CONTRIBUTION IN A CONTRACTUAL SETTING

ERNEST J. WEINRIB*

Toronto

The intricacies of the mechanism of contribution have long posed problems for courts concerned with the proper incidence of remedies when there is potentially more than one party liable. The most significant statutory change of the last few decades which allowed contribution as between multiple tortfeasors, has been criticized as a "piece of law reform which itself seems to call somewhat urgently for reform".[1] Within the last months working papers on the various aspects of contribution have been produced by law reform bodies in both England[2] and Alberta.[3] And the timeliness of this renewed attention to an old subject has been underlined by the appearance of a spate of recent cases in which Canadian courts have grappled, with uneven success, with some particularly intractable contribution difficulties.[4]

Contribution typically involves at least three parties, the original plaintiff, who as victim or obligee is entitled to recover from more than one defendant, the defendant (D1) who has been sued by P, and a second defendant (D2) whom D1 is trying to compel to bear a proportion of the damages to which P is entitled. This article concerns itself with one difficulty in particular. What is the relevance of the fact that the liability of either D1 or D2 or both flows from the breach of a contractual duty not shared by the other? Despite the infelicitous recent judicial

* Ernest J. Weinrib, of the Faculty of Law, University of Toronto.

[1] *Bitumen and Oil Refineries (Australia) Ltd* v. *Commissioner for Government Transport* (1955), 92 C.L.R. 200 (Aust. H.C.).

[2] The Law Commission, Working Paper No. 59, Contribution (1975).

[3] The University of Alberta Institute of Law Research and Reform, Working Paper, Contributory Negligence and Concurrent Tortfeasors (1975).

[4] *Dabous* v. *Zuliani* (1974), 52 D.L.R. (3d) 664 (Ont. H.C.); *Sealand of the Pacific* v. *Robert C. MacHaffie Ltd* (1974), 51 D.L.R. (3d) 702 (B.C.C.A.); *County of Parkland No. 31* v. *Stetar* (1974), 50 D.L.R. (3d) 376 (S.C.C.); *Dominion Chain Co.* v. *Eastern Construction Co.* (1974), 46 D.L.R. (3d) 28 (Ont. H.C.); *Groves-Raffin Construction Ltd* v. *Bank of Nova Scotia* (1974), 51 D.L.R. (3d) 380 (B.C.S.C.); *British Columbia Hydro and Power Authority* v. *Kees van Westen*, [1974] 3 W.W.R. 20 (B.C.S.C.); *Martin* v. *McNeely* (1975), 10 N.B.R. (2d) 473 (S.C.).

treatment of this question and the assumption of the working papers that only statutory reform is possible, I will submit that the concept of contribution, when properly appreciated, already contains within itself resources adequate to the resolution of this problem.

The facts of the recent case of *Dabous* v. *Zuliani*[5] provide an almost paradigmatic example. Due to a negligent breach of their respective contracts by the architect (D1) and the builder (D2) a fire broke out in the fire-place chimney of P's house. P's action against D1 succeeded, and D1 was now suing D2 for contribution on the basis that the damages had "been caused or contributed to by the fault or neglect of two or more persons" and so fell within the contribution provisions of the Ontario Negligence Act.[6] Morden J. dismissed the claim on the grounds that the Negligence Act covers only actions in tort, and that although the conduct of the defendants might be characterized as negligent, the actions against them sounded in contract and not in tort. The decision is thus based on a restrictive interpretation of the Negligence Act which, while not inevitable, is at least defensible. Not only can the title be invoked as an aid in construction,[7] but the manifest legislative purpose of the statute was to reverse the common law doctrine developed from the old case of *Merryweather* v. *Nixan*[8] imposing a bar against contribution as between tortfeasors. More dubious is the holding that an action that can be characterized as lying either in contract or in tort[9] must be contractual and not tortious. Aside from the logical impossibility that this approach seems to involve, it uses legal concepts which are convenient instrumentalities for channeling the direction of legal reasoning, as factors that are both determinative of the result and obviate the need to inquire into the desirability of the result thus produced.[10]

Lurking behind the court's approach is the assumption that when D1 and D2 cause damage to P by breaching their respective

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[5] *Ibid.*

[6] R.S.O., 1970, c. 296, s. 2 (1).

