



**New South Wales
Law Reform Commission**

**Report
89**

**Contribution between persons
liable for the same damage**

March 1999

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New South Wales Law Reform Commission

To the Honourable Jeff Shaw QC MLC
Attorney General for New South Wales

Dear Attorney

Contribution between persons liable for the same damage

We make this final Report pursuant to the reference to this Commission dated
12 August 1985.



The Hon Justice Michael Adams
Chairperson



Professor Regina Graycar
Commissioner



Mr Craig Kelly
Commissioner



The Hon Justice David Hodgson
Commissioner



Professor Michael Tilbury
Commissioner

March 1999

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW) the then Attorney General, the Hon T W Sheahan BA LLB MP, referred by letter dated 12 August 1985, the following matter to the Law Reform Commission.

To inquire into and report on:

- the law governing rights of contribution between two or more persons responsible for the same damage; and
- any incidental matter.

Participants

Pursuant to section 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams
Judge John Goldring
Professor Regina Graycar
The Hon Justice David Hodgson
Mr Craig Kelly
Professor Michael Tilbury*

(* denotes Commissioner-in-Charge)

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GLOSSARY OF TERMS AND ABBREVIATIONS

Civil wrong: a wrong other than a crime.

Concurrent liability: where a defendant's liability to a plaintiff can be placed, at least potentially, on more than one of the bases of tort, breach of contract, breach of an equitable obligation or breach of a statutory obligation.

Concurrent wrongdoer: one of two or more wrongdoers (joint wrongdoers and/or several wrongdoers) whose acts concur to produce a single damage to a plaintiff under the same head of liability.

D1: generally the defendant claiming contribution (from D2).

D2: generally the person from whom contribution is sought (by D1).

Joint and several liability: a synonym for “solidary liability”.

Joint wrongdoers: one of two or more wrongdoers who produce, by what is taken by law to be the same act, a single damage to a plaintiff.

Mixed concurrent wrongdoer: one of two or more wrongdoers (joint wrongdoers and/or several wrongdoers) whose acts concur to produce a single damage to a plaintiff under more than one head of liability and may include breach of separate contracts.

P: the plaintiff.

Several wrongdoers: one of two or more wrongdoers who produce, by independent acts, a single damage to a plaintiff.

Solidary liability: describes a situation where, of two or more concurrent wrongdoers, each is liable severally and all are liable jointly to an injured person and that injured person may choose to sue each wrongdoer separately or any number jointly and also may choose to recover full compensation from any one of the wrongdoers against whom judgment is entered.

Tort: a civil wrong usually resulting in a defendant's liability in damages.

Tortfeasor: a wrongdoer whose liability is grounded in tort; the perpetrator of a tort.

Wrong: a crime, tort, breach of contract, breach of trust or other equitable obligation, or breach of statutory obligation.

Wrongdoer: a person who commits a wrong.

LIST OF RECOMMENDATIONS

Recommendation 1 (page 48)

Rights of contribution should apply to all tortfeasors.

Recommendation 2 (page 51)

Rights of contribution should be extended to include mixed concurrent wrongdoers. Rights of contribution to mixed concurrent wrongdoers, some of whom are liable in contract, should explicitly provide that a defendant, whose liability to the plaintiff in contract is expressly limited or exempted, should have the full benefit of those contractual terms.

Recommendation 3 (page 63)

The proposed legislation defining rights of contribution should supersede all other rights of contribution except equitable rights of contribution. The legislation should also state that statutory rights of contribution may be modified by express contractual terms.

Recommendation 4 (page 69)

In contribution proceedings brought by D1 against D2, following a judgment (whether on the merits or by consent) against D1 in favour of P, it should be no defence, in the absence of evidence of fraud or collusion, for D2 to establish that D1 was not liable to P. D2 may, however, contest any issue relevant to D2's liability to P, even if that issue was decided in favour of P in P's action against D1.

Recommendation 5 (page 72)

In contribution proceedings brought by D1 against D2, following a judgment (whether on the merits or by consent) against D1 in favour of P, D2 may argue that the level of damages awarded in the judgment given against D1 was excessive.

Recommendation 6 (page 76)

A settlement between D1 and P which is a final determination of P's rights in relation to that damage should be the basis of D1's right to claim contribution from D2. Where D2 is liable to P, D2 should not be entitled to resist the claim for contribution on the ground that D1 was never liable to P.

Recommendation 7 (page 79)

In contribution proceedings, the sum agreed to between D1 and P in settlement of P's claim should be presumed to be reasonable. When D2, in a claim for contribution, challenges the quantum of the award on the ground that it was unreasonable or that the settlement was not bona fide, the court may order D2 to pay a sum which the court considers appropriate in the circumstances.

Recommendation 8 (page 81)

In the case of a partial settlement between D2 and P, D1 should have a right of contribution from D2; D2 should have a right of contribution from D1; and P should be entitled to bring an action against D1 in order to obtain full compensation.

Recommendation 9 (page 84)

In circumstances where a release and indemnity is given by P to D2, the rights of contribution between D1 and D2 should be the same as in the case of partial settlements.

Recommendation 10 (page 84)

Any judgment in favour of D2, following a hearing on the merits in an action brought by P against D2, should be conclusive evidence that D2 is not “liable” to P so that D1 cannot claim contribution against D2, except where:

- 1. P's action against D2 fails for want of prosecution;**
 - 2. D1 is appealing from a decision in favour of D2 where both D1 and D2 are parties to the action brought by P and where both are joined as third parties; and**
 - 3. P's action against D2 fails because the action has become statute barred.**
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Recommendation 11 (page 94)

The sanction in costs rule should apply to all plaintiffs pursuing successive actions in relation to the same damage.

Recommendation 12 (page 95)

The “sanction in damages” rule should apply in actions against concurrent wrongdoers only in cases where the plaintiff has already received judgment for the whole of his or her damages without limitation.

Recommendation 13 (page 98)

The judgment bar rule should be abolished for all joint wrongdoers.

Recommendation 14 (page 99)

The settlement bar rule should be abolished for all joint wrongdoers.

Recommendation 15 (page 101)

There should be explicit recognition that abolition of the judgment bar rule for all joint wrongdoers will have the effect of abolishing the single judgment rule.

Recommendation 16 (page 107)

Section 26 of the *Limitation Act 1969* (NSW) should be amended to cover rights of contribution between all concurrent wrongdoers.

1. Introduction

- The Commission's reference
- The law of contribution

THE COMMISSION'S REFERENCE

1.1 On 12 August 1985 the Commission was given a reference to inquire into and report on:

1. the law governing rights to contribution between two or more persons responsible for the same damage; and
2. any incidental matter.

The reference, made under the Commission's Community Law Reform Program, was prompted by the suggestion of Justice Clarke that the current joint tortfeasor legislation be amended to permit rights of contribution between a tortfeasor and a person in breach of contract and between persons in breach of separate contracts. The reference deals with contribution only and does not, like the reviews of some other law reform agencies, extend to consideration of reforms to the contributory negligence regime.¹

1.2 In 1990 the Commission released, as part of this reference, an Interim Report on solidary liability.² The Interim Report ("LRC 65") was produced following a request by the then Attorney General who was conducting a review of the general law of tort liability in New South Wales.³ The Attorney General's review included consideration of the reform of the doctrine of solidary liability,⁴ so it was considered necessary that the Commission report

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1. See, for example, Scottish Law Commission, *Report on Civil Liability: Contribution* (Scot Law Com No 115, 1988) at Part 4; Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at Chapter 10; New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) esp at para 55-67, 113-128 and 188-195. See also G L Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons, London, 1951) at Part 2.
 2. New South Wales Law Reform Commission, *Contribution Among Wrongdoers: Interim Report on Solidary Liability* (Report 65, 1990) ("LRC 65").
 3. New South Wales, Attorney General's Department, *Tort Liability in New South Wales* (Legislation and Policy Division, Issues Paper, 1989); New South Wales, Attorney General's Department, *Tort Liability in New South Wales* (Legislation and Policy Division, Discussion Paper, 1990).
 4. New South Wales, Attorney General's Department, *Tort Liability in New South Wales* (Legislation and Policy Division, Discussion Paper, 1990) at para 4.4.

immediately on the doctrine, which essentially provides the reason for the existence of the law of contribution.⁵

1.3 The Commission released a Discussion Paper⁶ covering all issues relevant to the reference in September 1997. This Discussion Paper (“DP 38”) included 18 proposals for the reform of the law relating to contribution between persons liable for the same damage.⁷ Eight written submissions⁸ were received on matters raised in DP 38 and the Commission held consultations with nine groups and individuals.⁹

THE LAW OF CONTRIBUTION

1.4 In order to understand the current law relating to contribution between concurrent wrongdoers in New South Wales, it is necessary to consider the position with respect to joint wrongdoers and several wrongdoers¹⁰ (particularly tortfeasors) at common law, and the changes effected in relation to tortfeasors only by the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

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5. See LRC 65 at para 6.
 6. New South Wales Law Reform Commission, *Contribution Between Persons Liable for the Same Damage* (Discussion Paper 38, 1997) (“DP 38”).
 7. See DP 38 at xi-xiv.
 8. B K Cutler, *Submission*; Australian Council of Professions Ltd, *Submission*; National Joint Limitation of Liability Taskforce, Australian Society of CPAs and the Institute of Chartered Accountants in Australia, *Submission*; Law Society of NSW, *Submission 1*; A D M Hewitt, *Submission*; Law Society of NSW, *Submission 2*; Insurance Council of Australia Ltd, *Submission*; and B Donovan, *Submission*.
 9. Law firms, *Consultation*; Supreme Court Judges, *Consultation*; NSW Bar Association, *Consultation*; Insurance companies, *Consultation*; B McDonald, *Consultation*; Accounting bodies, *Consultation*; J L R Davis, *Consultation*; Australian Council of Professions Ltd, *Consultation*; R Cooter, *Consultation*.
 10. Where two or more concurrent wrongdoers are responsible for the same damage, it is not necessarily the case that they will both be liable in tort. It may be that liability is founded on breach of contract, breach of some equitable obligation or breach of statute. It may also be the case that one concurrent wrongdoer will be liable to the plaintiff for the same damage on a different basis from that of another concurrent wrongdoer. The wrongdoers are, in such instances, referred to collectively as “mixed concurrent wrongdoers”.

Joint wrongdoers and several wrongdoers at common law

1.5 At common law there is a distinction between tortfeasors who are joint wrongdoers and those who are several wrongdoers.¹¹ The effects of this distinction, outlined below, have been rendered all but irrelevant with respect to tortfeasors by provisions of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

Joint wrongdoers

1.6 Joint wrongdoers are those who can be said to be responsible for the same wrongful act.¹² Situations in which joint wrongdoers are most commonly found are agency, vicarious liability and common action.¹³ Joint wrongdoers are jointly and severally liable for the whole of the damage suffered by an injured party, that is, they can each be sued individually for the full amount of the injured party's loss and can be sued jointly in the same action. This was most commonly the case with respect to tortfeasors and gave rise to a number of consequences:

1. a judgment against a number of joint tortfeasors could be executed in full against any one of them;
2. the judgment bar rule was said to have effect so that judgment against one tortfeasor released all the others;¹⁴ and
3. the release of one tortfeasor, by deed or accord and satisfaction, released all the others (the settlement bar rule).¹⁵

Several wrongdoers

1.7 "Several wrongdoers" are responsible for separate wrongful acts which, however, contribute to the same damage. A simple illustration involves the situation where a passenger in a motor vehicle suffers personal

11. A third category of wrongdoers, namely those who have committed different wrongful acts and are responsible for different damage to the plaintiff, is not relevant to this discussion: see B M E McMahon and W Binchy, *Irish Law of Torts* (Professional Books, Abingdon, 1981) at 87; and R P Balkin and J L R Davis, *Law of Torts* (2nd edition, Butterworths, Sydney, 1996) at 842.

12. See *The Koursk* [1924] P 140.

13. J W Salmond, *Salmond's Law of Torts* (8th edition, Sweet & Maxwell, London, 1934) at 79-80.

14. *Brinsmead v Harrison* (1871) LR 7 CP 547.

15. *Cocke v Jennor* (1614) Hob 66; 80 ER 214.

injury in an accident, caused both by the negligence of the driver of the vehicle and that of the driver of another vehicle. They are severally liable for the full amount of the damage suffered by the injured person, but are not jointly liable for the same wrongful act. The judgment bar rule is presumed not to apply in the case of several wrongdoers, so that the release of one wrongdoer does not necessarily release the others.¹⁶

16. This was the case with respect to several tortfeasors before the introduction of contribution legislation: J W Salmond, *Salmond's Law of Torts* (8th edition, Sweet & Maxwell, London, 1934) at 82. See also *The Koursk* [1924] P 140; and J F Clerk, *Clerk & Lindsell on Torts* (8th edition, Sweet & Maxwell, London, 1929) at 60.

Contribution

1.8 The principle of solidary liability as it applies at present is such that, in general, concurrent wrongdoers (that is, joint wrongdoers and/or several wrongdoers) are each liable for the whole of the damage which an injured party has suffered and the satisfaction of that liability by one of the wrongdoers will discharge all the wrongdoers.¹⁷ The injured party may choose to take action against any or all of the wrongdoers. This may be achieved by one action or by several.

1.9 Where a court holds one of the wrongdoers responsible for the damage, or where one of the wrongdoers satisfies a judgment for more than his or her “proper share”, that wrongdoer may in some cases seek assistance or recompense from the other wrongdoer(s) in meeting the plaintiff’s claim. Such claims are known as contribution claims.

1.10 Contribution between concurrent wrongdoers forms merely one part of a wider law of contribution which spans many areas of traditional legal classification (such as torts, contract, equity and restitution) and which is concerned with the circumstances in which a person (D1) who has made, or is liable to make, a payment to a third person (TP) in discharge of a liability owed to TP can claim from another person or persons (D2) the whole or part of that payment because the payment discharges a common liability of D1 and D2 to TP. This wider body of law not only encompasses contribution claims between co-obligors (such as co-sureties and insurers) but also claims for general average contribution in maritime law.¹⁸ This wider law of contribution, however, falls outside the Commission’s terms of reference: D1 and D2, in such cases, are not necessarily “wrongdoers”; nor are they responsible for the same damage.

17. On satisfaction see Williams (1951) at para 9.

18. See generally R Goff and G Jones, *The Law of Restitution* (5th edition, Sweet & Maxwell, London, 1998) at Chapters 13-15.

1.11 For the purposes of this reference, contribution can be formally defined as the right of one defendant (D1) to claim contribution from another defendant (D2) where both D1 and D2 are wrongdoers liable for causing the same damage to the plaintiff (P). The most common example of such a claim for contribution arises where D1 claims contribution from D2 where D1 has paid P's damages in full.

The rule in *Merryweather v Nixan*

1.12 The case of *Merryweather v Nixan*, decided in 1799, set down the position at common law that contribution is not available between joint tortfeasors. The principal reason given by Lord Kenyon was that "he had never before heard of such an action having been brought, where the former recovery was for a tort".¹⁹ Commentators have taken this to be a reference to the maxim that "an action does not arise from a base cause",²⁰ that is, that tortfeasors, as wrongdoers, ought not to be allowed to found a cause of action (in this case, for contribution) on their own wrongdoing. The decision in *Merryweather v Nixan* is considered to have been inadequately argued.²¹ Nevertheless the position was later extended to cover non-intentional torts and situations involving several concurrent tortfeasors as well as joint tortfeasors.²²

1.13 The effect of the doctrine of solidary liability together with the rule in *Merryweather v Nixan* made it necessary to enact a statutory right of contribution between joint wrongdoers. Such a provision generally ensures that a plaintiff's right to obtain full compensation for an injury is protected without allowing that plaintiff the apparently unfair discretion of determining which defendant(s) to proceed against and, therefore, who will ultimately be liable to pay compensation, regardless of individual levels of responsibility. At the same time, each defendant is expected to pay an amount of damages equivalent to the extent of that defendant's responsibility for the harm sustained by the plaintiff.

19. *Merryweather v Nixan* (1799) 8 TR 186; 101 ER 1337.

20. *Ex turpi causa non oritur actio*.

21. See J G Fleming, *The Law of Torts* (9th edition, LBC Information Services, Sydney, 1998) at 293.

22. See Williams (1951) at para 26.

Statutory variation of the common law

1.14 Statutory exceptions to the rule in *Merryweather v Nixan* were first enacted in England to allow apportionment of liability for misrepresentations in company prospectuses in 1890²³ and concerning collisions between certain ships in 1911.²⁴

1.15 Changes to the law regarding tortfeasors generally, as opposed to other wrongdoers, were introduced in 1935 in England by the *Law Reform (Married Women and Tortfeasors) Act 1935* (Eng).²⁵ The English legislation was the result of a report of the English Law Revision Committee.²⁶ In New South Wales these changes were reproduced in virtually identical terms in the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). The effects of s 5 of the New South Wales Act are as follows:

- The judgment bar rule has been abolished by s 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) so that a judgment recovered against one tortfeasor shall not be a bar to an action against another tortfeasor who would, if sued, have been liable as a joint tortfeasor. This puts joint tortfeasors in the same position as several tortfeasors.
- The rule that the release of one joint tortfeasor releases all other joint tortfeasors has, in effect, been abrogated.²⁷

23. *Directors Liability Act 1890* (Eng) s 3, 4 and 5, later s 84(4) of the *Companies (Consolidation) Act 1908* (Eng) and then s 37(3) of the *Companies Act 1929* (Eng).

24. *Maritime Conventions Act 1911* (UK) s 3. In New South Wales s 2 and 259-263 of the *Navigation Act 1912* (Cth) deal with collisions between ships outside of Australian territorial waters. In New South Wales apportionment applies to all claims including those for collisions by vessels inside territorial waters: see Fleming (1998) at 306.

25. A brief history of the introduction of rights to contribution among tortfeasors in Canada may be found in University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Report 31, 1979) at 2-3. See also D Cheifetz, *Apportionment of Fault in Tort* (Canada Law Books, Aurora, 1981) at 5-11.

26. England and Wales, Law Revision Committee, *Third Interim Report* (Cmd 4637, 1934).

27. Although not expressly abrogated by the Act: *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 584-585 per Brennan CJ, Dawson and Toohey JJ, at 591 per Gaudron J, and at

- Section 5(1)(b) places a limit on the sums recoverable under judgments given where more than one action is brought so that the sums recoverable cannot, in the aggregate, exceed the amount of the damages awarded by the first judgment. The actions are described as being brought against tortfeasors liable in respect of the damage “whether as joint tortfeasors or otherwise”.
- Finally, s 5(1)(c) allows contribution to be recovered by any tortfeasor from any other tortfeasor who would, if sued, have been liable in respect of the same damage “whether as a joint tortfeasor or otherwise”. This has the effect of abolishing the rule in *Merryweather v Nixan*.

1.16 The *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) provides only for contribution between tortfeasors and does not deal with rights of contribution between wrongdoers who are not tortfeasors or between mixed concurrent wrongdoers. The issue of extending rights of contribution is dealt with in Chapter 3 of this report.²⁸

611-615 per Gummow J. The Tasmanian legislation expressly abrogates the rule: *Tortfeasors and Contributory Negligence Act 1954* (Tas) s 3(3).
28. Para 3.7-3.33.

2. Solidary liability

- Joint and several or solidary liability
- Proportionate liability
- The Interim Report (LRC 65)
- Developments since the Interim Report
- The arguments

JOINT AND SEVERAL OR SOLIDARY LIABILITY

2.1 When a person is injured as a result of someone else's (a defendant's) negligence, the defendant is liable to pay the injured person (the plaintiff) damages calculated as the amount needed to put the person back into the position they would have been in but for the injury.¹ Damages are assessed by reference to the magnitude of the plaintiff's loss, not by reference to the magnitude of the defendant's fault. Once it is established, on the balance of probabilities, that the defendant's breach of duty caused the plaintiff's injury, then the defendant is liable for the full loss. So, for example, a defendant who causes damage to a Rolls Royce will be required to pay far more by way of damages than a defendant who, by exactly the same act of negligence, damages an old beaten up car.

