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CONTRIBUTORY NEGLIGENCE AND CONCURRENT WRONGDOERS

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TABLE OF CONTENTS

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REPORT ON
CONTRIBUTORY NEGLIGENCE AND CONCURRENT WRONGDOERS

I. INTRODUCTION

The subject of contributory negligence and concurrent tortfeasors was selected for study for two main reasons. Firstly, the Alberta Commissioners to what is now known as the Uniform Law Conference of Canada have for a number of years taken a very active interest in this topic. Secondly, several defects and omissions in this area of the law have been noted by the judiciary and by legal scholars. For instance, a judge in commenting upon a statute comparable to our Tort-Feasors Act stated that it was a piece of law reform which was itself in urgent need of reform.

In March, 1975, we issued a Working Paper entitled "Contributory Negligence and Concurrent Tortfeasors" which was widely circulated among interested groups. We have obtained benefit from a number of thoughtful and constructive comments on the paper. We have also derived much assistance from discussions with a committee of lawyers named by the Alberta Branch of the Canadian Bar Association, from the Working Paper[1] and the Report[2] of the Law Commission of England on Contribution and a perceptive article entitled, "Contribution in a Contractual Setting"[3] by Professor Weinrib. We have also had the benefit of the 1975 Report of the Alberta Commissioners on Contributory Negligence and Tortfeasors to the Uniform Law Conference of Canada.[4] The Contributory Negligence Act[5] enacted by Prince Edward Island in 1978 has also been of assistance to us. Some of the tentative opinions expressed in our Working Paper have as a result been changed or modified.

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1 Law Com., Working Paper No. 59 (March 14, 1975).

2 Law Com. No. 79, Report on Contribution (March 9, 1977).

3 (1976), 54 Can. Bar Rev. 338.

4 1975 Proceedings, 66.

5 S.P.E.I. 1978, c. 3.

Every common law jurisdiction in Canada has legislation in regard to contributory negligence. Indeed Canada among Commonwealth countries has played a pioneer role in the reforms which have given general application to such legislation. In 1924 Ontario passed the first general Act which abrogated the all or nothing approach of the common law and substituted a rule which merely diminishes the damages for which a contributorily negligent plaintiff can recover in proportion to the degree of his own fault. Later in 1924, the Conference of the Commissioners on Uniformity of Legislation adopted a Uniform Act entitled The Contributory Negligence Act.[6] All of the provincial enactments now follow the Uniform Act closely, although the statutes of Ontario and Manitoba are somewhat different in form.

An important revision of The Uniform Act occurred in 1935.[7] It provided a remedy for another defect of the common law by providing for contribution between tortfeasors whose fault contributes to the same damage.

With very minor modification the revised Uniform Act was enacted in Alberta in 1937.[8] However, in the previous year the Alberta legislature had enacted The Tort-Feasors Act,[9] which also provides for contribution between tortfeasors but employs terminology different from that used in the Uniform Act. This statute was adopted verbatim from section 6 of England's Law Reform (Married Women and Tortfeasors) Act 1935 which resulted from the Law Revision Committee's Third Interim Report

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6 1924 Proceedings, 36.

7 1935 Proceedings, Appendix E.

8 S.A. 1937, c. 18. The Contributory Negligence Act, R.S.A. 1970, c. 65 is reproduced as Appendix B to this Report.

9 S.A. 1936, c. 22. The Tort-Feasors Act, R.S.A. 1970, c. 365 is reproduced as Appendix C to this Report.

of 1934.[10] As well as providing for contribution, it provides that a judgment against one joint tortfeasor does not bar an action against another joint tortfeasor who would have been liable if sued for the same damage. The common law rule under which a judgment, though unsatisfied, discharged other joint tortfeasors, was based on the artificial and technical reasoning that there is only one cause of action which is completely converted into the judgment. The rule did not apply to several concurrent tortfeasors.

In addition to Alberta, Nova Scotia and New Brunswick have Tortfeasors Acts. Ontario and Saskatchewan deal with some of these problems in their Contributory Negligence statutes. Manitoba has combined the two statutes. The other provinces have statutes dealing mainly with contributory negligence and only incidentally with contribution.

The Contributory Negligence Act and The Tort-Feasors Act are valuable pieces of law reform. The Contributory Negligence Act in particular made a fundamental improvement in tort law. The two Acts, however, have some lacunae and give rise to some problems of interpretation. The time has come to re-examine them in order to reconcile them, to clarify them, to fill any lacunae and to consider whether or not their principles should be extended to cases not now within them, and we do so in this report. We will in separate reports deal with guest passenger legislation and inter-spousal tort immunity which are reflected in sections 4 and 5 of the Contributory Negligence Act and which were discussed in our Working Paper.

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10 Cmd. 4637.

II. CONSOLIDATION OF STATUTES

An initial issue is whether The Contributory Negligence Act and The Tort-Feasors Act should be consolidated into one statute. We will briefly describe the subject matter of the two statutes in order to explain our affirmative answer.

One person, P, can recover damages from another, D, whose negligence caused loss or damages to P. However, at common law, P could not recover damage if his own fault contributed to the loss or damage, i.e., if he had been contributorily negligent. This doctrine appears to have developed from Butterfield v. Forrester in which Lord Ellenborough, C.J. stated: "Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."[1] Section 2(1) of The Contributory Negligence Act changes this latter common law rule. Its effect is that P must bear his own damage or loss in the degree in which he was at fault. This represents a recognition that the Admiralty rule, which then provided for the apportioning of damages, was more equitable than the common law rule.

Where there are two or more defendants, D1 and D2, the situation is more complicated. P is still liable to make good his own damage or loss in the degree in which he was at fault. While section 2(1) is ambiguous, the combined effect of it and section 3(2) is that D1 and D2 are jointly and severally liable to him for their combined shares; that is, P can obtain judgment for the whole of his loss against either or both, subject to reduction for his own contributory negligence.

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1 (1809), 103 E.R. 926 at p. 927.

If D1 was compelled to compensate P for all the loss or damage that P had sustained, the general common law rule was that he could not obtain contribution from D2. The rule is generally regarded as having its source in Merryweather v. Nixan[2] which held that a joint tortfeasor who had satisfied a judgment could not claim contribution from the other joint tortfeasor. The rule was applied no matter how slight the relative fault of D1 and no matter how great the relative fault of D2. The reason advanced for it was that a claim for contribution must be based on an implied contract between wrongdoers and that such a contract is necessarily illegal and void being made in contemplation of a wrongful act. This reasoning is unconvincing. In Palmer v. Wick and Pulteneytown Steam Shipping Co., Lord Herschell thought that the rule against contribution ". . . does not appear to be founded on any principle of justice or equity, or even of public policy . . ."[3] Both section 3(2) of The Contributory Negligence Act and section 4(1)(c) of The Tort-Feasors Act reverse the common law rule and allow D1 to claim contribution from D2. Therefore, in regard to contribution between tortfeasors, the two statutes deal with the same subject matter but do so in a somewhat different fashion. In County of Parkland v. Stetar,[4] Mr. Justice Dickson found the contribution provisions in the two statutes to be in direct conflict. Section 3(2) of The Contributory Negligence Act would allow D1 to obtain contribution from D2. Section 4(1)(c) of The Tort-Feasors Act, as construed by the court, however, does not allow one tortfeasor, D1, to claim contribution from another, D2, unless the other, D2, is liable

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2 (1799), 101 E.R. 1337.

3 [1894] A.C. 318, (H.L.) at p. 324.

4 [1975] 2 S.C.R. 884.

for the damage, and in the Stetar case D2, a municipality, had not been given timely notice of the claim against it. The provisions in the two statutes would as a result produce opposite results. Mr. Justice Dickson resolved the conflict by holding that The Tort-Feasors Act, because it "addresses itself more particularly to . . . the question of recovery as between tort-feasors," takes precedence over The Contributory Negligence Act which "concerns generally the question of contributory negligence".[5]

At common law, if D1 and D2 were joint tortfeasors, and if P obtained judgment against D1 only, P was precluded from suing D2. This result ensued even though P's judgment against D1 remained unsatisfied. This rule was based on the idea that there is only one cause of action where there are joint tort-feasors and it merges in the judgment. It did not apply to concurrent tortfeasors who contributed to the same loss or damage because there are as many causes of action as there are concurrent tortfeasors. Section 4(1)(a) of The Tort-Feasors Act provides that a judgment against D1 is not a bar to a claim against D2 even though they are joint tortfeasors. In order to discourage multiplicity of actions, section 4(1)(b) precludes P from obtaining in a later action a larger damage award than that obtained in the first, whether or not D1 and D2 are joint tortfeasors. In addition, the plaintiff is not entitled to costs unless there are reasonable grounds for bringing the second action.

We will now summarize the principal effects of the two statutes. Despite his contributory negligence a person can recover for that part of his loss or damage not attributable to his own fault; tortfeasors may obtain contribution from other joint or concurrent tortfeasors; and the plaintiff, although he has

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5 Ibid., p. 898.

obtained a judgment against one joint tortfeator, can sue the others. Both statutes are concerned with problems arising from cases in which the fault of more than one person contributes to the same damage. We think that it would contribute to both clarity and orderliness for the whole subject matter to be dealt with in one statute.

RECOMMENDATION #1

> *The subject matter of The Contributory Negligence Act and The Tort-Feasors Act should be consolidated into one statute.*

III. CONTRIBUTORY NEGLIGENCE

(1) The Doctrine of the Last Clear Chance

The general common law rule that a plaintiff who was contributorily negligent could not recover produced harsh results, particularly in cases where the plaintiff was only slightly negligent. To alleviate this harshness the common law evolved another rule which prevented the defendant from relying on the defence of the plaintiff's contributory negligence when the defendant's negligence was later in time than that of the plaintiff's. The rule or doctrine of last clear chance is regarded as growing out of Davies v. Mann.[1] A plaintiff could avoid the application of the contributory negligence rule by showing that the defendant had the last clear chance of avoiding the occurrence which caused the harm.

The late Professor Malcolm MacIntyre in his classic article, The Rationale of Last Clear Chance stated:[2]

> Text writers, and some courts stressed the time element, and provided an alternative description of the exception to the contributory negligence bar under the name of the last clear chance doctrine. Thus was prevented a clear realization of the underlying reason for the escape from the harshness of the contributory negligence bar, i.e., that in the last clear chance cases the defendant's negligence was relatively greater than the plaintiff's....The whole last clear chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar, and serves no useful purpose in jurisdictions which have enacted apportionment statutes.

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1 (1842), 152 E.R. 588.

2 (1940), 18 Can. Bar Rev. 665.

Much of the foundation for the rule disappeared with the advent of legislation providing for apportionment of liability between a defendant and a contributorily negligent plaintiff. However, in McLaughlin v. Long,[3] it was stated that the Acts had not abrogated the doctrine. By 1965, Dean Bowker thought that although the "doctrine [had] not vanished, it [was] scarcely visible."[4] In 1972 our Appellate Division would have applied it if the facts had been appropriate.[5] In Hartman v. Fisette Mr. Justice Dickson stated:[6]

> If the so-called last opportunity or last-clear-chance doctrine, said to derive from Davies v. Mann, can be said to have survived the passage of Contributory Negligence Acts, as to which I harbour gravest doubt, having regard to the apparent intent of provisions such as contained in s. 4(1) of the Manitoba Act, I do not think the doctrine can have the remotest application on the facts of this case.

Doubt continues to exist as to whether the doctrine of last clear chance has been effectively laid to rest.[7] In Keough v. Henderson Highway Branch No. 215 of The Royal Canadian Legion, Freedman, C.J.M. stated: "I...do not feel justified in declaring the "last chance" doctrine to be non-existent. Such a conclusion would have to come, if at all, from the legislature or the Supreme Court of Canada."[8]

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3 [1927] S.C.R. 303.

4 "Ten More Years Under the Contributory Negligence Acts" (1965), 2 U.B.C. L. Rev. 198.

5 Meyer v. Hall, [1972] 2 W.W.R. 481 (Alta. App. Div.).

6 [1977] 1 S.C.R. 248 at p. 258.

7 See the editor's note to McKay v. MacLellan & Gamble (1976), 1 C.C.L.T. 310.

8 [1978] 6 W.W.R. 335 (Man. C.A.) at p. 344.

Sections 7 and 8 of the Alberta statute appear to have been inserted as a compromise short of abolition of the rule. They require as a condition of its application that the ultimate negligence be "so clearly subsequent to and several from" the other's negligent act or omission "as not to be substantially contemporaneous with it."

The Alberta Commissioners to what is now the Uniform Law Conference considered whether abolition of the rule might impose liability on a party whose negligence had come to rest. They concluded that the imposition of such liability would be an erroneous application of the principles of contributory negligence.[9] The Alberta Commissioners thought that it would be beneficial to abolish the doctrine since it would stop, or at least discourage, the courts from searching for a single cause in the conduct of the person whose negligence was later in time. Abolition of the doctrine should not result in a court being reluctant to hold that a litigant is free from any liability in those cases in which his conduct was not the proximate cause of the harm.

The Uniform Act was amended in 1969 to abolish the rule.[10] Abolition has been effected in Eire[11] and Western Australia.[12] British Columbia abolished the rule in 1970.[13] Abolition has been recommended by Glanville Williams and others.

RECOMMENDATION #2

We recommend that the doctrine of last clear chance be abolished.

(Draft Act, Section 3)

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9 1967 Proceedings, p. 70.

10 1969 Proceedings, p. 147.

11 Civil Liability Act, 1961, No. 41, s. 56.

12 Contributory Negligence and Tortfeasors Contribution Act, 1947, s. 4(1).

13 S.B.C. 1970, c. 9, s. 2.

(2) Contributory Negligence and Other Torts

We thought initially that it was inappropriate for a defendant who had committed an intentional tort to plead that the damage for which he was liable should be reduced because the plaintiff might have suffered less damage had he taken more care to protect himself or his property. However, there are several reasons why we have decided that the defence of contributory negligence should not be made explicitly inapplicable to an intentional tort. One reason is the definitional problem. It is extremely difficult to define what constitutes an intentional tort and we believe that we would be inviting needless problems by attempting to exclude the availability of the defence of contributory negligence to an intentional tortfeasor. Another reason is that we regard such an exclusion as unnecessary. We know of no statute which states explicitly that the partial defence of contributory negligence is not to be available to an intentional tortfeasor. Nevertheless, we recognize that the courts have been reluctant to apply contributory negligence in cases in which the defendant has committed a deliberate tort. In Lane v. Holloway,[14] for example, a young man savagely assaulted an old man and in an action by the old man for damages, the young man was not successful in his plea of contributory negligence. The plea was unsuccessful in spite of the fact that the old man had insulted the young man's wife and had delivered the first blow to the young man. This case indicates to us that explicit exclusion is unnecessary.

Our third and final reason for deciding that the partial defence of contributory negligence should not be explicitly

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14 [1968] 1 Q.B. 379.

denied to an intentional tortfeasor is that we believe that there are some cases in which fairness requires that it should be available even where the damage is intended. If, for instance, in Lane v. Holloway the blow delivered by the defendant had not been so out of proportion to the initial blow made by the plaintiff and if there had not been the great disparity between the age and strength of the parties, the defence of contributory negligence might have been invoked fairly and reasonably by the defendant to reduce the damages owed by him to the plaintiff. An example of an intentional tort in which the plea of contributory negligence may have been applicable is Murphy v. Culhane.[15] Mrs. Murphy claimed damages from the defendant for assaulting and killing her husband. The defendant admitted that he had pleaded guilty to manslaughter and that Mr. Murphy had died as a result of his assault. On the basis of these admissions, the plaintiff was successful in having judgment entered in her favour. The defendant appealed because he had been deprived of the opportunity of raising several defences. One of the defences was the contributory negligence of the plaintiff's husband, Mr. Murphy, who it was alleged had initiated the criminal affray for the purpose of assaulting the defendant. It was ordered that the judgment should be set aside and a new trial held. Even though the plaintiff's husband had died as a result of the defendant's assault, Lord Denning M.R., speaking for the court, thought it was arguable that damages "fall to be reduced under the Law Reform (Contributory Negligence) Act 1945 because the death of her husband might be the result partly of his own fault..."[16]

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15 [1976] 3 All E.R. 533 (C.A.).

16 Ibid., at p. 536.

At common law contributory negligence was a complete defence to many tort claims but not to a tort claim for intended injury. The policy of repressing deliberate misconduct was more important than the policy of denying any recovery to a person who contributed to his own loss. However, apportionment based upon the respective degrees of fault of the parties should not be confined to those cases in which contributory negligence was a complete common law defence. We will later in this Report urge that contribution between wrongdoers should be based upon fairness as between defendants. Similarly, we believe that the partial defence of contributory negligence should be grounded upon fairness as between the plaintiff and defendant. Fairness should be the sole criterion in determining whether the defendant's liability is to be reduced because the plaintiff's failure to take reasonable care of his own person or property contributed to his loss.

In Hollebone v. Barnard,[17] the plaintiff sued in trespass for damage caused by a golf ball which had been driven negligently by the defendant. The jury found that the plaintiff had been contributorily negligent in failing to exercise reasonable caution in proceeding onto a fairway. However, in spite of this finding, Mr. Justice Wells held that the partial defence of contributory negligence was inapplicable. He did so on the basis that contributory negligence at common law had not been a complete defence to an action in trespass and that "the Act was designed to cover only cases in which contributory negligence was formerly a defence."[18] We do not doubt that the original impetus for reform came from the fact that a negligent plaintiff was completely barred from any recovery in an action for negligence, no matter how slight his own negligence or how great that of the defendant. The late

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17 [1954] 2 D.L.R. 278 (Ont. H.C.).

18 Ibid., p. 286.

Dean J.A. Weir stated: "The Acts were for the relief of plaintiffs, not for the amelioration of the condition of negligent defendants."[19] It is clear that the statutes which changed the all or nothing approach of the common law and introduced proportionate recovery based upon the relative degrees of fault were enacted for the benefit of plaintiffs. However, we believe that it is time to cease treating contributory negligence statutes as providing relief only to plaintiffs and to commence to regard them as based on achieving fairness as between plaintiff and defendant.

When the defence of contributory negligence is regarded as one founded upon achieving fairness as between plaintiff and defendant and not one which merely corrects a defect of the common law for the advantage of a plaintiff, it ceases to be relevant to inquire whether at common law the plaintiff's own failure of care was either a complete defence or no defence at all. Consequently we think that there is no reason to confine the partial defence of contributory negligence to actions which are framed in negligence. Professor Klar has stated that: "One of the thorniest problems associated with the defence of contributory negligence has been determining its scope."[20] We would suggest that the difficulty in ascertaining the scope of the defence of contributory negligence has stemmed from a conflict between treating the relevant statute as one intended solely to correct a defect in the common law for the advantage of the plaintiff and as one intended to achieve fairness between a plaintiff and a defendant. If the broader rationale for the defence of contributory negligence, to achieve fairness between plaintiff and defendant, is accepted, the defence cannot be restricted to certain categories of torts. The

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19 "Davies v. Mann and Contributory Negligence Statutes" (1931) 9 Can. Bar Rev. 470 at p. 474.

