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SOUTH AUSTRALIA

FORTY-SECOND REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO PROCEEDINGS AGAINST AND CONTRIBUTIONS BETWEEN TORTFEASORS AND OTHER DEFENDANTS

1977

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

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THE HONOURABLE MR. JUSTICE JACOBS, *Deputy Chairman.*

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The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Adelaide, South Australia 5000.

FORTY-SECOND REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO PROCEEDINGS AGAINST AND CONTRIBUTIONS BETWEEN TORTFEASORS AND OTHER DEFENDANTS

To:

The Honourable Peter Duncan, M.P.,
Attorney-General for South Australia.

Sir,

Your predecessor referred to us the consideration of proceedings against and contributions between defendants and in particular tortfeasors and therefore the consideration of the provisions of Sections 24-27c contained in Part III of the Wrongs Act, 1936-1975.

The need for statutory amendment of the common law in this area arose out of the effect of the decision of *Merryweather* v. *Nixan* (1799) 8 *Term Reports* 186; 101 *E.R.* 1337. That case decided that if a plaintiff recovered the full amount of his judgment from one out of two or more joint tortfeasors, as he was and is entitled to do, the tortfeasor who had satisfied the judgment could not recover contribution from any of the other tortfeasors by reason of the operation of the *maxim ex turpi causa non oritur actio.* The rule was extended in *Horwell* v. *London Omnibus Company* (1877) 2 *Exch. Div.* 365 to concurrent tortfeasors whose independent actions caused the same damage.

The Courts tried to mitigate the harshness of the rule. They held in some cases that the rule only applied if the person claiming contribution knew or was presumed to know that he was doing an intentional and wrongful act: see *Adamson* v. *Jarvis* (1827) 4 *Bingham* 66; 130 *E.R.* 693: *Palmer* v. *Wick & Pulteneytown Steam Shipping Co.* [1894] *A.C.* 318, but there were exceptions to this exception: see *The Englishman and the Australia* 1895 *p* 212 and *Dall* v. *Blue Wren Taxi Co. Pty. Ltd.* [1926] *V.R.* 365.

To overcome the effect of this body of case law Sections 24, 25 (in its original form), 26 and 27 were inserted into the principal Act by the Wrongs Act Amendment Act, 18 of 1939. In their original form these sections were taken from the Imperial Act, 25 & 26 Geo. V c.30 s.6.

A new Section 26a was inserted by Act No. 50 of 1951, Section 3, to cover rights of contribution where the party against whom contribution was being sought was not a tortfeasor but was the insurance company of a tortfeasor which had become liable to be sued in any of the circumstances referred to in Sections 112 and 113 of the Motor Vehicles Act, 1959-1976.

Further amendments were required by reason of the decision of the Full Court in *Hall* v. *Bonnett* 1956 *S.A.S.R.* 10 that Section 25 of the Wrongs Act did not bind the Crown or in that case the Commissioner of Highways as the agent or instrumentality of the Crown and the decision of the High Court of Australia in *Bitumen Oil Refineries (Australia) Limited* v. *The Commissioner for Government Transport* (1955) 92 *C.L.R.* 200 which held that the words as they then stood in the section "any tortfeasor liable in respect of that damage" referred to a tortfeasor whose liability had been ascertained and that "liable" (first occurring) included ascertainment by judgment. The Full High Court in that case said of the English statute and its copies in Australian legislation: "It represents a piece of law reform which seems itself to call somewhat urgently for reform."

