PROPOSALS TO REFORM THE LAW OF CIVIL CONTRIBUTION

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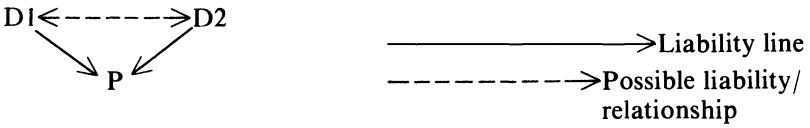
I Introduction

For many years the courts have had a power to apportion responsibility for loss, under the contribution legislation as between two or more tortfeasors whose conduct has caused the loss, and under the contributory negligence legislation as between a tortfeasor and a plaintiff whose negligence has contributed to the loss. The legislation has worked well, producing generally fair results with little controversy, a successful forerunner of the more recent discretionary statutes. Consequently, it is not surprising that the Reform Committee's paper proposes that the system should be extended to liability based on breach of contract. However, the proposal does highlight some of the basic problems inherent in the system of apportionment.

In the case of contribution, many of the problems stem from the trilateral nature of the relationship involved. A simple diagram may help illustrate the point.



For there to be a contribution claim, there must always be a liability relationship between each D and P. The fact that the Ds may be working on a common project promoted by P may also mean that there is a contractual or tortious relationship between D1 and D2 as well. The extension of tortious duties to the realms of pure economic loss in recent years, and now the proposed extension of the contribution system to the contractual sphere, make it all the more likely that there will be such a relationship between D1 and D2. The problems that arise in both determining entitlement to contribution and the actual apportionment of responsibility, frequently stem from the trilateral nature of this relationship. What may appear fair if just the P-D1 and P-D2 lines are considered, may not appear fair along the D1-D2 line. Indeed, it might be said that overall fairness lies at a point in the middle of the triangle, but as the courts are limited to working along the lines this is not an option.

In the case of apportionment between P and D, the difficulties appear less, as the court is working along a single line. But the proposed extension of the system to contractual liability raises the difficult question of the extent to which P is entitled to rely on performance of the contract by D. Furthermore, where the same facts give rise to both a contribution action between the wrongdoers and a direct tortious or contractual claim by one wrongdoer against the other, there may be problems achieving compatibility between the two claims particularly where the direct claim is based on contract.

The problems inherent in this area are conceptually and practically complex. The dilemmas may be clear, but the solutions are not. Fortunately the work of Professor Glanville Williams, *Joint Torts and Contributory*

Negligence published over 30 years ago, discusses the problems with a clarity and foresight greatly to be admired. But even to Williams, there were not always solutions. The purpose of this article is to review the law and its problems in the light of the proposals of the reform paper. Extensive reference will be made to the caselaw of the Commonwealth to elucidate problems and illustrate the possible solutions. The issues will be discussed under three headings: entitlement to contribution, apportionment between wrongdoers and contributory negligence.

II Entitlement to Contribution

S.17 (l) (c) of the Law Reform Act 1936 provides that "any tortfeasor liable in respect of that damage (suffered by plaintiff) may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage". The reform paper recommended that this provision should be altered in three respects. First, entitlement to contribution should not be limited to tortfeasors but should be extended to cover all bases of liability so that in particular, D1 should be entitled to recover a contribution from D2 where either or both are liable in contract but not in tort. Secondly, it should be extended so that a D1 who has compromised his alleged liability with P, should be entitled to claim a contribution from D2 without the need to prove his (D1's) actual liability, in other words that settlements should act as a sword entitling a contribution claim. Thirdly, it recommended that D1 should not be entitled to claim a contribution from D2 where D2 had compromised his liability with P, in other words that settlements should act as a shield against a contribution claim. Each of these recommendations will be examined in some detail. Whilst it will be suggested that the first two are relatively uncontroversial, it will be argued that the third raises wider issues which the reform paper did not fully consider. Finally, this section of the article will conclude with some consideration of a more radical proposal considered by the paper, the replacement of the contribution principle by one of proportionate recovery.

(1) Extension of Entitlement to All Wrongdoers

Two issues will be discussed under this heading; first, the extension of entitlement to those in breach of contract and secondly, whether entitlement should remain restricted to wrongdoers who are liable for the *same* damage.

(a) Extension to breach of contract

The Reform Paper follows the example of the English Law Commission in recommending an extension of entitlement to contribution to all wrongdoers whatever the basis of their liability. The Law Commission was particularly concerned that the 'tortfeasor' restriction in existing legislation precluded apportionment between a wrongdoer who was in breach of a strict contractual duty and one who was negligent. Thus if a builder was in breach of his strict contractual duty to the employer to use suitable materials and an architect was in breach of his duty of care in supervising the builder, there could be no apportionment between them as the builder was not a tortfeasor. If either the architect or the builder paid the employer in full for his loss, he would be unable to recover a contribution from the other. This obvious injustice has been remedied in the UK by the Civil Liability (Contribution) Act 1978 which allows contribution claims between wrongdoers whatever the basis of their liability.

In New Zealand, the injustice produced by the tortfeasor restriction has been exacerbated by the decision in *McLaren Maycroft & Co.* v *Fletcher Development Co. Ltd*[1] to the effect that the cause of action between a client and his negligent professional adviser lies only in contract. The resulting problem may be illustrated by the facts of *Young* v *Tomlinson*[2]. There, a house suffered damage as a result of the combined negligence of a builder, an architect and a local authority. The house was sold by the developer and the subsequent purchaser sued all three. As none of them had a contractual relationship with the purchaser, they were classed as tortfeasors and the court was able to apply the contribution legislation and apportion responsibility between them. However, if the developer himself had claimed, the architect at least,[3] would have been regarded as liable in contract only and hence would have been unable to claim a contribution from the other defendants. Conversely, neither would they have been able to claim a contribution from him if they had paid the developer. It is clearly unsatisfactory that the parties' entitlement to contribution should depend upon the fortuitous circumstance of whether the claim was brought by the developer or the subsequent purchaser, a circumstance likely to depend mainly on when the damage first came to light.

Similar problems may arise in other contexts: thus where a house purchaser has suffered loss because of the negligence of his solicitor and that of a valuer,[4] there will be no entitlement to contribution between them as the solicitor will be classed as a contract breaker and not a tortfeasor. Again a negligent auditor sued by his employer will be unable to claim a contribution from say, a negligent director who gave him inaccurate information,[5] whereas if the plaintiff had been an investor having no contractual relationship with the auditor, a contribution claim might have been open to him. Whatever the merits of the *McLaren Maycroft* rule in terms of general principle,[6] it is clear that it produces undesirable results in the context of contribution. The recommendation[7] of the Reform Paper to extend contribution to all wrongdoers will solve this problem and hence it is much to be welcomed.

(b) Restriction to liability for some damage

Under the reform proposal, entitlement to contribution will remain limited to wrongdoers who are liable in respect of the same damage and this implies that they must be liable to the same plaintiff. The potential significance of this restriction is illustrated by the recent English Court of Appeal decision in *Peabody Donation Fund* v *Sir Lindsay Parkinson & Co. Ltd.*[8] A developer

[1] [1973] 2 NZLR 100.

[2] [1979] 2 NZLR 441.

[3] In *Port* v *New Zealand Dairy Board* [1982] 2 NZLR 287, the *McLaren* rule was said to be limited to contractual relationships between a client and professional adviser, although in the earlier case of *Harris* v *Demolition Contractors* [1979] 2 NZLR 166, it was applied to the relationship between an employed and his building contractor.

[4] See for example *Nielsen* v *Watson* (1981) 125 DLR (3d) 325.

[5] See for example *Andrew Oliver & Son* v *Douglas* (1981) 82 SLT 222.

[6] For an exhaustive analysis see (1982) 5 Otago LR 236.

[7] Para 3.1

[8] [1983] 3 All ER 417.

had employed an architect to supervise a project. With the approval of a local authority building inspector, the architect had negligently changed the specifications of the drains with the result that they subsequently cracked causing the developer loss. The architect settled his liability with the developer who then sued the local authority for the balance of his loss. The court held that the authority did not owe the developer a duty of care to see that proper specifications were followed, but a majority of the court suggested that it might owe such a duty to a subsequent purchaser. If we consider this situation from the point of view of an architect claiming a contribution from an authority, it seems that he would not be so entitled if the action was brought by the developer as in that case, the authority would not have been liable for the same damage, being not liable at all to the developer. But if the action were brought by a subsequent purchaser, then he would be entitled to contribution as both he and the authority would be liable to the same plaintiff.

Once again, it seems unsatisfactory that a defendant's contribution entitlement should depend upon who is the plaintiff, which in turn depends upon when the defect becomes obvious. However, this problem requires a more radical solution than the analogous difficulty discussed earlier in relation to the 'tortfeasor' restriction. It would require freeing entitlement to contribution from the bounds of liability to the same plaintiff. In effect, this was what the Canadian judge attempted to do in *Dominion Chain Co. Ltd.* v *Eastern Construction Co. Ltd.*[9] He permitted a negligent engineer to claim a contribution from a negligent contractor who was not liable to the same plaintiff because he was protected by an exclusion clause in his contract with the plaintiff. The judge interpreted the contribution legislation as allowing a contribution claim where the parties were at fault although not actually liable to the same plaintiff, thereby on his own admission "creating a statutory liability (on the part of the contractor) outside the common law". The Ontario Court of Appeal reversed the judge's decision holding his interpretation to be contrary to the intention and wording of the legislation. But this still leaves open the question whether a reform proposal should adopt the suggestion of the trial judge in *Dominion*. The view of this commentator is that however fair such a suggestion might appear, it would fundamentally undermine the principles of civil liability at common law. Liability should be founded upon specific common law or statutory duties and not upon some general statutory conception of 'fault' akin to that found in civil law systems. The contribution action should remain parasitic upon liability to the same plaintiff. If apparent anomalies like that in *Peabody* result, the answer lies not in a radical alteration of the basis of contribution claims. If an answer is desired, it should be found in a reconsideration of the common law principles of duty, a clearer determination of when and why local authorities owe duties.

(2) Settlement as a Sword

In *Baylis* v *Walsh*[10] McGregor J. held that the fact D1 had settled his alleged liability with P did not prevent him from claiming a contribution towards the settlement from D2. But he can only bring such a claim against D2 if he can prove that he was in fact liable to P. This may not be easy

[9] (1973) 46 DLR (3d) 28 (Lerner J.) (1976) 68 DLR (3d) 385.

[10] [1962] NZLR 44.

where D1's negotiating position with P has involved a denial of all or part of his alleged liability. In *Baylis* for example, the settlement itself contained an express disclaimer of responsibility. If anything, the present rules discourage D1 from settling. He will be on safer ground if he fights and loses an action brought by P, for then he will clearly be entitled to claim a contribution from D2. Such a position is unsatisfactory, particularly in view of the proposed extension of contribution to the contractual context. Contractual relationships are often on-going in nature with settlement of liability being the norm. The contribution rules like other procedural rules should be designed to encourage not discourage settlements.

