Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 73

Civil Liability – Contribution

NOVEMBER 1986

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The Commission would be grateful if comments on this Consultative Memorandum were submitted by 30 April 1987. All correspondence should be addressed to:-

Miss J.L. McLeod
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

(Telephone: 031-668 2131)

Note In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Consultative Memorandum. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected but if no request for confidentiality is made, the Commission will assume that comments on the Consultative Memorandum can be used in this way.

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SCOTTISH LAW COMMISSION

CONSULTATIVE MEMORANDUM NO. 73

CIVIL LIABILITY - CONTRIBUTION

PART I - INTRODUCTION

Scope of Memorandum

1.1 On 10 December 1984 we received a proposal from the Faculty of Advocates

> "to take up and consider the question of rights of relief in relation to claims and proceedings based on delict with particular reference to the power of the court under section 3(2) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 to find a person found liable in damages entitled to recover a contribution from another person who, if sued, might also have been held liable."

Our preliminary examination of this topic has, however, suggested to us that any review of the law on rights of relief should not be restricted to the law of delict but should cover other areas of law in which one person may have a right to claim from another a contribution towards payment of damages, for example, in claims arising out of breach of contract or breach of trust.[1]

1.2 There are several reasons why we have decided to extend our examination of the law beyond the scope of the original proposal. In the first place, the principle underlying one person's right to claim relief from another

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1 This Memorandum is therefore issued under our general programme subject of obligations: Item 2, First Programme (1965) Scot. Law Com. No. 1.

is the same whatever the basis of their liability towards the party who has suffered loss or injury. The right of relief is "an equitable remedy which arises from, and which ultimately rests upon, the fact that the party claiming has in fact discharged the proper debt or liability of another."[1] It is an aspect of the law on unjust enrichment in that the person claiming relief has conferred a benefit on another party without being under any legal obligation to do so and without any intention to benefit him gratuitously. We therefore start from the premise that, in theory at any rate, the same considerations are applicable whether liability in damages to the injured party is based on a breach of duty owed in delict, contract or otherwise.

1.3 Some of the criticisms which may be made of the law regarding contribution in delict are highlighted in the recent case of Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd. and Others[2]. The Comex case raises issues of policy which are no different from those encountered in areas other than delict, in particular, the question whether or not an extra-judicial settlement of a claim for damages should be sufficient to found a right of relief. Moreover, although the statutory right of relief contained in the 1940 Act is generally regarded as amending the law on contribution only as between joint wrongdoers in delict, it is at least arguable that it has a wider application.[3]

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1 Glasgow Corporation v. John Turnbull & Co. 1932 S.L.T. 457 per Lord Murray at p. 459.

2 1986 S.L.T. 250 and 8 April 1986, unreported: see paras. 2.13 and 2.14 below.

3 See para. 2.32 below.

1.4 Also relevant to any examination of the law of contribution is the extent to which parties may be found jointly and severally liable in damages. Joint and several liability may arise not only where parties are under one common obligation but also where they are under separate obligations breaches of which result in a single wrong.[1] It is unclear whether the present law allows a right of relief in all cases of joint and several liability. A particular area of concern is whether there is any recognised right of relief between co-obligants who are jointly and severally liable for breaches of separate contractual obligations or where one is sued in delict and the other in contract. In recent years, the boundary between the two forms of claim has become increasingly ill-defined and a party who has suffered loss may frequently have a choice as to whether he bases his claim in contract or in delict.[2] It would be anomalous if the exercise of that choice could materially affect another's right to contribution.

1.5 These considerations, when taken together, have led us to the conclusion that it would be more appropriate to undertake a comprehensive review of the law on rights of relief rather than to examine the question only in the context of liability in delict. Our review is, however, subject to one important restriction. We are concerned only with rights of relief among parties liable in damages for the loss, injury or damage suffered by another person. We do not deal with rights of contribution among parties

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1 See paras. 2.18 and 2.21 below.

2 e.g. Robertson v. Bannigan 1965 S.L.T. 66; see also Junior Books Ltd v. The Veitchi Co. Ltd. 1982 S.L.T. 333 and 492.

who are liable under contract for payment of a debt, that is, for payment of a fixed sum of money. This question is determined properly by the terms of the contract itself and, in the absence of express stipulation, liability for the debt is shared equally among the co-contractors.[1]

1.6 As a separate issue, we have also taken the opportunity to consider the law of contributory negligence and, in particular, whether the plea of contributory negligence is or should be available as a partial defence to a claim based in contract. Again, bearing in mind that there are an increasing number of cases in which concurrent liability exists in negligence and breach of contract, it is arguable that contributory negligence should be relevant, whatever the basis of liability, at least in so far as the breach of duty in question is breach of a duty of care. Under the present law, it is possible, although by no means certain, that a pursuer can avoid reduction of damages on account of his own fault simply by electing to frame his action in contract.[2] This seems unsatisfactory. The issue of contributory negligence is quite distinct from that of rights of relief but, in practical terms, the relationship between the two can be highly significant. Both deal with the situation where two or more people have contributed to the loss or damage which has been caused. Both are concerned with the apportionment of responsibility among the

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1 Gloag on Contract (2nd edn., 1929) p. 206. Thus any one of a number of co-contractors who are jointly and severally liable for a fixed sum of money is entitled, on paying the sum due to the creditor, to recover an appropriate share (usually on a pro rata basis) from each of his fellow obligants.

2 See para. 5.17 below.

parties involved. One of the main policy considerations which will underlie our suggestions for reform of the law on rights of relief - that of achieving fairness among the parties responsible for the loss - also seems relevant to possible reform of the law of contributory negligence.

Arrangement of Memorandum

1.7 The rest of the Memorandum is arranged as follows. In Part II we outline the present law on rights of relief and consider to what extent it is in need of reform. Part III is a comparative survey. We discuss in Part IV the options for reform and set out our provisional proposals. In Part V we examine the law of contributory negligence and propose reform. Finally, Part VI contains a summary of the propositions and questions on which we invite comment.

PART II - RIGHTS OF RELIEF - THE PRESENT LAW

2.1 As a general principle, a right of relief exists where two or more persons are liable to compensate another who has suffered loss, injury or damage. Any payment made by one reduces the amount which may be claimed from the rest. It is that shared liability on which the payer founds when he claims relief.[1] He must be able to show that the person from whom he seeks relief could have been sued direct by the injured party.[2] The payer must also have been under a legal obligation to make payment in the first place.[3] This may be contrasted with the situation where a defender who has paid damages to the injured party may be entitled to recover that sum from another, not because they were both liable for the loss sustained, but on the ground that the other party's actings were the real cause of the harm. Thus damages paid by one party in delict may be recoverable in contract from another if the payment is shown to arise naturally and

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1 See Caledonian Railway Co. v. Colt (1860) 3 Macq. 833 per Lord Chelmsford at p. 848.

2 Buchanan & Carswell v. Eugene Ltd. 1936 S.C. 160 per Lord Murray at p.182.

3 Ovington and Others v. McVicar (1864) 2 M. 1066; Gardiner v. Main (1894) 22 R. 100.

directly and not too remotely from the breach of contract in question.[1]

2.2 This Memorandum deals with rights of relief arising from a common liability to the injured party. In the following paragraphs, we examine the existing law, with particular reference to rights of relief among parties liable in delict, breach of contract and breach of trust.

Rights of relief in delict

2.3 The principle underlying the development of the law on rights of relief in delict is that, where two or more persons have committed delicts which contribute to the same loss, injury or damage, they are jointly and severally liable.[2] For joint and several liability to attach, the co-delinquents may have acted in concert or they may have committed separate wrongs leading to a single harmful result.[3] In either case, the injured party may sue all or

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1 e.g. Buchanan & Carswell v. Eugene Ltd., supra. The facts of this case were that a woman injured by a defective hairdryer obtained damages in delict from the firm of hairdressers. The hairdressers then brought an action to recover this sum from the manufacturers on the ground of their alleged breach of warranty as to the condition of the machine. The action was held relevant as an action of damages for loss arising naturally and directly from the manufacturers' breach of contract.

2 Stair, I.9.5; Erskine, III.1.15 and IV.1.15.

3 Ellerman Lines Ltd. v. Clyde Navigation Trustees 1909 S.C. 690; Drew v. Western S.M.T. Co. 1947 S.C. 222; Williamson v. McPherson and Others 1951 S.C. 438. Vicarious liability is another example of joint and several liability although the employer and employee may not be joint wrongdoers as such: Lister v. Romford Ice and Cold Storage Co. [1957] A.C. 555.

any of the wrongdoers. If he wishes, he may sue only one and recover the full amount of damages from him.[1] Having successfully sued one wrongdoer for his total loss and having received full payment from him in satisfaction of the decree, the injured party cannot then sue another on the basis that the damages awarded were insufficient.[2]

2.4 At common law, it was initially unclear whether a person who had made payment to the injured party in such circumstances could recover a contribution from his fellow wrongdoers.[3] However, in Palmer v. Wick and Pulteneytown Steam Shipping Co. Ltd.,[4] where a joint and several decree had been obtained against the party claiming contribution and the party from whom it was claimed, the House of Lords held that, in a question between them, each was liable for a pro rata share (i.e. one half)[5] of the damages awarded.

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1 Walker, Delict (2nd edn., 1981) p. 111; N.C.B. v. Thomson 1959 S.C. 353 per L.J.-C. Thomson at p.361.

2 Erskine, III.1.15; Balfour v. Baird 1959 S.C. 64. The injured party may, however, proceed against other joint wrongdoers if the decree obtained against one turns out to be worthless: Steven v. Broady Norman & Co. 1928 S.C. 351.

3 Hume, Dec. 605 and Lectures III.124; Bell, Principles s.550; Western Bank v. Bairds (1862) 24 D. 859 per L.J.-C. Inglis at p. 913; contra, Bankton, I.10.4; Kames, Equity, 89.

4 (1894) 21 R. (H.L.) 39.

5 Pro rata share means an equal share of the total calculated according to the number of people liable: i.e. where there are two wrongdoers, it means one half each, where there are three wrongdoers, one third each and so on.

In that case, the pursuer, having paid the whole sum due to the injured party, had taken an assignation of the decree and then raised his action for contribution. Of the two grounds given for the decision, one was that the pursuer was entitled to use the assignation in order to enforce payment of the defender's share as co-obligant under the joint debt constituted by the decree. The decree and assignation were the foundation of the pursuer's claim, not the joint wrong.[1] Lord Watson, however, with Lords Halsbury and Shand concurring, expressed an additional ground for his decision, namely "that a right of relief exists and is available to a co-delinquent whose acts or omissions are not tainted with fraud or other moral delinquency."[2] Thus he recognised a right of relief in the case of unintentional delicts.

2.5 The next development was the case of Glasgow Corporation v. John Turnbull & Co.[3] in which Lord Murray held an action of relief to be relevant where only the person seeking contribution, not the person from whom it was sought, had been pursued to judgment by the injured party. On paying the whole sum awarded against him and on being able to establish the defender's liability to the injured party, the pursuer would, in Lord Murray's opinion, be entitled to pro rata relief. However, on appeal, the Second Division, without giving opinions, left this question open pending proof and the case was not reported

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1 per Lord Chancellor and Lord Watson at pp. 40-1 and 46-7 .

2 at p. 46. The Lord Chancellor, at p.41, while not disagreeing with Lord Watson's view, considered it obiter to the decision.

3 1932 S.L.T. 457.

further. Although Lord Murray's opinion cannot be taken as settling conclusively that a right of relief exists at common law where there has been a decree against only one co-delinquent, the court in N.C.B. v. Thomson[1] proceeded on the assumption that he was correct.[2]

2.6 The cases of Palmer v. Wick and Pulteneytown Steam Shipping Co. Ltd. and Glasgow Corporation v. John Turnbull & Co. did not go so far as to establish a general right of relief among co-delinquents. In particular, it remained unsettled whether it was always necessary for a party claiming relief to have had decree awarded against him or whether it would be sufficient that he had settled with the injured party.[3] The former interpretation of the law is the one which eventually found favour with the court in N.C.B. v. Thomson.[4] As a result of the majority decision in that case the common law rules have been effectively superseded by section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 which introduced a statutory right of contribution among joint wrongdoers. Section 3(1) deals

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1 1959 S.C. 353. See para. 2.12 below.

2 Ibid., opinions per L.J.-C. Thomson, Lords Patrick and Strachan at pp. 363, 370-1, and 383-4 respectively.

3 A purely voluntary payment would not give rise to an action of relief: Gardiner v. Main (1894) 22 R. 100. In Duncan's Trustees v. Steven (1897) 24 R. 880, an action of relief brought on an averment that the pursuers were themselves being sued for damages was dismissed as premature where the pursuers were denying liability in the main action which had not yet proceeded to decree.

4. See para. 2.12 below.

with the case where the injured party sues joint wrongdoers in a single action. It provides:

> "Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable inter se to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just."

Section 3(2) goes on to deal with the case where contribution is sought from a joint wrongdoer who has not been sued by the injured party. This is the provision with which we are primarily concerned. It is in the following terms:

> "Where any person has paid damages or expenses in which he has been found liable in any such action as aforesaid, he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just."

Finally, section 3(3) provides that:

> "Nothing in this section shall -
>
> (b) affect any contractual or other right of relief or indemnity or render enforceable any agreement for indemnity which could not have been enforced if this section had not been enacted."

2.7 The 1940 Act followed the recommendations of a Legal Reforms Committee set up by the Lord Advocate in 1936.[1]

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1 Hansard (H.L.) 26 June 1940, vol. 116, col. 697; J.R. Philip, "The Law Reform (Miscellaneous Provisions)(Scotland) Act 1940," 1940 S.L.T. (News) 93.

Similar provisions had recently been enacted in England and Wales[1] and this no doubt highlighted the need for Scottish reform. The stated purpose of section 3 was to allow relief to be obtained in proportion to the share of blame to be attached to each wrongdoer, instead of the strict pro rata apportionment available at common law.[2]

2.8 In the simple case, the effect of section 3(2) is clear. Where an injured party chooses to sue only one of those whose acts or omissions led to his loss and, after proof, damages are awarded against, and paid by,[3] the defender, the defender may in turn bring an action of relief against his co-delinquents and the court will apportion damages equitably amongst them.[4] The apportionment may, if the court sees fit, amount to a complete indemnity.[5] If the court cannot allocate blame with precision, liability should

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1 Law Reform (Married Women and Tortfeasors) Act 1935, s.6, now repealed by the Civil Liability (Contribution) Act 1978: see paras. 3.1 to 3.4 below.

2 Hansard (H.C.) 10 July 1940, vol. 362, col. 1197.

3 See Lord McDonald's opinion in Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd. and Others, 8 April 1986 unreported: "It is, of course, essential that the victim has accepted the decree in full and final satisfaction of his claim, and that he has been paid under it."

4 In practice, this situation arises only rarely because of the existence of third party procedure: see para. 2.10 below.

5 Walker, op. cit., pp. 120, 422; Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd. and Others 1986 S.L.T. 250 per Lord Mackay at p. 256.

be shared equally.[1] The defender need not take an assignation from the pursuer before raising his action for contribution.[2]

2.9 Certain conditions must be satisfied before section 3(2) can operate. First, the original action in which damages were awarded must have been one in respect of "loss or damage arising from any wrongful acts or negligent acts or omissions". This has been interpreted to mean acts or omissions which Scots law would view as wrongful or negligent.[3] Provided this can be established, the original action need not have taken place in the Scottish courts.[4] Second, the party from whom relief may be claimed must be one who, if sued, "relevantly, competently and timeously" might also have been held liable.[5] The pursuer in the action of relief must therefore establish the defender's liability to the injured party. It is not necessary that the defender should have been capable of being sued in the original action raised by the injured party nor even in the same jurisdiction as that in which the pursuer had himself

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1 Drew v. Western S.M.T. Co., supra per Lord Mackay at p. 236 (dealing with joint and several liability under section 3(1) of the 1940 Act).

2 N.C.B. v. Thomson, supra.

3 Comex Houlder Diving Ltd. v. Coine Fishing Co. Ltd. and Others, 1986 S.L.T. 250 per Lord Mackay at p. 256. It is not entirely clear, though, what is meant by "wrongful" in this context: see para. 2.32 below.

4 Ibid. See also the opinions of L.P Emslie and Lord Grieve on appeal: 8 April 1986 unreported.

5 Singer v. Gray Tool Co. (Europe) Ltd. 1984 S.L.T. 149 per L.P. Emslie at p. 151.

been found liable.[1] No relief will be available if the injured party has already sued the defender unsuccessfully. By this is meant that there must have been a finding of non-liability on the merits or on a preliminary plea, such as a plea of time-bar.[2] If the injured party simply abandons his action against one wrongdoer, that does not constitute a judicial determination of that wrongdoer's liability and he remains open to an action of relief at the instance of any other wrongdoer who has been found liable.[3] The fact that the injured party's claim against the defender in the action of relief has been barred by lapse of time is relevant only where the injured party has attempted to sue him and has failed on that ground. Prescription of the injured party's claim does not appear to matter if he has taken no court

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1 Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd. and Others, 1986 S.L.T. 250 at p. 257 and in the Inner House per L.P. Emslie, 8 April 1986, unreported.

2 Singer v. Gray Tool Co. (Europe) Ltd., supra per L.P. Emslie at pp. 150-51. This case overruled the decision in Travers v. Neilson 1967 S.C. 155 which was to the effect that a person who holds a decree of absolvitor as a result of the pursuer's abandoning the action against him is a person who, for the purposes of section 3(2) of the 1940 Act, has been sued and held not liable. According to Singer, the expression "if sued" in section 3(2) is properly construed as meaning "if sued to judgment", i.e. to the point where there has been a judicial determination of liability.

3 Singer v. Gray Tool Co. (Europe) Ltd., supra; Corvi v. Ellis 1969 S.C. 312. Cf. Douglas v. Hogarth (1901) 4 F. 148 which held that, at common law, a discharge granted by the injured party in favour of one co-delinquent could not deprive the other of his claim to contribution.

his fellow wrongdoers. In Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd. and Others,[1] a case which arose out of a diving accident in the Scottish sector of the North Sea, it was held that settlement of the claim made by the deceased diver's widow which was confirmed by an order pronounced by a Pennsylvania court did give rise to a right of relief under section 3(2), since the pursuers in the action of relief had fulfilled the requirement of being found liable in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions. In the Outer House, Lord Mackay held that it was not necessary for the decree constituting the debt to result from a fully contested action or an action "fought to the death"; if more than a mere decree were to be required, there would be difficulty in defining what more was necessary; and that it would, in any event, "be going beyond the ratio of the decision in Thomson to stipulate for anything more than a decree of court or some equivalent proceeding as a result of which the debt in question is enforceable against the person seeking contribution".[2] Since the debt in this case had been judicially constituted by the order of the Pennsylvania court, the pursuers had stated a relevant case. In reaching this conclusion, Lord Mackay dismissed the defenders' contention that to allow a right of relief based on a decree of the Pennsylvania court would create a great injustice. The defenders maintained that they had deliberately kept clear of the jurisdiction of the court in Pennsylvania and it would be unfair if they were now to be subjected to an

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1 1986 S.L.T. 250 and 8 April 1986, unreported.

2 1986 S.L.T. 250 at p. 255.

award of damages which was likely to be much higher than would have been obtained in a Scottish court. Lord Mackay, however, considered that, as a matter of statutory interpretation, section 3(2) of the 1940 Act was not confined to cases where the pursuer had been found liable in an action before the Scottish courts and that the provision conferred a wide discretion to enable the court "to do justice between the parties having regard to all the circumstances".[1] The court could therefore order the defenders to contribute to a part only of the award made in the United States if it was considered excessive by Scottish standards. Lord Mackay also held that the liability to contribute created by the 1940 Act was a liability in delict and that, accordingly, the court had jurisdiction, in terms of section 1 of the Law Reform (Jurisdiction in Delict)(Scotland) Act 1971, to entertain the action.

2.14 On appeal, the First Division confirmed this decision in all respects.[2] In their view, all that was required for the purposes of section 3(2) was a finding of liability by the decree of a competent court. There was nothing in the wording of the statute to require that such decree should be pronounced after a fully contested action either on the question of liability or quantum or both. As Lord President Emslie stated:

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1 Ibid, at p. 256.

2 8 April 1986, unreported. We understand that leave to appeal to the House of Lords has been granted.

"What matters is that the injured party's claim shall have been finally judicially determined by an enforceable decree under which payment has been made. In my opinion, an injured party's claim is just as finally determined judicially by a decree proceeding upon an agreement to settle in full satisfaction of the loss and damage complained of as by a decree pronounced in an action 'fought to the death'".

On the question of the amount of contribution, the Lord President observed,

" ... section 3(2) is not, in terms, concerned with the apportionment of a particular sum of damages among co-delinquents. Under that subsection the Court is invited only to decide what just contribution, if any, should be made by a delinquent in respect of the extinction, at the expense of a co-delinquent, of the common liability of all co-delinquents to the injured party to make reparation for his loss and damage. In these circumstances, the precise sum at which the injured party's claim has been judicially determined after settlement or tender is not of critical significance. If the delinquent who has paid under such a decree has paid too much this can readily be reflected in the contribution ordered and I need hardly say that the contribution does not require to be of a proportion of any particular sum."

Rights of relief in contract

2.15 Co-obligants under a contract may be liable either jointly or jointly and severally. If liability is joint, each obligant is bound to pay only his proportionate share of the total debt to the creditor; if it is joint and several, each is liable to pay the whole amount to the creditor subject to a right of relief against his fellow obligants if he has in fact been compelled to pay more than his pro rata share.[1] In the absence of express

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1 N.C.B. v. Thomson, supra per L.J.-C. Thomson at p.361.

stipulation, there is a presumption in favour of joint liability[1]. There are, however, a number of exceptions to this general rule. For example, partners,[2] co-acceptors of a bill of exchange and co-obligants in a promissory note[3] are held jointly and severally liable.[4] Similarly, liability is joint and several where the obligation is not to pay money but to do a particular act (ad factum praestandum) and the obligation is by its nature indivisible, for example, to erect a building[5]. If the obligation is not fulfilled, the co-obligants are liable jointly and severally in damages.[6]

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1 Stair, I.17.20; Erskine, III.3.74; Bell, Principles s.51; Gloag on Contract (2nd edn., 1929) p. 206; Coats v. Union Bank of Scotland 1929 S.C. (H.L.) 114.

2 Partnership Act 1890, s.9.

3 Bell, Principles s.61; Milne's Trustees v. Ormiston's Trustees (1893) 20 R. 523.

4 The same is true also in cautionary contracts. The principal debtor and cautioner are bound jointly and severally to the creditor although, in the event of the debt being paid by the cautioner, he is entitled to be fully relieved by the principal debtor in the obligation: Gloag, op. cit., p. 206. Where there are two or more cautioners, liability amongst themselves is pro rata: Marshall & Co. v. Pennycook 1908 S.C. 276.

5 Stair, I.17.20; Erskine, III.3.74; Bell, Principles s.58; Rankine v. Logie Den Land Co. Ltd. (1902) 4 F. 1074. Liability will, nevertheless, be pro rata if the obligants have the option of performing the act specified in the contract or paying a sum of money: Gloag, op. cit., p. 200.

6 Bell, Principles s.58; Denniston v. Semple (1669) Mor. 14630; Darlington v. Gray (1836) 15 S. 197.

2.16 We are concerned here with cases where co-obligants are jointly and severally liable in damages arising from a breach of contract. If the obligation is expressed in writing, any one obligant may be sued for the whole amount, without calling the others.[1] If, on the other hand, the debt still has to be constituted (as will usually be the case in this situation), the general rule is that all the obligants must be cited unless they are not subject to the jurisdiction of the Scottish courts[2] although the pursuer, if successful, may enforce his decree against any one.[3] Any obligant who pays is entitled to relief from the others to the extent that he has paid more than his pro rata share.[4] His right of relief may be supported by an assignation but this is not essential.[5] The claim against any one obligant may not exceed that party's proportionate

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1 Bell Principles s.56; Richmond v. Grahame and Others (1847) 9 D. 633.

2 Muir v. Collett (1862) 24 D. 1119; Neilson v. Wilson (1890) 17 R. 608.

3 Erskine, III.3.74; Richmond v. Grahame and Others, supra. If decree is granted against one co-obligant but is not satisfied, action may still be taken against the others: Steven v. Broady Norman & Co. 1928 S.C. 351.

4 Erskine v. Cormack (1842) 4 D. 1478; Mackenzie v. Macallister 1909 S.C. 367 per Lord Kinnear at p. 372.

5 Stair, I.8.9; Erskine, III.3.74. He is entitled to an assignation unless the granting of one would prejudice a legitimate interest of the creditor: Guthrie and McConnachy v. Smith (1880) 8 R. 107.

share.[1] However, in working out the number of obligants who are liable to contribute, no account is taken of any who are insolvent: their share of liability must be borne by the others.[2] There is no right of relief if payment was made of a sum which there was no obligation to pay, such as voluntary settlement of a claim of damages.[3] It is not, however, necessary to constitute the debt by prior decree.[4]

2.17 The party who has a claim in contract may not do anything in his dealings with one co-obligant which prejudices the right of relief possessed by the others bound jointly and severally with him. Where he grants a discharge in favour of one co-obligant, without the others' consent, he loses his claim against the others to the extent that their right of relief has been barred.[5] The remaining co-obligants are liable for the whole sum less the proportionate share which should have been borne by the one who was discharged.[6] If, however, the claimant undertakes not to sue one obligant without discharging him from

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1 Gloag, op. cit., p. 208; Gilmour v. Finnie (1832) 11 S. 193.

2 Bell, Principles s.62; Buchanan v. Main (1900) 3 F. 215.

3 Gardiner v. Main (1894) 22 R. 100; Clarke v. Scott (1896) 23 R. 442.

4 Marshall & Co. v. Pennycook 1908 S.C. 276 (A cautioner who intervened to complete a construction contract on behalf of the principal obligant was held entitled to recover one half of his loss from the co-cautioner).

5 Smith v. Harding (1877) 5 R. 147.

6 British Linen Co. v. Thomson (1853) 15 D. 314.

liability, this does not prejudice the rights of relief of the others and therefore does not affect their liability.[1]

2.18 Joint and several liability may arise where there are breaches of two or more different contracts. In Grunwald v. Hughes and Others[2] it was held that an architect and a firm of heating engineers could be jointly and severally liable for breach of their separate contractual obligations provided that their separate acts or omissions contributed to one wrong. The contractual obligation on both defenders was a duty to take reasonable care in the performance of their work and to show the usual standard of skill expected of others in the same profession. Had the pursuer wished, the action could have been founded on negligence, in which case a conclusion for a joint and several decree would certainly have been competent. The court did not, however, rely solely on the fact that "in this case breach of contract and negligence are in essence the same thing."[3] Lord Strachan gave his view in the following terms:[4]

> "... the true test of joint and several liability ... is not to enquire whether the action was founded on breaches of contract or on delicts, but to enquire whether the wrongs were disconnected or not ... I am of the opinion that it is really the same rule which is to be applied both to breaches of contract and to delicts."

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1 Muir v. Crawford (1875) 2 R. (H.L.) 148.

2 1965 S.L.T. 209.

3 per Lord Walker at p. 214.

4 at p. 213.

According to Lord Walker, there was "no reason in principle why two defenders should not be jointly and severally liable for their separate breaches of contract, provided always that each breach was a material cause of the whole damage".[1] He, in fact, went further and stated that if each defender could be found liable for the whole loss, they were jointly and severally liable irrespective of what the grounds of liability might be.[2] This case was not, however, concerned with rights of contribution and there is no direct authority on whether a right of relief is available where parties are jointly and severallly liable for breaches of different contractual obligations.[3] Nevertheless, following the reasoning adopted in Grunwald v. Hughes and Others,[4] it may be that a right of relief does exist where the parties are liable for the same loss, injury or damage, albeit in terms of separate contracts, at least in so far as their liability arises from breach of a contractual duty to show due skill and care.

2.19 A person sued in contract may bring into the action any third party who is also liable under the contract and

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1 at p. 215.

2 Ibid. See Belmont Laundry Co. Ltd. v. Aberdeen Steam Laundry Co. Ltd. (1898) 1 F. 45 and Rose Street Foundry and Engineering Co. Ltd. v. Lewis & Sons Ltd. 1917 S.C. 341 discussed at para. 2.22 below.

3 A classic example is the Northern Ireland case of McConnell v. Lynch-Robinson [1957] N.I. 70 in which it was held that there could be no statutory contribution between an architect and a builder who were liable under separate contracts for defective building work.

4 Supra.

from whom he is entitled to obtain relief.[1] Third party procedure may be used not only where the obligants are liable to the pursuer under the same contract but also where they are liable under different contracts provided that the liability under one contract is commensurate with the liability under the other.[2]

Rights of relief in breach of trust

2.20 The duties of a trustee are to conserve the trust estate and to administer it with the same diligence which a reasonably careful and prudent man would show in his own affairs.[3] If he fails in that duty and, as a result, the trust estate suffers loss, he is liable in damages for breach of trust and is bound to make good the loss which he has caused.[4] If two or more trustees have jointly committed a breach of trust, their liability is joint and several and they are equally liable to the beneficiaries, irrespective of the degree of personal fault. Liability for breach of trust is, at least in certain circumstances,

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1 R.C. 85 and Sheriff Court Rule 50.

2 Nicol Homeworld Contracts Ltd. v. Charles Gray Builders Ltd. 1986 S.L.T. 317; cf. Lanarkshire Speedway and Sports Stadium Ltd. v. Gray 1970 S.L.T. (Notes) 54.

3 Knox v. Mackinnon (1888) 15 R. (H.L.) 83; Buchanan v. Eaton 1911 S.C. (H.L.) 40; Mackenzie Stuart, The Law of Trusts (1932) pp. 157-60.

4 Town and County Bank Ltd. v. Walker (1904) 12 S.L.T. 411 per Lord Kyllachy at p. 412.

treated as liability in delict.[1] The action may be brought against one or more of the trustees in breach.[2] Any one trustee found liable may claim relief against the others who are in breach for their pro rata share of the damages.[3] The other trustees may be brought into the action by third party procedure.[4] There may, however, be cases in which one trustee is entitled to full indemnity against a co-trustee even though both may be liable vis-a-vis the beneficiaries. So, full relief may be granted against a trustee who has benefited from a breach of trust or if a relationship has existed between him and the other trustees which justifies the court in treating him as solely liable for the breach.[5]

2.21 It may be noted in passing that there are a number of statutory provisions which, in appropriate circumstances, may limit the trustee's liability or may excuse him from liability altogether. Section 3(d) of the Trusts (Scotland) Act 1921 provides that all trusts, unless the contrary be expressed, shall be held to include a provision that each trustee shall be liable only for his own acts and intromissions and shall not be liable for the acts and

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1 Croskery v. Gilmour's Trustees (1890) 17 R. 697.

2 Allen v. McCombie's Trustees 1909 S.C. 710.

3 Mackenzie Stuart, op. cit., p. 385; Pearson v. Houstoun's Trustees (1868) 6 M. 286.

4 Anderson v. Anderson 1981 S.L.T. 271.

5 Bahin v. Hughes (1886) 31 Ch. D. 390 per Cotton L.J. at p. 394. See also Raes v. Meek (1889) 16 R. (H.L.) 31 where a trustee's liability was limited so that no benefit would accrue to beneficiaries who had also been trustees and had taken part in the breach of trust.

intromissions of co-trustees and shall not be liable for omissions. This does not, however, protect a trustee who neglects his duties or who authorises or acquiesces in breaches of duty committed by his fellow trustees. Under section 32 of the 1921 Act, the court may relieve a trustee from personal liability for breach of trust, either wholly or partially, if the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust. Again, this does not protect a trustee from the consequences of his negligence.[2] Finally, section 31 of the 1921 Act allows the court to order a trustee to be indemnified out of a beneficiary's interest in the trust against the consequences of a breach of trust committed at the instigation or request or with the consent in writing of that beneficiary.

Rights of relief where different bases of liability

2.22 It is clearly established by the cases of Belmont Laundry Co. Ltd. v. Aberdeen Steam Laundry Co. Ltd.[3] and Rose Street Foundry and Engineering Co. Ltd v. Lewis & Sons Ltd.[4] that joint and several liability is competent where one defender is liable in contract and the other in delict. In both cases, a former employer sued his former employee for breach of his contract of service and the new employer for either inducing the employee to break his contract or

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1 Bell, Principles s.2000; Mackenzie Stuart, op. cit., pp. 376-7; Knox v. Mackinnon, supra at p. 86.

2 Clarke v. Clarke's Trustees 1925 S.C. 693.

3 (1898) 1 F. 45.

4 1917 S.C. 341.

"harbouring" that employee. Lord Adam, giving the Court's judgment in Belmont Laundry Co. Ltd. v. Aberdeen Steam Laundry Co. Ltd. stated:[1]

> "No doubt the ground of action against each defender is different - that against [the ex-employee] being breach of contract and that against the [new employer] the doing of a wrongous and illegal act - but they both contributed to produce the one wrong of which the pursuers complain, and therefore I think they are conjunctly and severally liable in the consequences."