As a result Section 25 was extensively amended by Act No. 38 of 1959, Section 3. That amendment had its own difficulties which appeared in the decision of the High Court of Australia in *Brambles Constructions Pty. Limited* v. *Helmers* (1965) 114 *C.L.R.* 213 in relation to time for claims for contribution; the decision of Bray, C. J. in *Thomas* v. *Associated Galvanisers and Others; Electricity Trust of South Australia third party* 1970 *S.A.S.R.* 136 as to the construction of Section 25 (ca) (iv) as it then stood and the decision of Hogarth J. in *Aakster* v. *H. A. Chalmers Pty. Limited; The Broken Hill Proprietary Company Limited third party* (1972) 3 *S.A.S.R.* 519 in relation to other parts of the same Section 25. As a result of those decisions Section 25 was once more amended by the Statutes Amendment (Miscellaneous Provisions) Act, 58 of 1972, Section 16. This Act also introduced a new Section 27c by Section 17 dealing with the partial abrogation of the rule in *Lister* v. *Romford Ice & Coal Storage Co. Ltd.* [1957] *A.C.* 555 relating to indemnity as between master and servant where the master is vicariously liable for the servant's negligence.

Whilst on the subject of the amending Act of 1972 may we draw attention to an infelicity occasioned by the amendment to Section 25 (2) deleting the words "subsection (1) of" in the first line of the subsection. The subsection three times refers to "of that subsection" in line six, in line ten, and again in line twelve, but as there is no longer a reference to "subsection" in line one, there is now nothing to which the later uses of the word in that subsection can refer back.

Section 25 as it now stands reads as follows:—

"(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 torfeasor in respect of the same damage;

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

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

(*ca*) a tortfeasor who, on or after the coming into operation of the Wrongs Act Amendment Act, 1959, becomes liable in respect of that damage may recover contribution from a third party as defined in subsection (2) of this section or commence proceedings for such recovery notwithstanding—

(i) that judgment in an action founded on the tort has not been given determining the tortfeasor's liability in respect of that damage; or

(ii) that the plaintiff as defined in that subsection has released the third party from his liability to the plaintiff for that or any part of that damage; or

(iii) that the plaintiff has not duly given any notice that would be required if the plaintiff where to recover judgment against that person; or

(iv) that the time within which the plaintiff may commence action against the third party has expired; or

(v) that the third party is the Crown or an instrumentality of the Crown;

(*d*) where the tort or torts causing the damage was or were committed by the husband or wife of the person suffering the damage and some other person, that other person may recover contribution as mentioned in paragraph (*c*) of this subsection from the husband or wife, as if the husband or wife had been liable to the person suffering the damage.

(2) In this section, so far as the context admits or requires:
'third party' means—

(i) a tortfeasor from whom any other tortfeasor is entitled to recover contribution under paragraph (*c*) of that subsection; and

(ii) the husband or wife of a person suffering the damage and from whom some other person is entitled to recover contribution under paragraph (*d*) of that subsection; and

'Plaintiff' means the person suffering the damage referred to in that subsection whether or not that person has commenced an action for recovery of judgment in respect of the damage.

'proceedings' means proceedings before a court.

(3) Any proceedings by a tortfeasor for the recovery of contribution from third party under this section must be instituted before the expiration of two years from the day on which the amount of damages or other compensation payable by the tortfeasor to the plaintiff if determined by the judgment of a court of competent jurisdiction, or by agreement between the plaintiff and the tortfeasor."

In this state of successive amendments to the law on this topic, it might seem somewhat rash on our part to suggest further amendments of the law. However our examination of the subject has satisfied us

that some further amendments would be beneficial and we report accordingly. In compiling this report we should say that we have been assisted by a perusal of a working paper by the Institute of Law Research and Reform of the University of Alberta on contributory negligence and concurrent tortfeasors and by the working paper number 59 of the Law Commission of England on contribution.

The first amendment relates to the words "in respect of the same damage". The general rule as to damage in this area of the law is as set out in the judgment of Jordan C. J. in *Dougherty* v. *Chandler* (1946) 46 *S.R. N.S.W.* 370 *at* 375—

> "If a number of persons jointly participate in the commission of a tort, each is responsible, jointly with each and all of the others, and also severally, for the whole of the damage caused by the tort, irrespectively of the extent of his participation. As regards damages, a person who commits a tort is liable to pay full compensation for all actually resultant damage which is 'direct' or 'not too remote', and also any resultant damage, whether direct or not, which he intended, or which he contemplated or ought to have contemplated. In the case of joint tortfeasors, all are liable, to the extent stated, for all the damage caused to the plaintiff by their joint tort."