Consequently, the Reform Paper's proposal[11] to permit D1 to claim a contribution without proof of liability where he has settled with P, is to be welcomed. The proposal is made subject to two provisos to safeguard the position of D2. One proviso is that D1 must prove "that D2 is liable to P for an amount equal to or exceeding the amount claimed by D1 by way of contribution". This gives D2 some protection as to quantum. However, it alone would not prevent D2 being required to contribute to an over-generous settlement. If say D2 was 50% responsible he could be required to make a 50% contribution to a settlement at a figure up to double the amount of the true loss to P. It is here that the other proviso is relevant: D1 must prove "that D1's compromise with P was reasonable having regard to all the factors that influenced the settlement". Clearly a deliberately over-generous settlement reached with the intention of forcing D2 to make a high contribution would fall foul of this proviso. But there may be other more borderline cases: would a settlement between an employer and a contractor in which the contractor's main motive was the likelihood of future work from the employer if the settlement was sufficiently generous, fall foul of the proviso? Such a circumstance may not be uncommon where contractual relationships are on-going in nature. Again, where P's claim against D2 is time barred, would a settlement with D1 conditional on his being able to take advantage of the longer time periods for contribution claims, be acceptable? The concept of a *Bona Fide* settlement is inherently vague but that is the price to be paid for a necessary reform.

The reform paper also noted a criticism[12] of the 1978 UK legislation permitting settlements to be used as a sword, namely that 'settlement' is there defined in terms of monetary payment. In a contractual context other forms of settlement e.g. that D1 will repair damage to a product sold to P, may be common. As the paper suggests, New Zealand legislation should define settlements in terms broad enough to include such arrangements. The UK legislation also limited the concept of settlement to situations where only the factual basis of liability was in doubt. As many settlements are based on legal doubts e.g. as to the existence or extent of D1's duty to P, it is to be hoped that any reform will apply to all settlements whether they compromise factual or legal disputes.

(3) Settlements as a Shield: P's Conduct as a Defence for D2

Should D2 be shielded from a contribution claim by D1 by virtue of a settlement D2 has made with P? If say D2 was 50% responsible for P's loss of $100 but managed to settle P's claim for $40 and P then recovered

[11] Para 4.1.

[12] (1979) 42 MLR 182.

the balance of $60 from D1, should D1 be able to recover a further $10 contribution from D2? The present position is not entirely clear. D2 may be subject to a contribution claim if he "is, or would if sued in time have been liable" for the loss to P. In *Wimpey* v *BOAC*[13] the House of Lords held that 'liable' in this context meant "liable by judgment". Obviously once D2 has settled with P, he can no longer be liable by judgment to P. He *is* not liable to P after the settlement. However, he would have been liable if he had been sued before the settlement and Williams suggests[14] that provided D2 would have been liable to judgment at the time of the wrong, he may be subject to a contribution claim from D1 notwithstanding the fact that P has later settled or released his liability.

The Reform Paper considered this result to be unfair to D2 "who may have legitimately believed that he had completely absolved himself from the consequences of his wrongdoing" by settling with P.[15] Consequently it recommended that "provided the compromise is bona fide and reasonable as between P and D2 and has been concluded before D1 brings a claim for contribution then D1 is barred from his claim". This recommendation appears consistent with the earlier recommendation that reasonable settlements between P and D1 should act as a sword entitling D1 to bring a claim. Settlements will be encouraged if they act both as a sword and a shield.

However, whether or not settlements should act as a shield raises a broader problem, namely the extent to which D1 should be prejudiced by P's conduct in relation to D2. The same general problem arises in respect of limitation periods: should the fact that P has failed to sue D2 within the limitation period, protect D2 from a contribution claim from D1 who was sued in time? It also arises in relation to a number of other issues e.g. waiver of D2's liability by P, exclusions or limitations of liability in a contract between P and D2. Broadly, it is suggested that D1 should not be prejudiced by P's conduct after D2's breach of duty has occurred but that P's agreement with D2 prior to the breach should protect D2 and prejudice D1. We will now consider the post-breach and pre-breach situations in more detail to justify this conclusion.

(4) Post-Breach Conduct

(a) Failure to sue within limitation period

It was established in *Moloney* v *Mullan*[16] that D1's right to claim contribution from D2 does not crystallise for the purposes of the statutes of limitation until his own liability to P is determined. Thus D1 may bring a claim against D2 at a time when a direct claim by P against D2 would have been barred. D1 is not prejudiced by P's conduct in relation to D2 in this context. The Reform Paper considered the argument that D2 should be shielded from a contribution claim if a direct claim would have been time barred. Pending a comprehensive review of the general law relating to limitation periods, they preferred the present principle justifying it on the ground that "the theory of contribution is to achieve fairness as between

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[13] [1955] AC 169.

[14] Williams: *Joint Torts and Contributory Negligence*, p.98.

[15] Para 4.3.

[16] [1963] NZLR 865.

the wrongdoers in a situation where the plaintiff can choose the one or more whom he sues. The right of the chosen wrongdoer to obtain contribution could otherwise be defeated because of the delay (even deliberate) in having the primary claim determined".[17]

(b) Want of prosecution

In *Hart* v *Hall & Pickles* the English Court of Appeal held that the fact that P's claim against D2 had been dismissed for want of prosecution did not bar a subsequent contribution claim against D2. This result can be justified in the same way as that relating to limitation periods: D1 should not be prejudiced by P's failure to actively pursue his claim against D2.

(c) Settlements

As noted earlier, the Reform Paper proposed that a settlement between P and D2 should shield D2 from a contribution claim by D1. The proposal appears consistent with that relating to settlements as a sword. But the analogy is superficial; permitting a settling D1 to claim from the other wrongdoer D2 does not prejudice D2, his liability to contribute should be no greater than were D1 to be sued to judgment. Permitting D2's settlement to act as a shield may prejudice the other wrongdoer — D1 in this case. If say D2 is 50% responsible and manages to settle a $100 claim for $40, D1 could well have to pay the remaining $60. The settlement will then have prejudiced him to the extent of $10. The Reform Paper did recommend that only reasonable settlements should act as a shield, but the settlement at $40 may be perfectly reasonable if say P has only been able to afford to gather limited evidence against D2. He may reasonably decide to take the $40 and use part of the sum to finance a fully researched action against D1 for the balance.

Why should D1 be prejudiced by P's settlement with D2 but not by P's failure to sue D2 in time? It could be argued that P's failure to sue in time is generally unreasonable conduct but this may not always be the case. The same lack of money to research a case against D2 that may lead to a low settlement, may also lead to a failure to sue in time. In both cases P may simply prefer to rely on full recovery from D1. It could be argued that D2 should not be able to rely on P's failure to sue in time because he has not bargained for this advantage whereas he has in the case of a settlement. But this distinction is perhaps more attractive in theory than practice. In practice D2 may be just as likely to rely on the fact that no action has been taken within his time limit as he is on a settlement. The consequence of the paper's proposal is to permit P's post-breach conduct to prejudice D1. If the purpose of contribution is to achieve fairness between wrongdoers without prejudicing the rights of P, the result seems unacceptable. It is suggested that the Reform Paper should have considered two alternative approaches to the problem both of which would have avoided prejudice to D1.

The first approach is the 'identification' solution suggested by Williams.[19] Under this approach it is P and not D1 who is prejudiced by a low settlement between P and D2. When P settles with D2, he is identified with D2's

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[17] Para 5.1

[18] [1969] 1 QB 405.

[19] Williams, op.cit., p. 152.

share of the responsibility and his claim against D1 is therefore reduced by the proportion of D2's responsibility. Thus in our example where P settled a $100 claim for $40 against D2 who was 50% responsible, P would be identified with D2's 50% and his claim against D1 would be limited to 50% of the loss. P and not D1 would be prejudiced to the extent of $10 by the settlement. Clearly, this proposal produces a fairer result than that of the Reform Paper; whoever should suffer as a result of the low settlement between P and D2, it should not be D1 who was not a party to it and could not influence it. However, it is arguable that as between P and D2 it is not necessarily P who should always suffer. he may have acted perfectly reasonably in making the low settlement.

An alternative approach is based on the notion of indemnity. Under this approach P would not be prejudiced unless in settling with D2 he had given D2 an indemnity against claims by D1. Under the indemnity approach, D1 would not be barred from bringing a claim against D2 but if as part of his settlement with P D2 had taken an indemnity, he would be able to pass the claim back to P. The indemnity solution has the merit of bringing it clearly to the attention of P that it is he who will suffer as a result of making too low a settlement with D2. Professor Williams criticises this approach on the ground that it encourages circuity of action i.e. P settles with D2 and sues D1 for the balance, D1 claims contribution from D2 and finally D2 claims under the indemnity from P. However, circuity of action is not uncommon in the contribution context and courts are accustomed to settling all the circuitous aspects of the matter in the one hearing. It is more important to get the end result right. It is suggested that the indemnity approach is to be preferred to 'identification' and that either are preferable to that recommended by the Reform Paper.

(d) Waivers

As is the case with settlements, it is not entirely clear whether D2 is shielded from a contribution claim by P's waiver of his liability. It is suggested that the better view is that of William's; namely, that he is subject to a contribution claim because he would if sued at the time of his wrong have been liable to P. P's waiver should not shield him. As we have noted the Reform Paper recommended that D2 should be shielded by settlements. The Paper did not refer to waiver but to be consistent it should have also recommended that a waiver should shield D2. D2 "may have legitimately believed that he had completely absolved himself from the consequences of his wrongdoing" as a result of obtaining a waiver just as much as by obtaining a settlement. The Paper confined its 'shielding' recommendation to reasonable settlements, but there may be circumstances in which a waiver appears quite reasonable as between P and D2. Where they have an on-going commercial or professional relationship, P may feel that it is in his long term interests to waive D2's breach for the sake of preserving their relationship.

As was suggested, it is unjust that D1 should be prejudiced by a settlement between P and D2. If this is so, it is all the more unjust that he is prejudiced by a waiver for that will result in him bearing all the responsibility for the loss. P's waiver should not shield D2. If D2 wishes complete protection through a waiver, he should take an indemnity from P against any contribution claim from D1. If P wishes to favour D2, he should only be able to do so at his own expense by giving an indemnity. He should

not be able to do so at D1's expense by simply giving a waiver which will shield D2.

(e) Judgment between P and D2

In *Wimpey* v *BOAC*[20] the House of Lords held that if judgment has been given in an action by P against D2, D2 is shielded from contribution by that judgment so that if he is found not liable to P he cannot be subject to a contribution claim from D1. In *Calderwood* v *Nominal Defendant*[21] the New Zealand Court of Appeal followed the same principle in holding that where judgment between P and D2 has determined the quantum of damages for which D2 is responsible, that too shields D2 from a contribution claim in excess of that quantum. As noted earlier, in *Hart* v *Hall and Pickles*[22] this principle was not applied where P's claim against D2 was dismissed for want of prosecution. That did not shield D2. A distinction is drawn between a judgment on the merits which shields D2 and one on a technicality, which does not. This distinction is embodied in the 1978 UK legislation: D2 is shielded by "any issue determined by the judgment".[23] He would not be shielded by a judgment based on P's failure to claim in time or his want of prosecution.

