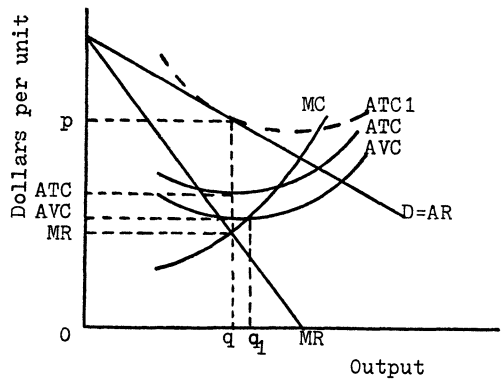
Chart 2.

Chart 2



Commentary

This is the profit maximising position of a monopolist. The maximum amount of profit occurrs at q, where MC equals MR. This does not necessarily indicate that there will be profits, however. When ATC (average total cost) is as shown, the profit is indicated by the shaded area. When the average total cost rises to ATC1, the firm would still be maximising profits at q, but the profits would be nil.

Lipsey et al., supra n.16, 248.

Contribution between defendants

Malcolm J. M. Shaw*

A restriction of the contribution rights provided in the Law Reform Act 1936 to tortfeasors may be viewed with concern as reflecting a piecemeal and compartmentalised approach to the law. This article considers how simultaneous liability in both contract and tort may be used to allow contribution, notwithstanding the presence of a contract. It also suggests that a reform of the law could provide for contribution rights between all concurrent wrongdoers regardless of where their liability stems from. Other issues arising when considering a reform of the law of contribution, such as its assessment and limitation of liability, and the effect of a compromise between the plaintiff and the defendant, are discussed.

I. BASIC PRINCIPLES

It is a well settled principle that where two or more persons have breached civil obligations to a plaintiff which have resulted in one and the same injury, those persons shall be independently or severally liable to the plaintiff for the whole of the damage.

Where the persons are tortfeasors their liability will necessarily be several; however they may also be joint tortfeasors. This is the case at Common Law not only where their acts cause the same damage, but also where they have been involved in some common enterprise. A common enterprise exists where the tortfeasors are principal and agent, or in breach of a joint duty imposed upon them, or where they are involved in "concerted action to a common end".[1]

For most purposes, including contribution between tortfeasors, any distinction between joint tortfeasors and merely several tortfeasors is redundant.[2] Section 17(1)(c) of the Law Reform Act 1936 which provides for contribution between tortfeasors applies equally to all tortfeasors. Williams suggests[3] a suitable name for both is "concurrent tortfeasors"; they are members of the larger class of "concurrent wrongdoers". Concurrent tortfeasors are persons whose tortious acts have concurred to produce the same damage, and each is liable in full for the damage collectively done.

* This article was submitted as part of the LL.B (Honours) programme at Victoria University.

1 *The Koursk* [1924] P.140, 156.
2 See J. G. Fleming *The Law of Torts* (6 ed., The Law Book Co. Ltd., Sydney, 1983) 231.
3 G. Williams *Joint Torts and Contributory Negligence* (Stevens & Sons Ltd., London, 1951) 1.

Similar definitions are applicable to other civil wrongs such as a breach of contract or trust. For instance if the same damage is caused to a plaintiff by two persons through the breach of a joint contract or by breaches of independent contracts they may be referred to as "concurrent wrongdoers".[4]

Likewise, if A breaches a contract and B commits a tort, both wrongs combining to cause the same injury, they may be referred to as concurrent wrongdoers. However, to avoid confusion, where the duties stem from different legal categories it is better to refer to those who breach them as "mixed concurrent wrongdoers".[5]

It is fundamental to remember that the "concurrence" lies in the fact that each wrongdoer breached an obligation owed to the plaintiff and that the wrongs combined to cause the same damage. The writer considers that the fact that the same damage was caused by two or more persons, in breach of one or more obligation(s) owed to the plaintiff, is the basis of, and justification for, contribution rights.

II. WHAT IS CONTRIBUTION

In general terms contribution is the right of one defendant (D1), who has recompensed or is liable to recompense a plaintiff (P) for the whole damage, to recover a degree of that loss from another person (D2) who is liable for the same damage. In some cases the contribution payable by D2 may be an amount equal to the whole of the damages paid by D1 to P so as to amount to a complete indemnity.

The contribution issue is likely to arise where a plaintiff has sought to recover damages from only one or some of the potential defendants liable for the same damage. This is possible because a plaintiff may sue any one defendant for the whole loss. If D1 alone is sued, D1 might want to recover a contribution from D2 towards the damages paid to the plaintiff. Similarly even if the plaintiff sues and obtains judgments against all the defendants, the plaintiff can execute that judgment against such one or more of the defendants as s/he pleases. Thus the defendant(s) against whom the plaintiff executes judgment would want to seek contribution from the other defendant(s).

III. THE AVAILABILITY OF CONTRIBUTION

As reflected by the law relating to contribution, the division of law into compartments, although convenient for analytical and teaching purposes, may in actual cases be artificial and produce unjust results. A different result in an action may be reached depending on whether it lies in the contract or the tort compartment.

An example is where the expiry of a limitation period is at issue. Although the statutory period of limitation for both contract and tort is the same,[6] the time at

4 Ibid. 2.
5 Idem.
6 Limitation Act 1950, s.4.

which the cause of action accrues will differ depending on the classification of the action.[7] Hence if D performs a service for P, and in doing so causes P some harm which does not become apparent until more than six years after the damage is done, D's liability will depend on whether or not the cause of action was in contract or tort. Similarly, whether D1 will be able to take advantage of a right to contribution, initially may depend on the classification of D1's and D2's liability, and the question whether they are liable in contract or tort.[8]

A distinction in results caused merely by classification does not necessarily reflect a just and equitable situation. The rules as to contribution may cause widely disparate results, and such a distinction can appear to a lay person to lack a justifiable foundation. If one asked such a person whether two defendants whose wrongful acts combine to cause harm to a plaintiff should both contribute to the redress of the damage, the answer would surely be "yes". However, what seems to be commonsense is not always reflected in the law.

