JOSHUA WILLIAMS MEMORIAL ESSAY 1986

Sir Joshua Strange Williams was resident Judge of the Supreme Court in Dunedin from 1875 until 1913, and he left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have provided from that trust an annual prize for the essay written by a student enrolled in law at the University of Otago which in the opinion of the Council makes the most significant contribution to legal knowledge and meets the requirements of sound legal scholarship.

We publish below the winning entry for 1986.

CIVIL CONTRIBUTION RIGHTS WHERE A PARTY HAS SETTLED: PROPOSALS FOR REFORM

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I INTRODUCTION

> Contribution is a simple concept but a complicated business – primarily because it involves three causes of action: the victim's claim against the contribution claimant, the victim's claim against the contribution defendant, and the contribution claim itself.[1]

Because of the complexity of contribution claims I have found it necessary to canvas the definition, development, basis and present law in New Zealand before discussing the reform aspect – that being, what changes are required with respect to civil contribution claims where a party has settled his potential liability.

Throughout this paper P denotes the plaintiff, ie the person who suffers damage. D1 and D2 are the wrongdoers, ie persons who are liable to a plaintiff for the same item of damage or part of it. D1 is the person claiming contribution. D2 is the person from whom it is claimed.

The paper discusses two situations:

(1) D1 settles with P. Can D1 claim contribution from D2:
   (i) where D1 is liable to P;
   (ii) where D1 would not have been liable if sued to judgment.

(2) D2 settles with P. P sues D1. Can D1 claim contribution from D2?

Each issue is discussed with reference to unjust enrichment since it is suggested that this is the basis for contribution. A failure to analyse contribution issues with reference to unjust enrichment leads to difficulties, as will be seen in this paper.

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1 P B Kutner, "Contribution Among Tortfeasors: Liability Issues in Contribution Law" (1985) 63 Can Bar Rev 1, 58.

II DEFINITION

Where a person has suffered loss or damage for which two or more persons are, or may be legally responsible, what are the rights of those others to claim contribution as between themselves for the loss or damage they are liable to make good? The right of contribution enables a defendant against whom the plaintiff has recovered the whole of his loss, in turn to recover a fair share from any others who are also liable.

III BASIS OF THE DOCTRINE OF CONTRIBUTION

The right of contribution is an illustration of the application of broad principles of unjust enrichment.[2] Story recognised this in his work, *Equity,*[3] where he says a claim for contribution

> . . . has its foundation in the clearest principles of natural justice; for as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards the benefit obtained by all . . . . And the doctrine has an equal foundation in morals; since no one ought to profit by another man's loss where he himself has incurred a like responsibility.

The early leading case of *Dering* v *Lord Winchelsea*[4] said the right to contribution "is bottomed and fixed on general principles of justice . . . . [It is] the result of general justice from the equality of burthen and benefit."

Kutner[5] sets out two distinct, but consistent arguments as to the basis of contribution. The first of these is that the fundamental purpose of contribution is to achieve an equitable division among tortfeasors of the financial burden of the liability to the victim. The contribution law removes from the victim the power to determine which tortfeasors will avoid it or bear only a small proportion of it. This line of argument is the way many tort textbook writers tend to view contribution.[6]

The second distinct argument is that the basis for contribution is unjust enrichment. The idea is that to allow D1 to discharge more than the fair share of a common liability confers a benefit on D2 so that D2 is unjustly enriched at D1's expense.

IV DEVELOPMENT OF THE DOCTRINE

The doctrine of contribution developed out of the equitable maxim "Equality is Equity".[7] Losses were adjusted so that they fell in due proportion upon persons liable. One of the earliest situations of this was in the case of co-sureties;[8] subsequently it was recognised that there were many

2 G E Palmer, *Law of Restitution* (2nd ed 1978) Ch 13.
3 Story, *Equity* (1st ed) 493.
4 (1787) 1 Cox Eq Cas 318 per Eyre LCB at 321, 323.
5 Supra n 1 at 47-56.
6 Eg J G Fleming, *The Law of Torts* (5th ed 1977) 242.
7 *Halsbury's Laws of England* (4th ed), Vol 16, para 1301.
8 *Dering* v *Lord Winchelsea* (1787) 1 Cox Eq Cas 318 which was recently affirmed by the Privy Council in *Scholefield Goodman & Sons Ltd* v *Zyngier* [1985] 3 WLR 953.

situations where the doctrine should be invoked: eg co-insurers,[9] trustees,[10] directors,[11] co-contractors,[12] partners,[13] mortgagors[14] and co-owners.[15]

The doctrine developed along two parallel lines, one in equity and one at common law.[16] The conflict between the rules of law and equity was resolved by the implementation of the Judicature system[17] so that now where there is a conflict the rules of equity prevail.

