

# OUT WITH THE OLD: ABANDONING THE TRADITIONAL MEASUREMENT OF CONTRACT DAMAGES FOR A SYSTEM OF COMPARATIVE FAULT

## I. INTRODUCTION

In breach of contract cases, courts often invoke the doctrine of expectation to make damage awards. When employing this doctrine, the courts attempt to put the non-breaching party in the position he would have occupied had the breaching party performed the contract as agreed.<sup>1</sup>

This Article challenges the appropriateness of the doctrine of expectation.<sup>2</sup> It contends that the results reached with expectation damages are too harsh because the doctrine fails to consider potential wrongful acts of other parties in contributing to breach.<sup>3</sup> This Article therefore proposes a more efficient and equitable system of measuring damages for breach of contract that apportions liability based on the percentage of fault in each party's cause of breach. In essence, such a system would mirror the doctrine of comparative fault more commonly used in the context of torts.

To illustrate the superiority of comparative fault, section II of this Article outlines the basic differences between the systems of expectation and comparative fault. Section III explores the characteristics of and justifications for the doctrine of expecta-

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1. 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8 (2d ed. 1990); DAVID H. VERNON, CONTRACTS: THEORY AND PRACTICE 297 (2d ed. 1991).

2. Thank you to Mary Ellen Morris, esq., Miller, Martin & Trabue, 25th Floor, Nashville City Center, 511 Union Street, Nashville, Tennessee 37219, for the idea of this Article and for her wise guidance over the summer of 1997.

3. See David W. James, *Concurrency and Apportioning Liability and Damages in Public Contract Adjudications*, 20 PUB. CONT. L.J. 490, 494 (1991).

In all cases involving problems of causation and responsibility for harm, a good many factors have united in producing the result; the plaintiff's total injury may have been the result of many factors in addition to the defendant's . . . breach of contract. Must the defendant pay damages equivalent to the total harm suffered? Generally the answer is yes, *even though there were contributing factors other than his own conduct.*

*Id.* (emphasis added).

tion in contract damages. Finally, section IV examines the reasons the doctrine of expectation is less rational than a system of comparative fault. In so doing, section IV will: (A) examine the justifications for adopting a comparative fault system in tort; (B) show that the elements of tort permeate the concepts of contract law; (C) explain that the incentives created by the doctrine of expectation are inefficient as compared to those associated with comparative fault; and (D) establish that several jurisdictions already apply comparative fault principles in awarding contract damages.

## II. BASIC DIFFERENCES

To begin, it is essential to understand the basic differences between expectation damages and comparative fault damages. Suppose bridge builder X contracts with steel manufacturer Y to supply steel for a new bridge. The contract calls for X to pay Y \$300,000 upon receiving the last of three shipments of steel. While construction is underway, the bridge collapses after only the second shipment of steel. X sues Y for breach of contract because the steel allegedly did not meet contract specifications. Under the doctrine of expectation, X's damages would equal the value of Y's performance (contract price), less any benefits X received from not having to complete his own performance.<sup>4</sup> In other words, X would receive the contract price (\$300,000) minus the benefit of not having to pay for the last shipment (\$100,000). X would receive an expectancy award of \$200,000.<sup>5</sup>

Under a comparative fault system, the damages awarded to X could be very different. By assessing fault among the parties, the court could reduce X's recovery by the percentage of fault attributable to X.<sup>6</sup> For instance, suppose Y's steel was slightly

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4. See VERNON, *supra* note 1, at 298 n.3. Vernon explains that the calculation of expectation damages requires ascertaining two things: (1) "the position the party is in as a result of the breach;" and (2) "the position the party would have been in had the other party performed." *Id.* Awarding the difference between the two figures accomplishes the expectancy goals. *Id.*

5. \$300,000 (contract price) - \$100,000 (benefit plaintiff received from not having to complete his performance) = \$200,000.

6. JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 579 n.5A (9th ed. 1994) (explaining how a pure comparative fault system works). Also notice

under specification, but X's installation of the steel was also faulty. Further suppose, on a contract amount of \$300,000, that the court attributed forty percent of the bridge's collapse to X. This results in a \$180,000 recovery for X in damages,<sup>7</sup> which is \$20,000 less than X received under the doctrine of expectation.