At Common Law the general rule was that one tortfeasor could not claim a contribution from another tortfeasor because of the underlying proposition that no person can claim damages when the root of the damage claimed, is the claimant's own wrong.[9] Now, however, section 17(1)(c) of the Law Reform Act 1936 provides:

> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) — . . .
>
> (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.[10]

The important point to note is that the legislation only applies where contribution is sought by one tortfeasor from another; no reference is made to persons who are potential defendants by virtue of a breach of contract. Hence should D1 be a contractor and D2 a tortfeasor no contribution may be recovered.

Contribution rights may be created by contract but will in any case exist between two or more persons, such as co-contractors, co-sureties, co-executors and co-trustees,[11] when they are liable for a common demand to a third party. This is the case notwithstanding that the contracts governing liability to the third party

7 See *McLaren Maycroft* v. *Fletcher* [1973] 2 N.Z.L.R. 100 and *Midland Bank Trust Co.* v. *Hett, Stubbs & Kemp* [1979] Ch.384. In contract the cause of action accrues on breach; in tort when damage occurs.

8 This article's main concern is with contract-tort distinctions relating to contribution. However, many of the problems also apply to other types of liability.

9 *Merryweather* v. *Nixan* (1799) 8 T.R. 186, 101 E.R. 1337. Also see Williams, supra n.3, 80. This rule was relaxed in some cases where moral fault was exclusively or largely on one side.

10 The Law Reform Act 1936, s.17(2), provides the court with jurisdiction to assess the "just and equitable" contribution.

11 See for more examples *Halsbury's Laws of England* (4 ed.) Vol 9, para. 655.

may be separate. Because the right "exists as a matter of quasi-contract"[12] it is not necessary that there be any agreement on the subject between the parties. The basis of such a right of contribution between two defendants is that there is a common liability to the plaintiff.[13]

IV. EXTENDING CONTRIBUTION

The case of two or more people liable for different demands, or whose breaches lie in different legal compartments raises a possibility for legislative reform. If, as appears to be so, at Common Law and under present legislation contribution proceedings are only available where D1 and D2 are liable to a common demand or are both tortfeasors, there is a major defect in the law.

Any of a number of concurrent wrongdoers liable for the same damage may be sued independently for the whole amount of the damage because of their several liability to the plaintiff.[14] Thus where contribution rights between concurrent wrongdoers do not exist, the plaintiff has the power to determine which of the wrongdoers shall suffer the consequences of their actions, by the choice of whom to sue.

As stated earlier it is the writer's opinion that the basis of a right to contribution lies in the fact that concurrent wrongdoers, including mixed concurrent wrongdoers, cause the same damage by the breach of their obligations. Therefore if the plaintiff recovers totally from one concurrent wrongdoer, that defendant should have a right of action against all other potentially liable persons, so that some of the loss can be made up. This should be so regardless of the legal compartment into which the wrongdoers' obligations fall.

The building industry provides examples of the problems that can be caused. An owner of a building with structural defects will often elect to sue the consulting or local body engineer rather than the contractor who actually constructed the building. Engineers, whilst having design responsibilities which they should not be allowed to avoid, may be made to carry the whole loss on the grounds that they did not prevent contractors, who carried out work which did not meet specifications or which was otherwise defective, from avoiding their own contractual responsibilities. This is especially so in the case of local authorities' engineers. Because of their various statutory and regulatory responsibilities there is potential exposure to liability at almost every stage of a construction process, from when the plans are lodged and checked prior to the issuing of the building permit through to the various inspections carried out during construction. Should the engineer or local authority not have a right of contribution from the contractor so as to spread the loss more evenly, the actual perpetrator of the damage will escape liability.

12 G. Williams *Joint Obligations* (Butterworth & Co Ltd., London, 1949) 163.
13 *McLaren Maycroft* v. *Fletcher* [1973] 2 N.Z.L.R. 100, 117.
14 The total amount recoverable by the plaintiff cannot exceed the plaintiff's loss, that is, a plaintiff cannot recover twice.

V. CONTRIBUTION WHEN THERE IS LIABILITY IN BOTH CONTRACT AND TORT

The facts of *Mount Albert Borough Council* v. *Johnson*[15] illustrate the situation. In that case two defendants were of the same legal type, namely, tortfeasors. The council granted a building permit to a building company, to erect a block of flats. An independent contractor subsequently built the flats. The company sold a flat to a buyer who sold to H, who then sold to the plaintiff. The plaintiff sued the council for damages for subsidence and cracking which occurred in the flat, and the council joined the company as a third party. The council was held to be liable for negligence in the issue of the building permit and in failing to observe the inadequacy of the foundations upon inspection. The company was held to be liable for breach of a duty to see that proper care and skill was exercised in the building of the flats.[16] On appeal responsibility was apportioned between the defendants at eighty per cent to the company and twenty per cent to the council.

What would be the result if the original buyer had retained the property and sued the council? Would the council have been able to recover any contribution from the building company, bearing in mind that the company's relationship with the plaintiff arose out of a contract, and that the statutory right to contribution exists only between tortfeasors?

The problem stems from the distinction between rights of action which are framed in contract and those which are framed in tort. In such a case if the council could establish that the company owed a duty of care in tort it should be able to recover contribution from the company, notwithstanding the company's contract with the purchaser. This should be so because the company could be in terms of section 17(1)(c) of the Law Reform Act 1936 a "tortfeasor who is . . . liable in respect of the same damage". This approach is possible if one takes a global rather than a compartmentalised view of the duty of care and the law.

The anomaly created by the tortfeasor/contractor distinction is illustrated by the case of *Stieller* v. *Porirua City Council*.[17] The plaintiffs were seeking damages from the council for the cost of repairs of faults in their newly constructed house. The claim against the council was in tort, alleging a lack of appropriate supervision in the building of the dwellinghouse and negligence in the issue of the building permit. The council was unsuccessful in a motion to join the builders of the house as a third party to the action on the basis that it had no possible claim against the builders. The first ground on which the council sought the order was a claim for contribution from the builders. Greig, J. held that any claim between the plaintiffs and the builders must be in contract, though he referred to none of the authorities on the subject.[18] This meant that under section 17(1)(c) of the Law Reform Act 1936 the builders could not be tortfeasors liable in respect of the

15 [1979] 2 N.Z.L.R. 235.

16 The existence of liability in tort to a purchaser who was not the builder's client was settled in New Zealand in *Bowen* v. *Paramount Builders (Hamilton) Ltd.* [1977] 1 N.Z.L.R. 394.