V PRESENT STATE OF THE LAW IN NEW ZEALAND

Three ways in which the right to contribution in civil cases may arise were identified in *Karori Properties Ltd* v *J A Smith and Davies.*[18] These are:

(1) By an express provision in a contract.
(2) Under section 17 of the Law Reform Act 1935. This applies only to joint tortfeasors.[19]
(3) A right by way of implied contract or recognised on equitable principles, which arises from the relationship of the parties, eg co-sureties or co-trustees, or where some fiduciary relationship is construed to exist.[20] But this right only arises where both are liable to a common demand.[21]

The result is that if, for example, D1 is liable to P for a breach of contract and D2 is liable to P in negligence, then if P chooses to sue D1 to recover the loss, D1 cannot get contribution from D2 for the share of the loss which P suffered. There is no contribution under the Law Reform Act because D1 and D2 are not joint tortfeasors. They do not owe a 'common' liability to P. It is unlikely that there will be a contractual provision allowing for contribution since there is usually no contract between D1 and D2 — they are generally independent parties. The result is that D2 is unjustly enriched at D1's expense. The possibility of unjust results was recognised by Somers J in *J W Harris & Son Ltd* v *Demolition & Roading Contractors*

9 Eg *North British and Mercantile Insurance Co* v *London, Liverpool and Globe Insurance Co* (1876) 5 Ch D 569.
10 Eg *Lingard* v *Bromley* (1812) 1 Ch 685.
11 Eg *Ashurst* v *Mason* (1875) LR 20 Eq 225.
12 Eg *Shepheard* v *Bray* [1906] 2 Ch 235.
13 Eg *Re the Royal Bank of Australia, Robinson's Executors* (1856) 6 De G M & G 572.
14 Eg *Ker* v *Ker* (1869) IR 4 Eq 15.
15 But these claims are not likely to recur because of the introduction of property legislation.
16 An action in equity for contribution offered many advantages over the common law action, eg the more effective procedure in the Court of Chancery; at law the sum each contributor had to pay was the total divided by the numbers of contributors with no allowance for those unable to pay through insolvency, whereas in equity contribution was only amongst solvent parties; at law the death of a contributor put his liability to an end, but in equity his estate remained subject to it.
17 Judicature Act 1873 (Eng).
18 [1969] NZLR 698, 702.
19 Introduced to negative the effect of *Merryweather* v *Nixon* (1799) 8 TR 186, which prevented contribution between joint tortfeasors.
20 Eg *Eastern Shipping Co* v *Quah Beng Kee* [1924] AC 177, 182. This is illustrated by many cases referred to in *Supreme Court Practice* (1967) 198.
21 *Smith* v *Cock* [1911] AC 317, 236; *Johnson* v *Wild* (1890) 44 Ch D 146; and more recently in *McLaren Maycroft & Co* v *Fletcher Development Co Ltd* [1973] 2 NZLR 100, 117, where it was said ". . . a common liability is of the essence of a right of contribution".

(NZ) Ltd[22] but he felt that it was up to a higher court to remedy.

In the United Kingdom the Civil Liability (Contribution) Act 1978 has been enacted.[23] It provides that[24]

> . . . [A]ny person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly or otherwise).

Therefore, two or more people need only be liable for the same damage to the same person. It is irrelevant upon what legal basis they are liable.[25]

Although it has been accepted[26] that reform allowing contribution in other situations of liability beyond joint tortfeasors was needed, the Act, in my opinion, does not go far enough in its reform. A working paper by the New Zealand Contracts and Commercial Law Reform Committee[27] incorporates the better approach, although it is not entirely without fault.

It will be argued that where D1 has settled the entire liability D2 has been unjustly enriched, and D1 should be entitled to contribution without proof of liability to P. Where D2 has settled a proportionate share of the liability with P, D1 does not have an automatic right to contribution from D2; there are better solutions which achieve a fairer result.

VI SETTLEMENTS

> No one event creates a wider variety of response within the framework of state contribution laws than when one joint tortfeasor settles prior to the time that judgment is entered.[28]

A Situation (1)

The situation under consideration here is one where D1 has settled the whole of the liability with P and wants to claim contribution from D2. D2 has obtained a benefit because under our law the plaintiff cannot recover loss more than once — what is received from one wrongdoer goes in satisfaction pro tanto of all rights. Therefore, if D1 has paid P's entire loss P cannot also sue D2.

In the United Kingdom, under the Civil Liability (Contribution) Act, settlement is governed by section 1(4). It provides that a person who has made a bona fide settlement of claim against him is entitled to contribu-

22 [1979] 2 NZLR 166, 180.

23 Reforms have also been recommended in South Australia, Victoria and New Zealand.

24 Section 1(c).

25 Eg whether tort, breach of contract, breach of trust or otherwise.

26 See Kutner, supra n 1 at 47-56. Kutner sets out fully the advantages and disadvantages of so extending contribution claims. He concludes that contribution should be available in all cases of common liability for damages, whatever the basis of liability. The pragmatic argument against contribution for non-tort wrongs although serious fails to justify differential treatment of tort and non-tort liability.

27 New Zealand Contracts and Commercial Law Reform Committee *Working Paper on Contribution in Civil Cases* (1983).

28 L S Kaplan, "From Contribution to Good Faith Settlements: equity where are you?" (1985) 49 Journal of Air Law and Commerce 771, 778.

tion without regard to whether he was ever liable in respect of the damage. The proviso is he must show that he would have been liable "assuming that the factual basis of the claim against him could be established".

This provision extended the meaning of "liable". The meaning of "liable" in the context of a tortfeasor wishing to claim contribution under section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935 (UK)[29] was the subject of much debate.[30] But the minimum requirement seemed to be that D1 had to be responsible at law, if not actually sued to judgment and held liable, as a prerequisite to a claim for contribution against D2.[31]

The Act still requires some degree of "liability" to P. If the settling party would not have been liable if sued to judgment, because the settlement was based on a legal doubt between the parties which would have been in D1's favour if it had been pronounced on in court, then D1 is not entitled to contribution, because D1 is not "liable" to P within the meaning of the Act.

It is my view that the Act is deficient in this respect. D1 should not have to prove that, assuming the factual basis of P's claim could be established, D1 would have been liable if sued to judgment, before there is a right to claim contribution from D2.