It has been argued that P's post-breach conduct should not prejudice D1. Consistently with this view, it might appear that D2 should not necessarily be shielded by a judgment on the merits. Indeed in *Bitumen & Oil Refineries* v *Commissioner for Transport*[24], the Australian court dealing with the somewhat analogous problem of D1 being found liable to P for an excessive amount, commented that if the verdict was due to his unreasonable conduct of the litigation, he should bear the loss and not be able to recover a contribution towards the excess from D2. If P's unreasonable conduct of litigation has led to a low judgment against D2, why should D1 be prejudiced? However, if prejudice to D1 is avoided by removing D2's shield, D1 will in effect be encouraged to relitigate an issue already decided by the courts. To some extent this may undermine the integrity of the judicial system. Hence it is suggested that New Zealand legislation should follow the UK example and provide that a judgment on the merits between P and D2 should bind D1 and shield D2. D1 could still be protected by adopting William's 'identification' principle; if P's unreasonable conduct had led to his failure to recover fully against D2, then he could be identified with D2's responsibility and should be able to recover from D1 no more than his proportionate share of the responsibility.

(5) Pre-Breach Conduct

With the proposed extension of contribution to the contractual context, situations in which P has excluded or limited his right of recovery against D2 by an express clause are likely to arise. Should such clauses shield D2 from contribution claims from D1 as well as direct claims from P? If D1 should not be prejudiced by P's post-breach conduct, why should

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[20] Supra, fn. 13.

[21] [1970] NZLR 296.

[22] Supra, fn.18.

[23] Civil Liability (Contribution) Act 1978, s.1(5).

[24] (1955) 92 CLR 200.

he be prejudiced by P's pre-breach conduct? Why should he not be able to make a contribution claim against D2 irrespective of the clauses in the contract between P and D2? There is a reason: it is that D2 was only prepared to supply his services to P on the condition that his liability was excluded or limited. The basis on which he supplied his services would be clearly undermined if he was not shielded by such clauses against a contribution claim by D1. Thus it is suggested that such clauses should shield D2. Four types of clause will be considered in order to evaluate this conclusion: limitation of damage clauses; exclusion of liability clauses; contractual waiver clauses and, finally, limitation of time clauses. The first type of clause was considered by the reform paper, the remainder were not.

(a) Limitation of damage clauses

In its brief discussion of clauses limiting a wrongdoer's liability to a figure less than the damage suffered by P, the Reform Paper concluded that "it would be wrong to deprive a potential defendant (D2) of the availability of such a limitation in any contribution proceedings brought by another defendant (D1)". Consequently it recommended that New Zealand legislation should follow the example of the UK legislation and provide that the limitation should shield D2 in a contribution claim.[25] Thus if D2 were 50% responsible for P's $100 loss but had limited his liability to P to $25, D1 who had paid P $100 would only be able to recover $25 from D2. If D2 had paid P $25 before D1 was sued for the balance, D1 would have no contribution claim against D2. The result is that D2 is shielded and D1 rather than P is prejudiced.

Although it is submitted that D2 should be shielded, it is perhaps to be regretted that the paper did not consider whether it should be P rather than D1 who is prejudiced. If Williams' identification principle were to be applied and P were to be identified with D2's share of the responsibility, then P would only be able to recover $50 from D1 and it would be P that was prejudiced to the extent of $25. However, whilst there is a strong case for identifying P with D2 where P's post-breach conduct has favoured D2, the same is not true in a pre-breach context. In agreeing to D2's limitation of liability, P cannot really be said to be prejudicing D1's contribution rights. D1 has no contribution rights until the wrong is committed. The limitation of liability clause simply defines what D1's right will be when it arises.

(b) Exclusion of liability clauses

If a limitation of liability clause should provide a limited shield to D2, it is self-evident that an exclusion clause should provide a complete shield. If, on its proper construction the effect of the clause is that D2 is not liable to P at all, he cannot logically be subject to a contribution claim. Here the fallacy of applying the identification principle is clearer. Why should P forfeit his right to sue other wrongdoers responsible for his loss, simply because he has agreed to accept services from one potential wrongdoer on the basis of an exclusion clause?

(c) Contractual Waiver Clauses

The standard civil engineering contract provides that the contractor shall

[25] Para 6.2.

complete the work "to the satisfaction of the engineer" and that no certificate other than the final certification of completion "shall be deemed to constitute approval" of the work.[26] The certificate does not expressly state that the employer is deemed to waive the contractor's breaches, but arguably read together, this is the effect of the clauses. If this is the case, can it be argued that although the contractor (D2) is not liable to the employer (P) once the final certificate has been issued, he may still be liable to a contribution claim from the engineer (D1)? Superficially the completion certificate might seem to be analogous to a post-breach waiver and thus should not shield D2. But in fact it is a variety of exclusion clause; the contractor agrees to supply his services only on the basis that his liability will cease on issuance of the final completion certificate. Like an exclusion clause per se, this final certificate should shield the contractor. This was the conclusion reached by the Supreme Court of Canada in *Giffels Associates* v *Eastern Construction.*[27] D1 was an engineer who had negligently supervised the work of D2, the contractor. He had also given the contractor a final certificate which had the effect of waiving the employer's claims against the contractor. On being sued by the employer, the engineer sought a contribution from the contractor. The court rejected the claim holding that "there was a contractual shield which precluded (P)'s action against (D2) and (D1) cannot assert a right to go behind it."

(d) Limitation of time clauses

A further ground for the decision in *Giffels* was the fact that the contractor was also protected by a clause limiting his liability for defects to one year from the date of substantial completion. The defect in question appeared after the expiry of that year. It was held that the time limit shielded the contractor D2 from both claims by P and by D1. Again, it might superficially appear that such clauses should be treated as analogous to statutory time limits so that D2 should not be shielded simply because the time limit for P's action had expired. But like contractual waiver clauses, time limit clauses are a variety of exclusion clause, they form part of the basis on which D2 is prepared to supply his services. He should be entitled to their protection both as against P and D1.

Conclusion

It has been suggested that a distinction should be drawn between P's post-breach conduct — delay in bringing claim, settlement, waiver, and his pre-breach conduct — agreeing to limitation and exclusion clauses. That in the former category D2 should not be shielded, save by a judgment on the merits. In the latter category, he should be shielded. It has been suggested that in the post-breach but not pre-breach situation, it may be reasonable in some circumstances for P to bear the consequence of his preferential treatment of D2 and that this could be achieved through the principle of identification or the use of an indemnity. It is perhaps unfortunate that the Reform Paper only briefly considered the problem of settlements as a shield and did not consider the broader problem nor the role of identification and indemnity. However, the Paper did consider a more radical proposal, namely that the contribution action should be

[26] NZS 623 Cls 8(7) and 17(6).

[27] (1978) 84 DLR (3d) 344.

abolished and replaced by a system of proportionate recovery under which P would be able to recover from each D only that proportion of the loss for which he was adjudged responsible in relation to the other wrongdoers e.g. in the case of a $100 loss with D1 and D2 equally responsible, P should be able to recover only $50 from each and there would then be no need for a contribution claim between them. In effect this would be to apply the identification principle to all circumstances, not just those where P had favoured one D by his conduct. This section of the article will conclude with a consideration of this radical proposal.

(6) Proportionate Recovery as a Substitute for Contribution

In considering this proposal, the Reform Paper was not concerned with the particular injustices at which Williams directed his identification principle. Rather, it was concerned with the fact that the general effect of the contribution action might be to make one wrongdoer guarantee the performance of another. The obvious example of this possibility arises where a house has inadequate foundations as a result of the negligence of the builder and the local authority inspector. Courts frequently apportion responsibility between builder and authority on an 80/20 basis. But in a situation where the builder has gone into liquidation, the authority will bear 100% of the loss, being unable to gain a contribution for the builder. This would be so even if the employer had contracted with the builder on a 'cut price' basis. As the Paper commented, this result "is not self-evidently fair".[28] The proportionate recovery principle would avoid this result. It would limit the employer's recovery against the authority to 20% of his loss. He, rather than the authority would take the risk that the builder would be unable to pay his 80% proportion.[29]

The Paper rejected this radical proposal on grounds of principle and pragmatism.[30] In principle they commented that "it seems to be difficult to justify a difference between a P's rights to full recovery from each wrongdoer in a situation where there is one wrongdoer and in a situation where there are more wrongdoers". Why should P be prejudiced simply because he has been the victim of more than one wrongdoer? On pragmatic grounds the proposal was rejected because it could involve much research and delay, and might in the end fail to gain acceptance. It would prejudice more limited and much needed reforms.

It is suggested that the Paper was right to reject the proposal. However, in this context again it is perhaps a pity that the Paper did not consider the role that might be played by the principle of identification. Where an employer has contracted on a 'cut price' basis with a builder, it might be reasonable to identify him with the responsibility of the builder so that he would be unable to recover more than say, 20% of his loss from an authority. Unlike proportionate recovery, identification would provide the courts with a selective weapon to deal with particular situations of injustice.

III Apportionment

The 1936 Law Reform Act provides that the amount of contribution

[28] Para 2.3

[29] Interestingly, a Canadian judge has recently managed to interpret provincial apportionment legislation to have this effect. See *Leischner* v *West Kootenay Power* (1983) 150 DLR (3d) 247.

[30] Para 2.7.

to be paid by D2 to D1 "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".[31] The application of this test is considered to be a matter for the trial judge to determine on the facts. Appeal courts will not interfere unless the decision of the judge was unreasonable in the light of the evidence. Hence there is little judicial guidance as to the principles to be followed when apportioning responsibility. Perhaps the only principle to be clearly established is that the test "involves a consideration not only of the causative potency of a factor, but also of its blameworthiness".[32] Indeed in many cases there may be little to choose between the wrongdoer's responsibility in causative terms and blameworthiness will be the determining factor.[33] The recent English decision in *Anglia Building Society* v *House*[34] illustrates this point. The Building Society (P) suffered loss as a result of lending money on mortgage for the purchase of a house which proved to be an inadequate security when the purchaser defaulted on his repayments. An estate agent (D1) was held liable for negligently overvaluing the property. The solicitor who appeared[35] to be acting for both vendor and purchaser was also held liable for negligently failing to disclose that the purchaser was taking a second mortgage — a fact which would have alerted P to the purchaser's lack of resources. Bingham J. held that the conduct of D1 and the solicitor (D2) was equally causative of the loss but that whilst D1 had made a misjudgment in a relatively brief involvement with the matter, D2 had failed to disclose information over a period of time and was motivated by his own personal interest in seeing the property sold.[36] Consequently he apportioned responsibility between D1 and D2 on a 30/70 basis.

In *Anglia*, D1 and D2 owed similar tortious duties of care to P and both acted independently of the other. In this type of situation the court's task in weighing the relative blameworthiness of the wrongdoers is fairly straightforward. The task is more difficult where thee is a relationship between D1 and D2, e.g. architect and builder, for here the nature of that relationship must also be fed into the weighing process. The task is likely to be still more complex if apportionment is extended to the contractual context, for then the differing nature of the relationships between each wrongdoer and P will need to be considered, e.g. D1's contractual duty to P will have to be weighed against D2's tortious duty.

Given the lack of judicial guidance on the question, the Reform Paper considered whether legislative guidelines for apportionment should be formulated. It concluded[37] that as guidelines equally applicable to all situations could not be devised, it was best to leave the courts with a general

[31] Law Reform Act s.17(2).

[32] Per Denning LJ. in *Davies* v *Swan Motor Co. Ltd.* [1949] 1 All ER 620, followed in New Zealand in *Helson* v *McKenzies* [1950] NZLR 878, and *McFarlane* v *Neshausen* [1952] NZLR 292.

[33] See further Chapman (1948) 64 LQR 26

[34] (1981) 260 EG 1128.

[35] He was only actually acting for the vendor; he channelled the purchaser's mortgage application to the Building Society with the result that it probably received preferential treatment.