In practice this concept however gives rise to considerable difficulty as may be seen by the varying fortunes of the case of *Kornjaca* v. *Steelmains Pty. Ltd. and Others; Steelmains Pty. Ltd.* (*cross claimant*); Dillingham Constructions Pty. Ltd. (cross defendant). This matter first came before Mr. Cantor Q.C. the Master of the Supreme Court of New South Wales (as he then was) and his decision is reported at (1973) 1 *N.S.W.L.R.* 175. The facts shortly were that Kornjaca sued Dillingham Constructions for negligence causing shock and injury to his back suffered in the course of his employment on or about the 1st August 1968, for which he recovered damages. Kornjaca later sued Steelmains for negligence causing shock and injury to his back suffered in the course of his employment with that company on or about 27th October 1970. Steelmains made a cross claim against Dillingham for contribution or indemnity and Dillingham countered with an application for an order striking out the cross claims as disclosing no reasonable cause of action. The Master allowed the claim for contribution or indemnity to stand and dismissed the application to strike out.

On appeal the matter came before Collins J.: see (1973) 1 *N.S.W.L.R.* 598. He reversed the judgment of the Master, holding that the 1968 act might have made the plaintiff more susceptible to the 1970 injury, but that this was not sufficient to make the third party "a tortfeasor liable" within their equivalent of our Section 25. As Dillingham did not contribute to the tort it could not be called upon to contribute to the damages. Accordingly the cross claim failed and the application to strike out succeeded.

An appeal was taken from the judgment of Collins J. to the Court of Appeal of New South Wales which, in its decision reported in (1974) 1 *N.S.W.L.R.* 343, held that the appeal should be allowed and the judgment of Cantor Q.C. Master restored except in relation to a claim for indemnity under the Workers' Compensation Act which does not concern the question we are now reporting upon.

A further appeal was taken to the High Court of Australia which reversed the decision of the Court of Appeal of New South Wales and restored the judgment of Collins J.: see *Dillingham Constructions Pty. Ltd.* v. *Steelmains Pty. Ltd. and Another* (1975) 6 *A.L.R.* 171.

The difficulty which this state of the law occasions may be easily illustrated by taking the illustration given to the current edition of Street on Torts (the 6th) (1976) pages 476-477 where the author says:—

> "Where two or more persons not acting in concert cause different damage to the same plaintiff, they are treated differently in law from either joint or several concurrent tortfeasors.
>
> In the straightforward kind of case the two defendants inflict quite separate harm on the plaintiff. For example, D1 gouges out P's eye, and D2 fractures his skull, whereupon D1 is answerable for the damage resulting from the loss of the eye and D2 for the damage following on the fracture of the skull."

This case may easily be tested by assuming that as a result of the negligence of the second defendant the plaintiff's skull is fractured and he suffers double vision. Clearly he is in a much worse position if the first defendant has taken out his eye than if he were a two eyed person with some hope of using the two eyes for comparison of objects and distances. The assistance which a skilled eye surgeon can give in correcting the second situation is much greater than in correcting the first. The law to be applied to such a case would be that set out by Barwick C. J. *in Dillingham Constructions Pty. Ltd.* v. *Steelmains Pty. Ltd. and Another* (*supra*). Provided that the acts have occurred successively, D1 will be liable not simply for the loss of an eye but for the extra potential risk to his vision that P must necessarily encounter in the future; D2, upon demonstrating that P was peculiarly vulnerable owing to a pre-existing condition for which another person was responsible, would be liable only for the extra damage that he caused. In such a case the law does not regard D1 and D2 as having contributed to the same damage and the apportionment legislation does not apply. Especially in cases in which P's claim against D1 has been concluded by judgment or by settlement there is every reason why the law should remain unaltered; it is quite undesirable that settlements should be so re-opened and the second accident may occur many years after the first. But where P's injuries are suffered simultaneously or follow closely upon each other it would be more convenient if his claims could be dealt with in the one proceeding and the provisions of Section 25 (1) (*c*) are likely to bring about a fairer result than the application of the common law rules, which are always difficult to apply. We recommend that in cases in which P is pursuing claims against two or more tortfeasors who have acted so that they may be said to have caused together part of the overall damage of which he complains contribution should be capable of being ordered between them.

