

Report 47

Apportionment of
Civil Liability

May 1998
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Commissioners are:

The Honourable Justice Baragwanath – President

Joanne Morris OBE

Judge Margaret Lee

DF Dugdale

Denese Henare ONZM

Timothy Brewer ED

The office of the Law Commission is at 89 The Terrace, Wellington

Postal address: PO Box 2590, Wellington 6001, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473–3453, Facsimile: (04) 471–0959

E-mail: com@lawcom.govt.nz

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28 May 1998

Dear Minister

I have the pleasure of submitting to you Report 47 of the Law Commission, *Apportionment of Civil Liability*.

This report follows the publication of the Commission's 1992 discussion paper. The developments in Australia that led the Commission to delay issuing its final report are explained in [paras 2 and 3](#) of this report.

The measure we now propose includes changes enacted for England and Wales in 1978 and first proposed for New Zealand in 1983. Our proposed statute will right serious injustices that under the existing law can arise where a single loss is caused or contributed to by more than one party.

None of the changes to the law proposed is, we believe, in itself controversial; the only issue is as to whether we should have recommended more radical change. Our reasons for not doing so are carefully explained in the report.

We commend the draft Act contained in this report as representing a valuable and long overdue reform of an important sector of the law.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Douglas Graham MP
Minister of Justice
Parliament Buildings
WELLINGTON

Apportionment of civil liability

Background

1 THE COMMISSION'S PRELIMINARY PAPER 19, *Apportionment of Civil Liability*, published in March 1992, was concerned with the situation where one party (P) is entitled in respect of a single loss to recover from more than one defendant (D1, D2 and so on). The loss may have been contributed to by P's own fault. The preliminary paper recommended (as had the Contracts and Commercial Law Reform Committee in a 1983 working paper) that there be a right to contribution among defendants whatever the basis of civil liability (a reform effected in England and Wales by the Civil Liability (Contribution) Act 1978 (UK)). The preliminary paper recommended that, where P had contributed to the loss, the hardship arising from a share that could not be collected from a defendant should be apportioned, at the court's discretion, among all the parties including P. For example, where D1, D2 and D3 are all liable to P, and D1, having been successfully sued by P (who has contributed to P's own loss) is unable to collect the contribution to P's entitlement due from D2 because D2 is insolvent, the court may allocate D1's loss arising from the inability to recover from D2 among D1, P and D3. The paper (in this respect also agreeing with a proposal made by the Contracts and Commercial Law Reform Committee in 1983) recommended that reduction of a plaintiff's claim to take account of contributory fault should not be restricted to the situation where the claim is founded on the tort of negligence.¹ The paper included a draft Act dealing with these points and other more detailed matters.

2 The preliminary paper considered and rejected suggestions that the present basis of liability which is *in solidum* (that is, each defendant is liable for the whole of the plaintiff's loss) should be

¹ This recommendation makes it unnecessary for present purposes to debate whether *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 was rightly decided, or whether the Australian criticisms of *Day v Mead* [1987] 2 NZLR 443 are warranted (see Meagher et al, para 2304), or to discuss the bold first instance assertion in *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, 76.

replaced by a scheme of several liability with each defendant being liable only for that defendant's share of the loss. Under such a scheme, if the share of one defendant cannot be recovered this loss is borne by the plaintiff rather than as now by the other defendant or defendants. It will be convenient to employ the terms *solidary* and *proportionate* for these two bases of liability. The Commission arrived independently at the view that solidary liability should be retained, but it did describe itself as being partly influenced by the reluctance of legislators or reformers elsewhere to favour its abandonment. It seemed for a time that there was a possibility of the adoption of proportionate liability in Australia when, following the establishment in February 1994 by the Australian Federal Attorney-General and the New South Wales Attorney-General of an inquiry into the law of joint and civil liability, a report was published by Professor JLR Davis of the Australian National University. It concluded that:

While there are arguments for the abolition of joint and several liability in some circumstances there is no clear view on which of the variants of proportionate liability is better. (1994, 29)

Davis recommended further consideration of "the nature and scope of possible further changes to the present law". A substantive report making specific recommendations for reform was published in January 1995. It recommended that solidary liability be abolished and replaced by a scheme of proportionate liability in all actions founded on the tort of negligence in which the plaintiff's claim was for property damage or purely economic loss (Davis, 1995, 34). Draft legislation to give effect to the Davis recommendations was published in July 1996.

- 3 It seemed to this Commission that these proposals called for careful consideration. The recommendations in our preliminary paper were founded at least in part on a general lack of enthusiasm in comparable jurisdictions for a retreat from solidary liability: it was obviously sensible to wait and see how matters eventuated across the Tasman. The Davis recommendations were supported in a joint submission made by the New Zealand Law Society and the Institute of Chartered Accountants of New Zealand who saw their members as "deep pockets" disadvantaged by the solidary approach. The Commission has had the benefit of conferring with representatives of those two bodies, as well as receiving the views of an Inter-professional Committee on Liability representing the New Zealand Institute of Architects, the Institution of Professional Engineers New Zealand, the New Zealand Institute of Surveyors, the New

Zealand Institute of Valuers, and the Association of Consulting Engineers New Zealand and of conferring with Professor Davis. Although we are told that the Davis proposals have attracted some expressions of support in Australia, no legislation has resulted. A September 1997 discussion paper by the New South Wales Law Commission, *Contribution Between Persons Liable for the Same Damage*, reaffirms that Commission's earlier rejection of proportionate liability. A consultation paper by the Common Law Team of the English Law Commission published in 1996, *Feasibility Investigation of Joint and Several Liability*, reached the same conclusion. In our view there is no reason to delay further our final report on this topic. Some of the reforms recommended were adopted in England in 1978 and first proposed in this jurisdiction as long ago as 1983. Even though the reforms we advocate do not go as far as the "deep pockets" have urged, they will provide some measure of relief and should not in our view be opposed simply on the basis that our recommendations might go further than those implemented in England.