2.2 Where there is more than one defendant, solidary liability comes into play. Solidary liability, also termed "liability in solidum"² but more commonly called "joint and several liability", describes situations where each of two or more concurrent wrongdoers is liable severally and all are liable jointly for the damage caused. For the principle to apply, each defendant must be found to have breached a duty of care and caused damage to the plaintiff. Solidary liability enables the plaintiff to take action against any one of the defendants and receive full compensation from that defendant. It is then up to that defendant, through the system of contribution, to seek to recover a share of the damages from any other liable defendant. A plaintiff may of course take action against more than one of the defendants,³ but it may be more convenient for the plaintiff to choose only one defendant and leave it to the defendants to sort out the issue of apportionment among themselves by way of contribution. Plaintiffs are not involved at the contribution stage: instead, the defendant against whom compensation has been recovered bears the responsibility for recovering contribution from the other defendants. In practice, however, rules of court ensure that the question of contribution is usually dealt with in the same proceedings as the plaintiff's original action.

-
1. This principle is known, with some inaccuracy, as *restitutio in integrum*.
 2. The term *in solidum* has been adopted by the New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 25 and Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 31.
 3. This is facilitated by modern rules of procedure which allow for the liberal joinder of parties: see B C Cairns, *Australian Civil Procedure* (4th edition, LBC Information Services, 1996) at 306 and 310.

2.3 Where the various defendants appear to have differing capacities to pay, a plaintiff will often choose to sue the one amongst them who appears to have what is known as the “deepest pocket”, that is, the one most likely to be able to pay damages. This is particularly important in cases where at least one of the other defendants is uninsured, insolvent or otherwise not amenable to jurisdiction. While in theory, the defendant sued can seek contribution against the others via the system of solidary liability, in practice it may not be possible to recover contribution from defendants who are insolvent, uninsured, or otherwise not amenable to jurisdiction. This means that “deep pocket” defendants may find themselves being targeted by plaintiffs where they are one of a number of those responsible for the damage. Concerns about the practical effects of this on certain types of defendants, and suggestions that liability insurance has become prohibitively expensive for certain types of professionals and public bodies, have led to calls for the replacement of solidary liability with a system known as “proportionate liability”.

PROPORTIONATE LIABILITY

2.4 Proportionate liability differs from solidary liability in that it divides the loss among multiple defendants according to their respective shares of responsibility. Under proportionate liability, a plaintiff can only recover from a particular wrongdoer that proportion of the full compensation which represents the wrongdoer’s liability. This can be contrasted with the situation at common law where once a defendant is found to be a cause of the plaintiff’s damage that defendant is liable for all of the foreseeable loss.⁴ The theory that defendants should be liable to compensate a plaintiff for only that proportion of the damage for which they are responsible was first developed in Europe in the nineteenth century.⁵ There have been a number of proposals for, and some implementations of, systems of proportionate liability in a range of jurisdictions. While they vary from jurisdiction to jurisdiction, most

4. See *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388. See also New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at para 7.

5. Bluntschli was the first to argue this in his commentary to the Civil Code for the Canton Zurich: H Stoll, “Consequences of Liability: Remedies” in A Tunc (ed), *International Encyclopedia of Comparative Law* Vol 11 (Torts) Part 2 at para 162.

involve some modified or limited form of proportionate liability. A number of these are outlined later in this chapter.⁶

THE INTERIM REPORT (LRC 65)

2.5 As noted in Chapter 1, the issue of solidary liability has already been dealt with fully in LRC 65 which was published in July 1990 as an interim report on solidary liability.⁷ The report was prepared at the request of the then Attorney General, as part of a broader review of tort liability. The Commission also specifically considered and rejected the adoption of proportionate liability for non-economic losses in personal injury cases.

DEVELOPMENTS SINCE THE INTERIM REPORT

2.6 Since the interim report was published, debate about the relative merits of solidary versus proportionate liability has continued. A number of law reform reports have been published and there have been some developments in other jurisdictions and these are discussed below. In addition, the Commission received a number of submissions and representations on this issue in the course of its Contribution reference and for all of these reasons, it has been considered necessary to revisit the issue in the Commission's final report on this reference.

The Davis Report

2.7 In the early 1990s an inquiry into the law of solidary liability was instituted by Commonwealth and New South Wales Attorneys General and conducted by Professor J L R Davis of the Australian National University. The inquiry was completed in 1995.⁸ The principal recommendation was that

6. See para 2.25-2.42.

7. For the history of this aspect of the reference see LRC 65 at para 2.

8. J L R Davis, *Inquiry Into the Law of Joint and Several Liability: Report of Stage Two* (Commonwealth of Australia, 1995) (the "Davis Report"); and J L R Davis, *Inquiry Into the Law of Joint and Several Liability: Report of Stage One* (Commonwealth of Australia, 1994). *Draft Model Provisions to*

“joint and several liability be abolished, and replaced by a scheme of proportionate liability, in all actions in the tort of negligence in which the plaintiff’s claim is for property damage or purely economic loss”.⁹ Three other recommendations followed upon this. The first was that “joint and several liability for negligence which causes only property damage or economic loss be replaced by liability which apportions fault, in all circumstances, among those responsible for the damage or loss”.¹⁰ The second was that proportionate liability be made available, instead of joint and several liability, for contraventions of s 995 of the *Corporations Law* and s 52 of the *Trade Practices Act 1974* (Cth) and equivalent State provisions.¹¹ The final recommendation arose from concerns expressed in LRC 65 about the application of proportionate liability in cases of vicarious liability and proposed that “any change to the present rules on joint and several liability should be expressed not to apply to instances of vicarious liability”.¹²

Discussion Paper on Contribution

2.8 In DP 38, which was published in September 1997, the Commission canvassed the arguments put in the Davis Report, and in particular, drew attention to some of the practical difficulties that would follow from its recommendations.¹³ The Commission concluded:

We, therefore, restate our opposition to the introduction of a system of proportionate liability and remain unconvinced by the arguments put forward in the Davis Report. Our support for solidary liability is, of course, dependent on the existence, in principle, of rights of contribution between joint and several wrongdoers.¹⁴

Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability (1996) have also been released by the New South Wales and Commonwealth Governments.

9. Davis Report at 34.
10. Davis Report at 36.
11. Davis Report at 39.
12. Davis Report at 41. See also LRC 65 at para 43.
13. DP 38 para 2.47.
14. DP 38 para 2.49.

Recent developments in other jurisdictions

2.9 Three more reports dealing, at least in part, with the issue of solidary liability have been published since DP 38 was released in September 1997, namely: a report of the Canadian Standing Senate Committee on Banking, Trade and Commerce¹⁵ in March 1998; a report of the New Zealand Law Commission¹⁶ in May 1998; and an Expert Report commissioned by the Victorian Attorney-General's Law Reform Advisory Council¹⁷ in August 1998 (the "Victorian Expert Report").

New Zealand

2.10 The Report of the New Zealand Law Commission on apportionment of civil liability deals almost exclusively with the issue of solidary liability.¹⁸ The New Zealand Commission concluded that there was "no sufficiently compelling case for departure from the solidary liability rule".¹⁹

Canada

2.11 The Canadian Standing Senate Committee on Banking, Trade and Commerce confined its deliberations to solidary liability amongst co-defendants in situations involving financial loss in the context of the *Canada Business Corporations Act*²⁰ and other statutes dealing with financial institutions and cooperatives. The Committee concluded that it is "reasonable to apply a liability regime other than joint and several liability to claims for financial loss",²¹ based on the perceived impact of joint and several liability on the accounting and other related professions in particular. The Committee's recommendation was that there be a "modified proportionate liability regime for claims for economic (financial) loss arising by reason of

15. Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998).

16. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998).

17. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998).

18. The other matters raised in their Discussion Paper (New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992)) were considered uncontroversial.

19. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at 9.

20. RSC 1985, c C-44.

21. Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 28.

any error, omission, statement or misstatement in financial information” issued under a variety of Canadian federal statutes²² and that joint and several liability would continue for individual plaintiffs who could be classified as “unsophisticated plaintiffs” and for all plaintiffs whose claims arise out of fraudulent or dishonest conduct. The Committee tended towards a “net worth test” to distinguish between sophisticated and unsophisticated plaintiffs, but recommended further consultations on this point.²³

Victoria

2.12 The Victorian Attorney-General’s Law Reform Advisory Council commissioned an expert report to consider “the likely economic impact of the replacement of joint and several liability with proportionate liability in cases of purely economic loss and property damage”.²⁴ The Report concluded that “on the evidence currently available there is no clear economic or other justification for a wholesale shift to a system of proportionate liability”.²⁵ However, this cautious approach, adopted after considering a variety of issues including those related to insurance, deterrence, and corrective and distributive justice, does not preclude more precisely targeted options for reform. One option suggested was that proportionate liability could be introduced specifically for particular professional groups who provide financial and business advice, such as auditors and solicitors.²⁶ Another was the introduction of a capping regime in relation to such professional activities. The preferred option, however, was to investigate mechanisms for “consensual limitations” on solidary liability.²⁷

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22. Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 47.
 23. Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 50.
 24. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 3, 1998) at iv.
 25. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 3, 1998) at v.
 26. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 3, 1998) at para 4.1.
 27. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 3, 1998) at para 4.1-4.4. See para 2.70 below.

The American experience

2.13 According to the American Tort Reform Association (“ATRA”) 34 American states have now modified the doctrine of solidary liability in some way,²⁸ mostly by introducing a limited form of proportionate liability.

2.14 Caution should be exercised in drawing comparisons with US law as so many aspects differ from Australian law. Matters such as the absence of effective joinder provisions, the continued use of juries in civil matters and different costs rules have added to the general pressure for civil justice reforms in the United States, one of which has been the limited introduction of various forms of proportionate liability.

THE ARGUMENTS

2.15 The arguments concerning the advantages and disadvantages of each system have been extensively canvassed in LRC 65, the Davis Report and DP 38. They are briefly reviewed below under the following general headings:

- policy issues;
- procedural issues; and
- economic issues.

Policy issues

2.16 Arguments in favour of solidary liability tend to focus on the issue of fairness to the plaintiff in an action for damages.

2.17 First, solidary liability aims to ensure, as much as possible, full compensation for a plaintiff.²⁹ Obviously this will not be possible in

28. American Tort Reform Association, “Mission Statement and General Information” (as at 1 March 1999) <<http://www.aaabiz.com/atra/atrm.htm>>.

29. LRC 65 at para 11 and 44. See also Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 33; New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 168; University of Alberta, Institute

situations where no defendants are solvent or otherwise amenable to jurisdiction. Nor will it be possible where there is only one defendant who is also insolvent. The Davis Report questioned the appropriateness of full compensation in cases other than those involving personal injury and also noted that various statutory limits on full recovery had been enacted in a number of jurisdictions.³⁰ The Report doubted “whether the interest in financial security should always be completely protected by law”.³¹

2.18 There has, of course, been a general trend in Australia and elsewhere to impose statutory limitations on recovery. For example, in New South Wales statutory limits have been imposed on certain losses for personal injury under motor accidents and workers compensation legislation.³²

2.19 The *Professional Standards Act 1994* (NSW) now offers a means of limiting the liability of professionals in situations not involving death or personal injury, breach of trust, or fraud and dishonesty.³³ A scheme under the Act may apply to any class or classes of an occupational association, or to all members of the association³⁴ and will limit the liability to damages of a member of such an occupational association by either a “monetary ceiling” or

of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Report 31, 1979) at 31.

30. An example of an argument in favour of separate treatment of instances of injury to property or purely economic loss may be found in the Attorney General’s 1990 review of tort liability where it was argued that “[t]here is no interference with a plaintiff’s physical ability to work and earn money and therefore no compensation for the loss of this capacity. The plaintiff will not be forced to rely on the social welfare system and will not require ongoing medical and other care”: New South Wales, Attorney General’s Department, *Tort Liability in New South Wales* (Legislation and Policy Division, Discussion Paper, 1990) at para 4.45. A Standing Senate Committee in Canada has also concluded that financial loss should not be afforded the same recognition as personal injury: Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 17.
31. Davis Report at 32.
32. *Motor Accidents Act 1988* (NSW) Part 6; *Workers Compensation Act 1987* (NSW) Part 5. See also J Swanton and B McDonald, “Reforms to the Law of Joint and Several Liability: Introduction of Proportionate Liability” (1997) 5 *Torts Law Journal* 109 at 121.
33. *Professional Standards Act 1994* (NSW) s 5.
34. *Professional Standards Act 1994* (NSW) s 17.

a “limitation amount”.³⁵ A number of schemes have already been approved by the Professional Standards Council.³⁶ It has been suggested that limiting the amount of damages recoverable is a remedy only for catastrophic cases, and does not deal with the question of justice between the parties.³⁷

2.20 While it is often assumed that there is a qualitative distinction between personal injuries that affect bodily integrity, and those injuries that cause solely economic or property loss, this may not always be the case. Instances can be envisaged where loss of property or financial security, for example, in the case of small investors or home owners, could be equally devastating compared with some types of physical injury.

2.21 Secondly, since each wrongdoer has caused what the law characterises as indivisible damage to the plaintiff, it is fair that each wrongdoer is fully liable for that damage. The mere existence of other wrongdoers should not prejudice a plaintiff’s chance of full recovery.³⁸ Justice between multiple wrongdoers is then achieved, so far as possible, by the availability of rights of contribution and without any impact on the plaintiff’s full recovery.

2.22 One argument consistently put to the Commission in submissions and consultations has been that plaintiffs who are willing participants in financial transactions can never be considered entirely “innocent”. On this ground they then cannot expect to receive full compensation if one of the wrongdoers is unable to pay.³⁹ Such views, however, ignore the wide field that can be covered by the term “financial transactions” including purchase of residential properties and consumer transactions. This argument also fails to take

35. *Professional Standards Act 1994* (NSW) s 21 and 22.

36. Those administered by the Institute of Chartered Accountants in Australia and the Australian Society of Certified Practising Accountants, the College of Investigative and Remedial Consulting Engineers of Australia Inc, the Institution of Engineers Australia and the Association of Consulting Engineers Australia, and the Professional Surveyors Occupational Association of NSW Inc: New South Wales, Professional Standards Council, “Registered Professional Standards Schemes” (as at 1 March 1999) <http://www.lawlink.nsw.gov.au/psc.nsf/pages/liability_index>.

37. Accounting bodies, *Consultation*.

38. LRC 65 at para 14-15. See also Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 34.

39. B K Cutler, *Submission* at 5; Australian Council of Professions Ltd, *Submission* at 1-2; National Joint Limitation of Liability Task Force, Australian Society of CPAs and The Institute of Chartered Accountants in Australia, *Submission* at 1; Law Society of NSW, *Submission 1* at 3.

account of the role of contributory negligence: where a plaintiff is found not to have taken adequate care for their own interests, reductions in damages can be made to take account of that conduct on the part of the plaintiff.⁴⁰ But it is not appropriate to suggest that simply engaging in certain kinds of lawful activity (such as financial investments) should inevitably preclude someone from what would otherwise be their entitlement to seek a legal remedy in cases of negligence. In any event, this argument is not specific to the debate about solidary and proportionate liability in that the number of defendants is irrelevant to this issue. It is, therefore, beyond the scope of this inquiry. And, to the extent that acceptance of a certain degree of risk by plaintiffs may have any relevance, that is a matter better addressed at the contractual level between the parties to such transactions.⁴¹

2.23 The proponents of proportionate liability are chiefly concerned with the question of fairness to wrongdoers in situations where there are multiple wrongdoers, at least one of whom is not amenable to judgment. The problem is that under a solidary liability regime, a solvent wrongdoer may be called upon to pay more than what would otherwise be their proportionate share of the plaintiff's damage because of the inability of other concurrent wrongdoers, through, say, bankruptcy or absence from jurisdiction, to pay what would otherwise be their proportionate shares. It has also been suggested that, in such circumstances, a plaintiff will endeavour to fix even a small measure of responsibility for the damage on a solvent (usually deep-pocket or insured) defendant who will in effect bear the whole loss. This is claimed to be especially unfair in that one who was only "marginally at fault" would bear the entire responsibility for compensating the plaintiff. It is then argued that that defendant – the solvent wrongdoer – should be liable to pay only that sum which represents his or her responsibility for the damage to the plaintiff. However, as already explained,⁴² current tort rules provide that even a small amount of fault on the part of a defendant may lead to that defendant being found liable for the whole amount of the damage caused.⁴³ This would

40. For example, the High Court has agreed with the reasoning of the NSW Court of Appeal (in *Daniels v Anderson* (1995) 37 NSWLR 438 at 567-568) which held that contributory negligence may, depending on the facts of the case, be available to reduce the liability of a negligent auditor: *Astley v Austrust Ltd* [1999] HCA 6 at para 29.

41. See para 2.70 below.

42. See para 2.1 above.

43. See *Overseas Tankship (UK) Ltd v The Miller Steamship Company* [1967] 1 AC 617 at 636. See also New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at para 7.

be the situation where there was only one defendant. The question is then asked: Why should it be any different for a defendant simply because there are other defendants present who would also, by themselves, be found liable for the whole of the damage sustained by the plaintiff?

2.24 On balance the introduction of proportionate liability may not be the best way to solve the question of justice for some defendants. The better policy approach to any perceived unfairness in holding a D responsible for the entirety of P's loss may be to look at the broader rules governing tort law: specifically, the principles of causation, remoteness and proximity in tort.⁴⁴ It is clear that policy considerations are also affecting judicial decision making in cases involving professional groups who claim to be subjected to such unfairness.⁴⁵ For example, in the High Court's first direct consideration of the liability of auditors to a third party investor, it was held that there was no proximity and hence no duty of care to that investor.⁴⁶ Justice McHugh articulated some of the implications of extending the liability of auditors, including cost and provision of auditing services, and the administration of the court system.⁴⁷ He noted that the trend in other jurisdictions has been "very much against expanding the liability of auditors for negligent misstatements"⁴⁸ and later concluded that "the demands of corrective justice do not require the imposition of such a duty".⁴⁹

44. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998) at para 3.4. But see Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 22.

45. See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 and Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 20-22.

46. *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

47. *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 283.

48. *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 281.

49. *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 289.

Limited introductions of proportionate liability

2.25 As noted above, most proposals for, and implementations of, proportionate liability have been limited or modified in some way. Following are some examples.

2.26 **Proportionate liability where plaintiff is contributorily negligent.** At common law, contributory negligence by a plaintiff was a complete defence to an action in negligence.⁵⁰ However this position has been altered by statute so that damages are apportioned between a contributorily negligent plaintiff and the defendants to an action. This was achieved in New South Wales by Part 3 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) which provides that damages recoverable in a case involving contributory negligence “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”.⁵¹

2.27 An apportionment of responsibility due to contributory negligence between plaintiffs and defendants can be seen as somewhat analogous to the apportionment of responsibility among multiple defendants under both solidary liability (with contribution) and proportionate liability. In fact it has been suggested that the move to apportionment for contributory negligence has opened the way to a revision of the doctrine of solidary liability.⁵² It is argued that, because solidary liability arose at a time when only plaintiffs who were not contributorily negligent could recover damages, a concurrent wrongdoer should not now be in a position of having to bear more than his or her share of responsibility for compensation when a plaintiff, who is partly to blame for his or her own loss, can receive only a proportion of the damages which would otherwise have been due.