### III. THE CURRENT SYSTEM OF EXPECTATION DAMAGES

Beyond a basic understanding of how the systems of expectation and comparative fault work, it is also essential to investigate the underlying rationale supporting the doctrine of expectation. The objective of expectation damages is to give the non-breaching party the benefit of his bargain.<sup>8</sup> Essentially, this system of damages is one of strict liability that operates without regard to fault.<sup>9</sup> In other words, the breaching party bears the full brunt of damage assessment regardless of the non-breaching party's contributions to the breach.<sup>10</sup> Commentators justify this strict liability system by urging that it prevents the courts from becoming entangled in an individual's freedom to contract.<sup>11</sup> Still others note that this system avoids costly and time-consuming efforts of determining fault.<sup>12</sup>

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how such a use of fault is similar to the mitigation principles already incorporated into the body of contract law. See, e.g., *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983) (stating that "[u]nreasonable failure to mitigate damages is 'fault' which can be apportioned under the comparative fault statute"). But see *Gresser, Inc. v. AVR, Inc.*, No. C4-92-430, 1992 WL 174728, at \*2 (Minn. Ct. App. July 28, 1992) (explaining that comparative fault generally is not applied in contract cases).

7. The amount of damage at stake is \$300,000. If X is forty percent at fault, then his recovery is reduced by that percentage.  $\$300,000 \times .40 = \$120,000$ . Subtract \$120,000 from \$300,000 to calculate X's award.  $\$300,000 - \$120,000 = \$180,000$ .

8. FARNSWORTH, *supra* note 1, § 12.8, at 188.

9. See *id.*

10. See *id.* at 189 (explaining that damages based on expectation should only take into account the circumstances peculiar to the injured party which includes evaluating his needs, opportunities, personal values, and idiosyncrasies). The author does admit, however, that some commentators see this measurement of damage as a way to "compensate the plaintiff by giving him something he never had." *Id.* at 190 (quoting L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 52-53 (1936)).

11. George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1230 (1994) (arguing that "strict liability grows out of the theory's commitment to limited court involvement in contract damage determination").

12. *Id.* (explaining that "[t]he beauty of the pure efficient breach theory is that

However, damage systems that assess fault on the basis of strict liability are generally unfair and inequitable.<sup>13</sup> The application of strict liability for contract damages leads to inefficiencies in the market system because the breaching party does not face the proper incentives to avoid breach.<sup>14</sup> As explained below, adapting the tort concept of comparative fault to contract damages is a workable alternative to the doctrine of expectation. A damages system in contract based on comparative fault will encourage contracting parties to carry out their respective obligations and, as a result, create a more efficient and equitable doctrine of liabilities for breach.<sup>15</sup>

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a uniformly applied rule of expectation damages avoids costly court determinations of the nature of a particular breach"); see also Scott E. Masten, *Equity, Opportunism, and the Design of Contractual Relations*, 144 J. INSTITUTIONAL & THEORETICAL ECON. 180, 184 (1988) (arguing that the strict liability theory assumes that the costs of courts determining whether a breach has occurred and the amount of damages are low compared to cost of court determination of fault).

13. Along these lines, Cohen concludes his proposal for adopting a fault-based system of contract damages by writing: "Strict liability fails to explain in a satisfactory way the wide variety of damage measures that courts actually use. And, most important, from an economic perspective, strict liability fails to provide the correct incentives to the contracting parties." Cohen, *supra* note 11, at 1349.

14. See *id.* at 1231-32 (rejecting the strict liability concept of contract damages and "developing instead a fault-based economic theory of contract damages that accurately describes the system we actually have").

15. For a similar proposition, see Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 11-16 (1985). Cooter explains that:

the narrow and broad constructions of excuses for breach of contract affect behavior in ways that parallel no liability and strict liability in tort. Furthermore, the effects of these constructions on cost internalization and efficiency are also parallel. Specifically, if excuses are broadly construed, allowing the promisor to avoid responsibility for breach regardless of his precaution level, the promisor will externalize some of the costs of breach. As a result, his incentives to take precaution against the events that cause him to breach are insufficient relative to the efficient level. If, on the other hand, excuses are narrowly construed and full compensation is available for breach, the promisee can externalize some of the costs of reliance. Insofar as the promisee can transfer the risk of reliance to the promisor, her incentives are insufficient to provide efficient reliance and, therefore, reliance will be excessive.

*Id.* at 13.