[7] Driedger, The Construction of Statutes (1974), p. 107.

[8] (1799), 8 T.R. 186.

[9] "It is trite law that a single act of negligence may give rise to a claim either in tort or for the breach of a term express or implied in a contract." *Lister* v. *Romford Ice and Cold Storage Co. Ltd,* [1957] A.C. 55, at p. 573, per Viscount Simonds.

[10] *Cf.* Alf Ross, Tu-Tu (1957), 70 Harv. L. Rev. 812; Felix Cohen, Transcendental Nonsense and the Functional Approach (1935), 35 Col. L. Rev. 809.

contracts, they cannot recover contribution from each other unless they bring their conduct within the ambit of the Negligence Act. The justification for this assumption is hard to see. Given that P can recover in full from D1, it would be unfair as between D1 and D2 to force D1 to pay all and allow D2 to escape with paying none of the damages for which each is wholly liable. Contribution is the mechanism rooted in both equity and the common law which reflects this basic consideration of relative fairness. Inasmuch as D1 in discharging his own liability to P has relieved D2 of any need on his part to satisfy his own obligation to P, D1 has under the compulsion of law been forced to confer a benefit on D2 to which D2 is not entitled and which the device of contribution would force him to disgorge.[11]

Why then is it assumed that contribution as between the architect and the builder is not available? The technical explanation seems to be that it is a necessary condition for contribution that D1 and D2 be subject to a "common liability" or, as it is sometimes expressed, to a "common demand". This of course pushes the enquiry back a stage and forces us to ask what is meant by "common liability" and why it should be considered important. The English Working Paper explains that "the obligation that [the architect] was alleged to have broken was not the same as the obligation that the builder was alleged to have broken".[12] This is factually true but its relevance is questionable. In this context what is at stake is fairness in the incidence of the sanction as a matter of remedial policy and it is hard to see why this should be affected by the fact that the parties have breached a different primary obligation.[13] Once it has been determined that the breaches of contract have caused the same loss and that the loss is translatable into money damages to which both parties are liable, the difference in initial obligation recedes into insignificance and the problem which remains is that of adjusting as between D1 and D2 the money damages which P can demand that either of them wholly pay. As far as P's ability to extract a remedy is concerned, both defendants *are* subject to a common demand, and there is thus no more reason as a matter of technicality than there is as a matter of fairness for denying the possibility of contribution.

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[11] See generally Goff and Jones, The Law of Restitution (1966), p. 173 *et seq.*; Glanville Williams, Joint Obligations (1949), pp. 163 *et seq.*

[12] *Op. cit.*, footnote 2, p. 13.

[13] For the difference between primary and remedial policies, see Hart and Sacks, The Legal Process: Basic Problems in the Making and Application of Law (1958), pp. 141 *et seq.*, 478 *et seq.*

That the requirement of a common liability or the subjection to a common demand is not an obstacle to the policy of the prevention of unjust enrichment, embodied in the notion of contribution but is rather merely an abbreviated way of expressing that policy, is apparent from a consideration of the cases in which the requirement was propounded. The most notable of these are cases involving the position of the sublessee. On the one hand he is, unlike the lessee and the lessee's assignee who are bound to the head landlord by privity of contract and of estate respectively, not liable to the head landlord directly for the payment of rent, but on the other hand he can be indirectly pressured to pay the head rent by the landlord's threat of forfeiture or distress. In the seminal case of *Hunter* v. *Hunt*[14] the sublessee who had paid the head rent under the threat of distress sued the sublessee of a different parcel for contribution. The court, after toying with the significance of lack of privity of contract or estate between the litigants, eventually decided the case on the ground that there was nothing to indicate that the defendant sublessee had realized a benefit from the payment of the rent since there was no evidence that he had any chattels on the property subject to distress. In other words the evidence before the court disclosed no unjust enrichment on which contribution could bite.