2.28 There are a number of ways of implementing forms of proportionate liability when a plaintiff is contributorily negligent. One is simply to provide that where a plaintiff is contributorily negligent, such liability as is attributed

50. See *Butterfield v Forrester* (1809) 11 East 60; 103 ER 926; J G Fleming, *The Law of Torts* (9th edition, LBC Information Services, 1998) at 303.

51. *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 10.

52. See New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 162; and LRC 65 at para 18.

to the defendants is not solidary but proportionate. This is the situation in British Columbia under the *Negligence Act*.⁵³

2.29 Another way is to allow proportionate liability but to preserve a right, where at least one of the defendants is insolvent or otherwise unavailable, for the plaintiff (who was contributorily negligent) to seek a secondary, or conditional, judgment which would divide liability for so much of D2's share as remained unpaid between P and D1.⁵⁴ This was proposed in 1951 by Professor Glanville Williams⁵⁵ whose aim was to spread the risk arising from an insolvent, or otherwise unavailable, defendant so that the whole burden would not fall either entirely on the remaining defendant(s), as would be the case if solidary liability were wholly retained, or fall entirely on the plaintiff, as would be the case if the doctrine were abolished.⁵⁶ Williams' proposals were adopted by s 38 of the *Civil Liability Act 1961* (Ireland).

2.30 While there are conceptual links between the law relating to contributory negligence and the law relating to contribution,⁵⁷ there are also

53. The effect of s 1 and 4 of the *Negligence Act* (RSBC 1996, c 333) with regard to solidary liability was not fully realised until the British Columbia Court of Appeal interpreted them as providing that, where a plaintiff is found to be contributorily negligent, the liability of the tortfeasors is not solidary but several: *Leischner v West Kootenay Power and Light Co Ltd* (1986) 24 DLR (4th) 641 at 665-667. The British Columbia Law Reform Commission has recommended that the doctrine of solidary liability not be abrogated where a plaintiff is found to be contributorily negligent: Law Reform Commission of British Columbia, *Report on Shared Liability* (LRC 88, 1986) at 22.

54. G L Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons, London, 1951) at 404. Contributory negligence of the plaintiff is not required for there to be an apportionment of an uncollected share among remaining defendants. For example, the British Columbia Law Reform Commission has recommended along these lines: Law Reform Commission of British Columbia, *Report on Shared Liability* (LRC 88, 1986) at 22; and Connecticut has implemented such a scheme: *Connecticut General Statutes* § 52-572h(c) and (g). See also Williams (1951) at 171-172. However, such schemes would require a plaintiff to face court proceedings a second time and it has been suggested that the costs of the adjudication to allocate the defendant's share would outweigh the fairness of the ultimate result: Davis Report at 37.

55. Williams (1951).

56. Williams (1951) at 403.

57. Some law reform agencies have reviewed both contributory negligence and contribution together: eg, Scottish Law Commission, *Report on Civil Liability: Contribution* (Scot Law Com No 115, 1988) at Part 4; Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and*

significant conceptual difficulties. Both are concerned with fairly apportioning responsibility and both become relevant only when the plaintiff has established all the elements of a cause of action against at least one defendant. Put simply, the main conceptual distinction is that a defendant must be found to be in breach of a duty of care that was owed to P, while a plaintiff need not be in breach of any duty of care for contributory negligence to be found. For example, in motor accidents, passengers who fail to wear seat belts are not to blame for the accident, in that the accident is not caused by that failure, but that failure may increase the magnitude of the damage suffered and for that reason, a reduction is made for contributory negligence.⁵⁸

2.31 It has also been suggested that allowing proportionate liability where a plaintiff is contributorily negligent may not achieve the desired result with respect to claims against professionals. In many cases, where, for example, auditors have been negligent, contributory negligence on the part of the plaintiff will simply not be established.⁵⁹ This can be seen in the Federal Court's refusal to accept as a general proposition that "a person who has suffered loss because of a failure of duty by a professional adviser is negligent if he or she failed to read and understand complex legal documents".⁶⁰

2.32 Accordingly the Commission rejects any attempt to introduce proportionate liability on the basis that contributory negligence is already available.

Contributory Negligence (1988) at Chapter 10; New Zealand Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) esp at para 55-67, 113-128 and 188-195. See also Williams (1951) at Part 2.

58. See *Froom v Butcher* [1976] 1 QB 286.

59. See A Burrows, "Should One Reform Joint and Several Liability" in N J Mullany and A M Linden (ed), *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, Sydney, 1998) 102 at 115.

60. *Australian Breeder Co-operative Society Ltd v Jones* (1997) 150 ALR 488 at 545. See also the comments of Heerey J in *Henderson v Amadio Pty Ltd* (1995) 62 FCR 1 at 194: "I do not see that it is negligent to rely on apparently competent and trusted accountants as the applicants ... did". But see *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1997) 26 ACSR 114 at 303-304.

2.33 *An industry specific approach.* An industry specific approach to the introduction of proportionate liability has already been achieved, with appropriate safeguards, with respect to building works in New South Wales,⁶¹ Victoria,⁶² South Australia,⁶³ and the Northern Territory.⁶⁴

2.34 In New South Wales the *Environmental Planning and Assessment Amendment Act 1997* (NSW) came into effect on 1 July 1998. This Act inserted Part 4C into the *Environmental Planning and Assessment Act 1979* (NSW) and implements a system of proportionate liability with respect to “building actions”⁶⁵ and “subdivision actions”.⁶⁶ However, it also recognises the need to ensure that defendants are able to pay and, consequently, the need for plaintiffs to be fully compensated⁶⁷ by requiring that “accredited certifiers” and “building practitioners” are covered by such insurance as may be specified by regulation.⁶⁸ This ensures that plaintiffs will be protected against the possible insolvency of defendants.⁶⁹ Regulations concerning insurance have been inserted as Part 7D of the *Environmental Planning and Assessment Regulation 1994* (NSW).

2.35 Victoria, South Australia and the Northern Territory have implemented similar schemes. However, it has been pointed out that those engaged in building litigation usually rely, in addition to actions in contract and in negligence, on the misleading and deceptive conduct provisions of the *Trade Practices Act 1974* (Cth)⁷⁰ which makes no provision for contribution.⁷¹ This allows some litigants to circumvent any regimes which apportion liability.⁷²

61. See *Environmental Planning and Assessment Act 1979* (NSW) Part 4C.

62. See *Building Act 1993* (Vic) s 131.

63. See *Development Act 1993* (SA) s 72.

64. See *Building Act 1993* (NT) s 154-158.

65. A “building action” is defined as “an action (including a counter-claim) for loss or damage arising out of or concerning defective building work. “Building work” includes “the design, inspection and issuing of a Part 4A certificate or complying development certificate in respect of building work”:
Environmental Planning and Assessment Act 1979 (NSW) s 109ZI.

66. A “subdivision action” is defined as “an action (including a counter-claim) for loss or damage arising out of or concerning defective subdivision work”:
Environmental Planning and Assessment Act 1979 (NSW) s 109ZI.

67. *Building Act 1993* (Vic) s 135(1).

68. *Environmental Planning and Assessment Act 1979* (NSW) s 109ZN, 109ZO and 109ZP.

69. See also Swanton and McDonald (1997) at 113.

70. Section 52.

2.36 Proportionate liability could be extended to other professional groups. One possibility is that it could be made available to those accredited under the *Professional Standards Act 1994* (NSW). One suggestion from Victoria has been the introduction of proportionate liability for “auditors and solicitors as well as others who provide financial business advice”.⁷³ The New Zealand Law Commission also considered, but rejected, an industry specific proposal.⁷⁴ The Canadian Standing Senate Committee on Banking, Trade and Commerce, because of constitutional requirements, was limited to considering proportionate liability with respect to the provision of financial services under federal statutes.⁷⁵

2.37 ***Proportionate liability for types of plaintiffs.*** The Canadian Standing Senate Committee on Banking, Trade and Commerce sought to mitigate the effect of an introduction of proportionate liability in cases of financial loss under Federal statutes by advocating the recognition of a class of plaintiffs, described as “unsophisticated”,⁷⁶ to whom solidary liability would continue to apply. The “unsophisticated” plaintiffs would be identified by means of a net worth test.⁷⁷ There are a number of problems with such an approach. These include:

- the arbitrariness of any financial limit, however defined;
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71. See K Tapsell, “Severing Liability in Building Cases” (1998) 36(7) *Law Society Journal* 42 at 44. See also para 3.32-3.33 below.
72. Although there is some support from the Federal Court for findings of coordinate liability at law or in equity such as to give rise to a right to contribution under the *Trade Practices Act 1974* (Cth): *Re La Rosa; Ex parte Norgard v Rodpat Nominees Pty Ltd* (1991) 31 FCR 83; *Trade Practices Commission v Manfal Pty Ltd (No 3)* (1991) 33 FCR 382 at 385; and *All-State Life Insurance Co Ltd v Australian and New Zealand Bank Group Ltd* (Australia, Federal Court, NG381/94, Beaumont J, 14 February 1995, unreported).
73. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 3, 1998) at para 4.1.
74. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at para 10, footnote 3.
75. Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998).
76. Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 47.
77. Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 47-50.

- the potential for avoidance of proportionate liability by asset stripping, for example by the creation of two dollar companies and family trusts; and
- the procedural complexity where there is more than one plaintiff, and at least one is sophisticated.

While the Commission is mindful that a distinction can be drawn between plaintiffs for the purpose of imposing legal liability,⁷⁸ we agree with all participants in our consultations that the Canadian proposals would be unworkable in practice in this context.⁷⁹

2.38 ***Where defendant is responsible for less than a specified percentage of liability.*** Another means of alleviating perceived unfairness to a defendant who is considered only marginally at fault is to establish a system whereby a defendant will be proportionately liable so long as the defendant's share of responsibility is less than a specified percentage.

2.39 Schemes of this nature have been introduced in a number of American States. For example, while Texas has introduced proportionate liability, it has retained solidary liability in circumstances where a defendant is more than 50% responsible, as well as where a defendant is more than 15% responsible in certain defined circumstances of harm arising from toxic torts.⁸⁰ Other States that have introduced limited forms of proportionate liability, but retained solidary liability where a defendant is more than 50% responsible, include Wisconsin⁸¹ and Montana.⁸²

2.40 However, it can be argued that whatever percentage was arrived at as the threshold, it would be an arbitrary distinction, with no rationale for preferring one particular cut-off point over another.

2.41 ***Judicial discretion.*** This method was considered by the New Zealand Law Commission, namely to allow liability to be reduced, if at all, according to the justice of each case.⁸³ Some civil law systems recognise a form of proportionate liability even where there is a single defendant – so that a

78. See, for example, *Trade Practices Act 1974* (Cth) s 51AC.

79. For example, Law firms, *Consultation*.

80. *Civil Practice and Remedies Code* (Texas) s 33.013.

81. § 895.045 of the *Wisconsin Statutes*.

82. *Montana Code Annotated 1997* § 27-1-703.

83. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at para 10.

momentary lapse will not necessarily mean liability for the full loss suffered. However, there is nothing in this particular policy argument that goes specifically to cases involving multiple defendants. Instead, it is an argument more in the nature of a general critique of the existing tort system, and as such is outside the scope of this enquiry.

2.42 **Conclusion.** Ultimately these “half-way houses” that go some way to introducing proportionate liability are unsatisfactory in that they simply introduce more complexity and uncertainty into the legal system. Accordingly the Commission does not consider them an appropriate means of balancing the rights of plaintiffs and defendants.

Procedural issues

2.43 In this section we consider the procedural implications of the various systems of liability. In considering whether one system of liability is likely, in practical terms, to lead to more complexity in the conduct of litigation than another, we also consider the related question of who should ideally bear some of the procedural burdens which arise.

2.44 The Davis Report dismissed concerns raised about practical problems involved in the introduction of proportionate liability as “more apparent than real”,⁸⁴ and stated that there was no evidence of problems in the Republic of Ireland where the *Civil Liability Act 1961* has been in force for over 30 years; in British Columbia, where a system of proportionate liability has been in place for 10 years;⁸⁵ or in various unspecified jurisdictions in the United States. Some submissions to the Commission have claimed that proportionate liability will in fact be simpler from a procedural point of view, highlighting the apparent complexity of the current system of contribution and its potential for separate proceedings.⁸⁶

84. Davis Report at 33.

85. For a history of the provision, which was in force, but its effect not appreciated until 1986, see para 2.28.

86. B K Cutler, *Submission* at 3; Australian Council of Professions Ltd, *Submission* at 2; National Joint Limitation of Liability Taskforce, Australian Society of CPAs and the Institute of Chartered Accountants in Australia, *Submission* at 7; Law Society of NSW, *Submission 1* at 4-5.

The burden of conduct of proceedings

2.45 A system of proportionate liability if introduced will most likely involve a number of procedural difficulties that are quite different to the present system of solidary liability. These will tend to fall on plaintiffs whereas solidary liability tends to shift the burden of what may be complex legal proceedings onto defendants.⁸⁷

2.46 One of the procedural difficulties relates to the manner in which the proportionate share of each concurrent wrongdoer would have to be determined. Problems may arise where all the concurrent wrongdoers are represented in the action, in that the plaintiff would have an interest in the determination of proportionate liability for each defendant. It would, for example, be in the plaintiff's interest to argue for a greater proportionate liability to attach to the defendants who are most able to pay.⁸⁸ This would involve increased complexity in the presentation of a plaintiff's case. The task of dividing responsibility is sometimes seen as best undertaken between the wrongdoers themselves rather than between the plaintiff and individual wrongdoers, especially where the plaintiff has not contributed to his or her own loss.

2.47 A question also arises as to how far a plaintiff should go in taking action against all those who might conceivably be liable in some degree in case one of the other defendants raises those others' liability in order to minimise their own. At present it is usually the defendants who decide who to bring in as co-defendants since it is in their interest to identify other defendants from whom they may seek contribution.⁸⁹ Defendants may also be in a better position to identify other potential wrongdoers,⁹⁰ particularly when complex chains of events are involved. Plaintiffs may have to choose from a wider range of defendants in order to ensure something near full recovery.

General issues

2.48 Clause 2(3)(a) of the draft model provisions to implement the Davis Report states that in apportioning responsibility between defendants in the proceedings "the Court may have regard to the comparative responsibility of

87. LRC 65 at para 16.

88. See LRC 65 at para 38.

89. J L R Davis, *Consultation*.

90. B McDonald, *Consultation*. See also para 2.68.

any concurrent wrongdoer who is not a party to the proceedings”.⁹¹ Assuming some of the defendants are absent, how does a judge apportion liability in the absence of some defendants, or even in the absence of all but one defendant? Are other defendants then bound by that apportionment? It has been suggested that this may involve liability being fixed on persons who are not parties or even not specifically identifiable.⁹² There may also be adverse impacts on the cost and efficiency of litigation, especially in cases where defendants are subject to winding up proceedings or bankruptcy.⁹³

2.49 It has also been suggested that a plaintiff might be under-compensated in some cases, where an initial determination of liability between the plaintiff and a defendant was different from the proportion determined at a later trial of liability with respect to another defendant.⁹⁴ Options for getting around such difficulties include restricting the assignment of shares of liability solely to the parties to a particular action together with the implementation of a procedure whereby a defendant may join other defendants to the plaintiff’s claim. This option could be seen as expanding the scope and complexity of litigation.

2.50 The question of the onus of proof under a system of proportionate liability has not been adequately addressed. One view put to the Commission in consultations was that the onus with respect to the roles of absent defendants would have to be on the defendants before the court, otherwise the plaintiff would have to prove a negative – that the other defendants were not liable.⁹⁵

2.51 There is also the problem of the extent to which the action between P and D1 creates an estoppel in respect of claims between D2 (D3, D4, etc) and D1.⁹⁶

2.52 Practical difficulties may also be encountered if proportionate liability is implemented only in certain circumstances, for example, with respect to

91. *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability* (1996).

92. K Tapsell, “Severing Liability in Building Cases” (1998) 36(7) *Law Society Journal* 42 at 46.

93. See also Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 40.

94. LRC 65 at para 40.

95. Supreme Court Judges, *Consultation*.

96. See DP 38 para 4.27-4.31; B McDonald, *Consultation*.

economic loss but not non-economic loss, yet both forms of loss are suffered in the one incident.⁹⁷ The existence of two sets of rules, one of which applies where economic loss is involved and the other where it is not,⁹⁸ will give rise to unwanted complexity.

Effect on settlements

2.53 It has been suggested that the introduction into litigation of complicated questions of proportionate liability would have the undesirable effect of hindering settlements. The resultant uncertainty in litigation may be more likely to benefit defendants, in particular those supported by insurers.⁹⁹ On one side it can be argued that, if solidary liability were abolished, a defendant's liability would be lower, easily predicted and settlements would become easier, whereas on the other side it can be argued that a reduction of risk at trial might reduce the incentive to settle.¹⁰⁰ However, the Davis Report has suggested that the experience in British Columbia has been that all parties need not be joined for settlement negotiations to take place.¹⁰¹

Dangers of non-uniform approach

2.54 If the introduction of proportionate liability is not uniform across the State and Federal jurisdictions, forum shopping will occur. An example of what may eventuate can be seen in the understanding that actions under the *Trade Practices Act 1974* (Cth) could provide a way of getting around the limitations under the *Professional Standards Act 1994* (NSW)¹⁰² and of getting around proportionate liability in building cases.¹⁰³

2.55 However, there may also be implications for Australia's place in the international market if Australia were to retain the system of solidary liability. One witness to the Canadian Standing Senate Committee claimed that, given the changes to the legal and economic environment and changes

97. LRC 65 at para 47.

98. This would be further complicated by the suggestion that statutory claims arising out of consumer transactions should also be exempted: see *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability* (1996) at 3.

99. LRC 65 at para 42.

100. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 40.

101. Davis Report at 33.

102. Insurance companies, *Consultation*.

103. See K Tapsell, "Severing Liability in Building Cases" (1998) 36(7) *Law Society Journal* 42 at 46.

in other jurisdictions, retaining the current position in Canada “would be fundamentally out of step with the global approach to liability for the provision of professional services”.¹⁰⁴

Conclusion

2.56 The Commission is of the view that arguments about the complexity of the respective systems are finely balanced. While the regime of solidary liability with contribution on the face of it seems to permit multiple proceedings, the reality is that rules of court relating to joinder of parties ensure that most matters are dealt with in one proceeding in any case. For example, the Victorian Expert Report considered that there may be little to distinguish the two forms of liability so far as procedural costs go, citing the flexibility of joinder provisions in Australian courts and the scope for estoppel which may arise if issues are not dealt with in the same proceedings.¹⁰⁵ However, the Commission is still of the opinion that a system which encourages defendants to identify other potential wrongdoers will ultimately be the most efficient since it ensures that as many wrongdoers as possible are before the court in one proceeding. This is best achieved by the current system.

Economic issues

Effect on liability insurance

2.57 Recent proposals for reform of the law of solidary liability in New South Wales have been made against a backdrop of general concern amongst professional groups, particularly accountants and auditors,¹⁰⁶ about the increasing costs of liability insurance.¹⁰⁷ Similar concerns have been

104. Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 29.

105. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 3, 1998) at para 2.6.

106. See, eg, J Burrows, “Going for Broke” *Australian* (22 October 1992) at 23; and “Joint and Several Liability: CLA Proposals” (1997) 11(1) *Commercial Law Quarterly* 21.