The position in New Zealand is contained in *Baylis* v *Waugh.*[32] In that case McGregor J held, after considerable review of the authorities, that "liable" in the context of section 17 of the Law Reform Act means "responsible in Law";[33] the defendant still has a right of contribution against a third party, but will have to prove actual liability at the time of payment. This means that if the factual or legal basis of P's claim cannot be established, D1 cannot claim contribution from D2.

My contention is that to limit "liability" to actual liability if sued to judgment is undesirable and should be discarded with future reform. Such a limitation denies the right to contribution in a situation which it is designed to rectify: where there is unjust enrichment.

To require actual proof of liability to P by D1 presents difficulties. There is the mechanical difficulty of defining "liability" as evidenced in *Baylis* v *Waugh, Littlewood* v *George Wimpey & Co Ltd,*[34] and *George Wimpey & Co Ltd* v *British Overseas Airways Corporation.*[35] Furthermore, an

29 This is the English equivalent of our Law Reform Act 1935.

30 See eg *Littlewood* v *George Wimpey & Co Ltd* [1953] 2 All ER 915 (CA) 918, 921, 916; *George Wimpey & Co Ltd* v *BOAC* [1955] AC 169, per Viscount Simonds at 178 and per Lord Keith at 195; *Bitumen and Oil Refineries (Australia) Ltd* v *Commissioner for Government Transport* (1955) 92 CLR at 212.

31 Idem.

32 [1962] NZLR 44, 49.

33 Idem.

34 [1953] 2 All ER 915 (CA).

35 [1954] 3 All ER 661 (HL); Kutner, "Contribution Among Tortfeasors: The Effects of Statutes and other Time Limitations" (1980) 33 Okla LR 203, 212 suggests several interpretations: responsible in law, sued to judgment, subject to a legally enforceable obligation or something else.

important policy consideration, pointed out by Dugdale,[36] is that D1 may have difficulty proving liability where D1's negotiating position has involved a denial of all or part of any alleged liability. In *Baylis* itself the settlement included an express disclaimer of responsibility. D1's ability to convince P that he is not liable to P, or at the most, only possibly liable so as to encourage P to settle, should not disadvantage D1 in a contribution claim against D2.

Secondly, the "proof of liability" requirement discourages settlement.[37] D1 would be on safer ground if she fought and lost an action against P because then, at least, she would be entitled to a contribution claim against D2. This is an unsatisfactory state of affairs; it is important to encourage settlement from a cost and time saving point of view.

Settlements will become increasingly desirable with the proposed extension of contribution claims in civil cases beyond joint tortfeasors and parties subject to a "common demand".[38] Contractual relationships are often ongoing and hence settlements are suitable to resolve disputes as quickly and painlessly as possible. To encourage settlement then, D1 should not have to prove that he would have been liable if sued to judgment.

Palmer[39] says that in the past a reason against allowing a settling party to claim contribution, where it transpired that she was not liable, was because that party was a volunteer: equity does not assist a volunteer.[40] Palmer argues that in settling a claim for which the payor had a potential liability, she acted to protect her own interests and this should take her out of the volunteer category.

The position is illustrated in *Crain Brothers* v *Duquesne Slag Products.*[41] In that case the defendant negligently failed to secure two barges. In a storm, the barges broke loose, and were carried downstream where they struck two barges owned by the plaintiff. This caused one of the plaintiff's barges to break loose and strike two barges owned by the Ohio Co. The Ohio Co asserted a claim against the plaintiff for damages to its barges

36 A M Dugdale, "Proposals to Reform the Law of Civil Contribution" (1984) 2 Canta LR 171, 175.

37 Idem.

38 It seems likely from the views expressed by the New Zealand Contracts and Commercial Law Reform Committee that New Zealand will follow the English example and extend contribution claims beyond the Law Reform Act 1935. The extension is desirable since it eliminates the manifest injustice of one wrongdoer being made totally liable while the other escapes liability according to the whim of the plaintiff in choosing. There is also no substantial objection to the extension being made.

39 Supra n 2 at 399.

40 There are some exceptions to this equitable maxim, eg the rule in *Strong* v *Bird* (1874) LR 18 Eq 315.

41 273 F 2nd 948 (3d Cir 1959); cf *Standard Meters Gas Co* v *State Farmers Mutual Automobile Insurance Co* 97, 50 2d 435 (La App 1957). In that case a garageman and a customer's insurer brought an action against the tortfeasor's insurer for damage to the customer's automobile by the tortfeasor while the customer's automobile was being road tested by the garageman's employee. The Court of Appeal, per Take J, held that where negligence of the tortfeasor was allegedly the sole proximate cause of the collision, and the garageman repaired the customer's automobile at the garageman's expense, the garageman could maintain the action, over the objection that the garageman was a mere volunteer, though there was no conventional subrogation by the customer.

which the plaintiff settled for $2,000. The plaintiff brought an action against the defendant. It was found that the damage to the Ohio barges was due solely to the negligence of the defendant. However, recovery of the $2,000 paid to the Ohio Co was denied for the reason that the plaintiff was a "volunteer". The court observed that "on the present record an action by Ohio against Crain would have been groundless".[42]

The case reveals an unfortunate judicial tendency to use hindsight. The court did not look at the position presented to the plaintiff at the time he made the settlement with Ohio. Palmer argues that intelligent solution of the problem of unjust enrichment requires the payor's acts to be judged as at the time they occurred. When the plaintiff made the settlement with Ohio he was faced with a potential tort liability which he settled in preference to litigating. This, argues Palmer, is a sufficient self-interest to support restitution from the one who was enriched by the settlement because the tort liability in fact rested on him.[43]

Crain Brothers was not a case on the doctrine of contribution but the same "intelligent solution" is required in the case of contribution since the doctrine is used as a solution to the same problem – unjust enrichment. In *Crain Brothers* the plaintiff discharged more than his fair share of the liability, since he was not liable at all, and this enriched the defendant. In a contribution claim, D1 has discharged more than his fair share of the liability and thus enriches D2.

