CONTRACTS AND COMMERCIAL LAW REFORM COMMITTEE

WORKING PAPER ON CONTRIBUTION IN CIVIL CASES

WELLINGTON
NEW ZEALAND
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CONTRIBUTION IN CIVIL CASES

CONTENTS

Appendices

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PROPOSALS TO REFORM THE LAW ON CONTRIBUTION IN CIVIL CASES

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CONTRIBUTION IN CIVIL CASES

1. Introduction

1.1 The Honourable Minister of Justice has asked this Committee to review the law about contribution in civil cases and, if thought fit, to recommend a reform. This paper outlines the problem, contains a proposal for a new statute, and invites interested parties to present their views of the proposal to the Committee. Communications should be addressed to:

The Secretary,
Contracts and Commercial
Law Reform Committee,
Department of Justice,
Private Bag, Postal Centre,
Wellington, 1.

1.2 This working paper was prepared for the initial purpose of considering, in a situation where a person has suffered loss or damage for which two or more other persons are, or may be, legally responsible, the rights of those others to claim contribution as between themselves for the loss or damage they are liable to make good. Discussion during the course of preparation demonstrated the desirability of considering also the closely allied question of the responsibility of the person injured for his own injury, and the extent if any to which his right of recovery should be affected by that responsibility.

1.3 The general law is contained in two statutes. Contribution by tortfeasors is governed by s.17 Law Reform Act 1936, which is reproduced in Appendix A. Contribution by plaintiffs is governed by the Contributory Negligence Act 1947, which is reproduced in Appendix B. Some particular classes of cases have been dealt with by special statutes, for example sureties by ss.84, 85 and 86 Judicature Act 1908, and carriers by the Carriage of Goods Act 1979.

1.4 Many of the problems which arise in practice and give rise to the call for some reform of the existing law, have as their base the distinction between rights of action which are framed in tort, and those which are framed in contract. The differing results which each gives is a cause for concern and demands an enquiry as to whether some measure of reform is needed to achieve a fair and equitable result whilst still maintaining sound established legal principles. This matter calls into review the question of concurrent liability in tort and contract raised, for example, by the case of McLaren Maycroft & Co. v. Fletcher Development Co. Ltd. [1973] 2 N.Z.L.R. 100. There is an extensive literature on the subject, some of which is mentioned in Appendix C.

1.5 In discussing the problems we can refer to the relevant parties as P (the plaintiff or person suffering loss or damage), D1 (the first defendant, a person who is or may

be liable to P for that loss or damage), and D2 (the second or subsequent defendant who is another person liable or potentially liable to P for the same loss or damage or part thereof). There may of course be a whole series of potential defendants, but two will be sufficient for our purposes.

1.6 Under the existing law, where D1 and D2 have no contractual or other legal relationship as between themselves, the only right of contribution which exists is under the provisions of s.17 Law Reform Act 1936 (Appendix A). The provisions apply where D1 and D2 are liable to P in tort. P may sue D1 alone, but judgment against D1 does not prevent P from later suing D2 (s.17(1)(a)). If P sues D2, P cannot have judgment against D2 for more than the amount of his judgment against D1 (s.17(1)(b)). D1 and D2 may each recover contribution from the other, except where one is obliged to indemnify the other (s.17(1)(c)). The amount of the contribution is "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" (s.17(2)).

1.7 Those provisions are confined to the situation where both D1 and D2 are liable to P in tort. They have no application where either D1 or D2, or both of them, are liable to P not in tort but for breach of contract, breach of trust or other breach of duty. This is regarded by many experts as producing injustice as between D1 and D2,

because their responsibility to contribute to making good P's loss depends upon P's decision whether to sue one or other or both.

1.8 Some examples will illustrate the problems:-

(a) Suppose a property owner engages an architect to draw up plans of a building and supervise its construction, and also under a separate contract engages a builder to carry out the work. If the builder is in breach of his contract, and the architect negligently failed to ensure the error was corrected, the owner could sue the architect for the whole of the damage, and yet regardless of the blameworthiness of their respective defaults, the architect has no right to claim against the builder for any part of what he has to pay the owner. The liabilities of the architect and builder to the owner are contractual in each case.

(b) Suppose a house is damaged as a result of the fault of the builder engaged under a contract, and also as a result of the tort of negligence by the building inspector of the local authority. Again, because both are not tortfeasors, it seems that the present law entails that neither has the right to obtain contribution from the other following on a suit brought by the owner.

1.9 The matter has been considered in other jurisdictions. In the United Kingdom the Civil Libility (Contribution) Act 1978 has been enacted, and we reproduce it as Appendix D. In Australia, the State of Victoria's Chief Justice's Law Reform Committee and the South Australia Law Reform Committee have recommended reforms.

2. Options for Reform

2.1 The need for contribution arises because, under our law, it is possible for two or more wrongdoers each to be liable to a plaintiff for the full amount of the plaintiff's recoverable loss or damage. This does not enable a plaintiff to recover his loss more than once - what he receives from any source goes in satisfaction pro tanto of his rights. The right of contribution, where it exists, enables a defendant, against whom the plaintiff has recovered the whole of his loss, in his turn to recover a fair share from any others who are also liable to the plaintiff in tort.

2.2 One obvious feature of this system is that it enables a plaintiff to pick and choose amongst potential defendants. Another is that the burden of establishing the liability of persons other than those chosen by the plaintiff as defendants rests upon the defendant or defendants chosen by the plaintiff. Such a defendant also has to bear the risk that he will not be able to enforce any judgment for

contribution he may obtain against the other wrongdoers. This distribution of risks and burdens seems to work fairly enough where the wrongdoers have acted in concert with each other to cause the plaintiff's loss or damage. The same would be true where, as between himself and the plaintiff, a defendant had by contract taken upon himself the whole risk of the loss. But it might not be fair in all cases, especially those involving a mixture of contract and tort.

2.3 Another example may be helpful. (It has some resemblance to Mount Albert Borough v. Johnson [1979] 2 N.Z.L.R. 234, but in that case there was no suggestion that the builder was engaged on a cut-price basis or was insolvent. Those are fictional suggestions of ours to highlight the nature of the problem.) Suppose the owner of a dwelling suffers loss because its foundations are unsuitable for the terrain on which it is built. The local authority through its building inspector is at fault but a Court adjudges the builder, who was engaged by the owner on a cut-rate basis, to be 80% to blame for the loss, and the local authority 20% to blame. Under present law, if the builder is insolvent, the local authority has to bear the whole of the owner's loss. The result is to shift from the owner to the local authority the whole burden of the risks the owner would otherwise have borne from engaging the builder on the cut-price basis. In effect, the local authority is made to guarantee the performance of the builder,

irrespective of the terms of the contract between the owner and the builder. That it should be so is not self-evidently fair.