107. See J L R Davis, *Inquiry Into the Law of Joint and Several Liability: Report of Stage Two* (Commonwealth of Australia, 1995) at 11; New South Wales, Attorney General’s Department, *Tort Liability in New South Wales* (Legislation and Policy Division, Discussion Paper, 1990) at para 4.4.1-4.4.9.

expressed in other jurisdictions such as England, with attacks on solidary liability there being led by accountants and the building industry.¹⁰⁸

2.58 It is claimed that the doctrine of solidary liability has contributed to the growing costs of insurance, in particular in the liability insurance market. This is because the system is said to encourage the fixing of even a small amount of responsibility on to a professional who is likely to be covered by liability insurance in the hope that that professional can pay the share of any other wrongdoers who may be insolvent or otherwise not amenable to jurisdiction.

2.59 As with other law reform agencies,¹⁰⁹ the Commission has been unable to reach a conclusion on the effect of solidary liability on the liability insurance market.¹¹⁰ While claims of a liability insurance crisis are frequently made, empirical evidence to support this is scarce and most of the evidence is purely anecdotal. The Ontario Law Reform Commission considered the arguments concerning the liability insurance crisis, including claims that there is only anecdotal evidence of a crisis with much of the necessary reliable evidence being in the hands of the insurance industry itself, and concluded that such claims were an unsatisfactory basis on which to alter the present rule of solidary liability.¹¹¹ In New South Wales the Attorney General's review of tort liability was "prompted by reports of the cost of insurance, claims of excessive awards of damages and an expansion of findings of liability" but noted in its discussion paper that the review had been "somewhat hampered by the absence of firm statistical data on many of

108. See England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996) at para 3.1-3.4. The Common Law Team also noted moves by the accounting profession in Canada: at para 6.10, on which see: Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 7.

109. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998) at para 2.10; University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Report 31, 1979) at 33; New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 167; cf para 84-89.

110. See DP 38 at para 2.15-2.16; LRC 65 at para 30-36.

111. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 38.

the issues raised” and relied on anecdotal evidence from the various submissions received.¹¹²

2.60 Submissions to the Commission have argued strongly that there is a link between solidary liability and the liability insurance crisis, with one submission suggesting that this can be supported by “anecdotal evidence and logical argument”.¹¹³ While there is no doubt that costs of liability insurance have increased in recent years,¹¹⁴ the Commission is not convinced that this is solely or even principally attributable to solidary liability.

2.61 Equally, if not more, difficult to predict is the likely effect of proportionate liability on the liability insurance market. Clearly, in a simple competitive insurance market, a reduction in liability would result in a reduction in claims and, presumably, a reduction in premiums. However, the conclusion could easily be that the form of liability may be only a relatively small component of the factors which have gone towards generating the perceived liability insurance crisis.¹¹⁵ A number of factors make it extremely difficult to predict the effect of different liability regimes on the liability insurance market:

- the insurance companies and professional organisations are unwilling to reveal commercially sensitive information relating to premiums and levels of insurance;¹¹⁶
- insurance cycles are hard to determine because the Australian insurance market is subject to developments in the global economy

112. New South Wales, Attorney General’s Department, *Tort Liability in New South Wales* (Legislation and Policy Division, Discussion Paper, 1990) at para 3.1-3.2.

113. B K Cutler, *Submission* at 11. See also National Joint Limitation of Liability Taskforce, Australian Society of CPAs and the Institute of Chartered Accountants in Australia, *Submission* at 6 and Law Society of NSW, *Submission 1* at 6-7.

114. See M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 3, 1998) at para 2.9; National Joint Limitation of Liability Taskforce, Australian Society of CPAs and the Institute of Chartered Accountants in Australia, *Submission* at 4-5; and Law Society of NSW, *Submission 1* at 6.

115. R Cooter, *Consultation*.

116. Law firms, *Consultation*; Accounting bodies, *Consultation*.

generally and the international re-insurance market in particular;¹¹⁷

- any changes are unlikely to be detected in the short to medium term because of the length of time taken to sort out the larger claims in the system (upwards of ten years).¹¹⁸

The Victorian Expert Report has found that it is not clear that the introduction of proportionate liability would be beneficial as regards the provision of insurance. This conclusion is based on two American studies on the impact of proportionate liability on insurance premiums and the understanding of insurance underwriters as noted in the report of the Canadian Standing Senate Committee.¹¹⁹

2.62 The report also noted that it is by no means clear that it will be cheaper for plaintiffs to spread risks by taking out first party insurance under proportionate liability:

. . . arguments regarding the efficiency of plaintiff insurance assume that plaintiffs will act rationally and in an informed way in selecting appropriate insurance cover. This assumption may be inappropriate for a significant number of plaintiffs - particularly if they are required to estimate risks associated with a wrongdoer's conduct based on information which is not fully available in the market, and may best be known by co-wrongdoers.¹²⁰

The role of some co-wrongdoers as efficient information gatherers is discussed below.¹²¹

Deterrence to entry to the professions

2.63 It has been suggested that people will not seek entry to various professions if the risks under solidary liability are too great.¹²² Obstetricians

117. Insurance companies, *Consultation*.

118. Insurance companies, *Consultation*.

119. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998) at para 2.10.

120. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998) at para 2.10.

121. Para 2.68.

122. See Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 14.

are said to be an example of a professional group that is already not attracting practitioners because of the professional liability situation.¹²³ However, the problem for obstetricians is not usually that of being one of several wrongdoers some of whom are not amenable to recovery. To the extent that there is a problem arising from an increasing incidence of litigation against certain groups, the introduction of proportionate liability will not alleviate the situation.

Deterrence to entrepreneurial enterprise/service provision

2.64 It has been suggested that defensive practice aimed at avoiding liability in areas like accounting will lead to increased costs to the community since those who most need advice will be unlikely to get it in future.¹²⁴ It was put to the Commission that some small accounting firms have abandoned their auditing practices altogether, while others have shed some existing clients.¹²⁵ It was also suggested that local government bodies, as institutions with “deep pockets”, may start withdrawing necessary services under the current regime,¹²⁶ or impose more regulations and controls than would otherwise be warranted.¹²⁷ Again most of the situations outlined here are not problems that will be solved by the introduction of proportionate liability. The problem is rather the tendency of plaintiffs to act rationally in only taking action against those from whom they can recover damages; a finding of liability in such circumstances; and, what some argue is an excessive level of damages. This is the case regardless of whether there are one or more possible defendants.

123. Accounting bodies, *Consultation*.

124. See also C Blyth and B Sharp, “The Rules of Liability and the Economics of Care” (1996) 26 *Victoria University of Wellington Law Review* 91 at 105; Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 14.

125. Accounting bodies, *Consultation*.

126. Accounting bodies, *Consultation*. See also, for example: J Harris “Lawsuit Spree: Claims on Council Cost Us Thousands” *Central Western Daily* (Orange) (19 August 1998) at 1; S Tucker, “Councils Risk Being Sued” *Blacktown Advocate* (30 April 1997) at 19; S Osborne and S Tucker, “Councils Not Ready to Take the Risk” *Penrith Press* (29 April 1997) at 7; S Tucker, “Playing Areas Facing Closure” *Manly Daily* (22 April 1997) at 1; but cf S Mooney, “Council Opposes Limiting Payouts” *Wentworth Courier* (12 February 1997) at 13.

127. C Blyth and B Sharp, “The Rules of Liability and the Economics of Care” (1996) 26 *Victoria University of Wellington Law Review* 91 at 104-105.

Incentive to be risk averse

2.65 The doctrine of solidary liability is said to have a detrimental effect on risk minimisation in that it encourages plaintiffs to take action against well-resourced defendants no matter how little their level of responsibility. This, it is argued, will do little towards encouraging well-resourced defendants to engage in risk minimisation. However, this argument first does not take into account the existence of a system of contribution between tortfeasors. In most circumstances where contribution arises there will be no reason for a defendant to think that any other defendant will be insolvent. Secondly the view that solidary liability is detrimental to risk minimisation concentrates on the incentive to minimise comparative fault rather than the more fundamental concern to avoid negligence altogether.¹²⁸ In LRC 65 the Commission concluded:

It is apparent that an opposing, and probably more cogent, argument can be put about the effect of the doctrine of solidary liability on risk minimisation. This argument states that the greater the potential liability the greater the resources that will be allocated to risk prevention. It follows that decreasing the potential liability of concurrent wrongdoers by abolishing solidary liability would reduce the incentive for effective accident prevention and might lead to potential defendants not taking safety measures that they otherwise might have implemented.¹²⁹

2.66 There have been a number of economic studies relating to the effects of proportionate and solidary liability in recent years. A 1996 New Zealand study has noted that a regime of solidary liability with contribution can closely approximate proportionate liability so far as allocating economic resources goes. However, the study concluded that there would be a “divergence from the efficiency achieved under proportionate liability”, on the assumption that, under solidary liability (with contribution), the costs involved in the legal process would be higher and that

128. The Ontario Law Reform Commission, while acknowledging that arguments in this area are theoretical and speculative, suggested that potential deep pocket defendants may, in particular, be motivated to implement optimal safety schemes, even those which might otherwise be considered uneconomic: Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 39.

129. LRC 65 at para 29.

the procedural burdens of bringing in other defendants did not lie on the plaintiff.¹³⁰

2.67 The recent Victorian Expert Report has suggested that, taking a simple economic model, solidary liability (with or without contribution) is as efficient in terms of deterrence as proportionate liability.¹³¹ The Victorian Expert Report differs from the New Zealand view by suggesting that many of the factors that need to be added to the simple model may have negative impacts on both solidary and proportionate systems of liability. It also suggested that transaction costs, such as legal costs, may not differ greatly between the two systems given the flexibility of joinder in the Australian Courts.¹³²

2.68 A further complicating factor considered by the Victorian Expert Report was the impact of insolvent or absent wrongdoers. While lower incentives to exercise due care may arise for wrongdoers who can anticipate their own absence or insolvency, higher levels of deterrence may also arise for those wrongdoers who can anticipate being left to bear the burden of absent or insolvent defendants.¹³³ The question then remains as to whether this form of deterrence is efficient under a system of solidary liability with contribution. The study's chief argument is that solidary liability will tend to encourage some potential wrongdoers, such as accountants and lawyers, to act as "gate keepers", that is, to supervise the activities of other potential wrongdoers. It is suggested that the presence of a gate keeper may:¹³⁴

- help to prevent the risk arising at all;
- lead to more efficient activity levels by professionals in the right position, for example, "refusal by a Big Six auditor to carry out an

130. C Blyth and B Sharp, "The Rules of Liability and the Economics of Care" (1996) 26 *Victoria University of Wellington Law Review* 91 at 101.

131. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998) at para 2.1.

132. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998) at para 2.6.

133. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998) at para 2.7.

134. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 3, 1998) at para 2.12.

audit for a particularly risky client may be the most efficient precaution”; and/or

- serve to improve the information available to participants in capital markets by alerting them to potentially risky players.

It is, therefore, by no means clear that proportionate liability will provide the most efficient deterrent to negligent behaviour.

Conclusion

2.69 It is clear that there is a very limited range of situations where problems with solidary liability occur. These situations must involve a finding of liability against a deep-pocket or insured defendant in circumstances where there are other defendants at least some of whom are not amenable to recovery by the plaintiff.

2.70 There are other ways of dealing with the problem of findings of liability, particularly among professionals, which might not have quite the effect on the legal system as a shift to proportionate liability. The following are raised as possible solutions to the problems put to the Commission:

- **Limited liability partnerships.** These are not a direct solution to problems arising from solidary liability, but rather more a solution to the joint and several liability of people in partnerships, at least as considered by the Canadian Senate Committee on Banking, Trade and Commerce.¹³⁵ Limited liability partnerships were also considered by the New Zealand Law Commission.¹³⁶
- **Liability caps.** These are an obvious solution to the problem of excessive damages. Liability caps are already in place in New South Wales under motor accident and workers’ compensation legislation and are discussed in more detail earlier in this chapter.¹³⁷

135. Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (Report, 1998) at 57-62.

136. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at para 15.

137. At para 2.18-2.19.

- **Consensual limitations.** Despite recommending a cautious approach to wholesale reform of the current system of solidary liability in Victoria, the Victorian Expert Report gave some support to allowing consensual limitations to solidary liability to be agreed between appropriate parties.¹³⁸ The Common Law Team of the English Law Commission suggested, in 1996, that liability for professionals may be capable of being limited by agreement and noted that such agreements would remain subject to normal common law and statutory controls in relation to contract.¹³⁹ It has also been suggested that duties of care owed to third parties can be contained by “non-contractual disclaimers (of which the plaintiff had notice) limiting liability”.¹⁴⁰

2.71 While some arguments in favour of proportionate liability are based chiefly on the need to provide justice to solvent wrongdoers in situations where other wrongdoers are not amenable to judgment, at present a move from the system of solidary liability with contribution is not justified as there is no clear indication that the introduction of proportionate liability will achieve the desired results or even be generally beneficial. Most proposals for, and implementations of, proportionate liability have involved some form of limitation on its wholesale introduction. The Commission also rejects these limited forms of proportionate liability as undesirable. The burden of proof lies on those who advocate so radical a change in the determination of liability in our legal system. In the Commission’s view, this burden has not been discharged.

138. M Richardson, *Economics of Joint and Several Liability Versus Proportionate Liability* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 3, 1998) at para 4.1-4.4.

139. England and Wales, Law Commission, Common Law Team, *Feasibility Investigation of Joint and Several Liability* (Department of Trade and Industry, HMSO, London, 1996) at para 5.10-5.26.

140. See A Burrows, “Should One Reform Joint and Several Liability?” in N J Mullany and A M Linden (ed), *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, Sydney, 1998) 102 at 117.

3 ● Where contribution arises

- Ensuring coverage of all tortfeasors
- Extension to mixed concurrent wrongdoers
- Extension to statutory schemes

3.1 This chapter deals with the question of where a right to contribution arises, that is, which wrongdoers should be able to claim contribution from other wrongdoers liable for the same damage, and the circumstances in which such a right should arise.

ENSURING COVERAGE OF ALL TORTFEASORS

Recommendation 1

Rights of contribution should apply to all tortfeasors.

3.2 Section 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) does not expressly exclude any specific categories of tort and, therefore, can be taken to cover all types of concurrent tortfeasors. In DP 38 the Commission asked whether any specific categories of tortfeasor should be excluded from the application of the section as it currently stands.¹ The following torts are considered:

- torts that are crimes;
- intentional torts; and
- torts of strict liability.

The Commission's general conclusion is that there should be no restrictions on the classes of tortfeasors who can claim contribution from other wrongdoers.

Torts that are crimes

3.3 Torts that are crimes were considered because it has been thought by some that tortfeasors should not be able to base a cause of action for contribution on the commission of a crime.² Section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) expressly includes torts that are crimes within the categories of torts for which contribution can be

1. DP 38 para 4.2.

2. This is similar to the reasoning in *Merryweather v Nixan* (1799) 8 TR 186; 101 ER 1337. See England and Wales, Law Revision Committee, *Third Interim Report* (Cmd 4637, 1934) at 7.

claimed. There are two principles³ to be noted when considering the retention of contribution with respect to torts that are crimes: the first is that it is not possible to have a blanket provision preventing rights of contribution where the tort is also a crime, given the range of wrongs which constitute crimes and the wide variety of contexts in which those wrongs are committed;⁴ the second is that the question of whether a defendant should have a right to contribution would presumably depend on the nature of the crime committed and on the circumstances relevant to the case.⁵

Intentional torts

3.4 Intentional torts raise similar issues to those discussed in relation to torts which are also crimes. While there is no specific provision including intentional torts amongst those for which contribution may be claimed, the Commission is of the view that the New South Wales courts will follow the course adopted in other common law jurisdictions⁶ and allow intentional tortfeasors to claim contribution from other wrongdoers. Once again, it is not possible to formulate a general rule excluding rights of contribution for intentional tortfeasors and it is both practicable and just for courts to apportion responsibility between defendants once one defendant's liability to the plaintiff is established. Also, there is no justification for allowing one or more concurrent tortfeasors to escape liability simply because there is one tortfeasor whose wrongdoing can be classed as intentional.⁷ A problem would also arise in situations where there is more than one intentional tortfeasor.⁸

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3. Both of which may be derived, in general terms, from the decision of the High Court in *Gala v Preston* (1991) 172 CLR 243.
 4. See also England and Wales, Law Revision Committee, *Third Interim Report* (Cmd 4637, 1934) at 7.
 5. *Gala v Preston* (1991) 172 CLR 243.
 6. *K v P* [1993] Ch 140; *Bell Canada v Cope (Sarnia) Ltd* (1980) 11 CCLT 170 (Ontario HC).
 7. See New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 178.
 8. See J R Morris, *Apportionment of Civil Liability* (Legal Research Foundation Inc, Publication No 28, 1987) at 8-9.

Torts of strict liability

3.5 Torts of strict liability may arise at common law or, more commonly, by statute. When they arise by statute, there is some uncertainty where no provision is made for a scheme of statutory rights of contribution, such as the liability created by s 2(2) of the *Damage by Aircraft Act 1952* (NSW).⁹ It seems that where liability arises from breach of statutory duty, a tortfeasor will have the right to claim contribution from another tortfeasor;¹⁰ this may be the case even though the tortfeasors cannot avail themselves of the defence of contributory negligence in the primary action against the plaintiff.¹¹ While it can be argued that strict liability tortfeasors should bear the whole burden of the damage suffered by the plaintiff on the grounds that the law makers have clearly specified where the liability for the damage caused is ultimately to fall, it can also be argued that strict liability torts are concerned with ensuring that in certain defined circumstances an injured plaintiff will recover compensation and that there is a clearly defined entity against which a plaintiff can commence an action.¹² Therefore, once a plaintiff has recovered compensation from the tortfeasor who is strictly liable, there is no reason why that tortfeasor cannot then claim contribution from other wrongdoers, irrespective of the nature of their liability.

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9. But see, eg, *Southgate v Commonwealth of Australia* (1987) 13 NSWLR 188 which states that liability imposed by the *Damage by Aircraft Act 1952* (NSW) is not a breach of duty and therefore not a “tort”.
 10. See, eg, *TAL Structural Engineers Pty Ltd v Vaughan Constructions Pty Ltd* [1989] VR 545 at 556-557 per Kaye J with whom Hampel and Ormiston JJ agreed. In this case D1’s liability to P was based on the tort of breach of statutory duty and it was acknowledged that D1’s right of contribution from D2 could be founded on the basis of D2’s liability to P for either breach of a common law duty of care or breach of statutory duty.
 11. *Statutory Duties (Contributory Negligence) Act 1945* (NSW) s 2 and *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 7. Whether the defence of contributory negligence should be available raises different issues from those that are relevant in determining whether there should be a right to contribution for breach of statutory duty: see G L Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons, London, 1951) at 357-361; R P Balkin and J L R Davis, *Law of Torts* (2nd edition, Butterworths, Sydney, 1996) at 147-148.
 12. See Fleming’s rationale for the *Damage by Aircraft Act 1952* (NSW): J G Fleming, *The Law of Torts* (9th edition, LBC Information Services, Sydney, 1998) at 372.

3.6 The Commission in recommending that it should be possible for the tortfeasors listed above to claim contribution from other wrongdoers, also considers that the courts should be left with a wide discretion as to how to apportion responsibility, including the right to award full contribution against particular defendants depending on the circumstances of the case.

EXTENSION TO MIXED CONCURRENT WRONGDOERS

Recommendation 2

Rights of contribution should be extended to include mixed concurrent wrongdoers. Rights of contribution to mixed concurrent wrongdoers, some of whom are liable in contract, should explicitly provide that a defendant, whose liability to the plaintiff in contract is expressly limited or exempted, should have the full benefit of those contractual terms.

3.7 The *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) currently provides that rights to contribution are available only between wrongdoers who are tortfeasors. This means that where there is more than one person responsible for the same damage, and at least some are wrongdoers under heads of liability other than tort,¹³ contribution is not available to those wrongdoers if they are proceeded against.