Crain Brothers demonstrates, by analogy, that it is important to look at the position D1 was in at the time he settled with P, rather than to insist that if D1 would not have been liable if sued to judgment then D1 should not be entitled to contribution from D2. D1 is faced with a potential liability which she settles in preference to litigating. At this stage, the matter of ultimate liability is unresolved. D1 should not have to know whether she would actually be liable if sued because this would negative most of the advantage of settling. She would have to research the position thoroughly, in which case she may as well go ahead with litigation and claim contribution from D2, if unsuccessful.

The result of D1's settling the potential liability is to enrich D2 at D1's expense and there is accordingly a need for restitution. D1 is not a volunteer within any sensible meaning of the word because she acted to protect her own interests. Therefore D1 should be entitled to claim contribution from D2 without proof of ultimate liability.

The insistence of "liability" as a prerequisite seems to have arisen out of the early surety cases which first allowed contribution. If there were two sureties for the same debt, it was considered that one surety should not have to bear the full responsibility of paying the debt in the event of default by the debtor. The surety who paid was entitled to contribution

42 Ibid 953.

43 The weakness in the decision of *Crain Brothers* can be seen if it is compared with a slight variation in the facts. If the plaintiff had been found to be 10% negligent it would have been possible to claim contribution from the defendant. Thus no liability means no contribution claim, whereas a small liability gives rise to the right to claim contribution. This distinction lacks good sense.

from the co-surety because they were both subject to a common liability.[44] However, confining contribution to situations which have all the elements present in the standard instance in which it was first allowed ignores the reason behind the rule: unjust enrichment.

It can therefore be seen that it is necessary to allow a settling D1 to claim contribution from D2, whether D1 was actually liable to P or not. The reasons are: (a) to rectify the unjust enrichment which results without the doctrine of contribution; (b) to encourage settlements; and (c) because of the difficulty D1 may have in proving liability to P where a favourable settlement has been negotiated by a good disclaimer of liability. It has also been shown that it is important to look at the situation at the time D1 achieved the settlement rather than use judicial hindsight.

The next question is how far the law should go. There should be a contribution right where D1 would have been liable if sued to judgment. There should also be a contribution right where D1 had a risk of liability. Should there be a right to contribution where D1 knew he was not liable but settled for extraneous reasons?

This problem is well illustrated by antitrust cases.[45] There is considerable academic argument in favour of allowing contribution as a general right in antitrust cases, but limited law to this effect.[46] One commentator[47] argues that the absence of contribution allows plaintiffs to force favourable settlements regardless of the merits of their cases in antitrust actions. When alleged co-conspirators have not been sued, defendants may feel compelled to settle from fear of liability for the damages of an entire conspiracy. This unfair settlement pressure will be mitigated if it is relatively certain that contribution will be allowed.

This can be illustrated by the following example. D1 and D2 are company co-conspirators. Say P is suing for damages of $500,000 and D1 and D2 are equally and entirely responsible for the loss caused to P by their conspiracy. P could sue D1 for the entire $500,000.[48] D1, in fear of this and because P seems to have been making no demands of D2, may settle for say $400,000. In this situation the fair solution is for D1 to pay $250,000 and D2 to pay $250,000, so D2 has been enriched by $250,000. However, P could sue D2 for the remaining $100,000. Therefore D2's enrichment is in reality $150,000. If D1 was entitled to contribution from D2 even if D1 had settled for $400,000, it would not matter because $150,000 could be claimed from D2. Therefore contribution should be allowed.

44 Eg supra n 8.

45 These involve conspiracies by companies to breach laws which protect trade and commerce from unlawful restraints, price discrimination, price fixing and monopolies.

46 Federal Courts until recently refused to allow antitrust defendants to seek contribution from co-conspirators. There was much criticism of this: see Corbett, "Apportionment of Damages in Antitrust Treble Damage Actions" (1962) 31 Fordham LR III; Paul, "Contribution and Identification Among Antitrust Conspirators Revisited" (1972) 41 Fordham LR 67. The first judicial change in attitude came with *Professional Beauty Supply Inc* v *National Beauty Inc* 594 F 2d 1179 (8th Cir 1979). The American Bar Association has formulated its own proposal for reform.

47 "Contribution in Private Antitrust Actions" (1980) 93 Harv LR 1540, 1542.

48 For reasons of simplicity I am ignoring the amount of damages that P would have overstated in his Statement of Claim.

But the problem goes further. Because of the vast sums of money involved in antitrust cases, a company may not be able to raise the funds necessary to litigate. It appears[49] that increasingly businessmen are concluding that they have no real option but to settle such antitrust claims even when they are confident that they did nothing wrong and that they have a solid defence. Even if the defendant is willing to litigate the situation, the unwillingness of creditors to lend money to a company with such a large contingent liability may force it to settle.

If actual liability is a condition precedent to the right to contribution, D1 in the above example would have no claim against D2. D2 has, however, still received the benefit of D1's settlement reducing the remaining liability to P. It does not matter that D1 was never liable and knew it. There is still unjust enrichment in favour of D2 at D1's expense. Therefore D1 in this situation should be entitled to contribution.

