CONTRIBUTION BETWEEN WRONGDOERS – IS THE DAMAGE SUFFICIENTLY RELATED?

SIR ANDREW TIPPING *

I. Introduction

This article addresses the rights of contribution (or indemnity), between themselves, of two or more parties who have each caused or contributed to the loss or harm for which a plaintiff is entitled to redress. The need for contribution arises when one wrongdoer has paid more than their fair share of the plaintiff's total loss. For simplicity, I will proceed on the basis of two defendants to be called D1 and D2. I will call the plaintiff P. My central thesis will be that New Zealand law has for some time been in an unsatisfactory state. Legislative attention is overdue.

Sir Peter Blanchard and I both said as much 10 years ago in the Supreme Court in *Marlborough District Council v Altimarloch Joint Venture Ltd* (*Altimarloch*).[1] In that case the court was divided 3:2 on the contribution issue, and indeed, in different combinations, on several other issues. Since then, the Supreme Court has addressed the contribution issue again in *Hotchin v Guardian Trust*.[2] The Court was again divided 3:2. The majority made a valiant effort to simplify the criteria for contribution, but the need for legislation remains, as the minority recognised. I will be making some suggestions in that respect at the end of my article.

Courts can achieve only so much with ad hoc situational solutions. The necessary general coherence is best achieved legislatively, particularly as a key issue with the present regime – the "same damage" conundrum – is enshrined in legislation. This is a similar situation to that which we faced for many years with the previously outdated Limitation Act 1950. That legislation was updated in 2010. In the contribution field, the only relevant legislation was passed as long ago as 1936. It is now seriously out of date. Equitable principles have found it difficult to adjust to changing needs.

My thesis will be that the present legislative regime, which covers contribution only between tortfeasors, should be expanded in two ways. First, it should cover

* Retired judge of the Supreme Court of New Zealand.

1 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] 2NZLR 206, [2012] NZSC 11.

2 *Hotchin v Guardian Trust* [2016] 1NZLR 500, [2016] NZSC 24.

all wrongdoers, not just tortfeasors. Second, the criterion for liability to contribute should be expanded from liability for the "same damage" to liability for the "same or sufficiently related damage". The new regime should take the place of all rules of the common law and equity. The amount of contribution should reflect the causal potency of each wrongdoer's conduct and their comparative blameworthiness, those being familiar concepts in the contributory negligence field.

My article is based on the premise that we retain the present joint and several liability regime, under which plaintiffs can recover their full loss from each of two or more wrongdoers. They can choose whom to sue. If we were to move to a proportionate regime under which plaintiffs could recover from each wrongdoer only that party's proportionate share of the plaintiff's total loss, the present difficulties with contribution between wrongdoers would be reduced, but not eliminated. That would be helpful, but a move to a proportionate regime would not suit the interests of plaintiffs, as there would be greater potential for them not to be fully compensated. While the two areas interact, my present purpose is to examine only the contribution aspect.

Before I move on, I must make an explanation. My article discusses a case in the Supreme Court on which I sat (*Altimarloch*). It discusses another case in the Supreme Court on which I did not sit, having retired in the meantime (*Hotchin*). It is not normally appropriate for a judge, whether retired or not, to discuss extrajudicially a case in which the judge has been involved. This risks perceptions of self-congratulation or self-justification, or indeed self-flagellation! It is also necessary for retired judges to be careful to not gratuitously criticise judges who have later disagreed with them. In this article I am conscious of doing both these things.

The reason I am taking the liberty of doing so is that my topic is a highly controversial one in respect of which I am calling for early legislative reform. That call is made in the public interest. In order to lay out the problematic background, I must necessarily discuss the two cases I have mentioned. I cannot conscientiously do so without addressing the merits of the competing points of view. The reasoning I deploy in support of my call for legislation must include an honest appraisal of the different approaches.

II. Facts of Altimarloch

Let me open the discussion by reference to the facts of *Altimarloch*. Vendors of land on which the Purchaser, to their knowledge, intended to plant grapes, misrepresented, by overstatement, the quantity of water rights that went with the land. The Purchaser had also checked the water rights situation with the local

Council. In a LIM, the Council similarly misrepresented the true position. In each case the parties were innocent but careless. The Purchaser sued the Vendors in contract and the Council in tort on account of the damage it suffered as a result of the shortfall of water available from the water rights.

The Council's misstatement was negligent and in breach of its duty of care and gave rise to damages in tort. The Vendors' corresponding misrepresentation gave rise to damages in contract as a breach of a contractual term. The Purchaser could sue the Vendors only in contract, any potential action in tort for negligent misrepresentation being precluded by s 6 of the then Contractual Remedies Act 1979 (now s 35 of the Contract and Commercial Law Act 2017). The purchaser was, in any event, likely to prefer the contract route as it provided fuller compensation.

Hence, subject to causation issues, both the Vendors and the Council were liable to compensate the Purchaser. The amount for which the two defendants were liable to the Purchaser differed on account of the different measures of damages in contract and in tort. The Vendors were liable in contract under the performance measure (cost of cure). That resulted in damages of approximately $1 million in total, being the cost of buying what additional water rights were available for about $300,000, and building a dam on the property for about $700,000 to provide for the remaining shortfall in the water available from the water rights.

The Council was liable in tort for the amount by which the value of the property was diminished on account of the missing water rights. That amount was only $400,000. The difference between the two measures was substantial, but that feature of the case makes no difference to the issue under discussion. That issue is whether the Vendors could obtain contribution from the Council towards the amount they were liable to pay the Purchaser and, if so, how that contribution should be fixed.

I will not, at this stage, refer to the various views that this fact situation produced in the Supreme Court. I will return to the different approaches later. My purpose thus far has been to introduce the issues I am addressing through the facts of an actual and difficult case.

III. The Current Legislation

The only legislation relevant to the contribution issues that arose in *Altimarloch* deals with the position between joint and several tortfeasors. It is s 17 of The Law Reform Act 1936. The liable parties in the fact situation described above were not joint or several tortfeasors. The Council was a tortfeasor; the Vendors were in breach of contract and were not tortfeasors.

I need not at this point describe in any detail how the legislative regime for tortfeasors is designed to work. For present purposes it is enough to say that they are liable to contribute between themselves if they are "liable for the same damage". This sounds simple, and it usually is when tortfeasors have acted jointly (in concert), and have thereby necessarily caused the same damage. But what constitutes "the same damage" is a controversial and difficult issue when it comes to be applied outside the case of joint tortfeasors. With independent (usually called "several") tortfeasors, the damage caused by each will not normally be the same, unless the total damage they have caused is indivisible.