## IV. REASONS FOR ADOPTING COMPARATIVE FAULT TO REPLACE THE DOCTRINE OF EXPECTATION

A. *Abandoning Contributory Negligence for Comparative Fault*

The principles of strict liability that historically underpin the doctrine of expectation form the base justifications for abandoning the doctrine of expectation in favor of a system of comparative fault. Because the system proposed mirrors that of comparative fault systems found in tort, it is important to investigate why comparative fault replaced the once favored system of contributory negligence. Many of the same justifications for replacing contributory negligence with comparative fault apply equally to the proposal of replacing the doctrine of expectation.

American jurisprudence is replete with examples of arbitrary court-created rules. However, as society progresses, the justifications for traditional rules can become tenuous. Occasionally, society will abandon such traditionalisms when it becomes clear that their underlying rationales are no longer practical. One can see an example of such a decision in the change from contributory negligence to comparative fault.

The law of contributory negligence can be traced to Lord Ellenborough's opinion in *Butterfield v. Forrester*.<sup>16</sup> In *Butterfield*, Lord Ellenborough stated, "[one] person being in fault will not dispense with another's using ordinary care."<sup>17</sup> Courts interpreted this to mean that a plaintiff must be free from fault in causing his injury if he is to remain eligible to receive damages from a defendant.<sup>18</sup> Tennessee case law eloquently explained the rule: "[I]f a party, by his own . . . negligence, brings an injury upon himself, or contributes to such

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16. 103 Eng. Rep. 926 (1809); see also *McIntyre v. Balentine*, 833 S.W.2d 52, 54 (Tenn. 1992), *superseded by statute*, TENN. CODE ANN. § 20-1-119 (1994) (explaining that "[t]he common law contributory negligence doctrine has traditionally been traced to Lord Ellenborough's opinion in *Butterfield v. Forrester*").

17. *Butterfield*, 103 Eng. Rep. at 927.

18. *McIntyre*, 833 S.W.2d at 54 (explaining that a number of rationalizations had been advanced in an attempt to justify the harshness of the "all-or-nothing" bar).

injury, he cannot recover; for, in such cases, the party must be regarded as the author of his own misfortune."<sup>19</sup>

However, "[t]he changing values of the 20th century saw the results of contributory negligence as overly harsh and often unjust."<sup>20</sup> In fact, it was the system's harsh treatment of injured workers around the turn of the century that served as the primary impetus leading to the demands for the system's abolition.<sup>21</sup> Eventually, almost every state in the nation responded to the inflexibility of contributory negligence by abandoning that system of tort liability.<sup>22</sup> A Florida court illustrated the rationale for abandoning contributory negligence when it stated, "[w]hatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss."<sup>23</sup>

In abandoning contributory negligence, state legislatures and courts acted appropriately. The impact of the doctrine was too harsh, and the validity of its historical justifications faded over time. The system of comparative fault solved these injustices by comparing fault between parties and provided more equitable resolutions to many disputes.

Similarly, the historical justifications supporting the doctrine of expectation are equally suspect. The effects of expectation damages are too harsh,<sup>24</sup> and the system's failure to consider fault in allocating liability leads to inefficient and misguided decisions to breach.<sup>25</sup> Adopting a system of comparative fault

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19. *Id.* (quoting *Whirley v. Whiteman*, 38 Tenn. (1 Head) 610, 619 (1858) (internal quotation marks omitted)).

20. Michael G. Shanley, *Comparative Negligence and Jury Behavior*, THE RAND PAPER SERIES, Feb. 1985, at 7.

21. VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 12 (3d ed. 1994).

22. See *McIntyre*, 833 S.W.2d at 55 (explaining that by 1992 only four states remained in not abandoning contributory negligence—Alabama, Maryland, North Carolina, and Virginia).

23. SCHWARTZ, *supra* note 21, at 25 (quoting *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973)).

24. Office Interview with Patrick E. Higginbotham, Judge for the United States Court of Appeals, Fifth Circuit (Nov. 12, 1997) (commenting that parties to contracts are always seeking new ways to escape the harshness of contract damages).

25. Cooter, *supra* note 15, at 6 (explaining that the rule of no liability and the rule of strict liability both lack incentives for one of the parties to take precaution

for contracts to replace the doctrine of expectation would have the same effects as did the adoption of comparative fault for contributory negligence. The strict liability system of expectation, which yields inequitable and harsh results, would be replaced by a system that compares fault and provides more equitable solutions to contract disputes.

