The Law Commission

(LAW COM. No. 79)

LAW OF CONTRACT

REPORT ON CONTRIBUTION

Laid before Parliament by the Lord High Chancellor pursuant to section 3 (2) *of the Law Commissions Act* 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Cooke, *Chairman.*
Mr. Stephen Edell.
Mr. Derek Hodgson, Q.C.
Mr. Norman S. Marsh, C.B.E., Q.C.
Dr. Peter M. North.

The Secretary of the Law Commission is Mr. J. M. Cartwright Sharp and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

CONTRIBUTION

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THE LAW COMMISSION

Item I of the First Programme

CONTRIBUTION

To the Right Honourable the Lord Elwyn-Jones,
Lord High Chancellor of Great Britain

PART I

INTRODUCTION

1. On 12 July 1971 The Law Society and the General Council of the Bar submitted a memorandum to us in which they drew attention to a variety of legal problems that seemed to call for law reform, including the following:—

> "Co-contractors and co-tortfeasors may claim contribution from one another but not where each of two (for example architect and builder) is liable for breach of his separate contract. An extension of Section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 could be made."

2. In our *First Programme*[1] we had included in Item I "an examination of the law of contract, quasi-contract, and such other topics as may appear in the course of the examination to be inseparably connected with them . . .". This item covered the problem referred to us and we therefore initiated a study of contribution rights in respect of contractual liability and under section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935[2]. In the remainder of this report we shall refer to this Act as "the 1935 Act"; section 6 of it is reproduced at the end of the report as Appendix A.

3. Our Working Paper on Contribution[3] was published on 15 May 1975. In it we canvassed a number of proposals for the reform of the 1935 Act. The principal one was that the statutory jurisdiction to make orders for contribution should not be limited to the situation where both the claimant and the contributor were liable to the plaintiff in tort, as at present, but should be widened to cover the situation where one or the other (or both) was not a tortfeasor but was liable to the plaintiff for breach of contract, breach of trust or other breach of duty[4].

4. We gave several examples in our working paper of situations in which two potential defendants were each liable to the plaintiff but had no right of contribution between each other[5]. It is convenient to repeat two of them here. For ease of exposition the plaintiff is abbreviated here, and elsewhere in the report, to P; the defendant claiming the contribution is described as D1 and the one from whom it is claimed is described as D2.

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[1] (1965) Law Com. No. 1.
[2] *Seventh Annual Report* (1972), Law Com. No. 50, para. 52.
[3] Working Paper No. 59.
[4] Working Paper No. 59, para. 56(*a*).
[5] *ibid.*, paras. 8 and 22.

5. The facts of the first example are based on those of *McConnell* v. *Lynch-Robinson*[6]. It was assumed by the Court of Appeal of Northern Ireland, for the purposes of the decision, that the following facts were proved:—

(*a*) P had engaged D1, an architect, to draw plans and to supervise certain building work;

(*b*) by a separate contract, P had engaged a builder, D2, to do the work in accordance with the plans and subject to the supervision of D1;

(*c*) D2, in breach of his contract, had put a damp-course in the wrong place and D1 had, in breach of his contract, failed to see that the error was put right; and

(*d*) P had incurred expenses in having remedial work done and had a sustainable claim in damages against D1 and also against D2.

6. On these facts D1 would have no right to contribution from D2 under the 1935 Act as neither would be a tortfeasor[7]. This would mean that if P were to enforce his claim in full against either D1 or D2, the statutory jurisdiction to order one defendant to indemnify or pay a contribution to the sum paid by the other would not be available[8].

7. Even if one of the defendants *were* a tortfeasor the 1935 Act would still have no application if the other defendant was not. This may be illustrated by a further example:—

> P's house falls down and two persons are to blame. One is the architect, D1, whom he engaged under a contract and the other is the local authority, D2, which is liable in tort for the negligence of its building inspector[9].

The 1935 Act requires that *both* defendants must be tortfeasors so it would not apply to such a situation.

8. The theme of our working paper was that the 1935 Act was too narrow in its scope and that in certain circumstances, such as the two examples just given, injustice could result. The facts of the first example were taken from a reported case and although the facts of the second example were invented for the purpose of illustrating the point in the working paper we learnt, on consultation, that they do occasionally arise in practice. In other common law jurisdictions, notably in Canada, the law of contribution has run into similar difficulties[10].

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[6] [1957] N.I. 70. The court was concerned with the scope of s.16(1) (*c*) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937, which is to the same effect as s.6(1) (*c*) of the 1935 Act.

[7] Except perhaps where the defects in the work gave rise to liability under s.1(1) of the Defective Premises Act 1972.

[8] *cf. Dabous* v. *Zuliani* (1974) 52 D.L.R. (3d) 664 (Ont.H.C.) in which the Ontario High Court held, on similar facts, that the architect, D1, could not claim a contribution from the builder, D2, under the Ontario Negligence Act, Revised Statutes of Ontario 1970, c. 296 s.2(1) as P's claim against each lay in contract, not in tort.

[9] The liability of the local authority was considered in *Dutton* v. *Bognor Regis U.D.C.* [1972] 1 Q.B. 373.

[10] *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.* (1974) 46 D.L.R. (3d) 28 (Ont.H.C.); *Sealand of the Pacific Ltd.* v. *McHaffe Ltd.* (1974) 51 D.L.R. (3d) 702 (B.C.C.A.); *Nowlan* v. *Brunswick Construction Ltée* (1972) 34 D.L.R. (3d) 422, affirmed sub nom. *Brunswick Construction Ltée* v. *Nowland* (1974) 49 D.L.R. (3d) 93 (Sup. Ct. of Canada); *Groves-Raffin Construction* v. *Bank of Nova Scotia and Canadian Imperial Bank of Commerce* (1974) 51 D.L.R. (3d) 380 (B.C.S.C.); the University of Alberta Institute of Law Research and Reform, Working Paper, Contributory Negligence and Concurrent Tortfeasors (1975); Ernest J. Weinrib, "Contribution in a contractual setting", (1976) 54 Can. B.R. 338-350.

9. Although the provisional recommendations with which we concluded our working paper were all concerned with enlarging the scope of the 1935 Act we did not suggest that the whole of the present law of contribution could be swept up in a single statute: we made no proposals for supplanting contractual rights of contribution by statutory rights and we suggested that quasi-contractual rights of contribution—at least so far as debts were concerned —should continue to be governed by the present rules of the common law and equity[11]. However we did examine the whole of the existing law of contribution in our working paper and invited comments not only on our provisional recommendations but also on any related points that might not have been dealt with expressly[12].

10. The comments that followed the publication of our working paper have confirmed our provisional view that the law of contribution needs reform. A list of those from whom comments have been received appears at the end of this report as Appendix B. Although we consulted widely the response came almost entirely from insurers, teachers of law and legal practitioners. As might be expected, we had extremely full and illuminating comments from The Law Society and from the Senate of The Inns of Court and the Bar[13]. They were the promoters of the original law reform proposal[14] and they went to a lot of trouble to see that all the problems in this branch of the law were thoroughly aired; we are extremely grateful to them. Taking the comments we received on consultation as a whole, there were differences of opinion over the extent of the proposed reforms but there was general agreement on the need for reform and on the proposal that the 1935 Act should be given a wider ambit.

11. In this report we have chosen the following scheme. We start, in Part II, with a resumé of the present law of contribution. In Part III we set out the matters on which we make no recommendations for change in the present law. In Part IV we summarise the matters that, in our view, need reform, together with our recommendations for changes. A draft Bill and explanatory notes are annexed as Appendix C.

PART II

THE PRESENT LAW

12. The present law of contribution can be conveniently divided into two. One part is made up of contract, quasi-contract and rules of equity with minor statutory additions[15]. The other came into existence with the introduction of statutory rights of contribution between tortfeasors under section 6 of the 1935 Act.

Recovery of contribution at common law

13. A right to contribution or indemnity may be created by contract. For example, contractors may hire out a mechanical excavator, together with its

[11] Working Paper No. 59, para. 45(*a*), (*b*) and (*c*).
[12] *ibid.*, para. 55.
[13] The Senate of the Inns of Court and the Bar took over the functions and powers of the General Council of the Bar on 27 July 1974.
[14] See para. 1, above.
[15] See, *e.g.*, ss. 32 and 80 of the Marine Insurance Act 1906 and s. 75 of the Consumer Credit Act 1974.

driver, on terms that require the hirer to indemnify them against claims arising out of the driver's operation of the plant[16]. A right to contribution may also arise between co-contractors, co-sureties, co-executors and co-trustees. There need not be a contract between the party seeking contribution and the party from whom it is sought. It is enough that each is liable to a common demand and this can arise even where the contracts governing the liability of each are made separately or on different occasions[17]. The right to recover contribution in such a situation is quasi-contractual in character.

14. In *Whitham* v. *Bullock*[18] the Court of Appeal approved the following description of the court's role in contribution proceedings between persons equally liable at law to the same demand:—

> "If, as between several persons or properties all equally liable at law to the same demand, it would be equitable that the burden should fall in a certain way, the Court will so far as possible, having regard to the solvency of the different parties, see that, if that burden is placed inequitably by the exercise of the legal right, its incidence should be afterwards readjusted[19]."

