THE CONTRIBUTORY NEGLIGENCE ACT

AND

THE TORT-FEASORS ACT

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GENERAL INTRODUCTION

A. Introduction

The purpose of this study is to examine the legal problems which arise when damage or loss is caused to one or more persons by the negligent or other tortious acts of two or more persons. In some instances the loss or damage may arise partly due to the fault of the victim himself, in which case we say that the victim was contributorily negligent, and in other instances the loss or damage may arise solely from the joint or several torts of others.

In Alberta there are two Statutes which deal with these matters; they are the Contributory Negligence Act, R.S.A. 1970, c. 65, and The Tort-Feasors Act, R.S.A. 1970, c. 365. This study will undertake an examination of these two specific Statutes, with a view to their revision and consolidation.

Related to the determination of the major issues of this study is the determination of two other important topics.

The first is whether the provision in the Highway Traffic Act, R.S.A. 1970, c. 169, s. 214, which creates what is known as "guest passenger discrimination", should be repealed, and the second is whether the provision in the Married Women's Act, R.S.A. 1970, c. 227, s. 3(2), which creates inter-spousal tort immunity, should be repealed or replaced.

B. The Scope of the Existing Legislation

The Contributory Negligence Act, supra, deals with the situation where by the fault of two or more persons, damage or loss is caused to one or more of them, or where by the fault of two or more persons damage is caused to a third person who was himself not at fault. The Act allows a court to establish different degrees of fault between persons whose fault contributes to the same damage or loss, so that each will be liable to those persons who have suffered the damage or loss, only to the extent of his own degree of fault. It permits a victim of the combined fault to recover damages even though the victim's own fault contributed to his damages. It permits a victim of two or more persons' fault to recover the total amount of his damages, less any reduced portion for his own fault, from any of the other persons, with the right reserved to these others to recover contribution from any of the wrong doers who have not contributed in accordance with their degrees of fault. It does not permit an injured spouse to recover from a third person those damages which were caused by the fault of his or her spouse, but only those damages which were caused by the fault of that third person. It also does not permit a gratuitous passenger to recover from a third person those damages which were caused by the fault of his host driver, but only those damages which were caused by the third person, unless the gratuitous passenger is able to establish that his host driver was either grossly negligent or that his misconduct was wilful and wanton. Finally, the Act permits a finding by judge or jury that the acts or omissions of the parties were so clearly severable and subsequent from each other that it can not be said that they contributed to the same damage or loss.

The Tort-Feasors Act supra, deals with the situation where a person suffers damage as a result of the joint or several torts of two or more tort-feasors. The Act allows more than one action to be instituted against joint tort-feasors, although plaintiff has recovered judgment against one of them. The Act limits the maximum recoverable by a plaintiff to the amount of the judgment given in the first action. The Act allows a joint or several tort-feasor who is liable to the plaintiff in respect of the damage to recover contribution from any other of the tort-feasors who is liable or who if sued would have been liable in respect of that damage. The amount of contribution recoverable shall be such as the court may find to be just and equitable having regard to the extent of responsibility of the tort-feasor from whom it is sought.

C. Consolidation of the Two Statutes

It is obvious that both of the above enactments treat different aspects of a common factual situation; namely, the situation whereby due to the tort, be it negligence or some other tort, of two or more persons, damage is suffered by either one of the wrong-doers themselves or by someone else.

The important contribution made by the Contributory Negligence Act which is not made by the Tort-Feasors Act is that it gives a person who has by his fault contributed to his own damages the right to recover a share of these damages from others, whose fault has also contributed to the loss. This is, of course, a reversal of the common law position regarding contributorily negligent plaintiffs, whereby contributory negligence was a complete bar to plaintiff's right of action.

The important contribution made by the Tort-Feasors Act, is the reversal of the common law rule that judgment recovered against one joint tort-feasor precluded plaintiff from instituting action against any other of the tort-feasors, even if he found himself unable to execute the judgment in full.

Both Acts allow contribution between tort-feasors. The Contributory Negligence Act allows contribution between those at fault to the plaintiff and jointly and severally liable to him, and the Tort-Feasors Act allows contribution between joint or several tort-feasors. These are reversals of the common law position that there is to be no contribution between tort-feasors.

Due to the similarity between the Statutes it is respectfully suggested that they both be consolidated into one legislative enactment.

The obvious advantage of such a proposal is the efficiency and orderliness of dealing with all problems involving a multiplicity of tort-feasors in one enactment.

This suggestion of consolidation has been made previously by others. The Alberta Commissioners studying the problem of "Contributory Negligence and Tortfeasors" recommended that "there should be a Uniform Tortfeasors Act combined with the Uniform Contributory Negligence Act". [1]

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[1] Contributory Negligence And Tortfeasors, Report Of The Alberta Commissioners, at p. 74.

Glanville Williams in his book "Joint Torts and Contributory Negligence", Stephens & Sons Limited: London, 1951 recommended that "the opportunity should be taken of linking together the rules relating to concurrent tortfeasors and contributory negligence in an integrated measure". [2]

Only three of the nine common law Provinces of Canada have two Statutes dealing with the issues of contributory negligence and joint or several tort-feasors--Alberta, Nova Scotia [3] and New Brunswick. [4] Of the remaining Provinces, only Manitoba [5] has dealt extensively with the problems which arise in relation to contributory negligence and joint torts in one enactment the other Provinces dealing mainly with the question of contributory negligence in a Contributory Negligence Statute. Saskatchewan [6] and Ontario [7] have incorporated some problems relating to contribution between joint tort-feasors in one enactment with other sections dealing with contributory negligence matters.

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[2] At p. 497. Many of the issues and recommendations discussed hereafter are those raised by Williams in his famous book on this subject. This work will be referred to as Williams.

[3] Contributory Negligence Act, R.S.N.S. 1967, c. 54; Tortfeasors Act, R.S.N.S. 1967, c. 307.

[4] Contributory Negligence Act, R.S.N.B. 1952, c. 36; Tortfeasors Act, R.S.N.B. 1952, c. 232.

[5] The Tortfeasors and Contributory Negligence Act, R.S.M. 1970, c. T90.

[6] The Contributory Negligence Act, R.S.S. 1965, c. 91.

[7] The Negligence Act, R.S.O. 1970, c. 296. The remaining Statutes in the other Provinces are: B.C. - Contributory Negligence Act, R.S.B.C. 1960, c. 74, as amended S.B.C. 1962, c. 15; S.B.C. 1969, c. 35 s. 4; S.B.C. 1970, c. 9. Nfld. - The Contributory Negligence Act, R.S.Nfld. 1970, c. 61. P.E.I. - The Contributory Negligence Act, R.S.P.E.I. 1951, c. 30. In England - The Law Reform (Contributory Negligence) Act 1945, 8 & 9 Geo. 6 c. 28); The Law Reform (Married Women And Tortfeasors) Act 1935 (25 & 26 Geo. 5 c. 30).

The question of consolidation however is mainly merely a question of technique. It does not go to the real problem of what the substance of any legislation dealing with contributory negligence and joint tort-feasors should be. For example, the Manitoba Tortfeasors and Contributory Negligence Act contains nothing of substantial difference from the present Alberta Statutes--the provisions are merely merged into one Act. The major examination of this study is to inquire into whether changes of substance should be made to our present legislation.

D. Distinctions Between Different Types of Tort-Feasors

As indicated above, the purpose of this study is to examine those situations where a damage or loss is suffered due to the tortious acts of more than one person.

We must initially discuss the various ways in which this can occur.

Damage or loss may result from the tortious act of one person, for whose act another may be responsible. Examples of this are master - servant relationships, principal - agent relationships, and Statutory imposition of liability on one person, e.g. an owner of a car, for the acts of another person, e.g. the car's driver. [8]

Damage or loss may result from the combined acts of

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[8] Highway Traffic Act, R.S.A. 1970, c. 169 s. 213.

of two or more persons acting in concert. An example of this occurrence can be seen in the case of Beecham v. Henderson and Houston [9] where an injury resulted to a passenger in a bus when two highway workers each threw sand into an open window of the bus at the same time.

In both of the above situations we would say that there has been the commission of a joint tort, and that the actors were joint tort-feasors.

A loss or damage may result from the combined torts of two or more persons. In this case each person's tort is an independent cause of action, but the damage produced is one damage. An example of this occurrence can be seen in the case of Sargent v. Canadian Coachways Ltd. et al. [10] In this example a driver of a vehicle drove it negligently causing it to go into a ditch which had been negligently dug by an excavator. One damage to a victim was therefore caused by the independent negligence of two tort-feasors.

In the above situation we would classify the tort-feasors as several concurrent tort-feasors, solidary wrong-doers or simply co-tort-feasors.

The present legislation is concerned both with joint tort-feasors and several concurrent tort-feasors, i.e. it is concerned with the situation where loss or damage arises either from a joint act or two independent acts. It is not concerned with a situation where two independent acts may

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[9] [1951] 1 D.L.R. 628 (B.C.,S.Ct.)

[10] [1950] 2 W.W.R. 1217, @1951] 1 D.L.R. 609 (Alta.,A.D.)

occur concurrently but which do not produce or contribute to the same damage.

It is important to realize that the distinction between joint tort-feasors and concurrent several tort-feasors had and still has important legal consequences.

At common law the liability of joint tort-feasors derived from one cause of action and therefore once one was sued and judgment was recovered against him, there was no possibility of the institution of another action against one of the other joint tort-feasors. This was based on the principle of "transit in rem judicatam". Therefore, if the victim made the unfortunate error of not suing all joint tort-feasors and recovering against them all, but chose one of them who was not able to pay the full judgment, he was unable to proceed against the others. This did not apply to concurrent several wrong-doers, the causes of action against them being different.

This distinction has been abolished by the Tort-Feasors Act for the purposes of the above rule. Section 4(1) of the Act allows more than one action to be brought against joint tort-feasors even though judgment has been recovered against one of them. To discourage plaintiffs from instituting actions however in search of the best judgment possible, the Act in s. 4(1)(b) states that the highest amount recoverable is the amount awarded in the judgment first given, and to further discourage litigation, the plaintiff will not be awarded costs for these subsequent actions unless the court is of the opinion that there was a reasonable ground for bringing them.

The abolition of the one judgment rule should be

regarded as a good thing. There is little fairness in depriving a plaintiff of his full remedy when he has been injured by the acts of others because he has been careless in choosing his Defendant, and the reason for the prohibition is based on a technical nicety. On the other hand, the provisions above included to discourage further litigation are well worthwhile.

The common law distinguishes between joint tort-feasors and several concurrent tort-feasors on another ground as well. Due to the concept that joint tort-feasors have jointly injured the Plaintiff and that the cause of action against them is one and the same, if the Plaintiff effects a release with one of two or more joint tort-feasors, all joint tort-feasors are released. Because the cause of action is the same, and because by a release Plaintiff agrees to give up his cause of action, the logic of the common law position becomes evident. This would and does not apply to several, concurrent tort-feasors because in this case although the damnum is the same, the injuria is different. Satisfaction by a several, concurrent tort-feasor of the Plaintiff's claim would of course release the other concurrent tort-feasors so as not to enable the Plaintiff to recover more than his fair amount of loss.

The common law rule regarding releases between joint tort-feasors has been unchanged by the Tort-Feasors Act. Because of the obvious harshness of this rule, especially in cases where a Plaintiff did not mean to release all but only some but acted out of ignorance of the rule, the courts have tried to alleviate the situation. The main method of doing this has been by distinguishing between a release and a covenant or agreement not to sue one or the other of two or more joint tort-feasors. An agreement not

to sue does not affect the Plaintiff's cause of action so that he may proceed against the rest. The difficulty with this method of approach however is that it becomes crucial for the court to decide whether what the Plaintiff effected was a release or agreement not to sue, the difference between the two in many instances not being great, and the second and more significant criticism of this approach is that if the court resolves that something is in fact a release it leaves a Plaintiff without a remedy. I would submit here as I did above that the agrument that a joint tort is based on only one cause of action is one of academic interest only and is certainly not weighty enough to allow an injured person to become remedyless because of it. At present the safest method of proceeding for a Plaintiff wishing to maintain his cause of action against some joint tort-feasors, but wishing to not proceed against others, is to include in his agreement with those with whom he is settling an express reservation of his rights.

The Tort-Feasors Act having recognized the possible inequity of holding too strongly to the common law rules regarding joint torts in relation to the single judgment rule, should also recognize the possible inequity in maintaining the common law rule re: releases. The courts having held that a covenant not to sue, and a discontinuance of action, do not prevent a Plaintiff from proceeding against joint tort-feasors should now be given the opportunity to do so in relation to releases as well.

At common law there could be no contribution between tort-feasors, be they joint tort-feasors or several concurrent tort-feasors. As we will see, the present legislation has abolished this no contribution rule for both categories of cases.

Joint tort-feasors and several, concurrent tort-feasors have been brought closer together by the present legislation. If the rule regarding releases is revised, there would no longer be any practical distinctions left. Glanville Williams suggests that a new term be developed to deal with both types of tort-feasors, namely, "concurrent wrong-doers". He would define them as follows: "parties becoming concurrent wrong-doers as a result of vicarious liability, breach of joint duty, conspiracy, concerted action to a common end, or independent acts causing the same damage". [11] I would respectfully endorse this proposal.

SECTION ONE

RESOLUTION OF THE ISSUES WHICH ARISE WHEN AN INNOCENT PLAINTIFF SUFFERS LOSS OR DAMAGE DUE TO THE TORTS OF TWO OR MORE CONCURRENT WRONG-DOERS.

A. General Introduction

This section deals with those issues which arise when an innocent plaintiff suffers loss or damage due to the torts of two or more concurrent wrong-doers.

We have recommended above that a release entered into by a victim of a loss or damage with one of two or more joint tort-feasors should not serve as a release of all joint tort-feasors and that this reform would assimilate

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[11] Williams, at p. 83.

the rules relating to concurrent, several wrong-doers with those relating to joint tort-feasors. The term suggested which would be applicable to all tort-feasors who are responsible to the plaintiff for the same damage was the term "concurrent wrong-doers". We must now examine those important issues which arise when an innocent plaintiff, as contrasted with a contributorily negligent plaintiff, seeks recovery for loss or damage suffered as a result of the acts of concurrent wrong-doers. We save for a future section those issues which arise when a contributorily negligent plaintiff is similarily injured.

B. Contribution Between Wrong-Doers

(i) Introduction

At common law the courts did not have the power to apportion liability between wrong-doers and when an innocent victim suffered damage or loss as a result of the joint tort of two or more joint tort-feasors, or two independent torts of several, concurrent tort-feasors, each tort-feasor was liable to the plaintiff for the whole of the plaintiff's loss. The courts did not enter into an inquiry into the degrees of wrong doing of each of the tort-feasors, and because of the nature of the plaintiff's loss, it being one, indivisible loss, it was natural for each of the wrong-doers to be responsible for the whole. Indeed if it were otherwise, and the courts could determine from the facts that defendant A caused one portion of the loss and defendant B caused another portion, the defendants, by definition, would not have been joint or concurrent, several tort-feasors. The essence of being joint or several, concurrent tort-feasors is that one indivisible loss results from the tort(s). This approach that the concurrent wrong-doers are each responsible

to the plaintiff for the whole of his loss is therefore an essential part of the existing legislation as well.

The common law went further, however, than merely creating liability in solidum between concurrent wrong-doers. It did not allow the tort-feasor from whom the whole damage may have been recovered to collect any contribution for this payment from any of the other wrong-doers. There were several reasons for this approach.

The most important was probably based on the maxim "ex turpi causa non oritur actio". The courts were unwilling to give aid to a wrong-doer, and to allow a wrong-doer to come into court and seek relief from the consequences of his admitted wrong doing. The first case which laid down this important principle was the case of Merryweather v. Nixan (1799), 8 T.R. 186, 101 E.R. 1337. The principle said to be established there was that "if A recover in tort against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution". [12]

Other reasons given for this rule were that it was an effective punishment for a wrong-doer to be forced to pay all of the damages, and that it would be a deterrent to others who were contemplating wrong doing if they realized that they could be made to pay for the total loss. Of

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[12] At p. 186; 1337.

course counter-arguments were also heard, one being that by not allowing one wrong-doer to collect contribution for the damages which he was forced to pay from the other wrong-doers, you were encouraging wrong doing by giving wrong-doers a good chance of escaping completely from the consequences of their acts. Perhaps the most compelling argument against the rule was that it was unfair to force some people to pay when at the same time others who were equally to blame for the damages escaped unscathed.

The rule forbidding contribution at common law became less stringent and it became open to argument that it only applied as to tort-feasors whose acts were maliscious, wilful, or intentional and not to those liable only in negligence. This was the view of Glanville Williams who states: "In view of these cases, and other American cases to the same effect, the view may be taken that, even at common law, the rule in Merryweather v. Nixan applies only as between conscious, wilful, maliscious, or intent onal tort-feasors." [(p. 83)].[13] In fact, the case of Merryweather v. Nixan itself dealt with an intentional tort, namely conversion, and the reasons as far as punishment and deterrence are concerned do not strongly apply when the act is one of inadvertence rather than wilfulness.

The Tort-Feasors Acts 4(1)(c) states that "any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if

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[13]Williams, at p. 83.

sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise . . . ", and therefore the common law rule against contribution has been reversed by the existing legislation. The Contributory Negligence Act, s. 3(2), also provides that "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 and indemnify each other in the degree in which they are respectively found to have been found at fault". Therefore this section as well abolishes the no contribution rule. We will examine this latter provision more closely later.

Although it is clear that the present Tort-Feasors Act allows for contribution between tort-feasors, many things about the present provision are not clear.

(ii) Contribution Between Intentional Tort-feasors

The Tort-Feasors Act does not clearly specify whether the right to contribution exists in cases of intentional, maliscious or wilful torts, as well as in cases of negligence. The Act states that it applies to "any tort-feasor liable . . .". There is no qualification to the type of tort involved. The Act also gives the court the discretion to determine the amount of contribution recoverable based on a finding as to what is "just and equitable having regard to the extent of that person's responsibility for the damage". It may be that by using the word "responsibility" instead of the word "fault" the Act implies that contribution will be available to intentional tort-feasors.

On the other hand, the arguments for refusing

contribution between intentional tort-feasors may prevail over the ambiguous wording of the Act. This may lead to the situation whereby some courts will apply their discretion in favour of intentional tort-feasors on one reading of the Act whereas other courts may determine that in order for the common law to be definitely altered, on this point, the Act must be specific and clear, and therefore that there is to be no contribution between intentional wrong-doers. Let us recall that the three primary arguments for refusing contribution between intentional tort-feasors are (1) the maxim ex turpi causa (2) the desire to punish and (3) the desire to deter. On the other side are arguments (1) that the need to punish is not part of the assessment of damages in tort law (2) intentional tort-feasors will not be deterred but may even be encouraged by the restriction (3) it is inequitable to allow certain tort-feasors to escape and to allow the entire burden to be placed on the others (4) intentional tort-feasors may not be morally blameworthy, (5) collusion and favouritism is encouraged between victim and one or the other of the tort-feasors in arriving at the decision as to who the unfortunate tort-feasor shall be.

Merely because there is as yet an absence of cases on this problem under Tort-Feasor legislation is not a convincing enough reason to "let sleeping dogs lie". In American jurisdictions with comparably unclear legislation, judicial decisions have gone both ways on this question.[14]

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[14] See inter alia: Smith, Wyoming Contribution Among Joint Tort-feasors (1974), 9 Land and Water Law Review 589; Thode, Comparative Negligence, Contribution Among Tort-Feasors . . . (1973), Utah Law Review 406; Bruisck, Contribution And Indemnity Between Tort-feasors in Nebraska (1974), 7 Creighton Law Review 182. Ausubel, The Impact of New York's Judicially Created Loss Apportionment Amongst Tort-feasors (1974), 38 Albany Law Review 155; La Forte, Recent Developments In Joint & Several Liability (1973), 24 Syracuse Law Review 1319.