20 Klar, Studies in Tort Law (1977) at p. 149.

defence should be available in regard to any tort whether the tort action is based on negligence or not or whether the tort is intentional or criminal. The single criterion should be whether fairness between plaintiff and defendant requires the defendant to have the defence of contributory negligence available to him. We believe that fault for the purpose of contributory negligence should be defined to include any tort whether or not it is intentional or criminal and also a failure of a person to take reasonable care of his own person or property. We think that in tort cases, and also in case of negligence under contract to which we next turn, fairness can be achieved by a formula which provides for a reduction of the defendant's liability by the degree of the plaintiff's contributory fault; such a formula is sufficiently flexible to enable the court to do justice in those cases.

RECOMMENDATION #3

> *We recommend that the defence of contributory negligence should be available to any tortfeasor whether or not the tort is intentional or criminal.*
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> (Draft Act, Sections 1(d) and 6)

(3) Contributory Negligence and Breach of Contract

We think that the principle of contributory negligence should not be extended to all breaches of contract. Contributory negligence is not relevant in regard to a contract which imposes an absolute obligation, for instance, to deliver a certain quantity of wheat. We believe, however, that if the contract imposes a duty of care and there is a breach of that duty, there should be apportionment of liability on the basis of the relative degrees of fault of the parties. This approach may appear novel but in many cases in which there is a contractual relationship the defendant has the partial defence of contributory negligence presently available to him.[21] For

21 Crossman v. Stewart (1978), 82 D.L.R. (3d) 677 (B.C.S.C.).

instance, actions for damages for medical malpractice seem to be invariably framed as tort claims but, except in unusual circumstances, there is a contractual relationship between the patient and the doctor. We do not believe that a contributorily negligent patient should be able to avoid having damages reduced in accordance with his contributory negligence simply by framing the action in contract. Similarly a contributorily negligent plaintiff who is a passenger on a bus or train should not be able to defeat a defendant's partial defence by suing on the contract rather than for negligence.

Among those who profess a special knowledge and skill, it would appear that there may be concurrent liability in both tort and contract.[22] It would be anomalous if the plaintiff could avoid the consequences of his contributory negligence by suing only for breach of contract. As the trend appears to be toward greater concurrent liability, there will be more cases in which different damage awards will be made depending upon whether the contributorily negligent plaintiff sues in contract or in tort. We believe that anomalies can be prevented by providing for apportionment of liability in cases in which there has been a breach of contract which imposes a duty of care.

Glanville Williams argues that the principles of contributory negligence should be the same in contract and tort[23] and that there are cases in which a plaintiff is part author of his own damage and the defendant should be given relief.[24] He also argues that "fault" as defined in the English Act of 1945,

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22 Dominion Chain Co. v. Eastern Const. Co. (1976), 68 D.L.R. (3d) 385 (Ont. C.A.). Aff'd. (sub. nom.) Giffels Associates Ltd. v. Eastern Construction Co. (1978), 84 D.L.R. (3d) 344 (S.C.C.). See also Power v. Halley (1979), 88 D.L.R. (3d) 381 (Nfld. S.C.) and Midland Bank Trust Co. v. Hett, Stubbs & Kemp, [1978] 3 All E.R. 571 (Ch.D.).

23 Glanville L. Williams, Joint Torts and Contributory Negligence (1951), pp. 328-332 (subsequently cited as Williams).

24 Ibid., p. 214.

already includes a negligent breach of contract, and that an act or omission which is subject to the Act in its tort aspect is also subject to it in its contract aspect if it has one.[25] This view is not generally accepted.

The Law Commission (England) in discussing the scope of contributory negligence states:[26]

> It may be that where the breach of contract in question consists of the breach of a contractual duty of care the defendant is entitled to a reduction in damages for which he is otherwise liable on the ground of the plaintiff's contributory negligence. However, where the contractual breach is of a duty other than a duty of care contributory negligence on the part of the plaintiff is not, it seems, available as a partial defence.

The first statement that contributory negligence may be a partial defence if the defendant's breach of contract consists of a breach of a contractual duty of care is supported explicitly by only a very few English trial level decisions.[27]

There is a cluster of trial level decisions in British Columbia that support the proposition that the Contributory Negligence Act is applicable to a breach of a contractual duty of care. In Truman v. Sparling Real Estate Ltd.,[28] Hutcheon J. found that the defendant had contracted to use his best endeavours to obtain insurance coverage for the plaintiff's

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25 Ibid., p. 330.

26 Law Com. No. 79 at p. 9.

27 Artingstoll v. Hewen's Garage Ltd., [1973] R.T.R. 197 (Q.B.D.); De Meza and Stuart v. Apple, [1974] 1 Lloyd's Rep. 508 (Q.B.D.).

28 (1977-78), 3 C.C.L.T. 205 (B.C.S.C.).

boat. The plaintiff launched his boat without obtaining any confirmation that there was insurance coverage and a bad storm caused the boat to sink at its anchorage with considerable damage. The defendant had not been diligent and there was no insurance coverage. Hutcheon J. stated:[29]

> In summary, then, there was consideration present in the placing by the plaintiff of his business in the hands of the defendant, or alternatively, the defendant did not carry out the promise although the defendant, through Sparling, must have known that the plaintiff was relying upon the defendant. In either case the defendant is liable to the plaintiff in damages for negligence.

The judge found that The Contributory Negligent Act was applicable and allocated 75 per cent of the fault for the loss to the plaintiff and 25 per cent to the defendant. With regard to the relevance of The Contributory Negligent Act, the judge stated: "In this province it has been held in two recent cases that the statute may be invoked when one party's claim is for a breach of contract."[30] The two cases are Emil Anderson Construction Co. Ltd. v. Kaiser Coal Ltd.,[31] a 1972 unreported decision of Mr. Justice Berger, and West Coast Finance Ltd. v. Gunderson, Stokes, Walton & Co.[32] On appeal in the latter case the plaintiff was found to have failed to prove that its

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29 Ibid., p. 213.

30 Ibid.

31 Ibid., at pp. 206-208. Professor Lewis Klar quotes the portion of the unreported decision which is relevant to the issue of applicability of contributory negligence in a contract action.

32 [1974] 2 W.W.R. 428 at p. 430 (B.C.S.C.).

losses, on the business subsequently undertaken, were caused by the auditor's breach of contract. McFarlane J.A. stated: "The very interesting problem of contributory negligence, therefore, becomes academic and I resist the temptation to discuss it."[33]

In Davey Bros. Paving & Development Ltd. v. Riteway Equipment Rentals (1973) Ltd.[34] the plaintiff leased a propane space heater to heat a small house which served as an office for a construction business. The heater which the defendant leased was a construction heater, designed to dry concrete in buildings under construction before the buildings were closed in and not to heat an enclosed house. The propane heater caused a fire which destroyed the house and the plaintiff sued the lessor for damages in negligence and for breach of contract. Mr. Justice Munroe in a decision rendered on July 28, 1978 and as yet unreported stated:[35]

> The law imposes upon a person who lets out for hire a chattel an obligation to ascertain that the chattel was reasonably fit and suitable for the particular purpose for which it was rented and his delivery of it to the hirer amounts to an implied warranty that the chattel is in fact fit and suitable for that purpose....
>
> Upon the whole of the evidence I find that the defendant was guilty of breaching the said implied warranty and of negligence.

The judge then found the plaintiff to have been contributorily negligent to the extent of 25 per cent in that Mr. Davey was not an ordinary lessee but, because of his experience with propane gas, knew or ought to have known of the danger of leaving a large space heater in an unventilated house.

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33 [1975] 4 W.W.R. 501 at p. 505 (B.C.C.A.).

34 Unreported Decision, July 28, 1978, No. C776176, Vancouver Registry (B.C.S.C.).

35 Ibid., pp. 5-6.

In Carmichael v. Mayo Lumber Co.[36] an employee of the defendant, who was engaged in road work, negligently detonated explosives. The violent explosion caused buildings in the vicinity to shake and windows in several houses to shatter including one occupied by the plaintiff and owned by the defendant. The plaintiff, while closing one of the shattered windows on the day following the blast, cut her hand severely. Mr. Justice MacFarlane found the defendant equally liable in contract and tort. In contract, the defendant was liable for breach of an implied term of the lease that the premises would be reasonably fit for habitation and in tort, the defendant was liable for failure to exercise reasonable care. Although the judge found that the plaintiff had not been contributorily negligent, he rejected the contention of the plaintiff that the Contributory Negligence Act would not apply where liability is based upon a breach of contract. He stated that "the statute in this Province may be invoked even when the claim is for breach of contract."[37]

In an Ontario case, Pajot v. Commonwealth Holiday Inns of Canada Ltd.[38] a paying guest of a hotel was seriously injured when he fell through an inadequately marked glass door. Mr. Justice Boland held that the hotel was liable in both tort and in contract because "There was an implied warranty that the premises were as safe as reasonable care and skill could make them."[39] The judge stated: "I can find no want of care or lack of prudence on the part of the plaintiff, and, therefore, find the defendant in breach of contract...."[40]

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36 (1978), 85 D.L.R. (3d) 538 (B.C.S.C.).

37 Ibid., p. 541.

38 (1978), 86 D.L.R. (3d) 729 (Ont. H.C.).

39 Ibid., p. 732.

40 Ibid.,

It can therefore be inferred that if the judge had found the plaintiff to have been contributorily negligent, the damages resulting from the breach of contract would have been reduced. However, even if the plaintiff had been found contributorily negligent, it could be argued that Ontario's Negligence Act would not have been applied as the judge found that "The plaintiff...entered into a contract with the defendant to enjoy the privileges offered by the Inn, provided he exercise prudence himself."[41]

In Husky Oil Operation Ltd. v. Oster,[42] the plaintiff company sued a welder for damages for the negligent performance of a repair contract. The defendant undertook some arc welding from the outside of a 2,000 gallon tank, believing that the water level was above the weld. The water level was lower and a spark entered the tank causing an explosion which totally destroyed the tank. Mr. Justice Hughes found that the defendant was "in breach of his contractual responsibility to the plaintiff to perform his duties to the standard to be expected of one undertaking welding operations."[43] He, however, considered the plaintiff to be contributorily negligent in that an employee of the plaintiff had participated in the faulty determination of the water level.

Mr. Justice Hughes concluded that the Contributory Negligence Act was "without applicability in the case of a breach of contract" and that "unless the plaintiff can succeed against the defendant in negligence, a basis for fixing a portion of the liability with the plaintiff does not exist."[44] Relying

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41 Ibid.,

42 (1978), 87 D.L.R. (3d) 86 (Sask. Q.B.).

43 Ibid., p. 89.

44 Ibid., p. 91.

upon Dominion Chain Co. v. Eastern Construction Co.,[45] he considered that the welder could be sued in negligence and that the plaintiff had to bear 40 per cent of the liability which flowed from the negligent miscalculation of the water level by its employee. Mr. Justice Hughes does not explain why classifying the defendant who is in breach of contract as a tortfeasor means that the Contributory Negligence Act is applicable whether or not the plaintiff sues in contract or tort. The judge appears to reject implicitly the possibility of the plaintiff choosing to sue in contract to avoid the application of the Contributory Negligence Act and states "the clinching reason...[for classifying the defendant as a tortfeasor] is that to do so allows equity to be done as I see it on the facts of this case to each party."[46] Mr. Justice Hughes thus clearly believes that fairness between the parties can only be achieved by applying the Contributory Negligent Act in the case of a breach of a duty of care arising from the contract.

One of the few cases in which an appellate judge has held that the Contributory Negligence Act is applicable to a breach of contract action is Caines v. Bank of Nova Scotia.[47] The plaintiff who was in financial difficulties and lacked funds to pay his fire insurance premium obtained a consolidation loan from the bank which undertook to pay his fire insurance premium. The bank failed to pay the right party, the insurance was cancelled and six weeks later the plaintiff's house and contents were completely destroyed by fire. The majority held that the plaintiff was only entitled to nominal damages because he had not acted reasonably to mitigate his damage by arranging alternative fire insurance. However, the dissenting judge, Bugold J.A. stated:[48]

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45 (1976), 68 D.L.R. (3d) 385 (Ont. C.A.).

46 Supra footnote 42 at p. 92.

47 (1978), 22 N.B.R. (2d) 631 (App. Div.).

48 Ibid., at p. 653.

> I think the contract in question does impart a duty to take care. I am inclined to hold that the Contributory Negligence Act,...would apply to an action in contract (such as the present case) which imposes a duty of care and there is a breach of a duty not to be negligent, or, as otherwise stated a negligent breach of contract.

Bugold J.A. found the plaintiff to be contributorily negligent to the extent of 25 per cent, for failing to arrange new insurance coverage, and the bank to have been negligent to the extent of 75 per cent. This case exemplifies the problem of distinguishing between an absolute contractual duty and a contractual duty of care. On several occasions, the dissenting judge states that the bank's duty was to pay the premium but in the end he holds that it was a duty to take care and therefore the Contributory Negligence Act should be applied.

We must conclude that the cases in which the Contributory Negligence Act has been held applicable to a contract are exceptional and appear to be confined to those cases in which the defendant owed a duty of care. The vast majority of cases deny its relevance to contract. J.E. Côté states that the scarcity of authority for the application of the Contributory Negligence Act to breaches of contract emphasizes the number which reject such an argument implicitly and says that its applicability "seems extremely dubious in principle: the Acts were clearly discussed and passed in the context of torts, and most refer to 'fault' which is not the foundation of contractual liability."[49]

M.B. Taggart in considering whether contributory negligence is relevant to the law of contract contends that:[50]

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49 An Introduction to the Law of Contract (1974), p. 247.

50 "Contributory Negligence: Is the Law of Contract Relevant?" (1977), 3 Auckland U.L. Rev. 140 at pp. 141 and 155.

> [T]he development of negligence in the 19th century introduced the distorting element of fault into the essentially causative defence of contributory negligence. As a result, this made the defence appear inappropriate to the law of contract which is based on causation not fault....
>
> It is submitted that to apply the Act to contract now would inevitably result in confusion of contractual principles.

However, the author concludes that:[51]

> There is, however, no reason why the Act could not be amended to allow apportionment of loss on causation grounds when the contract action is chosen or succeeds rather than the co-existing tort action. Thus, justice could be done in deserving cases without the threat of the confusion of tortious and contractual principles. It is submitted that any such redrafting should be limited to those cases where there is co-existence of contract and tort actions for it is only in those cases that any injustice is done by not applying the Contributory Negligence Act to contract.

We are very concerned about the anomalous results which appear to flow when a contributorily negligent plaintiff has a cause of action in both contract and tort. If the contributory negligence does not break the chain of causation, the plaintiff who has not failed to mitigate his damage will recover fully in contract but if the action is framed in negligence the plaintiff's damages will be reduced in accordance with his contributory negligence. The Law Commission (England) in its Report on Contribution recognizes the anomalous situation which occurs when a contributorily negligent plaintiff has the option of suing in contract or tort. It concludes that it is doubtful that "the partial defence of contributory negligence could be slotted into the general law of contract without

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51 Ibid., p. 155.

serious repercussions..."[52] Its misgivings stem in part from differences in damage assessment. However, the mode of assessing damages in contract and tort are moving closer together.

We believe that there should be apportionment of liability in a contract action brought by a contributorily negligent plaintiff, provided the action is based on a breach of a duty of care. We concede that there will be difficulties in extending apportionment based on contributory negligence to a breach of a duty of care arising from a contract. If, for instance, a contractor does not utilize a particular grade of steel, this might be either a breach of the term of the contract or a breach of a duty of care. Assuming the plaintiff was contributorily negligent, there will be difficulty in determining whether his damages should be reduced. However, if the defendant is in breach of a contractual duty of care and the plaintiff has been contributorily negligent, we believe that fairness between the plaintiff and the defendant makes apportionment of the damage on the basis of the relative degrees of fault necessary. The partial defence of contributory negligence should be available to a defendant even in an action on the contract provided the contract imparts a duty to take care and does not impose an absolute duty.

RECOMMENDATION #4

> *We recommend that the partial defence of contributory negligence be available where there is a breach of a duty of care arising from a contract.*
>
> (Draft Act, Sections 1(d) & 6)

(4) Contributory Negligence and Breach of Trust

We think that the liability between trustees and the beneficiaries of trusts are adequately and properly covered by the law of trusts.

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52 Law Com., No. 79, p. 9.

IV. OTHER RULES AFFECTING A PLAINTIFF'S RIGHT TO RECOVER

(1) Set-off

If damage is caused to A and B by the fault of both, each is entitled to judgment against the other. Convenience appears to suggest that the two judgments should be set off against each other and only the excess recovered. However, if the parties are insured against such liability, as is almost universally the case in regard to motor vehicle accidents, there is another consideration. If A's judgment is for $25,000 and B's is for $30,000, set-off will result in A receiving nothing and B receiving $5,000, payable by A's insurer. If there is no set-off, A will receive $25,000 which will be paid by B's insurer, and B will receive $30,000, which will be paid by A's insurer. In such cases, the insurers or perhaps ultimately the users of automobiles, are therefore the beneficiaries of the set-off. In our example, the extent of the benefit is $50,000 out of a total loss of $55,000. We think it unfair that a party who has paid for insurance coverage and has suffered loss should have his loss reduced for the benefit of the other party's insurer.

The Prince Edward Island Contributory Negligence Act[1] provides that in motor vehicle claims where there is a counter-claim "separate judgments shall be given for each party against the other." The British Columbia Contributory Negligence Act[2] specifically provides that there shall be set-off, though we understand that measures are taken to temper the requirement.

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1 S.P.E.I. 1978, c. 3, s. 9(1)(a).

2 R.S.B.C. 1960, c. 74, s. 3(d).

In Alberta, set-off may be ordered under the Alberta Rules of Court, Rule 93(1). The practice is not to provide for set-off in motor vehicle cases.[3] We have concluded that it is best to leave the question to be decided by the court in each individual case, with the exception that in actions arising out of the operation of motor vehicles, the statute should provide that there shall be no set-off unless the court otherwise orders.

RECOMMENDATION #5

> *We recommend that the statute should not deal with set-off of judgments but that set-off should continue to be a matter for discretion under the Rules of Court, with the exception that in motor vehicle claims, the statute should provide that there shall be no set-off, unless the court otherwise orders.*
>
> (Draft Act, Section 7)

(2) Effect of a Release of or a Judgment Against a Joint Tortfeasor

The question of contribution arises in tort only in connection with those torts which contribute to the same damage. In such cases, the tortfeasors, D1 and D2, may be joint tortfeasors or they may be several concurrent tortfeasors. They are joint tortfeasors if there is only one vinculum juris between both D1 and D2, on the one hand, and P, on the other, i.e., if there is only one tortious act, omission or course of conduct for which D1 and D2 are both responsible. They are, for example, treated as joint tortfeasors if D2 is responsible for D1's wrongful conduct, i.e., if D1 is D2's employee or agent or if D1 is the driver of a car owned by D2.[4] D1 and

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3 See, however, Checker Taxi Co. v. Zeniuk and Oxley, [1947] 1 W.W.R. 172 (Alta. S.C.).

4 The logic is open to question. See e.g. Laskin (1940), 18 Can. Bar Rev. 205, at pp. 216-216.

D2 are also joint tortfeasors if they act wrongfully in concert as in Beecham v. Henderson and Houston,[5] where two highway workers threw sand through an open window of a bus and injured a passenger, or, it appears, as in Harpe v. Lefebvre,[6] where one defendant drove the truck towing the van owned and driven by the other. However, if they commit separate torts which together cause one damage, they are several concurrent tortfeasors. In Sargent v. Canadian Coachways Ltd.,[7] a bus driver negligently drove a bus into a ditch which had been negligently dug by an excavator and a passenger in the bus was injured. The bus owner and the excavator were several concurrent tortfeasors.