15. The rules for dividing the loss up into shares are fully considered by Professor Glanville Williams Q.C. in his book *Joint Obligations*[20]. The general rule is that, unless there has been an agreement to the contrary, the amount of the loss is divided by the number of solvent persons liable and each bears an equal share. However, where two or more persons underwrite a liability in unequal shares or up to differing limits, as is not uncommon with contracts of guarantee or of insurance, the right of contribution is not equal but is proportionate to the liability of each. We suggested in our working paper that the rules worked reasonably well, at least so far as joint liability for debts was concerned[21], and this provisional conclusion received the general, although not unanimous, support of those who sent us comments. The major defect in contribution proceedings at common law, a defect that was not cured by the 1935 Act, is that they are only available where D1 and D2 are liable to a common demand and thus do not apply to the kind of case with which our proposals are primarily concerned[22].

16. We should next mention the court's power to order an *indemnity* where two persons are liable for the same debt or damages but the liability of one is primary and that of the other is secondary. The classic example is the contract of guarantee whereby the guarantor agrees to pay if the debtor defaults. The liability of the guarantor is secondary and if he has to pay the creditor he may recover an indemnity from the debtor whose liability is primary. In *Brook's Wharf and Bull Wharf Ltd.* v *Goodman Bros.*[23] Lord Wright M.R. described this aspect of the court's jurisdiction in the following words:

> "The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled

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[16] *cf. Arthur White (Contractors) Ltd.* v. *Tarmac Civil Engineering Ltd.* [1967] 1 W.L.R. 1508.
[17] *Deering (Dering)* v. *Earl of Winchelsea* (1787) 2 Bos. Pul. 270; 126 E.R. 1276; (1787) 1 Cox 318; 29 E.R. 1184.
[18] [1939] 2 K.B. 81, 85.
[19] This passage was taken from *Rowlatt on Principal and Surety* (3rd ed., 1936), p. 173.
[20] (1949), chapter 9.
[21] Working Paper No. 59, paras. 20 and 45(*a*).
[22] See paras. 5 and 7, above.
[23] [1937] 1 K.B. 534, 544-545.

to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff . . . The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law apart from any consent or intention of the parties or any privity of contract".

Lord Wright M.R.'s judgment was recently cited with approval in *Owen* v. *Tate*[24]. We suggested in our working paper that the court's jurisdiction to order an indemnity in such circumstances should be preserved[25]. No-one whom we consulted disagreed.

17. There were at common law a few situations in which one tortfeasor could claim a contribution from another tortfeasor but the general rule was that such a claim might not be made "because of the underlying proposition that no man can claim damages when the root of the damage which he claims is his own wrong"[26]. In 1934 the Law Revision Committee considered "the doctrine of no contribution between tortfeasors" and reported that it should be altered as speedily as possible[27]. This recommendation was implemented by section 6 of the 1935 Act.

The 1935 Act

Successive actions in respect of the same damage

18. Major changes in the law of contribution between tortfeasors were made by sections 6(1)(*c*) and 6(2) of the 1935 Act. Sections 6(1)(*a*) and 6(1)(*b*) are not concerned with rights of contribution as such but with the related question whether a plaintiff should be allowed to bring separate or successive actions in tort arising out of the same damage against different people. At common law where two persons were jointly liable for the payment of a debt or damages, judgment against one, although unsatisfied, released the other from his obligations[28]; the effect of section 6(1)(*a*) has been to change the law where the defendants are jointly liable in tort but not where they are jointly liable in contract. However, section 6(1)(*b*) discourages the plaintiff from suing tortfeasors in separate or successive proceedings by providing that the sums so recoverable should not in the aggregate exceed the amount of the damages awarded by the judgment first given and that the plaintiff should not ordinarily be entitled to the costs of any but the first action. We mention these provisions here because we shall be making recommendations for changes in them later in this report[29].

Recovery of contribution under the 1935 Act

19. Section 6(1)(*c*) gave new rights of contribution to tortfeasors:

"where damage is suffered by any person as a result of a tort . . . any tortfeasor liable in respect of that damage may recover contribution from any

[24] [1976] Q.B. 402, 408.
[25] Working Paper No. 59, para. 45(*b*).
[26] *Weld-Blundell* v. *Stephens* [1920] A.C. 956, 976, *per* Lord Dunedin. The proposition has been traced back to *Merryweather* v. *Nixan* (1799) 8 T.R. 186; 101 E.R. 1337, and is sometimes referred to as "the rule in *Merryweather* v. *Nixan*".
[27] *Third Interim Report* (1934), Cmd. 4637, para. 7.
[28] *King* v. *Hoare* (1844) 13 M. & W. 494; 153 E.R. 206.
[29] See paras. 34-41, below.

other tortfeasor who is, or would if sued have been, liable in respect of the same damage . . ."

Recovery by a tortfeasor

20. Statutory rights of contribution were thus given to "any tortfeasor liable in respect of that damage", and defendant tortfeasors have recourse to them in cases where more than one tortfeasor is sued to judgment by the plaintiff. Where only one tortfeasor is sued by the plaintiff he may assert his claim to contribution under the 1935 Act from another tortfeasor by third party proceedings or in a separate action. It is usual, and obviously desirable, for all the issues raised on the plaintiff's claim for damages and the defendant's claim for contribution to be disposed of in a single hearing. To this end claims that are initiated by separate proceedings may be consolidated and tried together.

21. The general tenor of comments received on consultation was that the regime for contribution proceedings set up by the 1935 Act worked reasonably well as between tortfeasors. However, as we pointed out earlier[30], it is of no assistance to persons liable in damages for breach of contract. Nor is it of any help to persons who may not be liable at all. A person who settles out of court with the plaintiff because he thinks that there is a risk that he may be found liable may not recover a contribution under the 1935 Act merely by reason of the settlement. Unless the court is satisfied that he is indeed a tortfeasor no claim for contribution will lie, however honest and reasonable the compromise may have been and even though it has reduced or extinguished the liability of the person from whom he claims contribution.

Recovery from a tortfeasor

22. Contribution may be recovered under the 1935 Act from "any other tortfeasor who is, or would if sued have been, liable in respect of the same damage". To this proposition a proviso is added by section 6(1)(*c*) to the effect that no tortfeasor may recover contribution under the 1935 Act from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. Where two tortfeasors are adjudged liable to the plaintiff in respect of the same damage they will usually have mutual rights of contribution under the 1935 Act. However, a defendant who is adjudged liable to the plaintiff otherwise than in tort, for example for breach of contract, may not be ordered to pay a contribution under the 1935 Act. Moreover, a defendant who is adjudged *not* liable to the plaintiff may in some circumstances rely on his success against the plaintiff as a complete answer to a claim for contribution. A dismissal of the plaintiff's claim for want of prosecution will not suffice for these purposes[31] but if a defendant defeats the plaintiff's claim after a hearing on the merits or if a defence under the Limitation Acts is upheld he cannot be required thereafter to pay a contribution to the other defendant[32].

The amount recoverable

23. The amount recoverable in contribution proceedings under the 1935 Act is governed by section 6(2) which provides as follows:

"In any proceedings for contribution under this section the amount of

[30] At paras. 3-7, above.
[31] *Hart* v. *Hall and Pickles Ltd.* [1969] 1 Q.B. 405.
[32] *Geo. Wimpey & Co. Ltd.* v. *B.O.A.C.* [1955] A.C. 169.

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

Limitation periods

24. Where contribution is not claimed under the 1935 Act but at common law, the limitation period for bringing the claim is the same as for any other proceedings founded on contract or quasi-contract, that is to say, six years from the date on which the cause of action accrued, or three years where the claim consists of or includes damages in respect of personal injuries[33]. However, where contribution is claimed under the 1935 Act the limitation period is, in all cases, two years from the date when the right to claim contribution accrued[34]. For limitation purposes the right to claim contribution under the 1935 Act is taken to accrue when judgment for the plaintiff is given against the tortfeasor claiming it or, if he admits liability before judgment, when the amount payable to the plaintiff has been settled by agreement[35]. The Law Reform Committee are at present considering whether any, and if so what, changes are needed in the present law on limitation periods in relation to contribution proceedings.

25. A tortfeasor who has not been sued by the plaintiff may be liable to pay a contribution to another tortfeasor even though he would have had a good defence under the provisions of the Limitation Acts to an action by the plaintiff. Section 6(1)(*c*) of the 1935 Act gives a tortfeasor a right to recover contribution from "any other tortfeasor who is, *or would if sued have been, liable*"[36] and this has been construed as including any tortfeasor who would have been liable if sued "at the time most favourable to the plaintiff"[37] or "at any time"[38].

PART III

MATTERS ON WHICH NO CHANGES IN THE PRESENT LAW ARE PROPOSED

Common law rights of indemnity

26. A right of *indemnity* may be created by contract or may be founded in quasi-contract. Such rights do not depend upon the 1935 Act for their existence. There was general agreement, on consultation, with our provisional view that common law rights of indemnity, where they existed, should be preserved[39]. We accordingly recommend no changes in this part of the existing law.