Difficulties in extending the right to contribution

3.8 Despite the largely uncontroversial nature of the proposal to extend the right to claim contribution to wrongdoers other than tortfeasors, a number of issues mostly related to liability in tort, contract and restitution have been considered by the Commission:

1. the fundamental difference between liability arising under different sources of obligation, in particular tort and contract;
2. the potential that liability under different heads (for example, tort, contract and restitution) may be found to exist concurrently, which may render reform in this area unnecessary; and
3. the potential for adding an unnecessary degree of complexity to an already complex area of the law, in particular the fact that there are different bases of assessment of damages in contract and tort.

Each of these concerns will be considered in the following paragraphs.

Different nature of liability

3.9 Differences in the basis of liability among various joint wrongdoers may make it difficult for courts to decide how to apportion liability among them. An assumption underlying existing rights of contribution (in tort and equity) is that the liability of both wrongdoers to the plaintiff is the same.¹⁴

13. This would include situations where persons are in breach of separate contracts.

14. In the case of equitable rights of contribution, this assumption is an explicit part of the doctrine. In order to seek contribution in equity, defendants need to be under a co-ordinate liability to make good the one loss. The underlying principle of contribution is the requirement that each of the defendants be “equally bound” which is the basis for the right to be “equally relieved”. A right of contribution is, in this sense, a simple and unproblematic

Each defendant has the same kind of liability to the plaintiff, and apportionment between the defendants is simply required to be “just and equitable”.¹⁵ However, where the liability of the defendants is different, as in the case of one defendant being liable to the plaintiff for breach of contract and the other defendant being a tortfeasor, the underlying rationale for the apportionment of responsibility disappears. The liability of the defendant (D1), who is liable to P in tort, arises because D1 breached a duty imposed on D1 by operation of the law. The liability of D2 in contract arises because D2 has breached a term of the contract with which D2 had promised to comply. The only common element between D1 and D2 is that breach of their separate and independent obligations to P caused the harm sustained by P. In this context it may be argued that a just and equitable apportionment of responsibility between D1 and D2 is not possible, because each of the defendants is exposed to an independent liability imposed for different reasons.

3.10 This approach to analysing rights of contribution places a high degree of importance on maintaining distinct boundaries between the primary categories of legal rights. However, the simple answer must be that the courts will do the best they can, just as they do in apportioning liability in cases of contributory negligence which involve the apportionment of damages between tortfeasors and plaintiffs, using concepts like “responsibility” and “causation”.¹⁶ For example, the Alberta Institute of Law Research and Reform, while recognising that the rules relating to remoteness of damage and the measure of damages are not precisely the same in tort as in contract, observed that claims for contribution would only be available in respect of the same “overlapping damage, flowing from the overlap in liability, whether it arises in tort or in contract”. They concluded that there would not be any serious problems with extending rights of contribution to include wrongdoers other than tortfeasors.¹⁷ The Commission agrees with this conclusion.

apportionment of responsibility between defendants who share the same kind of liability to the plaintiff.

15. Section 5(2) *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).
16. See *Pennington v Norris* (1956) 96 CLR 10; *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492. Cf *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 72 ALJR 65 at 68.
17. University of Alberta, Institute for Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Report 31, 1979) at 50. See also

The effect of concurrent liability

3.11 Situations can be envisaged where claims arising from damage may be founded on several other bases of liability in addition to tort. For example, in the Western Australian case of *Biala Pty Ltd v Mallina Holdings Ltd* the plaintiffs claimed equitable compensation for breach of fiduciary duty, damages under s 574(8) of the *Companies (Western Australia) Code* and damages in negligence,¹⁸ and in the New South Wales case of *Williams v Minister, Aboriginal Land Rights Act 1983*¹⁹ the plaintiff claimed damages for negligent breach of duty and false imprisonment and also equitable compensation for breach of fiduciary duty.

England and Wales, Law Commission, *Contribution* (Working Paper 59, 1975) at para 47; and J R Morris, *Apportionment of Civil Liability* (Legal Research Foundation Inc, Publication No 28, 1987) at 9-11.

18. In the circumstances, however, the claim in negligence was dismissed: *Biala Pty Ltd v Mallina Holdings Ltd* (1994) 13 WAR 11 at 83.

19. (1994) 35 NSWLR 497.

3.12 The most significant area of development in recent years has, however, been the finding that duties in tort and contract may co-exist. Concurrent liability in tort and contract was found to be possible in the relationship between a solicitor and that solicitor's client,²⁰ a relationship previously governed exclusively by contract.²¹ The High Court has also held that the existence of a contractual relationship between a builder and client does not preclude the existence of a "duty of care under the ordinary law of negligence".²²

3.13 However, the possibility that concurrent duties in tort and contract may be found to exist in some cases does not mean that they will be found in all cases. There are duties imposed by the operation of the law of contract which will not be concurrent with any duty imposed by the law of tort. Obligations arising out of terms dealing with fitness for purpose or merchantability would not generally be concurrent with duties imposed in tort.

3.14 In any event, where concurrent liabilities do exist in contract and tort the plaintiff can choose the head of liability under which he or she wishes to proceed subject to the operation of the express terms of any contract between the plaintiff and defendant. In *Bryan v Maloney*²³ Chief Justice Mason and Justices Deane and Gaudron stated that some aspects of the relationship between duties in tort and contract were "helpfully and correctly explained" by Justice Le Dain of the Supreme Court of Canada in *Central Trust Co v Rafuse*.²⁴ One of these explanations was as follows:

A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.²⁵

20. *Hawkins v Clayton* (1988) 164 CLR 539 per Deane J at 579 and 585 and also Mason CJ and Wilson J at 543. See also *Hill v Van Erp* (1997) 188 CLR 159.

21. See *Groom v Crocker* [1939] 1 KB 194.

22. *Bryan v Maloney* (1995) 182 CLR 609 at 619 per Mason CJ, Deane and Gaudron JJ.

23. (1995) 182 CLR 609.

24. [1986] 2 SCR 147 at 204-205; 31 DLR (4th) 481 at 521-522.

25. Cited in *Bryan v Maloney* (1995) 182 CLR 609 at 622.

The High Court now appears to have accepted the proposition stated in the last sentence to its fullest extent. In *Astley v Austrust Ltd*²⁶ the Court held that a plaintiff can choose the basis of liability under which he or she will proceed against a defendant where the liabilities are concurrent. In such cases the causes of action in tort and contract do not merge. Potentially this gives a plaintiff the power, by claiming damages for breach of contract, to deny certain wrongdoers the right to claim contribution and, in effect, decide on whom the financial burden of the plaintiff's damage will ultimately fall.

3.15 The expansion of tort liability into other areas of legal liability cannot, therefore, be relied on to alleviate the unfairness arising from the current limitation of rights to claim contribution to actions in tort.

Adding to the complexity of the law

3.16 Complexity may arise in the assessment of damages under different heads of liability. For example, the object of damages in contract is to put P in the position which P would have been in if the contract had been performed,²⁷ which leads to the award of expectation damages,²⁸ whereas, in tort, the object of damages is to put P in the position he or she would have been in if there had been no tort. Expectation damages are, therefore, not available in tort.²⁹

3.17 The extension of rights of contribution to cases involving liability other than in tort will also lead to more cases in which multiple actions will be possible. The increase in multiple actions in itself will not be a problem so long as the joinder of all parties relevant to an action in one case is still encouraged.

26. [1999] HCA 6 per Gleeson CJ, McHugh, Gummow and Hayne JJ. This concerned the potential application of the doctrine of contributory negligence in an action for breach of contract.

27. *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

28. See generally M J Tilbury, *Civil Remedies Volume 2: Remedies in Particular Contexts* (Butterworths, Sydney, 1993) at 267-269 and 283-284.

29. Though a claim in tort may yield what looks like expectation damages: consider, for example, *Hill v Van Erp* (1997) 188 CLR 159.

The benefit of a contractual term limiting liability

3.18 An effect of extending contribution to non-tortious wrongdoers will be to alter, where some of the wrongdoers are liable in contract, existing private contractual arrangements by giving D1, a tortfeasor, a right of contribution against D2, whose breach of contract has caused the same damage to P.³⁰ This intrusion into contractual arrangements has been viewed with concern by some.³¹

3.19 In DP 38, the Commission noted that its preferred option was to allow P to recover in full against the tortfeasor, D1, and to limit D1's right to claim contribution from D2 according to the contractual limitation or exclusion agreed between D2 and P.³² There are a number of reasons for this conclusion:

1. It is consistent with the restitutionary nature of the law of contribution. D2 does not benefit unfairly when D1 is denied the ability to claim contribution. In circumstances where D2 owes, by contract, a reduced, or no, liability to P, D2 can receive no benefit by D1's payment to P for the full loss suffered by P.³³
2. It is not unfair to D1 because D1 would have been liable in any case if D1 alone had caused P's loss and the price of the contractual limitation may have been factored into some other part of the contract. To allow D1 a right to contribution would be to allow D1 a benefit for which D1 paid nothing.³⁴

Accordingly the Commission recommends that there should be explicit recognition that any defendant whose liability to the plaintiff in contract is limited by agreement, should have the full benefit of those contractual terms.

30. A similar argument applies to the extension of rights of contribution between tortfeasors and persons in breach of equitable obligations to P.

31. See, for eg, B Keene, "Law Commission Report: Apportionment of Civil Liability" [1998] *New Zealand Law Journal* 252.

32. DP 38 para 6.27.

33. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 124.

34. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 124.

3.20 Most law reform agencies have chosen to respect the contractual arrangements agreed upon before liability was incurred.³⁵ This approach has been adopted in England, following recommendations of the Law Commission,³⁶ by s 2(3) of the *Civil Liability (Contribution) Act 1978* (Eng)³⁷ which provides as follows:

(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; ...

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.

Determining the contributable sum

3.21 In DP 38³⁸ the Commission considered the Ontario Law Reform Commission's approach to determining the contributable sum between D1 and D2 in circumstances where there was a contractual limitation. The Ontario Commission's solution was that:

35. Law Reform Committee of South Australia, *Forty-second Report of the Law Reform Committee of South Australia to the Attorney-General, Relating to Proceedings Against and Contributions Between Tortfeasors and Other Defendants* (1977) at 11-12; Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers* (Topic 5, 1984) at para 8.2-8.6; and Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 128. See also New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at 105. Section 8(2)(b) of the New Zealand Law Commission's draft legislation has fallen short of an express statement that contractual limitations are to have full effect: New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at para C17; see also B Keene, "Law Commission Report: Apportionment of Civil Liability" [1988] *New Zealand Law Journal* 252.

36. England and Wales, Law Commission, *Law of Contract: Report on Contribution* (Law Com 79, 1977) at para 71-74.

37. See also s 24(2A) of the *Wrongs Act 1958* (Vic).

38. DP 38 para 6.31.

. . . the fact that a wrongdoer's liability to the injured person is limited should be ignored for the purpose of calculating the amount that she is liable to pay by way of contribution, except for the purpose of ensuring that her liability to contribute does not exceed the amount in which her liability to the injured person was limited.³⁹

The English Law Commission recommended that this was the preferred method for calculating rights of contribution in these circumstances.⁴⁰ We also adopt this approach.

Conclusions

3.22 The discussion above has highlighted some of the issues surrounding the proposal to extend the right to claim contribution to mixed concurrent wrongdoers. The conclusions in support of a legislative extension of the right to claim contribution are as follows:

- It is unfair to give a plaintiff the right to determine which wrongdoer must ultimately pay for the loss (which would be the case if choice of action were to fall to the plaintiff in cases of concurrent liability).
- It would be inappropriate to rely on the development of concurrent liability as the basis for defining the extent of rights of contribution.
- It is unfair that denying D1 a right to contribution in some circumstances would mean that D2, who is also liable, is unjustly enriched at D1's expense.⁴¹
- There should be, as far as possible, a rational connection between a wrongdoer's liability for the harm caused and the wrongdoer's responsibility for that harm.

3.23 The case for expanding rights of contribution therefore focuses on the responsibility of D1 and D2 for causing the same harm to the plaintiff. If both the defendants cause the same harm to the plaintiff, the ultimate conclusion is

39. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 135.

40. England and Wales, Law Commission, *Law of Contract: Report on Contribution* (Law Com 79, 1977) at para 76-77.

41. D2 is not unjustly enriched if D2 has the benefit of a contractual limitation of liability: see para 3.19.

that it is unjust for one of the defendants to be wholly responsible for compensating the plaintiff and the other not responsible at all.

3.24 The reform of rights of contribution between concurrent wrongdoers has been considered by a number of other law reform agencies. One of the central issues has been whether rights of contribution should be extended to mixed concurrent wrongdoers and each agency has recommended that they should be.⁴² In a number of cases, these recommendations have been adopted in the form of new legislation defining rights of contribution between wrongdoers.⁴³

3.25 The Commission's conclusion is that rights of contribution should be extended to mixed concurrent wrongdoers. However, the new legislation should indicate clearly that, in any contribution proceedings, where there is a contractual term limiting or excluding D2's liability to P, D2 should retain the benefit of the exclusion clause.

42. England and Wales, Law Commission, *Law of Contract: Report on Contribution* (Law Com 79, 1977) at para 81; Victoria, Chief Justice's Law Reform Committee, *Report on Contribution* (1979); Scottish Law Commission, *Report on Civil Liability: Contribution* (Scot Law Com No 115, 1988) at para 3.5; Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 73-75; New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 99-104 and 175, adopted by New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at para 5; Manitoba Law Reform Commission, *Scope of Apportionment under the Tortfeasors and Contributory Negligence Act* (Informal Report 22A, 1992); Law Reform Committee of South Australia, *Forty-second Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Proceedings Against and Contributions Between Tortfeasors and Other Defendants* (1977) at 10-11; Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers* (Topic 5, 1984) at para 5.2-5.3; University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Report 31, 1979) at 40-52. See also Williams (1951) at 506-507; and J R Morris, *Apportionment of Civil Liability* (Legal Research Foundation Inc, Publication No 28, 1987) at 11.

43. See *Civil Liability (Contribution) Act 1978* (Eng); *Wrongs Act 1958* (Vic) Pt 4; *Civil Liability Act 1961* (Ireland). The Irish Act was based almost entirely on recommendations for reform of the law of contribution made by Williams (1951).

Legislative implementation

3.26 In DP 38, the Commission considered two models for the implementation of the extension of rights of contribution to mixed concurrent wrongdoers, the English *Civil Liability (Contribution) Act 1978* and the proposals of the New Zealand Law Commission.⁴⁴

3.27 Section 1(1) of the *Civil Liability (Contribution) Act 1978* (Eng) provides:

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).⁴⁵

Further, s 6(1) provides:

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).⁴⁶

3.28 The New Zealand Law Commission proposal was as follows:⁴⁷

This Act applies to loss or damage

- (a) which arises wholly or partly from an act or omission of a person, whether intentional or not, including an act or omission that is
 - (i) a tort, or

44. New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 50.

45. Similar provision is made in s 23B(1) of the *Wrongs Act 1958* (Vic) which states that:

a 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

46. Similar provision is made in s 23A(1) of the *Wrongs Act 1958* (Vic) which states that:

a person is liable in respect of any damage if the person who suffered that damage ... is entitled to recover compensation from the first-mentioned person in respect of that damage whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise.

47. New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 50.

- (ii) a breach of statutory duty, or
 - (iii) a breach of contract, or
 - (iv) a breach of trust or other fiduciary duty
whether or not the act or omission is also a crime, and
- (b) for which that person has a civil liability to pay damages.⁴⁸

3.29 DP 38⁴⁹ noted that the New Zealand proposal was not as clear as the English provision in leaving open-ended the list of bases of liability to which the provisions apply.⁵⁰ The New Zealand Law Commission has since accepted this criticism and has reformulated its proposed provision more in accordance with the English provision.⁵¹ We also confirm our preference for the English provision as the model for any legislative enactment extending rights of contribution to mixed concurrent wrongdoers.

Application of the legislative scheme

Recommendation 3

The proposed legislation defining rights of contribution should supersede all other rights of contribution except equitable rights of contribution. The legislation should also state that statutory rights of contribution may be modified by express contractual terms.

3.30 The extension of rights of contribution to mixed concurrent wrongdoers will necessitate a determination of whether the legislation will override existing contractual and equitable rights of contribution. Approaches to this have varied. The Ontario Law Reform Commission recommended that the legislative scheme should apply to all cases of concurrent wrongdoing, except for certain specific cases, including arrangements under the Ontario

48. The provision 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 14 of the *Shipping and Seamen Act 1952* (NZ).

49. DP 38 para 6.40.

50. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) para 13.

51. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at 16 (draft *Civil Liability and Contribution Act* (NZ) s 5).

Workers Compensation Act.⁵² The English *Civil Liability (Contribution) Act 1978* states that the statutory right to claim contribution shall not supersede any express contractual right to claim contribution and shall not affect “any express or implied contractual or other right to indemnity” or “any express contractual provision regulating or excluding contribution” which would be otherwise enforceable.⁵³

3.31 The Commission regards it as obvious that, where statute establishes a general regime, that regime takes precedence only over general schemes.⁵⁴ Express contractual provisions, where made, should also be allowed to take effect. However, to clarify any apparent uncertainty, the effect of express contractual provisions should be stated in legislation. The Commission considers that the relationship between the statutory provision and normal equitable rights of contribution could, in light of the development of equitable principles,⁵⁵ become complex. The Commission has concluded that the equitable regime should remain expressly unaffected by the statutory regime, although we are mindful of the fact that equitable rights of apportionment, with an emphasis on the maxim “equality is equity”,⁵⁶ may turn out to be more rigid in their application than the statutory regime which allows for apportionment according to what is “just and equitable having regard to the extent of that person’s responsibility for the damage”.

EXTENSION TO STATUTORY SCHEMES

3.32 There are a number of statutes which create specific causes of action without any reference to rights of contribution.⁵⁷ The *Trade Practices Act*

52. RSO 1980, c 539.

53. *Civil Liability (Contribution) Act 1978* (Eng) s 7(3).

54. *Generalia specialibus non derogant*.

55. See *Walsh v Permanent Trustee Australia Ltd* (NSW, Supreme Court, ED 2210/94, Hodgson J, 21 February 1997, unreported) at 5; *Leigh-Mardon Pty Ltd v Wawn* (1995) 17 ACSR 741 (NSW SC) at 751-753.

56. *Aequitas est aequalitas*: see R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (3rd edition, Butterworths, Sydney, 1992) at para 329-330.

57. Other statutes, such as the *Motor Accidents Act 1988* (NSW), which do not establish new causes of action do not need to be considered by this Report.

1974 (Cth) and the *Fair Trading Act 1987* (NSW) are two such statutes;⁵⁸ the *Anti-Discrimination Act 1977* (NSW)⁵⁹ is another. There are diverging opinions as to whether the causes of action created by such statutes are “torts” for the purposes of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and subject to the right to contribution found in s 5(1)(c).⁶⁰ Assuming that a breach of, say, s 42 of the *Fair Trading Act 1987* (NSW), is not “a tort (whether a crime or not)”, then it cannot come within the terms of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). However, s 23A of the *Wrongs Act 1958* (Vic) provides for contribution “whatever the legal basis of liability, whether tort, breach of contract, breach of trust or otherwise”. If s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) is amended along the lines of the Victorian provision, it would be sufficiently wide to include a breach, at least, of s 42 of the *Fair Trading Act 1987* (NSW).⁶¹ The contribution regime would, therefore, extend to causes of action under the *Fair Trading Act 1987* (NSW). However, this may still not be the case with respect to the *Trade Practices Act 1974* (Cth), since it has been argued that, even if a breach of its provisions could be classed as a basis for liability or even a “tort”, the statutory right to contribution may not apply in the Federal jurisdiction because s 79 of the *Judiciary Act 1903* (Cth) requires the Federal Court to apply only the “laws relating to procedure” of

58. Many provisions of the *Trade Practices Act 1974* (Cth) and *Fair Trading Act 1987* (NSW) create independent causes of action, eg, in s 52 and 82 of the *Trade Practices Act 1974* (Cth), the measure of damages is similar to that in tort: *Gates v City Mutual Life Assurance Society Ltd* (1985) 160 CLR 1. See also *Fair Trading Act 1987* (NSW) s 42 and 68.