- 4 We record for the sake of completeness the research provided to the Commission by Emeritus Professor Conrad Blyth and Associate Professor Basil Sharp, both of the Department of Economics of the University of Auckland, the substance of which was published as "The Rules of Liability and the Economics of Care" (1996) 26 VUWLR 91. The research considered which of proportionate liability on the one hand and solidary liability with contribution on the other offered the greater incentive to achieving an efficient level of care; it concluded that the inherent tendency of each was the same. The Commission accepts the authors' conclusion (104) that the imposition of liability upon "deeper pockets" creates economic inefficiencies because they then adopt excessive levels of care (eg, in the building industry, local authorities could insist on more regulations and controls than would otherwise be the case). We are not, however, persuaded by the further conclusion that, where there is a "deep pocket", the adoption of a proportionate liability rule would be economically beneficial because it would have the effect of increasing the care undertaken by the claimant (105). We think this is an unproven assumption. Can it really be suggested that a result of proportionate liability would be a second-guessing of auditors by creditors or shareholders present or potential of a company? Or that owners or potential owners of residences would hover around breathing down the necks of builders to ensure that the building's foundations were properly laid?

The format of this report

- 5 The Commission’s preliminary paper on this topic is a fully argued and carefully researched paper which has already been considered of assistance by other law reform agencies grappling with the same problem. In this report we do not propose to repeat the contents of the preliminary paper. We commence by re-examining the argument as to the competing solutions of solidary and of proportionate liability and the possibility of some sort of tertium quid falling between the wholehearted acceptance of one or other of these approaches. We next revisit the discussion paper’s proposals as to uncollectable shares. We then move on to consider certain matters of detail where we are persuaded that the recommendations in the preliminary paper can be improved. We conclude with some observations on the difficulties of “deep pockets” and ways in which they might be addressed. We do not discuss the other recommendations contained in our preliminary paper and referred to in [para 1](#) of this report as they have provoked no controversy.

Solidary or proportionate

- 6 On the basis that a defendant’s liability is for the whole of the loss caused by the defendant’s wrongdoing, then that liability is unaffected by the fact that the behaviour of some other party has caused the same loss. Loss may be caused to a building owner by the manner in which the builder carries out the works and by a failure in supervision by the owner’s architect. Both builder and architect are liable for the full amount of the loss. As between P and D1, it is simply irrelevant that P also has a claim against D2, or that D1 may be entitled to claim contribution from D2. The essential basis of the attack on solidary liability, while it can be (and in the literature and in the various submissions on the Commission’s working paper is) expressed in differing ways really boils down to the contention that it is unjust that a defendant’s liability should exceed that defendant’s share of responsibility for the loss. The rejoinder to this proposition can be stated equally roundly. The fallacy of the contention that it is unfair to D1 that D1 should be liable to compensate P for more than D1’s proportion of the loss is that such an argument introduces into an examination of D1’s liability to P the logically irrelevant issue of D2’s liability to P. Fairness *among* defendants requires a consideration of degrees of responsibility, but any such consideration is irrelevant to the question of what as against the plaintiff is required to ensure fairness *to* defendants. Even if, as between D1 and D2, D1 may be only five percent to blame, as between P and D1, D1 is 100 percent to blame.

7 There is a complaint that the solidary rule imposes liability in excess of responsibility. But the whole basis of the law of civil liability is that quantification is determined not by the degree of the defendant's fault but by the extent of the injury to the plaintiff. Trifling negligence, a momentary inattention for example, can cause horrific damage. Gross negligence can result in minor or no damage. As between plaintiff and defendant it is not the fault but the loss that is measured, and there is no reason why this principle should cease to apply simply because there is more than one wrongdoer. If there is injustice in substantial sums being recoverable from a professional firm whose error is very small when measured against the heinousness of the conduct of a now insolvent wrongdoer who has also caused the loss, the remedy for such injustice must lie either in an examination of the duty imposed by the law on the professional firm or in the rules of causation applied. Either way such injustice is neither consequent on nor reason for changes to the rules as to contribution.

Contrary to the assertions of the opponents of joint and several liability, a defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behaviour does not become "partial" or "minimal" simply because other defendants' tortious behaviour was much worse, individually or in the aggregate. Otherwise, plaintiffs would be subject to a perverse "tortfest," in which the more defendants there were, or the worse they behaved, the less individual responsibility each defendant would bear for the injury, even though her tortious behaviour remained constant and was an actual and proximate cause of the entire injury. (Wright, 1992, 59)

8 Such considerations should remind us that, in addition to the issues of principle discussed in [paras 6–7](#), there are procedural disadvantages in abandoning solidary liability. If there are 100 persons polluting a river, must P to recover damages join them all as defendants, and if P does not and chooses to join only D1 and D2 how does the judge determine apportionment among them and the absent 98? How binding is such an apportionment on the absent defendants? (See Ontario Law Reform Commission, Report 89, 186.)

9 The Commission is of the firm view that no sufficiently compelling case for departure from the solidary rule has been made.

A middle way?