Common law rights of contribution

27. A right of *contribution*, that is to say a right to something less than a complete indemnity, may be created by contract or may be founded in quasi-contract. It is convenient to refer to such rights here as common law rights of

[33] Limitation Act 1939, s. 2(1)(*a*).
[34] Limitation Act 1963, s. 4(1).
[35] *ibid.*, s. 4(2).
[36] Emphasis has been added.
[37] *Geo. Wimpey & Co. Ltd.* v. *B.O.A.C.* [1955] A.C. 169, 190, *per* Lord Reid.
[38] *Harvey* v. *R. G. O'Dell Ltd.* [1958] 2 Q.B. 78, 109, *per* McNair J.
[39] Working Paper No. 59, para. 45(*b*).

contribution. Where such rights exist, the amounts or proportions of the contributions recoverable may be regulated by the terms of the parties' own agreement. However, where there is no such agreement, or where the agreement has not been worked out in sufficient detail to cover the situation that has arisen, the amount or proportion recoverable is determined by certain equitable rules that have been developed over the years. The theme that underlies these rules is that persons who are liable to the same demand should, in the ordinary way[40], share the burden of that liability equally.

28. We said in our working paper[41] that the equitable rules seemed to work reasonably well where the persons concerned were liable in *debt* to the same demand. Not everyone agreed with us and we return to the point of disagreement in the next paragraph. However, we criticised the equitable rules for being insufficiently flexible where the persons concerned were jointly liable in *damages*. Our point, and it won almost unanimous support, was that the 1935 Act improved on the common law not only by allowing contribution proceedings between tortfeasors but also by requiring the court to order D2 to pay such contribution "as may be just and equitable *having regard to that person's responsibility for the damage*"[42]. The significance of this requirement is that where D2 is more to blame for the damage than D1 he may, under the 1935 Act, be ordered to pay more by way of contribution. The equitable rules, on the other hand, provide that the loss is to be shared equally between D1 and D2 even where D2 is more to blame than D1,[43] unless the balance of responsibility is so heavily tipped against D2 that a complete indemnity is justified[44]. Later in this report[45] we recommend that, provided the substantive claim is for damages, the statutory jurisdiction to award a contribution should be available for and against contractors as well as tortfeasors. This would mean that, in contribution proceedings between persons jointly liable in damages for breach of contract, the court's power to divide the damages justly and equitably, having regard to the responsibility of each for the damage, would no longer be fettered by the existing rules. We bring this point out now because of a division of opinion, which it is convenient to consider at this stage, over the desirability of limiting the recommendation to contribution proceedings between persons jointly liable in *damages*.

29. It has been said that the existing rules can work unfairly in contribution proceedings between persons jointly liable for the same *debt*, for example, between persons liable as partners, joint tenants or joint guarantors. The existing rules generally result in persons who are equally liable having to bear an equal share[46], without regard to the part they played in incurring the debt or the benefit, if any, that they derived under the agreement. It has been argued that this can lead to injustice and that the courts should therefore be given an overriding

[40] Special rules have been developed to deal with special situations, such as where one (or more) of those jointly liable is insolvent, or where liability is assumed by two or more persons in unequal proportions. See para. 15, above.
[41] Working Paper No. 59, para. 20.
[42] Section 6(2); emphasis has been added.
[43] *Bahin* v. *Hughes* (1886) 31 Ch. D. 390.
[44] For example where D1 and D2 are partners, and D2's conduct amounts to a fraud on D1 as well as on P; *Robertson* v. *Southgate* (1847) 6 Hare 536; 67 E.R. 1276.
[45] See para. 33, below.
[46] See para. 15, above.

discretion in contribution proceedings to redistribute the burden of the debt in whatever way the justice of the case may require. Although the argument has its attractions there are substantial points to be considered on the other side. First, although no doubt hardship *can* result from the existing rules, it is not apparent from reported cases or from comments received on consultation that hardship results in practice to any appreciable extent. Second, it is always open to those jointly liable for a debt to agree between themselves how the burden of the debt should be distributed between them; the court will then enforce their agreement. Third, a discretion in the court to reallocate the burden of debts between those jointly liable for them would introduce an element of uncertainty which would in many cases be extremely undesirable; it would, for example, make the preparation of partnership accounts very difficult, particularly once the partnership was dissolved; litigation would be almost inevitable. Our conclusion, so far as joint *debts* are concerned, is that it is more important that the rules should be reasonably certain than that the court should have a wide discretion to redistribute the burden of each and every joint debt according to the general merits of the particular case. We accordingly make no recommendation for changing the existing law of contribution as it applies to joint debts.

Contributory negligence

30. In our working paper we mentioned that the existing law of contributory negligence might be in need of reform but that it was not appropriate to deal with it as part of our work on the law of contribution[47]. We drew attention to the difficulties in the existing law where the plaintiff claims damages for breach of contract. It may be that where the breach of contract in question consists of the breach of a contractual duty of care the defendant is entitled to a reduction in the damages for which he is otherwise liable on the ground of the plaintiff's contributory negligence[48]. However, where the contractual breach is of a duty other than a duty of care contributory negligence on the part of the plaintiff is not, it seems, available as a partial defence. Many of those we consulted expressed the view that this was an anomaly, and that the Law Reform (Contributory Negligence) Act 1945 should be examined with a view to its reform. Some went further and proposed that the overhaul of the law of contributory negligence should be done at the same time as that of the law of contribution; they pointed out that the subjects were related and to take them separately would mean reforms of a "piecemeal" kind. These arguments have force and if we were satisfied that the reform of the law of contributory negligence could be dealt with satisfactorily in a summary way we might have felt able to adopt them. However we doubt whether the partial defence of contributory negligence could be slotted into the general law of contract without serious repercussions on, for instance, the present law of "discharge by breach" and on the assessment of damages for breach of contract. Take, for example, the familiar case of the builder who abandons work because the person who engaged him has delayed the payment of an instalment. If he is not entitled, by the other's breach, to stop work altogether, should he nevertheless be allowed to rely on it as a partial defence to a claim for damages? Our preliminary view when we referred to the topic of contributory negligence in our working

[47] Working Paper No. 59, paras. 11(b) and 54.
[48] *Artingstoll* v. *Hewen's Garages Ltd.* [1973] R.T.R. 197, 201; *De Meza and Stuart* v. *Apple* [1974] 1 Lloyd's Rep. 508.

paper was that its reform would call for deeper study than we could conveniently give it in a paper on contribution. We are still of this view, and are supported in it by comments we received from those we consulted. We are therefore not making any proposals in this report for changes in the law of contributory negligence.

The method of reform

31. We suggested in our working paper that it would be more convenient to use the 1935 Act as a basis for reform than to make a completely fresh start and, after ranging widely over the existing law, we reached the provisional conclusion that all its present defects, at common law and in the 1935 Act, could be cured by enlarging the jurisdiction that that Act now provides[49]. There was unanimity amongst those consulted that this was the best way of tackling the problems. We believe that the machinery of the 1935 Act, although in need of overhaul, is basically sound and that the scheme set up by it can be adapted to give effect to our recommendations. We accordingly recommend that the broad principles of contribution between wrongdoers, as provided by the 1935 Act, should be retained.

Limitation periods

32. In our working paper we discussed some of the difficulties that may arise in contribution proceedings where D1 brings an action for contribution against D2 after P's claim against D2 has become statute barred[50]. The revision of the law relating to limitation periods is at the moment in the hands of the Law Reform Committee so we posed various problems and invited comments without suggesting a preference for any one solution. Many extremely interesting comments were received and we have passed them on to the Law Reform Committee for their consideration. We make no recommendations in this report for changes in the law relating to limitation periods.

PART IV

RECOMMENDATIONS FOR REFORM

Wrongdoers other than tortfeasors

33. Section 6 of the 1935 Act implemented the recommendations of the *Third Interim Report* of the Law Revision Committee[51] which was primarily concerned with "the doctrine of no contribution between tortfeasors". The Law Revision Committee was not asked to consider the need to provide for contribution proceedings between wrongdoers other than tortfeasors. This meant that a gap was left. Joint contractors might recover contribution from one another at common law and tortfeasors might recover contributions from one another under the 1935 Act, but this still left others without rights of contribution. Earlier in this report we cited situations in which a wrongdoer might be required to meet the plaintiff's claim in full without having any remedy over against another wrongdoer against whom the plaintiff had an equally valid claim[52]. We can see no policy reason for leaving this gap unfilled. In our working paper we made the provisional recommendation that rights of contribution under the 1935 Act should not be limited to situations in which the

[49] Working Paper No. 59, paras. 46 and 55.
[50] *ibid.*, paras. 31-35.
[51] (1934), Cmd. 4637.
[52] See paras. 4-7, above.

claims arise out of tort but should be widened to cover breaches of contract, breaches of trust and other breaches of duty as well[53]. This proposal has a double advantage. First, it closes the gap where there are no rights of contribution at common law. Second, it allows the courts greater flexibility where the exisiting rules would otherwise work unjustly[54]. The proposal has won general support from those who commented on our working paper and we accordingly recommend that it should be given legislative effect.