[36] The vendor's own mortgage on the property was in the solicitor's name and hence he would have been liable if the vendor had defaulted.

[37] Para 3.6.

discretion whilst amending the present legislation to draw to the courts attention particular factors which should influence their decision. The factors suggested were:

1. The amount of each defendant's potential liability.
2. The rights and obligations of D1 and D2 in respect of P.
3. The rights and obligations of D1 and D2 as between themselves.

In this section of the article, these factors will be considered with reference not only to the New Zealand caselaw, but also to that of Canada and the UK where unfettered by a principle such as that in *McLaren Maycroft*, the courts have frequently had to deal with apportionment in a contractual context.

(1) Amount of Potential Liability

The amount of the potential liability of each defendant to P may differ. D2's potential liability may be less than that of D1 in the following circumstances:

1. Where there is a limitation of liability clause in the contract between P and D2.
2. Where there is a liquidated damage clause in the contract between P and D1 and the sum fixed by the clause turns out to be greater than the actual loss suffered by P for which D2 will be liable.
3. Where the extent of D2's liability is reduced by reason of P's contributory negligence in relation to D2 whilst D1's liability is not reduced to the same extent. Such a difference is most likely to arise where there is a contract between P and D1 for at present it seems that the extent of D1's contractual liability cannot be reduced to take account of P's contributory negligence but it may still arise where there is a purely tortious relationship between P and Dl.[38]
4. Where some of the loss suffered by P is too remote as against D2 but not so as against D1. Again, the difference is perhaps most likely to occur where D1 is a tortfeasor and D2 is a contract breaker, for the remoteness test applied in contract is arguably stricter than that applied in tort.[39]

How should the court take account of these differences in potential liability? One point should be clear: D2 cannot be made to contribute more than his upper limit of liability. The Paper expressly recommends this in relation to limitation of liability clauses.[40] The UK legislation provides for this both in the case of such clauses and where liability is reduced for P's contributory negligence.[41] It would be as well for New Zealand legislation to contain an express provision along the same lines, though perhaps in more general terms so as to cover all four categories.

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[38] *Brown* v *Heathcote* [1982] 2 NZLR 818. It was recognised that even where there was a purely tortious relationship between D1 and P, and D2 and P, P's contributory negligence in relation to D1 may differ in extent from his contributory negligence in relation to D2.

[39] See *The Heron II* [1969] 1 AC 350 where Lord Reid suggested that the contemplation test for contract is stricter than the foresight test for tort.

[40] Para 6.2.

[41] S.2(3).

The real problem is whether D2 should contribute only his percentage responsibility of the common extent of liability. On this basis if D1 and D2 were each 50% responsible for P's loss but whilst D1's potential liability was $100, D2's was only $50, then D2 would only contribute 50% of the common extent of liability for $50. Thus he would contribute $25 leaving D1 to pay $75. In effect this was the result in *Calderwood* v *Nominal Defendant*.[42] D1 and D2 were responsible on a 40/60 basis, but whereas D1 was potentially liable for P's full loss of $23,000, D2's liability was limited to $15,000. D2 was sued first and made a contribution claim against D1. $15,000 damages were awarded to P with D2 paying 60% of that amount. In a second subsequent action D1 was successfully sued for the balance of $8,000 and was unable to claim any contribution from D2 as D2 was shielded by the previous judgment against him. In the second action, the judge commented that the basis of the apportionment in the first action was wrong, the implication being that D2 should have borne 60% of the full $23,000 loss as his share of the $15,000 awarded in the first action. Part of the reason for the problem in *Calderwood* may seem to have lain in the fact that D2 with limited liability was sued first. If D1 had been sued first and claimed a contribution from D2, the court would have awarded $23,000 and it would then have been obvious that D2 should have contributed 60% of that sum. Clearly it should not make any difference to the eventual outcome whether the limited liability defendant is sued first or not.

The implication of *Calderwood* is that the courts should not apportion the common extent of liability, rather they should apportion the higher potential liability of D1 and then if necessary reduce the sum due from D2 to his upper limit of liability and re-allocate this reduction to D1. In our example this would mean that P's full loss of $100 would first be apportioned at $50 each on the basis of their 50% responsibility. Then the sum due from D2 should be reduced to his upper limit — as his upper limit in our example was $50, no reduction and reallocation to D1 would be necessary. It is suggested that this system of total apportionment followed by reduction and reallocation is generally the fairer approach. This was the view of the English Law Commission. But there may be exceptions. Where D1's potential liability is higher because he agreed to a liquidated damage clause, it would seem unfair to D2 that his due sum should be initially calculated on the basis of an apportioned share of the higher liquidated damage figure and only then reduced to his actual liability limit. It would be fairer to apportion only the common extent of liability. If a wrongdoer is entitled to be shielded by a limitation of damage clause, he should conversely accept the consequences of his liquidated damage clause and not be able in effect, to pass on some of the burden to another wrongdoer. Again, in some circumstances it might be fairer to deal with a remoteness problem in the same way. Given that there may be exceptional situations where an apportionment of the common extent of liability would be fairer, it is suggested that the Paper was right not to lay down any more precise guidelines as to how the loss should be apportioned.

(2) Obligations of Defendants in Relation to Plaintiff

Where the obligations of D1 and D2 arise solely from a tortious duty of care and are not defined in any way by a contract, this factor may

[42] [1970] NZLR 296.

be of little relevance. The wrongdoers obligations will usually be similar in nature and responsibility will be apportioned on the basis of the culpability and causative potency of their conduct rather than the nature of their obligations. However, where the obligations of one or both of the wrongdoers arise from a contractual undertaking, the nature of their obligations may differ and may be relevant to the issue of apportionment. The differences may relate to either the scope or the standard of their obligations.

(a) Differing scope of obligation

A number of cases involving apportionment where the scope of at least one of the wrongdoers obligation to P has been defined by contract, have come before the courts of Commonwealth countries. Most of the cases fall into three categories: first, cases where there has been a building defect due to the defective work of a contractor which another wrongdoer has negligently failed to check; secondly, cases where there has been a building defect due to a designer's error which another wrongdoer has failed to detect; and, thirdly, cases where a client suffers loss because of inadequate goods or information supplied by one wrongdoer which the client's professional adviser has negligently failed to evaluate correctly. Cases in these three categories will be examined to see the extent to which the courts have considered the scope of contractual obligations to P to be relevant in apportionment.

(i) Defective Construction

A building contractor's work will frequently be supervised by a professional architect or engineer. Some aspects of his work, particularly the depth of foundations may also be checked by local authority inspectors. Apportionment questions have arisen both between the contractor and the supervising professional and between contractor and local authority.

(a) *Contractor and supervising professional:* The Reform Paper suggested that where "P has a claim against D1, a builder, for faulty construction and D2, an architect, for faulty supervision, it would affront the conscience if the builder were to have the right to claim contribution from the architect".[43] In other words, the contractual obligation of the builder was regarded as so dominant that, in effect, no responsibility would be apportioned to the architect. It is suggested that this approach perhaps misapprehends the nature of the supervisor's obligation. His obligation does not require him to supervise every detail of the contractor's work. It is limited to supervising the overall method of work used by the contractor to ensure that it is adequate to achieve the satisfactory completion of the project.[44] He will not be liable to his employer at all, if the defect resulted from a detailed fault in the contractor's work which would not have been detected by proper supervision of the method of work. The detailed method of work is the contractor's responsibility and his alone. It is suggested that much of the "affront to conscience" is met by this point. Where the supervisor is liable, it will be because he has failed to supervise an essential part of the work and this is the job he is well paid to do. His employer relies on his skill in this regard and the provisions of the building contract give him ample power to fulfil this function. Indeed, although the supervisor

[43] Para 3.4.

[44] See *Clayton* v *Woodman* [1962] 2 All ER 33.

owes no duty to the contractor, the latter may well rely upon his skill to guide him in areas of difficulty. The construction of a complex project requires the cooperation of the supervisor and contractor. If loss is suffered due to both negligent construction and supervision, it is difficult to see why the supervisor should not carry some of the responsibility in an apportionment.

Certainly this has been the view taken by the courts. However, the courts have also generally taken the view that it is the contractor who should bear the primary responsibility. The negligent supervisor has been held 40%, 25% and 20% responsible, as against the contractor by courts in the UK,[45] Canada[46] and Australia[47] respectively. The one case[48] where the English has apportioned a higher responsibility to the negligent supervisor (42% as against 38% and 20% for the two contractors) arose from the supervisor instructing the contractors to take action which was contrary to the project plan. The supervisor was, in the words of the court, "in blind breach of his contract with his employer" and hence it is perhaps not surprising that he was apportioned a higher degree of responsibility.

(b) *Contractor and local authority:* A local authority has a statutory responsibility for checking that a new building had adequate foundations, drains etc. In recent years it has been established that it will be liable to third parties who suffer loss as a result of its negligent exercise of this responsibility. In *Mount Albert Borough Council* v *Johnson*[49] a New Zealand court considered how responsibility should be apportioned between a negligent contractor and authority. A building had suffered subsidence due to the negligent failure of the contractor to take foundations down to a solid bottom. The Council were also held to be negligent in failing to observe that the foundations were inadequate having regard to particular to their knowledge that the ground was unstable. The trial judge apportioned responsibility 50% to each defendant. On appeal, the Council's responsibility was reduced to 20% the court noting the comment of Lord Wilberforce in *Anns*[50], that primary responsibility for the construction was on the contractor and the inspector's function was only supervisory. Subsequently in *Young* v *Tomlinson*[51], where again subsidence occurred because foundations were not put down to solid ground, Quillam J. apportioned responsibility 90% to the contractor and 10% to the Authority. He justified the Authority's reduction from the *Johnson* case on the ground that it had every reason to believe that the construction was being supervised by an architect and hence its "supervisory role assumed rather less importance than might otherwise have been the case". In both cases P was a subsequent purchaser and hence had no contractual relationship with either defendant, but the same approach seems likely to be applied where P was the contractor's employer. Indeed, in *Harris* v *Demolition & Roading*

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[45] *A.M.F.* v *Magnet* [1968] 1 WLR 1043.

[46] *Dabous* v *Zuliani* (1976) 68 DLR (3d) 414.

[47] *Florida Hotels* v *Mayo* (1965) 113 CLR 558.

[48] *Clay* v *Crump* [1963] 3 All ER 687.

[49] [1979] 2 NZLR 234.

[50] *Anns* v *Merton L.B.C.* [1978] AC 728.

[51] [1979] 2 NZLR 441.

Contractors[52] where P was the employer, Somers J whilst holding that there could be no apportionment because the contractor was not a tortfeasor, suggested that had apportionment been available it would have been in the proportion of 80% to the contractor and 20% to the authority.

If any generalisation can be made as to apportionment between contractor, supervisor and authority, it would seem to be that the courts consider the primary responsibility to be that of the contractor, with lesser responsibility on the professional supervisor and least on the authority. Clearly an appreciation of the scope of each defendant's obligation in relation to P lies at the heart of these apportionments.

(ii) Defective design

Here primary responsibility clearly rests with those responsible for the design; architects or engineers. But an authority and arguably in some circumstances, a contractor, may be liable for negligently failing to spot the defect in the design.