These cases did not deal with any question as to rights of relief between parties jointly and severally liable for breaches of different obligations. Logically, however, if it is accepted that a joint and several decree may be competent in such circumstances, it is reasonable to suppose that a right to contribution would also be recognised at common law. The question arose in a rather different context in B.P. Petroleum Development Ltd. and Shell UK Ltd. v. Esso Petroleum Co. Ltd.[2] That case was concerned with damage caused to a jetty at the Sullom Voe Oil Terminal by a ship belonging to the defenders. The defenders were statutorily liable to Shetland Islands Council for the damage. The pursuers were also obliged by contract with Shetland Islands Council to provide the Council with funds to make good the damage. They sought a contribution from the defenders in respect of the sum they claimed to have

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1 Supra at p. 47.

2 29 August 1985, unreported.

paid. Lord Ross held[1] that the pursuers were entitled to pro rata relief from the defenders on the basis that:

> "...where two parties are made liable for damage done to the jetty, they can properly be regarded as under a common obligation or liable for the same debt even though the obligation of each has a different source; the origins of the obligation placed on the pursuers and the defenders are separate and distinct but the obligation is a common one because each has to perform substantially the same obligation. This view appears to me to be consistent with Grunwald v. Hughes and Others 1965 S.L.T. 209 at 215 where Lord Walker observes that 'the essential of joint and several liability is that each defender should be liable for the whole damage.' But he also pointed out that each defender might be so liable on different grounds."

2.23 It should be noted that the pursuers in this case were liable under a contractual indemnity provision, the defenders under statute. Neither party was liable in damages to the Council for breach of a legal duty. The decision may be contrasted with that in B.R.B. v. Ross and Cromarty County Council[2] where the defenders were under a statutory obligation to pay compensation to the pursuers in respect of loss suffered in the course of road construction works. They claimed that they had a right of relief against their consulting engineers on account of the

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1 The opinion has also been expressed obiter that third party procedure is available where one party is liable in delict and the other in contract where the loss to the pursuer is commensurate with the loss caused by the third party to the defender: Nimmo's Executors v. White's Executor and Others, supra per Lord Grieve at p. 72.

2 1974 S.C. 27.

latters' negligence being a breach of a duty of care owed to the defenders themselves. The court considered that the defenders' proposed action against their engineers was not an action of relief but was "nothing more than an action of damages in which the liability of the third parties will in character and origin be wholly different from that under which the defenders have been required to satisfy the claim of the pursuers."[1]

2.24 For the purposes of a right to contribution under the 1940 Act, it is essential, firstly, that the debt be constituted judicially, and secondly, that the party claiming relief and the party from whom it is sought were, or could have been, jointly and severally liable in damages as "wrongdoers".[2] Thus, where a defender whose liability was based on a contractual indemnity attempted to recover a contribution from a third party, whose liability was allegedly based on negligence, the provisions of the 1940 Act were held inapplicable.[3] Although there is no express authority that the 1940 Act has no application where the parties are liable in damages on different grounds, it is

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1 Supra, per L.P. Emslie at p. 37. In this instance, the parties were not under any common obligation.

2 N.C.B. v. Knight Bros. 1972 S.L.T. (Notes) 24.

3 N.C.B. v. Knight Bros., supra. The case left undecided whether any other right of relief existed in such circumstances.

generally interpreted as providing a statutory right of relief only as between co-delinquents.[1]

Assessment of the present law

2.25 The present law seems to us to be open to criticism on a number of fronts. The most important issue which it raises is one of policy. So far as contribution between co-delinquents is concerned, should it still be necessary for one joint wrongdoer to have his debt constituted by court decree before he may obtain relief from the others? The arguments for and against constitution of the debt may be set out fairly briefly. On the one hand, it is said that to require constitution of the debt ensures that the damages towards which the defender in an action of relief is called to contribute are of a proper and reasonable amount.[2] A party who is not liable in respect of the loss or injury caused should not be able to settle with the injured party and then seek to have the damages apportioned on others. So, constitution is necessary in order to establish the liability of the person seeking contribution.[3] Moreover, the requirement of constitution

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1 See e.g. the opinions of the Second Division in N.C.B. v. Thomson, supra and of the First Division in Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd and Others, supra.

2 N.C.B. v. Thomson, supra, per L.J.-C. Thomson at p. 364.

3 Ibid.

does not cause difficulties where there is an adequate third party procedure under which joint wrongdoers may be brought into the action and the damages apportioned among them by the court.[1] The existence of a third party procedure means, in effect, that separate actions of relief are rarely brought.

2.26 Since the Comex case, it can be argued that the requirement of constitution is not an onerous one: all that need be done is to ask the court to give judgment against the claimant in terms of the amount of settlement he made with the injured party.[2] There is no need for a fully contested action to take place. It has also been said that the proper way for a party to proceed if he settles a claim against him is to take an assignation from the injured party and go against his co-delinquents as assignee.[3]

2.27 The contrary view is that there is no reason in principle why one joint wrongdoer should require to have his debt constituted by court decree before he may obtain

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1 There was no third party procedure at the time of the 1940 Act or at the time of N.C.B. v. Thomson.

2 It is not clear whether the debt would be constituted by the court's interponing authority to a joint minute settling the case without the amount of the settlement having been disclosed.

3 N.C.B. v. Thomson, supra per L.J.-C. Thomson at p. 365.

relief. Lord Strachan, in his dissenting judgment in N.C.B. v. Thomson, stated the argument as follows:[1]

> "...the right of relief to which a co-delinquent is entitled arises not from a decree against him but simply from the circumstances that he has paid more than his share, and has thus benefited other delinquents bound jointly and severally with him. In other words he has a right of relief not because he has been forced to pay, but solely because he has paid the share of other co-delinquents."

There is no reason, it is argued, why the party who has settled should not be able to prove that he has paid the share of his fellow delinquents in the action of relief itself.[2] Lord Strachan noted, moreover, that constitution of the debt by prior decree is not necessary in an action of relief arising from contract and considered that "there is not sufficient difference in principle to require a different rule among co-delinquents."[3]

2.28 Another argument against the present law is that it discourages settlements and can therefore operate to the prejudice of the party who has suffered the loss or injury. A defender would always be advised not to settle any claim against him in order to preserve his right to seek contribution. Although the Comex decision may mean that very little is required in order to constitute the debt by means of a court decree, this in itself negates some of the other arguments advanced in favour of the present law. To

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1 Ibid, per Lord Strachan at p. 382.

2 Ibid, per Lord Walker (Ordinary) at p. 358 and Lord Strachan at p. 384.

3 Ibid at p. 385.

require the court merely to give judgment in terms of a settlement already made does not guarantee that the terms of the settlement are reasonable nor that the party who settled was in fact liable. If the court action need not be contested, this provides no protection against the possibility of collusion. The court judgment is simply a formality to comply with the requirements of section 3(2) of the 1940 Act. In effect, the Comex decision allows an action of relief based on settlement of the claim by the party seeking contribution, provided that the amount of the settlement is confirmed by court order. If that is considered sufficient, it should be possible to have the settlement confirmed in the action of relief itself. Moreover, the court when dealing with a claim for relief need not order contribution to the whole sum agreed in the settlement: it may adjust the amount in order to ensure justice between the parties.[1]

2.29 It is true that a delinquent settling with the injured party may take an assignation from him, but this is not a wholly satisfactory solution. An assignee is in an entirely different position from a person entitled to seek relief. An assignee takes exactly the same right which the injured party had.[2] His right to sue his fellow delinquents will therefore be subject to prescription from the date of the original liability to the injured party, not from the date

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1 Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd. and Others, supra per Lord Mackay and L.P. Emslie.

2 Cole-Hamilton v. Boyd 1963 S.C.(H.L.) 1 per Lord Reid at p. 14.

of the assignation.[1] If the payment made in settlement is regarded as payment of compensation to the injured party rather than the purchase price of the assignation, the assignee may sue the other wrongdoers for the balance of the injured party's claim.[2] If, of course, the assignee has satisfied the injured party's claim in full, his assignation is worthless because there is no balance left which he can seek to recover from the others. By contrast, if payment is expressed as representing the purchase price of the assignation, the assignee is entitled to go against the others for the full amount of damages which the injured party could have sought. It can be seen, therefore, that an assignation is not designed to produce a fair apportionment of damages among all the parties responsible. It cannot be regarded as an adequate substitute for a proper right of relief following settlement.[3]

2.30 It is also true that third party procedure enables the liability of all the joint wrongdoers to be determined in one action even if the pursuer sues only one of them. However, in some cases, a joint wrongdoer may not be found. Why should the available wrongdoer not be able to settle with the injured party and then bring an action of relief against his fellow wrongdoer if and when he is traced? It seems absurd to require the parties to go to court and have

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1 cf. the position where there is a right of relief: para. 2.10 above.

2 Cole-Hamilton v. Boyd, supra per Lord Guest at p. 17.

3 See also the opinion of the Lord President in Comex.

decree granted against a defender who is willing to settle merely to safeguard his position on the off-chance that the other wrongdoer may turn up.

2.31 Similarly, in some cases it may be impracticable for all the co-delinquents to be sued or convened as third parties in the same action, especially in cases with a foreign element, such as Comex. In such cases, if one defender is willing to settle, it again seems unreasonable to require him to be taken to court in order to preserve his right of relief against his fellow obligants in Scotland.

2.32 As well as this fundamental issue of policy, there are other problems and anomalies to be found in the present law. One particular difficulty is the scope of the statutory right of relief contained in the 1940 Act. What is meant by "any wrongful acts or negligent acts or omissions"? The conventional view is that the provision refers only to acts or omissions giving rise to liability in delict,[1] but, in our opinion, there is a statable argument that it extends much further. A wrongful act could be a breach of contract or breach of any other legal duty giving rise to a claim for

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1 See e.g. the opinions of the Second Division in N.C.B. v. Thomson, supra. This in itself is an advance on the common law which allowed a right of relief only between joint wrongdoers liable for negligence: see para. 2.4 above. But see the opinion of L.J.-C. Thomson in N.C.B. v. Thomson at p. 366 that the Act applies only in relation to quasi-delicts, i.e. negligence.

damages.[1] At the very least, a negligent act or omission could be taken to include breach of a contractual duty of care. A further problem concerns what is meant by the "other right of relief" which is preserved by section 3(3)(b). On one view, the common law right of relief (at least as between co-delinquents) was entirely superseded by the 1940 Act and the phrase "other right of relief" cannot be given effect according to its literal meaning.[2] On the other, if the expression is to have any meaning at all, there must remain circumstances not covered by the statute in which a claim for contribution may be made on a pro rata basis: in other words, the common law does recognise a right of relief among joint wrongdoers without prior constitution of the debt. His inability to find any other reasonable meaning for the phrase was one of the reasons which persuaded Lord Strachan to dissent in N.C.B. v. Thomson.[3]

2.33 A further problem with the 1940 Act concerns situations where the injured party's claim is time-barred against the wrongdoer from whom contribution is sought. Under the present law, the question whether the time bar has any effect on the right of relief appears to depend on

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1 See the opinion of Lord Strachan in Grunwald v. Hughes and Others, supra at p. 213, that, for the purpose of establishing joint and several liability where two wrongs contribute to a single result, a breach of contract is a wrong in the same way as the consequence of a delictual act. A wrongful act could also cover nuisance or breach of a statutory duty.

2 N.C.B. v. Thomson supra, per Lord Patrick at pp. 372-3. See also the opinion of L.J.-C. Thomson at pp. 367-8.

3 Ibid. at p. 386.

whether or not the injured party had tried to sue the wrongdoer from whom contribution is claimed after the time bar had expired.[1] This is, in our view, quite unprincipled and gives an opportunity for collusion between the injured party and the wrongdoer from whom contribution is sought in order to exclude the right of relief altogether.

2.34 If the correct interpretation of the 1940 Act is that it is confined to cases of delict, then rights of relief arising in other circumstances are available on a pro rata basis only. As a matter of principle, we do not think that this distinction between claims founded in delict and claims arising on other bases of liability is justifiable. Although it may be argued that in contract the parties have the opportunity to determine their respective shares of liability in advance, it may often be impracticable for them to do so in relation to liability in damages for an as yet unidentified breach of contract and in an unquantified amount. The circumstances in which a breach of contract or any other breach of obligation may arise are so varied that it seems to us desirable to adopt a flexible approach to enable liability to be apportioned on an unequal basis where appropriate.

2.35 The final criticism which we wish to make concerns rights of relief arising where the parties are liable on different grounds, or are liable for breaches of separate contracts. Again, if the 1940 Act applies only in delict, any right of relief in these circumstances must be available at common law. The position is, at best, uncertain. If joint and several liability is possible where the parties

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1 See para. 2.9 above.

are liable in damages on different grounds, then, logically, a right of relief should be available if only one of the wrongdoers has been sued. This may be the effect of cases such as Grunwald v. Hughes and Others[1] and Belmont Laundry Co. Ltd. v. Aberdeen Steam Laundry Co. Ltd.[2] but any remaining doubt about this should, we think, be removed.

2.36 In summary, it may be said that the present law gives rise to some anomalies and uncertainties, particularly in the relationship between the statutory provisions and the common law. This in itself is an adequate reason for considering reform at the present time. We also have considerable sympathy with the arguments advanced against the requirement for constitution of the debt by court decree. Without reaching any conclusion at this stage as to how the law should be reformed, we suggest that the policy underlying the present law should be re-examined in the light of these various criticisms and in the light of developments in other jurisdictions.

1 Supra.

2 Supra.

PART III - COMPARATIVE SURVEY

England and Wales

3.1 As we have already mentioned,[1] a provision similar to section 3 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 was enacted for England and Wales in the Law Reform (Married Women and Tortfeasors) Act 1935[2]. The English provision differed from that contained in the 1940 Act in that it merely required the party seeking relief to be "liable in respect of" the damage: there was no requirement that liability be established in prior court proceedings. The courts interpreted the Act as allowing actions of relief following settlement, provided that the party claiming contribution could prove in the action of relief that he was in fact liable as a tortfeasor to the injured party.[3] There was no right of relief where the parties were liable for breaches of different types of obligation, for example, owed in tort and in contract.[4]

3.2 This provision has now been replaced by the Civil Liability (Contribution) Act 1978. The main reform it introduced was to allow contribution not only among joint tortfeasors (co-delinquents) but among all wrongdoers who contributed to the loss or damage in question, whether their respective liability to the injured party was founded on

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1 at para. 2.7 above.

2 s.6.

3 Stott v. West Yorkshire Road Car Co. Ltd. [1971] 2 Q.B. 651.

4 McConnell v. Lynch-Robinson [1957] N.I. 70.

tort, breach of contract, breach of trust or breach of some other obligation.[1] Such contribution is to be assessed, as under the 1935 Act, according to what is "just and equitable having regard to the extent of that person's responsibility for the damage in question."[2] The Act also amended the law on contribution following settlement. Section 1(4) provides:

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

3.3 The 1978 Act largely followed the recommendations of the Law Commission for England and Wales in their Report on Contribution.[3] The final proviso to section 1(4) did not, however, form part of the Law Commission's recommendations. The Law Commission considered that it was unsatisfactory to require the settling party to prove his own liability in order to entitle him to relief.[4] It has been pointed out

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1 s.6(1). Prior to the 1978 Act, rights of contribution between parties liable under the same contract had been available at common law: Whitham v. Bullock [1939] 2 K.B. 81.

2 s.2(1).

3 Law Com. No. 79 (1977); see also Working Paper No. 59 (1975).

4 Law Com. No. 79, para. 44 et seq.

that many claims are settled simply because liability is in doubt and the parties wish to avoid lengthy court proceedings.[1] The proviso was added during the Bill's Committee stage in the Commons, apparently to ensure that settlements based on possible liability solely under foreign law could not found a claim to contribution.[2] Nevertheless, the form of the proviso adopted has the effect of excluding an action of relief where the settlement is based on legal rather than factual doubts and has been criticised for this reason.[3]

3.4 The Law Commission were anxious to eliminate the risk of collusive settlements and therefore adopted the requirement that the settlement be bona fide. They did not attempt to define such a settlement, considering that the courts would have no difficulty with the concept.[4] Under

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1 A.M. Dugdale, "The Civil Liability (Contribution) Act 1978" [1979] 42 M.L.R. 182 at p. 184.

2 House of Commons Official Report, Standing Committee C, 14 June 1978, p. 54.

3 A.M. Dugdale, supra at p. 184. For an example of a settlement based on a legal doubt see Dutton v. Bognor Regis U.D.C. [1972] 1 Q.B. 373.

4 Law Com. No. 79, para. 56.

the general law, the settlement figure must be reasonable before it can form the basis of a contribution claim;[1] and, of course, the party from whom relief is claimed must be proved to be liable to the injured party.

Australasia

3.5 The English Act of 1935 is the model followed in both Australia and New Zealand[2]. Statutory contribution is therefore available only between parties under a common liability in tort.[3] A claim for relief is allowed where a tortfeasor has settled with the injured party provided that he can prove he was liable[4]. If the amount of the settlement is unreasonable, the court will adjust the sum in respect of which contribution is ordered.[5]

3.6 In Victoria, reform has recently been proposed by the Chief Justice's Law Reform Committee.[6] Subject to some

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1 Stott v. West Yorkshire Road Car Co. Ltd., supra per Salmon L.J. at p. 660.

2 Fleming, The Law of Torts (6th edn., 1983) p. 233. See, for example, Queensland, Law Reform Act 1952, Part II; New Zealand, Law Reform Act 1936, s.17.

3 McLaren Maycroft & Co. v. Fletcher Development Co. Ltd. [1973] 2 N.Z.L.R. 100.

4 Bayliss v. Waugh [1962] N.Z.L.R. 44; Fleming, op. cit., p. 236.

5 Bakker v. Joppich (1980) 25 S.A.S.R. 468; Tasmania, Tortfeasors and Contributory Negligence Act 1954, s.3(1)(d).

6 Report on Contribution (1979).

modification, their Report follows the recommendations of the Law Commission for England and Wales. So, the Committee recommend that statutory rights of contribution should not be confined to cases where damage is suffered as a result of a tort, but should cover cases where it is suffered as a result of tort, breach of contract, breach of trust or other breach of duty; contribution should be recoverable by a person who has made a bona fide compromise of a claim against him; it should be a defence to a claim for contribution that the compromise was not bona fide, but not simply that the plaintiff's claim would have failed if it had not been compromised.[1] When ordering contribution to a settlement, the court should disregard any part of the payment which appears to the court to be excessive. Similar reform has also been recommended in South Australia.[2]

Hong Kong

3.7 Until recently, the relevant legislation in Hong Kong was modelled on the English Act of 1935 and was interpreted in the same way to allow claims for contribution based on settlements provided the claimant could establish his liability in tort to the injured party.[3] Reforms

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1 cf. Civil Liability (Contribution) Act 1978, s.1(4): para. 3.2 above.

2 South Australia Law Reform Committee, 42nd Report (1977).

3 See Law Reform Commission of Hong Kong, Report on The Law Relating to Contribution between Wrongdoers (1984) paras. 3.1-3.12 and 5.7.

recommended by the Law Reform Commission of Hong Kong[1] have now been implemented in the Civil Liability (Contribution) Ordinance 1984. These reforms largely mirror the changes introduced into English law in 1978. Accordingly, the right to contribution is now available wherever two or more persons are liable in respect of the same damage, no matter what the legal basis of their liability; and a person who makes a bona fide settlement of a claim is entitled to contribution regardless of whether he was actually liable, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.[2]

Fire

3.8 A detailed code on the law of contribution and relief among wrongdoers is contained in the Civil Liability Act 1961, the provisions of which cover all persons liable to make compensation for harm, whether their liability is based on tort, breach of contract or breach of trust.[3] The basic provision is that a concurrent wrongdoer[4] may recover contribution from any other wrongdoer who is, or would if

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1 Ibid.

2 For a discussion of this proviso, and possible alternatives to it, see paras. 5.7 to 5.16 of the Report.

3 1961 Act, ss. 2(1) and 21(1). See generally McMahon and Binchy, Irish Law of Torts (1981) pp. 86-96 and Williams, Joint Torts and Contributory Negligence (1951). Many of Professor Williams' recommendations were implemented in the 1961 Act.

4 See section 11 for full definition.

sued at the time of the wrong have been, liable in respect of the same damage.[1] Because of the definition given to the word "liable" in section 2, contribution may be recoverable even if the liability of the wrongdoer from whom it is claimed is unenforceable. The amount of contribution shall be such as the court finds just and equitable having regard to the degree of the contributor's fault.[2] Under section 22, a person who makes a reasonable settlement with the injured party can also recover contribution. If the court considers the amount of the settlement excessive, it may fix the amount at which the claim should have been settled and allow contribution in respect of that sum. The claimant is still entitled to relief even although he was not actually liable to the injured party.[3] His action for contribution must be brought within the same limitation period governing the injured party's claim against the contributor, or within two years after the liability of the claimant is ascertained or the injured party's damages are paid, whichever is the greater.[4]

South Africa

3.9 South African law on contribution between co-delinquents is regulated by the Apportionment of Damages Act

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1 s.21(1).

2 s.21(2). The test in apportioning damages appears to be the comparative blameworthiness of the wrongdoers: Keenan v. Bergin and Bishop & Co. Ltd. [1977] 1.R.192.

3 s.29(1).

4 s.31.

1956.[1] Under section 2(12), if any joint wrongdoer[2] agrees to pay to the injured party a sum of money in full settlement of that party's claim, he may recover relief from other joint wrongdoers as if judgment had been given against him, either on the basis of that sum of money or, if the court is satisfied that the full amount of the damage suffered is less than that sum, on the basis of such sum as the court finds equal to the damage actually suffered. This is a slightly different approach from that taken in other legal systems which use the concept of the "reasonable" settlement. The difference is probably more apparent than real, but it may shift the burden of proof as to the appropriateness of the amount of the settlement from the claimant to the party from whom relief is claimed. Contribution is assessed in an amount which is just and equitable having regard to the parties' fault.[3] Where a claim for contribution is made after settlement, the claimant must show that he was actually liable to the injured party[4]. Where the claimant has paid the injured

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1 s.2(1); SAR & H v. SA Stevedores Services Co. Ltd. 1983(1) S.A. 1066(A); OK Bazaars (1929) Ltd & Others v. Stern & Ekermans 1976(2) S.A.521(C). Pro rata relief is available at common law among parties jointly and severally liable under contract: Maasdorp's Institutes of South African Law, Vol. III. The Law of Contract, pp. 35-7.

2 i.e. a person alleged to be jointly and severally liable in delict with another for the same damage: s.2(1).

3 s.2(6)(a).

4 Boberg, The Law of Delict, Vol. 1 (1984) p. 206; cf. A. Gibb & Son (Pty.) Ltd. v. Taylor & Mitchell Timber Supply Co. (Pty.) Ltd. 1975(2) S.A. 457(W).

party pursuant to a court decree against him, that decree may be challenged by the person from whom relief is claimed.[1] The defendant in an action of relief is not liable to contribute, except in exceptional circumstances, unless he was given notice of the original proceedings taken by the injured party in which decree was granted against the claimant.[2] The action of relief must be taken within one year after the sum in respect of which contribution is sought has been fixed by judgment or settlement or within the limitation period governing the injured party's right of action against the contributor, whichever is the shorter.[3]

Canada

3.10 The English Act of 1935 was followed in some provinces of Canada[4] while others followed an earlier lead from Ontario[5]. In most provinces, the statutory right of contribution applies only between persons liable in negligence although in British Columbia the relevant provision may be wide enough to encompass persons liable for

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1 s.2(6)(c).

2 s.2(4)(b).

3 s.2(6)(b).

4 Alberta, Manitoba, New Brunswick and Nova Scotia: see Weir, International Encyclopedia of Comparative Law Vol XI, chapter 12, p. 41.

5 Ontario, Contributory Negligence Act 1930, now Negligence Act 1970, was followed in British Columbia, Newfoundland, Prince Edward Island and Saskatchewan: see Weir, supra. The law on contribution in Quebec is more akin to French law on the subject: see paras. 3.16 and 3.17 below.

breach of any duty of care, whatever the source of that duty.[1] A tortfeasor who settles with the injured party is generally entitled to contribution provided he can establish that he was actually liable to the injured party. Under the Ontario Act, however, a claimant who has settled may recover contribution even if he is later found not liable.[2] The amount recoverable in such circumstances may be the total sum paid to the injured party.[3] The amount of the settlement in respect of which contribution is sought may be adjusted if considered by the court to be excessive.[4] In recent years, some dicta have suggested that contribution could be allowed on general equitable principles, regardless of statute, between persons liable under separate contracts for the injured party's loss.[5] This question has not yet been decided authoritatively.

3.11 Recommendations for reform have been made by the Institute of Law Research and Reform in Alberta[6]. The

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1 Law Reform Commission of British Columbia, Working Paper No. 50 on Shared Liability, p.27; cf. Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd. (1974) 46 D.L.R. (3d) 28.

2 Marschler v. Masser's Garage (1956) 2 D.L.R. (2d) 484.

3 Ibid.

4 e.g. Ontario Negligence Act 1970, s.3.

5 Giffels Associates Ltd. v. Eastern Construction Co. Ltd. (1978) 84 D.L.R. (3d) 344; Smith v. McInnis (1979) 91 D.L.R. (3d) 190.

6 Report No. 31, Contributory Negligence and Concurrent Wrongdoers (April 1979) and preceding Working Paper (March 1975). See also Weinrib, "Contribution in a Contractual Setting" (1976) 54 Can. Bar Rev. 338.

fundamental principle on which they base their proposals is that "the law should treat wrongdoers fairly and that, in the absence of a compelling reason to the contrary, fairness requires that a burden which the law imposes on two parties should not be borne wholly by one of them."[1] Their recommendations include: the extension of the statutory right of contribution to cases where the liability of one or more of the parties is in contract; that a person settling the injured party's claims should be entitled to contribution even if it is subsequently determined that he was not liable; and that the amount to be apportioned should be based on the lesser of the actual consideration of the settlement or the consideration which in all the circumstances of the settlement it would have been reasonable to give.

3.12 The Uniform Law Commissioners of Canada have recently agreed the terms of a Uniform Contributory Fault Act.[2] On the question of contribution between concurrent wrongdoers, defined broadly as persons liable for the same damage in tort, breach of contract or statutory duty or for failure to take reasonable care of his own person, property or economic interest, the Act provides that the contribution payable by one wrongdoer should be proportionate to the degree to which his wrongful act[3] contributed to the damage. A person who gives consideration for release of all concurrent wrongdoers

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1 Report No. 31, p. 36.

2 See Proceedings of the Uniform Law Conference 1984, Appendix F.

3 i.e., his act or omission constituting the tort, breach of contract etc: see sections 1 and 8(1).

from liability should be entitled to contribution based on the lesser of the actual consideration given or the consideration that in all the circumstances of the settlement it would have been reasonable to give. Where the injured party releases some of the wrongdoers from liability, the amount of damages payable by the rest should be reduced by the amount attributable to the fault of those released. No contribution should be available between those released and those not released from liability. The Law Reform Commission of British Columbia have made provisional proposals for reform which are broadly similar in effect.[1]

United States of America

3.13 The law on this topic in the United States is particularly complex. Many states have enacted no legislation so that the question of contribution rights has to be resolved judicially. The Uniform Contribution among Tortfeasors Act 1939 was adopted by some states but was so extensively amended that it was withdrawn and replaced by a new Uniform Act in 1955.[2] This has been adopted by a larger number of jurisdictions while some still adhere to the provisions of the 1939 Act and others have independent

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1 See Working Paper No. 50. For a general discussion of contribution in common law jurisdictions, see Kutner, "Contribution among Tortfeasors: Liability issues in Contribution Law" (1985) Can. Bar Rev. 1.

2 See U.L.A., Vol. 12, p. 57 et. seq. See also Uniform Joint Obligations Act 1925, U.L.A. Vol. 13, 1986 Supplement, p. 496.

statutes of their own.[1] These statutes deal only with contribution rights between joint tortfeasors and some exclude the intentional wrongdoer from their ambit.[2] At common law, rights of contribution may exist between joint debtors, including judgment debtors compelled to pay the amount awarded by decree in an action founded on contract.[3]

3.14 As regards rights of relief in tort, a few states refuse contribution altogether, while providing fairly generously for rights of complete indemnity.[4] Some allow no contribution unless there has been a joint judgment against the wrongdoers.[5] In most jurisdictions, relief may be claimed by a wrongdoer who has settled with the injured party, provided that the settlement releases the other wrongdoers from liability.[6] The majority do not allow a right of contribution against a wrongdoer who has already settled[7]. This rule is sometimes qualified to the effect that the right of contribution will be excluded only if the

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1 See Weir, op. cit., pp. 41-2; Prosser, The Law of Torts (4th edn., 1971) pp. 305-10. For a discussion of the development of the law in New York, see Steinman, "Liberal contribution rules in New York: In the plaintiff's best interests," 1984 Albany Law Review 244.

2 e.g. Uniform Act of 1955.

3 C.J.S. vol. 18, p.12.

4 Weir, op. cit., pp. 61-3.

5 Weir, op. cit., pp. 63, 65.

6 Weir, op. cit. p. 63; Kaplan, "From Contribution to Good Faith Settlements: Equity where are you?" Journal of Air Law and Commerce, vol. 49, 1983-4, 771 at p. 778.

7 Kaplan, op. cit., p. 781.

wrongdoer from whom contribution is sought has settled with the injured party in good faith.[1]

3.15 It is usually provided that, in the action for relief, the party who has settled must establish his own liability to the injured party and show that the amount of the settlement was reasonable.[2] Exceptionally, the claimant need not prove that he was actually liable to the injured party[3] and in some states it is for the party from whom contribution is claimed to show that the amount of the settlement was not reasonable.[4] The contributor must originally have been liable to the injured party but the fact that the injured party's claim against him is time-barred does not prevent recovery of contribution from him.[5] In most states, the amount of contribution is calculated simply on a pro rata basis rather than according to the degree of fault of each of the wrongdoers.[6]

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1 Kaplan, op. cit. p. 789; O'Leary, "Good Faith Settlements and Release Agreements under the Illinois Contribution Act," 1984 Illinois Bar Journal 82.

2 Prosser, op. cit., pp. 308-9.

3 e.g. Harger v. Caputo 420 Pa 528, 218 A 2d 108 (1966) (Pennsylvania).

4 Consolidated Coach Co. v. Burge 245 Ky 631, 85 ALR 1086 (1932) (Kentucky).

5 Prosser, op. cit., p. 309.

6 Weir, op. cit., p.72.

France

3.16 The specific regime provided by the French Civil Code for dealing with common debtors appears to be restricted to debtors liable under the same contract[1]. Joint and several liability will not be presumed but, where it does exist, each debtor is liable for the whole amount to the creditor and, among themselves, each is liable only for his proportionate share.[2] Article 1214 of the Civil Code provides that a co-debtor of a joint and several debt who has paid it in full may recover from the others only the proportionate share of each of them.

3.17 Alongside the regime of solidarity in contract there has developed an obligation in solidum which arises in delict to the effect that one wrongdoer who has contributed to damage caused to a third party will be liable for the whole damage suffered.[3] In these circumstances a claim for relief against other wrongdoers who have also contributed to the damage is by way of subrogation.[4] In other words, the claimant exercises the injured party's rights against the others. Provided the claimant was liable to the injured party, it does not matter whether he paid the sum of damages voluntarily or under decree.[5] If he was not liable, he is

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1 Mazeaud and Tunc, II No. 1939.

2 C.C. arts. 1202 and 1213.

3 C.C. art. 1382; Mazeaud and Tunc, II No. 1943-1976.

4 C.C. art. 1251.3; Mazeaud and Tunc, II No. 1970-1975.

5 Weir, op. cit., p. 63.

not entitled to contribution but may have a subsidiary claim based on principles of unjust enrichment.[1] His claim for contribution will fail if the injured party's right of action against the other wrongdoer is time-barred or if the other wrongdoer would not have been held liable to him.[2] Where contribution is awarded, the amount is assessed according to the relative degree of the parties' fault.[3] The right to claim relief by way of subrogation appears to exist where one party is liable in delict and the other in contract, both for the same harm,[4] and presumably also where the parties are liable under two separate contracts.[5]

West Germany

3.18 The West German rules for determining the liability of common debtors[6] are designed to accommodate co-delinquents as well as co-contractors. In most cases, where several persons are responsible for one debt, for example, if several delinquents have committed delicts contributing to the same loss,[7] liability is joint and several and the creditor may take action to recover the whole debt from any one of them. A right of relief is

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1 Ibid.

2 Mazeaud and Tunc, III No. 2556-2562.

3 Weir, op. cit., p. 73; Mazeaud and Tunc, II No. 1970.

4 Weir, op. cit., p. 64.

5 Mazeaud and Tunc, II No. 1939.

6 B.G.B. s.421-7.

7 B.G.B. s.840(1).

available if one debtor has paid more than his share. So, a wrongdoer who settles the injured party's claim or who pays damages to him under court decree has an independent right to recover contribution from his fellow wrongdoers, whatever the basis of their liability.[1] In addition, the paying debtor is subrogated to the creditor's rights against the others.[2] A person who could not be sued by the injured party, for example, because of a time-bar or some contractual exemption, or who has been sued unsuccessfully, may still have to contribute.[3] This is on the basis that the mutual rights and liabilities of the common debtors are created at the time of the wrong and cannot be affected by the creditor's subsequent actings. Contribution is assessed according to the degree of fault of the common debtors without, however, going so far as to give persons strictly liable without fault a complete indemnity from those whose liability depends on proof of fault.[4] The creditor's right of action against the debtor must be exercised within three years: the common debtor remains liable to contribute for 30 years.[5]

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1 Weir, op. cit., p. 59.