10 In this Commission's discussions with representatives of the legal and accountancy professions some thought was given to a compromise scheme somewhere between solidary and proportionate

liability, in those discussions styled “reducible liability”. Under this scheme, courts would be empowered to reduce the amount of the defendant’s liability in such manner and for such reasons as they considered just. Invoked in support of this proposal were statutory provisions granting relief against liability to peccant trustees and company directors. The Commission does not recommend any change to the law along these lines. As expressed, such a change would constitute a blatant example of the process once described by Sir Alexander Turner as “throwing everything into the lap of the judge”.² Even if a more precise proposal could be formulated it would produce a change in the law more fundamental than can be justified by the desire to placate a particular interest group.³

Allocation of irrecoverable shares

- 11 This Commission in its preliminary paper (paras 180–187) proposed, as a compromise between solidary and proportionate liability, a solution under which, where the plaintiff has contributed to the loss, responsibility for uncollectable shares would be apportioned among solvent defendants *and the plaintiff*. In other words, if P obtains a judgment against D1 for an amount reduced by P’s contributory fault, and that judgment is satisfied by D1 but D2 is unable to contribute his or her share, the loss should be apportioned among D1, any other defendants, *and P*. Such a proposal, it can be argued, runs completely contrary to the reasons we have advanced in support of solidary liability. If the correct view is that D1 is liable to P for all of P’s loss, and questions of contribution among defendants are irrelevant to that liability, why should P’s net entitlement be diminished because D1 cannot collect the share of P’s entitlement that should be contributed by another defendant?

² This draft is simply an exhibition of ineffectual thinking on the part of those responsible for it – unable to foresee what may happen as a result of their proposed reforms, they seek to prevent catastrophe by throwing everything into the lap of the judge. (Turner, 420; see also 421)

A cautionary example is the uncertainty created by the Fair Trading Act 1986 s 43(2)(d) which introduces a novel discretion into the court’s power to award damages in contexts relevant to this report (see the Court of Appeal decisions in *Goldsbro v Walker* [1993] 1 NZLR 394 and *Foseco New Zealand Ltd v Cumberworld Contracting Ltd* (1997) 6 NZBLC 102,033).

³ We record that an alternative approach to a middle position is the introduction of proportionate liability in certain industry-specific situations and that such an arrangement has been adopted in the building legislation in force in Victoria (Building Act 1993 ss 131–132), South Australia (Developments Act 1993 s 72), and the Northern Territory (Building Act 1993 ss 155–156).

It originates in Professor Glanville Williams's monograph *Joint Torts and Contributory Negligence* (paras 102–104). His recommended legislation was adopted by the Irish Civil Liability Act 1961 and were supported by British Columbia's Law Reform Commission in its 1986 *Report on Shared Liability*. Professor JG Fleming favours an essentially similar stance (1976, 250–256; 1979, 1482–1485, and 1491–1494) as does Professor RW Wright (after he earlier advocated the contrary view; compare 1988, 191–193 with 1992, 77–78). The opposing view is taken by the Ontario Commission in its 1988 report (para 186) and by the English Commission's Common Law Team in its 1996 report (paras 4.2–4.15).

- 12 In reaching its conclusion, the Common Law Team placed substantial emphasis on the decision of the House of Lords in *Fitzgerald v Lane* [1989] AC 328. In this case the suggestion that the contributory fault of P should be assessed separately as against each defendant (so as to make possible a different percentage apportionment as between P and D1 and as between P and D2) was rejected. Instead, the court used the approach that, because what was being measured was P's departure from appropriate standards, all the defendants were treated as a unit. *Fitzgerald v Lane* was discussed in our preliminary paper (paras 125 and 195) and the paper's draft statute was shaped on the basis that the *Fitzgerald v Lane* decision was accepted. It now seems to us that, once it is accepted that any reduction in P's claim is to be calculated by treating the concurrent wrongdoers as a group, then any rationale for allocating part of an uncollected share to P evaporates. The Commission's view now, therefore, is that no part of an uncollectable contribution should be allocated to P. Section 16 of our draft Act in this report has been amended accordingly.

Defining rights of contribution

- 13 The New South Wales discussion paper, *Contribution Between Persons Liable for the Same Damage*, suggests that s 4 of the draft statute contained in our preliminary paper is less clear than the English section (para 6.40). We agree with this criticism, and the draft Act in this report is in a different form.

Reliance by a promisee on the promisee's contract

- 14 Professor Coote has urged the importance of not interfering with P's entitlement to rely on D's promise where it is claimed that D's responsibility to P for breach of contract should be reduced by P's contribution to P's loss (1992, 313). He suggests that the use of the word "justified" without definition in the expression "justified

reliance” in our proposed *section 7(3)* may blur this entitlement. We agree, and have inserted in the section a provision to the effect that reliance by P does not cease to be justified by reason only of the failure by P, before P knows of a breach by D, to take any precaution against such breach.

The plight of the “deep pockets”

15 We wish, in concluding, to return to the position of the “deep pockets”. It is their plight that triggered a retreat from solidary liability in various jurisdictions in the United States of America. It must of course be kept in mind that in those jurisdictions, unlike in New Zealand, liability for personal injury survives and that there is a greater use of juries in civil cases. Further, at least until very recently, there was an absence of the will or power by judges to intervene when juries, in making damages awards, ran amok. There are various ways of addressing the problems of “deep pockets” without interfering with the law of contribution:

- Professional firms could be permitted to incorporate with limited liability. (An entitlement to incorporate would be useful for other reasons.) It needs to be kept in mind that the bans on such incorporation were not imposed from the outside but have their origin in the genteel distaste for limiting liability that marked the early years of joint stock companies. The fear that such incorporation would not protect individuals will be largely set at rest if the Court of Appeal decision in *Trevor Ivory Ltd v Anderson* [1991] 3 NZLR 690 survives.
- As to auditors, it is remarkable how rare it has been, even in the buccaneering period preceding the stockmarket crash of 1987, for audit firms to show clients the door. To the extent that they have not, they are the authors of many of their own misfortunes; the Commission notes a growing recognition of this by auditors themselves (see, for example, “Big Six Accountancy Firms Sack their Dodgy Clients”, *The Independent*, 24 October 1997, 39).
- It would be possible to legislate for a cap on liability. A possible model is the New South Wales Professional Standards Act 1994 (see Whalley, 1997).
- It is unclear whether New Zealand courts will retreat from the broad basis of auditor liability to strangers expressed in *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 to the more circumscribed approach favoured by the Australian High Court in *Esanda Finance Corporation Limited v Peat Marwick Hungerford*

(1997) 71 ALJR 448. There is, for this reason, a strong case for a statutory reformulation of auditor liability.