At common law, the distinction between joint tortfeasors and several concurrent tortfeasors was an important one. If D1 and D2 were joint tortfeasors and, if the injured person, P, recovered judgment against D1, P could not sue D2. In addition, if P released D1 from liability, P could not sue D2. On the other hand, if D1 and D2 were several concurrent tortfeasors, a judgment or a release affecting one did not prevent P from making a claim against the other.

The Tort-Feasors Act does away with the distinction insofar as a judgment against one joint tortfeasor is concerned. We have no doubt that the new Act should do the same. It should be drafted in such a way that it cannot be argued that a judgment against one joint tortfeasor is a bar to a further judgment in the same action, as differentiated from a judgment in another action. That argument was advanced, albeit unsuccessfully, in Wah Tat Bank Ltd. v. Chan Cheng Kum,[8] and

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5 [1951] 1 D.L.R. 628 (B.C.S.C.).

6 (1976), 1 C.C.L.T. 331 (Alta. Dist. Ct.).

7 [1951] 1 D.L.R. 609 (Alta. App. Div.).

8 [1975] 2 All E.R. 257 (P.C.).

there is no reason to incur the risk that Canadian courts will not agree with the decision. However, once a judgment against one joint tortfeasor is satisfied, the plaintiff should no longer have a right of action against the other joint tortfeasor.

The Tort-Feasors Act does not do away with the rule that a release of one joint tortfeasor is a bar to an action against another. Indeed, in two cases[9] concurrent wrongdoers have argued, though unsuccessfully, that the Contributory Negligence Act, by imposing joint and several liability, made them joint tortfeasors for the purposes of the rule. We think that the new Act should abolish the rule that a release of one joint tortfeasor releases all the other joint tortfeasors as well as the rule that an unsatisfied judgment against one joint tortfeasor releases all the other joint tortfeasors. In so doing, the new Act would abolish the present trap for the unwary caused by the fact that a release of one joint tortfeasor and a covenant not to sue one joint tortfeasor are treated differently even though they accomplish the same purpose. We think that the rights of the parties should be determined by the substance of the agreement rather than its form.

The new Act should carry forward two qualifying provisions. The first is that the second judgment rendered against joint or concurrent tortfeasors should not exceed the first and the second is that costs should not be allowed the plaintiff in the second action unless there are reasonable grounds for bringing it as a separate action. The provision limiting the damages to the amount first awarded should be drafted so as to preclude the unsuccessful

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9 Dodsworth v. Holt (1964), 44 D.L.R. (2d) 480 (Alta. S.C.); Reaney v. National Trust Co. (1964), 42 D.L.R. (2d) 703 (Ont. H.C.).

argument in Bryanston Finance Ltd. v. de Vries[10] that it applies only to successive judgments in two actions and not to successive judgments in the same actions.

RECOMMENDATION #6

> *The statute should reverse the common law and provide that a release of one joint tortfeasor does not release another. It should also carry forward the provision of The Tort-Feasors Act that a judgment against one joint tortfeasor is not a bar to an action against another, though satisfaction of a judgment should be a bar. Also, the statute should continue to provide that a second judgment should not exceed the first and the plaintiff in the second action should not be allowed costs unless there are reasonable grounds for bringing the action.*
>
> (Draft Act, Sections 8 and 9)

(3) Joint and Several Liability or Apportioned Liability

"It is fundamental . . . to tort law that a plaintiff can proceed against any one of a number of joint or several tortfeasors."[11] It is also fundamental to tort law that he can proceed against all of them. If he is not himself at fault, he can recover from any or all of them the full amount of his damage. He is to be compensated at the expense even of a wrongdoer whose fault is very slight. That is the existing law. On the other hand, it is argued that the person suffering injury, P, should only get judgment against each of the concurrent tortfeasors for the share of the damage for which each is held responsible, even though that would be a change in the law. This argument points out that the law recognizes for certain purposes that a tortfeasor is responsible for damage in proportion to the degree in which he was at fault; it does so in

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10 [1975] 2 All E.R. 609 (C.A.).

11 County of Parkland v. Stetar, [1975] 2 S.C.R. 844 at p. 899.

apportioning responsibility between a contributorily negligent victim and a tortfeasor, and it does so in determining the amount of contribution between concurrent tortfeasors. The argument goes on that it is unfair to hold a tortfeasor responsible beyond the degree to which a court finds that he is at fault, the degree of unfairness varying inversely with the degree in which a particular concurrent tortfeasor is found to be at fault. If that argument should prevail, P, instead of having the right to recover the whole of his damages from either or both of D1 and D2 who are equally at fault, would only be able to recover half his damages from D1 under one cause of action and half his damages from D2 under another. The argument would not apply to a case where D2 is vicariously liable for the tort of D1.

Several difficult questions would then disappear. There would be no need to provide for contribution, as D1 and D2 would each be responsible for his own share of the damage and no more. There would also be no necessity to consider the effect of settlements and limitation periods and related problems.

Although recognizing the force of the argument in favour of apportioning liability in accordance with the degree of fault of the concurrent wrongdoers, we have concluded that paramount importance should be accorded to the principle that the non-negligent plaintiff should obtain full recovery, if at all possible; but for the fault of each wrongdoer, he would not have suffered the damage. The rule of joint and several liability best serves the end of obtaining full recovery for the non-negligent plaintiff.

Where the injured party, P, is partly at fault, the effect of the Contributory Negligence Act as interpreted by the Canadian courts is that the concurrent tortfeasors, D1 and D2, are jointly and severally liable to P for the amount of his damage reduced

by his degree of fault.[12] P can therefore recover from any or all concurrent tortfeasors the total of the damages for which they are collectively responsible.

The arguments for apportionment are stronger in cases in which P is at fault. It may be argued, and Glanville Williams does so, that a contributorily negligent P is no more deserving than D1 and D2.[13] The only thing that distinguishes him is that he suffered a loss, not that he was free from negligence. There is no reason to throw the whole risk of D2's insolvency onto D1; P, being also at fault, should share the risk. Furthermore, there is no reason why, even though he is later able to obtain contribution from D2, D1 should be financially embarrassed by having to pay P the total amount for which D1 and D2 are collectively liable.

Glanville Williams also argues[14] that where A, B and C are all at fault and all suffer damage, the apportionment of damages under the present Contributory Negligence Act is unnecessarily complex. Each is entitled to a judgment against the other two, reduced by his own degree of fault. In each case, the other two are entitled to contribution between themselves. It would be simpler for A to recover the appropriate fraction of his damage from each of B and C, and for each of the other two to recover similar judgments. Section 28 of Williams' draft bill,[15] which has been adopted by Eire and Tasmania, provides for apportioned judgments.

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12 Fellows v. Majeau, [1945] 2 W.W.R. 113 (Alta. S.C.); Jordan House Ltd. v. Menow [1974] S.C.R. 239.

13 Williams, p. 406.

14 Williams, pp. 400-403.

15 Williams, p. 522.

We think, however, that the present law should be maintained. For one thing it is commonly applied and well understood and no significant demand has appeared in Alberta for its abandonment; it may be argued that such a substantial change in law should not be made in the absence of evidence that the present law is considered unsatisfactory. For another, the prevailing theory is that the injured party should recover and be compensated for as much of his loss as possible. His only fault is in not looking after himself or his property and he should be penalized only by not allowing him to recover what was due to his own fault. Also, we think that there is a danger that the courts will be hesitant to find contributory negligence if the result will not only deprive the plaintiff of the share of the damage attributed to him but also expose him to the risk of failing to collect some of the rest. Further, we think that the adoption of one set of rules applicable if the plaintiff is at fault, and another if he is not, would result in undesirable complication. Since so many claims are paid by insurers, it may also be said that the principal result of a scheme of apportioned judgments would be to relieve them, though with virtually universal automobile insurance that argument has little force in regard to motor vehicle liability.

RECOMMENDATION #7

> *We recommend that the liability of concurrent tortfeasors either to a plaintiff who is free from negligence or to a contributorily negligent plaintiff should continue to be joint and several.*
>
> (Draft Act, Section 4)

V. WHEN A WRONGDOER SHOULD BE ENTITLED TO CONTRIBUTION

(1) The Basis for Contribution

Before determining when contribution should be available, we should consider the justification or philosophic foundation for allowing it. A simple formulation of the justification is that if D1 and D2 each contribute to P's loss, it would be unfair that D1 should have to satisfy all the loss simply because P chooses to sue only D1 or to exact a settlement from only D1 and that D2 would escape unscathed. The author of the seventh edition of Salmond denies that contribution between wrongdoers should be based on an implied contract and states: "It [contribution] is based on the principle of justice, that a burden which the law imposes on two men should not be borne wholly by one of them."[1] In the surety case of Deering v. The Earl of Winchelsea, Eyre C.B. states: "If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract . . ."[2]

Goff and Jones state:[3]

> Any obligor who owes with another a duty to a third party and is liable with that other to a common demand, should be able to claim contribution... In all these cases the basis of the right to contribution is unjust enrichment .

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1 Salmond, The Law of Torts (7th ed., 1928) at p. 103.

2 (1787), 126 E.R. 1276 at p. 1277.

3 The Law of Restitution (2nd ed. 1978), p. 211.

The authors note that tortfeasors are in an exceptional position because at common law they could not generally recover contribution from each other. However, even though the claim of a tortfeasor for contribution depends upon statute, the authors state: "the broad principles governing it are not dissimilar from the equitable principles which were established in Deering v. The Earl of Winchelsea."[4]

Professor Weinrib states:[5]

> Given that P can recover in full from D1, it would be unfair as between D1 and D2 to force D1 to pay all and allow D2 to escape with paying none of the damages for which each is wholly liable. Contribution is the mechanism rooted in both equity and the common law which reflects this basic consideration of relative fairness. Inasmuch as D1 in discharging his own liability to P has relieved D2 of any need on his part to satisfy his own obligation to P, D1 has under the compulsion of law been forced to confer a benefit on D2 to which D2 is not entitled and which the device of contribution would force him to disgorge.

Weinrib thus goes beyond the formulation of Goff and Jones which was quoted earlier. For example, D1, the builder, does not "owe with" D2, the architect, a duty to P, the owner. Each of D1 and D2 owes a separate duty to P, and if they breach their separate contracts each is not "liable with that other to a common demand". Professor Weinrib concedes that D1 and D2 are not subject to a common liability or a common demand. However, he denies the relevancy of such an issue.[6] he states:[7]

> In this context what is at stake is fairness in the incidence of the sanction as a matter of remedial policy and it is hard to see why this should be affected by the fact that the parties have breached a different primary obligation. Once it has been determined that the breaches of contract have caused the same loss and that the loss is translatable into money damages to which both parties are liable, the difference in initial obligation recedes into

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4 Ibid., p. 231.

5 "Contribution in a Contractual Setting" (1976), 54 Can. Bar Rev. 338, at p. 340.

6 Ibid.

7 Ibid.

> insignificance and the problem which remains is that of adjusting as between D1 and D2 the money damages which P can demand that either of them wholly pay.

He goes on to say "the requirement of a common liability or the subjection to a common demand is not an obstacle to the policy of the prevention of unjust enrichment, embodied in the notion of contribution but is rather merely an abbreviated way of expressing that policy . . ."[8]

We have found a consideration of the notion of contribution as a reflection of the notion of unjust enrichment to be most helpful. We think, however, that an even more appropriate and somewhat broader formulation is that the law should treat wrongdoers fairly and that in the absence of a compelling reason to the contrary, fairness requires that a burden which the law imposes on two parties should not be borne wholly by one of them.

This principle is of particular significance in deciding when contribution should be available, a subject which will be dealt with in the following pages. It is also of particular significance in deciding upon the criteria which will determine the amount; in view of the wide diversity of factual and legal circumstances to which the criteria will apply, we think that they will have to be formulated in such a way that the court will be left free to weigh both culpability and causation.

RECOMMENDATION #8

> *We recommend that the right to contribution be based upon the notion that the law should treat wrongdoers fairly and that in the absence of a compelling reason to the contrary, fairness requires that a burden which the law imposes on two parties should not be borne wholly by one of them.*
>
> (Draft Act, Section 11(1)).

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8 Ibid., at p. 341.

(2) Kinds of Torts for Which Contribution Should be Provided

Contribution is now available between two concurrent tort-feasors who are liable for negligence, and we think that it clearly should continue to be available. There is more question about its present application to torts which do not necessarily involve negligence, including cases of strict liability under the rule in Rylands v. Fletcher,[9] and cases such as nuisance or assault. The Contributory Negligence Act applies where damage is caused by the "fault" of two or more persons. That term might be interpreted to include tortious acts or omissions not involving negligence. Alternatively, particularly in view of the name of the statute, it might be restricted to negligence. In Yule v. Parmley and Parmley[10] the British Columbia Court of Appeal thought that trespass to the person was a "fault" under the British Columbia Statute, but the Supreme Court of Canada found the defendants, doctor and dentist, negligent and left open the question whether "fault" includes a tort other than negligence.[11] In Chernesky v. Armadale Publishers Ltd.[12] the Saskatchewan Court of Appeal held that contribution under the Saskatchewan statute does not extend to an action for libel but is restricted to cases of negligence. In Dominion Chain Co. v. Eastern Const. Co. Jessup, J.A. stated that fault as used in section 2(1) of The Negligence Act "includes a breach of statute or other act or omission giving rise to a liability in tort whether negligent or not."[13]

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9 (1868), L.R. 3 H.L. 330.

10 [1945] 2 D.L.R. 316, (B.C.C.A.).

11 [1945] S.C.R. 635 at p. 650.

12 [1974] 6 W.W.R. 162 (Sask. C.A.). (This judgment deals only with a preliminary issue between the defendants and the third party.)

13 (1976) 68 D.L.R. (3d) 385 (Ont. C.A.) at p. 390. Aff'd. (sub nom.), Giffels Associates Ltd. v. Eastern Const. Co., (1978), 84 D.L.R. (3d) 344 (S.C.C.).

In Athans v. Canadian Adventure Camps Ltd.,[14] the plaintiff, a professional water-skier, brought an action against a summer camp for children and a public relations firm which copied a photograph of the plaintiff and published it as a line-drawing in an advertising brochure for the summer camp. Both defendants were found jointly and severally liable for the tort of appropriating the plaintiff's personality. The reproduction of the drawing for commercial advantage was an invasion of the plaintiff's exclusive right to market his personality. Both defendants claimed contribution and indemnity against each other and relied on the Negligence Act. There was really no discussion about the relevance of the Act but the judge found the summer camp was entitled to a full indemnity for the damages awarded the plaintiff as against the public relations firm on the basis of Hedley Byrne.

In those provinces having Tort-Feasors Acts, contribution is clearly not limited to negligence actions. Such statutes apply to "any tortfeasor" liable in respect of the damage and are not restricted to negligent tortfeasors. There is little doubt that The Tortfeasors Act allows an intentional tortfeasor to obtain contribution because the Act applies where damage is suffered "as a result of a tort, whether a crime or not." Glanville Williams[15] says that the words, "whether a crime or not", were inserted in the English Act upon the recommendation of the Law Revision Committee which advised that there should be a right of contribution even for intentional torts which also constitute crimes. He thinks the balance of the argument is in favour of giving relief.[16] American decisions have gone both ways. The law should be clarified.

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14 (1978), 80 D.L.R. (3d) 583 (Ont. H.C.).

15 Williams, p. 91.

16 Williams, p. 94.

The reasons against providing for contribution in the case of intentional torts, some of which also apply to other cases of torts not involving negligence, appear to be:

(1) the public policy argument based on the maxim ex turpi causa non oritur actio;

(2) punishment; and

(3) deterrence.

The reasons in favour appear to be:

(1) punishment is not a reason for giving a cause of action in tort matters;

(2) the net effect of refusal of the right to claim contribution may not be to deter and may be to encourage wrong-doing;

(3) the inequity of allowing one wrongdoer to escape while putting the whole burden on another;

(4) there may be no moral blameworthiness in some "intentional" torts;

(5) contribution is already allowed where negligence is criminal, e.g. dangerous driving; and

(6) refusal to give a right to contribution encourages collusion and favouritism between the plaintiff and one or more of the wrongdoers.

As has been noted the English Law Revision Committee considered whether public policy might require an exception to the provision for contribution between tortfeasors where the tort was also a crime. The Committee stated:[17]

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17 Law Revision Committee, Third Interim Report, Cmd. 4637, 1934, p. 7.

> At first sight policy might appear to demand that such an exception should be made at any rate when the crime is wanton and deliberate and not merely the result of inadvertence. We have, however, come to the conclusion that it is impractical to draw such a distinction and that any attempt to exclude from our recommendations torts which are also crimes would produce anomalies...

We also have concluded that the public policy argument is not sufficiently strong to require any qualification in our recommendation about contribution. If the tort is also a crime, we have concluded that the criminal law is the appropriate means of imposing a suitable penalty and we see no reason for the law relating to contribution to be molded in such a way as to provide an additional monetary penalty. This is particularly so because there is no assurance that the monetary penalty involved in denying contribution will fall on the more culpable party.

RECOMMENDATION #9

> *We recommend that contribution should be available to all tortfeasors including intentional tortfeasors and this should apply even if the tort should also constitute a crime.*
>
> (Draft Act, Sections 1(e) & 10).

(3) Extension of Contribution to Breaches of Contract

In our Working Paper we perceived difficulties in a statutory right of contribution in all contract cases. The contract more than the general law determines the nature of the obligation between contracting parties. A contract may provide for a contractual limitation period, or a limitation of liability to an agreed amount as in cases of liquidated damages

and in many contracts for carriage of goods. Remedies other than damages may be available to a contracting party. Rights may be waived. We expressed a leaning against such an extension. We have, however, been persuaded that it should be made.

Our principal reason is based upon our formulation of the basis for contribution. One who breaks a contract is as much a wrongdoer as one who does not adhere to a general standard of conduct imposed by law. Fairness requires that a burden which the law imposes upon two parties should not be borne by one of them, and it makes no difference for this purpose that the obligation is imposed by contract law rather than tort law.

An additional reason is that the border between tort and contract is hazy, indistinct and poorly defined. Professor Prosser states: "Everywhere the fields of liability and doctrine interlock; everywhere there are borderlands and penumbras, and cases which cut across the arbitrary lines of division, or straddle them in a manner utterly bewildering to the young lawyer whose education has told him to look for sharp division."[18]

Professor Gilmore's ideas about the relationship between contract and tort are also very relevant. He states:[19]

> We might say that what is happening is that "contract" is being reabsorbed into the mainstream of "tort". Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again. It should be pointed out that the theory of tort into which contract is being re-

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18 Selected Topics on the Law of Torts (1953), p. 380.

19 The Death of Contract (1974), p. 87.

> absorbed is itself a much more expansive theory of liability than was the theory of tort from which contract was artificially separated a hundred years ago.

Although we do not agree with him that "contract . . . is dead", it is difficult to deny that the movement of the common law is toward a more generalized law of obligation or liability. As a consequence of recognizing this and of recognizing that the law always has been a seamless web, we have concluded that contribution should not be limited to the kinds of wrongs which are classified as torts but should extend to those classified as breaches of contracts. Statutes should take account of the hazy borders between tort and contract and should not compel the courts to engage in the difficult and virtually impossible task of delineating between the two.

Difficulties caused by limiting contribution to torts are exemplified by several recent cases in which an owner, P, suffered damage by reason of a breach of duty by a contractor or supplier, D2, and another breach of duty by an architect or engineer, D1.