17 19 February 1982, unreported, Wellington Registry, A.294/79.

18 Ibid. 3.

same damage and be subject to a claim for contribution. As noted, there is no right to contribution between a tortfeasor and a person who is in breach of contract. The important issue in *Stieller* could have been the extent to which the courts will allow a defendant to be liable in both contract and tort.

As affirmed by the case of *Batty* v. *Metropolitan Property Realisations Ltd.*[19] the courts have never doubted the correctness of allowing an alternative action in tort to succeed where an independent legal duty was established in the case of a common calling. In these cases the defendants are thought to be under a special type of legal liability. The recognition of a business operation as a calling seems to depend on the potential to cause physical harm. From a contribution perspective, such a distinction has no relevance.[20]

In *Dutton* v. *Bognor Regis Urban District Council*[21] it was argued by the defendants that a builder who owned the building which he had erected could never be under any liability to a purchaser, or anyone else, for defects in the building except by virtue of contract. It was held, however, that the fact that the builder was also the owner did not absolve him from liability in tort.[22] Further, in *Gabolinscy* v. *Hamilton City Corporation*[23] the plaintiff claimed in tort for damages, on the ground that the defendant by its negligence, in its capacity as owner-subdivider-lessor, had caused the damage. As an alternative cause of action the plaintiffs alleged breach of an express or implied warranty of its contract with the Corporation. The Supreme Court held that the Corporation as owner-subdivider, whose negligence in filling the land resulted in damage to the house of the purchaser, was liable in both tort and contract.[24]

In *Batty* v. *Metropolitan Property Realisations Ltd.*[25] the plaintiffs sued the developers for damages both in tort and in contract. The defendant's negligence had rendered worthless the property they had sold to the plaintiffs. It was held that the principle that a duty could be owed and a person could be held liable both in contract and tort was not confined to cases where a person conducted a common calling, but extended to include a professional person who owed a duty in relation to their professional skills.[26] If on the facts the plaintiff could show the defendants to be negligent, and that their negligence breached the contract, the plaintiffs were entitled to judgment against the defendants both in contract and tort. Such a case would render the defendant a "tortfeasor who is . . . liable in respect of the" damage and therefore subject to section 17 of the Law Reform Act 1936.

19 [1978] 2 W.L.R. 500, 508.
20 See W. L. Prosser "The Borderland of Tort and Contract" in *Selected Topics on the Law of Torts* (University of Michigan Law School, Ann Arbor, 1953) for an analysis of common callings.
21 [1972] 1 Q.B. 373.
22 Ibid. 402.
23 [1975] 1 N.Z.L.R. 150.
24 Ibid. 156.
25 Supra, n.19.
26 Ibid. 508.

In *Jackson* v. *Mayfair Window Cleaning Co.*[27] a contractor whilst cleaning a chandelier caused it to fall from the ceiling to the floor. Barry J. held that although the cleaner negligently performed the contract, he was liable in tort, a breach of duty having been established independently of any obligations under the contract.[28] Thus the question was whether the plaintiff needed to rely on the contract to established her claim. As she did not, liability could properly rest in tort.

This case was followed in New Zealand by the Supreme Court in *Buxton* v. *McKenzie*[29] where a builder's negligence in the installation of a furnace subsequently caused a house fire. The court held that where there is a contract between the plaintiff and the defendant, and the plaintiff also alleges that the defendant has breached a duty in tort, the plaintiff will be limited to an action founded in contract only if it is necessary for the plaintiff to rely on the contract to establish a cause of action.[30]

Thus it is clear that in some cases a defendant, although a contractor, may be a "tortfeasor who is . . . liable in respect of the same damage" and therefore subject to an action for contribution. In light of the above cases it is submitted that there was no reason in principle why the builder contractor in *Stieller* could not also be liable in tort, and therefore subject to a claim for contribution.

A. Professionals

The position is unclear where a contractor defendant is an engineer, an architect, or any other professional person who does not fall into any of the common calling exception. As stated above, Megaw L.J. said in *Batty* v. *Metropolitan Property Realisations Ltd*[31] that a professional person who owes a duty in relation to their professional skills can be liable in both contract and tort.

The New Zealand Court of Appeal has, however, been regarded as taking a contrary stance on the question of dual liability in the earlier case of *McLaren Maycroft & Co.* v. *Fletcher Development Co. Ltd.*[32] Where a professional person's relationship with a client is contractual, the true nature of an action brought against the professional person for damage caused by lack of proper professional skill and care was seen as being founded solely on contract. *McLaren* involved an engineer, and it was alleged that he failed to take proper professional skill and care, and thus was in breach of an implied warranty in the contract between the appellants and the respondents, and/or a duty to take reasonable care owed in tort. It was held that the evidence was insufficient to support the breach of any obligation, and hence the Court of Appeal did not have to consider whether the appellants owed a duty in both contract and tort. Nevertheless the court did so as to draw a distinction, in particular for the purposes of the Limitation Act 1950. The

27 [1952] 1 All E.R. 215.
28 Ibid. 217.
29 [1960] N.Z.L.R. 732.
30 Ibid. 738.
31 Supra, n.19, 508.
32 Supra, n.13.

consequences of this Act vary depending on whether the action lies in contract or tort.[33] Richmond J. in holding that any action in the case must be founded in contract alone followed the English case of *Bagot* v. *Stevens Scanlan & Co. Ltd.*[34] which was also concerned with the issue of limitation, because it was "the most appropriate . . . for present purposes".[35]

With respect, the writer submits that it is no longer good in law or in principle to adopt the view suggested in *McLaren*. As stated by Lord Roskill in *Junior Books Ltd.* v. *Veitchi Co. Ltd.*:[36]

> . . . proper control lies not in asking whether the proper remedy should lie in contract or instead in delict or tort, not in somewhat capricious judicial determination whether a particular case falls on one side of the line or the other . . . but in the first instance in establishing the relevant principles and then in deciding whether the particular case falls within or without those principles.

