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CONTRIBUTION AMONG TORTFEASORS: LIABILITY ISSUES IN CONTRIBUTION LAW

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At common law a person who became liable in tort and was required to compensate the injured party could not require another person who was liable for the same injury to share in the payment of compensation. Most jurisdictions have legislation abrogating the common law rule and providing for contribution between tortfeasors. This article discusses the application of this legislation to (1) parties who, though having caused an injury, are for one reason or another not liable to the plaintiff, (2) parties whose liability is subject to a monetary limitation, (3) parties whose liability is for a tort other than negligence, and (4) parties whose liability is not in tort.

En common law, une personne qui s'est rendue coupable d'un délit et a été condamnée à redommager un plaignant ne peut demander à une autre personne, elle aussi déclarée coupable du même délit, de contribuer au dédommagement. Un peu partout des dispositions législatives ont abrogé cette règle de common law et prévu un partage du dédommagement entre les auteurs du délit. Dans cet article, l'auteur examine comment ces dispositions législatives s'appliquent, en premier, à la partie qui, quoique qu'ayant causé le préjudice, n'est pas redevable à la partie plaignante; en second, à la partie qui a une limitation monétaire de responsabilité; en troisième, à la partie dont la responsabilité délictuelle n'est pas due à la négligence; et finalement à la partie dont la responsabilité n'est pas délictuelle.

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Introduction

*Merryweather v. Nixan*¹ established the common law rule that there is no contribution among tortfeasors. One person held liable in tort and required to compensate the injured party (the "victim") in damages could not require another person liable for the same injury to share the payment of compensation. Even when two parties were jointly held liable to the victim, one party required to pay the victim full compensation could not require the other party to contribute to the satisfaction of the judgment or reimburse the first party for a portion of his payment to the victim.

The rule in *Merryweather v. Nixan* has been abrogated in most common law jurisdictions by legislation providing for contribution among tortfeasors. In general, the legislation provides that a party liable in tort and required to pay damages to the victim can obtain contribution from other parties liable in tort to the victim for the same injury. It is intended that the burden of liability be proportionate to the fault or responsibility of each party.² Payment proportionate to fault or responsibility is each tortfeasor's "fair share" of the damages. The right of contribution is the right of the tortfeasor who pays the victim more than his "fair share" to recover the excess from a tortfeasor who has paid less than his "fair share".³

The contribution statutes of four Canadian provinces (Alberta, Manitoba, New Brunswick, and Nova Scotia),⁴ all Australian states and territories,⁵ New Zealand⁶ and other Commonwealth countries⁷ are based

¹ (1799) 8 Term Rep. 186, 101 E.R. 1337 (K.B.); D. Cheifetz, Apportionment of Fault in Tort (1981), pp. 8-9; G.L. Williams, Joint Torts and Contributory Negligence (1951), pp. 80-84; J.F. Williams, The Rule in *Merryweather v. Nixan* (1901), 17 Law Q. Rev. 293. Subsequent references to Williams, *op. cit.*, footnote 1, are to G.L. Williams.

² See accompanying footnotes 69-187, *infra*.

³ See Williams, *op. cit.*, footnote 1, p. 80.

⁴ Tort-Feasors Act, R.S.A. 1980, c. T-6, s. 3; Tortfeasors and Contributory Negligence Act, R.S.M. 1970, c. T90, s. 3; Tortfeasors Act, R.S.N.B. 1973, c. T-8, ss. 2, 3; Tortfeasors Act, R.S.N.S. 1967, c. 307, ss. 2, 3.

⁵ Law Reform (Miscellaneous Provisions) Ordinance, 1955, No. 3, ss. 11, 12 (A.C.T.); Law Reform (Miscellaneous Provisions) Act, 1946, No. 33, s. 5 (N.S.W.); Law Reform (Miscellaneous Provisions) Act, 1956, No. 31, ss. 12, 13 (N.T.); Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act, 1952, No. 42, ss. 5, 6 (Qld.); Wrongs Act, 1936, No. 2267, ss. 25, 26 (S.A.); Tortfeasors and Contributory Negligence Act, 1954, No. 14, s. 3 (Tas); Wrongs Act, 1958, No. 6420, s. 24 (Vic.); Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act, 1947, No. 23, s. 7 (W.A.).

⁶ Law Reform Act, 1936, No. 31, s. 17 (N.Z.).

⁷ E.g., Law Amendment and Reform (Consolidation) Ordinance, Hong Kong Laws 1979, c. 23, s. 19; Law Reform (Tort-Feasors) Act, Jamaica Laws 1973, c. 214, s. 3; Statute Law (Miscellaneous Provisions) Act, Malawi Laws 1968, c. 5:01, s. 11; Wrongs (Miscellaneous Provisions) Act, P.N.G. Laws 1976, c. 297, s. 37; Civil Law Act, Singa-

on the 1935 English statute, the Law Reform (Married Women and Tortfeasors) Act.⁸ The 1935 act also influenced the United Kingdom legislation now in force.⁹ These statutes provide for contribution between tortfeasors, and will be referred to as the "tortfeasors acts". Contribution provisions of six Canadian provinces and the two territories (Alberta, British Columbia, New Brunswick, Newfoundland, the Northwest Territories, Prince Edward Island, Saskatchewan and the Yukon)¹⁰ are to be found in legislation which is based on the Ontario Negligence Act¹¹ and the Canadian Uniform Contributory Negligence Act.¹² These statutes provide for contribution where two or more persons are found "at fault". This may or may not restrict their operation to negligence, but, in accordance with their titles, these acts will be referred to as the "negligence acts".¹³ The negligence acts differ from the tortfeasors acts not only in the language of the contribution provisions,¹⁴ but also in the negligence acts' linkage of contribution to provisions on contributory negligence. Jurisdictions with tortfeasors acts have separate legislation governing cases of contributory negligence. Ireland¹⁵ and South Africa¹⁶ have enacted statutes of unique detail and complexity, encompassing both contribution and contributory negligence. Ireland's is, with minor variations, the statute drafted by Glanville Williams and published in his book

pore Stat. 1970, c. 30, s. 11; Supreme Court of Judicature Act, Trinidad and Tobago Laws 1980, c. 4:01, s. 26.

⁸ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6, repealed 1978, c. 47, s. 9(2).

⁹ Civil Liability (Contribution) Act, 1978, c. 47 (Eng. & N.I.); Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, 3 & 4 Geo. 6, c. 42, s. 3 (Scot.).

¹⁰ Contributory Negligence Act, R.S.A. 1980, c. C-23, s. 2; Negligence Act, R.S.B.C. 1979, c. 298, s. 4; Contributory Negligence Act, R.S.N.B. 1973, c. C-19, s. 2; Contributory Negligence Act, R.S. Nfld. 1970, c. 61, s. 3; Contributory Negligence Ordinance, R.O.N.W.T. 1974, c. C-13, s. 3; Contributory Negligence Act, Stat. P.E.I., 1978, c. 3, ss. 2, 13; Contributory Negligence Act, R.S.S. 1978, c. C-31, ss. 3, 10; Contributory Negligence Ordinance, R.O.Y.T. 1971, c. C-14, s. 3.

¹¹ Negligence Act, R.S.O. 1980, c. 315, ss. 2, 3.

¹² Uniform Law Conference of Canada, Consolidation of Uniform Acts (1978), Uniform Contributory Negligence Act, s. 2, hereafter referred to as the Uniform Contributory Negligence Act.

¹³ Alberta and New Brunswick enacted both a tortfeasors act and a negligence act providing for contribution. To the extent their provisions conflict, the tortfeasors act, being more specifically addressed to contribution, prevails over the negligence act: *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884, at p. 898, (1974), 50 D.L.R. (3d) 376, at p. 385.

¹⁴ Language adopted from the tortfeasors act is found in Ontario, Prince Edward Island and Saskatchewan provisions on contribution claims by settling tortfeasors: Negligence Act, R.S.O. 1980, c. 315, s. 3; Contributory Negligence Act, Stat. P.E.I., 1978, c. 3, s. 13; Contributory Negligence Act, R.S.S. 1978, c. C-31, s. 10.

¹⁵ Civil Liability Act, 1961, No. 41, ss. 21-33 (Ir.).

¹⁶ Apportionment of Damages Act, 1956, No. 34, ss. 2, 3 (S. Afr.).

Joint Torts and Contributory Negligence,¹⁷ which is the leading study of contribution and contributory negligence.

As the Irish, South African and other statutes now reflect, contribution is a simple concept but it has not been simple in implementation. The draftsmen of the early statutes and judges of early contribution cases could not have foreseen, let alone have provided for, many of the questions that would arise in the course of litigation and attract attention in commentary on contribution law. Furthermore, limitations of the contribution remedy that once appeared generally accepted, such as that contribution is confined to persons liable in tort, are now the subject of debate. As a consequence, amendment and reform of contribution legislation has been addressed by legislatures and law reform bodies in numerous jurisdictions.

The purpose of this article is to canvass one set of issues pertinent to the application and reform of contribution legislation: issues concerning the types of liability to which contribution does or should apply. It is a basic premise of contribution that the claimant and defendant share responsibility for the victim's injury or loss. Generally, this means that the claimant and defendant have incurred a common liability to the victim for damages.¹⁸ The common liability requirement is, though, capable of flexibility and adjustment. It might be applied so that a person whose liability to the victim is limited or non-existent is required to contribute as if there were an unlimited liability. It might be applied so that persons whose liability for damage is not in tort are brought within the contribution scheme established for tort cases (principally, negligence cases), or so that person who incur liability for certain torts are excluded from contribution. This article will consider the appropriate application of contribution legislation to parties who are not liable to the victim, parties whose liability is subject to a monetary limitation, parties whose liability is for a tort other than negligence, and parties whose liability to the victim is not in tort.

I. Immune Defendants

In typical cases of injury caused by two negligence actors, both actors are liable to the victim in tort, and an actor who has borne more than his fair share of the liability has a right to contribution from the other actor. In a significant minority of cases, however, one actor is not liable to the victim because of an immunity or other defence. It is necessary to deter-

¹⁷ *Op. cit.*, footnote 1, pp. 498-530, (Draft Concurrent Fault Act).

¹⁸ Contribution applies only to liability to pay damages. Persons obligated to restore property to its rightful owners cannot obtain contribution from each other: Williams, *ibid.*, pp. 98-99. Williams proposed that a right of contribution be created, treating a party's restoration of property as payment equivalent to its value: *ibid.*, Draft Concurrent Fault Act, s. 16, enacted in Ireland, Civil Liability Act, *supra*, footnote 15, s. 26.

mine whether a person who caused injury by wrongful conduct but is not liable to the victim can or should be required to contribute to a concurrent wrongdoer who is liable to the victim. A related issue is whether the immunity of one actor should affect the other actor's liability to the victim.

In common law jurisdictions generally, the most significant immunities to tort liability have been spousal immunity¹⁹ and the immunities of governments and their officials.²⁰ Both types of immunities have been curtailed, but they continue in force to a substantial extent. Equally significant in Canada are immunities created by workers' compensation acts, which bar actions by injured workers against employers (and their employees) included in workers' compensation schemes.²¹

There are other circumstances in which one party enjoys an exception to the general rules of tort liability, although the term "immunity" may be inapposite. In Canada, motor vehicle "guest statutes"²² and "good samaritan statutes"²³ replace ordinary negligence liability with liability limited to cases of gross negligence. These statutes apply, respectively, to actions against drivers and owners of motor vehicles by injured passengers and actions against providers of emergency medical care by the persons treated.²⁴ In Britain and Ireland labour relations legislation prevents the imposition of tort liability upon persons partici-

¹⁹ See E.R. Alexander, *The Family and the Law of Torts* (1979), pp. 37-39; J. Fleming, *Law of Torts* (5th ed., 1977), pp. 664-668; S.J. Bailey, *Intrafamily Tort Immunity: Alberta's Position* (1978), 16 *Alta. L. Rev.* 417; D.M. daCosta, *Husband and Wife in the Law of Torts*, in A.M. Linden (ed.), *Studies in Canadian Tort Law* (1968), pp. 484-508, 536-537.

²⁰ See J. Clerk and W. Lindsell, *Torts* (15th ed., 1982), paras. 2-02 to 2-27; P. Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (1971), pp. 62-117; C.H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (1977), pp. 46-80 S.L. Goldenberg, *Tort Actions Against the Crown in Ontario*, in Law Soc. U.C. Spec. Lect. (1973), p. 341; S. Makuch, *Municipal Immunity From Liability in Negligence*, in F.M. Steel and S. Rodgers-Magnet (ed.), *Issues in Tort Law* (1982), p. 219.

²¹ See J. Fleming, *Int'l Ency. Comp. Law*, vol. 15, ch. 9 (1975), pp. 5-14; T.G. Ison, *Workers' Compensation in Canada* (1983), pp. 101-103, and statutes cited therein.

²² See H.D. Horsley, R.B. Foster, *Manual of Motor Vehicle Law* (2nd ed., 1974; supp., 1981), pp. 368-397; D. Gibson, *Guest Passenger Discrimination* (1968), 6 *Alta. L. Rev.* 211; Comment, *Gross Negligence and the Guest Passenger* (1973), 11 *Alta. L. Rev.* 165.

²³ *Emergency Medical Aid Act*, R.S.A. 1980, c. E-9, s. 2; *Good Samaritan Act*, R.S.B.C. 1979, c. 155; *Emergency Medical Aid Act*, Stat. Nfld., 1971, c. 15; *Emergency Medical Aid Ordinance*, Ord. N.W.T., 1976 (1st), c. 3; *Medical Act*, Stat. N.S., 1969, c. 15, s. 38; *Emergency Medical Aid Act*, R.S.S. 1978, c. E-8; *Emergency Medical Aid Ordinance*, Ord. Y.T., 1976 (3d), c. E-3.1.