Successive actions in respect of the same damage

34. As we mentioned earlier[55], section 6(1)(*a*) of the 1935 Act removed the defence of "release by judgment" where the plaintiff recovered a judgment against one of two or more joint tortfeasors; at common law the judgment, although unsatisfied, operated to release the other tortfeasors from their liability. In recommending this change in the law the Law Revision Committee added "If this meets with approval it may be desirable in the future to apply the same rules to actions against joint contractors."[56] In our working paper we expressed the provisional view that the time for this further step had now arrived and that a judgment against a person liable jointly with another in respect of a contract debt or breach of contract, trust or other duty should not be a bar to an action against that other person[57].

35. There was general support, on consultation, for the proposal in our working paper. However, a further point on section 6(1)(*a*) of the 1935 Act emerged after our working paper had been prepared. It was observed in *Bryanston Finance Ltd.* v. *De Vries*[58] that the section "does not, in terms, apply to a single action against two joint tortfeasors." Nor, it may be added, does it apply, in terms, to separate actions that are both already on foot at the time when judgment in one is obtained. In two cases reported in 1975[59] the courts had to consider whether the common law defence of "release by judgment" was still available where the tortfeasors were joined in the same proceedings and judgment was obtained against one while the action against the other was pending. The conclusion in each case was that the common law defence was *not* available but that section 6(1)(*a*) could be given greater clarity. We accordingly recommend that the defence of "release by judgment" should be abolished in its entirety and that judgment against one of two or more persons jointly liable for the same debt or damages should not be a bar to an action or to the continuance of an action against the other or others.

36. The Law Revision Committee had misgivings about recommending the abolition of the defence of "release by judgment". Without such a defence it would be possible for a plaintiff to obtain judgments against two or more joint tortfeasors for differing amounts by suing them in separate proceedings[60], perhaps obtaining more in the second action than in the first. Separate actions

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[53] Paras. 21-23, 45(*d*) and 56(*a*).
[54] See para. 28, above.
[55] See para. 18, above.
[56] *Third Interim Report* (1934), Cmd. 4637, para. 11.
[57] Working Paper No. 59, paras. 24 and 56(h).
[58] [1975] Q.B. 703, 722, *per* Lord Denning M.R.
[59] *Wah Tat Bank Ltd.* v. *Chan Cheng Kum* [1975] A.C. 507 (P.C.); *Bryanston Finance Ltd.* v. *De Vries* [1975] Q.B. 703.
[60] *cf. Broome* v. *Cassell & Co. Ltd.* [1972] A.C. 1027, 1063, *per* Lord Hailsham.

leading to differing awards were already possible where the plaintiff was proceeding against *several* tortfeasors[61] and the Law Reform Committee did not want the removal of the bar to separate proceedings against *joint* tortfeasors to result in a proliferation of actions. They accordingly made two recommendations, so far as proceedings against joint tortfeasors were concerned. First, they recommended that, although higher damages might be awarded in the second or subsequent action than in the first, the plaintiff should not be allowed to recover a bigher sum by execution than had been awarded in the first action. Second, they recommended that the plaintiff should not recover the costs of any action but the first, unless he satisfied the court that there was a good reason for bringing more than one action[62].

37. The recommendations of the Law Revision Committee were given statutory effect in section 6(1)(*b*) of the 1935 Act. However, Parliament went further by providing that the same reservations, as to the sum recoverable by execution and as to costs, should apply to actions against *several* tortfeasors as well. As a result section 6(1)(*b*) now contains two deterrents against separate or successive proceedings against tortfeasors, whether several or joint. First, there is the provision that the sum recoverable, by execution, from tortfeasors may not exceed the amount of damages awarded in the first action; this we shall, for convenience, describe as "the sanction in damages". Second, there is the provision that the plaintiff should not, as a general rule, recover the costs of any but the first action; this we shall describe as "the sanction in costs".

38. Since we are recommending that the defence of "release by judgment" should be abolished in relation to proceedings against joint contractors it is necessary to consider whether this recommendation should be backed by a sanction in damages or a sanction in costs or both. It is also appropriate, since section 6 of the 1935 Act is under general review, to consider whether the sanctions, or either of them, are desirable in relation to proceedings against tortfeasors.

39. The sanction in costs is the less complicated of the two and, in our view, the easier to justify. It is plainly desirable that all the persons who are to be sued should, as a general rule, be sued at the same time and in the same proceedings, but this is not always practicable. Some of the potential defendants may be hard to trace or even to identify. In such a situation separate proceedings would, we think, be appropriate and we would expect the court to be willing to allow the plaintiff the costs of the second set of proceedings if they succeeded. We regard the sanction in costs as a satisfactory expedient for seeing that there is no unnecessary proliferation of actions whether the proceedings are against contractors or tortfeasors and whether they are liable jointly or severally. In this respect we recommend that the scope of section 6(1)(*b*) should be widened so as to apply to all these cases.

40. As for the sanction in damages, we think that the existing law could lead to injustice. The amount of damages recoverable from one tortfeasor may be limited and the amount recoverable from another may not. The plaintiff may have good reasons for suing them in different actions and may have to sue

[61] *The Koursk* [1924] P. 140.
[62] *Third Interim Report* (1934), Cmd. 4637, para. 12(1).

the one with the limited liability first[63]. In such circumstances it would seem odd that the tortfeasor with unlimited liability should benefit from the fact that judgment was first obtained against the one whose liability was limited. Such a result would, in our view, cause unjustifiable hardship to the plaintiff. If section 6(1)(*b*) were widened to cover proceedings against persons liable for breach of contract the sanction in damages would result in hardship to the plaintiff in other cases too. For instance, the damages recoverable from the contract-breaker first sued, although not subject to an agreed limit, might be less than those recoverable from the other because the additional damages stemmed from special circumstances that were within the contemplation of the latter but not of the former[64]. It would seem unjust that the amount awarded against the one first sued should operate as a limit on the sum recoverable, by execution, from the other.

41. We doubt whether the sanction as to damages contained in section 6(1)(*b*) of the 1935 Act can be justified today. One of the main reasons for introducing it was that juries could not be relied on to assess damages in the same way[65]. Whatever merit this argument may once have had has largely gone now that jury trial has ceased to be the normal method of trying civil actions. The other main reason for introducing section 6(1)(*b*) was to prevent multiplicity of proceedings but we think that this consideration is sufficiently covered by the special provision on costs, which we support and would like to see extended[66]. We accordingly recommend that the limit set by section 6(1)(*b*) on the sum recoverable by execution in separate or successive actions should be removed. This does not, of course, mean that the plaintiff should be allowed to enforce judgments twice over for the same damages[67] but simply that the amount for which one defendant may be adjudged liable should not set a limit on the sum for which judgment may be enforced against another.

42. Before passing from "release by judgment" we should mention the related topic of "release by accord and satisfaction". Under the existing law where a plaintiff has a remedy against joint tortfeasors he may make an agreement with one of them to accept an offer of compensation without prejudice to his claim against the others; he may then proceed with his claim against the others. If, however, there is accord and satisfaction *vis-à-vis* one of the joint tortfeasors and the plaintiff's rights against the others are not reserved this may operate to release the others from their liability. The rule is somewhat technical and a plaintiff may find that settling with one joint tortfeasor prevents him from proceeding against the others although this was not what he really intended[68]. It was suggested to us that it was time the common law rule on which this doctrine is founded was abolished.

43. We have given anxious consideration to this proposal. It clearly has some force and we should like to examine it further. The problem is not so serious as in the case of release by judgment because whereas release by accord and satisfaction involves the satisfaction of the claim, release by judgment operates

[63] *The Koursk* [1924] P. 140.
[64] *Hadley* v. *Baxendale* (1854) 9 Exch. 341, 354-355.
[65] *Third Interim Report* (1934), Cmd. 4637, para. 11.
[66] See para. 39, above.
[67] This is prevented by other means. See *B. O. Morris Ltd.* v. *Perrot and Bolton* [1945] 1 All E.R. 567, 570.
[68] *Cutler* v. *McPhail* [1962] 2 Q.B. 292, 298, *per* Salmon J. But see *Gardiner* v. *Moore* [1969] 1. Q.B. 55.

even where the judgment is unsatisfied. Furthermore, if we were to recommend reform in this branch of the law we would feel compelled to consider not only release of tortfeasors but also release of other joint wrongdoers and whether an agreement with one of several, as opposed to joint, wrongdoers not to sue the others should provide the others with a defence to subsequent proceedings. It would also be necessary, we think, to consider the law relating to release by deed. None of these problems has an immediate bearing on the rights of contribution with which we are primarily concerned and our conclusion is that they would be better left over to be considered on another occasion as a separate topic of law reform.

The bona fide compromise

44. One of the problems that we discussed in our working paper concerned the defendant who settled the plaintiff's claim against him before judgment and then sought to recover contribution from another defendant. The problem was exposed in *Stott* v. *West Yorkshire Road Car Co. Ltd.*[69] where the first defendants settled the plaintiff's claim against them, which arose out of a traffic accident, by paying £10,000 without admitting liability; they then sought to recover a contribution from the other defendant who they alleged had contributed to the accident by the negligent parking of his vehicle. The Court of Appeal held that the contribution claim should proceed but pointed out that it would fail unless it was established in the contribution proceedings that the defendant claiming the contribution was a tortfeasor. If therefore the decision in the contribution proceedings was that the "settling" defendant had not been negligent but that the accident had been caused solely by the negligence of the other defendant the claim for contribution would have to be dismissed.

