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(Scot Law Com No 115)

# Report on Civil Liability— Contribution

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under section 3(2) of the Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting reform of the law of Scotland. The Commissioners are:

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Scottish Law Commission

*Item 2 of the First Programme*

**Civil Liability—Contribution**

To: The Right Honourable the Lord Cameron of Lochbroom, QC,  
*Her Majesty's Advocate*

We have the honour to submit our Report on Civil Liability—Contribution.

(Signed) PETER MAXWELL, *Chairman*  
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KENNETH F BARCLAY, *Secretary*  
30 September 1988



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# Part I Introduction

## Scope of Report

1.1 On 10 December 1984 we received a proposal from the Faculty of Advocates “to take up and consider the question of rights of relief in relation to claims and proceedings based on delict with particular reference to the power of the court under section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 to find a person found liable in damages entitled to recover a contribution from another person who, if sued, might also have been held liable.”

Our initial examination of the topic suggested to us that any review of the law on rights of relief should not be so restricted. The principle underlying one person’s right to claim relief from another is that he has discharged the proper debt or liability of that other person.<sup>1</sup> It applies irrespective of the basis of that person’s liability towards the party who has suffered the loss in question. Accordingly, in this Report we make recommendations for reform of the law of contribution, not simply in the context of liability in delict, but more generally as regards rights of relief among parties liable in damages on whatever basis for the loss, injury or damage suffered by another.<sup>2</sup> We do not, however, deal with questions of contribution among parties who are liable under contract for payment of a debt, that is, for payment of a fixed sum of money.<sup>3</sup>

1.2 As a separate issue, we also recommend reform of the law on contributory negligence, with particular reference to the availability of the plea in answer to a claim founded in contract.

## Consultation

1.3 The Report follows on a consultative memorandum on *Civil Liability—Contribution* which we published in November 1986 and in which we invited comment on provisional proposals for reform.<sup>4</sup> We are most grateful to all who responded.<sup>5</sup>

## Arrangement of Report

1.4 The rest of the Report is arranged as follows. In Part II we summarise the present law on rights of relief and assess the need for reform. Part III sets out our recommendations in the light of consultation. In Part IV we examine the law on contributory negligence and recommend certain reforms in that area. Part V is a summary of our recommendations and Appendix A contains a draft Bill with explanatory notes.

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1. *Glasgow Corporation v. John Turnbull & Co* 1932 SLT 457 per Lord Murray at p 459.

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

3. In the absence of express stipulation, liability for the debt is shared equally among the co-contractors: Gloag on *Contract* (2nd edn, 1929) p 206.

4. Consultative Memorandum No. 73, referred to in this Report as the “Memorandum”.

5. A list of those who submitted comments on the Memorandum is contained in Appendix B.

# Part II Rights of relief— The present law

2.1 In principle, a right of relief exists where two or more persons are liable to compensate another for the loss, injury or damage which he has suffered.<sup>1</sup> Any payment made by one reduces the amount which may be claimed from the rest. It is that shared liability on which the payer founds when he claims relief. That liability may be in delict or may be founded on breach of contract or breach of any other obligation owed to the injured party which gives rise to a claim for damages.

## Rights of relief in delict

2.2 The principle underlying the development of the law on rights of relief in delict is that, where two or more persons have committed delicts which contribute to the same loss, injury or damage, they are jointly and severally liable.<sup>2</sup> The injured party may sue all or any one of the wrongdoers for the full amount of damages.

2.3 At common law, it was initially unclear whether the person who had made payment to the injured party in such circumstances could recover a contribution from his fellow wrongdoers. However, in *Palmer v. Wick and Pulteneytown Steam Shipping Co Ltd*,<sup>3</sup> where a joint and several decree had been obtained against the party claiming contribution and the party from whom it was claimed, the House of Lords held that each was liable for a *pro rata* share (ie one half<sup>4</sup>) of the damages awarded. In *Glasgow Corporation v. John Turnbull & Co*,<sup>5</sup> Lord Murray held an action of relief to be relevant where only the person seeking contribution, not the person from whom it was sought, had been pursued to judgment by the injured party. Although the question was left open on appeal, it has since been accepted that a right of relief does exist at common law where there has been decree against only one co-delinquent.<sup>6</sup>

2.4 These cases did not go so far as to establish a general right of relief among co-delinquents. In particular, it remained unsettled whether it was always necessary for a party claiming relief to have had decree awarded against him or whether it would be sufficient that he had settled with the injured party.<sup>7</sup> The former interpretation of the law is the one which eventually found favour with the court in *NCB v. Thomson*.<sup>8</sup> The common law rules were, however, effectively superseded by section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 which introduced a statutory right of contribution among joint wrongdoers. Section 3(1) deals with the case where the injured party sues joint wrongdoers in a single action. It provides:

“Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are in pursuance

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1. For a more detailed account of the present law, with supporting references, see Part II of the Memorandum.

2. Stair, 1.9.5.

3. (1894) 21 R (HL) 39.

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

5. 1932 SLT 457.

6. *NCB v. Thomson* 1959 SC 358 per LJC Thomson, Lords Patrick and Strachan at pp 363, 370–1 and 383–4 respectively.

7. Although it was clear that a purely voluntary payment would not found a claim for relief: *Gardiner v. Main* (1894) 22 R 100.

8. 1959 SC 353. See para. 2.9 below.

of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable *inter se* to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just: Provided that nothing in this subsection shall affect the right of the person to whom such damages or expenses have been awarded to obtain a joint and several decree therefor against the persons so found liable.”

Section 3(2) goes on to deal with the case where contribution is sought from a joint wrongdoer who has not been sued by the injured party:

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

Finally section 3(3) provides that:

“Nothing in this section shall—

- (a) apply to any action in respect of loss or damage suffered before the commencement of this Act; or
- (b) affect any contractual or other right of relief or indemnity or render enforceable any agreement for indemnity which could not have been enforced if this section had not been enacted.”

2.5 Thus, where an injured party chooses to sue only one of those whose acts or omissions have led to his loss and, after proof, damages are awarded against, and paid by, the defender, the defender may in turn bring an action of relief against his co-delinquents and the court will apportion the damages equitably among them.<sup>1</sup> The apportionment may amount to a complete indemnity.<sup>2</sup> If the court cannot allocate blame with precision, liability should be shared equally.<sup>3</sup>

2.6 Certain conditions must be satisfied before section 3(2) can operate. First, the original action in which damages were awarded must have been one raised in the Scottish courts.<sup>4</sup> Second, the party from whom relief may be claimed must be one who, if sued, “relevantly, competently and timeously” might also have been held liable.<sup>5</sup> The pursuer in the action of relief must therefore establish the defender’s liability to the injured party. No relief will be available if the injured party has already sued the defender unsuccessfully. By this is meant that there has been a finding of non-liability on the merits or on a preliminary plea, such as a plea of time-bar.<sup>6</sup> If the injured party simply abandons his action against one wrongdoer, that does not amount to a judicial determination of that wrongdoer’s liability and he remains open to an action of relief at the instance of any other wrongdoer who has been found liable.<sup>7</sup> The fact that the injured party’s claim against the defender in the action of relief has been barred by lapse of time is relevant only where the injured party has attempted to sue him and has failed on that ground. Prescription of the injured party’s claim does not appear to matter if he has taken no court action against the defender in the first place or if his action has simply been abandoned for that reason.<sup>8</sup>

2.7 The right of relief under section 3(2) is a substantive and distinct right of action which comes into existence when the party claiming relief is himself found liable and makes payment to the injured party of the sum due under the decree. The prescriptive

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1. In practice, the claim for relief will usually be incorporated in the main action by means of third party procedure: see para 2.7 below.

2. *Comex Houlder Diving Ltd v. Colne Fishing Co Ltd* 1986 SLT 250 at p 256.

3. *Drew v. Western SMT Co* 1947 SC 222 per Lord Mackay at p 263 (dealing with joint and several liability under section 3(1) of the 1940 Act.).

4. *Comex Houlder Diving Ltd v. Colne Fishing Co Ltd* 1987 SLT 443, rev 1987 SLT 13 and 1986 SLT 250.

5. *Singer v. Gray Tool Co (Europe) Ltd* 1984 SLT 149 per LP Emslie at p 151.

6. *Ibid* per LP Emslie at pp 150–1.

7. *Ibid*.

8. *Ibid*; *Hardy v. British Airways Board* 1983 SLT 45.

period of two years runs from that date, not from the date on which the original cause of action accrued.<sup>1</sup> Where the defender claims in the original action that he has a right of contribution against another person, he may seek to have that person brought into the process as a third party in order to have their respective shares of liability determined by the court under section 3(2).<sup>2</sup>

2.8 The main difficulty with the present law stems from the requirement that, before the court may grant relief under section 3(2) of the 1940 Act, the person seeking contribution must have been “found liable” in an action of damages. A person who makes a wholly extra-judicial settlement does not come within the scope of the provision.

2.9 The question whether any common law right of relief was available in these circumstances was answered in the negative in *NCB v. Thomson*.<sup>3</sup> In this case, a van belonging to the pursuers collided with the defender’s lorry, causing injury to a passenger in the van. Under threat of legal proceedings, the pursuers paid the injured party £2,000 in full settlement and then brought an action against the defender seeking to recover in relief one half of the sum paid in settlement. The court, by a majority of three to one, held the action of relief to be irrelevant. They rejected the pursuers’ argument that the circumstances of the case fell within the “other right of relief” saved by section 3(3)(b) of the 1940 Act, holding that a court decree or equivalent instrument constituting the debt was an essential prerequisite of an action of relief; that no common law right of relief had been recognised prior to 1940 without constitution of the debt and therefore such a right could not be saved by section 3(3)(b); and that the common law should not be extended to include such a right because that would deprive a co-delinquent of the opportunity to have his liability determined on an equitable, rather than a strict *pro rata*, basis.

2.10 The most recent developments in the law on rights of relief in delict have centred on the case of *Comex Houlder Diving Ltd v. Colne Fishing Co Ltd*.<sup>4</sup> This case arose out of a diving accident in the Scottish sector of the North Sea. At first instance, Lord Mackay held that settlement of the claim made by the deceased diver’s widow which was confirmed by an order pronounced by a Pennsylvania court did give rise to a right of relief under section 3(2), since the pursuers in the action of relief had fulfilled the requirement of having been found liable in an action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions. It was not necessary for the decree constituting the debt to result from an action “fought to the death”. As regards the damages awarded being much higher than would have been obtained in a Scottish court, Lord Mackay considered that the 1940 Act conferred a wide discretion to enable the court to do justice between the parties. The court could therefore order the defenders to contribute to a part only of the award made in the United States if it was considered excessive by Scottish standards. Lord Mackay also held that the liability to contribute created by the 1940 Act was a liability in delict and that, accordingly, the court had jurisdiction, in terms of section 1 of the Law Reform (Jurisdiction in Delict) (Scotland) Act 1971, to entertain the action.

2.11 On appeal,<sup>5</sup> the First Division confirmed this decision in all respects. In their view, all that was required for the purposes of section 3(2) was a finding of liability by a competent court. There was nothing in the wording of the statute to require that such decree should be pronounced after a fully contested action either on the question of quantum or liability or both. On final appeal to the House of Lords,<sup>6</sup> this decision was reversed on the ground that section 3(2) applied only to actions which had been raised and decided upon in Scotland and could not therefore encompass the decree

1. Prescription and Limitation (Scotland) Act 1973, s 8A(1). The provision is in terms of the obligation subsisting for two years after the date “on which the right to recover the contribution became enforceable.”

2. RC 85; Sheriff Court Rule 50. See further para 2.10 of the Memorandum.

3. 1959 SC 353.

4. 1987 SLT 443, rev 1987 SLT 13 and 1986 SLT 250.

5. 1987 SLT 13.

6. 1987 SLT 443.

obtained in the Pennsylvanian court. Their Lordships did, however, agree that a right of relief under the 1940 Act could be founded on a decree following settlement.

## Rights of relief in contract

2.12 What we are concerned with here are cases where co-obligants are jointly and severally liable in damages arising from a breach of contract. If the obligation is expressed in writing, any one obligant may be sued for the whole amount.<sup>1</sup> If the debt still has to be constituted (as will usually be the case in this situation) the general rule is that all the obligants must be cited<sup>2</sup> although the pursuer, if successful, may enforce his decree against any one.<sup>3</sup> Any obligant who pays is entitled to relief from the others to the extent that he has paid more than his *pro rata* share.<sup>4</sup> There is no right of relief if payment is made of a sum which there was no obligation to pay, such as a voluntary settlement of a claim for damages.<sup>5</sup> It is not, however, necessary to constitute the debt by prior decree.<sup>6</sup>

2.13 The party who has a claim in contract may not do anything in his dealings with one co-obligant which prejudices the right of relief possessed by the others bound jointly and severally with him. Where he grants a discharge in favour of one co-obligant without the others' consent, he loses his claim against the others to the extent that their right of relief has been barred.<sup>7</sup> The remaining co-obligants are liable for the whole sum less the proportionate share which should have been borne by the one who was discharged.<sup>8</sup> If, however, the claimant undertakes not to sue one obligant without discharging him from liability, this does not prejudice the rights of relief of the others and therefore does not affect their liability.<sup>9</sup>

2.14 In *Grunwald v. Hughes*<sup>10</sup> it was held that an architect and a firm of heating engineers could be jointly and severally liable for breach of their separate contractual obligations to take reasonable care in the performance of their work and to show the usual standard of skill expected of others in the same profession, provided that their separate acts or omissions contributed to one wrong. In the opinion of Lord Walker,<sup>11</sup> if each defender could be found liable for the whole loss, they were jointly and severally liable irrespective of what the grounds of liability might be. This case was not, however, concerned with rights of contribution and there is no direct authority on whether a right of relief is available where parties are jointly and severally liable for breaches of different contractual obligations. Nevertheless, following the reasoning adopted in *Grunwald v. Hughes*, it may be that a right of relief does exist where the parties are liable for the same loss, injury or damage, albeit in terms of separate contracts, at least in so far as their liability arises from breach of a contractual duty to show due skill and care.

2.15 A person sued in contract may bring into the action any third party who is also liable under contract and from whom he is entitled to obtain relief.<sup>12</sup> Third party procedure may be used not only where the obligants are liable in damages to the pursuer under the same contract but also where they are liable under different contracts provided that the liability under one contract is commensurate with the liability under the other.<sup>13</sup>

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1. Bell, *Principles* s 56.

2. *Muir v. Collett* (1862) 24 D 1119.

3. Erskine, III. 3.74.

4. *Erskine v. Cormack* (1842) 4 D 1478.

5. *Gardiner v. Main* (1894) 22 R 100.

6. *Marshall & Co v. Pennycook* 1908 SC 276.

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

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

9. *Muir v. Crawford* (1875) 2 R (HL) 148.

10. 1965 SLT 209.

11. At p 215.

12. RC 85 and Sheriff Court Rule 50.

13. *Nicol Homeworld Contracts Ltd v. Charles Gray Builders Ltd* 1986 SLT 317.

## Rights of relief in breach of trust

2.16 The duties of a trustee are to conserve the trust estate and to administer it with the same diligence which a reasonably careful and prudent man would show in his own affairs.<sup>1</sup> If he fails in that duty and, as a result, the trust estate suffers loss, he is liable in damages for breach of trust and is bound to make good the loss which he has caused.<sup>2</sup> If two or more trustees have jointly committed a breach of trust, their liability is joint and several and they are equally liable to the beneficiaries, irrespective of the degree of personal fault. Liability for breach of trust is, at least in certain circumstances, treated as liability in delict.<sup>3</sup> The action may be brought against one or more of the trustees in breach.<sup>4</sup> Any one trustee found liable may claim relief against the others who are in breach for their *pro rata* share of the damages.<sup>5</sup> The other trustees may be brought into the action by third party procedure.<sup>6</sup> There may, however, be cases in which one trustee is entitled to full indemnity against a co-trustee even though both may be liable vis-à-vis the beneficiaries. So, full relief may be granted against a trustee who has benefited from a breach of trust or if a relationship has existed between him and the other trustees which justifies the court in treating him as solely liable for the breach.<sup>7</sup> In addition, there are provisions in the Trusts (Scotland) Act 1921 which, in appropriate circumstances, may limit the trustee's liability or may excuse him from liability altogether.<sup>8</sup>

## Rights of relief where different bases of liability

2.17 It is clearly established by the cases of *Belmont Laundry Co Ltd v. Aberdeen Steam Laundry Co Ltd*<sup>9</sup> and *Rose Street Foundry and Engineering Co Ltd v. Lewis & Sons Ltd*<sup>10</sup> that a finding of joint and several liability is competent where one defender is liable in contract and the other in delict provided both breaches combine to produce the single wrong which forms the basis of the pursuer's action. These cases did not deal with any question as to rights of relief between parties jointly and severally liable for breaches of different obligations. However, if it is accepted that a joint and several decree is competent in such circumstances, it is reasonable to suppose that a right to contribution would also be recognised at common law.

2.18 For the purposes of a right to contribution under the 1940 Act, it is essential, firstly, that the debt be constituted judicially and, secondly, that the party claiming relief and the party from whom it is sought were, or could have been, jointly and severally liable in damages as "wrongdoers". Thus, where a defender whose liability was based on a contractual indemnity attempted to recover a contribution from a third party whose liability was allegedly based on negligence, the provisions of the 1940 Act were held inapplicable.<sup>11</sup> Although there is no express authority that the 1940 Act has no application where the parties are liable in damages on different grounds, it is generally interpreted as providing a statutory right of relief only as between co-delinquents.

## Assessment of the present law and the need for reform

2.19 In the Memorandum,<sup>12</sup> we suggested that the present law was open to criticism on a number of fronts. The most important issue, so far as contribution between

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1. *Knox v. Mackinnon* (1888) 15 R (HL) 83.

2. *Town and County Bank Ltd v. Walker* (1904) 12 SLT 411 per Lord Kyllachy at p 412.

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

4. *Allen v. McCombie's Trustees* 1909 SC 710.

5. *Pearson v. Houstoun's Trustees* (1868) 6 M 286.

6. *Anderson v. Anderson* 1981 SLT 271.

7. *Bahin v. Hughes* (1886) 31 Ch D 390 per Cotton LJ at p 394; *Raes v. Meek* (1899) 16 R (HL) 31.

8. 1921 Act, ss 3(d), 31 and 32. See para 2.21 of the Memorandum.

9. (1898) 1 F 45.

10. 1917 SC 341.

11. *NCB v. Knight Bros.* 1972 SLT (Notes) 24.

12. At paras 2.25 to 2.36.

co-delinquents is concerned, is whether it should still be necessary for one joint wrongdoer to have his debt constituted by court decree before he may obtain relief from the others. On the one hand, it is said that to require constitution of the debt ensures that the damages towards which the defender in an action of relief is called to contribute are of a proper and reasonable amount. Constitution is also necessary to establish the liability of the person seeking contribution. Moreover, the requirement of constitution does not cause practical difficulties where there is an adequate third party procedure under which joint wrongdoers may be brought into the original action and the damages apportioned among them. Since the *Comex* case it can be argued that the requirement of constitution is not an onerous one: all that need be done is to ask the court to give judgment against the claimant in terms of the amount of the settlement he made with the injured party. It has also been said that the proper way for a party to proceed if he settles a claim without his liability having been established is to take an assignation from the injured party and go against his co-delinquents on that basis.<sup>1</sup>

2.20 The contrary view is that there is no reason in principle why one joint wrongdoer should require to have his debt constituted by court decree before he may obtain relief. What is important is that he has paid the share of the other wrongdoers, not that he has been forced to pay under decree.<sup>2</sup> Constitution of the debt by prior decree is not necessary in an action of relief arising from contract and should not be necessary in this context either.

2.21 Another argument against the present law is that it discourages settlements and can therefore operate to the prejudice of the injured party. A defender would always be advised not to settle any claim extra-judicially in order to preserve his right to seek contribution. Although the *Comex* decision means that very little is required to constitute the debt by court decree, this in itself negates some of the other arguments advanced in favour of the present law. To require the court merely to give judgment in terms of a settlement already made does not guarantee that the terms of the settlement are reasonable nor that the party who settled was liable. In effect, the *Comex* decision allows an action of relief based on settlement provided the amount of the settlement is confirmed by court order. If that is considered sufficient, it should be possible to have the settlement confirmed in the action of relief itself. The court need not order contribution to the whole sum agreed in the settlement in any event: it may adjust the amount in order to ensure justice between the parties.<sup>3</sup>

2.22 It is true that a delinquent settling with the injured party may take an assignation from him but this is not a wholly satisfactory solution. An assignee takes exactly the same right which the injured party had.<sup>4</sup> His right to sue his fellow delinquents is therefore subject to prescription from the date of the original liability to the injured party not from the date of the assignation. Moreover, an assignation is not designed to produce a fair apportionment of damages among all the parties responsible. The amount which the assignee may recover from the other delinquents will depend on whether the payment he made to the injured party is regarded as payment of compensation or simply the purchase price of the assignation.<sup>5</sup> An assignation is not therefore an adequate substitute for a proper right of relief following settlement.

2.23 It is also true that third party procedure enables the liability of all the joint wrongdoers to be determined in one action and thus obviates some of the difficulties involved in separate actions of relief. However, in some cases, one of the joint wrongdoers may be unknown or may not be subject to the court's jurisdiction. Why should the available wrongdoer not be able to settle with the injured party and then bring an action of relief against his fellow wrongdoer if and when that becomes possible?

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1. *NCB v. Thomson*, *supra* per LJC Thomson at p 365.

2. *Ibid* per Lord Strachan at p 382.

3. *Comex Houlder Diving Ltd v. Colne Fishing Co Ltd*, *supra*.

4. *Cole Hamilton v. Boyd* 1968 SC (HL) 1 per Lord Reid at p 14.

5. See para 2.29 of the Memorandum.

2.24 As well as this fundamental issue of policy, there are other problems and anomalies to be found in the present law. The effect of the House of Lords decision in *Comex* is to restrict the statutory right of relief to cases where the person seeking contribution has been found liable in the Scottish courts. This narrow interpretation of the 1940 Act seems inappropriate given the scope for “cross border” legal relationships nowadays in employment, commerce and other fields, as the facts of *Comex* illustrate. It is also unnecessary given the wide discretion of the court to order contribution in such sum as seems just in the circumstances of the case.

2.25 A further difficulty is the scope of the statutory right of relief contained in the 1940 Act. What is meant by “any wrongful acts or negligent acts or omissions”? The conventional view is that the provision refers only to acts or omissions giving rise to liability in delict but it is arguable that it extends much further. A wrongful act could be a breach of contract or breach of any other legal duty giving rise to a claim for damages.<sup>1</sup> At the very least, a negligent act or omission could be taken to include breach of a contractual duty of care. It is also unclear what exactly is meant by the “other right of relief” which is preserved by section 3(3), if, in effect, the common law right of relief (at least as between co-delinquents) was entirely superseded by the 1940 Act.<sup>2</sup>

2.26 Another problem with the 1940 Act concerns situations where the injured party’s claim is time-barred against the wrongdoer from whom contribution is sought. The question whether the time bar has any effect on the right of relief appears to depend on whether or not the injured party has tried to sue the wrongdoer from whom contribution is claimed after the time bar has expired.<sup>3</sup> This is, in our view, quite unprincipled and gives an opportunity for collusion between the injured party and the wrongdoer from whom contribution is sought in order to exclude the right of relief altogether.

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

2.28 Our final criticism concerns rights of relief arising where parties are liable on different grounds or are liable for breaches of separate contracts. Again, if the 1940 Act applies only in delict, any right of relief in these circumstances must be available at common law. The position is, at best, uncertain. If joint and several liability is possible where the parties are liable in damages on different grounds, then logically a right of relief should be available if only one of the wrongdoers has been sued. This may be the effect of cases such as *Grunwald v. Hughes* and *Belmont Laundry Co Ltd v. Aberdeen Steam Laundry Co Ltd* but any remaining doubt about this should, we think, be removed.

## Conclusion

2.29 In summary, it may be said that the present law gives rise to some anomalies and uncertainties, particularly in the relationship between the statutory provisions and the common law. A major question of policy concerns the requirement of

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1. See the opinion of Lord Strachan in *Grunwald v. Hughes*, *supra* at p 213.

2. *NCB v. Thomson*, *supra* per Lord Patrick at pp 372–3. But see also the dissenting opinion of Lord Strachan at p 386.

3. See para 2.6 above.

constitution of the debt by court decree. In the Memorandum we put forward a fairly comprehensive package of reforms both to deal with the technical difficulties of the present law and to resolve some of the more fundamental issues involved. Our proposals were, by and large, welcomed by consultees, subject to a number of criticisms on points of detail. In the following Part of the Report, therefore, we make firm recommendations for reform in the light of comments received.

# Part III Recommendations for reform

## Scope of statutory right of contribution

3.1 There are two particular areas of concern which we have identified in the present law. One is the uncertainty surrounding claims for contribution where the parties are liable for breaches of different kinds of obligation. The other is the fact that the method of calculating the amount of contribution varies depending whether the claim is made under the 1940 Act or at common law. Given the complexity of legal relationships today and the increasing scope for concurrent liability on different grounds, we suggested in the Memorandum<sup>1</sup> that there should be an equitable right of relief among all persons liable in damages<sup>2</sup> for the same loss, whatever the basis of their liability to the injured party. In addition to clarifying any doubt as to whether a right of contribution does exist where the parties are liable in damages on different grounds, this approach would give the courts the flexibility to make a just apportionment in circumstances where the present rules allow apportionment only on a *pro rata* basis.