59. See s 113(1)(b)(i).

60. *Australia and New Zealand Banking Group Ltd v Turnbull & Partners Ltd* (1991) 33 FCR 265 which says that a breach of s 52 of *Trade Practices Act 1974* (Cth) is not a tort; but see J C Campbell, “Contribution, Contributory Negligence and Section 52 of the Trade Practices Act – Part I” (1993) 67 *Australian Law Journal* 87 which states that the causes of action created by s 52 and s 82 of the *Trade Practices Act 1974* (Cth) are either “torts” or a form of “statutory tort” and within the terms of s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). There is also a possibility that the courts may find a co-ordinate liability at law or equity which could give rise to a form of contribution under the *Trade Practices Act 1974* (Cth): *Re La Rosa; Ex Parte Norgard v Rodpat Nominees Pty Ltd* (1991) 31 FCR 83; *Trade Practices Commission v Manfal Pty Ltd (No 3)* (1991) 33 FCR 382 at 385.

61. J D Heydon, “Damages under the Trade Practices Act” in P D Finn (ed), *Essays on Damages* (Law Book Company, Sydney, 1992) 42 at 53.

the State in which it is sitting. It is questionable that the laws relating to contribution can be classed as “relating to procedure”.⁶²

3.33 The failure of the *Fair Trading Act 1987* (NSW) to provide for any rights of contribution is a major gap in the law which can be simply remedied by the extension of the contribution regime to cover all concurrent wrongdoers. In DP 38, the Commission’s tentative proposal was to amend the *Fair Trading Act 1987* (NSW) to provide for rights of contribution between concurrent wrongdoers.⁶³ On reflection, the Commission is now not convinced of the need to make explicit provision in the *Fair Trading Act 1987* (NSW) as this will not be necessary if our proposals to extend rights of contribution to all wrongdoers are implemented. Accordingly no such recommendation is made. The failure of the *Trade Practices Act 1974* (Cth) to provide for any rights of contribution is a problem beyond the legislative competence of the New South Wales Parliament.

62. J D Heydon, “Damages under the Trade Practices Act” in P D Finn (ed), *Essays on Damages* (Law Book Company, Sydney, 1992) 42 at 53. Section 80 of the *Judiciary Act 1903* (Cth) may also not be of assistance in filling the gap in the law of the Commonwealth with respect to contribution: see *Pritchard v Racecage Pty Ltd* (1997) 72 FCR 203.

63. DP 38 Proposal 9.

4. ● When contribution arises

- Where P obtains judgment against D1
- Where D1 and P settle without judgment
- Where P fails in an action against D2
- Basis of apportionment of liability

4.1 D1's right to claim contribution from D2 depends upon the meaning of the term "liable" as it occurs in two places in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). In this chapter, the question of D1's right to claim contribution is considered first in relation to two basic circumstances:

- where D1 is sued to judgment by P – that is, found liable by a process of a court; and
- where D1 has reached a settlement with P, or made some payment which has the effect of reducing D2's liability.

We are here concerned with the meaning of "liable" where the term first occurs in s 5(1)(c):

Where damage is suffered by any person as a result of a tort ... any tort-feasor *liable* in respect of that damage may recover contribution ...

4.2 Secondly consideration is given to the situation where D2 has successfully defeated an action brought by P. This goes to the meaning of "liable" where it occurs for the second time in s 5(1)(c):

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

4.3 In considering these aspects of the law of contribution the Commission is concerned to ensure that:

- there will not be an increase in litigation (by challenges being made to earlier findings);
- settlements be encouraged;
- double recovery be avoided; and
- fairness be achieved between the parties.

4.4 There was strong support in the submissions received by the Commission that proceedings not be multiplied.¹ There are cases, though these are rare, where D2 cannot, for whatever reason, be joined in the original proceedings and, in general, the Commission expects that the law will continue to encourage all related claims to be dealt with in the one proceeding. Each of the following recommendations is framed with these principles in mind.

1. A D M Hewitt, *Submission* at 1; Insurance Council of Australia Ltd, *Submission* at 5.

WHERE P OBTAINS JUDGMENT AGAINST D1

4.5 There are two issues that arise where P has obtained judgment² against D1 and D1 subsequently seeks contribution from D2 who was not a party to the original proceedings between P and D1:

- the question of the finality of the original judgment against D1 as to liability; and
- the question of the finality of the original judgment as to quantum of damages.

A subsidiary issue, related to the finality of a judgment against D1 as to D1's liability, is the question of the finality of a consent judgment as to liability where there has been fraud or collusion.

Finality of judgment as to liability against D1

Recommendation 4

In contribution proceedings brought by D1 against D2, following a judgment (whether on the merits or by consent) against D1 in favour of P, it should be no defence, in the absence of evidence of fraud or collusion, for D2 to establish that D1 was not liable to P. D2 may, however, contest any issue relevant to D2's liability to P, even if that issue was decided in favour of P in P's action against D1.

4.6 In situations where D1 is found liable³ to P and D2 has not been a party to the proceedings between D1 and P, it has been held that D2 cannot defeat D1's contribution claim on the basis that D1 is not liable to P. The High Court in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for*

2. "Judgment" can be taken to include consent judgments and awards in court annexed arbitrations.

3. This would, therefore, not include situations where D1 is found not liable to P in, for example, a consent judgment: *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 73 ALJR 238. For situations where a defendant is found not liable, see para 4.40-4.42 below.

*Government Transport*⁴ has held that a judgment against D1 is sufficient to found a claim for contribution by D1 against D2.

4.7 There are several reasons why a finding against D1 in an action between P and D1 should generally be binding on D2 in a subsequent contribution action:⁵

1. To the extent that D1 has satisfied the judgment in P's action, D1 will have conferred a benefit upon D2 by removing or reducing D2's liability to P.
2. D1 cannot be said to have benefited D2 gratuitously, because the payment was made pursuant to a legal obligation.
3. Since D2 can raise against D1's claim for contribution any defence that should have enabled D2 to defeat or reduce P's claim against him or her, D2 is not prejudiced in being bound by the outcome of litigation to which he or she was not a party.
4. Preventing D2 from reopening the issue decided in the action between P and D1 is an efficient use of judicial time and public funds, and if D2 has to pay P in any event, he or she is not substantially prejudiced by this extension of issue estoppel.

4. (1955) 92 CLR 200 at 210. See also *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 73 ALJR 238.

5. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 114.

4.8 On the other hand, there has been some concern to ensure procedural fairness for defendants against whom contribution is sought, particularly in situations where D2 had not in fact participated in the hearing which determined D1's liability.⁶ It has been suggested that D2 will have been deprived of a defence that D2 could have raised if D2 had been brought into the original action as a co-defendant or by D1's service of a third party notice upon him or her. The Commission is not, however, convinced by this argument. It is clear that D2 cannot be prejudiced by a finding of liability on the part of D1 and consequent discharge of at least some of the liability to P. It would be unjust to allow D2 to relitigate the issue of D1's liability because D1's payment to P in satisfaction of a judgment debt has conferred a benefit on D2.⁷

Consent judgments and judgments obtained by fraud or collusion

4.9 A specific issue relating to the finality of a judgment against D1 is whether consent judgments and judgments obtained by fraud or collusion should be treated as final determinations between D1 and P for the purposes of a claim for contribution by D1 against D2.

4.10 There has been a tendency, in some jurisdictions, to discount consent judgments as not being in the nature of a determination of liability by a court,⁸ and also to consider that judgments obtained by fraud or collusion should be open to review in the contribution proceedings between D1 and D2.⁹

6. Law Society of NSW, *Submission 2* at 2.

7. See Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 115-116.

8. *James P Corry and Co Ltd v Clarke* [1967] NI 62 (English Court of Appeal); New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at para C32, C33 and at 30 (s 12 of the draft *Civil Liability and Contribution Act* (NZ)); see also New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 220.

9. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 115-116.

4.11 No convincing reason has been offered why a judgment “on the merits” in a proceeding between D1 and P is to be treated differently to one obtained by consent, at least so far as a contribution action by D1 against D2 is concerned. A judgment obtained by consent in the original proceedings has the same effect as a judgment on the merits, namely, of discharging some of D2’s liability to P. There is, then, no reason why D2 should not be liable to a contribution claim when there has been a consent judgment between D1 and P. However, the Commission is of the view that, on general principles, it should always be open to D2 to show that judgment in the proceedings between P and D1 was obtained by fraud or collusion.

Conclusion

4.12 We, therefore, recommend that in contribution proceedings brought by D1 against D2, following a judgment (whether on the merits or by consent) against D1 in favour of P, it should be no defence, in the absence of evidence of fraud or collusion, for D2 to establish that D1 was not liable to P.

Finality of judgment as to quantum against D1

Recommendation 5

In contribution proceedings brought by D1 against D2, following a judgment (whether on the merits or by consent) against D1 in favour of P, D2 may argue that the level of damages awarded in the judgment given against D1 was excessive.

4.13 In *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*,¹⁰ the High Court provided an important qualification to its finding that a judgment as to liability against D1 is binding in contribution proceedings between D1 and D2. The qualification is that D2 can challenge the quantum of damages determined in the original proceedings as excessive in order to determine what is “just and equitable” in the circumstances under s 5(2) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW):

The Court ... is required to find what is just and equitable as an amount of contribution having regard to the extent of the responsibility for the

10. (1955) 92 CLR 200.

damage of the tortfeasor against whom the claim is made. There does not seem to be any valid reason why that tortfeasor may not say to the tortfeasor making the claim, if he has improvidently agreed to pay too large an amount or by unreasonable or negligent conduct in litigation has incurred or submitted to an excessive verdict, that the excess is due to his fault and not to that of the tortfeasor resisting the claim. It would be a matter for the Court to consider under the heading of “just and equitable”.¹¹

The Ontario Law Reform Commission has also highlighted the fairness of this approach.¹²

4.14 However, some concern has been expressed about the use of contribution proceedings to challenge the original assessment of damages. It was submitted that the Commission should recommend that the damages assessed in a contested hearing between P and D1 are determinative except:

1. where differential forms of liability apply, for example, where D1 is assessed under general law and D2 assessed under the *Motor Accidents Act 1988* (NSW) or where one tortfeasor is liable under a statutory tort which may not allow the defence of contributory negligence;¹³ or
2. where collusion between P and D1 has been established.¹⁴

4.15 It should be noted that the right to challenge the quantum found in the first proceeding is available only so far as it allows the court, at D2’s suggestion, to determine what is “just and reasonable”. So long as it is made clear that this is the reason for allowing the challenge to the earlier finding as to quantum, the Commission sees no reason why it should not be possible to re-argue the issue of quantum on that limited point.

4.16 Both the finality of the judgment against D1 and the right of D2 to re-argue the issue of quantum, as discussed in *Bitumen and Oil Refineries*, have been specifically implemented in s 29(1) of the Irish *Civil Liability Act 1961*,

11. *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 212-213.
12. See Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 116.
13. See also *Statutory Duties (Contributory Negligence) Act 1945* (NSW) s 2.
14. A D M Hewitt, *Submission* at 1.

a position which has been endorsed by the Ontario Law Reform Commission¹⁵ and the New Zealand Law Commission.¹⁶

WHERE D1 AND P SETTLE WITHOUT JUDGMENT

4.17 There is, at present, no authoritative statement in Australian law¹⁷ as to the way in which the settlement of a claim without judgment will affect D1's claim for contribution from D2.

4.18 It is necessary to deal with issues relating to partial settlements separately to those relating to full settlements:

- A **full settlement** is a settlement between D1 and P that is in full satisfaction of P's claim. A plaintiff who reaches a settlement with a defendant may decide to give up all causes of action in relation to that damage. In this instance, the settlement will be the final determination of all of the plaintiff's rights in relation to that damage. The primary issue will be whether the settling defendant (D1) can use the settlement reached with P as the basis of a claim for contribution from D2.
- A **partial settlement** refers to the situation where D2 and P settle in such a way that other concurrent wrongdoers remain liable to P, although the sum that they may be required to pay, if P obtains judgment against them, will be reduced by the amount of the settlement with D2. The typical situation is that P will be successful in bringing a separate action against D1 and D1 will then want to claim contribution from the settling defendant, D2.

Whether the agreement between D1 and P is a full or partial settlement is a question of construing its terms to determine the intention of D1 and P.¹⁸

15. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 116.

16. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at 30 (s 12 of the draft *Civil Liability and Contribution Act* (NZ)).

17. Cf *Jameson v Central Electricity Generating Board* [1999] 2 WLR 141. See also *Ruffino v Grace Bros Pty Ltd* [1980] 1 NSWLR 732 (which dealt, however, with concurrent tortfeasors who were jointly, but not severally, liable to P).

18. *Jameson v Central Electricity Generating Board* [1999] 2 WLR 141.

Full settlements

4.19 Two issues¹⁹ arise where a full settlement between D1 and P is used as the basis of D1's claim for contribution against D2:

1. whether D2 can resist D1's claim on the ground that D1 was never liable to P;
2. whether the amount for which D1 settled with P should be the sum which the court apportions between D1 and D2 in the contribution proceedings.

Where D1 was never liable to P

Recommendation 6

A settlement between D1 and P which is a final determination of P's rights in relation to that damage should be the basis of D1's right to claim contribution from D2. Where D2 is liable to P, D2 should not be entitled to resist the claim for contribution on the ground that D1 was never liable to P.

4.20 The question whether D2 can resist a claim for contribution brought by D1 on the ground that even though D1 settled with P, D1 was never liable to P, has not been decided by any appellate court in Australia.²⁰ However, in the South Australian case of *Bakker v Joppich*,²¹ Justice Wells, after discussing the High Court's decision in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*,²² stated:

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19. Problems can also arise delimiting the relationship between statutory rights of contribution and other statutory rights, for example, estate claims: see *Jameson v Central Electricity Generating Board* [1999] 2 WLR 141. In the Commission's view, these problems can only be resolved by having regard to the considerations which we have listed in para 4.3.
 20. This issue may be complicated by the terms of a settlement in which D1 agrees to make a payment to P without actually admitting liability. In *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651 the English Court of Appeal found that such a settlement by D1 could be the basis of a claim for contribution from D2 but that D1 would, as part of the claim for contribution from D2, have to be able to prove that he or she was liable to P.
 21. (1980) 25 SASR 468.
 22. (1955) 92 CLR 200.

Both on principle and authority, I am of the opinion that, with respect to the first question, the word “liable” in the first line of par (c) of sub-s (1) of s 25²³ comprehends all circumstances in which a defendant becomes, under any head, legally liable to the plaintiff to pay damages on account of acknowledged or alleged negligence: liability, within the meaning of that passage exists, *inter alia*, where the defendant has submitted to judgment on that account or has made an accord and satisfaction.²⁴

While Justice Wells clearly recognises D1’s entitlement to rely on a full settlement as the basis for a claim to contribution, it is not clear to what extent D2 can resist the claim by arguing that, notwithstanding the settlement, D1 was not liable to P.

4.21 In England, s 1(4) of the *Civil Liability (Contribution) Act 1978* (Eng) requires that the settlement between D1 and P is a bona fide settlement, and that D1 “would have been liable assuming that the factual basis of the claim against him could be established”. This provision seems to leave D2 some room to resist D1’s claim for contribution on the grounds that D1 was never liable to P.²⁵

4.22 The English position can be contrasted with that in Ontario which specifically deals with settlements. It was held in *Marschler v G Masser’s Garage*²⁶ that D1 was entitled to recover an indemnity from D2 where D1 had reached a settlement with P, but was subsequently found (in the contribution proceedings between D1 and D2) not to be liable to P at all. Notwithstanding the fact that D1 was not a “tortfeasor”, the court ordered that D2 indemnify D1. The court interpreted the term “tortfeasor”²⁷ as “a person who impliedly assumes or admits liability when he enters into a

23. Section 25(1)(c) of the *Wrongs Act 1936* (SA), equivalent to s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

24. *Bakker v Joppich* (1980) 25 SASR 468 at 473.

25. See *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651. This case was, however, decided under the *Law Reform (Married Women and Tortfeasors) Act 1935* (Eng). The Court found that D1, who settled without admitting liability, was required to establish liability to P for D1’s contribution claim to succeed. But see the judgment of Salmon LJ who followed the decision in *Marschler v G Masser’s Garage* (1956) 2 DLR (2d) 484.

26. (1956) 2 DLR (2d) 484.

27. *Negligence Act*, RSO 1980, c 135, s 3 (now RSO 1990, c N1, s 2).

settlement”.²⁸ In New South Wales, this decision would be the equivalent of finding that D1’s settlement with P rendered D1 “liable” to P for the purposes of s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). The Ontario Commission has argued that there are good reasons for confirming by legislation the position adopted in *Marschler’s* case and extending it to other heads of civil liability. The only qualification to this would be that a court should be empowered to refuse to make an order for contribution where “the person claiming contribution made the settlement without believing that he was or might be liable and without regard to any legal proceedings that might be instituted against him by the injured person for the claim settled”.²⁹

4.23 There are a number of grounds for limiting D2’s right to resist D1’s claim for contribution. First, such a limit would encourage the settlement of claims, without unduly impinging on the capacity of D2 to defend a claim for contribution. D1 will still have to establish that D2 would have been liable to P. Where D1 has settled for an unreasonably high figure with P, D2’s position may be protected by allowing D2 to argue that the quantum of the settlement is excessive.³⁰ Secondly, it would be unusual for D2 to be able to defeat D1’s claim by establishing that D2 was exclusively liable to P, whereas D1’s claim for contribution may succeed if D1 establishes that he or she was indeed liable to P, no matter how small D1’s fair share of responsibility is ultimately determined to be. Thirdly, D2 will have benefited by D1 paying to P a sum that D2 would have been legally compelled to pay. This is not the kind of “unrequested” benefit for which it is unfair to require

28. Quoted in Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 87.

29. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 96. If D1 was never liable to P, then D1’s payment to P cannot be regarded as conferring a benefit on D2. A gratuitous payment would be regarded as a collateral payment which would not affect the extent of D2’s liability to pay damages to P (at 91). See also pages 87-88 and 95 of the same paper and New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at 59 which says that it is enough for D1 to show his or her genuine belief at the time of the payment.

30. See para 4.13-4.16. See also Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 93; J R Morris, *Apportionment of Civil Liability* (Legal Research Foundation Inc, Publication No 28, 1987) at 21.

D2 to pay: D1's payment has not deprived D2 of any real choice about the way in which D2 will allocate his or her resources.³¹

4.24 Again, as with the question of the finality of judgments against D1, if D1 has discharged some of D2's liability to P, then D1 should be able to claim contribution from D2 in separate proceedings provided D2 is still able to argue against the quantum of damages assessed and to contest his or her own liability.

The sum to be apportioned

Recommendation 7

In contribution proceedings, the sum agreed to between D1 and P in settlement of P's claim should be presumed to be reasonable. When D2, in a claim for contribution, challenges the quantum of the award on the ground that it was unreasonable or that the settlement was not bona fide, the court may order D2 to pay a sum which the court considers appropriate in the circumstances.