In Dominion Chain Co. v. Eastern Const. Co.,[20] the contractor, D2, was protected from liability to the owner, P, by the expiration of a contractual limitation period following the issuance of the engineer's final certificate. The engineer, D1, who was negligent, was liable to P. Jessup J.A., speaking for the majority in the Ontario Court of Appeal, held that it was a condition precedent to D2's obligation to make contribution to D1 that D2 should be liable to P under Ontario's s. 2(1), which is comparable to The Contributory Negligence Act ss. 3(1) and (2) of Alberta combined. He held also that s. 2(1)

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20 (1976), 68 D.L.R. (3d) 385 (Ont. C.A.). Aff'd. (sub nom.), Giffels Associates Ltd. v. Eastern Const. Co. (1978), 84 D.L.R. (3d) 344 (S.C.C.).

permits contribution only as between tortfeasors and not as between parties who have breached contracts, even though the section does not refer specifically to tortfeasors but rather to persons found at fault. He then went on to hold that both defendants in the action were tortfeasors, having discussed the vexed question of whether a breach of a duty to take care can give rise to a cause of action in tort as well as contract and having approved the affirmative answer given by Lord Denning in Esso Petroleum Co. v. Mardon. [21] Although he concluded that neither a contractor nor a builder professes skill in a calling so as to make him liable in tort on the same basis as an engineer or architect, he reached the conclusion that a contractor or builder who is negligent in the performance of a contract to build is liable in tort for injury to person or property on the basis of Donoghue v. Stevenson, [22] i.e., as a tortfeasor, and he would have held the contractor liable to a claim for contribution by the engineer but for the fact that the contractor was not liable to the plaintiff. The companion case of Dabous v. Zuliani [23] is to much the same legal effect, though the result was different. An architect and builder were held to be tortfeasors and, since both were liable to the plaintiff owner, contribution was available.

The Ontario Court of Appeal's decision in Dominion Chain Co. v. Eastern Const. Co. was appealed and the Supreme Court of Canada dismissed the appeal. Laskin C.J.C. delivered the unanimous opinion of the Court. The difficult issues were not clarified because the case was decided on the basis that D2, the contractor, possessed a contractual shield which pro-

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21 [1976] 2 All E.R. 5 at p. 15.

22 [1932] A.C. 562 (H.L.).

23 [1976] 68 D.L.R. (3d) 414 (Ont. C.A.).

tected it from liability to the plaintiff. The engineer, D1, was therefore precluded from asserting a right of contribution against D2. Laskin C.J.C. held that the "exculpatory clause" excluded all claims under the contract and stated that it was "immaterial whether they arise in contract or tort. In the present case, it was the same negligence, whether regarded as a breach of contract or as a basis for an independent tort claim, ..."[24] Laskin C.J.C. after saying that it was not necessary to determine whether the contribution provision of The Negligence Act was broad enough to embrace contractual liability stated that he was inclined to believe that it was not because other interrelated provisions of the statute referred only to tortfeasors.[25] An important aspect of this case is that the Chief Justice did not simply say that a claim for contribution in this case could arise only under The Negligence Act but inferred that it might arise out of two independent contracts. He stated:[26]

> I am prepared to assume, for the purposes of this case, that where there are two contractors, each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss, even where the plaintiff chooses to sue only that one and not both as in this case.

In Sealand of the Pacific Ltd. v. McHaffie Ltd.[27] the British Columbia Court of Appeal held that the owner, P,

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24 Giffels Associates Ltd. v. Eastern Const. Co. (1978) 84 D.L.R. (3d) 344 (S.C.C.) at p. 349.

25 Ibid.

26 Ibid., at p. 350.

27 [1974] 6 W.W.R. 724 (B.C.C.A.).

was entitled to judgment against the supplier, D2, and the architect, D1; that the Contributory Negligence Act did not apply and there is no common law procedure permitting apportionment; and that P was entitled to two independent judgments against D1 and D2 for the whole of its damage. While the judgment gives rise to some difficulties of interpretation, it applies two propositions to D1. The first is the proposition enunciated by Mr. Justice Pigeon in J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.,[28] that tort liability, at least under the Hedley-Byrne rule, does not apply unless the negligence is an "'independent tort' unconnected with the performance of the contract." The second is the proposition enunciated by the Ontario Appellate Division in Campbell Flour Mills Co. v. Bowes,[29] that although the damage caused by the breach of two contracts is the same, P is entitled to two independent judgments for the whole of it. Both the Campbell Flour case and the Sealand case appear to be inconsistent with the existence of any right to contribution between D1 and D2, though in Sealand the court did say that "It may well be that" the supplier, D2 "is obliged to indemnify"[30] the architect, D1, for the amount which D1 had to pay to P.

The English Law Commission in its Working Paper on Contribution discussed the case of McConnell v. Lynch-Robinson.[31] In this case, the plaintiff owner sued his architect, for inadequate supervision of the contractor. The architect sought to join the contractor and to recover contribution from him under a statutory provision comparable to s. 4(1)(c) of The Tort-Feasors Act of Alberta. Lord MacDermott C.J. expressed doubt as to whether the plaintiff's action against the architect was in contract or in tort. However, for the purpose of the

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28 [1972] S.C.R. 769, at 777-778.

29 (1914), 32 O.L.R. 270.

30 Supra., footnote 27, at p. 728.

31 [1957] N.I. 70 (C.A.).

appeal he was prepared to assume that the architect was a tortfeasor. In order for the defendant architect to establish a right of contribution against the contractor, it was held that the defendant must also establish that the contractor was a tortfeasor contributing to the same damage. The contractor had placed the damp-course in the wrong place and not in accordance with the specifications provided by the architect. Lord MacDermott stated that: "If the plaintiff has any claim against the building contractor it is clearly in respect of breach of contract and I can see no ground for saying that over and above that there is a claim in tort simply on the basis that the contractor did something which a reasonable man would not have done."[32] Consequently, the architect had to bear the whole loss in spite of the fact that the contractor was probably more at fault.

A recent case which should be mentioned is Smith v. McInnis.[33] A solicitor, D1, who was inexperienced in making proof of loss under a fire insurance policy, retained another solicitor, D2, who had experience in such matters. The proof of loss was not submitted within the one-year period for claiming under the policies. After failing to recover the loss caused by the fire from the insurer, the plaintiff, the insured, brought an action apparently in negligence against D1 who joined D2 as a third party. At trial D1, the inexperienced solicitor, was found wholly at fault. It was found that the more experienced solicitor, D2, was retained for the limited purpose of assisting in the completion of the proof of loss. D1 appealed and the appeal division took a broader view of the scope of D2's retainer. It apportioned one third of responsibility to D2, without reference to any statute. On appeal to the Supreme Court of Canada, the majority agreed with the trial judge's finding that D2 was retained only to submit proof of loss and

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32 Ibid., p. 71.

33 (1978), 4 C.C.L.T. 154 (S.C.C.).

not for further advice and therefore only D1 was liable. Laskin C.J.C. stated: "In the circumstances, it is unnecessary to canvass other questions raised here as to whether a solicitor's liability to his client lies in tort or only in contract, and the effect, accordingly, of the Tortfeasors Act, R.S.N.S. 1967, c. 307 and of the Contributory Negligence Act, R.S.N.S. 1967, c. 54."[34] The dissenting judge, Pigeon J., with whom Beetz J. concurred agreed with the wider construction of D2's retainer stating that D2 cannot be heard to say "I told you what to do because this is what you asked me, I did not tell you when to do it because you did not ask me."[35] Pigeon J. held that the solicitor's liability arises only in contract and not in tort and states: "It appears to me that the use of the word "fault" in the Contributory Negligence Act is evidence...of the intention to adopt the civil law principle with respect to the division of liability in proportion to the respective degrees of fault in all cases." However, Pigeon J. argues that even if the Contributory Negligence Act is not applicable to liability in contract the same apportionment is obtained by applying the principle of causality.[36]

From these cases, we can see that there is hopeless confusion about the border between breaches of contract which give rise to a tort and those that do not. This is not surprising. It is our view that with regard to contribution, the courts should not be compelled to make this difficult and well nigh impossible distinction. The basic rationale for the right of contribution is to achieve fairness in the burden which defendants must bear.

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34 Ibid., at p. 167.

35 Ibid., at p. 173.

36 A recent example of the application of the principle of causality is to be found in City of Red Deer, v. Canadian Tennis Association Ltd. (1977), 5 A.R. 330 (S.C.).

The issue of whether a breach of contract does or does not constitute a tort should not be important. In the words of Professor Weinrib "contribution is a unitary notion embodying a fundamental concept of restitutionary fairness that transcends the categories of contract and tort and for which those categories are irrelevant."[37]

The editor of Carswell's Practice Cases in a note on the implications of the Dominion Chain case[38] remarks that unless a breach of contract produces a remedy in tort as well as in contract, or the statute extends to comprehend breaches of contractual duties of reasonable care, contribution will be unavailable where in fairness it ought to exist. Although he regards the list as endless, he gives the following examples:

(a) Patient sues doctor for negligent failure to test operating equipment and sues manufacturer of equipment for negligent design.

(b) Building owner sues architect for negligent design and sues construction contractor for negligent construction.

(c) Company sues financial adviser (or accountant or broker, etc.) for negligent advice and sues its own officials for negligent scrutiny of such advice or failure to equip the experts with reliable background information.

(d) Home owner sues equipment maintenance representative for leaving fuel oil tank unattached to service pipe into basement and sues oil company for delivery of heating oil without verifying entry into the tank.

We do not believe that a court in order to achieve an equitable apportioning of the loss as between the two defendants

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37 Supra., footnote 5, at pp. 344-345.

38 (1976), 1 C.P.C. 18-19.

should have to go through the contortion of categorizing the two defendants as tortfeasors. The law will continue to remain uncertain if to achieve fairness between defendants such a categorization remains necessary. Judges possessing an acute sense of justice will probably be able to extend the defective rules through categorization of the defendants as tortfeasors and thereby achieve fairness as between defendants. Judges who take a more literal approach to the interpretation of statutes will under the present legislation render judgments which in many cases will not treat defendants fairly.

We have been persuaded that in order to achieve equitable apportioning of loss between defendants the law should provide for contribution in cases in which one or more of the wrongs contributing to the plaintiff's damage is a breach of contract. We have been fortified in this view by discussions which we have had with the Committee appointed by the Canadian Bar Association who were unanimous in their view that the legislation should be extended to comprehend two breaches of contract or a breach of contract and a tort which give rise to the same damage. We also note that in England it was The Law Society and the General Council of the Bar which drew attention to the problem that contribution is not available where there are breaches of two separate contracts which combine to produce the same loss. Their representation gave rise to the English Law Commission's Report on Contribution which recommended that rights of contribution should be widened to cover breaches of contract.[39] In 1978, the Report was implemented by legislation.[40]

The extension of contribution to breaches of contract

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39 Law Com. No. 79, p. 11

40 Civil Liability (Contribution) Act 1978, c. 47 (U.K.).

will undoubtedly produce some complications. For instance, the rules of remoteness of damage and the measure of damages are not precisely the same in contract as in tort. This problem was referred to by Jessup J.A. in the Dominion Chain case when he stated that the contribution provision of The Negligence Act of Ontario "would be virtually impossible to apply to a defendant tortfeasor and a defendant who had breached a contract because of the probable difference in the measure of damages for which they would be respectively liable to the plaintiff."[41] We believe that, setting aside special provisions in the contract, in the movement toward a generalized theory of obligation or liability the rules of remoteness of damage and the measure of damages are moving much closer together.[42] More importantly, The Tort-Feasors Act applies to defendants liable in respect of the same damage and it is in respect of that same damage that a right of contribution is provided. Consequently, it is in respect of the monetary amount of the overlapping damage flowing from the overlap in liability, whether it arises in tort or in contract, of the two claims for which contribution would be available. We, therefore, do not anticipate any serious problems in this regard. This is also the conclusion which the English Law Commission has reached.[43]

Limitation periods both statutory and contractual will create certain problems in the extension of the rights of contribution. So will contractual upper limits of liability. These problems will be considered subsequently in our Report. We have satisfied ourselves that the problems can be dealt with, and we agree with Professor Weinrib when he says: "while these problems require delicate treatment, they do not seem to

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41 (1976), 68 D.L.R. (3d) 385 (Ont. C.A.). at p. 390.

42 See H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co., [1978] 1 All E.R. 525 (C.A.).

43 Working Paper No. 59 at p. 28.

impose insuperable difficulties . . . . Restrictions on the operation of contribution need not be puffed up into a general denial of the existence of contribution in a contractual setting."[44] The reasoning upon which contribution is based applies to all kinds of breach of contract, not merely a failure to take reasonable care.

While the examples which we have discussed deal with a tort and a breach of contract or with breaches of two different contracts, our recommendation would confirm the common law that a breach by two contracting parties of the same contract would give rise to a right of contribution between the parties. In so recommending we do not intend that the law should override a bargain made by the parties. Accordingly, the provisions of a contract should have effect in such a case and should not be affected by the statute.

RECOMMENDATION #10

> *We recommend that the statutory right of contribution should be extended so as to comprehend cases in which the same damage is caused by two breaches of the same contract or two independent contracts or by a breach of contract and by a tort. The right to contribution should not be confined to cases in which the breach of contract consists of a negligent failure to perform a contractual obligation but should extend to all breaches of contract including intentional breaches. The Statute should not, however, override contracts.*
>
> (Draft Act, Sections 1(a) and (e), and 11(2))

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44 Supra., footnote 5, at p. 345.

(4) Extension of Contribution to Breaches of Trust

In our Working Paper, we expressed the tentative opinion that neither the principle of contributory negligence nor the principle of contribution should be extended to breaches of trust. Our opinion was based in part on the fact that there was not the same need to provide for contribution in the case of breaches of trust as in the case of torts. The rule against contribution never applied with regard to persons in breach of trust. The rule of equity was and is that a trustee held liable for a breach of trust may recover contribution from his co-trustee unless the former alone has been fraudulent.

We have now tentatively concluded that the principle of contribution should apply to breaches of trust, though not the principle of contributory negligence. We have reached this conclusion because the right of contribution which is currently available as between trustees is somewhat defective. We think, however, that a provision concerned with contribution between trustees should appear in The Trustee Act. For that reason and for the reason that we believe that further consultation is necessary, we have decided to defer to a subsequent report any recommendation about contribution between trustees.

VI. CLAIM FOR CONTRIBUTION BY WRONGDOER WHO HAS SETTLED

(1) Relationship between the Right of Contribution and the Liability of the Party who has Settled

In order to claim contribution under The Tort-Feasors Act, a person must be a "tort-feasor liable in respect of that damage." Under the existing legislation, there is considerable doubt as to whether D1, who settles with P but is subsequently held not liable to him, can recover from D2, who is a tortfeasor liable to P. In Marschler v. G. Masser's Garage,[1] Mr. Justice Lebel held that D1, though not a tort-feasor, was entitled to obtain contribution. However, the Ontario statute is different and the judge thought that under the English legislation and consequently the Alberta statute, no contribution could be obtained because the statute is not concerned with settlements but with simply abrogating the old common law rule against contribution between tortfeasors. This interpretation finds support in other decisions.[2]

Even if it is held in the proceedings for contribution that P could have recovered from D1, there is still a question as to the meaning of "liable." The better opinion appears to be that "liable" means "responsible in law" and that D1 is entitled to contribution even though no judgment has been pronounced against him. However, Viscount Simonds thought that "liable" means "liable in judgment."[3] Section 3(2) of The Contributory Negligence Act also provides for contribution or indemnity "in the degree in which they are respectively found to have been at fault." This provision seems to state clearly that contribution under The Contributory Negligence

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1 (1956), 2 D.L.R. (2d) 484 (Ont. H.C.).

2 Stott v. West Yorkshire Road Car Co., [1971] 2 Q.B. 651 (C.A.), Baylis v. Waugh, [1962] N.Z.L.R. 44 (S.C.).

3 George Wimpey & Co. v. B.O.A.C., [1955] A.C. 169 (H.L.) at p. 178.

Act only arises where there has been a judicial determination of fault, but this determination could be made in the contribution proceedings.

We believe that to refuse contribution or indemnity either on the grounds that D1 is subsequently found not to have been liable or on the grounds that though responsible in law he was not at the time of the settlement liable in judgment is to discourage settlements and to fail to treat D1 fairly as against D2. In the absence of a compelling reason, a person should not be required to arrange that he be sued to judgment in order to qualify for the right of contribution. D1 has conferred a benefit on D2 by freeing him from liability to P. It is a sufficient safeguard that D1 must establish that the amount of the settlement is reasonable. It should not be necessary for him to establish that he was liable or even that he had reasonable grounds for believing that he was liable. However, in order that D1 may claim contribution from D2, it will be necessary, according to our subsequent recommendation #17, that P's claim has not become statute-barred against D2.

RECOMMENDATION #11

> *We recommend that a person who has settled should be entitled to indemnity or contribution even if it is subsequently determined that he was not liable to the party who has suffered loss nor should he even have to establish that he had reasonable grounds for believing that he was liable at the date of the settlement.*
>
> (Draft Act, Sections 14(1) and (3))

(2) Full Settlement with the Party who has Suffered Damage

Most settlements are made simultaneously with all defendants and the liabilities of all parties are determined by agreement so that no contribution problem arises. The law should, however, provide for cases in which that is not done. We will first consider the case in which one wrongdoer settles a claim in full.

Where D1 settles with the party suffering loss, P, for the whole of P's damage, he has conferred a benefit on D2 since D2 is now relieved of any liability to P, and fairness requires that D1 should have a right of contribution from D2. The law should not discourage a settlement, which may be in everyone's interest, by allowing D1 to claim contribution from D2 only if D1 litigates P's claim.

P and D1 should not, by determining the amount of the settlement, however, be able to determine conclusively the amount to which D2 will have to make contribution. Section 3 of The Negligence Act of Ontario provides a safeguard against unfairness to D2, and we think that a similar safeguard would be appropriate for Alberta. The section reads as follows:

> A tort feasor may recover contribution or indemnity from any other tort feasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tort feasor, in which event the tort feasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in

> the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

We think that a similar provision not restricted to tort-feasors would be appropriate.

RECOMMENDATION #12

> *We recommend that if D1 settles P's claim in full, he should have a right to contribution from D2 upon satisfying the court that the amount of the settlement with P was reasonable. If the court should find the amount of the settlement excessive, it should have the power to determine the amount at which the claim should have been settled and D1's right to contribution should be based on that amount.*
>
> (Draft Act, Section 14(3))

(3) Only Partial Settlement with the Party who has Suffered Damage

We will now consider the case in which D1's settlement is not accepted by P in full settlement of his claim. It is important that the parties should be encouraged to settle claims. This suggests that P should be able to settle with D1 and that a release of D1 should also release D1 from any claim of contribution by D2: otherwise D1 has very little incentive to settle with P. If D1 still remains vulnerable in a contribution action by D2, D1 cannot be certain of obtaining any advantage from a good settlement. Another prime motive for settling, the avoidance of costly litigation, would also be absent in that D1 might be involved in litigating a contribution action brought by D2. We therefore think that neither D1 nor D2 should have any right of contribution where one defendant settles only his share of the loss, and that other measures should be taken to achieve fairness.