3.2 There was general agreement with this proposal on consultation. One body did, however, suggest that, so far as the scope of section 3(2) of the 1940 Act was concerned, the House of Lords decision in *Comex*, when given, might obviate the need for any statutory clarification. In the event, their decision simply reinforces the need for reform.<sup>3</sup> On the wider question of extending statutory rights of relief to breach of contract cases and the like, the same respondents were not convinced that legislative reform was necessary. While we accept there may not have been any major problems in these areas to date, it remains the case that the present law is unsatisfactory for the reasons which we have already outlined.<sup>4</sup> All other consultees supported our provisional proposal and we confirm it now.

3.3 In making proposals to expand the statutory right of contribution, we considered in the Memorandum<sup>5</sup> whether our scheme should cover not only cases of liability in damages for loss, injury or damage caused by a breach of duty but also cases where liability exists under statute or by virtue of a contractual indemnity provision or other contractual obligation to pay a sum of money to the party who has sustained the loss, injury or damage. At common law, rights of relief are determined in such circumstances on a *pro rata* basis.<sup>6</sup> It would be possible to treat them in the same way as we are recommending for rights of relief arising out of a shared liability in damages but, as we pointed out in the Memorandum,<sup>7</sup> this approach is fraught with difficulties. To allow claims for contribution in all cases where the liability of one of the parties was simply to indemnify a person against loss would have far-reaching and unacceptable consequences for the insurance industry. Without express qualification, it would supersede the insurer's right of subrogation against the wrongdoer and also the existing methods of apportionment used between insurers in double

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1. At para 4.1.

2. For convenience, we have referred here to rights of relief among *all parties liable in damages* for the loss. We shall, however, be recommending that the basis of the claim for contribution should simply be payment in respect of the injured party's loss regardless of whether or not the claimant was, in fact, liable in damages for that loss: see paras 3.13 to 3.23 below.

3. See paras 2.11 and 2.24 above.

4. See paras 2.27 and 2.28 above.

5. At paras 4.6 to 4.12.

6. Provided the obligation on each party is substantially the same: see, for example *BP Petroleum Development Ltd and Shell UK Ltd v. Esso Petroleum Co Ltd* 1987 SLT 345.

7. At paras 4.8 to 4.11.

insurance cases.<sup>1</sup> More importantly, where the assured suffered loss due to the fault of another party, it would lay the insurer open to a claim for relief at the instance of the wrongdoer.

3.4 In cases where both obligants are liable to indemnify the injured party, we are not convinced that the present law is inadequate. If two parties agree or are bound by statute to indemnify another for his loss, their obligation arises irrespective of fault and therefore equal apportionment is probably a fair result. Moreover, the indemnifier who settles the injured party's claim may have an alternative remedy against the other by way of subrogation if the other indemnifier is also the person responsible for causing the loss in the first place.<sup>2</sup>

3.5 In light of these considerations, our provisional conclusion in the Memorandum was that the proposed statutory scheme for contribution should not be extended to those under a contractual or statutory obligation to indemnify a person for his loss. In our view, the potential difficulties, especially in the insurance field, did not make it a feasible proposition. This view was shared by all who commented and, in relation to cases where both parties are under an obligation to indemnify the injured party for his loss, we do not pursue this option any further. Nevertheless, in view of the fact we will be recommending that the right of relief should be based simply on payment to the injured party, regardless of whether or not the payer was liable in damages for the loss suffered,<sup>3</sup> it is clear that payment under, say, a contractual indemnity provision could come within our scheme for reform and entitle the payer to seek relief on an equitable basis. This is unobjectionable so long as the legislation preserves any alternative right of subrogation available to the indemnifier against the actual wrongdoer, that is the person liable in damages for the injured party's loss.<sup>4</sup> Moreover, this formulation of our recommendations does not go so far as to enable the person liable in damages to seek contribution from another whose only obligation is to indemnify the injured party for his loss. That would clearly be unacceptable. The essence of our scheme remains as originally proposed, namely that it should be confined to rights of relief arising where the injured party would, but for the payment made by the person claiming contribution, have had a claim for damages against the person from whom contribution is sought. Accordingly, we recommend that:

- 1. Statutory rights of relief should be available in all cases where loss is suffered as a result of a delict, breach of contract, breach of trust or breach of any other obligation giving rise to a liability in damages.**

(Paragraphs 3.1 to 3.5; clause 1(1))

3.6 This first recommendation expresses the broad framework for reform. In the rest of this Part of the Report, we will be making recommendations on more detailed policy issues within this framework. Before doing so, it may be helpful to set out, as we did in the Memorandum, the main policy considerations underlying this area of law.

3.7 In the first place, it is important that the law should encourage the settlement of claims. If a satisfactory settlement can be achieved, it is to the advantage of all the parties involved, in avoiding the delay, expense and uncertainty of litigation and ultimately it assists the efficient working of the judicial process by keeping out of court those cases where a formal determination of the claim is unnecessary. Secondly, the law should try to achieve fairness among concurrent wrongdoers—that is, among parties liable in damages to the injured party in respect of his loss—so that each one is liable to pay only an equitable proportion of the total loss. Thirdly, the notion of fairness among concurrent wrongdoers should not prejudice the position of the injured party. His expectation of recovering the full amount of his loss should not be affected by the number of wrongdoers who contributed to it. While it may not

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1. See para 4.11 of the Memorandum.

2. A right of subrogation may be reserved expressly in the contract of indemnity. However, it remains unclear whether indemnifiers other than insurers have a right of subrogation under the general law. See *Esso Petroleum Co Ltd v. Hall Russell & Co Ltd* 1988 SLT 33 per LP Emslie at p 43.

3. See paras 3.13 to 3.23 below.

4. We recommend express provision to this effect at para 3.97 below.

be possible to reconcile these three objectives in all aspects of the law of contribution, they remain, we believe, the guiding principles of reform.

3.8 One other point worth mentioning at this stage is the general reaction of consultees to our provisional proposals for reform. Our proposals were, on the whole, welcomed, subject to a number of criticisms on points of detail. Nevertheless, slight reservations were expressed about the need for reform, on the ground that many, although not all, of the problems arising in the law of contribution can be resolved by the use of third party procedure. It was, however, recognised that some “long-stop” provision was necessary for those cases where such procedure was impossible. The comment was also made that reform based on broad principles was preferable to a comprehensive approach which attempted to make specific provision for every eventuality. While these comments do not detract from the main thrust of our proposals, they have led us to reconsider some of our more detailed propositions with a view to simplifying them or perhaps dropping them altogether.

3.9 For ease of reference in the following paragraphs, we will use “P” to mean the person who has suffered the loss, injury or damage, “D1” to mean the person claiming relief and “D2” to mean the person from whom relief is claimed. The expression “concurrent wrongdoer” is given an extended meaning to cover all parties liable in damages to the injured party, whatever the basis of their liability.

## Prerequisites of a claim for contribution

### Liability of D2 to P

3.10 In the Memorandum,<sup>1</sup> we suggested that the present rule should be retained, namely, that for a successful action of relief, D1 should have to prove that D2, had he been sued by P, would have been found liable to him.<sup>2</sup> This was agreed unanimously by consultees. Under the scheme which we are recommending D2’s liability could obviously be in delict, contract or founded on breach of any other obligation giving rise to a liability in damages.

3.11 A subsidiary question is whether D2’s liability should be determined solely according to Scots domestic rules or whether reference to a foreign applicable law should be possible. Our suggestion in the Memorandum, which was endorsed on consultation, was that the latter approach was preferable. We have, however, come to the conclusion that no express provision need be made on this point in the Bill. There is nothing in the drafting of the relevant provisions which would exclude the application of private international law rules to determine the appropriate law to govern D2’s liability.<sup>3</sup> As a matter of general construction, we believe that the Bill already achieves the desired result in this respect.

3.12 Our recommendation is that:

**2.(a) D1 should be entitled to claim contribution from any person who is liable in damages to P in respect of the loss, injury or damage which he has sustained.**

(Paragraph 3.10; clause 1(1))

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

(Paragraph 3.11)

### The basis of D1’s claim

3.13 The present law generally requires that D1 should establish his own liability to P (although, following *Comex*,<sup>4</sup> this does not appear to be the case where the court has merely interposed authority to a joint minute settling P’s claim). In relation to contribution among co-delinquents, liability must also be constituted by court decree. In the Memorandum,<sup>5</sup> we canvassed a number of options for identifying the basis

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1. At paras 4.17 to 4.20.

2. The time for ascertaining D2’s liability is discussed at paras 3.25 to 3.40 below.

3. See clauses 1(1) and 2 of the Bill annexed to this Report.

4. See paras 2.10 and 2.11 above.

5. At paras 4.21 to 4.33.

of D1's claim (all assuming that his payment to P has the effect of extinguishing or reducing the liability of D2 to P<sup>1</sup>). These were:

- (a) D1 should have a right of relief against D2 if he has made a settlement with P, whether or not P has made any prior claim against him and whether or not any such claim would have succeeded.
- (b) D1 should have a right of relief against D2 where settlement has been made in response to a claim by P, whether or not the claim would have succeeded.
- (c) D1 should have a right of relief against D2 if he has made a *bona fide* settlement with P.
- (d) D1 should have a right of relief against D2 where settlement has been made after P has raised a court action against him, whether or not the action would have succeeded.
- (e) D1 should have a right of relief against D2 following settlement of P's claim provided D1 would have been found liable had he been sued by P.
- (f) D1 should have a right of relief against D2 only where D1's liability to P is constituted by court decree, eg where the court has interponed authority to a joint minute settling the claim.
- (g) D1 should have a right of relief against D2 only where D1's liability to P is constituted by court decree against him after a fully contested action.

3.14 Our initial view was that option (g) did not merit serious consideration. It would be a retrograde step on the present law which does not require the court action to be "fought to the death" in order to establish a claim for contribution. Similarly, we provisionally rejected option (f), as we could see no purpose in requiring a court decree against D1 if that decree need do no more than confirm the terms of a settlement already reached between P and D1. In those circumstances, the decree does not ensure that D1 was liable to P in the first place, nor does it ensure that the amount of the settlement was reasonable. If neither of these factors was an essential prerequisite of a claim for contribution, we considered that it would be more appropriate to allow a right of relief based directly on the settlement itself. In the context of two of the policy considerations which we identified—encouraging settlement of claims and ensuring fairness among concurrent wrongdoers—we thought that the real safeguard from D2's point of view would be, not a prior judicial determination of D1's liability, but a power in the court to ensure that D1's right of relief is limited to what would be a just sum having regard to the extent of D2's liability to P. The fact that a settlement had been made which had also benefited D2 by satisfying or reducing a debt due by him to P might be the only matter of real relevance. We therefore tended to the view that the mere fact of settlement with P should be a sufficient basis for an action of relief against D2.

3.15 We did, however, appreciate that this solution might be seen as too radical and considered ways in which further conditions might be imposed in order to ensure the genuineness of the settlement between P and D1. Of the other options canvassed, we doubted the usefulness of requiring either that settlement should have been made in response to a claim or that it should have been made after P had raised an action against D1 (options (b) and (d)). Neither requirement would exclude the possibility of D1 settling P's claim without being in any way connected with the incident giving rise to P's loss. Another means of protecting against collusion would be to require D1 to establish his own liability to P in the action of relief itself (option (e)). However, we rejected this as an impractical and potentially unfair solution to the problem.<sup>2</sup> Moreover it would deter people from settling claims in which liability was uncertain if their right of relief was thereby put at risk.

3.16 The final possibility which we canvassed was to provide that D1 should have a right of relief against D2 if he had made a *bona fide* settlement with P (option (c)). We were not, however, convinced that this solution would be very easy to operate

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1. See para 3.21 below.

2. See para 4.27 of the Memorandum.

in practice. What exactly would be meant by “a *bona fide* settlement”? The court could no doubt take into account a variety of factors, including whether the settlement was made at arm’s length, the amount of the settlement, whether payment was made in response to a claim and so on. This formula would deal with the obviously collusive compromise between P and D1 where the sole purpose was to confer on D1 a right to claim relief from D2 in the knowledge that D1 could not possibly have been liable in the first place. But would consideration of D1’s good faith be limited to his dealings with P or would it also be relevant to any dealings he might have with D2? Our initial reaction was that a requirement of good faith on the part of D1 in settling P’s claim was too nebulous a test. It could not provide a clear answer for all the different circumstances in which a settlement might be reached and could perhaps be counter-productive, so far as encouraging settlements was concerned.

3.17 Our provisional view was therefore in favour of the most straightforward solution, namely that the mere fact of settlement which reduces a debt owed by D2 should entitle D1 to seek relief. Given adequate control of the amount of contribution payable and the time within which D2 might be called on to contribute, we thought that this was the most satisfactory option for reform. We also came to the conclusion that there was nothing inherently wrong in giving D1 a right of relief whether or not he was liable on the merits of P’s claim.<sup>1</sup> Recovery of contribution without proof of D1’s liability is already possible under the present law where the court simply interposes authority to a joint minute settling P’s action against D1. A similar result can be achieved if, in the absence of court proceedings, the settler takes an assignment of P’s claim against the wrongdoer and proceeds to recover the sum he paid to P on that basis. Moreover, we considered it desirable to encourage out-of-court settlements in those cases where there was uncertainty as to D1’s liability. To allow D2 to defeat the claim for relief by proving that D1 was not, in fact, liable would be a positive disincentive to settlement in this type of case.

3.18 This proposition proved more controversial than most. While it received support from the majority of consultees, including the Law Society of Scotland, the Scottish Law Agents’ Society and the Sheriffs’ Association, it was rejected by others. The Faculty of Advocates suggested that, in the case of a claim for relief founded on settlement, it should be a defence that the settlement was not made in good faith. They justified this approach on the ground that the courts should be entrusted with the apportionment of damages between concurrent wrongdoers according to considerations of equity as applied to the particular circumstances of the case. Having reconsidered the issue, however, we find it hard to see that our proposition necessarily conflicts with this principle which, in our view, relates more to determination of the amount of contribution payable than to the actual basis of D1’s right of relief. Moreover, if this suggestion were to be adopted, the courts and the parties themselves would still be left with the problem of deciding what exactly is meant by good faith in this context.<sup>2</sup>

3.19 Two other respondents both considered that, where D1’s claim for relief was based on his having settled with P, the question whether he was actually liable to P remained relevant. One body put it in terms of D1 having to show that he was liable to P before being able to seek contribution from D2. However, this runs up against the arguments put forward in the Memorandum as to the undesirability of requiring D1 to establish his own liability.<sup>3</sup> The other suggestion was that, if for no sufficient reason no notice of P’s claim was given by D1 to D2, it should be open to D2 to challenge D1’s liability (and therefore his right to seek relief). This would apply whether D1’s claim for contribution was based on a decree against him or on his having settled with P. It would not involve D1 in having to establish his own liability but rather would allow D2 to show that D1 was not liable. The arguments were presented, first, that it was not inequitable that D2 should escape liability if D1 unnecessarily settled a claim by P or did not sufficiently defend the claim; second,

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1. The fact that he was not liable would, however, be relevant in assessing the amount of contribution payable and could result in his recovering from D2 the whole sum that he had paid in settlement.

2. See para 4.28 of the Memorandum and para 3.16 above.

3. See para 4.27.

that the provision suggested would enable D2 to be satisfied that any settlement was made in good faith; and, third, that it would encourage D1 to secure D2's involvement in settlement of P's claim.

3.20 In our view, it is doubtful whether this type of provision should apply where D1's claim for contribution is based on a decree against him. To suggest that D2 might be able to escape liability if D1 did not sufficiently defend the action raises again the spectre of an action "fought to the death". This requirement would not encourage D1 to settle the action in cases where there was a possibility that he might be found not liable. Even in cases where D1's claim for contribution is based on an extra-judicial settlement, it is not obvious that D1's right of relief should be lost completely if he is shown not to have been liable to P in the first place. D1 may settle with P, quite properly, when it is not entirely clear whether he was liable. It does not seem equitable to deprive him of his right to claim any contribution from D2 where D2's liability is beyond doubt. Most consultees accepted that the basic justification for D1's right of relief was that he had paid a debt due by D2. Given this basis, most also agreed with the line of argument put forward in the Memorandum that proof of D1's liability is not relevant to founding his action of relief against D2 although it may be relevant in assessing the amount of contribution D2 would be required to pay. Having reconsidered the issue in light of the comments received, we remain convinced that this is the correct approach.

3.21 Accordingly, we recommend that D1 should have a right of relief if he has made a payment to P which has the effect of reducing or extinguishing D2's liability. This reference to the effect of D1's payment is crucial. It connotes, firstly, that D2 must have been liable to P in respect of his loss and, secondly, that the payment by D1 must have been made with reference to that loss. It would not be enough that D1 had, coincidentally, given a sum of money to P, perhaps as a birthday present, after P had suffered the loss for which D2 was liable. There would have to be some connection between D1's payment and P's loss in order to set up his claim for relief. D1 would have to show that his payment had the effect of reducing or extinguishing D2's liability. It would therefore be in his interests to produce, for example, documentary evidence to this effect, in the form of an acknowledgment from P that the payment had been made in respect of the loss for which D2 was liable. It would be for the court to determine the effect of D1's payment as a question of fact on the evidence presented.

3.22 Our original proposal was in terms of D1's having been found liable to make payment to P in respect of his loss or of his having made a settlement with P which had the effect of reducing or extinguishing D2's liability.<sup>1</sup> On further analysis, we have concluded that the criterion should simply be the fact of payment in all cases. It is the payment which reduced or extinguishes D2's liability. Whether it is made entirely voluntarily or in terms of a settlement between P and D1 or under a court decree is irrelevant. This formulation of the basis of D1's claim for relief is easier to put into legislation.<sup>2</sup> It also makes redundant our separate proposal that, in so far as a decree against D1 might form the basis of his claim, that decree could be one granted in Scotland or elsewhere.<sup>3</sup> The decision of the House of Lords in *Comex*<sup>4</sup> on this point would, in effect, be overruled if our recommendations were to be implemented. However, our formulation now goes rather further: it is not just whether the decree against D1 was granted in Scotland that would be irrelevant but whether any decree had been granted at all.

3.23 To sum up, we recommend that:

- 3. D1 should have a claim for relief against D2 if he has made a payment to P which has the effect of reducing or extinguishing D2's liability in damages in respect of P's loss.**

(Paragraphs 3.13 to 3.22; clause 1(1) and (2))

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1. See para 4.33 of the Memorandum.

2. See clause 1(1) and (2) of the Bill annexed to this Report.

3. See para 4.32 of the Memorandum.

4. 1987 SLT 443; see para 2.11 above.

**Extended definition of payment**

3.24 Our recommendations are framed in terms of payment of a sum of money by D1 to P. This phraseology is apt for claims in delict but in contract, particularly if the parties have a continuing business relationship, settlement of P's claim may be more complicated, involving the provision of some service. If a wrongdoer discharges his potential liability in damages by, for instance, repairing any damage caused to P's property or by supplying alternative goods, he may then wish to recover part of the cost of the repair or supply from another party also liable for P's loss. We suggested in the Memorandum<sup>1</sup> that the wrongdoer in this situation should not be deprived of his right to claim relief simply because of the form of "payment" which he has agreed to make. We therefore sought views as to whether payment should be given an extended definition to cover payments in kind or the provision of a service. This was agreed by all who commented although one body doubted whether any statutory provision was necessary. We ourselves are not convinced that the courts would be able to interpret payment in this broad sense without express guidance to this effect in the legislation. We therefore recommend:

- 4. For the purpose of establishing D1's right of relief, payment should be defined to include payment in kind or the provision of a service provided the value of such payment or service can be quantified.**

(Paragraph 3.24; clause 10(1))

## The time for ascertaining D2's liability to P

3.25 In the Memorandum<sup>2</sup> we identified one real danger in our general approach to reform. This was that if D1 were able to found a claim for relief on payment made to P after P's claim against him was time-barred, this would extend indefinitely the period during which D2 could be called on to contribute. Payment by D1 could therefore be a collusive device to get round the fact that P had failed to sue D2 within the appropriate time limit. We regarded it as unacceptable that D1 should be allowed a right of relief in those circumstances and considered ways of establishing a definite cut-off point beyond which D2 would be safe from contribution proceedings. The obvious solution was for any new legislation to specify the date on which D2 would have to be liable to P in order to found D1's action of relief. Three broad options were canvassed:<sup>3</sup>

- (a) D1 should be able to claim contribution if D2 was liable to P when P's right of action against him accrued, regardless of whether that right of action has since become time-barred. Generally speaking this would mean that the relevant date for determining D2's liability would be the date of the damage. This solution would safeguard D1's interests if D2 were protected by a particularly short time bar or if D1 were sued by P just before the expiry of the time limit governing P's claim against him. However, without further refinement, it would not deal with the specific problem mentioned above. Such a rule could operate unfairly against D2, extending the period within which he might be liable to compensate for the loss suffered by P. The only protection afforded to D2 would be that D1's claim against him would have to be made within the separate period of prescription relevant to rights of relief.<sup>4</sup>
- (b) D1 should be able to claim contribution only if D2 was liable to P at the date P commenced proceedings against D1 or settled with him, whichever was the earlier. This solution would give D2 the benefit of any time limit accruing before but not after P sues or settles with D1. D1 would not be prejudiced by the length of court proceedings against him as the relevant date would be the commencement of the action not the granting of the decree. He would, however, be prejudiced if D2 was protected by a particularly short time bar.
- (c) D1 should be able to claim contribution only if D2 was liable to P at the time D1 raised his action of relief. This solution would give full effect to the time

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1. At para 4.92.

2. At para 4.30.

3. At para 4.34.

4. See paras 3.94 and 3.95 below.

bar on P's claim against D2 but could deprive D1 of his right of contribution. Again, D1 would be at a disadvantage if D2 was protected by a particularly short time bar.

3.26 As a matter of principle, we tended to the view that D1 should retain his right of relief notwithstanding the fact that P's claim against D2 is barred by the time D1 is seeking to recover contribution. Any other solution could, we argued, deprive D1 of his right to contribution without his having had a reasonable chance to assert it. This left the relevant date for ascertaining D2's liability to P as either the date P's right of action against D2 accrued or the date P commenced proceedings against D1 or settled with him. The first solution we considered feasible only if it was provided in addition that D1 would have no right of relief if he had settled with P after P's claim against him was barred, otherwise D2's liability to compensate for P's loss would be extended virtually indefinitely. We recognised, however, that both solutions favoured one wrongdoer at the expense of the other. Ascertaining liability at the date P's right of action accrued would deprive D2 of the protection of his limitation period. Referring to the date of settlement or commencement of proceedings against D1 would deprive D1 of his right to contribution if D2 was protected by a particularly short time bar.

3.27 On balance, we provisionally favoured the latter approach, the relevant date being the date of settlement between P and D1 or the date of commencement of proceedings by P against D1, whichever was the earlier. We reached this conclusion on the grounds both of principle and of practicality. The alternative of referring to the date P's right of action against D2 accrued we considered inconsistent with the basic justification for allowing D1 a right of relief in the first place, namely that he has discharged D2's liability to P. If, by the time D1 agrees to settle with P or is sued by P, P no longer has an enforceable claim against D2, the premise on which the right of relief is based disappears. Secondly, we pointed to the problem of D1 settling with P long after any claim P might have made against him had become time-barred. This gave scope for collusion between P and D1 which would require complex provision to prevent and we doubted whether it would be a workable solution.<sup>1</sup> By contrast, we thought that the reference to when P commenced proceedings against D1 or settled with him was more in keeping with the notion that D1 must confer some benefit on D2 before he can claim contribution.<sup>2</sup> Moreover, from a practical point of view, the date of commencement of P's action or of settlement should be readily ascertainable.

3.28 The vast majority of those who commented supported our provisional conclusion on this issue. Dissent came from one body who preferred to retain the existing rule under the 1940 Act, requiring that D2 would have been liable if sued timeously. This is broadly similar to the option outlined above, that the relevant date for determining D2's liability to P should be the date when P's right of action accrued, regardless of whether that right of action had since become time-barred. We have seen, however, that this option can operate unfairly against D2 extending almost indefinitely the period within which he may be liable to compensate for the loss suffered by P. Moreover, for rather technical reasons, the position under the 1940 Act is not satisfactory. As section 3(2) has been interpreted in *Singer v. Gray Tool Co (Europe) Ltd*,<sup>3</sup> the fact that P's claim against D2 is time-barred would appear to be relevant only where P has attempted to sue him and has failed on that ground, but not where P has taken no court action against him or if his action has simply been abandoned.<sup>4</sup>

3.29 Leaving aside this technical difficulty, which could no doubt be resolved, we still believe that, for the reasons given, the date of commencement of proceedings

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1. See paras 4.37 and 4.38 of the Memorandum.

2. Although if this argument were taken to its logical conclusion, D2's liability should be ascertained at the date of payment by D1 because until that time D2 remains open to a claim by P. This could produce harsh results so far as D1 is concerned. It could deprive him of any chance of recovering contribution in cases where settlement took the form of an agreement to pay in the future or in cases where D1 was found liable after lengthy court proceedings.

3. 1984 SLT 149.

4. See para 2.6 above.

or of settlement between P and D1 is to be preferred as the appropriate date for determining D2's liability. Given that our provisional conclusion in the Memorandum was supported by all other consultees, we recommend that it be confirmed. The only minor change that we would suggest is to add a third limb to it, namely the date of payment itself, to deal with those cases where D1 makes a voluntary payment to P, without there having been any formal settlement between them.