There are basically two schools of thought about the right approach to sameness of damage: one favours a broad "equitable" approach to that question; the other favours a more analytical approach based on legal principle. Both approaches are tenable, albeit the former, while more flexible, is likely to give rise to greater uncertainty and its parameters are not easy to articulate in a convincing way. The position with several tortfeasors would benefit from clarification; and legislation is also badly needed to deal with contribution issues outside the field of tortfeasors. The position we have reached with equitable principles that regulate cases to which the legislation does not apply lacks desirable clarity and coherence. We need to consider whether the concept of the "same damage" can be improved and what provision should be made for cases other than those involving joint and several liability in tort.

IV. Equitable Principles

As I have said, all contribution issues outside the case of joint and several tortfeasors are at present regulated by equitable principles. They were not originally designed to have such a broad reach. The original equitable rule, put simply, was that persons co-ordinately liable to the same plaintiff for the same damage were liable to contribute equitably, usually pro rata, to the necessary redress. For example, if more than one person had guaranteed a debt, a guarantor discharging the whole debt could look to his co-guarantors in equity for contribution. The same applied to co-mortgagors and co-debtors and other co-obligors generally. Equity's focus was traditionally on cases involving co-obligations. The concept of a co-obligation was, in most respects, the same as a joint obligation.

Over time, the equitable rule evolved into the slightly broader proposition that equity would order contribution between those "co-ordinately" liable (often referred to as liability in common) for damage of the "same nature and extent". Even under that broader approach, careful analysis was still necessary to answer

the "co-ordinate" and "same nature and extent" inquiries. All this is demonstrated with clarity and cogency by the three substantive speeches in the House of Lords in the (2002) *Royal Brompton Hospital* case[3] to which I will return below, and by the historical aspects of the judgments in *Altimarloch* and, to an extent, in *Hotchin*.

A further general point regarding contribution is that there must ordinarily be mutuality between the contribution parties. It must be reasonable not only to require D1 to contribute to the damage for which D2 is liable; it must also be reasonable to require D2 to contribute to the damage for which D1 is liable. Thus, contribution must generally be reasonable both ways; which way will depend on which of D1 and D2 has paid more than their fair share.

The mutuality requirement will not usually cause any difficulty if the damage for which the defendants are each liable is, in conventional terms, the same. But issues can arise if the concept of sameness is expanded. In the *Hotchin* case, for example, as we will see a little later, it would have been reasonable to require one wrongdoer (A) to contribute to the damage for which the other wrongdoer (B) was liable. It would not, at least on the face of it, have been reasonable to order B to contribute to the damage for which A was liable. That would have required B to indemnify A, at least in part, on the basis that B should have prevented A from committing his wrongs. A was effectively saying to B: "you should have been more careful to stop me from being careless". The need for mutuality should not therefore be absolute; but it should be dispensed with only in clear cases.

V. Altimarloch: Reasoning

This was the general background against which the *Altimarloch* case was decided by the Supreme Court. As the tortfeasors legislation did not apply, the case had to be resolved on equitable principles. Two judges (Blanchard and Tipping JJ) held that contribution was not available between the Vendors and the Council. They considered the two liabilities were not co-ordinate, nor was the damage of the same nature and extent. Two judges (McGrath and Anderson JJ) favoured loosening the equitable contribution test to some extent and thereby held that contribution should be available, but purportedly still under the traditional equitable "same nature and extent of damage" approach. A substantial part of their reasoning relied on the fact that the Council and the Vendors had made the same mistake about the water rights. But that is to focus on the cause of the damage, not the nature of the damage for which each party was liable as a result of the mistake. Sameness of cause does not necessarily lead to sameness of damage. In her judgment in *Hotchin*, Glazebook

3 *Royal Brompton Hospital v Hammond* [2002] 2 All ER 600 (HL).

J attempted to explain this problem away, but in my view her attempt was not convincing.

McGrath and Anderson JJ said that the court should not take too technical an approach. While I have sympathy with that view, once one moves away from legal analysis, it is necessary to establish some other approach that involves a degree of analysis as well as intuition. It must be possible to articulate one's approach with reasonable clarity. An expanded factual approach to what constitutes the same damage is problematical without conceptual expansion. It lacks a coherent basis.

The fifth judge in *Altimarloch* (Elias CJ) held, as did I (but not the other three members of the Court), that the Council had not caused the purchaser any loss because the contract, entry into which the Council's negligence had induced the purchaser, was not ultimately a loss-making one. *Altimarloch*, as purchaser, was undoubtedly going to obtain full compensation from the Vendors pursuant to its contractual rights and was, therefore, left in the same contractual position as if there had been no negligent misstatement by the Council. Hence the Council's negligence ultimately caused the purchaser no contractual loss and there was therefore no basis for a contribution order against it.

This view was based on the fact that the Council's negligence had induced the purchaser to acquire an asset. That asset, properly analysed, was not the land and water rights as such. It was the contract, in the sense of the bundle of rights which the purchaser acquired under the contract of purchase. The question was whether the Council's negligence had caused the purchaser any diminution in the value of those rights. That depended on whether the rights could be successfully enforced against the Vendors.

It was common ground between the parties that exercise of the purchaser's contractual rights, both primary and secondary, was certain to leave it in the same position financially, and practically, as if there had been no negligent inducement by the Council. The rights acquired by the purchaser under the contract of purchase were not ultimately worth less than their cost. The purchaser, being entitled to a sum of money from the Vendors that fully compensated for the defective contract, suffered no loss as a result of the Council's negligence in inducing it to enter into that contract. As this was a minority view, I decided to address the contribution issue in detail, on the premise that the Council's negligence had caused loss to the purchaser.

Elias CJ indicated she would have favoured a broader approach to contribution if it had been necessary to decide the point. Hence the Court was essentially divided 3:2 in favour of a broader approach to contribution issues. Blanchard J and I both viewed the law as unsatisfactory but felt the necessary changes should be made

by Parliament, rather than by ad hoc judicial development, where the necessary coherence would be hard to achieve. I did not consider the views of other members of the court provided the necessary clarity or coherence. I would have favoured a change to the same damage test (see below), if I had thought it appropriate to deal with the problem judicially, rather than by legislation.

VI. Hotchin

I come now to the more recent decision of the Supreme Court on this subject in *Hotchin v Guardian Trust*. The case involved a strike out application. The assumed facts, simply stated, were that the Financial Markets Authority (FMA) had sued Mr Hotchin as a director of a finance company for issuing a prospectus for debt securities containing inaccurate statements. The FMA claimed compensation for investors who had suffered loss by relying on the prospectus. Mr Hotchin denied liability but settled the claim by paying a sum of money to the FMA.