²⁴ Some "guest statutes" formerly barred all liability and thus created a true immunity. Current and former provisions in each province are outlined in Comment, *Gross Negligence and the Guest Passenger*, *loc. cit.*, footnote 22, at pp. 168-169.

pating in strikes or other action in the course of labour disputes.²⁵ Examples in the common law are cases in which the old "common employment" rule shielded an employer from vicarious liability to an injured employee²⁶ and cases in which an injured participant in crime is denied recovery from a co-participant.²⁷

Inasmuch as the tortfeasors acts provide for recovery of contribution from a "tort-feasor who is, or would if sued have been, liable in respect of the same damage"²⁸ no contribution is recoverable from a tortfeasor who was never liable to the victim.²⁹ Glanville Williams, believing that immune wrongdoers ought to be required to contribute, contended that persons under an "unenforceable liability" were "liable" for purposes of the tortfeasors acts.³⁰ Such an unenforceable liability would exist, he said, when there is a "defence which is a complete defence to the action in tort and yet . . . is not sufficient to take away all wrongful quality from the act".³¹ Unenforceable liability would exist, it appears, when all of the elements of liability exist but a special defence prevents the victim from obtaining a judgment in his favour. Thus, there would be an unenforceable tort liability if harm was caused by the negligence of an actor under a duty of care, but the actor or his employer enjoyed a spousal or governmental immunity or immunity conferred by a workers' compensation act.³² There would be no liability at all if one of the essential elements of

²⁵ See Clerk and Lindsell, *Torts*, *op. cit.*, footnote 20, paras. 15-27 to 15-38; R. Lewis and B. Simpson, *Striking a Balance: Employment Law after the 1980 Act* (1981); B. McMahon and W. Binchy, *Irish Law of Torts* (1981), pp. 448-460; R.W. Rideout, *Principles of Labour Law* (4th ed., 1983), pp. 492-520; I.T. Smith and J.C. Wood, *Industrial Law* (1980), pp. 316-335; D.M. Walker, *Law of Delict in Scotland* (2nd. ed., 1981), pp. 919-935.

²⁶ See J. Munkman, *Employer's Liability at Common Law* (9th ed., 1979), pp. 6-25; J.W. Salmond, *Law of Torts* (10th ed., 1945), pp. 99-110; P. Winfield, *Law of Tort* (4th ed., 1948), pp. 128-143.

²⁷ See W.J. Ford, *Tort and Illegality: The Ex Turpi Causa Defence in Negligence Law* (1977), 11 *Melb. U.L. Rev.* 32, 164; G.H.L. Fridman, *The Wrongdoing Plaintiff* (1972), 18 *McGill L.J.* 275; J.P. Swanton, *Plaintiff a Wrongdoer: Joint Complicity in an Illegal Enterprise as a Defence to Negligence* (1981), 9 *Syd. L. Rev.* 304; E.J. Weinrib, *Illegality as a Tort Defence* (1976), 26 *U.T. L.J.* 28.

²⁸ *Law Reform (Married Women and Tortfeasors) Act, 1935*, *supra*, footnote 8.

²⁹ See authorities cited in footnotes 39-41, *infra*.

³⁰ Williams, *op. cit.*, footnote 1, pp. 99-110.

³¹ *Ibid.*, p. 99.

³² *Ibid.*, pp. 100-105 (spousal and governmental immunities); 123 (workers' compensation). If contribution were extended to damage caused by breach of contract (see text accompanying footnotes 209-252 *infra*), liability for the damage would be unenforceable if the Statute of Frauds rendered the contract unenforceable: *ibid.*, p. 99. In formulating the concept of "unenforceable liability", Williams drew upon the Statute of Frauds and cases involving vicarious liability for harm caused by an actor immune to suit by the victim because of a spousal relationship. If a master is vicariously liable for harm caused

liability was absent—as, for example, when the actor was careless but he was not under a duty of care to the victim or the harm was too “remote” for him to be legally responsible for it.³³

One could not always predict the result if such a distinction were made. If a victim cannot recover damages because he has given consent³⁴ or gross negligence cannot be proved, as required by a guest statute or good samaritan law, or the common employment rule excludes vicarious liability, or industrial action is protected by trade disputes legislation, or certain parties are excepted from a statutory duty (either as parties owing the duty or parties owed it),³⁵ or a court applies the maxim *ex turpi causa non oritur actio*, or the common law contributory negligence rule applies,³⁶ or the action is not one which can be maintained against a tortfeasor’s estate, is this because of a defence to liability for wrongful conduct or because one of the essential elements of liability is absent?

Even if this distinction is workable, the argument that the term “liable” in the tortfeasors acts includes “unenforceable liability” is unpersuasive.³⁷ “Liable” bears its ordinary meaning of being under an obligation enforceable by legal process.³⁸ If the victim of harm cannot obtain a judgment against a person, the person is not “liable” in tort. This is the construction of the tortfeasors acts accepted by courts³⁹ and

by his servant to the servant’s wife, it would appear that the servant committed a tort. Williams deduced that the servant was under an unenforceable liability to his wife: *ibid.*, pp. 99-102.

³³ *Ibid.*, pp. 96 (remote danger); 124 (duty owed victim by one actor but not other).

³⁴ See text accompanying footnotes 73-92, *infra*.

³⁵ See *Knapp v. Railway Executive*, [1949] 2 All E.R. 508 (C.A.); *Waitapu v. R.H. Tregoweth Ltd.*, [1975] 2 N.Z.L.R. 218 (S.C.).

³⁶ This is relevant to the definition of “liable” under the tortfeasors acts if the “last opportunity” rule permits a contributorily negligent victim to recover damages from one actor; see Williams, *op. cit.*, footnote 1, p. 96. With the substitution of apportionment of damages for the common law’s complete defence, the negligent actor who does not come within the last opportunity rule is now “liable” to the negligent victim.

³⁷ The argument failed to persuade the courts in *Murphy v. Colbron* (1956), 73 W.N. (N.S.W.) 468 (S.C. Proth.), and *Howard v. Loney*, [1956] Tas. S.R. 57 (S.C.): But see Denning L.J., dissenting, in *Littlewood v. George Wimpey & Co. Ltd.*, [1953] 2 Q.B. 501, at pp. 514-520, [1953] 2 All E.R. 915, at pp. 920-924 (C.A.).

³⁸ See D.M. Walker, *Oxford Companion to Law* (1980), pp. 765-766. This is the meaning intended when “liable” or “liability” is used in this article.

³⁹ *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, [1955] A.C. 169, [1954] 3 All E.R. 661 (H.L.); *Hall v. Bonnett*, [1956] S.A.S.R. 10, at pp. 15-16 (F.C.); *Brambles Construction Pty. Ltd. v. Helmers* (1966), 114 C.L.R. 213, at p. 221 (Windeyer, J.); *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 69 D.L.R. (3d) 385, at pp. 400-404, 12 O.R. (2d) 201, at pp. 216-220 (Ont. C.A.), *aff’d sub. nom. Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, [1978] 2 S.C.R. 1346, (1978), 84 D.L.R. (3d) 344; cf. *Tomlin v. London & Lancashire Insurance Co. Ltd.*, [1962] (2) S.A. 30, at p. 31 (D.) (South African Law).

commentators other than Williams.⁴⁰ It is, therefore, clear that, without a statutory amendment, contribution under the tortfeasors acts cannot be required from a person who, by virtue of an immunity or other rule of tort law, could not be required to compensate the victim.⁴¹

The position under the Canadian negligence acts has not been as clear. The principal provisions governing contribution declare, in substance, that where two or more persons are found at fault (or negligent)⁴² they are jointly and severally liable to the person suffering damage or loss caused thereby, but as between themselves they are liable to make contribution according to their degrees of fault. The provisions can be and have been interpreted to establish a right to contribution when harm has been caused or contributed to by the fault of two or more persons, even if the victim has no action against one of them.⁴³ However, the language reflects no intent to cast any liability upon immune tortfeasors. It is hardly likely that a provision for contribution would have been appended to a

⁴⁰ See J. Charlesworth, *Negligence* (6th ed., 1977) para. 61; J. Fleming, *Law of Torts* (6th ed., 1983), p. 234; J.A. Weir, *Int'l Ency Comp. Law*, vol. II, ch. 12 (1976), pp. 66-67; Note, *Actions Against and Contribution Between Joint Tortfeasors* (1940), 7 *Solicitor* 40; cf. R.G. McKerron, *Law of Delict* (7th ed., 1971), p. 306 (*South African Law*).

⁴¹ Spousal immunity: *Chant v. Read*, [1939] 2 K.B. 346, [1939] 2 All E.R. 286 (K.B.D.); *Drinkwater v. Kimber*, [1952] 2 Q.B. 281, [1952] 1 All E.R. 701 (C.A.); *Murphy v. Colbron*, *supra*, footnote 37; *Bird v. Armstrong*, [1950] 4 D.L.R. 824, at p. 846, (1950), 27 M.P.R. 54, at pp. 84-85 (N.B. App. Div. (Harrison J.)); *Walsh v. Fairweather*, [1937] N.Z.L.R. 855 (S.C.). See also Lord Porter, dissenting in *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, *supra*, footnote 39 at pp. 184 (A.C.), 668 (All E.R.). Guest statute: *Bird v. Armstrong*, [1950] 4 D.L.R. 824, at p. 846, (1950), 27 M.P.R. 54 at pp. 84-85 (N.B. App. Div. (Harrison J.)); *Edmonds v. Nova Scotia Light & Power Co. Ltd.*, [1953] 4 D.L.R. 27 (N.S.S.C.). See also *County of Parkland No. 31 v. Stetar*, *supra*, footnote 13, at pp. 899-900 (S.C.R.), 386 (D.L.R.). Common employment: *Dowling v. Brown* (1956), 94 Ir. L.T.R. 67 (S.C.). No duty: *Davies v. Swan Motor Co. (Swansea) Ltd.*, (K.B.D., 1948), [1949] 2 K.B. 291, [1949] 1 All E.R. 620 (C.A.) (victim a trespasser to one party); *Knapp v. Railway Executive*, *supra*, footnote 35 (statutory duty not owed victim); *Howard v. Loney*, *supra*, footnote 37 (child owed parent no duty to protect itself from injury); *Lawrence v. Slatcher*, [1968] V.R. 337 (S.C.) (wife owed husband no duty to protect herself from injury); *Waitapu v. R.H. Tregoweth Ltd.*, *supra*, footnote 35 (statutory duty not owed victim). The point is made explicit in the 1978 English contribution statute, *Civil Liability (Contribution) Act*, 1978, *supra*, footnote 9: "A person is liable in respect of any damage for the purposes of this Act if the person who suffered it . . . is entitled to recover compensation from him in respect of that damage. . .". In contrast, Ireland adopted Williams' draft contribution statute, which defines "liable" as "legal liability whether or not enforceable by action": *Civil Liability Act*, *supra*, footnote 15, s. 2. Accordingly, contribution may be obtained under Irish law from persons under an "unenforceable liability".

⁴² See *Uniform Contributory Negligence Act*, *supra*, footnote 12; *Negligence Act*, R.S.O. 1980, c. 315, s. 2.

⁴³ *Keoppel v. Colonial Coach Lines Ltd.*, [1933] S.C.R. 529, [1933] D.L.R. 469 (spousal immunity); *Lappin v. Morrison* (1932), 41 O.W.N. 104 (Ont. H.C.) (workers' compensation); *Dube v. Saville*, [1952] 2 D.L.R. 382, (1951), 4 W.W.R. 361 (B.C.S.C.)

provision that persons found at fault are "jointly and severally liable" (to the victim)—a phrase not normally applied to persons enjoying an immunity or other defence—if it was contemplated that liability to contribute would be wider than liability to the victim. In some provinces there are provisions on contribution claims by settling tortfeasors which adopt the language of the tortfeasors acts.⁴⁴ Persons not liable to the victim are not liable to contribute to settling tortfeasors.⁴⁵ If the negligence acts of these provinces are not interpreted consistently with the tortfeasors acts, liability to contribute will depend upon whether the claimant settled or was sued to judgment by the victim—an undesirable and apparently unintended result.⁴⁶ The weight of authority has always been that liability to the victim is a prerequisite to contribution under the negligence acts,⁴⁷ and the Supreme Court of Canada's decision in *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*⁴⁸ would appear to leave little room for argument on this point.

(spousal immunity and guest statute); *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1974), 46 D.L.R. (3d) 28, at pp. 49-52, 3 O.R. (2d) 481, at pp. 502-505 (Ont. H.C.), rev'd on this point (1976), 68 D.L.R. (3d) 385, 12 O.R. (2d) 201 (Ont. C.A.), aff'd *sub. nom.* *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, *supra*, footnote 39 (contractual waiver of liability); D. Cheifetz, Recent Developments Under the Ontario Negligence Act (1977), 25 Chitty's L.J. 145; R.A. O'Donnell, *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 1 C.P.C. 16, at pp. 17-18.

⁴⁴ Negligence Act, R.S.O. 1980, c. 315, s. 3; Contributory Negligence Act, Stat. P.E.I., 1978, c. 3, s. 13; Contributory Negligence Act, R.S.S. 1978, c. C-31, s. 10.

⁴⁵ Cheifetz, *op. cit.*, footnote 1, p. 151; Ontario Law Reform Commission, Report No. 25, Report on Family Law: Part I—Torts (1969), pp. 34-35.

⁴⁶ *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 68 D.L.R. (3d) 385, at p. 402, 12 O.R. (2d) 201, at p. 218 (Ont. C.A.), criticized in D. Cheifetz, *loc. cit.*, *supra*, footnote 43, at pp. 147-153.