2 B.G.B. s.426(2).

3 Weir, op. cit., pp. 66-8.

4 Weir, op. cit., p. 73.

5 B.G.B. s. 195; Weir, op. cit., p. 74.

PART IV - PROPOSALS FOR REFORM

Expanding the statutory right to contribution

4.1 There are two particular areas of concern which we have identified in the present law. One is the uncertainty surrounding claims for contribution where the parties are liable for breaches of different kinds of obligation. The other is the fact that the method of calculating the amount of contribution varies depending whether the claim is made under the 1940 Act or at common law. In view of the potential complexity of legal relationships today and the increasing scope for concurrent liability on different bases, the only way in which the law can do justice among the parties is to provide an equitable right of relief among all persons liable in damages for the same loss, whatever the basis of their liability to the person who has suffered the loss. In addition to clarifying any doubt as to whether a right of contribution does in fact exist where the parties are liable in damages on different grounds, it would give the courts the flexibility to make a just apportionment in circumstances where the present rules allow apportionment only on a pro rata basis. So far as claims in delict are concerned, we intend that a right of relief should be available in the case of both intentional and non-intentional delicts and in cases of strict liability.[1]

4.2 We have also considered the extent to which rights of relief between parties, one of whom is vicariously liable for the delicts of the other, should come within our proposals. Under English law, it is clear that an employer

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1 For example, some forms of statutory liability.

who has been found vicariously liable for the tortious act of his employee is entitled to claim damages from the employee for breach of an implied term of his contract to exercise reasonable care in the performance of his duties.[1] The measure of damages is the sum which the employer has paid to the injured party plus the expenses of any court action which he has been required to meet. In practice, this claim is rarely, if ever, enforced.[2] We are not aware of any Scottish authority on the point so it is unclear how the courts in Scotland would deal with this issue were it ever to arise for decision. However, as a species of joint and several liability, cases of vicarious liability would seem to come within the existing statutory scheme for apportionment between joint wrongdoers.[3] So the employer apparently has a right of relief under section 3(2) of the

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1 Lister v. Romford Ice and Cold Storage Co. [1957] A.C. 555.

2 There is, in fact, a "gentleman's agreement" among insurers that they will not claim against the employee of an insured employer in respect of the death of or injury to a fellow employee unless the employee has been guilty of collusion or wilful misconduct. See Morris v. Ford Motor Co. [1973] 1 Q.B. 792 per James L.J. at pp. 813-4. See also Atiyah, Vicarious Liability (1967) pp. 426-7.

3 Successful claims have been made under the equivalent English legislation: e.g. Ryan v. Fildes [1938] 3 All E.R. 517; James v. Manchester Corporation [1952] 2 Q.B. 852; Semtex Ltd. v. Gladstone [1954] 2 All E.R. 206. It appears to have been assumed at common law that a master who became vicariously liable for the wrongdoing of his servant was entitled to relief against the servant: Fraser on Master and Servant (3rd edn., 1882) p. 305; Glegg on Reparation (4th edn., 1955) p. 408. See also Mack v. Allan (1832) 10 S. 349 per L.P. Hope and Lord Gillies at pp. 350 and 351.

1940 Act in addition to any possible claim for breach of contract. In the converse situation, where the employee has been sued by the injured party, he is apparently entitled to seek relief from his employer.

4.3 Whatever may be the rights and wrongs of allowing contribution claims between, say, an employer and an employee, the question seldom arises in practice. An employee does not usually have the resources to meet any claim so is not sued in the first place. An employer is unlikely to prejudice good industrial relations by making a claim for contribution against his negligent employee, even if he is worth suing. To this extent, the law of contribution seems of little practical importance. Nevertheless, a claim for relief may be available under the 1940 Act as both parties are, in a strict sense, jointly and severally liable in damages for the loss caused. It is obviously outwith the scope of this Memorandum to consider substantive changes in the field of vicarious liability, even if any were thought desirable. However, we think that there may be a case for regulating expressly by statute the rights inter se of the wrongdoer and the person who is vicariously liable for his wrongdoing.

4.4 An important policy consideration underlying the imposition of vicarious liability is that it gives the injured party a defender worth suing. Its primary purpose is not to exempt the actual wrongdoer from liability. If the present law is adequate in this context, it is our view that it is so on the assumption that where the party vicariously liable has not been personally at fault, he would be entitled to 100% relief from the actual wrongdoer, were he to seek contribution and, conversely, he would not

be bound to make contribution, were a claim for relief to be made against him. This result has been achieved under the equivalent English legislation, at least as regards claims for contribution against the actual wrongdoer.[1] In the absence of actual fault on the part of the person vicariously liable, which has contributed to the loss, we think that this is right. However, we do not know of any reported cases before the Scottish courts in which a similar decision has been reached.[2] Section 3(2) of the 1940 Act does not preclude the award of 100% contribution in appropriate cases but it is perhaps arguable that the basis of apportionment under the existing law, requiring the court to apportion damages in such sum as it "may deem just", gives insufficient guidance to the courts to achieve this result in cases of vicarious liability. It is therefore for consideration whether any express provision is necessary to meet the point, to the effect that in the absence of actual fault on his part, a person vicariously liable for the delicts of another should not be open to a claim for contribution at the instance of the wrongdoer and, conversely, that he should be entitled to full indemnity from the actual wrongdoer, were he to seek contribution from him.

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1 e.g. Ryan v. Fildes, supra; Semtex Ltd. v. Gladstone, supra.

2 cf. Yuille v. Daks Simpson Ltd. 1984 S.L.T. 114 where an employer was found liable under the Employers' Liability (Defective Equipment) Act 1969 in respect of personal injuries suffered by an employee. Lord Grieve expressed the obiter opinion at p. 116 that in the absence of any fault on his part, the employer would be entitled to 100% relief from the engineers responsible for the negligent design and installation of the equipment.

4.5 Against this, it may be said that the present basis of apportionment, or indeed any of the bases of apportionment which we canvas under our proposals,[1] is flexible enough to reach this result in appropriate cases and that it would be unwise to determine in advance what the court's decision should be in cases of vicarious liability. Each case should be decided on its merits, within the general framework of our scheme. The lack of fault on the part of the person vicariously liable would simply be one of the factors to be taken into account by the court in deciding what contribution, if any, should be awarded. We do not express a concluded opinion on this issue.

4.6 In making proposals to expand the statutory right of contribution, we have considered whether our scheme should cover not only cases of liability in damages for loss, injury or damage caused by a breach of duty but also cases where liability exists under statute or by virtue of a contractual indemnity provision or other contractual obligation to pay a sum of money to the party who has sustained the loss, injury or damage. The situation which we are envisaging may be illustrated by the recent case of B.P. Petroleum Development Ltd. and Shell U.K. Ltd. v. Esso Petroleum Ltd[2]. The facts of this case were that an oil tanker belonging to the defenders collided with a jetty at Sullom Voe Oil Terminal. The defenders were liable under

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1 See paras. 4.77 to 4.83 below.

2 29 August 1985, unreported. See also Esso Petroleum Co. Ltd. v. Hall Russell & Co. Ltd. and Others, 11 December 1985, unreported.

statute to Shetland Islands Council, as port and harbour authority, for the damage caused. The pursuers were also bound under contract to provide the Council with the funds required to make good the damage. They sought to recover the sum which they had allegedly paid to the Council under their contractual obligation. The defenders contended that the action was one of relief but that the circumstances did not fall within the accepted meaning of a right of relief at common law because there was no connection between the parties and therefore no common obligation owed to Shetland Islands Council. Lord Ross held that the pursuers and the defenders were liable for the same debt, even in the absence of any contract between them. Although the origins of the parties' respective liabilities were separate and distinct, the obligation was a common one because each had to perform substantially the same obligation, i.e. to make good the damage to the jetty. Neither of the parties was primarily liable so as to enable the other to claim full relief. Accordingly, the pursuers and the defenders were each held to be liable for the whole sum due to Shetland Islands Council but were liable inter se only for a proportionate share which, in the absence of any special agreement between them, was one half of the total.

4.7 We think that this decision achieves the desired result between parties who are clearly both liable to compensate for the same damage. It would be unfair if a right to contribution were excluded simply because the parties' liability was by virtue of a contractual or statutory obligation to make payment to the injured party rather than because of a breach of duty. It can therefore be said that the common law already works satisfactorily in this area. However, it would be possible, for the sake of completeness

and with a view to allowing the courts to make an apportionment otherwise than on a pro rata basis in this situation, to extend the statutory right of relief to encompass situations such as that arising in the BP case. The end result, broadly speaking, would be to recognise a right of relief in each of the following circumstances:

(a) where two persons are jointly and severally liable for loss, injury or damage caused by their acts or omissions in breach of a duty owed in delict, contract, trust or otherwise;

(b) where they are liable to compensate for the same loss, injury or damage in terms of a statutory or contractual obligation to make payment to the injured party;

(c) where they are liable for the same loss, injury or damage, one because of a breach of duty giving rise to a liability in damages, the other because of a statutory or contractual obligation to pay for the loss, injury or damage sustained.

4.8 This approach is, however, fraught with difficulties. Unless subject to some qualification, a proposal to allow claims for contribution in all cases where the liability of one of the parties was simply to indemnify a person against loss would be too sweeping. In particular, it would have far-reaching consequences for the insurance industry. It would mean, for example, that an insurer who had indemnified the assured for certain loss caused by another party would not be entitled to be subrogated to all the rights and remedies of the assured against the wrongdoer in

order to recoup the sum paid out under the insurance policy[1]. He would simply have a right to claim contribution from the wrongdoer towards that sum and the amount of contribution awarded by the court would not necessarily be the same as he would have been entitled to by way of subrogation. This result would, in our view, be unacceptable. The insurer's remedy is, quite properly, that of subrogation and such rights would have to be expressly preserved.

4.9 There would be a further problem for insurers and others under an obligation to indemnify a person for his loss. Stated baldly, any proposal to extend the statutory scheme to indemnifiers would mean that an insurance company, for instance, would be open to a claim for relief in circusmtances where the assured suffers loss due to the fault of another party. If the wrongdoer was found liable in damages to the assured, he could attempt to recover a contribution from the insurer on the ground that both he and the insurer were under an obligation to compensate the assured for the loss he had suffered. Again, this result would be clearly unacceptable, but we have difficulty seeing how it could be avoided, except by excluding such cases from the scheme altogether. Indeed, to exclude from our proposals cases where one person is liable to indemnify the injured party and the other is liable to him in damages would not deprive the indemnifier of all rights against the

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1 On subrogation generally, see Ivamy, General Principles of Insurance Law (4th edn., 1979) chap. 46; MacGillivray and Parkington on Insurance Law (7th edn., 1981) chap. 17.

actual wrongdoer. Insurers would still have their rights of subrogation and other indemnifiers would still be able to take an assignation from the injured party in order to go against the wrongdoer.[1]

4.10 Turning to cases where both obligants are liable to indemnify the injured party for his loss, we are not convinced that the present law is inadequate. In the first place, apportionment on a pro rata basis may well be the right answer. If two parties agree or are bound under statute to indemnify another for his loss, their obligation arises irrespective of who causes the loss. Unequal apportionment according to fault or according to what the court deems just may therefore be inappropriate. Secondly, the indemnifier who settles the injured party's claim may have an alternative remedy against the other by way of subrogation if the other indemnifier is also the wrongdoer responsible for causing the loss. If the settler is under a contractual obligation to indemnify the injured party, he may reserve a right of subrogation expressly in the contract. It is also possible, depending on the outcome of the appeal in Esso Petroleum Co. Ltd. v. Hall Russell & Co. Ltd. and Others[2], that a right of subrogation may arise under the general law. For both these reasons, we doubt whether it would cause any obvious injustice to leave the law on contribution between indemnifiers as it stands.

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1 It is an open question under the present law whether other indemnifiers would have any general right of subrogation: see para. 4.10 below.

2 Supra. In the Outer House, Lord Wylie considered that the doctrine of subrogation applied only in the field of insurance. See also the opinion of Lord Ross in B.P. Development Ltd. and Shell U.K. Ltd. v. Esso Petroleum Co. Ltd., supra.

4.11 A further complication would arise in insurance cases if our proposals were to extend to indemnifiers. Where the assured has double insurance for his loss, insurance law and practice have developed their own rules of apportionment as between the two insurers. Most insurance contracts, in fact, contain a rateable proportion clause whereby, in cases of double indemnity, the assured may recover only an appropriate proportion of his loss from each insurer. In the absence of such a clause, the assured can make his claim against any one of his insurers who has in turn a right of contribution against the others. Section 80 of the Marine Insurance Act 1906 provides that in these circumstances each insurer is bound, as between themselves, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract. Similar principles apply in other forms of indemnity insurance, the result being, in broad terms, that where the insurers' liability to the injured party is unlimited, the total liability for loss is divided equally and where liability is limited to a fixed sum, each insurer is bound to contribute in proportion to the amount for which he is liable under his contract.[1] We are not aware of any particular problems experienced by the insurance industry in this area. However, if double insurance cases were to come within our proposals, their existing methods of apportionment would be superseded by a more general and flexible rule which we discuss later in the Memorandum.[2]

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1 See Ivamy, op. cit., chap. 48; MacGillivray and Parkington op. cit., chap. 22.

2 See paras. 4.77 to 4.83 below.

4.12 In light of these considerations we are not convinced that there would be any benefit to be gained in extending the statutory scheme for contribution to those under contractual or statutory obligations to indemnify a person for his loss. The practical difficulties, particularly in the field of insurance, do not make it a feasible option. Subject to any other views expressed by consultees, we suggest that our proposals should be confined to rights of relief arising in situations where the injured party's claim is one for damages.[1]

4.13 Comments are invited on the following propositions:

1. (a) Statutory rights of relief should not be confined to cases where loss is suffered as a result of a delict but should cover cases where loss is suffered as a result of a delict, breach of contract, breach of trust or breach of any other obligation.

   (b) Should it be provided that, in the absence of actual fault on his part, a person vicariously liable for the delicts of another should not be open to a claim for contribution at the instance of the actual wrongdoer and, conversely, that he should be entitled to full indemnity from the actual wrongdoer, were he to seek contribution from him?

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1 We discuss at paras. 4.21 to 4.33 below the exact basis of the claim for relief and in particular whether the claimant should have to prove his liability to the injured party.

(c) The statutory scheme should not be extended to include rights of relief between parties one or both of whom is bound, by contract or statute, to indemnify the injured party for his loss.

4.14 Our general approach to reform would be to replace section 3 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 with a new provision which, as well as extending beyond rights of relief in delict, would form a comprehensive code dealing with all aspects of the law of contribution arising in relation to liability in damages for loss caused.[1] This would supersede entirely the common law rules so far as applicable to the kinds of contribution rights which we have identified. We would, of course, retain the substance of section 3(1) of the 1940 Act insofar as it entitles the court to apportion damages between parties who are sued together and who are found jointly and severally liable.

4.15 Within this basic framework, there are a number of issues to be resolved: for example, should a right of relief be available following settlement and, if so, should it be necessary for the person claiming relief to prove that he was in fact liable to the injured party? Should a person who has paid a sum of money in settlement to the injured party be safe from all subsequent claims for contribution? Before discussing these and other questions, it may be helpful to set out what we think are the main policy considerations underlying this area of law. In the first

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1 Rights of relief between parties liable for the same debt would be unaffected: see para. 1.5 above.

place, it is important that the law should encourage the settlement of claims. If a satisfactory settlement can be achieved, it is to the advantage of all the parties involved, in avoiding the delay, expense and uncertainty of litigation and ultimately it assists the efficient working of the judicial process by keeping out of court those cases where a formal determination of the claim is not strictly necessary. Secondly, the law should try to achieve fairness among concurrent wrongdoers - that is, among parties liable in damages to the injured party in respect of his loss - so that each one is liable to pay only an equitable proportion of the total loss. Thirdly, the notion of fairness among concurrent wrongdoers should not prejudice the position of the injured party. His expectation of recovering the full amount of his loss should not be affected by the number of wrongdoers who contributed to it. While it may not be possible to reconcile these three principles in all aspects of the law of contribution, we believe that they should be the main criteria by which proposals for reform should be assessed.

4.16 For ease of reference when outlining our proposals in the following paragraphs, we will use "P" to mean the pursuer or person who has suffered the loss or injury, "D1" to mean the person claiming relief and "D2" to mean the person from whom relief is claimed. The expression "concurrent wrongdoer" is given an extended meaning to cover all parties liable in damages to the injured party for his loss, whether their liability arises in delict, contract, trust or otherwise.

Prerequisites of a claim for contribution

4.17 Liability of D2 to P. For a successful action of relief, the present law requires that D1 should prove that D2, had he been sued by P, would have been held liable to him. This does not seem controversial: a right of relief is, after all, based on the premise that D1 has discharged a debt properly due by D2. We therefore suggest that this requirement should be retained. It would mean that any plea which D2 could have taken to defeat P's claim against him, for example, on grounds of personal bar or waiver, would also be effective to defeat D1's claim for relief.

4.18 It follows from our first proposal concerning the extent of statutory rights of relief that D2's liability could be in delict or contract or founded on breach of any other legal duty giving rise to a liability in damages. Leaving aside for the moment the question of the time for ascertaining D2's liability,[1] we also have to consider whether his liability should be restricted to liability under Scots law.

4.19 As section 3(2) of the 1940 Act is presently interpreted,[2] the action against D1 need not have been raised in Scotland but it must have been founded on acts which the law of Scotland would regard as wrongful or acts or omissions which the law of Scotland would regard as negligent. So far as D2's liability is concerned, the question appears to be whether he could have been found

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1 See paras. 4.34 to 4.50 below.

2 See the Comex case.

liable had he been sued by P in a Scottish court. It is not clear whether this includes the possibility of a reference to the applicable law or whether D2's liability must be determined under Scots domestic rules.

4.20 Express provision is made on this issue in England and Wales. The effect of section 1(6) of the Civil Liability (Contribution) Act 1978 is that D2's liability is recognised for the purposes of contribution proceedings if it could be established in an action brought by P in England and Wales, but it is immaterial whether, according to the relevant rules of private international law, the issue was governed by the law of some other country. We think this is the right result. Where D2's liability has to be established for the purposes of a contribution action before a Scottish court, it is appropriate that it should be determined not just according to Scots domestic rules but by whatever foreign law is recognised in Scotland as being the proper one to govern the matter. By the same token, Scots law, including its choice of law rules, should decide the basis of D2's liability to P, whether it is founded in delict, breach of contract or otherwise. We accordingly invite consultees' views on the following proposals:

2. (a) D1 should be able to claim contribution from any person who is liable to P in respect of the loss, injury or damage which he has sustained. Subject to Proposition 4 below regarding the time for ascertaining D2's liability, any plea which could have been taken to defeat P's claim should also be effective to defeat D1's claim for relief.

(b) For the purpose of (a) above, liability is to be determined according to Scots law, including, where appropriate, its rules of private international law.

4.21 Basis of D1's claim. In addition to requiring D1 to prove D2's liability, the present law probably requires that D1 should establish his own liability to P (although, following the Comex decision,[1] this does not appear to be the case where the court has merely interponed authority to a joint minute settling P's claim). In relation to contribution among co-delinquents, the debt also requires to be constituted by court decree. There are, however, other possible bases on which his right of contribution could be founded. The main options which we have identified (all assuming that payment by D1 has the effect of reducing a debt owed by D2[2]) are:

(a) D1 should have a right of relief against D2 if he has made a settlement with P, whether or not P has made any prior claim against him and whether or not any such claim would have succeeded.

(b) D1 should have a right of relief against D2 where settlement has been made in response to a claim by P, whether or not the claim would have succeeded.

(c) D1 should have a right of relief against D2 if he has made a bona fide settlement with P.

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1 See paras. 2.13 and 2.14 above.

2 See para. 4.31 below.

(d) D1 should have a right of relief against D2 where settlement has been made after P has raised a court action against him, whether or not the action would have succeeded.

(e) D1 should have a right of relief against D2 following settlement of P's claim provided D1 would have been found liable had he been sued by P.

(f) D1 should have a right of relief against D2 only where D1's liability to P is constituted by court decree, e.g. where the court has interponed authority to a joint minute settling the claim.

(g) D1 should have a right of relief against D2 only where D1's liability to P is constituted by decree against him after a fully contested action.

4.22 We do not suggest that this last option merits serious consideration. It would be a retrograde step on the present law which, as interpreted in Comex, does not require the court action "to be fought to the death" in order to establish a claim for contribution.[1] If a court decree were still to be required, the preferred solution would, in our view, be option (f) which does not actively discourage the settlement of claims. In one sense, however, option (f) begs the question, for what purpose does the decree serve if it simply confirms, without further investigation, the terms of the settlement between

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1 See paras. 2.13 and 2.14 above.

P and D1? It does not ensure that D1 was liable in the first place. It does not ensure that the amount of the settlement was reasonable,. If neither of these factors is considered to be an essential prerequisite of a claim for contribution, it would be better to omit the requirement of a court decree and allow a right of relief based directly on the settlement itself.

4.23 The comparative survey shows that Scots law is relatively unusual in refusing to allow a claim for relief based on a settlement betwen P and D1.[1] This in itself is not necessarily a ground for reform, but we have already indicated[2] that there are a number of cogent arguments that can be advanced against the present rule. Most importantly, in many cases the existing law seems to us to offend against the principle of fair distribution of the burden of damages amongst concurrent wrongdoers and can give rise to practical difficulties, leading to protracted and unnecessary litigation. The fact that one wrongdoer has been pursued to judgment through the courts should not be the sole determining factor in apportioning liability for the loss.

4.24 We see advantages in stating the rules on contribution fairly liberally. A requirement that there should be some form of judicial decree is unnecessarily restrictive and may

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1 Of the legal systems considered, only a few American states have a similar rule: see para. 3.14 above.

2 at paras. 2.27 to 2.31 above.

3 See, in particular, the reasoning of Lord Strachan in N.C.B. v. Thomson, supra, quoted at para. 2.27 above.

be an artificial safeguard, so far as D2 is concerned, in those instances where a court has merely interponed authority to a joint minute of the settling parties. In the context of a policy encouraging the early settlement of claims, a real safeguard would be, not a prior judicial determination of D1's liability, but a power in the court to ensure that D1's right of relief is limited to what would be a just sum having regard to D2's liability to P. The fact that a settlement has been made which has also benefited D2 by satisfying a debt due by him to P may be the only matter of real relevance. We therefore tend to the view that the mere fact of settlement with P should be a sufficient basis for an action of relief against D2.

4.25 This proposal may be regarded by some people as going too far. It may be considered desirable to impose some further condition to ensure the genuineness of the settlement between P and D1. Otherwise it would be possible for a person who was entirely unconnected with the circumstances giving rise to the loss or injury to intervene in order to make a voluntary payment to P and to recover at least part of that payment from D2. We do not, in fact, see any particular objection to this result, given the fact that there can be no right of relief unless D2 is shown to be liable to P in the first place. Provided appropriate safeguards are build into the scheme to limit D2's liability as regards both the amount of contribution payable and the period during which he may be called on to contribute,[1] he cannot be prejudiced by the circumstances

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1 See generally paras. 4.34 to 4.50, 4.66 to 4.91 and 4.117 to 4.119 below.

of the settlement between P and D1. It is worth noting that the same result - i.e. recovery of contribution without proof of D1's liability - can already be achieved under the present law where the court simply interpones authority to a joint minute settling P's action against D1. The same result also follows if, in the absence of court proceedings, the settler takes an assignation of P's claim against the wrongdoer and proceeds to recover the sum he paid to P on that basis. In the latter case, of course, the settler's claim against the wrongdoer is subject to the same time limits of P's original claim.[1] In either case, the settling party's liability, or even his connection with the incident, is irrelevant. If that is so, why should those considerations give cause for concern where D1's claim is framed as one of relief following settlement, without any intervening decree or assignation?

4.26 However, if we accept, for the sake of argument, the need to exclude collusive settlements, by which we mean here settlements by D1 without any question of his being liable, it remains to consider how this could be achieved. Of the options canvassed above, we have some doubts about the usefulness of requiring either that settlement should have been made in response to a claim or that it should have been made after P has raised an action against D1 (options (b) and (d)). Neither condition excludes the possibility of D1 settling P's claim without being in any way connected with the incident giving rise to P's loss. The making of a claim against D1 could be a relevant consideration but would not, in our view, be decisive. The raising of a court action is a rather arbitrary requirement since there may be good

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1 See para. 2.29 above.

reasons why P would not want to or would not be able to take that step. The fact that he had taken that step would not necessarily ensure the genuineness of D1's settlement.

4.27 One possible means of protecting against collusion would be to require D1 to establish his own liability to P in the action of relief itself (option (e))[1]. We do not, however, favour this solution for the reasons identified by the Law Commission for England and Wales in their examination of this topic[2]. First, to require D1 to prove his own liability would mean "turning all the usual conventions of civil claims upside down"[3]: D1 might have to call evidence in the possession of P in order to establish his own liability and D2 would then call D1's witnesses in order to raise a doubt as to D1's liability. Second, if the result of the contribution proceedings was that D2's liability was established but D1's was not, then D1 would get no contribution towards the sum he paid in settlement to P, although he was not in fact to blame, and D2, who was to blame, would have to pay nothing at all. This seems a very harsh result and inappropriate for a remedy which is said to be based on equity. Parties would be deterred

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1 See Lord Strachan's dissenting opinion in N.C.B. v. Thomson 1959 S.C. 353 where he considered, at pp. 382-3, that a right of relief in respect of a sum paid as damages for injuries caused by negligence need not be founded on a prior decree but that the person seeking relief would require to establish that the injuries were caused to some extent by his own negligence.

2 Law Com. No. 79, para. 45; Working Paper No. 59, para. 28.

3 Working Paper No. 59, para. 28.

from settling claims in which liability was doubted if their right of relief was thereby put at risk. Many settlements are made because there is a doubt as to liability and the parties wish to avoid lengthy litigation on the matter. Under English law, the proviso contained in section 1(4) of the Civil Liability (Contribution) Act 1978 - that D1 must have been "liable assuming that the factual basis of the claim against him could be established" - excludes a right of relief where there is such uncertainty as to the law.[1] Its meaning is not entirely clear, but this provision seems to have a rather curious twofold effect. It can apparently prevent recovery of contribution following settlement if it is established that there is no basis in law for D1's liability, assuming the facts are as stated in P's claim and notwithstanding the fact that D2's liability may never have been in doubt. At the same time, the provision seems to allow D1 to claim relief even although he was not actually liable if, on the factual basis of P's claim, which turns out to be incorrect, he would have been liable. We do not consider that this type of approach to the problem is at all helpful.

4.28 A further possibility would be to provide that D1 should have a right of relief against D2 if he has made a bona fide settlement with P (option (c)). This solution is not without its problems. The difficulty is, of course, in identifying what exactly is meant by a bona fide settlement. The Law Commission for England and Wales, when recommending similar reform, concluded that the concept if left undefined "should present no difficulty to the courts"[2] and, indeed,

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1 See para. 3.3 above.

2 Law Com. No. 79, para. 56.

the criterion of good faith has been adopted or recommended in other jurisdictions.[1] We are not, however, convinced that the matter would be so straightforward in practice. A test of good faith would presumably leave it open to the court to take a variety of factors into account, including whether the settlement was made at arm's length, the amount of the settlement, whether payment was made in response to a claim and so on. It would presumably exclude the obviously collusive compromise between P and D1 where the sole purpose was to confer on D1 a right to claim relief from D2 in the knowledge that D1 could not possibly have been liable in the first place. But would consideration of D1's good faith be limited to his dealings with P or would it also be relevant to his dealings vis-a-vis D2? Would good faith in this context mean anything more than reasonableness?[2] Take, for example, the case of a solicitor faced with a claim for professional negligence in circumstances where a third party may be at least partly to blame for the loss caused. The claim may be unfounded but, in order to avoid adverse publicity and the burden of defending a court action, the solicitor still decides to settle. He may have acted in perfectly good faith vis-a-vis the claimant and the settlement may have been reasonable to safeguard his own financial and professional

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1 e.g. Victoria, South Australia and Hong Kong: see paras. 3.6 and 3.7 above.

2 It was argued in debate on the Civil Liability (Contribution) Act 1978 that the requirement of good faith should be expanded to incorporate an express reference to the reasonableness of the settler's conduct: See House of Commons Official Report, Standing Committee C, 7 June 1978, pp. 26 et seq.

interests but, seen objectively, the settlement was entirely unreasonable because there was an obvious defence to the claim.

4.29 Regardless of whether or not the solicitor should, as a matter of policy, have a right of relief in this situation, our initial reaction is that a requirement of good faith on the part of D1 in settling P's claim is too nebulous a test. It cannot provide a clear answer for all the different circumstances in which a settlement may be reached. Moreover, a bona fides test would involve a difficult investigation into the state of D1's knowledge, his motives for settling and so on. If, for example, D1 settles with P knowing that P's claim against him has prescribed or knowing that, as a matter of law, he is not liable, can he still be said to have acted in good faith, at least so far as D2 is concerned? The matter is, we think, left in some doubt. If the law is to encourage settlements, we think it should state clearly the kind of settlement which is sufficient to found an action for relief. If any qualification is to be made of the rule allowing contribution following settlement, it should be stated explicitly.

4.30 Having considered the various possibilities, we are still attracted to the most straightforward solution, namely that the mere fact of settlement which reduces a debt owed by D2 should entitle D1 to seek relief. This solution has the obvious merit of simplicity. Given adequate control of the amount of contribution payable and the period during which D2 may be liable to contribute, we think that this is the most satisfactory option for reform. We did, however, start out by suggesting that this approach might seem

unacceptable to some people, giving D1 too wide a scope to intervene to settle claims voluntarily. If we analyse the problem, two possible areas of concern emerge. First, D1 would be able to settle with P without being liable on the merits of the claim. Second, he would be able to settle, regardless of whether or not he was ever liable on the merits of P's claim, at a time when P's claim against him was time-barred. As regards the first situation, the logic of the Comex case and the existing law on assignations persuade us that this result is unobjectionable. Moreover, it seems to us desirable to encourage out-of-court settlements in those cases where there is uncertainty as to liability. To allow D2 to defeat the claim for relief by proving that D1 was not, in fact, liable would be a positive disincentive to settlement in this type of case. The fact that D1 was not liable could nonetheless be relevant at the stage of quantification of D2's contribution and could result in his recovering from D2 the whole sum which he had paid in settlement.[1] It is in the second situation that the real mischief lies. If D1 were able to found a claim for relief on settlement at any time after P's claim against him was time-barred, this would extend indefinitely the period during which D2 could be called on to contribute. Payment by D1 could therefore be a collusive device to get round the fact that P had failed to sue D2 within the appropriate time limit. We think it would be unacceptable to allow D1 a right of relief in such

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1 We discuss the amount recoverable at paras. 4.66 to 4.91 below.

circumstances. For practical reasons, there must be a definite cut-off point beyond which D2 is safe from contribution proceedings. We discuss below how this should be achieved.[1]

4.31 Our proposal is stated in terms of D1's payment reducing a debt owed by D2. This reference to reducing D2's debt is crucial. It connotes, firstly, the fact that D2 must have been liable to P in respect of his loss[2] and, secondly, that the payment by D1 must have been made with reference to that loss, in the sense that it must have reduced or extinguished D2's liability to P. It would not be enough that D1 had, coincidentally, given a sum of money to P after P had suffered the loss for which D2 was liable. There would have to be a clear connection between D1's payment and P's loss in order to set up his claim for relief. D1 would therefore have to show that his payment had the effect of reducing or extinguishing D2's liability. It would be for the court to decide whether the payment had this effect in any particular case and, if the payment was made generally with reference to P's loss, whether it was attributable to the specific heads of damage suffered by P for which D2 was liable.

4.32 Under our proposal, proof of D1's liability to P would not be necessary to found his action of relief. If he had been sued successfully by P, he would, of course, be entitled to proceed on the basis of the decree to claim

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1 See paras. 4.34 to 4.50 below.

2 See paras. 4.17 to 4.20 above.

contribution from D2.[1] By decree we mean a decree made by any competent court, tribunal or arbiter, whether in Scotland or elsewhere. Under the 1940 Act, a decree granted by a foreign court provides a sufficient basis for a claim for contribution if it was granted in an action of damages "arising from acts or omissions which the court in Scotland could hold were negligent."[2] We do not think this qualification would be necessary under any reformed system where D1's liability was no longer an essential condition of recovery. The fact that a Scottish court, whether applying domestic law or following the rules of private international law, might not have held D1 liable should not matter so long as D2's interests are protected by the need for D1 to establish D2's liability in the action of relief and by rules for the fair apportionment of responsibility for the loss between the two parties.[3]

4.33 The views of consultees are sought on the following proposals:

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1 We discuss later the whole question of enforcement of the right of relief, whether D1 should be entitled to claim contribution as soon as he has been found liable to P or has agreed to settle with him or only after he has made payment: see paras. 4.101 to 4.107 below.