He then sought contribution (on the contradictory basis that he was indeed liable to the investors) from the Guardian Trust, which was Trustee for the investors under the relevant Trust Deed. It was responsible for monitoring the activities of the finance company, primarily after the securities had been issued. The same prospectus was used for several issues of debt securities and some investors had rolled over their investments, and some had subscribed after the date on which the Trustee should have intervened to prevent further investments. Those aspects need not detain us here. They must, however, be acknowledged as adding a complication that the Court had to address and making it problematic to strike out the contribution claim in its entirety. Mr Hotchin and the Guardian Trust were both assumed for strike out purposes to be tortfeasors

The Guardian Trust applied to strike out the contribution proceedings against it on the ground that the case was not, in law, one where contribution was available, whether under the tortfeasors legislation or otherwise. The High Court and the Court of Appeal agreed and ordered the contribution claim to be struck out. By a majority of 3:2 (Elias CJ, Glazebrook and William Young JJ; Arnold and O'Regan JJ dissenting) the Supreme Court allowed the appeal and reinstated the claim so it could go to trial. They did however record that the merits of the claim appeared dubious from a just and equitable point of view.

In the Supreme Court, the majority held that equitable contribution should apply to wrongdoers who were liable simply for "the same damage", as per the tortfeasors legislation. They detached the same damage requirement from the traditional need for the wrongdoers to be co-ordinately liable for a single wrong. In other words, they

held that the damage could be the same without the liabilities of the contribution parties being common or co-ordinate (on the basis of a single wrong) and without the damage being indivisible. They took the same isolated view of the same damage requirement, both under the tortfeasors legislation and in equity. This approach must logically be based on the implicit proposition that the co-ordinate liability element in the equitable formulation was gratuitous surplusage. It was, however, not surplusage. It had always provided a necessary control over the scope of the "same damage" and the "same nature and extent" criteria.

The approach of the majority seems to have been influenced also, to an extent, by the concept of mutual discharge. This concept is seen as useful in some jurisdictions in determining whether the damage is the same. That will be so if one wrongdoer pays a sum to the plaintiff and that payment either fully or partially discharges the liability of another wrongdoer. There is, however, a danger of circularity here. Mutuality of discharge is a consequence of the liability being for the same damage. That conclusion comes first; there will be mutual discharge if the damage is the same. The mutual discharge concept originated in equity in circumstances where two or more parties were liable to discharge a common liability.

The removal of common or co-ordinate liability from the arena was, according to the judgment of Arnold and O'Regan JJ, an approach that, understandably, had not been advanced by either side. There are, of course, dangers in that situation. The conclusion of the majority was rather like separating Siamese twins and is hard to reconcile with the underlying basis on which the concept of the same damage was originally adopted, both legislatively and in equity.

On the approach they favoured, the majority held that it was at least arguable that Mr Hotchin and the Guardian Trust had caused or contributed to, and were therefore liable for, the same damage; that damage being defined at a high level of generality as the financial loss suffered by the investors, by reason of the diminished value of their investment. The majority fortified their conclusion by saying that substance should prevail over form. I agree with that in general terms. My problem is that what the majority saw as form, I regard as substance.

O'Regan and Arnold JJ held that, under the proper approach, as they saw it, the claim for contribution had correctly been struck out. They preferred a more analytical approach to what constituted "liability for the same damage" and on that basis, which was essentially the approach taken in England in the *Royal Brompton Hospital* case, to which I will return, and by the minority in *Altimarloch*, they held it could not be said that the parties were liable for the same damage. They held that the concepts of "same damage" and "co-ordinate liability" should not be separated, with the latter being eliminated from the inquiry. Their view was that each concept

was important as each informed the other. That was certainly the case historically. The notion of damage being the same was simply a corollary of the liabilities being common or co-ordinate.

VII. The Crux of the Problem

It can thus be seen that the issue of the proper approach to contribution claims remains without clear and coherent judicial guidance. There is general support for widening the ability to claim contribution beyond the case of joint and several tortfeasors. Indeed, in equity the position was never confined so narrowly. But there remains considerable difficulty in applying the criterion that for contribution to be available the parties must be "liable for the same damage", or for damage of "the same nature and extent", whether co-ordinately, in common or otherwise.

The issue has become whether the concept of liability for the same damage or damage of the same nature and extent should be based on a legal analysis of the damage for which each wrongdoer is liable; or rather on a broader and looser approach, yet to be cogently articulated. That essentially was the difference between the majority and minority in both *Altimarloch* and *Hotchin*. There is also a further issue, namely whether the same damage criterion should itself be expanded.

One significant matter that necessarily arises is the level of generality at which the damage should be identified for the purpose of the sameness assessment. If that level is high, for example, simply "financial loss" or "physical harm", there will be little, if any, limit to contribution claims. I acknowledge that in *Hotchin* the concept of financial loss was limited to the particular species of financial asset, but the nature of the damage was still quite general, diminution in value of that asset, never mind on what basis or by what means. The common or co-ordinate liability aspect of the conventional test served a necessary purpose. This was to put a limit on the generality of the approach to what amounts to the same damage that was a feature of the majority views in *Hotchin*. They dispensed with that requirement, thereby eliminating, without acknowledgement, the controlling role it implicitly played.

It is vital that there be some aspect of the test that narrows the concept of qualifying damage to avoid the open-ended consequences that are likely to arise from too general an approach. That can be done either by defining the concept of damage in an appropriate way or, as I prefer, by expanding the conventional same damage test so as to allow contribution either when the damage is the same or when the damage is sufficiently linked. Only with a sufficient link between the damage for which each wrongdoer is liable to the plaintiff will it normally be appropriate to permit contribution. If the damage is identified at a high level of generality and

thereby found to be the same, the risk is that there is an insufficient link and the whole assessment will turn substantively on the just and equitable criterion. This, on its own, provides very little to go on in predicting the outcome in a novel situation,

Another aspect of the problem is that the word "damage" is somewhat amorphous. Their Lordships recognised this in *Royal Brompton* and saw it as a feature that required some further control. As we have seen, useful synonyms are "harm" and "loss". If one is looking to whether "loss" is the same, one tends to have a more confined focus than that which applies when the question is whether "damage" is the same. This applies also with the concept of harm, but to a lesser extent.