⁴⁷ Spousal immunity; *Macklin v. Young*, [1933] S.C.R. 603, [1933] 4 D.L.R. 209; *Ferguson v. Macdonald*, [1950] 1 D.L.R. 77, [1949] 2 W.W.R. 1130 (B.C.S.C.); *Bourbeau v. Szabo* (1978), 85 D.L.R. (3d) 570 (Alta. App. Div.). (ante-nuptial tort). Workers' compensation: *Wilson v. Hamilton Hydro-Electric Commission*, [1932] 3 D.L.R. 799, (1931), 40 O.W.N. 545 (Ont. H.C.); Masten J.A., dissenting in *Healy v. Runnymede Iron and Steel Co.*, [1941] 3 D.L.R. 325, at pp. 328-332, [1941] O.R. 133, at pp. 140-145 (Ont. C.A.). Guest statute: *Bates v. Illerburn* (1976), 70 D.L.R. (3d) 154, at pp. 157-158, (1976), 12 O.R. (2d) 721, at pp. 724-725 (Ont. C.A.) (Jessup J.A.). No duty: *Swan v. Canadian Pacific Railway Co.* (1959) 19 D.L.R. (2d) 51, at pp. 62-65, 29 W.W.R. 1, at pp. 13-16 (B.C.C.A.); *Fraser v. Harrison* (1968), 65 W.W.R. 624, at p. 627 (B.C.S.C.) (mother owed child no duty to protect if from injury). Compare *Cowle v. Filion* (1956), 6 D.L.R. (2d) 258, [1956] O.W.N. 881 (Ont. Co. Ct.) (injured child had no negligence action against father, from whom contribution claimed), with *Peter v. Anchor Transit Ltd.* (1979), 100 D.L.R. (3d) 37, [1979] 4 W.W.R. 150 (B.C.C.A.) (contribution obtainable if parent owed and breached duty to child). See also *Cohen v. S. McCord & Co. Ltd.*, [1944] 4 D.L.R. 753, at pp. 761-764, [1944] O.R. 568, at pp. 577-580 (Ont. C.A.) (Laidlaw J.A.) (liability of two or more persons required for contribution); criticized in Annot., [1944] 4 D.L.R. 754.

⁴⁸ *Supra*, footnote 39. See Cheifetz, *op. cit.*, footnote 1, pp. 37-41; J.R. Morse, Negligent Interpretation of the Negligence Act: A Study of the Interpretation of the

If the tortfeasors acts and Canadian negligence acts do not authorize contribution from a party who is not liable to the victim, the issue then becomes whether to enact legislation which provides for contribution or otherwise adjusts the liabilities of the parties in these circumstances. The principal options are:

- (1) preserve the *status quo*; parties not liable to the victim would continue to be free of liability to contribute, despite their responsibility for causing damages; parties liable to the victim would have no recourse to contribution from immune parties;
- (2) provide for contribution from immune tortfeasors; the amount of contribution would be the same as if they were liable to the victim;
- (3) limit the liability of non-immune tortfeasors to the victim, so that they are not adversely affected by the absence of contribution; it could be provided that non-immune tortfeasors are not liable to the victim for the portion of the victim's damages which corresponds to the degree of fault or responsibility of an immune tortfeasor.

There is, of course, a fourth option: abolish the immunity or defence which protects a party from liability to the victim. That may be the best course,⁴⁹ but this discussion proceeds on the basis that the relevant immunity or defence is retained and some rational basis for it exists.

Effects of Sections 2, 3, 6, and 9 of the Ontario Negligence Act (1980), 28 Chitty's L.J. 231, at p. 244. Even if other immune tortfeasors can be required to contribute, the Crown cannot. The Crown proceedings act of all common law provinces of Canada provide that the law relating to contribution is enforceable by and against the Crown in respect of "any liability to which it is subject". Uniform Law Conference of Canada, Consolidation of Uniform Acts (1978), Uniform Proceedings against the Crown Act, s. 5; Proceedings Against the Crown Act, R.S.A. 1980, c. P-18, s. 6; Crown Proceeding Act, R.S.B.C. 1979, c. 86, s. 2(d); Proceedings Against the Crown Act, R.S.M. 1970, c. P140, s. 7; Proceedings Against the Crown Act, R.S.N.B. 1973, c. P-18, s. 5; Proceedings against the Crown Act, Stat. Nfld., 1973, c. 59, s. 6; Proceedings against the Crown Act, R.S.N.S. 1967, c. 239, s. 5; Proceedings Against the Crown Act, R.S.O. 1980, c. 393, s. 6; Crown Proceedings Act, R.S.P.E.I. 1974, c. C-31, s. 6; Proceedings against the Crown Act, R.S.S. 1978, c. P-27, s. 6. Similar provisions are in force in other countries; Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44, s. 4(1) (U.K.); Crown Proceedings Act, 1950, No. 54, s. 8(1) (N.Z.). Accordingly, contribution is not enforceable against the Crown in respect of a liability to which it is *not* subject. In any event, contribution legislation, even if it explicitly binds the Crown, is unlikely to be interpreted so as to require contribution when the applicable Crown proceedings act provides for no liability to the victim. See P. Winfield and J.A. Jolowicz, *Tort* (10th ed., 1975), p. 594, n. 25.

⁴⁹ The inability of a co-tortfeasor to obtain contribution from an immune spouse has been considered one of the worst effects of spousal immunity, constituting a principal argument for abolition; Law Reform Committee, Report No. 9, *Liability in Tort between Husband and Wife* (1961), paras. 4, 16; G.L. Williams, *Some Reforms in the Law of Tort* (1961), 24 Mod. L. Rev. 101, at p. 102.

In New Zealand and most of Australia, tortfeasors acts have been amended to permit contribution claims against a single category of immune tortfeasors: spouses. Third parties may recover contribution as if spousal immunity did not exist.⁵⁰ In Canada, almost all common law jurisdictions have taken the third option for cases affected by spousal immunity and motor vehicle guest statutes. Everywhere but in Prince Edward Island, the victim's recovery has been reduced so as to protect non-immune tortfeasors from an excessive burden while retaining the co-tortfeasors' immunity to claims for both damages and contribution. The victim cannot recover from non-immune tortfeasors the portion of the victim's damages representing the fault of the victim's spouse or the protected motor vehicle driver and owner.⁵¹ The same rule is embodied in several workers' compensations acts: the injured worker cannot recover from third parties the portion of the damages representing the fault of immune employers and employees.⁵²

⁵⁰ Law Reform Act, 1936, No. 31, s. 17(1A), repealed 1963, No. 72, s. 9(2)(b) (N.Z.) (repealed upon abolition of spousal immunity); Law Reform (Miscellaneous Provisions) Ordinance, 1955, No. 3, s. 11(5) (A.C.T.); Law Reform (Miscellaneous Provisions) Act, 1956, No. 31, s. 12(5) (N.T.); Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act, 1952, No. 42, s. 7, repealed 1968, No. 15, s. 5 (Qld.) (repealed upon abolition of spousal immunity); Wrongs Act, 1936, No. 2267, s. 25(1)(d) (S.A.); Tortfeasors and Contributory Negligence Act, 1954, No. 14, s. 3(1)(e) (Tas); Wrongs Act, 1958, No. 6420, s. 24(1)(d) (Vic.). See also Apportionment of Damages Act, 1956, No. 34, s. 2(1A) (S. Afr.), discussed in P.Q.R. Boberg, *The Apportionment of Damages Amendment Act 58 of 1971* (1971), 88 S.A.L.J. 423, and Further and Better Reflections on the Apportionment of Damages Amendment Act 1971 (1975), 92 S.A.L.J. 330.

⁵¹ Spouses: Uniform Contributory Negligence Act, *supra*, footnote 12, s. 4; Contributory Negligence Act, R.S.A. 1980, c. C-23, s. 4; Negligence Act, R.S.B.C. 1979, c. 298, s. 5; Tortfeasors and Contributory Negligence Act, R.S.M. 1970, c. T90, s. 6, repealed 1973, c. 13, s. 2; Contributory Negligence Act, R.S.N.B. 1973, c. C-19, s. 4; Contributory Negligence Act, R.S.N. 1970, c. 61, s. 9, repealed 1982, c. 33, s. 1; Contributory Negligence Ordinance, R.O.N.W.T. 1974, c. C-13, s. 9; Contributory Negligence Act, R.S.N.S. 1967, c. 54, s. 4; Negligence Act, R.S.O. 1970, c. 296, s. 2(4), repealed 1975, c. 41, s. 7; Contributory Negligence Act, R.S.S. 1978, c. C-31, s. 9; Contributory Negligence Ordinance, R.O.Y.T. 1971, c. C-14, s. 9. Motor vehicle passengers: Uniform Contributory Negligence Act, *supra*, footnote 12, s. 3; Contributory Negligence Act, R.S.A. 1980, c. C-23, s. 3; Contributory Negligence Act, R.S.B.C. 1960, c. 74, s. 6, repealed 1970, c. 9, s. 1; Tortfeasors and Contributory Negligence Act, R.S.M. 1970, c. T90, s. 5, repealed 1980, c. 19, s. 2; Contributory Negligence Act, R.S.N.B. 1973, c. C-19, s. 3; Contributory Negligence Act, R.S.N. 1970, c. 61, s. 8; Contributory Negligence Ordinance, R.O.N.W.T. 1974, c. C-13, s. 8; Contributory Negligence Act, R.S.N.S. 1967, c. 54, s. 3; Negligence Act, R.S.O. 1970, c. 296, s. 2(2), 3, repealed 1977, c. 59; Contributory Negligence Act, R.S.S. 1978, c. C-31, s. 8; Contributory Negligence Ordinance, R.O.Y.T. 1971, c. C-14, s. 8, 1, repealed 1980 (1st), c. 20, s. 5. Repeals were consequent upon abolition of spousal immunity or repeal of the provincial or territorial guest statute.

⁵² Workers' Compensation Act, Stat. Alta. 1981, c. W-16, s. 18(2) (third party liable only for portion of damages corresponding to that party's fault); Workers Compen-

In selecting among the three options stated, one question to be considered is: upon which party or parties should the burden of loss fall, given the victim's injuries and the immunity or other defence. Under the first option (*status quo*), the burden falls upon non-immune tortfeasors. Because they are unable to obtain contribution, they must bear more than their "fair share" of the damages, i.e. the share which corresponds to the degree of their fault or responsibility. Immune tortfeasors have the benefit of the immunity and, subject to any partial defence (such as contributory negligence), the victim is entitled to full compensation from non-immune tortfeasors. Under the second option (contribution permitted), the burden of loss can be shifted to immune tortfeasors. In effect, they lose the protection of the immunity, to the benefit of non-immune tortfeasors. Immune tortfeasors will, however, be liable only for the proportion of the damages corresponding to the degree of their fault or responsibility. As in the first option, non-immune tortfeasors are liable for all of the victim's damages. Under the third option (liability to the victim diminished), the burden falls upon the victim. The immunity is retained and the victim's loss is not fully compensated by non-immune tortfeasors. Non-immune tortfeasors are protected. They are in as favourable a position as if they were liable for all of the victims' damages and then obtained contribution from immune tortfeasors.

If the only question addressed is who should bear the burden of loss, the answer is almost inevitable, at least in cases of recognized immunities. The third option will be rejected because the loss falls on the "innocent" victim rather than the tortfeasors. The first option will be rejected because it concentrates the burden on some tortfeasors and allows others to go "scot-free". The second option will be preferred because the victim's interests are protected and the burden is equitably shared by all tortfeasors.⁵³

If one considers whether liability for contribution is consistent with the immunity, the answer is given that the objects of the immunity are not served by applying it to contribution. In the case of guest statutes, there is a principal object of reducing the cost of motor vehicle liability insurance—particularly, the portion of the cost attributable to claims established by

sation Act, R.S.B.C. 1979, c. 437, s. 10(7); Workers Compensation Act, R.S.M. 1970, c. W200, s. 7(8); Workers' Compensation Act, R.S.N.B. 1973, c. W-13, s. 10(12); Workers' Compensation Act, R.S.O. 1980, c. 539, s. 8(11), (12); Workers' Compensation Ordinance, Ord. Y.T. 1973 (3d), c. 6, s. 16.2(2) (third party liable only for portion of damages corresponding to that party's fault). See Uniform Law Conference of Canada, Recommendation, Workers Compensation Act and Contribution under the Contributory Negligence Act (1981), 63 Unif. Law Conf. Can. Proc. 322; Uniform Law Conference of Canada, Report on Workers' Compensation Acts and Contribution under the Contributory Negligence Act (1982), 64 Unif. Law Conf. Can. Proc. 526.

⁵³ See Denning L.J., dissenting, in *Littlewood v. George Wimpey & Co. Ltd.*, *supra*, footnote 37; Fleming, *op. cit.*, footnote 19, at pp. 665-666; Boberg, *loc. cit.*, footnote 50,

collusion between passengers and owners or drivers.⁵⁴ It is true that this object would not be frustrated if a person other than a passenger could obtain contribution from the owner or driver; rarely would there be collusion in such cases.⁵⁵ But guest statutes also have a purpose to protect owners and drivers from the risk of lawsuits when they offer rides to passengers,⁵⁶ a purpose which is not fulfilled when an action for contribution can be maintained.