2 Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd. 1986 S.L.T. 250 per Lord Mackay at p. 256.

3 His non-liability could, however, be relevant to quantification of D2's contribution: see paras. 4.66 to 4.91 below.

3. (a) D1 should have a claim for relief against D2 either if he has been found liable to make payment to P or if he has made a settlement with P which has the effect of reducing or extinguishing D2's liability. In the case of a claim for relief founded on settlement, the question of D1's liability to P for the damage caused is irrelevant.

(b) In so far as a decree against D1 may form the basis of his claim of relief, it does not matter whether it was granted in Scotland or elsewhere.

The time for ascertaining D2's liability

4.34 Under any reformed system of rules governing rights of relief, the law should be clear as to the date on which D2 would have to be liable to P in order to found a claim for contribution.[1] The question is relevant where, for example, D1 has settled with P and, either before or after settlement, P's claim against D2 becomes time-barred. Alternatively P may already have attempted to sue D2 and failed because of lapse of time. A more complex situation can arise if D2 is protected by a specially short time bar, either by statute or under contract, and P may have sued D1 or settled with him after the expiry of that time limit.

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1 We deal separately with the period of prescription governing the right of relief itself: see paras. 4.117 to 4.119 below.

Should D1 still have a right of relief in such circumstances? We put forward three basic options for consideration:

(a) D1 should be able to claim contribution if D2 was liable to P when P's right of action against him accrued, regardless of whether that right of action has since become time-barred. Generally speaking, this would mean that the relevant date would be the date of the damage.[1] On the one hand, it may be argued that the barring of D2's liability should not affect D1's claim for contribution, provided that his claim is made within the separate period of prescription relevant to rights of relief.[2] This solution

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1 There can be no liability to compensate for breach of a legal duty until some loss, injury or damage occurs. The claim for reparation only becomes enforceable at that stage: Prescription and Limitation (Scotland) Act 1973 s.11(1). In claims founded on breach of contract, there may be liability for nominal loss arising immediately on the breach although the real loss may not occur until later: Walker, The Law of Contracts and related obligations in Scotland (2nd edn., 1985) para. 33.24. Consideration will be given in our forthcoming consultative memorandum on liability for latent damage to the problem of defining the date of the damage to cover cases where that date cannot be readily ascertained.

2 See paras. 4.117 to 4.119 below.

would safeguard D1's interests, particularly if he were to be sued by P just before the expiry of the time limit governing P's claim against him. On the other hand, as under the present law, such a rule could operate unfairly against D2, in effect extending the period within which he might be liable to compensate for the loss suffered by P.

(b) D1 should be able to claim contribution only if D2 was liable to P at the date P commenced action against D1 or settled with him, whichever was the earlier.[1] This solution would give D2 the benefit of any time limit accruing before but not after P sues or settles with D1. D1 would not be prejudiced by the length of the court proceedings against him as the relevant date would be the commencement of the action, not the granting of the decree. He would, however, be prejudiced if D2 was protected by a particularly short time bar.

(c) D1 should be able to claim contribution only if D2 was liable to P at the time D1 raised his action of relief. This solution would give full effect to the time bar on P's claim against D2 but could deprive D1 of his right of contribution. P might delay taking proceedings against D1 and, in order to safeguard his own position, D1 would have to obtain a declarator, before expiry of the time bar

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1 So, in cases where settlement was reached in the course of proceedings taken by P, the relevant date would be the date of commencement of those proceedings.

claim contribution.[1] Moreover, from a practical point of view, the date of commencement of P's action or of settlement should be readily ascertainable.

4.40 One consequence of this solution is that there may be cases where D1 never has a right of relief against D2 because the time limit relevant to P's claim against D2 has begun to run and has expired before D1 has ever become liable to P. This could arise particularly in the context of building damage. Although both D1 and D2 might ultimately be responsible for the damage caused, D2 could be liable for a breach of contract which happened more than 5 years before D1's negligence. While this may seem unfair from D1's point of view, it is nevertheless an acceptable result given the principle on which any claim for relief must be based.

4.41 We have so far referred in general terms to the time bar relevant to P's claim against D2. We have not distinguished between time bars imposed by virtue of a limitation period, whereby P's right of action becomes unenforceable although D2's obligation still exists, and

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1 Admittedly, if this argument were taken to its logical conclusion, D2's liability should be ascertained at the date of payment by D1 because until that time D2 remains open to a claim by P. However, this could produce extremely harsh results so far as D1 is concerned. It could deprive him of any chance of recovering contribution in cases where settlement was in the form of an agreement to pay in the future or in cases where D1 was found liable only after protracted court proceedings. We discuss at paras. 4.101 to 4.107 below whether or not D1 should be able to enforce his right of relief before he has actually made payment to P.

those imposed by virtue of a period of prescription whereby the right on which P's claim is based is extinguished altogether.[1] We do not believe that any such distinction should be made in this context. In practical terms, prescription and limitation have the same end result, namely that D2 cannot be sued. Thus even although D2's obligation to P still exists where P's claim has merely been barred by expiry of a limitation period, it cannot be enforced and therefore D2 obtains no benefit from D1's payment. Accordingly, we suggest that prescription and limitation periods should be treated alike for the purpose of determining D1's right of contribution. This means that his action of relief would be unsuccessful if D2 was protected by expiry of a period of either prescription or limitation at the time P commenced action against D1 or settled with him, whichever was the earlier.

4.42 One further point arises in connection with limitation periods under Scots law. In terms of section 19A of the Prescription and Limitation (Scotland) Act 1973, the court has power to extend the three year limitation period for personal injuries claims in cases where it considers it equitable to do so. Obviously, if P has not tried to sue D2 in the first place, the possibility of the court's allowing P to make his claim outwith the three year period has not been considered. Nevertheless, it may well be relevant to

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1 For example, claims in respect of personal injuries are subject to a three-year limitation period whereas obligations arising from breach of contract prescribe after a period of five years: Prescription and Limitation (Scotland) Act 1973, s.6 and Sched. 1, para. 1(g) and s.17. See Walker, The Law of Prescription and Limitation of Actions in Scotland (3rd edn., 1981) pp. 1-4.

D1 in his action of relief, if the three year period has expired before P has taken proceedings against D1 or settled with him. We think that in this situation D1 should have an opportunity to show that, had P sued D2 outwith the normal limitation period, the court would have exercised its discretion to allow his claim.

4.43 It may be noted in passing that the Scottish rules of prescription and limitation apply only where the obligation owed by D2 to P is itself governed by Scots law. Where the applicable law is that of another country, our courts will apply the rules of that country relating to the extinction of the obligation or the limitation of time within which proceedings may be brought.[1] Our proposals regarding the time for ascertaining D2's liability apply whether the time bar in question is governed by Scots law or by a foreign lex causae.

4.44 In the preceding paragraphs, we have concentrated on cases where D2 has ceased to be liable at the relevant date because of expiry of a time limit imposed under the general law. We must also consider those cases where he is no longer liable because of some private arrangement reached between himself and P. This could take the form of a specially short contractual period of limitation governing P's claim, a discharge following settlement or a complete waiver of liability.

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1 Prescription and Limitation (Scotland) Act 1973 s. 23A(1), inserted by Prescription and Limitation (Scotland) Act 1984 s.4.

4.45 We start from the general principle that cessor of liability before the relevant date, for whatever reason, should protect D2 from a claim for contribution. Again, the justification is that D2 receives no benefit from D1's payment in these cases. However, we would not wish to provide an opportunity for D2 to make a private arrangement with P <u>after</u> the loss, injury or damage has been sustained in order to pass the whole liability for P's loss on to D1. The problem may be illustrated as follows:

> P, a passenger on a cruise ship, is injured due to the negligence of one of the ship's crew and another passenger. His claim against the ship owner (D1) must be brought within two years.[1] His claim against the other passenger (D2) is subject to the usual three year limitation period. P settles with D1 two years and three months after the accident. In normal circumstances, D1 would still have a right of relief against D2 under our proposals. Unknown to D1, however, P agrees immediately after the accident that his claim against D2 will be barred after one year, or perhaps he agrees to exonerate him from all liability. Applying the test of D2's liability at the date of settlement, D1 would not be entitled to seek relief.

It is clearly unacceptable that D2 should be able to prevent recovery of contribution by this sort of collusive device. We therefore suggest that any arrangements entered into between P and D2 after the loss, injury or damage has been sustained, whereby D2 ceases to be liable, should not have the effect of barring D1's claim for contribution.

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1 Merchant Shipping Act 1979, ss. 14-16 and Sched. 3.

4.46 It may be possible to mount a similar argument, on grounds of equity, in respect of such arrangements entered into before the damage occurs. If, for example, P has agreed a very short time limit with D2 in terms of a contract entered into before the loss was sustained, it would perhaps be unfair if, without D1's knowledge, this had the effect of precluding his claim for relief. A distinction could be made between cases where D2 had been exempted from all liability in advance and those where the time limit on his liability had simply been shortened. In the former, D2 has never been liable for P's loss and therefore should not be liable to contribute. In the latter, he has been liable at some stage and, out of fairness to D1, he should remain open to a claim by him.

4.47 We are not, however, attracted by this approach. It is contrary to our general proposition that D2's liability should be determined at the date P commenced proceedings against D1 or settled with him. We do not think that this principle should be departed from unless there are obvious grounds for doing so. In our view, the possibility of collusion does justify a departure from this principle in respect of arrangements entered into between P and D2 after the loss, injury or damage has been sustained. We are not convinced that the same risk attaches to arrangements entered into prior to the damage. Indeed, until the damage occurs, P and D2 may not even contemplate the existence of another wrongdoer and therefore cannot be acting with the intention of saddling him with the whole responsibility for the loss. Their purpose is rather to safeguard their own interests, particularly in a continuing contractual relationship. The fact that their private arrangements may incidentally prejudice another party should not

necessarily prevent those arrangements taking effect. D1 may have a similar opportunity to organise his business relationship with P to his best advantage. Moreover, D1 will always take the risk that he may not be able to recover any contribution. D2 may be unidentified, outwith the jurisdiction or bankrupt. The fact that he may have been exonerated in advance from all liability or that the time limit on P's claim against him may have been shortened is simply one of the risks which D1 must face, however inequitable the result may appear to be. In short, we do not think that the case has been made out for extending the special protection proposed for D1 in relation to "post-damage" arrangements to include those arrangements entered into between P and D2 before the loss, injury or damage has occurred.

4.48 That special protection would, of course, cover cases where D2 had settled P's claim and had obtained a discharge from him. It would ensure for D1's benefit a proper apportionment of the damages, even if D2 had made a very favourable settlement with P.[1] From a practical point of view, this approach should not cause any difficulty. The court, when assessing the amount of contribution, would be entitled to take into account any sum already paid by D2 in order to ensure that he did not pay more than his fair share.[2]

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1 This is broadly the effect of the present law as regards rights of relief in delict: see para. 2.10 above.

2 See paras. 4.77 to 4.83 below.

4.49 It may, however, be argued that to preserve a right of relief against a settling wrongdoer would not give him any incentive to settle P's claim in the first place. If D2 was still going to be vulnerable to an action of relief by D1, despite his having apparently discharged his liability direct to P, he could never be sure of gaining any advantage from making a good settlement. In this situation, the principle that damages should be apportioned fairly clashes with the principle that settlements should be encouraged. Our proposal gives priority to the former. In our view, it is important to safeguard D1 against collusion between P and D2 where, for example, P, out of favouritism towards D2, agrees to settle with him for a minimal sum. Our proposal does mean, however, that a settlement would never be conclusive as to the settler's maximum liability unless it operated to discharge all the concurrent wrongdoers from liability. Although the argument that this solution may discourage settlements is not without force, we are not wholly convinced by it. D2, by settling P's claim against him, still gets the benefit of avoiding court action by P and does not have the burden of paying the expenses of that litigation. Moreover, he may seek relief from the other wrongdoers. We believe that this approach, coupled with flexibility in the apportionment of damages, is the best way to do justice to all the parties concerned.

4.50 Our provisional conclusions regarding the time for ascertaining D2's liability are as follows:

4. (a) Subject to paragraphs (c) and (d) below, D2 should be bound to make contribution if he was liable to P at the time P commenced

action against D1 or settled with him, whichever was the earlier ("the relevant date").

(b) For the purpose of paragraph (a) above and subject to paragraph (d) below, D2 should not be bound to make contribution if, at the relevant date, P's claim against him is barred by virtue of the expiry of a period of limitation or prescription.

(c) Where P's claim against D2 is for personal injuries and Scots law is applicable, D1 should have the opportunity to show that, had P sued D2 outwith the normal three-year limitation period, the court would have exercised its discretion under section 19A of the Prescription and Limitation (Scotland) Act 1973 to allow his claim.

(d) Any arrangement entered into between P and D2 after P's right of action against him has accrued, whereby D2 is no longer liable to P at the relevant date, should not have the effect of barring D1's claim for contribution. Such arrangements include those exempting D2 from all liability, discharging him from liability following settlement and providing for a special limitation period governing P's claim.

The effect of a finding of non-liability in favour of D2

4.51 In a simple case arising under our proposals, P may settle for the whole of his damages with D1 who will in turn raise an action against D2 to recover contribution. Other more complicated situations may be envisaged. P may sue both wrongdoers together but only D1 is held liable. Or P may sue D2 unsuccessfully and then settle with D1. In either event, D1 may wish to take proceedings to obtain relief from D2. The question arises whether he should be bound by a decision given in court proceedings against D2 with the result that he would lose his right of relief where D2 had already been held not liable.

4.52 The present law is interpreted in such a way that a claim for contribution is excluded if D2 has been found not liable on the merits or on a preliminary plea, such as a plea of time bar.[1] Contribution may still be recoverable where the action against D2 has simply been abandoned provided D1 can show that D2 would have been liable, had he been sued "relevantly, competently and timeously".[2] Looking first at a finding of non-liability on the merits, there is undoubtedly an argument that D1 should

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1 Singer v. Gray Tool Co. (Europe) Ltd. 1984 S.L.T. 149: see para. 2.9 above.

2 Ibid. Thus a deliberate attempt by P to protect D2 from liability to make contribution by raising an action against him simply in order to abandon it cannot be successful: see Corvi v. Ellis 1969 S.C. 312.

nonetheless be able to re-open the issue of D2's liability in the contribution proceedings. If D1 was not a party to the original proceedings against D2, he is not bound by the decision on general principles of res judicata. Moreover he may have better evidence than P had against D2 and may be able to establish that D2 was at least partly responsible for P's loss. On the other hand, it might be unfair to put D2 at risk of further proceedings when the issue of his liability had, so far as he was concerned, already been determined by a competent court on the basis of all the evidence available.

4.53 While it may seem unjust to prevent D1 from proving that an earlier decision in favour of D2 was wrong, we think, on balance, that greater injustice would be done by forcing D2 to defend himself twice on the same issue. We therefore suggest that D1 should be bound by a fully contested decision of the court holding D2 not liable on the merits of the case. The intention is to preclude D1 from trying to establish D2's liability on the same ground as that on which P has already been unsuccessful. Where P has alternative claims against D2, in, say, delict and contract, a finding of non-liabililty in favour of D2 on one ground would not prevent D1 from seeking contribution on the basis of D2's liability on the other.[1]

4.54 In one sense, this rule would be similar to and would complement the doctrine of res judicata which precludes

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1 cf. Wilson v. Dunlop Bremner & Co. Ltd. 1921 1 S.L.T. 35 (plea of res judicata not sustained where first action founded in contract and the second in quasi-delict).

further action on the same subject matter and on the same grounds between the same parties. In another, it would be more restrictive in that it would apply only to decisions given after a fully defended proof on the merits whereas the plea of res judicata may be sustained even if the earlier decision gives effect to a settlement between the parties or if the decree is one by default or is pronounced of consent.[1] In view of the risk of prejudice to D1, we think it right that he should be bound by the court's decision in favour of D2 only in the restricted circumstances which we have proposed.

4.55 Where D1 and D2 are sued together in the same proceedings and D2 is found not liable, it is not clear whether the doctrine of res judicata would always be applicable to D1's subsequent claim for contribution. A successful plea of res judicata requires that the parties to the second cause be identical to or have the same interest as the parties to the first cause; that the subject matter be identical; and that the grounds of action in fact and law be identical.[2] The issue being litigated in an action of relief - apportionment of damages between the wrongdoers - may not have been raised as such between the two defenders in the first action although both actions concern the question of D2's liability to P. In view of the latter consideration, we suggest that our

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1 Maclaren, Court of Session Procedure (1916) p. 396; Maxwell, The Procedure of the Court of Session (1980) p. 197; Glasgow and S.W. Railway Co. v. Boyd & Forrest 1918 S.C. per Lord Dunedin at p. 26.

2 Maclaren, op. cit., pp. 397-401; Maxwell, op. cit., pp. 196-7.

proposal should apply to findings of non-liability made in proceedings taken by P against both D1 and D2 as well as to findings made in proceedings against D2 alone.

4.56 It follows from what we have said in the preceding paragraphs about the relevant date for ascertaining D2's liability that a successful plea of time bar in proceedings by P against D2 should bar D1's claim for relief only if it means that P's claim was barred or that D2's obligation had prescribed at the time P commenced proceedings against D1 or settled with him, whichever was the earlier. The following example illustrates the result we want to achieve.

> P is injured in a car accident due to the negligence of D1 and D2. P settles with D1 for part of his loss 2 years 11 months after the accident. He then tries to sue D2 for the balance 3 months later but fails because of expiry of a limitation period. D1 would not be prevented from recovering contribution on account of the finding in favour of D2 because, at the relevant date, i.e. the date of settlement, P still had an enforceable claim against D2. If the facts were changed so that P tries unsuccessfully to sue D2 outwith the 3-year period and then settles with D1, D1's claim for contribution would be barred.

In many cases, it will be quite evident, even in the absence of any court finding to this effect, that the limitation or prescriptive period governing P's claim against D2 will have expired. However, difficult questions may arise concerning, for example, the commencement of the limitation period in

respect of personal injuries claims[1] or the interruption of the prescriptive period by the making of a "relevant claim".[2] For these problematic cases, in particular, we think it should be made clear that, if the court has determined the issue for the purpose of P's action against D2, it should not be open to further argument in D1's action of relief.

4.57 To sum up, our provisional view is that D1 should be bound, firstly, by a finding of non-liability made in favour of D2 on the merits of the case and, secondly, insofar as it may be relevant to his claim for contribution, by a finding that P's claim against D2 is time-barred or that D2's obligation to P has prescribed. The question now arises as to how this could best be achieved. A reference simply to a finding after proof on the merits may be an inappropriate formula for legislation. Does it mean, for example, that every single averment on which P's case was founded would have to be contested before the decree would be binding on D1? We think not. Although it may be said that the courts could resolve any such difficulties as they arose, it would perhaps be preferable to give them more specific guidance as to the type of findings which are to be conclusive against D1.

4.58 One possibility which occurs to us is to make use of the existing principles of res judicata, qualified in such a way as to exclude those decrees which it would be unfair

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1 McIntyre v. Armitage Shanks Ltd. 1980 S.L.T. 112.

2 British Railways Board v. Strathclyde Regional Council 1982 S.L.T. 55; George A. Hood & Co. v. Dumbarton District Council 1983 S.L.T. 238.

to make binding on D1 either because there is a risk of collusion between P and D2 or because they allow for a decree of absolvitor without proof on the merits. On this basis, it could be provided that D1 should be bound by a finding of non-liability in favour of D2 if the decision would be res judicata between P and D2 except where the finding was of a kind which came within a list of specified exceptions. That list would include decrees by default against the pursuer[1] and decrees of absolvitor granted after settlement of the action or after abandonment by P.[2]

4.59 One difficulty with this approach concerns findings by a foreign court. In order to be consistent with our earlier proposals,[3] we suggest that a finding of non-liability made by a court outwith Scotland should be conclusive provided the court applied the law which Scots choice of law rules recognise as governing the matter. It is clear that at common law a foreign decision can give rise to a plea of res judicata before a Scottish court[4]. However, the plea cannot

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1 Forrest v. Dunlop (1873) 3 R.15.

2 Young v. Young's Trustees 1957 S.C. 318; Hynds v. Hynds 1966 S.C. 201. Where P lodges a minute of abandonment the more usual course is for the court to grant decree of dismissal: e.g. Singer v. Gray Tool Co. (Europe) Ltd, supra; Hardy v. British Airways Board, supra. In certain circumstances, a decree of absolvitor may be appropriate: see Maclaren, op. cit., pp. 443-8.

3 See paras. 4.17 to 4.20 above.

3 Anton, Private International Law (1967) pp. 589-591. English law is broadly similar on this point: see Cheshire and North, Private International Law (10th edn., 1979) pp. 651-665.

be sustained where no decision was taken by the foreign court upon the issue between the parties nor where the judgment was not res judicata in the country where it was issued. It is also open to the pursuer to plead that the foreign court lacked jurisdiction in the international sense, that the decree had been obtained by fraud or that it was contrary to justice. It is implicit that the decree must be final and conclusive between the parties. In English law, there is clear authority that the decision must have been given on the merits[1] and the position may be the same in Scotland. For present purposes, we want to ensure that only findings on the merits are brought within our proposals. To avoid any possible doubt on this, we suggest that our proposal to use the res judicata analogy, if acceptable, should be phrased in terms of D1 being bound by a finding of non-liability granted by any competent court on grounds which, if granted in Scotland, would give rise to a plea of res judicata as between P and D2, but excluding any findings on grounds which, if granted in Scotland, would result in a decree in favour of D2 coming

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1 Harris v. Quine (1869) L.R.4 Q.B. 653.

within one of the excepted categories mentioned above.[1]

4.60 This approach may deal satisfactorily with findings on the merits. However, we also want to ensure that a finding in favour of D2 on a prescription or limitation point, whether under Scots law or under a foreign applicable law,[2] would bar D1's claim insofar as it meant that D2 was not liable to P at the relevant date. A finding of non-liability on the ground of expiry of a limitation period results in dismissal of the action.[3] Decree of dismissal does not found a plea of res judicata in subsequent proceedings[4]. Separate provision would therefore be necessary to ensure that such findings were conclusive against D1. As regards findings based on a plea of

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1 We have also considered whether use could be made of any of the statutory schemes for recognition and enforcement of foreign judgments to the effect that D1 would be bound by a finding of non-liability which would be recognised under statute as conclusive between P and D2: see, for example, section 8 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591 which held that a decision applying a period of limitation was not a judgment on the merits in favour of the defender which fell to be recognised as conclusive between the parties. The difficulty is, of course, that such schemes are not worldwide and, even if a suitable formula could be worked out for our purposes, it would provide only a partial solution. We do not pursue this possibility further.

2 See para. 4.43 above.

3 McIntyre v. Armitage Shanks Ltd, supra. But see Gray v. North British Steel Foundry 1969 S.C. 231 where decree of absolvitor was granted.

4 Cunningham v. Skinner (1902) 4 F. 1124.

prescription, the result should probably be decree of absolvitor since the plea is in effect a substantive plea on the merits, claiming that the obligation does not exist.[1] If that is the case, the doctrine of res judicata would be applicable. We understand, however, that the practice of the courts has varied on this. For this reason, separate provision might be desirable to deal with prescription as well.

4.61 An alternative approach which we have examined would be to adopt the formula used in section 1(5) of the Civil Liability (Contribution) Act 1978 which is to the effect that a judgment given by a court in the United Kingdom in proceedings brought by P against D2 should, as regards any issue determined by that judgment in favour of D2, be conclusive in an action of relief brought by D1 against D2. This solution is also not without its difficulties. In the first place, it is confined to judgments given by courts in the United Kingdom. This restriction is, in our view, unprincipled and would not accord with our earlier proposal concerning the law governing D2's liability.[2] Secondly, it goes beyond findings of non-liability to cover "any issue" determined by the judgment. We are not entirely clear what is meant by an issue in this context. It would presumably cover findings in fact as to, for example, the extent of P's loss, findings on a plea of time bar or title to sue, quantification of D2's liability and the like. We are not sure that it is necessary to go this far. Moreover, we are not convinced that this formula would exclude decrees of absolvitor without proof on the merits. The reference is

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1 Munro v. Tod (1829) 7 S. 648.

2 See paras. 4.17 to 4.20 above.

simply to an issue determined by that judgment in favour of D2. If P and D2 have settled the action and decree of absolvitor is granted of consent, without any consideration of the merits of the case, that decree is res judicata between them and bars further proceedings. Could it not also be regarded as a judgment which determines the issue of D2's liability, at least as between P and D2?[1]

4.62 On balance we do not think that the English provision is appropriate to achieve our desired result. As between the two other possible solutions of using the res judicata analogy or referring simply to a finding on the merits, we have not formed a concluded view. The res judicata formula is relatively complex but may be thought necessary to avoid the vagueness inherent in the alternative proposal.[2] We

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1 But see the opinion of L.P. Emslie in Singer v. Gray Tool Co. (Europe) Ltd. supra where he states at p. 151: "A person who has been sued in the sense that an action has been commenced against him, and has been released from the process as the result of abandonment of the action against him by the pursuer is not, however, regardless of the form of the decree pronounced by the court, a person in respect of whom the issue of liability has been determined by the court."

2 It is interesting to note that the recommendation of the English Law Commission was that D1 should be bound by a finding of non-liability in favour of D2 provided that the finding was made after a hearing on the merits. This was not limited to findings made by a court in the United Kingdom. See Law Com. No. 79, paras. 60-65 and clause 3(7) of draft Bill annexed. Clause 13 of the Canadian Uniform Contributory Fault Act states:
"In proceedings against a person for contribution under this Act, the fact that the person has been held not liable for damages in an action brought by or on behalf of the person who suffered the damage is conclusive proof in favour of the person from whom contribution is sought as to any issue which has been determined on its merit in the action."

invite comment from consultees on both possibilities.

4.63 We have also considered whether D1 should be bound by a finding of non-liability made in arbitration proceedings. Parties may often be obliged by contract to go to arbitration rather than take court proceedings so that their dispute may be resolved by a person appointed for his particular expertise in the area in question. Where P, D1 and D2 are all parties to the same arbitration agreement, we think that the principles outlined above should apply. D1 should not be able to challenge a finding of non-liability in favour of D2. He has after all agreed to submit the dispute to arbitration. He has ample opportunity to produce evidence to support his claim. It would be unfair on the other parties if he could then ignore the arbiter's decision and seek separate recourse through the courts.

4.64 The situation is more complicated when they are not all parties to the same arbitration. For example, P may have a claim in contract against D2 which goes to arbitration. His claim against D1 may be in delict. D1 cannot take any part in the proceedings before the arbiter. On one view, it may be argued that it would be unjust to deprive D1 of access to the courts on the basis of an agreement to which he was not a party. Accordingly, he should not be bound by the arbiter's finding in these circumstances. The counter-argument is that P may be obliged by statute to go to arbitration. There is little difference between arbitration proceedings to which D1 is not a party and court proceedings between P and D2 in which D1 cannot participate because no third party notice has been served on him. On this view, if the court's decision

can be binding on D1, any finding of non-liability made by the arbiter should also be binding. We have not reached a firm conclusion on this matter but simply invite views.

4.65 Comments are invited on the following propositions and questions:

5. (a) D1 should be bound by a finding of non-liability in favour of D2 made in proceedings brought by P provided it is made after a full proof on the merits. A finding of non-liability on one ground should not, however, bar D1 from claiming relief based on D2's liability on a different ground.

(b) To avoid the possible uncertainty of the general formula proposed in paragraph (a) above, should it be provided that D1 would be bound by a finding of non-liability granted in favour of D2 by any competent court on grounds which, if granted in Scotland, would give rise to a plea of res judicata between P and D2, except for such findings which, in Scotland, would take the form of a decree by default against P or a decree of absolvitor granted after settlement of the action or after abandonment by P?

(c) Insofar as relevant to his claim for contribution, D1 should also be bound by a finding made in proceedings brought by P that P's claim against D2 is time-barred or that D2's obligation to P has prescribed.

(d) For the purpose of paragraphs (a), (b) and (c) above, the finding in favour of D2 would have to be one made by a court (whether in Scotland or elsewhere) applying the law which Scots private international law rules recognise as governing the matter.

(e) Should the principles outlined above apply to findings in favour of D2 made in arbitration proceedings between P and D2 whether or not D1 was also a party to those proceedings?

The amount recoverable - general principles

4.66 Relevance of the amount of the award or settlement. If an award of damages has been made or a settlement reached which forms the basis of D1's right of relief, D2, in the action for contribution before the Scottish courts, may wish to question the overall sum in respect of which it is claimed he should pay a proportion. This issue will be of particular concern to him if the award or settlement has been made according to an assessment of damages considerably higher than is usual in this country. Under the 1940 Act, the courts have a wide discretion to award such contribution as they "deem just".[1] The scope of their powers is illustrated in Comex.[2] In both the Outer House and on appeal to the First Division, it was made clear that the court was not concerned with ordering contribution

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1 s.3(2).

2 Supra.

towards the particular sum of money paid by D1.[1] If that sum was considered excessive by Scottish standards, the court could order D2 to bear only a proportion of an award which would be regarded as appropriate in the Scottish courts. The language of section 3(2) of the 1940 Act was considered wide enough to enable the court to do justice between the parties having regard to all the circumstances. In the words of Lord Grieve, "The quantum [of the award against D1] is of no significance except to provide a total sum within which contributions are to be assessed."[2]

4.67 Other jurisdictions achieve a similar result in relation to contribution following settlement by empowering the courts expressly to consider whether the amount of the settlement was reasonable and then, if it is considered excessive, to award contribution, in proportion to the parties' fault, on the basis of what would have been a reasonable settlement.[3] The English Act provides simply that the amount of contribution "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."[4] At common law, however, the settlement figure

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1 1986 S.L.T. 250 per Lord Mackay at p. 256. See also the opinion of L.P. Emslie quoted at para. 2.14 above.

2 8 April 1986, unreported.

3 e.g. Tasmania, Eire and Ontario: see paras. 3.5, 3.8 and 3.10 above.

4 1978 Act, s.2(1).

must be reasonable before it can form the basis of a contribution claim.[1]

4.68 Leaving aside the question of what is meant by a person's responsibility for damage,[2] we think that this difference in approach is more one of presentation than of substance and that either formulation can be used to achieve the same end. Indeed the present law is such that the courts are not bound by the amount of the award made in proceedings between P and D1, at least where that award has been made by a foreign court.[3] We suggest that this approach should be adopted generally under any new scheme for apportionment among concurrent wrongdoers. Thus, the amount of the settlement made by D1 or the amount of award against him would simply be treated as the maximum sum of which D2 would be liable to pay a proportion by way of contribution.[4] This seems the most appropriate way to deal with cases like Comex where the award made by a foreign court is substantially greater than would have been made in Scotland. Similarly, it deals satsifactorily with cases where the foreign award or settlement is low by Scottish standards: the amount of D2's contribution would still be

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1 Stott v. West Yorkshire Road Car Co. Ltd. [1971] 2 Q.B. 651 per Salmon L.J. at p. 660.

2 See para. 4.78 below.

3 See the Comex case, supra. The dicta of L.P. Emslie, quoted at para. 2.14 above, are wide enough to include awards made by courts in Scotland.

4 In appropriate cases, D1 would still be able to recover 100% contribution from D2: see para. 4.82 below.

based on an assessment of his liability according to the normal rules of the Scottish court.

4.69 This approach is also necessary to avoid the possibility of collusive settlements between P and D1 whereby D1 agrees to pay P a grossly inflated sum in respect of his claim, on the understanding that a substantial proportion of that sum, calculated simply as a percentage of the total, would be recoverable from D2. Moreover, it enables the court dealing with an action of relief to take into account the wide variety of circumstances which may underlie the settlement. For example, D1 may have purported to settle P's whole claim and thus discharge both himself and D2 from liability. Or the settlement may represent less than the total value of P's claim while still being greater than D1's fair share of liability. Or he may have made a settlement on very favourable terms leaving P to pursue D2 for the more substantial proportion of his damages. A further possibility is that contribution may be payable in respect of only a part of P's total claim. P may, for instance, have a claim for damages in respect of a building collapse. D1, the architect responsible for the design of the building and supervision of construction, settles P's total claim. D2, a builder who constructed part only of the building, is liable to contribute not towards the whole settlement but only to the extent that the settlement met P's claim in respect of the damage to that part of the building. The rules on remoteness of damage may also have a bearing on the amount recoverable by way of contribution. Both D1 and D2 may be liable, in general terms, for the damage caused but because they are liable on different bases, the applicable rules on remoteness of damage may mean that certain heads of damage in P's claim are too remote to

be recoverable from D2 although they may be recoverable from D1.[1] It would be a matter of proof in each case the extent to which D1's payment had reduced D2's liability to P.[2]

4.70 In all these circumstances, the court should be able to do more than make a simple percentage division of the sum paid in settlement or under court decree. There is perhaps an argument that the court should be bound by the level of award made by another court in Scotland on the ground that quantification of that award would have been by the same standards as would be used by the court determining D1's claim for relief. A straight percentage division of that award would no doubt be the right solution in cases where D1 and D2 were both liable on the same basis for the whole of P's claim. The amount of the award could be regarded as conclusive of the total value of P's claim. However, a special provision on these lines would not deal adequately with the other types of case we have mentioned, where, for example, liability exists on different grounds or where contribution is payable only in respect of part of the award made against D1. In the latter case, the court would probably regard that part of the existing award as a proper quantification of the corresponding part of P's claim but we do not think it necessary to provide expressly for this result. In any event, the availability of third party procedure means that, in the majority of cases, quantification of P's damages and assessment of D2's

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1 On rules of remoteness generally, see Walker, Civil Remedies (1974) pp. 454-67, 835-66.