2.4 It follows that, preliminary to any proposal for extending rights of contribution, lies the question whether the rules which enable a plaintiff to recover the whole of his loss from any one of a number of persons who contributed to that loss should themselves be reviewed.

2.5 It there were to be a change in this matter, it would not be sufficient merely to provide for a plaintiff to recover from any one defendant in proportion to the contribution of that defendant to the plaintiff's loss or damage. Exceptions would have to be made for cases where the defendants had acted in concert or where a particular defendant had by contract accepted the risk of the whole loss. But in addition there would be cases where proportions which were fair as between the plaintiff and a defendant would be unfair as between the defendants themselves. For example, a plaintiff might have suffered loss because, on the negligent advice of a professional adviser, he had purchased faulty or unsuitable goods from a manufacturer who knew the plaintiff's requirements. As between the plaintiff and the adviser, the whole or a high proportion of the loss might have to be ascribed to the adviser. But as between the adviser and the manufacturer the position might be quite different. As between them

the fault might be more or less wholly with the manufacturer.

2.6 An intermediate possibility would be in general to continue the existing rules but to allow the courts a discretion to reduce the damages recoverable by the plaintiff against any one defendant where in all the circumstances fairness so required, irrespective of any breach of existing legal duty by the plaintiff. The reform could be confined to cases where the plaintiff by his own acts or omissions (whether or not amounting to "fault" as defined in the Contributory Negligence Act 1947) had in some degree brought upon himself, or increased, the risks of the loss or damage of which he complains. The effect would be to shift to the plaintiff the burden of obtaining contribution only when and to the extent that it would be fair to say that, as between the plaintiff and the defendant, the plaintiff contributed to his own misfortune. It would not, of itself, deny to the plaintiff the right to recover the balance of his loss from other potential defendants, nor prevent a determination of contribution as between the defendants themselves.

2.7 There are undoubtedly strong arguments which can be presented against proposals such as these, being as they are a departure not only from the existing law but from proposals to reform and the actual reform of that law in

other jurisdictions. Perhaps the main objection is that rules of that kind would restrict the right of an injured person to full recovery against a wrongdoer simply because there happen to be other wrongdoers in the picture. It seems to be difficult to justify a difference between a plaintiff's rights to full recovery from each wrongdoer in a situation where there is one wrongdoer and in a situation where there are more wrongdoers. It has been a settled principle that a defendant who by breach of duty owed to the plaintiff contributes to the chain of causation which results in the plaintiff's loss is liable for the whole of the loss, whether or not others also have contributed. It would be a radical change to provide that no plaintiff could succeed against a defendant without a trial of the liability of all other potential defendants whether or not they were solvent or within the jurisdiction. Another aspect which will need to be kept in mind is whether the promotion of such a reform would have an adverse effect on the implementation of what appears to be a needed reform in other areas as discussed below. So radical a proposal would involve considerable research and delay and might, in the end, fail to gain acceptance.

2.8 Our tentative opinions on this matter are, first, that the existing right of P who is free from legal fault should not be restricted or altered and, second, that if there is to be any restriction on the right of recovery by P where

he himself can be said to be morally but not legally at fault, it should only be in the circumstances and to the extent discussed in section 8 of this paper in connection with the possible extension of the defence of contributory negligence to breach of contract. Accordingly, our proposal in section 9 does not include the suggestions in para. 2.5, 2.6 and 2.7.

3. Recovery Amongst Defendants

3.1 As amongst defendants, the first question to be answered is whether the right of contribution should continue to be restricted, as it now is, to tortfeasors, and if not whether there should be any restriction regarding the relationship situations to which the right should apply. It seems to us that in principle there should be no restriction. The right to contribution should be extended to all situations, whether they arise from a statutory, tortious, contractual, trustee, fiduciary, or other relationship. This is in accord with the general intent of the United Kingdom Act, and also with the Victorian and South Australian recommended approaches.

3.2 If it is accepted that in principle it is desirable to have a right of contribution amongst wrongdoers (using that term in its wide sense as meaning persons who are liable to a plaintiff for the same item of damage or part of it), then the next question which arises is whether a

general discretion should be vested in the Court to apportion the responsibility, including power to exempt entirely and to order a complete indemnity. Once there is an unlimited extension beyond the existing joint or several tortfeasor situation, problems of determining a fair apportionment increase by reason of the differing legal bases of liability. It may be said that these do no more than create problems of apportionment which can be left to the good sense and judgment of the Court to resolve in each particular set of circumstances. The opposing view is that any amending legislation should make some specific provisions as to the exercise of the discretion of the Court because of the nature of the particular problem, either by way of exemption or possibly by way of a guideline or guidelines. One possibility is that a distinction be drawn so as to exclude cases where there was 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. The difficulty in trying to provide for any such concept is that it would, on the application of the principle involved, operate against some of the very types of situation in which it is thought relief should now be made available. Suppose, for example, that P, an intending purchaser of a boat, separately engages two marine surveyors, each without knowledge of the other's engagement, to furnish him with a report on the soundness of a particular vessel. Both

supply a report and the vessel is then purchased. It so happens that both reports were made negligently and did not disclose that the vessel had substantial dry rot. It would seem fair that P's resulting loss, arising as it did from reliance on both reports, should be shared by the surveyors despite the fact that neither could be said to bear any legal or moral relationship to the other. (Such a situation was alleged in the unreported case of Osmond v. Alan Orams Marine Ltd. Supreme Court, Whangarei, No. A51/74, judgment 18 March 1977 but was not litigated beyond the point of procedure that it was not competent to join the defendants in the one action. We reproduce the judgment as Appendix E.)