For example, recall the hypothetical contract between X and Y discussed above. If X, the bridge builder, knows his damages award will be reduced by his percentage of fault, he will take additional care in constructing the bridge. Likewise, if Y, the steel manufacturer, knows he can reduce liability for breach by obtaining accurate contract specifications, he will adopt added precautions to meet those specifications. This behavior leads to additional efficiency in the economic market because both parties are now working toward satisfactory completion of the contract while also minimizing their liability for breach.

### B. *Elements of Tort Already Pervade Contract Law*

Traditionally, tort law is the *situs* for applying comparative fault principles. Therefore, some critics might attempt to reject the proposal for applying these principles in contract law by suggesting that the theories of tort will not interchange with principles of contract damages.<sup>26</sup> However, the proposal to extend the doctrine of comparative fault into contract law is not without merit. Numerous facets of contract law originated from tort and vice versa, and courts often use concepts from both contract and tort interchangeably. Thus, to suggest an additional adaptation of tort law principles into contract damages determinations is a plausible proposition and one that should take few by surprise.

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against breach).

26. For instance, one court stated, "In contract, a damage award should put the injured party 'in the position in which he would be if the contract were performed.'" *Gresser, Inc. v. AVR, Inc.*, No. C4-92-430, 1992 WL 174728, at \*2 (Minn. Ct. App. July 28, 1992) (quoting *Lesmeister v. Dilly*, 330 N.W.2d 95, 101-02 (Minn. 1983)). In other words, the court believed that the theories of fault had no place in contract damage determinations, and that "expectancy or benefit of bargain" are to be the measures of contract damages. See *Gresser*, 1992 WL 174728, at \*2.

For instance, courts often infuse principles of negligence into contract damages determinations. Although the negligence of a plaintiff does not preclude his recovery for breach of contract, the plaintiff's negligence may be a material consideration in assessing the amount of damages recoverable.<sup>27</sup> Thus, courts sometimes exclude from recovery for breach the amount of damage attributable to a plaintiff's negligence.<sup>28</sup>

As another example of applying tort principles to contract law, courts sometimes allow claims of emotional distress to commingle with damages considerations for breach. Although applying elements of emotional distress to contract actions is not a typical practice,<sup>29</sup> "[s]ome courts have looked to the nature of the contract and made exceptions where breach was particularly likely to result in serious emotional disturbance."<sup>30</sup> Other courts allow the application of emotional distress principles if the nature of the breach is sufficiently egregious.<sup>31</sup> For example, in *Volkswagen of America v. Dillard*,<sup>32</sup> the Alabama Supreme Court upheld a damage award for mental suffering in an action for breach of warranty on the sale of a new car because it caused "anxiety, embarrassment, anger, fear, frustration, disappointment, and worry."<sup>33</sup> Moreover, in *Salka v. Dean Homes of Beverly Hills*,<sup>34</sup> the purchaser of a defective home recovered for emotional distress because the defect was so substantial that it was continuously disrupting use, comfort, and security.<sup>35</sup>

Additionally, courts sometimes apply the notion of punitive damages to contract actions. Although punitive damages are not typically awarded for breach of contract,<sup>36</sup> some courts award such damages when fraudulent conduct accompanies the

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27. 57A AM. JUR. 2D *Negligence* § 913 (1989).

28. *Id.*

29. See FARNSWORTH, *supra* note 1, § 12.17, at 274.

30. *Id.* at 275.

31. *Id.* at 275-76.

32. 579 So. 2d 1301 (Ala. 1991).

33. *Dillard*, 579 So. 2d at 1307.

34. 22 Cal. Rptr. 2d 902 (Cal. Ct. App. 1993), *opinion depublished*, 18 Cal. App. 4th 1145; 23 Cal. App. 4th 952.

35. *Salka*, 22 Cal. Rptr. 2d at 903.

36. FARNSWORTH, *supra* note 1, § 12.8, at 189-90 (explaining that a fundamental tenet of contract remedies is not to put an injured party in a better position than had the contract been performed).



breach.<sup>37</sup> Such an application of punitive damages met with approval as early as 1904 in *Welborn v. Dixon*,<sup>38</sup> in which the South Carolina Supreme Court held that a defendant may respond in punitive and compensatory damages when a fraudulent act accompanies the breach of a contract.<sup>39</sup> In 1988, the Fourth Circuit followed this application of punitive damages in *Edens v. Goodyear Tire & Rubber Co.*<sup>40</sup> Furthermore, although the use of punitive damages is atypical in contract actions, respected commentators note a "trend both in judicial decisions and in legislation toward greater use of punitive damages for breach of contract."<sup>41</sup>

As the standard measure for contract damages a comparative fault system should be adopted to replace the current system of expectation damages. This proposition is controversial, in part, because it advocates abandoning a well-settled doctrine of contract law and replacing it with a system that originates in tort. However, demonstrating the integration of tort concepts in contract law surely mitigates some of this controversy.