Similar explanations apply to other cases in which the lack of common liability has been invoked. Thus the assignee of the lessee cannot recover contribution from the sublessee for rent paid to the landlord because the sublessee, having no obligation to pay the landlord, cannot be said to have been enriched by the assignee's payment to the landlord.[15] For the same reason the lessee who has paid the head rent has no claim against the assignee's sublessee.[16] By contrast the assignee of one parcel of the leasehold who pays the whole rent under the threat of distress, is entitled to contribution from the assignee of the other parcel because both parties are obligated to pay their respective shares

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[14] (1845), 1 C.B. 300, 135 E.R. 55. The litigants were actually assignees of the two sublessees. Contrast *Webber* v. *Smith* (1689), 2 Vern. 103, 23 E.R. 676, where the dicta envisage contribution as between sublessees.

[15] *Johnson* v. *Wild* (1890), 44 Ch. D. 146. Here also the landlord had been paid under threat of distraining, but the threat would have been ineffective against the sublessee who had been using his parcel as a garden.

[16] *Bonner* v. *Tottenham & Edmonton Permanent Investment Building Society*, [1899] 1 Q.B. 161 (C.A.). This was a case of indemnity rather than contribution but the underlying principle is the same for both.

of the rent by privity of estate and therefore one is enriched if his obligation is discharged by the other's payment.[17]

Accordingly, there is nothing mysterious in the notion of common liability. Those words do not embody a requirement that the liability of D1 and D2 share a single legal status, but simply that D1 and D2 be liable to the same person in such a way that the obligation of D2 is diminished or extinguished by the payment that D1 has been compelled to make. It follows then that the fact that the liability of the defendants flows from breaches of different contracts to do different things is irrelevant if they are concurrently liable to P for a single loss so that the action of one in satisfying a prospective judgment will have the effect of conferring a benefit on the other.

It thus appears that there is no obstacle to applying contribution to the builder-architect situation as a matter of common law even though it does not fall within the ambit of the Negligence Act. Indeed one can perhaps go further and conclude that there is no need to create a statutory right of contribution, as assumed in both Working Papers, to handle a situation which is perfectly tractable under the common law. No Canadian or English appellate court has as yet handed down a decision which irrevocably precluded allowing contribution in this context to which it seems so naturally suited. Indeed legislative intervention here might be not only superfluous but undesirable. The experience of applying a legislative scheme of contribution under the Negligence Act and parallel legislation in other jurisdictions has not been an entirely happy one.[18] Once the right of contribution is enshrined in statutory language, there is a natural tendency to lavish attention on the construction of the statute's actual words rather than on exploring the dynamics of the underlying institution. Where one can envisage many variations in the kinds of contractual relationships and in their terms, the difficulties would best be solved by the kind of case-by-case elaboration which is the common law's vaunted strength.

Two factors should facilitate judicial treatment of contribution in a contractual context as merely an instance of a more general principle forcing the restitution of gains unjustly realized at the expense of another. The first is the flowering over the last few decades of the recognition that there is such a general principle. After a period in which Lord Mansfield's conception of an

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[17] *Whitham* v. *Bullock*, [1939] 2 K.B. 81 (C.A.).

[18] *Supra*, footnote 1.

overarching notion of unjust enrichment[19] was dismissed as "well-meaning sloppiness of thought"[20] and swallowed up by the formalized fiction of implied contract,[21] the courts are now prepared to look behind the traditional categories to deeply rooted feelings of restitutionary justice.[22] Indeed one of the harbingers of this new trend was a case involving the compulsory discharge of another's liability[23] and was thus a variant of the issue at stake in the area of contribution. Discharging another's liability is itself only one aspect of the wider restitutionary issue of unrequested benefits and here the courts have been progressively broadening the grounds for recovery in circumstances falling far short of legal compulsion, such as mistake,[24] moral qualms,[25] self-interest,[26] or the practical need to protect one's own position.[27] Given this sensitive and liberal judicial attitude,[28] there is little justification for reluctance to apply the ancient restitutionary mechanism of

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[19] *Moses* v. *Macferlan* (1760), 2 Burr 1005, 97 E.R. 676 (K.B.).

[20] *Holt* v. *Markham*, [1923] 1 K.B. 504, at p. 513 (C.A.), per Scrutton L.J.

[21] *Sinclair* v. *Brougham*, [1914] A.C. 398 (H.L.).