- As to the territorial local authorities, it is uncontroversial to observe that their liability for the civil consequences of negligent supervision of building and like activities is entirely the result of conscious judicial social engineering. Some would contend that such judicial activism is insupportable and that in any event the relevant facts on which policy decisions might be based were not adequately placed before the courts. A statutory revisiting of this topic would, on such a view, be appropriate.

It is not the Commission's purpose in this report to offer a concluded view on any of these five issues. We refer to them simply to draw attention to the existence of these possibilities in support of our firm view that the substantive issues discussed in this report must be determined in a principled way, and not warped or skewed solely to answer "deep pocket" concerns.

- 16 The Commission recommends the enactment of the draft Act contained in this report.
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DRAFT CIVIL LIABILITY AND CONTRIBUTION ACT 199–

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**The Parliament of New Zealand enacts the
Civil Liability and Contribution Act 199–**

1 Title

This Act is the *Civil Liability and Contribution Act 199–*.

2 Purposes

The purposes of this Act are

- (a) to provide that concurrent wrongdoers are jointly and severally liable for the damages payable in respect of a loss; and
- (b) to revise and extend the rights of wrongdoers to have their liability to pay damages reduced because the wronged person has failed to act with due regard for that person's own interest; and
- (c) to revise and extend the rights of concurrent wrongdoers to contribution among themselves; and
- (d) to provide for the apportionment of uncollectible contribution.

3 Commencement

This Act comes into force on 1 January 199–.

COMMENTARY

Section 2

- C1 *Section 2* sets out the purposes of the Act by reference to the specific areas of law with which it deals.
- C2 *Paragraph (a)* refers to the purpose of providing for the joint and several liability of concurrent wrongdoers (defined in *section 4*) who have caused loss or damage of a kind to which the Act applies (provided for in *section 5*). The joint and several rule is in *section 7*.
- C3 *Paragraph (b)* refers to the purpose of enabling wrongdoers to have their liability to pay damages reduced when a plaintiff (wronged person) has failed to act with due regard for that person's own interests. *Section 8(1)(a)* and (2) provide for the attribution of loss in those circumstances as between a wronged person, on the one hand, and a single wrongdoer or more than one wrongdoer (as a group), on the other hand, in just and equitable proportions.
- C4 *Paragraph (c)* refers to the purpose of enabling concurrent wrongdoers to have their contribution to the plaintiff's damages adjusted amongst themselves. The substantive provisions are *section 8(1)(b)* and (2) and *section 10*.

4 Definitions

In this Act

compromise includes a consent judgment, a payment into court which has been accepted, and a settlement reached whether or not a proceeding has been brought;

concurrent wrongdoer means each of two or more wrongdoers whose acts or omissions give rise, wholly or partly, to the same loss, and includes a person who is vicariously liable for any act or omission of a wrongdoer;

judgment includes an award made by an arbitrator and an approved settlement or order that is final and binding under section 23 of the *Disputes Tribunals Act 1988*;

loss means loss or damage to which this Act applies under section 5;

payment includes the conferment of any benefit having a monetary value that is reasonably capable of being ascertained;

wrongdoer means a person whose acts or omissions give rise, wholly or partly, to a loss;

wronged person means a person who suffers a loss.

Section 4

- C5 A distinction is drawn in the Act between **compromises**, which are consensual and do not involve determinations of liability by the courts, and **judgments** given “on the merits”: see respectively *sections 14* and *12*. A consent judgment is treated as a compromise. A judgment which is neither on the merits nor by consent (such as a default judgment) falls into neither category.
- C6 Wrongdoers who, acting together or independently, have caused to the plaintiff loss or damage of a kind to which the Act applies are defined as **concurrent wrongdoers**. Included in the term are persons such as employers or principals liable vicariously for the acts or omissions of their employees or agents. The Act does not disturb rights to contribution or indemnity which may exist as between such persons independently of the Act: *section 18(1)*.
- C7 A **loss** must, independently of the Act, give rise to a liability to pay damages recoverable by civil action and includes loss or damage arising from a tort or breach of a contract, statute, trust or fiduciary duty: see *section 5*.
- C8 The ordinary meaning of **payment** is extended to include all benefits that can be translated into monetary values. These will most commonly be orders for specific performance of a contract and restitution orders.
- C9 In the case of counterclaims by a **wrongdoer**, the wrongdoer may also be a **wronged person**. Take for example a multi-vehicle collision, where one driver driving too fast collides with another who has encroached on to the wrong side of the road, in turn colliding with the plaintiff. The speeding driver is a wrongdoer with respect to the plaintiff, and a wronged person in relation to the driver on the wrong side of the road.

5 Application

- (1) This Act applies to any loss or damage if the person who suffered it, or anyone representing that person's estate or dependants, is entitled to recover compensation from some other person in respect of that loss or damage, whatever the legal basis of liability, whether tort, breach of contract, breach of trust, or otherwise.
- (2) Notwithstanding subsection (1), this Act does not apply to loss or damage arising wholly or partly from a failure to pay a debt or from the fault of two or more ships within the meaning of Part VIII of the *Maritime Transport Act 1994*.
- (3) This Act does not apply to any loss or damage arising wholly or partly from any act or omission that occurred before the commencement of this Act.

6 Act to bind the Crown

This Act binds the Crown.