The United Kingdom legislation, as discussed earlier,[50] limits the right to contribution in the settlement context, to settlements where only the factual basis of liability was in doubt. The point was made by Dugdale[51] that as many settlements are based on legal doubts, for example, as to the existence or extent of D1's duty to P, it is important that any reform apply to all settlements whether they compromise factual or legal disputes. What is important to realise, though, is that the unjust enrichment is the same if the right of contribution is denied D1, whether the doubt as to liability concerns factual or legal disputes.

The New Zealand working paper's[52] proposal is to permit D1 to claim contribution from D2 without proof of liability, where he has settled with P. The paper suggests no limitation as to what "liability" means.

The working paper suggests two provisos to the settling D1 claiming contribution from D2.[53] They are:

(1) That D1's compromise with P was reasonable having regard to all the factors which influenced the settlement; and

(2) That D2 is liable to P for an amount equal to or exceeding the amount claimed by D1 by way of contribution.

The second proviso is a protection for D2 as to quantum. The working paper argues that although a settlement may well be reasonable as far as D1 and P are concerned, it may not reflect the potential liability or risk of it that D2 was under, and to whom quite different considerations may apply. Also, the rules of remoteness as to damage may give different results or quantum and what may be reasonable for D1 may be unreasonable for D2. These are valid arguments and hence the second proviso has merit.

The first proviso is a protection for D2 so that she is not prejudiced by the settlement, since she was not a party to it and could not influence it. Because it requires looking at the factors which influenced the settle-

49 Hearings on s 1468 Before the Subcomm on Antitrust, Monopoly and Business Rights of the Senate Commission on the Judiciary, 96th Cong 1st Sess 19 (1979).

50 Text to n 29-30 supra.

51 Supra n 36.

52 Supra n 27, para 4.1.

53 Supra n 27, para 4.2

ment, the proviso requires the court to evaluate the situation at the time the settlement was made. As discussed earlier,[54] this is the important time for intelligent solution of the problem of unjust enrichment.

Dugdale[55] points out that a deliberately over-generous settlement reached with the intention of forcing D2 to make a high contribution would fall outside the proviso, ie the over-generous settlement would not be reasonable.[56] However, he suggests there may be more borderline cases: would a settlement between an employer and a contractor in which the contractor's main motive was the likelihood of future work from the employer if the settlement was sufficiently generous, fall foul of the proviso?

Any solution concerning contribution requires analysis in terms of unjust enrichment. If D1 is not entitled to contribution, D2 is unjustly enriched — he has got off scot free. However, D1 is not totally without benefit if contribution is now allowed (he may obtain work), but his claim for contribution must be reduced.[57] The amount of reduction would be the amount the court considered to be over and above what the settlement would have been, if the contractor and the employer were two unrelated individuals.

This would be a difficult decision for the court but courts are constantly dealing with similar problems as to quantification of damages. Left with enough discretion, the courts are able to deal with problems of unjust enrichment; the complexity of contribution claims is no cause for complaint. For example, despite initial complaints concerning the difficulty of applying contribution in the securities context,[58] courts have discerned[59] "no unmanageable administrative problems which have been caused by allowing contribution in security cases" and have proved capable of handling contribution claims.[60] One commentator[61] has argued that the complexity of contribution claims is the price to pay if significant issues in contribution are to be addressed.

The court should have a discretion as to what is a reasonable settlement. The working paper states that the settlement must be bona fide and it must be at a reasonable figure. Where D1 settles when she was not liable at all, D2's contribution would be the entire amount of the settlement since this is D2's share of the liability. This is unfair to D2 in that he has to take responsibility for D1's settlement. D2 may have been able to negotiate a more favourable settlement or he may have gone on to conduct a brilliant case and reduce P's claim to well below what D1 settled for. Requiring the settlement to be reasonable and in good faith gives D2 some protection as to the amount he will have to pay by way of contribution.

54 Text to n 43 supra.
55 Supra n 36.
56 It has been recognised in certain states in USA that the reasonableness of the settlement can be put in issue, with contribution limited by the amount of the reasonable settlement. For the collection of cases on this see Palmer, supra n 2 at 401 n 8.
57 In other words the enrichment of D2 is not totally at D1's expense and the court would be involved in a balancing exercise.
58 W O Douglas & G E Bates, "The Federal Securities Act of 1933" (1933) 43 Yale LJ 171, 178.
59 *Professional Beauty Supply Inc,* supra n 46 at 1185-1186.
60 Supra n 47 at 1550.
61 Supra n 1 at 58.

Thus regardless of whether D1 should have made a settlement with P she will be entitled to contribution from D2 if she can show:

(1) that the amount settled for was reasonable;

(2) that D1 acted in good faith; and

(3) that D2 would have been liable if sued to judgment.

Contribution can be considered as an instance of a more general principle forcing the restitution of gains unjustly realised at the expense of another; discharging another's liability is only one aspect of the wider restitutionary issue of unrequested benefits.[62] Weinrib[63] says that in this area the courts have been progressively broadening the grounds for recovery in circumstances falling short of legal compulsion, such as mistake,[64] moral qualms,[65] self interest,[66] or the practical need to protect one's own position.[67] American commentators say that the trend has extended in the direction of allowing contribution as a general matter.[68]

In New Zealand one writer[69] has said the trend is away from the dual compartmentalisation of actions as tort and contract. Quasi-contractual remedies are increasingly looked on as belonging to neither category and are often dealt with under the heading of restitution.