### *C. The Current System of Expectancy Provides Inefficient Incentives*

After explaining that the current doctrine of expectation is really a system of strict liability which has very harsh results on the breaching party, and after understanding that the principles of comparative fault can apply to the theories of contract, it is important to investigate the economic incentives created by the doctrine of expectation. As shown below, an additional reason for abandoning the doctrine of expectation is that it fails to create optimal economic incentives among the contracting parties.

The "model of precaution" is an economic theory some scholars use to evaluate the incentives created by damages systems.<sup>42</sup> The premise of this theory begins with the assumption

37. *Id.* at 191-92.

38. 49 S.E. 232 (S.C. 1904).

39. *Welborn*, 49 S.E. at 234; see FARNSWORTH, *supra* note 1, § 12.8, at 192 n.24.

40. 858 F.2d 198 (4th Cir. 1988).

41. FARNSWORTH, *supra* note 1, § 12.8, at 192 (commenting that this trend toward the use of punitive damages is especially noticeable in consumer cases and in claims against insurers for vexatious refusal to settle insurance claims).

42. See Cooter, *supra* note 15, at 43-44 (explaining that the model of precaution

that both injurers (breaching parties) and victims (non-breaching parties) can influence the harm suffered by the non-breaching party.<sup>43</sup> The breaching party can reduce harm by taking precautions against the events that precipitate the breaching of contracts.<sup>44</sup> The non-breaching party can reduce the cost of injury by taking precaution against relying too heavily upon a contract's obligations.<sup>45</sup> "Efficiency requires both parties to balance the cost of further precaution against the consequent reduction in harm and to act accordingly."<sup>46</sup> In other words, efficiency requires responsibility on the part of both parties.<sup>47</sup>

Whatever theory the courts use in allocating damages, that theory will determine the parties' incentives for precaution.<sup>48</sup> The current doctrine of expectation provides few, if any, incentives to contracting parties to avoid breach because contract expectancy damages are in reality an application of strict liability.<sup>49</sup> Reasons for the breach's occurrence do not matter when determining the measure of damages,<sup>50</sup> and the breaching party must compensate the non-breaching party regardless of any role the latter party played in causing the breach.<sup>51</sup>

Under strict liability, the non-breaching party is indifferent to whether a breach occurs because he will be fully compensated<sup>52</sup>—placed in the position he would have occupied had the contract been performed.<sup>53</sup> One reason parties enter into contracts is to legally obligate the performance of the other party.<sup>54</sup> However, the more the non-breaching party relies on the con-

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is the starting point in evaluating the economic theory of damages).

43. *Id.* at 44.

44. *Id.*

45. *Id.*

46. *Id.*

47. Cooter, *supra* note 15, at 4 (noting that such responsibility is referred to by economists as double responsibility at the margin).

48. *Id.* at 5.

49. Cohen, *supra* note 11, at 1226.

50. *Id.* at 1226 n.1.

51. Cooter, *supra* note 15, at 5 (explaining that strict liability means the injurer must compensate the victim whenever an accident occurs).

52. *Id.* at 5 (explaining how the concept of strict liability works when applied to accident cases).

53. FARNSWORTH, *supra* note 1, § 12.8, at 186; VERNON, *supra* note 1, at 297.

54. See Cooter, *supra* note 15, at 11.

tract, the more the party suffers as a result of breach.<sup>55</sup> A strict liability system gives no economic incentive to take precaution against relying too heavily on performance because the non-breaching party will be compensated regardless.<sup>56</sup> As for the breaching party, the probability of timely performance depends, in part, on efforts to prevent obstacles that impede performance.<sup>57</sup> However, prevention measures are costly.<sup>58</sup> If the breaching party bears full responsibility for these obstacles regardless of fault, then economic incentives to prevent obstacles extend only to the value of the contract.<sup>59</sup>

The interplay between the breaching party and non-breaching party works like this:

[A] higher damage measure will lead the [breaching party] to take more precaution and mitigation steps but will lead the [non-breaching party] to take fewer precautions and mitigation steps. A lower damage measure will have the opposite effect. Thus, [in terms of developing proper incentives between the parties], the fundamental problem for . . . contract damages is to identify how to reduce the costs associated with the apparently inevitable tradeoff between optimal [breaching party] conduct and optimal [non-breaching party] conduct.<sup>60</sup>

Fault-based rules and damage systems such as comparative fault resolve this tension by providing optimal incentives to both parties.<sup>61</sup> Notable commentators suggest optimal incentives are created by comparative fault rules because they "make at least one party's liability depend on its level of precaution-taking, and because that party has the incentive to take the precautions to avoid liability, the other party has an incentive to take precau-

55. *See id.*

56. *See id.* at 6.

57. *Id.* at 11.

58. *Id.*

59. *See Cooter, supra* note 15, at 11.

60. Cohen, *supra* note 11, at 1235. Cohen states that:

Cooter refers to this tradeoff as the "paradox of compensation." The paradox is that to give the proper incentives to both parties to take precautions, each party must bear the full responsibility for harm; thus, there is no single level of compensation that gives the proper incentives to both parties.

*Id.* at 1235 n.29; *see Cooter, supra* note 15, at 3-4.

61. Cohen, *supra* note 11, at 1236-37.

tions to avoid the residual loss.<sup>62</sup>

Thus, by adopting a system of comparative fault, a balance is struck between optimal breaching party conduct and optimal non-breaching party conduct. The current system of expectancy damages in contract is not only too harsh, but it also ignores the need for improving efficiency. Developing a system in which each party's incentive to avoid breach is approximately equal should be the goal of modern contract damages. Indeed, as explained in the following section, there is a growing judicial trend toward the goal of equalizing party incentives in cases involving breach of contract.

*D. Apportioning Damages Based on Comparative Fault Is an Accepted Practice Among Many Tribunals*

The proposed system of comparative fault for contract damages is actually an exercise in apportionment. Should courts adopt and apply this system consistently, they would compare the parties' respective fault in causing breach and apportion the cost of that breach accordingly. Beyond improved incentives and efficiency, an additional factor supporting the adoption of comparative fault in contract law is that many courts already accept the practice of apportionment in contract damages.

For instance, in the context of liquidated damages, where contractual parties stipulate the amount to be recovered by one party if the other party breaches,<sup>63</sup> several tribunals approve assessing damages in proportion to each party's degree of responsibility. One tribunal that favors the apportionment of liquidated damages is the Department of Transportation Contract Appeals Board (DOTCAB). Admittedly, DOTCAB takes a minority approach,<sup>64</sup> but it holds that "[w]hen the parties are both at fault the damages should be apportioned between them."<sup>65</sup> Furthermore, DOTCAB directly relies on the principles of comparative fault to justify its apportionment philosophy.<sup>66</sup> In *Pacific*

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62. *Id.*; see also Cooter, *supra* note 15, at 7.

63. BLACK'S LAW DICTIONARY 164 (pocket ed. 1996).

64. See James, *supra* note 3, at 509-10.

65. *Id.* at 524 (quoting J.R. Pope, Inc., DOTCAB No. 78-55, 80-2 BCA ¶ 14,562, 71,781).

66. *Id.* at 510 n.57 (explaining that the DOTCAB rule was probably adopted

*Western Construction, Inc.*, DOTCAB stated: "When the failures of two parties have resulted in one of them incurring costs, it would be *manifestly unfair* . . . to require that either of them bear the full brunt of those costs. We have on several occasions applied a theory of *comparative responsibility* in such circumstances."<sup>67</sup>

Historically, courts did not approve of apportioning liquidated damages. Much of the rationale for this stance, however, had its basis in early judicial hostility toward private agreements that attempted to fashion their own remedies.<sup>68</sup> Courts have now dispelled much of this initial hostility. In fact, a majority of courts now approve apportioning liquidated damages under certain circumstances.<sup>69</sup>

Furthermore, the Third Circuit has approved a fault-based apportionment of contract damages when the evidence made the exact allocation of damages impossible.<sup>70</sup> In *Groves & Sons Co. v. Warner Co.*,<sup>71</sup> the plaintiff contended that the defendant breached their contract by supplying faulty materials for the pouring of a concrete slab<sup>72</sup> and that the defendant should, therefore, be liable for the entire loss.<sup>73</sup> However, the trial court attributed some of the fault for the breach to the plaintiff and noted the plaintiff's contribution to lengthy labor strikes and overly optimistic expectations of efficiency.<sup>74</sup> As a result, the trial court attributed only twenty-five percent of the slab's defects to the defendant and apportioned the remainder of the damages accordingly.<sup>75</sup>

from the tort doctrine of comparative fault).