(a) *Designer and authority:* In Young *v Tomlinson*[53] a wall collapsed because of a design fault. The architect was held liable for negligent design but the local authority was held liable in negligence for approving the design when it should have been passed to their structural engineering department where the defect should have been detected. Responsibility was apportioned 75% and 25% to the authority. A similar issue between architect and authority arose in the English case of *Acrecrest Ltd.* v *Hattrell & Partners.*[54] The architect had negligently specified inadequate foundations in his design. The authority inspector negligently approved the design for part of the site although insisting on deeper foundations for other parts of the site. P sued both authority and architect for the loss he suffered in the resulting subsidence. As in *Young*, responsibility was apportioned 75/25 as between architect and authority. The Court of Appeal rejected the contention that as the architect was working for profit, he should bear an even higher percentage of the loss. In response the court stressed the importance of building safety and the role of inspectors in its promotion. Of course, two cases cannot be said to establish a pattern, but it is interesting that without reference to each other, the two courts reached the same result as between the architect and authority.

(b) *Designer and contractor:* Does a contractor owe his employer any duty of care to warn him of defects in his architect's or engineer's design? It might be thought that as the standard forms of building contract oblige the contractor to work in accordance with the professional's design and instructions, there is no room for such a duty to be implied. However, in *Brunswick Construction* v *Nolan*,[55] the Supreme Court of Canada held that this may not always be the case. An architect had negligently failed to provide for adequate ventilation in the design of a woodframe house. The majority of the court held the contractor liable for poor workmanship and for failure to warn the employer of the obvious danger. As the architect was not a party to the action, no question of apportionment arose. Had

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[52] [1979] 2 NZLR 166.

[53] Supra, fn. 51.

[54] [1983] 1 All ER 166.

[55] (1974) 49 DLR (3d) 93.

it arisen in respect of the design defect, one might have expected the contractor's responsibility to be at least as low as that of the Council in *Young* v *Tomlinson*. Perhaps it should also be noted that in *Brunswick* the contractor's work was not supervised and hence to some extent the employer was relying on the contractor to detect problems during construction. In the normal case where an architect is both designer and supervisor, it is suggested that only exceptional facts would justify finding the contractor both liable and responsible for some share of the loss as against the architect. Once again the answer to the problem should lie in an examination of the scope of each party's obligation to P.

(iii) Evaluation of information or goods

Professional services are frequently retained to evaluate information or products on behalf of a client. Where the client suffers loss because the information or product turns out to be inadequate, both the supplier and the professional retained to evaluate, may be liable for the loss. How should responsibility for such loss be apportioned between them?

The Reform Paper considered one example of such a situation: the A.A. advising P about a proposed car purchase and negligently overlooking a defect in the car. The Paper suggested[56] that in such a situation, the supplier of the car should not be able to claim any contribution from the A.A. i.e. that as between supplier and evaluator, all the responsibility should be placed upon the supplier. Given that the A.A. is paid only a small fee for its services, this view seems not unreasonable. Should the same approach be applied to professional advisers working for a 'professional' fee? Such a situation arose in the Canadian case of *Sealand* v *McHaffie*.[57] P retained an architect to advise as to the suitability of a particular type of concrete P was contemplating using. The architect recommended the concrete relying entirely on the supplier's assertion that it was suitable and without making any enquiries of his own. The architect was held to be negligent and liable for P's loss resulting from the unsuitability of the concrete. The supplier was also held liable to P. Contribution proceedings between architect and supplier were not reported, but in the main action the court did comment that "it may well be that (the supplier) is obliged to indemnify (the architect) for any amount payable by him to (P)". This lends some support to the view taken in the Reform Paper. But in both the car and concrete situations, the supplier had a direct contact with P. Clearly, he owed the primary obligation to P. As with the builder in a defective construction case, he should bear the main, if not all, the responsibility, in an apportionment action. In other cases where professional services are retained to evaluate information, the position may be different. The role of solicitors and auditors illustrate this point.

(a) *Evaluation by a solicitor:* The recent New Zealand decision in *Kendall Wilson Securities* v *Barraclough*[58] illustrates this situation. A solicitor acting for an investment company, loaned the company's money on an inadequate security. The security had been negligently over-valued by land valuers but the solicitor was also found to be negligent in failing to read the valuation carefully — relying just on the bottom line — and in failing to enquire

[56] Para 3.4

[57] (1974) 51 DLR (3d) 702.

[58] [1984] 2 NSWLR 293.

into the financial stability of the borrower. The valuer was held 40% and the solicitor 60% responsible for the loss to the company. In fact the company was a nominee of the solicitor's firm and brought a claim only against the valuer. The solicitor's fault was identified with the company and as a result its damages against the valuer were reduced by 60%. If the company had been independent, had retained the solicitor to act on its behalf and then sued both the solicitor and valuer, presumably the same division of responsibility would have been applied in an apportionment action had one been permissible. In the *Kendall* case, greater responsibility was placed upon the professional directly responsible for protecting the plaintiff's interests. Such an approach is still more likely to be applied where the professional is an auditor.

(b) *Evaluation by an auditor:* The possibility of an apportionment claim being brought by a negligent auditor is illustrated by the Scots case of *Andrew Oliver* v *Douglas*.[59] P had advanced credit to a company on the strength of accounts prepared by an independent auditor. P sued the auditor alleging that he had negligently failed to evaluate information about the company's work in progress. The auditor in turn claimed a contribution from a director of the company alleging that he had negligently prepared inaccurate information relating to the work. The case was heard on the preliminary issue whether the auditor owed a duty to P, but as well as finding there was such a duty the court commented that the auditor had a possible contribution claim against the director if they could prove their allegation.

How should the courts apportion responsibility in such cases? Somewhat analogous problems have arisen in two cases decided by the New South Wales Court of Appeal. In the first case, *Dominion Freeholders* v *Aird*,[60] a company sued its auditors for negligently reporting that the company balance sheet was accurate. The auditors sought a complete indemnity from the company accountant alleging that he had negligently misrepresented the accuracy of the balance sheet. Rejecting the auditors claim, Moffit J.A. stated "he has a duty imposed upon him as auditor to state his opinion, after such inquiry as his duty of care whether in contract or statute calls for. That is a duty which by its very nature he cannot by the contract sued upon, under the general law or by statute delegate to the accountant of the company". In the second case, *Simonius Vischer* v *Holt & Thomson*[61] auditors were sued by a company for negligently failing to discover unauthorised trading by company employees. He alleged that the company itself was contributory negligent in failing to control its own employees. Rejecting this defence, Moffit P. commented "when an action was professional negligence is against an auditor, it is difficult to see how a finding of contributory negligence can be made . . . it is difficult to see how the conduct of a servant or director of the company could constitute the relevant negligence so as to defeat the claim against the auditor, whose duty it is to check on the conduct of such persons".

Neither case deals with the question of apportionment as such. The fact that an auditor cannot claim the company is contributory negligent in an

[59] (1981) 82 SLT 222.

[60] [1966] 2 NSWLR 293.

[61] [1979] 2 NSWLR 322.

action brought by the company, does not necessarily mean that he could not claim a contribution from the company were the claim to be brought by a third party as it was in *Oliver*. However, there is authority[62] that as the wording of the contributory negligence and contribution legislation is so similar, a decision as to the one should bind by estoppel a decision as to the other on the same facts. In any case, the policy underlying Moffit's judgments would seem equally applicable to contribution claims: the statutory and contractual duty of the auditor to verify information would be undermined if he was able to obtain a substantial contribution from the wrongdoer responsible for supplying him with inaccurate information.

Conclusion

The conclusion to be drawn from these examples from construction, legal and auditing contexts, seems to be twofold: first, the differing scope of the wrongdoer's obligation towards the plaintiff is a highly relevant factor when the court is considering apportionment. Secondly, no specific legislative guidelines can be laid down as to how the courts should apportion responsibility in all cases. Much turns on the specific scope of the wrongdoer's obligation in relation to the loss. To some extent the courts seem to be establishing consistent patterns of apportionment for standard situations and this development is likely to continue on a case by case basis. The Reform Paper was right to leave issue to judicial discretion and to reject the use of specific legislative guidelines.

(b) Differing standard of obligation

The problem that may face the courts in this context can be illustrated by the facts of *McLaren Maycroft*.[63] P had purchased a building plot from D1. P's house subsequently suffered from subsidence due to the fact that the plot had been insufficiently cleared of swampy material. D1 were held liable for breach of their strict contractual warranty to provide a site suitable for a house. They claimed a contribution from D2, an engineer they retained to supervise the clearance of the plot, claiming that D2 had acted negligently. At trial, Quillam J. found D2 negligent and without explaining the basis, allowed a contribution claim by D1. He rejected D1's argument for a 100% contribution from D2, on the ground that D1 should have appreciated that D2 was not in a position to give adequate supervision of the clearance. He apportioned responsibility 25% to D1 and 75% to D2. On appeal it was held that D2 were not negligent and that in any case, no contribution claim could be brought as D1 was not a tortfeasor. Nevertheless, the trial judgment does raise an interesting question, namely how responsibility should be apportioned between a D1 whose obligation is strict in standard,and D2 whose obligation is one of care.

To some extent Quillam J. avoided the problem by finding that D1 were culpable independently of their breach of strict duty i.e. in not appreciating D2's inadequate resources. But what if there was no independent culpability? Should D1 be entitled to a complete indemnity from D2? If culpability were the only factor to be considered, such a conclusion might well be correct. But if the wrongdoer's respective obligations are considered, the answer does not appear so clear. After all, D1 has undertaken a strict

[62] *Clyne* v *Yardley* [1959] NZLR 749.

[63] [1973] 2 NZLR 100.

obligation in return for payment and that must count for something. Courts have considered somewhat analogous problems where industrial accidents have been caused partly by the employer's breach of a strict statutory duty and partly by the employee's negligence. They have held that "it would be wrong to attribute to the employee too large a share of responsibility",[64] It is conceivable that courts will take a similar approach when comparing responsibility for breach of a strict contractual duty with that for breach of a duty of care.

In practice, in many of the cases where D1 is in breach of a strict duty and D2 in breach of a duty of care, there has also been a contractual relationship between D1 and D2. That was the case in *McLaren Maycroft* for example. Where there is such a relationship, it may be this which will be crucial in determining the outcome between the wrongdoers.

(3) Rights and Obligations of Wrongdoers against Each Other

Both tortious and contractual obligations may exist between the wrongdoers. Indeed, such a relationship is very common where the parties are engaged in a common project promoted by the plaintiff. The existence of such obligations raises two problems: first, the extent to which they are regarded as relevant in any apportionment between the wrongdoers, and secondly, the extent to which D1 may in effect, 'upset' the apportionment with D2 by subsequently bringing a direct claim against D2 on the basis of his obligation. The problems are linked, for to the extent to which the wrongdoers' rights and obligations *inter se* are not reflected in the apportionment,to that extent the apportionment may be upset by a later direct claim. As will be seen, where the obligation owed by D2 to D1 is tortious, an apportionment of responsibility between them in relation to a third party should reflect their relationship *inter se* and hence no problem arises, but where D2's obligation is contractual there may not be such compatibility and it is here that difficulties arise.

(a) Tortious obligations

In *Clyne* v *Yardley*,[65] D1 and D2 were drivers of two cars which crashed due to their combined negligence. In an action brought by P, the owner of D2's car, responsibility was apportioned 25% to D1 and 75% to D2. In reaching this conclusion, the court considered that it was estopped from holding otherwise by the outcome of an earlier tortious claim by D1 against D2 in which D1 had been found 25% contributory negligent. This seems a sensible outcome avoiding as it does, any conflict between the outcome of a contribution action and a direct action between the two wrongdoers.