3.30 In referring to the time bar relevant to P's claim against D2 we have not distinguished between time bars imposed by virtue of a limitation period, whereby P's right of action becomes unenforceable although D2's obligation still exists, and those imposed by virtue of a period of prescription whereby the obligation on which P's claim is based is extinguished altogether. The view we put forward in the Memorandum<sup>1</sup> was that no such distinction should be made. In practical terms, the expiry of periods of prescription and limitation have the same end result, that D2 cannot be sued. We therefore suggested that they should be treated alike for the purpose of determining D1's right of contribution. Consultees agreed with this approach. This means that D1's action of relief would be unsuccessful if D2 was protected by expiry of a period of prescription or limitation at the time P commenced action against D1 or settled with him or at the time D1 made payment to him, whichever was the earliest.

3.31 We made one further proposal in the Memorandum<sup>2</sup> concerning limitation periods. In terms of section 19A of the Prescription and Limitation (Scotland) Act 1973, the court has power to extend the three year limitation period for personal injuries claims in cases where it considers it equitable to do so. Obviously, if P has not tried to sue D2 in the first place, the possibility of the court's allowing P to make his claim outwith the three year period has not been considered. Nevertheless, it could be relevant to D1 in his action of relief, if the three year period has expired before P has taken proceedings against D1 or settled with him or received payment from him. We suggested that in this situation D1 should have an opportunity to show that, had P sued D2 outwith the normal limitation period, the court would have exercised its discretion to allow his claim.

3.32 This proposal received general support on consultation although one or two commentators expressed reservations about its practical application. In particular there were doubts as to whether D1 would ever be able to discharge the onus of proof and show that no reasonable judge would have refused to exercise his discretion to extend the limitation period. We see the force of this criticism. Having reconsidered the matter and bearing in mind the observations made about the desirability of reform based on broad principles,<sup>3</sup> we have concluded that this particular refinement should be abandoned. The number of cases in which it would apply would probably be very few in any event: any resulting prejudice to D1 in dropping this proposal would be minimal.

3.33 We have so far dealt with cases where D2 has ceased to be liable at the relevant date because of expiry of a time limit imposed under the general law. In the Memorandum<sup>4</sup> we also considered those cases where he is no longer liable because of some private arrangement reached between himself and P. This could take the form of a specially short contractual period of limitation governing P's claim, a discharge following settlement or a complete waiver of liability.

3.34 We started from the principle that cessor of liability before the relevant date, for whatever reason, should protect D2 from a claim for contribution, the justification being that D2 has received no benefit from D1's payment in these cases. However, we thought it inappropriate to allow D2 to come to some private arrangement with P *after* the loss, injury or damage had been sustained in order to pass the whole liability for P's loss on to D1. It was, in our view, unacceptable that D2 should be able to prevent recovery of contribution by this sort of collusive device. Even where there

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1. At para 4.41.

2. At para 4.42.

3. See para 3.8 above.

4. At paras 4.44 to 4.49.

was no collusion between P and D2, but P simply discharged D2 from liability on receipt of some payment from him, we did not think that this should bar D1's right of relief altogether: rather, any sum paid by D2 to P would be taken into account by the court in determining the amount of contribution recoverable by D1. This would not necessarily discourage D2 from settling with P as he would still get the benefit of avoiding court action and the risk of paying the whole expenses of that action. Moreover, he could seek relief from other wrongdoers. At the same time, it would ensure for D1's benefit a proper apportionment of the damages even if D2 had made a very favourable, and possibly collusive, settlement with P. Our proposal was therefore that any arrangement entered into between P and D2 after the loss, injury or damage has been sustained, whereby D2 ceases to be liable at the relevant date, should not have the effect of barring D1's claim for contribution.

3.35 This proposition received general support from consultees. One dissenter considered that the encouragement of settlements should take priority over the prevention of collusion between P and D2 and that, moreover, the proposal was a positive disincentive to settlement. We accept that there are arguments both ways on this issue but, in our view and in the view of most of our consultees, the balance of argument still lies with the proposed solution. The principle of fair apportionment between the wrongdoers is as important as that of encouraging settlements. Given that it is impossible to give full weight to both of these policy considerations here, we believe that this proposal, coupled with a flexible basis of apportionment, is the best way of achieving a fair result.

3.36 One consultee would, in fact, have gone further and would have extended our proposal to cover arrangements involving P and D2 made *before* P's right of action arose. They cited the example of a passenger in a car being injured as a result of the negligence of his driver, who was drunk, and of a third party. If the injured party had agreed in advance not to hold the drunk driver liable for the consequences of his drunk driving that would have the result, under our proposal, that the injured passenger could sue the third party for his whole loss but the third party would not be entitled to contribution from the drunk driver.

3.37 We did consider this issue in the Memorandum<sup>1</sup> and came to the provisional conclusion that the proposal should be restricted to post-damage arrangements between P and D2. This remains our general view. There is not the same risk of collusion between P and D2 in respect of any agreement they may enter into before the damage had been sustained or even contemplated. Moreover, the sort of example given in the previous paragraph would be unlikely to occur in practice. Such agreements are more likely to be made in the course of a continuing contractual relationship between P and D2 and, if they were to count for nothing so far as D1's claim for contribution was concerned, it would make it difficult for P and D2 to organise their business relationship with any degree of certainty. We do not think that such interference with their freedom of contract would be justified. The fact that D2 had been exonerated in advance from all liability or that the time limit on P's claim against him had been shortened would simply be one of the risks which D1 would have to face in pursuing his claim for contribution, along with the risk that D2 might be unidentified, outwith the jurisdiction or bankrupt.

3.38 There are, nonetheless, two slight modifications which we would now like to make to our original proposal. The proposition contained in the Memorandum was in terms of arrangements between P and D2 entered into after P's right of action accrued, in other words, after the loss, injury or damage had been sustained. On reflection, we have come to the view that the appropriate point after which arrangements reducing or extinguishing D2's liability should not affect D1's right of relief is not the occurrence of the loss but the commission of the wrong by D2. This means that, where D2 has breached an obligation and he is aware that his action will result in loss to P at a later date, he would not be able to preclude D1's right of relief before the loss actually occurs. Our recommendation therefore refers to arrangements

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1. At paras 4.46 and 4.47.

entered into after D2's act or omission giving rise to P's loss. In the case of an omission, being a continuing breach, it is necessary to identify the point in time when it should properly be regarded as having been committed. For this purpose we recommend borrowing the type of formula used in *Midland Bank Trust Co Ltd v. Hett, Stubbs and Kemp*<sup>1</sup> to the effect that the omission would be committed when the obligation in question ceased to be effectively capable of performance.

3.39 The second modification which we think desirable is to frame the recommendation, not in terms of arrangements between P and D2, but in terms of arrangements *not* involving D1. Clearly if D1 is party to an arrangement whereby, say, P gives D2 a complete discharge from liability, D1 should be bound by it so as to preclude any claim for relief which he might otherwise have made against D2.<sup>2</sup> Similarly, if P and D2 agree to a particularly short limitation period governing P's claim, that limitation period should be effective vis-à-vis D1's right of relief if D1 was also party to that agreement.

3.40 In summary, our recommendations regarding the time for ascertaining D2's liability are as follows:

**5.(a) Subject to paragraph (c) below, D2 should be bound to make contribution if he was liable to P at the time**

- (i) P commenced proceedings against D1,**
- (ii) P settled with D1, or**
- (iii) D1 made payment to P,**

**whichever is the earliest ("the relevant date").**

(Paragraphs 3.25 to 3.29; clause 2(1) and (2))

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

(Paragraph 3.30; clause 2(3))

**(c) D1's right of contribution should be unaffected by any arrangement not involving D1 himself, entered into after D2's act or omission giving rise to the loss in question, whereby D2's liability to P has, by the relevant date, been reduced or extinguished by any means other than by payment or has been rendered unenforceable by the expiry of a period of time. In the case of payment by D2 to P, such payment should not bar D1's right of relief but should be taken into account in determining the amount of contribution recoverable.**

(Paragraphs 3.33 to 3.39; clause 2(4))

**(d) For the purpose of paragraph (c) above, any omission by D2 giving rise to the loss in question should be taken to have occurred when the obligation ceased to be effectively capable of performance.**

(Paragraph 3.38; clause 10(2))

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

3.41 The question arises whether D1 should be bound by a decision given in proceedings taken against D2 in respect of P's loss with the result that he would lose his right of relief where D2 had already been held not liable. In the Memorandum<sup>3</sup> we considered first the effect of a finding of non-liability on the merits of P's claim and came to the provisional view that D1 should be bound by such a finding whether or not he had not been party to those court proceedings.<sup>4</sup> We thought that in this situation

1. [1979] Ch 384.

2. This is similar, in effect, to what we are recommending in relation to findings of non-liability in favour of D2 made by an arbiter or tribunal: see paras 3.48 and 3.49 below.

3. At paras 4.52 to 4.55.

4. Where D1 and D2 are sued together, it is not clear whether the doctrine of *res judicata* would preclude D1's subsequent claim for relief: see para 4.55 of the Memorandum. As regards findings made by a tribunal or in arbitration proceedings, see paras 3.48 to 3.49 below.

greater injustice would be done by forcing D2 to defend himself twice on the same issue than by preventing D1 from showing that an earlier decision in favour of D2 was wrong. The intention was to preclude D1 from trying to establish D2's liability on the same ground as that on which P had already been unsuccessful. Where P had alternative claims against D2 in, say, delict and contract, a finding of non-liability in favour of D2 on one ground would not prevent D1 from seeking contribution on the basis of D2's liability on the other. This rule would be similar to the doctrine of *res judicata* which precludes further action on the same subject matter and on the same grounds between the same parties. It would, however, be more restrictive in that it would apply only to decisions given after a full investigation into the facts of the case whereas the plea of *res judicata* may be sustained even if the earlier decision gives effect to a settlement between the parties or if the decree is one by default or is pronounced of consent. In view of the risk of prejudice to D1, we considered that this more restricted approach was justified.

3.42 This basic proposal was agreed by most consultees and we confirm it now. One commentator did, however, argue that a finding of non-liability on one ground should bar D1 from claiming relief based on D2's liability to P on a different ground. They did so on the ground that certainty was preferable to flexibility here. In our view, however, this bald solution would not be very principled. Given D2's potential liability on different grounds, P has the opportunity to establish that liability on whichever ground he chooses. If he fails on one ground but does not seek to establish the other, there is no reason why D1 should not do so in his action of relief. P would not be precluded from doing so on the normal principles of *res judicata*: neither should D1. This would be a straightforward rule which would not detract greatly from the certainty of the basic proposition. There is, nonetheless, one slight modification which we would now recommend which should go some way to meet the point raised on consultation. This is to deal with cases where D2 is potentially liable in both delict and contract and the breach of obligation owed to P on each ground is substantially the same, ie breach of a duty to take reasonable care. P may have failed in his claim founded on delict. In these circumstances we do not think it would be fair to allow D1 a second chance to establish D2's liability on what is essentially the same ground, albeit formulated on a technically different basis.

3.43 Our original proposal was in terms of D1 being bound by a finding of non-liability made in favour of D2 in proceedings brought against him by P. On reflection, however, we do not think the rule should be so restrictive. A finding of non-liability may also be made in separate contribution proceedings brought against the contributor by another wrongdoer who has himself made payment in respect of P's loss. Take the case of three individuals, D1, D2 and D3, all allegedly liable for P's loss. P successfully sues D1 and D2 but cannot get jurisdiction to sue D3. Subsequently D1 sues D3 for contribution but D3 is held not liable in respect of P's loss. That finding of non-liability should, in our view, be conclusive against D2 were he also to try to recover contribution from D3 in later proceedings. Our recommendation is therefore framed in these broader terms.

3.44 We also suggested in the Memorandum,<sup>1</sup> and it was agreed unanimously on consultation, that D1 should be bound by a finding made in D2's favour on a prescription or limitation point. Following from our recommendations about the relevant date for ascertaining D2's liability, it is obvious that a successful plea of time bar in proceedings by P against D2 would bar D1's claim for relief only if it meant that P's claim was barred or that D2's obligation had prescribed at the time P started proceedings against D1 or settled with him or when D1 made payment to him, whichever was the earliest.

3.45 Having made these basic proposals, that D1 should be bound, firstly, by a finding of non-liability made in favour of D2 on the merits of the case and, secondly, in so far as it might be relevant to his claim for contribution, by a finding in D2's favour on a prescription or limitation point, we then considered in the Memorandum

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1. At para 4.56.

how they might best be implemented. We were concerned that a reference simply to a finding after proof on the merits might be too vague to put into legislation<sup>1</sup> although we surmised that the courts would be able to resolve any difficulties as they arose. Nevertheless we thought it might be preferable to give the courts more specific guidance, if at all possible, as to the type of findings which were to be conclusive against D1.

3.46 One possibility which we examined in some detail<sup>2</sup> was to make use of the existing principles of *res judicata*, qualified in such a way as to exclude those decrees which it would be unfair to make binding on D1 either because there was a risk of collusion between P and D2 or because they allowed for a decree of absolvitor without proof on the merits. On this basis, we suggested provision that D1 should be bound by a finding of non-liability in favour of D2 if the decision would be *res judicata* between the parties to the action except where the finding was of a kind which came within a list of specified exceptions.<sup>3</sup> However, this approach, we found, was not without its difficulties. One concerned the effect of findings made abroad. We suggested, and it was agreed by consultees, that a finding of non-liability made by a court outwith Scotland should be conclusive provided the court applied the law which Scots choice of law rules recognised as governing the matter. This is consistent with our earlier recommendation regarding the law governing D2's liability.<sup>4</sup> However, although a foreign decision can give rise to a plea of *res judicata* before a Scottish court, the plea will be successful only if the decision was also *res judicata* in the country where it was issued. Clearly not all countries will employ the concept of *res judicata* as we know it. The proposal would therefore have to be framed in terms of D1 being bound by a finding of non-liability granted by any competent court on grounds which, if granted in Scotland, would give rise to a plea of *res judicata* between P and D2, but excluding any findings on grounds which, if granted in Scotland, would result in a decree in favour of D2 coming within one of the specified exceptions. A further problem concerned findings in favour of D2 on a prescription or limitation point, whether under Scots law or a foreign applicable law. Such findings do not always found a plea of *res judicata* because they may take the form in Scotland of a decree of dismissal, not a decree of absolvitor. Special provision would therefore be needed to ensure that they were conclusive against D1.

3.47 As between the *res judicata* formula and a reference simply to a finding on the merits, we did not form a concluded view. We recognised that the former was complex but thought it might be necessary to avoid the vagueness inherent in the latter. In the event, the response on consultation was divided. While most favoured the *res judicata* solution, one or two influential commentators considered that it was too complex. This was, of course, our worry in formulating the proposal in the first place and should not, in our view, be cast aside too lightly. Having re-examined the arguments very carefully, we now favour allowing matters to rest on a general formula and leaving the courts to resolve any difficulties as they arise. Since, because of the availability of third party procedure, separate actions of relief are a relatively rare occurrence, we regard this as the most appropriate and effective solution. It also takes account of the preference expressed by one consultee for reform based on broad principles, rather than on detailed solutions to every conceivable problem. However, instead of referring to a finding on the merits, we now recommend provision in terms of a finding made after consideration of the evidence. This formulation is thought to be less technical and therefore more apt for findings from foreign courts where

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1. Although the expression has been used before: Matrimonial Proceedings (Children) Act 1958, s 9 (now repealed by the Family Law Act 1986). See also the recommendation of the English Law Commission on this point: Report on *Contribution* (Law Com No 79), paras 60–65 and clause 3(7) of the draft Bill annexed.

2. See paras 4.58 to 4.60.

3. Such as decrees by default against the pursuer and decrees of absolvitor granted after settlement of the action or after abandonment by P.

4. See para 3.12 above. We also considered the formula used in section 1(5) of the Civil Liability (Contribution) Act 1978 which is to the effect that a judgment given by a court in the United Kingdom in proceedings by P against D2 should, as regards any issue determined by that judgment in favour of D2, be conclusive in D1's action of relief. Our view was that it was unacceptable, partly because it was restricted to United Kingdom judgments and partly because it went beyond findings of non-liability to cover "any issue" determined by the judgment. No-one dissented from this view on consultation.

the procedure followed may be quite different from that used in our courts. It focusses clearly on what is the essential ingredient of the court's decision for this purpose, namely that it must have been reached on the facts of the case and not simply on an issue of law.

3.48 One final matter to be considered under this heading is the effect of a finding of non-liability made in non-judicial proceedings. Parties may often be obliged by contract to go to arbitration rather than to court in order to resolve a claim arising between them. In the Memorandum<sup>1</sup> we suggested that where P, D1 and D2 are all parties to the same arbitration agreement the principles outlined above should apply. The issue was, however, more complicated where this was not the case. P could have a claim in contract against D2 which goes to arbitration but his claim against D1 is in delict. On one view, it might be argued that it was unjust to deprive D1 of access to the courts on the basis of an agreement to which he was not a party. The counter-argument was that P might be obliged by statute to go to arbitration. There was little difference in practice between arbitration proceedings to which D1 was not a party and court proceedings between P and D2 in which D1 could not participate because no third party notice had been served on him. Without reaching any firm conclusion, we invited views whether D1 should be bound by a finding made in favour of D2 in arbitration proceedings, whether or not he was also a party to those proceedings. Consultees were, in fact, divided on this point, reflecting the even balance of the arguments. In our opinion, either solution can be justified but, in view of the clear difference of opinion that has been expressed, we recommend that the more restricted approach, requiring both D1 and D2 to be parties to the proceedings, should be adopted.

3.49 In the Memorandum we examined this problem only in relation to arbitration proceedings. On further consideration, it seems to us that the same arguments apply to proceedings before a tribunal. There may well be tribunals, if not in this country then abroad, which deal with claims for damages but whose procedure does not allow for participation of other interested parties in determination of the claim. For this reason we think it would be appropriate for D1 to be bound by the findings of such a tribunal only if he was party to the proceedings before it.

3.50 To sum up, our recommendations concerning the effect of a finding of non-liability in favour of D2 are as follows:

**6.(a) Where, in court proceedings brought against him and after consideration of the evidence, D2 has been found not liable to P on a particular ground, D1 should not be entitled to seek contribution from D2 on the basis of D2's liability to P on the same or substantially the same ground.**

(Paragraphs 3.41 to 3.43, 3.45 to 3.47; clause 4(1)(a))

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

(Paragraph 3.44; clause 4(1)(b))

**(c) The principles outlined above should apply to findings in favour of D2 made in proceedings taken against D2 before an arbiter or a tribunal only if D1 was also a party to those proceedings.**

(Paragraphs 3.48 and 3.49; clause 4(2))

**(d) For the purpose of paragraphs (a), (b) and (c) above, a finding made in favour of D2 in proceedings conducted in Scotland or elsewhere should be binding**

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1. At para 4.63.

**on D1 only if the law applied was that which Scots private international law rules recognise as governing the matter.**

(Paragraph 3.46; clause 4(1))

## The amount of contribution recoverable

3.51 Under this heading we consider, first, the basis on which D2's contribution should be assessed and, second, the limits which should be imposed on the amount recoverable.

### The basis of apportionment

3.52 In the Memorandum<sup>1</sup> we sought views as to the basis on which D2's contribution should be determined. Three possible options were canvassed:

- (a) to retain the existing rule of the 1940 Act that contribution should be in such sum as the court deems just;
- (b) to borrow the English formula found in section 2(1) of the Civil Liability (Contribution) Act 1978 that contribution should be in such sum as the court finds just and equitable having regard to the extent of D2's responsibility for the damage;
- (c) to adopt the approach of the Canadian Uniform Contributory Fault Act that the amount of contribution should be that amount of the total liability of all the concurrent wrongdoers that was proportionate to the degree to which D2's wrongful act contributed to the damage.

3.53 Bearing in mind our proposal that the mere fact of settlement should found D1's right of relief, we thought it desirable that the courts should have the widest possible discretion to reach a fair apportionment in the circumstances of each case. For this reason, our tentative preference was to retain the flexibility of the present law. The Canadian solution seemed to us too rigid and would require a fairly precise calculation of the degrees to which the wrongful acts of each wrongdoer contributed to P's loss. We did not think that it would be readily adaptable to all the different situations in which a right of relief might arise, where, for example, D1 was strictly liable under statute and D2 was liable in negligence. By concentrating solely on the causation element and ignoring the nature of D2's wrongful act and the respective degrees of blameworthiness of all the wrongdoers, it might not always produce a fair result.

3.54 The English solution we found attractive in that it ruled out of consideration totally extraneous factors such as the resources of the parties. On the other hand, reference to D2's "responsibility" could cause difficulties, again in cases involving breaches of different types of duty where, for example, one party was liable in negligence and the other for breach of contract not being breach of a duty of care. The two elements of responsibility, blameworthiness and causation, would not always be present in equal measure and in such cases we wondered whether to direct the courts to award contribution having regard to D2's responsibility for the damage might not simply be ambiguous and misleading. Although we recognised that the English basis of apportionment seemed to work well in practice, we were not convinced that it held any real advantage over the formula which our courts were already used to.

3.55 This view was widely supported on consultation and we confirm it now. The existing rule does not give rise to difficulties in practice and we see no reason to depart from it.<sup>2</sup> It is an appropriate formula to enable the courts to take into account a whole variety of factors which may be relevant in a particular case. It can, for instance, deal with cases where D2 has already made some payment to P or where D1 has made

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1. At para 4.77 to 4.83.

2. We do, however, use a slightly different formula in the draft legislation—referring to "such proportion as the court deems just" instead of "such sum as the court deems just"—in view of our later recommendations concerning the limits on the amount recoverable. See paras 3.56 to 3.70 below and clause 3 of the draft Bill annexed.

only partial settlement of P's claim. It enables the court to take account of the fact that D1 and D2 may be liable to P on different bases. In our view, the fact that D2 is liable in negligence while D1 is strictly liable under statute does not necessarily mean that D2 should bear the entire loss because he is the only party "at fault". Much may depend on the nature of the liability imposed on D1. If he is liable without proof of fault because he has failed to discharge some statutory duty of supervision, it is reasonable that he should bear part of the loss. If, on the other hand, his liability takes the form of vicarious liability for loss caused by D2, the actual wrongdoer, the court may wish to award him 100% contribution.<sup>1</sup> Either eventuality can, we believe, be catered for on this basis of apportionment. Accordingly we recommend:

**7. The amount of contribution recoverable should be determined on the basis of what the court deems just.**

(Paragraphs 3.52 to 3.55; clause 3(1))

**Limits on the amount recoverable**

3.56 In the Memorandum we suggested various ways in which the court should be given specific guidance in calculating the amount of contribution payable. The aim was to set upper limits on the contribution payable by reference to the amount of D1's payment to P and the amount of D2's liability to P. We envisaged that the court would have discretion to award contribution amounting to a complete indemnity or exempt D2 from liability to make contribution in appropriate cases. Further rules were proposed for assessing D2's contribution where his liability to P was subject to special contractual or statutory limitations or where his liability was reduced on account of P's contributory negligence. In the event, we are now recommending a slightly different approach although these criteria remain relevant.

**(1) Relevance of the amount of D1's payment**

3.57 Our provisional view in the Memorandum<sup>2</sup> was that, in assessing the amount of contribution payable, the court should not be bound by the level of award or settlement between P and D1. That figure should, however, be the maximum sum of which D2 would be liable to pay a proportion by way of contribution. We considered that the courts should retain their power to award contribution on a sum less than what D1 had actually paid to P in order to deal with those cases where D1's payment was regarded as excessive by Scottish standards.<sup>3</sup> In particular, this approach was necessary to avoid the possibility of collusive settlements between P and D1 whereby D1 agrees to pay P a grossly inflated sum in respect of his loss, on the understanding that a substantial proportion of that sum, calculated simply as a percentage of the total, would be recoverable from D2. We also thought that this approach would enable the court to take into account the wide variety of circumstances which might underlie D1's payment to P. For example, D1 might have purported to settle the whole of P's claim and thus discharge both himself and D2 from liability. Or the payment might represent less than the total value of P's claim while still being greater than D1's fair share of liability. Or he may have made a settlement on very favourable terms leaving P to pursue D2 for the more substantial proportion of his damages. A further possibility was that contribution might be payable in respect of only a part of P's claim which D1 had purported to settle in full. All these considerations led us to the conclusion that the amount of D1's payment should simply be regarded as the maximum sum of which D2 would be liable to pay a proportion in contribution.

3.58 This proposition was, on the whole, accepted by consultees. The only substantive disagreement came from the Scottish Consumer Council on the ground that wrongdoers would be less willing to settle claims where action was taken against them in jurisdictions where the level of damages was much higher than in Scotland. They thought it might also make wrongdoers less willing to make full settlement since the court might later decide that a smaller sum would have been awarded in damages and reduce the amount of contribution accordingly. The better solution, in their view, was to link the level of contribution to the level of settlement provided the settlement was reasonable. In a sense, this simply begs the question. By what standard should the settlement be reasonable—according to the law under which D1 settles with P (if that is ascertainable) or the law under which D2 is liable to P or the law of the

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1. See further paras 3.68 and 3.69 below.

2. At paras 4.66 to 4.71.

3. See, for example, the *Comex* case, *supra*.

(Scottish) forum? It would be unfair to D2 if it were the first of these three options: he might incur no liability whatsoever to P under that law and might end up paying more in contribution than he would have paid had he been sued direct under the law applicable to P's claim against him. If it is a question of reasonableness according to Scottish standards or according to the law governing D2's liability to P, this will not necessarily achieve the desired result of linking the level of contribution to the level of settlement. Moreover, the argument that the proposal would not encourage settlements is, in our view, overstated. The consideration for D1 in deciding whether or not to settle P's claim is not only what he might recover from D2 in contribution but also what greater sum he might have to pay to P in damages and expenses if court action were to be successful against him. Our proposal would apply both to the amount awarded by court decree and the amount paid voluntarily by D1 or agreed in settlement. D1 would always be able to cut his losses to some extent, regardless of what he might recover from D2, by settling with P for a sum less than might have been awarded by a court. Having reconsidered the arguments, we still believe that our provisional proposal, in so far as it refers to D1's actual payment, not to any payment considered reasonable in the circumstances,<sup>1</sup> achieves a satisfactory balance between the interests of D1 and D2.