[22] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour*, [1943] A.C. 32 (H.L.); *Deglman* v. *Guaranty Trust Co.* v. *Constantineau*, [1954] S.C.R. 725. For a recent survey of the position in Canada, see John D. McCamus, Restitutionary Remedies, in Special Lectures of the Law Society of Upper Canada: Current Problems in the Law of Contracts (1975).

[23] *Brooks Wharf and Bull Wharf Ltd* v. *Goodman Bros.*, [1937] 1 K.B. 534 (C.A.).

[24] *County of Carleton* v. *City of Ottawa* (1965), 52 D.L.R. (2d) 220.

[25] *A.-G. for British Columbia* v. *Parkland Private Hospital Ltd* (1974), 47 D.L.R. (3d) 57 (S.C.C.); *Samilo* v. *Phillips* (1968), 69 D.L.R. (2d) 411 (B.C.S.C.), aff'd on other grounds (1971), 20 D.L.R. (3d) 283 (S.C.C.).

[26] *Arnett & Wensley Ltd* v. *Good* (1967), 64 D.L.R. (2d) 181 (B.C.S.C.).

[27] *Traders Realty Ltd* v. *Stevenson Road Realty Co. Ltd*, [1968] 1 O.R. 791 (Ont. S.C., Master's Chambers).

[28] Too liberal, as the following cases on unrequested benefits show: *Estok* v. *Heguy* (1963), 40 D.L.R. (2d) 88 (B.C.S.C.), criticised by Crawford (1964), 42 Can. Bar Rev. 318; *Nicholson* v. *St. Dennis* (1974), 4 O.R. (2d) 480 (Co. Ct), reversed March 11th, 1975 (C.A.); *Greenwood* v. *Bennett*, [1972] 3 All E.R. 586 (C.A.), criticised by Anderson (1973), 36 Mod. L. Rev. 89 and Weir (1973), 32 Camb. L.J. 23; *Re Gilroy*, [1971] 3 O.R. 330 (Surr. Ct), criticised by Maddaugh (1972), 50 Can. Bar Rev. 307; *James More* v. *University of Ottawa* (1974), 49 D.L.R. (3d) 66 (Ont. H.C.), a case involving disposition of a windfall supplied by a third party rather than restitution of a benefit provided by the plaintiff. Contrast *Re Fink* (1971), 14 D.L.R. (3d) 31 (Ont. H.C.); *Owen* v. *Tate*, [1975] 2 All E.R. 129 (C.A.).

contribution for the treatment of precisely the sort of injustice for which it was excogitated.

The second factor is the existence of the statutory scheme of contribution for tortfeasors under legislation parallel to the Ontario Negligence Act. Courts have unfortunately examined this scheme only with a view to determining whether the fact situation before them falls within its words or whether it falls beyond them. There is however a third alternative. The statute can be looked upon as a statement of public policy emanating from an authoritative source and can thus serve as a basis from which judges can reason by analogy. Legislation under this approach functions as a reservoir for judicial elaboration of socially desirable decisions in much the same way as judicial precedent, business and professional custom, and the judges' own intuition as to existing societal values. The historical legitimacy and conceptual viability of this approach were pointed out four decades ago in a famous article by Dean Landis,[29] and Canadian courts have on occasion been willing to engage in it especially in the creation of tort duties and the formulation of negligence standards.[30] Accordingly, the Negligence Act can be used to show that the authoritative legislative body, in extending contribution into an area from which the judges had excluded it, must have regarded it favourably as an instrument of corrective justice. At any rate, there is little justification for using a statute which extended contribution as a device for limiting that remedy's scope.

This approach to contribution calls for nothing more than an awareness of the purpose that the device serves. It also eliminates the need to decide whether any given fact situation sounds in contract rather than tort and to pretend that there is any rational way of making this decision. It emphasizes that contribution is a unitary notion embodying a fundamental concept of

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[29] Landis, Statutes and the Sources of the Law, Harvard Legal Essays (1934), p. 213, reprinted in (1965), 2 Harv. J. of Leg. 7. *Cf.* Traynor Statutes Resolving in Common Law Orbits (1968), 17 Cath. U.L. Rev. 401.