2 See para. 4.31 above.

contribution will take place in the same proceedings so that the problem of assessment of P's loss by different courts in Scotland should not arise very often in practice.

4.71 We invite views on the proposition that:

> 6. In assessing the amount of contribution payable, the court should not be bound by the level of award or settlement between P and D1. The amount of the award or settlement should, however, be the maximum sum of which D2 would be liable to pay a proportion by way of contribution.

4.72 Assessment of D2's liability and the value of P's claim. Given that the basis of the action of relief is that D1 has paid D2's debt, the main question facing the court is what is the extent of D2's liability to P. That liability is determined either under Scots domestic law or following the Scottish rules of private international law. If liability is established, the assessment of damages should be according to the normal rules and practice of the Scottish courts, including considerations of public policy. Thus, where the issue of liability is governed by a foreign law, that law should determine the heads of damage recoverable but quantification of those damages should be according to Scots law as the law of the forum.

4.73 A further consideration for the court is the total value of P's claim, again assessed by Scottish standards, against both D1 and D2. Their total liability to P is relevant to determining the extent to which D2 should relieve D1 of the actual payment which he has made to P. The fact that D1 settled P's claim without being liable at

all could entitle him to recover 100% contribution from D1.[1] Difficulties may, however, be encountered in assessing the value of P's claim. The problem may be illustrated by the following examples:

1. P is injured in a car accident for which D1 and D2 are equally to blame. D1 is sued by P shortly after the accident and is found liable to pay £10,000 in damages. Thereafter P's injury becomes more severe and by the time D1 seeks contribution it is apparent that P's full claim would be for £50,000. Should D2 be liable to contribute one half of the sum actualy paid under the decree, or nothing at all on the basis that D1 had paid less than his total liability would have been had he been sued by P at the time of the action of relief?

2. Following a similar accident, D1 settles with P for £20,000. It turns out that P makes a better recovery from his injuries than was originally expected and his claim for damages, if made at the time of D1's action of relief, would amount to only £10,000. Should D1's claim for contribution be for £10,000, i.e. half of the amount actually paid or for £5,000, i.e. half what the total liability would have been at the time of the action of relief?

In essence the question is whether P's loss should be assessed at the relevant date for determining D2's

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1 Provided that was not more than D2's maximum liability to P: see para. 4.84 below.

liability, regardless of later events such as the deterioration or improvement in P's condition, or whether it should be assessed at the time of D1's action of relief, to take account of any changes in the value of P's claim in the intervening period. On the first formulation, D1 would be protected against any drop in the value of P's claim during that time. On the second, any benefit from a drop in value would accrue to D2. Numerous other cases can be figured in which either formulation could work to the advantage of one or other wrongdoer, depending on the particular circumstances.

4.74 In our view, P's claim should be assessed at the relevant date for determining D2's liability, i.e. at the dae of commencement of proceedings against D1 or at the date of settlement with D1, whichever is the earlier. D1's right of relief is, after all, based on payment of a debt owed by D2. Quantification of that debt at the time D2's liability must be established seems the more logical solution of the two. In many cases, it clearly produces the right result. In the first example given above, where decree has been granted against D1, the basic rule applies that damages must be claimed "once and for all". Subject to one limited exception under section 12 of the Administration of Justice

Act 1982,[1] if P obtains an award of damages for the whole of his loss he cannot go back to court to seek further damages from either D1 or D2 on the ground that his loss has turned out to be greater than originally anticipated.[2] So unless he is able to make use of the 1982 Act, P can have no further claim against either wrongdoer. The fairest result would therefore be to apportion damages on the basis of what was an appropriate level of compensation at the time of P's action against D1. Even if P is able to take advantage of the 1982 Act and obtains a subsequent award in respect of the worsening of his condition, this should not affect the apportionment of damages between D1 and D2 following the initial award. D1 would be able to seek further contribution from D2 as and when he was found liable in further damages.

4.75 Other cases may be more complex and the desired result less obvious. In the second example given above, it is very difficult to balance the interests of both wrongdoers. D1's settlement may have been perfectly

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1 This empowers the court to award provisional damages for personal injuries where there is a risk that, in the future, the pursuer will, as a result of the act or omission giving rise to the action, develop some serious disease or suffer some serious deterioration in his physical or mental condition. It applies only where the defender is a public authority or corporation or is insured or otherwise indemnified in respect of the claim. The court may, on the pursuer's application, award provisional damages in respect of the actual extent of the pursuer's injuries, with the possibility of a further award at a later date should the pursuer develop the disease or should his condition deteriorate.

2 Balfour v. Baird 1959 S.C. 64.

reasonable at the time it was made and, on one view, justice demands that he should not be prejudiced by any subsequent change in the value of P's claim. At the same time, it seems unfair on D2 that he should have to pay more in contribution than he would have had to pay if D1 and D2 had been sued together at the time of the action of relief. We have suggested that the court, in determining the level of D2's contribution, should not be bound by the amount of the award or settlement. D1 will therefore bear the risk that he has settled with P for an excessive sum. It could be argued that the same principle should apply here as well so that D1 would recover a smaller contribution than he would have done, but for the decrease in the value of P's claim. This would represent a departure from the general rule we are proposing that P's claim should be assessed at the date D2's liability is determined. We do not think that it would be justified. One or other of the concurrent wrongdoers must suffer as a result of a marked drop in the value of P's claim in the period between D1's settlement and his action for relief. D2 is to be protected against any increase in value during this period so it is perhaps fair that he should bear the risk of any corresponding drop in value. In any event, the circumstances surrounding D1's claim for contribution may vary considerably and there is no overall advantage to be gained in trying to legislate specifically for this situation. What might give the right result in one case could be patently wrong in another. It is also worth bearing in mind that this problem is unlikely to arise very often in practice. Where D1 is sued by P, his action of relief is usually incorporated in the main process so that later changes in the value of P's claim are irrelevant. Where D1's claim for contribution is based on settlement, it is only in very unusual cases that there will be a dramatic change in the valuation of P's claim in the relatively short

period before D1 raises his action of relief. For these reasons, we prefer to stick to the general principle, which is consistent with our earlier proposals, that P's claim should be assessed as at the date D2's liability is determined and that no account should be taken of any subsequent changes in the value of his claim.

4.76 Views are invited on the proposition that:

> 7. Having determined D2's liability and the heads of damage recoverable under the applicable law, the court should quantify P's claim and D2's contribution according to Scots law as the law of the forum. The total value of P's claim should be assessed as at the time D2's liabilility is determined.

4.77 The basis of apportionment. Assuming that the courts are not to be bound by the level of award or settlement between P and D1 and that quantification of the sum payable by D2 is to be according to the normal rules of the Scottish forum, it remains to consider the basis on which D2's contribution should be determined. There appear to be two main possibilities. One would be to retain the existing rule that contribution shall be in such sum as the court deems just. The other would be to qualify this general rule along the lines of section 2(1) of the English Act and provide that contribution shall be in such sum as the court finds just and equitable having regard to the extent of D2's responsibility for the damage. Other jurisdictions use a similar formula referring to the degree of the contributor's fault.[1]

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1 Eire, South Africa, France and Germany: see paras. 3.8, 3.9, 3.17 and 3.18 above.

4.78 The English solution is attractive in that it rules out of consideration totally extraneous factors such as the resources of the parties. There may, however, be some ambiguity in the reference to D2's "responsibility" which could cause difficulties, particularly in cases involving breaches of different types of duty where, for example, D1 is liable in negligence and D2 is liable for breach of contract not being breach of a duty of care or where D1 is strictly liable under statute and D2 is liable in negligence. It is thought that there are two elements in an assessment of responsibility for the purposes of apportionment - blameworthiness and causation.[1] Blameworthiness is certainly a relevant test in cases based on the wrongdoers' fault but not in cases based on strict liability either under contract or statute. A breach of statutory duty, for instance, may involve neither culpability or unreasonable behaviour.[2] A test of causation may not always be appropriate either. There is, in fact, an argument that it is impossible to determine degrees of causation.[3] If the acts or omissions of both wrongdoers were necessary for the damage to occur, apportionment could only be on the basis of equal shares even although, on a common sense view, one wrongdoer might be regarded as being "more to blame" than the other. The question is whether apportionment according to degrees of

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1 See Law Commission Working Paper No. 59, para. 42.

2 For this reason, it seems inappropriate to apportion damages according to the degree of the parties' "fault" unless "fault" were to be given an extended definition to encompass strict liability cases.

3 See Hervey, "'Responsibility' under the Civil Liability (Contribution) Act 1978" (1979) N.L.J. 509.

responsibility would oblige the courts always to give equal weight to the two elements of blameworthiness and causation or whether they would be free to use either test alone or both together in an unequal combination, as appropriate to the facts of the particular case.

4.79 What is clear is that the basis of apportionment must be flexible enough to cater for all the possible permutations of liability which could arise under our proposed new scheme. The courts may want to take account of the fact that one of the wrongdoers is liable to P for an intentional delict while the other is liable only in negligence. Indeed, D2's culpability, or lack of it, may not be relevant where fault is not necessary to establish liability in the first place. Similarly the fact that he may be liable in negligence while D1 is strictly liable under statute may not always mean that D2 should bear the entire loss because he is the only party "at fault". Much may, in fact, depend on the nature of the statutory liability imposed on D1. If he is liable without proof of fault because he has failed to discharge some statutory obligation of supervision, it is reasonable that he should bear at least part of the loss. If, on the other hand, his liability takes the form simply of vicarious liability for loss caused by D2, the actual wrongdoer, the court may wish to award him 100% contribution. Either eventuality should be catered for.

4.80 Although we have some doubts about referring to D2's responsibility, these may be unfounded. When combined with the "just and equitable" wording of the English formula, this basis of apportionment may work quite satisfactorily in practice. Alternatively, there may be something to be

said for giving the courts the widest possible discretion to decide on the amount of contribution as they deem just. The existing provision seems to work well in delict and may work equally well in contribution claims based on other forms of liability. The danger is that it would allow the courts too great a discretion to take into account matters which are not strictly relevant to apportionment between the wrongdoers, for example, the policy considerations underlying different forms of civil liability in terms of loss-spreading capacity or deterrence. It would, however, be an appropriate formula to enable the courts to give due consideration to those matters which we have suggested are or may be relevant, such as the circumstances of the settlement between P and D1. It would give the courts wide powers to deal with the variety of circumstances in which D2 may already have paid a sum of money in settlement of P's claim. It would also deal effectively with cases where D1 had made only partial settlement. Take, for example, a case where D1 and D2 are equally to blame for loss caused to P, in the sum of £100,000. P accepts £30,000 in settlement from D1 while reserving his right to go against D2 for the balance. On the English formula, it is at least arguable that the equal sharing of responsibility for the loss between D1 and D2 would always mean that D1 would recover 50% of his settlement from D2 despite the fact that, when considered in the context of P's total claim, the amount of D1's settlement was actually less than his share of liability and despite the fact that P was going on to claim the balance direct from D2. The more general reference to contribution in such sum "as the court deems just" clearly allows the court to take such considerations into account.

4.81 A further possibility would be to adopt the approach taken by the Uniform Law Commissioners of Canada. Their Uniform Contributory Fault Act provides:[1]

> "The amount of contribution to which a concurrent wrongdoer is entitled from another concurrent wrongdoer is that amount of the total liability for damages of all concurrent wrongdoers that is proportionate to the degree to which the wrongful act[2] of the concurrent wrongdoer contributed to the damage."

This formula seems to set a more objective test than one focussing on D2's responsibility for the damage. On the other hand, it may put too much emphasis on the causation element to be adaptable to all the different situations in which a right of relief might arise. It seems to ignore the nature of the wrongful act and the respective degrees of blameworthiness of the wrongdoers. For this reason, it may not produce the fairest result where, for example, D1 is strictly liable under contract and D2 is liable in negligence.

4.82 Bearing in mind our proposal that the mere fact of settlement should be a sufficient basis for a right of

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1 s.8(1).

2 "Wrongful act" is defined in section 1 to mean "an act or omission that constitutes

(a) a tort,

(b) a breach of contract or statutory duty that creates a liability for damages, or

(c) a failure of a person to take reasonable care of his own person, property or economic interest,

whether or not it is intentional."

relief, without any provisos as to the good faith of the settling party or the likelihood of his being liable,[1] we think it desirable that the courts should have the widest possible discretion to reach a fair apportionment in the circumstances of each case. Our tentative preference is to retain the flexibility of the present law rather than give the courts what may be ambiguous and misleading guidelines as to what factors they are entitled to take into account. Whatever the basis of apportionment, it should be read subject to the proviso that, as under the existing rules, the court should be able to award contribution amounting to a complete indemnity or to exempt D2 from liability to make contribution in appropriate cases.

4.83 Consultees' views are invited as follows:

8. (a) Should D2's contribution be determined on the basis of

(i) such sum as the court deems just,

(ii) such sum as the court finds just and equitable having regard to the extent of his responsibility for the damage, or

(iii) such sum as is proportionate to the degree to which D2's wrongful act contributed to the damage?

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1 See para. 4.33 above.

(b) Whatever the basis of apportionment, the court should be entitled to award contribution amounting to a complete indemnity or exempt D2 from liability to make any contribution in appropriate cases.

Upper limits on the amount recoverable

4.84 Having determined the basis for assessment of D2's contribution, the next question is whether the amount of contribution fixed by the court on these general principles should be subject to any limitations. One obvious limitation is that D2 should not be made liable beyond the extent of his obligations to P. In other words, D1 should not be able to recover more in contribution than D2 would have been liable to pay had he been sued by P direct. The maximum extent of D2's liability to P should therefore be the upper limit on the sum which D2 would have to pay in contribution. Further limitations on the amount payable in contribution, either because of express restrictions on D2's liability or because of P's contributory negligence, may also be considered. Some legal systems, notably that of England and Wales,[1] make specific provision to enable the court to calculate the amount of contribution payable where D2's liability to P is so limited. In the following paragraphs, we consider whether such provision should be made here as well or whether a different approach to the problem would be desirable.

4.85 Limitations imposed by law or agreement. Financial restrictions on liability may be imposed by statute or by

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1 1978 Act, s.2(3).

contract. Where there is an upper limit on the liability of one concurrent wrongdoer, what effect should this have on his liability to contribute? The point may be illustrated as follows:

> P buys a car from D2 which has a latent defect in its electrical system. As he is driving the car one night, the headlights go out and the car runs into an obstruction in the road that D1 has negligently left unlit. D1 pays P £1,000 in settlement and seeks relief from D2. The court considers D1 and D2 to be equally to blame but a clause in the contract between P and D2 limits D2's liability for breach of contract to £400. What should be the amount of his contribution?

4.86 We do not think it appropriate that only the common extent of liability, i.e. £400 in this example, should be apportioned. This would mean that, although both were equally to blame for the accident, D2 would have to contribute only half of the common liability, i.e. £200, while D1 would be liable for the remaining £800. One possible solution, and the one which the English Law Commission recommended,[1] would be to apportion the loss between D1 and D2 as if there were no limitation on D2's liability and then give effect to the limitation by reducing D2's share in accordance with it, leaving D1 responsible for the balance. The result would be that D2 would bear £400 and D1 £600. A further possibility would be to apportion the loss in proportion to the maximum liability of both wrongdoers. In the example given, D2's maximum liability is

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1 Law Com. No. 79, paras. 74 and 81(h); see the 1978 Act, s.2(3)(a).

£400, D1's is £1,000. The total maximum liability is £1,400 of which D2's share is two-sevenths. His share of the loss would therefore be £286 and D1 would bear the remaining £714.

4.87 The advantage of this last approach is said to be that each wrongdoer benefits from the presence of the other whereas in the English solution D2, who has to contribute up to his total liability, does not benefit from the presence of D1.[1] He has, however, already benefited from his contractual limitation and we think that any remaining advantage to be gained from the situation should fall on D1 who will, in any event, still have to pay more than his due share. This seems to us to be the fairest solution. Accordingly, if express provision were to be made on this point, we suggest it be to the effect that where the amount of contribution, calculated on the normal basis of apportionment, is greater than the maximum sum which D2 would be liable to pay to P, having regard to any financial limits imposed on his liability by statute or by agreement before P's right of action accrued against him, then the amount payable by D2 should be that maximum sum. By "agreement" we mean to include both contracts between the injured party and the contributor and agreements to which the person suffering loss is not a party but under which he is entitled to sue, for example, on principles of jus quaesitum tertio.[2]

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1 Weinrib, "Contribution in a contractual setting" (1976) 54 Can. Bar Rev. 338 at p. 346, footnote 34.

2 See Gloag on Contract (2nd edn., 1929) pp. 234-241; Smith, A Short Commentary on the Law of Scotland (1962) pp. 777-784.

4.88 Contributory negligence. Similar problems arise where the injured party has been partly to blame for his loss and the plea of contributory negligence is available to one wrongdoer but not to the other. In the example given above, P, when driving into the unlit obstruction may have been driving negligently and may be 40% to blame for his injuries in a question with the wrongdoer responsible for the obstruction whose liability is in delict. Accordingly, P would be entitled to only £600 in damages from him. Under the present law, however, it is unclear whether the plea of contributory negligence is available in contract.[1] If the plea were excluded and if P were to sue the supplier of the car, he would recover the full £1,000, assuming there was no contractual limitation on liability. The supplier (now D1) would in turn seek relief. If there were to be specific provision to deal with this situation, we think it should be modelled on the rule we have suggested as appropriate in relation to financial limits imposed on liability. D2's contribution would therefore be calculated on the usual basis but would be subject to the upper limit imposed on his liability by virtue of P's contributory negligence. In this case, apportionment of the damages on an equal basis would mean that D2's share would not exceed his limit of £600 and he would therefore be liable to contribute £500.

4.89 An alternative approach. There is, perhaps, a danger that by prescribing fixed rules to determine the amount of contribution payable in these situations, we would be discounting the possibility of the court's wishing to make a slightly different apportionment which, in particular

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1 The possibility of reform is discussed at paras. 5.32 to 5.49 below.

circumstances, might be more appropriate. For this reason, there may be something to be said for leaving it to the court to decide, without specific guidance, what would be a just apportionment in each case. We have already said[1] that D2 should not be liable to pay more in contribution proceedings than he would have had to pay had he been sued by P direct. Special rules regarding contractual or statutory limitations on his liability or regarding limitations arising by virtue of P's contributory negligence would, on this view, be unnecessary. Given a flexible basis of apportionment in the first place, the court would always be able to reach a fair solution.

4.90 Although this line of argument is initially attractive, we think it would create too much uncertainty. Two courts faced with identical claims could reach quite different results. One might apportion only the common extent of liability between D1 and D2, the other might calculate D2's contribution in the way we have suggested above. In our view, the type of solution which we have proposed, whereby D2 could be liable to contribute up to the maximum extent of his liability to P, would produce a fair result in the majority of cases. If that is so, we consider that express provision should be made to remove any doubt as to how the court should determine the level of D2's contribution in these cases.

4.91 Our provisional conclusions regarding upper limits on the amount of D2's contribution are as follows:

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1 at para. 4.84 above.

9. (a) D2 should not be liable to pay more in contribution than he would have had to pay had he been sued by P direct.

(b) Where the amount of contribution calculated according to the rules in Proposition 8 above is greater than the maximum sum which D2 would be liable to pay to P, having regard to

(i) any financial limits imposed on D2's liability expressly by statute or by agreement entered into before P's right of action accrued against him, or

(ii) any limitations on his liability by virtue of P's contributory negligence

then the amount payable by D2 should be that maximum sum.

"Payment" in settlement of P's claim

4.92 Our proposals regarding rights of relief following settlement have been framed in terms of payment by one wrongdoer of a sum of money in settlement of the injured party's claim. This phraseology is apt for claims in delict but in contract, particularly if the parties have a continuing business relationship, the settlement may be more complicated, involving the provision of some service, such as repair of any damage caused or the supply of alternative goods. For example, a garage may have fitted a defective part in a car engine which causes damage. The owner has a claim against both the garage in terms of its service

contract and the manufacturer for supplying the faulty part. The garage may discharge its potential liability in damages by carrying out the necessary repairs and may then seek to recover part of the cost from the manufacturer in respect of its liability for the damage caused. Admittedly, there may be practical difficulties in assessing the value of the services rendered by D1 where, for instance, D1 has carried out the repairs in his own time and not on a proper commercial basis. Consideration would have to be given not just to the outlays incurred by D1 in buying spare parts, but also to any consequential loss he might have suffered as a result of carrying out the repairs himself. As a matter of principle, however, we do not think that the settling wrongdoer in this situation should be deprived of his right to claim relief simply because of the form of "payment" which he has agreed to make.[1]

4.93 Consultees are asked to respond to the question:

10. Should payment in settlement of the injured party's claim be given an extended definition to include payments in kind or the provision of a service, provided the value of such payment or service can be quantified?

Requirement of notice to D2

4.94 A question of policy arises whether a concurrent wrongdoer who is sued by, or who settles with, the injured

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1 See Report of the Law Reform Commission of Hong Kong, para. 5.13.

party should be required to intimate the claim to other parties allegedly liable for the same loss. There may be circumstances in which the defender to an action raised by the injured party does not make use of the third party procedure but it would still have been possible for him to notify other potential wrongdoers of the claim. Should a person who has been found liable or who has made a settlement be able to seek apportionment of the award or the sum paid when the alleged concurrent wrongdoer has had no prior warning of the original claim? At present, there is no statutory requirement of notice, nor does there appear to be any authority for such a proposition at common law. It has, however, been suggested that notice is required as a matter of practice. In Central S.M.T. Co. Ltd. v. Cloudsley[1], Sheriff Principal Sir Allan Walker stated:[2]

> "A right of relief, whether at common law or under statute, is an equitable right, and there must be fairness on both sides. If it is fair that in certain circumstances the pursuers in this action might obtain relief against the defender in respect of their liability under a decree of court, the proper practice indicates that such a right can be fairly claimed only if the defender had an opportunity, before the decree was pronounced, of safeguarding his own position with regard to it. Rules of practice are useless if no sanction is attached to their neglect. In the present

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1 1974 S.L.T. 70.

2 at p. 72. See also the comments of L.J-C Thomson in N.C.B. v. Thomson 1959 S.C. 353 at pp. 364-5.

case, once the decree in the earlier action was pronounced, the defender's position was prejudiced irretrievably and no later action on the part of the present defender could remedy the position. It must follow, in my opinion, that if the pursuers failed to adopt the proper practice, the proper sanction must be the failure of their action."

4.95 It is obviously desirable that everyone who might be liable to the injured party should be aware of the claim. The giving of notice serves two main purposes. First, it alerts an alleged wrongdoer (D2) to the possibility of a claim against him so that he will not dispose of any relevant evidence. Second, it enables him to enter into negotiations with P and/or D1 with a view to settling the claim. We are not, however, convinced that lack of notice should always deprive D1 of his right to seek contribution. Such an absolute rule would be unfair to D1 if he settled a claim without legal advice. Indeed he may become aware of the existence of other wrongdoers only after he has settled or after he has been sued and found liable. At the other extreme, it may be argued that lack of notice should not be entirely irrelevant if, as a consequence, D2 has been prejudiced in his defence of the action of relief. We discuss later[1] the possible sanctions for failure if some requirement of notice were to be introduced. In the meantime, we put forward a range of options for consideration:

(a) There should be no requirement to intimate P's claim to others who might be liable.

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1 at para. 4.98.

(b) Notice of the claim should not be required but the court should be entitled to have regard to any prejudice suffered by D2 by reason of not having received intimation.

(c) D1 should be required to give notice of the claim where it was reasonable and practicable to do so.

(d) Notice of the claim should be required but the court should have discretion to disregard the lack of notice in appropriate circumstances.

(e) D1, if sued by P, should be required to make his claim for contribution using third party procedure.

4.96 Among the options in which lack of notice would be a relevant consideration for the court, we do not have a preferred solution. They all incorporate varying degrees of flexibility. Under option (b) the court would have to consider the difficult question of the amount of prejudice suffered by D2. Under option (d), the court would have a fairly open-ended discretion to take into account all the relevant factors in order to reach a decision appropriate to the facts of any given case. Option (c) would provide for a similar result, but based only on the reasonableness and practicality of serving notice on D2.

4.97 We do, however, have serious reservations about compelling D1 to make his claim for contribution in P's

action, using third party procedure.[1] This goes beyond a requirement merely of intimation of P's claim but lays down a formal procedure which D1 must follow in order to pursue his separate right of relief. There must be cases where such a requirement would be wholly inappropriate, either because D1 is not aware of the existence of any other wrongdoers or because, at the time of P's action, the other wrongdoers are not amenable to the court's jurisdiction. If that were the case, D1 could not make his claim against them in the main process unless, on receipt of the third party notice, they were, in fact, willing to prorogate the jurisdiction. Now that third party procedure is available in both the sheriff court and the Court of Session, D1 will usually make use of it, wherever possible, in order to protect his own interests. A rule requiring him to use third party procedure would be of little practical benefit. Although we do not suggest this as a feasible option, we consider later[2] what effect D1's failure to use third party procedure should have on the question of expenses in his action of relief.

4.98 If lack of notice were to be a relevant consideration for the court, two questions need to be answered. When should notice be given in order to be effective? And what

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1 This type of solution is adopted in the Irish legislation. D1, if sued, must make his claim for contribution using third party procedure. If he does not do so, or if he fails to serve the third party notice as soon as reasonably possible, the court in its discretion may refuse to award contribution: 1961 Act, s.27(1).

2 at paras. 4.113 and 4.114.

should be the sanction for failure to give notice? Bearing in mind the purposes served by notification, we think that intimation of the claim should be given as early as possible. One solution would be to require notice to be given either within a specified period of the claim having been made or proceedings started against D1 or before settlement has been reached. At this stage, however, D1 may not even know that he has a claim for contribution. A more flexible approach would be to say that notice should be given as soon as is reasonably practicable and leave it to the court to decide, first, whether or not it was reasonably practicable to give notice to D2 and, second, if relevant, whether or not it was reasonably practicable to give notice at the time it was actually given. At the expense of introducing an element of uncertainty for both D1 and D2, we suggest that this latter formula is probably necessary in order to produce a just result in all cases. As regards the appropriate penalty for lack of notice, we have not reached any firm conclusion. Complete denial of D1's right of relief, either automatically or at the discretion of the court,[1] seems a rather extreme form of sanction. Reduction in the amount of contribution awarded is a possibility but it may be difficult to measure the amount of prejudice suffered by D2 in individual cases. Under option (b), for example, any prejudice suffered by D2 is likely to be in his failure to prove that he was not liable to P. That cannot be quantified in financial terms except by holding that he is not bound to make any contribution at all. A further possibility would be to award the expenses of the action of relief against D1, whatever the outcome. This would be a straightforward penalty but in an amount which would be

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1 e.g. the Irish Civil Liability Act 1961, s.27(1).

determined not by the circumstances of D1's failure to give notice but by the length and complexity of the court proceedings.

4.99 Having considered the various possibilities for reform, we are provisionally of the view that there should be no requirement of notice. We have reached this conclusion partly because of the practical difficulties and the potential prejudice to D1, in requiring him to give some form of notice prior to an informal settlement, and partly because we are not satisfied that any of the sanctions we have discussed would be appropriate. The circumstances in which settlement may be made are too varied to make intimation to D2 a precondition of D1's right of relief.

4.100 Consultees are invited to respond to the following propositions and questions:

11. (a) A concurrent wrongdoer who is sued by the injured party should not be required to make his claim for contribution in the same action using third party procedure.

(b) (i) A concurrent wrongdoer who is sued by or who settles with the injured party should not be required to give notice of the claim to other parties allegedly liable for the same loss.

(ii) There being no requirement of notice, should the court still be entitled, in contribution proceedings, to have

regard to any prejudice suffered by the defender to those proceedings as a result of not having received notice?

(c) If the proposition at paragraph (b) above is not accepted, should notice require to be given

(i) in all cases, subject to the court's discretion to disregard the lack of notice in appropriate circumstances, or

(ii) where it was reasonable and practicable to do so?

(d) If notice of the original claim were to be a relevant consideration for the court in contribution proceedings, should notice require to be given

(i) within a specified period of the claim having been made or before settlement has been reached, or

(ii) as soon as is reasonably practicable?

(e) If notice of the original claim were to be a relevant consideration for the court in contribution proceedings, should the sanction for failure to give notice be

(i) dismissal of the action for relief

(ii) reduction in the amount of contribution awarded, or

(iii) an award of expenses against the pursuer?

Enforcement of the right of relief

4.101 Under section 3(2) of the 1940 Act, D1 is entitled to recover contribution where he "has paid any damages or expenses in which he has been found liable".[1] The right of relief is dependent on actual payment by D1. It is not unknown for D2 to challenge D1's title or interest to sue in the action for relief on the ground that D1 has not yet paid the sum owing to P.[2] In the context of third party proceedings, D1 is allowed to raise his action of relief at any stage in the main process but he cannot obtain his decree against D2 until he has been found liable and has satisfied P's decree against him.[3]

4.102 On this question, there are a number of options which may be put forward for consideration:

(a) It would be possible to allow D1 to recover contribution as soon as his liability to P had been established or as soon as he had agreed to

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1 See also the opinions of L.P. Emslie and Lord McDonald in Comex, 8 April 1986, unreported.

2 cf. B.P. Petroleum Development Ltd. and Shell U.K. Ltd. v. Esso Petroleum Co. Ltd., supra.

3 cf. Findlay v. N.C.B. 1965 S.L.T. 328 at p. 330.

make payment. Satisfaction of P's claim would not be necessary. This option, while obviously attractive from D1's point of view, has serious drawbacks. By allowing D1 to recover contribution before he has actually satisfied P's claim, D2 is put at risk of double jeopardy through his continuing liability to P in the event that D1 becomes bankrupt or disappears after enforcing his right of relief but before making payment to P. Moreover, this solution is inconsistent with the underlying justification for the right of relief, namely that D1 must have conferred a benefit on D2. D2 does not receive any benefit until payment by D1 because, until that time, he remains open to a claim by P.

(b) In order to protect D2 against the risk of non-payment by D1, D1 could be entitled to claim relief as soon as his liability was established or he had agreed to settle P's claim but he could not enforce his decree for contribution against D2 until he had himself made payment to P. This is the solution adopted in England and Wales. Under the Civil Liability (Contribution) Act 1978, D1 may recover contribution once he has made payment or has been found liable or has agreed to make payment in settlement of P's claim.[1] Rules of Court provide that until P's claim has been satisfied D1 may not execute the judgment against D2, except with the leave of the court.[2] This

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[1] ss. 1(2) and (4).

[2] Rules of the Supreme Court, Order 16, rule 7(2) and (3); County Court Rules 1936, Order 12, rule 3.

approach to the problem enables D1 to raise his action for relief with the minimum delay and avoids the need for multiple actions to recover contribution where he is liable under an instalment decree. Under the general rule, however, enforcement of his decree for contribution is postponed until P has been paid in full. This safeguards D2's position, although if the court decides to allow early enforcement, D2 has to make his contribution to D1 with no clear guarantee that D1 will in turn pay the whole sum due to P. If D1 fails to do so, D2 may be at risk of further proceedings by P.

(c) As a variation on option (b), D1 could be entitled to seek relief once he had been found liable or agreed to settle and D2's contribution would be payable through the medium of a judicial factor who could ensure payment to P. On this basis, contribution by D2 would not have to wait for payment by D1. The judicial factor could pass D2's contribution direct to P, the sum owed to P by D1 could be adjusted accordingly and a discharge provided for D1 in the amount of D2's contribution. The advantage of this scheme is that P could get immediate payment of at least part of his damages even if D1 is not able or refuses to pay him promptly. D2 would not be at risk of double jeopardy as his contribution would clearly go to satisfy part of P's claim. D1 would remain liable to P for the whole sum in the event that his decree for contribution against D2 was worthless. From D1's point of view, the

scheme would deal satisfactorily with instalment decrees. Contribution could be obtained before D1 had made full payment to P. It would be to D1's advantage where he was ultimately going to bear only a small proportion of the total liability as he would not have to raise the money to meet P's total claim before seeking relief.

(d) A further possibility would be to follow the model of the Canadian Uniform Act.[1] Section 14 provides:

> "Unless the person suffering the damage has been fully compensated or the court otherwise orders, a concurrent wrongdoer shall not issue execution on a judgment for contribution from another concurrent wrongdoer until
>
> (a) he satisfies that amount of the total damages that is proportionate to the degree to which his wrongful act contributed to the damage; and
>
> (b) the court makes provision for the payment into court of the proceeds of the execution to the credit of those persons that the court may order."