45. In our working paper we suggested that it was unsatisfactory to require the "settling" defendant to prove his own liability as a tortfeasor in order to entitle him to contribution from the other[70]. It is convenient to repeat here the three points that we made. The first is that it means turning all the usual conventions of civil litigation upside down; D1 (the settling defendant) has to call evidence that is in the possession of the plaintiff in order to establish his own liability in tort, and D2 (the other defendant) then calls D1's witnesses in order to raise a doubt as to D1's liability. The second is that if the result of the contribution proceedings on the facts of *Stott's* case was that the liability of D2 was established but that the liability of D1 was not, the person who made the compromise, D1, would get no contribution towards the £10,000 although he was not in fact to blame, and D2 who really was to blame would have to pay nothing at all. The third reason is that defendants might be deterred from compromising claims in which liability was in doubt if their right of contribution was thereby put at risk. Salmon L.J. said in *Stott's* case[71] that it would be very unfortunate if a defendant was obliged to fight a case to judgment in order to protect his contribution rights. We attached particular importance to the third point and made the provisional recommendation[72] that a person who had compromised a claim made against him so as to benefit some other possible defendant should

[69] [1971] 2 Q.B. 651.
[70] Working Paper No. 59, para. 28.
[71] [1971] 2 Q.B. 651, 658-659.
[72] Working Paper No. 59, paras. 28 and 56(*b*).

have the right to claim a contribution from the other defendant provided that the other could be shown to be liable; we added that it should not be an answer to such claim that the person who settled the claim would not have been held liable if the action against him had been tried.

46. This proved to be the most controversial of our proposals. One of the objections raised was that the difficulty at which the proposal was aimed hardly ever arose in practice; it was said that to question D1's liability would but rarely prove a fruitful avenue for exploration by D2. Insurers, while agreeing that the problem seldom arose in practice, were in favour of the proposal. One commentator gave us the facts of a case in which the problem did in fact arise. P was a passenger in a car driven by D1. There was an accident and P sued D1 alleging that he had caused the accident by negligent driving. D1 put the blame for the collision on D2 and, on D1's version of what happened, D2 had been negligent and D1 had not. D1 eventually settled P's claim and proceeded no further with the contribution claim against D2; for it to have succeeded D1 would have had to show that, despite his own evidence to the contrary, he was partly to blame for the accident.

47. It is no doubt true that most cases involving more than one defendant are settled out of court. As one of those we consulted observed, the greater the number of insurers involved the smaller the shares of the potential damages and the larger the potential liability for costs. These factors tend to encourage compromise rather than inter-defendant litigation. Nevertheless the insurers favoured our proposal; the point was made that the recommendation would give a party greater flexibility in settling claims, for example in a large claim where costs were rapidly escalating and a settlement was reached in order to prevent this escalation. Accordingly, although the *Stott* problem may not arise very often in practice we would not feel justified in ignoring it on this ground alone.

48. Three other points were raised. One was that our proposal might lead to multiplicity of contribution proceedings. Another was that D2 might be prejudiced by our proposal. Thirdly objection was taken that our proposal might encourage "collusive" settlements, and even some of those who supported our proposal in principal felt that safeguards against collusion would be needed.

49. As to the point about multiplicity of proceedings, our proposal would, it is true, mean that there might sometimes be two sets of contribution proceedings: the first by D1 against D2, following D1's compromise with P, the second by D2 against D1, following P's obtaining judgment against D2 for the balance of his claim. We agree with the point made by one commentator that it is desirable that the two contribution claims and the claim by P against D2 should be heard together if possible. However the existing rules of practice, in particular those relating to consolidation of actions and the award or refusal of costs[73] should ensure that the problem will not normally arise.

50. As for the point about prejudice to D2, the suggestion was made that D2 might find it harder to defend himself on issues of liability and quantum after the *fait accompli* of a settlement between P and D1, and that D1's right of

[73] See para. 39, above.

contribution after the compromise with P should only be available where D2 has unreasonably refused to be party to the compromise or to take part in the negotiations.

51. We are not convinced by the *fait accompli* argument. We do not see why D1's compromise should make it harder for D2 to defend himself on the issue of liability or on the question of the amount recoverable. As to liability, D1 would have to establish that D2 was liable to P, and the case against D2 would, presumably, be much the same whether it was advanced by P in the main proceedings or by D1 in his claim for contribution. In any event the fact that D1 had compromised the claim against himself would not seem to give P any better chance of success against D2. As to the amount payable, clearly the settlement figure should not be relevant in the contribution proceedings except as representing the maximum recoverable[74]. If the figure were too high D2 would only be liable to contribute on the basis of the proper figure; if it were too low that would be D2's good fortune. There is the more general point that our proposal might encourage D1 to make a dishonest compromise with P at an extravagant figure without reference to D2 and that this would be undesirable. This, however, is really an aspect of the "collusion" objection to which we now turn.

52. The "collusion" point was argued strongly by some of our commentators. They said that if contribution claims between contract-breakers were to be brought within the scope of the 1935 Act (which they favoured), the proposal to allow a contribution claim founded on a compromise with the plaintiff would give greater scope for collusion or, where commercial contracts were concerned, the exertion of economic weight. They took the example of an architect defendant making a compromise because the plaintiff was an important client of his whose business he did not wish to risk losing rather than because the architect ran any real risk of being held liable in proceedings. It was suggested that if, after such a compromise, the architect were to seek contribution from another defendant, say the builder[75], that other defendant should be allowed to avail himself of any legal or evidential point which might have been taken by the defendant party to the compromise but which, for whatever reason, was not taken.

53. We think that the objection goes too far. We accept that it is desirable that the compromise of a claim should be open and above board, involving all the parties to the litigation if possible, rather than that it should be furtively made by two parties without notifying the others of what was being done. We also accept that it would not be right to allow contribution proceedings to result from a sham agreement where the settling defendant was an intermeddler and not someone against whom a case in law could possibly have been made out.

54. However we are not convinced that we need go further. To return to the example posed earlier[76], we think that the architect's rights of contribution against the builder should not be made worse merely because he compromised a claim that he might have won. It would, we think, be a pity if the law required

[74] Working Paper No. 59, para. 47 and *Stott* v. *West Yorkshire Road Car Co. Ltd.* [1971] 2 Q.B. 651.
[75] Taking the facts posed in para. 5, above.
[76] See para. 52, above.

such a defendant to take every legal and evidential point against his client in order to safeguard his remedy over against the builder. We think that amicable—although not fraudulent—settlements ought generally to be encouraged.

55. We accordingly recommend that the defendant who compromises a claim against him should be entitled to claim a contribution from any wrongdoer against whom liability can be proved. However, this recommendation needs to be qualified. —

56. It is important that the compromise should not be a sham but should be genuine. One test of its genuineness would be that it should confer a benefit on the plaintiff which he would have to bring into account in the assessment of the damages recoverable from the other defendant[77]. Other relevant matters would be the amount of the settlement and the circumstances in which it was made. If it was made by one defendant behind the other's back or if it involved accepting liability for an extravagant amount it would no doubt be regarded by the judge with suspicion. We want to exclude the collusive or otherwise corrupt or dishonest compromise but do not consider that it would be appropriate to attempt to provide a detailed definition of what should amount to a *bona fide* compromise; this is something which should present no difficulty to the courts. We accordingly recommend that contribution should be recoverable by a person who has made a *bona fide* compromise of a claim against him for damages.

57. We should conclude our discussion of the *bona fide* compromise by mentioning that our recommendations on this topic take roughly the same line as section 22 of the Irish Civil Liability Act 1961[78] and that this section does not seem to have given rise to any difficulties or been the subject of criticism in the Republic of Ireland.

Persons from whom contribution should be recoverable

58. Contribution may be recovered under section 6(1)(*c*) of the 1935 Act from "any other tortfeasor who is, or would if sued have been, liable in respect of the same damage. . . ". We have two recommendations to make on this provision. The first is that wrongdoers other than tortfeasors should be brought

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[77] For examples of compromises that satisfy this test see the compromise between P and D1 in *Dutton* v. *Bognor Regis U.D.C.* [1972] 1 Q.B. 373 and also in *Stott* v. *West Yorkshire Road Car Co. Ltd.* [1971] 2 Q.B. 651.

[78] Section 22 of the Civil Liability Act 1961 is as follows:—

(1) Where the claimant has settled with the injured person in such a way as to bar the injured person's claim against the other concurrent wrongdoers, the claimant may recover contribution in the same way as if he had suffered judgment for damages, if he satisfies the court that the amount of the settlement was reasonable; and, if the court finds that the amount of the settlement was excessive, it may fix the amount at which the claim should have been settled.