As in *Jackson* v. *Mayfair Window Cleaning Co.*,[37] where the case was "based on a broader duty independent of any contractual obligation undertaken by the defendants",[38] if the principles of a tort duty are satisfied then the defendant should be liable in tort, regardless of the fact that the parties' relationship arose out of a contract. The only exceptions are where there has been an express denial of a tortious duty in a contract establishing the relationship or where section 6 of the Contractual Remedies Act 1979 is applicable. Section 6 provides:

> (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract — . . .
>
> (b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.

Prima facie this would prevent such a person from being liable in tort and therefore from being liable in any contribution proceedings under section 17 of the Law Reform Act 1936. However section 5 of the Act does allow a contract to make express provision for a recovery in tort, though it is unlikely that this would happen in practice.

McMullin J. said in *Rowe* v. *Turner Hopkins & Partners*[39] that " . . . the door which the *McLaren Maycroft* approach might have suggested was firmly closed may now be thought to rest ajar". As noted by Somers J. in *J. W. Harris & Son Ltd.* v. *Demolition & Roading Contractors (N.Z.) Ltd.*,[40] the observations in *McLaren* about the unavailability of both contract and tort actions against pro-

33 Supra, n.6. Problems of time limitation in relation to the law of contribution are better discussed in the context of the law as to limitation as a whole and thus fall out of the scope of this paper.
34 [1966] 1 Q.B. 197.
35 Supra, n.13, 116.
36 [1983] 1 A.C. 520, 545.
37 Supra, n.27, 217.
38 Independent does not mean the act cannot be connected with the performance of the contract.
39 [1982] 1 N.Z.L.R. 178, 182.
40 [1979] 2 N.Z.L.R. 166, 174.

fessionals may strictly be obiter. Furthermore, not only did the Court of Appeal not have to address the issue to decide the case before it, it did not consider the authorities in any depth.[41] The writer submits that it is open to a later court to allow liability in both contract and tort, and thus follow the English authorities on the point. *Bagot* v. *Stevens Scanlan,*[42] the case followed by Richmond J. in *McLaren,* is now of doubtful authority. Lord Denning M.R. in *Esso Petroleum Co. Ltd.* v. *Mardon*[43] thought the case was in conflict with decisions of high authority not cited in it, and further:[44]

> These decisions show that, in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract, and is therefore actionable in tort.

Subsequently in *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp*[45] the court allowed an alternative action in tort to succeed against a firm of solicitors, thus establishing authority for professionals being liable in both contract and tort.[46] Oliver J.[47] felt he should follow the decision of Lord Denning M.R. in *Esso Petroleum Co. Ltd.* v. *Mardon.*[48] Oliver J's. decision was " . . . a very full and convincing judgment which surveyed and marshalled the authorities in very great detail . . . ."[49]

In accord with the view of the English judges the writer submits that there is no reason to distinguish between professionals and others who may owe a duty in both contract and tort. As indicated by judges such as McMullin J.[50] in *Rowe* v. *Turner Hopkins & Partners,* the authority which *McLaren* might have provided against liability in both contract and tort for professionals needs, at the very least, reconsideration. In *J. W. Harris & Son Ltd.* v. *Demolition & Roading Contractors (N.Z.) Ltd.,*[51] Somers J. in the High Court said that any change is a matter for a higher court, and that wider matters of policy such as the impact upon insurance would have to be considered. In *Marlborough Properties Ltd.* v. *Marlborough Fibreglass Ltd.*[52] Jeffries J. at first instance wrongly thought that the case before him turned on the observation of Richmond J. in *McLaren,* that the only right of action which the respondent had against the appellant was for breach of contract. After having cited recent authorities indicating that liability in both contract and tort may exist for professionals, the judge though he should follow Richmond J's.

41 See J. L. Dwyer "Solicitor's Negligence — Tort or Contract?" (1982) 56 A.L.J. 524, for an historical analysis of the authorities.
42 Supra, n.34.
43 [1976] 1 Q.B. 801, 819.
44 Idem.
45 [1979] Ch. 384.
46 See R. Falkner "Contract and Negligence: Concurrent Liability", a paper submitted for the LL.B. (Honours) degree at the Victoria University of Wellington (1979), 15.
47 Supra, n.45, 432.
48 Supra, n.43.
49 Dwyer, supra, n.41.
50 Supra, n.39.
51 Supra, n.40.
52 [1981] 1 N.Z.L.R. 464.

opinion in *McLaren*.[53] On appeal, Cooke J. said *McLaren* had little to do with the instant case which was concerned with a particular clause in a lease and whether it had the effect of relieving the lessee of liability for negligence.[54] Therefore the court did not have to decide whether a professional's liability may exist in both contract and tort. However Cooke J. notes that the observations of Richmond J. in *McLaren* were "as the authorities then stood" and that there are more recent authorities allowing liability for a professional in both contract and tort.[55]

Rowe v. *Turner Hopkins & Partners*[56] provides the best indication of a potential reconsideration of the matter. At first instance Prichard J. regarded himself bound by *McLaren* to hold that an action for professional negligence by a client against a solicitor lies only in contract, with the consequence that there could be no apportionment of damages under the Contributory Negligence Act 1954.[57] Cooke and Roper JJ. commented that it was not certain whether the reasoning of Richmond J. had the support in all respects of the other two members of the Court of Appeal in *McLaren*.[58] The case was disposed of on its facts with a finding by Cooke and Roper JJ. that the appellants were not negligent.[59] The two judges nevertheless commented[60] that what was said in *McLaren* about the relationship of a professional person and client being contractual only, requires, at least, reconsideration in light of cases of high authority such as *Sutcliffe* v. *Thackrah*,[61] *Arenson* v. *Arenson*[62] and other English authorities applied by Oliver J. in *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp*.[63] However Cooke and Roper JJ. considered "that trial judges should apply the law as stated by Richmond J. in *McLaren*, but make any necessary findings of fact so that the matter can be argued in the Court of Appeal.[64]

Subsequently in *Port* v. *New Zealand Dairy Board*,[65] Bisson J. distinguished *McLaren*, holding that the defendant and third party were in breach of a duty of care, and that the existence of contracts did not preclude them from being tortfeasors.[66] In the case the issue of contribution was precisely in point. For the purpose of cattle-breeding the plaintiffs engaged the defendant to collect semen from a particular bull, and the third party to artificially inseminate cows. The fault causing loss lay in the distribution and insemination of the wrong semen. Because the plaintiffs only sued the defendant, it was left to the defendant to join

53 Ibid. 466.
54 Idem.
55 Idem.
56 Supra, n.39.
57 [1980] 2 N.Z.L.R. 550, 559.
58 Supra, n.39, 179.
59 Ibid. 181.
60 Idem.
61 [1974] A.C. 727.
62 [1977] A.C. 405.
63 Supra, n.45.
64 Supra, n.39.
65 [1982] 2 N.Z.L.R. 282.
66 Ibid. 301.

the third party in order to claim contribution. Bisson J. held that the defendant and third party were negligent, but found it necessary to consider whether the right of action between the plaintiff and defendant, and between the plaintiff and the third party, could be in tort for negligence and not just based on a breach of contract.[67] This had to be determined before the defendants could be regarded as tortfeasors "liable in respect of the same damage" for the purposes of section 17(1)(c) of the Law Reform Act 1936.