Glanville Williams presents strong arguments to support the proposition that the contribution section of the Act is wide enough to cover intentional wrongs as well as negligent wrongs. The most convincing of his arguments is that the opening section of section 4 which discusses the right to contribution states that "where damage is suffered by any person as a result of a tort, whether a crime or not . . . ". Williams states that these opening words were inserted in the English Act on the recommendation of the Law Revision Committee "which expressly advised that the right of contribution should be extended even to those guilty of intentional crimes". Williams concludes after listing eleven arguments to support his proposition that "rationally, however, the balance of the argument is in favour of giving relief, and it is this view that gives the most satisfactory interpretation to the words of the Tort-Feasors Act".[15]

In sum, although I would respectfully submit that the terms of the Alberta Tort-Feasors Act are wide enough to include intentional torts as well as negligence, that there is the possibility of doubt being expressed on this conclusion. I would also submit that the courts should, if they are not now, be empowered to grant contribution even in cases of intentional wrong doing. This could easily be made clear by the inclusion in the legislation of a definition of wrong doing which would include inter alia, intentional wrong doing.

(iii) Contribution Between Those Who Are Not Tort-feasors

A second problem which is identified by Glanville

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[15] Williams, at p. 94.

Williams in relation to the provision of the Tort-Feasors Act which allows for contribution between "any tort-feasor liable" is that this by definition would exclude persons whose liability to the plaintiff was based not in tort but on a breach of trust or breach of contract. For example, it might be arguable that if a plaintiff suffers injury due to the negligence of a doctor and a lawyer, since the liability of the lawyer would be in contract and not in tort, the two would not be tort-feasors for the purpose of contribution. A review of the cases shows how infrequent an event of this nature is; no reported cases existing to the knowledge of this researcher on the problem. Nevertheless it might be advisable in order to forestall a problem in this area to adopt Glanville Williams' suggestion that a wrong should be defined as a "tort, breach of contract or breach of trust".

(iv) Who May Seek Contribution?

Having resolved the questions as to who are "tort-feasors" for the purpose of the contribution section of the Tort-Feasors Act, the next major area of concern is to inquire into which of these tort-feasors are entitled to seek contribution and from whom. The Act states: "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, . . . "

Looking first to the tort-feasor seeking contribution, the Act states that he must be a tort-feasor liable in respect of that damage.

Does this mean that the claimant for contribution must first have been found liable by action in order to claim

contribution from other tort-feasors? Clearly not. The cases, for example Tarnaya et al v. Larson et ux (1956-57), 20 W.W.R. 538, (D.C. Alta), have held that a claimant does not have to have first been found liable in respect of an action brought by the party who suffered the damage in order to claim contribution. In the words of District Court Justice Turcotte in the above case "To hold otherwise would mean that in some cases substantial and needless legal costs would have to be incurred before liability between tort-feasors could be determined. Settlements would be discouraged". (p. 541).[16] It is of interest here that other legislation, for example the Ontario Negligence Act, R.S.O. 1970, c. 296, s. 3, is worded differently from the Alberta Act and makes it clear that a tort-feasor may recover contribution by settling with the victim, and satisfying the court in an action for contribution that the settlement was reasonable. It should also be noted here that by permitting a claim for contribution to be made by a settling tort-feasor under the Alberta Tort-Feasor Act an important interpretation of the contribution section of the Tort-Feasors Act is being made which could not be made for the contribution section of the Contributory Negligence Act since in the latter case there is only contribution between persons found at fault.

This result that a tort-feasor need not have been found liable before he can claim contribution from other tort-feasors does not resolve a more difficult problem.

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[16] At p. 541.

What happens under the Tort-Feasors Act, if a tort-feasor settles before judgment has been recovered against him, claims contribution and it is shown by the tort-feasor against whom contribution is claimed, that the settling party would not have been found liable had he allowed an action against him to proceed?

It would seem from a reading of the words of the section that the section only applies to "any tort-feasor liable in respect of that damage". A person who settles the damages with the victim but who would not have been liable had he been sued seems not to qualify as a "tort-feasor" under the express wording of the section. In the case of Marschler v. G. Masser's Garage (1956), 2 D.L.R. (2d) 484 (Ont., High Court), the court was faced with a claimant who had paid the victim the cost of repairs although he was in no way negligent nor obligated to do so. This was a case under the Ontario Negligence Act, R.S.O. 1950, c. 252, s. 3 which although, as was pointed out above, differs from the Alberta Act does use the same term "tort-feasor" which the Alberta Act uses, the definition of which is crucial to the resolution of this issue. Another fact which may have been important in the case was that the claimant was claiming two items of damage from the tort-feasor, damages owed to him for breach of contract, and the amount of settlement paid out. It was argued, but rejected by the court, that the amount of settlement paid by the claimant were damages resulting from the breach of contract notwithstanding the Ontario Negligence Act contribution section. Therefore the case came to be resolved solely on the question as to whether contribution was payable to a person who had settled with the victim but, who was under no legal liability to him, under the terms of the Negligence Act.

Mr. Justice LeBel held that it made no difference that the claimant would not have been held liable. He comes to this decision on the basis of sound policy. It would be unfortunate indeed if a person thinking he is liable and wishing to avoid litigation and extra costs could find himself without the right to contribution should it later be shown that he was mistaken and was innocent all the time. Mr. Justice LeBel does admit that the "words 'tort-feasor' are troublesome" but concludes that "the precise and technical meaning (of tort-feasor) should be passed over". (p. 490) [17] He concludes that the word tort-feasor must refer "not to a person who is held liable or admits liability at a trial, but to a person who impliedly assumes or admits liability when he enters into a settlement". [18] (ibid) He does concede that the expressions "tort-feasor" and perhaps "contribution" and "indemnity" are not apt". ibid.[19]

Can the same argument be used with respect of the Alberta Tort-Feasors Act? Mr. Justice LeBel thinks not. He underscores the words "liable in respect of that damage" and "whether as a joint tort-feasor or otherwise" found in both the English and Alberta Acts, which are not present in the Ontario Act, and concludes that since the English section

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[17] At p. 490.

[18] Ibid.

[19] Ibid.

"is not at all concerned with settlements" as is the Ontario Act, the same argument cannot be used. He says: "Its (referring to English Act) object, as subsequent authorities show, was to put an end to the common law rule against contribution between joint tort-feasors. In my opinion there is no resemblance of substance between the sections". (p. 491).[20]

With all due respect to Mr. Justice LeBel I cannot agree that there is any substantial difference between the Alberta section and the Ontario one, except in words. The spirit of the provisions is the same, to foster settlements as indicated in the case of Tarnava et al v. Larson et ux, supra, and the decision reached in Marschler v. Masser's Garage, supra, was the just one not only for Ontario but for Alberta as well. It is clear that it would be folly not to allow a person settling with the victim of a tort for a reasonable amount to recover contribution from a tort-feasor on the ground that he was under no liability and should not have settled. This could conceivably cause a process of litigation with the victim now seeking to proceed against the tort-feasor and the settler seeking to get back his money from the victim. It is undoubtedly true however that the present wording of the provision must be changed to clarify the situation.

If we were to accept Mr. Justice LeBel's approach to this problem and concede that the fact that a claimant for contribution has entered into a settlement with the injured party is conclusive, irrefutable proof that he was

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[20] At p. 491.

a "tort-feasor liable" and therefore could claim contribution under the Tort-Feasors Act, this would prevent both the injured party and tort-feasors from whom contribution was being claimed from disputing the liability of the claimant for contribution to the injured party. When we later examine the actual mechanics and provisions which govern the settlement by one person of the injured party's damages and his consequent claim for contribution we will see that this rule works no injustice on the parties.

(v) Against Whom May Contribution Be Claimed?

The claimant may recover contribution "from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage . . . ".

It is clear here that in order for a claim for contribution to be made the tort-feasor against whom it is made need not have first been sued and found liable to the victim. The issue of his liability to the victim can be resolved in the action for contribution. There are however questions which arise from the present wording of the Act.

The Act does not state at which point in time the issue of the liability of the party against whom contribution is being sought to the injured party is decided. There are at least three possible periods which could be chosen. It could be held that the words in the Act "who is or would, if sued have been held liable" mean who is or would if sued at any time have been held liable and therefore that if the party against whom contribution is being sought would have been held liable at any time after the injury he is liable to pay contribution to any other tort-feasor as long as the claim for contribution is brought at a time when the limitation

period for claiming contribution has not expired. This would mean that if the injured party did not proceed against the tort-feasor against whom contribution is sought but settled with the claiming tort-feasor or sued the claiming tort-feasor at a time in which he could not have sued the tort-feasor against whom contribution is subsequently sought due to the expiration of a limitation period or for some other reason, that the claiming tort-feasor would still be able to seek contribution, providing that the limitation period for seeking contribution had not yet expired.

Alternatively it could be decided that the relevant time at which the issue of the liability of the party against whom contribution is being sought is determined is the time at which the injured party either institutes an action or settles without action with the claiming tort-feasor. This would mean that if at that time the party against whom contribution is subsequently sought could not have been successfully sued by the injured party due to the expiration of a limitation period that there could subsequently be no successful claim for contribution against him.

Finally it could be decided that the relevant time at which to determine the liability of the tort-feasor against whom contribution is being sought is the time of the institution of the claim for contribution against him. This would mean that if at that time the party against whom the claim for contribution is being made could not have been held liable to the injured party he could not be held liable to pay contribution.

The factual situation which has most often raised this problem in the cases has been the situation where the injured party has had different limitation periods in which

to institute his actions against the tort-feasors. In these cases the problem has arisen when the injured party instituted an action against one tort-feasor in the time permitted to do so, but not within the time in which he could have successfully sued the second tort-feasor. This mattered little to the injured party because he was able to collect the full amount of damages from either tort-feasor but was, of course, crucial for the unsuccessful tort-feasor who was seeking contribution from the other tort-feasor for the amount he was forced to pay to the injured party. Admittedly this problem no longer has great importance in Alberta since most short limitation periods have been abolished. However it can still arise in relation to certain categories of persons, for example, doctors, dentists, chiropractors, naturopaths, podiatrists who are subject to a one year limitation period, unlike the usual two year limitation period for other tort-feasors.[21] It can also arise if the suggestion made above that settlement by a tort-feasor be conclusive proof of his liability is accepted. In this case, it is possible that one tort-feasor who may be subject to the same limitation period as a second tort-feasor will settle with the injured party at a time at which neither could have been successfully sued, and the problem of contribution will arise.

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If the courts hold, as was held in the case of Wimpey v. B.O.A.C. [1965] A.C. 169 (H.L., Eng), that a defendant can not be sued for contribution by a tort-feasor,

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[21] The Limitations Of Actions Act, R.S.A. 1970, c. 209, s. 55.

if either at the time the first tort-feasor was sued by the injured party or at the time the claim for contribution was made, the defendant no longer was liable to the injured party, due to the expiration of the limitation period against him, an obvious injustice is worked on the first tort-feasor. He is unable to collect contribution from another tort-feasor not because of any omission on his part but because of an omission on the plaintiff's part to institute an action against the other tort-feasor in due time. He could not be expected to claim contribution from the defendant before he was himself proceeded against, and when he was in fact proceeded against he could no longer claim contribution because the other defendant, on this interpretation of the Act, was no longer a tort-feasor who was liable, or if sued, would have been held liable, to the injured party.

If, on the other hand, the courts hold, as seems to have been held in Harvey v. R. G. O'Dell Ltd. and Another, [1958] 2 Q.B. 78, that a defendant can be sued for contribution as long as he would have been held liable to the injured party if sued at any time after the cause of action against him arose, an obvious injustice is worked on him. He would by this decision lose any benefit of a short limitation period which he was given by Statute if he were involved in a concurrent wrong with a defendant who did not have the benefit of such short period of limitation. [22]

Another factual situation which raises similar

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[22] In Clayton v. McNeill's Taxi Limited, [1946] 3 W.W.R. 218 (Alta. S. Ct.) an application for contribution was allowed even though it was made at a time when the person against whom it was claimed could not be sued due to the expiration of a short limitation period.

problems is the situation in which the injured party actually does sue both tort-feasors, but the action against one is dismissed either because the limitation period against him had expired, or for want of prosecution against him. In this case the Act seems clear: the tort-feasor from whom contribution is sought is neither a tort-feasor who is liable or a tort-feasor who would have been liable if sued. He is in fact a person who was sued and held not liable, and thus apparently one not liable for contribution. As was stated by the Supreme Court of Alberta in Aleman v. Blair and Canadian Sugar Factories Ltd. (1963) 44 W.W.R. 530 "it is rather grotesque that a plaintiff by a mere mistake in procedure, can wipe out and defeat a third party's right". (at p. 534).[23]

What are the possible solutions to this dilemma?

The solution which has been adopted by Ontario and Saskatchewan in their respective legislation, has been to effectively wipe out short periods of limitation when the problem raised has dealt with concurrent wrong-doers and where one of the wrong-doers has been sued or has settled with the injured person within his appropriate limitation period. The Ontario section states: "s. 9. Where an action is commenced against a tort-feasor or where a tort-feasor settles with a person who has suffered as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant Statute, no proceedings for contribution or indemnity against another tort-feasor are defeated by the operation of any statute limiting the time for the commencement of action against such other tort-feasor provided (a) such

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[23] At p. 534.

proceedings are commenced within one year of the date of the judgment of the action or settlement, as the case may be; and (b) there has been compliance with any statute requiring notice of claim against such tort-feasor".

Although this section has the merits of not depriving one tort-feasor of his right to contribution against other tort-feasor due to the Plaintiff's omission to bring the second tort-feasor into an action in due time, it has the defect of abolishing the short period of limitation which the second tort-feasor has elsewhere been given. It may be that short periods of limitation should not be awarded, but it is my respectful opinion that the cure of this matter is not to deal with it indirectly in certain cases. If it is deemed advisable to abolish short periods of limitation this should be done in the Limitation Act itself.

Another possible solution to this problem is one advanced by Glanville Williams who makes note of a suggestion made by Arthur Larson in an article entitled "A problem in Contribution: The Tort-feasor with an Individual Defence against the Injured Party", (1940) 4 Wisconsin L. Rev. 467. According to this suggestion, if the injured party by a procedural error allows the time in which he has to institute action against a tort-feasor to expire, or by some other procedural defect allows the action against a tort-feasor to come to an unsuccessful conclusion, he should be identified with this tort-feasor when he sues the second tort-feasor. This would mean that the second tort-feasor would be liable to the plaintiff only for his share of damages which correspond to the degree of his responsibility as determined by the court, and he would thus have no right to seek contribution from the first tort-feasor. This solution is equitable in that it does not penalize one tort-feasor because of an oversight on the part of the Plaintiff, nor does it remove from the

other tort-feasor procedural advantages which would normally be enjoyed by him. It does penalize the faulty plaintiff, and turns what would have been joint and several liability on the part of all tort-feasors into liability for only a certain portion of the damages. This might be viewed as too dramatic a departure from the principle of joint and several liability of concurrent wrong-doers, but it would I submit be the most just solution. If one tort-feasor decided to settle with the injured party at a time when the other tort-feasor and himself would be under no liability, there is no reason to allow the other tort-feasor to be prejudiced. As well if the first tort-feasor settled or was sued at a time when he was still liable but at a time when the liability of the second had expired, this is the plaintiff's fault and should be the plaintiff's misfortune.

Although there is no specific provision in the Alberta Tort-Feasors Act which adopts any solution with regards to this problem, there is a provision in the Alberta Limitation of Actions Act, R.S.A. 1970, c. 209, s. 60, which seems to adopt the Ontario and Saskatchewan solution. It states that "where an action to which this Part applies has been commenced, the lapse of time limited by this Part for bringing an action is no bar to (b) third party proceedings, with respect to any claims relating to or connected with the subject matter of the action". This section however deals only with actions, not settlements, and with third party proceedings, not new actions for contribution. It thus does not adequately deal with the problems noted above.

In conclusion therefore and in answer to the question who are tort-feasors who are liable or would if sued have been liable and who are subject to pay contribution to another tort-feasor, I would respectfully submit that only those tort-

feasors who could have been held liable at the time the injured party either settled with or instituted action against another tort-feasor, are liable to pay contribution. Further, I would submit that if by his omission the plaintiff has thus deprived a tort-feasor of his right to seek contribution against another tort-feasor, that the liable tort-feasor be liable to the plaintiff only for that portion of the damages which correspond to his degree of responsibility, and he accordingly be given no right of contribution. Alternatively, it could be held that as long as settlement is entered into or action instituted against one of the tort-feasors in the appropriate time, that the right to contribution against the other tort-feasor is maintained, although at the time of settlement or action, he could not have been held liable due to the expiration of the limitation period. I would not favour this alternate approach for those reasons discussed above.

(vi) Limitation Period In Which To Claim Contribution

Notwithstanding which approach is adopted, it is still necessary to decide the limitation period which should be given in order to claim contribution when this claim is possible. It is possible to either give the claimant the same amount of time in which to make his claim for contribution which was available for the injured party to make his original claim, reckoning this time from the date of settlement or judgment, from the date at which the payment is actually made to the injured party by the claimant, or from the date of the original cause of action. It is also possible to create a new time period.

It would be unfair to give the claimant for contribution the same amount of time in which to make his claim as there was for the original action (generally two

years) but to have this time begin to run from the date of the original action, for this would virtually preclude the claimant from making a claim at any time other than when action is instituted against him, by third party proceedings in that action. As we will discuss later it would be preferable for all claims to be litigated in the same action, but this may not always be possible. Further it would be unfair to the person against whom a claim is made to give the claimant the same time to make his claim as was available in the original action but to commence the running of this time at the point when the claimant actually pays the plaintiff. This may be four or more years from the original cause of action - an unduly long period of time. If the time began to run from the date of judgment in the original action, it could also be an unfairly long period of time.

The fairest method of proceeding would be to adopt the Ontario solution, which is to give the claimant a one year period of time in which he could make his claim from the date of judgment against him. This would give him some time for his claim, but would not place a burden on the tort-feasor against whom the claim is made for an unlengthy period of time.[23A]

C. Methodological Problems Related To Contribution Between Wrong-Doers

(i) Introduction

Having resolved the following points:

(1) that the present Tort-Feasors Act deals with judgments against and contribution between concurrent wrong-doers, i.e. joint or several tort-feasors;

[23A] This is subject to the discussion at the end of Section Two as to whether claims for contribution should be allowed to be made if not made in the same action in which the claimant for contribution was sued by plaintiff. The one year would apply at any event in cases where there was no action but a settlement.

(2) that the scope of the term "tort-feasor" for the purposes of the Act should include those liable for intentional torts, as well as unintentional torts;

(3) that it may be useful to consider extending the term "tort-feasor" to include those liable in tort, and also those liable for breach of contract or breach of trust where necessary;

(4) that those tort-feasors who can utilize the contribution section of the Act should include not only those found liable to the injured party by an action, but those who have admitted their liability by settling before action and judgment against them;

(5) that a settlement should be regarded as conclusive proof of the liability of the settling party, which should not be able to be disputed by the plaintiff with whom the settlement was made, nor by other tort-feasors;

(6) that a claim for contribution should only be able to be made against a tort-feasor who was liable or would have been held liable if sued at the time the settlement was entered into or at the time that action was instituted against the claiming tort-feasor;

(7) that if the above rule is adopted the plaintiff who by his action (or inaction) allows a tort-feasor to lose his claim for contribution against another tort-feasor be allowed to only recover against the liable tort-feasor that portion of the damages which determined to have been caused by his responsibility;

(8) that when a claim for contribution exists it must be made within a year from the date of the judgment entered into against the claiming tort-feasor, or a year from the date of settlement;

it now remains to resolve other problems associated with the method of determining contribution in various instances.