(2) Where the claimant has settled with the injured person without barring the injured person's claim against the other concurrent wrongdoers or has paid to the injured person a sum on account of his damages, the claimant shall have the same right of contribution as aforesaid, and for this purpose the payment of a reasonable consideration for a release or accord shall be regarded as a payment of damages for which the claimant is liable to the injured person: but the contributor shall have the right to claim repayment of the whole or part of the sum so paid if the said contributor is subsequently compelled to pay a sum in settlement of his own liability to the injured person and if the circumstances render repayment just and equitable.

within its ambit. Contribution should, in our view, be recoverable not only from tortfeasors but also from persons liable in damages for breach of contract, breach of trust or other breach of duty. This is a particular aspect of our more general purpose of widening the scope of the 1935 Act to fill the gap left between the court's jurisdiction both under the 1935 Act and at common law[79].

59. Our second recommendation concerns the phrase "who would if sued have been liable" which lacks clarity and has been interpreted in a variety of ways[80]. We recommend that it should be provided instead that a person should be liable to contribution proceedings if he was liable for the damage at the time when the damage occurred[81].

Double jeopardy

60. A defendant who has defeated the plaintiff's claim against him by relying on the provisions of the Limitation Acts may not thereafter be required to pay a contribution under the 1935 Act to a defendant against whom the plaintiff's claim has succeeded. This was decided by the House of Lords in *Geo. Wimpey & Co. Ltd.* v. *B.O.A.C.*[82] and we pointed out in our working paper that this seemed unsatisfactory[83]. D2 was dismissed from P's action because P's claim against him was "time-barred" so the claim for contribution by D1 was dismissed as well. If however the plaintiff had never sued D2 at all then, on the present state of the law, D1's claim for a contribution would have succeeded. Our provisional conclusion was that, as against D1, D2 ought to be no better off if the plaintiff's proceedings against D2 fail on a "limitation" point than if they are never brought. The comments that we received on consultation generally supported this conclusion and we accordingly recommend that it should be given legislative effect.

61. There is a related problem where D2 succeeds in having the plaintiff's claim against him dismissed for want of prosecution. Should he be entitled to rely on the dismissal as a defence to contribution proceedings by D1? One commentator made the point that the risk of prejudice to D2 which had justified the dismissal of P's claim would be reintroduced if contribution proceedings against him were allowed, and that this would be unjust. We admit the force of this but the injustice to D2 of allowing contribution proceedings to continue must be balanced against the injustice of D1 of refusing them. No doubt where D1 was guilty of culpable delay the contribution proceedings would be dismissed for want of prosecution[84], but if there had been no culpable delay on his part it would seem to be more just to allow them to continue. This was the view of the Court of Appeal in *Hart* v. *Hall and Pickles Ltd.*[85] and we are persuaded that this is right. We are supported in this conclusion by all but one of the comments that we received on this point.

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[79] See para. 33, above.
[80] See para. 25, above.
[81] We have not dealt with limitation periods in relation to contribution claims as this is being considered by the Law Reform Committee. See para. 32, above.
[82] [1955] A.C. 169. See the speeches of Viscount Simonds and Lords Tucker and Reid; Lords Keith and Porter dissented.
[83] Working Paper No. 59, para. 38.
[84] *Slade & Kempton (Jewellery) Ltd.* v. *N. Kayman Ltd.* [1969] 1 W.L.R. 1285.
[85] [1969] 1 Q.B. 405.

62. This leads us to the third problem in this area, where D2 defeats P's claim against him "on the merits"[86]. Under the existing law he may not be put in jeopardy twice. This is not because of estoppel by record or *res judicata*, but because of the interpretation of section 6(1)(*c*) of the 1935 Act preferred by the majority of the House of Lords in *Geo. Wimpey & Co. Ltd.* v. *B.O.A.C.*[87] Is this satisfactory or should it be changed by legislation?

63. In our working paper we put the case for allowing D1 to reopen the question of D2's liability to the plaintiff for the purpose of contribution proceedings even where D2 had defeated P's claim on the merits[88]. We pointed out that D1 might have better evidence of D2's liability than P did and that, if so, it might seem unfair that he should have to pay the whole of P's claim without a right of contribution. Nevertheless our provisional view was that D2 should not be put at risk a second time.

64. On consultation opinion was divided but a clear majority supported our provisional opinion that it was on balance better that D1 should be bound by the judgment in D2's favour, provided that it was arrived at after a hearing on the merits, than that D2 should have to defend himself twice.

65. Our conclusion is that the majority is right on this point. We accordingly recommend that if D2 defeats the plaintiff's claim against him after a hearing on the merits he should not be liable to pay contribution. By "a hearing on the merits" we do not intend to include dismissal for want of prosecution, or a judgment collusively obtained[89] or judgment on a limitation point.

66. A further question has arisen which we did not canvass in our working paper but which we have felt it necessary to consider, namely, whether a finding of non-liability made in an arbitration should be enough to bar contribution proceedings. The main characteristic of an arbitration is that it allows a dispute to be dealt with privately by someone other than a judge, appointed perhaps because of his expertise in the area of commerce concerned. Parties to a contract often provide for this means of solving disputes that arise between them as being quicker, cheaper and more satisfactory generally than litigation in the courts: the arbitrator's jurisdiction is founded on the arbitration agreement that the parties have made.

67. Difficulties can arise where some, but not all, of the parties to the dispute are parties to an arbitration agreement. For example, P may have a claim against D1 for breach of a contract that contains an arbitration clause and against D2 for breach of a contract which does not. Only P's claim against D1 can be submitted to arbitration pursuant to the clause, not P's claim against D2, nor the contribution proceedings between D1 and D2. If, in such a situation, P were to submit his dispute with D1 to arbitration and were to start court proceedings against D2 there would be two sets of proceedings, one before an arbitrator and one before the courts; such a course would involve extra

[86] This phrase is taken from the judgments in *Hart* v. *Hall and Pickles Ltd.* [1969] 1 Q.B. 405, 411, 412.

[87] [1955] A.C. 169, Viscount Simonds and Lords Tucker and Reid.

[88] Working Paper No. 59, para. 39.

[89] We are grateful to a working party set up by the Scottish Law Commission for drawing our attention to a Scottish case in which one wrongdoer sought to obtain an advantage over the other by means of a collusive judgment: *Corvi* v. *Ellis* 1969 S.L.T. 350.

costs, extra time and, perhaps, inconsistent findings. For these reasons P would probably not submit his dispute with D1 to arbitration but would initiate court proceedings against D1 and D2 together. If D1 then applied to have the proceedings against him stayed in favour of having the dispute between himself and P arbitrated, the application would probably be dismissed[90]. It would therefore be unusual for P's claim against one defendant to be heard in the courts while his claim against another was being arbitrated; however, it could happen[91]. In such an event, it would, we think, be harsh to prevent the one who was sued in the courts from claiming a contribution from the other solely on the ground that the other had defeated substantially the same allegations when made against him by P in the arbitration proceedings. After all, the arbitrator was appointed by P and the other defendant pursuant to an agreement between them to which the defendant seeking contribution was not a party. We accordingly recommend that the defence to contribution proceedings that P's claim had been rejected on the merits should avail where the claim was heard and rejected in court proceedings but not where it was heard and rejected by an arbitrator.

The amount recoverable

68. Section 6(2) of the 1935 Act provides that the amount recoverable from any person "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

69. It was not suggested to us that the wording of section 6(2) had given rise to difficulties or injustices in contribution proceedings between tortfeasors. We reached the provisional conclusion in our working paper that it did not need substantial reform[92] and this remains our view.

70. There are, however, two points of difficulty that could arise out of our recommendation that contribution proceedings should be allowed between wrongdoers other than tortfeasors. One is where one of the two defendants is protected by a clause in a contract or by statute from having to pay damages above a certain figure. Unless the other defendant is protected by a like clause or statute difficulties in apportioning the loss between them could arise. The other point is contributory negligence; if one defendant were liable in tort and the other for breach of contract and contribution proceedings between them were permitted, the plaintiff's contributory negligence might be relied on in reduction of damages by the former but not by the latter defendant.

(*a*) *Upper limits*

71. It is convenient to illustrate the point by repeating the illustration and the discussion set out in our working paper[93]. We posed the following hypothetical situation:

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[90] *Taunton-Collins* v. *Cromie* [1964] 1 W.L.R. 633.
[91] *cf. City Centre Properties (I.T.C. Pensions) Ltd.* v. *Matthew Hall & Co. Ltd.* [1969] 1 W.L.R. 772.
[92] Working Paper No. 59, paras. 42, 43 and 56(*f*).
[93] *ibid.*, paras. 49-51.

P buys a car from D1 which has a latent defect in its electrical system. As he is driving it one night the headlights suddenly go out and he runs into an obstruction in the highway that D2 has negligently left unlit. P sues D1 and D2. There is a clause in the contract between P and D1 that sets a ceiling of £400 on any claim that P may make for breach of contract.

72. Assuming, for the sake of the example, that the clause is binding, notwithstanding the provisions of the Supply of Goods (Implied Terms) Act 1973[94], that the damage caused by the accident amounts to £1,000 and that D1 and D2 are held equally to blame, how should the loss be apportioned between them?

73. There are at least three possible solutions that should be considered.

Solution 1 One solution might be that D1 should pay P £400, D2 should pay £500 and the balance of £100 should be irrecoverable from either[95].