The third party relied[68] on Quilliam J's. statement in *Young* v. *Tomlinson:*[69]

> I consider the decision in *McLaren Maycroft* establishes in New Zealand the principle that where there is a contractual relationship between parties there may not also be a cause of action in tort between them, and that this is not confined to any particular class of persons.

With respect the writer submits that this statement cannot be correct as it would prevent actions in both contract and tort even against persons engaged in common callings, an ancient exception to any rule purporting to prevent liability in both contract and tort. Furthermore, Richmond J's. judgment on the issue in *McLaren* was founded on *Babot* v. *Stevens Scanlan,* where Diplock L.J. said "I accept that there may be cases where a similar duty is owed under a contract and independently of contract".[70] Richmond J. said he was in complete agreement with everything said by Diplock L.J. in the case.[71]

Bisson J. noted the divergent trend of more recent English authorities but said he had to decide whether he was bound by *McLaren.*[72] Bisson J. thought *McLaren* could be restricted on its facts and that Richmond J'.s reliance upon *Bagot* v. *Stevens Scanlan* was due to the fact that it was a similar case. The judge held that there was no general principle laid down in *McLaren* and the authority used was concerned with the same issue, namely whether the cause of action was founded in contract or in tort for the purposes of the limitation legislation, and in respect of a contract with a professional person.[73] Bisson J. decided that the case before him was not concerned with such an issue or such a person.[74] The defendant could be classified as an "apothecary" and the third party as a "skilled labourer" or "artisan", but neither as a professional person. Therefore the defendant was entitled to contribution from the third party.

Bisson J. has clearly shown that it is possible to be liable in both contract and tort, and therefore for contribution where neither of the liable persons are "professionals". Can the dicta in *McLaren* be restricted still further to cases involving a similar time limitation issue? As stated, one ground on which Bisson J. distinguished *Port* from *McLaren* was that it was not concerned with the same

67 Ibid. 299.
68 Ibid. 300.
69 [1979] 2 N.Z.L.R. 441, 449.
70 Supra, n.34, 204.
71 Supra, n.13, 116.
72 Supra, n.65, 300.
73 Ibid. 302.
74 Ibid. 303.

issue of the Limitation Act 1950. He said:[75]

> . . . I fail to see in the judgments of the Court of Appeal in *McLaren Maycroft* any more than a decision which on the facts involved an engineer and an allegation that he had shown a lack of proper professional skill and care in breach of a duty arising because of an implied warranty and/or at common law and which required a distinction to be drawn as to the nature of that duty in particular for the purpose of the Limitation Act.

Bisson J. could have distinguished *Port* from *McLaren* exclusively on the ground that neither the defendant nor the third party were professionals. However, the limitation issue remains a distinguishing characteristic of *McLaren,* and, further, it seems likely that Richmond J. in *McLaren* was drawn to *Bagot* v. *Steven Scanlan* because of its similarity to the instant case on that issue. Richmond J. might otherwise have looked at a wider variety of authorities, which may have led to a different conclusion.

It may be that there are considerations which have led Diplock L.J. and Richmond J. in *Bagot* v. *Stevens Scanlan* and *McLaren* respectively to reject liability in both contract and tort only where the limitation question is raised. Falkner in his writing on the subject of liability in both contract and tort says that the limitation of actions question may affect the courts' attitude towards the issue, for if such liability is accepted an action in tort may not begin to run until years after the contract has finished.[76] For an architect or engineer this may mean being personally liable after retirement; however, it is the writer's opinion that what Falkner describes as "potentially ruinous liability after retirement"[77] should not be a consideration.

As Falkner recognizes the worse a defect is, the sooner it is likely to be discovered, and the longer the time lapse the more difficult it is to prove negligence.[78] Furthermore professionals may find themselves in a situation of "potentially ruinous liability" at present. If the plaintiff has, for example, purchased the property from the person with whom the professional contracted, the professional's liability would be in tort, thus making it more likely that the time limitation period will not have expired. It is absurd to not allow an independent duty in tort, just because the parties' relationship arose out of a contract and that the action would otherwise be time-barred. If a particular case falls within the tort principles, that should decide the matter and it should not be affected by the existence of a contract which does not itself determine the remedies for the parties.

As suggested previously, should the parties to a contract limit their liability to contract, no independent duty in tort should arise out of their contractual relationship. Lord Roskill in *Junior Books Ltd.* v. *Veitchi Co. Ltd.* said " . . . in principle I would venture the view that such a clause according to the manner in which it was worded might in some circumstances limit the duty of care . . . ".[79] Cer-

75 Ibid. 302.
76 Falkner, supra, n.46, 17.
77 Idem.
78 Idem.
79 Supra, n.36, 546.

tainly in *Hedley Byrne* v. *Heller*[80] where it was held that a negligent misstatement may give rise to an action for damages for financial loss, the plaintiffs were ultimately defeated by an express disclaimer, preventing any duty from being implied. Therefore any express disclaimer of tort liability may have the far-reaching and perhaps unintended consequence of defeating a claim for contribution.

It appears from the foregoing analysis that contribution may in many cases be obtained regardless of the fact that a contract is involved. Anomalies in the New Zealand law on liability in both contract and tort raise doubts as to its use as a device to gain contribution in some cases. These doubts are likely to be erased when the matter of professionals' liability in both contract and tort comes squarely before the Court of Appeal. In the meantime it may be that there is no liability in tort for professionals' negligent acts, where they have contracted out their services.[81] Alternatively there may be liability in contract and tort, except in those cases in which the question of dual liability is pertinent to the time limitation question. This would mean that in most cases where an independent tort duty can be shown, contribution will be available. There appears however, to be no obstacle in the part of the Court of Appeal accepting liability in both contract and tort, and thus the possibility of contribution, in any case where an independent tort duty can be shown.