(2) *Relevance of the amount of D1's liability*

3.59 It proved uncontroversial on consultation that D2 should not be liable to pay more in contribution than he would have had to pay had he been sued by P direct.<sup>2</sup> On this basis, the court would have to determine what would have been D2's maximum liability to P in those circumstances, so as to ensure that the amount of contribution awarded did not exceed that figure. In assessing D2's liability to P, we suggested that the existence of liability and the heads of damages recoverable should be determined under the applicable law but that actual quantification of his liability should be according to Scots law as the law of the forum.<sup>3</sup> This follows the normal rules of private international law<sup>4</sup> and, again, did not give rise to any adverse comment on consultation.

*Conclusion*

3.60 It is obvious that D1 should not recover more in contribution than he has paid to P and that D2 should not pay more in contribution than he would have had to pay had he been sued by P direct: so obvious that we do not think that express statutory provision is necessary. However we have concluded that it is not enough simply to say that the lesser of these two figures should be the maximum recoverable from D2 by way of contribution. Take, for instance, a case where D1 settles P's claim in the United States at £1 million. D1 and D2 are equally to blame for P's loss but D2, had he been sued in this country, would have been found liable to pay only £500,000. In a claim for contribution by D1 should D2 be required to pay his full liability, ie half of D1's payment of £1 million, or should his contribution be calculated as a proportion of what he would have been obliged to pay direct to P, ie half of £500,000? Our conclusion is that the latter is the right result. It is not a fair apportionment from D2's point of view that he should be liable to pay the full extent of his liability when another party, D1, is equally to blame for P's loss. As for D1, he will always have the benefit of recovering *something* in contribution from D2. He runs the risk, though, that it will not amount to a just proportion of what he has actually paid but this seems perfectly acceptable if D2 could not have been sued in the jurisdiction under which D1 has settled P's claim in the first place or if D1 has chosen not to seek relief in that jurisdiction.

3.61 This is broadly the effect of the present law, as interpreted in *Comex*. However, under the scheme we are now recommending, we think it would be desirable to make express provision to achieve this result, otherwise there might be a risk of the court reaching the opposite conclusion on the basis that £500,000 is a just apportionment

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1. But see also paras 3.60 and 3.61 below.

2. See para 4.84 of the Memorandum.

3. See paras 4.72 to 4.76 of the Memorandum. We did, in fact, speak of quantification of P's claim in this context, rather than of D2's liability. This is, however, a bit confusing. What is relevant is the amount of D2's indebtedness to P ie the sum which he could have been held liable to pay in respect of P's loss, regardless of the sum that P was claiming. See also para 3.62 below regarding the appropriate time for quantifying D2's liability.

4. And therefore does not require any express provision.

of the sum paid by D1 to P and does not exceed the extent to D2's liability to P. If the figures in the example given were reversed—D1 pays P £500,000 and D2 could have been found liable to pay £1 million—we think that contribution should be calculated on the basis of D1's actual payment so that D2 would be obliged to pay £250,000. It would, we believe, be unacceptable to enable D1 to recover 100% contribution when he had also been at fault. In both situations, the advantage is with D2 in assessing contribution as a proportion of the lesser of the two amounts.

3.62 As regards quantification of D2's liability, we proposed in the Memorandum that this should be calculated as at the time D2's liability to P was determined, that is, under our recommendations as now formulated,<sup>1</sup> at the date of commencement of proceedings against D1, or at the date of settlement or of payment by D1, whichever was the earliest. The reasoning behind this proposal was that, since D1's right of relief was based on payment of a debt owed by D2, the logical solution was to quantify that debt at the time D2's liability had to be established. The one criticism made of this suggestion was in relation to cases where P took court action against D1 and the appropriate date for quantification was accordingly to be the date of commencement of those proceedings. It was pointed out to us that this ran counter to the approach generally taken by the courts in quantifying liability, namely that where a defender is found liable in damages, those damages are assessed as at the time decree is granted against him, not when the action was first raised which may have been many months or years earlier. This criticism is, in our view, well-founded. The solution here must be in line with the approach taken generally to the issue of quantification. Subject to this modification, we recommend that our provisional proposal be confirmed.

(3) *Effect of upper limits on D2's liability*

3.63 One further matter concerning the amount of D2's liability is the effect that any upper limits on his liability should have on the amount of contribution payable. Such limits may be imposed by statute or agreement or may arise as a result of P's contributory negligence. In the Memorandum,<sup>2</sup> we proposed that where the amount of contribution, calculated in the usual way without regard to any financial limits on D2's liability, was greater than the maximum sum which D2 would be liable to pay to P, taking into account any such limit on the extent of his liability, then the amount payable by way of contribution should be that lower figure. We thought that it would be better to have a special rule on this question rather than leaving it entirely to the court's discretion, otherwise there would be a risk that two courts faced with identical claims for contribution could reach quite different results. One might apportion only the common extent of liability between D1 and D2, resulting in a lower award against D2, while the other might assess D2's contribution in the way suggested, applying the limit on his liability only after the basic calculation had been made.

3.64 Although consultees accepted this proposal, we think it merits reconsideration in light of the approach which we are now recommending on what should be the starting point for assessing D2's contribution. The base figure for the calculation is to be the amount of D1's payment or the extent of D2's liability to P, whichever is less. Where the lesser figure is the extent of D2's liability, ie the amount of damages which might have been awarded against him in proceedings taken by P in this country, we do not think it should affect the method of calculation that that figure has been reduced on account of P's contributory negligence. This reduction arises as a consequence of the general law and is a matter over which D2 has no control. We see no reason why D2 should be liable to pay up to the full extent of his liability in such circumstances, although not found to be solely to blame, and in effect, receive no benefit from the involvement of D1 in the incident causing P's loss. Contribution should instead be calculated as a proportion of the amount of damages which might have been awarded against D2, taking into account any reduction because of P's contributory fault.<sup>3</sup>

3.65 On the other hand, we consider that our original proposal is still justified where the limitation on D2's liability has been imposed by statute or, in certain

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1. See paras 3.25 to 3.40 above.

2. At paras 4.84 to 4.91.

3. This approach is in line with the House of Lords decision in *Fitzgerald v. Lane* [1988] 2 All ER 961: see paras 4.44 and 4.45 below.

circumstances, by contract between P and D2. Looking first at statutory limitations, we understand that the policy behind these limitations is to keep the total liability of certain potential defenders, such as carriers, within reasonable bounds. That policy is achieved even if they have to pay up to the upper limit of their liability in an action for contribution. In balancing the interests of the parties involved, we believe that this is an acceptable result.

3.66 As for contractual limitations on D2's liability, three situations may be distinguished:

- (a) where D2's liability is limited by virtue of an agreement to which D1 is not a party, entered into *before* D2's act or omission giving rise to P's loss;
- (b) where D2's liability is limited by virtue of an agreement to which D1 is not a party, entered into *after* D2's act or omission giving rise to P's loss; and
- (c) where D2's liability is limited by virtue of an agreement to which D1 is a party, whether entered into before or after D2's act or omission giving rise to P's loss.

As regards cases falling within category (b), limitations by virtue of an agreement to which D1 is not a party, entered into after D2's act or omission, we think that these should effectively be ignored and contribution assessed on the basis of D2's unlimited liability or on the basis of D1's payment to P, whichever is less. This is in line with what we have already recommended regarding arrangements, not involving D1, whereby D2 is no longer liable at the relevant date.<sup>1</sup> The same approach is desirable here to avoid the possibility of any collusion between P and D2 after the event which might attempt to pass the greater share of responsibility for P's loss to D1.

3.67 By contrast, we consider that other contractual limitations falling within categories (a) or (c) should be treated as the maximum amount which may be recovered by way of contribution, as we had originally proposed. Where D1 is a party to the agreement, he should obviously be bound by it to the extent that he should not be able to recover more in contribution than that limited figure. We do not see any good policy reasons for going further and saying that contribution should be calculated as a proportion of that limited amount: if the parties had wanted to achieve that result, they could have provided so expressly. Likewise, in the case of a limitation by virtue of a contract to which D1 is not a party, entered into before D2's act or omission, principles of freedom of contract require that it should be given effect. The end result of our recommendation is that where such a contractual limitation or statutory limitation on D2's liability exists, the court would first calculate the total amount of damages which would have been awarded if there had been no such limitation, determine D2's contribution on the basis of that figure (or of the amount of D1's payment to P if it is less) and only then apply the limitation so that the actual contribution awarded would be the amount assessed by the court or the amount of the limitation, whichever was less. The limitation figure would thus be the maximum which could be awarded in contribution but would not be the base figure on which the calculation was made.

(4) *100% or nil contribution*

3.68 In the Memorandum<sup>2</sup> we envisaged that the court would be able to award contribution amounting to a complete indemnity or exempt D2 from liability to make any contribution at all in appropriate cases. There was no dissent from this view on consultation. We also raised the separate, but related, question of whether rights of relief between parties, one of whom is vicariously liable for the delicts of the other, should be provided for expressly in our new scheme.<sup>3</sup> Although we accepted that the issue of contribution claims between an employer and an employee seldom arose in practice, we thought that, as a matter of policy, the party vicariously liable who has not been personally at fault should be entitled to 100% relief from the actual wrongdoer and, conversely, he should not be bound to make contribution, were a claim for relief to be made against him. It could be argued that the current basis of apportionment, requiring the court to apportion damages in such sum as it may deem just, gave insufficient guidance to ensure the desired result in all cases.

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1. See paras 3.33 to 3.39 above.

2. At para 4.82.

3. See paras 4.2 to 4.5.

3.69 Although express provision was favoured by some consultees, it was rejected by others as unnecessary. As a species of joint and several liability, vicarious liability already came within the general provisions of the 1940 Act and therefore nothing more was required. It is certainly clear that vicarious liability cases come within the scheme which we are now recommending. Payment by an employer to the injured party would entitle him to seek relief from his negligent employee. Similarly, in the unlikely event of an employee making payment in respect of the loss he had caused, he would in theory be entitled to claim contribution from his employer who could have been liable in damages to the injured party. Given this background, is it appropriate to provide expressly that a person vicariously liable should not be open to a claim for contribution at the instance of the wrongdoer and that he should be entitled to 100% relief from the actual wrongdoer were he to seek contribution from him? Our conclusion is that it is not. In our view, it would be politically unacceptable to make such provision where, as a matter of practice, claims between an employer and an employee are rarely, if ever, made. In practice, an employee does not usually have the resources to meet any claim by P and so is not sued in the first place. An employer is unlikely to prejudice good industrial relations by claiming relief from his negligent employee, even if he is worth suing. To this extent, the law of contribution is of little real significance and we do not think it proper to encourage claims in this context by making express provision as to the appropriate outcome. If any claims for relief were to be made between an employer and employee, we take the view that the general provision which we are recommending, that contribution should be in such sum as the court deems just, is sufficient to achieve the desired result provided it is made clear, in general terms, that the court has discretion to award no contribution in appropriate cases or to award 100% contribution, ie in a sum equivalent to the total payment made by D1 to P or the total extent of D2's liability to P, whichever is less.

3.70 To sum up, our recommendations regarding the limits on the amount of contribution recoverable and quantification of such contribution are as follows:

**8.(a) Subject to paragraph (d) below, the contribution recoverable from D1 should be calculated as a proportion of**

**(i) D1's payment to P or**

**(ii) the amount of damages which might otherwise have been awarded against D2 in an action brought against him by P,**

**whichever is the lesser of the two.**

(Paragraphs 3.57 to 3.61; clause 3(1))

**(b) For the purpose of paragraph (a) above, the heads of damages recoverable should be determined under the applicable law but quantification of the extent of D2's liability to P should be according to Scots law as the law of the forum.**

(Paragraph 3.59)

**(c) For the purposes of paragraph (a) above, the extent of D2's liability to P should be assessed as at**

**(i) the date of decree in proceedings brought by P against D1,**

**(ii) the date on which P settled with D1, or**

**(iii) the date of payment by D1 to P,**

**whichever is the earliest.**

(Paragraph 3.62; clause 2(1) and (2))

**(d) Where D2's liability to P is limited by virtue of**

**(i) statute,**

**(ii) an agreement to which D1 is a party, whether entered into before or after D2's act or omission giving rise to P's loss, or**

**(iii) an agreement to which D1 is not a party, entered into before D2's act or omission giving rise to P's loss,**

**the court should assess D2's contribution, first, as if there had been no such limitation and the amount of contribution actually awarded should be that sum or the maximum extent of D2's liability having regard to the limitation so imposed, whichever is the lesser of the two.**

(Paragraphs 3.63 to 3.67; clause 3(1) and (2))

- (e) Where D2's liability to P is limited by virtue of a contract entered into after D2's act or omission giving rise to P's loss and to which D1 is not a party, the court should ignore that limitation for the purpose of determining the amount of damages which might have been awarded against him in an action brought against him by P.**

(Paragraph 3.66; clause 2(4))

- (f) In appropriate cases, the court should be entitled to award no contribution at all or contribution in a sum equivalent to the whole of the payment or amount referred to in paragraph (a) above, whichever is the lesser of the two.**

(Paragraphs 3.68 and 3.69; clause 3(3))

## Claims for relief by D2 against other wrongdoers

3.71 The basis of apportionment which we recommend is clearly wide enough to result in D2 being found liable to pay, not only his own fair share of the damages for P's loss, but also a share of the damages for which another wrongdoer, a D3, should be ultimately responsible. In other words, the amount of contribution payable by D2 may be calculated only as between D1 and D2 as parties to the action of relief, not taking into account the role of other wrongdoers who, for whatever reason, are not being sued by D1 for their share. Take, for example, a car accident, in which D1, D2, D3 and D4 are equally at fault in causing the injuries suffered by P. D1 makes a payment in full settlement of P's claim and seeks relief only from D2. As D1 and D2 are equally at fault, it is likely that the court would find D2 liable to contribute 50% of the total payment. This would leave both D1 and D2 to pursue D3 and D4 for their respective shares. It would, of course be possible for the court to reach some other conclusion by, for example, awarding D1 contribution in a sum equivalent to the whole amount of his payment to P less his own share of liability. In other words, D2 would bear 75% of D1's original payment to P. Or D1 could be awarded contribution from D2 only in respect of D2's own 25% share and would then have to pursue D3 and D4 for a further 25% each. One or other of these alternatives might be appropriate, depending on what the court deemed just in the circumstances of the case.

3.72 We do not suggest that any one of these possible solutions will always be right. There are arguments for and against all three and we are not sure that any of them necessarily produces a just result. They all mean that one or more of the wrongdoers bears more than his fair share. This is unavoidable given the underlying principle of joint and several liability which will be relevant in at least some of the situations in which a right of relief can arise. In the illustration given above, any one of the wrongdoers could have been sued by P for the full amount of his damages. That wrongdoer would have been obliged to pay P, regardless of his prospects of recovery from the other parties at fault. The same principle can apply when D1 settles with P. It is, in our view, impossible to achieve a just result between the wrongdoers in all cases so that each will only be liable for his own share.

3.73 This seems to us to be another argument in favour of the flexible basis of apportionment which we have recommended. The court may, if it thinks it appropriate and practicable, take account of the role of other wrongdoers in the incident. The fact that they are not amenable to the court's jurisdiction or have not been traced may be a factor to be weighed in deciding that their share of the damages should be borne equally by D1 and D2. Or, if D1 has deliberately chosen not to sue other wrongdoers, that may persuade the court that he alone should bear their share. On any view, the fact that D2 may be found liable to pay more than his share will give him an incentive to bring in all other available wrongdoers as third parties so that

the issue of contribution can be settled among all the parties involved in a single court action.

3.74 This analysis of the basis of apportionment has led us to reconsider the usefulness of the specific proposal which we made in the Memorandum empowering the court to reallocate the share of a “missing” wrongdoer.<sup>1</sup> The suggestion was that where contribution payable by one concurrent wrongdoer could not be recovered, the court should be able to apportion his share among those remaining or, where decree had already been granted against him, to reallocate his share among those remaining, in such proportions as the court finds just. This was seen as an equitable means of dealing with cases where one of the wrongdoers had disappeared without trace or had gone bankrupt: it was thought to be a flexible rule which could cater for all the different situations in which D1’s inability to recover contribution from one of the other wrongdoers might be relevant.

3.75 However, we are no longer convinced that a special rule along these lines is either desirable or necessary. Although our proposal was generally supported on consultation, the Law Society of Scotland did point out the practical difficulties that could be involved in varying the decree for contribution against the available wrongdoers once diligence had been instructed. Moreover, the first part of the proposal, apportioning the “missing” wrongdoer’s share among those who are party to D1’s action of relief, is no more than can already be achieved, following our recommendation on the basis of apportionment itself. Again, we are conscious of the comment made by one consultee that a broad approach to reform was desirable and that we should not attempt to cater specifically for every eventuality. Bearing all these considerations in mind, we have concluded that special provision dealing with the “missing” wrongdoer’s share should not be made. Instead, we confine ourselves to the more straightforward recommendation enabling D2, and indeed any subsequent contributor, to make use of our statutory scheme to recover contribution from other wrongdoers if he has ended up paying more than his share. This will involve only minor modification of the substantive provisions of the Bill.<sup>2</sup> We therefore recommend that:

- 9. Where D2’s contribution has been assessed at an amount more than he would have had to pay if other wrongdoers liable in damages for P’s loss had also been sued by D1 for relief, D2 should be entitled to recover contribution from those other wrongdoers on a like basis and a similar right of relief should be available to any subsequent contributors against the remaining wrongdoers. The provisions of the Bill should apply to such a claim for relief, with any necessary modifications.**

(Paragraphs 3.71 to 3.75; clause 1(3))

## Contribution towards expenses

3.76 In the Memorandum<sup>3</sup> we proposed that the court should retain its power to award contribution towards the expenses of any action in which D1 had been found liable to P. We recognised that such an award would not always be appropriate where, for example, D1’s defence of P’s action was wholly misconceived, but we thought that there might, exceptionally, be cases where, perhaps because D1’s line of defence was substantially the same as might have been taken by D2 and therefore D2 had a direct interest in the outcome, fairness demanded some apportionment of the expenses between them. Although this proposal was broadly welcomed on consultation, we ourselves have had second thoughts about it. While there may be some justification for allowing contribution to expenses under the present law on the ground that the 1940 Act requires a court decree against D1 to found his right of relief and that therefore expenses are necessarily incurred by D1 in order to pursue his claim, the same is not true under the scheme which we are now recommending. D1 does

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1. See paras 4.108 to 4.110.

2. See clause 1(3).

3. At para 4.112.

not need to defend P's claim in order to safeguard his right of relief against D2. That right is founded on the simple fact of payment by D1 to P which has the effect of reducing or extinguishing D2's liability for P's loss. If D1 chooses to defend P's claim and fails, thereby making himself liable in expenses, we are not convinced that D2 should ever have to bear a share of his expenses. D1 has defended P's action in order to protect his own interests. The fact that D2 may also have an interest in the outcome of the proceedings is largely irrelevant. Moreover, D1's payment of expenses does not reduce or extinguish D2's liability for P's loss and therefore does not fit in with the basic justification for allowing a right of relief in the first place.

3.77 There is also a more technical reason for deciding not to go ahead with our provisional proposal. This is that, if logically coherent provision were to be made on contribution towards expenses, we would have to deal with three separate situations: D1's claim against D2 for contribution towards the expenses of P's action in which D1 has been found liable; D2's claim against D3 for contribution towards the expenses of D1's action for relief against D2 in which he (D2) has been found liable; and D2's claim against D3 for contribution towards the expenses of P's action against D1 towards which he (D2) has been found liable to contribute. Given that power to award contribution towards expenses would probably be used only in exceptional cases, we doubt that the fairly complicated provision which would be required to meet all three situations would be justified. In all the circumstances, our recommendation is that:

**10. No provision should be made empowering the court to award contribution towards any expenses for which the person claiming contribution has been found liable in proceedings taken against him.**

(Paragraphs 3.76 and 3.77)

## Use of third party procedure

3.78 In the Memorandum<sup>1</sup> we canvassed views on two related questions: whether D1, if sued by P, should be required to make his claim for contribution using third party procedure; and whether, if he was sued by P or settled with him, D1 should be required to give notice of P's claim to other parties allegedly liable for the same loss. On the first question, we had serious reservations about compelling D1 to make his claim for contribution by way of third party procedure in P's action. Such a requirement would be inappropriate in some cases where, for example, D1 was not aware of the existence of other wrongdoers or where, at the time of P's action, the other wrongdoers were not amenable to the court's jurisdiction. It would possibly be unworkable where D1 was sued in a foreign court. Given that third party procedure is available in both the sheriff court and the Court of Session, we thought that D1 would make use of it whenever possible anyway in order to protect his own interests. To make its use mandatory would therefore be of little practical benefit.

3.79 This view was shared by most of those who commented. The suggestion was, however, made that, where third party procedure was appropriate, its use should be a matter of formal requirement. Failure to do so would entitle D2 to challenge D1's liability to P and/or the amount of the settlement between them in any subsequent action for relief. Having considered the issue again, we are not attracted to this solution. Since it has already been accepted that D1's liability is irrelevant to his claim for relief (though not to assessment of the amount of contribution payable), this form of sanction does not fit into our overall scheme. Moreover, it is difficult to envisage how such a recommendation would be implemented so that there would be no doubt when it was "appropriate" to use third party procedure. The balance of consultation was clearly in favour of our provisional view and we confirm it now.<sup>2</sup>

3.80 As a subsidiary issue, we also considered what effect D1's failure to use third party procedure should have on the question of expenses in his action of relief.<sup>3</sup> The

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1. At paras 4.94 to 4.100.

2. There is, however, no need for any statutory provision to this effect as the use of third party procedure is left entirely to the court's discretion in any event.

3. See paras 4.113 and 4.114 of the Memorandum.

normal rule is, of course, that expenses follow success but we suggested that the court should have discretion to disregard this rule so that, where D1 had obtained decree for contribution against D2 in separate proceedings, not using third party procedure, the court could decide not to award expenses to or by either party or could find D1 liable for the whole expenses of the action. We thought that the use of third party procedure would be encouraged by providing a sanction in expenses along these lines which the court could apply if it considered that D1 had acted unreasonably in not incorporating his action of relief in the main proceedings.

3.81 Consultees agreed in principle with this approach although one or two doubted whether any statutory provision was necessary to achieve the desired result. We certainly accept that the award of expenses is a matter for the court's discretion in all cases and that our proposal, strictly speaking, does not add anything to the existing powers of the court in this respect. Nevertheless we believe that express provision would have a useful role here in drawing attention to the risk that D1 would run if he did not pursue his claim for contribution in P's action against him.

3.82 Our recommendations are that:

**11.(a) D1, if sued by P, should not be required to make his claim for contribution against D2 in the same action using third party procedure.**

(Paragraphs 3.78 and 3.79)

**(b) Notwithstanding paragraph (a) above, the fact that D1 has not sought to recover contribution in the course of any action brought against him by P may be taken into account by the court in determining liability for the expenses of D1's action of relief.**

(Paragraphs 3.80 and 3.81; clause 6(2))

## Requirement of notice to D2

3.83 It is obviously desirable that everyone who might be liable to the injured party should be aware of his claim. The giving of notice serves two main purposes. First, it alerts an alleged wrongdoer (D2) to the possibility of a claim against him so that he will not dispose of any relevant evidence. Second, it enables him to enter into negotiations with P and/or D1 with a view to settling the claim. In the Memorandum,<sup>1</sup> we canvassed views whether D1 should always be required to intimate P's claim to other parties allegedly liable and what should be the effect of his failure to give notice. Our provisional conclusion was that there should be no requirement of notice. Such an absolute rule would, we argued, be unfair to D1 if he settled a claim without legal advice. Indeed he might only become aware of the existence of other wrongdoers after he had been sued and found liable. Moreover, there would be practical difficulties in deciding when notice should be given in order to be effective. We did, however, leave open the possibility that, even although the giving of notice would not be mandatory, lack of notice would be a relevant consideration for the court in determining the outcome of the action for relief where, for example, D1 had failed to give notice of P's claim to D2 in circumstances where it would have been reasonable and practicable for him to do so. Possible sanctions for failure to give notice in this situation would be dismissal of the action, reduction in the amount of contribution awarded or an award of expenses against the pursuer. We recognised, however, that none of these penalties was ideal. Complete denial of D1's right of relief seemed too extreme. Reduction in the amount of contribution awarded might be fairer but it would be difficult to measure the amount of prejudice suffered by D2 in not having received notice. An award of expenses against D1 would be a rather arbitrary penalty, determined not by the circumstances of D1's failure to give notice, but by the length and complexity of the court proceedings.

3.84 In the event, the response on consultation was divided. Most commentators agreed that there should be no formal requirement of notice but that the court should

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1. At paras 4.94 to 4.100.

be entitled in contribution proceedings to have regard to any prejudice suffered by D2 as a result of not having received notice. A few suggested turning the proposition round so that notice would be required in all cases subject to the court's discretion to disregard the lack of notice in appropriate circumstances or that notice would require to be given where it was reasonable and practicable to do so. The sanction favoured by the majority was an award of expenses against D1 rather than dismissal of the action of relief or reduction in the amount of contribution awarded.