(ii) Amount Of Contribution Recoverable

Section 4(1)(c) of the Tort-Feasors Act gives a tort-feasor who is liable in respect of the plaintiff's damage the right to claim contribution from other tort-feasors who are liable or who if sued would have been held liable. Assuming that we can infer from this that it is not only liability which entitles a tort-feasor to claim contribution, but liability accompanied with actual payment by him of plaintiff's damages, Williams raises the question as to whether the claimant can only recover what he paid in excess of what he owed according to the degree of his responsibility, or whether once having paid some part of the plaintiff's damages, even though this may be less than what he eventually must pay, the claimant may recover a portion of this payment, corresponding to the other tort-feasor's degree of responsibility from the other tort-feasor.

The problem will arise in the following way. Let us assume that P, the plaintiff, is injured by two concurrent wrong-doers, A and B. A may decide to pay P a portion of his damages as a settlement between them, P reserving the right to institute proceeding against B for the rest. Will A be able to seek contribution for the amount which he paid to P from B?

If the Act is interpreted so that contribution is only obtainable by a tort-feasor for the amount which that tort-feasor paid to the plaintiff in excess of what his share of the full damages was in accordance with his responsibility,

then A will not be able to seek contribution from B unless it is determined that what A paid P was a full settlement of P's damages. Since in the settlement, P reserved his rights against B, A will have to wait until P either sues B and the full amount of P's damages is determined, or until the Statute of Limitation for P's action against B expires. This may place an unfair burden on A. If, on the other hand, the Act is interpreted so that contribution is obtainable on any amount paid by one tort-feasor to the injured party, A will be able to sue B immediately for contribution.

Williams suggests that the second interpretation results in a more equitable solution. It may in order to ensure that this interpretation is the one which is used by the courts be necessary to express this in any new legislation. It is noted here however that judicially this problem has not yet arisen which may suggest that it is one which is unlikely to arise and legislation may merely serve to confuse rather than clarify.

(iii) Settlements

Several problems may arise when a plaintiff settles with one of the tort-feasors, reserves his rights to sue the others for the balance, and the tort-feasors seek contribution from each other. Let us recall that the Tort-Feasors Act allows a tort-feasor to settle and become eligible for contribution.

Let us examine a simple example. P is the Plaintiff who is injured by the concurrent wrongs of A and B. P settles with A for $100.00 and reserves his rights as against B. P sues B, and in the action B claims against A for contribution, and A claims against B for contribution on the

settlement. If the court should hold that P's full damages were $300.00 and that A was 20% at fault, and B was 80% at fault, P will be able to execute against B (not A, because he has settled with him) for $200.00, i.e. that which remains from the $300.00. Since A is only found responsible for $60.00, i.e. 20% of $300.00 he can collect the excess of what he paid, i.e. $40.00, from B. B ends up paying $240.00, and A pays $60.00.

Let us assume that, on the facts above, the court determines that A's responsibility was 80%, and B's only 20%. P therefore receives $200.00 from B, and B is entitled to contribution for the excess of what he paid over his share from A; that is, his share is 20% of $300.00 which is $60.00, he paid $200.00, so he is entitled to $140.00 from A. Let us note that the settlement between A and P is irrelevant as far as B is concerned.

The problem with the above state of affairs is obvious. If A settles with P but P reserves his rights against other tort-feasors, the settlement between A and P may be completely over-turned as far as A is concerned. There would in fact be no point in A's settlement on these terms, because if by the settlement he wished to avoid litigation, costs, and a more unfavourable judgment, he did not succeed in avoiding any of these things. It therefore becomes obvious that a settlement will only be entered into between a settling tort-feasor and an injured party, if the latter either gives up his rights to proceed against the other tort-feasors, or promises in the settlement to indemnify the settling tort-feasor of any claims for contribution which may subsequently be made against him. If the former agreement is made then there is no problem; A will seek contribution from B on the sum he paid, if reasonable, in proportion to their degrees of responsibility. If the latter agreement is made then in the

case above what would result at present is a circuitry of actions; that is P will sue B, B will claim contribution against A, A will claim to be indemnified according to the agreement by P. In order to avoid this circuitry Williams suggests that if P settles with A and agrees to indemnify him against a claim by B, then in the action by P against B P should be identified with A. That is, P should be able to sue B for the full damages minus A's share, which would leave B only to pay for his share.

Let us assume that this is the rule which is adopted, that is, if the injured party settles with a tort-feasor and reserves his rights against the other tort-feasors, but agrees to indemnify the settling party against any claim made against him for contribution, then in his suit against the remaining tort-feasor the plaintiff shall be identified with the settling party.

With the application of this rule, the following may occur. P settles with A for $100.00 on the above terms. P sues B, the damages are assessed at $300.00 and B is held to be 80% to blame. P can, on the above rule, receive 80% of $300.00 from B, that is, $240.00. Because of a wise settlement P recovers $340.00, although he has only suffered a loss of $300.00. A has paid $100.00 although he only actually owed $60.00. The opposite may occur. P settles with A for $100.00 on the above terms. P sues B, the damages are assessed at $300.00 with B 20% responsible. P can, on the above rule, collect 20% of $300.00, which is $60.00. Because of a bad settlement P has recovered only $160.00, although his damages were assessed at $300.00. A has only paid $100.00 although he actually owed $240.00. Should this result be permitted?

It may be argued that this result is perfectly legitimate. The persons who stand to gain or lose by the settlement are the settling parties, and the non-settling party pays what he owes notwithstanding the settlement.[24]

Glanville Williams argues that this result is not fair. He disagrees with the proposition that an astute plaintiff should be able to benefit by a good settlement and ultimately receive more than his assessed damages. He suggests that in the above case the plaintiff should only receive from the second tort-feasor, B, what he is owed taking into account how much he has already received. Thus, in the above example, where P has received $100.00 from A, although A only owed $60.00, B should be made to pay only $200.00 and not $240.00 that he actually owed. In other words, P's claim against B should be reduced by the greater of A's assessed liability or the amount of settlement. Williams also suggests that if P miscalculated and settled with A for too low an amount B would still only be liable for his share, and P would lose out. Finally Williams suggests that although in the above case B would only be liable for $200.00 instead of $240.00 so as not to give P more than $300.00, A would be able to seek contribution from B for the excess that was paid in settlement by A.

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[24] In Rodenbush v. Jeffers Transport Co. Ins. (1958), 11 D.L.R. (2d) 410 (Sask., C.A.), by order of the court the non-settling party was held liable for the amount of the victim's damages as assessed by the court which corresponded to his degree of liability. The amount of settlement was considered irrelevant as far as the determination of his damages was concerned.

Which of the above two schemes should be adopted? As Williams himself points out the weakness with his scheme is that it is a disincentive for plaintiffs to settle since in no cases will they be able to gain by settling, they may only lose or stay the same. Moreover it does not seem inequitable to me to allow the settling parties to suffer or gain by settling, and because of these reasons and because it is simpler, I would prefer the scheme whereby the plaintiff is identified with the settling party when he proceeds against the other tort-feasor, and the second tort-feasor will be liable for his share which is the damages as assessed by the court minus the share of responsibility attributed to the settling tort-feasor.[25]

(iv) Risk Of Insolvency

Another situation which may arise under the Tort-Feasors Act which is capable of giving rise to a problem is the following.

Assume that P is injured by the concurrent wrongs of A and B. It is clear that P can attempt to sue and recover in full from either A or B and that if either A or B is insolvent, it will be the other tort-feasor and not P who will bear this loss.

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[25]This is the scheme suggested by Arthur Larson, A problem in Contribution: The Tort-feasor with an Individual Defence Against The Injured Party (1940), 4 Wis. L. Rev. 467.

Assume that P is injured due to the concurrent wrongs of A, B and C. The court determines that the three are equally at fault, and P executes in full from A. A is then able to seek contribution from B and C which according to s. 4(1)(c) of the Act is "the amount as the court may find to be just and equitable having regard to the extent of that person's responsibility for the damage." A is able to recover one third of the damages which he was forced to pay from B, but when he seeks contribution from C, he is unable to recover due to C's insolvency. Who bears the risk of this insolvency?

It is obviously equitable for both A and B to bear this loss in accordance with the degrees of responsibility inter se; which is in this case 50/50. Therefore the court should hold that B owes A one-third of the assessed damages as contribution plus one-half of C's share should C be insolvent, namely an additional one-sixth. In order to effect this Williams suggests that the courts be empowered to grant a wrong-doer primary judgments against the other wrong-doers for their respective shares of the total loss and contingent judgments against the wrong-doer to apportion the share of an insolvent wrong-doer inter se. In my respectful opinion the present wording of the Tort-Feasors Act, that contribution be "just and equitable" is sufficiently general to allow for this or for any other equitable mode of apportionment. Additional sections to ensure this may confuse or be misinterpreted so as not to effect results which are in fact desirable.

D. Apportionment

What is the basis for deciding the question of apportionment under the Tort-Feasors Act?

Section 4(2) of the Act states that the amount of

contribution which is recoverable shall be the amount that the court may find to be just and equitable having regard to "the extent of that person's responsibility for the damage".

In terms of the problems with which the Tort-Feasors Act attempts to deal, the word "responsibility" must refer not to the amount of the damage caused by one party as compared to the amount caused by the other, since the damage caused has been jointly caused by the two parties acting together or independently. If it were possible to ascertain that Defendant A caused one portion of the damage and Defendant B another, the problem would lie outside the scope of the Tort-Feasors Act. The term "responsibility" must refer to the culpability of the tort-feasors and not the amount of damage caused. This is by no means an easy assessment for the courts to make. Nevertheless, if contribution is not to be automatically equal it is one which must of necessity be made.

E. Indemnity

The Tort-Feasors Act in s. 4(1)(c) states that "no person is entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability regarding which the contribution is sought", and in s. 4(3)(b) the Act states that "The court has power to direct that the contribution to be recovered from any person shall amount to a complete indemnity".

"Indemnity" as compared to "contribution" involves one tort-feasor completely re-paying the amount which another tort-feasor has been required to pay, instead of merely "contributing" to what the tort-feasor was required to pay. The Act is, therefore, logical in forbidding contribution when the person against whom it is claimed is entitled to be indemnified by the claimant.

When will indemnity be ordered by the court?

Williams states that it will be ordered in the following circumstances:

(1) Where it otherwise would have been ordered at common law.

(2) Where one person has benefited from the commission of the tort.

(3) Where one tort-feasor has been guilty of misfeasance whereas the other was liable only for "passive inaction" or a nonfeasance.

(4) Where it has been agreed to by contract or specified by Act.

(5) Where one party's liability was based on no fault but was due to strict liability and the other tort-feasor's liability was based on fault. This case is one which Williams recommends but which has not been judicially accepted.

A question which has received much comment is whether a master should be entitled to be indemnified by his negligent servant. There are certainly arguments on both sides of this issue.

At present as pointed out above the Tort-Feasors Act gives the courts a wide discretion to order indemnity. Canadian courts have awarded indemnity in the following cases: (1) On several occasions a master has been indemnified by his employee.[26] (2) A dentist who was negligently authorized

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[26] See, inter alia, Finnegan v. Riley (1939), 4 D.L.R. 434 (Ont., C.A.) Sleeman and Sleeman v. Foothills School Division No. 38 et al., [1946] 1 W.W.R. 145 (Alta., S.Ct.)

by a doctor to perform a tooth extraction was indemnified by the doctor. This was based on the principle that when one does something for someone else at his request, the law implies from the request an undertaking on the part of the principal to indemnify the agent if the agent acts upon the request.[27] (3) Where one party's negligence consisted merely in omission he was indemnified by the other party whose act was a commission.[28] Due to time limitations, the question of indemnity has not been fully examined. Perhaps it would be preferable to refuse the master an indemnity against his employee based on economics, and on humanitarian grounds. Generally however the wide discretion given to the courts by our present Act has not caused any difficulty and there seems to be no immediate reason for its change.

F. Conclusion To Section One

This Section has dealt with those issues which may arise when an innocent party suffers damage due to the torts, whether joint or several, concurrent torts, of two or more parties.

The following changes have been suggested to our present legislation, The Tort-Feasors Act, in light of certain present weaknesses outlined above.

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[27] Parmley v. Parmley and Yule [1945] 1 W.W.R. 405, 61 BCR 116 (B.C.,C.A.) reversed on appeal to Supreme Court, [1945] S.C.R. 635.

[28] McFall and McFall v. Vancouver Exhibition Association and Marble, [1943] 2 W.W.R. 225 (B.C.,C.A.).

(1) New legislation should abolish the rule that a release of one joint tort-feasor releases all joint tort-feasors.

(2) New legislation should allow contribution, if just and equitable, between intentional tort-feasors as well as other tort-feasors.

(3) New legislation should clarify certain ambiguities in the present wording of the Act by making it clear that: (i) A tort-feasor can settle before judgment and claim contribution. (ii) The fact of settlement is to be regarded as conclusive proof of liability, not disputable by others. (iii) There is to be a claim for contribution against a tort-feasor who was not sued and found liable by the victim only if it can be shown that there was an existing cause of action against him at the time that the first tort-feasor was sued or entered into a settlement with the victim. (iv) A victim who fails to institute or continue proceedings against a tort-feasor so that a holding of liability against him becomes impossible should be allowed to only recover against a liable tort-feasor that portion of the damages which are determined to have been caused by him. (v) A claim for contribution must be instituted within a year from the date of judgment or settlement. (vi) Contribution should be claimable on any amount paid by one tort-feasor to the injured party. (vii) If the Plaintiff settles with one tort-feasor and promises to indemnify him against all further claims, the Plaintiff will be identified with the Settling party in his subsequent suit against the remaining tort-feasors. The remaining tort-feasors shall in this case only be liable for their shares of the damages to the Plaintiff (jointly and severally). (viii) The risk of insolvency shall be shared by all solvent tort-feasors.

Section Two will examine those issues which are peculiar to the situation where the victim is partly responsible for his own damages, which is covered at present by the Contributory Negligence Act. Recommendations will be made to improve this legislation. In the Concluding Section, both series of recommendations will be consolidated and presented together.

SECTION TWO

A. General Introduction

In Section One we examined those issues which arise when an innocent plaintiff suffers loss or damage due to the torts of two or more concurrent wrong-doers, which questions are presently dealt with primarily by the Tort-Feasors Act.

In this Section we are concerned with those issues which arise when a plaintiff suffers loss or damage partly due to the fault of another, and partly due to his own fault. In this case we say that the Plaintiff was contributorily negligent, and we see that the Act which is most relevant to the settlement of these problems at present is the Contributory Negligence Act.

B. Scope Of The Contributory Negligence Act

(1) Introduction

At common law if a Plaintiff was found negligent, however slight his negligence may have been, and this negligence was a proximate cause of his injury, the Plaintiff had no recourse against the negligent Defendant. This harsh rule was based upon the same philosophy expressed

above in Section One which prevented contribution between wrong-doers at common law, namely, that a wrong-doer could not seek relief from the courts. Though this common law rule appears draconian, it should be noted that it is still important in the law today, and many jurisdictions in the United States only allow a plaintiff relief if it is shown that his negligence is not as great as defendant's. If it is shown that it is equal to or greater than defendant's, the rules of "comparative negligence" dictate that there shall be no relief for the Plaintiff.

Section 2(1) of the Alberta Contributory Negligence Act which states:

> "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 the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally"

reverses the above common law rule in Alberta. The "fault" of the Plaintiff is no longer a bar to an action by him against the defendants but is a defence which goes to the reduction of his damages. In my respectful opinion this result is far more equitable than the common law rule and as well the comparative negligence rule discussed above.

(2) Applicability Of The Defence Of Contributory Negligence

The first issue which must be resolved in relation to the Contributory Negligence provision outlined above is to determine the scope of this provision. For which torts is the defence of contributory negligence appropriate?

The Contributory Negligence Act indicates that the defence of contributory negligence and the consequent apportionment is available where the tort is based on the "fault" of the persons involved. There is no definition of the term "fault" in the Act as there is in the English Law Reform (Contributory Negligence) Act 1945 where "fault" is defined as "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act give rise to the defence of contributory negligence".[1]

Without a precise definition in the Contributory Negligence Act concerning the scope of the term "fault" it is possible to encounter problems in the following situations. (A) Should a defendant who was liable for an intentional tort be able to base a defence on the Act if he can establish Plaintiff's contributory negligence? (B) Is the Act available only in cases where the fault of the parties is personal fault, or does it apply as well to imputed fault, that is where the fault is on the part of someone with whom they can be identified.

Application Of Contributory Negligence Act To Intentional Torts

(A) This question has been the subject of judicial decisions. In the case of Parmley and Parmley v. Yule, [1945] S.C.R. 635 the Supreme Court of Canada was faced with the task of interpreting the Contributory Negligence Act of British Columbia,[2] which was substantially in the same wording as is the present provision of the Alberta

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[1]Section 4.

[2]R.S.B.C. 1936, c. 52, s. 2.

Contributory Negligence Act, stated above. The Supreme Court was faced with the question whether the Act applied in a case where the "fault" complained of was a trespass, and more particularly, whether the person who was liable for the trespass could recover contribution. It had been held in the British Columbia Court of Appeals, per Mr. Justice Smith, that "trespass to the person, like trespass to a ship, must be deemed to be 'fault' within the provisions of the Contributory Negligence Act and whether such trespass was the result of negligence or wilfulness".[3] Mr. Justice Estey in the Supreme Court avoided the question by deciding that the defendants in the action had committed the trespass by their negligence and that because they were persons whose joint fault, in terms of negligence, had caused them to suffer damage or loss, i.e. the pecuniary prejudice in compensating the injured party due to not only theirs' but the other party's fault, that the Act applied and contribution was payable. We will return to this latter point regarding the type of "damage or loss" which the Act is concerned with shortly, but for the moment it is observed that Mr. Justice Estey on the question of the meaning of the term "fault" was prepared to say only that "whether it (the word "fault") is a somewhat wider term (than merely negligence) as used in the British Columbia Act, in my view it is not necessary here to determine".[4]

This same question was faced again by the Ontario High Court in the case of Hollebone v. Barnard, [1954] 2 D.L.R. 278. In this case a Defendant liable for the intentional tort of trespass was seeking to reduce Plaintiff's recovery

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[3] [1945] 2 D.L.R. 316, at p. 330.

[4] At p. 650.

based on his contributory negligence. In this case the words in issue were the words "fault or negligence" as they appeared in the Ontario Negligence Act R.S.O. 1950, c. 252, s. 4. After a brief review of some authorities, Mr. Justice Wells concludes as follows:

> "It would seem to be clear from a reading of these authorities that the Act was designed to cover only cases in which contributory negligence was formerly a defence. I am not aware that a plea of contributory negligence was ever a defence to an action of trespass and no authorities to show that it was have been cited to me nor have I been able to find any . . . I must therefore, come to the conclusion that the words "fault" and "negligence" in the Ontario statutes are synonymous and simply mean negligence, and should not receive any wider meaning than that which is included in the word "negligence" . . . It may well be that to meet modern conditions it is desirable that there should be a wider interpretation given the statute . . . It may well be that the only authority which can so liberalize the Negligence Act is the Legislature itself. While, in the absence of authority I might have been inclined to follow the reasoning of Sidney Smith J.A. in the Parmley case, [1945] 2 D.L.R. 316, that road does not seem now open".[5]

It may be noted in reference to Mr. Justice Wells' comment, that to date it does not seem that the Legislature in Ontario has seized upon the opportunity of so "liberalizing" its statute. When the same problem came up in the case of Funnell v. C.P.R. and Bwoden (1964), 45 D.L.R. 2d 481 (Ont., High Court), this time dealing with the situation where one defendant was liable in negligence and the other for nuisance, Mr. Justice Fraser was also able to avoid the issue by holding that the defendant liable for the nuisance was also negligent and therefore that the Ontario Negligence Act was applicable.

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[5] At p. 286.