It is perhaps arguable that the word "damage" was chosen for the purpose of having a wider focus. There is, however, no support for that in the case law or other literature. All this shows how inherently difficult it is to administer a test focussed simply on "sameness" with regard to "damage". My proposed solution adds the additional criterion of "sufficiently related" damage. If there is doubt about sameness one can move on to consider if the damage is sufficiently related. On one view the test could be framed solely by reference to whether the damage is sufficiently related. But it is better to retain the sameness element for the avoidance of doubt and for consistency with the historical origins of the contribution regime.

VIII. Return to Altimarloch

I return to the facts of *Altimarloch* to exemplify in more detail the outcome of these difficulties and the different approaches. I will be doing the same with *Hotchin* a little later. In *Altimarloch* the Vendors were liable to the Purchaser in contract for damages designed to put the Purchaser in the same position as it would have been in if the representation as to water rights had been true. The damages were designed to equate the promised performance. By contrast, the Council was liable to the Purchaser in tort for the loss of value it had suffered as a result of relying on the Council's negligent misstatement. Readers will remember that the difference was between $1 million and $400,000

The fact that one cause of action was in contract and the other was in tort influenced the result, but was not significant in itself. The different causes of action were important only on account of the different damage (or harm or loss) for which the Vendors and the Council were liable to the Purchaser under each cause of action. To recognise this is not to take a "cause of action" approach. The cause of action was not controlling; its relevance lay in the nature of the damage to which the different causes of action led. The ultimate question turned on a proper identification of the "damage" suffered by the Purchaser for which the Council was liable and that

suffered by the Purchaser for which the Vendors were liable. At a general and broad-brush level it could be said, and was said by McGrath and Anderson JJ, that the damage for which each party was liable was the absence of the missing water rights. But that is to focus more on the cause of the damage rather than its nature.

The damage suffered by the Purchaser was not the absence of water rights per se; it was the economic consequences of their absence. The damage for which the Vendors were responsible and that for which the Council was responsible differed in that respect both in extent and in nature. The Vendors were liable for cost of cure; the Council for diminution in value. These economic consequences were materially different. The question was whether, despite that, the two wrongdoers were liable for the "same damage".

On any analytical basis the damage for which D1 and D2 were liable to P in these circumstances, as opposed to its cause was not the same. It is only if one adopts a much broader approach to the concept of what constitutes the damage that it is possible to view the damage at issue in *Altimarloch* as being the same. The problem, and it is an acute one, is that if one goes beyond legal analysis, it is difficult to know how far one can properly go and on what basis. This leads to even more uncertainty and instability in what has always been a potentially difficult area.

IX. Background to Necessary Legislation

In order to decide how the necessary clarifying legislation should best be framed, I will examine the position in England, where there has, since 1 January 1979, been legislative extension of the earlier joint and several tortfeasor regime.

I should first explain why the earlier legislation did not refer to the necessary liability having to be common or co-ordinate. This was because with joint tortfeasors the damage was necessarily the same. With several tortfeasors the damage was necessarily not the same, unless it was indivisible. The concept of common or co-ordinate liability was therefore not relevant as a control. In addition, the first legislation in England and New Zealand was enacted in an era when the focus was on physical harm to the person or to property. The ability to recover for economic loss not resulting from physical harm was yet to emerge outside contract. The law regarding contribution has been required to develop to accommodate the capacity to recover for "pure" economic loss. But, as we have seen, this is best achieved by legislation.

The leading case in England on its present expanded regime is the decision of the House of Lords, already mentioned, in *Royal Brompton Hospital v Hammond.* That case involved contracts for major construction works at the hospital. There

were delays as well as poor performance. The key question concerned whether the architect and a contractor were liable for the same damage suffered by the owner as a result of the problems that had arisen. Different damage arose from the delays and the deficiencies in performance. It is not necessary to go into the very complex facts in any more detail. It is the points of principle identified by the Judges that matter for our purposes.

Lord Bingham commenced his speech with a comprehensive review of the history of contribution jurisprudence. I will not set out the historical details here as I am now looking more to the future. But certain important statements made both by him, and by Lord Steyn and Lord Hope, deserve careful attention. Lord Bingham said that the context did not support an expansive approach to what constituted "the same damage", albeit the word "damage" should not be read as "damages". His Lordship recognised that the concept of "damage" in this field was, in itself, somewhat amorphous.

He also said that a consistent theme throughout the contribution jurisprudence was that of sharing a "common" liability. Persons sharing a common liability are often described as being "co-ordinately" liable. There must be one loss to be apportioned between two or more co-ordinately liable people. I interpolate that, on this approach, in *Altimarloch* there was not one loss. There were two separate, albeit, subject to causation, overlapping losses for which the two defendants were not co-ordinately liable.

In his speech Lord Steyn observed that the closest synonym for "damage" was "harm". I add that the word "loss" may also be helpful. In rejecting a submission that a broad and flexible approach should be taken to the concept of the "same damage", Lord Steyn observed that loyalty to that concept, as properly understood, required an analytical approach. He too stressed the idea of parties sharing a common or co-ordinate liability.

Lord Hope agreed with Lord Bingham and Lord Steyn but added some points of his own. He emphasised that a "single" harm must result from the conduct of D1 and D2. He said that the mere fact two or more wrongs lead to a common result (compare *Altimarloch*, shortage of water rights, or *Hotchin*, loss of value of investment) does not of itself mean the wrongdoers are liable for the same damage. The facts must be examined more closely and analytically to see if the "damage" is in fact "the same". The other judges in *Royal Brompton*, Lord Mackay and Lord Rodger agreed generally with the other speeches.

An important feature of all three substantive speeches in *Royal Brompton* is their emphasis on the point that the test is sameness of damage not similarity. Their Lordships each said that even "material" similarity was not enough. The damage

must be analytically the same. This was simply a recognition of the effect of the whole previous contribution jurisprudence. It properly informed the meaning of the statutory language of sameness.

Forecasting a later discussion, I consider there is a good case in modern conditions for relaxing the same damage approach a little, but on a principled and disciplined basis. I think we can usefully build on the idea of material similarity, but without adopting that precise language. I will revert to this a little later. In the meantime, it is helpful to identify briefly how the same damage criterion came to be adopted legislatively in the first place. It was adopted as a component of legislation that first allowed contribution between tortfeasors, thereby doing away with the problematic common law rule in *Merryweather v Nixan* which prevented any contribution between tortfeasors.[4] That case involved intentional wrongdoing not negligence, but it came to be viewed, almost by default, as applying to negligence also.