Section 5

- C10 The Act is not to apply to loss or damage arising wholly or partly from a failure to pay a debt. There appears to be no significant dissatisfaction with the present law relating to existing rights to contribution amongst persons who owe debts to one another. *The Law of Restitution* provides a good analysis of the current law in respect of liabilities in debt (Goff and Jones, 1993, 306–332).
- C11 The omission of the fault of ships under Part VIII of the Maritime Transport Act 1994 reflects the inclusion in that Act of separate (but parallel) rules for liability. (Compare ss 31 and 32 of the Marine Pollution Act 1974 which impose joint liability on ship-owners for pollution damage but do not in themselves provide for contribution between those owners.)
- C12 It may be noted that one effect of the broad terms of *subsection (1)* is that the Act applies whether or not the act or omission on which liability is based is intentional, and whether or not such act or omission constitutes a crime.

Section 6

- C13 The application of the provisions of the Act to claims by or against the Crown accords with general principle: the Crown should generally be bound by the same laws as its subjects unless there are very good reasons for a different position (see generally *A New Interpretation Act* (NZLC R17, 1990) chapter iv). It also accords with current practice. Section 8(1) of the Crown Proceedings Act 1950 provides that the law relating to contribution and indemnity should apply to the Crown as if it were “a private person of full age and capacity”. Section 8(2) provides further that Part V of the Law Reform Act 1936 binds the Crown. The Contributory Negligence Act 1947 itself binds the Crown: see s 7 as inserted by the Statutes Amendment Act 1948.
- C14 The general statement in s 8(1) of the Crown Proceedings Act 1950 remains useful, because it applies the whole law relating to contribution and indemnity to the Crown. *Section 5* of our draft Act is not sufficient to replace that, as it applies only to actions for damages and does not affect the general law as it relates to debts, for example. However, s 8(2) of the Crown Proceedings Act 1950 should be repealed because the Law Reform Act 1936 is itself to be repealed: *section 20*.

7 Liability of concurrent wrongdoers

Concurrent wrongdoers are jointly and severally liable for the whole of the damages payable to a wronged person in respect of a loss.

Section 7

- C15 The rule that the liability of defendants is *joint and several* is retained. In effect this carries over s 17 of the Law Reform Act 1936 and s 86 of the Judicature Act 1908, but extends those schemes, for example, to damages payable under compromises between wrongdoers and wronged persons. The section will not affect joint and several obligations which arise outside the context of the Act, as in the case of contractual provisions stipulating that liability will be joint and several.

8 Attribution of loss

- (1) Loss suffered by a wronged person is attributable in accordance with subsection (2)
 - (a) as between a wronged person who has failed to act with due regard for that person's own interest and a wrongdoer, or concurrent wrongdoers taken as a group; and
 - (b) as among concurrent wrongdoers.
- (2) Loss suffered by a wronged person is attributable in the proportions that are just and equitable, having regard to
 - (a) the nature, quality and causative effect of
 - (i) the wronged person's failure (if any) to act with due regard for that person's own interest; and
 - (ii) the acts and omissions of the wrongdoer or of each concurrent wrongdoer; and
 - (b) the rights and obligations of the wronged person and the wrongdoer or each concurrent wrongdoer in relation to one another.

Section 8 continues overleaf

Section 8

C16 This section provides for the attribution of actionable loss suffered by a wronged person. Under *subsection (1)* it applies where there is either or both of the following circumstances:

- the wronged person is in part responsible for his or her own loss because of failure to act with due regard for his or her own interest;
- there are concurrent wrongdoers (see definition in *section 4*).

Section 8 does not affect the entirely different concept of mitigation of loss, which is concerned with the acts or omissions of a wronged person *after* loss is suffered (in the terminology of the present proposal). It should be noted, however, that in many, perhaps most, cases the question of which conceptual basis is relied on for reducing the amount recovered by the wronged person will not matter.

C17 It requires the loss to be divided by being attributed between these persons in proportions thought by the court to be just and equitable. *Subsection (2)* provides factors which the court must take into account in that determination. Because of the almost infinite variety of circumstances in which loss will fall to be attributed, the court is left with a complete discretion. The court must, however, have regard to the nature, quality and causative effect of the acts or omissions of the wronged person and the wrongdoer(s): *paragraph (a)*. The court must also have regard to the rights and obligations of each of these persons to the other(s): *paragraph (b)*.

C18 The procedure to be followed by the court is to be found in *section 11*.

- (3) For the purposes of this section,
- (a) a wronged person who does or fails to do anything in justified reliance on a contract, a rule of law, or an enactment does not fail to act with due regard for that person's own interest; and
 - (b) the reliance by a wronged person on a contract does not cease to be justified by reason only of a failure by that person to take any precaution against default by the wrongdoer in the performance of an obligation under the contract before the wronged person knows that such default has occurred.

Section 8 commentary continued

- C19 The substantive provision requiring reduction of a wronged person's damages where part of the loss is attributable to that person is in *section 9*. Under the existing law (Law Reform Act 1936 s 1 and Contributory Negligence Act 1947) apportionment of liability for the purposes of contribution and reduction of damages is possible only in tort actions, but this Act will require it in all civil claims (see *section 5*). Because these include claims in contract, it is necessary to take account not only of rules of law or enactments which govern the relationship between the parties but also of provisions of a contract on which a wronged person may have relied, where that reliance has caused or increased the loss. *Subsection (3)* states that where the wronged person did or failed to do anything in "justified reliance" on a contract, rule of law or enactment, the wronged person has *not* failed to act with due regard for that person's own interests. *Subsection (3)* makes it clear that a party to a contract is entitled until becoming aware of a breach to assume that the other party will duly perform that party's obligation. The words chosen are intended to preserve the wronged party's election to hold the other party to that party's performance (held to exist in *White & Carter (Councils) Ltd v McGregor* [1962] AC 413). The reference to default in performance would not include an anticipatory repudiation.