The resolution of the question whether or not the courts should allow the Contributory Negligence Act and its provision allowing for the apportionment of liability to be used in favour of an intentional wrong-doer depends for its answer upon the same considerations as discussed in Section One in attempting to resolve the question as to whether the court should permit an intentional tort-feasor to recover contribution under the Tort-Feasors Act.

There may be instances where although the Defendant is technically liable for a trespass or other intentional tort, he is not "culpable" in any moral sense. As well it may be inequitable to allow a negligent victim to recover in full merely because the other wrong-doer committed an intentional tort, notwithstanding the latter's culpability. It is true that in certain cases the courts will feel compelled in dealing with an intentional tort-feasor to place the "lion's share" of the responsibility and liability on him, but this can be done notwithstanding a provision which would allow a more equal apportionment in other cases involving an intentional wrong-doer. It would be inconsistent to allow intentional wrong-doers to claim and receive contribution under the Tort-Feasors Act but to deny them the defence of contributory negligence.

It may be that at present the wording of the present Contributory Negligence Act is wide enough so as not to preclude the courts from utilizing it in cases of wrongs other than "negligence". Nevertheless, as an examination of the cases discussed above show this is by no means certain. It would therefore be advisable to clarify this point in any new legislation.

Imputed Fault

A very important question which arises in reference to the meaning of the word "fault" as used in the Contributory Negligence Act regards the issue of "imputed fault". When will a person whose own conduct is in no way faulty, be identified with the fault of someone else so that he will be a person at fault for the purposes of the Contributory Negligence Act?

(1) Vicarious Liability

If a person is vicariously liable for the act of another, will he be identified with the latter's fault when he institutes an action against another for damages which he has suffered, so that these damages might be reduced by the application of the Contributory Negligence Act?

William believes that the answer to this must be affirmative. He states: "A plaintiff is identified with another in every case in which the negligence of another is imputed to a defendant . . ."[6]

This answer seems not to have been the answer which was given by the Alberta Supreme Court in the case of Hilburn v. Lynn, Sprecher and Rainey; and Rainey (Third Party) (1955-56), 17 W.W.R. 15. The facts of this case are as follows. Plaintiff H was in a car as a guest passenger, which car was operated and driven by R. There was a collision between this latter vehicle and a vehicle

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[6]At p. 432.

driven by S and owned by L. Plaintiff H was injured and sued R, S, and L. According to the section of the Contributory Negligence Act then in effect, which corresponds closely to s. 3(1) and (2) of the present Contributory Negligence Act, if two persons were found at "fault" they could recover contribution from each other in Plaintiff's action against them. The court was faced with the question whether L could seek contribution under this provision, being a person found at "fault" or whether the term "fault" was restricted to only those who were personally and not vicariously at fault, in which case the appropriate way for L to seek contribution would be by third party notice under the Tort-Feasors Act. Although this issue which the court was facing was not the same issue as described above, namely whether a person is at "fault" under the Act for the operation of section 2 of the Act, if he is only vicariously at fault, it is obvious that the resolution of both issues is the same and depends on the court's definition of the word "fault".

After a review of the authorities, the court concluded that the word "fault" used in the context of section 3 of the Act referred only to personal fault and not imputed fault. Mr. Justice Egbert stated: "In the plaintiff's action the defendant Lynn cannot be found guilty of fault or neglect. His liability, if any is a vicarious one imposed upon him as the owner of the car . . . That being so, in this case there is no manner in which the trial judge can, in the plaintiff's action, determine his degree of fault and consequently no manner in which the concluding portion of the section relating to contribution and indemnity can be made applicable".[7]

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[7] At pps. 19-20.

A more recent case, that of Flamant et al v. Knelson et al, [1971] 4 W.W.R. 454 (B.C., S.Ct.), was faced with the two questions, firstly, whether the fault of an employee was to be imputed to the employer to make him at "fault" under the B.C. Contributory Negligence Act, and secondly, whether, the fault of a driver of a car was to be imputed to the owner of the car to make the latter a person at "fault" for the purposes of the Contributory Negligence Act. The purpose of these questions was to decide whether or not section 6 of the Act which enabled those at fault to escape liability for the whole of the damage caused to a gratuitous passenger could be applied for the benefit of an employer and an owner of a vehicle.

The court was presented with the above case of Hilburn v. Lynn, Sprecher and Rainey, inter alia, as support for the proposition that the Act does not contemplate imputed fault in its conception of the term "fault" and the application of the Act. While not disputing that this case held that the word "fault" did not refer to imputed fault for the purpose of one section of the Act, Mr. Justice Dryer held that this did not mean that it did not refer to imputed fault for the application of section 6. He stated:

> "The question decided in those two cases, however, is entirely different from the one which faces me . . . I find the reasoning of Glanville Williams convincing. I think and I hold that the fault referred to in section 6 of The Contributory Negligence Act extends to and includes the fault imputed to an employer as such at common law because of the fault of the employee, and also the fault imputed to the owner of a car because of the fault of the driver to whom he has entrusted it and for which, because of such imputation, he is made liable by section 70 of The Motor-vehicle Act. I realize and regret that there may be some conflict between my ruling and that of Egbert J. in Hilburn v.

> Lynn et al., supra, but he was not dealing with the same problem as confronts me but rather with the form in which a particular claim should be brought".[8]

Mr. Justice Dryer also refers to an earlier Alberta case, that of Iliuk et al v. Stein et al. [1940] 2 W.W.R. 646, where an owner of a car was held to be at fault for the purpose of the provisions of the Contributory Negligence Act.

With all due respect, I think that Mr. Justice Dryer's attempt to reconcile the Hilburn case with the Flamant case is not convincing. However, I would strongly agree with the result in the latter case and with the suggestion by Glanville Williams that the word "fault", whereever it appears in the Act, should include fault imputed due to vicarious liability. It is unteneable that the same word should have different meanings in the same enactment, and a definition section which clarifies this point would be advisable in any proposed legislation.

(2) Family Relationships

Aside from the issue of Vicarious Responsibility, a second major area where there is some question as to whether the Contributory Negligence Act has application is in relation to identification due to family relationships. Where an individual without personal fault suffers damage or loss due partly to the fault of a close relation and a stranger, will the relative's negligence be imputed to the plaintiff so as to reduce his damages? This question can be looked at in two situations: (1) Where the damage or loss

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[8] At pps. 463-464.

suffered is directly related to an injury suffered by the faulty relative; (2) Where the damage or loss suffered is due to an injury suffered by the plaintiff himself.

Taking the first situation, we may question whether the negligence of a spouse will be imputed to the plaintiff-spouse, when the latter sues for loss or damage, e.g. loss of services, and consortium, which he has suffered as a result of the negligent spouse's injury?

Section 35(1) and (2) of the Domestic Relations Act R.S.A. 1970, c. 113, as amended by S.A. 1973, c. 61 states: (1) Where a person has, either intentionally or by neglect of some duty existing independently of contract, inflicted physical harm upon a married person and thereby deprived the spouse of that married person of the society and comfort of that married person, the person who inflicted the physical harm is liable to an action for damages by the married person in respect of the deprivation. (2) The right of a married person to bring the action referred to in subsection (1) is in addition to, and independent of, any right of action that the spouse has, or any action that the married person in the name of the spouse has, for injury inflicted upon the spouse".

This action for loss of consortium has been the subject of some debate and reforms have been suggested by certain bodies. The Newfoundland Family Law Study, Final Report XII, on "Some Aspects Of Torts In Family Law", for example, studies this question.[9] It is beyond the scope of this paper to examine the legitimacy of this action and suggest reforms; nevertheless, it is necessary to discuss it

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[9]At pps. vii-viii.

in relation to the Contributory Negligence Act. Will a Plaintiff who is suing for loss of consortium be identified with the negligence of his/her spouse, which negligence contributed to the injured party's injuries, so that damages which would normally be recovered from the negligent stranger-defendant will be reduced?

The case law on this question has been very inconsistent. In the case of Enridge et al v. Copp (1966), 57 D.L.R. (2d) 239 the common law was thoroughly reviewed. In this latter case, a husband was suing for loss of consortium and servitum resulting from an injury to his spouse, which injury was caused 40% by the fault of the spouse and 60% by the fault of the stranger defendant. The issue was, quite simply, whether the husband's claim should be reduced according to the provisions of the Contributory Negligence Act by his wife's degree of negligence.

The stated arguments for reducing the husband's damages are as follows:

(1) the husband's action is derivative from the wife's and thus no better than her own action. If the wife's action for damages is subject to reduction due to her contributory negligence, so should his action for loss of consortium.

(2) Section 7 of the British Columbia Contributory Negligence Act which is similar to Section 5 of the Alberta Contributory Negligence Act, which will be discussed shortly, dictates that this reduction should take place.

The arguments for allowing the husband to recover in full are as follows:

(1) The husband's action is a completely independent action

and is no way derived from the wife's cause of action and therefore it should not be affected by the same disabilities as is her action. Two cases were cited for support of this proposition: Mallet v. Dunn, [1949] 1 ALL E.R. 973, [1949] 2 K.B. 180, and Macdonald and Macdonald v. McNeil [1953] 2 D.L.R. 248 and [1953] 1 D.L.R. 755. According to Mr. Justice Aikins in the Enridge case these authorites hold that "a husband's cause of action per quod is not derivative, that it is wholly independent, of the wife's cause of action, and that before the passage of the contributory negligence legislation it was not defeated by contributory negligence on the part of the wife, with the result that after such legislation the husband's damages are not to be diminished by the percentage to which his wife is found to have been guilty of negligence contributing to her own injury".[10]

(2) Section 7 to the Contributory Negligence Act has no application to this case.

Mr. Justice Aikins in the Enridge case held:

(1) Section 7 of the Contributory Negligence Act does indeed not refer to this situation. He held that it applies where A suffers bodily injury due to the negligence of his spouse and another, not where the bodily injury is not suffered by the suing spouse. It is clear from the wording of the Section that this is so.

(2) The theory most in line with Canadian authorities is that the action per quod is a derivative action, dependant on the wife's action, and is not independent from it.

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[10]At p. 241.

He stated: " . . . in my view the principle adopted supports the theory that in Canada, as in the United States, the action per quod is to be regarded as a derivative or dependant action. For these reasons I have concluded that I should follow what seems to me to be the mainstream of Canadian authority and hold that the damages awarded by the plaintiff husband are to be diminished by the extent in terms of percentage in which the plaintiff wife was held to have been negligent."[11]

It is interesting to note that the Alberta Domestic Relations Act cited above which states that the right to bring the action for loss of consortium is "independent of" the right of action of the injured spouse seems to settle this question in favour of the independent action theory and thereby the result would seem to be, at least in Alberta, that there will be no reduction of damages for the negligence of the spouse. However, in the case of Young and Young v. Otto, [1947] 2 W.W.R. 950 (Alta. S. Ct.), despite this wording of the Domestic Relations Act, the court did reduce the husband's damages. In fact, the Domestic Relations Act was not even mentioned in relation to the action. Therefore it certainly cannot be taken as settled that there will not be a reduction of the damages in Alberta despite the seeming clarity of the Statute.

Even after the Enridge decision, there is continued uncertainty as to this question. The 1970 Newfoundland Study in reference to this issue states: "Authority is divided but the better view is that since the husband is suing in his own right his claim should not

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[11] At p. 253.

be diminished by his wife's failure to take care of herself".[12] This of course is exactly the opposite conclusion to the decision in Enridge.

I would submit that there are basically three alternatives open should legislation be deemed advisable to clarify this question.

The first alternative is to allow the Plaintiff to recover in full from the stranger defendant; he could of course not recover from his spouse due to the principle of inter-spousal tort immunity, as well as the apparent illogic in giving a spouse an action for loss of consortium against his own spouse. The stranger could in this alternative be given a right of contribution against the other spouse. This of course can arguably be deemed to be an indirect inter-spousal tort action, which infringes against the immunity principle, and suffers from a certain illogic as explained above.

The second alternative is to allow the Plaintiff to recover in full from the defendant, but not to give the defendant a right of contribution. This is arguably inequitable because it places an unfair burden on a stranger defendant due to a relational problem between the other defendant and the plaintiff. On the other hand it may be determined to be not that inequitable in view of the fact that contribution between tort-feasors is a privilege given by Statute and not a right springing from the common law.

The third alternative is to reduce the plaintiff's damages according to the negligent spouse's degree of fault. This derogates from the supposed "independence" of

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[12] At p. 19.

this cause of action, and places on one a reduction due to no negligence of his own.

It may be that it would be ill advised to legislate on this at all. Aside from not being a problem which arises that frequently, the flexibility which the courts presently have with reference to this issue may be preferable to fixing a rule which is bound to be unsatisfactory in some respect at any event.

The discussion concerning the common law action for the loss of services of children and servants suffers the same confusion as the above problem and is susceptible of the same resolution.[13]

The second situation where there is a question of identification for the purposes of the Contributory Negligence Act due to a family relationship arises in the case where a spouse is injured by the fault of his/her spouse and a stranger defendant. This situation is dealt with explicitly in s. 5 of the Act and will be discussed shortly.

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[13]The following cases, inter alia, have discussed these problems. Wasney v. Jurazsky, [1933] 1 W.W.R. 155 (Man., C.A.): Mother allowed to recover full medical expenses, although child negligent. Young and Young v. Otto, [1947] 2 W.W.R. 950 (Alta., S. Ct.): Husband's damages for expenses, loss of consortium and loss of services reduced in proportion to wife's degree of fault. Dority v. Ottawa Roman Catholic Separate Schools Trustees, [1930] 3 D.L.R. 633 (Ont., C.A.): damages reduced for wife's negligence. Knowlton v. Hydro-Electric Power Com'n, [1926] 1 D.L.R. 217 (Ont.): damages reduced for wife's negligence. McKittrick v. Byers, [1926] 1 D.L.R. 342, 58 O.L.R. 80: father's damages reduced on account of child's negligence. Macdonald and Macdonald v. McNeill, [1953] 1 D.L.R. 755 (N.S., S. Ct.): husband's damages not reduced although wife negligent. Quinlan v. Nordlund (1961), 27 D.L.R. (2d) 162 (B.C., S. Cht.): father's damages reduced by son's degree of fault.

(3) Fatal Accident Legislation

Will a dependent who is suing under Fatal Accident legislation be identified with the deceased, so that the deceaseds' fault will be imputed to the former with the result that his damages will be reduced?

There is no specific provision in the Alberta Contributory Negligence Act at present which dictates the above result. In the English Law Reform (Contributory Negligence) Act 1945, s. 4, there is the following provision which does identify the claimant with the deceaseds' "fault". "Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons . . . any damages recoverable in an action brought for the benefit of the dependants of that person under the Fatal Accidents Acts, 1846 to 1908, shall be reduced to a proportionate extent."[14]

In the Alberta Fatal Accidents Act, R.S.A. 1970, c. 138 s. 3, a claim is given to the dependants if the deceased would have been able to maintain an action and recover damages in respect thereof, had he not died. This seems to make the dependants' action a derivative one and the arguments discussed above which would reduce a plaintiff's claim if his action were derivative and the injured party were contributorily negligent would apply strongly here. It is also well established case law that the fault of the deceased will be imputed to the dependants in their Fatal Accident claims.[15] Glanville Williams suggests that this identification is wrong and that there is no logical

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[14] Section 1(4).

[15] See inter alia: Newell v. Gemmell, [1938] OWN 1; Bigcharles et al v. Merkel et al, [1973] 1 W.W.R. 324 (B.C., S. Ct.).

requirement for it to exist. Instead he suggests that there be no identification, that the claimant be entitled to an undiminished claim, and that the defendant be entitled to recover contribution as to this claim from the deceased's estate. This would result in benefitting the dependants before benefitting creditors and beneficiaries under an estate. It would also place the loss if the estate were insolvent on the defendant rather than on the dependants. Williams' proposal is attractive, but too dramatic a departure from the accepted case law and inconsistent with the derivative nature of the claim under Fatal Accident legislation, to be acceptable.

(4) Miscellaneous

Other instances where fault of someone else is to be imputed to the plaintiff for the purposes of the Contributory Negligence Act are where the suit is by a nominal plaintiff who will be identified with the fault of the real plaintiff, assigned claims and actions by personal representatives of an estate where the fault of the deceased will affect their claims on behalf of his estate. These instances require no elaboration.

(5) Summary

It may be appropriate at this stage to summarize what we have said about the scope of the Contributory Negligence Act so far.

Section 2(1) of the Act applies so as to apportion damages between those at fault and to thus allow a contributorily negligent plaintiff to recover a portion of his damages.

The Act does not indicate the scope of the word

"fault" and hence the applicability of the defence of contributory negligence where the tort involved is not based on negligence. It was recommended that even though the tort committed was intentional that the courts not be precluded from denying to the defendant the defence of contributory negligence.

The Act does not indicate whether the word "fault" as used therein is to be taken to refer only to personal fault, or whether in certain instance, the Act will apply to those who were not personally at fault but who may be identified with some one who was at fault. There are several instances where this may arise. It is arguable that the fault of a person for whose acts another is responsible should be imputed to that other for the purpose of the Act. It is also arguable that when an action is based upon an injury caused to another, that the fault of that other person, should be imputed to the plaintiff so as to reduce his damages. This latter situation arises most frequently in relation to actions per quod for loss of servitum and consortium, and for actions under Fatal Accident legislation. Finally where some one is suing on behalf of someone else, the fault of the latter should be imputed of the former for the purposes of the Act.

C. The Effect Of The Contributory Negligence Act On Other Defences

It is arguable that with the acceptance of the principles of contribution between wrong-doers under the Tort-Feasors Act and apportionment between plaintiff and defendant under the Contributory Negligence Act should come the restriction or abolition of the defences of "volenti non fit injuria" and "ex turpi causa". As is known, these defences, if established, will operate to relieve defendant

from all liability to the plaintiff, even though the former's conduct was in itself blameworthy. These defences are based on the premise, for volenti, that there is no duty owed to one who consents to legal and physical risks associated with someone's conduct, and for ex turpi, that a party whose own act was illegal should not be allowed to come into court, allege his own illegality, and claim damages.

Although the theory behind the three defences of contributory negligence, volenti non fit, and ex turpi causa differ, each operating with its own set of facts, because of the harshness of the latter two defences, courts have preferred to avoid them in favour of contributory negligence. This has tended to slur the differences between the three and has resulted in inconsistent judicial decisions. It may therefore be necessary to examine the three together with a view to reform. This has not been done by this writer due to the scope of the paper which deals with contributory negligence; it may be advisable for a future study.[16]

D. Meaning Of The Terms "Damages Or Loss"

Section 2(1) of The Contributory Negligence Act states that where by fault of two or more persons damage or loss is caused to one of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault . . .

What do the terms "damage or loss" mean?

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[16]See recent case of Tallow v. Tailfeathers (1973) 6 W.W.R. 732 (Alta. A.D.). See Article by Dean Fridman, Wrongdoing Plaintiff, (1972), 18 McGill L.J. 275.

It is obvious that it refers to the most common instance, which is where someone suffers either bodily injury or material injury. However, it has been suggested that the term damage or loss is wide enough to include mere pecuniary damage or loss which is lost when one person is called upon to compensate a third party for an injury the latter suffered due to the fault of the former and another party. The amount of damages payable by the defendant for the degree of liability of the non-paying defendant is a damage or loss caused to him by the fault of himself and the other. The significance in making this interpretation of the word "damage or loss" in the Contributory Negligent Act is that if accepted it could result in allowing a defendant who could not for some reason seek contribution under the Tort-Feasors Act to seek contribution under the Contributory Negligence Act. This could happen if the Tort-Feasors Act is interpreted so as to require liability on the part of the defendant against whom contribution is sought, to the plaintiff, before he could be forced to make contribution to the other tort-feasor.

If the person against whom contribution is sought has a special defence against the plaintiff, like immunity from action, he might not be a person liable who would be susceptible to contributing. However, he may still be defined as a person at fault, and if by this fault he caused loss or damage, here pecuniary loss to the other tort-feasor, he would be obliged, on this interpretation, to pay for this loss under the Contributory Negligence Act.