Section 84 of the Workmen's Compensation Act, 1971, as amended, provides that an employer may in certain circumstances recover the equivalent of compensation payments he has made to his workman under the Act from a third party whose wrongful act caused the workman's injury. The section sets out certain rules for ensuring that the workman cannot retain both compensation and damages, and then goes on to provide that—

> "(*d*) If the workman has received compensation under this Act, but no damages or less than the full amount of the damages to which he is entitled, the third party shall be liable to indemnify the employer against so much of the compensation paid to the workman as does not exceed the damages for which the third party is still liable and the employer may enforce the indemnity against the third party by action."

This paragraph poses a number of problems, including the question of the application of the contributory negligence provisions of the Wrongs Act, and you have agreed that we should make appropriate recommendations about the matter in this report. In our opinion, Section 84 should be amended to deal with the following difficulties:—

1. In *Price* v. *Commissioner of Highways* 1968 *S.A.S.R.* 329 it was held that the amount an employer could recover from a third party under Section 84 (*d*) of the Workmen's Compensation Act was liable to be reduced by reason of the contributory negligence of the employer or his servants. There is no doubt about the justice of this decision but we think, with respect, that there is some difficulty in applying the language of Section 27a (3) of the Wrongs Act to the statutory right of recovery given to an employer by Section 84 of the Workmen's Compensation Act, and we think it would be better to put the question beyond the reach of further argument by legislating on the matter.

2. Despite the interpretation provision in Section 8 (2) of the Workmen's Compensation Act, there is difficulty in adapting Section 84 to the case of an employer whose workman has died after receiving compensation payments but before the employer has himself sued the third party for their recovery.

3. The expression "is still liable" in paragraph (*d*) would seem—at least at first sight—to attract the time limits imposed by the Limitation of Actions Act. This may cause hardship to the employer vis-a-vis the third party in the cases—and they are by no means rare—in which compensation payments are still being made more than three years after the workman received his injury. It would be argued that the third party cannot be said to be "still liable" to pay damages to a workman who has not sued him within the appropriate limitation period. It is true that similar argument was rejected by the High Court in *Tickle Industries Pty. Ltd.* v. *Hann* (1974) 48 *A.L.J.R.* 149, *but there* the relevant expression in the Northern Territory Ordinance was merely "is liable", and the reasoning of the majority in that case (that the purpose of the expression may be intended simply to identify the tortfeasor) may possibly not be applicable to the different wording of Section 84. Judge White thought it was (*G.M.H.* v. *Cowell,* L.S.J.S. 21st April, 1977) and a majority of the Full Court agreed with him: see *Cowell* v. *G.M.H.* (unreported, judgment delivered 27th October, 1977). Nevertheless, it would be prudent, we think, in any recasting of the section to ensure that the Limitation of Actions Act cannot operate to the employer's disadvantage in this respect.

4. While the Workmen's Compensation Act applies to the Crown as an employer for certain purposes (e.g. Section 87), the Act as a whole does not appear to bind the Crown, and it may be that the Crown Proceedings Act 1972 does not cover the statutory right to indemnity conferred by Section 84 (*d*). It would therefore seem appropriate to provide that Section 84 should bind the Crown, and on similar grounds to make it applicable to the case of a nominal defendant appointed under the Motor Vehicles Act (Cf. Wrongs Act, Section 26a).