This solution would be a departure from the normal rule that an injured party is always entitled to recover the full amount of his damages from any one of the wrongdoers. D1 would have to satisfy

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1 See para. 3.12 above. The same solution is recommended by the Alberta Institute of Law Research and Reform: Report, No. 31 pp. 81-3. See also the Irish Civil Liability Act 1961, s.23(2).

only his share of the damages and the court could arrange for payment of D2's share direct to P. This could cause prejudice to P. The risk of D2 being insolvent or having disappeared from the jurisdiction would fall initially on P although presumably in such circumstances he would still be entitled ultimately to recover the balance from D1 on the basis that D1's liability for the whole sum would not be extinguished by his part payment.

(e) D1's right of relief could depend on his satisfaction of P's claim. This would undoubtedly protect D2 from the risk of double jeopardy. There would, however, be practical difficulties where D1 was liable to P under an instalment decree. It would mean that a fresh claim for contribution would have to be made in respect of each instalment paid or D1 would have to wait until payment had been made in full, possibly some years later, before seeking to enforce his right. If it were the case that D1 could not seek relief until he had made <u>full</u> payment to P, it would mean, in the case of an instalment decree, that D2's liability to contribute could continue long after P had obtained his decree against D1. This could extend considerably the period during which D2 would be liable to compensate for the loss sustained by P. In such extreme examples, we think that this rule, although it protects D2 from direct liability to P, could work to his disadvantage vis-a-vis D1. In order to get round

the difficulties of instalment decrees or partial settlement of P's claim, it could be provided that the full amount of contribution would be payable after only partial satisfaction of P's claim but that it would be paid direct to P through a judicial factor, as suggested in the previous option.

4.103 In principle, we tend to the view that the right of relief should not arise until payment by D1 because, until that time, D2 has not received any benefit. Nevertheless we recognise that this solution could lead to injustice so far as D2 is concerned because D1 might not make payment under decree for a considerable number of years after he had been found liable. Some compromise between principle and practicality would therefore be desirable.

4.104 Options (b) and (c) both have advantages over the other possible solutions which we have canvassed. Both options make what we think is a relevant distinction between the right to commence contribution proceedings against D2 and the right to obtain payment from him. They both protect D2's position although under option (b), as presently formulated, D2 is put at some risk if leave is granted to allow D1 to enforce his decree for contribution before he has made payment to P. The major drawback of option (c) is the involvement of a judicial factor which may be thought too cumbersome and expensive a procedure in most cases. This option does, however, ensure that P is not prejudiced by any delay in payment by D1.

4.105 Having considered the advantages and disadvantages of both options, we have provisionally come down in favour of

option (b), subject to some modification. It embodies what we think should be the general approach to this question, namely that D1 should not be able to obtain contribution from D2 until he has himself made payment to P. At the same time, it incorporates a degree of flexibility by allowing the court to authorise immediate payment by D2 in exceptional circumstances. However, rather than focussing on D1's right to enforce his decree against D2, we think it is more consonant with the principle underlying his right of relief that, in normal circumstances, D1 should not even be able to obtain decree against D2 until he has himself made payment to P. Our proposal is therefore that D1 should be entitled to raise his action as soon as he has been found liable or as soon as he has agreed to settle P's claim but that he should not be able to obtain his decree for contribution, except with the consent of the court, until he had made full payment to P.[1] In this context, the finding of liability against D1 is taken to mean not only the fact that D1 has been held liable but also that his liability has been quantified.[2] Similarly, agreement to settle means not only agreement in principle to settle with P but also that the amount of the settlement has been fixed. In either situation, the amount to be paid by D1 must obviously be determined before the court can begin to quantify D2's contribution.

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1 This is not intended to affect the procedural device of third party notice whereby D1's action of relief can be incorporated in the main process before he has been found liable.

2 The two issues may be determined quite separately: R.C. 108; Lancashire Textiles (Jersey) Ltd. v. Thomson Shepherd & Co. Ltd. 1986 S.L.T. 41.

4.106 The most likely circumstance in which the court would consent to grant decree against D2 before full payment by D1 would be where D1 was liable to P under an instalment decree. In those cases, the court would be able to grant decree for contribution to the extent of the instalment that D1 had paid. The process could then be repeated in respect of subsequent instalments. Alternatively the court might be prepared to grant decree before payment by D1 where this was with the consent of D2. P would then have an opportunity to arrest in D2's hands the amount of contribution due to D1 which could be taken in part satisfaction of his own decree.

4.107 Comments are invited on the proposition that:

12. D1 should be entitled to raise an action for relief as soon as he is found liable to P or as soon as he has agreed to settle P's claim but he should not be able to obtain decree for contribution against D2, except with the consent of the court, until he has made full payment to P.

Inability to recover contribution

4.108 Where there are two concurrent wrongdoers, one of whom has disappeared without trace or become insolvent, it seems obvious that the other one should still be liable to the injured party for the full amount of his loss despite the fact that the chances of his recovering any contribution are virtually nil. If there are three or more wrongdoers, the same is true so far as liability to P is concerned. However, the position becomes more complicated as regards any claim for contribution which the paying wrongdoer may wish to make against the others. For example, D1, D2 and

D3 may be equally to blame for P's loss. P sues, and recovers in full from D1 who is entitled to seek relief from D2 and D3. D3 is insolvent. It may be argued that, out of fairness to D1, the risk of D3's insolvency should not fall on D1 alone but should be shared between D1 and D2 in proportion to their respective shares of liability.[1] D1 is not to blame for D3's insolvency and he should not be prejudiced by it.

4.109 Against this it may be said that where only two wrongdoers are involved, no account is taken of the insolvency of one of them. The wrongdoer who makes payment to P is still entitled to obtain decree for contribution against the other even although, for the time being, that decree is worthless. Arguably, the same rule should apply no matter how many wrongdoers are involved. Moreover, there may be cases where D1 is himself at fault in failing to recover D3's contribution while he was still solvent or within the jurisdiction. In those cases, he should not be protected against his own failure. D1 already takes the risk in agreeing to settle P's claim that he may not be able to prove liability on the part of the other alleged wrongdoers and that he may not be able to recover any contribution at all for that reason. He should perhaps also be prepared to accept the risk that the other concurrent wrongdoers may have disappeared without trace or may not be subject to the court's jurisdiction or may be insolvent.

4.110 We have found it difficult to reach a concluded view on this issue. Indeed, we suspect that there is no "right"

1 cf. Irish Civil Liability Act 1961, s.28 and Canadian Uniform Act, s.9.

answer which can be applied across the board to all cases where, for example, one of the wrongdoers has become insolvent. In some instances, his insolvency should properly be ignored; in others, the apportionment of the loss among the remaining wrongdoers should be adjusted. A flexible rule is desirable to cater for all the different situations in which DI's inability to recover contribution from one of the other wrongdoers might be relevant. We therefore suggest that the court should have power to allocate the contribution of the "missing" wrongdoer among those remaining, not necessarily in proportion to their respective shares of liability, but simply in such proportions as the court finds just. This would enable the court to take DI's inability to recover contribution from one wrongdoer into account in determining the initial apportionment of P's loss so that, in appropriate cases, no award would be made against the one from whom contribution was irrecoverable. It would also enable the court to re-allocate the "missing" wrongdoer's share after decree of contribution had been awarded against him by varying DI's decree(s) against the remaining wrongdoer(s). In the event that the missing wrongdoer reappeared or became solvent again, the other wrongdoers whose share of P's loss had been increased would be able to claim reimbursement from him on general principles of unjust enrichment.

4.111 The proposal on which we invite comment is that:

13. Where contribution payable by one concurrent wrongdoer cannot be recovered, the court should have power

(a) to apportion his share of contribution among the remaining wrongdoers, or

(b) in cases where decree for contribution has already been granted against him, to re-allocate his share among the remaining wrongdoers

in such proportions as the court finds just.

Expenses

4.112 Contribution towards expenses of P's action. The present law entitles the court to award contribution towards the expenses of the action in which D1 has been found liable.[1] The expenses to which contribution may be sought are those of the pursuer for which the unsuccessful defender is liable, not the expenses incurred by the wrongdoer himself in his unsuccessful defence.[2] It may be reasonable to include the pursuer's expenses as part of the total sum which the defending wrongdoer is obliged to pay on behalf of the other, but we are not sure that the same argument applies to the defender's own expenses. They do not, strictly speaking, form part of the debt to which contribution is sought. Nor can a claim in respect of these expenses be based on unjust enrichment as the contributing wrongdoer has not gained any benefit thereby. Even as regards the pursuer's own expenses, it is doubtful whether D2 should be required to contribute towards

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1 1940 Act, s.3(2).

2 cf. Irish Civil Liability Act 1961, s.24.

expenses incurred because of a defence taken by D1 which was wholly unfounded, with no prospect of success, or one which, even if successful, would have been of no benefit to D2. We do not suggest that the court should be deprived of its power to award contribution toward expenses but we think that it should be clearly within the court's discretion to refuse to make any award in wholly inappropriate cases or to award contribution in a different proportion from that applied in calculating D2's contribution towards P's damages.[1]

4.113 Expenses of D1's action of relief. The normal rule is, of course, that expenses follow success and if D1 obtains decree for contribution against D2 he is also awarded the expenses of his action. We do not suggest that this general rule should be altered. Instead we suggest that the court should have discretion to disregard this rule so that, even where D1 has been successful, the court could decide not to award any expenses to or by either party or could find D1 liable for the whole expenses of the action.

4.114 The particular circumstances we have in mind are where D1 has had the opportunity to use third party procedure to claim contribution in P's action but he has not done so. In some cases, his failure to bring D2 in as a third party may be unimpeachable. In others, his motive may be pure self-interest, perhaps in the knowledge that D2 has clear evidence against him which D1 does not want brought out. D2 may be equally anxious to take part for the same reason. Or he may simply wish to avoid the expense and inconvenience of separate contribution proceedings. The

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1 cf. Williamson v. McPherson 1951 S.C. 438.

advantage of third party procedure is that it enables all the issues among all the parties concerned to be settled in one court action. Its use should, in our view, be encouraged by providing a sanction in expenses in D1's action of relief which the court may apply if it considers that D1 acted unreasonably in not incorporating his action of relief in the main proceedings.

4.115 Our proposals in relation to expenses are as follows:

14. (a) The court should be entitled to award contribution, as it sees fit, towards any expenses in which D1 has been found liable in court proceedings taken by P.

(b) Where D1 has not claimed contribution by way of third party procedure in P's action, the court should be entitled, as it sees fit, to find D1 liable for the whole expenses of his action of relief or to find no expenses due to or by either party.

Contribution and indemnity

4.116 One concurrent wrongdoer may be entitled by contract or under the general law to be indemnified by another for the damages in respect of which relief is sought. Such rights are preserved by the 1940 Act[1] with the result that the wrongdoer with the right of indemnity in his favour is exempt from liability to contribute. Contractual rights of

1 s.3(3).

relief between wrongdoers are similarly unaffected. We think that this should continue to be the case. Accordingly we suggest that:

15. (a) Contractual or other rights of indemnity between concurrent wrongdoers should continue to be recognised and no contribution should be recoverable from a person who is entitled to be indemnified by the person seeking relief.

(b) Express contractual rights of relief between concurrent wrongdoers should not be superseded by the proposed new statutory right to contribution.

Prescriptive period governing rights of relief

4.117 The existing law provides expressly for prescription of obligations to make contribution under the 1940 Act. Section 8A(1) of the Prescription and Limitation (Scotland) Act 1973[1] is in the following terms:

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1 Inserted by the Prescription and Limitation (Scotland) Act 1984 s.1. Originally there was no express time-limit on the exercise of the statutory right of relief. A two-year limitation period was first imposed by s.10 of the Limitation Act 1963. This was replaced in the 1984 Act by a prescriptive period of two years, following the recommendation in our Report on Prescription and Limitation of Actions (Scot. Law Com. No. 74, 1983), Part VI.

"If any obligation to make a contribution by virtue of section 3(2) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 in respect of any damages or expenses has subsisted for a continuous period of 2 years after the date on which the right to recover the contribution became enforceable by the creditor in the obligation -

(a) without any relevant claim having been made in relation to the obligation; and

(b) without the subsistence of the obligation having been relevantly acknowledged;

then as from the expiration of that period the obligation shall be extinguished."

Any period during which the person seeking relief is under a disability or is induced by fraud or error on the part of the person liable to contribute not to make a relevant claim against him is discounted in computation of the two-year period.[1] As for rights of relief at common law, the matter rests on the general rules of prescription contained in the 1973 Act. Depending on the circumstances, an obligation to make contribution may come under the head of obligations based on redress of unjustified enrichment,[2] obligations arising from, or by reason of any breach of, a contract or promise,[3] or, possibly, obligations arising from liability to make reparation.[4] Obligations falling

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1 ss. 8A(2) and 6(4).

2 1973 Act, Sched. 1, para. 1(b).

3 1973 Act, Sched. 1, para. 1(g).

4 1973 Act, Sched. 1, para. 1(d).

within any of these categories are subject to the five year prescriptive period.[1]

4.118 If the law on contribution were to be reformed along the lines we have proposed, a single rule on prescription governing all rights of relief coming within our proposed scheme would be necessary. We see the justification for fixing a relatively short period after which the obligation to contribute is extinguished. It is clearly desirable that proceedings arising out of one incident should not be unduly protracted. D1, if sued by P, should be encouraged to bring D2 into the action. From D2's point of view, it is important that he should not be open to a contribution claim for very long after the principal claim against him has prescribed.[2] When we consulted on the question of reclassifying the two-year limitation period for obligations under the 1940 Act as a period of prescription, no adverse comment was made on the length of the period.[3] It is in line with the equivalent limitation period found in other

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1 1973 Act, s.6. The prescriptive period runs from the date when the obligation became enforceable: s.6(3). See also s.7 for the application of the long negative prescriptive period of 20 years.

2 The time limits relevant to ascertaining D2's liability are discussed at paras. 4.34 to 4.50 above.

3 Consultative Memorandum No. 45, paras. 4.18 and 4.19; Scot. Law Com. No. 74, para. 6.3.

jurisdictions[1] although some use a dual formula referring to the lesser[2] or greater[3] of the limitation period governing P's right of action against D2 and the separate limitation period governing the claim for contribution itself. It is more consistent with our view of the right of relief as a substantive right that the prescriptive period should be entirely independent of any period of prescription or limitation affecting P's claim against D2. Unless there are shown to be compelling reasons to the contrary, we propose that:

16. All obligations to make contribution which come within our proposed scheme should be subject to a two-year prescriptive period.

4.119 Under the existing statutory provision, the prescriptive period runs from the date on which the right

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1 A one-year limitation period applies in South Australia, Tasmania, Victoria and Saskatchewan, a two-year period in England and Wales, Hong Kong and New South Wales: see Weir, International Encyclopedia of Comparative Law, Vol. XI, Chap. 12, footnotes 789 and 790. But in West Germany a person remains liable to contribute for 30 years: see para. 3.18 above.

2 In South Africa, the action of relief must be taken within one year after the sum in respect of which contribution is sought has been fixed by judgment or settlement or within the limitation period governing the injured party's claim against the contributor, whichever is the shorter: Apportionment of Damages Act 1956, s.2(6)(b).

3 In Eire, the action must be brought within the limitation period governing the injured party's claim against the contributor or within two years after the liability of the claimant is ascertained or the injured party's damages are paid, whichever is the greater: Civil Liability Act, s.31.

to recover contribution becomes enforceable.[1] This follows the wording used in sections 6 and 7 of the 1973 Act regarding obligations governed by the five-year and twenty-year periods of prescription. "Enforceable" is used in this connection to mean that there has been created a legal right which can be pursued through the courts.[2] We have suggested[3] that D1 should be entitled to claim relief as soon as his liability is established and quantified or as soon as he has agreed the amount of his settlement with P but that, to safeguard D2's interests, D1 should not, as a general rule, be able to obtain decree for contribution against D2 until he had himself made payment to P. On this basis, we suggest that:

17. The two-year prescriptive period, subject to interruption on account of disability, fraud or error, should start to run from the date when D1's liability has been established and quantified or when he has agreed to settle P's claim and the amount of the settlement has been fixed.

Questions of private international law

4.120 In any case involving a foreign element, the Scottish courts must consider what is the appropriate law to govern the claim for relief. The present choice of law rules are uncertain. It may be argued that section 3 of the Law

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1 1973 Act, s.8A(2).

2 Walker, The Law of Prescription and Limitation of Actions in Scotland (3rd edn., 1981) p. 49.

3 at para. 4.105 above.

Reform (Miscellaneous Provisions)(Scotland) Act 1940 requires a Scottish court to apply the rules enunciated by that section as part of the law of the forum to all claims for contribution coming before it, whther or not the claim is itself governed by Scots law. However, it has been held in Comex that, for the purposes of determining jurisdiction, the obligation to contribute under the 1940 Act is a liability in delict.[1] On this reasoning, it should be subject to the same choice of law rule as governs the delict itself. A similar approach could well be taken in contract although there does not appear to be any direct authority on the point. In a claim before the Scottish courts concerning rights of relief between concurrent wrongdoers liable on different grounds or under two separate contracts, it is not clear how the applicable law would be selected.

4.121 If a statutory right of contribution were to be conferred regardless of the basis of liability of the wrongdoers, a clear and comprehensive choice of law rule would be desirable. It would not be appropriate simply to characterise the right of relief as an issue in delict or contract, according to the nature of D2's liability to the injured party. It would after all be a substantive right between concurrent wrongdoers created by statute, which would exist independently of any delict or breach of contract between them. This is not to say that the law of the delict, for example, should not be selected, but the application of that law could not be justified under our proposals on the ground that the obligation to make contribution was itself founded in delict. Nor do we think

1 1986 S.L.T. 250 at p.258 and 8 April 1986, unreported.

that the question should be referred to Scots law as the law of the forum. That would mean that the parties' rights would depend simply on jurisdiction. Moreover, as we have already said, the right of relief is a substantive right, not a matter of procedure.

4.122 We stated at the beginning of the Memorandum[1] that rights of relief rest on the notion of unjust enrichment, the premise being that D1 has conferred a benefit on D2 by satisfying the latter's debt to P. Logically, the choice of law rules applicable in cases of unjust enrichment generally should apply here as well. There is in fact widespread support for the proposition that the question of contribution should be separated from the breach of duty from which the claim arises and that, in the absence of express provision, a claim for contribution should be regarded as quasi-contractual and governed by the choice of law rule appropriate to restitutionary obligations.[2] In Scots law, such obligations are matters of substantive law,

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1 at para. 1.2.

2 Dicey and Morris, The Conflict of Laws (10th edn., 1980), p. 967; Graveson, Conflict of Laws (7th edn., 1974), p. 614; Leflar, American Conflicts Law (3rd edn., 1977), p. 274; Morse, Torts in Private International Law (1978), p. 209. Williams, Joint Torts and Contributory Negligence (1951), pp. 135-6. Cf. Restatement, Second, Conflict of Laws, s.173 which provides that the law of the tort should determine the right of one tortfeasor to obtain contribution from another. See also Law Commission Working Paper No. 87 and Scottish Law Commission Consultative Memorandum No. 62 on Choice of Law in Tort and Delict (1984) paras. 2.82 to 2.84 and 6.46 to 6.49.

to be governed by the proper law of the relationship.[1] It is beyond the scope of our present exercise to examine private international law questions in the whole range of restitutionary obligations but this rule may provide a suitable analogy on which to base a choice of law rule for rights of relief. A rule framed solely in terms of the proper law of the relationship would not be apt where there had been no previous dealings between the parties and the only connection between D1 and D2 was the right of relief itself. The solution would, we think, be to focus on what could be regarded as the proper law of the obligation to make contribution, that is, the law with which the obligation has the closest and most substantial connection.[2] We do not suggest that the rule should be framed expressly in these terms.[3] That would lead to too much uncertainty. However, using the proper law of the obligation as the underlying principle, it could be provided that the applicable law was either the law governing any relationship between D1 and D2 which was

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1 Anton, Private International Law (1967) p. 234.

2 See Dicey and Morris, op. cit., Rule 170.

3 cf. Restatement, Second, Confict of Laws, s.221 which provides that, in actions for restitution, the applicable law is the law which has the most significant relationship to the occurrence and the parties. It then lists five factors to be taken into account in selecting that law, each factor to be evaluated according to their relative importance with respect to the particular issue. These factors include the place where a relationship between the parties which was related to the enrichment was centred, the place where the benefit was received or where the act conferring the benefit was done, and the domicile, residence, nationality, place of incorporation and place of business of the parties.

connected with the loss caused to P or, in the absence of any such relationship, the law of the country where D2 had been enriched.[1] The first limb would deal, for example, with cases where there was express agreement in a joint enterprise between D1 and D2 that a particular law would govern their rights inter se. The second limb, although consistent with our general approach to contribution, raises the difficult question of the place of enrichment and would require further clarification. If it was simply where D1 had made payment to P, the place of enrichment would be entirely fortuitous, dependent on circumstances unconnected with the incident giving rise to P's loss. In our view, the preferable approach would be to consider the place of enrichment from the standpoint of D2's liability to P. The benefit accruing to D2 is in his being discharged from liability to P. His enrichment is therefore under the law governing that liability. Whether D1 can recover contribution should also be determined by the law which applied to the liability which has been discharged.[2] This would lead to the application of the law governing D2's liability in all cases, except those where there was a pre-existing relationship between D1 and D2. So, where D2's liability to P was in delict, the law governing his delictual liability would be selected. Where he was liable in contract, the proper law of the contract would be applicable. We believe that this solution is justifiable both on the principle of unjust enrichment and on the more practical ground that, wherever possible, the same system of law should determine both the primary obligation of D2 to

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1 cf. Dicey and Morris, op cit., Rule 170(2)(a) and (c).

2 Zweigert and Muller-Gindullis, International Encyclopedia of Comparative Law, Vol. III, Chap. 30, p. 18.

pay damages to P and any restitutionary obligation which arises as a consequence of payment by D1. Although the right of relief is not to be classified according to the nature of D2's liability to P, its very existence depends on that liability. This in itself provides a sufficient connecting factor to make the law governing D2's primary obligation the appropriate law to govern his obligation to contribute as well.

4.123 There remain cases where D2's liability to P is in both delict and contract. In this situation D1 will, in effect, be able to choose the applicable law by deciding which ground of liability will form the basis of his claim for relief. If D1 founds on D2's liability to P for breach of contract, the proper law of the contract would govern his right of relief. If he founds on D2's liability in delict, the governing law would be that governing the delict itself. In many cases, his choice will make no difference. The applicable law on both grounds will be the same. If the alternative grounds of liability point to the application of two different laws, D1 will obviously select whichever is more favourable to his claim for relief. We do not think this is objectionable. It is no different than the advantage P would have had in choosing the applicable law, had he sued D2 direct.

4.124 A further, more general question is whether it should be possible to displace the law governing D2's liability in favour of the law of another country which, in particular circumstances, was regarded as having the closest and most substantial connection with D2's obligation to contribute. A 'safety net' provision along these lines would undoubtedly be adaptable to individual

cases but that degree of flexibility could only be achieved at the expense of introducing an element of uncertainty into what is otherwise a clear and straightforward rule. It would be of value only in a small minority of cases. At present, we are not convinced that the benefits to be gained from such a provision would outweigh its disadvantages.

4.125 Views are invited on the following proposition and question:

18. (a) The law selected to determine the existence and scope of a right of relief should be

(i) the law governing any relationship between D1 and D2 which is connected with the loss caused to P, or

(ii) in the absence of any such relationship, the law governing D2's liability to P.

(b) Should it be possible to displace the law governing D2's liability to P in favour of the law of another country which, in the circumstances of the individual case, has the closest and most substantial connection with D2's obligation to contribute?

PART V - CONTRIBUTORY NEGLIGENCE

The present law

5.1 Contributory negligence is carelessness on the part of the pursuer or a disregard for his own interests which has contributed to the loss which he has sustained as a result of the defender's conduct.[1] At common law, if a person were to succeed in an action based on the defender's negligence, he had to show that it was the fault of the defender alone which caused the accident. If the pursuer had contributed to his loss by his own act of carelessness, he was regarded as being solely responsible for the harm caused and his action failed. Contributory negligence was thus a complete defence to his claim.[2]

5.2 Over the years, the courts developed a number of narrow principles in order to temper the injustice of this rule. So the pursuer's claim would not be defeated if he

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1 cf. Robinson v. Wm. Hamilton (Motors) Ltd. 1923 S.C. 838 per L.P. Clyde at p. 841:

"In short, the technical meaning of 'contributory negligence' is negligence on the part of a pursuer which is itself jointly causative of the accident along with the negligence of the defender."

See also, Walker, Delict (2nd edn., 1981) pp. 353-75.

2 McNaughton v. Caledonian Railway (1858) 21 D. 160; Forbes v. Aberdeen Harbour Commissioners (1888) 15 R. 323. An exception existed in maritime cases, where, at common law, if two vessels collided and both were at fault, the loss was divided equally. This rule was replaced by a statutory apportionment according to the degree of fault of each of the parties: Maritime Conventions Act 1911, s.1.

had acted negligently "in the agony of the moment".[1] There also developed the "last clear chance" rule or the "last opportunity" rule that, where both parties had been negligent, the one who had had the last clear chance of avoiding the accident but who had failed to do so by not taking reasonable care was the one to blame.[2] This doctrine did, however, fall into disrepute in so far as it had been applied in its literal sense. The failure to take care which was later in chronological sequence was not necessarily the more important of the two in causing the accident.[3] In time, the question became one of which was "the decisive and immediate cause" of the pursuer's loss, regardless of the precise sequence of events.[4]

5.3 The present law is contained in the Law Reform (Contributory Negligence) Act 1945. Section 1(1) provides:

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1 Laird Line Ltd. v. U.S. Shipping Board 1924 S.C. (H.L.) 37; S.S. Baron Vernon v. S.S. Metagma 1928 S.C. (H.L.) 21.

2 Carse v. N.B. Steam Packet Co. (1895) 22 R. 475.

3 Boy Andrew v. St. Rognvald 1947 S.C. (H.L.) 70 per Viscount Simon at p. 76; Davies v. Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291 per Denning L.J. at p. 321.

4 Taylor v. Dumbarton Tramways Co. 1918 S.C. (H.L.) 96 per Viscount Haldane at p. 106.

"Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that -

(a) this subsection shall not operate to defeat any defence arising under a contract;

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

5.4 This provision obviously superseded the common law rule that a successful plea of contributory negligence defeated the pursuer's claim entirely. What is not so clear is the extent to which it also superseded the "last opportunity" rule. There has been much academic and judicial debate on the point.[1] The views expressed have ranged from the opinion that the doctrine was already dead

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1 e.g. Glanville Williams, Joint Torts and Contributory Negligence (1951) chaps. 9 and 10; Glanville Williams, "The Law Reform (Contributory Negligence) Act 1945", 1946 9 M.L.R. 105; Goodhart, "The Last Opportunity Rule" 1949 65 L.Q.R. 237 and pp. 320 and 453; Monteith, ibid., p. 318; Glanville Williams, ibid., p. 449; Wright, "Contributory Negligence" 1950 13 M.L.R.2; S.S. Bogota v. S.S. Alconda, supra.; Boy Andrew v. St. Rognvald, supra; Grant v. Sun Shipping Co. 1948 S.C. (H.L.) 73; Davies v. Swan Motor Co. (Swansea) Ltd., supra; Sharp v. Glasgow Corporation 1952 S.L.T. (Sh. Ct.) 69.

before the 1945 Act or that the Act by implication abolished it[1] to the contention that the rule survived the passing of the Act, but only in a limited sense concerned, not with which party actually caused the loss, but with the question whether the injured party's knowledge of the dangerous situation created by the defender brought the defender's negligence to an end.[2] Certainly the rule, as originally formulated, is no longer part of our law. Whether it continues, in modified form, as a specific doctrine applicable to contributory negligence or whether it has been subsumed into more general principles of causation and foreseeability is of little practical importance.

5.5 The effect of the 1945 Act is that the pursuer's own fault is no longer a complete defence but is only a ground for limiting the damages which he would otherwise have received. Where the pursuer and defender are both partly responsible for the loss, injury or damage caused, the court must determine what share of responsibility should be allocated to each party and reduce the damages awarded to the pursuer accordingly. The search is not simply for the predominant cause of the damage. The court must have regard to all the causes and, in particular, to the relative importance of the pursuer's and defender's acts in causing the damage and also to their relative degrees of blameworthiness.[3] The pursuer's claim will fail altogether

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1 Glanville Williams, op. cit.; Monteith, loc. cit.

2 Goodhart, loc. cit.

3 Davies v. Swan Motor Co. (Swansea) Ltd, supra per Denning L.J. at p.326; Stapley v. Gypsum Mines Ltd. [1953] A.C. 663 per Lord Reid at p. 682; Kilgower v. National Coal Board 1958 S.L.T. (Notes) 48.

only if the court finds his conduct to be the sole effective cause of his loss.

5.6 The onus is on the defender to show that the loss, injury or damage sustained by the pursuer was partly due to the pursuer's own carelessness.[1] The standard of care required of the pursuer is one of reasonable care for his own safety, the ordinary care which would be expected of him in the circusmtances.[2] A person is guilty of contributory negligence "if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."[3] He is not held to be contributorily negligent merely on account of some error of judgment or inadvertence.[4] A person acting in circumstances of danger or emergency is not guilty of contributory negligence simply because he has taken a risk or not adopted the best course of action.[5] The pursuer's fault is material only if it actually contributed to the harm sustained as a

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1 Barker v. Murdoch 1977 S.L.T. (Notes) 75.

2 Grant v. Sun shipping Co., supra per Lord du Parcq at p.97.

3 Jones v. Livox Quarries Ltd. [1952] 2 Q.B. 608 per Denning L.J. at p. 615.

4 Thurogood v. Van den Berghs and Jurgens Ltd. [1951] 2 K.B. 537; Carswell v. Powell Duffryn Assoc. Colleries Ltd. [1940] A.C. 152 per Lord Wright at p. 175.

5 Laird Line Ltd v. U.S. Shipping Board, supra.

consequence of the defender's breach of duty. It will be ignored if the harm would have resulted in any event.[1]

5.7 In deciding the issue of contributory negligence, the court must consider the age and mental and physical capacities of the pursuer. A child is not expected to meet the standard of care of a reasonable adult. It is a question of fact in each case whether the child has the requisite mental capacity to appreciate the dangerous circumstances and the risk involved in his own conduct.[2] He need only show the degree of care to be expected from a child of the same age, intelligence and experience in the circumstances.[3] In practice, children have been held capable of contributory negligence in failing to look after their own safety from the age of about five onwards.[4] Physical infirmities, such as defective eyesight[5] or drunkenness[6] have also to be taken into account in

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1 McWilliams v. Arrol 1962 S.C. (H.L.) 70; Mackay v. Borthwick 1982 S.L.T. 265.

2 Campbell v. Ord and Maddison (1893) 1 R.149 per L.J-C Moncrieff at p.153; Stevenson v. Magistrates of Edinburgh 1934 S.C.226.

3 Frasers v. Edinburgh Street Tramways Co. (1882) 10 R. 264 per Lord Fraser at p.269.

4 e.g. Banner's Tutor v. Kennedy's Trustees 1978 S.L.T. (Notes) 83; Shillinglaw v. J.G. & R. Turner 1925 S.C. 807.

5 Rennie v. Great North of Scotland Railway Co. (1905) 12 S.L.T. 667; cf. McKibbin v. Glasgow Corporation 1920 S.C. 590 per Lord Salvesen at p.597.

6 Pollock v. Glasgow Magistrates (1895) 3 S.L.T. 156.

considering whether a person has been contributorily negligent. In some circumstances, the infirmity may exclude the plea of contributory negligence altogether.[1] In others, an infirm person may be expected to take greater care for his own safety than a person of ordinary fitness and faculties and may be contributorily negligent in attempting to do what a fully fit person would be able to do.[2]

5.8 Our discussion so far has dealt with the plea of contributory negligence as a partial defence to a claim based on liability in delict for negligence. Two important questions remain: whether the plea is available in actions based on breach of a statutory or strict duty or in actions based on intentional wrongdoing; and whether the plea is available in answer to claims based on breach of contract.

5.9 The term "fault" is defined for Scotland in section 5(a) of the 1945 Act as

> "wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages or would, apart from this Act, give rise to the defence of contributory negligence."

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1 Rennie v. Great North of Scotland Railway Co., supra.

2 See Cork v. Kirby MacLean Ltd. [1952] 2 All E.R. 402; cf. Bourhill v. Young 1942 S.C.(H.L.) 78 per Lord Wright at p. 92:

> "A blind or deaf man who crosses the traffic on a busy street cannot complain if he is run over by a careful driver who does not know of, and could not be expected to observe and guard against, the man's infirmity."