3.3 The objection to an unlimited extension of the right to contribution can be illustrated, for instance, in the case of a manufacturer (D1) who sells an article to P which is not up to quality and in breach, say, of the warranties implied in the Sale of Goods Act 1908. The article may also have been misrepresented. Quite unknown to the vendor, D2 advised P to buy the article and is negligent in giving that advice for which he may be legally liable to P. There may well be an objection in principle in giving D1 in those circumstances a right to claim contribution as against D2, thereby in effect indemnifying him to a greater or less extent against a contractual or perhaps even statutory liability which he has accepted, and that at the expense of a person who was unknown to him

at any relevant time and who had no conceivable obligation to him. A possible solution would be to deny D1 the right of any recovery against D2 in circumstances where D2's liability consists in a failure to protect P from the effects of a breach of duty on the part of D1, providing in the circumstances D2 was not under any legal duty in respect of D1. Although this has attraction as it deprives D1 of a way of alleviating what should be his full moral and legal responsibility in cases where mitigation of that liability has little real justification, the question of principle does still need consideration. Suppose in the case of the marine surveyors, one, D2, was called in by P specifically to confirm the report of the other, D1, then D2's liability for his own report would have been a failure to protect P from the effects of the breach of duty of D1 to P and on that basis contribution would not be available. Similarly in the case of a sale of goods, if D2 was specifically employed by P to advise on the purchase of the article in question his advice may have been a dominant factor in P's decision to purchase. Should D1 who supplied the defective article have no right of contribution although his causative responsibility may have been far less? The question is whether such a distinction is logical and practical.

3.4 Another approach, and one which meets some of the criticisms referred to above, would be to have an express

provision, either by way of guideline or even perhaps by way of a substantive provision, to the effect that D1 shall have no right to claim contribution from D2 if the basis of P's claim against D2 is D2's failure to ensure proper performance by D1. 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. Similarly, if the Automobile Association for a fee advises P about a proposed motor car purchase and negligently overlooks certain defects and P sues the seller, the seller should surely not be able to claim contribution from the Automobile Association.

3.5 It may be said that the only answer to these problems is to leave the matter to the Court to apportion, or to refuse apportionment, without attempting to lay down any definite rule of exception or even any guideline or guidelines which it would undoubtedly be difficult to formulate, except in a very general way, so as to be applicable to all situations. What has to be weighed up are the respective advantages and disadvantages between, on the one hand, allowing the Court a completely free rein with a probably resulting lack of certainty, and, on the other, restricting or guiding the Court's application of the general principle but realising that in so doing there

could be difficulties in achieving overall fairness in all cases.

3.6 Our present view is that the matter can probably best be dealt with by giving the Court a wide discretion, but at the same time drawing its attention to the particular considerations which should influence its decision. As a suggestion there could be a provision along the following lines:

> "The amount of contribution recoverable under this Act 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 in question, the amount of his potential liability, and to the respective rights and obligations of the parties both as between themselves and in respect of P."

4. The Problem of the Compromise

4.1 Under the present law if D1 settles a claim made against him by P his entitlement to contribution from D2 is dependent upon proof of his own liability as well as that of D2. It seems fair to remove this prerequisite as in many situations a settlement between P and D1 is proper and desirable even where there is no certainty that D1 is in truth liable to P. It is the risk of liability which is the governing factor and which D1 should not be forced to disregard if he is to retain his right of contribution against D2. Similarly in a compromise situation it is likely that the quantum of the claim being brought by P will be in dispute and the end figure will be a true

compromise which it may be difficult for D1 to prove in a positive fashion was his actual liability legally to P. It is of course important to see that D2, who has not been a party to the settlement or involved in the proceedings leading to it, is not prejudiced but this can be done by requiring any settlement to be bona fide and to be at a reasonable figure before contribution towards it can be claimed as against D2. A criticism of the United Kingdom Act is made in an article by A.M. Dugdale in the Modern Law Review (1979) 42 MLR 182 in respect of the situation where in a dispute based on contract a compromise may take the form of something other than a monetary payment. The problem mentioned in that article can however probably be overcome by appropriate wording in any intended legislation.

4.2 Care will however need to be taken to see that D2 is not affected in a way which is unfair having regard to his actual liability to the Plaintiff. A settlement made by D1 may well be bona fide and reasonable on his part, but 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 on quantum, and what may be reasonable for D1 may be unreasonable for D2. These considerations seem to make it necessary to spell out the elements that D1 must prove to recover contribution from D2. They seem to be:-

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

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

4.3 A further complicating factor could arise where, unbeknown to D1, D2 has already entered into a compromise with P. Should D2 be liable to make a further payment in respect of his compromised liability by way of payment to D1? Either D2's compromise is to be disregarded for the purpose of assessing contribution, which it seems would be unfair to D2 who may have legitimately believed he had completely absolved himself from the consequences of his wrongdoing, or D1 is bound by the compromise which would then operate as a bar to his right to contribution. Our present view is that on balance we favour the latter approach. 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 is liable. For example in the marine surveyors' case (para. 3.2) it would be unfair if D2 had there settled with P without knowing of the existence of D1's report, and was later met with a further claim from D1. It seems to us that provided a compromise is bona fide and reasonable as between P and D2 and has been concluded before D1 brings a claim for contribution, then D1 is barred from his claim. This

reasoning would apply to any instance where D2 has compromised, and not just where D1 had also effected his compromise with P.

4.4 It is recognised that where the claim for contribution does arise, the Court will necessarily be required to consider the issue of D1's own legal liability to P, as otherwise it would not be possible to make a value judgment as to the extent to which D2 should contribute to D1's settlement. This we think is acceptable from a practical and procedural viewpoint. We repeat that what we regard as important to achieve in this particular area is the removal of the present unsatisfactory requirement that D1 must prove his own liability to P as a prerequisite to recovering contribution from D2.

5. Limitation as to Time

5.1 A further question which arises is whether or not the expiry of any time limit which may exist in D2's favour at the suit of P should affect a claim for contribution by D1. The existing law as between tortfeasors is that the right of action by D1 against D2 does not crystallize for the purposes of the statutes of limitation until his own liability to P is determined. There is justification in principle for such an approach in that the theory of contribution is to achieve fairness as between two wrongdoers in a situation where the plaintiff can choose

the one or more whom he sues. The right of the chosen wrongdoer to obtain contribution could otherwise be defeated because of delay (even deliberate) in having the primary claim determined. It is also possible for D1 to be unaware of the existence of any liability on the part of D2, and have no reasonable way of ascertaining the existence of that liability, until a late stage. If it is fairness as between D1 and D2 which is in issue, then there should be no alteration to the present law.

5.2 The contrary argument is that it is unfair on D2 to subject him to a substantially extended time limit at the suit of D1, when he is no longer legally liable to P. That argument however does tend to emphasise the position between P and D2, rather than that between D1 and D2.

5.3 A possible compromise is to provide, as does the United Kingdom, legislation that there be a separate time limit, say 2 years from determination of his liability within which D1 must institute proceedings for contribution against D2. The drawback to any such proposition is the added confusion and practical problems it would create to the already difficult and sometimes complicated question of limitation. We think it is preferable to let the existing law prevail until such time as a comprehensive review of the law as to limitation is undertaken as a separate exercise.