67. See *id.* at 526 (quoting *Pacific W. Constr., Inc.*, DOTCAB No. 1084, 82-2 BCA ¶ 16,045, 79,515) (emphasis added).

68. 22 AM. JUR. 2D *Damages* § 725 (1988) (citing *Baldwin v. National Safe Depository Corp.*, 697 P.2d 587 (Wash. Ct. App. 1985)).

69. *Id.* (stating that apportionment may be allowed if actual damages would be difficult to prove and the jury is presented with an adequate basis for allocating the contractual measure of damages).

70. See *Groves & Sons Co. v. Warner Co.*, 576 F.2d 524, 524 (3d Cir. 1978).

71. 576 F.2d 524 (3d Cir. 1978).

72. *Groves*, 576 F.2d at 527 (explaining that there was an inadequate amount of retarder in the concrete that caused premature drying and that some concrete delivered was too dry).

73. *Id.*

74. *Id.* The trial court also cited "first day jitters" as causing the plaintiff to perform inefficiently. *Id.*

75. *Id.* (explaining that Warner's poor performance was "a substantial cause of

In upholding the trial court's decision, the Third Circuit found that the conduct of both parties contributed in some degree to the loss.<sup>76</sup> The court of appeals explained that when a specific amount of damages is not attributable to separate causes, apportionment is not an accepted practice.<sup>77</sup> However, because the trial court distinguished the types of damage caused by each party, the division of loss between the parties was a fair solution.<sup>78</sup>

In a case directly supporting the premise of this Article, the United States Court of Appeals for the Eighth Circuit upheld the apportionment of damages for breach of contract based on a comparative fault instruction.<sup>79</sup> In *Gateway Western Railway Co. v. Morrison Metalweld Process Corp.*,<sup>80</sup> the plaintiff sued the defendant for both breach of contract and negligence and alleged that the defendant's defective welding of Gateway's railroad track caused the derailment of a train.<sup>81</sup> Although the court allowed the plaintiff to submit both its contract and negligence claims to the jury, the plaintiff appealed the district court's use of identical comparative fault instructions for both claims.<sup>82</sup>

The Eighth Circuit approved this use of comparative fault instructions because "the 'consideration of collateral cause' . . . is similar, from the jury's perspective, to the application of comparative fault principles [in] negligence damages."<sup>83</sup> The Eighth Circuit also approved the instruction on comparative fault because

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the defective slab to the extent of one-fourth of the damages sought by Groves").

76. *Groves*, 576 F.2d at 527 (indicating that the lower court's analysis of the incident demonstrated that the conduct of both parties attributed to the loss).

77. *Id.* at 528 n.3 (arguing that "whether it is proper to allocate damages in situations where specific amounts cannot be attribut[ed] to separate causes is not free from doubt").

78. *Id.* at 527-28 (noting that there was enough evidence for the trial court to determine twenty-five percent as a proper allocation).

79. *Gateway W. Ry. Co. v. Morrison Metalweld Process Corp.*, 46 F.3d 860, 862 (8th Cir. 1995).

80. 46 F.3d 860 (8th Cir. 1995).

81. *Gateway*, 46 F.3d at 861 (alleging that three days after the defendant's welding repair of a "spring frog" a Gateway train derailed at that location).

82. *Id.* at 861-62.

83. *Id.* at 863 (agreeing with the district court's reasoning that when negligence and contract claims combine an instruction of comparative fault is proper and avoids confusing the jury).

a strict application of contract damage principles would have been overly harsh and inequitable under the circumstances.<sup>84</sup> In developing its holding, the Eighth Circuit willingly accepted the application of comparative fault instructions to the jury because it presented each party's essential position in a simple, understandable manner.<sup>85</sup> Furthermore, this instruction was proper because it encouraged the jury to find a fair solution to a difficult problem.<sup>86</sup>

Although other jurisdictions use comparative fault principles in contract determinations,<sup>87</sup> the Eighth Circuit's analysis in *Gateway v. Morrison* explains the justification most clearly. The *Gateway* court approved the use of comparative fault instructions because applying the normal rule of contract damages would have been "fundamentally unfair."<sup>88</sup> This is one of the primary reasons for abandoning the strict liability approach to expectation damages.<sup>89</sup> Most often, because it is essentially a

84. *Id.* at 862. *Gateway* contended that *Morrison* was "liable for all consequential damages of derailment even if the accident was primarily caused by *Gateway's* 'rotten roadbed.'" *Id.* at 863. Although this was a standard application of contract expectancy damages, the court of appeals saw this as fundamentally unfair. *Gateway*, 46 F.3d at 863.