The difficulty with this definition is that "fault" is used in two different senses in section 1(1), firstly to refer to the pursuer's own fault, i.e. his contributory negligence and, secondly, to refer to the fault of the defender. Glanville Williams, commenting on the equivalent English definition of fault in the Act,[1] argued that the whole definition could not apply to the fault of the defender because that would in effect mean that an action for damages could be brought for a fault which at common law did not give rise to a liability but merely to the defence of contributory negligence. Since contributory negligence did not involve a duty of care owed by the pursuer to the defender, this would allow an action for damages for fault that would not at common law be a breach of a duty of care. On this line of argument, the definition in section 5(a) should be read as two separate definitions rolled into one. As applied to the issue of the defender's fault, it should be taken to mean "wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages." As applied to the separate issue of the pursuer's fault, it should be taken to mean "wrongful act, breach of statutory duty or negligent act or omission which would, apart from this Act, give rise to a defence of contributory negligence."

5.10 This appears to be the only reasonable construction that can be given to the provision.[2] The common law rules

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1 Glanville Williams, op. cit., p. 318.

2 Burrows, "Contributory Negligence - A Defence to Breach of Contract?" 1985 L.Q.R. 161; Rowe v. Turner Hopkins & Partners [1980] 2 N.Q.L.R. 550 at pp. 555-6.

on contributory negligence are thus incorporated into the statute. On these rules is superimposed the provision that the plea is available as a partial defence to any action for damages founded on "a wrongful act, breach of statutory duty, or negligent act or omission". It is not clear, however, particularly in view of the wording of section 1(1), whether the combined effect of these rules is to limit the application of the defence to those actions in which the plea was available at common law or whether the defence is available under statute to any action for damages arising from the defender's fault regardless of the legal basis of that action, provided that the pursuer's conduct is of a sort which, in general terms, would have been held to be contributory negligence at common law.[1]

5.11 The doctrine of contributory negligence clearly applies to claims based on breach of statutory duty.[2] This was the case even before the Act was passed.[3] Although the pursuer in these cases is still expected to take reasonable care for his own safety, the courts have emphasized that not every error of judgment or inadvertence on his part will justify a finding of contributory negligence. The purpose of the statutory duty, particularly when imposed on

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1 In relation to the English definition, Glanville Williams favours the former interpretation: op. cit., p.318 and footnote 3. The latter view is put forward by Burrows, loc. cit., at p. 163.

2 Stevenson v. J. Drummond & Sons Ltd. 1978 S.L.T. (Notes) 13; Boyes v. Carnation Foods [1985] 12 C.L. 645.

3 Gibb v. Crombie (1875) 2 R. 886; Caswell v. Powell Duffryn Assoc. Collieries Ltd., supra.

employers, may be to protect the injured party from the risks of his own inattention to safety. To find an injured employee contributorily negligent for every minor act of carelessness due to his familiarity with machinery or fatigue in repetitive work would defeat the object of the legislation.[1]

5.12 As regards the availability of the plea in claims founded on strict liability, the position seems to be as follows. The plea may be taken in cases of strict liability for failure to confine a dangerous animal.[2] It has been recently explained by the House of Lords that the strict liability rule in Rylands v. Fletcher[3] is not part of Scots law,[4] with the exception or possible exception that, by virtue of an earlier House of Lords judgment,[5] the rule may apply in the case of a person who interferes with the course of a natural stream.[6] In this narrow class of case the

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1 Caswell v. Powell Duffryn Assoc. Collieries Ltd., supra per Lord Atkin at pp. 164-6 and per Lord Wright at pp. 178-9.

2 Gordon v. Mackenzie 1913 S.C. 109. We have recommended that the plea should continue to be available: Report on Civil Liability in relation to Animals (1985) Scot. Law Com. No. 97, para. 4.14.

3 (1868) L.R. 3 H.L. 330 at p. 340.

4 R.H.M. Bakeries (Scotland) Ltd. v. Strathclyde Regional Council 1985 S.L.T. 214 (H.L.) revg. 1985 S.L.T. 3.

5 Caledonian Ry. Co. v. Greenock Corporation 1917 S.C. (H.L.) 56; appl'd. Plean Precast Ltd. v. N.C.B. 1986 S.L.T. 78 (O.H.).

6 1985 S.L.T. 214 at p. 217.

defender may escape liability wholly or partly if he proves that the pursuer was wholly or partly to blame for the damage.[1]

5.13 In the case of an action of damages for nuisance, it is now clear that liability is not strict so that the rules on contributory fault in Rylands v. Fletcher[2] do not afford a safe guide. Thus, in R.H.M. Bakeries (Scotland) Ltd v. Strathclyde Regional Council[3] the House of Lords approved a dictum of Lord Atkin in an English case[4] to the effect that an owner or occupier from whose land a nuisance emanates "is not an insurer ... Deliberate act or negligence is not essential but some degree of personal responsibility is required ...". This dictum, however, should not be taken as meaning that nuisance is a separate delict with rules of its own imposing a single standard of conduct.[5] Nuisance in modern law is rather a field of delictual liability with uncertain boundaries in which liability is in some situations based on negligence, in other situations on intent or deliberate act,[6] and it may be that in yet other

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1 Rylands v. Fletcher (1868) L.R. 3 H.L. 330 at p. 340; Postmaster-General v. Liverpool Corporation [1923] A.C. 587; cf. Wilsons v. Waddell (1876) 3 R. 288.

2. Supra.

3 Supra. at pp. 213-219.

4 Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880 at pp. 896-7.

5 Clerk and Lindsell Torts (15th edn., 1982) p. 1158.

6 See e.g. The Wagon Mound No. 2 [1967] 1 A.C. 617 (P.C.) at p. 639; Goldman v. Hargrave [1967] 1 A.C. 645 (P.C.) at pp. 656-7.

situations (e.g. those where nuisance overlaps with the rule in Rylands v. Fletcher or breach of the strict duty of support by land to land or buildings) some other criterion of responsibility is applicable.

5.14 In the typical nuisance case (in which the remedy sought is normally interdict rather than damages) the court is required to determine the limits within which the defender may intentionally invade the pursuer's land. Liability normally depends on a test in which the court balances the conflicting interests of the two neighbours, the critical question being whether the harm is plus quam tolerabile (more than reasonably tolerable).[1] Generally speaking, the authorities do not use the language or concepts of contributory negligence or contributory fault.[2] Nevertheless, the law of nuisance does place a certain burden on the pursuer to take protective measures. There is authority by dictum that the pursuer "must use all reasonable means within his own premises to minimise the inconvenience of which he complains"[3]. In some cases, the

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1 Watt v. Jamieson 1954 S.C. 56 (O.H.) at p.58; Miller v. Jackson [1977] Q.B. 966 (C.A.) at pp. 981, 986, 988.

2 Thus there is authority that where the pursuer is ultra-sensitive to harm and the invasion would only harm a person who is ultra-sensitive in this sense, the invasion is not an actionable nuisance: Robinson v. Kilvert (1889) 41 Ch.D. 88 esp. at p. 97; see also Armistead v. Bowerman (1888) 15 R. 814 (exceptionally delicate salmon ova); cf. Maguire v. Charles McNeil Ltd. 1922 S.C. 174.

3 Wilson v. Gibb and Brattesani (1902) 10 S.L.T. 293 per Lord Stormonth Darling.

pursuer's failure to take protective measures will bar recovery.[1] Generally, however, a pursuer is not "required to do more than to conform to the ordinary habits of life as a reasonable person",[2] and so need not, for example, keep his doors or windows closed to shut out disagreeable smells[3] or noise.[4] It is no defence that the pursuer "came to the nuisance"[5] for, if it were, the defender could reduce the value of the adjoining land by his wrongful acts. For a similar reason, it seems that use by the pursuer of his land which foreseeably increases his exposure to nuisance does not usually bar an action: e.g. if the pursuer builds on land over which the defender has emitted smoke for a period short of the negative prescription, he will have an action.[6] It appears that the defence of volenti non fit injuria is available where in the knowledge of the danger the pursuer shows his willingness to accept it.[7]

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1 Armistead v. Bowerman, supra per L.J.-C. Moncrieff at p. 821 and per Lord Young at p. 832.

2 Webster v. Lord Advocate 1984 S.L.T. 13 per Lord Stott at p.15.

3 Fraser's Trs. v. Cran (1877) 4 R. 794 per Lord Shand at p. 796.

4 Webster v. Lord Advocate, supra.

5. Fleming v. Hislop (1886) 13 R. (H.L.) 43 per Lord Halsbury at p. 49; Webster v. Lord Advocate, supra at p. 14.

6 Harvie v. Robertson (1903) 5 F. 338.

7 Leakey v. National Trust [1980] 1 Q.B. 485 per Megaw L.J. (obiter) at p.515.

5.15 We are not aware of any Scottish authority dealing with the availability of the plea of contributory negligence in actions based on the defender's intentional wrongdoing.[1] Nor are we aware of any direct Scottish authority dealing with application of the defence to claims based on breach of contract.[2] In Lancashire Textiles (Jersey) Ltd. v. Thomson Shepherd & Co. Ltd.,[3] Lord Davidson expressed the obiter opinion that the plea could be taken in an action for damages for breach of contract only if the breach could also be described as constituting a wrongful act, breach of statutory duty or negligent act or omission within the meaning of the Act. A breach of an implied term under the Sale of Goods Act 1979, importing a strict contractual duty, was, in his view, neither a wrongful act or a breach of statutory duty for this purpose.

5.16 In conclusion, two other provisions of the 1945 Act may be noted. Under section 1(3),[4] the statutory scheme for contribution between joint wrongdoers is applied where two or more persons are liable for the pursuer's loss. In these cases, the proper course is for the court to assess the

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1 The weight of English authority seems to be against its availability: Quinn v. Leathem [1901] A.C. 495 at p.537; Lane v. Holloway [1968] 1 Q.B. 379. But see Murphy v. Culhane [1977] Q.B. 94. For an extensive review of authorities and academic comment on this point see Horkin v. North Melbourne F.C. Social Club [1983] 1 V.R. 153.

2 This question has, however, been the subject of a number of English decisions: see paras. 5.19 to 5.22 below.

3 1986 S.L.T. 41 at p.45.

4 As modified for Scotland by section 5(b).

total damages due in respect of the pursuer's loss, deduct the appropriate sum for his contributory negligence and then apportion the balance among the defenders according to the provisions of section 3 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940.[1] Section 1(4)[2] applies the principle of apportionment between pursuer and defender in those cases where a person has died as a result partly of his own fault and partly of the fault of another. In any action for damages brought by his dependants in respect of his death, the damages awarded shall be reduced "to such extent as the court thinks just and equitable having regard to the share of the said person in the responsibility for his death."[3]

Is there a need for reform?

5.17 The present law appears to work satisfactorily in clear cut cases arising, say, out of a car accident. Any claim made by the pursuer is founded on the defender's negligence and the plea of contributory negligence is obviously available. Similarly, in the context of claims based on breach of a statutory duty, the law is reasonably well-defined, while remaining sufficiently flexible to take account of the purpose for which the statutory duty was imposed. The difficulty is in the area of contractual claims. In the absence of any direct authority, it remains an open question, so far as Scots law is concerned, whether the plea of contributory negligence is a defence to a claim

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1 cf. Davies v. Swan Motor Co. (Swansea) Ltd., supra.

2 As modified for Scotland by section 5(c).

3 e.g. Kelly v. Glasgow Corporation 1951 S.C. (H.L.) 15.

for breach of contract. This question has, however, received some attention from the English courts. In view of the close similarity between the Scots and English rules on contributory negligence, both at common law and under the 1945 Act, the present state of English authority is particularly relevant. Of the two most recent English decisions, one is against the availability of the plea in contract,[1] the other allows the plea insofar as the defender is under concurrent liability in both tort and contract.[2] Either interpretation would be possible under Scots law. The question turns on the statutory definition of "fault". Apart from the technical difficulties involved in rolling two separate definitions into one,[3] there are ambiguities in the way the definition is phrased. The use of the term "wrongful act" creates the same difficulties here as it does in section 3 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940.[4] On one view, the term is restricted to acts giving rise to liability in delict. On another, it is wide enough to embrace also acts in breach of contract. This latter interpretation is supported indirectly by the opinion of Lord Strachan in Grunwald v. Hughes and Others[5] that, for the purpose of establishing joint and several liability where two wrongs contribute to a single result, a breach of contract is a wrong in the same way as a consequence of a delictual act.

1 A.B. Maritrans v. Comet Shipping Co. Ltd. [1985] 3 All E.R. 442.

2 Forsikringsaktieselskapet Vesta v. Butcher and Others [1986] 2 All E.R. 488.

3 See para. 5.9 above.

4 See para. 2.32 above.

5 1965 S.L.T. 209 at p. 213. See para. 2.18 above.

5.18 The uncertainty surrounding the role of contributory negligence in contractual claims is unsatisfactory and should be resolved, one way or the other. Our initial view is that contributory negligence should have some role to play at least in certain types of contractual claims. In later paragraphs, we discuss the arguments in favour of this view and set out our provisional proposals. First we examine the law in other jurisdictions relating to contributory negligence in contract.

Comparative survey

5.19 England and Wales. The law on contributory negligence is governed in England and Wales, as in Scotland, by the Law Reform (Contributory Negligence) Act 1945. The main difference in the application of the Act north and south of the Border is in the definition of "fault". The English definition, contained in section 4, is in the following terms:

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

5.20 The application of the Act to breaches of contractual duty has been considered on numerous occasions in recent years. It would appear that the plea of contributory negligence is not available in actions founded on breach of a strict contractual obligation, that is where the defendant's liability does not depend on his having been

negligent[1]. As regards actions founded on breach of a contractual duty of care, the authorities are divided. In Sayers v. Harlow Urban District Council,[2] an action based on both negligence and breach of a contractual duty of care, the Court of Appeal held that contributory negligence was a partial defence to either cause of action. This decision was subsequently applied in De Meza and Stuart v. Apple, Van Straten, Shena and Stone,[3] where the plaintiff's claim rested solely on breach of a contractual duty of care.

5.21 Thereafter the courts adopted a stricter approach. In Basildon District Council v. J.E. Lesser (Properties) Ltd. and Others,[4] Judge Newey Q.C. held that the 1945 Act did not apply in contract because contributory negligence was based on a concept of blameworthiness which was irrelevant in contract. Neill L.J. reached a similar conclusion in A.B. Maritrans v. Comet Shipping Co. Ltd.,[5] on the ground that as the defence of contributory negligence had not been

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1 Quinn v. Burch Brothers (Builders) Ltd. [1965] 3 All E.R. 801. In this case, Paull J. made a distinction between breach of a contractual duty not to be negligent and breach of contract importing strict liability which was brought about negligently: in his view, the plaintiff's contributory negligence was relevant only in the former. See also Lambert v. Lewis [1980] 2 W.L.R. 299.

2 [1958] 2 All E.R. 342.

3 [1974] 1 Lloyds Rep. 508.

4 [1985] 1 All E.R. 20.

5 Supra.

available in contract at common law[1] there could be no relevant "fault of the person suffering the damage" within the meaning of section 1(1) of the Act. The definition of 'fault' in section 4 was directed to tortious liabilities alone and was not apt to cover breaches of contractual duties of care or breaches of statutory duty giving rise to liability other than in tort.

5.22 These two decisions have been criticised as giving an unnecessarily restrictive interpretation to the provisions of the 1945 Act.[2] More recently, in Forsikringsaktieselkapet Vesta v. Butcher and Others,[3] Hobhouse J. has taken the view that the plea of contributory negligence is available where the defendant's liability is the same in both contract and in the tort of negligence. His reasons were, firstly, that he was bound by the Court of Appeal decision in Sayers v. Harlow Urban District Council[4] and, secondly, that the parties had not by their contract varied the common law relationship which existed between them and which gave rise to tortious liabilities falling to be adjusted in accordance with the 1945 Act. Apportionment of blame was clearly one of the

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1 There are conflicting views on this issue. See Glanville Williams, op. cit., pp. 214-222; Palmer and Davies, "Contributory Negligence and Breach of Contract - English and Australasian Attitudes Compared" 1980 I.C.L.Q. 415 at pp. 418-422.

2 e.g. Burrows, "Contributory Negligence - A Defence to Breach of Contract?" 1985 L.Q.R. 161; Spowart Taylor, "Contributory Negligence - A Defence to Breach of Contract?" 1986 M.L.R. 102.

3 [1986] 2 All E.R. 488.

4 Supra.

legal incidents of that relationship which had not been excluded by the terms of their contract. Moreover, the provisos to section 1(1) of the 1945 Act "contemplate that the Act is capable of application where there is a contractual relationship between the parties and thus cast doubt on the approach adopted by Neill L.J. [in Maritrans]."[1] Although this latest decision reverts to a more liberal interpretation of the 1945 Act, recent conflicting authority means that the issue of contributory negligence in contract remains unsettled in English law.

Australasia

5.23 The statutory provisions dealing with contributory negligence in both Australia and New Zealand are generally based on the provisions of the 1945 Act.[2] In recent years, the courts in both countries have had to decide whether their apportionment legislation is applicable in contract. Their consideration of the issue has centred on the ambiguities in the definition of 'fault'. The weight of authority is against its application on the basis that the defence was not available in contract at common law and that not even breaches of a contractual duty of care come within the statutory definition of 'fault' which requires conduct

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1 [1986] 2 All E.R. 488 at p. 510.

2 e.g. Victoria, Wrongs Act 1958, s.26; Tasmania, Tortfeasors and Contributory Negligence Act 1954; New Zealand, Contributory Negligence Act 1947. See, generally, Fleming, The Law of Torts (6th edn., 1983) chap. 11.

giving rise to a liability in tort.[1] However in Rowe v. Turner Hopkins and Partners the New Zealand Court of Appeal, without being required to decide the point, seemed to leave open the possibility of the plea being available in contract, stating that "it can apply whenever negligence is an essential ingredient of the plaintiff's cause of action, whatever the source of the duty."[2]

Canada

5.24 Every common law jurisdiction in Canada has legislation dealing with contributory negligence.[3] Its main purpose has been to abrogate the common law rule that contributory negligence was a complete defence. To this extent, the legislation is broadly similar to the 1945 Act

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1 Belous v. Willetts [1970] V.R. 45; A.S. James Pty. Ltd. v. Duncan Vaile Bros. and Hobson Ltd. [1970] V.R. 705; Read v. Nerey Nominees Pty. Ltd. [1979] V.R. 47; Rowe v. Turner Hopkins & Partners [1980] 2 N.Z.L.R. 550 and [1982] 1 N.Z.L.R. 178. For a discussion of the Australian cases, see Palmer and Davies, loc. cit.; Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract" 1981 55 A.L.J. 278.

2 [1982] 1 N.Z.L.R. 178 per Cooke and Roper J.J. at p. 181.

3 e.g. British Columbia, Negligence Act 1979, s.1; Ontario Negligence Act 1970 s.4.

although there are differences in drafting.[1] In some,[2] the term 'fault' is left undefined and is open to various interpretations. There are a number of decisions, mainly at first instance, in which the defence has been allowed in answer to a claim for breach of a contractual duty of care or where the court has at least expressed a view in favour of application of the relevant statute[3] but the question does not appear to have been determined authoritatively.

5.25 Where the apportionment and contribution statutes have not been used in contractual claims, the courts have sometimes considered other ways of ensuring a fair

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1 Most of the statutes are modelled on a Uniform Act originally adopted in 1924: e.g. Alberta, Contributory Negligence Act 1955, s.2(1):

"Where by fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumtances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally."

2 e.g. the Alberta Act.

3 e.g. Truman v. Sparling Real Estate Ltd. (1977-78), 3 C.C.L.T. 205; Carmichael v. Mayo Lumber Co. (1978) 85 D.L.R. (3d) 538; Pajot v. Commonwealth Holiday Inns of Canada Ltd. (1978) 86 D.L.R. (3d) 729; cf. Caines v. Bank of Nova Scotia (1978) 22 N.B.R. (2d) 631 per Bugold J.A. at p. 653. These cases are discussed in Report no. 31 of the University of Alberta Institute of Law Research and Reform, Contributory Negligence and Concurrent Wrongdoers (1979) pp. 17-23. See also West Coast Finance Ltd. v. Gunderson, Stokes, Walton & Co. (1974) D.L.R. (3d) 232.

apportionment of liability in such circumstances.[1] In Giffels Associates Ltd. v. Eastern Cosntruction Co. Ltd.,[2] Larkin C.J.C. suggested that a claim for contribution could be allowed on general equitable principles between parties liable for breach of separate contracts. More relevant to our present discussion is the dissenting judgment of Pigeon J. in Smith v. McInnis[3]. This case involved an action for negligence against a solicitor and his subsequent claim for contribution against a barrister retained by him. The majority of the Supreme Court of Canada held that the barrister was not in breach of his retainer. Accordingly, it was unnecessary for them to consider questions regarding apportionment of liability, and in particular whether a solicitor's liability to his client lay in tort or contract and the consequent effect of the Tortfeasors Act and the Contributory Negligence Act. Pigeon J. however, held that the barrister was liable for breach of contract. Proceeding on the assumption that the Contributory Negligence Act was inapplicable to contractual liability, he suggested that, quite apart from statute, there could be apportionment in contract between the plaintiff and defendant or between defendant and third party where the fault of each had contributed to the loss suffered.

5.26 These dicta have been considered in later decisions. In Tompkins Hardware Ltd. v. North West Flying Services,[4]

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1 Morgan, "The Negligent Contract-Breaker" 1980 Can. B.R. 299.

2 (1978) 84 D.L.R. (3d) 344.

3 (1979) 91 D.L.R. (3d) 190.

4 (1983) 139 D.L.R. (3d) 329. See also Cosyns v. Smith (1983) 146 D.L.R. (3d) 622.

Saunders J. relied both on Pigeon J.'s opinion and on earlier authority supporting the application of apportionment legislation in contract to allow reduction of the plaintiff's damages. In Ribic v. Weinstein,[1] Grange J. held that the Ontario Negligence Act 1980 was inapplicable in contract but still limited the plaintiff's award at common law because of his share in responsibility for the loss. This judicial development of apportionment at common law has yet to be considered at appellate level.

5.27 Finally, it is worth noting the terms of the Canadian Uniform Contributory Fault Act which deals with contributory negligence as well as rights of relief among concurrent wrongdoers. The "last clear chance" rule is abolished expressly by section 3 of the Act. Section 5(1) provides:

> "Where the fault of two or more persons contributes to damage suffered by one or more of them, the liability for damages of a person whose fault contributed to the damage is reduced by an amount of the damages proportionate to the degree to which the fault of the person suffering the damage contributed to the damage."

The term "fault" is defined in section 1 to mean -

> "an act or omission that constitutes
>
> (a) a tort,
>
> (b) a breach of a statutory duty that creates a liability for damages,
>
> (c) a breach of duty of care arising from a contract that creates a liability for damages, or

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1 (1983) 140 D.L.R. (3d) 258.

(d) a failure of a person to take reasonable care of his own person, property or economic interest,

whether or not it is intentional."

Similar rules have been recommended by the Univesity of Alberta Institute of Law Research and Reform.[1]

Fire

5.28 The Civil Liability Act 1961 contains detailed provisions regarding contributory negligence, based largely on the draft legislation proposed by Glanville Williams.[2] Under the 1961 Act contributory negligence ceased to be an absolute defence. Section 34(1) of the Act provides:

> "Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant."

The meaning of "contributory negligence" is further defined in subsection (2) to include a negligent or careless failure to mitigate damage[3] but to exclude the plaintiff's breach of statutory duty unless the damage of which he

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1 Report No. 31 (1979), Draft Bill, clauses 1(d) and 6. This version omits breach of a statutory duty from the definition of fault.

2 Op. cit., chap. 22.

3 s.34(2)(b).

complains is damage that the statute was designed to prevent.[1] The plea may be made in any action in respect of a wrong, i.e. "a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the crime is intentional."[2] Apportionment of damages is according to the degrees of fault of the plaintiff and defendant which "is equated to blameworthiness and not to the potency of the causative factors moving from each side."[3]

South Africa

5.29 The apportionment of Damages Act 1956 introduced the principle of apportionment of liability in place of the "all or nothing" rule under the common law doctrine of contributory negligence. It also abolished the rule of last opportunity.[4] Section 1(1) is in almost identical terms to section 1(1) of the 1945 Act, the damages recoverable being reduced "to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage." "Fault" is defined

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1 s.34(2)(c).

2 s.2.

3 Kelly v. Jameson, unreported, Sup. Ct., 1 March 1972 (29-1970) per Walsh J. at p.4 (cited in McMahan and Binchy, Irish Law of Torts (1981) p.221). See also O'Sullivan v. Dwyer [1971] I.R. 275 (Sup. Ct.); Carroll v. Clare Co. Co. [1975] I R. 221 (Sup. Ct.).

4 s.1(1)(b).

to include "any act which would, but for the provisions of this section, have given rise to a defence of contributory negligence."[1] As regards the plaintiff, this is taken to mean conduct which would have founded a defence of contributory negligence at common law.[2] As regards the defendant, fault is construed to include vicarious liability but not liability for breach of a strict or absolute duty nor liability for intentional wrongdoing.[3] The absence of any express reference to delictual liability in section 1 paved the way for the contention that its apportionment provisions could be applied also to a claim for damages for breach of contract. This argument was, however, rejected in OK Bazaars (1929) Ltd. v. Stern and Ekermans[4] on the ground that the defence of contributory negligence was inapplicable in contract prior to 1956 and the legislature could not be regarded as having made such a radical change in the law without using clear language to express that intention.

Civil law jurisdictions

5.30 Rules for apportionment of liability have developed quite differently in civil law jurisdictions than in

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1 s.1(3).

2 King v. Pearl Insurance Co. Ltd. 1970(1) S.A. 462 (W).

3 McKerron, The Law of Delict (7th edn., 1971) p.297; Boberg, The Law of Delict, Vol. 1, (1984) pp. 655-61. See also Mabaso v. Felix 1981 (3) S.A. 868 (intentional wrongdoing); South African Railways and Harbour v. South African Stevedores Co. Ltd. 1983 (1) S.A. 1066 (breach of statutory duty).

4 1976(2) S.A. 52(C).

countries following the common law tradition. Long before the first apportionment legislation was introduced in Ontario in 1924, civil law systems had already acquired rules for apportionment as between pursuer and defender. In some countries, provision is to be found in the civil code. So, West German law provides[1]

> "If any fault of the injured party has contributed to causing the damage, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially how far the injury has been caused predominantly by the one or the other party."

No distinction is made between claims in delict and claims in contract: reduction of an award of damages on account of the injured party's own fault is applicable in both.[2] In other countries, notably France, equitable apportionment has been developed without statutory intervention.[3] Again, it applies whether the claim is for breach of an obligation owed by the defender in delict or in contract, the underlying principle of French law being that proof of fault is necessary to establish liability on either ground.[4]

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1 B.G.B. s.254(1). See also the General Civil Code of Austria, arts. 1295(1) and 1304.

2 Horn, Kotz and Leser, German Private and Commercial Law - An Introduction (1982) p. 153.

3 Honore, International Encyclopedia of Comparative Law, Vol. XI, Torts, Chap. 7, pp. 94-5.

4 Nicholas, French Law of Contract (1982) pp. 30 and 198-9; Amos and Walton, Introduction to French Law (3rd edn., 1967) p. 216.

Proposals for reform

(1) Contributory negligence in contract

5.31 The conclusion to be drawn from this brief survey is that those countries whose law on contributory negligence is based on statutory provision similar to our own are in a similar state of uncertainty regarding the availability of the defence in contract. It is only in Eire and under the Canadian Uniform Act that the matter has been put beyond doubt. As for the rest, the root cause of the problem seems to be the style of drafting used in the relevant legislation.

5.32 If the position in Scots law is to be clarified by statute, as we think it should be, the first question to consider is whether the pursuer's contributory negligence should have any relevance at all in contractual claims. Are there other mechanisms within the law of contract which can achieve similar results so as to render the specific plea of contributory negligence unnecessary? Of course, there is often the possibility of a cross-action by the defender against the negligent pursuer but this depends on the pursuer's conduct constituting a breach of a separate legal duty owed to the defender. In many cases, the prusuer's contribution to his loss will simply be a negligent failure to look after his own interests which does not give rise to any liability to third parties. The argument has also been advanced that the rules of causation and the duty imposed on the pursuer to mitigate his loss are more than adequate to restrict the defender's liability

in appropriate cases.[1] In our view, however, rules on causation of damage achieve a quite different result from that achieved by the doctrine of contributory negligence. Causation provides an "all or nothing" solution to the problem. To recover damages for breach of contract, the pursuer must show that the loss was directly caused by and was entirely, or at least mainly, attributable to that breach.[2] If the pursuer's own conduct was the proximate cause of his loss, the result is failure of his action, not apportionment of damages, even although the defender's breach of contract was an essential prerequisite to that loss.[3] On the other hand, the fact that the loss is caused by two equally co-operating causes, one being the defender's breach of contract, does not prevent damages being awarded against him.[4] How this rule would be applied where the other co-operating cause was the pursuer's own conduct is not clear.

5.33 Actings of the pursuer which would be sufficient to break the chain of causation, as novus actus interveniens,

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1 Harper v. Ashton's Circus Pty. Ltd. [1972] 2 N.S.W.L.R. 395 per Hope J.A.; cf. Basildon District Council v. J.E. Lesser (Properties) Ltd. and Others [1985] 1 All E.R.20 per Newey J. at p.30: "There was no room [in contract] for contributory negligence, although, in the assessment of damages, causation and the plaintiff's duty to mitigate his loss were very relevant." See also Palmer and Davies, loc. cit. pp. 447-51.

2 Walker, Civil Remedies (1974) p. 449.

3 Scouller v. Robertson (1829) 7 S. 344; Wood v. Mackay (1906) 8 F. 625. See also Quinn v. Burch Brothers (Builders) Ltd., supra; Lambert v. Lewis, supra.

4 A/B Karlshamns Oljefabriker v. Monarch S.S. Co. Ltd. 1947 S.C. 179; 1949 S.C. (H.L.) 1.

in either delict or contract are not comparable to actings which would justify a finding of contributory negligence. There is a difference in degree between conduct which is the predominant or proximate cause of the pursuer's loss and conduct by which the pursuer is partly responsible, even to a fairly minor extent, for his loss. To rely only on rules of causation to take account of the pursuer's conduct in contract can produce anomalous results if the court fails to distinguish behaviour which is so unreasonable that it constitutes a novus actus interveniens from unreasonable behaviour which merely contributes to the loss. Thus in Sole v. W.J. Hallt Ltd.,[1] where the defendants were concurrently liable in contract and tort, Swanwick J. held that if the claim were brought in contract the plaintiff's own negligence broke the chain of causation so that he would not recover any damages whereas, if the claim were brought in tort, the plaintiff's damages would have been reduced by one third because of his share of responsibility for his loss. This decision has been rightly criticised as overemphasizing the source of the duty rather than its content.[2] Where the duty is, in substance, the same in both contract and in tort then an act which breaks the chain of causation in contract should have the same effect in tort.

5.34 Reliance on the pursuer's duty to mitigate his loss is not a satisfactory answer either. Any failure by the pursuer to fulfil this duty is not a cause of the damage concurrent with the defender's breach of contract. The

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1 [1973] Q.B. 574.

2 Jolowicz, (1973) 32 C.L.J. 209; Goodhart, (1973) 89 L.Q.R. 322; Spowart Taylor, loc. cit..

duty to mitigate can arise only after the defender's breach has taken place. It is an obligation imposed on the pursuer to take reasonable steps to prevent greater loss or damage occurring as a result of the breach.[1] It cannot deal with cases where the pursuer's conduct is a co-operating cause of the damage itself.

5.35 Our provisional conclusion is that the rules of contract law relating to causation and mitigation of loss are not an appropriate substitute for a defence of contributory negligence. If that is the case, we must next consider the different types of contractual claim in which the pursuer's contributory negligence might be relevant. An analysis of the case law in other jurisdictions reveals that the question arises in the following sets of circumstances:

(a) where the defender is liable for breach of a contractual duty to take care and there is also concurrent liability in delict for his negligence;[2]

(b) where the defender is liable in contract only, for breach of a duty to take care;[3] and

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1 Gloag on Contract (2nd edn., 1929) p. 688.

2 e.g. Sayers v. Harlow Urban District Council, supra; Forsikringsaktieselskapet Vesta v. Butcher and Others, supra.

3 e.g. Rowe v. Turner Hopkins & Partners, supra.

(c) where the defender's liability for breach of a contractual obligation does not depend on his having been negligent.[1]

Each of these situations will be examined in turn.

5.36 Concurrent liability for negligence. This is the situation in which the defence of contributory negligence is easiest to justify. Where there is concurrent liability for failure to take reasonable care, it is anomalous that the outcome of the pursuer's claim should depend on whether the action is framed in delict or contract. If the pursuer can avoid a reduction of damages on account of his own negligence simply by choosing to sue in contract, he has an unfair advantage over the defender. This is particularly unsatisfactory given the present scope of concurrent liability, for example, in the field of professional negligence.[2] If the content of the defender's duty is the same on both grounds of liability, and contributory negligence is accepted as a defence when he is sued on one of the grounds, then that defence should also be available when he is sued on the other. This is the only way in which a fair apportionment of liability can be achieved.

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1 e.g. Lambert v. Lewis, supra (breach of the conditions of fitness for purpose and merchantability implied into a contract for sale of goods).