9 Reduced damages where part of loss attributable to wronged person

- (1) Where part of a loss suffered by a wronged person is attributable to a wronged person and part to a wrongdoer or concurrent wrongdoers,
 - (a) the wronged person is not precluded from recovering damages in respect of the loss from the wrongdoer or concurrent wrongdoers, but
 - (b) the damages payable to the wronged person by the wrongdoer or concurrent wrongdoers are reduced by the proportion of the loss attributable to the wronged person.
- (2) Where the legal basis of the liability of the wrongdoer to the wronged person is breach of contract, this section shall have effect subject to any express provision of the contract inconsistent with this section.

Section 9

C20 This section confirms that where part of the loss suffered by a wronged person is attributable to the wronged person (under *section 8*) and part to the wrongdoer(s), that fact will not preclude recovery of damages: *paragraph (a)*. But recovery is to be on a reduced basis, depending on the proportion of loss attributed to the wronged person: *paragraph (b)*. It thus extends to all areas of civil liability the rules now found for tort law in the Contributory Negligence Act 1947 and in claims in equity. *Subsection (2)* makes it plain that where the wronged person's claim is for breach of contract the provisions of this section may be excluded or modified by an express term of the contract.

10 Contribution among concurrent wrongdoers

- (1) A concurrent wrongdoer who in good faith has paid, or has agreed or is obliged by a judgment to pay, to a wronged person an amount which, as a proportion of the whole of the damages payable to the wronged person, exceeds the proportion of the loss attributable to that concurrent wrongdoer is entitled to recover contribution from any one or more other concurrent wrongdoers.
- (2) The amount of contribution recoverable by a concurrent wrongdoer is the amount by which the amount paid, agreed or obliged to be paid by that concurrent wrongdoer to the wronged person by way of damages exceeds an amount proportionate to the loss attributable to that concurrent wrongdoer.
- (3) A concurrent wrongdoer from whom contribution is recoverable is not liable to pay, by way of contribution, an amount greater than
 - (a) the amount for which that concurrent wrongdoer is liable to the wronged person by way of damages; or
 - (b) an amount that is proportionate to the loss attributable to that concurrent wrongdoer,whichever is the smaller.

Section 10

- C21 *Subsection (1)* provides a wrongdoer with a general right to contribution when that wrongdoer has paid, or has agreed to, or is obliged to pay damages to a wronged person in excess of the proportion of the loss attributable to that wrongdoer (ie, that part of the loss attributed to that wrongdoer). The loss in question may be the full loss suffered by the wronged person or a reduced amount taking into account the wronged person's proportion (see *section 9*). Contribution can be claimed once the court has ordered the wrongdoer to pay damages to the wronged person or a compromise has been agreed upon. But in the case of a compromise the agreement must have been reached in good faith. If so, the amount which the contribution claimant has agreed to pay is not open to challenge. The contribution defendant is protected against an excessive claim by *subsection (3)*.
- C22 *Subsection (2)* provides the formula for calculating the amount of contribution a wrongdoer is entitled to by virtue of *subsection (1)*: it is the amount by which the payment to the wronged person exceeds an amount proportionate to that person's share of the loss. For example, if D1 has paid half of total damages of \$1 000 (ie, a payment of \$500) but only one quarter of the loss is attributable to that wrongdoer, he or she will in principle be entitled to contribution of \$250 from other concurrent wrongdoers.
- C23 *Subsection (3)* imposes limits on the amount of contribution a wrongdoer can recover under *subsection (2)*. *Paragraph (a)* clarifies the rule that the amount of contribution which a wrongdoer (D1) can claim from another wrongdoer (D2) cannot exceed D2's liability to the wronged person (P) (in a situation in which, for example, D2 has a partial defence to P's claim that is not available to D1). To pursue the hypothetical case in para C22, in a situation where D2's total liability to P is \$200, D1 can claim contribution of only \$200 from D2, not \$250.
- C24 *Paragraph (b)* sets a second limit. No concurrent wrongdoer may be required to contribute a greater share of the damages than an amount proportionate to that wrongdoer's share of the loss. So, in the example given, D2's maximum contribution is \$200, or one-fifth of the total damages. But if the proportion of the loss attributable to D2 is only one-tenth, then D2 will be liable to D1 for a maximum contribution of \$100, being one-tenth of the total damages payable to P.

11 Legal proceedings

- (1) A wrongdoer or concurrent wrongdoers may seek reduction of damages under section 9 in a proceeding brought by a wronged person for the recovery of damages.
- (2) A claim for contribution by a concurrent wrongdoer against another concurrent wrongdoer under section 10 may be made in a proceeding brought by a wronged person for the recovery of damages or in a proceeding brought by a concurrent wrongdoer for the recovery of contribution.
- (3) In a proceeding where the reduction of damages is sought or there is a claim for the recovery of contribution, or both,
 - (a) the court must
 - (i) first, ascertain the loss suffered by the wronged person;
 - (ii) second, ascertain, in relation to the wrongdoer or concurrent wrongdoers taken as a group, the proportion of the loss (if any) attributable to the failure of the wronged person to act with due regard to that person's own interest;
 - (iii) third, where there are concurrent wrongdoers, ascertain, as among them, the proportion of the loss attributable to each; and
 - (b) the court must not
 - (i) attribute any proportion of a loss to a person who is not a party to the proceeding;
 - (ii) apportion as between the wronged person and the wrongdoer or concurrent wrongdoers, or as among concurrent wrongdoers, any entitlement to or liability for an amount awarded to the wronged person as exemplary damages.