Spousal immunity has the object of preserving family harmony from friction caused by litigation between husband and wife. It also denies an opportunity for a defendant spouse to collude with a plaintiff spouse in order to obtain payment from a liability insurer.⁵⁷ It is thought that if contribution were permitted, there would be no friction and no collusion because the litigation would be between a spouse and a third party, not between the two spouses.⁵⁸ It is true that there would be no collusion, but it is not clear that there would be no family friction. There could well be friction if a wife's decision to sue a third party had the consequence of exposing her husband to an action for contribution, especially if the husband was uninsured.⁵⁹ It must, however, be conceded that it is incon-

at pp. 429-430 (88 S.A.L.J.); M.M. MacIntyre, *The Rationale of Imputed Negligence* (1944), 5 U.T.L.J. 368, at p. 372. But see Weir, *op. cit.*, footnote 40, pp. 49, 50, 53 (favouring first option); Williams, *op. cit.*, footnote 1, pp. 106-107 (favouring third option for spousal immunity); Uniform Law Conference of Canada, Report, *Contributory Negligence and Contribution* (1979), 61 Unif. Law Conf. Can. Proc., pp. 95, 97-101 (favouring third option in cases of spouses and guest passengers). Uniform Law Conference of Canada, *Uniform Contributory Fault Act*, s. 11 (1983 draft), provides for the third option in cases of immunity under the workers' compensation acts, as recommended in Uniform Law Conference of Canada, *op. cit.*, (1982), footnote 52, University of Alberta Institute of Law Research and Reform, Report No. 17, *Small Projects* (1975), pp. 41-47. This draft seems to provide that contribution can be obtained from persons enjoying other forms of immunity, who apparently fall under the general provisions for contribution; ss. 1(a), (e), 7.

⁵⁴ See Saskatchewan Law Reform Commission, *Proposals Relating to Guest Passenger Legislation* (1983), pp. 9-10, 14-16; University of Alberta Institute of Law Research and Reform, Report No. 32, *Guest Passenger Legislation* (1979), pp. 6-9.

⁵⁵ See MacIntyre, *loc. cit.*, footnote 53, at pp. 371-372.

⁵⁶ See Saskatchewan Law Reform Commission, *op. cit.*, footnote 54, pp. 15-16; University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 54, pp. 5-6.

⁵⁷ See British Columbia Law Reform Commission, Report No. 62, *Interspousal Immunity in Tort* (1983), pp. 6-10; University of Alberta Institute of Law Research and Reform, Report No. 33, *Inter-Spousal Tort Immunity* (1979), pp. 7-17.

⁵⁸ See Flemming, *op. cit.*, footnote 19, pp. 664-666; Williams, *op. cit.*, footnote 1, p. 106.

⁵⁹ Liability insurance usually covers liability to contribute when it covers liability to the victim, but immune tortfeasors may find that they are not protected by insurance. If an immunity is in force, no coverage may be provided. For example, in jurisdictions with spousal immunity or motor vehicle guest statutes, insurance policies may exclude liability

gruous to deny a third party's contribution claim for this reason while permitting one spouse to demand contribution from the other when a third party is injured.⁶⁰

Even if liability for contribution can be rationalized with spousal immunity or guest statutes, it cannot be rationalized with other immunities. Governmental immunities, good samaritan statutes and labour legislation⁶¹ protect certain activities by insulating them from the operation of tort law. The protection would be ineffective and the activities would be discouraged if liability for contribution were incurred. Workers' compensation immunities are related to allocation of compensation functions between tort law and a separate no-fault compensation scheme. One of the elements of this allocation in Canada is that participating employers gain immunity from tort liability in exchange for bearing the cost of compensating injured workers.⁶² Employers would lose the benefit of this exchange if, through contribution, they were required to bear the costs of tort liability—tort damages, which often are much higher than workers' compensation awards, and litigation expenses—in addition to the costs of workers' compensation.⁶³

Perhaps the best basis for refusing contribution from immune tortfeasors is found in the premises and objects of contribution rather than the premises and objects of the various immunities and defences. Contribution is not simply a mechanism to make those "responsible" for causing injury share the cost of injury. Its fundamental purpose is to achieve an equitable division among tortfeasors of the financial burden of liability to the victim. Contribution law removes from the victim the power to determine which tortfeasors will bear this burden and which tortfeasors will

for injuries to family members or guest passengers; Weir, *op. cit.*, footnote 40, p. 77; see Saskatchewan Law Reform Commission, *op. cit.*, footnote 54, pp. 11-12. However, motor vehicle and other liability insurance must extend to damage caused in jurisdictions without these immunities and there is no point in excluding coverage simply because there is an immunity. If insurance companies are to be permitted to withhold coverage of liability to family members or guest passengers, it should be specified that the exclusion applies only to claims by the family members or passengers themselves (or their representatives), and not to consequential claims by third parties.

⁶⁰ *Strang v. Cheney* (1981), 123 D.L.R. (3d) 735, [1981] 5 W.W.R. 86 (Alta. C.A.).

⁶¹ See text accompanying footnotes 20-25, *supra*.

⁶² See text accompanying footnote 21, *supra*.

⁶³ See discussion in Fleming, *op. cit.*, footnote 21, pp. 14-16. See also *Fischer v. Trenchard* (1963), 42 W.W.R. 701 (Alta. T.D.); *DiCarlo v. DiSimone* (1982), 140 D.L.R. (3d) 477, 39 O.R. (2d) 455 (Ont. H.C.). Workers' compensation laws may be considered to establish a limitation of damages rather than complete immunity, as injured workers are entitled to recover compensation payments. If so, the indicated consequence for contribution is that contribution should be limited to the amount of compensation which the injured worker was entitled to recover but has not obtained. Cf. text accompanying footnotes 93-97, *infra* (tort liability limited by statute).

avoid it or bear only a small portion of it. An equitable division of liability is one in which the burden of liability is borne by and appropriately apportioned among all parties liable.⁶⁴ It goes beyond the purpose of contribution law to involve parties not liable to the victim. Contribution is a new remedy founded upon a pre-existing liability. It was not intended to make wrongdoers pay for harm for which they did not previously have to pay. Hostility to an immunity and a desire to confine it within narrow limits⁶⁵ is no justification for imposing liability to contribute.

A distinct, but consistent, argument is that the basis of contribution is unjust enrichment: when one tortfeasor discharges more than his fair share of a common liability, he confers a benefit upon a co-tortfeasor who has not paid his fair share by reducing or eliminating the co-tortfeasor's liability to the victim; the co-tortfeasor is unjustly enriched unless contribution can be obtained; there is no benefit to the co-tortfeasor and, therefore, no unjust enrichment if the co-tortfeasor was not liable to the victim.⁶⁶ To this may be added practical arguments concerning the difficulty of distinguishing between immunities to tort liability, defences to tort liability and the absence of *prima facie* tort liability,⁶⁷ and of adequately justifying denial of contribution from certain categories of non-liable wrongdoers while it is recoverable from other categories. It is, therefore, submitted that liability to the victim should be a prerequisite to liability for contribution. If this is not accepted as a universal rule, it is submitted that liability to the victim should be a prerequisite to liability for contribution subject to narrowly defined exceptions, such as cases of spousal immunity.

If immune parties will not be required to contribute, one should reconsider the option of reducing the victim's recovery. This would protect third party tortfeasors from the consequences of denying contribution. It may be thought that this option is never justified because the injured victim's need for compensation is not fulfilled and the reduction of damages depends upon the fault of another person (the immune party). Canadian legislatures obviously disagree. The virtual unanimity on this point is striking.⁶⁸ The position taken in the Canadian legislation is sound. It is appropriate to deny the victim damages, to the extent the immune party is at fault, when the victim's relationship with the immune party is

⁶⁴ See Lord Porter, dissenting, in *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, *supra*, footnote 39, at pp. 181 (A.C.), 666 (All E.R.); University of Alberta Institute of Law Research and Reform, Report No. 31, *Contributory Negligence and Concurrent Wrongdoers* (1979), pp. 34-36.

⁶⁵ See Williams, *op. cit.*, footnote 1, pp. 106-107: (spousal immunity); MacIntyre, *op. cit.*, footnote 53, at p. 372 (guest statutes).

⁶⁶ See E.J. Weinrib, *Contribution in a Contractual Setting* (1976), 54 Can. Bar Rev. 338.

⁶⁷ See text accompanying footnotes 30-36, *supra*.

⁶⁸ See footnotes 51, 52, *supra*, and accompanying text.

the basis for the immunity. This is true of spousal, motor vehicle and workers' compensation immunities. As between the victim, who has voluntarily entered the relationship and enjoyed its benefits, and the third party tortfeasor, who has not entered the relationship, it is just to place the burden on the victim. In the case of workers' compensation, it is certainly fair to limit the third party's liability if the workers' compensation award is not set off against the limited liability. In contrast, when the immunity is not based upon a relationship with the victim—as when a governmental immunity applies⁶⁹—there is no reason to protect the third party tortfeasor in preference to the victim, and the victim's recovery of damages has not been reduced.

One category of immune tortfeasor must be considered separately from the rest: the tortfeasor who is not liable because he and the injured party were co-participants in criminal activity.⁷⁰ While not having an action against a co-participant, the injured party may have an action for damages against a third person. For example, a passenger in a speeding "getaway" car, injured when the car collides with another vehicle, may recover from the driver of the other vehicle (if he was negligent) but not from the driver of the getaway car. It would seem that the driver of the other vehicle cannot obtain contribution from the driver of the getaway car because the latter is not liable to the passenger. Here, of course, there is no argument that the immunity protects favoured activities by insulating them from the operation of tort law. Contribution would, if anything, deter activities that are decidedly disfavoured. Thus, one might support the South Australian Law Reform Committee's proposal to provide for contribution liability when the victim could not recover from the contribution defendant because they were engaged in a joint illegal enterprise.⁷¹ On the other hand, the more general arguments against contribution from immune tortfeasors⁷² fully apply. Furthermore, as the situation arises from the victim's own participation in criminal activity, it would be entirely appropriate to protect the tortfeasor not engaged in that activity by limiting the victim's claim against him. If a spousal, employment or vehicle passenger relationship limits a claim against one tortfeasor while barring an action against another tortfeasor, so should a criminal relation-

⁶⁹ One governmental immunity dependent upon a relationship applies to cases in which the victim and tortfeasor are both members of the armed forces. (But see *Groves v. Commonwealth* (1982), 40 A.L.R. 193 (Aust. H.C.), which decided that an action for damages could be maintained). A proposal to limit a civilian third party's liability to the portion of the damages corresponding to his own fault was inserted in, but later removed from a bill in the British Parliament which defined the immunity: Williams, *op. cit.*, footnote 1, p. 125, n. 18.

⁷⁰ See authorities cited in footnote 27, *supra*.

⁷¹ South Australian Law Reform Committee, Report No. 42, Proceedings Against and Contributions Between Tortfeasors and Other Defendants (1977), p. 9.

⁷² See text accompanying footnotes 64-67, *supra*.

ship. Accordingly, it is submitted that the victim should not recover from the other tortfeasor the portion of the total damages that corresponds to the fault of the immune co-participant.

II. Defendants Protected by Consent of the Victim

Some of the immunities discussed above, such as spousal immunity and the exclusion of tort liability by workers' compensation acts and guest statutes, arise from a relationship into which the victim has voluntarily entered. The victim's inability to hold a wrongdoer liable arises from the rule of decisional or statutory law applicable to the relationship, not from any consent or "assumption of risk" by the victim. The victim has not given consent to the exclusion of liability or assumed the risk, in a proper sense, by entering the relationship. In other cases, no such immunity or exclusion of liability bars an action by the victim against a person who caused the victim's injury, but some form of consent operates to prevent the victim from holding that person liable. The consent may take the form of an expression of consent by the victim to the other party's conduct or to exposure to the risk of injury, without recourse against the other party; a contract under which the victim agrees that the other party will not protect the victim from injury or will not be liable for injury; or an implied consent associated with the maxim *volenti non fit injuria* and, in negligence law, the doctrine of assumption of risk.⁷³ Another person may be liable to the victim for the same injury. If so, is the situation any different from that in which an immunity operates?

Under the tortfeasors acts, contribution is recoverable only from a "tort-feasor who is, or would if sued have been, liable in respect of the same damage".⁷⁴ There is no basis for allowing a contribution claim against a person excluded from all liability to the victim by the victim's consent, given before the time at which liability would otherwise commence.⁷⁵ Such a person is never "liable" and, when consent wholly excludes the existence of a tort, is not a "tort-feasor".⁷⁶ Nor is there a

⁷³ See Clerk & Lindsell, *op. cit.*, footnote 20, paras. 1-129 to 1-153; Fleming, *op. cit.*, footnote 40, pp. 264-278; P. Winfield and J.A. Jolowicz, *Tort* (11th ed, 1979), pp. 656-669; M. Hertz, *Volenti Non Fit Injuria; A Guide*, in L.N. Klar (ed.), *Studies in Canadian Tort Law* (1977), p. 101.

⁷⁴ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c), repealed 1978, c. 47, s. 9(2).

⁷⁵ *Alex Kay Pty. Ltd. v. Fife* (1966), 9 F.L.R. 246, at pp. 251-254 (A.C.T.S.C.); *Herrick v. Leonard and Dingley Ltd.*, [1975] 2 N.Z.L.R. 566, at p. 572 (N.Z.S.C.); R. Goff and G. Jones, *Law of Restitution* (2nd ed., 1978), p. 234; Weir, *op. cit.*, footnote 40, pp. 52, 56; see *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1974), 46 D.L.R. (3d) 28, 3 O.R. (2d) 481 (Ont. H.C.), rev'd (1976), 68 D.L.R. (3d) 385, 12 O.R. (2d) 201 (Ont. C.A.), aff'd *sub. nom. Giffels Associates v. Eastern Construction Co. Ltd.*, *supra*, footnote 39.

⁷⁶ Glanville Williams' theory of "unenforceable liability", see text accompanying footnotes 30-36, *supra*, would seem applicable to cases in which the victim expressly

basis for allowing a contribution claim in respect of a type of damage for which, by consent, there is no liability, even if there is liability for another type of damage.