6. Limitation as to Liability

6.1 If the right of contribution is to apply to contractual or fiduciary and other relationships, a further problem arises where the particular relationship contains or is subject to a provision limiting or reducing the amount of the liability to a figure less than the damage suffered by the plaintiff. It would be wrong to deprive a potential defendant of the availability of such a limitation or restriction in any contribution proceedings brought by another defendant. The question which arises is whether the formula for contribution should be based upon the percentage of "blameworthiness" as between the defendants being applied to the limit of liability or to the total liability but restricting recovery to that limit, or some other basis altogether.

6.2 The 1978 United Kingdom legislation has dealt with this problem by simply providing that where there is any limitation, the defendant in whose favour the limitation operates shall not be obliged to pay more than that amount in respect of the damage in question. If the principle to be adopted is to be one based on fairness as between defendants, then that approach would seem to be appropriate and to avoid any complicated and possibly unreal calculations which may not necessarily reflect what is fair overall. It would also avoid further difficulties which may arise by reason of the differing rules which

apply to recovery of damages for breach of contract as contrasted with tort, quasi-contract, or breach of fiduciary duty.

7. Release by Judgment

7.1 At common law where two persons were jointly liable to a plaintiff for the same damage, judgment against one, even if unsatisfied, operated as a release of the other. The Law Reform Act 1936 and s.94 Judicature Act 1908 altered the common law in respect of joint tortfeasors in removing that ban and further providing that where there is more than one action the damages awarded in the latter shall not exceed those first awarded. Further the plaintiff is not entitled to costs in the latter actions unless the Court is of opinion that there was reasonable ground for bringing the further action. These provisions are referred to as the sanctions in damages and costs.

7.2 The United Kingdom 1978 Act has abolished the sanction as to damages, but retained that as to costs. There would seem to be no valid argument against retaining the sanction as to costs. The damages issue is more complex, the argument for its abolition being that there may be circumstances when it is appropriate for P to sue D1 first, although he has a limited liability. It would seem unjust to restrict P's recovery in a later action against D2 to that same amount, even although D2 had no such

limitation as to his own liability. On balance it is probably therefore preferable to abolish this sanction in its entirety. It is not suggested however that this should in any way affect the true contribution issue as between D1 and D2, whose liability inter se would be as has been discussed in section 5.

8. Contribution by the Plaintiff

8.1 To this point, we have been dealing with contribution by defendants amongst themselves. We move now to consider contribution as between the defendants on the one hand and the plaintiff on the other, in situations where the plaintiff's loss or damage is in part the result of his own acts or omissions. Those acts or omissions by the plaintiff may have been in breach of some duty owed to a defendant, or they may have been no more than a failure on his part to take precautions for his own interests.

8.2 Where the plaintiff's loss or damage is divisible between co-operating causes, so that separate parts can be ascribed and allocated to a party who was exclusively the cause of them, or if the risk of the loss or damage has otherwise been allocated between the parties, no problem arises. Where difficulty does arise is when the plaintiff's loss or damage is single and indivisible. In cases of that kind, the common law has no mechanism by which reponsibility may be apportioned according to

degrees of blameworthiness. In consequence, the loss or damage has to be borne wholly by one party or the other.

8.3 Though situations of this kind occur throughout the common law, it is only in respect of obligations in tort that the legislature has so far intervened, by the Contributory Negligence Act 1947, to give the Courts powers of apportionment (Appendix B). No doubt, a principal reason why that Act was so confined was that it was passed to remedy a particular social ill. At common law, the contributory negligence of a plaintiff was a complete defence to a claim in the tort of negligence. This meant that, in claims arising from road accidents, a failure by the injured party to take sufficient precautions for his own safety could deprive him of all rights of recovery, even when the real merits of the case called for the loss to be apportioned.

8.4 The Contributory Negligence Act being thus limited, in all other cases involving co-operating causes of indivisible loss the position has remained that, as a general rule, apportionment is impossible and the whole loss has to be borne by one party or the other. Since the problem is the same whatever the cause of action, consistency alone would seem to require that powers of apportionment be extended to a wider range of cases, provided always that that can be done without violence to settled principles and rights. The issue is one of considerable importance. The absence

of any power of apportionment in contract cases has, we believe, put pressure on the courts to impose tort liability on the parties to contracts and also so to interpret the present Contributory Negligence Act as to confer powers of apportionment in contract cases. In our view, the contract-tort problem would be much better settled on its merits without regard to questions of apportionment. We also take the view that if powers of apportionment are to be extended beyond torts cases that result would be more suitably achieved by legislation.

8.5 The alternative to a reform of general application would be to confine any extension of powers of apportionment to the area which is, at present, the cause of greatest difficulty, that of claims based on the breach of a contractual duty of care. Because of the decision of the New Zealand Court of Appeal in McLaren Maycroft, and the existence of contrary decisions of the Court of Appeal in England, it is still uncertain how far claims based on want of care can be brought in this country concurrently in contract and tort. (The subject is discussed in the writings mentioned in Appendix C.) Whatever form the resolution of that problem eventually takes, there are some relationships at least, such as bailment, where concurrent duties of care do already exist. In such cases, it has quite evidently been a matter of concern that the availability of powers of apportionment could turn upon whether the plaintiff should choose to sue in

contract or in tort. We note that a recent law reform report from Alberta recommends that powers of apportionment be extended to cover contractual duties of care, but no further.

8.6 We are inclined tentatively to prefer a reform of wider application. If the absence of powers of apportionment was seen to work injustice in relation to claims in tort, a similar absence might be expected, prima facie, to work no less injustice in other areas of liability. It is with this in mind that we have suggested for discussion the proposal which appears in section 9. In formulating that proposal we have had regard, inter alia, to the following considerations:

(a) Our concern throughout is with indivisible loss or damage, by which is meant loss or damage no separate or severable part of which is the result exclusively of the acts or defaults of either the plaintiff or the defendant. What we say about apportionment in such cases presupposes that responsibility has not been apportioned by the parties themselves, or by or under any rule of law.