3.85 Having reconsidered the issues we agree with the majority view that there should be no formal requirement of notice.<sup>1</sup> A requirement to give notice which could be waived at the court's discretion or which would operate only in certain circumstances would give rise to too much uncertainty. A rule whereby failure to give notice to D2 would bar D1's right of relief would be too harsh. Nevertheless we see the need to encourage intimation of P's claim to D2 wherever possible. A sanction in expenses against D1 would, in our view, serve this purpose and would fit in with what we have already recommended in relation to the use of third party procedure.<sup>2</sup> Failure to give notice would not result automatically in an award of expenses against D1: rather, we would advocate a more flexible approach whereby the court could take such failure into account, where appropriate, in determining liability for the expenses of D1's action for relief.

3.86 Accordingly we recommend that:

**12.(a) D1 should not be barred from seeking contribution from D2 by reason only of the fact that he had not given notice to D2 of any claim made by P in respect of his loss.**

**(b) Notwithstanding paragraph (a) above, the court should be entitled to take into account the fact that D1 had not given such notice in determining liability for the expenses of D1's action for relief.**

(Paragraphs 3.83 to 3.85; clause 6)

## Enforcement of the right of relief

3.87 Our scheme bases D1's right of relief on the fact that he has paid a sum of money to P which has reduced or extinguished D2's liability in respect of P's loss. Stated baldly, it means that D1 cannot seek to recover contribution until he has made payment to P. This is the position under the 1940 Act.<sup>3</sup> Such a rule is obviously satisfactory in a straightforward case where D1 makes a once-and-for-all payment to P. The background to D1's payment can, however, be more complicated. In particular, D1 may have been found liable to P under an instalment decree or he may have agreed to settle P's claim by a series of regular payments. In either case, he may not make full payment to P for a considerable period of time.

3.88 With this type of case in mind, we set out in the Memorandum a range of options for determining the point at which D1 should be entitled to seek relief:<sup>4</sup>

(a) D1 could be entitled to recover contribution as soon as his liability to P had been established or as soon as he had agreed to make payment. This option, although attractive from D1's point of view, has serious drawbacks. By allowing D1 to recover contribution before he has actually satisfied P's claim, D2 is put at risk of double jeopardy through his continuing liability to P in the event that D1 becomes bankrupt or disappears after enforcing his right of relief but before making payment to P. This solution is also inconsistent with the underlying

1. Statutory provision is necessary on this point in view of the decision in *Central SMT Co Ltd v. Cloudsley* 1974 SLT (ShCt) 70 suggesting that notice is required as a matter of practice. See clause 6(1) of the Bill annexed.

2. See paras 3.75 to 3.79 above.

3. S 3(2). In the context of third party proceedings, D1 is allowed to raise his action of relief at any stage in the main process but he cannot obtain decree against D2 until he has been found liable and has satisfied P's decree against him.

4. See paras 4.101 to 4.107.

justification for the right of relief, namely that D1 must have conferred a benefit on D2. D2 does not receive any benefit until payment by D1 because, until that time, he remains open to a claim by P.

- (b) In order to protect D2 against the risk of non-payment by D1, D1 could be entitled to claim relief as soon as his liability was established or he had agreed to settle P's claim but, as a general rule, he could not enforce his decree for contribution against D2 until he had himself made payment to P. The court would, however, have power to allow early enforcement in appropriate cases. This approach would enable D1 to raise his action with the minimum of delay and would avoid the need for multiple actions to recover contribution where he is liable under an instalment decree. Enforcement of the decree would usually be postponed until P had been paid in full.
- (c) As a variation on option (b), D1 could be entitled to seek relief once he had been found liable or agreed to settle and D2's contribution would be payable through the medium of a judicial factor who could ensure payment to P. Contribution by D2 would not have to wait for payment by D1. The judicial factor could pass D2's contribution direct to P, the sum owed by D1 to P could be adjusted accordingly and a discharge provided for D1 in the amount of D2's contribution. The advantage of this scheme is that P would get immediate payment of at least part of his damages even if D1 is not able or refuses to pay him promptly. D2 would not be at risk of double jeopardy as his contribution would clearly go to satisfy part of P's claim. From D1's point of view, the scheme would deal satisfactorily with instalment decrees. Contribution could be obtained before D1 had made full payment to P. It would be to D1's advantage where he was ultimately going to bear only a small proportion of the total liability as he would not have to raise the money to meet P's total claim before seeking relief.
- (d) A further possibility would be to allow D1 to enforce his decree for contribution once he had paid only his own share of the damages to P and the court could in turn arrange for payment of D2's contribution direct to P. This solution would be a departure from the normal rule that an injured party is always entitled to recover the full amount of his damages from any one of the wrongdoers. The risk of D2 being insolvent or having disappeared from the jurisdiction would fall initially on P although presumably in such circumstances he would still be entitled ultimately to recover the outstanding balance from D1.
- (e) D1's right of relief could depend on his having made payment to P. This would protect D2 from the risk of double jeopardy but, where D1 was liable to P under an instalment decree, it would mean that a fresh claim for contribution could be made in respect of each instalment. If D1 waited until he had made full payment to P before seeking to enforce his right, D2's obligation to make contribution in respect of the earlier instalments might have prescribed.

3.89 As a matter of principle we tended to the view that the right of relief should not arise until payment by D1 because, until that time, D2 has not received any benefit. Nevertheless we recognised that this solution could lead to injustice so far as D2 was concerned, extending the period during which he would be liable to compensate for P's loss. In our view, options (b) and (c) represented a reasonable compromise between principle and practicality and were to be preferred to the other options canvassed. They both made what we considered to be a relevant distinction between the right to commence contribution proceedings against D2 and the right to obtain payment from him. They both protected D2's position although under option (b) D2 would be put at some risk if the court decided to allow enforcement of the decree for contribution before D1 had made payment to P. The major drawback of option (c) was the involvement of a judicial factor which might be thought too cumbersome and expensive a procedure in most cases. There might also be complications in trying to adjust the sum due by D1 to P to take account of D2's contribution where D1 was liable under a foreign decree.

3.90 Our provisional view was in favour of option (b), modified to the effect that D1 should be entitled to raise his action as soon as he had been found liable or agreed

to settle with P, and his liability had been quantified or the amount of the settlement fixed, but that he should not be able to obtain his decree, except with the consent of the court, until he had made payment to P. Rather than focussing on enforcement of the decree, we thought it more consonant with the principle underlying D1's right of relief that, in normal circumstances, D1 should not even be able to obtain decree against D2 until he had himself made payment to P. The court would be most likely to grant decree against D2 before full payment by D1 where D1 was liable to P under an instalment decree. In those cases, we suggested that the court would grant decree for contribution to the extent of the instalment that D1 had paid and the process could be repeated for subsequent instalments.

3.91 This proposition received general support from consultees. The only real dissent came from the Law Society of Scotland who, although they agreed that in principle D1 should not be able to recover contribution from D2 until he had himself made payment to P, suggested that D2 should pay his contribution into court subject to provision being made to prevent D1 obtaining the consigned sum other than on payment by him to P. This would have the advantage of enabling D1 to obtain his decree against D2 without delay and, in effect, enforce it immediately. It could also be to P's advantage. If D1 had to borrow money to pay P in the first place, the security of the sum consigned in court would make it easier for him to do so. The drawback of this proposal is in any subsidiary provision which would have to be made. What should happen to the sum consigned if D1 never makes payment to P? If he disappears without trace, P may decide to raise further proceedings directly against D2 who therefore runs the risk of paying for P's loss twice. Some provision would have to be made to return the sum to D2 after a certain length of time or in certain circumstances. As a general rule, this kind of approach may be too complex.

3.92 While we still believe that our original proposal can be justified as a matter of policy, we are conscious that it would require relatively complicated provision in the Bill to implement it. It would also be used in only rare cases where D1 did not make a once-and-for-all payment to P. It would not affect the use of third party procedure whereby D1 may make his claim for relief before he has been found liable to P. This would continue to be the more usual course for D1 to take. Bearing all this in mind, we have come to the conclusion that our provisional proposal is too sophisticated. A straightforward rule making the right to relief dependent on payment is, in our view, more principled and is to be preferred. In opting for our original proposal, consultees did accept, as the general rule, that D1 should not be able to enforce his claim to contribution until he had made payment to P and, to that extent, we are not departing totally from what was originally suggested. However, we now take the view that an exception to this rule would not be worthwhile. This approach is easy to understand and the date of payment easy to identify. It protects D2 from the risk of double jeopardy. Although it means that D1's claim for relief may be delayed for a considerable period if he makes payment to P only after lengthy court proceedings, this is the position under the existing law and it does not appear to give rise to any difficulties. The only practical difficulty concerns instalment decrees against D1 or an agreement between P and D1 to settle on an instalment basis. If all the instalments are made within the prescriptive period governing the right of relief,<sup>1</sup> there is no problem. D1 can wait until he pays the final instalment before seeking relief. If not, D1 will have to raise successive actions of relief in respect of each instalment or separate blocks of instalments to ensure that his claim in respect of earlier instalments is not time-barred. However we do not see this as a major problem. Although there is now increased scope for instalment decrees,<sup>2</sup> we still see such decrees being granted as the exception, rather than the rule. We think that this slight inconvenience in a few cases can be justified by the desirability of providing a straightforward and principled rule for the vast majority of cases.

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1. See paras 3.94 and 3.95 below.

2. The Debtors (Scotland) Act 1987 provides for instalment decrees in respect of payment of sums not exceeding £10,000: see sections 1(1) and (5).

3.93 Accordingly we recommend that:

- 13. Without prejudice to his right to claim contribution by way of third party procedure, D1 should not be able to raise his action of relief against D2 until he has made payment to P.**

(Paragraphs 3.87 to 3.92; clause 1(1))

## Prescriptive period governing rights of relief

3.94 We provisionally proposed that all obligations to make contribution which came within our scheme should be subject to a two year prescriptive period, in line with the present rule of prescription applying to obligations under the 1940 Act.<sup>1</sup> This was generally agreed by consultees. The only dissent came from one professional organisation who suggested that a three year prescriptive period should replace both the short negative period of prescription and the two year period governing rights of relief. This suggestion, however, lies outwith the scope of our present exercise. In view of the clear support which our proposal received, we recommend that it be confirmed.

3.95 As for the date from which the prescriptive period should run, we suggested that it should be the date on which, following our earlier proposals, D1 was entitled to raise his action of relief.<sup>2</sup> This proposal was agreed by consultees. In essence, it remains valid although the starting point has now changed in the light of our recommendation on enforcement of the right of relief. Instead of the prescriptive period running from the date when D1's liability was established and quantified or when he had agreed the amount of his settlement with P, it should run simply from the date of payment by D1. This is, in fact, the position under the current law. Our recommendation is therefore as follows:

- 14. All obligations to make contribution coming within our scheme for reform should be subject to a two year prescriptive period, which should run from the date of payment by D1 to P.**

(Paragraphs 3.94 and 3.95; clause 7)

## Saving provisions

3.96 One concurrent wrongdoer may be entitled by contract or under the general law to be indemnified by another for the damages in respect of which relief is sought. Such rights are preserved by the 1940 Act<sup>3</sup> with the result that the person with the right of indemnity in his favour is exempt from liability to contribute. Contractual rights of relief are similarly unaffected. We suggested in the Memorandum,<sup>4</sup> and it was agreed on consultation, that this should continue to be the case. In relation to contractual rights of relief we would now go somewhat further, not only to preserve any express contractual right of relief between D1 and D2 but also to ensure that any express exclusion of relief between the parties is given effect.

3.97 We also recommend making an additional saving for rights of subrogation. As mentioned earlier,<sup>5</sup> our statutory scheme is wide enough to encompass cases where an insurer indemnifies the assured for certain loss suffered and then seeks to recover from the person who caused the loss. We think it important that in such cases the insurer should not be forced to seek contribution in terms of our recommendations but should be able to rely on his existing right to be subrogated to the rights and remedies of the assured against the wrongdoer in order to recoup the sum paid out under the insurance policy.

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1. Prescription and Limitation (Scotland) Act 1973, s 8A. See paras 4.117 and 4.118 of the Memorandum.

2. See para 4.119 of the Memorandum.

3. S 3(3).

4. At para 4.116.

5. See para 3.5 above.

3.98 To sum up, we recommend that:

**15. Express saving provision should be made for**

- (a) contractual or other rights of indemnity between D1 and D2;
- (b) contractual provision between D1 and D2 conferring, regulating or excluding contribution between them; and
- (c) rights of subrogation.

(Paragraphs 3.96 and 3.97; clause 12(1)(b), (c) and (d))

## Effect on rights of relief at common law

3.99 Our intention is to supersede entirely the common law rules so far as applicable to the kinds of contribution claim which we have identified, that is, claims for contribution arising out of a liability in damages to the injured party. It was suggested to us on consultation that, in view of the uncertainty about the continued existence of a common law right of contribution among co-delinquents on a *pro rata* basis, which uncertainty would be increased if the scope of statutory relief were to be extended, express provision should be made to this effect. We agree. We do not want to perpetuate the kind of difficulty faced in *NCB v. Thomson*<sup>1</sup> when the court had to decide whether a right of relief at common law was available as an alternative to relief under the 1940 Act on an equitable basis. Express abolition of the common law rules would not prevent the court from awarding *pro rata* contribution if it was unable to allocate liability among the wrongdoers with precision. Nor would it prohibit claims for *pro rata* relief in circumstances falling outwith the scope of our recommendations. We therefore recommend that:

**16. Express provision should be made abolishing the common law rules on rights of relief arising out of a liability in damages to the injured party.**

(Paragraph 3.99; clause 1(4))

## Questions of private international law

3.100 The present choice of law rules in contribution claims are rather uncertain. Arguably, section 3 of the 1940 Act requires a Scottish court to apply the rules enunciated by that section to all claims for contribution coming before it, whether or not the claim is itself governed by Scots law. However, it has been held in *Comex* that, for the purposes of determining jurisdiction, the obligation to contribute under the 1940 Act is a liability in delict.<sup>2</sup> On this reasoning it should be subject to the same choice of law rule as governs the delict itself. A similar approach could well be taken in contract. In an action for relief between concurrent wrongdoers liable on different grounds, it is not clear how the applicable law would be selected.

3.101 Given that a right of relief is a substantive right founded on principles of unjust enrichment, we suggested in the Memorandum that the choice of law rules applying to our scheme should be modelled on the rules applicable in cases of unjust enrichment generally.<sup>3</sup> This led us to consider what should be regarded as the proper law of the obligation to make contribution, that is, the law with which the obligation had the closest and most substantial connection. We did not think it appropriate to frame a choice of law rule expressly in these terms. That would give rise to too much uncertainty. However, using the proper law of the obligation as the underlying principle, we proposed that the applicable law should be either the law governing any relationship between D1 and D2 which was connected with P's loss or, in the absence of any such relationship, the law governing D2's liability to P. The first limb would deal, for example, with cases where there was an express agreement in a joint enterprise between D1 and D2 that a particular law would govern their rights *inter*

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1. 1959 SC 353. See para 2.9 above.

2. 1986 SLT 250 at p 258 and 1987 SLT 13 at pp 21 and 23.

3. See paras 4.120 to 4.125.

*se.* The second limb would probably operate more frequently and would result in the same system of law determining both the primary obligation of D2 to pay damages to P and any restitutionary obligation which arises as a consequence of payment by D1. Since the existence of a right of relief depends on D2's liability to P, we considered that this provided a sufficient connecting factor to make the law governing D2's primary obligation the appropriate law to govern his obligation to contribute as well. We also considered whether it should be possible to displace the law governing D2's liability in favour of the law of another country which, in the circumstances, was regarded as having the closest and most substantial connection with D2's obligation to contribute. Our provisional conclusion was that this was an unnecessary refinement, introducing too much uncertainty into the rule for the sake of a very small minority of cases.

3.102 Our suggested approach was agreed by all who commented and we confirm it now. There is, however, a problem where it points to the application of the law governing D2's liability to P in delict. According to our present choice of law rules in delict, there are two laws governing D2's liability, the law of the forum and the law of the place of the delict.<sup>1</sup> If reference were to be made to both laws under the double actionability rule, then broadly the same right of relief would have to be available under both for D1 to succeed in his claim against D2. Given the technicalities of the law of contribution, it is perhaps unlikely that this would be so, in which case D1 would lose out altogether even although some form of relief might have been available under each law independently.

3.103 To resolve this difficulty, we recommend further provision to the effect that, where D2's liability is in delict, the law governing D1's right of relief should be the law of the place where the harmful event occurred.<sup>2</sup> It is not necessary to spell out whether this means the law of the place of acting or of the place where the harm resulted because the expression is wide enough to cover both.<sup>3</sup> It means, in effect, that there would be a choice as to the governing law, either the law of the place of acting or the law of the place of result. This is, however, little different from the situation where D2 is liable to P on two separate bases and accordingly D1 can choose the governing law by deciding which ground of liability he should use to found his claim for relief. In either case, he would obviously select the law more favourable to his claim. If new choice of law rules in delict were to be enacted doing away with the double actionability rule, this special provision could simply be repealed.

3.104 Our recommendation is therefore as follows:

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

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

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

**(b) Where the rule enunciated in paragraph (a) above points to the application of the law governing D2's liability to P in delict, that should be taken to refer to the law of the place where the harmful event occurred.**

(Paragraphs 3.102 and 3.103; clause 8)

## Section 3(1) of the 1940 Act

3.105 Our scheme for reform obviously involves repeal of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 and its replacement with

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1. *McElroy v. McAllister* 1949 SC 110. The whole question of choice of law rules in delict is currently under review by the two Law Commissions: see Law Commission Working Paper No 87, Scottish Law Commission Consultative Memorandum No 62 on *Choice of Law in Tort and Delict* (1985).

2. Borrowing from the Civil Jurisdiction and Judgments Act 1982, Schedule 1, article 5(3).

3. See the *Reinwater* case [1976] ECR 1735.

more comprehensive provisions dealing with contribution claims in relation to liability in damages for loss caused. We would, of course, retain the substance of section 3(1) of the Act. Our formal recommendation is that:

- 18. Provision should be made, corresponding to section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, entitling the court to apportion damages and expenses between parties who are sued together and are found jointly and severally liable in damages.**

(Paragraph 3.105; clause 5 and Schedule 2)

## Transitional arrangements

3.106 It is clear to us that amendment of the law in this area should not be retrospective so as to apply to contribution claims in respect of loss suffered where the cause of action accrued before commencement of any implementing legislation. The legal position of D1 and D2 in such circumstances should be determined according to the law then in force. Accordingly we recommend:

- 19. The new statutory scheme for rights of relief should not apply in respect of any loss suffered by P where the cause of action in respect of such loss accrued before the commencement of the implementing legislation.**

(Paragraph 3.106; clause 12(1)(a))

## Consequential amendments and repeals

3.107 A number of consequential amendments and repeals follow from our recommendations in this area. These are set out in Schedules 1 and 2 to the draft Bill appended to this Report. The reasons for them and the effects of them are, where necessary, explained in the notes accompanying the Schedules.

# Part IV    Contributory negligence

## Summary of the present law<sup>1</sup>

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

4.2 Over the years the courts developed a number of narrow principles to temper the injustice of this rule. So the pursuer's claim would not be defeated if he had acted negligently "in the agony of the moment".<sup>3</sup> There also developed the "last opportunity" rule that, where both parties had been negligent, the one who had had the last clear chance of avoiding the accident but who had failed to do so by not taking reasonable care was the one to blame.<sup>4</sup> This doctrine did, however, fall into disrepute in so far as it had been applied in its literal sense. In time, the question became one of which was "the decisive and immediate cause" of the pursuer's loss, regardless of the precise chronological sequence of events.<sup>5</sup>

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

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

Provided that—

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

4.4 The effect of the 1945 Act is that the pursuer's own fault is no longer a complete defence but is only a ground for limiting the damages which he would otherwise have received. Where the pursuer and defender are both partly responsible for the loss, injury or damage caused, the court must determine what share of responsibility should be allocated to each party and reduce the damages accordingly. The pursuer's claim will fail altogether only if the court finds his conduct to be the sole effective cause of his loss.

4.5 The onus is on the defender to show that the loss, injury or damage sustained by the pursuer was partly due to the pursuer's own carelessness. The standard of care

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1. For a more detailed account, with supporting references, see Part V of the Memorandum.

2. *McNaughton v. Caledonian Railway* (1858) 21 D 160.

3. *Laird Line Ltd v. US Shipping Board* 1924 SC (HL) 37.

4. *Carse v. NB Steam Packet Co* (1895) 22 R 475.

5. *Taylor v. Dumbarton Tramways Co* 1918 SC (HL) 96 per Viscount Haldane at p 106.

required of the pursuer is one of reasonable care for his own safety, the ordinary care which would be expected of him in the circumstances.<sup>1</sup> In deciding the issue of contributory negligence, the court must consider the age and mental and physical capacities of the pursuer. A child is not expected to meet the standard of care of a reasonable adult. He need only show the degree of care to be expected from a child of the same age, intelligence and experience in the circumstances.<sup>2</sup>

4.6 A few questions remain to be considered: whether the plea of contributory negligence is available in actions based on breach of a statutory duty or in cases of strict liability or in actions based on intentional wrongdoing; and whether the plea is available in answer to claims based on breach of contract. The term “fault” is defined for Scotland in section 5(a) of the 1945 Act as

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

The difficulty with this definition is that “fault” is used in two different senses in section 1(1), firstly, to refer to the pursuer’s own fault, ie his contributory negligence, and secondly, to refer to the fault of the defender. It would seem that the definition in section 5(a) must be read as two separate definitions rolled into one. As applied to the issue of the defender’s fault, it should be taken to mean “wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages”. As applied to the separate issue of the pursuer’s fault, it should be taken to mean “wrongful act, breach of statutory duty or negligent act or omission which would, apart from this Act, give rise to the defence of contributory negligence”.

4.7 The common law rules are thus incorporated into statute. On these rules is superimposed the provision that the plea is available as a partial defence to any action for damages founded on “a wrongful act, breach of statutory duty or negligent act or omission”. It is not clear, however, whether the combined effect of these rules is to limit the application of the defence to those actions in which the plea was available at common law or whether the defence is available under statute to any action for damages arising from the defender’s fault, as defined, provided that the pursuer’s conduct is of a sort which, in general terms, would have been held to be contributory negligence at common law.

4.8 The doctrine of contributory negligence clearly applies to claims based on breach of statutory duty.<sup>3</sup> This was the case even before the Act was passed.<sup>4</sup> There are, however, some forms of liability under statute which are not in terms of breach of a statutory duty, which comes within the general ambit of delictual liability, but which simply impose an absolute liability for loss caused in certain situations. In these cases, it would appear that the plea of contributory negligence applies only if there is express provision to that effect.<sup>5</sup>

4.9 As regards the availability of the plea in claims founded on strict liability at common law, it has recently been explained by the House of Lords that the strict liability rule in *Rylands v. Fletcher*<sup>6</sup> is not part of Scots law<sup>7</sup> with the possible exception that the rule may apply in the case of a person who interferes with the course of a natural stream.<sup>8</sup> In this case, the defender may escape liability wholly or partly if he proves that the pursuer was wholly or partly to blame for the damage.<sup>9</sup>

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1. *Grant v. Sun Shipping Co* 1948 SC (HL) 73.

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

3. *Anderson v. Thames Case Ltd* 1987 SLT 564.

4. *Gibb v. Crombie* (1875) 2 R 886.

5. For example, s 1(6) of the Animals (Scotland) Act 1987, when read with ss 2(1)(a) and (3)(a), makes the plea available in answer to claims founded on the new statutory form of strict liability for injury or damage caused by “dangerous” animals. See also s 88 of the Control of Pollution Act 1974 and ss 2 and 6 of the Consumer Protection Act 1987.

6. (1868) LR 3 HL 330.

7. *RHM Bakeries (Scotland) Ltd v. Strathclyde Regional Council* 1985 SLT 214 (HL), rev. 1985 SLT 3.

8. 1985 SLT 214 at p 217.

9. *Rylands v. Fletcher*, *supra* at p 340.

4.10 In the case of an action of damages for nuisance, liability is not strict so that the rules on contributory fault in *Rylands v. Fletcher* do not afford a safe guide.<sup>1</sup> Nuisance is instead a field of delictual liability with uncertain boundaries in which liability may be based on negligence or deliberate acting or in some situations (where, for example, nuisance overlaps with breach of the strict duty of support by land to other land or buildings) some other criterion of responsibility may be applicable. Liability normally depends on a test in which the court balances the conflicting interests of the two neighbours, the critical question being whether the harm complained of is more than reasonably tolerable.<sup>2</sup> Generally speaking, the authorities do not use the language of contributory negligence. Nevertheless the law of nuisance does place a certain burden on the pursuer to take protective measures to minimise the inconvenience of which he complains.<sup>3</sup> In some cases the pursuer's failure to do so will bar recovery.<sup>4</sup> Generally, however, a pursuer is not "required to do more than to conform to the ordinary habits of life as a reasonable person."<sup>5</sup>

4.11 We are not aware of any Scottish authority dealing with the availability of the plea of contributory negligence in actions based on the defender's intentional wrongdoing.<sup>6</sup> Nor do we know of any direct Scottish authority dealing with application of the defence to claims based on breach of contract.<sup>7</sup> The English Court of Appeal has recently held<sup>8</sup> that a court does have power to reduce the plaintiff's damages under the 1945 Act where the defendant's liability in contract is the same as his liability in negligence arising independently of the existence of any contract. It has, however, also held<sup>9</sup> that where a plaintiff brings a claim in tort and the defendant makes a counter-claim in contract for breach of a repairing covenant in a lease, both claims being attributable to two concurrent causes operating contemporaneously, the problem of how liability should be apportioned cannot be solved by the 1945 Act. The solution is instead to assess the recoverable damages for each claim on the basis of causation.