Transferring the "same damage" rule into a regime which caters for both joint and independent wrongdoing outside tort will not necessarily serve the purpose of the expanded regime. Contribution between wrongdoers should be available when it is just and equitable to require it. Contribution has often been said to reflect natural justice. That will be so when there is a sufficient link between the damage caused by each wrongdoer. When formulating an expanded regime, it is necessary to identify how that link should be identified and how it should be determined whether, in a particular case, the link is sufficient.

In *Royal Brompton*, the House of Lords, when interpreting the relevant legislation, gave little, if any, support for a broad brush, as opposed to an analytical approach to assessing whether damage is the same for contribution purposes. But the relevant policy implications for us in the 21st century may well support a somewhat broader test, not tied solely to sameness. Indeed, in *Hotchin*, the judges in the majority all favoured a more liberal approach to the same damage issue, but they maintained the same damage test while leaving the criteria for how to apply their expanded approach rather uncertain and open ended. Arnold and O'Regan JJ in the minority expressly reinforced the call for new legislation.

New Zealand's current legislative background is not the same as that which now applies in the United Kingdom. In that jurisdiction, wrongdoers of different kinds have from 1979 been able to claim contribution from other wrongdoers, irrespective of the nature of their liability to the plaintiff. There is still, however, the control that the contribution parties must each be liable for the same damage.

4 *Merryweather v Nixan* (1799) 8 Term Rep. 186.

It is, in that respect, important to be aware that the history of the current legislation in England provided little, if any, support for loosening the application of the "same damage" criterion. The general view of those promoting the new legislation was that any such loosening would be hard to define and would lead to uncertainty. I do not entirely share that view; but this background clearly influenced the House of Lords in its approach to the issue in *Royal Brompton*.

X. Same Damage: Proposed Development

In New Zealand we have no such legislative background. We badly need further legislation but that legislation need not necessarily adopt the strict "same damage" jurisprudence. The question is how much, if at all, we want to expand the ambit of damage in respect of which contribution between wrongdoers is appropriate.

As we have seen, at common law, under *Merryweather v Nixan*, a tortfeasor could never get contribution from another tortfeasor. The law did not lend its aid to "litigation between rogues". The word rogue may have been appropriate for intentional wrongdoers but could hardly apply to those who had simply been careless. The rule meant that if two parties had both caused another party the same tortious harm, but only one of them was sued, that party had to carry the whole burden and could not get the other to contribute anything. The potential injustice of that led ultimately to legislation in both England (in 1935) and New Zealand (in 1936).

As I have noted, England, and other common law countries, such as Australia and Canada, have subsequently expanded that first legislative step to include parties other than tortfeasors in their contribution regimes. It is strange that this relatively uncontroversial development has still not been adopted in New Zealand. We have had to struggle with the application of equitable principles, which were never designed for the complexities of modern law, life and litigation. Courts have attempted to develop equitable principles to accommodate modern needs, but that exercise has not been particularly successful.

It should not matter whether a wrongdoer is in breach of a duty of care in tort, or is in breach of contract or in breach of a fiduciary duty, or a statutory duty, or any other duty for that matter. What is important is that the breach of duty in each case, whatever it was, should have caused or contributed to the damage suffered by the victim of the several breaches in a "sufficient" way to make it just and equitable to require contribution.

The much more difficult issue is how to incorporate the requirement for a "sufficient link" by drawing a conceptually clear and workable line so as to include damage for which a common responsibility should be recognised and exclude

damage for which it should not. The "same damage" rule is a convenient starting point and has the advantage of simplicity of expression; but that very simplicity hides real difficulty in determining how the damage involved should be identified and whether it should be classified as the same or (under an expanded approach) sufficiently the same.

In *Altimarloch*, for example, it was possible to identify the damage suffered by the Purchaser in different ways and at different levels. The most simplistic approach involved identifying the damage as the absence of the stipulated water rights. But, even at that level, there was difficulty because one wrongdoer, the Vendors, had promised the water rights; the other wrongdoer, the Council, had not, and that factor influenced the different measures of damages for which each party was liable. The damage was analytically different not only in extent but also in nature.

Despite that, both wrongdoers had led the Purchaser to believe and rely on the fact that the Vendors had the stated quantity of water rights. The Purchaser reasonably relied on the representations made by both the Vendors and the Council in making its decision to buy and how much to pay. In a very real sense, they each contributed to the Purchaser's decision to buy and the price it was prepared to pay. Should that be enough to require contribution between them?

The difference in the amounts was significant but not in itself decisive. Contribution could have been ordered to the extent of the overlap. The difficulty comes from the fact that the character and nature of the damage was materially different in each case. Clearly there was not a single loss in any ordinary sense. But notwithstanding that, leaving aside legal analysis, both wrongdoers contributed in practical terms to the damage suffered by the Purchaser as a result of their different wrongs. These facts represent a good example of why clarification by legislation is highly desirable. In both the recent cases about contribution in the Supreme Court, the Court has been divided 3:2 on this difficult issue. The High Court of Australia has been similarly divided on these matters: see the judgment of O'Regan J in *Hotchin* and the Australian cases he mentions. Seldom is a difficulty in the law so vividly identified.

In *Hotchin*, it will be recalled, the facts involved a company director who was assumed to be liable to compensate investors for their losses caused by an erroneous and misleading prospectus. The Trustee for those investors was assumed to be liable to compensate them for its breach of a duty to monitor carefully the activities of the finance company after subscription. The key issue in respect of the negligent monitoring was the assumption, for strike out purposes, that the Trustee had been negligent in not acting earlier to close down the activities of the finance company. It thereby added to the loss already suffered by the investors from relying

on the inaccurate prospectus. It was also argued that, by omission, the Trustee had negligently failed to prevent continuing and new subscription under the defective prospectus.

It is vital, however, to appreciate that the Trustee's duties in *Hotchin* did not extend to checking the prospectus for erroneous statements. Such a duty had initially been pleaded but was rejected by Winkelmann J in the High Court. There was no appeal from her decision in that respect. Had the Trustee owed a duty of care as regards the accuracy of the prospectus, the case for sameness of resulting damage would have been much stronger, indeed compelling. The minority judgment, written by O'Regan J and joined by Arnold J aptly pointed this out. The absence of such a duty was a key point leading to their conclusion that contribution was not available. The majority referred to this point in their judgments but did not see it as precluding their view that the damage was nevertheless the same, either in whole or in part.

The majority conclusion seems to have resulted from the underlying proposition that in each case the damage should be characterised as loss of money or loss of value of the investment. But, as I have said, to adopt that view of the damage is to paint with a very broad brush. Even when two wrongs are completely independent and unrelated, it is often the case that the party suffering harm has, on both accounts, lost money or value. It is hard to see this feature, in itself, as a sufficient basis for a conclusion that the damage is the same.