VI. CONTRIBUTION BEYOND TORT

Notwithstanding that in many cases there may be a right to sue in both contract and tort, legislative reform is still necessary to allow contribution rights where the prima facie constraint of section 17(1)(c) of the Law Reform Act 1936 cannot be overcome by showing an independent tort duty to exist. The Contracts and Commercial Law Reform Committee's Working Paper on Contribution[82] (hereafter referred to as the Committee) concluded that in principle the right to contribution should be extended to all persons liable in a civil action for damages, whether the liability arises from a statutory, tortious, contractual, trustee, fiduciary or other relationship. The United Kingdom Law Commission Report on Contribution[83] could see no policy reason for leaving the gaps in the law unfilled. Consequently section 1 of the Civil Liability (Contribution) Act 1978 (U.K.) provides that:

> . . . any 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 . . .

This removed the anomalous situation of allowing contribution rights for only some concurrent wrongdoers. The writer submits that the same anomaly should be removed in New Zealand.

80 [1964] A.C. 465.

81 Falkner, supra, n.46, 18-25 concludes that the different considerations that apply to negligent misstatements allow for liability in both contract and tort notwithstanding a contractual relationship.

82 Contracts and Commercial Law Reform Committee, Working Paper on Contribution in Civil Cases (Wellington, New Zealand, 1983) 10, hereafter referred to as "Working Paper on Contribution 1983".

83 The Law Commission, Report on Contribution (Law Com. No. 79, H.M.S.O., London, 1977) 10, hereafter referred to as "Report on Contribution 1977".

VII. ASSESSMENT OF CONTRIBUTION

Where there is a Common Law right to contribution the loss will generally be divided equally among those concurrent wrongdoers who are still solvent.[84] However, where there is a limitation of liability written into a contract, the right of contribution may be proportionate to the liability of each person. An example of this would be the case of a contract of guarantee or insurance where two or more persons underwrite a liability in unequal shares or up to differing limits. In *Whitham* v. *Bullock*[85] the following was accepted as correctly stating the courts' attitude where the contract is silent as to liability for damages:

> If, as between several persons or properties all equally liable at law to the same demand, it would be equitable that the burden should fall in a certain way, the Court will so far as possible, having regard to the solvency of the different parties, see that, if that burden is placed inequitably by the exercise of legal right, its incidence should be afterwards readjusted.

Section 17(2) of the Law Reform Act 1936 provides:

> In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

Section 17(2) does not appear to have given rise to any difficulties or injustices in contribution proceedings between tortfeasors either here or in the United Kingdom,[86] and the subsection was re-enacted in the United Kingdom legislation.[87]

If contribution rights are extended to all concurrent wrongdoers as the writer proposes, should the same general discretion remain vested in the court or is a new power needed? The Committee considers that there may be situations in which it is undesirable to assess contribution merely on the basis of section 17(2). One example given is:[88]

> If P has a claim against D1, a builder, for faulty construction, and D2, an architect, for faulty supervision, it would affront the conscience if the builder (assuming that in the circumstances the architect owed no duty to him) were to have the right to claim contribution from the architect.

The writer's conscience is not affronted by this possibility because, it is submitted, it would pose no difficulty for a court to assess liability for contribution in a particular fact situation, according to the builder's and architect's respective responsibility for the damage.

Furthermore, to draw a distinction so as to exclude cases where there is no relationship between D1 and D2 of a type which could be said to create any sort of legal or moral duty or obligation as between them (one possibility that was

84 Williams, supra n.12, 166.
85 [1939] 2 K.B. 81, 85.
86 Report on Contribution 1977, 20.
87 Civil Liability (Contribution) Act 1978 (U.K.), s.2(1).
88 Working Paper on Contribution 1983, 14.

raised) is irrelevant to the question of contribution. The defendants are concurrent wrongdoers who owe a duty to the plaintiff. Breach of their respective duties has resulted in the plaintiff's damage. A court would be able to assess the responsibility for the damage on the facts. The fact that D2's liability may be due to D2's failure to protect P from the effects of a breach of duty on the part of D1, or D2's failure to ensure proper performance by D1 can be considered by the court, and given its proper weight, within the present power.

Similarly a fresh consideration which might arise, when exercising the jurisdiction under section 17(2), is the relevance of the monetary value of a contract. It is arguable that if a contract is for personal gain then the contractor should carry more of the loss. Again it is submitted that the present wide discretion given by section 17(2) provides the court with a suitable basis on which to assess liability for contribution, so that the court has the flexibility with which to approach each individual set of circumstances on its own merits. It would be difficult to draft anything but general guidelines, and overall fairness will be better achieved by applying general principles.

The Committee wished to add two new guidelines to section 17(2). It considered that a court should have regard to "the amount of [D2's] potential liability, and to the respective rights and obligations of the parties, both as between themselves, and in respect of P".[89] The writer submits that there is no reason to give further guidelines such as these. However, there are two specific areas which should be provided for in a new section: the significance, in assessing contribution of, contractual limitations of liability, and of the partial defence of contributory negligence.

VIII. LIMITATIONS OF LIABILITY

Extending the concept of contribution beyond tort raises a problem where there is a limitation of liability involved. Many contracts will contain a clause limiting the liability of the parties. The problem arises where the contribution for which an individual defendant should ordinarily be liable exceeds the limitation of liability. On the grounds of fairness, that defendant should pay no more than the limit. To provide otherwise could greatly harm contractual liability insurance. However, who should pay the remainder?

> The United Kingdom legislation[90] provides that where there is any limitation, . . . the person from whom the contribution is sought shall not by virtue of any contribution awarded . . . be required to pay in respect of the damage done a greater amount than the amount of those damages as so limited or reduced.