(b) Contractual obligations

The compatibility achieved where D2 owes D1 a tortious obligation is the result of the availability of contributory negligence apportionment in a tort action. This gives the courts flexibility in determining the rights and obligations of D1 and D2 *inter se*. It is generally accepted that the contributory negligence legislation does not apply to contractual actions and herein lies the problem.

The recent decision of the House of Lords in *Lambert* v *Lewis*[66] illustrates

[64] *Ball* v *Richard Thomas & Baldwins Ltd.* [1968] 1 All ER 389, 395, per Davies LJ.

[65] [1959] NZLR 749.

[66] [1981] 1 All ER 1185.

the nature of the difficulties which may face the courts. D2, a car dealer, had supplied D1 with a dangerously defective trailer coupling and was thereby in breach of his strict contractual duty to supply a coupling safe for use. It was found that D1 ought and indeed, must have discovered that part of the coupling was missing and that he was negligent in continuing to use the coupling without further examination. The coupling broke causing an accident in which P was injured. P sued D1, D2, and D3 the negligent manufacturer of the coupling. D2 was held not to be negligent and responsibility was apportioned between D1 and D3 on a 25/75 basis. D1 then sought to recover the 25% for which he was responsible from D2 as damages for breach of contract. he succeeded before the Court of Appeal but failed before the Lords. Giving the judgment of the Lords, Lord Diplock stated that D1 can only recover such a loss where D2 "has warranted that he (D1) need not take the very precaution for the failure to take which D1 has been held liable to P." Applying this test, he held that up to the time when D1 discovered the defect "he would have had a right to rely on (D2)'s warranty as excusing him from making his own examination of the coupling". Once D1 did know of the defect, that broke the chain of causation and there "was no longer any warranty by (D2) of the couplings continued safety in use on which D1 was entitled to rely". Hence D1 could not recover his apportioned responsibility as damages from D2.

At first sight, the approach in *Lambert* seems to achieve a compatibility between contribution and contract claims. Where D1 is not negligent but is strictly liable to P, he will be able to recover his payment to P as damages in contract from D2. *Bevan Investments* v *Blackhall & Struthers*[67] illustrates the point. P engaged D1 to design a building and without negligence, D1 engaged D2 to produce the engineering element of the design. That element failed. P sued D1 and D2. Both were held liable, D2 for negligence and D1 for breach of his strict duty to see that care had been taken in the overall design. D1 was held entitled to a complete indemnity from D2. Whether D1's claim against D2 was based on contribution or direct contract is immaterial, the result would have been the same. There is compatibility. In the converse case where D1 is negligent and as in *Lambert*, that has broken the chain of causation from D2's breach of contract, D1 will be unable to claim any contractual damages from D2. The contribution apportionment will not be upset by a direct contract claim; again there will be compatibility.

Incompatibility has arisen where the courts have found D1 to be negligent but unlike *Lambert*, they have not found D1's negligence to break the chain of causation from D2's breach of contract. Two cases illustrate this problem. In *Southland Harbour Board* v *Vella*,[68] D2 a harbour board, supplied loading equipment to D1, a shipping company. D2 were in breach of contract as the equipment was not fit for its purpose. It was used by D3, stevadores, and P one of their employees was injured due to its defect. All three defendants were held liable to P for negligently failing to notice the defective condition of the equipment. Responsibility was apportioned 50% to D3, 35% to D2 and 15% to D1. D1's negligence was not held to break the chain of causation from D2's breach and hence D1 was able

[67] [1973] 2 NZLR 45.

[68] [1974] 1 NZLR 527.

to recover his 15% contribution from D2 as damages. In *A.M.F.* v *Magnet Bowling*[69], D2 a builder was in breach of an express warranty to D1 his employer, to provide a building ready to accept delivery of goods. In fact the building was not watertight and as a result P suffered damage to his goods stored in the building. In an action brought by P, both D1 and D2 were found to be negligent, D1 because his architectural staff had failed to properly check D2's work. Responsibility was apportioned 40% to D1 and 60% to D2. D1 was held entitled to recover his 40% responsibility from D2 as damages for his breach. As McCarthy J. admitted in *Vella*, the result in these cases might seem odd, but it follows from the fact that D1's negligence in relation to P does not necessarily mean that he is so negligent in relation to D2 so as to prevent him suing D2 for breach of contract.

These cases raise two issues. The first is whether they stand as good law following the statement of principle in *Lambert*. *Vella* is the more difficult to justify as there, D2's implied warranty was similar in nature to that in *Lambert* i.e. that goods supplied would be safe to use. The cases could be distinguished on the ground that whilst in *Vella*, D1 was negligent in failing to detect the defect, in *Lambert* the defect was so obvious that D1 was deemed to know of it. The distinction is a fine one. *A.M.F.* is easier to justify for there, D2's warranty as to the building was express and unqualified. It is arguably not inconsistent to hold that D1 can continue to rely on such a warranty as between himself and D2, whilst at the same time owing P a duty to check the building. Indeed, if his negligent failure to check the building broke the chain of causation from D2's warranty, there would seem little point to the warranty as in many cases D1 would not be able to sue upon it. The *A.M.F.* case does illustrate that there are still likely to be situations where although D1 is negligent in relation to P, his negligence does not break the chain of causation from D2's breach of contract.

The second issue is whether the overall approach taken in *Lambert*, *A.M.F.* and *Vella*, is desirable or necessary. The fundamental problem is that the defendant's contractual obligations *inter se* are analysed as an entirely separate issue from the apportionment in relation to P and that the analysis presents an 'either or' solution. The defendant's responsibility to P is apportioned ignoring the contract and then D1 will either recover all of his apportioned liability from D2 or none of it depending upon whether D2's contractual obligation is still regarded as having causative effect. If D1 recovers nothing, the apportionment stands: if he recovers everything, the apportionment was a wasted exercise.

The Paper's recommendations provide two means by which these problems might be solved. The first is the proposal that courts should consider the rights and obligations of the defendants *inter se* at the stage of apportioning responsibility. Taking this approach, it would be open to a court in a case like *A.M.F.* to hold that, given D2's warranty to D1, no responsibility should be apportioned to D1; he should receive a complete indemnity from D2. The result of the apportionment would then reflect the contractual obligations between the parties and no further direct contractual action by D1 would be necessary. it seems unlikely that courts will adopt this

[69] [1960] 1 WLR 2043.

approach; they could have adopted it under the present legislation without waiting for an express legislative provision, but chose not to do so.

The second possibility is raised by the Paper's final recommendation that the contributory negligence legislation should be extended to actions for breach of contract. Under this proposal it would be possible for D1's damages against D2 to be reduced in respect of his contributory negligence. In *A.M.F.* for example, where D1 was found to be 40% responsible to P in the contribution action, it could be argued that his contractual damages against D2 to compensate him for his liability to P, should be reduced by 40% to take account of his own contribution towards that loss. Just as an apportionment of responsibility between tortfeasors in a contribution action should arguably mirror any contributory negligence finding between the two tortfeasors, the same could be true where the action between the wrongdoers is contractual; an apportionment finding should be mirrored in any contributory negligence finding between them, and vice versa. However, whether this apparently neat solution is desirable depends on the broader issue of whether and to what extent, contributory negligence legislation should apply to contractual actions. This issue will be considered in the final section of this article.

IV. CONTRIBUTION BY THE PLAINTIFF IN CONTRACTUAL ACTIONS

The Contributory Negligence Act 1947 empowers the court to reduce P's damages to such an extent as is just and equitable having regard to P's responsibility for the damage. This provision only applies where D's liability is based on "negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort".[70] On a natural reading, the phrase 'liability in tort' would seem to qualify the word 'negligence' so that the provision would not apply where D was only liable in contract for his negligence. Nevertheless, in a number of first instance English decisions, it has been suggested that the identical UK provision should be applied to an action in contract against a negligent D.[71] In none of these cases was the question considered in any depth but in two Australian cases at appellate level,[72] the issue was fully considered and it was decided that the identical provision could not apply to actions in contract against D. In the leading New Zealand decision, *Rowe* v *Turner Hopkins*,[73] Prichard J. at first instance followed the Australian view and somewhat ironically, Prichard's view has now been followed in the latest English decision on the matter.[74] However, the Court of Appeal in *Rowe*[75] re-introduced an element of uncertainty by stating that they "should not be taken necessarily to assent to the view of the act adopted by Prichard J." (Having found D not to be negligent at all, the Court did not have to decide the issue.) Perhaps all that can be safely said is that the provision does not apply where D is in breach of a strict contractual duty and that legislation clearly stating whether and to what extent apportionment for contributory negligence applies to contract actions is much needed.

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[70] S.2.

[71] *Quinn* v *Burch Bros.* [1965] 3 All ER 801; *De Meza* v *Apple*

[72] *James Pty* v *Duncan* [1970] VR 705; *Harper* v *Ashtons Circus* [1972] NSWLR 395.

[73] [1980] 2 NZLR 550.

[74] *Basildon DC* v *J.E. Lesser properties* 1984 Times 15th Feb.

[75] [1982] 1 NZLR 178.

The Paper proposed that the contributory negligence legislation should be extended to cover the case where D was liable for breach of contract.[76] This proposal was justified both in terms of the practical need to avoid inconsistency and the theoretical basis of the law.

(l) The Practical Considerations

Here the main concern was to avoid the inconsistency resulting from the fact that the legislation applied where a negligent D was liable in tort but apparently not where he was liable in contract. *Rowe* v *Turner Hopkins* illustrates the problem. P and his wife separated. His wife refused to leave the house they jointly owned. P failed to keep up the mortgage payments on the house and it was eventually sold for less than its market value on a mortgagee's sale. Prichard J. found that D, P's solicitor had negligently failed to advise P that he could bring a partition action against his wife thereby forcing a sale of the property and avoiding the loss causing mortgagee's sale. The judge commented that if the claim had been brought in tort, he would have reduced P's damages by 50% because P's irresponsible action in failing to keep up the mortgage payments was equally causative of the eventual outcome. However having held, following *McLaren Maycroft* that D was liable only in contract and that the apportionment legislation did not apply to contract, the judge felt he was forced to award P his full damages against D.

The potential inconsistency is clear: if D had been sued in tort he would have been liable for 50% of the loss, but in an action in contract on the same facts he was held liable for 100% of the loss. Actual inconsistency was avoided in *Rowe* by the rule in *McLaren Maycroft* that a D in breach of a contractual duty of care can only be sued in contract. This saved Prichard J. from having to make two inconsistent awards, one of 50% in a tort action and one of 100% in a contract action.[77]

The Reform Paper did not consider that the *McLaren Maycroft* rule provided an acceptable solution to the problem. In the first place, the desire of one or other of the parties to achieve a fairer result through apportionment in a tort action would inevitably put pressure on a court to depart from the rule. Furthermore, if it did so depart, the desire to avoid actual inconsistency would lead to pressure on the court to strain the interpretation of the apportionment legislation to cover contractual actions on the same facts. The Paper suggested that the proper solution would be to expressly extend the legislation to cover contractual actions. This would remove the inconsistency and also the pressure on the *McLaren Maycroft* rule thus allowing the courts to reconsider that rule on its overall merits and not simply in relation to apportionment.