It might however, be a basis for saying that the damage is sufficiently related, particularly, as in *Hotchin*, where the damage caused to the investors by Mr Hotchin and the Trustee related to the same asset, namely the money invested pursuant to the prospectus. In *Altimarloch* the broader approach saw the damage in each case as being based on reliance on statements of the same kind about the same subject matter, namely water rights, as opposed to the much more general concept of loss of money or value, albeit that concept does seem to have influenced McGrath J's reasoning to some extent. Whatever view one takes about the right answer in these cases, it is beyond doubt that clarification and conceptual simplification is desirable.

Before I leave *Hotchin*, I should identify a point that can be overlooked. The concept of the same damage cannot be divorced from the concepts of causation and consequent liability. The question is whether D1 and D2 are *liable* for the same damage. That can be so only if they have *caused* the same damage. The extent of the liability is a necessary ingredient in the sameness inquiry. The key point remains; at what level of specificity do we identify the damage for present purposes.

Let me amplify this by a simple example broadly based on *Hotchin*. It is similar to an example used by William Young J in that case. Let us assume an

investor subscribes for debt securities in reliance on an inaccurate prospectus. On subscription, each unit of $1 invested is worth 50 cents less than would have been the case if the prospectus had been accurate. That damage is immediate and complete on payment of the subscribed amount. It does not depend on any rollover or overlap. It is caused by reliance on the faulty prospectus. Hence D1 (being a director of the issuing company) is liable to the investor on subscription for 50 cents per $1 subscribed (albeit the 50 cents amount may not be quantifiable as such at that time). The investment product suffers immediate damage to this extent, whether it is rolled over or not.

D2 (being the Trustee for the investors) fails to monitor the company's activities, post subscription, with reasonable care. It fails to pull the plug on the company soon enough. For its negligence in that respect D2 causes our investor further damage of 40 cents per $1 invested. D2 is separately liable for that damage. The total loss suffered by the investor is 90 cents per $1 invested. But the total does not represent a single loss. There is no overlap between the first 50 cents and the second 40 cents. These two amounts are separate not indivisible.

Of course, if there is a rollover of the investment after the time the plug should have been pulled, it may be arguable that the Trustee has caused the whole loss of that investment. The same would apply to a new investor after that time. This would be on the basis that the Trustee's wrongdoing swallows and overtakes the earlier loss caused by the director on initial subscription. In the case of a new investor, if the Trustee had not been negligent, the new investor would have had no occasion to invest. I put aside those debatable complexities for present purposes, while accepting they had to be factored into the assessment on the assumed facts in *Hotchin*.

The question in this situation, without the complexities, is whether D1 and D2 are liable to the investor for the same damage? In my view, they are not. D1 and D2 are not liable for one loss; they are each liable only for the loss that each of them has caused: 50 cents per unit in one case, and a further, but separate, 40 cents per unit in the other. The damage for which each defendant is liable is not the same, nor is it overlapping, nor is it indivisible. If both parties are regarded as tortfeasors, they are not joint tortfeasors who have caused the same loss. They are several tortfeasors who have caused and are therefore liable for several, that is separate, divisible losses.

Even if the test were based, as I will suggest below, on liability for "the same or sufficiently related damage", it is not obvious that the two losses in my example would be sufficiently related. What is the link between them? It could only be at a very high level of generality in that each party was liable for causing damage to the investors in the form of the diminished value of their investment. But I doubt this, in itself, should qualify as a sufficient link to make it fair and equitable to require

contribution by one party to loss caused quite separately by the other. If this was enough, we would have little limit on at least the arguability of many contribution claims.

In any event, unless the "same damage" criterion is modified, there cannot, at least in conventional terms, be contribution in these circumstances. A problem with *Hotchin* is that the majority did not adopt a modified test as regards the same damage criterion. They purported to apply the "same damage" test, but were satisfied on the assumed facts that the damage for which each party was liable was, or was arguably, the same. A principled modification of the same damage test is preferable to keeping that test and then having to strain to bring the facts within it. It is not ideal to force square facts into a legally round hole. It is better, if appropriate, to change the shape of the hole.

The "liable for the same damage" criterion is now being asked to do work for which it is often unsuited. The criterion originated, as we saw earlier, as a consequence of the damage that is caused by joint tortfeasors being necessarily indivisible and the same. It really added nothing in that context to the concept of being a joint tortfeasor. It did implicitly add a necessary and appropriate restriction in the case of several tortfeasors. There, sameness is confined to indivisibility. But when a contribution regime comes to deal with cases where there is only one or perhaps no tortfeasor involved, but wrongdoers of other kinds, we have to look for a criterion which more satisfactorily deals with the need for an appropriate link between the damage caused by each wrongdoer, without causing the problems that arise when the focus is on "sameness" of damage. To that topic I now turn.

XI. Reform

In searching for the best way forward in policy terms it is helpful to go back to basics. Why do we allow contribution between wrongdoers in the first place? Before statutory intervention, both the common law and equity had their own approaches to this issue. Over time equity came to subsume the common law approach because it applied wider and more flexible principles, at least in comparative terms.

Equity regarded it as unjust and contrary to good conscience for someone who had paid all of a common liability not to be able to recover a fair "share" from someone who "shared" that common liability. The same damage criterion was part of that principle. A breach of a common liability usually gave rise to what was clearly the same damage. In earlier times equity did not envisage a situation where breach of a common liability might give rise to damage that was not the same. Indeed, that would have been regarded as something of a contradiction in terms.

However, developments in the law and in societal needs justify a reappraisal of how we should allow for contribution between wrongdoers of different kinds whose conduct does not result in literally the same damage, but does result in damage that can be regarded as sufficiently related for contribution purposes.

We should aim for a sensible degree of flexibility while preserving some rigour of analysis and predictability of outcome. I agree with William Young J in that respect. It is almost universally accepted that we should allow contribution between all kinds of wrongdoer, if it is just and equitable to do so. For that to be so there must ordinarily be a sufficient link between the damage caused by one wrongdoer and that caused by another.

If separate wrongs lead to wholly unlinked damage, it would hardly be fair and just that one wrongdoer should be required to contribute to the wholly separate damage caused by the other. The closer the link between the damage caused by D1 and that caused by D2, the more likely it will be just and equitable to require contribution. The key challenge is to frame a test that combines flexibility with analysis and serves the ultimate purpose of allowing for contribution when it is appropriate to do so but not when contribution is inappropriate. It is not enough to determine that issue simply by relying on whether contribution is just and equitable. That is a necessary but not sufficient criterion. On its own it is too uncertain and unpredictable in application.