(b) There would not seem to be any particular difficulty in allowing apportionment of indivisible loss in those cases where it has resulted from breaches of obligations owed by each party to the other, whatever the actual source of the obligation. The greater

problem lies in the extent to which a plaintiff's failure to take care for his own interests should be a basis for apportionment in those cases where his failure involves no breach of duty to the defendant. Contributory negligence, of course, in its strict sense, includes a failure of this kind. Contributory negligence is relevant only to tort claims, and, even then, is probably not relevant to deliberate torts. But while contributory negligence is thus limited in its application, we do not think the same is true of the underlying principle from which it stems. In the ordinary case, the law does not allow a party to profit from his own wrong, or to obtain recovery from another for a harm he has brought upon himself. It is a principle which finds expression, for example, in the so-called "duty" to mitigate; in the realms of causation; in relation to estoppel by negligence; and in the rule that a party who has brought about the failure of a condition is to be denied the benefit of that failure. In none of these cases, of course, is there any dependence upon a duty being owed in law to oneself, nor need an enforceable duty to the other party be shown. The underlying principle is one of disqualification. One consequence of this is that the standard of care required of a party for his own interests tends to be somewhat lower than that which would be required under a duty of care owed to someone else.

(c) In considering whether failure to care for oneself should be a subject for apportionment, it is useful to draw a distinction between events occurring before, and those occurring after, the commission of the defendant's wrongful act. After a wrongful act has occurred the position at common law is that the victim of a tort and the victim of a contract must each take care for his own interests. The only difference between the two is that the contract victim's "duty" is one of mitigation of damage throughout whereas that of the tort victim (unless the tort is actionable per se) is one of avoiding contributory negligence until loss or damage occurs. Once loss or damage has occurred the tort victim, too, becomes subject to the "duty" to mitigate. It is in respect of the plaintiff's position before the commission of the wrongful act that significant differences appear to exist between contract and tort. The law seems to require of a potential tort victim that he take care for his own safety even before the wrongful act occurs and, a fortiori, when he neither knows nor has the means of knowing that a wrongful act has already taken place. By contrast, the potential victim of a breach of contract is not thought of as having to mitigate his loss, at least until he ought reasonably to have known of the breach, and certainly not before the breach has

occurred. On analysis, though, the difference between the two cases turns out to be less than at first appears.

(d) Whether a claim lies in tort or in contract, in neither case can the plaintiff (an agreement to the contrary, apart) recover for loss, damage, or injury of which the sole or the "decisive" or "effective" cause has been his failure to take care for his own safety or interests. Under present law, a plaintiff's failure in any lesser degree to take care for himself can be the subject of apportionment in tort. In the absence of similar powers of apportionment outside of tort, such lesser failures are for the present irrelevant to claims in contract, but it should be remembered that much the same was true of contributory negligence itself in tort cases before the Contributory Negligence Act 1947. Thus, if a client brings an action in contract against his solicitor in respect of a single loss suffered partly because of his own breach of contract in withholding information from his solicitor and partly because of the latter's want of care, recovery will depend on whose breach is accounted the predominant cause of the loss. No apportionment will be possible. That apart, the main difference between contract and tort in this context seems to be this: that it can be want of care for his own safety for a potential tort

victim to fail to take account of the possibility of a tort by the wrongdoer whereas, in the case of a party to a contract, it is (agreement apart) not open to a contract-breaker to suggest that the innocent party showed lack of care because, before breach, he acted on the basis that the wrongdoer would perform his contract. Hence, in a case, say, between a building owner and a contractor, it could not be held against the owner that he failed to tell the contractor all he knew about the site if the entire responsibility for its suitability had been allocated to the contractor by the building contract. It is perhaps significant, too, that even in the case of tort, it appears to be no defence to a deliberate tort that the victim failed to take precautions against the possibility that the tort would be committed by the defendant.

(e) In our Report on Misrepresentation and Breach of Contract, we expressed the view that, as a general rule, notions of fault have no place in contract law. The proposition comprehends two others. The first is that, characteristically, contractual promises are absolute in the sense that it is not in itself a defence to a claim for breach of contract that the breach occurred despite the defendant's best endeavours to perform. The second is the point already mentioned, that a contract-breaker cannot

reduce his liability by the plea that the injured party should not, before breach, have relied on the wrongdoer's performing his obligations. It is not our intention to interfere with either of those principles. Nor, for that matter, would we wish to alter the present law that (agreement apart) failure to take care for one's own interests does not give rise to a cause of action.

9. The Proposal

9.1 The reform we have in mind, which we put forward tentatively for discussion, can be conveniently constructed upon the provisions of the Contributory Negligence Act 1947 (Appendix B). The substance is to delete the definition of the term "fault" from s.2 and to enact a new definition on some such lines as the following:-

"Definition of Fault

(1) For the purposes of this Act "fault" means, on the part of a plaintiff or defendant (and whether by act or omission), negligence, breach of statutory duty, breach of contract or any other breach of a civil duty owed by the one to the other and, in the case of a plaintiff, any unjustified failure to take adequate care for his own interests.

(2) A failure by a plaintiff to take adequate care for his own interests is unjustified if it is not excused (i) by the terms of a contract or other agreement between the plaintiff and the defendant, or (ii) by the rules of the common law or of equity, or (iii) by the provisions of any enactment.

(3) Care taken by a plaintiff for his interests is not inadequate, by reason only and to the extent that it constitutes a failure to take precautions against

(a) the breach by the defendant of an obligation owed to the plaintiff under the terms of a contract, or

(b) the deliberate fault of a defendant

before the plaintiff knows or ought to be taken to know that, as the case may be, the breach or the deliberate fault has occurred."

9.2 On this basis, section 3(1), which already makes provision for defences arising under a contract, could probably remain substantially unchanged, though it would seem that the words "loss or" should be inserted before the word "damage" where it appears in that subsection in order to cover situations where the fault is a failure to mitigate.

9.3 It would be desirable to embody the changes in a consolidating and amending statute entitled the Civil Liability (Contribution and Apportionment) Act. The new statute would include the provisions of

s.94 Judicature Act 1908

s.17 Law Reform Act 1936

Contributory Negligence Act 1947,

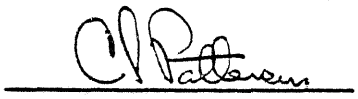
modified as suggested in paras. 3.6, 4.4, 6.2, 7.2 and 9.

9.4 Consequential drafting changes would be required, which we need not examine at this stage.

10. Invitation to make submissions

We will be grateful to interested parties who let us have the benefit of their views on the matters discussed in this paper. Correspondence should be addressed to the Secretary, Contracts and Commercial Law Reform Committee, Department of Justice, Private Bag, Postal Centre, Wellington 1.

For the Committee



Chairman

Wellington.

1 June, 1983

APPENDIX A

EXTRACT FROM THE LAW REFORM ACT 1936

PART V

LIABILITY OF TORTFEASORS

17. Proceedings against, and contribution between, joint and several tortfeasors—(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—

(a) Judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage:

(b) If more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent, or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action:

(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.