This interpretation to the words "damage or loss" was given in The Cairnbahn, [1941] p. 95 under the Maritimes Convention Act, 1911, and was accepted by Mr. Justice Estey in Parmley v. Parmley, supra.

This same argument was made without success in the case of Drinkwater v. Kimber [1952] 1 All E.R. 701. The term damage as it appeared in the Law Reform (Contributory Negligence) Act 1945 was interpreted as applying to personal injury or property damage resulting from the accident and not the type of "damage" which was involved in paying compensation to an injured party in full when someone else was at fault for part.

In my opinion the Drinkwater case reached the appropriate decision. It is not satisfactory to allow the Contributory Negligence Act to be interpreted so as to allow for contribution which should be provided under the Tort-Feasors Act, but which was not, to be provided under the Contributory Negligence Act. Hopefully, the sections dealing with contribution between wrong-doers in any proposed legislation will be inclusive enough to encompass all those situations where contribution between tort-feasors is desirable.

E. Apportionment And Contribution Under The Contributory Negligence Act

Sections 3(1) and 3(2) of the Contributory Negligence Act deal with the general case of apportionment of liability and contribution under the Act. They state:

> "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 and indemnify each other in the degree in which they are respectively found to have been at fault."

The basis of apportionment under the Act is on degree of "fault", which must in this context refer to culpability and not causation. Both parties' fault have contributed to the same damages, and the nature of the event is such so as to not allow it to be said that A caused one portion and B caused another. The Act explicitly states this in s. 2(2) where it states:

> "Nothing in this section operates to render any person liable for damage or loss to which his fault has not contributed".

A more serious problem related to the interpretation of the words of section 3 of the Act is the determination of the scope of 3(2). Does section 3(2) refer only to the situation where an innocent plaintiff is suing two or more persons at fault, or does it also encompass the situation where a plaintiff who is himself at fault is suing two or more other persons who are also at fault?

The determination of this is very important for an understanding of the method of apportionment in cases of combined fault. The Act states that those at fault are "jointly and severally" liable to the person suffering the damage or loss. This means that if P is injured by the fault of B and C, P is able to sue either B or C or both for the full amount of his loss, and the court is empowered to determine the degree of fault of B and C and to order them to contribute to each other in accordance with the degrees of fault so found. In a sense this allowance for contribution is duplicative of the provision of the Tort-Feasors Act, discussed in Section one, which would also allow contribution between B and C.

Let us assume that there are three persons at fault,

P the Plaintiff, B and C, the Defendants. Does Section 3(2) of the Act mean that P will be able to sue both B and C, that the court will reduce P's damages in accordance with his own degree of fault, and that the court will then give P a judgment in solidum against B and C for the remainder? The answer to this question must be emphatically stated in the affirmative. This has been the method of apportionment used by Canadian Courts under Contributory Negligence legislation, and it is accordance with the purpose of the Act, to resolve issues relating to contributory negligence, that it be so.[17] It is therefore suprising that Glanville Williams in interpreting the apportionment sections of the Alberta Act held that: "It is submitted that this (referring to s. 2(1)) means that if P, himself guilty of contributory negligence, is damaged by the concurrent negligence of D1 and D2, the two latter are each responsible only for a part of P's damage corresponding to his own negligence. In other words, liability

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[17]Although the Acts are not clear, the recent case of Menow v. Honsbergerer and Jordan House Hotel [1970] 1 O.R. 54, affirmed [1971] 1 O.R. 129, affirmed by the Supreme Court of Canada, 1974, 38 D.L.R. (3d), apportioned liability between the negligent plaintiff and the two negligent defendants by holding the latter two jointly and severally liable to the plaintiff for his damages reduced by his degree of fault. This seems to settle the issue. This was also the method of apportionment used in the case of Fellows v. Majeau, [1945] 2 W.W.R. 113, [1945] 3 D.L.R. 792 (Alta.). The order made in this case was that: "The parties are jointly and severally liable to each other and liable to make contribution to and indemnify each other in the degree in which each has been at fault . . . " A difficult case and one which did not use joint judgment was Lecomte v. Bell Tel. Co & Ottawa, [1932] 3 D.L.R. 220 (Ont. S. Ct.). This case however was based on an unusual set of facts and in view of the latter cases must be given little weight.

is not in solidum".[18] Williams' explanation of s. 3(2) is that this provision leaves untouched the liability in solidum of concurrent wrong-doers only where the plaintiff is not guilty of contributory negligence.[19]

As pointed out above, Canadian case law does not support Williams interpretation of the sections of the Act relating to apportionment, and it must be accepted that liability will be in solidum even where the plaintiff is contributorily negligent.

This does not mean, however, that this is the way it should be. Williams proposes that in cases of contributory negligence the "joint judgment" method of apportionment, which is the method presently followed by Canadian Courts, is inappropriate and should be replaced by the "apportioned judgment" method.

The following example will serve to demonstrate the application of these two methods.

Assume that A, B and C are involved in an accident for which the fault of each is equal. Assume as well that each suffers damage.

Williams points out that under the joint judgment system which is the one dictated by the Alberta Contributory Negligence Act the apportionment of damages will be

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[18] At p. 409.

[19] The Manitoba Act which made it clear that the liability was joint and several even to a negligent plaintiff by entitling the section "Effect of contributory negligence" was termed "an aberration" and "a legislative mistake." by Williams, at p. 409.

unnecessarily complex. A will be able to collect his damages reduced by his degree of fault from B and C who will be each liable to A in full. Similarly, A and B will be jointly and severally liable to C for his reduced damages, and A and C will be jointly and severally liable to B for his reduced damages. In addition, those against whom the judgments are recovered will have appropriate claims for contribution against the other tort-feasor who was jointly liable with them. Williams points out that this way of proceeding is needlessly complex.

He suggests the adoption of the "apportioned judgment" system. Under this method, each of the parties will be liable to the others for the share of the latters' damages which correspond to the formers' degrees of fault. Thus in the above example, A will be able to collect 1/3 of his damages from B and 1/3 from C. Similarily B will be able to collect 1/3 of his damages from A and 1/3 from C. The same would apply to C. With a quick set-off, the resolution of the apportionment is quickly arrived at.

Should the apportioned judgment method be substituted for our present method of apportionment?

Williams presents three reasons for supporting the apportioned method judgment.

Firstly there is the argument that the calculations of damages are less complex in the apportioned judgment method.

Secondly Williams argues that a defendant may be financially embarassed by the joint judgment method needlessly. If defendant 1 is called upon to pay the whole of the plaintiff's recoverable loss he may not be able to meet this payment even though he is subsequently able to collect contribution from the second defendant.

Thirdly, the prime reason for utilizing a joint judgment method is give the plaintiff the assurance that he will recover his recoverable damages in full even if one of the defendants is insolvent, since he has the right to recover the full amount from any one of the solvent defendants. Williams argues however that there is no reason for giving a negligent plaintiff this benefit, he being no more deserving than the other solvent defendants. On principles of justice, why require a negligent defendant to pay more than his share of the damages because one of the other parties is insolvent, but not require this from a negligent plaintiff? The only thing that distinguishes them is that one suffered a loss, not that one was innocent.

The arguments for maintaining the joint judgment method however are also convincing.

Firstly it is the method presently used by most courts and is one which is well understood. It would be a significant departure to change this method.

Secondly, it is in accordance with prevailing philosophy that the injured party should recover and be compensated for as much of his damages as possible. In cases of motor vehicle accidents with the use of liability insurance the less a plaintiff recovers the more an insurer saves. In cases where there is no insurance, a sympathetic Judge may be hesitant to deem the plaintiff contributorily negligent if the result of this finding may be that the plaintiff will not recover some of his damages due to the insolvency of one of the defendants. Let us recall that it is agreed that innocent plaintiffs will have a right to recover all from any of the defendants; changing this rule for negligent plaintiffs may make it less likely that courts will be prepared to find contributory negligence.

The British Columbia Contributory Negligence Act, R.S.B.C. 1960, c. 74, as amended 1962, c. 15; 1969, c. 35; 1970, c. 9 does contain an apportioned judgment method of calculation. Section 3 of the Act states: "The awarding of damage or loss in every action to which section 2 applies shall be governed by the following provisions:

(a) The damage or loss (if any) sustained by each person shall be ascertained and expressed in dollars:

(b) The degree in which each person was at fault shall be ascertained and expressed in terms of a percentage of the total fault:

(c) As between each person who has sustained damage or loss and each person who is liable to make good the damage or loss, the person sustaining the damage or loss shall be entitled to recover from that other person such percentage of the damage or loss sustained as corresponds to the degree of fault of that person:

(d) As between two persons each of whom has sustained damage or loss and is entitled to recover a percentage thereof from the other, the amounts to which they are respectively entitled shall be set off one against the other; and if either person is entitled to a greater amount than the other; he shall have a judgment against that other for the excess".

In my opinion, the apportioned judgment method is the one to be preferred in cases of contributory negligence. It provides a less complex method of determining liability for damages in multi-party actions, especially where more than one party is at fault and more than one party suffered damages. At common law plaintiffs who were contributorily negligent were able to receive no recovery; a provision

which allows them to receive a portion of their damages, but only that portion which corresponds to the degree of wrong doing of another party is more in keeping with the common law rule than one which gives plaintiffs who are contributorily negligent the right to recover from another wrong-doer more than that other wrong-doer's share of the damages. Equity demands that all wrong-doers share equally, even if one of the wrong-doers is a person who has unfortunately suffered injury.

If the apportioned method judgment is accepted, it must be clear that if any of the parties is unable to satisfy the judgment against him, that this loss is to be shared by the other parties, in proportion to their degrees of fault. Otherwise, contributorily negligent plaintiff will bear the risk of insolvency of one of the defendants alone, which is obviously inequitable. Williams points out moreover that in cases where a contributorily negligent Plaintiff is suing two persons one of whom is vicariously liable for the other, he may recover the full extent of his recoverable damages from either. This makes sense since the reason for imposing vicarious liability is to ensure that a party injured will not be defeated by the insolvency of one of the parties.

F. Set-Off

Under either system of calculating damages should a set-off of the damages be ordered by the court?

In view of Rule 93(1) of the Alberta Rules of Court set-off may be pleaded but it will not necessarily be ordered by the court on its own motion. In many cases of automobile collisions, where the parties are covered by third party liability insurance it will not be to the

benefit of the parties to ask for a set-off. If set-off is ordered in these cases, it will be the Insurance Companies who will benefit to the detriment of the injured persons. This was strongly condemned by Dean Wright in his article on "The Adequacy Of The Law Of Torts", where the apportionment legislation came under attack for allowing this to happen in certain cases.[20] A review of the jurisprudence indicates that in several cases set-off has been ordered to the detriment

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[20] Wright, The Adequacy of the Law of Torts, found in Linden, Studies in Canadian Tort Law, 1968, at p. 579.

of the party.[21] It is the opinion of this writer that set-off should not be permitted where it will have the result of depriving injured persons of receiving a portion of their damages. Section 3(d) of the British Columbia Act noted above seems to dictate this undesirable result.

Questions of apportionment and contribution become exceedingly more difficult if all claims, counter-claims, contribution claims, and indemnity claims are not heard at the same time. We will examine at a later stage the provisions now in effect in Alberta to ensure this result and look at those problems which can arise should, for valid reasons, the claims be heard at different times.

G. Releases

As pointed out in Section One, the common law rule regarding releases is that a release of one joint tort-feasor serves to release all joint tort-feasors, whereas a release does not serve to release all several, concurrent tort-feasors. It was submitted that this rule regarding releases of tort-feasors should be abolished so that in all cases a release of one tort-feasor would not serve to release them all.

Assuming the continuation of the common law rule, an interesting question is raised by the wording of s. 3(2) of the Contributory Negligence Act. Does the fact that

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[21] See Wells v. Russell, [1952] O.W.N. 521 (Ont.): set-off ordered at trial, reversed on appeal; Schellenberg v. Cooke (Sask., C.A.) set-off; Johnny's Taxi v. Ostoforoff (1962), 33 D.L.R. (2d) (Sask., C.A.) set-off; Leaman v. Rae, [1954] 4 D.L.R. 423 (N.B., C.A.) no set-off.

s. 3(2) states that persons found at fault "are jointly and severally liable" turn these persons into joint tort-feasors for the purpose of the common law rule regarding releases?

This question was considered in the case of Dodsworth v. Holt et al (1964), 44 D.L.R. (2d) 480 AHA. (Alta. S. Ct.). The argument was made by Defendant 2 that a release given to Defendant 1 served to release him because they were "joint tort-feasors" by the terms of The Contributory Negligence Act, and at common law the joint tort-feasors would all be released. Mr. Justice Milvain responded: "In my view the argument is not sound, at common law, and in the absence of statute, there can be no doubt of Holt and Buckler being concurrent several tort-feasors contributing to the same damage. . . . I do not believe that the statute should be construed to change the common law any further than its plain words dictate".[22]

In the case of Reaney et al v. National Trust Co., [1964] 1 O.R. 461, 42 D.L.R. (2d) 703 (Ont., High Ct.) this same question was raised with regard to the Ontario Negligence Act. Mr. Justice Hughes clearly differentiated between persons who may be jointly and severally liable under the Act and "joint tort-feasors" for the purpose of the application of common law rules relating to joint tort-feasors. Joint tort-feasors are only those who commit or are responsible for the commission of a tort, one injuria, and the fact that the Act states that those at fault are "jointly and severally" liable does not convert persons who are responsible for different injuria which produce the same damnum, into joint

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[22]At p. 483.

tort-feasors. Glanville Williams in his treatise feared that the wording of the Canadian statutes would have that result, but as we see from these two recent cases the courts have not allowed this to occur.

H. Miscellaneous

In Section one, when dealing with an innocent victim and two or more wrong-doers, we asked the following questions with regard to possible situations which may occur:

(1) Must a claimant for contribution first be found liable to the victim before he can claim contribution?

(2) Can the tort-feasor against whom the claim is made dispute the liability of the claimant?

(3) At which point in time is the liability of the person against whom the claim is made determined?

(4) What should be the effect on the other tort-feasors of the victim allowing his right of action against one of the tort-feasors to become extinguished?

(5) What should the limitation period in which to claim contribution be?

(6) On what should the amount of contribution which is recoverable be based?

(7) What are the possible repurcussions of settlements before judgment with some but not all of the wrong-doers?

(8) When should indemnity be ordered?

If the suggestion that when a plaintiff is not innocent but partly responsible for his damages, he may only claim against the other wrong-doers that portion of the damages which correspond to their individual degrees of fault, is accepted, then there will be no rights of contribution between wrong-doers in this circumstance, and these concerns will not be relevant.

If this suggestion is not accepted and it is deemed that a plaintiff who is contributorily negligent may recover in full from any of the other wrong-doers, (minus his own degree of liability), then the concerns will equally apply here and will be resolved in the same manner as above suggested in Section One.

I Gratuitous Passengers

Section 4 of the Contributory Negligence Act states:

> "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 damages 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."

Section 214 of the Highway Traffic Act states:

"(1) No person transported by the owner or driver of a motor vehicle as his guest without payment for the transportation has any cause of action for damages against the owner or driver for injury, death or loss, in case of accident, unless

(a) the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle, and

(b) the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

(2) This section does not relieve

(a) any person transporting passengers for hire or gain, or

(b) any owner or operator of a motor vehicle that is being demonstrated to a prospective purchaser, or responsibility for any injury sustained by a passenger being transported for hire or gain or sustained by any such prospective purchaser.

(3) Where the owner of a motor vehicle is being driven in his own motor vehicle by another person, subsection (1) applies as if the owner were the guest of the driver."

Suppose P is a guest passenger in a car driven by A. A and B, a driver of another vehicle, are involved in a collision, for which each party is 50% at fault. Under the normal application of section 3(2) of the Contributory Negligence Act P would be able to sue both A and B who would be jointly and severally liable to him for his injuries; A and B would be able to collect contribution inter se in proportion to their respective degrees of fault. Due to section 214 of the Highway Traffic Act, P can only recover damages from A upon proof of gross negligence or wilful and wanton misconduct. Section 4 of the Contributory Negligence Act is therefore important in order to preserve the intention of Section 214 of the Highway Traffic Act. Without section 4 of the Contributory Negligence Act, P would be able to avoid section 214 of the Highway Traffic Act by proceeding against B, establishing ordinary negligence, and recovering in full. B would then collect 50% of the damages from A, as contribution and A would be liable with proof only of ordinary negligence. Alternatively, if it were held that B would only collect 50% upon proof of gross negligence on the part of A, the burden of 214 of the Highway Traffic Act, to penalize gratuitous passengers would not of course be carried out. Either alternative necessitates the introduction of section 4 of the Contributory Negligence Act.

The question which then must be asked is whether the gratuitous passenger discrimination established by the Highway Traffic Act is necessary, or whether it should be abolished.

It is to be noted that this is not the first time

that this question has been asked, and that it will not be the first time, that the answer given to it is that the legislation is unfortunate and should be repealed.

There have been several methods of dealing with the question of the liability of an owner or driver of a car to his guest passenger. At common law, the liability of an owner or driver to the guest passenger was based on the same principle as liability in negligence to any one else; that is, there was a duty to take reasonable care for the protection and safety of a guest passenger. Ordinary negligence was sufficient to produce liability. This was changed by various legislative enactments which had the effect of either barring recovery completely to the gratuitous passenger as against the owner or driver of a car, or allowing the gratuitous passenger to recover on the condition that he establish that the owner or driver of the car was either grossly negligent or that his misconduct was wanton and wilful. At present the legislative situation in the Canadian Provinces is as follows: In Quebec there is no guest passenger discrimination; he is treated as are all other victims of delictual acts. Alberta, Manitoba,[23] Nova Scotia,[24] New Brunswick, [25] and Prince Edward Island[26] and

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[23] Highway Traffic Act, R.S.M. 1970, c. H60, s. 145(1).

[24] Motor Vehicle Act, R.S.N.S. 1967, c. 191, s. 223(1).

[25] Motor Vehicle Act, S.N.B. 1955, c. 13, s. 242(1).

[26] The Highway Traffic Act, 1964, c. 14, s. 275.

Newfoundland[27] require proof of "gross negligence or wilful and wanton misconduct". Saskatchewan[28] requires proof of "wilful and wanton misconduct". Ontario[29] requires proof of "gross negligence". British Columbia[30] has repealed guest passenger discrimination and treats the guest passenger on the same footing as all other victims of automobile accidents. In England there is no guest passenger discrimination. Several American states do not have guest passenger discrimination and recently in the case of Brown v. Merlo, 506 Pacific Reporter 2d Series,/the Supreme Court of California declared that the California guest statute was unconstitutional.[31]

What reasons have been given for the imposition of either no duty of care or a lower duty of care on the driver of an automobile vis-a-vis his guest passenger? Are these reasons valid today and do they justify the continued discrimination?

One of the reasons always given for guest passenger discrimination is based upon a "fairness to the driver" or "protection of hospitality" philosophy. One does not bite the hand that feeds it, and thus it is seen to be unfair to attach liability to a generous motorist. Mr. Justice MacKenzie in the case of Shortt v. Rush & British American Oil Co., [1937] 4 D.L.R. 62 (Sask., C.A.) stated:

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[27] Highway Traffic Act, R.S.Nfld. 1970, c. 152, s. 221(1).

[28] Motor Vehicles Act, R.S.S. 1965, c. 377, s. 168(2).

[29] Highway Traffic Act, R.S.O. 1970, c. 202, s. 132(3).

[30] Motor-vehicle Act, R.S.B.C. 1960, c. 253, section 71 was repealed 1969, c. 20, O.C., eff. Jan/1, 1970.

[31] The Court held that the guest statute violated equal protection guarantees of California and United States Constitutions. The guest statute allowed a guest recovery only if wilful misconduct or intoxication was shown.