In the North American literature there is a colourful example of several, as opposed to joint liability which is useful for my present purposes. Hunters A, B, and C are individually hunting for deer. Both B and C separately, but at the same time, see A, and negligently mistake her for a deer. They each shoot at A. Fortunately neither of them is a good shot. B hits A in the leg. C hits A in the shoulder. A survives but is left with a damaged leg and a damaged shoulder. Have the several tortfeasors, B and C, caused, and are they therefore liable to A for, the same damage? Clearly not on any conventional basis, unless one identifies the damage as simply "bodily harm", in which case B and C could be said to have caused the same damage, that is bodily harm. But to take that high level approach would defeat the whole point of requiring an appropriate linkage.

But what if B and C were each to hit A in the same shoulder causing indivisible damage to her shoulder. In that situation, although they were not acting in concert, so as to make them joint tortfeasors, B and C would be regarded as several tortfeasors who are liable for the same damage. This is because the damage they each caused was indivisible, meaning that the total damage to which they each contributed could not sensibly be divided between them. B and C are then each liable to A for her whole damage. But between themselves they are each responsible for half. If A sues only

B and recovers her whole loss from B, B may claim contribution from C for half of what he has to pay A.

The analogy with the facts of *Hotchin* is that Mr Hotchin hits the investor in the leg (damage from false prospectus) and the Trustee hits the investor in the shoulder (damage from failing to pull the plug sooner). The damage from each wrong is clearly separate and divisible both in concept and in amount. Similarly, in *Altimarloch* the Vendors hit the Purchaser in the leg (damage caused by failed promise), whereas the Council hits the Purchaser in the shoulder (damage from careless statement). Again, the damage resulting from each wrong is clearly separate and divisible both in concept and amount. In neither case is there a single harm or indivisible loss.

I should make it clear that my purpose in giving these analogies is not to support the retention of the same damage criterion. I am simply pointing out that there is a need to change it by appropriate legislation, rather than by trying to make meritorious facts fit the same damage test when they do not really do so.

XII. My Solution

As forecast, I consider the best way forward is to expand the same damage criterion to permit contribution if the damage is "the same or sufficiently related". That should allow justice to be done with a degree of flexibility while retaining the need for analysis. The word "sufficiently" introduces the need for an informed value judgment. The word "related" introduces the need for an appropriate link between the damage for which each party is liable. The ultimate question is whether the damage caused by each wrongdoer is related in a sufficient way to make it just and equitable to require one wrongdoer to contribute to the compensation payable to the plaintiff by the other.

I prefer the test to be sufficiently "related" rather than sufficiently "similar". I regard the former as capturing the essential point better than the latter, albeit each approach would usually produce the same outcome. The concept of similarity of damage focusses sharply on the nature of the damage itself. The concept of the damage being sufficiently related focusses on the need for a link between the damage caused by each party but allows for a broader appraisal, which includes the nature of the damage, but also includes other relevant linkage considerations such as causation and the nature of the duty breached.

Judges will be required to explain why they regard the damage as sufficiently related, or not, as the case may be. It will not be enough to go straight to saying that contribution is or is not just and equitable. That conclusion must be reached, or denied, through the concept of the damage being the same or sufficiently related.

This serves to introduce mental discipline as well as moral intuition into the arena. Both can play a proper part. Moral considerations underlie decisions in both tort and equity, and indeed in contract. Of course, much more than moral intuition is required in all areas. Otherwise, we would be lost in the "formless void of individual moral opinion", as Mahon J elegantly put it in *Carly v Farelly*.[5]

The choice of "sufficiently related" as a criterion may be criticised as lacking in certainty and predictability. But the jurisprudence developed by equity in the contribution field was, unsurprisingly, never able to produce a verbal formula by means of which the result of marginal cases could be confidently predicted. If that had been so we would not be having this discussion. If one wishes to have both flexibility and predictability in a particular legal situation each criterion must give way, to an extent, to accommodate the other. The best we can do is to have as much of each ingredient as is consistent with allowing a proper place for both.

Whether the damage is sufficiently related will require an examination of how close the link is between the damage caused by, and for which D1 is liable, and that caused by D2 and for which D2 is liable. There is a conceptual continuum between damage that is analytically the same and damage which is analytically completely separate and unrelated. The nearer the damage is to analytical sameness the stronger will be the case for saying it is sufficiently related and vice versa. Ultimately the question is whether the relationship between the damage caused by each wrongdoer is sufficient to make it fair and just, as between the contribution parties, to require one to contribute to an amount which another is required to pay to the plaintiff.

XIII. Altimarloch and Hotchin under Proposed Test

I return to the facts of *Altimarloch* to show how my "same or sufficiently related damage" regime might work. The following factors in combination would have led me to the view that the damage caused by the Vendors' misrepresentation and that caused by the Council's negligent misstatement was sufficiently related to justify contribution:

(a) The misrepresentation and the misstatement were about exactly the same subject matter, and were to exactly the same effect.

(b) The plaintiff foreseeably relied on the accuracy of the statements of both wrongdoers in its decision to enter into the contract and how much to pay.

5 *Carly v Farelly* [1975] 1NZLR 356 at 367.

(c) The loss caused in each case resulted directly from that reliance.
(d) Although the causes of action, and therefore the basis for assessment of the appropriate damage differed, the nature of the damage in each case was, in practical terms, the same: compensation for the economic consequences of the shortfall of water available from the water rights.
(e) The Council knew or should have known that the Purchaser's inquiry about water rights was likely to have been made for contractual purposes. The Council, albeit inadvertently, reinforced the Vendors' breach of contract, making it, in a sense, a party to that breach.
(f) Contribution would have been appropriate both ways: Vendors to Council and Council to Vendors; contribution being just and equitable from either perspective.

As regards my example based on a simplified version of the facts of *Hotchin*, I add only that the case for there being a sufficient relationship between the damage for which each party was liable would have been harder to make. As I have said, the necessary link would need to be at a high level of generality for the test to be satisfied. The liabilities of the two parties were quite distinct, leading to damage that was also quite distinct: 50 cents per $1 in one case and 40 cents per $1 in the other. One potential relational factor would have been that the damage was to the same asset. But to view the sameness of the asset damaged as meaning that the damage was sufficiently related is problematical. It would be the same as saying in the hunting example that because the same body was damaged, albeit in different parts, the separate damage was sufficiently related for contribution purposes.