(1A) *Inserted by s. 3 of the Law Reform Amendment Act 1955 and repealed by s. 9 (2) (b) of the Matrimonial Property Act 1963.*

(2) 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.

APPENDIX A (Contd)

10

(3) For the purposes of this section—

(a) The expressions "parent" and "child" have the same meanings as they have for the purposes of [the Deaths by Accidents Compensation Act 1952]:

(b) The reference in this section to "the judgment first given" shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed, and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

(4) Nothing in this section shall—

(a) Affect any criminal proceedings against any person in respect of any wrongful act; or

(b) Render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed.

(5) Section 94 of the Judicature Act 1908 shall not hereafter apply with respect to any action or other proceeding to which this Part of this Act applies.

In subs. (1) (c) the words "in time" were inserted by s. 33 (2) of the Limitation Act 1950.

In subs. (3) (a) the Deaths by Accidents Compensation Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Deaths by Accidents Compensation Act 1908 as amended by Part II of this Act.

This Part of this Act binds the Crown; see s. 8 (2) of the Crown Proceedings Act 1950, reprinted 1979, R.S. Vol. 2, p. 23.

As to contributory negligence, see s. 3 (3) of the Contributory Negligence Act 1947, reprinted 1979, R.S. Vol. 1, p. 539.

As to the right of contribution between the owners of ships, see s. 470 of the Shipping and Seamen Act 1952, reprinted 1965, Vol. 3, p. 2059.

As to insurance against employers' liability, see ss. 86 (1) and 98 (2) (c) of the Workers' Compensation Act 1956, reprinted 1966, Vol. 4, pp. 3391, 3400.

As to contributions between landlords and tenants as joint tortfeasors, see s. 6 of the Occupiers' Liability Act 1962.

As to liability for damage to a Post Office line or works, see s. 156 (4) of the Post Office Act 1959, reprinted 1970, Vol. 3, p. 2228.

APPENDIX B

EXTRACTS FROM THE CONTRIBUTORY NEGLIGENCE ACT 1947

THE CONTRIBUTORY NEGLIGENCE ACT 1947
1947, No. 3

An Act to amend the law relating to contributory negligence [*14 August 1947*

1. Short Title—This Act may be cited as the Contributory Negligence Act 1947.

The provisions of this Act apply to occupier's liability, see s. 4 (8) of the Occupier's Liability Act 1962; and to actions under the Carriage by Air Act 1967, see s. 27 of that Act.

This Act is part of the law of New Zealand in actions pursuant to the Warsaw Convention (as amended 28/9/55), see s. 12 of the Carriage by Air Act 1967.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Court", in relation to any claim, means the Court or arbitrator by or before whom the claim falls to be determined:

"Damage" includes loss of life and personal injury:

"Dependant" means any person for whose benefit an action could be brought under [the Deaths by Accidents Compensation Act 1952]:

"Employer" and "worker" have the same meaning as in [the Workers' Compensation Act 1956] as amended by any subsequent enactment:

"Fault" means negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

Cf. Law Reform (Contributory Negligence) Act 1945, s. 4 (U.K.)

"Dependant": The Deaths by Accidents Compensation Act 1952, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Deaths by Accidents Compensation Act 1908.

"Employer" and "worker": The Workers' Compensation Act 1956, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Workers' Compensation Act 1922.

"Fault": For applications of this definition, see s. 23 (6) of the Civil Aviation Act 1964 and s 6 (3) of the Hovercraft Act 1971.

As to accidents, see now the Accident Compensation Act 1972 (reprinted 1975, Vol. 2, p 1409).

3. **Apportionment of liability in case of contributory negligence**—(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that—

(a) This subsection shall not operate to defeat any defence arising under a contract:

(b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

(2) Where damages are recoverable by any person by virtue of the last preceding subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

(3) Section 17 of the Law Reform Act 1936 (which relates to proceedings against, and contribution between, joint and several tortfeasors) shall apply in any case where 2 or more persons are liable or would, if they had all been sued, be liable by virtue of subsection (1) of this section in respect of the damage suffered by any person.

(4) Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under Part I of the Law Reform Act 1936 the damages recoverable would be reduced under subsection (1) of this section, any damages recoverable in an action brought for the benefit of the dependants of that person under [the Deaths by Accidents Compensation Act 1952] shall be reduced to a proportionate extent.

(5) Where, in any case to which subsection (1) of this section applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading any enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages or contributions from that other person or representative by virtue of that subsection.

(6) Where any case to which subsection (1) of this section applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.

(7) *Repealed by s. 14 of the Carriage by Air Act 1962.*

Cf. Law Reform (Contributory Negligence) Act 1945, s. 1 (U.K.)

In subs. (4) the Deaths by Accidents Compensation Act 1952, being the corresponding enactment in force at the date of this reprint has been substituted for the repealed Deaths by Accidents Compensation Act 1908

As to accidents, see now the Accident Compensation Act 1972 (reprinted 1975, Vol. 2, p. 1409).

APPENDIX C

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R.J. Sutton and M.A. Mulgan - Contract and Tort" [1980] N.Z.L.J. 366.

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APPENDIX D

Civil Liability (Contribution) Act 1978

1978 CHAPTER 47

An Act to make new provision for contribution between persons who are jointly or severally, or both jointly and severally, liable for the same damage and in certain other similar cases where two or more persons have paid or may be required to pay compensation for the same damage; and to amend the law relating to proceedings against persons jointly liable for the same debt or jointly or severally, or both jointly and severally, liable for the same damage. [31st July 1978]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Proceedings for contribution

Entitlement to contribution.

1.—(1) Subject to the following provisions of this section, 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 (whether jointly with him or otherwise).

(2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

(3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be

liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

(4) 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.

(5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

Assessment of contribution.

2.—(1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above 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 in question.

(2) Subject to subsection (3) below, the court shall have power in any such proceedings 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.

(3) Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to—

(*a*) any limit imposed by or under any enactment or by any agreement made before the damage occurred;

(*b*) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976; or 1945 c. 28. 1976 c. 30.

(*c*) any corresponding limit or reduction under the law of a country outside England and Wales;

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.

Proceedings for the same debt or damage

Proceedings against persons jointly liable for the same debt or damage.

3. Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage.

Successive actions against liable (jointly or otherwise) for the same damage.