The United Kingdom Law Commission[91] intended that the section would have the following effect. Assuming D1 and D2 were equally responsible for the damage, the loss would be divided equally between D1 and D2, subject to the limit on the amount of D1's overall liability set by the clause in the contract. It was then intended that D2 would pay, in addition to her or his contribution, the amount

89 Ibid. 15.
90 Civil Liability (Contribution) Act 1978 (U.K.), s.2(3).
91 Report on Contribution 1977, 21.

over and above D1's limitation of liability. Such a case might well arise where D1 was liable in contract and D2 in tort. The Committee[92] favoured this approach on the grounds of simplicity and because it would adhere to the principle of fairness between defendants. However, as Dugdale[93] points out, the wording of the Act does not preclude the adoption of other approaches.

One such approach is to apportion only the common extent of liability between D1 and D2. Suppose it was held that the defendants were equally to blame as between themselves, that the amount of damages was $1,000, but D1 had a $400 limitation of liability to P written into the contract. The common extent of liability to P would be $400. Shared equally D1 would pay $200 and D2 $200 plus the remaining $600. The writer submits that this approach is indefensible as D1 would end up paying less than the amount to which her or his liability was limited, and this is surely unfair to D2. The courts should not even have the option of adopting this approach.

An alternative approach, taken by section 35(1)(g) of the Irish Civil Liability Act 1961, is to provide that D1 should pay up to the limitation of liability, D2 should just pay her or his proportion of the damage, and the balance should not be recoverable by the plaintiff. Hence on the previous example D1 would pay $400 and D2 $500. The plaintiff would thus carry the weight of the limitation contracted for. Since it is the plaintiff's choice to contract for a limitation of liability, and D2, who has no control over the matter may be unaware of any limitation, this solution is attractive. Further, the Committee's wish to avoid any complicated and possibly unreal calculations"[94] would not be affected by the adoption of this solution. The courts would have to decide, in the usual way, how much each defendant should contribute notwithstanding any limitation and then reduce the contribution of any defendant with a limit, to that limit.

This solution has been objected to[95] on the grounds that it benefits the defendant without a limitation at the expense of the plaintiff, and that the plaintiff's right to recover in full should not be affected by the rules for assessment of contribution. However, the defendant without the limitation will be paying no less than the proportion of the damage for which the court has found liability. Furthermore, it is the plaintiff who has contracted to abrogate the right to recover in full, by agreeing to a limitation of liability. The writer submits that this latter solution should be specifically provided for in any reform of the law on contribution.

A similar problem may arise where there are two defendants, D1 and D2, and the plaintiff is contributorily negligent with respect to D2. Assuming it was held that the defendants were equally responsible as between themselves, the plaintiff was sixty per cent to blame for the loss with repect to D2, and the amount of the loss was $1,000, how should the damages be divided? For the same reasons as

92 Working Paper on Contribution 1983, 20.
93 A. M. Dugdale "The Civil Liability (Contribution) Act 1978" (1979) 42 M.L.R. 182, 184.
94 Working Paper on Contribution 1983, 20.
95 Report on Contribution 1977, 21.

were given with regard to limitations of liability the writer submits that the common extent of liability approach should not be followed. The section from the United Kingdom Act cited above, which applies to limitations of liability, was applied to the contributory negligence problem. Thus although the United Kingdom Report[96] intended the first solution mentioned in relation to limitation of liability to also apply to contributory negligence, the courts are not so restricted. If that solution is applied, then in the example given, D2 would be liable for $400 and D1 for $600.

The writer submits that a better solution is to divide the loss equally between D1 and D2, and then reduce D2's liability to the amount for which D2 would have been liable if sued alone, i.e. $400. Then D1 would pay $500 and the plaintiff would carry the burden of the remaining $100. This is a fairer solution because then the plaintiff carries the loss caused by the contributory negligence, just as if the plaintiff had contracted for a limitation of liability.

IX. THE PROBLEM OF COMPROMISE

In practice many defendants settle the plaintiff's claim against them before the case reaches trial, or before judgment is given. This occurs by a payment being made into court, which is accepted by the plaintiff. This is not equivalent to a judgment of liability by the court; it is just a settlement of the cause of action in the nature of a compromise.[97] What if the defendant then wishes to obtain a contribution from another person who is liable for the loss? The question has in the past raised difficulties and without reform may continue to do so in the future. The problem confronting the compromising D1 is that D1 must be "liable" as first used in section 17(1)(c).[98]

At worst "liable" has been said to mean "held liable in judgment" by Viscount Simonds in *George Wimpey & Co. Ltd.* v. *British Overseas Airways Corporation*,[99] which would mean no contribution rights as the unsuspecting compromiser would never have been held liable in judgment. However, it has since been clearly held to mean "responsible in law" by McGregor J. in *Baylis* v. *Waugh*.[100] This allowed the defendant to bring a claim for contribution against a concurrent tortfeasor, after having settled the plaintiff's claim against him by making a payment into court with a denial of liability, which the plaintiff accepted in satisfaction of the claim. More recently in *Stott* v. *West Yorkshire Car Co.*[101] Lord Denning M.R. reached the same conclusion as McGregor J. because as a matter of good sense it ought to be open to a tortfeasor to admit liability and pay for the damage and then claim contribution from any other tortfeasor. Otherwise there would be an unnecessary waste of time and money to qualify for the right to contribution.

96 Ibid. 22.
97 *Baylis* v. *Waugh* [1962] N.Z.L.R. 45, 47.
98 Set out in the section entitled "The Availability of Contribution".
99 [1955] A.C. 169.
100 Supra, n.97.
101 [1971] 2 Q.B. 651, 657.

Even though a tortfeasor may be liable or responsible in law from the time they commit the wrong, the right to recover contribution is conditional upon liability being in some way and at some time established and quantified. The plaintiff must either have received or be entitled to a certain sum from the defendant seeking contribution. This is implicit in the use of the word "recover" in section 17(1)(c) and not in the word "liable".

Nevertheless the right of action for contribution is still not without its problems, for the claimant must still prove the liability of the other concurrent tortfeasor to the plaintiff, and also that the other tortfeasor was actually liable at the time of the compromise with the plaintiff. This situation is apt to result in some absurd consequences, for if on the facts of *Baylis* D2 could prove that D1 did not breach any duty owed to the plaintiff the claimant would be left having paid all the damages, though never having been in fact liable. Hence there is the paradoxical situation of D1 having to prove his or her own fault using the plaintiff's witnesses and evidence, and D2 having to "defend" D1 using D1's witnesses and evidence. The person at fault might end up paying nothing at all, while someone who was not at fault may carry the full burden of the settlement.