When P settles with D1 and releases D1 from liability, P's claim against D2 could be reduced by:

(1) the amount received by P from D1,

(2) the amount of D1's share of the liability to P,

(3) the greater of (1) and (2),

(4) the lesser of (1) and (2).

These four methods of reducing D2's liability to P will be subsequently referred to as rules.

We will assume that, if a court had assessed the loss suffered by P, it would have awarded damages of $1,000 against D1 and D2, and, as between D1 and D2, the court would have determined that D1 was 75% responsible and D2 was 25% responsible. However, in order to illustrate how P's claim against D2 would be reduced, we will now suppose that, prior to litigation, P settles with D1 in regard to D1's liability and releases D1. We will consider two cases, the first, where P settles with D1 for $400, and the second, where P settles with D1 for $900. The effect which the two settlements have utilizing the four preceding rules are shown in Tables 1 and 2.

TABLE 1

P Settles with D1 for $400

(P's loss $1000, D1 75% responsible and D2 25% responsible)

Rule	P's claim against D2 is reduced by	P's claim against D2 amounts to	P's total recovery from D1 & D2 is
1.	400	600	1000
2.	750	250	650
3.	750	250	650
4.	400	600	1000

TABLE 2

P Settles with D1 for $900

(P's loss $1000, D1 75% responsible and D2 25% responsible)

Rule	P's claim against D2 is reduced by	P's claim against D2 amounts to	P's total recovery from D1 & D2 is
1.	900	100	1000
2.	750	250	1150
3.	900	100	1000
4.	750	250	1150

By referring to row 1 and 4 of Table 1, we can see that, if P's claim against D2 is reduced either by the amount received by P from D1 or by the lesser of such amount and the amount of D1's share of the liability to P, the burden placed upon D2 can be unreasonable. It has been assumed that D2 is only responsible for $250 and yet the reduction provided by rules 1 and 4 would make D2 liable for $600 when P settles with D1 for $400. The basic problem of rules 1 and 4 is that if P makes a very poor settlement with D1, an unreasonably large burden can be placed upon D2. If P is friendly towards D1 and releases D1 for a nominal amount all the burden can be thrust onto D2. B.F. MacPherson has stated: "Plaintiffs retain their ability to choose their "victims" who, consequently, must bear the entire financial burden without recourse to the tortfeasors whom the injured party has chosen to let off lightly."[4] The whole function of contribution, which is to share the liability between defendants fairly, would be defeated by rules 1 and 4.

Only rule 2, that P's claim against D2 is reduced by the amount of D1's share of the liability to P, or rule 3, that P's claim is reduced by the greater of the amount received by P from D1 and the amount of D1's share of the liability to P

4 "Contribution and the Distribution of Loss Among Tort-feasors" (1975) 25 America U.L. Rev. 203 at p. 240.

is fair to D2. The problem with rule 3 can be observed by comparing row 3 of Tables 1 and Tables 2. In Table 1, P has made a poor settlement with D1 and P's total recovery is only $650. In Table 2, P has made a very favourable settlement with D1 and yet rule 3, illustrated in row 3, means that his total recovery will only be $1,000. The benefit of a good settlement by P with D1 will accrue by rule 3 to the benefit of D2. In our example this is shown by the reduction of D2's liability from $250 to $100. By referring to row 3 of Table 1, we see that the detriment of a poor settlement with D1 will be borne by P. If settlements are to be encouraged, there must be the possibility of a benefit accruing to both parties who are negotiating a settlement. Under rule 3, P will either lose by settling with D1 or, if he is fortunate, will just recover the total amount of his loss. A good settlement with D1 would never increase his total recovery to an amount in excess of his loss.

Glanville Williams believes that it is unfair that an astute plaintiff should recover more than his loss and suggests that P's claim against D2 should be reduced by the greater of the amount received from D1 and the amount of D1's share of the liability to P.[5] This is our rule 3. He does concede that depriving the plaintiff of an advantageous settlement with D1 does operate as "a disincentive to the plaintiff to settle."[6] Other writers insist that a plaintiff will have little incentive to settle if he may frequently lose and can never gain by the settlement. For example, B.F. MacPherson states:[7]

> To maximize a plaintiff's incentive to settle, he must be allowed the full benefit of any settlement he might make, and his recovery must not be limited by an artificial rule designed to hold the plaintiff to "one recovery."

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5 Williams, p. 153.

6 Williams, p. 155.

7 Supra, footnote 4, at p. 244.

If the law is to encourage settlements, it must be accepted that daily there are plaintiffs who are settling on terms which are advantageous in relation to what they would get by going to court, just as there are plaintiffs who are settling on terms which are disadvantageous. The whole purpose of settlement is to convert an uncertainty into a certainty and to avoid lengthy and expensive litigation, the result of which may only be predictable within a wide range. We believe that the appropriate proposal flowing from the two criteria of fairness between wrongdoers and encouragement of settlements is to treat P's settlement with D1 as his agreement to the apportionment of liability between D1 and D2 according to their respective degrees of responsibility. Rule 2 should apply, i.e., P's recovery from D2 should be reduced by the amount of D1's share of the liability to P as subsequently determined by a court.

We believe that in at least some cases P would have an incentive to settle with D1 because:

(1) The settlement would give P some money in hand while avoiding the vicissitudes of litigation;

(2) If P is doubtful about being able to recover the whole amount from either defendant, it might be to his advantage to take part from D1 and take his chances for the other part from D2;

(3) P may think that his chances of obtaining a good recovery are best through negotiation with D1 followed by an action against D2 or subsequent negotiation with him.

D1 will have a clear incentive to settle because he will obtain relief from the whole claim by paying part of it and will not be dependent upon obtaining contribution from D2 in order to reduce his liability to the proportion of the loss for which he is at fault. We believe that it is fair to D1 to deny him any right of contribution against D2 because D1

has settled only for himself. D1 does not have any intention of compensating P for any more than for his own share. In addition, the settlement is consensual and D1 need not make it if he does not think that it is to his advantage to do so. We think that it is fair to D2 because D2's liability is restricted to the amount which he would have had to contribute to D1 if P had obtained a judgment against D1 for his whole claim. D2's liability is similarly restricted to the amount which would not be covered by contribution from D1 if P had obtained a judgment against D2, and he is relieved of the risk of having to pay the whole amount with a right of contribution from D1 which might be of dubious value.

RECOMMENDATION #13

> *We recommend that if D1 settles with P and obtains a release for himself but the settlement does not purport to settle P's claim in full, P's claim against D2 should be reduced by the amount of D1's share of the responsibility to P. Neither D1 nor D2 should have any right of contribution in the case of a settlement on the part of one defendant which purports to settle only his share of the loss.*
>
> (Draft Act, Section 14(2).)

VII. CONTRIBUTION WHERE PLAINTIFF'S CLAIM AGAINST WRONGDOER IS BARRED OR LIMITED BY STATUTE OR CONTRACT

(1) Lapse of Time Barring Claim

Contribution may be recovered "from any other tortfeasor who is or would, if sued, have been liable in respect of the same damage".[1] But what if D2 was liable for P's damage at one time but can no longer be sued by P? Does a right to contribution come into existence when D1 pays or when P enters judgment against D1? The situation in which D2 can no longer be sued by P can arise if different limitation periods apply, e.g., if D2 has a specially short limitation period or, under our proposals, if P's claim against one is in contract and against the other in tort. It can also arise if there is a special contract between P and D2 which bars an action by P against D2 after a certain time, or it may simply be that the time taken for the proceedings leading to settlement or judgment has extended past the limitation period.

There are a number of different fact situations. P may have sued D2 and failed, either because of the lapse of a statutory or contractual limitation period or for some other reason such as want of prosecution. P may have sued D1 either before or after the expiration of D2's limitation period. D1 may have taken steps to add D2 as a third party in an action brought by P, or he may have sued for contribution later. D1 may have settled with P, or judgment may have gone against him after trial. The law is settled in some cases but not in others.

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1 The Tort-Feasors Act, R.S.A. 1970, c. 365, s. 4(1)(c).

Section 60 of the Limitation of Actions Act[2] appears to allow D1 to bring D2 in as a third party in P's action even though the Act would bar P himself from suing D2. That provision covers a great number of cases but it does not touch limitation periods provided for in other statutes or in contracts, nor does it apply to cases in which D1 does not join D2 as a third party but later claims contribution in another action, or cases in which D1 settles with P and wants contribution.

The courts have sometimes held that D2 can be sued for contribution if he would have been liable to P at any time.[3] However, the decision of the Supreme Court of Canada in County of Parkland v. Stetar[4] makes that position untenable. In that case D1, the driver of one of the two cars involved in a collision, was 75% responsible for the collision, and D2, a municipal authority which had not maintained a traffic sign, was 25% responsible. P, the innocent driver of the second car, obtained a judgment against D1 for the whole of his damage, but his action against D2 was dismissed because he had not given the timely notice required by statute. The Supreme Court of Canada held that D1 was not entitled to recover contribution from D2. Mr. Justice Dickson in his judgment quoted with apparent approval a passage from the judgment of Lord Denning in Hart v. Hall & Pickles Ltd.[5] Lord Denning referred to the words in the English statute identical to those in The Tort-Feasors Act requiring that the tortfeasor from whom contribution is claimed "is, or

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2 R.S.A. 1970, c. 209.

3 Clayton v. McNeill's Taxi Limited, [1946] 3 W.W.R. 218 (Alta. S.C.); Harvey v. R.G. O'Dell Ltd., [1958] 2 Q.B. 78.

4 [1975] 2 S.C.R. 884.

5 [1968] 3 All E.R. 291 (C.A.).

would if sued, have been, liable in respect of the same damage" and then went on to say:[6]

> That is all I need read. Those words as construed by the House of Lords cover two situations: (i) where a tortfeasor has been sued and has been held liable; and (ii) where a tortfeasor has not been sued, but, if he had been sued, he would have been held liable. The words do not cover a third situation; (iii) where a person who is alleged to be a tortfeasor has been sued and has been held not liable. If he has been held not liable on the merits of the case, clearly he cannot be sued for contribution. If he has been saved from liability by reason of the Statute of Limitations, again he cannot be sued for contribution, see George Wimpey & Co. v. British Overseas Airways Corp.

Mr. Justice Dickson then proceeded to hold that Section 4(1)(c) of The Tort-Feasors Act prevails over Section 3(2) of The Contributory Negligence Act, which "might suggest a right of contribution and indemnification as between" D1 and D2. He said that "While The Contributory Negligence Act concerns generally the question of contributory negligence, The Tort-Feasors Act addresses itself more particularly to the relationship of tort-feasors."[7] The Stetar case was followed in Martin v. McNeely.[8] New Brunswick is another province which like Alberta has two statutes which provide for contribution.

In the Stetar case, as in the Wimpey case, P had sued D2 and lost. What if P had sued only D1? The underlying

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6 [1975] 2 S.C.R. 884 at p. 897 (The Emphasis was added by Mr. Justice Dickson.)

7 Ibid., p. 898.

8 (1975), 10 N.B.R. (2d) 473 (S.C.).

situation would be the same: P's action against D2 would still be barred by statute. The only distinction would be that no judgment would have been given, a distinction which appears to make no difference in principle. Neither of the two cases deals with the question whether or not D1 can claim contribution from D2 if P sues or settles only with D1 at a time when P could not sue D2, though the reasoning in the two cases suggests a negative answer to that question. This inference is also affirmed in Dominion Chain Co. v. Eastern Construction Co.[9] It was held that it is essential for the application of section 2(1) of the Negligence Act of Ontario, which is similar to sections 3(1) and (2) of the Alberta Contributory Negligence Act, that a person from whom contribution is sought would himself, if sued, have been liable to the person suffering damage. This interpretation was based on the Ontario section 3 which provides for contribution where a tortfeasor has settled and utilizes the words which appear in the Alberta Tort-Feasors Act: "Who is, or would if sued have been, liable in respect of the damage."

In British Columbia Hydro and Power Authority v. Kees van Westen[10] however, Mr. Justice Hutcheon allowed two alleged tortfeasors to join as a third party a municipal body which appears from the facts to have had a good limitations defence against P. The decision in terms dealt only with the limitation period affecting D1's claim to contribution once it arises, and it did not expressly deal with a limitation affecting P's claim against D2 which, it may be argued, prevents the right to contribution from arising in the first place.

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9 (1976), 68 D.L.R. (3d) 385 (Ont. C.A.). Aff'd. (sub nom.) Giffels Associates Ltd. v. Eastern Construction Co. (1978), 84 D.L.R. (3d) 344 (S.C.C.).

10 [1974] 3 W.W.R. 20 (B.C.S.C.).

In Scott v. Whitworth,[11] the Appellate Division, by a majority, allowed D1 to join the Administrator of the Motor Vehicle Accident Claims Act as a defendant although the Limitation of Actions Act would have barred P's action against the unknown driver in whose stead the Administrator was sued; but special legislation applied and the case does not appear relevant to the legal issues under discussion.

The Tort-Feasors Act provides that contribution may be recovered from another tortfeasor "who is or would, if sued, have been liable in respect of the same damage." It has been authoritatively established that no claim for contribution may be made by one tortfeasor against another "when that other has been sued by the injured party and held not liable."[12] This is so even where the action against D2 has not been dismissed on its merits but because of a technical defence. There is no equally authoritative decision to cover the situation where D1 has settled with P or where D2 has not been sued in the original action. The basic issue is the time at which to make the determination as to whether D2 "is or would if sued, have been liable in respect of the same damage." The answer by analogy appears to be when the plaintiff sues D1 or settles with D1. However, the weight of authority supports the proposition that a cause of action for contribution does not arise until the liability of the person seeking contribution has been determined. This leads to the anomalous result that when the cause of action for contribution arises, there may be no one liable to make contribution.

This anomaly was recently considered in MacKenzie v. Vance.[13]

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11 [1974] 6 W.W.R. 740 (Alta. App. Div.).

12 County of Parkland v. Stetar, [1975] 2 S.C.R. 884 at p. 896.

13 (1977), 74 D.L.R. (3d) 383 (N.S. App. Div.).

The plaintiff brought a negligence action against the defendant physician within the limitation period and the defendant sought leave to issue a third party notice for contribution against the hospital and nurse. MacDonald J.A. refused to accept the submission of counsel for the hospital and the nurse that since the plaintiff commenced his action against Dr. MacKenzie at a time when the plaintiff could not sue the hospital and nurse because of a one-year limitation period, Dr. MacKenzie could not third party the hospital and nurse. It was held that a claim for contribution only accrues when the defendant's liability has been ascertained. MacDonald J.A. after a careful review of much of the case law stated:[14]

> In my opinion, to hold that the proposed third parties can rely on the one-year limitation period would lead to the absurd result that the cause of action given by the Tortfeasors Act to the appellant would be barred before it accrued, not by anything done by the appellant Dr. MacKenzie but by the whim of the plaintiff in the conduct of his proceedings.

MacKenzie v. Vance did not, however, consider the Stetar case and is reconcilable with that case only on the basis that in Stetar, the plaintiff sued the municipality and lost, whereas in the Vance case, the plaintiff did not sue the hospital and nurse. The state of the law is thus unclear and unsatisfactory.

What should the law be? If the injured party P is to recover his entire loss, there appear to be three possible answers:

(1) To allow D1 to obtain contribution if D2 was liable to P at any time, whether or not his liability has become barred by lapse of time. That answer would give full effect

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14 Ibid., p. 395.

to the right of contribution, but at the expense of depriving D2 of the protection of his limitation period. Section 60 of the Limitation of Actions Act which has already been referred to adopts that answer in part as it says that that Act is no bar to third party proceedings against D2 for contribution.

(2) To allow recovery only if D2 is liable to P at the time at which P commences action against D1 or settles with him, i.e., to allow D2 the benefit of any limitation period accruing before but not after P sues or settles with D1.

(3) To allow recovery only if D2 was liable to P at the time D1 commenced action against D2 for contribution. That answer would give effect to D2's limitation period but would, in some circumstances deprive D1 of his right to contribution before the right had accrued. It might be considered harsh to deprive D1 of that right in a case in which P has not proceeded against D1 in time for the latter to bring his claim against D2 within D2's limitation period, or if P's action has been dismissed because he failed to prosecute his action against D2 properly; indeed in Aleman v. Blair and Canadian Sugar Factories Ltd. Mr. Justice Riley, though he felt bound to apply the Wimpey case and to deny contribution, thought it "rather grotesque that a plaintiff, by a mere mistake in procedure, can wipe out and defeat a third party's rights."[15]

A fourth choice would be to impose the burden on the injured party, P. If D2 is protected by a limitation period, P's claim against D1 could be restricted to the share of his damage which corresponds to the degree of D1's responsibility.

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15 (1963), 44 W.W.R. 530 (Alta. S.C.) at p. 534.

D1 would have no claim for contribution, and D2's limitation period would be respected. That answer would impose the burden on P, the party whose delay or error let D2 go free, and it would not penalize D1 for something which D1 could not control. The major objection is that it would impose in favour of a tortfeasor a penalty upon an innocent party or one who was simply contributorily negligent. The unfairness of this approach may be illustrated by considering the case of Stetar. In that case, the driver who had the right of way at the intersection knew that the other driver was partly or totally at fault and sued him in time. The driver who had the right of way may not have known that the crossroad warning sign which should have been facing the other driver was not in place and for this reason may have failed to give the County the required notice in writing. If this fourth approach were followed, the non-negligent driver in the Stetar case would have recovered only 75% of his loss as he would be identified with the fault of the County which was found to be 25%. If the non-negligent driver did not know that the crossroad warning sign was down in time to give the required notice the result of this approach seems less fair to the non-negligent driver than the decision of the Supreme Court of Canada which awarded him 100 per cent of his loss against the other driver. This approach is also contrary to our earlier decision that concurrent wrongdoers should continue to be jointly and severally liable.

The issue is difficult. As Morris L.J. in Littlewood v. George Wimpey & Co. Ltd. stated:[16]

> [If D2] can feel secure from claims after the lapse of a statutory period and after the safety curtain of time has been thought to have been lowered, it might be said to be contrary to

16 [1953] 2 All E.R. 915 (C.A.) at p. 925. Aff'd. (sub nom.), George Wimpey & Co. Ltd. v. B.O.A.C., [1955] A.C. 159 (H.L.).

> the intention of the legislature if this security can be indirectly assailed. On the other hand, it might be said to be inappropriate that the full burden should be carried by one tortfeasor when another shares his blame.

We do not think that the principle of unjust enrichment requires contribution in such a case because little or no benefit would be conferred on D2 through D1's payment of the obligation; we do not agree with Professor Weinrib's[17] suggestion to the contrary insofar as it is based on the proposition that a limitation period extinguishes only a remedy and not a right, because the burden of the unenforceable obligation on D2 is so slight as to be negligible.

We have, however, concluded along with Professor Weinrib that contribution must take precedence over security from suit because to hold otherwise would in many cases deprive D1 of a right to contribution without having a reasonable opportunity to assert it. This is therefore a situation in which the right to contribution must be allowed even though it cannot be premised on unjust enrichment but must be based simply on fairness as between defendants.