Having argued that the legislation should be extended to cover actions based on breach of a contractual duty of care, the Paper went on to suggest that as "no less injustice" might result in other areas of liability, the legislation should be extended to cover all breaches of contract. No examples of injustice in other areas were given but the *A.M.F.*[78] case discussed in the last section

[76] Para 9.1.

[77] If P's conduct was more than 50% causative it may well be regarded as breaking the chain of causation in contract in which case P will receive no damages in contract but might still be able to receive much reduced damages in tort.

[78] [1968] 1 WLR 1043.

may serve to illustrate the point. There,the builder D, was in breach of a strict contractual warranty and the employer P, was also found to be negligent. It was tentatively suggested that one solution to the contribution problems which arose in the case would have been to allow D to plead contributory negligence against P.[79] This would only have been open to D if the contributory negligence legislation applied to all breaches of contract including breaches of strict duties.

(2) Theoretical Basis

The Paper considered that whatever the practical justification for reform, the legislation should only be extended if "that can be done without violence to settled principle". Two general principles were considered relevant. The first was that a "party should not obtain recovery from another for loss that he has brought on himself". This principle was seen as underlying doctrines of mitigation, causation and estoppel by negligence. On the basis of this 'disqualification' principle there would be no distinction between P's conduct before and after D's breach. In the same way as P's recovery is reduced in respect of his post-breach conduct by the doctrine of mitigation, so to it should be reduced in respect of his pre-breach conduct by a doctrine of contributory negligence. The second principle was that "notions of fault have no place in contract law" and its consequence that a contract breaker "cannot reduce his liability by a plea that the injured party should not, before breach, have relied on the wrongdoer's performing his obligations". The Paper sought to reconcile these two principles by recommending that the apportionment legislation should be extended to contractual actions but with two qualifications: the first was that P's inadequate care of his own interests would be unjustified and constitute fault, unless it was excused by the terms of the contract between P and D. The second was that P's care of his own interests would not be inadequate "by reason only that it constitutes a failure to take precautions against breach by D of an obligation owed to P under the terms of a contract before P knows or ought to know that the breach has occurred".

(3) The implications of the Reform Proposal

In essence the proposal is that apportionment should be extended to contractual actions but that P should not be regarded as contributory negligent if either his sole fault was a failure to take precautions against the possibility of breach by D or he was otherwise excused by the terms of the contract. To examine the implications of the proposal, this section of the article will consider its possible effect in three situations: first, where P's and D's conduct act independently in causing different aspects of of P's loss; secondly, where their conduct acts concurrently to produce a common loss; and thirdly, where P's conduct is consecutive, following that of D and either adding to or failing to prevent the loss flowing from D's breach.

(a) Independent conduct

A simple example is provided by the Australian case of *Belous* v *Willets*[80]. P who had been injured in a road accident, sued his solicitor for breach of contract in failing to pursue a claim against the other driver within

[79] Infra. p.32.

[80] [1970] VR 45.

the time limit. D pleaded that P was contributory negligent. The basis of the plea was not made clear in the report but it seems likely that it related to P's conduct in causing the accident. Gillard J. struck out the defence on the ground that the legislation did not apply to contractual actions but he also pointed out that the defence was unnecessary. The reason is clear: D's breach could only have caused P to loose what he would have been able to recover in an action against the other driver. If say, P was 25% to blame for the accident, D's conduct could only have caused P to loose 75% of what would have been his full compensation.

Principles of causation provide a simple answer where losses can be easily divided between the independent causes. The case of *Government of Ceylon* v *Chandris*[81] illustrates that problems can arise where this is not possible. P chartered a ship from D to carry rice. The rice was damaged. Some of the damage was caused by lack of ventilation for which D was contractually responsible. But even if there had been adequate ventilation, some of the rice would have been damaged due to the long period of time it spent in the hold caused by P's delay in unloading the ship. The arbitrator found that it was impossible to say how many bags of rice had been damaged by the lack of ventilation and how many by the delay alone. Accordingly, Mocatta J. held that as the burden of proving damage was on P and he could not prove that any particular damage was due to D's conduct rather than his own, he was only entitled to nominal damages.

It seems hardly satisfactory that after D's breach has independently caused some damage, P should be unable to recover because he cannot identify the precise items of damage caused by D's conduct rather than his own. Should an owner/builder be unable to recover substantial damages from his architect for failing to produce an adequate design, simply because he cannot identify precisely what items of long term damage has flowed from the defective design as opposed to his own defective workmanship? In such a case,[82] Dickson J. in the Supreme Court of Canada, has suggested that it is sufficient for courts to identify broadly the quantum of damage caused by each. Still, there are always likely to be cases like *Chandris* where not even a broad identification is possible.

Where it is impossible to prove what elements of the overall loss were independently caused by the respective fault of P and D, the apportionment approach may provide a solution. The Reform paper's proposal should enable courts to make an apportionment of overall responsibility in a case like *Chandris*.

(b) Concurrent conduct

In the *Chandris* situation each party's conduct was a cause of a divisible part of the loss, the problem lay in identifying the precise division. However, in case of concurrent causation, the loss is not even theoretically divisible, it results from a confluence of both causes. Without the conduct of both P and D no loss would have resulted. The example given in the Report Paper was that of a client's loss suffered partly as a result of his own withholding of information from his solicitor and partly as a result of his solicitor's lack of care. It was to this kind of situation that the Paper's proposal was primarily directed. However, before there is any need to fall

[81] [1965] 3 All ER 48.

[82] *Brunswick Construction* v *Nolan* (1974) 48 DLR (3d) 93.

back on apportionment for a solution it must be shown that both D and P are at fault and that the conduct of both was causative of the loss. Many apparent problems can be solved at the preliminary stage of duty and causation.

As far as D's duty is concerned, it may be limited to acting on information provided by P or alternatively may encompass the need to verify that information. Thus a solicitor's retainer's is normally taken to be limited to the matter raised by information provided by the client.[83] He will not necessarily be in breach because he failed to consider issues not raised by the information supplied or did not independently verify the information. Conversely, an auditor is under a duty to verify information provided by the client or his employees. In that case, it may be difficult to show that the client is at fault in failing to disclose information. In *Simonius Vischer*,[84] Moffit P. was clearly of the view that an auditor could not plead contributory negligence against the client simply because the client had failed to control his own employees adequately. Under the Reform Proposal, it would certainly be open to an auditor's client to argue that his own failure to supply correct and full information was excused by the terms of the auditor's contractual duty to verify and thus did not amount to fault.

The causation point is illustrated by *James Pty* v *Duncan*.[85] P hired a barge from D. The barge sank and P lost his equipment. D was in breach of contract because the bilge pump of the barge was not in good working order. P was also at fault because his actions resulted in water entering the barge through the bow gate. McInerny J. giving the judgment of the Victorian appellate court, held that D could not plead P's contributory negligence as the legislation did not apply to contract actions. However, he found that in any case not more than 10% of the water that sank the barge was attributable to P's conduct and that "considered as a matter of causation and looking at the matter broadly, the real cause of the sinking was D's failure". Thus even if the apportionment legislation had been applicable, it se ms that no reduction of damages would have been made on the particular facts of the case.

It is where both P and D are clearly at fault and the conduct of both is a substantial cause of the loss, that the need for apportionment arises. The facts as found by the trial judge in *Rowe* v *Turner Hopkins*[86] illustrate the situation. The solicitor failed to advise the client the possibility of a mortgagee's sale could be avoided by selling the house through a partition action with his wife. The client was also at fault in allowing the mortgage interest to get into arrears and refusing to consider a refinancing of the mortgage. Without the conduct of both P and D the loss creating mortgagee's sale would not have taken place. The judge found that the conduct of each was equally causative and would have reduced P's damages by 50% had the apportionment legislation been applicable to a contract action.

Would the situation as analysed by the judge in *Rowe*, have been covered by the Reform Proposal? Could it be argued that P's irresponsible conduct was in any way excused by the term of his contract with the solicitor?

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[83] *Griffiths* v *Evans* [1953] 1 WLR 1424.

[84] Supra, fn. 61.

[85] [1970] VR 705.

[86] Supra fn. 73.

In some cases of this kind, it may be part of the solicitor's retainer to solve problems created by his client's irresponsibility, e.g. where the client says 'I have got myself in a mess' and the solicitor undertakes to use all reasonable care to retrieve the position. If this is the basis of the retainer and the solicitor fails to use care, it must be open to the client to argue that his failure to take care of his own interests was excused by the terms of the retainer and thus can not constitute fault for the purposes of apportionment. However, it is suggested that clear evidence of the scope of the solicitor's retainer would be necessary to support such a conclusion. In *Rowe* there was no such evidence. The Reform Proposal should therefore apply and this would seem to be a desirable result.

(c) Consecutive conduct

P's conduct consequent upon D's breach may be said to have contributed to his loss in three broad categories of situation: first, where P's conduct actively brings about the loss following D's breach. Secondly, where P failed to avoid loss that was likely to follow a known or obvious breach by D; and thirdly, where P failed to take precautions against the possibility of breach by D. Although these situations have a certain overlapping equality, they each raise distinctive problems for the reform proposal.

(i) Actively causing loss–

The traditional approach of the courts has been to solve this problem by principles of causation. P's conduct may not be regarded as a legal cause of his loss, alternatively it may be regarded as the sole cause. An example of the former is provided by *Harper* v *Ashtons Circus Pty.*[87] D was in breach of his contractual duty of care to P in failing to provide a safety rail around the back of circus seating. P, although he must have realised there was no rail, attempted to swap seats with his wife and in so doing slipped and fell. The New South Wales Court of Appeal held that the apportionment legislation was inapplicable to the contract action but held that in any case although P's action was the occasion of the damage, D's conduct was the sole cause in law. An example of the latter situation is provided by *Quinn* v *Birch Bros.*[88] D in breach of contract failed to supply P with a ladder to use in building work. It was held that P's decision to use a folded trestle in the absence of the ladder, broke the chain of causation from D's breach and D was not liable for the injury suffered by P when the trestle collapsed. *Lambert* v *Lewis*,[89] the case extensively discussed in the previous section illustrates the same point.

In these cases it was clear that one or other of the party's conduct was the sole cause of the loss and hence there was no room for apportionment. In other situations it may not be so clear. In *Quinn* the judges considered what would have been the result if D had negligently broken contract by supplying an unsafe ladder and despite the obvious defect P had used it and suffered injury. Paull J. at first instance, indicated that the apportionment legislation might then be applicable. Sellers LJ. on appeal, seems to have taken the view that the employee's conduct might still have

[87] [1972] NSWLR 395.

[88] [1965] 3 All ER 801 (Paull J.); 1966 2 All ER 283 (CA).

[89] *Lambert* v *Lewis*, supra fn. 66, the case extensively discussed in the previous section illustrates the same point.

been the sole cause. In the Canadian case of *Tompkins Hardware* v *North Western Flying Services*,[90] apportionment was applied to this kind of situation. D was in breach of contract by negligently fitting skis to P's plane. On its first flight one of the skis dropped out of position but despite this P decided not to leave the plane with D for a further check. The plane was later damaged because of the failure of the ski. The judge held that P was under a duty to mitigate the effects of D's breach, that his failure to leave the plane to be checked was unreasonable and that there should be an apportionment whether the action was in tort or contract. P's damages were reduced by 20%.