> "This legislation was doubtless prompted by a general feeling that it was unjust that a passenger should be able to recover damages from a generously minded motorist who had given him 'a lift'".[32]

As Professor Gibson points out the legislation was passed mainly in the 1930's when free lifts were an important part of the transportation system and liability insurance was not as common as it is today. How valid, however, are these reasons?[33]

Firstly, one does not necessarily refrain from biting the hand that feeds you if the food makes you ill. Negligent driving was and is not part of the "bargain" that a gratuitous passenger would normally accept.

Secondly with the wide spread utilization of liability insurance it is the hand of the insurer which is bitten by the guest passenger should he be given recovery. The protection of hospitality argument has little validity in view of insurance; and in light of the fact that the injured party may be a close friend or relative of the driver, the former's inability to recover is as tragic for the driver as it is for the victim.

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[32] At p. 66.

[33] Dale Gibson, Guest Passenger Discrimination (1968), 6 Alberta Law Review 211, at p. 212.

Thirdly it is not part of our law that gratuitous undertakings must be grossly negligent before the actor is held liable. The Occupiers Liability Act places on every occupier a duty to take reasonable care for the protection of his invited guests. There is no justification for accepting this approach for one class of hosts and not for another.[34]

These reasons were very persuasive to Mr. Justice Tobriner of the California Supreme Court, who recently held that the California guest passenger discrimination was unconstitutional in that it violated constitutional equal protection guarantees.[35]

In sum, I submit that the "protection of hospitality" argument ever since Donoghue v. Stevenson was inadequate to warrant the guest passenger discrimination.[36] It is even more so now.

A second reason given is that without the legislation it would be difficult to prevent collusion and fraud between driver and guest passenger in the creation of fake claims, and that the present statute makes this collusion more difficult.

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[34] The Occupiers' Liability Act, S.A. 1973, c. 79, s. 5: "An occupier of premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there."

[35] Brown v. Merlo, 506 Pacific Reporter 2d Series 212 (Cal., Supreme Court 1973).

[36] [1932] A.C. 562.

The basic criticism of this reason is that it is unjust to penalize an entire class of victims because some may take advantage of the law. The law must not start out with the presumption that persons will seek to fraudulently abuse it. It is the role of the courts and the rules of evidence to sort out the real from the phoney. A California court in the case of Emery v. Emery (1955), 45 Cal. 2d 421, 289 P. 2d 218 states:

> "The courts may and should take cognizance of fraud and collusion when found to exist in a particular case. However, the fact that there may be greater opportunity for fraud and collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficiency of the judicial processes to ferret out the meritorious from the fraudulent in particular cases".[37]

Professor Gibson deals with the collusion prevention argument, which is one of the more substantial arguments, as follows. He states that if ordinary negligence were all that would be needed for a gratuitous passenger to succeed there would only be collusion in cases where the driver was not in fact negligent and where the other motorist was uninsured (he would most probably be negligent if the first was not, most accidents being caused by someone's negligence). If the other motorist was insured, as he must be in Alberta, then the victim would collect from him if he were the only one found negligent; if the driver himself was negligent, then it would not be collusive to so admit, and the victim would collect from both. The only possibility

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[37] At p. 255.

where collusion would be important would be in cases where the damages suffered are more than the insurance coverage of the insured other motorist, or the Fund, or where no one was negligent. Professor Gibson claims that collusion will not be prevalent as well due to the fear that the parties will have in perjuring themselves, the human instinct not to accept blame where it is not due, and the acceptance of higher premiums. Moreover he contends that collusion regarding "gross negligence" can take place under our present system at any event.[38]

A third reason stated for the discrimination against guest passengers is that without this legislation the insurance claims would rise significantly resulting in a premium hike. This reason has little validity in view of the realities of the situation. Professor Gibson reports that it was estimated in 1962 that complete abolition of guest passenger discrimination in Ontario would have resulted in an annual premium increase of $7.00 to $9.00 per policy. It also must be noted that this would have meant for Ontario at that time a complete reversal of its policy of not allowing recovery by guest passengers at all to recovery for negligence. In Alberta it would mean only that the requirement of gross negligence would be changed to a requirement of negligence, not as dramatic a change and hence not likely to effect insurance premiums as much. Moreover the Insurance Law Section of the Canadian Bar

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[38]At p. 215. Professor Gibson neglects to consider those cases where the insurance coverage of the negligent driver is not sufficient to compensate him in full.

Association itself passed a resolution in 1965 to the following effect: "That The Canadian Bar Association recommends that the present restrictions in certain provincial legislation on claims by guest passengers in motor vehicles be removed". The vote was 10 for, 9 against and the resolution was carried by the entire meeting of the Association.[39]

A strong reason for abolishing the "gross negligence" requirement lies in the pratical difficulty which the courts have had in dealing with this rather vague standard of care. It is generally accepted that in order to be grossly negligent one must be more than ordinarily negligent but not criminally negligent. Mr. Robert L. Pierce in a paper delivered to the 1965 meeting of the Canadian Bar Association cited an article by Frederick Green entitled "High Care and Gross Negligence" (1928) 23 Ill L. Rev. 4 to describe the doctrine of different degrees of care as "An untested invention of fancy", something not springing from the common law.[40] Judicial comments such as the one by Rolfe B. in Wilson v. Brett (1843), 11 M & W 113, as follows: "I said I could see no difference between negligence and gross negligence; that it was the same thing

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[39]See Canadian Bar Association Proceedings, 1965, Volume 48, at p. 220.

[40]Robert L. Pierce, Liability To Gratuitous Aircraft Passengers, 1965 Annual Meeting of the Canadian Bar Association, p. 43, at p. 49.

with the addition of a yituperative epithet",[41] are frequent. W. G. MacArthur in an article entitled "Gross Negligence and the Guest Passenger" (1960), 38 Canadian Bar Review cites several examples of judicial decisions expressing confusion and dislike for the notion of "gross negligence". Mr. MacArthur's points out that although the notion has been described by eminent jurists as meaningless and undefinable, that in truth it has been used by the courts and is susceptible of application.[42] Be that as it may, there is, in my opinion, no good purpose served in struggling with an elusive term when the aim of the struggle is unjustifiable.

Professor Gibson points out that one way that the courts have found to avoid applying the guest passenger statutes has been to "place a strained and unnatural interpretation on the words of the legislation".[43] This of course is not conducive to consistent and logical judicial decision making. Rather than distorting a rule whose reason for existence has ceased it is far better to change the rule itself.

If support for the idea of abolishing the guest passenger legislation is desired one need not look far. Mr.

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[41] At p. 115, 116.

[42] W. G. MacArthur, Gross Negligence And The Guest Passenger (1960), 38 Canadian Bar Review 47, at p. 57.

[43] Gibson, At p. 217.

MacArthur points out that one year after the New Brunswick Legislature passed its legislation in 1934, the Bar of that Province passed a resolution demanding the restoration of the common-law rights of guest passengers.[44] As pointed out above the Canadian Bar Association in 1965 passed a resolution seeking to abolish the rule. Dean Wright, speaking with reference to the former Ontario provision which entirely prevented recovery by guest passengers, called it one of "the most vicious pieces of legislation which an active insurance lobby was able to foist on an unsuspecting public".[45] In an article written in the Manitoba Bar News, the author Mr. B. Kushner concludes as follows: "The legislation should be repealed so that the common law position will prevail and gratuitous passengers in motor vehicles might justifiably rely for their safety upon the conduct of their hosts".[46] Mr. J. A. Griffin concluded his paper presented to the Canadian Bar Association as follows: "In principle there is no discernable distinction between guest passenger claims and other claims and on this account the restriction should be removed".[47] The Honourable J. C.

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[44] MacArthur, At p. 47, note 1.

[45] Case and Comment, (1945) 23 Can. Bar Review 344, at p. 347.

[46] B. Kushner, The Gratuitous Or Guest Passenger (1958), 30 Manitoba Bar News 57, at p. 65.

[47] J. A. Griffin, The Restriction On Guest Passenger Claims (1965), Canadian Bar Association Papers 77, at p. 79.

McRuer speaking with regards to the Ontario legislation states: "It is difficult to justify this legislation (the former total restriction) on any principle of law or justice".[48] Professor Linden critcizes the legislation and its purported function to avoid fraudulent claims by asking: "Surely the trial process could expose these liars without the need of such drastic legislation".[49]

I would advocate the repeal of the legislation. An alternative to abolition which has recently been adopted by at least one states, Texas, is to restrict certain categories of guest passengers. In this case the Act applied to "persons related within the second degree of consanguinity or affinity to the owner or operator".[50] This is unsatisfactory in my opinion for the reasons stated above and for the undue complexity it brings into the law. A total abolition of differentiating between different degrees of care in relation to non-paying passengers is what is called for.

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[48] The Honourable J. C. McRuer, The Motor Car And The Law (1966), 4 Osgoode Hall Law Journal 54, at p. 65.

[49] Comment, (1962), 40 Can. Bar Rev. 284.

[50] Texas Guest Statute, September 1973.

J. Inter-spousal Tort Immunity

Section 5 of The Contributory Negligence Act states:

> "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 indemnity shall be recovered for the portion of the damage or loss caused by the fault of that 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".

Section 3 of The Married Women's Act R.S.A. 1970, c. 227, as amended S.A. 1973, c. 61, s. 11, states:

> "(1) A married woman has, in her own name and without joining her husband as a co-plaintiff the same civil remedies against all persons, including her husband, for the protection and security of her own separate property as if she were an unmarried woman".
>
> (1.1) A married man has the same civil remedies against his wife for the protection and security of his own separate property that he has against other persons.
>
> (2) Except as provided in subsections (1) and (1.1), no husband or wife is entitled to sue each other for a tort."

Let us assume that A is injured by the torts of B, his wife, and C, a stranger. Under the normal application of Section 3(2) of The Contributory Negligence Act, A who is injured by the concurrent fault of two others could sue them jointly and severally, with the right of contribution according to their degrees of fault existing between the wrong-doers.

However, in the case at bar, A cannot sue his wife B because of the principle of inter-spousal tort immunity established by the Married Women's Act. A's only action is against C.

Section 5 of the Contributory Negligence Act provides that in A's action against C, C will be liable only for the damages corresponding to his own degree of fault. Two alternative solutions in the case of two tort-feasors, one of whom is the spouse of the injured party, are to allow full recovery by the injured spouse against the stranger defendant with no right of contribution given to the latter to claim for the negligent spouse, or to allow full recovery by the injured spouse against the stranger defendant with a right to claim contribution against the negligent spouse. The first alternative has been one widely used, e.g. in England before legislation was enacted abolishing, with qualifications, inter-spousal tort immunity, and the second alternative has also been one adopted by certain other jurisdictions. For example, it was adopted in the State of Victoria, in the Victoria Wrongs Act s. 24(1)(d), 1958.

Neither of these alternatives is presently in use in Alberta due to s. 5 of the Contributory Negligence Act. The criticism which can be levelled at the first alternative is that it forces a stranger defendant to bear the full amount of a loss to which his fault has contributed, not because of any personal limitation or relationship he may have with the other parties, but because of an immunity which exists between the other defendant and the plaintiff. This is inequitable and illogical. The criticism which can be levelled at the second alternative is that it abrogates the principle of inter-spousal tort immunity indirectly when there is a multiplicity of parties. The result of the abrogation may be viewed as a good thing, but it is inconsistent

with the present law which would impose the immunity in single party actions.

The principle of inter-spousal immunity, with certain minor differences, is part of the law of all common law Provinces except for Manitoba which abolished it in 1973.[52] It has also been abolished in England, New Zealand, Tasmania, and Queensland with certain modification as we shall see, and unrestricted abolition has been legislated in Victoria.[53]

Moreover, abolition of the principle without qualification, has recently been suggested by the Ontario

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[52]Alberta: The Married Women's Act, R.S.A. 1970, c. 227, s. 3(1), 3(1.1), 3(2) as amended S.A. 1973, c. 61, s. 11. British Columbia: Married Women's Property Act, R.S.B.C. 1960, c. 233, s. 13. Manitoba: The Married Women's Property Act, R.S.M. 1970, c. M70, s. 7(1), (2) and (3), as amended S.M. 1973, c. 12, s. 1. New Brunswick: Married Women's Property Act, R.S.N.B. 1952, c. 140 s. 6(1), (2) and (3). Newfoundland: The Married Women's Property Act, R.S.Nfld. 1970, c. 227, s. 13. Nova Scotia: Married Women's Property Act, R.S.N.S. 1967, c. 176, s. 17(1), (2) and (3) and (4). Ontario: The Married Women's Property Act, R.S.O. 1970, c. 262, s. 7. Prince Edward Island: The Married Women's Property Act, R.S.P.E.I. 1951, c. 92, s. 9. Saskatchewan: The Married Women's Property Act, R.S.S. 1965, c. 340, s. 8(1), (2).

[53]The English amendments came in 1962 in the Law Reform (Husband and Wife Act 1962, (10 & Eliz. 2, c. 48), and similar amendments then followed in New Zealand, Tansmania and Queensland.

Law Reform Commission,[54] and the Newfoundland Family Law Study.[55]

Should Alberta maintain the immunity in whole or in part?

The arguments and issues have been well discussed in the Reports of several bodies; e.g. England Law Reform Committee, 1962;[56] the Statute Law Revision Committee of Victoria in 1966;[57] the Ontario Law Reform Commission in 1968[58] and the Newfoundland Family Law Study in 1970;[59] the Manitoba Law Reform Commission in 1972.[60] This report will review the main arguments pro and con made in these studies.

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[54]Study Prepared By The Family Law Project, Ontario Law Reform Commission, Volume VI, Torts, Toronto, 1968, hereinafter referred to as the Ontario Study.

[55]Family Law Study, Project XII, Some Aspects Of Torts In Family Law, Final Report, June 1970, hereinafter referred to as the Newfoundland Study.

[56]Law Reform Committee, Ninth Report, Liability in Tort between Husband and Wife, January 1961.

[57]Report from the Statute Law Revision Committee of Victoria upon Actions in Tort Between Husband and Wife, d-No.8-2046/66, found in Appendix B to Chapter 1 of the Ontario Study.

[58]Supra, note 54.

[59]Supra, note 55.

[60]Manitoba Law Reform Commission, Report on "The Abolition of Inter-spousal Immunity in Tort", Report No. 10, December, 1972.

The principle of tort immunity between spouses stems from the common law's general treatment of husband and wife. The Ontario study points out that the law regarded marriage "as a sacrament, the result of which was to make husband and wife one flesh".[61] The fact that husband and wife were in law regarded as one had many legal consequences, one of which was the inter-spousal immunity principle. Because the husband was liable for the wife's torts, and because the wife could not be sued or could not sue alone, the principle of tort immunity between spouses was a logical and necessary conclusion. It is important to realize however that this immunity was founded not only upon a procedural bar, but on a substantive bar as well. Mr. Justice Rand, in the case of Minaker v. Minaker [1949] 1 D.L.R. 801 (Can., S. Ct.) stated:

> "At common law no action lay between husband and wife both because of a formal obstacle, i.e. that the wife could be impleaded only with the husband; and one of substance, that they were held to be one person between whom none of the ordinary rights or claims in law could arise."[62]

As is well known, legislation has considerably affected the position of husband and wife and its legal consequences, (in terms of property law especially,) and in terms of tort law has had the following effects:

(1) A married woman can sue in tort and be sued in tort without her husband being joined as a party;[63]

(2) A married woman can sue her husband in tort if the suit is for the protection and security of her own separate

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[61] At p. 114.

[62] At pps. 804-5.

[63] Married Women's Act, Section 2(c).

property;[64]

(3) A married man can sue his wife in tort if the suit if for the protection and security of his own separate property;[65]

(4) A husband cannot sue for a tort committed to his wife except where he has sustained separate damage or injury thereby;[66]

(5) A husband is not liable for torts committed by his wife.[67]

Legislation enacts the common law rule that there is to be no tort between husband and wife except as stated above.

This legislation and legislation similar to it in other jurisdictions has spawned a number of questions.

(1) What does the term "separate property" encompass?

(2) What is the situation if the tort is committed before the marriage? Can an action be taken in respect of it after the marriage has been solemnized?

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[64] Ibid., Section 3(1).

[65] Ibid., Section 3(1.1).

[66] Ibid., Section 5.

[67] Ibid., Section 7.

(3) Which actions are "tort" actions?

(4) Although a spouse cannot sue his/her spouse for injuries caused to him by the latter's negligence, can the injured party sue the employer of the spouse who is vicariously liable for the acts of his employee?

These questions would of course be irrelevant if the decision to abolish inter-spousal tort immunity was made. Until that decision is made, however, they retain importance.

As indicated by case law, protection of "separate property" deals with those remedies taken for the protection of the person's own property, as distinct from actions taken to recover damages for personal injuries. As stated in Laxton v. Ulrich (1964), 41 D.L.R. (2d) 476, at p. 478-9:

> "The term and concept of separate property, originating in equity and adopted by the statutes, was concerned with rights with respect to property and not the person".

This not only encompasses actions to recover property, but actions for damages based on injury to property. The Ontario study lists those actions which have been excluded from the scope of this, e.g. false imprisonment, malicious prosecution, deceit, libel, assault, personal injury claims, and those which have been included e.g. property damage claims, detinue.[68]

An interesting question which has been asked with reference to the legislation is whether the right to take an action for a tort committed before the marriage was

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[68] At pps. 122-124.

solemnized can be viewed as an action for the protection of the separate property of the spouse, thus enabling the spouse to take such action during the marriage. The Appeal Court (Eng.) decided this question in the case of Curtis v. Wilcox[69] and held that the right to take an action for a wrong committed is a chose in action, and would form part of the separate property of the injured party. As the Ontario study points out this case has been subject to criticism since it confuses an action taken to protect separate property with separate property itself.[70]

Another area which has created certain difficulties in reference to the legislation has been the determination whether an action is a tort action or not. The Act restricts the spouses in their ability to sue each other in tort, but not to otherwise proceed against each other. Thus as the Ontario study points out actions of the following nature were allowed:

(1) action to declare partnership existence[71]

(2) action in contract

(3) action to set aside a deed for fraud[72]

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[69] [1948] 2 K.B. 474.

[70] At p. 125.

[71] Dallas v. Dallas (1961), 29 D.L.R. (2d) 388 (B.C., S. Ct.)

[72] Hulton v. Hulton, [1917] 1 K.B. 813.

Because until recently in Alberta, a husband could not sue in tort even to protect his separate property, it was often very important whether the action was categorized as a tort action or not.

The immunity which exists between spouses in tort cannot be utilized in favour of a person who is vicariously liable for the negligent act of a spouse if this negligent act caused injury to the other spouse. This vicarious liability will most commonly arise due to an employer - employee relationship, or as in the Highway Traffic Act if one party is deemed to act as the agent for another, i.e. driver and owner of a vehicle. This result was held in Smith v. Moss [1940] 1 K.B. 424; Waugh v. Waugh (1950), 50 S.R. (N.S.W.) 210, and is discussed at some length in the Ontario study at pages 141 to 150.

The main question which must be examined is not how the inter-spousal immunity in tort should be interpreted, but whether in view of the diminishing scope of the immunity, and the increasing tendency to "normalize" the legal position of spouse vis-á-vis spouse, there is any justification for maintaining the immunity at all.

The English Law Reform Committee reported to Parliament in January 1961, on the topic "Liability In Tort between Husband and Wife", and presented the following arguments for abolition of the immunity doctrine with some qualifications.

Firstly they contended that the law was unjust. It was so because a wife (and now in Alberta a husband) could only sue to protect property and in no circumstances could sue for personal injury inflicted on her, however

grievous. It was also unjust because insurance was of no avail to a spouse who is injured by the other's negligence. The Committee members also argued that it was unjust because the husband was not given the same rights to protect his own property as was the wife. This of course does not apply in Alberta. Another injustice identified by the Committee, not applicable in Alberta, was that a third party defendant could not recover contribution from the negligent spouse, but was liable to pay the full amount of the damages.