The next group of amendments arise out of the words "liable in respect of that damage . . . liable as a joint tortfeasor in respect of the same damage". The first amendment is one which is accepted in practice but has never been ultimately pronounced upon by the High Court of Australia and that is the effect of the last opportunity rule and of the decision of the High Court of Australia in *Alford* v. *Magee* (1952) 85 *C.L.R.* 437. This matter has been the subject of a careful

study by one of our number: see *Alford* v. *Magee and the Apportionment Legislation by J. F. Keeler* (1967) 41 *A.L.J.* 148. The apportionment legislation was said to have abrogated the last opportunity rule in Victoria as early as 1944: see the judgment of the Full Supreme Court of Victoria in *Quinn* v. *Symonds* (1944) *V.L.R.* 231. *Similar* statements have been made by the High Court of Australia but unfortunately these latter were not necessary for the decision in those cases: see *Chapman* v. *Hearse* (1961) 106 *C.L.R.* 112 and the judgment of Windeyer J. in *Teubner* v. *Humble* (1963) 108 *C.L.R.* 491 *at* 502. The matter was treated similarly by Napier C. J. in South Australia in *Municipal Tramways Trust* v. *Ashby* (1951) *S.A.S.R.* 61 *at* 65. It would seem wise to put the matter beyond debate, particularly having regard to the decision of the Privy Council in *Sigurdson* v. *The British Columbia Electric Railway Co. Ltd.* (1953) *A.C.* 291. We therefore recommend that an express provision be inserted in the Wrongs Act abolishing the last opportunity rule—see also an article in (1955) 33 *Canadian Bar Review* 257—"*Last Clear Chance after Thirty Years under the Apportionment Statutes*" *by MacIntyre.*

The next amendment is one which is covered in other parts of the Act but not expressly in Section 25. It is probable that the words in brackets in the second line of subsection (1) "(whether a crime or not)" were intended to cover the situation we are now discussing but it is clear that they do not do so because the other person in this instance would not "have been liable as a joint tortfeasor". This refers to the case where two of the parties, the plaintiff and one of the defendants, were engaged in a joint criminal exercise which precluded the plaintiff recovering against the defendant. As the law stands the joint illegal enterprise would be a sufficient defence by the second criminal to any action by the first criminal. This matter was considered by another member of the Committee in *Nathan and James* v. *Vos* (1970) *S.A.S.R.* 455 *at* 473-474. We do not think that the provisions of Sections 104 and 121 of the Motor Vehicles Act affect this position. That produces justice no doubt as between those two parties themselves but if the criminal is driving one car and the plaintiff criminal, in order to prevent the illegality point being taken against him, sues the other driver and recovers judgment against him it would be quite wrong for the other driver or his insurance company in seeking to enforce the contribution provisions of the Act to be met by the fact that the second defendant was never liable to the plaintiff because of their joint illegal enterprise. We therefore recommend that it be made explicit that the contribution provisions of Section 25 apply notwithstanding that the plaintiff might not have been able to recover against one defendant because of a defence of joint illegal enterprise.

Our next recommendation concerns a limitation on the scope of Section 25 (1) (*ca*). That subsection prevents the actions of a plaintiff after he has suffered injury from affecting the right of the two defendants to contribution from each other. It does not, however, extend to cover the case where a person has agreed to accept the risk of damage that another may cause him before that damage or injury actually occurs; in other words it does not cover cases in which the injured party has waived his rights before suffering damage or cases to which the doctrine of volenti non fit injuria applies. It is true that the practical consequences of this limitation are considerably reduced by the difficulty of proving the common law defences (*see McComiskey* v. *McDermott* 1974 *I.R.* 75) and because it has no application to claims arising out of negligence in the use of a motor vehicle (see Motor Vehicles Act, 1959-1977 Section 133). Nevertheless, in other cases

arrangements between the injured party and a person causing him injury may operate to deny the right to contribution of another person who is not a party to them. Especially in cases where personal injury or damage to property has been caused we do not believe that this should be so, and recommend that an additional clause to cover the situation be added to Section 25 (1) (*ca*). Where a person has suffered purely economic loss the position may have to be viewed differently, a matter with which we deal later in this report. But the same observations apply in relation to a defendant who is entitled to a complete indemnity from a plaintiff because in such a case the plaintiff's claim as against him may well be struck out on the ground that it was an abuse of the process of the Court as being simply a circuity of action. This is a less obvious and less common case but it might be wise to provide for both cases whilst the law is being amended.