What is the significance of the trend? In my opinion, it reinforces the argument that actual liability should not be necessary to settling D1's claim for contribution from D2. The trend in this area is to look at the problem as a restitutionary one – if there is unjust enrichment then it should be corrected. The fairest result is achieved in these situations where the court is left with a wide discretion.

Although it is true that restitutionary remedies are not as firmly established in English and New Zealand law as they are in Canada and the USA,[70] the courts have shown some willingness to adopt these remedies at times.[71]

The scope of an action for money had and received is growing.[72] A case on money had and received which adopted a similar approach to the position I am advocating with respect to contribution is *Larner* v *London City Council.*[73] It had, in the past, been implicit that where money paid in advance was paid because of a supposed liability, this must be a supposed *legal* liability and not a mere moral obligation.[74]

62 Contribution is seen in this way by C Weinrib, "Contribution in a Contractual Setting" (1976) 54 Can Bar Rev 338 at 342-343.

63 Idem.

64 Eg *County of Carleton* v *City of Ottawa* (1965) 52 DLR (2d) 220.

65 Eg *Samilo* v *Phillips* (1968) 69 DLR (2d) 411 (BCSC).

66 Eg *Arnett & Wensley Ltd* v *Good* (1967) 64 DLR (2d) 181 (BCSC).

67 Eg *Traders Realty Ltd* v *Stevenson Road Realty Co Ltd* [1978] 1 OR 791.

68 See J F Ponsoldt & B H Terry "Contribution in Civil Antitrust Litigation: The Emerging Consensus in Legal Literature" (1981) 38 W & Lee LR 321 for this trend.

69 J F Burrows "Contract or Tort?" [1967] NZLJ 223.

70 *Hayward* v *Giordani* (1983) 2 NZFLR 129 per Cooke J; Goff and Jones, *The Law of Restitution* (1966) 13-14 state that English law has not yet recognised any generalised right to restitution in every case of unjust enrichment.

71 Eg the obiter statements of Cooke J ibid.

72 Goff and Jones, supra n 70 14, n 63 for collection of cases.

73 [1949] 2 KB 683.

74 *Aitken* v *Short* (1856) 1 M & N 210.

The Court of Appeal in *Larner* cast doubt on this. In that case, during wartime, the council had resolved to pay all their employees who entered the services during the last war the difference between their war service pay and their civil pay. The employees were asked to inform the council of changes in their war service pay. Larner failed to do this. As a result the council overpaid him.

The Court of Appeal held that the council was entitled to recover the amount so overpaid even though the council had no legal liability to make the payment at all. Denning LJ,[75] who delivered the court's judgment, said:

> London City Council by their resolution, for good reasons of national policy made a promise to the men which they were in honour bound to fulfil. The payments made under that promise were not gratuities. They were made as a matter of duty .... It is a question of recovering overpayments in the belief that they were due under the promise, but in fact not due.

This is similar to a settlement made to P by D1 in the mistaken belief that D1 was liable to P and the approaches are similar. *Larner* allows money to be recovered where there was no supposed legal obligation to pay it. I advocate that contribution should be recovered by D1 even though D1 was not legally obligated to pay anything. The safeguard with respect to money paid under mistake is that the payor must have been under a duty to make the payment. The safeguard with respect to contribution is that the settlement must be reasonable having regard to all the circumstances.

Both "duty" and "reasonable" can be vague terms. But the result in *Larner* is just, as is the result of allowing contribution where D1 reasonably settles a claim from P.

If the court has been willing to extend recovery in the restitutionary field of money had and received the same extension can be made in the restitutionary field of contribution claims. However, the encouragement to do so will need to come from legislation.

A final point about legislation in this situation concerns the definition of "settlement". As the working paper suggests[76] the legislation should define settlements in terms broad enough to include arrangements such as that D1 will repair damage to a product sold to P. Settlements other than monetary payments may become common with the extension of contribution claims to the contractual setting. The narrow definition given to settlements in the UK Act has been criticised.[77]

B Situation 2

The second situation with which this paper deals concerns whether D2 should be shielded from a contribution claim by D1 because of a settlement D2 has made with P. The important issue is whether there will be unjust enrichment if there is no right of contribution.

75 At 688.
76 Supra n 27, para 4.1
77 A M Dugdale, "The Civil Liability (Contribution) Act" (1979) 42 MLR 182.

If D1 and D2 are equally responsible and D2 settles with P for half of the loss there will be no unjust enrichment if P sues D1 for the remaining loss. Therefore, there is no need for D1 to claim contribution from D2. What we are concerned with is where D2 and P settle for less than D2's proportional share of the liability and P sues D1 for the remaining loss. In this situation D2 is enriched at D1's expense.

The present position is contained in *Harper* v *Gray & Walker*.[78] This case concerned an action under section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act which is equivalent to the Law Reform Act 1935 in New Zealand. In that case it was held that the architect (D1) could recover contribution from the engineer or contractors (D2's) if D1 could show that the D1's who settled with the plaintiff would have been liable if sued to judgment. It is sufficient if the engineer or contractors (D2's) could have been successfully sued at any time. A finding, therefore, that they would have been liable to P before the dates of the settlements would suffice.