[30] See especially the language of Laskin J. in *Jordan House Ltd* v. *Menow* (1963), 38 D.L.R. (3d) 105, at p. 110 (S.C.C.), where he describes a statute as "crystallizing a relevant fact situation which, because of its authoritative source, the Court was entitled to consider in determining on common law principles, whether a duty of care should be raised . . .". For instances from other contexts, see *Byrd* v. *Metropolitan Toronto* (1959), 22 D.L.R. (2d) 140 (Ont. H.C.) (jury notice); *Hill* v. *C.A. Parsons*, [1971] 3 All E.R. 1345, at p. 1355 (C.A.) (contract of employment).

restitutionary fairness that transcends the categories of contract and tort and for which those categories are irrelevant. Indeed there should be contribution not only between defendants who are contractually liable to the same plaintiff for the same loss, but also when the same loss is caused by the contractual breach of the one defendant and the tortious act of the other.[31]

The only remaining question is whether applying contribution in a contractual setting would pose impossible problems of judicial administration. The tentative conclusion of the Alberta Working Paper is that it would. It points out that the obligations flowing from the contracts may be widely disparate because of the presence of waivers of liability, limitations of liability by means of liquidated damage clauses, or contractual limitations periods.[32] The Alberta Working Paper is thus envisaging situations in which the positions of D1 and D2 will differ either in question of damages or in liability itself. As will be seen, while these problems require delicate treatment, they do not seem to impose insuperable difficulties, but even if they do so appear, the conclusion to be drawn is not that the whole notion of contribution in this area is undermined, but rather that it cannot be applied in certain specific situations. Restrictions on the operation of contribution need not be puffed up into a general denial of the existence of contribution in a contractual setting.

As an instance of difference in quantum of damages, the Working Paper adduces liquidated damage clauses. But the situation in which there are different ranges of contractual undertakings by the two parties in breach and different amounts which each is subject to pay upon breach seems closely to parallel the problem posed when several insurers are liable in different amounts for losses under policies which are not concurrent in range of risks they cover. The treatment in the insurance context, especially apportionment on the basis of liabilities,[33] could serve as a model

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[31] *Cf. Groves-Raffin Construction Co.* v. *Bank of Nova Scotia, supra,* footnote 4, at p. 415, where the statutory scheme was applied in this situation, but Andrews J. remarked that he would have apportioned even in the absence of statute as a matter of "common sense and logic". Contrast, however, *Allcock Laigh & Westwood Co.* v. *Patten,* [1967] 1 O.R. 18 (C.A.).

[32] *Op. cit.,* footnote 3, p. 22. The Alberta Working Paper also mentions the possibility that "other remedies than damages may be available to a contracting party". No case has so far arisen in which this was a possibility, and it is hard to imagine how it will arise as a practical matter.

[33] *American Surety Co. of New York* v. *Wrightson* (1910), 103 L.T. 663, Com. Cas 37.

and a source of experience for a court perplexed by the mechanics of contribution in a contractual setting.[34]

The possibility of limitation periods and waivers raises a more basic and complicated problem. Here the respective positions of the defendants differ not merely as to quantum but as to liability. Several stages in the enquiry must be isolated. The first question is whether there ever was a time when both D1 and D2 were liable to P. If there was no such time, there is simply nothing on which contribution can bite since there never would have been a time when either defendant could have discharged the liability of the other. For instance, if there had been a clause in the contract between the plaintiff and the builder that relieved the builder from liability for damage caused by the defect in the chimney, a contribution claim by the architect would have no basis. In these circumstances payment by D1 does not confer a benefit on D2, and there is accordingly no room for contribution.

Assume, however, that the answer to the first question is that there once was a time when both defendants were liable to P but that time is no more because of some intervening event which has relieved D2 of a liability to which he had formerly been subject. At first glance one might say that here too there is nothing on which contribution can bite since payment by D1 does not have the effect of discharging D2 from any present liability. But surely at this stage one is justified in asking a second question: if there once was a concurrent libility of D1 and D2 which has vanished because of some intervening event, what was