The next amendment to the law which we think ought to be made is to grant a right of contribution where one defendant liable for the same damage is liable in tort and the other or others is or are liable in contract. This may arise in one of three ways:—either (*a*) where one liability is a breach of contract stricto sensu and the other sounds in tort, (*b*) where both liabilities arise out of negligence but the law classifies the claim in negligence against the professional man concerned, as in a claim against an architect, solicitor, doctor and persons in similar professions, as a claim in contract: see for a recent discussion of this question of professional liability, an article in (1977) 127 *L.J.N.* 108 *by Parris*, or (*c*) because one is a liability in tort and the other is an innominate liability arising out of recent extensions of liability beyond contractual situations made by recent statutes. Examples of these are contained in South Australian Acts such as the Misrepresentation Act, 1971-1972, which extends liability from fraudulent misrepresentations to innocent misrepresentations, the Consumer Transactions Act, 1972, and the Manufacturers Warranties Act, 1974, and the Trade Practices Act of the Parliament of the Commonwealth. All these Acts and others like them extend liability beyond the bounds of the law of contract. In some cases it is difficult to classify the innominate right thereby given: for example in relation to the Misrepresentation Act, fraudulent misrepresentation could always be treated as a tort because the plaintiff could at his option claim in deceit; what then is the position when the misrepresentation is innocent? The right given by the Act would appear to be neither contractual nor tortious but, as we have said, an innominate claim somewhere in the borderland of the two.

The position is that at present the contribution section, Section 25, does not apply because a contract breaker is not a tortfeasor; see the judgment of Crawford J. in the Supreme Court of Tasmania in *Brown* v. *Sevrup Fisheries Pty. Ltd.* 1970 *Tas. R.* 1, but the position is not entirely clear—see the different decisions in Canada of the British Columbia Supreme Court in *West Coast Finance Limited* v. *Gunderson Stokes Walton & Co.* (1974) 44 *D.L.R.* 3*d.* 232 *and on appeal* (1975) 56 *D.L.R.* 3*d.* 460 and the judgment of the Supreme Court of Ontario in *Dabous* v. *Zuliani* (1974) 52 *D.L.R.* 3*d.* 664 and a Canadian article on this problem—*Contribution in a Contractual Setting by Weinrib* (1976) 54 *Canadian Bar Review* 338. The problem is discussed by Glanville Williams in his usual careful way in his book: *"Joint Torts and Contributory Negligence"* at pages 328-332. We realise that there are difficulties inherent in this type of case: see *Quinn* v. *Burch Bros. (Builders) Limited* (1966) 2 *Q.B.* 370 *and Waitapu* v. *R. H. Tregoweth Ltd.* (1975) 2 *N.Z.L.R.* 218 but we do not think that these difficulties

should be allowed to obscure the point of principle. The law is not logical in this matter because it has been held many years ago that a breach of contract is sufficient to ground a claim for damages under what was Lord Campbell's Act and is now the Fatal Accidents provisions of the Wrongs Act: see the judgment of the High Court of Australia in *Woolworths Limited* v. *Crotty* (1942) 66 *C.L.R.* 603.

We recommend that Section 25 be amended to permit claims for contribution to be made where the liability of one defendant sounds in contract or in an innominate cause of action and the other in tort, provided the damage claimed is in whole or in part the same damage in both cases.

Adoption of this last recommendation may well lead to difficulty if the party against whom the plaintiff has a claim in contract may take advantage of a provision in the contract excluding or limiting the extent of this responsibility for negligent performance of the contract. An example of this problem is provided by the United Kingdom Law Commission in its working paper on contribution:

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. Total damage amounts to $1 000; D1 and D2 are held equally to blame; but there is a clause in the contract between P and D1 limiting P's damages for breach of the contract to $400.