Therefore, the position is the same under present New Zealand law with respect to tortfeasors as under the first situation. Actual liability of D2 must be established. Contribution is being claimed because only part of the loss was settled. Therefore P can sue D1 for the remaining loss.[79]

Is this a satisfactory position? Here there is no problem in requiring D1 to prove that D2 would have been liable if sued to judgment. If D2 was never liable to P then D2 in settling with P has not caused D2 to be unjustly enriched at D1's expense. Rather, D2 is the one who is enriching D1 by reducing the amount P claims. Because D2 chose to settle and thereby obtain the advantages which attach to settling, the price paid for this advantage is that he may not have been found liable if sued to judgment. Therefore D2 would not have a contribution right against D1 if D2 was found not to be liable.

What is of concern is where the settled D2 is liable to P and she settles for under her share of the responsibility leaving D1 to pay the rest. The quick solution would be to say that D2 is enriched at D1's expense and therefore contribution should be allowed. But this assumes that any enrichment is an unjust one. There are several factors which I believe mitigate any unjustness of the enrichment in this situation.

One of these is pointed out in the working paper.[80] There it said that a defendant should not be at risk at the suit of another wrongdoer once he has effectively discharged his debt to the person to whom he was liable. To allow D1 to recover contribution from D2 in this circumstance is unfair to D2. D2 may have legitimately believed that she had been completely absolved from the consequences of wrongdoing by settling with P. This belief can be seen as one factor amongst others, for explaining why D2 should be shielded from a contribution claim.

78 [1985] 1 WLR 1196.

79 Cf the first situation discussed where the settling party settled the entire loss and then wished to claim contribution from the other liable person.

80 Supra n 27, para 4.3

Secondly, to allow D1 to claim contribution would discourage settlements. If D2 settles with P and then D1 brings a contribution action against D2, D2 has gained no advantage from settling with P in the first place. D2's solicitor's time would be better utilized in preparing a defence for D2 against P's claim rather than in negotiating a settlement which is unsatisfactory.

Kaplan[81] questions giving encouragement of settlement such a high priority. He argues that the higher priority should be that of equitably apportioned damages. Kaplan argues that the litigation was not initiated by the non-settling defendants and it is therefore not fair that they be the very parties whose rights are extinguished in order to terminate a process which they did not start. Additionally, he says the right of contribution against a settling defendant only results in piecemeal settlements. The litigation as to the remaining defendants continues.

Although these are valid arguments, they do not necessarily lead to the conclusion that D1 should be entitled to contribution from D2. Equitably apportioned damages can be ensured by other methods as will be discussed later.[82] Because of this D1's rights are not extinguished through D2's settlement with P. Piecemeal settlements are not that undesirable – the jury's task is made easier because of the reduced number of defendants. Also D1 is able to settle with P if there are effective negotiations between the parties.

A further factor why D2's settlement with P is not unjust is because D2 has bargained for the advantage. Say P is claiming $100 in damages and D2 and D1 are equally responsible. If P settles with D2 for $40 then the $10 that D2 is saved from paying is an advantage that she bargained for, ie D2 has earned a saving of $10 and should therefore be entitled to keep it.

The working paper[83] recomends that provided the settlement between P and D2 is "bona fide and reasonable" then D1 should be barred from contribution. Although this offers some protection to D1 as to how much D1 will end up paying[84] it is not enough.

In the previous example a settlement for $40 between D2 and P may well be considered reasonable.[85] The question becomes who should bear the $10 loss? The objection to D1 having to pay the extra $10 is that he is having to pay because of an arrangement between P and D2 to which he was not a party and which he could not influence.

A settlement is a compromise. P's compromise is that she gets less money but does not have to fund litigation against D2. D2's compromise is that he pays the money to P without defending himself, with the advantage of not having to fund his defence case and generally paying less than he would have if sued to judgment. Because a settlement is a compromise

81 Supra n 28 at 783.
82 Text to n 88 et seq infra.
83 Supra n 27, para 4.3
84 An example of an unreasonable settlement would be where in the $100 example given, P settles with D2 for $10 because they are friends and sues D1 for the rest.
85 This point was made by Dugdale, supra n 36 at 177.

for the benefit of the parties concerned, D1 should not be the one who is adversely affected.

The remaining alternative is P (since as previously discussed D2 should not miss out).[86] The objection to P missing out is that she is the one who has suffered the loss. One commentator[87] has said that contribution is not simply a mechanism to make those "responsible" (ie the wrongdoers) for causing injury to share the cost of the injury. Its fundamental purpose is to achieve equitable division among tortfeasors of the financial burden of the liability.

This equitable division is best achieved in this situation if the innocent party bears the loss of too low a settlement. P chose to settle with D2 at below the level of D2's actual liability. P has the advantage of only having to sue one party and having the funds to do so from the settlement. Therefore, although she may receive less money than if she had sued D2 to judgment there are still advantages to P in settling and so settlement is not discouraged.

There are two alternative approaches as to when P will bear the loss. The first is the "identification" solution as suggested by Glanville Williams.[88] The idea is that when P settles with D2 he is identified with D2's share of the responsibility. Or, to put it in other words, if D1 and D2 are equally liable then each should pay 50% of the damages. If P chooses to accept less than this from D2 by way of settlement then D2 is still considered to have discharged 50% of the liability. There remains only a further 50% of the damage to be paid by D1. So in the example given of P's $100 loss, P would get $40 from D2 and only $50 from D1 (rather than $60 from D1).

Dugdale[89] argues that this is not necessarily a fair result because P may have acted reasonably in making a low settlement with D2. This is, with respect, irrelevant in my opinion. It is up to P whether to settle or not. He gains advantages, even if he receives less than the total claimed. There is no unjust enrichment at P's expense.