The Canadian negligence acts left room for argument, as in the case of parties protected by a common law or statutory immunity,⁷⁷ but the law appears to have been settled by the Supreme Court of Canada's decision in *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*⁷⁸ A party whose agreement with the victim excludes liability cannot be required to contribute to a party liable to the victim for the same damage. Whatever criticisms may be made of this position,⁷⁹ it should be conceded, at least, that the provisions of the negligence acts provide no more support to a contribution claim against a party protected by the victim's consent than one against a party protected by an immunity rule. In some respects there is less support: the party whose conduct is consented to is arguably not "at fault" (or "negligent").⁸⁰

Accepting that there is now no right of contribution, should one be established by legislative amendment? Alternatively, should the party who is liable to the victim be "compensated" by reducing the extent of his liability? It is submitted, first, that any such action be confined to cases in which the victim contractually exempts a person from a liability which would otherwise exist.⁸¹ It should not extend to other cases in which the victim's consent is the basis of a party's non-liability—especially cases of assumption of risk, as proposed by the South Australian Law Reform Committee and others.⁸² There is no justification for contribution from a party who is not subject to a *prima facie* case of

agrees by contract that the other party shall not be liable. He concedes, however, that there is no right to contribution in these circumstances; Williams, *op. cit.*, footnote 1, pp. 114-115. Any possibility that contribution can be based on an unenforceable liability is removed in England by the 1978 contribution statute's definition of "liable": "A person is liable in respect of any damage for the purpose of this Act if the person who suffered it . . . is entitled to recover compensation from him in respect of that damage. . ."; Civil Liability (Contribution) Act, 1978, c. 47, s. 6(1) (Eng. & N.E.).

⁷⁷ See text accompanying footnotes 42-48, *supra*.

⁷⁸ *Supra*, footnote 39. See D. Cheifetz, Contribution Between Tortfeasors Revisited: *Giffels Associates Limited v. Eastern Const. Company* (1978), 26 Chitty's L.J. 109, at pp. 110-111.

⁷⁹ See Cheifetz, *loc. cit.*, footnote 43. *Contra*, L.N. Klar, Contribution Between Tort-Feasors (1975), 13 Alta. L. Rev. 359, at p. 363.

⁸⁰ See Uniform Contributory Negligence Act, *supra*, footnote 12 ("at fault"); Negligence Act, R.S.O. 1980, c. 315, s. 2 ("at fault or negligent").

⁸¹ See Civil Liability Act, 1961, No. 41, s. 35(1)(f) (Ir.), adopting Williams, *op. cit.*, footnote 1, Draft Concurrent Fault Act, s. 25(1)(e); Apportionment of Damages Act, 1956, No. 34, s. 2(10) (S. Afr.).

⁸² South Australian Law Reform Committee, *op. cit.*, footnote 71, pp. 9-10; Klar, *loc. cit.*, footnote 79, at pp. 365-367.

liability to the victim, and there is no satisfactory distinction between consent as preventing *prima facie* liability and consent as a waiver of liability, absent an express contractual provision. Surely a person whose conduct is consented to by the victim should not be required to contribute, and courts should not be asked to decide, in order to extend contribution, that assumption of risk is a defence to a *prima facie* case of negligence rather than a circumstance in which no duty of care is owed.

It is submitted, second, that if contribution is extended to persons liable in contract,⁸³ there should be no attempt to include persons enjoying contractual "exemptions" from liability. The concept of a contractual exemption or waiver of contractual liability makes little sense when the question is whether a contracting party can be required to contribute to a non-contracting party, even if the contract is drafted in terms of exemptions, exclusions, waivers, limitations and the like. In substance, the contracting party is not liable on the contract and should be so treated.

Suppose that only cases in which the victim contractually exempts a party from a non-contractual liability would be affected. Should the legislature subject such a party to a contribution claim by a party liable to the victim for the same damage? Should the legislature compensate the liable party for the absence of contribution by reducing his liability to the victim—i.e. by deducting the non-liable party's "share" from the victim's recovery? Or should the legislature maintain the *status quo*, in which the victim's recovery from the liable party is unaffected by the contractual exemption but the exemption prevents contribution?

Each option is subject to serious objections. Under the *status quo*, a contract to which a person is not a party deprives him of a right to contribution which would otherwise be available, thus requiring him to bear alone liability for harm caused in part by another person.⁸⁴ This contravenes the principle that contracts should not impair the rights of non-contracting parties. Permitting contribution would mean that contracting parties could not rely upon contractual exemptions to limit their liability. Carefully constructed commercial arrangements would be undetermined.⁸⁵ This might not be a serious concern if contribution were limited to cases of tortiously-inflicted personal injury and damage to non-commercial property, but the growth of tort liability for economic loss and possible extension of contribution to breaches of contract weigh against permitting contribution against a contracting party not liable to the

⁸³ See text accompanying footnotes 209-252, *infra*.

⁸⁴ See *Alex Kay Pty. Ltd. v. Fife*, *supra*, footnote 75, at pp. 251-254; Williams, *op. cit.*, footnote 1, pp. 114-115; Klar, *loc. cit.*, footnote 79, at pp. 365-367.

⁸⁵ Weir, *op. cit.*, footnote 40, p. 52; South Australian Law Reform Committee, *op. cit.*, footnote 71, pp. 11-12.

person suffering loss.⁸⁶ If the party enjoying the exemption is open to a contribution claim, he may insist upon indemnification by the victim. This would produce circuitous litigation.⁸⁷ Permitting contribution seems inappropriate when the claimant has participated in the same transaction or project with the defendant. The claimant might have protected his interests by contractual or other means before the victim was injured.⁸⁸ Even if contribution is confined to cases of contractual exemption from non-contractual liability, courts would have difficulty in distinguishing between an agreement to exemption from liability and agreement to circumstances in which there is no liability (when liability would be personal rather than vicarious).⁸⁹

This last point applies also to the option of reducing the victim's recovery, but that is usually attacked on the ground that exemption of another person from liability is not a justification for removal of a victim's right to full compensation from a wrongdoer: the victim's interests should prevail over a defendant's; why permit the non-contracting party to benefit from an agreement he did not join?⁹⁰ Nevertheless, this option has been advocated strongly as producing the most appropriate apportionment of loss in the circumstances, and has been adopted in Ireland and South Africa and proposed in Canadian draft legislation.⁹¹

No one of these options produces the best results in all or even most circumstances. Nevertheless, one might venture the conclusion that permitting contribution is the least satisfactory option. Reducing the victim's recovery seems a more attractive means of protecting people from contracts they did not enter. It does, however, advance wrongdoers' interests ahead of the interests of injured victims and require courts to draw a distinction that may be elusive. It may be that the case for either reform is not, on balance, strong enough to support any change from the *status quo*.⁹²

⁸⁶ See South Australian Law Reform Committee, *ibid.*, pp. 9-12, which recommends that contribution not be affected by consent or waiver of rights prior to injury, but concedes that a different position may be appropriate in cases of economic loss.

⁸⁷ See Williams, *op. cit.*, footnote 1, pp. 120-122.

⁸⁸ See Weinrib, *op. cit.*, footnote 66, at p. 349 (discussing example in which contribution claimant's issuance of architect's certificate shields defendant builder from liability to victim).

⁸⁹ See also arguments against permitting contribution from immune tortfeasors in text accompanying footnotes 64-67, *supra*.

⁹⁰ Weir, *op. cit.*, footnote 40, p. 52; Law Commission, Working Paper No. 59, Contribution (1975), para. 11(d); McKerron, *op. cit.*, footnote 40, pp. 116, 316; Weinrib, *loc. cit.*, footnote 66, at p. 347.

⁹¹ See Williams, *op. cit.*, footnote 1, pp. 114-115, 120-122, 427; Klar, *loc. cit.*, footnote 79, at pp. 365-367; Civil Liability Act, 1961, No. 41, s. 35(1)(f) (Ir.); Apportionment of Damages Act, 1956, No. 34, ss. 2(10), 4(1)(b) (S. Afr.); Uniform Law Conference of Canada, Uniform Contributory Fault Act, s. 12(2) (1983 draft).

⁹² A related but seldom-considered point appears in the Law Commission's report on contribution. An agreement entered into by the victim may contain an arbitration clause.

III. Monetary Limitations of Liability

Statutes and contractual provisions which immunize a party from liability for damages serve to protect the party from the financial hazards of liability-producing activities. More limited protection may be achieved by statutes and contractual provisions which limit a party's liability for damages to an amount lower than the sum which otherwise would be awarded. When a statute or contractual provision confers total immunity, it is doubtful that the immune party can or should be subject to a claim for contribution. In contrast, when a statute or contractual provision merely limits the quantity of damages, it is clear that the protected party can and should be subject to contribution.⁹³ The question is: in what amount?

If a victim's action against a tortfeasor or other wrongdoer is subject to a monetary ceiling set by statute, the wrongdoer cannot properly be required to pay a greater amount through contribution proceedings. If, for example, the ceiling is \$10,000, any contribution claim should be limited to \$10,000 less what the wrongdoer has paid the victim. The statutory ceiling has the purpose of insulating the wrongdoer from a greater drain on its finances. This purpose would be thwarted if the total sum recoverable in damage and contribution proceedings exceeded \$10,000. The language of the tortfeasors and Canadian negligence acts contemplates apportionment in proportion to fault or responsibility,⁹⁴ but does not exclude consideration of statutory limitations of liability. If the statutory ceiling is in disrepute, it is tempting to hold that it is addressed only to actions for damages and has no bearing on contribution proceedings, but this temptation should be resisted.

There is no reason to limit contribution to an amount less than the monetary ceiling. If the ceiling is \$10,000, total damages are \$30,000, and the protected wrongdoer's responsibility is 40%, it might be argued that the wrongdoer's share of the damage is \$4,000: 40% of \$10,000, which is the amount for which he shares a common liability to the victim.

The arbitration clause is, in effect, an agreement that a claim shall not be maintainable if it is not upheld by the arbitrator. If the arbitrator rejects the victim's claim, the other party is not liable to the the victim. Should a contribution claim against that party be foreclosed by the arbitrator's decision? The Law Commission rejected this solution as "harsh", noting that the arbitrator would have been selected by the victim and contribution defendant pursuant to an agreement to which the claimant was not a party; Law Commission, Report No. 79, Law of Contract: Report On Contribution (1977), paras. 66-67. This seems much less "harsh" than when contribution is foreclosed by an agreement that the defendant shall not be liable, with no arbitration.

⁹³ Cheifetz, *op. cit.*, footnote 1, pp. 110-111; Fleming, *op. cit.*, footnote 40, p. 234, n. 1; Weir, *op. cit.*, footnote 40, pp. 70-71; Williams *op. cit.*, footnote 1, p. 167. This is to be distinguished from a provision which limits liability according to the type of damage; see text accompanying footnotes 74-80, *supra*. Compare *Dabous v. Zuliani* (1976), 68 D.L.R. (3d) 414, 12 O.R. (2d) 230 (Ont. C.A.) (contribution claim supported by establishing that damage sustained by victim was outside scope of waiver clause).

⁹⁴ See text accompanying footnotes 98-101, *infra*.

The proper approach is to compute the wrongdoer's share as if the statutory ceiling did not exist—here, 40% of \$30,000 = \$12,000—and then reduce the share to the amount specified by the statute—here, \$10,000.⁹⁵ The same applies when claims for damages or contribution are brought in a court whose jurisdiction is limited to an amount set by statute—the limit should attach only after contribution shares are determined on the basis of the damages otherwise obtainable. The position advocated appears to be in accord with current law.⁹⁶ Any doubt should be resolved by legislation.⁹⁷ Ordinarily, statutory limitation of liability is not based upon a voluntary relationship between the victim and the party whose liability is limited. It follows that the other wrongdoer's liability to the victim should not be limited on account of limitation of contribution. This is a burden placed on the wrongdoer by the statute.

Different considerations apply when the victim's recovery from a wrongdoer is limited by contractual agreement. When one wrongdoer's liability is limited by statute and another's liability is not, the latter may

⁹⁵ Law Commission, *op. cit.*, footnote 92, paras. 78-79; University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, Draft Concurrent Negligence and Contribution Act, s. 11(2); Uniform Law Conference of Canada, *op. cit.*, footnote 53, Draft Contributory Negligence and Contribution Act, s. 12(2) (omitted in later drafts); authorities cited in footnote 93, *supra*.

⁹⁶ *Unsworth v. Commissioner for Railways* (1958), 101 C.L.R. 73 (Aust. H.C.) (tortfeasors act; monetary limit of liability); *Plant v. Calderwood*, [1969] N.Z.L.R. 752 (S.C.), *aff'd sub. nom. Calderwood v. Nominal Defendant*, [1970] N.Z.L.R. 296 (C.A.) (same); cf. *Malat v. Bjornson*, [1980] 2 W.W.R. 764, at p. 767 (B.C.S.C.) (negligence act; tortfeasor's liability reduced by insurance). These cases do not dispose of the argument that if the victim obtained a judgment against the protected wrongdoer in the amount of the statutory ceiling, in proceedings to which the contribution claimant was not a party, the judgment fixes the "damage" for which the wrongdoer is "liable" and contribution is for the share of this amount corresponding to the wrongdoer's fault or responsibility relative to the contribution claimant. This may be supported by older cases involving contributory negligence, which held that a court may not consider damages in excess of the amount claimed (or of the court's jurisdiction) in apportioning damages between the defendant and a negligent plaintiff: *Kelly v. Stockport Corporation*, [1949] 1 All E.R. 893 (C.A.); *Anderson v. Parney*, [1930] 4 D.L.R. 833, (1930), 66 O.W.N. 112 (Ont. App. Div.); *Parker v. Hughes*, [1933] O.W.N. 508 (Ont. C.A.); *McQuarrie v. Wight*, [1942] 2 W.W.R. 449 (Alta. D.C.); see *Marks v. Victorian Railways Commissioners*, [1955] V.R. 1 (F.C.) (rule changed by statute). But this has been disapproved in more recent cases: *Unsworth v. Commissioner for Railways* (1958), 101 C.L.R. 73, at pp. 88 (Fullagar J.), 93-94 (Taylor J.) (Aust. H.C.); *Burkhardt v. Beder*, [1963] S.C.R. 86, at pp. 90-92, (1962), 36 D.L.R. (2d) 313, at pp. 317-319, discussed in Cheifetz, *op. cit.*, footnote 1, pp. 240-242. Furthermore, the apportionment formula of the tortfeasors acts (although perhaps not the Canadian negligence acts) is sufficiently flexible to support an apportionment based on the largest (rather than smallest) amount of liability incurred by a tortfeasor. See text accompanying footnotes 98-101, *infra*.