The law, however, should interfere with D2's claim to security from suit only to the extent necessary to give D1 a reasonable chance to assert his claim. Therefore, where P's claim against D2 is barred, we think that the way to achieve that result is to require D1 to assert his right in the action brought against him by P and to require him to issue and serve a third party notice within 6 months from service of the statement of claim upon him. D2 would then have 6 months to claim contribution from D3 by the same means and so on. Our proposal is similar to the effect of section 60

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17 (1976), 54 Can. Bar Rev. 338 at p. 348.

of the Limitation of Actions Act which we think has on the whole worked satisfactorily, but would guard against its abuse[18] by giving D1 only a limited time to exercise his rights under it. If D1 has commenced third party proceedings against D2 within 6 months of being served with the statement of claim, we believe that such third party proceedings for contribution should be continued even though D1 settles with P. We perceive no reason why D1 should have to insist on P's litigation being carried through to judgment in order to preserve a right of contribution against D2 where P's limitation period for bringing an action against D2 has expired.

It should be noted that after D2's limitation period has run, D1 will lose his right of contribution if he settles without being sued. This is an inherent problem in the proposal we are making, though only where different limitation periods apply to D1 and D2. However, we believe that D2 should be able to rely upon the protection provided to him by a statutory limitation period unless P commences an action against D1 after the lapse of the period within which P may sue D2.

RECOMMENDATION #14

> *We recommend that a wrongdoer D1 should be able to claim contribution from another wrongdoer D2 even though the claim of the injured party P against D2 is barred by a statutory limitation period or by a statutory provision for notice. However, in situations in which P's claim against D2 is barred, D1 may only claim contribution in the same action and may only do so by serving a third party notice on D2 within 6 months of having been served with the statement of claim. If D2 from whom D1 is seeking contribution also wishes to claim contribution he may also serve a third party notice on such persons within 6 months of having been served a third party notice. Notwithstanding the settlement by D1 of P's claim, the contribution proceedings commenced by a third party notice to D2 may be continued.*
>
> (Draft Act, section 16(3) and (4))

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18 Edmonton Flying Club v. Northward Aviation Ltd., [1977] 3 W.W.R. 7 (Alta. App. Div.).

(2) Contractual Limitations on Amount of Liability.

Contractual upper limits on liability are a source of difficulty. To illustrate this we will use an example similar to that employed by the English Law Commission:[19] P buys from D1 a car which has a latent defect in its electrical system. The contract limits D1's liability for breach of the contract to $1,000. As P is driving the car one night the headlights go out and the car runs into an obstruction in the highway that D2 has negligently left unlit, giving P a cause of action against D1 and D2 for damage to the car of $2,500, subject to the contractual limitation. As between themselves, the wrongful acts of D1 and D2 are equally responsible for the damage.

P will be entitled to a joint and several judgment against D1 and D2 for $1,000 and a judgment against D2 for $1,500, and we think that that should be the case even if the compensation principle, as will appear later, comes into conflict with the contribution principle. What should the responsibility of D1 and D2 as between themselves be? We think that the fairest of the several solutions to the problem is firstly to apportion the loss as if the limitation did not exist, and then, if necessary, to give effect to the limitation by reducing D1's responsibility in accordance with it, leaving D2 responsible for the balance. In the example given, D1 would initially appear to be responsible for $1,250, as between himself and D2, but in the second step would have his liability reduced to $1,000, to give effect to the limitation so that D2 would be left with responsibility for the remaining $1,500. This solution appears to us to be fairer on balance than the alternative of dividing responsibility between D1 and D2 only for the amount by which the claims against D1 and D2 overlap. In the example given the amount of overlap would be $1,000, and we do not think it fair to provide that D1 should be

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19 Law Com. No. 79, p. 21.

responsible for only half that amount, leaving D2 responsible for $2,000. This is the conclusion which the Law Commission reached and we concur in its conclusion.

If the example is changed so that both D1 and D2 are entitled to a reduction by reason of P's contributory negligence the same rules would apply to the reduced amount. If, however, D2 has such a partial defence and D1 does not, the situation is more complex. We think, as does the Law Commission,[20] that the approach should be similar. Assume the same facts, but assume also that as against D2, but not D1, P is 75% at fault. In the first step, D1 would be treated as responsible for one-half of P's damage, or $1,250, but would have his liability reduced to $1,000 by his contractual limitation. D2 would initially be treated as responsible for the other $1,250 but would have his liability reduced to $625 (25% of $2,500) by P's contributory negligence. P would recover a joint and several judgment for $625 and a further judgment against D1 for $375 for a total recovery of $1,000, being the higher of the two upper limits.

RECOMMENDATION #15

> *We recommend that where a concurrent wrongdoer has a defence which reduces his liability to the injured party, the amount of the damage attributed to him shall be the lesser of*
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> *(a) the amount determined by the court without regard to the defence, and*
>
> *(b) an amount equal to the amount of his liability to the injured party if properly sued.*
>
> (Draft Act, sections 11(1) &(2))

20 Ibid., p. 22.

VIII. THE CONTRIBUTION CLAIM

(1) Contribution in the Original Action or in a Separate Action

It has been held that the Negligence Act of Ontario contemplates that damages are to be litigated once only and that D1 cannot claim contribution from D2 in a second action.[1] Such a requirement would tend to avoid multiplicity of actions and it would achieve earlier finality and avoid limitations problems. On the other hand, a wrongdoer who failed to join another in the action brought by the injured party would lose his right to contribution. This might promote a tendency for parties to be brought into the original action unnecessarily. The wrongdoers might prefer to leave their position vis-a-vis one another to be determined after the plaintiff's claim has been adjudicated upon, as can now be done in Alberta under The Tort-Feasors Act. Although we recognize that there is a public policy issue involved which concerns the optimal or most effective use of time of the judiciary, of court rooms and of the legal profession itself, we believe that because of other considerations previously mentioned, there is not a sufficiently compelling reason to prohibit a separate action for contribution.

RECOMMENDATION #16

> *We recommend that a wrongdoer should continue to be able to claim contribution in a separate action brought for that purpose.*
>
> (Draft Act, Section 16(2)).

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1 Cohen v. McCord [1944] 4 D.L.R. 753 (Ont. C.A.); Rickwood v. Aylmer (1957) 8 D.L.R. (2d) 702 (Ont. C.A.).

(2) The Limitation Period for Contribution Claims

What limitation period should apply to a right to contribution once it comes into existence? That is a different question from one that we have already discussed, namely, the question whether the expiration of D2's limitation period should prevent the right from arising at all.

The Limitation of Actions Act does not mention a claim for contribution and it therefore seems likely that the claim is governed by section 5(g) and is six years. In George Wimpey & Co. Ltd. v. B.O.A.C., Viscount Simonds stated: "I am content to assume that the right to contribution arose, at any rate, not earlier than the date when the existence and amount of Wimpey's liability to Littlewood was ascertained by judgment and that the relevant period of limitation was six years."[2] The weight of authority supports the proposition that a cause of action for contribution does not arise until the liability of the tortfeasor who claims contribution has been determined.[3] By analogy, it would seem that a claim for contribution in the case of a settlement by D1 purporting to satisfy P's claim in full would only arise at the time of the making of the settlement. A period of six years from settlement or judgment appears to us to be inappropriately long. We believe that the law should require that a claim for contribution be brought within the limitation period for the original wrong as between P and D2, except in the case in which D1 brings D2 into the original action by way of a third party notice as provided in Recommendation #14.

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2 [1955] A.C. 169 (H.L.) at p. 177.

3 Harvey v. R.G. O'Dell Ltd., [1958] 1 All E.R. 657 (Q.B.D.), Brambles Construction Pty. Ltd. v. Helmers (1965-66), 114 C.L.R. 213, B.C. Hydro and Power Authority v. van Westen [1974] 3 W.W.R. 20 (B.C.S.C.) and Martin v. McNeely (1975) 10 N.B.R. (2d) 473 (S.C.).

If the original action is in tort, the two year limitation period will effectively mean that most contribution claims arising out of a tort will have to be pursued in the original action. However, where the original cause of action is in contract, the six year period will permit scope for the bringing of a separate action for contribution.

RECOMMENDATION #17

> *We recommend that the limitation period for which a claim of contribution can be made in a separate action should be the limitation period for the original wrong as between the person suffering damage and the person or persons from whom contribution is being sought.*
>
> (Draft Act, Section 16(2)).

(3) Double Jeopardy

We have concluded that even if P's claim against D2 is statute-barred D1 may claim contribution against D2 in the same action. Thus, although P may be nonsuited against D2 because his action is time-barred, D1 may claim contribution from D2 in the same action. However, if D2 has succeeded in defeating the plaintiff's claim after a full hearing on the merits, we agree with the Law Commission that D1 should be bound by the judgment in D2's favour. We agree that it is preferable for D1 to lose his claim for contribution than that D2 should be required to defend himself twice. The Law Commission also states that a hearing on the merits should not include "dismissal for want of prosecution, or a judgment collusively obtained or judgment on a limitation point."[4] We agree with this position.

RECOMMENDATION #18

> *We recommend that if the plaintiff's claim against D2 has been dismissed on the merits by a court D1 should have no claim for contribution against D2.*
>
> (Draft Act, Section 15)

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4 Law Com. No. 79, p. 19.

(4) Standard for the Determination of the Share for which Contribution may be Obtained

The contribution which one concurrent tortfeasor D1 can recover from another, D2, under section 3(2) of The Contributory Negligence Act is "in the degree in which they are respectively found to have been at fault." The contribution which D1 can recover from D2 under section 4(2) of The Tort-Feasors Act is "such amount as the court may find to be just and equitable having regard to the extent of that person's [D2's] responsibility for the damage." Further flexibility is provided by section 4(3) of The Tort-Feasors Act which empowers the court to exempt any person from making contribution and to direct that the contribution shall be a complete indemnity. It does not seem appropriate that the standard by which the amount of contribution is determined should be different merely because contribution is sought under one statute rather than another. Since County of Parkland v. Stetar,[5] it can probably be inferred that if there is any conflict in the two Acts with regard to contribution, it is The Tort-Feasors Act which must prevail and that the standard prescribed by it must be applied. We, however, are not so much concerned with what the standard is but with what it ought to be.

It can be argued that the concept of fault is more causation oriented while the concept of responsibility looks to a greater extent to both causation and culpability or blameworthiness. We must now consider which is more appropriate, bearing in mind that we have recommended that the statutory right of contribution should be extended to such diverse wrongs as negligence, intentional torts, torts of strict liability, and breaches of contract. In cases of breach of contract,

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5 [1975] 2 S.C.R. 884.

there may be very complex situations. For example, D1, the builder, may knowingly have departed from the plans or he may not, and D2, the architect may have authorized or perceived the departure or he may not. The same is true in tort. D1's wrongful conduct contributes to the damage to the same degree whether it is negligent or intentional but his culpability in relation to that of a negligent D2 may be very different. These considerations suggest that the law should not merely direct the court to look at causation. There is, however, force to the criticism that the "just and equitable" standard is too vague and confers too much untrammeled discretion upon the court. We also have some reluctance to abandon the word "fault", upon which contribution has long been based in most Canadian provinces.

While it may be that the courts could find sufficient flexibility in the words of the Contributory Negligence Act, we have concluded that the law should use language which points to a consideration of both causation and culpability. We accordingly recommend that the amount of contribution should be determined by having regard to the extent of that person's responsibility for the damage. Section 4(3) of The Tort-Feasors Act, however, which deals with the court's power of exemption and its power to direct that the contribution may be a complete indemnity, appears to us to be superfluous and we think that it should be deleted.

RECOMMENDATION #19

> *We recommend that the amount of contribution should be determined by having regard to the wrongdoer's responsibility for the damage. We also recommend that section 4(3) of The Tort-Feasors Act be deleted on the basis that it is superfluous.*
>
> (Draft Act, Section 11(1)).

(5) Indemnity and Contribution

Under section 4(1)(c) of The Tort-Feasors Act, no person is entitled to contribution "from any person entitled to be indemnified by him". A master may be entitled to be indemnified by a servant.[6]

In Yule v. Parmley and Parmley,[7] the British Columbia Court of Appeal held that a dentist was entitled to indemnity from a doctor who negligently requested him to extract a tooth. Although the Supreme Court of Canada allowed the appeal and awarded contribution instead of indemnity, it did so on the grounds that there was no request by the doctor which justified the dentist in removing the tooth.[8] In McFall and McFall v. Vancouver Exhibition Association[9] D2, a contractor, was held liable to indemnify D1, an occupier, against a claim for damage to P who fell at night over a pile of gravel negligently left by D2 on D1's premises. Chief Justice McDonald suggested that there is a general rule that if D2's negligence consists in commission and D1's in omission, D1 is entitled to indemnity. However, Glanville Williams[10] does not think that there is a general rule to that effect though under The Tort-Feasors Act the court may take notice of the distinction. The McFall case involved a contract of indemnity by D2 which Chief Justice McDonald thought normally would not be enforceable by one joint tortfeasor against another. Glanville Williams also disagrees with that proposition. In his view, the courts will probably continue to award indemnity in most

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6 Finnegan v. Riley [1939] 4 D.L.R. 434 (Ont. C.A.); Sleeman and Sleeman v. Foothills School Division [1946] 1 W.W.R. 145 (Alta. S.C.).

7 [1945] 2 D.L.R. 316 (B.C.C.A.).

8 [1945] S.C.R. 635.

9 [1943] 2 W.W.R. 225 (B.C.C.A.).

10 Williams, p. 147.

cases where they would have awarded it at common law prior to the statute; they may award indemnity to the extent of his profit against a tortfeasor who has received the whole benefit from the tort; they may award indemnity against a tortfeasor guilty of misfeasance where the tortfeasor claiming indemnity was guilty merely of non-feasance; and they will award indemnity under a contract where the act is not manifestly tortious. Dr. Williams suggests that D1 who has committed a breach of strict duty without negligence should be able to recover indemnity from D2 who is negligent, but this is only a suggestion.

There has been debate as to whether a master should continue to be entitled to indemnity from a servant whose negligence imposes upon the master vicarious liability to an injured third party. Strong criticism has been directed at Lister v. Romford Ice & Cold Storage Co.,[11] in part because it was an insurance company, claiming to be subrogated to the employer's rights, which successfully sued the servant in the employer's name and against the employer's wishes. It is not, however, within the scope of this project to deal with that issue and we will confine our consideration to how rights of indemnity which exist should be dealt with by the statute.

Section 4(1)(c) of The Tort-Feasors Act provides that D1 cannot obtain contribution from D2 if D2 is entitled to be indemnified by D1. It appears that the indemnity provision in The Tort-Feasors Act is based on sound policy and has not caused difficulty. The English Law Revision Committee[12] recommended that it be continued, as did the Law Commission.[13]

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11 [1957] A.C. 555.

12 Third Interim Report, (Cmd. 4637, 1934), p. 7.

13 Law Com. No. 79, p. 34.

The provision is, however, excluded from the Civil Liability (Contribution) Act 1978 which in the main has implemented the recommendations of the Law Commission.

RECOMMENDATION #20

> *We recommend that the statute continue to recognize rights of indemnity and that no contribution should be recoverable from a person who is entitled under the present law to be indemnified by the person seeking contribution.*
>
> (Draft Act, Section 12)

(6) Enforcement of a Judgment for Contribution

If the person who has suffered the damage has been fully compensated, a person who has a contribution judgment and who has satisfied the primary obligation should be entitled to enforce his judgment. However, where the person who has suffered the damage has not been fully compensated, what are the contribution rights of concurrent wrongdoers? Should a concurrent wrongdoer be entitled to contribution only to the extent that he has paid more than his share of the loss as determined by his degree of responsibility or should he be entitled to contribution toward whatever he has paid to the person who suffered the damage? Suppose that P's damages are $100 and that D1 and D2 are held jointly and severally liable and are also found to be equally responsible. If D1 pays $50 to P, does D1 have a right to obtain contribution from D2 to the extent of $25 or can he obtain contribution only for any payment made by him in excess of $50? The question does not appear to have been litigated.

We have taken the position that contribution is generally based upon unjust enrichment. It can be argued that no benefit is conferred on D2 until D1 has paid more than his share of the liability as determined by his degree of responsibility. Goff and Jones state that "A right of contribution arises whenever a person, who owes with another a duty to a third party and is liable with that other to a common demand discharges more than his proportionate share of that duty."[14] However, it could be argued, since concurrent wrongdoers are made jointly and severally liable, that any payment by D1 confers a benefit on D2 because D2 can no longer be held liable for the whole loss. We have concluded that a right to enforce contribution by a concurrent wrongdoer for his own benefit should only arise when he has discharged more than his share of the liability as determined by his degree of responsibility.

We think that it would be unfortunate were the enforcement of contribution rights to increase the problem of the person who has suffered the damage in enforcing the primary judgment. We do believe, however, that there is a need to protect concurrent wrongdoers from being prejudiced by favouritism or delay by the person who has obtained a judgment against them. For example, it will be assumed that P has obtained a joint and several judgment against D1 and D2 and that D1 and D2 have been found equally responsible. D1 pays half the amount of the judgment which P has obtained. P is either friendly toward D2 or is simply tardy in enforcing his judgment against D2 for the other half. D2 either dissipates his assets or leaves the jurisdiction and P levies execution upon D1 for the unsatisfied half of his judgment. D1 can now enforce his contribution rights against D2 but these rights are now worthless as a result of P's delay.

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14 The Law of Restitution (1966), p. 173.

It can be argued that D1, in the previous example, could have paid the total amount of P's judgment and as a result D1 could have immediately levied execution on his contribution judgment against D2 for 50% of the total damages owed to P. However, it does not seem fair that D1 who has been held 50% responsible should have to pay out initially 100% in order that his right of contribution against D2 is not prejudiced by P's delay. Consequently, we recommend that after D1 pays his 50% share, D1, on the order of a judge, should be able to direct the sheriff against D2 on D1's contribution judgment in order that the other 50% should be collected immediately but that proceeds of the execution should be paid into court to the credit of P. This provides a method by which D1, by only paying the share for which he has been held responsible, can protect himself against being compelled to satisfy the whole judgment at a time when D2 may not have the assets to satisfy D1's contribution judgment.

RECOMMENDATION #21

> *We recommend that concurrent wrongdoers should not be able to issue execution on a contribution judgment until the person suffering the damage has been fully compensated but that, on an order by a judge, a concurrent wrongdoer, having satisfied the share of the liability for which he has been held responsible, may issue execution on a contribution judgment with the money being paid into court to the credit of the person who has suffered the damage or such other person as the judge may order.*
>
> (Draft Act, Section 17)

(7) Risk of Insolvency

If the party who suffers loss, P, recovers judgment against concurrent wrongdoers D1, D2 and D3, and requires and obtains payment from D1 alone, D1 is entitled to contribution from D2 and D3. We will suppose that D3 is judgment-proof. It appears clear that some mechanism must be provided for the distribution of the burden caused by the fact that one of the wrongdoers is without assets. Fairness requires that the burden should not be imposed upon D1 alone, and that as between themselves, D1 and D2 should share the amount which cannot be recovered from D3 in the ratio in which D1's share of the responsibility and D2's share of the responsibility bear to each other. The present law on the subject is not clear.