The disadvantage of this approach is that P may not be aware that it is she who will miss out by making too low a settlement with D2. This can be overcome by clear legislation stating that D1 is only liable for his proportionate share of the liability. In this way P will realise that in making too low a settlement she is acting at her own peril.

The second alternative is the notion of indemnity. Under this approach P only misses out if he gives D2 an indemnity against claims by D1. D1 would not be barred from bringing a claim against D2 unless as part of D2's settlement with P, D2 has an indemnity. Where there is such an indemnity P will be the one who misses out if he makes too low a settlement with D2.

Under the indemnity approach P, who is the innocent party, only suffers some pecuniary loss where this has been agreed to as part of the settle-

86 Text to n 80 et seq supra.
87 Supra n 1 at 14.
88 Williams, *Joint Torts and Contributory Negligence* (1951) 152.
89 Supra n 36 at 178.

ment. Where D2 has bargained for an indemnity the argument in favour of D2 being shielded from a contribution claim is even stronger. D2 is not unjustly enriched at either P's or D1's expense because the advantage is earned by bargaining; bargaining included obtaining an indemnity. D1 is not disadvantaged by an arrangement to which he was not a party.

Where P makes too low a settlement with D2 and gives D2 an indemnity against claims from D1, P is not only aware that it is he who will suffer, but has agreed to it. Hence it is fair that P misses out under such an arrangement. Where P does not give D2 an indemnity against claims from D1, D1 is free to claim contribution from D2 where P has sued D1 for the remaining liability. This is not unfair to D2 since she knowingly did not bargain for an indemnity. D2 has acted at her own peril and should not be protected. The arguments in favour of allowing D2 to be shielded from a contribution claim, as discussed earlier,[90] have no force where D2 has acted foolishly in not obtaining an indemnity. D2 could sue her solicitor for negligence.

Either approach is preferable to the present position and the position advocated by the working paper. The second alternative is possibly better in that all the parties are more aware of the consequences of their actions. Against this, the indemnity approach encourages circuity of action.[91]

Because of the many varied situations in which contribution issues arise, the approach (whichever of the two is chosen by the legislature) should be the general rule. The court should be left with a discretion to depart from the rule where its operation would be unjust in the circumstances. To bring into play the court's discretion, the parties should have to show that there are special circumstances which render the general rule unfair.

VII CONCLUSION

> ". . . fairness provides a powerful rationale for allowing contribution . . ."[92]

The situations in which contribution questions may arise vary enormously. That, coupled with competing policy objectives of protecting the defendants from paying twice and from being unfairly treated as against each other, protecting the plaintiff and encouraging settlement provide a strong argument for allowing courts as much discretion as possible. In this way the court can find a fair solution on a case by case basis.[93]

The legislative reform which I am advocating reflects this need for discretion. In the situation where D1 has settled the entire liability and is claiming contribution from D2, the fact of settlement, the proof that D2 is liable to P regardless on what theory of law, and the fact that the settlement is reasonable in all the circumstances should give D1 the right to claim contributions from D2 regardless of whether D1 was ever liable to P.

90 Supra n 86.
91 Ie P settles with D2 and sues D1 for the balance, D1 claims contribution from D2 and finally D2 claims under the indemnity from P.
92 Supra n 47 at 1542.
93 Dugdale supra n 77, 191.

D1's liability to P is irrelevant. If D1 has discharged the entire liability which D2 in fact owed, or partially owed, D2 has been unjustly enriched at D1's expense unless there is contribution. The policies of equitable division of damages and encouragement of settlements are achieved if D1 is entitled to contribution from D2.

As to the amount of contribution the working paper[94] suggested that once a claim for contribution is established by D1 the court should then look at D1's liability to P. This is a factor which influences the court in making a value judgment as to the extent to which D2 should contribute to D1's settlement. A further factor will be the degree of responsibility which each D shares.

It is in determining the reasonableness of the settlement and in determining the amount of contribution that the judge needs to be left with discretion so as to reach the fairest result in the case at hand.

In the situation where D2 has settled with P at below a proportionate share of the liability D1 should then be able to claim contribution from D2. If D2 has an indemnity, then D2 can claim the contribution amount claimed by D1, from P.

D2 has bargained for the indemnity and so has not been unjustly enriched at D1's expense or P's expense. D2 will still be encouraged to settle, P knowingly agrees to a reduced amount of money where an indemnity is given. P will still be encouraged to settle since the benefit of reduced D's to sue and guaranteed money from the settlement is obtained. D1 is not disadvantaged by an arrangement to which he was not a party.

Alternatively D1 cannot claim contribution from a settled D2. However, P can only sue D1 for a proportionate share of the liability. In this way there is no unjust enrichment to D2. She has bargained for or earned the advantages. D2 will not be discouraged from settling. P bears the loss because of an election to settle for that amount. It will be a conscious choice because the legislation will provide that this will be the result. P will still have the advantage in settling of a reduced number of D's to sue and guaranteed money from the settlement. D1 will not be prejudiced by an arrangement which he could not influence.

Therefore either approach achieves both policies of equitable division of loss and promotion of settlement. There is no unjust enrichment. The court will be left with discretion as to what the respective D's share of the liaibility is.

Although there are few New Zealand cases on contribution where there has been a settlement, the number of these cases will increase with the proposed extension of the doctrine of contribution to the contractual setting. These will often involve settlements because of the on-going nature of many contractual relationships. The extension should be made, following the United Kingdom example. When it is made it is important that the legislative draftsmen bear in mind the purpose of contribution – to correct unjust enrichment. If this is done the fairest and best result will be achieved.

94 Supra n 27, para 4.4.