4.25 The law is not clear on the issue of whether the amount of the settlement between D1 and P should be treated as the sum to be apportioned between D1 and D2. The issue will generally arise where P and D1 have settled for an amount which is in excess of what D2 considers a reasonable amount. In England the House of Lords has recently held that the effect of a compromise is to fix the amount of the plaintiff's claim in the same way as if the plaintiff had obtained judgment, but in that case P had settled for less than the full value of the claim.³² There has been no judicial statement on the issue in New South Wales. While there has been some support in South Australia for the proposition that the sum arrived at by settlement should be presumed to be reasonable,³³ the majority of the Full Court of the South Australian

31. See Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 93; Scottish Law Commission, *Report on Civil Liability: Contribution* (Scot Law Com No 115, 1988) at para 3.20-3.24.

32. *Jameson v Central Electricity Generating Board* [1999] 2 WLR 141.

33. *Bakker v Joppich* (1980) 25 SASR 468 at 475; *Anderson v Haskins* (1989) 8 MVR 425 at 433 (SA SC).

Supreme Court in *Saccardo Constructions Pty Ltd v Gammon*³⁴ rejected this view. The majority stated that the quantum of the settlement between D1 and P would not be presumed to be reasonable in contribution proceedings initiated by D1 and that D1 could be required to prove the quantum of damages as in any other suit.³⁵ It was felt that the prospect of a potential costs order was sufficient to prevent D2 putting D1 to full proof of the quantification of damages in the settlement with P.³⁶

4.26 In reaching our conclusion, we have given great weight to the necessity of discouraging unnecessary and expensive litigation. Any system that would require separate proof of even the reasonableness of the amount of the settlement between D1 and P is considered undesirable. Accordingly we have chosen not to follow the approach in the Ontario *Negligence Act*³⁷ which places the onus of proving the reasonableness of the settlement on D1.³⁸

4.27 The New Zealand Law Commission's approach has been to recommend that D1 have a right to contribution if:

- D1 has agreed to pay P "in good faith"; and
- the amount payable by D1 "exceeds the proportion of the loss attributable" to D1.³⁹

If the amount agreed upon was reached in good faith, the amount is then not open to challenge.⁴⁰

4.28 The Commission, however, considers that settlement or accord between D1 and P should be treated, so far as is possible, in the same way as a judgment against D1 in favour of P and therefore we do not consider that the settlement must be proved to be bona fide for the amount to be the basis

34. (1991) 56 SASR 552 at 559-560.

35. Mohr J, in dissent, found that D1's settlement with P should have the benefit of a presumption of reasonableness. The primary rationale for Mohr J's decision was that such a presumption would discourage unnecessary litigation (at 555-557).

36. *Saccardo Constructions Pty Ltd v Gammon* (1991) 56 SASR 552 at 560-561 per Matheson J and Zelling AJ.

37. RSO 1990, c N1.

38. This onus is usually discharged by evidence from which the Court can approximate what P would have recovered in legal proceedings.

39. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at 26, s 10(1) of the draft *Civil Liability and Contribution Act* (NZ).

40. New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at 27.

for the contribution proceedings.⁴¹ The opportunity for D2 to challenge the amount agreed between D1 and P should be sufficient protection for D2's interests against an excessive settlement, while ensuring that the matter is not raised in every case. The Commission considers that this limited ground for review of the settlement figure reaches an adequate balance between the need to encourage settlements and the need to ensure that the amount of D2's contribution is just and equitable in the circumstances.

4.29 The legislation implementing this recommendation should be framed so that the presumption of reasonableness applies also to cross defendants and other parties to a settlement since it is in the interests of all to get some of the parties out of the proceedings wherever possible so as to reduce complexity and costs.⁴²

Partial settlements

Recommendation 8

In the case of a partial settlement between D2 and P, D1 should have a right of contribution from D2; D2 should have a right of contribution from D1; and P should be entitled to bring an action against D1 in order to obtain full compensation.

4.30 There are two basic questions to be dealt with when partial settlements are involved:

- whether D1, who has been sued to judgment, can claim contribution from D2 who has already settled with P; and
- whether D2, having settled with P, can claim contribution from D1 who has been sued to judgment or has settled with P.

4.31 The current law is that P is entitled to obtain full compensation for the harm sustained and each tortfeasor is entitled to pursue rights of contribution against the other under s 5(1)(c) of the *Law Reform (Miscellaneous*

41. See also Scottish Law Commission, *Report on Civil Liability: Contribution* (Scot Law Com No 115, 1988) at para 3.14 and 3.16.

42. See NSW Bar Association, *Consultation*; A D M Hewitt, *Submission* at 2.

Provisions) Act 1946 (NSW) since each “is, or would if sued have been, liable”. The process which determines the rights of each of the parties is complicated and leaves the settling defendant, D2, vulnerable to claims for contribution after reaching a settlement with P. D2’s position under this arrangement may provide little incentive for D2 to reach a settlement.

4.32 In DP 38 the Commission considered three options for dealing with partial settlements:⁴³

- the first, which represents the current position, allows for a series of multiple actions which aim to achieve full compensation to the plaintiff and a fair allocation of liability amongst the tortfeasors;⁴⁴
- the second denies any right of contribution to D2 who has settled with P and protects D2 from any claims by D1; and
- the third protects D2 from contribution claims by D1 and limits the damages which P, having settled with D2, can recover from D1.⁴⁵

4.33 It is by no means clear what the effect of these options might be on settlements. The first option will have the effect of protecting P’s interests but may not encourage any defendants to settle. The third option may not encourage P to seek settlement since P will have to bear any shortfall if P settles for too low a figure, having underestimated D2’s degree of fault. Such a system will also not allow P to take advantage of a settlement with D2 which is for too high a sum. The second option may be preferable since it will allow P to retain the benefit of a favourable settlement with D2 and will also protect D2 from further claims.

4.34 However, there are a number of arguments against adopting the second option in favour of the current position. The first is that it involves a risk that

43. DP 38 para 4.60. See also Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 96-105.

44. Adopted by the *Civil Liability (Contribution) Act 1978* (Eng) following recommendations in England and Wales, Law Commission, *Law of Contract: Report on Contribution* (Law Com 79, 1977) at para 44-57. See also Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 105-108.

45. Proposed by G L Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons, London, 1951) at 152-155 and implemented by s 17(2) of the *Civil Liability Act 1961* (Ireland) and s 3(3) of the *Tortfeasors and Contributory Negligence Act 1954* (Tas).

the plaintiff may be either over-compensated or under-compensated. This would offend against the principle that the plaintiff should be entitled to full compensation. The second is that partial settlements do not prevent the plaintiff bringing actions against any of the other defendants. In this sense, a policy of encouraging partial settlements may or may not be consistent with an overall policy of encouraging settlements.

4.35 One submission strongly supported the third option as implemented by s 3(3) of the *Tortfeasors and Contributory Negligence Act 1954* (Tas), stressing the benefits of encouraging early settlement to reduce the complexity and length of any remaining hearings between P and other defendants. It was suggested that there are particular problems under the current regime where D2 and P are prepared to settle (if, say, D2 had few assets available to defend a claim or P has a strong case against D2) but D1 is prepared to take the action to trial. D2 would obviously be unwilling to settle if there was still the possibility of a claim for contribution from D1.⁴⁶

4.36 Overall, the Commission is not persuaded that a change in the law is warranted. The current legal position protects the right of the plaintiff to obtain full compensation for the harm sustained. The relatively complex state of the law is balanced against the uncertain basis of any policy encouraging other than final settlements. Lastly, the current legal position allows the parties maximum room to negotiate a settlement which would be a final determination of all of P's rights in relation to the damage.

Releases and indemnities

Recommendation 9

In circumstances where a release and indemnity is given by P to D2, the rights of contribution between D1 and D2 should be the same as in the case of partial settlements.

4.37 A specific instance of a partial settlement is where P releases D2 from liability altogether, leaving P with a single cause of action against D1.⁴⁷ A release and indemnity is, therefore, merely a special form of a settlement

46. A D M Hewitt, *Submission* at 2.

47. See, for eg, *AWA Ltd v Daniels* (1992) 7 ACSR 759 at 774-775 (affirmed in part as *Daniels v Anderson* (1995) 37 NSWLR 438).

which is not a final settlement. The Commission considers that the same rules should apply for all settlements which are not final settlements.

WHERE P FAILS IN AN ACTION AGAINST D2

Recommendation 10

Any judgment in favour of D2, following a hearing on the merits in an action brought by P against D2, should be conclusive evidence that D2 is not “liable” to P so that D1 cannot claim contribution against D2, except where:

- 1. P’s action against D2 fails for want of prosecution;**
 - 2. D1 is appealing from a decision in favour of D2 where both D1 and D2 are parties to the action brought by P and where both are joined as third parties; and**
 - 3. P’s action against D2 fails because the action has become statute barred.**
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4.38 The provision in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) which allows D1 to claim contribution from any other tortfeasor (D2) “who is, or would if sued have been, liable” has given rise to a number of problems in the following circumstances:

- where D1 claims contribution from D2 when D2 has already successfully defended an action against P;⁴⁸
- where D1 claims contribution from D2 when P is unable to take action against D2 because of the operation of a time bar;
- where P’s action against D2 fails for want of prosecution; and
- where P brings an action against D1 and D2 with each defendant joining the other as a third party, and where there is a finding that D1 is liable to P but that D2 is not liable to P.

48. This was the issue dealt with in *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169.

4.39 A further consideration arises where differential damages apply, that is, where D2 and D1 are liable for the same damage to P but where the quantum of damages for which D1 and D2 are each liable is different as would be the case where contributory negligence was available to only one of them.⁴⁹ In *Mahony v J Kruschich (Demolition) Pty Ltd*⁵⁰ the High Court decided that the reference to “any tortfeasor liable in respect of that *damage*” in s 5(1)(c) did not require that D1 and D2 each be responsible for exactly the same *damages*. Provided that both D1 and D2 are liable for the same damage, it does not matter that the amounts of damages which each must pay are different.

Where D2 successfully defends an action “on the merits”

4.40 Section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), which provides that any tortfeasor “may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage”, prevents any claim for contribution by D1 against D2 in circumstances where D2 has already successfully defended an action brought by P.⁵¹ This position has been confirmed in England by s 1(5) of the *Civil Liability (Contribution) Act 1978* which provides that any judgment in an action by P against D2 “should be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of [D2]”.

4.41 The concern that D1’s rights of contribution are lost in a proceeding (between D2 and P) to which D1 has not been a party is more than outweighed by the fact that D2 will be subjected to a form of “double jeopardy” if the findings in the earlier proceedings can be effectively re-opened by D1’s contribution proceeding.⁵² There is no warrant for allowing

49. For example, where one tortfeasor is liable under a statutory tort which may not allow contributory negligence to be raised and the other only under common law negligence.

50. (1985) 156 CLR 522.

51. See *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169.

52. See Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 168-169; University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Report 31, 1979) at 76; and Scottish Law

the expense, inconvenience and uncertainty which would arise were D1 able to challenge the earlier judgment and the Commission accordingly recommends that there be no right of contribution for D1 where D2 has, on the merits, successfully defended an action brought by P.

4.42 The phrase “on the merits” has been included in this recommendation to ensure that D2 is protected only by judgments arising after full litigation. Judgments obtained by consent would, therefore, not fall within the terms of this recommendation.⁵³

Where P’s action against D2 is time barred

4.43 The next situation to be considered is where P brings an action against D1 at a time when P is no longer able to bring an action against D2 because the limitation period in relation to P’s action against D2 has expired.

4.44 The words “or would if sued have been, liable” in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) have been interpreted by the High Court to mean “if sued at any time”.⁵⁴ The consequence of this decision is that D1 is entitled to claim contribution from D2 in circumstances where P’s own action against D2 is statute barred because the relevant limitation period has expired. There are two reasons for endorsing the High Court’s interpretation. The first, consistent with the doctrine of solidary liability, is that P should not bear the burden of having failed to bring an action against D1 within the limitation period applicable to D2.⁵⁵ The second is that allowing D1 to claim contribution from D2, at a time when P’s action

Commission, *Report on Civil Liability: Contribution* (Scot Law Com No 115, 1988) at para 3.41.

53. See *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 73 ALJR 238 at 245 per Gaudron and Gummow JJ and 262-264 per Callinan J, but see 254-256 per Kirby J (with whom McHugh J agreed).

54. *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213.

55. This involves a rejection of the solution proposed by G L Williams, *Joint Torts and Contributory Negligence*, (Stevens & Sons, London, 1951) at 444-446, and adopted by the *Civil Liability Act 1961* (Ireland) s 35(1)(i).

against D2 is statute barred, removes in effect P's power to decide whether D1 will be able to claim contribution from D2.⁵⁶

4.45 However, there is also authority for the proposition that D2, where the limitation period in P's cause of action has expired, will be able to defend D1's claim for contribution if P had previously sued D2 and been defeated by the time bar.⁵⁷ This situation is clearly unsatisfactory. It cannot be thought fair that the success of D1's claim for contribution against D2 will depend on whether P did or did not attempt to take action against D2 once the cause of action has become statute barred. In any case, a finding that P's cause of action against D2 was statute barred cannot really be said to be the result of a hearing on the merits so that D2 can claim protection. Accordingly the Commission recommends that the expiration of a limitation period for an action between P and D2 should be no defence to a claim by D1 for contribution from D2 regardless of whether P has failed in taking action against D2 for that reason. D1 should, therefore, only be prevented from claiming contribution from D2 where D2 has been successful on a hearing "on the merits".

Where P fails for want of prosecution

4.46 A further, related, issue arises where P's action against D2 fails for want of prosecution. In *Canberra Formwork Pty Ltd v Civil & Civic Ltd*⁵⁸ Justice Blackburn decided that the dismissal of a cause of action for want of prosecution was not a final order determining the question of liability. Hence D1 was not prevented from claiming contribution from D2. The English Law Commission and the Ontario Law Reform Commission each recommended that D1's claim for contribution from D2 be allowed to proceed where P's action against D2 failed for want of prosecution.⁵⁹ The Commission sees no

56. See also the discussion at para 4.74-4.76.

57. *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169.

58. (1982) 41 ACTR 1. See also *Hart v Hall & Pickles Ltd* [1969] 1 QB 405 (CA).

59. England and Wales, Law Commission, *Law of Contract: Report on Contribution* (Law Com 79, 1977) at para 61; Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 168-169.

reason to reform the rule which allows D1's claim for contribution to proceed in these circumstances.

Where D2 is found not liable in third party proceedings

4.47 Another issue arises where D1 and D2 are both parties to an action brought by P, and have joined each other as a third party. It is possible that D1 will be held responsible for P's loss, while D2 is found to be not liable to P. In these circumstances, D1 may wish to appeal against the decision in favour of D2 in order to preserve a claim for contribution against D2. An "appeal" of this kind by D1 is not prevented by operation of the rule outlined above.⁶⁰ Indeed the New South Wales Court of Appeal has recognised that in such circumstances D1 would have a right of appeal from the ruling of the trial judge that D2 was not liable to P.⁶¹

4.48 The Commission is unable to identify any reason why such an appeal from the finding of the trial judge should not be allowed to proceed. As a result, the Commission recommends that the right of D1 to appeal from the finding of the trial judge in these circumstances should be retained and given more formal recognition.

BASIS OF APPORTIONMENT OF LIABILITY

4.49 The apportionment of liability between wrongdoers is at the heart of a scheme for providing rights of contribution. Apportionment of liability is also the most difficult element to define with any degree of specificity. Section 5(2) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) provides the basis for apportionment of liability between D1 and D2 in contribution proceedings:

In any proceedings 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.

60. See para 4.40.

61. In the absence of satisfaction of P's damages by D1: *Castellan v Electric Power Transmission Pty Ltd* (1967) 69 SR (NSW) 159 at 186-187 per Asprey JA (with whom Holmes JA agreed), but see Walsh JA at 172-173. See also *Kelly v Newcastle Protective Coating Pty Ltd* [1973] 2 NSWLR 45.

This provision allows a court a wide discretion to achieve a just and equitable apportionment, having regard to the extent of each person's responsibility. "Responsibility" here is taken to mean more than fault, and invites consideration of individual culpability as well as of the relevant "causal factors".⁶²

4.50 One particular feature of s 5(2) is that it provides that an order to make contribution includes the power to order that the contributor make a payment which amounts to a full indemnity. This allows a court a discretion in apportioning liability including the power to order one defendant to pay 100% of the plaintiff's liability. The extent of this discretion is important in allowing the court to apportion responsibility between the wrongdoers in a just and equitable way. This may be particularly important where one of the defendants has committed an intentional tort.⁶³

4.51 The Commission recommends that the discretion in s 5(2), which allows a court to determine the level of contribution on the basis of a "just and equitable" amount and "responsibility" should be retained, chiefly because the formulation allows an appropriate degree of discretion and no better alternative has presented itself. This basis also works well in the context of contributory negligence which already has an established body of law. There has also been general support among other law reform agencies for retaining the requirement that the contribution recoverable be that amount which is found to be "just and equitable".⁶⁴

62. J G Fleming, *The Law of Torts* (9th edition, LBC Information Services, Sydney, 1998) at 297-298.

63. *K v P* [1993] Ch 140.

64. England and Wales, Law Commission, *Law of Contract: Report on Contribution* (Law Com 79, 1977) at para 69 (implemented by *Civil Liability (Contribution) Act 1978* (Eng) s 1(2)); Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers* (Topic 5, 1984) at para 8.1; New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at 20-21; Victoria, Chief Justice's Law Reform Committee, *Report on Contribution* (1979) and also *Wrongs Act 1958* (Vic) s 24(2); Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 196. See also J R Morris, *Apportionment of Civil Liability* (Legal Research Foundation Inc, Publication No 28, 1987) at 12-15. But see Scottish Law Commission, *Report*

on Civil Liability: Contribution (Scot Law Com No 115, 1988) at para 3.54-3.55.

5. Procedural

- Sanction in costs
- Sanction in damages
- The distinction between joint wrongdoers and several wrongdoers
- Limitation of actions

SANCTION IN COSTS

Recommendation 11

The sanction in costs rule should apply to all plaintiffs pursuing successive actions in relation to the same damage.

5.1 Section 5(1)(b) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) operates to discourage plaintiffs from bringing successive actions by limiting the costs they can recover. It is generally presumed that the courts have an inherent power to make such costs orders in any case. However, notwithstanding this, most law reform agencies have recommended the retention of the sanction in costs rule.¹ Its continued presence in contribution legislation appears uncontroversial.²

5.2 The Law Reform Commission considers that the sanction in costs rule should be retained and extended to cover not only all plaintiffs injured by multiple tortfeasors, but also plaintiffs injured by multiple wrongdoers. This recommendation represents merely an adaptation of current provisions to fit the expanded rights to contribution envisaged by the Commission.

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1. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 28; England and Wales, Law Commission, *Law of Contract: Report on Contribution* (Law Com 79, 1977) at para 37-39; Law Reform Commission of Saskatchewan, *Proposals Relating to Joint Obligations* (Report to the Minister of Justice, 1985) at 12; Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers* (Topic 5, 1984) at para 9.1; and University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Report 31, 1979) at 29-30. See also J R Morris, *Apportionment of Civil Liability* (Legal Research Foundation Inc, Publication No 28, 1987) at 24-25. But see Law Reform Commission of British Columbia, *Report on Shared Liability* (LRC 88, 1986) at 17; and New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 263.
 2. The matter was not raised in either submissions or consultations conducted by the Commission.

SANCTION IN DAMAGES

Recommendation 12

The “sanction in damages” rule should apply in actions against concurrent wrongdoers only in cases where the plaintiff has already received judgment for the whole of his or her damages without limitation.