Secondly, the Committee considered evidence it had received as to the wisdom of the immunity and it concluded that it was "unanimous in its dissatisfaction with the present law".[73] It must be stressed however that it appears that a great deal of dissatisfaction with the law in England was based not primarily on the immunity itself, which Salmond on Torts was able to justify because of the theory that the litigation between spouses is 'unseemly, distressing and embittering', but because of some of the most inequitable features of the English law, such as its giving advantages to the wife which are not given to the husband and not giving contribution to stranger defendants, which inequitable features are not part of the present Alberta law.

The Committee rejected two possibilities which conceivably lay open to it. It rejected the possibility of equalizing the situation for husband and wife by deciding to permit no actions at all between husband and wife. It considered that this alternative would be unacceptable to the community. It did concede however that this alternative did preserve a "genuine unity of the household which should

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[73] English Report, at p. 4.

be protected against anything likely to undermine it".[74] It also rejected the policy of total abolition of the doctrine which would give complete freedom of action between husband and wife. It conceded that there is an argument to be made for this approach which is that it is not the existence of the legal remedy which would serve to create disharmony in the family but it is the tort itself which has already disrupted the marriage. There was no evidence moreover that in countries which had no restrictions on suit between spouses that there was reason to believe that marriages were in jeopardy. The Committee may have been influenced in its rejection of this alternative, however, by the fact that only one of the memoranda submitted to it had advocated this total abrogation. It concluded that this approach of total abrogation "would be undesirable as a matter of general social policy".[75] It did not consider it wise to allow litigation in respect of all acts of negligence which might naturally arise due to the "strains" or marriage. They considered that this "would certainly not be conducive to the continuance of the marriage and would, we think, do nothing but harm".[76]

As a solution to its problem, the Committee decided that the best alternative was to allow actions in tort between spouses, but to give the court the power to stay the action if the court did not think that it was in the best interests of the parties to proceed. The Committee added that this

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[74] At p. 5.

[75] Ibid.

[76] Ibid.

power to stay would in all likelihood not be exercised in cases where one of the parties had an insurance policy which permitted liability for risks to spouse, and expressed its feeling that it was this inability to recover under an insurance policy which led to most of the attacks on the state of the law. It felt that this solution did away with the theory that spouses could not sue each other but preserved the policy that in certain cases, for the benefit of the marriage, actions are not advisable.

The Committee's Report results in The Law Reform (Husband and Wife) Act 1962, (10 & 11 Eliz., 2 C. 48), which adopted the Report's recommendations, with minor modification.

New Zealand adopted the English solution and introduced legislation allowing the spouses to sue in tort with the power to stay given the court where (a) no substantial benefit would accrue to either party or (b) where the proceedings are vexatious in character, or (c) where the dispute could be resolved under another section of the Act which section allows the court to settle property disputes. This latter recommendation also follows the English example.[77]

The 1966 Report from the Statute Law Revision Committee of Victoria upon Actions in Tort Between Husband and Wife made the following points in relation to this question.

The Report felt that the fear that to allow inter-spousal suits would weaken a marriage relationship or cause

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[77] New Zealand Statutes, 1963, No 72, Matrimonial Property Act 1963.

ill feeling was unfounded in those cases where the negligent spouse was covered by a third party liability insurance policy. The Committee also considered the question of allowing inter-spousal suits even in those cases not covered by insurance and concluded: "Early in this inquiry considerable concern was expressed by some members of the Committee that if spouses were granted unrestricted right to sue each other and to recover damages from sources other than insurance, considerable bitterness and matrimonial unrest could result. However, evidence tendered during the inquiry does not support this contention and it is considered that the protection offered to a spouse against slanderous or physical injury would more than outweigh any danger of breaking up a marriage which would probably already be on an unstable basis. At present spouses can sue each other for a tort committed before marriage and no apparent ill-effects have been experienced."[78]

The Committee disagreed with the English suggestion and enactment giving the Court power to stay. It considered this unnecessary; it noted that spouses could sue each other for petty grievances regarding property and that this right had not been abused. This power to stay not being necessary for the wide range of actions then available to spouses, the Committee did not feel it should be introduced for others.

Finally the committee noted that the Chief Justice's Law Reform Committee considered the question of inter-spousal suits, agreed that there should be an unrestricted right in respect of them, and stated that the power to stay would

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[78]Found in Ontario Study, Appendix B to Chapter 1, at p. VI.

only result in additional work for the court and additional expenses for the parties.

In 1968, the Ontario study presented the following arguments for complete abolition of the immunity.

Firstly, if the immunity is based on the common law fiction that husband and wife are one, it is unjustifiable because Statute has radically changed this fact.

Secondly, the argument that legislation between spouses is contrary to public policy because of the damage which this may cause to the marriage is unsatisfactory. The commission of the wrong for which the suit is sought to be brought is proof that there is no matrimonial peace left to preserve. Husband and wife who are happily married will not naturally sue each other unless they can benefit by an insurance policy. It also may be added that since suits for property damage and non-tort actions are permitted, there is little justification for denying suits for torts causing personal injury in order to preserve the marriage.

The Report cites Fleming who discusses the issue of collusion between husband and spouse as a justification for not allowing these suits. Fleming makes the point that it is up to the judicial institutions to detect fraudulent claims. The same arguments discussed previously in regard to abolition of guest passenger discrimination would equally apply to this contention. Fleming also contends that the true beneficiary of the immunity is the insurance company.

The Ontario study suggested that there were five possible ways to amend the legislation.

The first was to give the husband the same rights for the protection of his separate property as has the wife for the protection of hers. This has been done in Alberta. This possibility was not recommended because of the continued injustice which would exist by both parties being denied recovery for personal injury claims.

The second was to abolish the immunity for those spouses who have ceased to cohabit persuant to a separation order or separation agreement. This was not recommended because it does not deal at all with the criticisms levelled at the existence of the immunity for couples living together.[79]

The third way was to allow suits between spouses when these suits are to recover compensation for injuries sustained due to negligence on the road. This is the position accepted in South Australia and New South Wales. In South Australia the suit is taken against the negligent spouse's insurer, and in New South Wales the suit is between the parties. This solution did not commend itself to the Ontario Study because it only partially dealt with the problem.

The fourth approach suggested was to adopt the English solution of abolishing the immunity subject to a power to stay which could be exercised by the court. For the same reasons as did the Victoria Committee, supra, the Ontario Study rejected this possibility.

The fifth approach and the one accepted by the Ontario Report was to abolish the immunity completely. The

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[79]This is the rule in New Brunswick at present.

recommendation was: "that section 7 of the Ontario Married Women's Property Act, 1960 should be repealed and replaced by legislation to the effect that either spouse can sue the other for a tort."[80]

The Newfoundland Study found the following inadequacies in the inter-spousal tort immunity principle:

(1) It is based party on the unity of spouses principle which has been abrogated by legislation, and is no longer valid in today's social conditions.

(2) The argument that the recognition of inter-spousal tort actions would disrupt or destroy the tranquility of the family unit is invalid due to (a) insurance, (b) the spouses may be separated, (c) there are other actions which can be taken now which do not seem to have this effect, (d) the suit will be evidence of marital discord and not the cause of it.

(3) the argument that without the immunity there would be fraud and collusion is an unsatisfactory justification of preclusion of actions.

The study reviewed the alternatives available and concluded that it would be best to recognize an unrestricted right of action between spouses. It noted that this right is present in the State of Victoria and New York State.

The study also recommended repeal of the provisions

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[80] At p. 158.

of The Automobile Insurance Act, Stats. Nfld. 1968, no. 36 which relieved an insurer from liability resulting from bodily injury to or the death of the daughter, son, wife or husband of any person insured by the contract while being carried in or upon entering or getting on to or alighting from the automobile. The rationale behind the repeal of this provision was presumably that it is automobile accidents which are a main cause of injury and to allow inter-spousal tort suits but to deny insurance coverage to spouses and other relatives would be inconsistent and unjust.

The 1972 Manitoba Law Reform Commission Report on "The Abolition of Inter-spousal Immunity in Tort made the following points.

(1) The historical basis of the immunity has disappeared.

(2) The concern for domestic harmony which is used to justify the immunity is "displaced". Briefly it is displaced because of (a) insurance, (b) little domestic harmony to preserve in these situations, (c) likely to cause more rancour, (d) inconsistent with other rules e.g. actions between parents and children.

(3) The concern that it would cause collusion between spouses to defraud insurance companies is invalid in that it would only occur where one spouse was (a) insured, (b) not actually liable, (c) dishonest, (d) undeterred by fear of prosecution for perjury and (e) where there is no other tort-feasor. It is also inconsistent with other relationships which could produce collusion but which are not saddled with such an immunity.

It is interesting to note that the Manitoba Law

Reform Commission sought opinions from the local Insurance Law Section, of the Canadian Bar Association, the Insurance Bureau of Canada, and the Manitoba Public Insurance Corporation. The Bar Association reported no objection to the abolition; the General Counsel to the Insurance Bureau of Canada, MR. E.H.S. Piper, Q.C. wrote:

> "A similar enquiry was addressed to us by the Law Reform Commission of Ontario, and, in a report on Torts and Family Law, they dealt with this subject. We were invited to express our views as to what effect elimination of inter-spousal immunity would have and, to the best of our knowledge, it would have little, if any, effect on the cost of any form of liability insurance. The Ontario study did obtain some figures from Britain, Australia and New Zealand, which similarly indicated that exposing a spouse to liability in damages for loss or injury suffered by the other spouse would not have any substantial effect on insurance costs."[81]

It must be noted however that in Manitoba at that time The Insurance Act, R.S.M. 1970, c. 140 s. 245(b) stated that automobile liability insurance would not render the insurers liable to pay compensation for bodily injury to or the death of the daughter, son, wife or husband of any person insured by the contract while being carried in or upon or entering or getting on to or alighting from the automobile. The Report does not state whether Mr. E.H.S. Piper's reaction to the abolition of inter-spousal tort immunity would have been the same had he been told that it would be accompanied by repeal of this provision.

The Manitoba Public Insurance Corporation also wrote that it would not oppose the proposed amendment. It

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[81] Manitoba Report, at p. 5.

did indicate however that before the Insurance Act was amended it would like to "assess the added cost to the motoring public of Manitoba".[82]

The Manitoba Report reports that it made inquiries in the U.K. as to the effect of its repeal in regard to automobile claims. The conclusion drawn was that the incidence of fraud and collusion did not increase, and that the cost to the motor insurance market was of a "very minor order". The Co-operative Insurance Society Limited also informed the Commission that extra payments paid out to spouses since the revision would not increase the total payments by more than "the odd 1% or so"; and that it would not justify an increased premium on its own account. The Manitoba Commission does point out however that the costs to Manitoba (and Alberta) would be greater than in England, since in England in multi-party accidents the spouse was able to collect from another negligent driver completely, with the right of contribution by the other driver against the negligent spouse. Therefore the revision regarding automobile accidents only would apply in single car accidents.[83]

The Commission recommended total abolition. It did not accept the England provision as to the power to stay, and cited the Ontario Report to show that between 1962 and 1967 in England there were 74 actions between spouses in torts and only 6 actions stayed. It recommended the abolition of section 245(b)(i) of the Insurance Act

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[82] At p. 6.

[83] At p. 7.

as well and did not consider seriously that this would wipe out the exclusion of children from the coverage. It also recommended that there should be enacted a statutory provision declaring that family members shall not be excluded from insurance coverage, so as to prevent the insurer from writing this into the policy. This was also recommended in Ontario.

Inter-spousal tort immunity was abolished in Manitoba in 1973, however, the Insurance Act restrictions have yet to be amended.

In view of these discussions and recommendations, what position should be taken in Alberta?

It is submitted that:

(1) The fact that at present there is a very wide scope in which actions between spouses are permitted in Alberta demonstrates that to maintain the immunity only for tort actions involving bodily injury is (a) unjust and (b) inconsistent. Moreover, there has been no suggestion that the widening of the scope has had any detrimental effect on marital relationships in the Province.

(2) The fact that the Married Womens Act separates husband and wife into two legal personalities is evidence that in Alberta the "unity principle" has been abolished and can no longer be used as a justification for the continued immunity.

(3) The fact that collusion may be possible if actions were permitted is (a) no justification for maintaining the immunity, (b) inconsistent with other close relationships

where actions are permitted, (c) and unfounded due to the limited cases in which collusion will be a factor. The arguments for the abolition of the guest passenger discrimination apply equally well here. Moreover, there are still certain restrictions in insurance coverage which would be unaffected by abolishing the immunity.

(4) The argument that suits would lead to marital discord is (a) unfounded by statistical evidence where actions are permitted and (b) inconsistent with the fact that marital suits are allowed in many situations now.

It is my conclusion that the immunity should be abolished. For the reasons stated in the above reports it is also concuded that the English power to stay discretion has not been very useful, and should not be adopted.

If inter-spousal tort immunity were abolished, section 5 of the Contributory Negligence Act would no longer have any rationale and would accordingly be abolished.

As suggested in Manitoba, Newfoundland and Ontario, the Insurance Act provision, which is section 296(b) in the Alberta Insurance Act, which provision excludes third party liability coverage to a spouse or a child of the insured in cases of automobile accident claims, would prevent a large number of spouses from being covered by insurance and would render less meaningful the proposed abolition of the immunity. The three jurisdictions above have recommended abolition. Due to the fact that this question would undoubtedly have great consequences for the insurance industry, and on insurance premiums, I am not prepared to make the same recommendation. I realize the inequity in preventing spouses and children from being covered and

the optional hardship this may cause, but without knowing the costs of such coverage no proposal can be made. It can be suggested, however, that this matter be investigated with a view towards the practicality of reform.

K. Last Clear Chance Or Ultimate Negligence

Section 7 of the Contributory Negligence Act states:

> "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."

Section 8 of the Contributory Negligence Act states:

> "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."

These two provisions preserve for the Alberta law of contributory negligence a restricted version of what is commonly known as "last clear chance" or "ultimate negligence".

As is well known, the so-called doctrine of "last clear chance" was developed by the common law before the apportionment legislation was enacted in order to protect the Plaintiff's right of action in certain cases. At common law a plaintiff's negligence was a complete bar to

his right of recovery against a negligent defendant, unless he could establish that although negligent, it was the defendant who had the "last clear chance" to avoid the injury. If established, plaintiff was given a right to full recovery. There has been some debate as to the underlying retionale behind "last clear chance" and to the use of causation language to explain what some contend to be merely a question of comparative fault, i.e. if the defendant's fault was greater in terms of culpability than plaintiff's then the doctrine was applied.[83] The question for the purpose of this discussion, however, is whether the doctrine of last clear chance should be abolished in view of the apportionment legislation and whether this should be done by specific enactment.

Dean Bowker writing in 1965 in the University of British Columbia Law Review[84] points out that one of the first questions which arose immediately upon the passing of the Contributory Negligence legislation was whether or not the Acts abrogated the rules of last clear chance. The opinion was that the Acts did not have this effect, which opinion was re-inforced by the Supreme Court in the decision of McLaughlin v. Long, [1927] Sup. Ct. 303. Dean Bowker

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[83]See especially MacIntyre, The Rationale Of Last Clear Chance (1940), 53 Harv. L. Rev. 1225.

[84]Bowker, Ten More Years Under The Contributory Negligence Acts (1965), 2 U.B.C.L.R. 198.

outlines various efforts which were undertaken to study the question including the report of a committee of the Canadian Bar Association which in 1932 "recommended an amendment to the Uniform Act to the effect that a negligent party should be bound to contribute even though the other party's negligence was ultimate".[85] As Dean Bowker points out this recommendation was not adopted; however, a compromise amendment was suggested by the Nova Scotia Commissioners on Uniformity to the effect that there be added to the Uniform Act a section requiring a judge to put the question of last clear chance to the jury only when clearly subsequent and severable acts of negligence were involved. The Conference on Uniformity did not accept this suggestion but as is evident from the Alberta Act, this was included in the Alberta legislation as well as in the Saskatchewan, Prince Edward Island and Newfoundland Acts. Dean Bowker's conclusion on the worth of adding this section however is summed up as follows:

> " . . . it has had no practical effect. In the provinces that have enacted it the courts give as little (or as great) effect to it as the courts of the other provinces give to The Volute."[86] (The Volute was a case which stated that there should be no application of last clear chance "unless a clear line could be drawn".)[87]

The conclusion Dean Bowker draws after a review of "last clear chance" cases reported between 1955 and 1965, is

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[85] Ibid., At p. 204.

[86] Ibid.

[87] Ibid.

that although the doctrine "has not vanished, it is scarcely visible".[88] There are cases discussed by Dean Bowker in which it has been applied which leads to the conclusion "that it seems impossible at this late date for them to hold it no longer part of the law".[89]

In the recent Alberta Appeal Court decision of Meyer v. Hall (1972), 26 D.L.R. (3d) 309, Mr. Justice Johnson, in an obiter dicta, stated:

> "If I had held that any acts or omissions of the appellants referred to by the trial judge were in fact evidence of negligence, I would have held that this principle (referring to the doctrine of "last clear chance") however it may be stated, applied, and held the appellants entitled to recover in full for their loss".[90]

In the case of Simmons v. Gammon (1973), 3 Nfld. & P.E.I. Rep. 161 (S.Ct., P.E.I.) a court was dealing with an accident which was caused when the Plaintiff entered a highway from a private lane in the face of the defendant's oncoming car, and the defendant collided into plaintiff's car. Both parties were held to be negligent but Mr. Justice Trainor stated:

> "But notwithstanding that negligence, the defendant's driver, if he had applied his brakes firmly as soon as he saw the plaintiff's violation of the Highway Traffic

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[88] Ibid., At p. 214

[89] Ibid., At p. 215

[90] At p. 321

> Act, could have brought his vehicle to a stop before colliding so devastatingly with the plaintiff . . . . The doctrine of contributory negligence is still in force in this Province. And notwithstanding the negligence of the plaintiff, the negligence of the defendant Gammon in not applying his brakes adequately and in time to bring his vehicle to a stop in order to avoid a collision with the plaintiff was in my opinion "clearly subsequent to and severable from the negligence of the plaintiff so as not to be substantially contemporaneous with it". I, therefore, find that the collision was caused by the ultimate negligence of the defendant John A. Gammon."[91]

It is therefore evident that the doctrine of "last clear chance" is still a factor in those jurisdictions which have incorporated it into their apportionment legislation, and probably in those that have not. The question then is whether this state of affairs should be continued in any new legislation.

This question was the subject of examination by the Alberta Commissioners to the Conference of Commissioners on Uniformity of Legislation in Canada and was presented in a report prepared in 1967.

The principle objection which is used to oppose any legislative enactment which would have the effect of discontinuing the use of the "last clear chance" doctrine is that this might result in placing liability on a party whose negligence has come to rest. The Alberta Commissioners discount the seriousness of this objection and argue that it would be

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[91] At pps. 163-164.

an erroneous application of the principle of contributory negligence and the provisions of the Act if this were done. Let us recall that section 2(2) of the Alberta Act specifically states that "nothing in this section operates to render any person liable for damages or loss to which his fault has not contributed".

The arguments for enacting a provision which would clearly eliminate the doctrine are:

(1) The reason for the doctrine's existence was to mitigate the harshness of the common law rule which prevented a negligent plaintiff from recovery of any damages. This no longer being the case, the doctrine has lost its usefulness.

(2) It is inconsistent to only apply the doctrine when the relationship involves a negligent plaintiff and a negligent defendant but not to apply it when there are two or more negligent defendants. However to apply it between defendants would be highly unfair to the injured party.

(3) The Contributory Negligence Act if properly applied will only permit apportionment when both parties were negligent and their negligence were effective causes of the injury. Thus the "last clear chance" provision is redundant.