Section 11

- C25 *Subsection (1)* permits the defendant(s) to seek reduction of damages in the plaintiff's action. This will be possible in all kinds of civil actions (*section 5*) where *section 9* applies, that is, where part of the plaintiff's loss is attributable to that person's failure to act with due regard for his or her own interests (see also *section 8*).
- C26 *Subsection (2)* gives a defendant who wishes to claim contribution against another wrongdoer the right to do so either in the plaintiff's action – by cross-claim or third party notice – or in separate contribution proceedings. See Rules 75 and 154–168 of the High Court Rules.
- C27 The procedure to be adopted by the court is to be found in *subsection (3)(a)*. *Subparagraph (ii)* will apply only when there is loss attributable to the plaintiff and *subparagraph (iii)* only when there are concurrent wrongdoers.
- C28 The procedure for the recovery of damages or contribution (or both) follows that set down by the House of Lords in *Fitzgerald v Lane* [1989] 1 AC 328, where it was held that the assessment of the plaintiff's share in the responsibility for damage did not involve the determination of the individual culpability of the defendants. Accordingly, the plaintiff's share of the responsibility is to be fixed as against all defendants together and only then is the reduced amount claimable by the plaintiff to be apportioned between the defendants.
- C29 When the proceedings are a claim for contribution the parties are bound, in relation to the loss suffered by the wronged person, by any judgment on the merits in a prior proceeding against the contribution defendant (see *section 12*). In this context see also *section 10(3)* which controls the amount for which such a defendant can be made liable.
- C30 *Subsection 3(b)* recognises that it is unjust and inconvenient to apportion loss against a person who is not a party to the proceedings. Any such finding cannot bind a non-party and would require reassessment if that person were later sued.
- C31 Similarly, it is unjust to apportion exemplary damages. Exemplary damages are directly related to the culpability and the nature of the behaviour of a particular wrongdoer.

12 Effect of prior judgment

In a proceeding for contribution brought by a concurrent wrongdoer, a judgment on the merits in a prior proceeding brought by the wronged person against any other concurrent wrongdoer is conclusive evidence, in the absence of fraud or collusion, of the liability of that other concurrent wrongdoer to the wronged person and of the amount by way of damages for which that other concurrent wrongdoer is liable to the wronged person.

13 Payments already made to be taken into account

In making any order for the payment by any concurrent wrongdoer of an amount by way of contribution, the court must take account of any payment already made by that wrongdoer by way of damages or by way of contribution.

14 Compromises

A compromise made by a concurrent wrongdoer with a wronged person is not a defence to a claim for contribution made against that concurrent wrongdoer and does not affect the attribution of a proportion of a loss to that concurrent wrongdoer for the purposes of such a claim.

Section 12

- C32 This section applies when there has been a judgment in an action by P against D2 and there has also been a judgment or compromise between P and D1. If D1 then seeks contribution from D2, the judgment between P and D2 is to be conclusive evidence of D2's liability (and the extent of that liability) to P. If the judgment was in favour of D2 it will be conclusive evidence that D2 was not a wrongdoer. The phrase "on the merits" excludes a judgment based on a statute bar or by consent, or a dismissal for want of prosecution.
- C33 As to the effect on a contribution claim of a prior judgment by P against D1, see *section 10(1)* and (3). D1's ability to recover contribution in respect of an amount D1 has been obliged to pay in damages to P is limited by the amount which D2 is liable to pay to P. So, where there are two wrongdoers, the amount to be apportioned between them is the lower of D2's liability to P or the amount of the judgment in favour of P suffered by D1.

Section 13

- C34 Payments already made will not have an effect on the attribution of loss between a wronged person and wrongdoer(s) under *section 8*. Such payments will, however, affect the amounts of contribution payable between wrongdoers. *Section 10* requires that concurrent wrongdoers should not pay more than the share of the loss attributed to them. *Section 13* accordingly provides that payments already made under a judgment or compromise as contribution are to be taken into account in a claim for contribution. The initial payment and the contribution payment ordered should equal the sum of the loss attributed to that defendant.

Section 14

- C35 This section is concerned with a situation in which a wrongdoer (D1) has suffered a judgment or made a compromise with a wronged person (P) and is pursuing a contribution claim against another concurrent wrongdoer (D2) who has already compromised a claim by P. It prevents D2 from avoiding liability to contribute to D1's damages payment on the ground that D2 has already settled with P. Nevertheless, the payment made to P by D2 must be taken into account under *section 12*.
- C36 As to the effect of D1's compromise with P, see *section 10(1)* and (3). D1's claim will be limited in accordance with *section 10(3)*.

15 Limitation in contribution proceedings

- (1) A defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement, that is available to a concurrent wrongdoer in respect of a claim for damages against that concurrent wrongdoer is not a defence in respect of a claim for contribution against that concurrent wrongdoer.
- (2) Notwithstanding subsection (1), if
 - (a) a defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement, is available to all concurrent wrongdoers in respect of a claim for damages made by a wronged person against them or any of them; and
 - (b) that defence ceases to be available to one or more of those wrongdoers because of an acknowledgement of liability or a payment in favour of the wronged person, that defence is available in respect of a claim for contribution from any other concurrent wrongdoer to whom the defence would have been available in respect of a claim for damages.
- (3) This section does not affect the availability to a concurrent wrongdoer of any defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement in respect of a claim for contribution in its own right.

16 Other defences in contribution proceedings

- (1) A defence to which this section applies that is available in respect of a claim for damages by a wronged person against a concurrent wrongdoer is similarly available to that concurrent wrongdoer in respect of a claim for contribution from that concurrent wrongdoer.
- (2) This section applies to a complete or partial defence under
 - (a) an agreement made between the concurrent wrongdoer and the wronged person before the loss occurred; or
 - (b) an enactment other than a limitation provision in the *Limitation Act 1950* or another enactment.