⁹⁷ England and South Africa provide that a wrongdoer's contribution is limited to the amount to which a statute limits damages recoverable by the victim. Civil Liability (Contribution) Act, 1978, c. 47, s. 2(3) (Eng. & N.I.); Apportionment of Damages Act, 1956, No. 34, s. 4(1)(c) (S. Afr.).

properly be "bound" by the statute in order to achieve its objects. One has difficulty in accepting a parallel proposition when a contract rather than a statute is involved. If the second wrongdoer is "bound"—that is, if the first wrongdoer cannot be made to pay through contribution an amount in excess of the contractual ceiling—the second wrongdoer bears a burden disproportionate to his responsibility for the victim's loss. Perhaps this should not result from a contract to which the second wrongdoer was not a party.

The tortfeasors act provide that "the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage".⁹⁸ "[H]aving regard to the extent of [a contracting party's] responsibility for the damage, it would seem that contribution is not limited to the contractual ceiling", and it is not "just and equitable" to apply the ceiling to a non-contracting party's contribution claim.⁹⁹ The Canadian negligence acts speak with apparent dogmatism of "contribution . . . in the degree in which [the parties] are respectively found to have been at fault".¹⁰⁰ Yet it does not seem impossible under either formula to limit a contracting party's payments to the maximum liability provided by the contract.¹⁰¹

Although what is "just and equitable" may depend upon the nature of the contract(s) involved, the basis of the victim's cause of action, the type of injury sustained and the relationship between the parties to the contribution claim, it is expedient to adopt a general rule for circumstances in which liability is limited but not excluded by contract. The options parallel those available when liability is excluded: first, limit contribution to the maximum liability provided by the contract, after a deduction for any damages paid the victim by the defendant; second, permit contribution as if liability were not limited; third, limit contribution, as in the first option, and reduce the non-contracting party's liability to the victim to the extent contribution is limited—in other words, prevent the victim from recovering from the non-contracting party as damages the difference (if any) between contribution as limited on account of the contract and the amount of contribution obtainable if the contract did not contain the limit.¹⁰²

⁹⁸ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(2), repealed 1978, c. 47, s. 9(2).

⁹⁹ Williams, *op. cit.*, footnote 1, p. 167.

¹⁰⁰ Uniform Contributory Negligence Act, *supra*, footnote 12, s. 2(2).

¹⁰¹ Cheifetz, *op. cit.*, footnote 1, pp. 110-111 (negligence acts); Weir, *op. cit.*, footnote 40, pp. 52, 71 (tortfeasors acts); Uniform Law Conference of Canada, Contributory Fault and Contribution—Report of the Alberta Commissioners (1982), 64 Unif. Law Conf. Can. Proc. 118, at p. 122 (language taken from tortfeasors acts).

¹⁰² Law Commission, *op. cit.*, footnote 90, para. 49-50. The Law Commission mentioned an additional option of contribution confined to the amount for which both

Suppose that the victim's damages are \$30,000; a contract limits one party's liability to \$10,000 and his responsibility for the damages is 40%; the non-contracting party's liability is unlimited and his responsibility is 60%. Under the second option, the contracting party would contribute 40% of \$30,000 = \$12,000. Under the first and third options, contribution would be limited to the \$10,000 contractual maximum. The third option would reduce the non-contracting party's liability to the victim by \$2,000 from \$30,000 to \$28,000, \$2,000 being the amount of contribution lost on account of the contractual provision (\$12,000 less \$10,000). After \$10,000 contribution, the non-contracting party will have borne his appropriate share of the damages: 60% of \$30,000 = \$18,000. Under any option, of course, the amount of contribution recoverable would be reduced by any amount the defendant has paid the victim.

The first option was advanced as the proper solution when liability is limited by statute. It places a burden on the party who does not enjoy the limitation. He bears more than his fair share of liability. When liability is limited by contract, it would seem more appropriate to place a consequential burden on one of the contracting parties than on the non-contracting party. The second option—contribution irrespective of the contract—is open to the same objections as when the contract excludes liability entirely¹⁰³

parties are liable. Suppose that the victim has suffered a \$12,000 loss and one party's liability is limited by contract to \$4,000; that party's responsibility for the loss is 40%; the non-contracting party's liability is unlimited and his responsibility is 60%. This option would provide for contribution towards the \$4,000 common liability in the amounts of \$1,600 (40% of \$4,000) and \$2,400 (60% of \$4,000) by the contracting and non-contracting party respectively. The non-contracting party would bear the remaining \$8,000 of liability alone. The Law Commission rejected this option as unduly favourable to the party enjoying the contractual limitation, who was willing to assume liability up to the maximum set by the contract; *ibid.*, paras. 50-51. The contracting party might contend that this option is embodied in current law if he was held liable to the victim for \$4,000 prior to the contribution claim. See footnote 96, *supra*. Weinrib, *op. cit.*, footnote 66, at pp. 345-346, suggests another form of apportionment: apportionment in proportion to the maximum liabilities of each party to the victim. Applied to the foregoing example, the contribution share of the party whose liability is limited to \$4,000 would be:

$$\frac{4000}{4000 + 12,000} \times 12,000 = \frac{1}{4} \times 12,000 = \$3,000. \text{ The share of the other party} \\ \text{would be } \frac{12,000}{12,000 + 4000} \times 12,000 = \frac{3}{4} \times 12,000 = \$9,000. \text{ This formula was}$$

proposed for application to parties liable in contract. It has merit when two parties in substance insure the victim against the same risk. It does not have merit for the broader range of cases in which there is liability for damage, including cases in which liability is for breach of contract. Suppose the victim to have been injured to the extent of \$12,000 by the combination of negligence and a breach of contract subject to a \$4,000 ceiling. There is no reason to limit contribution from the contracting party to less than \$4,000 if he is at least $\frac{1}{3}$ responsible for the victim's injury. A case in which both parties cause damage by breaches of separate contract is indistinguishable.

¹⁰³ See text accompanying footnotes 84-91, *supra*.

and has no noticeable support. If, however, contribution should be made available when a contract insulates a party from all liability to the victim, it would be incongruous to limit contribution on account of a limitation of liability. This leaves the third option as the preferred choice. It has its advocates and has been adopted by Ireland and South Africa,¹⁰⁴ but it is predictably attacked on the ground that the victim should not be deprived of the usual right to full compensation from a wrongdoer for having a contractual agreement with another party and suffered breach.¹⁰⁵ It is the first option—contribution limited to the amount set by the contract and no reduction of the victim's recovery—that is most likely to win acceptance by law reform bodies and legislatures.¹⁰⁶

IV. *After Judgment for the Defendant*

In most instances, a timely contribution claim will succeed when it is established that the defendant incurred liability to the victim. Liability is established by the grant of judgment for the victim against the contribution defendant or by proof that the victim would have been granted judgment had the contribution defendant been sued.¹⁰⁷ Suppose the victim sued the contribution defendant unsuccessfully, judgment being entered in the defendant's favour. A contribution claimant might be able to show that a diligent and timely suit against the contribution defendant would have been successful. If so, should a contribution claim be entertained, or should it be barred by the judgment for the defendant?

The tortfeasors acts provide for contribution "from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage. . . ."¹⁰⁸ When the victim's action against a defendant has failed

¹⁰⁴ See Cheifetz, *op. cit.*, footnote 1, pp. 110-111; Williams, *op. cit.*, footnote 1, pp. 167-168; Civil Liability Act, 1961, No. 41, s. 35(1)(g) (Ir.); Apportionment of Damages Act, 12956, No. 34, ss. 2(10), 4(1)(c) (S. Afr.).

¹⁰⁵ Law Commission, *op. cit.*, footnote 92, para. 74

¹⁰⁶ Law Commission, *ibid.*; South Australian Law Reform Committee, *op. cit.*, footnote 71, pp. 11-12; University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, pp. 72-73; Uniform Law Conference of Canada, *op. cit.*, (1979), footnote 53, Draft Contributory Negligence and Contribution Act, s. 12(2); Weir, *op. cit.*, footnote 40, pp. 52, 71. A later draft of the Uniform Law Conference of Canada provides that when there is a partial release of liability for damages, the victim's claim against non-released wrongdoers is reduced by the degree of the released wrongdoer's fault—an extreme version of the third option; Uniform Law Conference of Canada, Uniform Contributory Fault Act, ss. 1(d), 12(2) (1983 draft); Civil Liability (Contribution) Act 1978, c. 47, s. 2(3) (Eng. & N.I.), discussed in A.M. Dugdale, The Civil Liability (Contribution) Act (1979), 42 Mod. L. Rev. 182, at pp. 186-187.

¹⁰⁷ *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, *supra*, footnote 39.

¹⁰⁸ Law Reform (Married Women and Tortfeasors) Act. 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c), repealed 1978, c. 47, s. 9(2)

but a contribution claimant can prove that the victim could have maintained an action, it would be accurate to describe the defendant as a "tort-feasor who . . . would if sued have been, liable in respect of the same damage".¹⁰⁹ The language of the Canadian negligence acts is less favourable to the contribution claim, but not dispositive. "[W]here two or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, . . . they are liable to make contribution. . . ."¹¹⁰ If the victim's action against the defendant fails, the defendant is not "jointly and severally liable". If, however, the defendant would have been found "jointly and severally liable" in a timely and diligently prosecuted action, he might fall within this provision for contribution.

The possibility of awarding contribution under the tortfeasors acts against a defendant granted judgment in the victim's action has been foreclosed by the House of Lords' disposition of *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*¹¹¹ It is curious that the *Wimpey* case has had this effect. The victim's action against the contribution defendant failed because it was found to be barred by the statute of limitations. The question of whether a contribution claim could be maintained in these circumstances divided the House of Lords. Only two of the Law Lords—Viscount Simonds and Lord Tucker—took the position that the judgment in the victim's action precluded contribution. They relied on the language of the English tortfeasors act, concluding that the defendant was not a "tort-feasor who is . . . liable" because he was not held liable, and the defendant was not a "tort-feasor who . . . would if sued have been, liable" because it was actually sued and held not liable; a person sued and held not liable fell outside the provision for contribution. Lord Porter and Lord Keith of Avonholm disagreed, interpreting the phrase "tort-feasor who . . . would if sued have been, liable" as not excluding a tortfeasor who had been sued by the victim and found not liable. The fifth Law Lord, Lord Reid, believed that the contribution claim in the *Wimpey* case could not be maintained, but for a different reason: the limitation period applicable to the victim's cause of action against the contribution defendant had expired before the victim sued the contribution claimant. He did not accept that the phrase "tort-feasor who . . . would if sued have been, liable" excluded all tortfeasors who had been sued. Nevertheless, the case is taken to have established that a defendant granted judgment in the victim's action is not subject to contribution claims under the

¹⁰⁹ See *Morgan v. Ashmore, Benson, Pease & Co. Ltd.*, [1953] 1 W.L.R. 418, [1953] 1 All E.R. 328 (Q.B.D.); Lords Porter and Keith dissenting, in *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, *supra*, footnote 39; G.L. Williams, *Limitation of Claims to Contribution Between Tortfeasors* (1953), 103 Law J. 211, at p. 212.

¹¹⁰ Uniform Contributory Negligence Act, *supra*, footnote 12, s. 2(2).

¹¹¹ *Supra*, footnote 39.

tortfeasors acts.¹¹² Thus, the victim's commencement of an action barred by the statute of limitations operates to insulate the defendant from liability to contribute,¹¹³ as does judgment "on the merits", however erroneous.¹¹⁴ In *County of Parkland No. 31 v. Stetar*,¹¹⁵ the Supreme Court of Canada held that a co-tortfeasor could not obtain contribution from a county when the victim's action against the county had been non-suited for failure to give timely notice of claim, as required by statute. It is, therefore, necessary to amend the tortfeasors acts in order to preserve the remedy of contribution when the victim initiates an action terminated by judgment for the defendant.¹¹⁶ The *Stetar* case did not settle the question of whether

¹¹² *Hart v. Hall & Pickles Ltd.*, [1969] 1 Q.B. 405, at pp. 409-411, [1968] 3 All E.R. 291, at pp. 292-293 (C.A.) (Lord Denning M.R.); *Kelly v. Newcastle Protective Coating Pty. Ltd.*, [1973] 2 N.S.W.L.R. 45, at pp. 51-52 (C.A.); *County of Parkland No. 31 v. Stetar*, *supra*, footnote 13, at pp. 896-899 (S.C.R.), 384-386 (D.L.R.); *East African Railways & Harbours v. East African Road Services Ltd.*, [1971] E.A. 1 (C.A.), at pp. 4 (Spry V.-P.), 7-8 (Duffus, P., dissenting); P. Winfield and J.A. Jolowicz, *Tort* (10th ed., 1975), p. 550.

¹¹³ *Hart v. Hall & Pickles Ltd.*, *ibid.*; *Aleman v. Blair* (1963), 44 W.W.R. 530 (Alta. T.D.); *East African Railways & Harbours v. East African Road Services Ltd.*, *ibid.*, at pp. 4-5 (Spry, V.-P.), 7-8 (Duffus, P., dissenting).