4. If more than one action is brought in respect of any damage by or on behalf of the person by whom it was suffered against persons liable in respect of the damage (whether jointly or otherwise) the plaintiff shall not be entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of the opinion that there was reasonable ground for bringing the action.

Supplemental

Application to the Crown. 1947 c. 44.

5. Without prejudice to section 4(1) of the Crown Proceedings Act 1947 (indemnity and contribution), this Act shall bind the Crown, but nothing in this Act shall be construed as in any way affecting Her Majesty in Her private capacity (including in right of Her Duchy of Lancaster) or the Duchy of Cornwall.

Interpretation.

6.—(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).

(2) References in this Act to an action brought by or on behalf of the person who suffered any damage include references to an action brought for the benefit of his estate or dependants.

(3) In this Act "dependants" has the same meaning as in the Fatal Accidents Act 1976.

(4) In this Act, except in section 1(5) above, "action" means an action brought in England and Wales.

Savings.

7.—(1) Nothing in this Act shall affect any case where the debt in question became due or (as the case may be) the damage in question occurred before the date on which it comes into force.

(2) A person shall not be entitled to recover contribution or liable to make contribution in accordance with section 1 above by reference to any liability based on breach of any obligation assumed by him before the date on which this Act comes into force.

(3) The right to recover contribution in accordance with section 1 above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances; but nothing in this Act shall affect—

(*a*) any express or implied contractual or other right to indemnity; or

(*b*) any express contractual provision regulating or excluding contribution;

which would be enforceable apart from this Act (or render enforceable any agreement for indemnity or contribution which would not be enforceable apart from this Act).

Application to Northern Ireland.

1945 c. 28.
1976 c. 30.
1948 c. 23 (N.I.).
S.I. 1977/1251 (N.I. 18).

8. In the application of this Act to Northern Ireland—

(*a*) the reference in section 2(3)(*b*) to section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976 shall be construed as a reference to section 2 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948 or Article 7 of the Fatal Accidents (Northern Ireland) Order 1977;

1947 c. 44.

(*b*) the reference in section 5 to section 4(1) of the Crown Proceedings Act 1947 shall be construed as a reference to section 4(1) of that Act as it applies in Northern Ireland;

(*c*) the reference in section 6(3) to the Fatal Accidents Act 1976 shall be construed as a reference to the Fatal Accidents (Northern Ireland) Order 1977;

(*d*) references to England and Wales shall be construed as references to Northern Ireland; and

(*e*) any reference to an enactment shall be construed as including a reference to an enactment of the Parliament of Northern Ireland and a Measure of the Northern Ireland Assembly.

Consequential amendments and repeals.

9.—(1) The enactments specified in Schedule 1 to this Act shall have effect subject to the amendments set out in that Schedule, being amendments consequential on the preceding provisions of this Act.

(2) The enactments specified in Schedule 2 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

Short title, commencement, and extent.

10.—(1) This Act may be cited as the Civil Liability (Contribution) Act 1978.

(2) This Act shall come into force on 1st January next following the date on which it is passed.

(3) This Act, with the exception of paragraph 1 of Schedule 1 thereto, does not extend to Scotland.

SCHEDULES

Section 9(1).

SCHEDULE 1

CONSEQUENTIAL AMENDMENTS

1945 c. 28. *The Law Reform (Contributory Negligence) Act* 1945

1. For section 5(*b*) of the Law Reform (Contributory Negligence) Act 1945 (application to Scotland) there shall be substituted—

"(*b*) section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (contribution among joint wrongdoers) shall apply in any case where two or more persons are liable, or would if they had all been sued be liable, by virtue of section 1(1) of this Act in respect of the damage suffered by any person."

1950 c. 39. *The Public Utilities Street Works Act* 1950

2. In section 19(4) of the Public Utilities Street Works Act 1950 (indemnity in respect of damage by execution of works)—

(*a*) for the words "within the meaning of the Law Reform (Married Women and Tortfeasors) Act 1935" there shall be substituted the words "suffered by the authority as a result of a tort"; and

(*b*) for the words "section six of that Act" there shall be substituted the words "section 1 of the Civil Liability (Contribution) Act 1978".

1958 c. 10 (N.I.). *The Statute of Limitations (Northern Ireland)* 1958

3. For section 10 of the Statute of Limitations (Northern Ireland) 1958 there shall be substituted the following section—

"Time-limit for claiming contribution.

10.—(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the end of the period of two years from the date on which that right accrued.

(2) For the purposes of this Act the date on which a right to recover contribution in respect of any damage accrues to any person (in this subsection referred to as "the relevant date") shall be ascertained as follows, that is to say—

(*a*) if the person in question is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall be the date on which the judgment is given, or the date of the award, as the case may be;

SCH. 1

(*b*) if, in any case not falling within the preceding paragraph, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made;

and for the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question."

4. In section 8(*e*)(iii) of that Act, and in section 50(9) of that Act (as substituted by Article 4(3) of the Limitation (Northern Ireland) Order 1976), for the words "by a tortfeasor under section 16 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937" there shall be substituted the words "under section 1 of the Civil Liability (Contribution) Act 1978". S.I. 1976 1158 (N.I. 18).

The Carriage by Air Act 1961 1961 c. 27.

5.—(1) In section 4(1) of the Carriage by Air Act 1961 (limitation of liability) paragraph (*a*) shall be omitted.

(2) In section 5(2) of that Act, for the word "tortfeasors" there shall be substituted the words "persons liable for any damage to which the Convention relates".

The Limitation Act 1963 1963 c. 47.

6. For section 4 of the Limitation Act 1963 (time-limit for claiming contribution between tortfeasors) there shall be substituted the following section:—

"Time-limit for claiming contribution.

4.—(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall (subject to subsection (3) of this section) be brought after the end of the period of two years from the date on which that right accrued.

(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (in this subsection referred to as "the relevant date") shall be ascertained as follows, that is to say—

(*a*) if the person in question is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall be the date

SCH. 1

on which the judgment is given, or the date of the award, as the case may be ;

(*b*) if, in any case not falling within the preceding paragraph, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made ;

and for the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.

(3) Sections 22(1) and 26 of the Limitation Act 1939 (which make provision for cases of disability, fraud and mistake) shall each have effect as if any reference therein to that Act included a reference to subsection (1) of this section, and section 2(1) of the Limitation (Enemies and War Prisoners) Act 1945 shall be amended by adding at the end of the definition of " statute of limitation " the words " subsection (1) of section 4 of the Limitation Act 1963 ".