Solution 2 The contribution proceedings might be confined to the amount by which the two claims overlap (£400), leaving D2 to pay the balance. The overall result would be that D1 would bear £200 of the loss and D2 £800.

Solution 3 The loss of £1,000 might be divided equally between D1 and D2, subject to the limit on the amount of D1's overall liability set by the clause in the contract. The result would be that D1 would bear £400 and D2 £600.

74. The first solution is open to the objection that it benefits D2 unduly at the expense of P. P's right to recover in full should not be affected by the rules for the apportionment of loss between D1 and D2. Adoption of the first solution would mean that P would be worse off by reason of D1's breach of contract. The second solution seems to be unduly favourable to D1 as he has caused £1,000 worth of damage for which he was ready to assume liability up to £400, but at the end of the day his liability is further reduced to £200. The third solution seems to give the fairest result all round. The comments we received were almost unanimously in favour of solution 3. We are satisfied, as a result, that our provisional preference for solution 3 was correct and that provision should be made for it in our recommendations for reform.

(b) Contributory negligence

75. Let us take the same situation of P driving into an unlit obstruction but let us suppose that it could be shown that he was driving negligently and, *vis-à-vis* the tortfeasor, D2, 40 per cent. to blame for his injuries. If he were to sue D2 he would recover £600. If he were to sue the person who sold him the car, D1, and were able to prove a breach of the contract of sale, he would recover either nothing or the full £1,000, assuming that the contract did not contain an "upper limit" clause. If he sued both and the court were to hold D1 and D2

[94] Let us say that P buys it in the course of a business and it would be fair and reasonable to allow D1 to rely on the clause. See s. 55(4) of the Sale of Goods Act 1893, as amended by s. 4 of the Supply of Goods (Implied Terms) Act 1973.

[95] This solution follows s. 35(1)(*g*) of the Irish Civil Liability Act 1961.

equally to blame as between themselves, how should the loss be apportioned between them?

76. There are again three possible solutions.

Solution 1 One solution might be to allow D1 to plead contributory negligence as a partial defence to breach of contract[96]. Then P would recover £300 from D1 and £300 from D2.

Solution 2 The contribution proceedings might be confined to the amount by which the two claims overlap (£600) leaving D1 to bear the balance. The result would be that D1 would bear £700 of the loss and D2 £300.

Solution 3 The loss of £1,000 might be divided equally between D1 and D2 subject to the limit on the amount of D2's overall liability set by the figure for which he would have been liable if sued alone *i.e.*, £600. On the facts given, D2's share would not exceed the amount for which he would be liable if sued alone so the result would be that D1 and D2 would bear £500 each. If P had been 60 per cent to blame, D2 would be liable, on this approach, to make a contribution of £400.

77. The comments received on consultation supported our provisional preference for solution 1 as the most obviously just in its results. However, as we pointed out in our working paper[97], this could not conveniently be implemented within the context of a reform of the law of contribution. It would depend upon a reform of the provisions of the Law Reform (Contributory Negligence) Act 1945 which we have not felt able to deal with in the present report for reasons given earlier[98]. This leaves a choice between solution 2 and solution 3 and there was agreement amongst those from whom we received comments that, as between the two, solution 3 was to be preferred. We agree.

78. Our conclusion on "upper limits" and contributory negligence is that they should not be brought into the calculation of the amount recoverable by way of contribution until after the court has determined what it would otherwise be just and equitable for a wrongdoer to pay having regard to the extent of his responsibility (as between himself and the other wrongdoer) for the damage. The "upper limit" or contributory negligence should then operate to set a limit upon the amount payable by way of contribution. This would mean that solution 3 would be applied in the case of both "upper limits" and contributory negligence.

79. We accordingly recommend that the amount ordered by way of contribution should not exceed the maximum for which the contributor could be held liable to the plaintiff, having regard to any financial limit on the amount of the damages set by statute or by contract made with the plaintiff before the wrongdoer's breach of duty, and having regard also to any contributory negligence on the part of the plaintiff.

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[96] This solution follows s. 34(1) of the Irish Civil Liability Act 1961.
[97] Working Paper No. 59, para. 54.
[98] Para. 30, above.

Summary of conclusions

Matters on which no changes in the present law are proposed

80. There are some matters on which we recommend no changes in the existing law:—

(*a*) We recommend that rights of contribution and indemnity founded in contract or quasi-contract should, for the most part, continue to be regulated by the common law (paragraphs 26–29).

(*b*) The existing law of contributory negligence may need reform but we believe that it should be the subject of further study and make no recommendations for changes in this report (paragraph 30).

(*c*) The broad scheme of the 1935 Act would seem to be sound (paragraph 31).

(*d*) We make no recommendations for changing the existing law in relation to limitation periods applying to contribution proceedings. This is because the reform of the law of limitation is at present being examined by the Law Reform Committee (paragraph 32).

Summary of recommendations for change

81. We make a number of recommendations for the reform of the existing law of contribution. Their main aim is to widen the jurisdiction given to the courts by the 1935 Act. They are as follows:—

(*a*) We recommend that statutory rights of contribution should not be confined, as at present, 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 (paragraph 33 and clauses 3(1) and 5(1)).

(*b*) We recommend that judgment against a person jointly liable with another should not be a bar to an action or the continuance of an action against that other person. The 1935 Act removed the defence of "release by judgment" where the plaintiff sued joint tortfeasors in separate actions. It is recommended that the defence should no longer be available where other kinds of joint liability are concerned (paragraphs 34 and 35 and clause 1).

(*c*) We recommend, in connection with section 6(1)(*b*) of the 1935 Act, that the sanction in damages should be abolished but that the sanction in costs should be retained and should apply to actions against wrongdoers generally, not just tortfeasors (paragraphs 36–41 and clause 2).

(*d*) We recommend, following recommendation (*a*), that the statutory right to recover contribution should be available to any person liable in respect of the damage, not just persons liable in tort (paragraph 33 and clauses 3(1) and 5(1)).

(*e*) We recommend, as an extension of recommendations (*a*) and (*d*), that contribution should also be recoverable by a person who has made a *bona fide* compromise of a claim against him; that it should be a defence to such a claim that the compromise was not made *bona fide*

but that it should not be a defence, without more, that the plaintiff's claim would have failed if it had not been compromised (paragraphs 44–57 and clause 3(2)).

(*f*) We recommend that contribution should be recoverable from any person who was liable for the same damage at the time when it occurred, whether as a tortfeasor or not (paragraphs 58 and 59 and clauses 3(1) and 5(1)).

(*g*) We recommend that, for the purposes of contribution proceedings, neither party should be allowed to challenge a finding of non-liability made in favour of the other in an action brought against the other by the plaintiff, provided that the finding was made after a trial "on the merits" by which we mean to exclude dismissal for want of prosecution, judgment that has been obtained "collusively" and judgment on a "limitation" point (paragraphs 60–67 and clause 3(7)).

(*h*) Finally, we recommend that the amount recoverable by way of contribution should be such as may be found by the court to be just and equitable having regard to the extent of the person's responsibility (as between himself and the person claiming a contribution) for the damage, and that the court's powers should be substantially the same as under the 1935 Act (paragraphs 68 and 69 and clauses 3(3), 3(4) and 3(5)). However, it is further recommended that the amount ordered by way of contribution should not exceed the maximum for which the person from whom it is claimed could be held liable to the plaintiff, having regard to any financial limit set on the amount of the damages by statute or by a contract made with the plaintiff before that person's breach of duty, and having regard also to any contributory negligence on the part of the plaintiff (paragraphs 70–79 and clause 3(6)).

(*Signed*) SAMUEL COOKE, *Chairman.*
STEPHEN EDELL.
DEREK HODGSON.
NORMAN S. MARSH.
PETER M. NORTH.

J. M. CARTWRIGHT SHARP, *Secretary.*

15 *December* 1976.

APPENDIX A

PART II OF THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT 1935 AS AMENDED BY SECTION 1(4) OF THE FATAL ACCIDENTS ACT 1959

Proceedings against, and contribution between, tortfeasors

6. *Proceedings against, and contribution between, joint and several tortfeasors*

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not):—

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

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

(*c*) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

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

(3) For the purposes of this section:—

(*a*) the expression "dependants" means the persons for whose benefit actions may be brought under the Fatal Accidents Acts, 1846 to 1959; and

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

(4) Nothing in this section shall:—

(*a*) apply with respect to any tort committed before the commencement of this Part of this Act; or

(*b*) affect any criminal proceedings against any person in respect of any wrongful act; or

(*c*) render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed.

APPENDIX B

Organisations and persons who submitted comments on Working Paper No. 59

Mr. R. C. Allcock
Professor G. J. Borrie
Bristol University Law Faculty
British Insurance Association
Finance Houses Association
Professor R. F. V. Heuston
The Incorporated Law Society of Ireland
The Law Society
Mr. W. A. Leitch, C.B.
Lloyd's
Lord Chancellor's Office
The Right Honourable Lord Justice Megaw
Property Services Agency (Department of the Environment)
Provincial Insurance Company Ltd.
The Prudential Assurance Company Ltd.
A Working Party set up by the Scottish Law Commission
The Senate of the Inns of Court and the Bar
The Society of Public Teachers of Law
Sun Alliance and London Insurance Group
Mr. Graeme Williams

APPENDIX C

Draft Civil Liability (Contribution) Bill

ARRANGEMENT OF CLAUSES

Clause

DRAFT

OF A

BILL

TO

A.D. 1977

AMEND the law relating to proceedings against persons jointly liable for the same debt or jointly or severally, or both jointly and severally, liable for the same damage and the law relating to contribution between persons jointly or severally, or both jointly and severally, liable for the same damage.