85. *Id.*

86. *Id.* The court cited the reasoning in *Groves & Sons Co. v. Warner Co.*, 576 F.2d 524, 527-28 (3d Cir. 1978), approvingly: "The action of the trial judge in dividing the loss between the parties was a fair solution to a difficult problem." *Gateway*, 46 F.3d at 863.

87. See *American Mortgage Inv. Co. v. Hardin-Stockton Corp.*, 671 S.W.2d 283, 291 (Mo. Ct. App. 1984) (approving the use of comparative fault principles in contract cases); see also *Pathman Constr. Co. v. Hi-Way Elec. Co.*, 382 N.E.2d 453, 460 (Ill. App. 1978) (reasoning that where there is sufficient evidence to allow the court to make a reasonably certain division of responsibility for delay in completion of construction contract, the assessment of damages caused by delay in performance of the contract may be allocated among several parties). See generally *Calumet Constr. Corp. v. Metropolitan Sanitary Dist.*, 533 N.E.2d 453, 456 (Ill. App. 1988) (explaining that fault for mutual delay should be apportioned between contracting parties pursuant to a liquidated damages clause contained in the construction contract); *Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983) (stating that where two parties owe contract duties to a third party under separate contracts and each breaches independently, if it is not reasonably possible to make division of damage caused by separate breaches, then breaching parties are jointly and severally liable).

88. *Gateway*, 46 F.3d at 863.

89. Subsections B & C of this Article suggest that the strict liability approach to expectation damages should be abandoned because application of the rule has an overly burdensome impact on the breaching party. The effects are too harsh, and inefficient incentives are created by systems of strict liability in the context of con-

system of strict liability, the impact of contract expectancy damage is too harsh and fundamentally unfair.

Furthermore, an often-cited justification for retaining the strict liability system of contract expectancy damage is to prevent the courts from becoming unnecessarily entangled in the freedom of contract.<sup>90</sup> In addition, the strict liability rule avoids the cost of determining fault. However, the propositions presented above directly undermine the rationale behind the strict liability system. In all instances where courts use comparative fault, or apportion damages under some other concept, they must necessarily become entangled in the parties' decision to contract. As shown above, courts are now willing to take testimony, weigh evidence, and apportion liability in contract determinations.

## V. CONCLUSION

Abandoning the doctrine of expectation in contract damages and replacing it with a fault-based analysis of damages would result in equitable damages awards. Few justifications still exist for maintaining the traditional doctrine of expectation in contract. As shown above, the current system of expectation is based on a theory of strict liability, which has overly harsh results on the breaching party and fails to consider fault of the non-breaching party in causing the breach. Additionally, strict liability fails to provide the correct economic incentives to the contracting parties.

The solution for these failures of the current system is to adopt a system which mirrors that of tort comparative fault for damages in contract. Just as tort law abandoned contributory negligence for a system of comparative fault, contract law should

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tract damages.

90. See Cohen, *supra* note 11, at 1230-31 (explaining that the strict liability theory behind contract expectancy damages grows out of the theory's commitment to limited court involvement in contract damage determination). Cohen goes on to explain that a uniformly applied rule of expectation damages avoids costly court determinations of the nature of a particular breach. *Id.* at 1230. Cohen states, "[t]he court's role with respect to damages is minimized: its only responsibility is to determine whether a contract has been made, whether a breach has occurred, and what the expectation damages are." *Id.*



abandon the doctrine of expectation for a system of comparative fault. This idea is not radical because notions of tort are already heavily integrated into the arena of contracts. A system of comparative fault creates better economic incentives and more market efficiency in decisions to breach than does the current doctrine of expectation. Moreover, many tribunals across the country have already accepted the practice of applying comparative fault principles to contract damages determinations because the system generates more equitable results while better evaluating each party's participation in creating breaches of contract.

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