¹¹⁴ *Johnson v. Cartledge*, [1939] 3 All E.R. 654 (K.B.D.); *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, *supra*, footnote 39, at pp. 178 (A.C.), 664 (All E.R.) (Viscount Simonds), *Hart & Pickles Ltd.*, *ibid.*; *Walsh v. Curry*, [1955] N.I. 112 (C.A.); *Castellan v. Electric Power Transmission Pty. Ltd.* (1967), 69 S.R. (N.S.W.) 159 (C.A.); *Hood v. Commonwealth*, [1968] V.R. 619, at pp. 622-624 (F.C.); *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1967), 68 D.L.R. (3d) 385, at pp. 400-404, 12 O.R. (2d) 201, at pp. 216-220 (Ont. C.A.).

¹¹⁵ *Supra*, footnote 13, at pp. 896-899 (S.C.R.), 384-386 (D.L.R.).

¹¹⁶ When dismissal of the victim's action does not prevent the victim from again suing the defendant in respect of the same injuries, or the defendant has not been "sued to judgment", it appears that the victim's failure to hold the defendant liable does not prevent contribution: *Hart v. Hart & Pickles Ltd.*, *supra*, footnote 112 (dismissal for want of prosecution; subsequent suit possible); *Walsh v. Curry*, *supra*, footnote 114, at pp. 125-126 (Lord MacDermott C.J.) (subsequent suit on different theory possible); *Canberra Formwork Pty. Ltd. v. Civil & Civic Ltd.* (1982), 41 A.C.T. R. 1, at pp. 13-19 (S.C.) (dismissal for want of prosecution; subsequent suit not possible because judgment satisfied by contribution claimant); *Re Urquhart and Hatt* (1982), 132 D.L.R. (3d) 684 (Ont. Co. Ct.) (dismissal for want of prosecution; "final order"). Compare *Waitapu v. R.H. Tregoweth Ltd.*, *supra*, footnote 35, (contribution claim entertained on merits when victim had discontinued action against defendant during trial), and *O'Neill v. Cowan's Scaffolding Hire Service*, [1983] 2 Qd. R. 40 (S.C. Master) (striking defendant out of victim's action would not affect other defendant's rights), with *Travers v. Neilson*, [1967] S.C. 155 (O.H.) (contribution claim not entertained when defender granted absolver as consequence of pursuer's abandonment of action). Courts may create an exception to the general rule when the victim initiates an action intended to result in judgment for the defendant and thereby protect him from contribution, or even when the defendant is granted judgment in consequence of a settlement with the victim. See *Corvi v. Ellis*, [1969] S.C. 312 (victim instituted action against daughter and then abandoned it, resulting in decree in her favour, in order to prevent contribution); *Magee & Co. (Belfast) Ltd. v. Bracewell, Harrison & Coton*, [1981] S.L.T. 107 (O.H.) (settlement and judgment for defender).

contribution might have been obtained under the negligence acts.¹¹⁷ but the position appears to be the same as under the tortfeasors acts.¹¹⁸

There is much to commend the proposition that the contribution claimant should not be bound by a judgment to which he was not a party or prejudiced by the victim's lack of diligence in instituting or prosecuting suit.¹¹⁹ Furthermore, it frustrates the objects of contribution to insulate a person who was liable to the victim from liability to contribute.¹²⁰ It would follow that judgment for the contribution defendant should not prevent liability for contribution, irrespective of the ground on which the judgment was rendered.¹²¹ There are, however, serious objections to entertaining contribution claims in these circumstances. If the victim's claim against the defendant went to trial, it seems oppressive to the defendant and a waste of judicial resources to hold a second trial of the same matter. Even if there was no prior trial, a desire to create more perfect justice among tortfeasors may not justify the costs of proceedings against parties unsuccessfully sued by victims. Whether the judgment was "on the merits" or otherwise, the victim's lack of success may not

¹¹⁷ It was decided that in Alberta, which enacted both a tortfeasors act and a negligence act, the provisions of the tortfeasors act prevailed, being more specifically addressed to contribution. *County of Parkland No. 31 v. Stetar*, *supra*, footnote 13, at pp. 898 (S.C.R.), 385 (D.L.R.).

¹¹⁸ See *Cohen v. S. McCord & Co. Ltd.*, *supra*, footnote 47, at pp. 761-764 (D.L.R.), 577-580 (O.R.), (Laidlaw J.A.) (defendant dismissed from action by victim); *Horvath v. Registrar M.V.*, [1961] O.W.N. 324 (H.C. Master) (action against defendant dismissed because plaintiff could not establish identity of vehicle involved in accident); *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 69 D.L.R. (3d) 385, at pp. 400-404, 12 O.R. (2d) 201, at pp. 216-220 (Ont. C.A.), *aff'd sub. nom. Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, *supra*, footnote 39; (defendant held not liable to victim because of contractual waiver). Compare *L.N. Klar, Giffels Associates Ltd. v. Eastern Const. Co.* (1978), 4 C.C.L.T. 144, at pp. 145-146 (dismissal of victim's claim fatal), with *Cheifetz*, *supra*, footnote 1, pp. 39, 46 (inconclusive).

¹¹⁹ See Denning L.J., dissenting in *Littlewood v. George Wimpey & Co. Ltd.*, *supra*, footnote 37, at pp. 517 (Q.B.), 922 (All E.R.); *Walsh v. Curry*, *supra*, footnote 114, at pp. 129-131 (Porter L.J.); *Aleman v. Blair*, *supra*, footnote 113, at p. 534.

¹²⁰ See Lord Porter, dissenting, in *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, *supra*, footnote 39; G. Williams, *Tort—Contribution Between Concurrent Tortfeasors*, [1956] Camb. L.J. 15; Note, *Contribution Between Tortfeasors: Some Recent Problems* (1957), 23 Ir. Jur. 45, at p. 49.

¹²¹ An exception could be made for cases in which the contribution claimant was a party to litigation between the victim and contribution defendant, provided that the victim's decision not to continue the action against the contribution defendant or take an appeal from judgment in his favour did not prevent the contribution claimant from continuing the action or appeal for the purpose of establishing the defendant's liability. If judgment for the defendant does bar a contribution claim, to avoid the claimant's being prejudiced by the victim's conduct it is necessary to permit the claimant to present evidence against the defendant and to continue the litigation or take an appeal from judgment in the defendant's favour, without being joined by the victim: see *Fleming*, *supra*, footnote 40, p. 2351, n. 8; Williams, *supra*, footnote 1, pp. 189-190; *Civil Liability Act*, 1961, No. 41, s. 29(5) (Ir.).

be due to neglect or default by the victim or his counsel. To de-emphasize or discontinue suit against the contribution defendant may be an appropriate means of concentrating the victim's resources and the court's attention upon the party most likely to be held liable and satisfy a judgment. The dismissal of an action as time-barred casts no reflection on the victim or counsel when relevant facts do not come to light until long after injury occurred and there is doubt about the application of a statutory limitation.

In addressing the issue of whether judgment for the defendant should bar a contribution claim, the most appropriate question to consider is whether a case in which judgment for the defendant is granted should be treated differently from a case in which the victim never sued the defendant. It is submitted that the answer is "yes" when the judgment is based upon a decision that the defendant never incurred liability or that liability has not been proved.¹²² It is submitted that the answer is "no" when the judgment is consistent with the defendant's having incurred liability at some time.

When the judgment represents a decision that the defendant never incurred liability or that liability has not been proved, the defendant should not be subject to a contribution claim. The defendant should have the same protection from contribution as he does from a second action by the victim. Otherwise, when another person is or may be liable for the same damage, judgment in the defendant's favour provides no security from future claims arising from the same matter. Given the opportunity, a contribution claimant might establish that the defendant was liable to the victim, but this would occur in relatively few cases. In most cases it would be accurate to deduce from the entry of judgment for the defendant that the defendant was never liable. The costs of permitting contribution claims, including insecurity for defendants, would exceed the benefits in equitably apportioning the burden of compensating the victim.

When judgment in the victim's action is given on a ground consistent with the defendant's having incurred liability, the defendant's claim to protection from subsequent suit is weaker. His success is more likely to be a "lucky break" accruing from lack of diligence in commencing or prosecuting the suit. The victim's action will usually have been terminated before trial, thus sparing the defendant the burden of two trials. If every judgment in the defendant's favour bars contribution, the victim may bring an action expected to be unsuccessful (e.g. an action on a released or time-barred claim) in order to protect the defendant from a contribution claim.¹²³ If there is no basis for concluding that the defendant

¹²² See Law Commission; *supra*, footnote 92, paras. 62-65. The Law Commission recommended that if the defendant defeated the victim's claim after a "hearing on the merits", he should not be liable to pay contribution: *ibid.*, para. 65.

¹²³ As in *Corvi v. Ellis*, *supra*, footnote 116. The Law Commission recommended that a collusively obtained judgment for the defendant not bar liability to contribute: Law

was not liable to the victim, the defendant is no more entitled to security from suit than a person never sued by the victim. If judgment for the defendant is entered as a consequence of an agreement or release by the victim, the defendant should be in no better position than if the agreement provided for judgment for the victim or the claim was resolved before suit was instituted.¹²⁴

Settlements and releases aside, cases in which judgment for the defendant is consistent with his having been liable to the victim are most likely to involve time limitations established by statutes of limitations, as in *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*,¹²⁵ or statutory notice of claim requirements, as in *County of Parkland No. 31 v. Stetar*.¹²⁶ If the defendant succeeds on the ground that the victim's action is time-barred, the court makes no decision on the question of whether the victim had a cause of action against the defendant. The same is true when the victim's suit fails for non-compliance with rules of civil practice or orders of court. It is quite possible that the victim's action would have succeeded if the court had addressed the merits of the claim. A potential contribution claimant should not be prejudiced by the victim's decision to initiate litigation at a time when the statute of limitations or notice of claim requirement defeats the action, however reasonable that decision may be. Nor should the claimant be prejudiced by the victim's failure to meet practice requirements. In these circumstances, judgment for the defendant should not bar a contribution claim. The defendant should be in the same position as if never sued by the victim.¹²⁷

Commission, *ibid.*, para. 65. If this avenue of collusion is closed, it would remain possible to arrange for the victim to present a weak case against the defendant resulting in judgment for the defendant "on the merits" or judgment in the victim's favour for a small sum. When judgment in the victim's action follows an agreement—even an informal one—between the victim and a defendant, the judgment should not be conclusive against a contribution claimant who was not party to the agreement. In other cases, while there may be no agreement or collusion between the parties, the victim may seek to protect the other party from liability—as when the two are relatives, friends or business associates. The proposition advanced in the text would foreclose protection by suing upon a time-barred or released claim. It would still be possible to protect a party by presenting a weak case against him. This could be controlled, partially, by consolidation of the victim's action against the party with the action against the party who would be the contribution claimant. One would also expect a victim's legal representative to avoid deceptive conduct of the litigation as unethical.

¹²⁴ This statement refers only to releases or agreements made after the accrual of the victim's cause of action. See text accompanying footnotes 73-92, *supra*, concerning prior waivers and agreements.

¹²⁵ *Supra*, footnote 39. See text accompanying footnotes 111-112.

¹²⁶ *Supra*, footnote 13. See text accompanying footnotes 115-118.

¹²⁷ See Law Commission, *supra*, footnote 92, paras. 60-65 (judgment on limitation point, dismissal for want of prosecution, collusively obtained judgment should not prevent contribution); Uniform Law Conference of Canada, Report of the Alberta Commissioners, Contributory Negligence and Tortfeasors (1975), 57 Unif. Law Conf. Can. Proc.

To summarize, judgment for the defendant in the victim's action should protect the defendant from a contribution claim when based upon a decision that the defendant never incurred liability or that liability has not been proved. In other circumstances, as when the victim's action is time-barred, or when the judgment follows an agreement or release of liability, the defendant should not be protected by the judgment. This may be accomplished by inserting into contribution legislation a provision such as one proposed by the Law Commission:¹²⁸

In any proceedings for contribution. . . , the fact that a person has been held not liable in respect of any damage in any action brought by or on behalf of the person who suffered it shall be conclusive evidence that he was not liable in respect of the damage at the time when it occurred, provided that the judgment in his favour rested on a determination of the merits of the claim against him in respect of the damage (and not, for example, on the fact that the action was brought after the expiration of any period of limitation applicable thereto).

An alternative is to provide specifically that judgment granted to the defendant on the basis of a statute of limitations, notice of claim requirement or delay in prosecuting the claim against him shall not be a defence to liability for contribution. This would resolve the most serious problems and avoid the difficulty of determining when a court has rejected a victim's assertion of liability "on its merits".¹²⁹ It also should be provided

69 (defendant should be protected from contribution only by judgment on merits, not on limitations or pleading point).

¹²⁸ Law Commission, *ibid.*, Draft Civil Liability (Contribution) Bill, s. 3(7). A similar provision appears in Uniform Law Conference of Canada, Uniform Contributory Fault Act, s. 13 (1983 draft). The Law Commission's language is preferable to the language of the 1978 English contribution statute, Civil Liability (Contribution) Act, 1978, c. 47, s. 1(5) (Eng. & N.I.), under which a United Kingdom judgment is "conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from which the contribution is sought". This could be read as giving any judgment in the defendant's favour conclusive effect on the question of whether the defendant was liable to the victim, thus defeating the contribution claim. Alternatively, s. 1(5) could be read as giving the judgment conclusive effect only when it is based upon the issue of whether the defendant incurred liability, not when it is based upon such matters as limitation periods and post-accident releases. S. 1(5) may be qualified by s. 1(3), which appears to have been intended to overrule *George Wimpey & Co. Ltd. v. British Overseas Airways Corp.*, *supra*, footnote 39, in which event judgment for the defendant on the ground that the victim's remedy is barred by the statute of limitations no longer forecloses a contribution claim; see Clerk and Lindsell, *op. cit.*, footnote 20, para. 2-60; Winfield and Jolowicz, *op. cit.*, footnote 73, p. 588, n. 54; Dugdale, *loc. cit.*, footnote 106.