2 Robertson v. Bannigan 1965 S.L.T.66. More generally, see also Grunwald v. Hughes and Others 1965 S.L.T. 209; Junior Books Ltd. v. The Veitchi Co. Ltd. 1982 S.L.T. 333 and 492.

5.37 The injustice of any other rule has been acknowledged both by the courts[1] and by commentators.[2] Some commentators argue, perhaps rightly, that the 1945 Act is already wide enough to cover cases of concurrent liability[3] but, as we have seen,[4] this view has not been wholly accepted by the courts in England and Wales. Although the existing Scottish definition of "fault"[5] is certainly open to this wider interpretation, we think that the matter should be put beyond doubt. Accordingly we suggest that:

> 19. Where the defender is liable for breach of a contractual duty of care and is also under concurrent liability in delict for his negligence, the plea of contributory negligence should be available as a defence whether the action is framed in delict or in contract.

5.38 Liability for breach of a contractual duty of care. In certain circumstances, the defender may incur liability for breach of a duty of care owed only in contract, not in delict. For example, the contracting parties may agree to exclude delictual liability altogether, allowing claims only for breach of their contractual obligations one of which is

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1 e.g. A.B. Maritrans v. Comet Shipping Co. Ltd., supra per Neill L.J. at p. 448; Harper v. Ashtons Circus Pty. Ltd. [1972] 2 N.S.W.L.R. 395 per Manning J.

2 Swanton, loc. cit at p. 280; Burrows, loc. cit. at p.164.

3 Swanton, loc. cit., at p.280; Burrows, loc. cit., at p. 163; Spowart Taylor, loc. cit., at p. 108.

4 at paras. 5.19 to 5.22 above.

5 1945 Act, s.5(a).

an obligation to take reasonable care. Alternatively, the defender's liability may arise from a contractual obligation expressed in terms of taking care (or its equivalent) which does not correspond exactly to the common law duty to take care which would exist in the given case independently of contract.[1] In some jurisdictions, a claim for professional negligence by a client against his solicitor may lie only in contract.[2]

5.39 There are two opposing strands of argument in such cases. On the one hand, it may be said that the policy of the law should be to apportion liability between pursuer and defender in all cases where the fault of the pursuer, in the sense of a failure to look after his own interests, has contributed to his loss. The fact that the defender's liability may be in contract, rather than in delict, is of no importance. On the other hand, it may be maintained that notions of fault or blameworthiness have no place in contract since a contracting party is entitled to damages for loss resulting from a breach of the contract irrespective of how or why the breach occurred. If the defender's fault is irrelevant to liability, any fault on the part of the pursuer should also be ignored in determining the level of damages.

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1 See the analysis of the relevant case law made by Hobhouse J. in Forsikringsaktieselskapet Vesta v. Butcher and Others, supra at pp. 508-9.

2 e.g. New Zealand: Rowe v. Turner Hopkins & Partners, supra; cf. Belous v. Willetts [1970] V.R. 45, overruled by Macpherson & Kelley v. Kevin J. Prunty & Associates [1983] V.R. 573.

5.40 This argument may hold good in the case of breach of a strict contractual obligation, but it is less convincing where the contractual term which has been broken is one which expressly or impliedly requires the exercise of reasonable care. If notions of fault on the part of the defender are deliberately introduced into the contract, it is fair that any contributory fault on the part of the pursuer should also be relevant. Our provisional conclusion, on which we invite comment, is that:

20. The plea of contributory negligence should be available to the defender in answer to an action based solely on breach of a contractual duty of care .

5.41 Liability for breach of a strict contractual obligation. By this we mean cases where the defender is liable for breach of a contractual obligation other than an obligation to take care. If, for example, one party has agreed to supply a certain quantity of goods by a certain date, he will be liable for his failure to do so, regardless of whether or not he had taken reasonable cae to prevent his breach of contract. The argument against contributory negligence as a defence in these circumstances may be stated briefly. The fault of the defender is irrelevant to liability: therefore any fault on the part of the pursuer should also be irrelevant. The counter-argument is that if the defence is available in answer to claims based on strict liability at common law or under statute, it should also apply where an absolute obligation is imposed on the defender by virtue of the terms of the contract. Moreover, in some cases, strict liability in contract may co-exist with liability for negligence at common law. For instance,

a development company may be in breach of a contractual duty to supply a house which is fit for habitation and also be liable for negligence when subsidence occurs due to the house having been built on an unsuitable site.[1] If contributory negligence is not to be relevant in claims based on strict contractual liability, the pursuer can maximise the extent of the defender's liability by suing in contract rather than in delict.

5.42 We agree with Paull J. in Quinn v. Burch Bros. (Builders) Ltd.[2] that the question should not turn on whether or not the breach has been committed negligently. If the plea of contributory negligence were to be available only where the defender had himself been negligent, it would have the curious result that the contributorily negligent pursuer would recover larger damages where the defender had taken all care not to break the contract than he would where the defender had also been careless. If the defence is to be available at all, we think it should be available regardless of the manner of the breach.

5.43 We are not, however, persuaded that contributory negligence is relevant in actions based on strict contractual liability. The analogy drawn with strict liability at contract or under statute is not wholly accurate. As a general rule, the owner of a dangerous animal may reasonably expect members of the public coming in contact with his animal to take some precautions for their own safety. It would be a different matter if the owner were to undertake to a named individual that he

1 Batty v. Metropolitan Property Realisations Ltd. [1978] Q.B. 554.

2 Supra at p. 808.

would be liable for any injury caused to that person, no matter what the circumstances. A person bound by a contractual obligation has the opportunity to specify the terms of his undertaking and, in particular, the circumstances in which he might be released from his obligation. If he in fact agrees to be bound by the contract in all circumstances, even those involving irresponsibility or carelessness by the other contracting party, then he should not be able to plead that party's conduct in answer to a claim for breach of contract.

5.44 The same argument applies even where the defender is liable in delict for negligence as well as strictly liable under the terms of his contract.[1] The duties owed to the pursuer under the two heads are not co-extensive. One imports an absolute obligation, the other only an obligation to take reasonable care. There seems no reason in principle why the pursuer should not take advantage of the stricter obligation owed to him in contract and thus exclude the court from taking his own conduct into account in assessing the extent of the defender's liability. None of this means that the actings of the pursuer following the breach are to be disregarded. Rules on causation, remoteness of damage and mitigation of loss may all play a part in limiting the extent of the defender's liability or in extinguishing it altogether.

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1 cf. Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd. [1971] 1 Q.B. 88.

5.45 Comments are invited on the proposition that:

> 21. The plea of contributory negligence should not be available in answer to an action founded on breach of a contractual obligation other than a contractual obligation to take care.

5.46 Contracting out of the plea. In so far as we are proposing that contributory negligence should be relevant in claims for breach of contract, we also suggest that the contracting parties should be specifically entitled to exclude the plea in their contract. Under our proposals, such an exclusion could be made where one of the parties was under a contractual duty of care whether or not he was also under an equivalent duty of care in delict.

5.47 Contracting out of the plea was envisaged by Hobhouse J. in Forsikringsaktieselskapet Vesta v. Butcher and Others where he stated:[1]

> "The role of a contract is, by agreement, voluntarily to introduce into the relationship between the parties rights and liabilities, immunities or obligations, which would not exist in the absence of that contract. What legal obligations and immunities are thus introduced and to what extent, if at all, the legal incidents of the common law relationship are displaced, redefined or supplemented is ... a matter of the construction of the contract together with any terms properly to be implied or inferred."

Although this opinion was expressed in the context of concurrent liability in tort and contract, the principle is no different where liability is for breach of a duty of

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1 Supra at p. 510.

care owed only in contract. The parties should be entitled to adjust their rights and liabilities in such a way as to displace one of the standard legal incidents of the contractual relationship, i.e. by agreeing that the plea of contributory negligence should not be available.

5.48 Views are invited on the proposal that:

22. Insofar as contributory negligence may be relevant in actions founded on breach of contract, the contracting parties should be entitled to exclude the plea in their contract.

(2) Other reforms

5.49 Our examination of the law on contributory negligence has concentrated on the availability of the defence in contract. If our proposals on this question were to prove acceptable, we would recommend replacement of the 1945 Act with separate legislation for Scotland. It is therefore appropriate to consider what other aspects of the Act might benefit from reform if this step were to be taken.

5.50 Intentional delicts. By intentional delicts we mean wrongdoing where there is a deliberate intention on the part of the wrongdoer to cause loss or injury to another party, as in the case of assault, for example. The law imposes an absolute duty not to commit such wrongs. This may be contrasted with deliberate conduct which brings about an unintentional result. Here liability will be imposed only for breach of a duty of care owed to the injured party and only if the harm caused was reasonably foreseeable.

5.51 Actions based on intentional wrongdoing by the defender are not expressly excluded from the scope of the 1945 Act, as it applies to Scotland.[1] We are not aware of any direct Scottish authority on the matter, either at common law or under statute. The general, though not universal, view taken of the 1945 Act and equivalent legislation in other jurisdictions is that they do not allow any reduction of damages on account of the injured party's contributory negligence in cases where the defendant has committed an intentional tort.[2] This is on the basis that the legislation merely abrogated the "all or nothing" rule under the existing common law and did not seek to make contributory negligence a defence where it was not already a defence at common law.[3] The rationale behind the exclusion of contributory negligence in cases of intentional wrongdoing is that:

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1 Compare the English and Scottish definitions of fault in ss. 4 and 5(a).

2 Quinn v. Leathem [1901] A.C. 495 per Lord Lindley at p. 537:
"The intention to injure the plaintiff negatives all excuses."
See also, Glanville Williams, op. cit., pp. 198, 202-4 and 318; Lane v. Holloway [1968] 1 Q.B. 379; Mabaso v. Felix 1981(3) S.A. 865(A) at pp. 876-7; Horkin v. North Melbourne F.C. Social Club [1983] 1 V.R.153; contra, Murphy v. Culhane [1976] 3 All E.R. 533; Hoeberger v. Koppens [1974] 2 N.S.W.L.R. 597. See also Winfield and Jolowicz on Tort (12th edn., 1984) p. 150.

3 Horkin v. North Melbourne F.C. Social Club, supra, per Brooking J. at p. 158.

> "It is a penal provision aimed at repressing conduct flagrantly wrongful. Also it is a result of the ordinary human feeling that the defendant's wrongful intention so outweighs the plaintiff's wrongful negligence as to efface it altogether."[1]

5.52 We agree with this approach. The policy of discouraging deliberate misconduct seems more important than the policy of reducing the damages awarded to a person who has contributed to his own loss. Although there is some judicial support in England and Wales for the view that contributory negligence should be a partial defence in cases of assault if the pursuer's conduct was sufficiently serious to make him liable in tort or at least partly responsible for the damage,[2] there is no need for a similar approach to be taken in Scotland. Under Scots law, such conduct may amount to provocation which, it has been held, will mitigate the damages awarded.[3] In other instances of intentional wrongdoing, such as defamation, we are not convinced that it is appropriate, in policy terms, to allow the plea of contributory negligence, nor are we sure that the pursuer's conduct in such circumstances could be properly called contributory negligence in the sense of a failure to look after his own interests. In defamation, for example, there is a specific defence that the pursuer had authorised or consented to the statement being made:[4] we doubt whether there is scope for an additional plea based on his contributory fault.

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1 Glanville Williams, op. cit., p. 198.

2 Murphy v. Culhane, supra.

3 Ross v. Bryce 1972 S.L.T. (Sh. Ct.) 76.

4 Walker, Delict (2nd edn., 1981) p. 792.

5.53 Admittedly, both the Irish Civil Liability Act 1961[1] and the Canadian Uniform Contributory Fault Act[2] bring intentional wrongdoing within their scope. This was also the recommendation of the University of Alberta Institute of Law Research and Reform.[3] Their reasons were that it was difficult to define what was meant by an intentional tort; that it was unnecessary to exclude the plea expressly because the courts would be reluctant to allow it in any event where the defender had committed a deliberate tort; and that there may be some cases in which fairness demands that the plea should be available even where the damage is intended.[4] It seems to be accepted that the plea would be allowed only in very exceptional circumstances. Assault is the most obvious example and, as we have seen, provocation by the pursuer in such cases may already result in a reduction in the amount of damages awarded. We are not convinced that the alternative plea of contributory negligence is necessary. In the absence of any compelling reason to do otherwise, we prefer to stick to what is probably already the position under the existing law. Accordingly we propose that:

23. The plea of contributory negligence should not be available in answer to any action founded on liability in delict for intentional wrongdoing.

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1 s.2.

2 s.1.

3 Report No. 31 (1979), p.15.

4 Ibid. at pp. 11-15.

5.54 Contributory intention. It is not entirely clear from the statutory definition of fault whether, when applied to the conduct of the pursuer, it embraces both contributory negligence and contributory intention, i.e. an intentional act or omission which has combined with the defender's wrongdoing to cause loss to the pursuer. Glanville Williams argues[1] that contributory intention was a defence at common law but that it was probably expressed in terms of consent or causation. Before 1945, the classification of a defence based on the pursuer's deliberate conduct was of little practical importance. In all cases, a successful defence, whether based on contributory intention so called or on the issue of consent or causation, would defeat the pursuer's claim entirely. Now, of course, it is relevant to consider whether a separate category of contributory fault, one involving intention on the part of the pursuer, should exist alongside that of contributory negligence so as to allow for reduction of damages as an alternative to complete failure of P's action.

5.55 The present meaning of contributory negligence is wide enough to cover some kinds of intentional conduct by the pursuer, such as the deliberate failure to wear a seat belt[2] or being a passenger in a car knowing that the driver is drunk.[3] The American Restatement describes this conduct on the part of the plaintiff as an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has

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1 op. cit., pp. 199-201.

2 Mitchell v. Hutchison 1983 S.L.T. 392.

3 McCaig v. Langan 1964 S.L.T. 121.

reason to know.[1] Such conduct still falls within the general category of failure to look after one's own safety or interests.

5.56 In many cases intentional acts or omissions by the pursuer will be dealt with under the head of consent or volenti non fit injuria or may be such as will break the chain of causation. However this may not always be so. Intentional conduct on the part of the pursuer may contribute to his loss but may not be so significant as to imply his agreement to waive any claim for compensation from the defender. The defences of consent and voluntary assumption of risk may sometimes be excluded on public policy grounds, for example, in some cases of breach of statutory duty by an employer.[2] It is therefore arguable that in these situations the alternative plea of contributory fault, connoting deliberate conduct on the part of the pursuer, should be available in order to do justice between the parties.

5.57 In other circumstances it may be unfair if the pursuer's consent were to absolve the defender entirely from liability. If A wishes to die and B, at his request, kills him, what should be the effect of A's consent to his death in the subsequent civil action for damages raised by his family? A less fanciful example is where A provides heroin for his own use, asks B to administer it to him and then seeks damages from B because he has contracted hepatitis from use of a dirty needle. Arguably, in either

1 Restatement Second, Torts s.466.

2 Alford v. N.C.B. 1952 S.C. (H.L.) 17 per Lord Normand at p.22; Wheeler v. New Merton Board Mills Ltd. [1933] 2 K.B. 669.

case it would be unfair to exonerate B from all liability bcause he should not have acceded to A's request. Similarly, it would be unfair to ignore A's conduct as one of the effective causes of his death or illness. Whether his conduct would be regarded as contributory negligence under the present law is not clear.

5.58 We do not think it desirable to specify precisely what conduct may or may not amount to contributory negligence. This task should be left to the courts. Nevertheless, it may be helpful to make it clear that the doctrine applies to intentional as well as to negligent conduct by the pursuer on the ground that intentional wrongdoing by the pursuer, which may not be the same as a failure to take reasonable care for his own safety and interests, may merit reduction of his damages rather than complete failure of his claim. Against this it may be said that the doctrine, as presently applied, copes adequately with deliberate conduct which amounts to lack of care for one's own safety. Other intentional conduct contributing to the pursuer's loss is properly dealt with under the head of causation and voluntary assumption of risk. We have not reached any conclusion on this matter. Consultees are simply invited to respond to the question:

24. Should contributory negligence be defined so as to include intentional conduct by the pursuer which contributes to his loss or would the general definition of contributory negligence as conduct amounting to lack of care for one's own safety or interests suffice?

5.59 Alternatives to a claim based on negligence. Our main concern in examining the application of contributory negligence in contract has been to ensure that the pursuer should not be able to avoid a reduction of damages on account of his own contribution to his loss merely by choosing to frame his action in contract rather than in negligence. Hence we have suggested[1] that the plea should be available where the defender is under concurrent liability in delict and in contract for breach of a duty of care. However, concurrent liability for breach of a duty of care may exist not only in delict and contract but also, for example, in delict and nuisance. We have seen[2] that liability in nuisance may be based on negligence or on a deliberate act. In the former case, it clearly overlaps with the wider field of delictual liability for negligence itself. The law of nuisance has no distinctive role in such circumstances. It would, in our view, be unsatisfactory if the pursuer could avoid any reduction of damages on account of his own conduct by framing his action in nuisance rather than in negligence where the foundation of his claim, however it is expressed in legal terms, is breach of a duty of care owed by the defender. The same problem can arise, for example, where delictual liability for negligence overlaps with liability for breach of a right of support. The technical distinction between different forms of liability should not be used by the pursuer in order to maximise the amount of damages which he might receive. In principle, we think that where the defender is or could be found liable in negligence for the

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1 at para. 5.38 above.

2 at para. 5.13 above.

loss suffered by the pursuer, the plea of contributory negligence should be available regardless of the actual basis of the pursuer's claim.

5.60 A proposal stated in such broad terms would, however, go too far. It would be inconsistent with the view we have already expressed on cases where the defender is liable for breach of a contractual duty other than a duty of care. We have suggested[1] that contributory negligence should not be applicable in such cases even where the contractual liability overlaps with liability in delict for negligence. The reason is that the pursuer should be entitled to rely on the stricter obligation which has been specifically agreed between the parties and which clearly disregards any contribution which the pursuer himself might make to his loss. This type of case would have to be excluded from our proposal. It is, however, a different matter if the pursuer has alternative grounds of action under the general law of delict, one of which is the defender's negligence. In order to achieve fairness between the parties in this situation, we propose that:

> 25. Where the defender is or could be found liable in negligence for the loss suffered by the pursuer, the plea of contributory negligence should be available regardless of the actual basis of the pursuer's claim, except where the claim is for breach of a contractual obligation other than an obligation to take care.

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1 at paras. 5.42 to 5.46 above.

5.61 Vicarious responsibility for contributory negligence. Under the present law, it is not entirely clear whether the plea of contributory negligence is available where a person for whom the pursuer is vicariously liable contributed to the pursuer's loss. An obvious example of this would be where a van driver is involved in a road accident in the course of his employment and his employer seeks damages from the other driver in respect of damage caused to the van. On a literal construction of the 1945 Act, it is arguable that the plea is excluded, being available only where the pursuer has been personally at fault in contributing to his loss.[1] We are not aware of any direct Scottish authority on the point. In England, there is some pre-1945 authority which supports the availability of the plea at common law[2] and the general view taken is that the Act is applicable in such circumstances.[3] As a matter of principle, it would be anomalous if an employee's negligent conduct was imputed to his employer only where the employer was the defender in an action for damages, not where he was

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1 Section 1(1) refers to a person suffering damage as a result partly of his own fault and partly of the fault of another.

2 Chaplin v. Hawes (1828) 3 Car. & P. 554; Thompson v. Bundy, The Times 5 May 1938. See also dicta of the House of Lords in The Bernina, (1888) 13 App. Cas. at pp. 7, 13 and 16.

3 Glanville Williams, Joint Torts and Contributory Negligence (1951) pp. 432-36; Atiyah, Vicarious Liability (1967) pp. 409-10; Winfield and Jolowicz, Tort (12th edn., 1984) p. 157; Salmond and Heuston, Torts (18th edn., 1981) p. 489. In Jay & Sons v. Veevers Ltd. [1946] 1 All E.R. 646, the application of the Act was presumed without argument. See also Mallett v. Dunn [1949] 2 K.B. 180.

the pursuer. We have no doubt that the plea should be available in these cases but think it would be desirable for the legislation to say so expressly.

5.62 We therefore propose that:

> 26. It should be provided expressly that the plea of contributory negligence is available where a person for whom the pursuer is vicariously liable has contributed to the pursuer's loss.

5.63 Breach of trust. The Irish Civil Liability Act 1961 allows the plea of contributory negligence in answer to claims for breach of trust as well as to claims in tort and contract.[1] It is for consideration whether we should take the same approach, particularly in view of the fact that we are proposing to include breach of trust cases within our scheme for statutory rights of relief.[2]

5.64 There is already some provision in the Trusts (Scotland) Act 1921 which may be thought adequate to deal with cases where a beneficiary has contributed to the loss caused to the trust estate by the trustee's breach. Section 31 provides specifically for cases where the trustee has acted at the beneficiary's request. It is in the following terms:

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1 ss. 2 and 34(1). See para. 5.28 above.

2 See para. 4.13 above.

> "Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it shall think fit, make such order as to the court shall seem just for applying all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

In addition, section 32(1) provides

> "If it appears to the court that a trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, then the court may relieve the trustee either wholly or partly from personal liability for the same."

5.65 These two provisions taken together may well cover most cases in which questions of contributory negligence might arise. However, there is a possible gap in section 32 in that it requires the trustee to have acted both honestly and reasonably. Read literally, it means that where a beneficiary's conduct contributing to the loss has been wholly unreasonable and the trustee has himself acted unreasonably, but to a much lesser degree, relief under section 32 is not available.[1] This may suggest that a defender in an action for breach of trust should be allowed to take a separate plea based on the pursuer's contributory negligence.

5.66 Against this, it may be said that the problem is so minor that it does not justify any further legislative provision. We are reluctant to propose any extension of the plea into the law of trusts unless we are convinced that the gap which we have identified in the present law

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1 cf. Clarke v. Clarke's Trustees 1925 S.C. 693.

poses a real problem. We have had some difficulty in thinking of practical examples which would not be covered either by the existing provisions for relief and indemnity contained in the 1921 Act or by the simple expedient of a cross-action against the beneficiary. One possible example which occurs to us is where a trustee is obliged, in terms of the trust deed, to maintain a house for the occupation of the beneficiary. He breaches this obligation by not replacing a missing banister on the staircase, despite the fact that there are sufficient funds in the trust to enable him to do so. The beneficiary falls and is injured, partly as a result of the missing banister and partly as a result of his own carelessness in tripping on the stairs. The trustee cannot be said to have acted reasonably and therefore cannot take advantage of section 32. The beneficiary has, however, contributed to his own injury. Arguably, it should be open to the trustee to plead the beneficiary's contributory negligence in answer to the latter's action for breach of trust.

5.67 There may be other, less fanciful situations in which the plea of contributory negligence ought to be relevant. We would like to hear of any cases which consultees have come across in practice or which they can suggest from their own experience are likely to occur. In the meantime, we do not express a concluded opinion on the matter but invite consultees to respond to the following question:

27. Should the plea of contributory negligence be available in answer to an action founded on breach of trust?

PART VI - SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSIDERATION

Note. Attention is drawn to the notice at the front of the Memorandum concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this Memorandum may be referred to or attributed in our subsequent report.

Rights of Relief

In the proposals and questions which follow, "P" is used to mean the pursuer or person who has suffered the loss or injury, "D1" to mean the person claiming relief and "D2" to mean the person from whom relief is claimed. The expression "concurrent wrongdoer" is given an extended meaning to cover all parties liable in damages to the injured party for his loss, whether their liability arises in delict, contract, trust or otherwise.

1. (a) Statutory rights of relief should not be confined to cases where loss is suffered as a result of a delict but should cover cases where loss is suffered as a result of a delict, breach of contract, breach of trust or breach of any other obligation.

(b) Should it be provided that, in the absence of actual fault on his part, a person vicariously liable for the delicts of another should not be open to a claim for contribution at the instance of the actual wrongdoer and, conversely, that he should be entitled to full indemnity from the

actual wrongdoer, were he to seek contribution from him?

(c) The statutory scheme should not be extended to include rights of relief between parties one or both of whom is bound, by contract or statute, to indemnify the injured party for his loss.
(Para. 4.13)

2. (a) D1 should be able to claim contribution from any person who is liable to P in respect of the loss, injury or damage which he has sustained. Subject to Proposition 4 below regarding the time for ascertaining D2's liability, any plea which could have been taken to defeat P's claim should also be effective to defeat D1's claim for relief.

(b) For the purpose of (a) above, liability is to be determined according to Scots law, including, where appropriate, its rules of private international law. **(Para. 4.20)**

3. (a) D1 should have a right of relief against D2 either if he has been found liable to make payment to P or if he has made a settlement with P which has the effect of reducing or extinguishing D2's liability. In the case of a claim for relief founded on settlement, the question of D1's liability to P for the damage caused is irrelevant.

(b) In so far as a decree against D1 may form the basis of his claim of relief, it does not matter whether it was granted in Scotland or elsewhere.

(Para. 4.33)

4. (a) Subject to paragraphs (c) and (d) below, D2 should be bound to make contribution if he was liable to P at the time P commenced action against D1 or settled with him, whichever was the earlier ("the relevant date").

(b) For the purpose of paragraph (a) above and subject to paragraph (d) below, D2 should not be bound to make contribution if, at the relevant date, P's claim against him is barred by virtue of the expiry of a period of limitation or prescription.

(c) Where P's claim against D2 is for personal injuries and Scots law is applicable, D1 should have the opportunity to show that, had P sued D2 outwith the normal three-year limitation period, the court would have exercised its discretion under section 19A of the Prescription and Limitation (Scotland) Act 1973 to allow his claim.

(d) Any arrangement entered into between P and D2 after P's right of action against him has accrued, whereby D2 is no longer liable to P at the relevant date, should not have the effect of barring D1's claim for contribution. Such arrangements include those exempting D2 from all liability, discharging him from liability

following settlement and providing for a special limitation period governing P's claim.

(Para. 4.50)

5. (a) D1 should be bound by a finding of non-liability in favour of D2 made in proceedings brought by P provided it is made after a full proof on the merits. A finding of non-liability on one ground should not, however, bar D1 from claiming relief based on D2's liability on a different ground.

(b) To avoid the possible uncertainty of the general formula proposed in paragraph (a) above, should it be provided that D1 would be bound by a finding of non-liability granted in favour of D2 by any competent court on grounds which, if granted in Scotland, would give rise to a plea of res judicata betwen P and D2, except for such findings which, in Scotland, would take the form of a decree by default against P or a decree of absolvitor granted after settlement of the action or after abandonment by P?

(c) Insofar as relevant to his claim for contribution, D1 should also be bound by a finding made in proceedings brought by P that P's claim against D2 is time-barred or that D2's obligation to P has prescribed.

(d) For the purpose of paragraphs (a), (b) and (c) above, the finding in favour of D2 would have to be one made by a court (whether in Scotland or elsewhere) applying the law which Scots private

international law rules recognise as governing the matter.

(e) Should the principles outlined above apply to findings in favour of D2 made in arbitration proceedings between P and D2 whether or not D1 was also a party to those proceedings?

(Para. 4.65)

6. In assessing the amount of contribution payable, the court should not be bound by the level of award or settlement between P and D1. The amount of the award or settlement should, however, be the maximum sum of which D2 would be liable to pay a proportion by way of contribution.

(Para. 4.71)

7. Having determined D2's liability and the heads of damage recoverable under the applicable law, the court should quantify P's claim and D2's contribution according to Scots law as the law of the forum. The total value of P's claim should be assessed as at the time D2's liability is determined.

(Para. 4.76)

8. (a) Should D2's contribution be determined on the basis of

(i) such sum as the court deems just,

(ii) such sum as the court finds just and equitable having regard to the extent of his responsibility for the damage, or

(iii) such sum as is proportionate to the degree to which D2's wrongful act contributed to the damage?

(b) Whatever the basis of apportionment, the court should be entitled to award contribution amounting to a complete indemnity or exempt D2 from liability to make any contribution in appropriate cases.

(Para. 4.83)

9. (a) D2 should not be liable to pay more in contribution than he would have had to pay had he been sued by P direct.

(b) Where the amount of contribution calculated according to the rules in Proposition 8 above is greater than the maximum sum which D2 would be liable to pay to P, having regard to

(i) any financial limits imposed on D2's liability expressly by statute or by agreement entered into before P's right of action accrued against him, or

(ii) any limitations on his liability by virtue of P's contributory negligence

then the amount payable by D2 should be that maximum sum.

(Para. 4.91)

10. Should payment in settlement of the injured party's claim be given an extended definition to include payments in kind or the provision of a service, provided the value of such payment or service can be quantified?

(Para. 4.92)

11. (a) A concurrent wrongdoer who is sued by the injured party should not be required to make his claim for contribution in the same action, using third party procedure.

(b) (i) A concurrent wrongdoer who is sued by or who settles with the injured party should not be required to give notice of the claim to other parties allegedly liable for the same loss.

(ii) There being no requirement of notice, should the court still be entitled, in contribution proceedings, to have regard to any prejudice suffered by the defender to those proceedings as a result of not having received notice?

(c) If the proposition at paragraph (b) above is not accepted, should notice require to be given

(i) in all cases, subject to the court's discretion to disregard the lack of notice in appropriate circumstances, or

(ii) where it was reasonable and practicable to do so?

(d) If notice of the original claim were to be a relevant consideration for the court in contribution proceedings, should notice require to be given

(i) within a specified period of the claim having been made or before settlement has been reached, or

(ii) as soon as is reasonably practicable?

(e) If notice of the original claim were to be a relevant consideration for the court in contribution proceedings, should the sanction for failure to give notice be

(i) dismissal of the action for relief

(ii) reduction in the amount of contribution awarded, or

(iii) an award of expenses against the pursuer?

(Para. 4.100)

12. D1 should be entitled to raise an action for relief as soon as he is found liable to P or as soon as he has agreed to settle P's claim but he should not be able to obtain decree for contribution against D2, except with the consent of the court, until he has made full payment to P.

(Para. 4.107)

13. Where contribution payable by one concurrent wrongdoer cannot be recovered, the court should have power

(a) to apportion his share of contribution among the remaining wrongdoers, or

(b) in cases where decree for contribution has already been granted against him, to re-allocate his share among the remaining wrongdoers

in such proportions as the court finds just.

(Para. 4.111)

14. (a) The court should be entitled to award contribution, as it sees fit, towards any expenses in which D1 has been found liable in court procedings taken by P.

(b) Where D1 has not claimed contribution by way of third party procedure in P's action, the court should be entitled, as it sees fit, to find D1 liable for the whole expenses of his action of relief or to find no expenses due to or by either party.

(Para. 4.115)

15. (a) Contractual or other rights of indemnity between concurrent wrongdoers should continue to be recognised and no contribution should be recoverable from a person who is entitled to be indemnified by the person seeking relief.

(b) Express contractual rights of relief between concurrent wrongdoers should not be superseded by the proposed new statutory right to contribution.

(Para. 4.116)

16. All obligations to make contribution which come within our proposed scheme should be subject to a two-year prescriptive period.

(Para. 4.118)

17. The two-year prescriptive period, subject to interruption on account of disability, fraud or error, should start to run from the date when D1's liability has been established and quantified or when he has agreed to settle P's claim and the amount of the settlement has been fixed.

(Para. 4.119)

18. (a) The law selected to determine the existence and scope of a right of relief should be

(i) the law governing any relationship between D1 and D2 which is connected with the loss caused to P, or

(ii) in the absence of any such relationship, the law governing D2's liability to P.

(b) Should it be possible to displace the law governing D2's liability to P in favour of the law of another country which, in the circumstances of the individual case, has the closest and most substantial connection with D2's obligation to contribute?

(Para. 4.125)

Contributory negligence

19. Where the defender is liable for breach of a contractual duty of care and is also under concurrent liability in delict for his negligence, the plea of contributory negligence should be available as a defence whether or not the action is framed in delict or in contract.

(Para. 5.37)

20. The plea of contributory negligence should be available to the defender in answer to an action based solely on breach of a contractual duty of care.

(Para. 5.40)

21. The plea of contributory negligence should not be available in answer to an action founded on breach of a contractual obligation other than a contractual obligation to take care.

(Para. 5.45)

22. Insofar as contributory negligence may be relevant in actions founded on breach of contract, the contracting parties should be entitled to exclude the plea in their contract.

(Para. 5.48)

23. The plea of contributory negligence should not be available in answer to any action founded on liability in delict for intentional wrongdoing.

(Para. 5.53)

24. Should contributory negligence be defined so as to include intentional conduct by the pursuer which contributes to his loss or would the general definition of contributory negligence as conduct amounting to lack of care for one's safety or interests suffice?

(Para. 5.58)

25. Where the defender is or could be found liable in negligence for the loss suffered by the pursuer, the plea of contributory negligence should be available regardless of the actual basis of the pursuer's claim, except where the claim is for breach of a contractual obligation other than an obligation to take care.

(Para. 5.60)

26. It should be provided expressly that the plea of contributory negligence is available where a person for whom the pursuer is vicariously liable has contributed to the pursuer's loss.

(Para. 5.62)

27. Should the plea of contributory negligence be available in answer to an action founded on breach of trust?

(Para. 5.67)