XIV. Quantum of Contribution

I will now very briefly address the question of how to fix the amount of any required contribution. This is conceptually much simpler. Here we can draw an analogy with contributory negligence. In that field the two traditional ingredients are causal potency and relative blameworthiness. They are familiar concepts with a well-established jurisprudence. There is no need to explore them here.

In a contribution case, D1's wrongdoing may have had comparatively less causal effect on the plaintiff's loss than that of D2. But D1's conduct may have been distinctly more blameworthy than that of D2. There can obviously be a number of permutations of these two factors. As has often been said in the contributory negligence field, the necessity apportionment is a matter of combining analysis with impression, and reaching a conclusion that is designed to do justice in all the

circumstances. Again, we cannot avoid a degree of unpredictability. It is desirable for any new legislation to state expressly the criteria that should apply to fixing the amount of the contribution one wrongdoer is required to pay to another or directly to the plaintiff.

XV. New Legislation: Outline

That brings me to summarise the key points of what might usefully be incorporated into my proposed new legislation. A skilled legislative drafter will do a better job, but I will sketch the outlines.

(1) The new Act could be called The Contribution Act 202?

(2) It should replace all rules of the common law and equity. We would not want a parallel regime to run alongside the new Act. That would tend to defeat the whole point of having new legislation. It should cover the whole field.

(3) The following definitions may be helpful:
   (a) Claimant: means a person that has suffered damage and has obtained or is entitled to obtain redress in money or otherwise for that damage from more than one wrongdoer.
   (b) Damage: includes all forms of damage, harm, and loss; including the non-payment of money payable for any reason and any entitlement to an account of profits or other relief.
   (c) Wrongdoer: includes any person liable for damage caused to a Claimant on any cause of action or other basis, whether at common law, in equity or otherwise; and whether that liability is for relief in the form of damages, compensation, a requirement to pay money as a debt or otherwise, or for any other form of relief.
   (d) Contribution party: includes any Wrongdoer (A) who seeks to have another Wrongdoer (B) contribute to the relief for which the first mentioned Wrongdoer (A) is liable to the Claimant, and also includes on a like basis the other Wrongdoer (B).
   (e) Contribution Order: means an order requiring one contribution party to pay to another contribution party, or to a Claimant, a sum of money designed to ensure that each of the contribution parties pays a fair and equitable share of the total amount payable to a Claimant.

(f) Same damage: means damage that fulfils one or more of the following criteria:
   (i) it is indivisible;
   (ii) it results from joint liability on the same cause of action; and
   (iii) it results from several liability on the same or different causes of action but is legally of the same nature and extent.

(g) Sufficiently related damage: means damage caused by two or more wrongdoers that is linked or connected in such a way that makes it fair and reasonable to require one wrongdoer to contribute to the redress for that damage to which the plaintiff is entitled from another wrongdoer.

(4) On the basis of these definitions the principal provisions of the new legislation would be along the following lines:

A. The Court may make a contribution order if:

1. Each of the contribution parties is liable to the Claimant for the same damage and the Court is satisfied that it is just and equitable between the contribution parties to make a contribution order; or
2. Each of the contribution parties is liable to the Claimant for sufficiently related damage. [Note; the just and equitable element is already included in the definition of sufficiently related damage.]

B. If the Court is satisfied that the criteria for making a contribution order are satisfied, the Court shall, in determining the amount of such order, take into account:

1. The degree of causal potency the conduct of each contribution party has had on the damage suffered by the Claimant.
2. The comparative blameworthiness of each contribution party.
3. Such other matters as the Court considers relevant to a fair and equitable apportionment of responsibility between the contribution parties.

C. If the redress to which the claimant is entitled is not a sum of money, the Court may make an order determining how that redress shall be satisfied as between the contribution parties. It shall make that determination by applying the same criteria as apply when the redress the claimant is entitled to receive is a sum of money. The Court may,

in such a case, make all necessary consequential orders in aid of its primary order.

XVI. Drawing the Threads Together

The foregoing discussion exemplifies matters that have general importance outside the confines of our particular subject matter. The most important is that if we are to understand the present law properly it will often be necessary to understand how the law has developed into its current state. That is so both as regards judge made law and statute law. The path the law has already trodden can assist both present understanding and future developments.

In hindsight, and in the light of the continued legislative inactivity, it would have been better in *Altimarloch* if I had attempted to frame an expanded approach to the same damage criterion rather than leaving that to Parliament. The expanded approach could have been introduced into the principles that guide contribution in equity. That would have been a legitimate judicial development. But it would not have been possible to construe the same damage criterion in the 1936 Act as including both the same and sufficiently related damage. That would have been a legislative development rather than one appropriate for judges. Having some dissonance between the statutory criterion and the equitable criterion would have been an awkward but not an overwhelming problem.

The absence of legislation has meant that those who favour expansion may have felt inhibited in developing a suitably crafted and coherent expanded test. Rather, they have been obliged to view individual factual circumstances as more easily falling within the existing test, that test being regarded as involving only the question of sameness of damage. This appears to have been attempted on the basis that abandoning the common or co-ordinate liability requirement makes a material difference to the ambit of the same damage criterion. This is ingenious, but cannot be reconciled with the fundamentals of contribution jurisprudence as shown by its history. The outcome is not conceptually convincing.

As commentators have said of *Hotchin*, we now have the capacity for greater flexibility but at the price of greater expense for litigants and for the administration of justice. No longer can speculative contribution claims be struck out. Previously hopeless cases have become, at least arguably, distinctly less hopeless. This may well lead to claims for contribution that may lack ultimate merit unduly complicating litigation. It may also lead to joinder of parties on a speculative basis in the hope of getting some settlement out of them to avoid the cost of expensive litigation. I am

concerned that the recent judicial efforts have expanded the contribution rules too loosely and therefore at too great a cost. I acknowledge that at the margins there will still be unpredictability with a "sufficiently related" test. But the approach required under that test is conceptually simple and the test itself is firmly based on the rationale for contribution.

XVII. Conclusion

That brings me to the end of my article. I have endeavoured to show that the current law as regards contribution between wrongdoers is uncertain and lacks coherence. The two recent decisions of the Supreme Court in this area have not produced a satisfactory outcome. Legislation is badly needed. I have suggested a possible way forward. I can only hope the appropriate Minister will swiftly pick up the challenge, and that parliamentary time can be made available. I have tried to assist the cause and will now watch with interest from the side-lines. At the age of 79, my actuarial prognosis leads me not to wager heavily on living to see a legislative outcome. I hope I am proved wrong, whether on the basis of early legislative attention or longevity.