The Law Commission advances three possible solutions to this problem. (1) P should recover $400 from D1, $500 from D2 and bear personally $100 of the loss. (2) The contribution proceedings might be confined to the amount by which the two claims overlap ($400), leaving D2 to pay the balance; D1 would then pay $200 and D2 $800. (3) D1 might be responsible to the extent of the limit set down in the contract, and D2 for the balance, so that D1 would pay $400 and D2 $600. In its final report on contribution the Law Commission recommends the adoption of the third, on the ground that (1) offers D2 an unjustified benefit at the expense of P, and one which arises from an arrangement to which he is not a party, and that (2) allows the arrangement between P and D1 to prejudice D2 unduly. A fourth possibility, not considered by the Law Commission, is that D1 and D2 should each be held liable to the extent of $500 on the ground that even if the third solution of the Law Commission is adopted D2 is being prejudiced by the arrangement made between P and D1, and the extent of that prejudice might be extreme; for example, if in its example the contract between P and D1 excluded liability for the breach of contract altogether the effect of the proposal would be to deprive D2 of any right of contribution at all.

The Committee has considered these solutions carefully, and sees merit in more than one of them. Recognising, however, that the arguments in favour of the different solutions may appeal to different minds with different force, the Committee agrees with the Law Commission in the solution it recommends. The example it gives is one in which P has suffered personal injury and special considerations might possibly apply to such cases; but it is clear that an increasing proportion of cases will be those where P has suffered economic loss. This follows from the considerable advances made in this field by the law of torts in recent years, as exemplified by the cases based on the making of negligent statements and provision of negligent advice, or on the principles of *Anns* v. *London Borough of Merton* (1977) 2 *All E.R.* 492,

or of Cases of which *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge "Willemstadt"* (1977) 51 *A.L.J.R.* 270 may be taken as the representative. The Committee recognises that clauses limiting or excluding liability for breach of contract generally form part of carefully considered commercial agreements which are entitled to considerable respect and agrees with the principle implicit in the recommended solution that the liability to contribute should not exceed the limits on liability established by prior contract or agreement between the plaintiff and a defendant.

We should add that the Law Commission in its final report on contribution indicated that the particular example it gave would require the contract to be outside the terms of the Supply of Goods (Implied Terms) Act, 1973, since Section 4 of that Act would otherwise invalidate the exemption clause. Section 10 of the Consumer Transactions Act also invalidates an exemption clause purporting to cover any matter where a term in a contract is implied by the Act. The committee does not, of course, intend its recommendation to affect the operation of the provisions of the Consumer Transactions Act in any way.

If that last recommendation be accepted, the next question to be faced is that of the contributory negligence of a plaintiff in relation to such an action in contract. This matter was considered by one of the members of this Committee in *Hunnerup* v. *Goodyear* (1974) 7 S.A.S.R. 215 *at* 229-230. It was not necessary for the point to be decided in that case. It is a far-reaching amendment in the law of contract and we think it would more properly be the subject of a separate reference if you desire us to consider it in detail. We would only add that in dealing with this matter, if referred, any amendment to Section 25 would have to stipulate that nothing in such an Act overrides or should be construed to override any claim for indemnity or contribution under the various consumer credit acts or under Section 46 (6) of the Companies Act and this would therefore be one of the bounds of such a reference.

The English Committee would go further and would recommend the consideration of amendments based on contribution which arises solely in contract or by the operation of the general law. The law on this matter is contained in *Goff and Jones*: *The Law of Restitution* Chapter 11 and in *Meagher Gummow and Lehane* Chapter 10. We think there is good reason to consider a further amendment of the law along the lines adumbrated by the English Committee. However, we regard this as outside the scope of the present reference, though we would be happy to consider it, should such a reference later be made by you, either separately or along with the one referred to in the last preceding paragraph.

We have the honour to be

HOWARD ZELLING
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The Law Reform Committee of South Australia.

7th December, 1977.

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