## The need for reform

4.12 Our tentative view in the Memorandum was that some reform of the law on contributory negligence was desirable. The main difficulty, in our opinion, surrounded the availability of the plea in answer to claims based on breach of contract and, although there have been developments in this area south of the Border, the position in Scotland remains uncertain. In addition there are certain aspects of the 1945 Act, particularly its twofold definition of "fault", which are open to criticism. Given that there was general support on consultation for clarifying the role of contributory negligence in contract cases, we think that the opportunity should also be taken to deal with the other anomalies and ambiguities arising out of the 1945 Act. Accordingly, some of our later recommendations are concerned with repeal of the 1945 Act and its replacement with separate Scottish provision.

## Contributory negligence in contract

4.13 We provisionally concluded in the Memorandum that the rules of contract law relating to causation and mitigation of loss were not a satisfactory substitute for the

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1. See *RHM Bakeries (Scotland) Ltd v. Strathclyde Regional Council*, *supra* at pp 213–9.

2. *Watt v. Jamieson* 1954 SC 56 at p 58.

3. *Wilson v. Gibb and Brattesani* (1902) 10 SLT 293 per Lord Stormonth Darling.

4. *Armistead v. Bowerman* (1888) 15 R 814 per LJC Moncrieff at p 821.

5. *Webster v. Lord Advocate* 1984 SLT 13 per Lord Stott at p 15.

6. The weight of English authority seems to be against its availability. For an extensive review of authorities and academic comment see *Horkin v. North Melbourne FC Social Club* [1983] 1 VR 153.

7. But see the obiter opinion of Lord Davidson in *Lancashire Textiles (Jersey) Ltd v. Thomson Shepherd & Co Ltd* 1986 SLT 41 at p 45.

8. *Forsikringsaktieselskapet Vesta v. Butcher* [1988] 3 WLR 565. See, however, *AB Maritrans v. Comet Shipping Co Ltd* [1985] 1 All ER 20; *Lipkin Gorman v. Karpnak Ltd* [1987] 1 WLR 987; *Banque Keyser Ullman SA v. Skandia (UK) Insurance Co Ltd* [1987] 2 All ER 923. See also paras 5.19 to 5.22 of the Memorandum and Logie, "Contributory negligence in contract and tort" 1987 Sol J 929.

9. *Tennant Radiant Heat Ltd v. Warrington Development Corporation*, *The Times*, 19 December 1987.

specific plea of contributory negligence.<sup>1</sup> Although recent English authority points to causation as a means of apportioning damages where a claim in tort is met by a counter-claim in contract,<sup>2</sup> it does not necessarily mean that the rules of causation can provide the answer where a claim in contract is met by a plea that the pursuer's own conduct, not amounting to breach of any obligation owed to another party, contributed to his loss. Moreover, apportionment in terms of causation is a more rigid and possibly less fair method of sharing the loss between pursuer and defender than is apportionment on the basis of what the court deems just. As far as mitigation of loss is concerned, it can only take account of the pursuer's actings after the defender's breach of contract. It cannot deal with cases where the pursuer's conduct is a co-operating cause of the damage itself.

4.14 No one disagreed with this analysis on consultation. Accordingly, it remains to consider the different types of contractual claim in which the pursuer's contributory negligence might be relevant. For this purpose it is convenient to adopt the classification used by Hobhouse J, and accepted by the Court of Appeal, in *Forsikringsaktieselskapet Vesta v. Butcher and Others*:<sup>3</sup>

- (1) cases where the defender's liability for breach of a contractual duty of care is the same as his liability in delict for negligence which arises independently of the existence of any contract;
- (2) cases where the contractual obligation of the defender is expressed in terms of taking care but he is under no corresponding common law duty to take reasonable care;
- (3) cases where the defender's liability for breach of a contractual obligation does not depend on his having been negligent.

**(1) Concurrent liability for negligence**

4.15 This is the situation in which the defence of contributory negligence is easiest to justify. Where there is concurrent liability for failure to take reasonable care, it is anomalous that the outcome of the pursuer's claim should depend on whether the action is framed in delict or contract. If the pursuer can avoid a reduction of damages on account of his own negligence simply by choosing to sue in contract, he has an unfair advantage over the defender. This is particularly unsatisfactory given the present scope of concurrent liability, for example, in the field of professional negligence. If the content of the defender's duty is the same on both grounds of liability, and contributory negligence is a relevant plea when he is sued on one of the grounds, then we have no doubt that the defence should also be available when he is sued on the other. This was the view which we put forward in the Memorandum<sup>4</sup> and it was agreed unanimously by consultees. Although the 1945 Act may be open to this interpretation,<sup>5</sup> we think that the matter should be put beyond doubt. Accordingly, we recommend:

**20. Where the defender's liability for breach of a contractual duty of care is the same as his liability in delict for negligence, the plea of contributory negligence should be available as a defence whether the action is framed in delict or in contract.**

(Paragraph 4.15; clause 9(1))

**(2) Liability only for breach of a contractual duty of care**

4.16 In certain circumstances, the defender may incur liability for breach of a duty of care owed only in contract, not in delict. For example, the contracting parties may agree to exclude delictual liability altogether, allowing claims only for breach of their contractual obligations, one of which is an obligation to exercise reasonable care. Alternatively, the defender's liability may arise from a contractual obligation expressed in terms of taking care which does not correspond to the common law duty to take care which would exist in the given case independently of contract.

1. See paras 5.32 to 5.35.

2. *Tennant Radiant Heat Ltd v. Warrington Development Corporation*, The Times, 19 December 1987.

3. [1986] 2 All ER 488 and [1988] 3 WLR 565. For ease of presentation, however, we have reversed the order of his three categories.

4. At paras 5.36 and 5.37.

5. *Forsikringsaktieselskapet Vesta v. Butcher and Others*, *supra*.

4.17 In the Memorandum<sup>1</sup> we argued that if notions of fault on the part of the defender were to be deliberately introduced into the contract, it was only fair that contributory fault on the part of the pursuer should also be relevant. We therefore proposed that the plea of contributory negligence should be available in such circumstances. Most consultees agreed. One body expressed some doubts about the proposal on the ground that it would introduce too much uncertainty which would detract from the mutuality of a contract. They also thought that there might be contractual duties of care breach of which should not be met by the plea of contributory negligence. However, in the absence of any concrete examples where this should be the case, we do not find this argument very convincing. It is, indeed, hard to envisage cases where the plea should not be available. Even if there were such cases, it would always be possible for the parties to contract out of the plea.<sup>2</sup> Nor do we believe that our proposal would cause too much uncertainty in contractual relationships. It would be a reasonably straightforward rule which would apply automatically only if there was a duty of care imposed, expressly or by implication, on one of the parties. Given the support which the proposal received from other quarters, we have no doubt that it should be confirmed. Accordingly, we recommend:<sup>3</sup>

**21. The plea of contributory negligence should be available to the defender where he is in breach of a contractual duty of care but is under no corresponding common law duty to take reasonable care.**

(Paragraphs 4.16 and 4.17; clause 9(1))

**(3) Liability for breach of a strict contractual obligation**

4.18 By liability for breach of a strict contractual obligation we mean cases where the defender's liability for breach of contract does not depend on his having been negligent. The obligation could, for example, be to deliver a certain quantity of goods by a certain date. The argument against contributory negligence being available as a defence in these circumstances may be stated briefly. The fault of the defender is irrelevant to liability: therefore any fault on the part of the pursuer should also be irrelevant. The counter-argument is that if the plea is available in answer to claims based on strict liability at common law or under statute, it should also apply where an absolute obligation is imposed on the defender by virtue of the terms of the contract. Moreover, in some cases, strict liability in contract may co-exist with liability for negligence at common law. If the plea is not to be available in claims based on strict contractual liability, the pursuer can maximise the extent of the defender's liability by suing in contract rather than in delict.

4.19 Our provisional conclusion in the Memorandum was that the plea of contributory negligence should not be available in these circumstances.<sup>4</sup> We did not consider that the analogy drawn with strict liability at common law or under statute was wholly accurate. Where liability arises under the general law without fault on the part of the pursuer, it is reasonable, in balancing the interests of the two parties, to expect the defender to take some precautions for his own safety.<sup>5</sup> It is, in our view, a different matter if liability without proof of fault arises as a result of a specific contractual arrangement between the parties. A person bound by a contractual obligation has the opportunity to specify the terms of his undertaking and, in particular, the circumstances in which he might be released from his obligation. If he agrees to be bound by the contract in all circumstances, even those involving carelessness by the other contracting party, he should not, as a matter of general law, be able to plead that party's conduct in answer to a claim for breach of contract. Moreover, where the defender is liable in delict for negligence as well as strictly liable under contract, it is reasonable that he should be able to take advantage of the stricter obligation owed to him in contract and thus preclude the court from taking his own conduct into

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1. See paras 5.38 to 5.40.

2. See paras 4.21 below.

3. The effect of this and the preceding recommendation is, of course, that the plea should be available in answer to an action founded on breach of a contractual duty of care regardless of whether or not the defender is also liable in delict for negligence: see clause 9(1) of the draft Bill.

4. See paras 5.41 to 5.45.

5. Even so, where liability under statute is an absolute liability for loss caused in certain circumstances, it seems that the plea of contributory negligence will be available only if there is express provision to that effect: see para 4.8 above.

account in assessing the extent of the defender's liability, otherwise he would gain little benefit from contracting in the first place.

4.20 The majority of consultees agreed with our view. The suggestion was, however, made that the plea should always be available in contract unless it has been expressly excluded. We are not attracted to this solution. It would mean that a consumer would have to write into a contract for the supply of goods that his own contributory fault would not be relevant where, for example, he sued the supplier for breach of his obligation to deliver the goods by a certain date. It is perhaps hard to envisage cases where the pursuer's negligence would contribute to his loss in such circumstances but, as a matter of principle, we doubt that the consumer should have to take such steps to protect himself. Another view expressed on consultation was that considerations of equity indicated that the plea of contributory negligence should be available here in order to take due account of the pursuer's own conduct contributing to his loss. This can however, be countered by the argument that to allow the plea in *all* claims for breach of contract would give rise to such uncertainty in commercial dealings as to be unacceptable. This argument is, we think, irrefutable. Having reconsidered the issue in the light of consultation, we remain of the view originally expressed in the Memorandum. Accordingly, we recommend:

- 22. The plea of contributory negligence should not be available where the defender's breach of a contractual obligation does not depend on his having been negligent.**  
(Paragraphs 4.18 to 4.20)

#### Contracting out of the plea

4.21 We proposed in the Memorandum,<sup>1</sup> that, in so far as contributory negligence was to be relevant in claims for breach of contract, the parties should be entitled to agree to exclude the plea in their contract. It was, in our view, perfectly acceptable that parties should be able to adjust their rights and liabilities in such a way as to displace one of the standard legal incidents of the contractual relationship.<sup>2</sup> This proposition was agreed by all who commented and we confirm it now. Accordingly we recommend that:

- 23. In so far as contributory negligence is relevant in actions founded on breach of contract, parties should be entitled to exclude the plea in their contract.**  
(Paragraph 4.21; clause 9(4))

### Other reforms

#### Intentional wrongdoing

4.22 By intentional wrongdoing we mean wrongdoing where there is a deliberate intention on the part of the wrongdoer to cause loss or injury to another party, as in the case of assault, for example. This may be contrasted with deliberate conduct which brings about an unintentional result and which still comes within the scope of negligence.

4.23 Actions based on intentional wrongdoing by the defender are not expressly excluded from the scope of the 1945 Act. We are not aware of any direct Scottish authority on the matter, either at common law or under statute. However, the general, though not universal, view taken of the 1945 Act and equivalent legislation in other jurisdictions is that they do not allow any reduction of damages on account of the injured party's contributory negligence in cases where the defendant has committed an intentional tort.<sup>3</sup>

4.24 Our provisional conclusion in the Memorandum<sup>4</sup> was that this was the right approach. The policy of discouraging deliberate misconduct was, in our view, more important than the policy of reducing the damages awarded to a person who has

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1. At paras 5.46 to 5.48.

2. Subject, of course, to the Unfair Contract Terms Act 1977.

3. See, for example, *Quinn v. Leatham* [1901] AC 495; *Horkin v. North Melbourne FC Social Club* [1983] 1 VR 153; *contra*, *Murphy v. Culhane* [1976] 3 All ER 533.

4. See paras 5.50 to 5.53.

contributed to his own loss. In the absence of any compelling reason to do otherwise, we preferred to stick to what was probably the position under existing law.

4.25 All but one of our consultees agreed with us. Opposition came from the Law Society of Scotland who suggested that in intentional delicts the actings of both parties should be considered and that, if the injured party's conduct contributed to his loss, the amount of damages awarded should be reduced accordingly. We are not, however, convinced that extension of the plea into the field of intentional wrongdoing is warranted. This is not necessarily to say that the conduct of the pursuer in such cases will always be irrelevant. The plea of *volenti non fit iniuria* may be available or his conduct may be such as to break the chain of causation. In other circumstances, his conduct may amount to provocation which, it has been held, will mitigate the damages awarded.<sup>1</sup> Moreover, in some cases, such as defamation, we doubt that the pursuer's actings could be properly called contributory negligence in the sense of a failure to look after his own interests. Indeed, in defamation there is already a special defence that the pursuer had authorised or consented to the statement<sup>2</sup> and there seems little scope for a further defence based on his contributory fault. Given that the plea would probably be allowed only in exceptional circumstances, we do not think that the uncertainty which would inevitably follow if it were to be expressly available across the whole field of intentional delicts would be justified.

4.26 In the Memorandum we examined this question only in relation to intentional delicts. It seems to us, however, that the same policy considerations apply in the case of intentional breach of a contractual duty of care. If a person breaches such an obligation with the clear intention of causing the other contracting party to suffer loss then it is not unreasonable that he should bear sole responsibility for the resulting loss regardless of the other party's contributory failure to look after his own interests in the circumstances. While such cases would be rare and it would no doubt be difficult for the pursuer to prove the defender's intention to cause him loss, we believe that our scheme should cater for this situation. Accordingly, our recommendation is in broader terms than we had originally proposed, namely, that:

**24. The plea of contributory negligence should not be available in answer to any action founded on liability in delict for intentional wrongdoing or on liability for an intentional breach of contractual duty of care.**

(Paragraphs 4.22 to 4.26; clause 9(1))

#### **Meaning of contributory negligence**

4.27 In the Memorandum we sought views as to whether contributory negligence should be defined to include intentional conduct on the part of the pursuer which has combined with the defender's wrongdoing to cause him loss.<sup>3</sup> It is clear that the present meaning of the term is wide enough to cover deliberate conduct by the pursuer provided it still falls within the general category of failure to look after one's own safety or interests. An obvious example is the pursuer's deliberate failure to wear a seat belt. The question is whether we should go further to include conduct where the actual intention of the pursuer is to cause himself loss or harm.

4.28 In many cases, such conduct is adequately dealt with under the head of consent or *volenti non fit iniuria* or may be such as will break the chain of causation and thus defeat the pursuer's claim altogether. However, we did wonder whether there were circumstances in which intentional conduct, not being simply a failure to look after one's own interests, should merit reduction of the damages awarded rather than complete failure of the claim. In the event, most consultees thought that the present law struck the right balance. Deliberate conduct amounting to lack of care for one's own safety or interests was already covered by the plea. Any other intentional actings contributing to the pursuer's loss was properly dealt with under the head of causation or voluntary assumption to risk. They therefore favoured a general definition of contributory negligence simply as conduct demonstrating a lack of care for one's own safety or interests.

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1. *Ross v. Bryce* 1972 SLT (Sh Ct) 76.

2. Walker, *Delict* (2nd edn, 1981) p 792.

3. See paras 5.54 to 5.58.

4.29 We agree with this approach. One or two commentators did, however, suggest that the term contributory negligence itself gave rise to difficulty since it might be taken to exclude any form of deliberate conduct and that perhaps contributory fault might be a better expression to use. We do not see this as a real problem in the current law nor should it be under our recommendations. Moreover, we would be reluctant to change terminology in case, by so doing, we cast doubt on the validity of existing case law. By way of compromise, however, we think it appropriate to expand the definition to refer specifically to deliberate or careless acts or omissions by the pursuer.<sup>1</sup> We therefore recommend that:

**25. Contributory negligence should be defined to mean any deliberate or careless act or omission by the pursuer which demonstrates a lack of reasonable care for his own safety or interests.**

(Paragraphs 4.27 to 4.29; clause 9(3))

#### **Vicarious responsibility for contributory negligence**

4.30 It is not entirely clear under the present law whether or not the plea of contributory negligence is available where a person for whom the pursuer is vicariously liable has contributed to the pursuer's loss.<sup>2</sup> An obvious example of this would be where a van driver is involved in a road accident in the course of his employment and his employer seeks damages from the other driver in respect of damage caused to the van. As a matter of policy, it is clearly right that the plea should be available in such circumstances to take account of the van driver's conduct. It would be anomalous if an employee's negligent conduct was imputed to his employer only where the employer was the defender in an action for damages, not where he was the pursuer.

4.31 We proposed in the Memorandum that express provision should be made to this effect. Although one consultee doubted whether legislative provision was necessary, there was no disagreement as to the policy. We remain of the view that it would be better to put the matter beyond doubt. As a matter of drafting, however, it is not possible to use the concept of vicarious liability directly. That imposes liability on one person for breach by another of an obligation owed to a third. Here we are concerned with imputing conduct to the pursuer which simply demonstrates a lack of care for the pursuer's own safety or interests but which does not connote any form of delictual liability to another. It is nonetheless conduct by a person for whose acts or omissions, the pursuer would, in other circumstances, be vicariously liable if an action for damages were to be brought against him. In effect, we want to bring within the scope of our Bill those cases where the pursuer's employee or agent, acting in the course of his employment or agency, has contributed to the pursuer's loss. This is, in our view, the clearest way of expressing what we want to achieve and is an appropriate formula to be used in the legislation. Accordingly we recommend that:

**26. The plea of contributory negligence should be available expressly where the pursuer's employee or agent, acting in the course of his employment or agency, has contributed to the pursuer's loss.**

(Paragraphs 4.30 and 4.31; clause 9(1))

#### **Alternatives to a claim based on negligence**

4.32 We have seen that liability in nuisance is a form of delictual liability which may be based on negligence or on intention or even on some other form of responsibility.<sup>3</sup> In light of this, we suggested in the Memorandum<sup>4</sup> that a pursuer should not be able to avoid any reduction of damages on account of his own conduct by framing his action in nuisance rather than in negligence where the foundation of his claim, however it is expressed in legal terms, was breach of a duty of care owed by the defender. We surmised that the same problem could arise where liability in delict for negligence overlapped with liability for breach of a right of support. The technical distinction between different forms of liability should not be used by the pursuer to maximise the amount of damages which he might receive. We therefore proposed

1. In the Bill, the definition is expanded further to deal with cases where the pursuer's employee or agent has demonstrated a lack of care not necessarily for his own safety or interests, but for those of the pursuer: see clause 9(3) and paras 4.30 and 4.31 below.

2. See para 5.61 of the Memorandum.

3. Para 4.10 above.

4. See paras 5.59 and 5.60.

that where the defender could have been found liable in negligence for the loss suffered by the pursuer, the plea of contributory negligence should be available regardless of the actual basis of the pursuer's claim. The only qualification to this proposal was that it should not apply where the pursuer's claim was for breach of a contractual obligation other than an obligation to take care. This was in line with what we had already proposed in relation to contractual claims and which we have now confirmed in this Report.<sup>1</sup>

4.33 This proposal was generally supported on consultation. However, having examined the question further, we are not convinced that a recommendation in these terms fits into our overall package of reforms. In later paragraphs of this Part of the Report we deal with repeal of the 1945 Act and its replacement with separate legislation for Scotland. In drafting replacement provisions, we have tried to express the principles of the law on contributory negligence as broadly as possible but without extending the scope of the plea beyond those areas in which we have made specific recommendations or in which the plea is already available. Thus we have provided that the plea is to be available in answer to claims based on (a) delict, including breach of statutory duty and (b) breach of a contractual duty of care, excluding from both those based on intentional wrongdoing.<sup>2</sup> This, it seems to us, already provides the answer to the problem. Since liability in nuisance is a form of delictual liability, the plea of contributory negligence will be available except where the claim is based on intentional actings of the defender. Similarly, other types of liability forming sub-categories under the general head of liability in delict, such as liability for breach of a right of support or liability for diverting the natural course of a stream, will also be covered without the need for special provision. Admittedly this solution goes somewhat further than we had originally envisaged in that there is no need to show that the defender could also have been found liable in negligence as such. It is, however, consistent with the existing rules on strict liability at common law where the plea of contributory negligence is already available. We do not believe that it would produce unacceptable results in practice on those few occasions where the pursuer has contributed to his loss for which the defender is liable without proof of negligence. We accordingly recommend that:

**27. No special provision should be made regarding the availability of the plea in answer to claims which are alternatives to a claim based on negligence.**

(Paragraphs 4.32 and 4.33)

#### **Breach of trust**

4.34 One final question raised in the Memorandum<sup>3</sup> was whether the plea of contributory negligence should be extended to actions founded on breach of trust. While sections 31 and 32 of the Trusts (Scotland) Act 1921 can already deal with cases where a beneficiary has contributed to the loss caused to the trust estate by the trustee's breach,<sup>4</sup> they are, arguably, incomplete in that relief is available to the trustee under section 32 only if he has acted both honestly and reasonably. Thus where a beneficiary's conduct contributing to the loss has been quite unreasonable and the trustee has himself acted unreasonably, but to a much lesser degree, the trustee would still be wholly liable for the loss suffered. On this basis we wondered whether there was scope for a separate plea founded on the pursuer's contributory negligence although we had difficulty envisaging cases where it would be relevant in practice.

4.35 The results of consultation on this point were decisive. No-one commenting to us could give any examples of situations in which the plea ought to be available and there was no support for its being extended in this way. This response confirmed the doubts which we had already expressed, namely, that the problem, if it exists at all, is so minor that it does not justify any further legislative provision. We are reluctant to propose any extension of the plea into the law of trusts unless we are convinced that the gap which we have identified in the present law poses a real problem. No evidence has been forthcoming of any practical difficulties in this area. We therefore recommend that:

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1. See paras 4.18 to 4.20 above.

2. See clause 9(1) of the draft Bill annexed.

3. At paras 5.63 to 5.67.

4. See para 5.64 of the Memorandum.

**28. The plea of contributory negligence should not be available in answer to an action founded on breach of trust.**

(Paragraphs 4.34 and 4.35)

## Repeal and replacement of the 1945 Act

4.36 We have already indicated our intention to replace the 1945 Act with separate Scottish provision.<sup>1</sup> In addition to the specific issues on which we have made recommendations for reform, we have to consider which of the existing provisions of the Act should be retained.

4.37 A few of the substantive provisions of the Act are untouched by our recommendations so far. These are: (1) the proviso to section 1(1) that the apportionment of damages in cases of contributory negligence should not defeat any defence arising under a contract and that where any contract or enactment providing for limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of section 1(1) should not exceed that limit;<sup>2</sup> (2) provision directing the court to find and record the total damages which would have been recoverable if the injured party had not been contributorily negligent and directing the jury, where appropriate, to determine the total damages which would otherwise have been recoverable and the extent to which they are to be reduced;<sup>3</sup> (3) provision whereby, if one of the persons at fault avoids liability to any other person at fault by virtue of expiry of a period of limitation or prescription, he should not be entitled to recover any damages or contributions from that other person under section 1(1);<sup>4</sup> (4) provision applying section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 in any case where two or more persons are liable for the loss suffered by the injured party who has also been contributorily negligent;<sup>5</sup> and (5) provision allowing for apportionment of damages in an action brought in respect of a person's death.<sup>6</sup>

4.38 Looking at the first limb of the proviso to section 1(1), which preserves any defence arising under a contract, we are not sure what it is meant to cover. Any defence available under contract would presumably relieve the defender of liability and therefore the question of the pursuer's contributory negligence would not arise in the first place. If it is meant to refer to an express exclusion of the plea, it seems inappropriate to speak of defeating any "defence". While we do not see any need for a proviso along these lines, there is, we believe, scope for a more general saving to the effect that the operation of our provisions on contributory negligence may be modified by contract. What we have in mind are cases where the parties agree in advance that, should any loss be suffered by one of them, the damages would be apportioned between them in a particular way. Any such agreement should, in our view, be given effect in the same way as any agreement between the parties to exclude the plea altogether.<sup>7</sup>

4.39 As regards the second limb of the proviso, dealing with limitations on liability, it seems to state the obvious—that the damages awarded cannot exceed any limit imposed on the defender's liability—and for that reason is unnecessary. However, to go further and say that, where the damages would otherwise have exceeded that limit, the defender would still have to pay up to that figure, does not seem appropriate either. Take an example where the defender is liable for the pursuer's loss, the pursuer himself being 25% to blame. The defender's liability is subject to a contractual limitation of £500. In the circumstances, his liability would otherwise have been £1,000, reduced to £750 on account of the pursuer's contributory negligence. If the defender were still obliged to pay up to the maximum of his limit, ie £500, the pursuer's

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1. See para 4.12 above. Repeal does not, of course, revive the common law rule that contributory negligence affords a complete defence to the pursuer's claim: see Interpretation Act 1978, s 16(1)(a).

2. For the text of this proviso see para 4.3 above.

3. Sections 1(2) and (6).

4. Section 1(5).

5. Section 5(b).

6. Section 5(c).

7. See para 4.21 above.

contributory negligence would have no effect on the amount awarded. A fairer solution, in our view, would be to reduce the £500 by 25%, resulting in an award of £375 against the defender. In other words, no special provision should be made to deal with cases where the defender's liability is subject to a statutory or contractual limitation. In all cases the amount of the defender's *actual* liability should be the sum that is subject to reduction on account of the pursuer's contributory negligence.

