the reflective loss principle is given priority. Recovery by C2 should be permitted on the former but denied on the latter. As mentioned above, both rationales have been embraced by the courts.[158] But what are the relative merits of these two justifications? This is obviously not the place to engage in a fully-fledged treatment of the rationales for the reflective loss principle. Briefly, however, the unfairness rationale seems to be significantly more compelling. The protective rationale is not particularly persuasive where there is only a single shareholder. Nor is it convincing where the defendant has ample assets. And there are, perhaps, other ways of ensuring that litigation proceeds in an orderly fashion in cases involving reflective loss other than by a complete bar on claims by shareholders. One procedural device that might be recruited in this regard is the abuse of process doctrine. If the unfairness rationale is the stronger of the two justifications, the tension between it and the protective rationale in connection with the law of contributory negligence ought to be resolved in favour of the former rationale, with the result that C2 ought to be permitted to recover.

VII. CONCLUSION

This article has engaged with four important questions that arise in relation to the contributory negligence doctrine in the commercial law setting, which is a field in which the doctrine's operation has been little explored. The answers given to the questions, in overview, were as follows. First, it was argued that the landmark decision in *Vesta* has been implicitly overruled. If this is correct the contributory negligence doctrine does not apply to contractual claims. Second, it was contended that *Vesta* is unfaithful to the 1945 Act. *Vesta* should not be followed for that reason alone, if it has not already been implicitly overruled. It was also considered whether the rules established in *Vesta* are justified irrespective of that statute. No final conclusion was reached on this score, but it was contended both that criticisms of the rules established by *Vesta* and arguments in support of alternative rules offered in the literature are unsatisfactory. It was additionally suggested that prior analyses of whether the rules for which *Vesta* provides are defensible might have proceeded from the wrong direction. Instead of asking whether there are material differences between different types of contractual claims in which the contributory negligence doctrine can arise, it might well be that the focus should be on what the rationale for doctrine requires. Third, it was asked whether the 1945 Act has been dethroned in proceedings against auditors as a result of the Companies Act 2006, s.532(2). The better view, it was argued, is that the 1945

158. See *supra*, fnn 150–151.

Act survived the enactment of s.532(2). Finally, the intersection of the reflective loss principle and the contributory negligence doctrine was addressed. Consideration of the rationales for the reflective loss principle suggests that a shareholder should be barred from recovering damages in respect of the difference between the damages recoverable by the company that has had its damages reduced for contributory negligence and the total loss sustained.