(4) There is inconsistency in the application of the principle at present. In certain cases it is difficult to rationalize the application or failure of application of the principle.

Abrogation has been recommended both by Dean Bowker and Dr. MacIntyre in their respective articles. Dean Bowker suggests adoption of Professor Williams'

draft:

> "Damage shall not be deemed not to be caused by the Act of any person by reason only of the fact that another person had an opportunity of avoiding the consequences of such act and negligently or carelessly failed to do so."[92]

The suggestion to abolish the doctrine was also the one arrived at by the Alberta Uniformity Commissioners. It is interesting to note that the Report set out seven draft sections whose effects were to abrogate the doctrine. They are from Professor Williams; the Uniformity Proceedings of 1933,31 discussed above; the Uniformity Proceedings 1933,32, Prosser, Selected Topics on the Law of Torts, p. 68; South Africa's Apportionment of Damages Act 1956, section 1(b); Eire, Civil Liability Act, 1961, section 56, Western Australia Law Reform (Contributory Negligence and Tortfeasor's Contribution) Act 1947, section 4(1).[93]

In 1969, the British Columbia Commissioners on Uniformity issued a report on Contributory Negligence. This Report also suggests that the case law indicates that last clear chance should be abolished in view of the apportionment legislation and that this should be made clear by enactment. The draft suggested is:

> "This Act applies to all cases where damage is caused or contributed to by the act of any person notwithstanding that another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so."

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[92] Bowker, At p. 215.

[93] At pps. 72-73.

In view of the above arguments, it is submitted that this reform should take place.

L. Miscellaneous

There remain two further points which should be the subject of some consideration.

(1) Number of Actions

Section 4 of the Alberta Tort-Feasors Act states:

> "(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 any tort-feasors liable in respect of that damage, whether as joint tort-feasors or otherwise, the sums recoverable under the judgments given in those actions 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, . . ."

Section 9 of the Contributory Negligence Act states:

> "Whenever it appears that a person not already a 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."

Rule 229 of the Alberta Rules of Court states:

> "Where there are two or more actions or proceedings that: (a) have a common question of law or fact, or (b) arise out of the same transaction or series of transactions, or where for any other reason it is desirable to make an order under this Rule, the court may order that the actions or proceedings be consolidated or be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them".

In any action involving more than two parties when the issue of contribution or indemnity may arise it is definitely preferable to have all the issues tried together. There are various ways in which this may be accomplished.

If a plaintiff is injured by the concurrent fault of two others, he can institute proceedings against them both as co-defendants. In this action, and without the need of a third party notice, the defendants can serve a notice claiming contribution or indemnity, in accordance with rule number 77 of the Alberta Rules of Court.

If the Plaintiff chooses to sue only one of the defendants which is his right according to the terms of section 4 of the Tort-Feasors Act, then (a) the defendant can serve a third party notice on the unsued tort-feasor, or (b) the court can order that the third party be added as a defendant on the basis of section 9 of the Contributory Negligence Act.

If two separate proceedings are instituted at the same time in order to resolve the issues between the parties, the court may consolidate these proceedings into one action, based on Rule 229 of the Alberta Rules of Court.

The problem becomes complicated if for some reason the actions are not joined. Can a defendant not serve a notice upon a co-defendant claiming contribution, not issue a third party notice joining the second tort-feasor, but wait until after judgment is recovered against him, and then claim contribution?

The case of Cohen v. S. McCord & Co., [1944] 4 D.L.R. 753 (Ont., C.A.) dealt with this question under the Ontario Negligence Act, R.S.O. 1937, c. 115. The facts of the case are as follows. Plaintiff instituted action against two defendants as co-tort-feasors, and during the trial notified the court that he was terminating his action against one of the defendants and that it should be dismissed. The other defendant had no objection to this and stated moreover that "as far as this action is concerned I am not making any claim over against the co-defendant".[94]

Could this second defendant later seek contribution in a new action against the first defendant for damages he was forced to pay as the result of an unfavourable judgment against him?

The court considered the problem inherent in allowing this to happen. As the judgment in the first action would not be res judicata for this second action claiming contribution, the issue would have to be retried with the possibility that liability determined in the first action would be contradicted in this second action. The court also took into consideration section 6 of the Contributory Negligence Act which stated:

. . . . . .

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[94]At p. 755.

> "Whenever it appears that any person not already a 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 may be deemed just".

This is the same provision as presently found in section 9 of the Alberta Contributory Negligence Act, stated above.

The court felt, per Mr. Justice Gillanders, that "the provisions of the Act seem wide enough to afford every opportunity to a defendant, by adding other parties (either as defendants or as third parties) to obtain in the one action whatever contribution or indemnity he merits and chooses to claim. It appears obvious, for various reasons, that it would be very desirable and much more convenient, that such claims should be determined in one action. Apart from the multiplicity of proceedings, one can think of situations arising in subsequent actions for contribution or indemnity which would raise matters of difficulty".[95] Mr. Justice Gillanders concluded that since the Statute provided a specific remedy, the person was deprived of any other remedy, and thus denied the claim for contribution. Mr. Justice Laidlaw supported Mr. Justice Gillanders in this decision.

The result of Cohen v. S. McCord, supra, was upheld in the case of Rickwood v. Town of Aylmer (1957), 8 D.L.R. (2d) 702 (Ont., C.A.).

The conclusion derived from these cases is that a party cannot claim contribution from a co-tort-feasor if

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[95] At p. 756.

the opportunity was available to the former to claim the contribution by third party proceedings, or by notice, in a previous action and he failed to do so. The result in these cases, being based on the section of the Ontario Negligence Act which is similar to section 9 of the Alberta Contributory Negligence Act, can arguably be held to apply in Alberta. It is no doubt true that it is a very desirable rule to institute and if it is not the case now that no subsequent action for contribution can be brought in these circumstances it should be so stated in any proposed legislation. This would of course not affect the right of a tort-feasor to bring a separate action for contribution against a co-tort-feasor after the former had settled, without action, with the victim, in accordance with the arguments submitted previously.

L. Costs

There are several questions which may be raised with reference to the question of costs in a multi-party action.

(1) If an innocent plaintiff is injured due to the concurrent wrongs of two or more others, is there contribution between the wrong-doers in relation to the costs of the action as well as in relation to the damages?

(2) If the Plaintiff is partly at fault but succeeds in recovering some damages, is plaintiff able to recover full costs or will his costs be reduced accordingly? Can defendant recover a portion of his costs from plaintiff?

Certain of the Provinces have legislation dealing with these matters.

One provision found in the Acts of Saskatchewan, Newfoundland, British Columbia, is as follows:

> "Unless the judge otherwise directs, the 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, and where as between two persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there shall be a set-off of the respective amounts and judgment shall be given accordingly".

The Acts of New Brunswick and Prince Edward Island state that the liability for costs of the parties shall be in the same proportion as the liability to make good the damage or loss.

Ontario, Manitoba and Nova Scotia have the following provision:

> "Where the damages are occasioned by the fault or negligence of more than one party, the court has power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just.

There is no specific provision dealing with costs in either Alberta Act, although Rule 601 of the Alberta Rules of Court gives the court discretion to make any order it determines re: costs.

The general method of dealing with costs when there are two or more concurrent wrong-doers is to treat them as part of the damages and to allow contribution between the wrong-doers in proportion to their respective degrees of liability. This is what is provided for in the provisions in some of the above stated statutes and evern where not

specifically provided it is the method which the courts utilize.

A more difficult question to determine is whether a plaintiff who is partly at fault should be partly responsible for the costs of the action.

There are at least three alternatives available.

The first is to award the plaintiff full costs of the action although he is found partly at fault and receives a reduced amount of damages. This is quite common procedure and has been used frequently.

The second is to reduce plaintiff's costs by his degree of fault. As noted above this is provided for in the Acts of Manitoba, Ontario and Nova Scotia "if the circumstances render this just". This latter phrase has been subject to some judicial questioning. In a Manitoba case of Carlson v. Chochinov, [1948], 4 D.L.R. 556 (Man., C.A.) Mr. Justice McPherson reviews the jurisprudence concerning this provision and the conclusion drawn is that there was little consistency in its application. The court did hold that it was inappropriate to apportion costs in every case, due to the express wording of the provision, and that this could only be done in special circumstances. The scope or content of these special circumstances was not clarified.

The third alternative is to award plaintiff that portion of his costs as corresponds to defendant's degree of fault, and to award defendant that portion of his costs which corresponds to the plaintiff's degree of fault. This was exactly the procedure followed in the Saskatchewan case of Fallis v. Lewis, [1948], 2 D.L.R. 620, and is dictated by the Acts of Saskatchewan, Newfoundland and British Columbia

as noted above.

The most equitable alternative seems to be the third. Both parties having contributed to the injury and the need for the litigation, both should bear responsibility for it.

SECTION THREE

SUMMARY OF RECOMMENDATIONS

A. Recommendations:

That the law relating to Contributory Negligence and Concurrent Wrong-Doers be dealt with in one legislative enactment.

The law relating to contributory negligence, presently dealt with in the Contributory Negligence Act, and the law relating to concurrent wrong-doers, presently dealt with in the Tort-Feasors Act, both deal with the problems which arise when damage or loss is caused to one or more persons by the actionable wrongs or fault of more than one person. This being the case, for reasons of efficiency and orderliness this law should be consolidated into one enactment.

That the Common Law rule that a Release of one Joint Tort-Feasor will serve to release all Joint Tort-Feasors be Abolished.

The proposed legislation should maintain the present provisions of the tort-Feasors Act, s. 4(1)(a) and s. 4(1)(b) which allow a person who suffers damage due to the joint tort of two or more joint tort-feasors to institute more than one action against the joint tort-feasors even though judgment may have been recovered against any one of them, with the provision that the sums recoverable in the judgments

shall not in the aggregate exceed the amount of the damages awarded by the first judgment, and that costs of the subsequent actions may in certain circumstances not be awarded to the Plaintiff. The only remaining important distinction between joint tort-feasors and several concurrent tort-feasors is that it is the common law rule that a release of one joint tort-feasor releases all joint tort-feasors, whereas a release of one several, concurrent tort-feasor does not release all several, concurrent tort-feasors. This distinction should be abolished so that in no case will a release of one tort-feasor release other tort-feasors not intended by the plaintiff to be released. The effect of this reform would be to extinguish all important differences between joint tort-feasors and several, concurrent tort-feasors and Williams' proposal that the term "concurrent wrong-doers" be adopted to refer to both categories of tort-feasors may be considered.

That it be provided that when any person suffers damages due to the concurrent wrongs of two or more concurrent wrong-doers that each be liable to the plaintiff for the whole of the damage in respect of which they are concurrent wrong-doers.

This preserves the common law rule that both joint tort-feasors and several, concurrent tort-feasors are liable to the plaintiff for the full amount of his damages. It may be further considered, although this recommendation is not specifically made at this time, that the Act deal with "wrong-doers" and not soley "tort-feasors". That is that the scope of the legislation be wide enough to include not only those liable in tort, but those liable as well for breach of contract, or breach of trust, as suggested by Williams. The term "concurrent wrong-doers" may also be considered to be a useful substitute for the two expressions

"joint tort-feasors" and "several, concurrent tort-feasors" if the difference between these two categories is eliminated as discussed above.

That it be provided that there is to be Contribution between Concurrent Wrong-Doers in accordance with the following provisions:

(a) that there be contribution among wrong-doers liable in tort and responsible for the same damage, this liability to include liability for intentional acts as well as negligent acts, where the court deems it to be just and equitable;

(b) that a wrong-doer seeking contribution need not have first been sued by the victim and found liable to him in order to seek contribution; but that a settlement by the wrong-doer seeking contribution be considered an admission of liability to the victim not refutable by any other party.

Section 4(c) of the present Alberta Tort-Feasors Act does not expressly contemplate contribution being recovered by a settling party from other tort-feasors as do the Acts of Ontario, and Saskatchewan. It is submitted that it should not be necessary for a person to have been found liable by a judgment in order for him to seek contribution; one of the aims of any legislative enactment should be to encourage settlements.

(c) that a wrong-doer against whom contribution is sought not be liable for such contribution unless he would have been held liable to the victim had he been sued at the time the wrong-doer seeking contribution was sued or entered into a settlement with the victim. A plaintiff who fails to proceed against a wrong-doer in the time required, or who

allows an action against the wrong-doer to fail due to a procedural defect, and thus prevents a second wrong-doer from recovering contribution, may only recover from the latter wrong-doer, if the latter is liable, that portion of the damages which correspond to the latter's degree of responsibility.

This recommendation is made to clarify the situation in which a wrong-doer can escape a claim for contribution because the plaintiff failed due to a procedural defect to establish the wrong-doer's liability. The alternatives to adopting this suggestion are to either award contribution against a wrong-doer even at a time in which he could not have been held liable to the plaintiff, which would be unjust to him, or to withhold contribution from a wrong-doer because the plaintiff allowed the wrong-doer against whom contribution is being sought to escape liability, which would be unjust to the claimant. With the reduction of short periods of limitations, the problem is less likely to arise at any event.

(d) that a wrong-doer who fails to claim contribution by third party notice, by notice under the Rules of Court, or by adding a party defendant, in the action instituted against him by the plaintiff shall lose his right to contribution.

In view of the fact that it is advantageous to settle all issues of liability in one action, and that there are several provisions at present which enable this to occur, it would be advisable to prevent subsequent claims for contribution from being claimed in situations where previous opportunities were available but not utilized. This would not prevent a wrong-doer who settled with the victim from instituting claim for contribution by separate action.

(e) that contribution may be claimed on any amount paid by one wrong-doer to the plaintiff in proportion to the degrees of responsibility.

This suggestion is made to enable a wrong-doer to claim immediate contribution on a sum paid by him to the plaintiff, without the requirement that he wait for the determination as to whether this sum was in excess of what he owed the plaintiff.

(f) that when a plaintiff settles with one of two or more wrong-doers and agrees to indemnify the settling party against any claims for contribution which may subsequently be made against him by the other wrong-doers, that plaintiff be identified with the settling party in his subsequent suit against the other wrong-doers.

In order to avoid a circuitry of actions in cases where plaintiff settles with one party and agrees to indemnify him against subsequent claims for contribution the above suggestion is made. This would mean that the remaining wrong-doer(s) would be liable only for the damages which correspond to his degree of fault, i.e. the assessed damages minus the settling party's share of the damages. The amount of settlement would not be relevant to this calculation and the plaintiff might recover more or less than his assessed damages depending on the wisdom of his settlement.

(g) that the risk of the insolvency of one of the wrong-doers be borne by the solvent wrong-doers, in accordance with their respective degrees of liability, and not by the innocent plaintiff.

The plaintiff is able to recover in full from any of the wrong-doers and therefore does not bear any loss should

one be insolvent. It may be necessary to make clear that the other wrong-doers must bear this insolvency in accordance with their respective degrees of liability.

(h) that contribution between wrong-doers be assessed on the basis of the responsibility of each for the damages, unless such an assessment is impossible in which case liability shall be equal.

Concurrent wrong-doers are liable in relation to the same damage. It may be possible to differentiate degrees of responsibility based on the nature of the acts of the parties although it will not be possible to establish that one part of the damage was caused by one wrong-doers, and another part by another. When responsibility cannot be differentiated it shall be determined to be equal.

(i) that in certain cases the contribution ordered may amount to a complete indemnity.

The courts will order one party to indemnify another party in certain instances, e.g. master-servant relationship.

That it be provided that where by the fault of two or more persons, or of persons for whose acts they are responsible, damage is caused to one or more of them, the liability to make good the damage is in proportion to the degree in which each person was at fault but if having regard to the circumstances of the case it is not possible to establish different degrees of fault, the liability shall be apportioned equally. Where one of the parties' liability is based on a cause of action other than negligence, the court shall consider the fault of the other parties to the action in determining the damages which may be awarded.

This reverses the rule that a contributorily negligent plaintiff is barred from the recovery of any damages and differs from the present provision in the Contributory Negligence Act in two respects. It makes it clear that the fault may be personal fault or imputed fault, and it allows the defence of contributory negligence to be used in cases where the defendant is liable not in negligence, but for an intentional tort.

It also provides that in cases where the plaintiff is contributorily negligent that he is able to recover from the other wrong-doers only that portion of the damages which correspond to the other's degree of wrong-doing. This changes the present interpretation of the law which gives a contributorily negligent plaintiff the right to recover his recoverable damages in full from either the wrong-doers with the right to contribution existing between themselves. It must also be understood that implicit in this proposal are two others: that the insolvency be shared between all wrong-doers in accordance with their degrees of fault, and that in cases of vicarious liability the contributorily negligent plaintiff be able to recover in full from either wrong-doer their share of the damage.

That it be provided that set-off of damages not be awarded where it will have the effect of depriving the parties of recovery of a portion of their damages to the benefit of the insurers of these parties.

Where there is a claim and a counter-claim and each party is found to be partly at fault for the damages, set-off of these damages should not be ordered where there is third party liability insurance. This is provided in s. 9(a) - (b) of the Prince Edward Island Contributory Negligence Act as

follows:

9. Where a counterclaim is allowed in actions arising out of the operation of motor vehicles, and this Act is invoked by the Court Order 21 Rule 17 of the Rules of the Supreme Court shall not apply, and instead:

(a) 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 shall have judgment on the counterclaim for a specified amount, or as the case may be.

(b) Paragraph (a) shall apply, mutatis mutandis, where a third or fourth party, or as the case may be, has been added.

That Section 214 of the Highway Traffic Act be repealed and that therefore Section 4 of the Contributory Negligence Act be repealed.

It is recommended that the provision of the Highway Traffic Act, s. 214, which provides that a guest passenger may not recover against the owner or driver of the car unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator, be abolished, thereby placing a guest passenger in the same legal position as all other passengers, i.e. a requirement of ordinary negligence only. If this reform were adopted it would make Section 4 of the Contributory Negligence Act inoperative and therefore it would be repealed.

That Section 3(2) of the Married Women's Act, which creates what is known as "inter-spousal tort immunity" be repealed;

that all tort actions be permitted between spouses without qualification; and that therefore Section 5 of the Contributory Negligence Act be repealed.

If this provision were adopted there would be no restriction in tort suits between husband and wife. There would still be however, the restriction on insurance coverage of spouses and children created by section 296(b) of the Alberta Insurance Act. It is strongly proposed that this matter be investigated, specifically with respect to the costs of abolition of this insurance restriction.

That it be provided that the doctrine of "last clear chance" be specifically abrogated by legislation.

That although the question of costs if a matter of the courts discretion, it is equitable for the costs of an action to be divided in accordance with the fault of the parties.

The question of costs is a difficult matter, especially for one with so little practical experience in litigation. It can therefore only be suggested that this question be the subject of some consideration.

CONCLUSION

This report has attempted to deal with the major problems which arise as a result of multi-party accidents, and to present what is in my opinion the main structure of the law which deals or ought to deal with these problems. It has focused in on problems which have been discussed, although in most instances minimally, in the reported cases.

It has not dealt with all of the problems which may arise. Glanville Williams who has singly identified the

majority of the issues and has suggested solutions discussed several other areas of concern which were not dealt with in this paper. These issues raised by Williams are, inter alia:

(1) problems related to joint libel;

(2) problems related to collisions at sea;

(3) problems related to contractors and trustees;

(4) the awarding of punitive damages against some but not all wrong-doers;

(5) judgments by default against one of several wrong-doers;

(6) problems which may arise when there are more than two wrong-doers and one of them is omitted from a claim for contribution;

(7) rules as to which parties shall be bound by which findings in previous actions;

(8) matters related to bankruptcy;

(9) questions related to evidence and appeals;

(10) a detailed assessment of which acts constitute "contributory negligence";

(11) questions which arise when a contributorily negligent plaintiff institutes two successive actions, which are not joined, against wrong-doers;

(12) abolition of certain defences

It is hoped that this paper has presented the most important issues with the understanding that there will undoubtedly be the need for further addition and clarification.