4.40 This is slightly different from the approach we are advocating for limitations on D2's liability in relation to rights of relief.<sup>1</sup> There we are recommending special provision where D2's liability is limited by statute or, in certain circumstances, by contract to the effect that D2 should be liable to pay up to that limit by way of contribution. That situation can, however, be distinguished in that there is a need to protect the interests of a third party, the person claiming contribution. In the case of contributory negligence, on the other hand, we are concerned only with the position of the pursuer and defender. Even if they have agreed that the defender's liability should be limited to a specified sum, it does not necessarily follow that they also wish the pursuer's contributory negligence to be ignored by the court, at least in some cases, when determining the amount of damages payable. The converse seems more likely given that it is open to the parties to exclude the plea of contributory negligence expressly.

4.41 The next provision to be examined concerns the direction to the court to find and record the total amount of damages which would have been awarded had there been no finding of contributory negligence against the pursuer. Separate provision is also made in the 1945 Act making it clear that it is for the jury, where applicable, to determine the total damages which would otherwise have been awarded and the extent to which those damages should be reduced. Both of these provisions should, in our view, be retained. For the sake of completeness, we think that the court should be directed expressly to record the extent to which the total damages have been reduced. If the case goes to appeal on quantum it will be important to ensure that the decree shows the arithmetic involved in the court's decision.

4.42 Section 1(5) of the 1945 Act provides that, where one of the persons at fault avoids liability to any other because of expiry of a period of prescription or limitation, he should not be entitled to recover any damages or contribution from the other person by virtue of section 1(1). The meaning of this provision is obscure. If A, the wrongdoer, is protected by a limitation period, B, the injured party, cannot sue him in the first place. Moreover, it is difficult to see why A would be seeking to recover damages or contribution from B in such circumstances. If, on the other hand, A and B are joint wrongdoers causing injury to C, the question of contribution between A and B and the effect of prescription and limitation on rights of relief are dealt with elsewhere. We have therefore concluded that this provision is unnecessary.

4.43 Turning now to section 5(b), which applies the statutory scheme for relief between joint wrongdoers where two or more persons are liable for the pursuer's loss and the pursuer himself has also been partly at fault, we are not convinced that such express provision is necessary. As we have said of another provision in the 1945 Act, it seems to be stating the obvious. There is nothing in our earlier recommendations on rights of relief which would disapply the statutory scheme in cases where the pursuer has been contributorily negligent. The pursuer's conduct contributing to his loss will, of course, have a bearing on the amount of contribution awarded but that has already been catered for in our recommendations on contribution.<sup>2</sup> In our view, nothing further is required in this context.

4.44 It may be noted in passing that our recommendations do not affect the recent decision of the House of Lords in *Fitzgerald v. Lane*<sup>3</sup> concerning the apportionment

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1. See paras 3.63 to 3.67 above.

2. See paras 3.63 and 3.64 above and clause 3(1)(b) of the draft Bill. The pursuer's contributory negligence will obviously be taken into account in determining the amount of damages which D2 would otherwise have been found liable to pay to P.

3. [1988] 2 All ER 961. The Court of Appeal decision is reported [1987] QB 787.

of damages under the 1945 Act. In that case a pedestrian injured in a traffic accident sued both drivers involved. At first instance all three parties were held equally to blame and judgment was entered against the defendants for two-thirds of the plaintiff's damages. This apportionment was reduced by the Court of Appeal to one half with an order for contribution between the defendants on a 50-50 basis. The House of Lords upheld this decision.<sup>1</sup> In their view, the correct approach to apportionment in such a case involved two distinct and different stages in the decision-making process. The first, in the main action, once liability was established and the plaintiff's loss assessed, was to determine whether the plaintiff had been contributorily negligent and, if so, the extent to which his damages should be reduced. These issues concerned the plaintiff on the one hand and the defendants jointly on the other. The second, in the contribution proceedings, was to decide what contribution was just and equitable between the defendants towards the damages which the plaintiff had been held entitled to recover. This affected only the defendants as between themselves and did not involve the plaintiff. The trial judge's error had been to telescope these two stages into one with the result that the judge took into account the proportions in which the defendants were liable between themselves for the plaintiff's recoverable damages in deciding on the degree of contributory negligence of which the plaintiff was guilty. His ultimate conclusion, as represented in the order granted, was that each defendant was twice as much to blame as the plaintiff since two-thirds of the damages could be recovered from either of them.

4.45 On one view the trial judge's decision seems fair because each party should ultimately bear a one-third share of the damages. However, given the principle of joint and several liability that the pursuer is entitled to recover the whole of his damages from any one of the defenders found liable, the logic of the approach adopted by the House of Lords is unavoidable. Any other solution would cause even more injustice because it would mean that the proportion by which the pursuer's damages were reduced would vary according to the number of defenders he chose to sue unless it were provided that the individual fault of other persons not party to the action could be taken into account in determining the share of the total damages for which the defenders could be found liable. Apart from the difficulties of proof which this approach might entail, it would represent a significant departure from the concept of joint and several liability which could not be undertaken in this exercise. We therefore do not propose any change in the way the law has been interpreted in this area.

4.46 The final provision of the 1945 Act to be considered is section 5(c) which applies the principle of apportionment between pursuer and defender in those cases where a person has died as a result partly of his own fault and partly of the fault of another. In any action for damages or solatium brought by his dependants in respect of his death, the sum awarded shall be reduced to "such extent as the court thinks just and equitable having regard to the share of the said person in the responsibility for his death". The substance of this provision should obviously be retained.<sup>2</sup>

4.47 To sum up, our recommendations for repeal and replacement of the 1945 Act are as follows:

**29.(a) The Law Reform (Contributory Negligence) Act 1945 should be repealed and replaced with separate legislation for Scotland.**

**(b) In addition to provision implementing our earlier recommendations for reform, the following provisions should be made in substitution for those contained in the 1945 Act:**

**(i) There should be a general saving to the effect that the operation of the statutory provisions on contributory negligence may be modified by contract.**

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1. Although they did not agree fully with the Court of Appeal's reasoning: [1988] 2 All ER 961 per Lord Ackner at p 967.

2. Although the drafting technique used in our Bill means that separate provision on this point is unnecessary: see clause 9(1).

- (ii) **The court or the jury, where appropriate, should be directed to find and in either case the court should be directed to record, first, the total damages which would have been awarded had there been no finding of contributory negligence against the pursuer and, second, the extent to which those damages should be reduced.**
  - (iii) **The principle of apportionment between pursuer and defender should be applied in actions for damages brought in respect of a person's death so that any damages awarded in respect of the death would be subject to reduction on account of the deceased's contributory negligence.**
- (Paragraphs 4.36 to 4.46; clauses 9(1), (2) and (4) and 13 and Schedule 2)

## Transitional arrangements

4.48 We take the same approach to transitional arrangements here as we have done in relation to our recommendations on rights of relief.<sup>1</sup> In other words amendment of the law should have prospective effect only and should not apply to claims for damages arising out of loss suffered where the cause of action accrued before commencement of any implementing legislation. Accordingly we recommend:

- 30. The new rules on contributory negligence should not apply to actions for damages in respect of any loss suffered where the cause of action in respect of such loss accrued before the commencement of the implementing legislation.**

(Paragraph 4.48; clause 12(1)(a))

## Consequential amendments and repeals

4.49 A number of consequential amendments and repeals follow from our recommendations in this area. These are set out in Schedules 1 and 2 to the draft Bill appended to this Report. The reasons for them and the effects of them are, where necessary, explained in the notes accompanying the Schedules.

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1. See para 3.101 above.

# Part V Summary of recommendations

## Rights of relief

1. Statutory rights of relief should be available in all cases where loss is suffered as a result of a delict, breach of contract, breach of trust or breach of any other obligation giving rise to a liability in damages.  
(Paragraphs 3.1 to 3.5; clause 1(1))
2. (a) D1 should be entitled to claim contribution from any person who is liable in damages to P in respect of the loss, injury or damage which he has sustained.  
(Paragraphs 3.10 and 3.12; clause 1(1))  
  
(b) For the purpose of (a) above, liability is to be determined according to Scots law, including, where appropriate, its rules of private international law.  
(Paragraphs 3.11 and 3.12)
3. D1 should have a claim for relief against D2 if he has made a payment to P which has the effect of reducing or extinguishing D2's liability in damages in respect of P's loss.  
(Paragraphs 3.13 to 3.23; clause 1(1) and (2))
4. For the purpose of establishing D1's right of relief, payment should be defined to include payment in kind or the provision of a service provided the value of such payment or service can be quantified.  
(Paragraph 3.24; clause 10(1))
5. (a) Subject to paragraph (c) below, D2 should be bound to make contribution if he was liable to P at the time
  - (i) P commenced proceedings against D1,
  - (ii) P settled with D1, or
  - (iii) D1 made payment to P,whichever is the earliest ("the relevant date").  
(Paragraphs 3.25 to 3.29 and 3.40; clause 2(1) and (2))  
  
(b) For the purpose of paragraph (a) above and subject to paragraph (c) below, D2 should not be bound to make contribution if, at the relevant date, P's claim against him is barred by virtue of the expiry of a period of limitation or prescription.  
(Paragraphs 3.30 and 3.40; clause 2(3))  
  
(c) D1's right of contribution should be unaffected by any arrangement not involving D1 himself, entered into after D2's act or omission giving rise to the loss in question, whereby D2's liability to P has, by the relevant date, been reduced or extinguished by any means other than by payment or has been rendered unenforceable by the expiry of a period of time. In the case of payment by D2 to P, such payment should not bar D1's right of relief but

should be taken into account in determining the amount of contribution recoverable.

(Paragraphs 3.33 to 3.40; clause 2(4))

(d) For the purpose of paragraph (c) above, any omission by D2 giving rise to the loss in question should be taken to have occurred when the obligation ceased to be effectively capable of performance.

(Paragraphs 3.38 and 3.40; clause 10(2))

6. (a) Where, in court proceedings brought against him and after consideration of the evidence, D2 has been found not liable to P on a particular ground, D1 should not be entitled to seek contribution from D2 on the basis of D2's liability to P on the same or substantially the same ground.

(Paragraphs 3.41 to 3.43, 3.45 to 3.47 and 3.50; clause 4(1)(a))

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

(Paragraphs 3.44 and 3.50; clause 4(1)(b))

(c) The principles outlined above should apply to findings in favour of D2 made in proceedings taken against D2 before an arbiter or a tribunal only if D1 was also a party to those proceedings.

(Paragraphs 3.48 to 3.50; clause 4(2))

(d) For the purpose of paragraphs (a), (b) and (c) above, a finding made in favour of D2 in proceedings conducted in Scotland or elsewhere should be binding on D1 only if the law applied was that which Scots private international law rules recognise as governing the matter.

(Paragraphs 3.46 and 3.50; clause 4(1))

7. The amount of contribution recoverable should be determined on the basis of what the court deems just.

(Paragraphs 3.52 to 3.55; clause 3(1))

8. (a) Subject to paragraph (d) below, the contribution recoverable from D1 should be calculated as a proportion of

(i) D1's payment to P or

(ii) the amount of damages which might otherwise have been awarded against D2 in an action brought against him by P,

whichever is the lesser of the two.

(Paragraphs 3.57 to 3.61 and 3.70; clause 3(1))

(b) For the purpose of paragraph (a) above, the heads of damages recoverable should be determined under the applicable law but quantification of the extent of D2's liability to P should be according to Scots law as the law of the forum.

(Paragraphs 3.59 and 3.70)

(c) For the purpose of paragraph (a) above, the extent of D2's liability to P should be assessed as at

(i) the date of decree in proceedings brought by P against D1,

(ii) the date on which P settled with D1, or

(iii) the date of payment by D1 to P,

whichever is the earliest.

(Paragraphs 3.62 and 3.70; clause 2(1) and (2))

(d) Where D2's liability to P is limited by virtue of

(i) statute,

(ii) an agreement to which D1 is a party, whether entered into before or after D2's act or omission giving rise to P's loss, or

(iii) an agreement to which D1 is not a party, entered into before D2's act or omission giving rise to P's loss,

the court should assess D2's contribution, first, as if there had been no such limitation and the amount of contribution actually awarded should be that sum or the maximum extent of D2's liability having regard to the limitation so imposed, whichever is the lesser of the two.

(Paragraphs 3.63 to 3.67 and 3.70; clause 3(1) and (2))

- (e) Where D2's liability to P is limited by virtue of a contract entered into after D2's act or omission giving rise to P's loss and to which D1 is not a party, the court should ignore that limitation for the purpose of determining the amount of damages which might have been awarded against him in an action brought against him by P.

(Paragraphs 3.66 and 3.70; clause 2(4))

- (f) In appropriate cases, the court should be entitled to award no contribution at all or contribution in a sum equivalent to the whole of the payment or amount referred to in paragraph (a) above, whichever is the lesser of the two.

(Paragraphs 3.68 to 3.70; clause 3(3))

9. Where D2's contribution has been assessed at an amount more than he would have had to pay if other wrongdoers liable in damages for P's loss had also been sued by D1 for relief, D2 should be entitled to recover contribution from those other wrongdoers on a like basis and a similar right of relief should be available to any subsequent contributors against the remaining wrongdoers. The provisions of the Bill should apply to such a claim for relief, with any necessary modifications.

(Paragraphs 3.71 to 3.75; clause 1(3))

10. No provision should be made empowering the court to award contribution towards any expenses for which the person claiming contribution has been found liable in proceedings taken against him.

(Paragraphs 3.76 and 3.77)

11. (a) D1, if sued by P, should not be required to make his claim for contribution against D2 in the same action using third party procedure.

(Paragraphs 3.78, 3.79 and 3.82)

- (b) Notwithstanding paragraph (a) above, the fact that D1 has not sought to recover contribution in the course of any action brought against him by P may be taken into account by the court in determining liability for the expenses of D1's action of relief.

(Paragraphs 3.80 to 3.82; clause 6(2))

12. (a) D1 should not be barred from seeking contribution from D2 by reason only of the fact that he had not given notice to D2 of any claim made by P in respect of his loss.

- (b) Notwithstanding paragraph (a) above, the court should be entitled to take into account the fact that D1 had not given such notice in determining liability for the expenses of D1's action for relief.

(Paragraphs 3.83 to 3.86; clause 6)

13. Without prejudice to his right to claim contribution by way of third party procedure D1 should not be able to raise his action of relief against D2 until he has made payment to P.

(Paragraphs 3.87 to 3.93; clause 1(1))

14. All obligations to make contribution coming within our scheme for reform should be subject to a two year prescriptive period, which should run from the date of payment by D1 to P.

(Paragraphs 3.94 to 3.95; clause 7)

15. Express saving provision should be made for

- (a) contractual or other rights of indemnity between D1 and D2;

- (b) contractual provision between D1 and D2 conferring, regulating or excluding contribution between them; and
  - (c) rights of subrogation.  
(Paragraphs 3.96 to 3.98; clause 12(1)(b), (c) and (d))
16. Express provision should be made abolishing the common law rules on rights of relief arising out of a liability in damages to the injured party.  
(Paragraph 3.99; clause 1(4))
  17. (a) The law selected to determine the existence and scope of a right of relief should be
    - (i) the law governing any relationship between D1 and D2 which is connected with P's loss, or
    - (ii) in the absence of any such relationship, the law governing D2's liability to P.
 (b) Where the rule enunciated in paragraph (a) above points to the application of the law governing D2's liability to P in delict, that should be taken to refer to the law of the place where the harmful event occurred.  
(Paragraphs 3.102 to 3.104; clause 8)
  18. Provision should be made, corresponding to section 3(1) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940, entitling the court to apportion damages and expenses between parties who are sued together and are found jointly and severally liable in damages.  
(Paragraph 3.105; clause 5 and Schedule 2)
  19. The new statutory scheme for rights of relief should not apply in respect of any loss suffered by P where the cause of action in respect of such loss accrued before the commencement of the implementing legislation.  
(Paragraph 3.106; clause 12(1)(a))

## Contributory negligence

20. Where the defender's liability for breach of a contractual duty of care is the same as his liability in delict for negligence, the plea of contributory negligence should be available as a defence whether the action is framed in delict or in contract.  
(Paragraph 4.15; clause 9(1))
21. The plea of contributory negligence should be available to the defender where he is in breach of a contractual duty of care but is under no corresponding common law duty to take reasonable care.  
(Paragraphs 4.16 and 4.17; clause 9(1))
22. The plea of contributory negligence should not be available where the defender's breach of a contractual obligation does not depend on his having been negligent.  
(Paragraphs 4.18 to 4.20)
23. In so far as contributory negligence is relevant in actions founded on breach of contract, parties should be entitled to exclude the plea in their contract.  
(Paragraph 4.21; clause 9(4))
24. The plea of contributory negligence should not be available in answer to any action founded on liability in delict for intentional wrongdoing or on liability for an intentional breach of a contractual duty of care.  
(Paragraphs 4.22 to 4.26; clause 9(1))
25. Contributory negligence should be defined to mean any deliberate or careless

act or omission by the pursuer which demonstrates a lack of reasonable care for his own safety or interests.

(Paragraphs 4.27 to 4.29; clause 9(3))

26. The plea of contributory negligence should be available expressly where the pursuer's employee or agent, acting in the course of his employment or agency, has contributed to the pursuer's loss.

(Paragraphs 4.30 and 4.31; clause 9(1))

27. No special provision should be made regarding the availability of the plea in answer to claims which are alternatives to a claim based on negligence.

(Paragraphs 4.32 and 4.33)

28. The plea of contributory negligence should not be available in answer to an action founded on breach of trust.

(Paragraphs 4.34 and 4.35)

29. (a) The Law Reform (Contributory Negligence) Act 1945 should be repealed and replaced with separate legislation for Scotland.

(b) In addition to provision implementing our earlier recommendations for reform, the following provisions should be made in substitution for those contained in the 1945 Act:

(i) There should be a general saving to the effect that the operation of the statutory provisions on contributory negligence may be modified by contract.

(ii) The court or the jury, where appropriate, should be directed to find and in either case the court should be directed to record, first, the total damages which would have been awarded had there been no finding of contributory negligence against the pursuer and, second, the extent to which those damages should be reduced.

(iii) The principle of apportionment between pursuer and defender should be applied in actions for damages brought in respect of a person's death so that any damages awarded in respect of the death would be subject to reduction on account of the deceased's contributory negligence.

(Paragraphs 4.36 to 4.46; clauses 9(1), (2), (4) and 13 and Schedule 2)

30. The new rules on contributory negligence should not apply to actions for damages in respect of any loss suffered where the cause of action in respect of such loss accrued before the commencement of the implementing legislation.

(Paragraph 4.48; clause 12(1)(a))

# Appendix A

## CONTRIBUTION IN DAMAGES (SCOTLAND) BILL

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### ARRANGEMENT OF CLAUSES

#### Part I

##### *Contribution in Damages*

#### Clause

1. Right of contribution.
2. Determination of liability of contributor.
3. Assessment of contribution.
4. Finding of non-liability.
5. Joint contributors.
6. Notice of claim.
7. Prescription of obligations of contribution.
8. The applicable law.

#### Part II

##### *Contributory Negligence*

9. Liability for contributory negligence.

#### Part III

##### *Miscellaneous Provisions*

10. Interpretation.
11. Application to Crown.
12. Savings.
13. Amendments and repeals.
14. Citation, commencement and extent.

#### SCHEDULES:

- Schedule 1 Amendment of enactments.  
Schedule 2 Repeals.



DRAFT  
OF A  
**BILL**  
TO

Make fresh provision in the law of Scotland as to contribution in damages and as to contributory negligence; and for connected purposes.

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

*Contribution in Damages (Scotland) Bill*

Part I

*Contribution in Damages*

Right of  
contribution.

1.—(1) Subject to the following provisions of this Act, any person (“the claimant”) who has made payment in respect of any loss suffered by another may recover contribution from any other person (“the contributor”) who is, or but for that payment would be, to any extent liable to pay damages in respect of that loss, whether the liability of the contributor arises by reason of delict (including breach of statutory duty), breach of contract, breach of trust or breach of any other obligation.

(2) In this Act, any reference to payment by the claimant is a reference to a payment by him (whether arising as a result of civil proceedings or settlement or otherwise) which has the effect of reducing or extinguishing the damages which would otherwise be payable by the contributor in respect of the loss in question.

(3) Where the contributor has made contribution under subsection (1) above, he may in turn as a claimant in terms of that subsection recover contribution from any other person liable as a contributor; and the provisions of this Act shall in these circumstances apply accordingly subject to—

(a) the modifications that—

- (i) except in section 2(2) below, any reference to the claimant shall be construed as a reference to any person who, having made contribution under subsection (1) above, is entitled to recover contribution by virtue of this subsection; and
- (ii) any reference to the contributor (other than the first such reference in this subsection) shall be construed as a reference to any person from whom contribution is sought by virtue of this subsection; and any reference to contribution shall be construed accordingly; and

(b) any other necessary modifications.

(4) Subject to section 12(1)(a) below, any rule of law in force immediately before the commencement of this Act with respect to the right to recover contribution in respect of liability for damages shall cease to have effect.

(5) In this Act, “loss” means any loss, injury, damage or death, as the case may require.

## EXPLANATORY NOTES

### *Clause 1*

Clause 1 sets out the general policy of the Report, replacing the existing rules on rights of relief between joint wrongdoers with a new statutory right of relief available against anyone liable in damages for the injured party's loss. For convenience, in these notes as in the Report itself, "P" is used to refer to the injured party, "D1" to refer to the person seeking contribution and "D2", the person from whom contribution is sought.

### *Subsection (1)*

This subsection implements Recommendations 1, 2(a) and 13 and, in part, Recommendation 3. The right of relief is based on the fact that D1 has made a payment in respect of P's loss for which D2 would otherwise be liable. D2's liability is not restricted to liability in delict: it may arise from breach of any obligation provided it is a liability to pay damages in respect of the loss. Although, in our view, no express provision is necessary, the intention is that D2's liability should be determined according to the law which Scots private international law rules recognise as the applicable law (see Recommendation 2(b) and para 3.11 of the Report). Our scheme does not, of course, apply to cases of liability for payment of a fixed sum (see para 1.1 of the Report).

Subsection (1) also makes it clear that, without prejudice to the use of third party procedure, D1 cannot claim contribution until he has actually made the payment to P.

### *Subsection (2)*

This subsection, when read with subsection (1), implements Recommendation 3. It makes it clear that, in order to found a right of relief, D1's payment must have the effect of reducing or extinguishing D2's liability to P (see para 3.21 of the Report). The payment may be made as a result of proceedings taken against him or may be made under a settlement with P or may be made entirely voluntarily. Decree against D1 is no longer an essential prerequisite to his claim.

"Civil proceedings" are defined in clause 10(1).

### *Subsection (3)*

This subsection implements Recommendation 9, modifying the provisions of the Bill to apply to claims for contribution by D2 against D3. Broadly speaking, the modifications required are simple translations of references to the claimant (D1) and the contributor (D2) into references to D2 and D3 respectively. Further explanation is given, where appropriate, in the notes on later clauses.

### *Subsection (4)*

In implementation of Recommendation 16, this subsection makes it clear that our scheme supersedes the existing common law rules on contribution between parties liable in damages for P's loss (see also the repeal of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 contained in Schedule 2). D1 will therefore not have the choice of seeking equitable contribution under our Bill or claiming relief on a *pro rata* basis at common law. The existing rules are preserved only for the purpose of the transitional arrangements (see clause 12(1)(a)).

### *Subsection (5)*

This subsection defines loss to mean loss, injury, damage or death. The drafting technique used throughout the Bill, referring to any payment or claim "in respect of the loss," covers payment made to, or any claim made by, the deceased's relatives without further specification being necessary.

*Contribution in Damages (Scotland) Bill*

Determination of liability of contributor.

2.—(1) For the purposes of section 1 above, the liability which, but for the payment referred to in section 1(1) above, the contributor would have had in respect of the loss in question, and the extent of that liability, shall be determined as at the relevant date.

(2) Except in relation to the quantification of the liability referred to in subsection (1) above, “the relevant date” shall be—

(a) the date of the bringing of civil proceedings against the claimant in respect of the loss in question,

(b) the date on which, the claimant having agreed to make payment in respect of the loss, the amount of such payment has been fixed, or

(c) the date on which the claimant has made payment in respect of the loss, whichever is the earliest; and, in relation to the said quantification of liability, “the relevant date” shall have the meaning assigned to it in this subsection, with the substitution, in paragraph (a) hereof, for the words “the bringing of”, of the words “decree in”.

(3) Subject to subsection (4) below, the contributor shall not be liable under section 1 above in respect of the loss in question where by the relevant date any claim against him in respect thereof is or would have been barred by virtue of the expiry of a period of limitation or prescription.

(4) Any right of the claimant to recover contribution under section 1 above and the assessment of such contribution under section 3 below shall not be affected by any arrangement not involving the claimant (entered into after the act or omission of the contributor giving rise to the loss in question) whereby any liability of the contributor to pay damages in respect of that loss has, by the relevant date, been reduced or extinguished by any means other than payment or rendered unenforceable by virtue of the expiry of a period of time.

Assessment of contribution.

3.—(1) Subject to section 2(4) above and the following provisions of this section, the amount of contribution recoverable by the claimant under section 1 above shall be such proportion, if any, as the court finds just of whichever is the less of—

(a) the payment referred to in section 1(1) above;

(b) the amount of the damages which (in the absence of any liability of any other person to make payment or contribution and without regard to any upper limit referred to in subsection (2) below) would have been likely to be awarded in respect of the loss in question in an action brought in Scotland against the contributor on the assumption that the court in Scotland had jurisdiction.