5.3 Even though s 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) has abolished the judgment bar rule for joint tortfeasors³ which prevented plaintiffs taking successive actions against joint tortfeasors, s 5(1)(b) continues to apply a sanction in damages to all successive actions whether the liability of tortfeasors is joint or several. This sanction in damages prevents plaintiffs from recovering any more in subsequent actions than that which they obtained in their first action. The rationale of this provision was to discourage plaintiffs from bringing multiple actions and from “forum shopping” for increased awards of damages.⁴

5.4 In more recent times, there has been a move in some quarters to abolish the sanction in damages rule. One reason for this has been that there is no longer so great a concern about “forum shopping” for increased awards of damages. This is because the decline in the use of civil juries has meant that the possibility of inconsistencies between jury verdicts is no longer a relevant consideration for most plaintiffs.⁵ Another reason for the move against the sanction in damages rule is that it is too onerous on plaintiffs and this unfairness would be heightened if rights to contribution were extended to all concurrent wrongdoers.⁶ This could be the case, for example, where a plaintiff takes action against one wrongdoer liable under a contract which contains some form of limitation before proceeding against a tortfeasor liable for the same damage.

3. See below at para 5.9.

4. See eg, England and Wales, Law Commission, *Law of Contract: Report on Contribution* (Law Com 79, 1977) at para 40-41.

5. Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers* (Topic 5, 1984) at para 9.1; New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 259.

6. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 20-21.

5.5 The complexity arising from the introduction of a right to contribution for wrongdoers liable in contract, where liability may be limited, is certainly a reason to abolish the sanction in damages rule. This has been the course adopted in England⁷ and recommended in Ontario.⁸ However this may be seen as going too far. One way around the problem caused by the limitation of liability in some cases would be to allow the sanction in damages rule to apply only to cases where the judgment in the first action was not subject to a limitation of liability.⁹ This would eliminate the unfairness to those plaintiffs who were subject to some limitation in their first action, while continuing to discourage those who had obtained, but were dissatisfied with, a judgment for full compensation.

5.6 In DP 38, the Commission proposed that the sanction in damages rule should be abolished for all concurrent wrongdoers.¹⁰ Submissions on DP 38 raised a number of concerns with this proposal. Several concerns related to the expectation that the abolition of the sanction in damages rule might lead to a proliferation of litigation, either because the abolition in New South Wales alone might encourage plaintiffs from other States to pursue claims in New South Wales,¹¹ or because there was still a degree of inconsistency between civil judgments in New South Wales courts.¹² One submission drew attention to the fact that there were sufficient tactical advantages to encourage plaintiffs to run a second action once the sanction in damages rule had been removed. An example given was that plaintiffs would be able to tailor evidence in their second action according to weaknesses revealed in the first.¹³ It was also noted that the problem would be eliminated in any case, even in situations where liability was limited, if other measures were successful in encouraging joint actions.¹⁴

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7. *Civil Liability (Contribution) Act 1978* (Eng) s 9(2), repealing s 6(1)(b) of the *Law Reform (Married Women and Tortfeasors) Act 1935* (Eng).
 8. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 20-21.
 9. This was the approach adopted by the Law Reform Commission of British Columbia, based on a *Uniform Contributory Fault Act* proposed by the Uniform Law Conference of Canada in 1984: Law Reform Commission of British Columbia, *Report on Shared Liability* (LRC 88, 1986) at 16-17.
 10. DP 38, Proposal 14.
 11. Insurance Council of Australia Ltd, *Submission*.
 12. A D M Hewitt, *Submission*.
 13. A D M Hewitt, *Submission*.
 14. NSW Bar Association, *Consultation*.

5.7 The Commission is not entirely persuaded that other measures will be successful in completely eliminating multiple proceedings so that plaintiffs will receive judgment against wrongdoers liable under different heads of liability at the same time. However, the concerns raised about the proposal to abolish the sanction in damages rule have made that course of action undesirable. The Commission has therefore decided that, in order to prevent a feared proliferation of litigation and to ensure that plaintiffs subject to a limitation under one head of liability only are not disadvantaged, the sanction in damages rule should continue to apply to plaintiffs who have received judgment for the whole of their damages. This will mean that the sanction in damages rule will not apply to plaintiffs in cases where the liability of a wrongdoer in the first action has been limited in some way.

THE DISTINCTION BETWEEN JOINT WRONGDOERS AND SEVERAL WRONGDOERS

5.8 Concurrent wrongdoers may be either joint or several. However, this distinction has become difficult to justify, especially since the passing of contribution legislation has rendered the distinctions between joint tortfeasors and several tortfeasors irrelevant. When the right to claim contribution is extended to wrongdoers other than tortfeasors, such differences as remain with respect to wrongdoers generally may adversely affect a concurrent wrongdoer's right to claim contribution. The following paragraphs contain recommendations to remove the legal distinction between joint wrongdoers and several wrongdoers.

Judgment bar rule

Recommendation 13

The judgment bar rule should be abolished for all joint wrongdoers.

5.9 The judgment bar rule, which provides that judgment against one joint wrongdoer bars actions against other joint wrongdoers, is one of the important points of distinction between cases involving joint wrongdoers and

those involving several concurrent wrongdoers. The operation of this rule was removed, with respect to joint tortfeasors, by s 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), thereby placing joint tortfeasors in the same position as several tortfeasors. The sanction in damages¹⁵ and sanction in costs provisions operate to discourage successive actions by plaintiffs against joint tortfeasors.

5.10 Since s 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) refers only to joint tortfeasors, the extension of rights of contribution to other wrongdoers will make it necessary to extend the abolition of the judgment bar rule to include other wrongdoers who are jointly liable to the plaintiff, including co-sureties.

5.11 Section 97 of the *Supreme Court Act 1970* (NSW), which prevents the operation of the judgment bar rule except where s 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) applies, will need to be amended to confirm the abolition of the judgment bar rule for all joint wrongdoers. Other provisions which will also need to be amended include the relevant parts of the *District Court Rules 1973* (NSW)¹⁶ and s 29 of the *Local Court (Civil Claims) Act 1970* (NSW), which allows a plaintiff, who has obtained judgment against one or more of several defendants, to proceed to judgment and enforce it against any other defendant or defendants.

Settlement bar rule

Recommendation 14

The settlement bar rule should be abolished for all joint wrongdoers.

5.12 At common law, release or release by accord and satisfaction by a plaintiff with a joint wrongdoer discharges the liability of all other joint

15. But see the recommendation to alter the sanction in damages above, Recommendation 12, para 5.3-5.7.

16. For example, Part 20 r 9.

wrongdoers.¹⁷ This was the case even where the amount for which the plaintiff settled with a wrongdoer was less than the amount of the judgment in favour of the plaintiff. This rule was ameliorated by the effect of the distinction between a “release” and a “covenant not to sue”. The latter, but not the former, preserved the plaintiff’s rights against the other parties who were liable to the plaintiff. However, a plaintiff had to state specifically that the agreement with the joint tortfeasor was a covenant not to sue.

5.13 Section 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), by effectively severing the unity of a cause of action against joint tortfeasors, has implicitly abrogated the basis for the settlement bar rule.¹⁸ An extension of rights of contribution to all wrongdoers should, therefore, have the effect of implicitly abrogating the basis for the settlement bar rule with respect to all joint wrongdoers. There is, therefore, on the face of it, no need to abolish the rule expressly.

5.14 In DP 38 the Commission proposed that the settlement bar rule should be abolished for all joint wrongdoers on the grounds that the effect of the rule was pernicious in any case and generally against the policy of the law to encourage settlements.¹⁹ Instead the effect of a settlement between a plaintiff and one of a number of joint wrongdoers should depend on the intention of the plaintiff.²⁰ The settlement bar rule has recently been expressly abolished in proceedings before the New South Wales Dust Diseases Tribunal.²¹

17. See *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 581-582.

18. *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 584-585 per Brennan CJ, Dawson and Toohey JJ, at 591 per Gaudron J, and at 613-614 per Gummow J.

19. See J G Fleming, *The Law of Torts* (9th edition, LBC Information Services, Sydney, 1998) at 292.

20. Proposal 16, para 7.23-7.29. The question of the intention of a plaintiff in settling with one of a number of joint wrongdoers will be one for the courts to decide. Justice Gummow in *Thompson* noted that the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) “establishes a regime creating and regulating a right of contribution between joint tortfeasors where contribution is sought consequent upon a release of the claimant for contribution”: *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 617.

21. *Dust Diseases Tribunal Act 1989* (NSW) s 12C, inserted by Sch 1[5] of the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998* (NSW) and the Explanatory Note to Sch 1[5] of the Bill as introduced to Parliament. The amendment commenced on 1 December 1998:

Ontario had also expressly abolished the rule.²² However, in light of the recent decision of the High Court in *Thompson v Australian Capital Television Pty Ltd*²³ the Commission is not entirely convinced that there is a good reason for expressly abolishing the rule.

5.15 Although the Commission does not consider that there will be any need to abolish the settlement bar rule expressly since the extension of rights of contribution to all wrongdoers will impliedly abolish it, in order to avoid any doubt, and given recent legislative developments in New South Wales, we recommend that the abolition of the settlement bar rule be expressly stated in legislation.

Single judgment rule

Recommendation 15

There should be explicit recognition that abolition of the judgment bar rule for all joint wrongdoers will have the effect of abolishing the single judgment rule.

5.16 The single judgment rule provides that when joint wrongdoers are sued together only one judgment can be given against them, and damages cannot be severed. One consequence of this rule at common law was that it was impossible for a court to apportion damages between joint tortfeasors, or to award exemplary damages against any one of them. The High Court has held that s 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) abolished the common law rule that only one judgment could be awarded in an action for damages against joint tortfeasors and in that case, the Court

New South Wales, *Government Gazette* No 165 of 27 November 1998 at 9016.

22. *Courts of Justice Act* SO 1984, c 11 s 149(1).

23. (1996) 186 CLR 574.

confirmed an award of exemplary damages against one of the joint tortfeasors who was a party to that action.²⁴

24. *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448; J G Fleming, *The Law of Torts*, (9th edition, LBC Information Services, Sydney, 1998) at 291.

5.17 In DP 38 the Commission recognised that, if s 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) were recast to include all joint wrongdoers, it would follow that the single judgment rule would be abrogated for all joint wrongdoers.²⁵ However, out of an abundance of caution, we recommend that there should be explicit statutory recognition that an extension of s 5(1)(a) to include other wrongdoers would have the effect of abolishing the single judgment rule.

LIMITATION OF ACTIONS

5.18 There are two situations in which limitation periods may affect a claim for contribution made by D1 against D2. The first is where P proceeds against D1 at a time when P's primary cause of action against D2 is statute barred. The second is concerned with the limitation period within which D1 is allowed to initiate a claim for compensation against D2.

Limitation period relevant to the primary cause of action

5.19 When P proceeds against D1 at a time when P's primary cause of action against D2 is statute barred, the current position is that D1 will not be prevented from claiming contribution from D2. This is because of the interpretation placed on s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) by the High Court in *Brambles Constructions Pty Ltd v Helmers*.²⁶ The phrase "or would if sued have been, liable" has been held to mean "if sued at any time" (whether or not the claim against D2 is statute barred).

5.20 When rights of contribution are extended to mixed concurrent wrongdoers the limitation periods for the primary causes of action may differ with the result that P may bring an action against D1 at a time when P's action against D2 is statute barred. Varying limitation periods are likely to occur in cases involving damages for personal injury,²⁷ damage in the form of

25. DP 38, Proposal 17, para 7.30-7.31.

26. (1966) 114 CLR 213.

27. See *Limitation Act 1969* (NSW) Pt 3 Div 3 (amended in 1990) which provides for a three year limitation period (with various provisions for extension of time) with respect to actions for damages for personal injury "founded on

economic loss,²⁸ or where statutes define specific limitation periods.²⁹ The particular problem in the case of rights of contribution is that the later limitation period for D1 to initiate a claim for contribution does not begin to run until D1's liability to P is determined.³⁰

5.21 Alternative approaches to the current position include denying D1 a right of contribution from D2 when P's action against D2 is statute barred³¹ or reducing P's right to damages in the action against D1 on the grounds that P should bear the losses flowing from a failure to sue D2 within the limitation period.³² However, the Ontario Law Reform Commission,³³ the New Zealand Law Commission,³⁴ and the *Civil Liability (Contribution) Act 1978* (Eng)³⁵ have confirmed the position reached by the High Court in *Brambles Construction Pty Ltd v Helmers*³⁶ so that D2 will not be able to rely on the passing of the limitation period as a defence against D1's claim for contribution.

5.22 There are two reasons for retaining the rule in *Brambles Construction Pty Ltd v Helmers*. The first, consistent with the doctrine of solidary liability,

negligence, nuisance or breach of duty"; *cf* the limitation period generally for tort, breach of statutory duty or breach of contract which remains six years: s 14(1).

28. See *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27 at 65-71. In this case the plaintiff's contractual claim was statute barred but the negligence action was within time because the economic loss was sustained when the plaintiffs became aware of the defect, that is, the point of time when the building sustained the diminution in value which amounted to the economic loss.
29. *Trade Practices Act 1974* (Cth) s 75A (three year period runs from when the person becomes aware of the loss). See para 3.32 and 3.33 for discussion of whether there is any right to contribution arising out of breach of the *Trade Practices Act 1974* (Cth).
30. *Limitation Act 1969* (NSW) s 26.
31. This would conform to the decision in *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169.
32. G L Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons, London, 1951) at 444-446.
33. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 157-158.
34. New Zealand, Law Commission, *Apportionment of Civil Liability: A Discussion Paper* (PP 19, 1992) at para 240-249.
35. *Civil Liability (Contribution) Act 1978* (Eng) s 1(3).
36. (1966) 114 CLR 213.

is that P should not bear the burden of having failed to bring an action against D1 within the limitation period applicable to D2.³⁷ The second is that allowing D1 to claim contribution from D2, at a time when P's action against D2 is statute barred, effectively removes P's power to decide whether D1 will be able to claim contribution from D2.³⁸ Concerns raised by some law reform agencies that the possibility of D1 settling with P long after the expiration of the primary limitation periods for all defendants could result in the indefinite extension of the time during which D2 could be called on to contribute do not apply in New South Wales. Section 26(1)(b) of the *Limitation Act 1969* (NSW) provides that an action for contribution cannot be pursued beyond the prescribed period, currently four years, from the expiry of the limitation period of the principal cause of action. The Commission, therefore, sees no reason to alter the law as it currently exists so long as the phrase in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) is retained in any reformulation to include mixed concurrent wrongdoers.

Limitation period for contribution actions

5.23 In New South Wales a claim for contribution is a separate cause of action and hence has its own limitation period. Section 26(1) of the *Limitation Act 1969* (NSW) provides that a claim for contribution is not maintainable if brought after the first to expire of:

- (a) a limitation period of two years running from the date on which the cause of action for contribution first accrues to the plaintiff or to a person through whom he claims; and
- (b) a limitation period of four years running from the date of the expiration of the limitation period for the principal cause of action.

The date on which the cause of action first accrues is defined in s 26(2) as the date on which judgment is given in the action of P against D1, or the date on which P and D1 reach a settlement to the action of P against D1.³⁹

37. This involves a rejection of the solution proposed by Williams (1951) at 444-446, and adopted by the *Civil Liability Act 1961* (Ireland) s 35(1)(i).

38. See also the discussion at para 4.74-4.76.

39. *Limitation Act 1969* (NSW) s 14(2)(b).

Length of limitation period

5.24 In most cases the overall effect of the operation of s 26 is that a defendant seeking contribution has two years from the date of judgment in the principal action in which to initiate a claim for contribution.⁴⁰ This is generally in line with the limitation period for claims for contribution established by the *Civil Liability (Contribution) Act 1978* (Eng)⁴¹ and with recommendations of other law reform bodies,⁴² although some have opted for longer periods.⁴³ By contrast, s 24(4) of the *Wrongs Act 1958* (Vic) provides for a shorter limitation period so that the action for contribution must commence either within the period of limitation relevant to P's action against D1, or within twelve months after the writ in the action against D1 was served on D1. The University of Alberta Institute of Law Research and Reform has taken a different approach and recommended that the limitation period for a contribution claim should be the limitation period for the original wrong.⁴⁴

5.25 In DP 38 the Commission made no proposal to alter the limitation period for contribution claims as they currently stand, observing that the Victorian position could result in D1 losing the right to claim contribution before the cause of action to claim contribution first accrued.⁴⁵

5.26 One submission drew attention to the fact that considerable periods of time could pass before a defendant need claim against another under the available extensions and that this could be unfair to defendants who were

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40. The effect of s 26(1)(b) is to provide an outer limit to the right to contribution where no judgment is given, or settlement reached, four years after the expiration of the original cause of action.
 41. Section 47 of which provides a general limitation period of two years for all causes of action.
 42. Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 222-223; Scottish Law Commission, *Report on Civil Liability: Contribution* (Scot Law Com No 115, 1988) at para 3.94-3.95; Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers* (Topic 5, 1984) at para 5.17-5.19. See also J R Morris, *Apportionment of Civil Liability* (Legal Research Foundation Inc, Publication No 28, 1987) at 51-60.
 43. Three years: New Zealand, Law Commission, *Apportionment of Civil Liability* (Report 47, 1998) at para C39.
 44. University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Report 31, 1979) at 76.
 45. See eg, *Van Win Pty Ltd v Eleventh Mirontron Pty Ltd* [1986] VR 484.

joined close to the end of the limitation period and could then not join other defendants in time. It was suggested that a more appropriate limitation period for the addition of a joint wrongdoer would be “two years from the service of the process on the party who wishes to claim contribution”.⁴⁶ It was argued that this would give a reasonable amount of time for a defendant to act while also serving as an effective time constraint. Allowing time to run from the time the defendant first became aware of the cause of action against him or her could be considered analogous to time running from the time that a plaintiff first becomes aware that a cause of action is available. The chief advantage of this proposal is that it would encourage joinder of all parties in the one action. However, it may also be unfair in that D1, while he or she may well have been made aware of P’s action, may not be aware of D2’s involvement until some time during the course of the trial, which may still be more than two years beyond the date at which D1 was first served. The Commission has therefore, on balance, decided not to recommend that the current limitation period for contribution claims be altered.

Extension to rights of contribution between all concurrent wrongdoers

Recommendation 16

Section 26 of the *Limitation Act 1969 (NSW)* should be amended to cover rights of contribution between all concurrent wrongdoers.

5.27 This is a consequential amendment necessitated by the extension of rights of contribution to mixed concurrent wrongdoers.

46. A D M Hewitt, *Submission*.

Appendix A SUBMISSIONS

1. Mr Bruce K Cutler, Managing Partner, Freehill Hollingdale and Page (14 November 1997).
2. Australian Council of Professions Ltd (16 December 1997).
3. National Joint Limitation of Liability Taskforce, Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia (18 December 1997).
4. Law Society of New South Wales (24 December 1997) *Submission 1*.
5. Mr A D M Hewitt, barrister-at-law (13 February 1998).
6. Law Society of New South Wales (16 February 1998) *Submission 2*.
7. Insurance Council of Australia Ltd (10 March 1998).
8. Mr Brian Donovan, QC (1 June 1998).

Appendix B CONSULTATIONS

1. Law firms (Sydney, 4 June 1998).
2. Supreme Court Judges (Sydney, 4 June 1998).
3. New South Wales Bar Association (Sydney, 5 June 1998).
4. Insurance companies (Sydney, 5 June 1998).
5. Ms Barbara McDonald, Senior Lecturer, Faculty of Law, University of Sydney (Sydney, 5 June 1998).
6. Accounting bodies (Sydney, 5 June 1998).
7. Professor Robert Cooter, Professor of Law, Boalt Hall, Berkeley (Canberra, 25 June 1998).
8. Australian Council of Professions Ltd, Mr Donald Hunter, Executive Director (Canberra, 25 June 1998).
9. Professor J L R Davis, Professor of Law, Faculty of Law, Australian National University (Canberra, 26 June 1998).

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