The Reform Proposal would make it possible to apply apportionment in such a situation. P's conduct in *Tomkins* could be regarded as an unjustified failure to take adequate care of his own interests. It would not be excused by the terms of the contract nor as a simple failure to take precautions against D's breach for P ought to have been aware that the breach had occurred. The problem likely to be faced by the courts in applying the proposal is one of establishing the borderline between cases of sole causation and those of joint causation. How would the defective ladder example discussed in *Quinn*, be solved? Following the introduction of apportionment in tort actions, courts became less willing to make findings of sole causation. preferring the flexibility afforded by apportionment. Perhaps the same will happen in contractual actions if the proposal is adopted. Certainly, the flexibility afforded by apportionment in contrast to the 'all or nothing' solution provided by causation, is a reason to welcome the proposal rather than the contrary.

(ii) Failing to avoid loss after obvious or known breach

These problems have been traditionally dealt with by the concept of mitigation under which "if P fails to take reasonable steps to minimise his loss following a known or obvious breach, he will not be able to recover anything in respect of the extra loss due to his failure".[91] Under this doctrine, responsibility for the overall loss is divided between P and D according to the causative role of their conduct. Can or should the Reform Proposal apply to such a situation? Would it make any difference if it did?

Williams suggests that the principles of mitigation and contributory negligence are essentially the same and that the courts should be able to apply the apportionment legislation in cases where P has failed to mitigate his loss.[92] The most powerful argument against this view, is that the loss which is attributable to P's failure to mitigate does not fall within the scope of the legislation which deals with losses "suffered partly as a result of (P)'s fault and partly of the fault of another person (D)". The loss suffered as a result of a failure to mitigate is arguably solely due to P's fault. Williams argues to the contrary on the basis that P's failure to mitigate does not break the chain of causation from D's breach but the point is clearly open. It should be clarified by any reform legislation.

Should the apportionment legislation apply to the avoidable loss situation? Where P is aware of the breach and fails to act reasonably to mitigate the loss, it is suggested that apportionment may be neither necessary nor

[90] (1983) 139 DLR (3d) 329.

[91] Treitel: *Law of Contract*, 6th ed., p. 737.

[92] Williams: *Joint Torts and Contributory Negligence*, p. 291.

desirable. Under the principle of mitigation, the courts divide responsibility on the basis of causation. P does not recover the loss caused by his failure to mitigate. If apportionment was to be applied, the courts would apply equitable principles and in so doing could take into account culpability as well as causation. If they limited themselves to causation, the result produced would be similar to that produced by mitigation and the exercise would not be necessary. If they considered culpability and awarded P some of the loss that he could have avoided, they would undermine the established principles of mitigation and conceivably lessen the inducement to P to take mitigating action. Not a desirable result.

There is a much stronger case for applying apportionment where P does not actually know of the breach but in all the circumstances he should have done. It seems that the mitigation doctrine can apply in such circumstances[93] but the result is arguably, harsh. Whilst it may be fair to say that P who knows of the breach and deliberately or negligently fails to take steps to avoid the loss, should be responsible for the avoidable loss; it may not be fair to treat P in the same way where he has negligently failed to become aware of the breach. In two cases dealing with this type of situation, the courts have applied apportionment legislation to produce a fair result. In *De Meza* v *Apple*,[94] D, an accountant, negligently completed earnings certificates for a client, P. The certificate showed only 40% of P's true earnings. The certificate was sent to P with a view to basing P's consequential loss insurance on the figures. P did not notice the mistake, the insurance was taken on the basis of the erroneous figures and when P's office was destroyed by fire he discovered that he had inadequate insurance cover. The judge reduced P's damages by 30% to take account of his contributory negligence. This seems a fairer result than either awarding him nothing on the basis that the loss was caused by his failure to mitigate, or awarding him full compensation on the basis that he had not acted unreasonably and hence failed to mitigate. The Alberta Court of Appeal took a similar approach in *Canadian Western Natural Gas* v *Pathfinder Surveys*.[95] D, a surveyor retained to stake out a gas line for P, negligently left his tangent lines marked and failed to mark in the curves to be followed. P did not realise the error and suffered an obvious loss by following the tangent lines with the pipe. The loss was apportioned rather than being attributed solely to P or D.

Thus it is suggested that apportionment may be desirable where P's unreasonable conduct consists of his failure to become aware of an obvious breach but not where it consists of his failure to take avoiding action in respect of a known breach. The distinction is put forward with some hesitation, but whatever view is taken, it would clearly have been helpful if the Reform Paper had discussed the relationship of mitigation and contributory negligence in contract actions.

(iii) Failure to take precautions against possible breach

Where the breach is not so obvious that P should reasonably have been

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[93] Williams, op.cit., p. 290. Williams comments that 'a reasonable man does not spend his time nosing out possible wrongdoing on the part of others! Hence his conduct will rarely amount to a failure to mitigate before he is aware of the breach.

[94] [1974] 1 Ll.Rep. 508.

[95] (1980) 12 Alta LR (2d) 135.

aware of it, there are normally no grounds for holding that he acted unreasonably in failing to take precautions against its possibility. The recent decision of the Ontario Court of Appeal in *Cosyns* v *Smith*,[96] illustrates this point. D, an insurance agent undertook to take out insurance for P and subsequently assured P that he had done so. Despite the fact that he received no confirmation of the policy from the insurer, P relied on the agent and did not enquire further. Some months later P's property was destroyed by fire and it was discovered that no insurance had been taken. The trial judge reduced P's damages by 25% to take account of his failure to enquire further. The Court of Appeal, after holding the apportionment was possible in a contract action, found that P was not at fault. P was entitled to rely on his agent and his failure to check on the agent's assurance could not amount to contributory negligence. It is this principle which is enshrined in the New Zealand reform proposal.

Under the proposal, P's care will not be inadequate "by reason only that it constitutes a failure to take precautions" against D's possible breach. Some problems can be foreseen in relation to the word 'only'. There may be exceptional cases where P's fault does not lie 'only' in his failure to take precautions. In the *A.M.F.*[97] case discussed at length in the last section, it will be recalled that P failed to check on whether D was in breach of his contract to provide a watertight building and that this failure constituted a breach of P's duty to a third party who suffered loss in consequence. P was able to recover his liability to the third party as damages from D for his breach. Would the Reform Proposal apply to this situation? It would be possible to argue that P's lack of care was not 'only' inadequate because it was a failure to take precautions against the possibility of breach by D, but also because it amounted to a breach in relation to the third party and that breach was the direct cause of P's loss. It is tentatively suggested that this might be an acceptable approach for a court to take. It would not seem unjust to reduce P's damages by the amount to which he was considered responsible for the third party's loss and as noted in the previous section, it would resolve the apparent incompatibility between P's direct claim against D and his contribution claim.

(4) The Reform Proposals: A Conclusion

In *Harper*[98], Hope JA. in rejecting the view that the apportionment legislation should apply to contract, commented "the law of contract is not so intractable as to be unable to produce an acceptable solution . . . by the application of its own principles without bringing in aid principles of the law of torts". Unfortunately, the traditional principles of contract law did not seem to provide a satisfactory solution to the problems that arose in *Chandeis*, *Rowe*, *De Meza* or arguably, *A.M.F.* But apportionment does seem to provide an acceptable result in these cases. Ironcially, Canadian courts in cases like *Cosyns*, have been prepared to solve the problems by contract principles, but only arguing that apportionment forms part of the principles of contract law.

Should apportionment be seen as a subversion of contract principles by those of tort, further evidence of the 'death of contract'? The two

[96] (1983) 146 DLR (3d) 622.

[97] [1968] 1 WLR 1043.

[98] Supra, fn. 87.

qualifications to the reform proposal, that P is entitled to rely on both the terms of the contract and the fact that D will not break them, suggest that this is not the case. Indeed if anything, it may be the traditional tort approach which may be modified. If the rule in *McLaren Maycroft* is overturned or further restricted, courts may increasingly meet claims in tort between parties to a contract. In applying the apportionment legislation in the tort action they will not be able to disregard the contractual relationship between the parties. The proposed qualifications to the definition of fault apply in both contract and tort claims. The relationship of contract and tort will be seen in terms of compatibility rather than conflict.

V. CONCLUSION

In view of the length of this review, it may be helpful to conclude with a summary of the main points of agreement or otherwise with the proposals of the Reform Paper.

(1) Entitlement to Contribution

1. The proposal that entitlement to contribution should be extended to all wrongdoers is to be welcomed, in particular because it removes the undesirable effects of the *McLaren Maycroft* rule in the contribution context.
2. The proposal that a wrongdoer who has settled his liability to P, should be entitled to contribution is also to be welcome and it is hoped that reform legislation will define the concept of 'settlement' sufficiently broadly.
3. The proposal that a settlement by D2 should shield him from a contribution claim from D1, is not accepted. The Reform Paper should have considered the broader problem of who should be prejudiced by P's preferential treatment of D2. It is suggested that whilst D2 should be shielded by P's pre-breach conduct in agreeing to exclusion clauses etc. he should not be shielded by P's post breach conduct whether it takes the form of settlement, waiver or delay in pursuing a claim. The Paper should have considered the role of Identification and Indemnity in the solution of these problems.
4. The Paper was right to reject the replacement of the contribution system by one of proportionate recovery, but again it could have profitably considered the role of Identification in this context.

(2) Apportionment

1. The Paper was right to reject specific guidelines in favour of a general discretion whilst drawing the court's attention to the potential amount of the wrongdoers liability, their obligations to P and their obligations *inter se*, as relevant factors in applying the discretion.
2. The Paper was right to propose that a limitation of liability between D2 and P should act as an upper limit on D2's liability in a contribution act, but it should have been made clear that the same principle applies where D2's liability is more limited than D1 for other reasons e.g. P's contributory negligence, the rules of remoteness, D1's higher liability under a liquidated damage clause.
3. The courts do consider the obligations of the wrongdoers to P when apportioning responsibility. Their practice does not support the Paper's

view that a contribution by a 'supervising' or 'evaluating' wrongdoer would necessarily 'offend conscience'.

4. The courts do consider the obligations of the wrongdoers *inter se* where their relationship *inter se* is tortious and hence there is likely to be compatibility between a contribution claim and a direct claim between them. However, where their relationship is contractual, the cases show that D1's direct contract claim may not produce a result compatible with his contribution claim. Much of the incompatibility seems to stem from the fact that contributory negligence is not regarded as a defence to breach of contract.

(3) Contribution by Plaintiff

1. The proposal that the contributory negligence legislation be extended to situations where D is in breach of contract subject to the proviso that P is entitled to rely on the contract terms and their performance, is to be welcomed. It will provide a fairer solution where the fault of P and D concurrently cause the loss and where they independently cause separate losses which are practically indivisible.
2. The Paper should have clarified the relationship of their contributory negligence proposal to the doctrine of mitigation. It is suggested that the contributory negligence concept is not necessary or desirable where P's fault follows his knowledge of the breach, but that there may be a role for the proposal was negligently unaware of the breach.
3. The qualification that P should not be regarded as at fault only as a result of failure to take precautions against D's possible breach is to be welcomed, but some clarification of what is meant by 'only' would have been helpful.
4. The impact of the proposed qualifications to the definition of 'fault' on the role of contributory negligence in tort actions, should be noted.