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

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

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

EXPLANATORY NOTES

Clause 1

1. This clause implements the recommendation in paragraph 81(*b*) of the report.

2. The clause is intended to replace section 6(1)(*a*) of the Law Reform (Married Women and Tortfeasors) Act 1935 and extends it in these ways:

(*a*) it refers, not to tortfeasors, but to "any person liable in respect of any debt or damage" (clause 5(1) explains the wide meaning to be given to "any person liable");

(*b*) it makes it clear that the provision applies not only to successive actions but also to a single action against two or more persons (see the doubts expressed by Lord Denning M.R. on section 6(1)(*a*) of the 1935 Act in *Bryanston Finance Ltd.* v. *De Vries* [1975] Q.B. 703, 722).

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

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

EXPLANATORY NOTES

Clause 2

1. This clause implements the recommendation in paragraph 81(*c*) of the report.

2. The clause is intended to replace section 6(1)(*b*) of the Law Reform (Married Women and Tortfeasors) Act 1935 and differs from it in these ways:—

(*a*) it refers, not to actions against tortfeasors, but to actions against "persons liable in respect of the damage" (clause 5(1) explains the wide meaning to be given to "persons liable");

(*b*) whereas section 6(1)(*b*) of the 1935 Act fixes a limit on the sums recoverable under judgments other than the judgment first given, the present clause sets no such limit: see paragraphs 40 and 41 of this report.

3. There is no provision here or elsewhere to replace section 6(3)(*b*) of the 1935 Act. The purpose of section 6(3)(*b*) was to explain how the limit on the sums recoverable under a judgment other than the judgment first given was to be applied where the judgment first given was appealed. Since clause 2 replaces section 6(1)(*b*) of the 1935 Act but does not reintroduce the limit, the judgment that is appealed no longer raises a problem.

Proceedings for contribution.

3.—(1) Subject to the following provisions of this section, any person who is liable in respect of any damage suffered by another person at the time when the damage in question occurs may recover contribution from any other person who is liable in respect of the same damage at that time (whether jointly with him or otherwise).

(2) A person who, without actually being liable, 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 under this section as if he had in fact been liable in respect of that damage at the time when it occurred.

(3) No person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(4) Subject to subsection (6) below, in any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage.

(5) Subject to subsection (6) below, the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

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

(*a*) any limit imposed by or under any enactment or by any agreement made before the cause of action accrued; or

1945 c. 28.

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

1976 c. 30.

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

(7) In any proceedings for contribution under this section, the fact that a person has been held not liable in respect of any damage in any action brought by or on behalf of the person who suffered it shall be conclusive evidence that he was not liable in respect of the damage at the time when it occurred, provided that the judgment in his favour rested on a determination of the merits of the claim against him in respect of the damage (and not, for example, on the fact that the action was brought after the expiration of any period of limitation applicable thereto).

EXPLANATORY NOTES

Clause 3

1. This clause implements the recommendations in paragraph 81(*a*), (*d*), (*e*), (*f*), (*g*) and (*h*) of the report.

2. Clause 5(1) explains what is meant by "any person liable" and makes it clear that this clause extends to all types of liability to compensate for damage, whatever the cause of the action.

3. Subsection (1), with subsection (3), is intended to replace section 6(1)(*c*) of the Law Reform (Married Women and Tortfeasors) Act 1935. Apart from extending the ambit of statutory contribution beyond tortfeasors, it makes it plain that whether a person is liable is to be determined at the time when the damage occurs. Thus a person seeking to recover contribution does not cease to be able to do so because his liability has been discharged by payment or compromise. Similarly a person from whom contribution is sought does not cease to be under an obligation to contribute because the claim against him by the person who suffered the damage is or has been held to be statute-barred or has been dismissed for want of prosecution (see recommendation (*f*) in paragraph 81).

4. The purpose of subsection (2) is to make it clear that if a person claiming contribution has made a bona fide compromise of a claim against him by the person who suffered the damage, it is no answer to the claim for contribution to show that he was never liable (see recommendation (*e*) in paragraph 81). This subsection therefore disposes of the difficulty arising from *Stott* v. *West Yorkshire Road Car. Co. Ltd.* [1971] 2 Q.B. 651 (see paragraph 44 of the report).

5. Subsection (3) reproduces matter formerly in section 6(1)(*c*) of the 1935 Act.

6. Subsections (4) and (5) are intended to reproduce section 6(2) of the Law Reform (Married Women and Tortfeasors) Act 1935.

7. Subsection (6) implements the second recommendation in paragraph 81(*h*) of the report.

8. Subsection (7) implements the recommendation in paragraph 81(*g*) of the report.

Application to the Crown.

4. Without prejudice to section 4(1) of the Crown Proceedings Act 1947 (indemnity and contribution), this Act shall bind the Crown.

EXPLANATORY NOTES

Interpretation.

5.—(1) For the purposes of this Act—

(*a*) a person is liable in respect of any damage if he is subject to a duty enforceable by action to compensate for that damage, whether or not he has in fact been held to be so liable in any action actually brought against him; and

(*b*) it is immaterial whether he is liable in respect of a tort, breach of contract, breach of trust or on any other ground whatsoever which gives rise to a cause of action against him in respect of the damage in question.

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

In this subsection "dependants" means the persons for whose benefit actions may be brought under the Fatal Accidents Act 1976.

1976 c. 30.

EXPLANATORY NOTES

Clause 5

1. Subsection (1)(*a*) explains what is meant by "liable", a word used in clauses 1, 2 and 3 of the Bill. It makes it clear that a person is to be regarded as liable even though he has not yet been sued and held liable. This avoids the confusion which arose from the expression "who is, or would if sued have been, liable" used in section 6(1)(*c*) of the 1935 Act.

2. Subsection (1)(*b*) supplements clause 3(1) in implementing recommendations (*a*) and (*d*) in paragraph 81 of the report.

3. Subsection (2) reproduces material formerly in section 6(1)(*b*) and section 6(3)(*a*) of the 1935 Act.

Consequential amendments and repeals.

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

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

EXPLANATORY NOTES

Short title, commencement, savings and extent.

7.—(1) This Act may be cited as the Civil Liability (Contribution) Act 1977.

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

(3) Nothing in this Act shall—

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

(*b*) render enforceable any agreement for indemnity which would not have been enforceable if this Act, and section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 (which is superseded by this Act), had not been passed.

1935 c. 30.

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

(5) Paragraph 1 of Schedule 1 to this Act extends to Scotland, but, subject to that, this Act does not extend to Scotland or to Northern Ireland.

Clause 7

Subsection (1) reproduces material formerly in section 6(4)(*b*) and (*c*) of the Law Reform (Married Women and Tortfeasors) Act 1935.

SCHEDULES

SCHEDULE 1

CONSEQUENTIAL AMENDMENTS

The Law Reform (Contributory Negligence) Act 1945

1945 c. 28.

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

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

The Public Utilities Street Works Act 1950

1950 c. 39.

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

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

(*b*) for the words "section six of that Act" there shall be substituted the words "section 3 of the Civil Liability (Contribution) Act 1977".

The Limitation Act 1963

1963 c. 47.

3. In section 4(1) of the Limitation Act 1963 (time-limit for claiming contribution between tortfeasors), for the words "section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935" there shall be substituted the words "section 3 of the Civil Liability (Contribution) Act 1977".

The Carriage of Goods by Road Act 1965

1965 c. 37.

4. In section 5(1) of the Carriage of Goods by Road Act 1965 (exclusion, as respects carriers, of the general law with respect to contribution between persons liable for the same damage), for the words "section 6(1)(*c*) of the Law Reform (Married Women and Tortfeasors) Act 1935" there shall be substituted the words "section 3 of the Civil Liability (Contribution) Act 1977".

The Carriage by Railway Act 1972

1972 c. 33.

5. In section 6(2) of the Carriage by Railway Act 1972 (special provision with respect to actions against railway undertakings), for the words "section 6(1)(*a*) of the Law Reform (Married Women and Tortfeasors) Act 1935" there shall be substituted the words "section 1 of the Civil Liability (Contribution) Act 1977".

EXPLANATORY NOTES

SCHEDULE 2

REPEALS

Chapter	Short Title	Extent of Repeal
25 & 26 Geo. 5.	The Law Reform (Married Women and Tortfeasors) Act 1935.	Section 6.
8 & 9 Geo. 6. c. 28.	The Law Reform (Contributory Negligence) Act 1945.	Section 1(3).
10 & 11 Geo. 6. c. 44.	The Crown Proceedings Act 1947.	Section 4(2).
7 & 8 Eliz. 2. c. 65.	The Fatal Accidents Act 1959.	Section 1(4).

EXPLANATORY NOTES

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