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[34] The English Working Paper, unlike the Alberta one, regards the problem posed by differences in quantum as quite soluble. For the solutions it canvasses, see *op. cit.*, footnote 2, p. 30. The proposal it tentatively favours is that, if the damage caused by each of D1 and D2 is £1,000 but D1 has limited his liability to £400, D1's share should be £400 and D2's £600. This is based on the feeling that the contract with P shows that D1 was ready to assume liability up to £400. But the converse argument could also be made: because the law imposes liability of £1,000 upon D2, he cannot complain if he is short that amount when all the dust settles. The flaw is that it does not follow that the quantum consequences of the several relationships between the defendants and P should govern the rights of the defendants *inter se*. Since contribution is a device for adjusting the equities between D1 and D2, each should be able to benefit proportionally from the presence of the other. Under the English proposal D2 benefits from the presence of D1 but not vice versa. The proposal in the text would apportion $\frac{400}{1000 + 400} \times 1000 = 286$ to D1 and $\frac{1000}{1000 + 400} \times 1000 = 714$ to D2.

the intervening event and who is to bear the legal responsibility for its effects? If, for instance, P had subsequently allowed the lapse of a limitation period or has gratuitously released D2 he had not merely made a free choice within the bargaining process as with an antecedent clause excluding liability, but his actions may also have resulted in the disappearance of a right which D1 would otherwise have had. In other words, the basic problem has become one of determining the protection to be afforded D1 against the snuffing out of his existing rights by other parties.

Two methods are available for protecting D1's position from the effects of a development incidental to the relationship between P and D2. Since P has caused D1 to lose the right to claim contribution from D2, the cost of this loss might be shifted to P by subtracting from the amount which P would otherwise recover from D1 an amount equal to the value of D1's lost right of contribution against D2. One example of this sort of protection for D1 can be found in the rule governing the effect of release of one surety by the principal creditor upon the right of any other several surety.[35] The disadvantage of this arrangement in the contracts or contracts-torts setting is that it leaves P, who is, after all, the victim of D1, without a full recovery. This is not easy to reconcile with the whole nature of contribution which attempts to adjust the equities between the potential defendants without impairing the right of the plaintiff to recover in full from any single one of them.

The other method of protecting D1's position is to allow D1 to claim contribution against D2 regardless of the defence that an intervening event would have given D2, if he had been sued by P. This would involve the recognition that D1's right of contribution is independent of P's original right of action against D2 and not derivative from it. Adjectives like "independent" and "derivative" are themselves, however only code-words which should not permit evasion of the more basic question inhering in them: does the legal policy which protects D2 from suit by P also require that D2 be immune from a suit brought by D1?

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[35] *Ward* v. *The National Bank of New Zealand Ltd* (1883), L.R. 8 App. Cas 755, at p. 766 (P.C.), where Sir Robert Collier pointed out that the basis of the several surety's claim to be released is that he has been deprived of his remedy for contribution in equity and that to support the claim his right to contribution must have been "taken away or injuriously affected". An analogous consequence protects against the snuffing out of a right in the subrogation context, *e.g.*, *Davis* v. *MacRitchie*, [1938] 4 D.L.R. 187 (N.S.S.C.).

This will of course depend on the specific legal policy at issue, and there is no reason why different fact patterns should not produce different answers.

One fact situation in which it seems fairly easy to justify allowing a claim of contribution in the face of a defence that would be available to D2 as against P, is where the defence in question is the elapse of a limitation period, whether statutory or contractual. In balancing D1's claim that he has discharged an obligation to which D2 was also once subject against D2's entitlement to security from suit, the proper weighting in favour of contribution is indicated by the subordination of security to contribution in cases[36] and statutes[37] dealing with analogous problems and by the trite notion that a limitation period extinguishes only a remedy and not a right and thus should be restricted in its effect to P and need not infect the claim by D1. In other circumstances the proper balance may be more difficult to ascertain.[38] But the need to choose creatively between competing values is a routine task under the common law system and should not in

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[36] *Wolmerhausen* v. *Gullick*, [1893] 2 Ch. 514; *Robinson* v. *Harkin*, [1896] 2 Ch. 415; *Brambles Construction* v. *Helmers* (1966), 114 C.L.R. 213 (Aust. H.C.); *British Columbia Hydro and Power Authority* v. *Kees van Westen, supra*, footnote 4; *Martin* v. *McNeely, supra*, footnote 4.