Section 15

- C37 *Subsection (1)* ensures that a limitation defence of any kind (ie, a bar against bringing proceedings because of a time limitation) available to D2 against P does not prevent D1 from claiming contribution against D2. It preserves and extends to all kinds of civil claims the rule now applying to contribution claims between tortfeasors under s 17(1)(c) of the Law Reform Act 1936.
- C38 *Subsection (2)*, however, allows such a defence to D2 where P's claim has become stale against both of them but D1 has voluntarily revived it by acknowledging liability or making a payment to P.
- C39 *Subsection (3)* relates to the limitation period applicable to the contribution claim itself and indicates that the section does not affect it (see the Limitation Act 1950 s 14 and paras 253–254 of our Preliminary Paper 19).

Section 16

- C40 This section applies to all other (ie, non-limitation) defences available to D2 in a claim by P. These include defences available under a contract between D2 and P or under an enactment (eg, a limit on the amount of D2's liability to P). Such defences will have been available to D2 when the act or omission occurred which gave rise to P's right to claim against D1. *Section 16* preserves them for D2 in any proceedings for contribution brought by D1.
- C41 The rationale for treating such defences differently from limitation defences (*section 15*) is that the former do not involve any change in D1's situation by reason of P's behaviour (ie, delay by P after the loss has been suffered).

17 Apportionment of uncollectible contribution

- (1) If
 - (a) contribution is recoverable from a concurrent wrongdoer under this Act; and
 - (b) a court has attributed a proportion of a loss to that concurrent wrongdoer; and
 - (c) the proportionate amount of contribution payable by that concurrent wrongdoer is uncollectible,
any other concurrent wrongdoer to whom all or part of that contribution is payable may apply to the court for apportionment of the uncollectible contribution.
- (2) Contribution is uncollectible for the purposes of this section if it cannot be collected because the concurrent wrongdoer by whom it is payable is insolvent, absent from New Zealand, or cannot be found.
- (3) If the court is satisfied that contribution payable by a concurrent wrongdoer is uncollectible, it may make an order apportioning the uncollectible contribution among the other concurrent wrongdoers (including the applicant) so that each is liable to pay or to forego a share of the uncollectible contribution that is proportionate to the loss attributable to each.
- (4) An application under this section may be made in a proceeding brought by a wronged person for the recovery of damages or in a proceeding brought by a concurrent wrongdoer for the recovery of contribution or in a separate proceeding, but must be brought within one year after the attribution of a proportion of the loss to the concurrent wrongdoer whose contribution is uncollectible.
- (5) Apportionment of uncollectible contribution under this section does not discharge the concurrent wrongdoer whose contribution is uncollectible from liability to pay contribution.

18 Contractual or indemnity rights not affected

- (1) This Act does not affect any right to contribution or indemnity that arises otherwise than under this Act.
- (2) This Act does not make any agreement for contribution or indemnity enforceable that would not have been enforceable if this Act had not been enacted.

19 Powers of the court

In a proceeding to recover damages or contribution or to apportion uncollectible contribution, the court may

- (a) order that contribution should be paid directly to a wronged person or into court pending a further order; or
- (b) order that payment of contribution should be postponed pending a further order; and
- (c) make any other order that it considers necessary or desirable to give effect to this Act.

Section 17

- C42 This section represents an attempt to reduce the harsh consequences for concurrent wrongdoers if one of their number cannot be found or is insolvent and therefore unable to meet the share of the plaintiff's judgment which has been attributed to that wrongdoer. It enables the court, if it thinks fit, to re-allocate the damages provided an application is made within one year after the original attribution of the loss amongst the parties other than the plaintiff. There is a provision as to limitation in *section 17(4)*.
- C43 A re-apportionment under this section does not release the absent or insolvent wrongdoer from liability – lest a change of circumstance subsequently renders that person available or solvent.

Section 18

- C44 A wrongdoer may have by contract or statute (other than this Act) or under equitable principles a right to have another concurrent wrongdoer contribute to damages payable to a wronged person, or even a right to a complete indemnity. *Subsection (1)* ensures that any such existing right remains undisturbed by the Act. On the other hand, *subsection (2)* confirms that an otherwise unenforceable agreement for contribution or indemnity is not made enforceable by the Act.

Section 19

- C45 The court is given wide powers to facilitate the purposes of the Act. *Paragraphs (a)* and *(b)* deal particularly with the need for interim orders where the position of all the parties may not have been finally established. This will be especially relevant to the possibility of a re-apportionment of damages under *section 17*.

20 Consequential amendments to other Acts

The enactments specified in Schedule 1 are amended in the manner indicated in that schedule.

21 Repeals

The enactments specified in Schedule 2 are repealed.

SCHEDULE 1
ENACTMENTS AMENDED

See section 20

Carriage by Air Act 1967 (1967/151)

section 12

Delete: “Contributory Negligence Act 1947”

Substitute: “Civil Liability and Contribution Act 199–”

section 27

Delete: “Contributory Negligence Act 1947”

Substitute: “Civil Liability and Contribution Act 199–”

Carriage of Goods Act 1979 (1979/43)

section 12(5)

Delete: “Contributory Negligence Act 1947”

Substitute: “Civil Liability and Contribution Act 199–”

Civil Aviation Act 1990 (1990/98)

section 97(5)

Delete: “Contributory Negligence Act 1947”

Substitute: “Civil Liability and Contribution Act 199–”

Occupiers’ Liability Act 1962 (1962/32)

section 4(8)

Delete: “Contributory Negligence Act 1947”

Substitute: “Civil Liability and Contribution Act 199–”

SCHEDULE 2
ENACTMENTS REPEALED

See section 21

Contributory Negligence Act 1947 (1947/3)

Repeal: the whole Act

Crown Proceedings Act 1950 (1950/54)

Repeal: section 8(2)

Judicature Act 1908 (1908/89)

Repeal: section 86

Law Reform Act 1936 (1936/31)

Repeal: Part V

Occupiers' Liability Act 1962 (1962/31)

Repeal: section 6

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