There appear to be several alternatives to the problem of distributing the additional burden caused by D3's insolvency. One is Glanville Williams' proposal of primary and contingent judgments. We will assume that D1, D2 and D3 are equally responsible for P's loss and that P has recovered the total damage award from D1. Glanville Williams[15] suggests that in a contribution action, D1 should be given primary judgments against each of D2 and D3 for one-third of the award and a contingent judgment against D2 for one-half of D3's share should it not be realized from D3 and also a contingent judgment against D3 for one-half of D2's share should it not be realized from D2. The contingent judgment against one is only to be made absolute on application to the court and on proof that recovery of the primary judgment against the other is not reasonably possible. That proposal, while logical, seems to us to require a complex set of judgments, the need for which might well be overlooked. Another alterna-

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15 Williams, pp. 171-2.

tive contained in the Uniform Comparative Fault Act of the American National Conference of Commissioners on Uniform State Laws is:[16]

> Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

We believe that this is generally a suitable way of dealing with the problem when a wrongdoer's share may not be collectible. We think, however, that there should be no time limit placed upon the making of the application. We propose that on application at the time a judgment is rendered for contribution, or thereafter, the court may make such further orders as are necessary to distribute the share of a wrongdoer, from whom collection cannot be effected, among the remaining wrongdoers in the ratio of their respective liabilities. Our conclusion is that it is preferable to leave the court free to make an order upon whatever evidence of insolvency or uncollectibility it thinks necessary.

It can be argued that a plaintiff who is himself at fault, that is, who has been contributorily negligent, should share in the loss occasioned by D3's insolvency, and, indeed, the provision quoted above from Uniform Comparative Fault Act does have that effect. Our previous recommendation for joint and several liability even where contributory negligence exists, would, however, preclude such a provision. We do not think that the plaintiff should share the loss.

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16 Uniform Comparative Fault Act, s. 2(d).

RECOMMENDATION #22

> *We recommend that if the share of one wrongdoer, D3, cannot be realized, D1, on proof that reasonable effort has been made to collect the share of D3, should be able to recover the amount which cannot be collected from D3 in the ratio in which D1's share of the responsibility and D2's share of the responsibility bear to each other. We also recommend that even if P is contributorily negligent this should not affect the sharing of the amount which cannot be collected from one of the wrongdoers.*
>
> (Draft Act, Section 13)

(8) Imputed Fault

Vicarious liability is not mentioned in The Contributory Negligence Act nor in The Tort-Feasors Act, but a person vicariously liable for a tort, such as an employer or owner of a car, obtains the benefit of any defence of contributory negligence available to the employee or driver who is at fault. However, in Hillburn v. Lynn, Sprecher and Rainey,[17] Mr. Justice Egbert held that the owner of a car, though vicariously liable for the fault of the driver, was not "at fault" within the meaning of The Contributory Negligence Act and could not take advantage of the contribution provisions in it but must rather bring proceedings for contribution under The Tort-Feasors Act. Although the decision appears to be an exception to the general trend of authority, the problem of interpretation should be resolved by making it clear that a concurrent wrongdoer includes a person who is vicariously liable for the wrongful act of another.

RECOMMENDATION #23

> *We recommend that the statute should be clarified so that a concurrent wrongdoer includes a person who is vicariously liable for the wrongful act of another.*
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> (Draft Act, Section 1(a))

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17 (1955), 17 W.W.R. 15 (Alta. S.C.).

IX. COSTS

(1) The Non-Negligent Plaintiff

The general practice is to treat an innocent plaintiff's costs in the same way as damages so that the responsibility of the defendants for costs is in proportion to their respective degrees of responsibility to make good the plaintiff's loss. That is the effect of the contributory negligence legislation of five of the provinces (Saskatchewan, Newfoundland, British Columbia, New Brunswick, and Prince Edward Island). In Lindsay v. Gartrell,[1] D1 was found 86 per cent at fault and D2, 14 per cent at fault and the two defendants were held liable for the plaintiff's taxed costs corresponding to their respective degrees of fault. This is the method normally utilized in Alberta where there is no provision relating to costs in The Contributory Negligence Act. It is also the mode in which costs are ordinarily awarded in Manitoba, Nova Scotia and Ontario where the legislative provision relating to costs specifically refers only to cases in which the plaintiff has been negligent. We do not believe there is any reason to suggest that the practice should be otherwise and we see no need for the statute to say anything in regard to costs. Rule 601 of the Alberta Rules of Court provides the court with discretion in regard to costs.

RECOMMENDATION #24

> *We recommend that the statute should continue to remain silent as to the costs of a plaintiff who has not been contributorily negligent with the result that the current practice of awarding costs to the plaintiff against concurrent wrongdoers would normally be in proportion to their respective liability to make good the damage or loss.*

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1 (1970), 74 W.W.R. 156 (B.C.S.C.).

(2) The Contributorily Negligent Plaintiff

A more difficult issue arises concerning the distribution of costs of the action when the plaintiff has been partly at fault. There are at least three alternatives available:

(1) The first is to award the plaintiff full costs of the action, based on the amount recovered, even though he is partly at fault and receives a reduced amount of damages. This is the common practice in Alberta, where Rule 601 of the Alberta Rules of Court confers a broad discretion on the court. Thus, a contributorily negligent P is not usually held responsible for a share of the costs of D1 and D2 and his costs are not reduced except indirectly to the extent that his claim is reduced by contributory negligence to a lower column.

(2) The second is to reduce the plaintiff's costs by the degree of fault. This approach can be a rigid one or discretion can be given to the court. The Tort-feasors and Contributory Negligence Act of Manitoba[2] provides that "where the damages are occasioned by the negligence of more than one party, the court may direct that the plaintiff shall bear some portion of the costs if the circumstances render this just." Section 7(1) of New Brunswick's Contributory Negligence Act,[3] section 6 of Nova Scotia's Contributory Negligence Act,[4] and section 8 of Ontario's Negligence Act,[5] are provisions substantially the same as that of Manitoba. Thus in Manitoba, New Brunswick, Nova Scotia and Ontario, the court is empowered to make a reduction because of the

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2 R.S.M. 1970, c. T90, s. 8.

3 R.S.N.B. 1973, c. C-19.

4 R.S.N.S. 1967, c. 54.

5 R.S.O. 1970, c. 296.

plaintiff's contributory negligence "if the circumstances render this just." This phrase has been said to have been applied with little consistency and it appears to provide for reduction only in special circumstances the nature of which has not been judicially determined.[6] In Bering v. S.S. Stevenson & Co.,[7] Hamilton J. initially awarded the plaintiff 75 per cent of her damages and 75 per cent of her costs. Before formal judgment was entered the judge was asked to reconsider the costs. As the only reason he had for limiting her costs was her contributory negligence, he reconsidered and awarded the plaintiff full costs.

(3) The third alternative is to award the plaintiff the portion of his costs that corresponds to the defendant's degree of fault, and to award the defendant that portion of his costs which correspond to the plaintiff's degree of fault. British Columbia in its Contributory Negligence Act,[8] provides that "Unless the Judge otherwise directs, liability for costs of the parties to every action shall be in the same proportion as their respective liability to make good the damage or loss; . . . " Newfoundland's section 10 of The Contributory Negligence Act,[9] and Saskatchewan's section 12 of The Contributory Negligence Act,[10] are identical to the provision of British Columbia. Fallis v. Lewis,[11] is an example of the apportioning of costs as provided for in the statute.

The third alternative may appear to be the most equitable in principle but it is complex and we think that it can be unfair. However, the first alternative will, in the usual case, re-

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6 See Carlson v. Chochinov, [1948] 4 D.L.R. 556 (Man. C.A.).

7 [1977] 2 W.W.R. 374 (Man. Q.B.).

8 R.S.B.C. 1960, c. 74, s. 4.

9 R.S.N. 1970, c. 61.

10 R.S.S. 1965, c. 91.

11 [1948] 2 D.L.R. 620 (Sask. K.B.).

cognize the actual success of the parties, and it seems to us to be simple and expedient. We believe that Rule 601 is working satisfactorily and we see no reason to advocate any change.

RECOMMENDATION #25

We recommend that the statute should continue to remain silent about the awarding of costs and that this matter should continue to be at the discretion of the court under Rule 601 of the Alberta Rules of Court.

X. SPECIAL RELATIONSHIPS

(1) Loss of Consortium

As part of our Family Law Project we will consider whether the action for loss of consortium should be abolished. In the meantime, we will assume that it continues in existence.

If one spouse, P, sues for loss of consortium by reason of injury to the other, should the negligence of the other be imputed to P? It is presently unclear whether P's action is to be treated as derivative (in which case the damages would be reduced) or as independent (in which case they would not). Canadian authority is divided, although it is predominantly in favour of treating it as a derivative action. In Enridge v. Copp[1] Mr. Justice Aikins thought that the theory most in line with the Canadian authorities is that the action is derivative. Since the authorities are thoroughly reviewed in that judgment, they need not be referred to here. He was not persuaded by the decision in two cases holding that the action was independent, namely Mallett v. Dunn,[2] and Macdonald & Macdonald v. McNeil.[3] He concluded that the mainstream of Canadian authority "supports the theory that in Canada, as in the United States, the action per quod is to be regarded as a derivative or dependent action."[4] In Trapp and The Queen v. Hnatuk[5] Urie J. in delivering the judgment of the Federal Court of Appeal reviewed the decisions and reaffirmed that such actions are derivative and that the claim of a father or husband is dependent upon the right of his child or wife to recover damages. The case, however, only involved the claim

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1 (1966), 57 D.L.R. (2d) 239 (B.C.S.C.).

2 [1949] 1 All E.R. 973 (K.B.D.).

3 [1953] 1 D.L.R. 755 (N.S.S.C.).

4 Supra, footnote 1, at p. 253.

5 (1977) 71 D.L.R. (3d) 63 (Fed. C.A.).

of the father for special damages incurred as a result of injury to his son caused by a vehicle owned by the Crown and operated by an R.C.M.P. constable. As the child, age 7, was found to have been 50 per cent at fault, the father's claim for special damages was reduced by half.

The case of Young and Young v. Otto,[6] however, is significant in Alberta in that the court reduced the husband's damages despite section 35(2) of the Domestic Relations Act which provides that the right to bring the action for loss of consortium is "in addition to, and independent of" the injured spouse's action. The section was not mentioned in the judgment. Young and Young v. Otto was cited in Mallett v. Dunn.[7] In the Mallett case, the husband claimed for special damages in respect of injuries sustained by his wife through the defendant's negligent operation of a motor vehicle. The wife had been contributorily negligent. Hillbery J. considered that The Law Reform (Contributory Negligence) Act 1945 was not applicable and the husband either succeeded as to all his claim or totally failed. This determination depended upon the true basis of the husband's claim, and the judge considered the husband's claim to be genuinely independent. He stated: "It must be remembered that it was not the wife who gave her husband the right to consortium. It was the status of marriage which gave him that right. The husband did not derive his cause of action from his wife, but from his marriage."[8]

There is a very definite cleavage of judicial opinion, Canadian and American case law being predominantly in favour

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6 [1947] 2 W.W.R. 950 (Alta. S.C.).

7 [1949] 1 All E.R. 973 (K.B.D.).

8 Ibid., p. 976.

of the position that the action is derivative, while both English and Australian case law take the view that it is an independent action. Some legal scholars appear to favour regarding the action as independent.[9]

Logic might suggest that P should be able to recover the whole amount from D1 who would have a right to contribution from the injured spouse. That would ensure full compensation to P and would apparently place the responsibility where it belongs. However, though we will in another report consider the abolition of inter-spousal immunity in tort, we do not think that the law should encourage either a direct or an indirect action by one spouse against the other for loss of consortium, nor do we think that the law should regard the injured spouse as a wrongdoer vis-a-vis the plaintiff spouse. We therefore reject that alternative.

An alternative would be to allow P to recover in full from D and to deny D a right to contribution against the injured spouse. A number of legal scholars argue for this position and Fleming states that: "This position has of course the merit of aiding recovery and thus helping to distribute losses, even if it happens to be rather at odds with the contemporary bias against relational claims . . ."[10] That proposition appears to assume that D will be insured, and, while that will usually be true in automobile accident cases, it is by no means the rule in other torts. If distribution of loss is an objective to be achieved, we think that it should be achieved by direct measures. We think that this alternative would be unfair to D and in conflict with the principle that one of two

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9 MacIntyre, "The Rationale of Imputed Negligence" (1944), 5 U.T.L.J. 368, p. 382; Lloyd, (1949), 27 Can. Bar Rev. 710; Williams, p. 456.

10 The Law of Torts (5th ed., 1977) at p. 645.

persons whose fault has contributed to the loss should not, as between them, have to bear the whole of the loss. We therefore reject that alternative.

We think that the action should be treated as derivative and that P's claim should be reduced in proportion to the contributory negligence of the injured spouse. That will leave P without compensation for the amount of the reduction, but we think that result justifiable and preferable to either of the alternatives we have described.

RECOMMENDATION #26

> *We recommend that the action for loss of consortium should continue to be regarded as a derivative action with a reduction in the award of damages in accordance with the injured spouse's degree of negligence. In order to clarify the law in Alberta, we also recommend that section 35(2) of The Domestic Relations Act, R.S.A. 1970, as amended by S.A. 1973, c. 61 should be modified so that the inference cannot be drawn that the action for loss of consortium is independent and not derivative.*
>
> (Draft Act, Sections 6(3) & 18)

(2) Loss of Services

In Attorney-General of Canada v. Jackson[11] the Crown in the right of the Dominion was suing for wages paid and hospital services furnished to a soldier who was injured by the negligent driving of the defendant. The soldier was on leave and was travelling to his home as a guest passenger of the defendant. The Motor Vehicle Act of New Brunswick had abrogated any right of action by a gratuitous passenger. Mr. Justice Rand stated:[12]

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11 [1946] S.C.R. 489.

12 Ibid., p. 492.

> The act here, in relation to the servant, is not in law culpable and unless we import into the right given to the master the conception of an independent duty running to him in addition to the duty to the servant- an introduction which, in view of our ignorance of the principle underlying the rule and the comparative modernity of the concept of duty in negligence, I think wholly unwarranted-we must conclude that it is the quality of the act vis-a-vis the servant which determines its significance for the purpose of liability to the master.

The Supreme Court has thus adopted the view that the action per quod servitium amisit is a derivative action. Therefore it would appear to follow that if the servant is not deprived of a cause of action but has been contributorily negligent, the servant's contributory negligence will be imputed to the master and the master's recovery will be reduced accordingly.

Professor Dennis Lloyd, however, contends that it is an independent cause of action and he states:[13]

> The master's complaint is that the defendant's wrongful act has deprived him of services to which he was entitled and it is difficult to see, save in one case...why it should be open to the defendant to say that the servant was not himself free from blame.

The exceptional case is the situation in which the servant is acting in the course of his employment and then the employee's conduct according to Professor Lloyd, should be identified with his employer.

If the employer's cause of action is totally independent, it would appear that the defendant who injured the employee and the contributorily negligent employee are both concurrent tortfeasors vis-a-vis the employer. On this assumption it would appear that the employer should be able to recover in its entirety the damage sustained for loss of the employee's services from the defendant

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13 (1949), 27 Can. Bar Rev. 710 at p. 713.

who injured the employee. However, it would appear that the defendant would have a right of contribution against the contributorily negligent employee as both would be concurrent tortfeasors in regard to the plaintiff employer.

It seems unlikely that an employer would sue an injured employee for loss of services caused by the injury. However, a person who has negligently injured an employee and has been held liable for all of the loss sustained by the employer is likely to seek contribution from the contributorily negligent employee. We are therefore of the opinion that an action which is generally regarded as anachronistic will best be confined by continuing to regard it as a derivative or a dependent action. As Lord Sumner in Admiralty Commissioners v. S.S. Amerika stated: "what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed but that it should exist at all."[14] Mr. Justice Kellock in Attorney-General of Canada v. Jackson stated: "It is important to keep in mind that the cause of action here in question is an anomalous one, having arisen at a time when the relationship of master and servant was based on status and that it is illogical in a society based on contractual obligation."[15] He also goes on to state that: "The cause of action, therefore, is not to be extended beyond limits already marked out, however logical it might be to do so."[16]

We therefore conclude that a claim for loss of services should continue to be regarded as a derivative or dependent action and that the employer should have his claim for loss of services reduced by reason of the contributory negligence, if any, of his employee. We think that this is preferable to regarding it as a totally independent action because we

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14 [1917] A.C. 38 at p. 60.

15 [1946] S.C.R. 489 at p. 497.

16 Ibid.

believe that if this approach is adopted, then fairness to the defendant requires that he should have a right of contribution against the contributorily negligent employee. This would extend a cause of action which is regarded as anomalous and consequently we are not in favour of treating it as a totally independent action.

RECOMMENDATION #27

> *We recommend that a claim for loss of service should continue to be regarded as a derivative or dependent action and the claim should be reduced in accordance with the contributory negligence of the injured employee.*
>
> (Draft Act, Section 6(3).

(3) Medical or Hospital Expenses Incurred by a Parent or Spouse

A parent or spouse may sue for medical and hospital expenses resulting from an injury to the child or to the other spouse. There is perhaps somewhat more controversy as to whether this cause of action is independent or derivative. In Wasney v. Jurazsky[17] a child aged twelve was injured when a rifle was unintentionally fired and the child sustained injuries. The defendant had sold ammunition to the child in violation of a provision of the Criminal Code. At trial, both the child's own action for injuries sustained and the mother's action to recover hospital and medical expense were dismissed because of the child's contributory negligence, there being no apportionment legislation in force in Manitoba at the time. On appeal, the majority of the court held that the mother had a right to recover hospital and medical expenses. Prendergast

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17 [1933] 1 D.L.R. 616 (Man. C.A.).

C.J.M. stated:[18]

> Where the parent's action is for loss of services, the answer seems to be that what he is seeking to recover in the shape of damages, being the child's lost capacity to work, has been (partly at least) destroyed by the child himself.
>
> But the present case seems to me to be distinguishable, in that the foundation of the mother's claim is that there has been thrown upon her the obligation of incurring expense to have her child's wounds attended to, an obligation which is legally binding on her even if the child was also negligent.
>
> I think it is enough for her to be able to say that if it had not been for the defendant's selling of the cartridges, such obligation would not have been thrown upon her.

This decision was in part based on an obiter dictum of Anglin C.J.C. in McLaughlin v. Long in which he stated:[19]

> There is recent judicial authority for the view that contributory negligence of the infant plaintiff in the case at bar would at common law preclude the father's recovery upon his own claim (McKittrick v. Byers, [1926] 1 D.L.R. 342, 58 O.L.R. 158; Knowlton v. Hydro-Elec. P. Com'n Ont., [1926] 1 D.L.R. 217, 58 D.L.R. 80). In these cases the position of the father is assimilated to that of a master who sues for tortious injury to his servant. That analogy is perhaps questionable and there is not a little to be said for the view that instead of negligence of the infant plaintiff being attributable to his father so as to bar his recovery, the former and the defendants are quoad the father rather in the position of joint tortfeasors.

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18 Ibid., p. 618.

19 [1927] S.C.R. 303 at p. 311-312.

In Oliver Blais Co. Ltd. v. Yachuk,[20] a boy of 9 was severely burned when lighting bulrushes with gasoline obtained from the defendant company. Mr. Justice Estey accepted the trial judge's finding that the boy was contributorily negligent. With regard to the father's claim for medical expenses, Mr. Justice Estey stated:[21]

> While the father was in no way associated with the events that inflicted the injury suffered by the infant plaintiff, it must not be overlooked that, although a separate and distinct cause of action, his has been regarded as a consequential or dependent action and treated upon much the same basis as the infant. The contributory negligence of the latter was a bar to his recovery at common law. It seems, therefore to follow that under The Negligence Act the principle that his action is affected by the negligence of the infant should be recognized and his damages therefore apportioned on the same basis as that of the infant.