(4) In this section references to an action and to section 22(1) or section 26 of the Limitation Act 1939 shall be construed as including references respectively to an arbitration and to the said section 22(1) or, as the case may be, section 26 as applied to arbitrations by section 27(1) of that Act ; and subsections (3) to (7) of section 27 (which relate to the application of that Act to arbitrations) shall apply for the purposes of this section."

1965 c. 37.

The Carriage of Goods by Road Act 1965

7. In section 5(1) of the Carriage of Goods by Road Act 1965 (exclusion, as respects carriers, of the general law with respect to contribution between persons liable for the same damage), for the words from " section 6(1)(c) " to " (Northern Ireland) 1937 " there shall be substituted the words " section 1 of the Civil Liability (Contribution) Act 1978 ".

1972 c. 33.

The Carriage by Railway Act 1972

8. In section 6(2) of the Carriage by Railway Act 1972 (special provision with respect to actions against railway undertakings), for the words " section 6(1)(*a*) of the Law Reform (Married Women and Tortfeasors) Act 1935 " there shll be substituted the words " section 3 of the Civil Liability (Contribution) Act 1978 ".

SCHEDULE 2

Section 9(2).

REPEALS

Chapter	Short Title	Extent of Repeal
25 & 26 Geo. 5. c. 30.	The Law Reform (Married Women and Tortfeasors) Act 1935.	Section 6.
1 Edw. 8 & 1 Geo. 6. c. 9 (N.I.).	The Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937.	Section 16.
8 & 9 Geo. 6. c. 28.	The Law Reform (Contributory Negligence) Act 1945.	Section 1(3). In section 1(5) the words "or contributions".
10 & 11 Geo. 6. c. 44.	The Crown Proceedings Act 1947.	Section 4(2) (including that section as it applies in Northern Ireland).
1948 c. 23 (N.I.).	The Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948.	Section 2(3). In section 2(5) the words "or contributions".
1958 c. 10 (N.I.).	The Statute of Limitations (Northern Ireland) 1958.	Section 74(5).
7 & 8 Eliz. 2. c. 65.	The Fatal Accidents Act 1959.	Section 1(4).
1959 c. 18 (N.I.).	The Fatal Accidents Act (Northern Ireland) 1959.	Sections 1(4) and 3(1).
9 & 10 Eliz. 2. c. 27.	The Carriage by Air Act 1961.	Section 4(1)(*a*).
10 & 11 Eliz. 2. c. 43.	The Carriage by Air (Supplementary Provisions) Act 1962.	In section 3(1), the words from "paragraph" to "and in".
1964 c. 1 (N.I.).	The Limitation Act (Northern Ireland) 1964.	Section 4.
1972 c. 33.	The Carriage by Railway Act 1972.	Section 6(6)(*a*).
S.I. 1977/1251 (N.I. 18.).	The Fatal Accidents (Northern Ireland) Order 1977.	In Schedule 1, paragraph 1(2).

APPENDIX E

Extracts from the unreported judgment of the Supreme Court in Osmond v. Alan Orams Marine Ltd. & Baxter, Whangarei Registry, A51/74, judgment 18 March 1977 per Speight J.

"The Plaintiff sues two separate Defendants in the one action arising out of the purchase by him of a launch from one, Evans.

Prior to purchase, he had separately engaged each Defendant, who are marine surveyors or boatbuilders, to furnish him with a survey report on the soundness of the vessel. Each Defendant furnished the Plaintiff with a separate report, both apparently favourable though in guarded terms; acting in reliance of one or other or both reports, the Plaintiff purchased the launch but now claims it is in rotten condition. He alleges that the reports were negligently made, in breach of a duty of care owed to him by each Defendant and sues for loss suffered.

The First Defendant moves to sever the claim.

Rule 61 authorises the joinder of defendants against whom the right to any relief in respect of or arising out of the same transaction or event, or series of transactions or events is alleged to exist.

Does the relief claimed here arise out of the same transactions or events?

In Barnao & Anor v. Garguilo & Lecaldane (1912) 31 N.Z.L.R. 1078, Sim, J. allowed the joinder of two defendants who were carrying on business jointly as fishmongers, they having previously under separate contracts given covenants in restraint of trade to the plaintiff or his predecessor. At p.1080, the learned Judge said:-

> '... separate and distinct contract. That is true and the rule would not have applied if the defendants had been acting separately and independently. But

> the allegation ... is that they are carrying on together a fishmongers business in Palmerston North.'

In the Rule, the phrase is 'the same transactions or events'. A transaction is a matter which occurs in which parties are involved. The only common transaction or event here was the purchase of the launch by the Plaintiff from his vendor. Neither Defendant was involved in that. There was no common transaction or event between the parties giving rise to a claim for relief.

There was the separate engagement of each Defendant to supply a separate report and there were separate reports on different days. If the Plaintiff is to succeed against either Defendant, he must show that the particular report was defective and he acted in total or partial reliance on it, suffering loss thereby.

Rules 62 and 64 do not seem to apply. It is a prerequisite of Rule 62 that there must be some matter in common even though additional causes may relate to one defendant only. Rule 64 relates to cases where there is doubt as to which Defendant may be liable on a cause of action - here the Plaintiff alleges each Defendant is separately liable on a separate cause - so each of these must be pursued separately.

With great respect, I question whether the observations in Chiplin v. Williams (1964) N.Z.L.R. 904 at 905, that the nature of damage sustained supplies a sufficient nexus, although I am in entire agreement that that decision was an appropriate application of a Rule 64 situation.

The application is reluctantly granted.

I cannot see that I can direct an amended Statement of Claim only. The basis of an action is a Writ, and without a Writ, no judgment can be given. Consequently, I invite the Plaintiff to elect which Defendant he wishes to have struck out of A.51/74 and he will have to file separate

proceedings against the other person if he so wishes. He must also file an amended Statement of Claim against the Defendant against whom he elects to continue.

I appreciate that it would be far more convenient to the Court, and might avoid the possibility of conflicting findings on such matters as damages if both matters were heard together. I have been tempted to follow the guide suggested by observations of Turner J. in delivering the judgment of the Court of Appeal in McKnight v. Davis (1968) N.Z.L.R. 1164 at 1170, when he said that the Court must always be master of its own procedure. But he was dealing there with actions between the same two parties on identical facts.

I do not think any assumption of that ill-defined concept 'inherent jurisdiction' permits me in this case to ignore the clear wording of the rules and well settled authority. I commend to Counsel however the advantages and convenience in due course of having both actions heard together."

Note see also Kaori Properties Ltd. v. Jelicich Austin Smith and Davis [1969] N.Z.L.R. 698.