The law should encourage people to make settlements so as to reduce costs and the workload on the courts. Any prospect of receiving nothing in contribution proceedings after a settlement may deter defendants from making compromises. A salient reason for not compromising would be that it is unclear whether or not the defendant will be held liable in court, the very reason why people might otherwise want to compromise.

It is of course important to see that the contributor who has not been a party to the settlement is not prejudiced, and that any future contribution proceedings are not unfair having regard to the contributor's actual liability to the plaintiff. D2's position is largely protected by the fact that, under section 17(2) of the Law Reform Act 1936, the court must make a "just and equitable" assessment of D2's liability for contribution, having regard to D2's responsibility for the damage.

Consequently where, for example, the settlement made by D1 is reasonable, but does not reflect D2's potential liability to P, or, where the claimant and the contributor are mixed concurrent wrongdoers and the rules of remoteness of damage may give different results on quantum, D2 need not be adversely affected by the compromise. Neither does D1's compromise make it harder for D2 to defend the issue of liability, nor the question of the amount recoverable. D1 would have to prove D2 is liable to P in a similar manner to that in which P might have proven D2 liable, and thus D2 can make a defence in the same way as in a suit brought by P. D1's compromise with P sheds no light on D2's liability to P, and thus does not affect D2's defence.

The relevance of the settlement figure will be that it represents the maximum recoverable by D1. However the sum must be reasonable before it can form the basis of a contribution claim. In *Stott* v. *West Yorkshire Car Co.* Salmon L.J. said "[D2] can argue that the damages paid by the defendants on the assumption that

they were to blame were in any event far too high".[102] The Committee accepted the validity of removing the prerequisite that the claimant's own liability must be proved, as a defendant will often make a decision to compromise based on a doubt as to her or his own liability.[103] The writer submits that the removal of that prerequisite is the proper course to take. Where a claim for contribution does arise, the court will of necessity have to consider the issue of D1's own legal liability to the plaintiff as a practical measure to assess the extent to which D2 should contribute. However, the claimant will be attempting to show as little responsibility as possible, which would remove the paradox of the present situation.

Section 1(4) of the United Kingdom Civil Liability (Contribution) Act 1978 provides:

> A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

Dugdale notes that the wording of the section is unfortunate because if a compromise is based on legal doubts as to liability, compared with factual doubts, a defendant may not be entitled to contribution.[104] Thus many defendants are still left in the position of being able to protect contribution rights only by being held liable in court. The reason for the proviso that the claimant must be liable assuming "the factual basis of the claim" was to prevent contribution claims based on possible liability solely under provisions of foreign law. Any legislation in New Zealand would have to be drafted so as to avoid the same result.

Assuming D1's own liability need not be proved, D2 is still protected as D2 must be shown to be liable to P, and the settlement figure must still be reasonable. In addition, the Committee agreed that there should be the requirement that the settlement be "bona fide".[105]

A. A Bona Fide Compromise?

The "bona fide" requirement is thought to be necessary because it is desirable that a compromise should be out in the open rather than made secretly between two parties. Contribution proceedings should not result from a "sham agreement"[106] or "'collusive' settlement",[107] where the claimant was an intermeddler and not someone against whom a case in law could possibly have been made out.

The United Kingdom report noted that "the proposal to allow a contribution claim founded on a compromise with the plaintiff would give greater scope for collusion or, where commercial contracts were concerned, the exertion of economic

102 Ibid. 660.
103 Working Paper on Contribution 1983, 15.
104 Supra, n.93, 184.
105 Working Paper on Contribution 1983, 16.
106 Report on Contribution 1977, 16.
107 Ibid. 15.

weight".[108] This concern gave rise to the suggestion that the contributor should be able to "avail himself of any legal or evidential point which might have been taken by the [claimant] to the compromise but which, for whatever reason, was not taken".[109] However, as recognized in the United Kingdom report,[110] a claimant's right of contribution should not be made worse merely because a claim was compromised, which the claimant might have won, and a claimant should not have to take every legal and evidential point against the plaintiff, in order to safeguard the remedy against another concurrent wrongdoer.

The United Kingdom report[111] thought that "amicable", though not "fraudulent", settlements should be encouraged, hence the "bona fide" requirement. No indication is given as to what "bona fide" means. One example given in the course of discussion is that of an architect making a compromise because the plaintiff was an important client of his whose business he did not wish to risk losing, rather than because there was any real risk of being held liable.[112] It appears that the Commission thought this to be a "bona fide" settlement. The question arises whether there need be a "bona fide" requirement?

The writer submits that the "bona fide" requirement is not necessary. Although it may not be "cricket" for an intermeddler who has no liability to become involved, it will not have any practical difference. It is also hard to see how "economic weight" may be exerted. The fact remains that D2 caused the plaintiff's damage, and as long as D2 is protected from having to pay any more for that damage than might otherwise be necessary, there is no injustice done. It should not matter to whom the money is paid. On a practical level the involvement of an intermeddler is nothing more than a subrogation of the plaintiff's rights to the person from whom they accepted payment. If the plaintiff subsequently brings a claim against D2[113] for the same amount as was received from D1, and D1 has already recovered that amount from D2, P shall receive nothing more. If the plaintiff obtains judgment against D2 for a higher sum after D1 has recovered from D2, the plaintiff shall be entitled to the difference between that higher sum and D2's payment of one hundred per cent to D1. D2 will not have had to pay any more than D2's legal liability to the plaintiff. If P and D1 have kept their settlement a secret, then P would be able to recover again from D2. However, this would result in no injustice to D2. The intermeddling D1 will have suffered the loss, and will not then be able to gain a contribution from D2. D1 might have a remedy against the plaintiff in quasi-contract for unjust enrichment.

108 Ibid. 16.
109 Idem.
110 Idem.
111 Ibid. 17.
112 Ibid. 16.
113 Section 17(1)(a) of the Law Reform Act 1936 removed the Common Law ban on suing a second joint tortfeasor where judgment had been obtained against one. The Civil Liability (Contribution) Act 1978 (U.K.) extended this reform to all civil cases of joint liability.