The position is, however, complicated by cases of the highest authority holding, as a matter of the interpretation of particular statutory language dealing with contribution between tortfeasors, that the effect of an action by P against D2 which is unsuccessful because of a defence based on a procedural defect such as the limitations period (*Geo. Wimpey Ltd* v. *British Overseas Airways Corp.*, [1954] 3 All E.R. 661 (H.L.)) or the omission of a statutorily required notice (*County of Parkland No. 31* v. *Stetar* (1974), 50 D.L.R. (3d) 376 (S.C.C.)) is that D1 cannot recover contribution from D2. The Supreme Court of Canada, speaking through Dickson J. (at p. 386), adverted to the apparent injustice of D1's rights being extinguished by someone else's procedural error but commented that it is fundamental that P be allowed to proceed against whichever tortfeasor he chooses. It is, with respect, difficult to see the logical structure of this, since allowing one defendant to proceed against the other for contribution does not in any way affect the right of P to sue whichever defendant he chooses.

[37] *E.g.*, Limitation of Actions Act, R.S.A., 1970, c. 209, s. 60, mentioned by the Alberta Working Paper, *op. cit.*, footnote 3, p. 28; Negligence Act, *supra*, footnote 6, s. 9.

[38] *E.g.*, in the fact situation of *Castellan* v. *Electric Power Transmission Pty Ltd* (1967), 69 S.R. (N.S.W.) 159 (C.A.), where the notion of contribution as an independent right was carried so far as to raise the possibility that D1 might recover contribution from D2 even if D2's success in the P-D2 action had been based not on a procedural mistake by P but on an incorrect legal decision of the trial judge.

itself be a justification for the exclusion of an entire category of restitutionary claims that would otherwise be meritorious.

In sum, the considerations canvassed by the Alberta Working Paper, which involve differences regarding either quantum or liability in the respective positions of D1 and D2 vis à vis P are not decisive objections to contribution in a contractual setting. At most they require judicial sensitivity to the underlying policies that the notion of contribution expresses and to the dynamics of the shifting factual patterns in which these policies must be effected. It might accordingly be appropriate to conclude by pointing to a situation in which contribution should *not* be allowed, and this will bring us full circle to the case of *Dabous* v. *Zuliani*[39] which was one of the starting points of this discussion. In this case, it will be recalled, D1 was an architect and D2 was a builder, and they each breached their contracts with the result that the fire-place chimney caught fire. The court, after concluding for reasons already criticized that contribution was not available here, went on to indicate by way of dicta that if contribution had been available it would not have been defeated by reason of the waiver clause defence that D2 had against P. This waiver clause deserves closer attention. It was part of a standard form agreement prepared by the architect and submitted to the builder and the plaintiff, and it provided that the issuance of the final certificate by the architect shall constitute a waiver of all claims by the plaintiff against the builder. This certificate had indeed been issued by the architect who had not noticed the defective construction. If, as was suggested earlier, the reason for allowing contribution when an event subsequent to the contract has extinguished D2's liability to P, is to afford D1 protection against the destruction of his rights through the actions of others, this reason will not support contribution in the present circumstances. Here the act which snuffed out D2's liability to P was D1's own act in issuing the certificate, and since the contract was one which was standard in his profession and which he had drawn up himself, he was presumably aware of the effect that his act would have on the liability of D2. The purpose of allowing contribution in the absence of a present liability of D2 is to protect D1 from the consequences of the acts of others. It should not be used to insulate D1 from the consequences of his own careless acts.

Contribution is a concept which is deeply rooted in our legal history. It provides a mechanism for the achievement of the

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[39] *Supra*, footnote 4.

fundamental policy which Aristotle termed corrective justice.[40] It thus transcends or should transcend the individual compartments of contract and tort into which we have fragmented our conceptualization of the law. Recognition that a unitary theme runs through all the specific applications of this mechanism should facilitate the process of solving a difficulty in one area by drawing on the experience, both decisional and statutory, which has been accumulated when the problem has presented itself in other contexts. This in turn should prompt examination and rejection of the assumption that contribution is not available between parties who have caused the same damage by violating different contractual obligations.

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[40] Nicomachean Ethics V, 4.