(2) If, by virtue of—

(a) any provision in an enactment,

(b) any arrangement not involving the claimant (entered into before the act or omission of the contributor giving rise to the loss in question), or

(c) any arrangement involving the claimant (whenever it was entered into), there is an upper limit on the amount of damages payable by the contributor in respect of the loss, the amount of contribution recoverable by the claimant under section 1 above shall not exceed that limit.

(3) The proportion referred to in subsection (1) above may, if the court thinks fit, equal the whole of the payment or amount referred to in paragraph (a) or (b) of that subsection.

## EXPLANATORY NOTES

### *Clause 2*

This clause makes general provision regarding D2's liability to P for the purpose of D1's right of relief.

### *Subsections (1) and (2)*

These subsections, taken together, implement Recommendations 5(a) and 8(c). Subsection (1) provides that, for D1's claim for contribution to be successful, D2 must have been liable in respect of P's loss at the relevant date as defined in subsection (2). The same rules apply as regards the date for quantifying D2's liability except in a case where D1 is sued by P. In that instance the relevant date may be the date of decree not the date of commencement of the proceedings (see para 3.62 of the Report).

In the application of subsection (2) to a claim for contribution by D2 against D3, the references to claimant (D2) are unaltered (see clause 1(3)(a)(i)). This means that the date for determining D3's liability will be fixed by reference to the date of settlement or payment by D1 or the date on which proceedings were brought against D1, whichever is the earliest.

### *Subsection (3)*

This subsection implements Recommendation 5(b). It makes it clear that, for the purpose of determining D2's liability, the expiry of a period of limitation is to have the same effect as expiry of a period of prescription. In other words, if, at the relevant date, P's claim against D2 is barred by expiry of a period of limitation or prescription, D1's claim for contribution will fail. The only qualification to this is provided by subsection (4) which enables the court to disregard contractual limitation periods imposed on P's claim in certain circumstances.

### *Subsection (4)*

This subsection implements Recommendations 5(c) and 8(e). The intention is to avoid causing any undue prejudice to D1 by virtue of arrangements between P and D2 to which D1 is not a party (see paras 3.33 to 3.39 and 3.66 of the Report). It is therefore provided that any such arrangements entered into after D2's act or omission giving rise to P's loss whereby D2's liability is reduced or extinguished by any means other than payment or whereby P's claim is rendered unenforceable shall be disregarded. This covers, for example, unilateral acts by P discharging D2 from liability, agreements on the amount of damages payable, and contractual limitation periods governing P's claim. Any payment by D2 to P will obviously affect D1's right of contribution to the extent of reducing the amount recoverable: it will not bar his right of relief completely.

The point at which an omission shall be taken to have occurred is dealt with in clause 10(2).

### *Clause 3*

This provision lays down guidelines for the court in assessing the amount of contribution payable.

### *Subsection (1)*

This subsection implements Recommendations 7 and 8(a). It directs the court to award contribution on an equitable basis, as a proportion of either the payment made by D1 to P, or the amount of D2's liability to P, had D2 been sued in the Scottish courts, whichever is less. For the purpose of subsection (1), the amount of D2's liability is assessed without reference to any upper limits on liability imposed by virtue of statutory provision or certain contractual arrangements (see subsection (2)). By contrast, any reduction by virtue of P's contributory negligence in the amount of damages which would have been awarded against D2 is automatically taken into account so that, if that reduced liability is less than D1's payment to P, contribution is awarded as an equitable proportion of that reduced figure. Similarly, account is taken of any payment already made by D2 to P: any such payment would automatically reduce the amount.

### *Subsection (2)*

This provision, when read with subsection 1(b), implements Recommendation 8(d). Where there is a limit on D2's liability by virtue of statutory provision or by virtue of an arrangement involving D1 or one not involving D1 and entered into before D2's act or omission, then the amount of contribution recoverable may equal, but not exceed, that upper limit (see paras 3.63 to 3.67 of the Report). The reference to "any arrangement" in paragraphs (b) and (c) is principally meant to cover limitations on D2's liability imposed in terms of a contract entered into between P and D2 but the wider expression "arrangement" is used to ensure consistency with clause 2(4).

### *Subsection (3)*

This subsection implements Recommendation 8(f).

*Contribution in Damages (Scotland) Bill*

Finding of non-liability.

4.—(1) Where, in any civil proceedings previously brought against the contributor in respect of the loss in question, there has, by reference to the law which governs his liability in respect thereof,—

- (a) been made, after consideration of the evidence, a finding that the contributor is not liable on a particular ground in respect of the loss, that finding shall be binding on the claimant in respect of any claim he might make on the same, or substantially the same, ground for the recovery of contribution from the contributor under section 1 above;
- (b) been made a finding that the contributor is not liable in respect of the loss on the ground that the claim against him is by the relevant date barred by virtue of the expiry of a period of limitation or prescription, that finding shall be binding on the claimant in respect of any claim he might make for the recovery of contribution from the contributor under section 1 above.

(2) In relation to civil proceedings before any tribunal or arbiter, the foregoing provisions of this section shall apply only if the claimant was a party to those proceedings.

Joint contributors.

5. Where, in any action of damages in respect of loss, two or more persons are, in pursuance of the verdict of a jury or the judgment of a court, found jointly and severally liable in damages or expenses, they shall be liable among themselves to contribute thereto in such proportions as the jury, or as the case may be the court, finds just.

Notice of claim.

6.—(1) The bringing of an action by the claimant to recover contribution under section 1 above shall not be precluded by reason only of the fact that the claimant has not given notice of any claim made against him in respect of the loss in question to the contributor.

(2) Notwithstanding subsection (1) above, the fact that the claimant—

- (a) has not sought to recover the contribution in the course of an action brought against him in respect of the loss, or
- (b) has not given notice of the claim made against him in respect of the loss to the contributor,

may be taken into account by the court in determining liability for the expenses of the action to recover contribution.

Prescription of obligations of contribution.  
1973 c.52.

7. For subsection (1) of section 8A of the Prescription and Limitation (Scotland) Act 1973 there shall be substituted the following subsection—

“(1) If any obligation to make a contribution by virtue of the Contribution in Damages (Scotland) Act 1988 has subsisted for a continuous period of two years after the date on which the right to recover the contribution became enforceable, and within that period there has not been—

- (a) a relevant claim made in relation to the obligation, or
- (b) a relevant acknowledgement of the subsistence of the obligation,

then as from the end of that period the obligation shall be extinguished.”

## EXPLANATORY NOTES

### *Clause 4*

Clause 4 makes provision regarding the effect of a finding of non-liability in favour of D2.

#### *Subsection (1)*

This subsection implements Recommendation 6(a), (b) and (d). It provides, firstly, that D1 is bound by a finding of non-liability in favour of D2 made after consideration of the evidence in court proceedings brought against D2, ie not on a preliminary plea but after proof on the merits. Such a finding on one ground does not, however, prevent D1 from establishing D2's liability on an entirely different ground (see paras 3.41 and 3.42 of the Report). Secondly, it provides that D1 is also bound by a finding in D2's favour on a prescription or limitation point. Thus, D1's action for relief cannot succeed if the effect of the finding is that D2's obligation to P has prescribed or that P's claim against him is time-barred at the relevant date. The finding may be one made in this country or elsewhere provided the court in question applies the law which Scots private international law rules recognise as governing the matter.

As explained in para 3.43 of the Report, the drafting of subsection (1) is wide enough to cover not only findings made in D2's favour in an action brought against him by P, but also findings made in previous contribution proceedings brought against the contributor by another wrongdoer who has himself made payment in respect of P's loss.

#### *Subsection (2)*

This subsection implements Recommendation 6(c), applying the foregoing provisions to findings made in proceedings before a tribunal or arbiter only if D1 is also a party to those proceedings.

### *Clause 5*

In implementation of Recommendation 18, this clause re-enacts section 3(1) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 providing for contribution among defenders found jointly and severally liable in damages or expenses. It does not repeat the proviso to section 3(1) to the effect that nothing in the subsection shall affect the right of the person to whom such damages or expenses have been awarded to obtain a joint and several decree therefor against the persons so found liable. In our view, these words are superfluous and can safely be omitted.

### *Clause 6*

Clause 6 deals with the giving of notice of P's claim by D1 to D2 and the effect of D1's failure to give such notice or to pursue his claim for relief using third party procedure. It implements Recommendations 11(b) and 12.

#### *Subsection (1)*

This subsection makes it clear that D1 is not required to give notice of P's claim to D2 before seeking relief. Similarly, D1 is not required to claim relief by way of third party procedure in the course of proceedings brought against him (see Recommendation 11(a)). No provision is necessary on the latter point as the use of third party procedure is a matter for the court's discretion.

#### *Subsection (2)*

Although the use of third party procedure and the giving of notice is not compulsory, the court is entitled to take account of D1's failure to take either of these steps in determining liability for the expenses of the action for relief. If, for example, D1 could have used third party procedure to pursue his claim but deliberately chose not to, it may be appropriate for him to bear at least a share of the expenses despite the fact that decree is granted in his favour. A separate action of relief merely adds to the length and expense of litigation arising out of a single incident: a possible sanction in expenses is considered to be an appropriate deterrent.

In the application of this clause to contribution proceedings by D2 against D3, the claim in question is the claim for contribution made against D2 by D1, not any claim made initially by P against D1. Similarly, the reference to court proceedings in subsection (2)(a) means any action of relief brought by D1 against D2 prior to D2's seeking contribution from D3.

### *Clause 7*

This clause implements Recommendation 14, imposing a two year prescriptive period on obligations to make contribution under this Bill. The prescriptive period runs from the date of payment.

In drafting style, this clause is almost identical to the existing section 8A(1) of the 1973 Act. The only change is in the reference to there being no relevant claim or acknowledgement within the two year period. The form of words adopted here is thought to be clearer in its meaning than that used in the existing provision. Corresponding amendment is made elsewhere in the 1973 Act (see Schedule 1).

*Contribution in Damages (Scotland) Bill*

The applicable law.

8.—(1) The law applicable in any particular case for the determination of the existence and scope of a right of contribution shall be the law which governs any relationship between the claimant and the contributor which is connected with the loss in question.

(2) Where there is no such relationship as is referred to in subsection (1) above, the law applicable as aforesaid shall be, in a case where the liability of the contributor in respect of the loss in question was in delict, the law of the place where the harmful event occurred, and, in any other case, shall be the law which governs the liability of the contributor in respect of the loss.

(3) Nothing in this section shall apply in relation to section 3(1)(b) above.

Part II

*Contributory Negligence*

Liability for contributory negligence.

9.—(1) Subject to subsection (4) below, where any person suffers loss as a result of—

(a) delict, including breach of a statutory duty, or

(b) breach of a contractual duty of care,

(other than by virtue of a deliberate act or omission intended to cause him to suffer loss), any damages which would otherwise be recoverable in an action brought in respect of the loss shall in such an action be reduced by such proportion (if any) as the court or, as the case may be, the jury finds just, having regard to the extent (if any) to which the loss was caused or contributed to by any negligence by that person or by any employee or agent of that person acting in the course of his employment or agency, as the case may be.

(2) Where any damages which would otherwise be recoverable in an action to which subsection (1) above applies fall to be reduced having regard to any negligence in terms of that subsection, the court or, as the case may be, the jury shall find, and in either case the court shall record,—

(a) the damages which would have been recoverable if they had not fallen to be reduced as aforesaid; and

(b) the proportion by which, in terms of that subsection, the damages fall to be reduced.

(3) In this section—

“action” includes an application;

“contractual duty of care” means a duty of care expressed or implied in a contract;

“negligence” means any deliberate or careless act or omission by a person which demonstrates a lack of reasonable care for his own safety or interests or, in the case of such an act or omission by an employee or agent, means any such act or omission which demonstrates in whole or in part a lack of reasonable care for the safety or interests of his employer or principal, as the case may be.

(4) Nothing in this section shall affect the operation of any term in a contract which is inconsistent with the provisions of this section.

## EXPLANATORY NOTES

### *Clause 8*

This clause, laying down the choice of law rules to determine the law governing rights of contribution in damages, implements Recommendation 17. For an explanation of the special rule contained in subsection (2) where D2's liability to P is in delict, see paras 3.102 and 3.103 of the Report.

Subsection (3) has been inserted to make it absolutely clear that the quantification of damages under clause 3(1)(b) should always be according to Scots law.

### *Clause 9*

This clause restates for Scotland the substance of the Law Reform (Contributory Negligence) Act 1945. The one major reform introduced is to provide expressly that the plea of contributory negligence should be available in answer to an action founded on breach of a contractual duty of care.

#### *Subsection (1)*

Subsection (1) implements Recommendations 20, 21, 24, 26 and 29(b)(iii). It firstly defines the circumstances in which the plea of contributory negligence may be taken, that is, in answer to claims founded on delict, including breach of statutory duty, or on breach of a contractual duty of care but excluding from both these categories claims founded on intentional wrongdoing. There is no extension of the plea into claims founded on breach of other contractual obligations or on breach of trust (see Recommendations 22 and 28). Express provision is made to deal, not only with cases of contributory negligence by the pursuer himself, but also with cases where the pursuer's employee or agent has contributed to his loss.

The drafting of this subsection is such that it applies both to cases of loss or injury where the pursuer himself has been contributorily negligent and to cases of death where it is the deceased's conduct which must be taken into account, and not the conduct of those seeking damages in respect of the death.

No special provision is made regarding the effect of upper limits on the amount of the defender's liability. This means that it is that limited amount which is further reduced on account of the pursuer's conduct (see paras 4.39 and 4.40 of the Report).

#### *Subsection (2)*

In implementation of Recommendation 29(b)(ii), this subsection restates and expands section 1(2) and (6) of the 1945 Act.

#### *Subsection (3)*

The definition of contributory negligence contained in this subsection implements Recommendation 25.

#### *Subsection (4)*

This subsection implements Recommendations 23 and 29(b)(i), allowing parties to contract out of the plea and generally preserving the effect of any contractual provisions which are inconsistent with clause 9.

*Contribution in Damages (Scotland) Bill*

Part III

*Miscellaneous Provisions*

Interpretation.

**10.**—(1) In this Act the following expressions shall, unless the context otherwise requires, have the following meanings respectively assigned to them—

“civil proceedings” means—

- (a) civil proceedings in a court,
- (b) civil proceedings before any tribunal, or
- (c) an arbitration, whether under an enactment or not,

whether in Scotland or elsewhere; and “decree” shall be construed accordingly;

“claimant” has the meaning assigned to it in section 1(1) above or, as the case may require, section 1(3) above;

“contributor” has the meaning assigned to it in section 1(1) above or, as the case may require, section 1(3) above;

“court”, in relation to Part I of this Act, means the Court of Session or the sheriff, and, in relation to Part II of this Act, means any competent court, tribunal or arbiter before whom the action or application is heard;

“loss” has the meaning assigned to it in section 1(5) above;

“payment” includes payment in kind or by way of services or other arrangement if such payment has a monetary value which is reasonably capable of being ascertained;

“relevant date” has the meaning assigned to it in section 2(2) above.

(2) For the purposes of sections 2(4) and 3(2)(b) above, an omission of the contributor giving rise to the loss in question shall be taken to have occurred when the obligation in question ceased to be effectively capable of performance.

Application to Crown.  
1947 c.44.

**11.** Without prejudice to sections 1 and 4(1) of the Crown Proceedings Act 1947, this Act shall bind the Crown.

Savings.

**12.**—(1) Nothing in this Act (including the repeals made by it) shall—

- (a) apply in respect of any loss suffered by any person where any cause of action in respect of such loss accrued before the commencement of this Act;
- (b) affect any contractual or other right of indemnity between the claimant and the contributor;
- (c) affect any contractual provision between the claimant and the contributor relating to contribution among themselves;
- (d) affect any right of subrogation.

1911 c.57.

(2) Nothing in this Act shall apply to the Maritime Conventions Act 1911, and that Act shall have effect as if this Act had not been passed.

Amendments and repeals.

**13.**—(1) The enactments mentioned in Schedule 1 to this Act shall have effect subject to the amendments respectively specified in that Schedule.

(2) The enactments set out in columns 1 and 2 of Schedule 2 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

Citation, commencement and extent.

**14.**—(1) This Act may be cited as the Contribution in Damages (Scotland) Act 1988.

(2) This Act shall come into force at the end of the period of two months beginning with the date on which it is passed.

(3) This Act extends to Scotland only.

## EXPLANATORY NOTES

### *Clause 10*

#### *Subsection (1)*

This subsection is a general interpretation provision. In particular, it implements Recommendation 4, giving an extended definition to the term “payment” to include payment in kind or the provision of a service.

#### *Subsection (2)*

This subsection implements Recommendation 5(d).

### *Clause 12*

This clause contains, in effect, transitional arrangements for the coming into force of the Bill and also makes various express savings.

#### *Subsection (1)*

This subsection implements Recommendations 15, 19 and 30. It preserves the existing law on rights of relief and contributory negligence in relation to any loss in respect of which the cause of action accrues before commencement. It also preserves rights of indemnity and subrogation and any contractual arrangements made by D1 and D2 regarding contribution between themselves.

#### *Subsection (2)*

The Maritime Conventions Act 1911 contains special provision on division of loss and rights of contribution between shipowners where two or more vessels are involved in a collision, causing damage to property or personal injury (see sections 1 and 3). These provisions are not superseded by the provisions of this Bill (cf section 3(1) of the Law Reform (Contributory Negligence) Act 1945).

SCHEDULE 1

AMENDMENT OF ENACTMENTS

*The Carriage by Air Act 1961 (c.27)*

In section 6, for the words from “1945” to “Scotland),” there shall be substituted the words “1945, section 9 and (insofar as it relates to that section) Part III of the Contribution in Damages (Scotland) Act 1988”.

*The Gas Act 1965 (c.36)*

In section 14, in subsection (3), for the words from “the Law” to “1945” there shall be substituted the words “section 9 and (insofar as it relates to that section) Part III of the Contribution in Damages (Scotland) Act 1988”, and for the word “fault” wherever it occurs there shall be substituted the word “negligence”.

In section 14, there shall be added the following subsection—

“(5) In subsection (3) above, ‘negligence’ has the same meaning as in section 9 of the said Act of 1988.”

*The Carriage of Goods by Road Act 1965 (c.37)*

In section 5(1), for the words from “section 3(2)” to “Act 1940” there shall be substituted the words “the Contribution in Damages (Scotland) Act 1988”.

*The Merchant Shipping (Oil Pollution) Act 1971 (c.59)*

In section 1, there shall be added the following subsection—

“(6) For the purposes of the application of this section to Scotland, subsection (5) above shall apply as if for the words from the beginning to ‘1948’ there were substituted the words ‘Section 9 and (insofar as it relates to that section) Part III of the Contribution in Damages (Scotland) Act 1988’, and as if for the words from ‘section’ to the end there were substituted the words ‘section as they apply in relation to any loss in terms of the said section 9’.”

*The Prescription and Limitation (Scotland) Act 1973 (c.52)*

In sections 6(1) and 7(1), for the words from “years” to “acknowledged” there shall be substituted the words “years and within that period there has not been—

- (a) a relevant claim made in relation to the obligation, or
- (b) a relevant acknowledgement of the subsistence of the obligation,”.

*The Control of Pollution Act 1974 (c.40)*

In section 88(1)(a), after the word “fault” there shall be inserted the words “(or, in relation to Scotland, the negligence)”.

In section 88(3), at the end there shall be inserted the following definition—

“ ‘negligence’ has the same meaning as in section 9 of the Contribution in Damages (Scotland) Act 1988.”

In section 88, in subsection (4), in paragraph (b), after the word “1945” there shall be inserted the words “or section 9 and (insofar as it relates to that section) Part III of the Contribution in Damages (Scotland) Act 1988”, and, at the end of the subsection, for the word “fault” there shall be substituted the words “act or omission giving rise to a liability to pay damages”.

*The Animals (Scotland) Act 1987 (c.9)*

In section 1, for subsection (6) there shall be substituted the following subsection—

“(6) Section 9 and (insofar as it relates to that section) Part III of the Contribution in Damages (Scotland) Act 1988 shall apply in relation to any injury or damage for which a person is liable under this section as they apply in relation to any loss in terms of the said section 9.”

## EXPLANATORY NOTES

### *Schedule 1*

*General.* Most of the amendments in this Schedule deal with removal of statutory references to section 3 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 and to the Law Reform (Contributory Negligence) Act 1945. In some cases, there is a straight substitution of a reference to the relevant provisions of our Bill: in others, separate provision is necessary. Where references to the 1945 Act are being changed, there may also be some amendment to the terminology used, eg translating any reference to the fault of the pursuer as a reference to his negligence in terms of clause 9. It may be noted in passing that a further amendment will require to be made by Order in Council to the Merchant Shipping Act 1979, Schedule 3, paragraph 3, inserting a reference to the contributory negligence provisions of the Bill.

### *The Prescription and Limitation (Scotland) Act 1973*

This amendment is simply to ensure consistency in style with the new section 8A(1) of the 1973 Act as substituted by clause 7 of the Bill.

### *The Animals (Scotland) Act 1987*

In amending section 1(7) to substitute a reference to our provisions on contribution for the existing reference to section 3 of the 1940 Act, we have not retained the saving at the end of the subsection for contractual or other rights of relief or indemnity. This is unnecessary given the general saving provisions contained in clause 12(1) of our Bill.

*Contribution in Damages (Scotland) Bill*

In section 1, in subsection (7), for the words from the beginning to “wrongdoers)” there shall be substituted the words “Parts I and III of the Contribution in Damages (Scotland) Act 1988”, and for the words from “loss or” to the end there shall be substituted the words “loss to which section 1 of that Act applies”.

In section 2(1)(a), for the word “fault” there shall be substituted the word “negligence”.

In section 2(3), for paragraph (a) there shall be substituted the following paragraph—

“(a) in paragraph (a), ‘negligence’ has the same meaning as in section 9 of the Contribution in Damages (Scotland) Act 1988;”.

*The Consumer Protection Act 1987 (c.43)*

In section 6, after subsection (1) there shall be inserted the following subsection—

“(1A) Parts I and III of the Contribution in Damages (Scotland) Act 1988 shall, subject to any necessary modifications, apply to any damage for which a person is liable under section 2 above as they apply to any loss to which section 1 of that Act applies.”

In section 6, after subsection (5) there shall be inserted the following subsection—

“(5A) Section 9 and (insofar as it relates to that section) Part III of the Contribution in Damages (Scotland) Act 1988 shall apply in relation to any damage for which a person is liable under section 2 above as they apply in relation to any loss in terms of the said section 9.”

Section 13

**SCHEDULE 2**

**REPEALS**

<i>Chapter</i>	<i>Short title</i>	<i>Extent of repeal</i>
3 & 4 Geo. 6. c.42.	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.	Section 3.
8 & 9 Geo. 6. c.28.	The Law Reform (Contributory Negligence) Act 1945.	The whole Act.
10 & 11 Geo. 6. c.44.	The Crown Proceedings Act 1947.	Section 4(2) and (3) and, in section 43(b), the words from “and for any reference” to the end.
14 Geo. 6. c.39.	The Public Utilities Street Works Act 1950.	Section 19(4).
1978 c.47.	The Civil Liability (Contribution) Act 1978.	In Schedule 1, paragraphs 1 and 2.
1984 c.54.	The Roads (Scotland) Act 1984.	In Schedule 9, paragraph 39(18)(c).
1987 c.43.	The Consumer Protection Act 1987.	Section 6(1)(b).

## EXPLANATORY NOTES

### *The Consumer Protection Act 1987*

The insertion of a new section 6(1A) should be read with the repeal of section 6(1)(b) referring to section 3 of the 1940 Act (see Schedule 2).

### *Schedule 2*

#### *The Law Reform (Contributory Negligence) Act 1945*

This repeal implements recommendation 29(a).

#### *The Crown Proceedings Act 1947*

Section 4(2), when read with section 43(b), provides that section 3 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 shall bind the Crown. Similar provision is made in section 4(3) in relation to the Law Reform (Contributory Negligence) Act 1945. Neither of these provisions appear to be necessary under the existing law (see the generality of sections 1 and 4(1) of the 1947 Act) and are not necessary given the terms of clause 11 of our Bill.

#### *The Public Utilities Street Works Act 1950*

Section 19(4), as substituted by the Roads (Scotland) Act 1984, Schedule 9, paragraph 39(18)(c), provides that where undertakers are required by a transport authority to give an indemnity under section 19(1) against loss or damage in respect of which another person would if sued by the authority be liable in respect of a wrongful act or negligent act or omission, but in respect of which the undertakers are not so liable, the undertakers should be entitled to recover contribution from that other person under section 3 of the 1940 Act as if they had been so liable. This special extension of the statutory right of contribution is no longer necessary as, under our scheme, D1's right of relief is not dependent on his being liable in respect of the loss in question.

# Appendix B

## **List of those who submitted written comments on Consultative Memorandum No 73.**

Association of British Insurers  
Building Societies Association  
Committee of Senators of the College of Justice  
The Right Hon the Lord Emslie, PC, Lord President of the Court of Session and  
the Right Hon Lord Ross, PC, Lord Justice-Clerk  
Faculty of Advocates  
Professor W M Gordon, Glasgow University  
Institute of Chartered Accountants of Scotland  
Institution of Civil Engineers, Glasgow and West of Scotland Association  
Law Society of Scotland  
Royal Incorporation of Architects in Scotland  
Scottish Consumer Council  
Scottish Law Agents' Society  
Sheriffs' Association