This case cannot perhaps be regarded as definitively establishing that the action is a derivative one since only Hudson, J. concurred with Estey J. Kerwin J. with whom Rinfret C.J.C. concurred found that the defendant was not negligent and Rand J. found the defendant to be negligent and the child not contributorily negligent. Thus the majority did not have to consider the issue of whether the action was derivative or independent. The decision was reversed by the Privy Council but on the basis that the child was not contributorily negligent.[22]

Recently, Urie J. in Trapp and The Queen v. Hnatuk[23] stated after a review of the decisions of the Supreme Court of Canada that it was the Federal Court of Appeal's opinion that the Supreme Court regards "actions by a parent to recover damages sustained by him as a result of a tort against his child as derivative or dependent in nature."[24]

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20 [1946] S.C.R. 1.

21 Ibid., p. 17.

22 [1949] 2 W.W.R. 764 (P.C.).

23 (1977), 71 D.L.R. (3d) 63.

24 Ibid., p. 71.

We recognize that there may be more justification for regarding an action by a parent or spouse for medical expenses incurred for a child or by the other spouse as an independent cause of action as compared to an action for loss of consortium or loss of services. Nevertheless, we still believe that it is desirable to treat this action as derivative. It may appear somewhat harsh that the recovery by the parent for medical expenses should be reduced in proportion to the contributory negligence of the child. However, as long as fault is the basis of tort recovery, the contributory negligence of the child must be inserted into the equation at some point in order that the defendant may be treated fairly. If the parent is to be entitled to recover fully for medical expenses incurred for the child who has been contributorily negligent, we believe that the defendant should have a right to contribution against the child and we are not persuaded that this would be advantageous. The problem has been greatly diminished by the introduction of comprehensive health care programs in Canada.

RECOMMENDATION #28

> *We recommend that the claim of a parent or spouse for medical and hospital expenses incurred for a child or the other spouse should be reduced in accordance with the contributory negligence of the child or spouse.*
>
> (Draft Act, Section 6(3))

(4) Fatal Accidents Act

The Fatal Accidents Act[25] gives a cause of action for the benefit of dependants of the deceased if that person would have been entitled to recover if death had not ensued. In

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25 R.S.A. 1970, c. 138, s. 3.

Littley v. Brooks[26] it was in effect held that the action is derivative and the plaintiff's claim is to be reduced in accordance with the contributory negligence of the deceased. The English Fatal Accidents Act[27] explicitly provides that any damages recoverable for dependants shall be reduced in accordance with the Law Reform (Contributory Negligence) Act 1945.

Glanville Williams suggests that the dependant's claim should be undiminished as a result of the contributory negligence of the deceased and that the defendant should be entitled to claim contribution from the estate of the negligent deceased person.[28] A somewhat similar view was also held by the late Professor M.M. MacIntyre but he believed that the dependants should have a cause of action against the estate of the deceased person who had been contributorily negligent. He stated:[29]

> This is desirable not because it affords an indirect attack on testamentary caprice, but because the dependents are harmed by B's negligent act (their interest was clearly put at risk when he exposed himself) and compensation for that injury can be obtained out of funds accumulated by him. True the compensation is obtained at the expense of equally innocent people (the estate beneficiaries); but that always happens in an action against the estate of a deceased person, and in this type of case the estate beneficiaries would not be generally regarded as having as high a moral claim as B's dependents.

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26 [1932] S.C.R. 462.

27 Fatal Accidents Act 1976, c. 30, s. 5.

28 Williams, p. 442.

29 "The Rationale of Imputed Neligence" (1944), 5 U. of T.L.J. 368, p. 382.

If the same persons benefit under The Fatal Accidents Act as under the will or under an intestacy, there will be no difference between permitting full recovery to the dependants with a right of contribution by the defendant against the estate, as suggested by Glanville Williams, provided the estate is solvent. If the estate is insolvent, the greater benefit which accrues to the dependants would be at the expense of creditors of the estate and at the expense of the defendant.

The late Dean Wright criticized Newell v. Gemmell[30] and Chapman v. C.N.R. and Parry Sound[31] for holding, without discussion, that the right to damages under the Fatal Accidents Act is subject to apportionment in accordance with the contributory negligence of the deceased. He stated:[32]

> Nothing in the Fatal Accidents Act justifies the courts in identifying the plaintiffs in a fatal accidents action with the deceased, in such a manner as to reduce the account (sic) of their recovery. Nor is the present wording of the Negligence Act broad enough, it is submitted, to make it applicable to fatal accidents actions.

This was also in general the position taken earlier by Professor Laskin.[33] We are not persuaded that the added complication of permitting the dependants to recover in full under The Fatal Accidents Act in spite of the contributory negligence of the deceased and at the same time permitting the defendant a right of contribution against the estate of the deceased is warranted. We are of the view that an action under The Fatal

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30 [1938] O.W.N. 1 (H.C.).

31 [1943] 2 D.L.R. 98 (Ont. H.C.).

32 (1943), 21 Can. Bar Rev. 416.

33 (1941), 19 Can. Bar Rev. 291.

Accidents Act should continue to be regarded as derivative and the claim should be reduced in proportion to the contributory negligence of the deceased. The group of lawyers with whom we consulted was unanimously of this view.

RECOMMENDATION #29

We recommend that the recovery of dependants under The Fatal Accidents Act should be reduced by the contributory negligence, if any, of the deceased.

(Draft Act, Section 6(3))

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BY _____
Chairman

_____
Director

April, 1979

(Mrs. Margaret Donnelly and Mr. R.P. Fraser were members of the Board when the substantive decisions about this Report were made and Mr. D.B. Mason joined the Board subsequently.)

CROSS-REFERENCE BETWEEN RECOMMENDATIONS

AND PROPOSED ACT

Recommendation No.	Page No.	Subject	Reference to Proposed Act in Appendix A
1	7	Consolidation of the two statutes	---
2	10	Abolition of last clear chance	Sec. 3
3	15	Defence of contributory negligence available to all tortfeasors	Sec. 1(d) & 6
4	25	Defence of contributory negligence available where there is a breach of a contractual duty of care	Sec. 1(d) & 6
5	27	No provision for set-off except in motor vehicle claims	Sec. 7
6	30	Judgment against or a release of one joint tortfeasor does not release others - Continuation of the deterrent in damages and costs	Sec. 8 & 9
7	33	Liability of concurrent tortfeasors to continue to be joint and several	Sec. 4
8	36	Contribution to be based on fairness to wrongdoers	Sec. 11(1)
9	40	Contribution to be available to all tortfeasors	Sec. 1(e) & 10
10	51	Contribution to be available to all wrongdoers	Sec. 1(a) & (e) & 11(2)
11	54	Settling party to be entitled to contribution whether or not he is liable	Sec. 14(1) & (3)

Recommendation No.	Page No.	Subject	Reference to Proposed Act in Appendix A
12	56	Party settling claim in full entitled to contribution based on the lesser of the consideration paid or the reasonable amount	Sec. 14(3)
13	61	Party settling only for himself reduces claim by his share of responsibility with no rights of contribution arising	Sec. 14(2)
14	71	Mode of claiming contribution where limitation period for primary action has run	Sec. 16(3) & (4)
15	73	Limitation on amount of liability by statute or contract	Sec. 11(2)
16	74	Contribution in a separate action	Sec. 16(1) & (2)
17	76	Limitation period for contribution claim the same as for original wrong	Sec. 16(2)
18	76	Provision against double jeopardy	Sec. 15
19	78	Contribution based on wrongdoer's responsibility	Sec. 11(1)
20	81	Contribution not recoverable from person entitled to be indemnified by claimant	Sec. 12
21	83	Enforcement of contribution judgment	Sec. 17
22	86	Effect of uncollectible contribution judgment on other concurrent wrongdoers	Sec. 13

Recommendation No.	Page No.	Subject	Reference to Proposed Act in Appendix A
23	86	Concurrent wrongdoer includes one vicariously liable	Sec. 1(a)
24	87	Costs of non-negligent plaintiff to remain unchanged	---
25	90	Costs of contributorily negligent plaintiff to remain unchanged	---
26	94	Loss of consortium to continue to be a derivative action	Sec. 6(3) & 18
27	97	Loss of services to continue to be a derivative action	Sec. 6(3)
28	100	Medical or hospital expenses for a child or spouse to continue to be a derivative action	Sec. 6(3)
29	103	Recovery of dependants under Fatal Accidents Act to be reduced by any contributory negligence of deceased	Sec. 6(3)

THE CONTRIBUTORY NEGLIGENCE AND CONTRIBUTION ACT

1 In this Act

(a) "concurrent wrongdoers" means

(i) two or more persons whose wrongful acts contribute to the same damage suffered by another, and any other person liable for the wrongful act of any of those persons, or

(ii) a person whose wrongful act causes damage suffered by another and a person liable for the wrongful act;

(b) "contribution" includes indemnity;

(c) "damage" means damage, injury or loss to a person or to property;

(d) "fault" means

(i) a tort,

(ii) a breach of duty of care arising from a contract, or

(iii) a failure of a person to take reasonable care of his own person or property,

whether or not it is intentional or criminal;

(e) "wrongful act" means

(i) a tort, or

(ii) a breach of contract,

whether or not it is intentional or criminal.

PART 1

GENERAL

2 This Act binds the Crown.

3 This Act applies if damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

4 The liability of concurrent wrongdoers is joint and several.

5 In every action

(a) the amount of damage,

(b) the fault, if any, and

(c) the degree to which the fault of a person contributes to damage,

are questions for the trier of fact.

PART 2

CONTRIBUTORY FAULT

6(1) This section applies when the fault of two or more persons contributes to damage suffered by one or more of them.

(2) The liability of a person whose fault contributes to damage is reduced by the degree to which the fault of the person suffering the damage contributes to it.

(3) If a claim arises from the death of or personal injury to a third person, the liability of the person whose fault contributes to the damage is reduced by the degree to which the fault is attributable to the third person.

(4) If different degrees to which the fault of persons contributed to the damage cannot be determined, each of the persons contributing to the damage shall be deemed to have contributed equally.

7 If a counterclaim is allowed in actions arising out of the operation of motor vehicles, unless the court otherwise orders, no judgment shall be given for any balance but separate judgments shall be given for each party against the other, to the extent that any party is successful, so that the plaintiff shall have judgment on the claim for a specified amount and the defendant, the plaintiff by counterclaim, shall have judgment on the counterclaim for a specified amount.

PART 3

TORTFEASORS

8 An action against one or more joint tortfeasors is not barred by

(a) a settlement with or release of any other joint tortfeasor, or

(b) an unsatisfied judgment against any other tortfeasor,

and may be continued notwithstanding the settlement, release or unsatisfied judgment.

9(1) If a judgment determines an amount of damages against one or more joint or concurrent tortfeasors the person suffering the damage is not entitled to have the damages determined in a higher amount by

(a) a judgment in the same action against any other joint or concurrent tortfeasor, or

(b) a judgment in any other action against any other joint or concurrent tortfeasor.

(2) Except in respect of the action first taken against a joint or concurrent tortfeasor, the person suffering damage is not entitled to costs in respect of an action taken against any other joint or concurrent tortfeasor unless the court is of the opinion that there were reasonable grounds for bringing more than one action.

PART 4

CONTRIBUTION

10 Subject to this Part, a concurrent wrongdoer is entitled to contribution from any other concurrent wrongdoer.

11(1) Subject to this section, the amount of contribution to which a concurrent wrongdoer is entitled is the amount which the court finds just and equitable having regard to the responsibility of each concurrent wrongdoer for the damage.

(2) If the liability of a concurrent wrongdoer is limited or reduced by statute or agreement the amount of contribution payable by him shall not exceed his liability as so limited or reduced.

(3) If the responsibility of each concurrent wrongdoer cannot be determined the responsibility shall be apportioned equally.

12 No person is entitled to recover contribution under this Act from any person entitled to be indemnified by him in respect of the liability for which contribution is sought.

13 If the court is satisfied that the share of a concurrent wrongdoer cannot be collected, the court may, upon or after giving judgment for contribution, make such order as it considers necessary to apportion among the other concurrent

wrongdoers, in the ratio of their respective responsibilities, liability for payment of the share that cannot be collected.

14(1) This section applies if a person suffering damage enters into a settlement with a concurrent wrongdoer or a person whom he considers to be a concurrent wrongdoer.

(2) If the person suffering the damage does not release all concurrent wrongdoers, the amount for which the other concurrent wrongdoers may be held liable to him is reduced by the amount for which the concurrent wrongdoers who are released would be responsible under this Part and there shall be no contribution between those who are released and those who are not released.

(3) If all concurrent wrongdoers are released, a person who gives consideration for the release, whether he is a concurrent wrongdoer or not, is entitled to contribution in accordance with section 11 from any other wrongdoer based upon the lesser of

(a) the consideration actually given for the release, and

(b) the consideration which in all the circumstances of the settlement it would have been reasonable to give.

15 In proceedings for contribution under this Part, the fact that a person has been held not liable, in respect of any damage in an action brought by or on behalf of the person who suffered it, is conclusive evidence in favour of the person from whom contribution is sought as to any issue determined on its merits by that judgment.

16(1) A concurrent wrongdoer shall not commence proceedings for contribution from any other concurrent wrongdoer except as provided in this section.

(2) A concurrent wrongdoer may commence proceedings for contribution at any time during which the person who suffered the damage is entitled to commence proceedings to recover damages from the concurrent wrongdoer from whom contribution is claimed.

(3) Notwithstanding the expiration of any statutory limitation or notice period a concurrent wrongdoer from whom damages or contribution is claimed in an action may in the same action claim contribution from any other concurrent wrongdoer in accordance with subsection (4).

(4) Unless subsection (2) applies, a concurrent wrongdoer may commence proceedings under subsection (3) and serve the initiating process within 6 months of the service upon him of the process by which relief is claimed against him.

(5) If for any sufficient reason service of the initiating process cannot be effected within the time specified in subsection (4), the court may extend the time for service.

(6) Subsections (4) and (5) apply notwithstanding any rule of court to the contrary.

17 If concurrent wrongdoers are responsible for damage and judgment for contribution is given in respect of that damage, unless either the person suffering the damage has been fully compensated or the court otherwise orders, execution shall not issue on the judgment until

(a) after satisfaction by the person obtaining the judgment of such proportion of the total damages as the court may order, and

(b) the court makes provision, subject to The Execution Creditors Act, for the payment into court of the proceeds of the execution on the judgment to the credit of such persons as the court may order.

PART 5

TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

18 Section 35(2) of The Domestic Relations Act is amended by striking out the words "and independent of".

19(1) This Act applies to any case where the damage in question occurred after the coming into force of this Act.

(2) Subject to subsection (3),

(a) The Contributory Negligence Act, and

(b) The Tort-Feasors Act,

are repealed.

(3) The Contributory Negligence Act and The Tort-Feasors Act continue in force as if unrepealed with respect to any case where the damage in question occurred prior to the coming into force of this Act.

20 This Act comes into force on the day upon which it is assented to.

THE CONTRIBUTORY NEGLIGENCE ACT

CHAPTER 65

Short title

1. This Act may be cited as *The Contributory Negligence Act.* [R.S.A. 1955, c. 56, s. 1]

Apportionment of liability for damages

2. (1) Where by fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

(2) Nothing in this section operates to render any person liable for damage or loss to which his fault has not contributed. [R.S.A. 1955, c. 56, s. 2]

Determination of degree of fault

3. (1) Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree in which each person was at fault.

(2) Except as provided in sections 4 and 5, where two or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of any contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

[R.S.A. 1955, c. 56, s. 3]

Contribution where plaintiff is a passenger

4. Where no cause of action exists against the owner or driver of a motor vehicle by reason of section 214 of *The Highway Traffic Act,* no damages, contribution or indemnity shall be recovered from any person for the portion of the damage or loss caused by the negligence of such owner or driver but the portion of the damage or loss so caused by the negligence of such owner or driver shall be determined although such owner or driver is not a party to the action. [R.S.A. 1955, c. 56, s. 4; 1967, c. 30, s. 266(3)]

R.S.A. 1970, c. 65

164. *The Contributory Negligence Act is amended as to section 4 by striking out the words* "section 214 of *The Highway Traffic Act" and by substituting therefor the words* "section 77 of *The Motor Vehicle Administration Act* or section 160 of *The Highway Traffic Act, 1975".*

Contribution where plaintiff is spouse of person at fault

5. In an action brought for damage or loss resulting from bodily injury to or the death of a married person, where one of the persons found to be at fault is the spouse of the married person, no damages, contribution or indem-

nity shall be recovered for the portion of damage or loss caused by the fault of the spouse, and the portion of the damage or loss so caused by the fault of the spouse shall be determined although the spouse is not a party to the action. [R.S.A. 1955, c. 56, s. 5]

Questions of fact

6. In every action

(*a*) the amount of damage or loss,

(*b*) the fault, if any, and

(*c*) the degrees of fault,

are questions of fact. [R.S.A. 1955, c. 56, s. 6]

Last chance submission to jury

7. Where the trial is before a judge with a jury, the judge shall not submit to the jury any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof, unless in his opinion there is evidence upon which the jury could reasonably find that the act or omission of the latter was so clearly subsequent to and severable from the act or omission of the former as not to be substantially contemporaneous with it. [R.S.A. 1955, c. 56, s. 7]

Trial before judge alone

8. Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof, unless he is satisfied by the evidence that the act or omission of the latter was so clearly subsequent to and severable from the act or omission of the former as not to be substantially contemporaneous therewith. R.S.A. 1955, c. 56, s. 8]

Adding party defendant

9. Whenever it appears that a person not already party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as are deemed just. [R.S.A. 1955, c. 56, s. 9]

(*NOTE*: *This Act is based on a model Act recommended by the Conference of Commissioners on Uniformity of Legislation in Canada.*)

THE TORT-FEASORS ACT

CHAPTER 365

Short title

1. This Act may be cited as *The Tort-Feasors Act.* [R.S.A. 1955, c. 336, s. 1]

Definitions

2. (1) In this Act, the expressions "parent" and "child" have the same meanings as they have for the purposes of *The Fatal Accidents Act.*

(2) In this Act, the reference to "the judgment first given"

(*a*) shall, in a case where a judgment is reversed on appeal, be construed as a reference to the judgment first given that is not so reversed, and

(*b*) shall, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied. [R.S.A. 1955, c. 336, s. 2]

Application of Act

3. Nothing in this Act

(*a*) affects any proceedings against any person for a penalty or forfeiture under any Act of the Province in respect of any wrongful act, or

(*b*) renders enforceable any agreement for indemnity that would not have been enforceable if this Act had not been passed. [R.S.A. 1955, c. 336, s. 3]

Where damage suffered as result of tort

4. (1) Where damage is suffered by any person as a result of a tort, whether a crime or not,

(*a*) a judgment recovered against any tort-feasor liable in respect of that damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage,

(*b*) if more than one action is brought in respect of that damage

(i) by or on behalf of the person by whom it was suffered, or

(ii) for the benefit of the estate, or of the wife, husband, parent or child of that person,

against tort-feasors liable in respect of the damage, whether as joint tort-feasors or otherwise, the sums recoverable under the judgments given in those ac-

tions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given, and in any of those actions, other than that in which judgment is first given, the plaintiff is not entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action, and

(*c*) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise, but no person is entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liablity regarding which the contribution is sought.

(2) In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be such amount as the court may find to be just and equitable having regard to the extent of that person's responsibility for the damage.

(3) The court has power

(*a*) to exempt any person from liability to make contribution, or

(*b*) to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

[R.S.A. 1955, c. 336, s. 4]

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