¹²⁹ Statutes now in force may be interpreted to have this effect. Some jurisdictions have enacted legislation intended to provide that contribution may be obtained even though the victim's cause of action against the contribution defendant is barred by a statute of limitations. In a few jurisdictions contribution is preserved against the victim's failure to give timely notice of claim. In Canada, some legislation provides generally that limitation provisions do not bar counterclaims and third party proceedings respecting the subject matter of the plaintiff's action. This may have the effect of authorizing counterclaims and third party claims for contribution when the plaintiff's cause of action against

that a judgment obtained on account of the victim's release of or agreement with the defendant is not conclusive in contribution proceedings.¹³⁰

It has been proposed that when contribution cannot be obtained because the defendant was granted judgment in the victim's action, the victim's recovery against the party who otherwise would have entitlement to contribution be reduced; when it is proved that the successful defendant did incur liability to the victim, the other party's liability to the victim is to be reduced by the amount of contribution which otherwise would be available, i.e. the portion of the victim's damages corresponding to the successful defendant's share of responsibility for the harm.¹³¹ This should

the contribution defendant has expired. The legislation referred to and interpretive decisions are collected in P.B. Kutner, *Contribution Among Tortfeasors: The Effects of Statutes of Limitations and Other Time Limitations* (1980), 33 Okla. L. Rev. 203, at pp. 225-226, 263. It may be argued that such legislation preserves contribution claims from limitation of the victim's action against the contribution defendant even when the victim has brought suit and lost because of the limitations; see *Adams v. W.J. Hyatt Ltd.*, [1954] O.W.N. 895 (Ont. H.C.), interpreting what is now Negligence Act, R.S.O. 1980, c. 315, s. 9; *Campbell v. Jenkins*, [1974] 1 N.Z.L.R. 578 (S.C.), interpreting Law Reform Act, 1936, No. 31, s. 17 (N.Z.); G.R. Stewart, *Paquette v. Batchelor: The Problem of a Contribution Claim in Conflict with a Limitation Period* (1981), 3 Adv. Q. 122, at pp. 134-135. Such an argument was accepted in *J.R. Paine & Associates Ltd. v. Strong, Lamb & Nelson Ltd.* (1979), 103 D.L.R. (3d) 579, [1979] 6 W.W.R. 353 (Alta. C.A.). That case involved what is now Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 60(1). This provides that "the lapse of time limited by this Part for bringing an action is no bar to (a) proceedings by counterclaim. . . , or (b) third party proceedings, with respect to any claims relating to or connected with the subject matter of the action". The victim's application to add a party as a defendant had been dismissed on the ground that the victim's action against the party was barred by the Limitation of Actions Act. It was held that, because of s. 60(1), this dismissal did not require that a third party claim for contribution from that party be rejected. The decision is criticized on a number of grounds in L.N. Klar, *J.R. Paine & Associates Ltd. v. Strong, Lamb & Nelson Ltd.* (1980), 18 Alta. L. Rev. 515. One criticism is that provisions such as s. 60(1) are addressed to a problem far removed from the effects of unsuccessful actions on contribution—the problem of a defendant's lack of opportunity to counterclaim or bring a third party claim if sued when the limitation period for the claim has expired or is about to expire.

¹³⁰ "Agreement" is intended to refer to settlement of the claim and collusion, but not to agreement by counsel concerning what is and is not in issue in the litigation. The proposal of the Law Commission was intended to protect the contribution claimant against a judgment obtained by collusion; Law Commission, *op. cit.*, footnote 92, para. 65. It is not clear whether the provision drafted by the Law Commission, the provision in the Uniform Law Conference draft, *supra*, footnote 128, or Civil Liability (Contribution) Act, 1978, c. 47, s. 1(5) (Eng. & N.I.), leaves a court free to disregard a judgment on the ground of collusion. None of these provisions is addressed to judgments obtained by release or "arms length" agreement. In those circumstances, s. 1(5) may give judgment for the defendant the effect of preventing contribution and judgment for the victim the effect of protecting the defendant from being found liable for more than the agreed amount. See Dugdale, *loc. cit.*, footnote 106, at p. 189.

¹³¹ Williams, *op. cit.*, footnote 1, pp. 186-187; L.N. Klar, *Contributory Negligence and Contribution Between Tortfeasors*, in L.N. Klar (ed.), *Studies in Canadian Tort Law* (1977), pp. 161-163. This has been done in Ireland; Civil Liability Act, 1961, No. 41.

not be done. If the court granted judgment on the ground that the defendant never incurred liability or was not proved to be liable, another party should not be permitted to raise the issue of that defendant's liability. The outcome of the first action may have been influenced by factors other than any possible neglect or default by the victim or the victim's counsel, such as unavailability of evidence which is now obtainable, rulings by the trial judge, and the trier's evaluation of evidence. The victim, having lost his suit against one defendant, should not lose part of a valid claim against another defendant on the ground that he should have succeeded against the former.¹³² In other cases, where judgment is given on a ground consistent with the defendant's having incurred liability, a contribution claim should be unaffected by the judgment. Such a case should be treated as if the victim had not sued the contribution defendant. It may be that when the victim has released a tortfeasor or allowed the statute of limitations to run out, the victim's recovery against another tortfeasor should be reduced and a contribution claim precluded,¹³³ but whether this is done should not depend upon whether the victim has brought suit against the first tortfeasor and lost.

V. Torts Other than Negligence

The tortfeasors act provides that, "Where damage is suffered by any person as a result of a tort (whether a crime or not), . . . any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise. . .".¹³⁴ The Canadian negligence acts provide that, "where two or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, . . . they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault".¹³⁵ Neither provision mentions negligence.¹³⁶ It is obvious that the contribution provisions of the negligence acts apply to negligent actors in view of the titles of the

s. 35(1)(j) (Ir.). There usually is no reduction of liability when the victim sues the contribution claimant and defendant together; *ibid.*, s. 29(5).

¹³² Law Commission, *op. cit.*, footnote 90.

¹³³ See Klar, *loc. cit.*, footnote 79, at pp. 365-367. The present article does not address the complex question of whether settling or released parties should be subject to liability for contribution or the even more complex matter of the effects of time limitations upon contribution. The author addressed time limitations in Kutner, *loc. cit.*, footnote 129.

¹³⁴ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c), repealed 1978, c. 47, s. 9(2).

¹³⁵ Uniform Contributory Negligence Act. *supra*, footnote 12, s. 2(2).

¹³⁶ The Ontario statute adds "or negligent" after "at fault"; Negligence Act, R.S.O. 1980, c. 315, s. 2.

statutes,¹³⁷ the linkage of the contribution provisions to provisions on contributory negligence, and the typical usage of "fault" to mean "negligence".¹³⁸ That the contribution provisions of the tortfeasors acts were intended to apply to negligent actors is hardly less obvious.¹³⁹ Otherwise, contribution would extend to only a small minority of tort cases. Also, there is no noticeable body of opinion that negligent actors ought to be denied contribution because of their wrongdoing. The same cannot be said of persons who committed an intentional tort and, especially, persons whose tort was also a crime. Furthermore, there is doubt concerning the application of contribution legislation to persons whose tort is intentional and those who become liable without personal fault such as negligence. Consequently, it is useful to address the question of whether persons other than negligent actors who incur tort liability are or should be brought within a system of contribution among tortfeasors. That will require a discussion of the question of whether persons whose tortious conduct violated criminal or other public law should be denied contribution.

The Canadian negligence acts provide for contribution among "persons . . . found at fault".¹⁴⁰ "Fault" is a term which normally encompasses the conduct of intentional tortfeasors, but the titles and provisions of the negligence acts, including the provisions on contributory negligence,¹⁴¹ imply a particular association between this legislation and negligence liability. This association is so strong as to suggest that the legislation extends only to negligence liability and not to other forms of tort liability—at least, not to forms of tort liability in which neither negligence nor contributory negligence is an element.¹⁴² Courts have equated the term "fault" with "negligence" and declined to apply negligence acts to such torts as libel, conspiracy to defraud, cattle trespass, and even trespass to the person, on which the presence of negligence was an element of liability.¹⁴³ Recent cases, however, lend strong support to the view that

¹³⁷ Negligence Act in British Columbia and Ontario; Contributory Negligence Act in other provinces and the territories.

¹³⁸ Cheifetz, *op. cit.*, footnote 1, pp. 34-36.

¹³⁹ See Law Revision Committee, Interim Report No. 3. The Doctrine of No Contribution Between Tort-Feasors (1934), para. 7.

¹⁴⁰ Uniform Contributory Negligence Act, *supra*, footnote 12, s. 2(2).

¹⁴¹ See footnotes 137-138, *supra*, and accompanying text.

¹⁴² The contribution provisions of the negligence acts should be found applicable to torts in which contributory negligence is a defence and, thus, to which the contributory negligence provisions apply. See *McNeill v. Frankenfield* (1963), 39 D.L.R. (2d) 332 (B.C.S.C.); rev'd (1963), 44 D.L.R. (2d) 132, 46 W.W.R. 257 (B.C.C.A.) (contributory negligence and strict liability for keeping dangerous animal *scienter*); *Albion v. Cochrane* (1969), 4 D.L.R. (3d) 666, at pp. 675-676, [1969] 2 O.R. 184, 192-193 (Ont. Co. Ct.) (contributory negligence and public nuisance).

¹⁴³ *Libel: Chernesky v. Armadale Publishers Ltd.* (1974), 53 D.L.R. (3d) 79, [1974] 6 W.W.R. 162 (Sask. C.A.); rev'g (1974), 45 D.L.R. (3d) 433, [1974] 3 W.W.R. 10

"fault" extends beyond negligence to encompass all intentional tortious wrongs and other torts based on fault.¹⁴⁴ Authority is thus divided on the scope of the negligence acts.¹⁴⁵

In the contribution provisions of the tortfeasors acts, there is nothing which distinguishes or excludes any category of tort. "[A]ny tort-feasor liable in respect of [damage . . . suffered . . . as a result of a tort] may recover contribution. . . ."¹⁴⁶ Furthermore, the case of *Merryweather v. Nixan*,¹⁴⁷ whose "rule" the tortfeasors acts are supposed to overturn, involved a tort classified as intentional (trover). The tortfeasors acts, therefore, authorize contribution to and from intentional tortfeasors.¹⁴⁸

(Sask. Q.B.) (no contribution); conspiracy to defraud: *Standard International Corp. v. Morgan*, [1967] 1 O.R. 328 (S.C. Master) (no contribution); cattle trespass: *Acker v. Kerr* (1973), 42 D.L.R. (3d) 514, at pp. 519-520, (1973), 2 O.R. (2d) 270 at pp. 275-276 (Ont. Co. Ct.) (no contributory negligence apportionment); trespass to the person: *Hollebone v. Barnard*, [1954] 2 D.L.R. 278, [1954] O.R. 236 (Ont. H.C.) (no contributory negligence apportionment). But see *Yule v. Parmley*, [1945] 2 D.L.R. 316, at pp. 328-330, [1945] 1 W.W.R. 405, at pp. 419-422 (B.C.C.A.) (Sidney Smith J.A., with whom O'Halloran J.A. agreed, dissenting); rev'd *sub. nom. Parmley v. Parmley*, [1945] S.C.R. 635, [1945] 4 D.L.R. 81 (trespass for "assault" is "fault"; tortfeasor entitled to contribution).

¹⁴⁴ *Bell Canada v. Cope (Sarnia) Ltd.* (1980), 119 D.L.R. (3d) 254, (1980), 31 O.R. (2d) 571 (Ont. C.A.) (1980), 11 C.C.L.T. 170 (Ont. H.C.), (contributory negligence apportionment in action for trespass, in which defendant acted both intentionally and negligently); *Anderson v. Stevens* (1981), 125 D.L.R. (3d) 736, [1981] 5 W.W.R. 550 (B.C.S.C.) (contribution between defendants liable for fraud and defendants liable for negligence). See also *Athans v. Canadian Adventure Camps Ltd.* (1977), 80 D.L.R. (3d) 583, at p. 597, (1977), 17 O.R. (2d) 425, at p. 439 (Ont. H.C.) (contribution between defendants liable for wrongful appropriation of personality): But it may be doubted that these decisions establish contributory negligence as a defence to intentional torts; see *Anderson v. Stevens* (1981), 125 D.L.R. (3d) 736, at pp. 740-741, [1981] 5 W.W.R. 550, at p. 556 (B.C.S.C.); *Long v. Gardiner* (1983), 144 D.L.R. (3d) 73, at pp. 75-78 (Ont. H.C.).

¹⁴⁵ See discussions in Cheifetz, *op. cit.*, footnote 1, pp. 29-36; University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, pp. 37-38; W.D. Griffiths, Claims for Contribution or Indemnity as Between Hospitals, Doctors and Others, in Law Soc. U.C. Spec. Lect. (1963), pp. 237, 239, 247-249.

¹⁴⁶ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c), repealed 1978; c. 47, s. 9(2). See Law Revision Committee, *op. cit.*, footnote 139, which recommended the establishment of contribution without exclusion of any tort.

¹⁴⁷ *Supra*, footnote 1.

¹⁴⁸ See, e.g., see *Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd.*, [1952] 1 All E.R. 1326, at pp. 1341-1342 (Ch. D.); aff'd [1953] 1 Ch. 149, [1953] 1 All E.R. 179 (C.A.) (trespass to land and nuisance); *Sulisz v. Flin Flon*, [1979] 3 W.W.R. 728, at p. 741 (Man. Q.B.) (trespass to land, with exemplary damages), *Mihaka v. Wellington Publishing Co. (1972) Ltd.*, [1975] 1 N.Z.L.R. 10 (S.C.) (libel); *Marshal v. Semper* (1956), 10 W.I.R. 129, at p. 133 (T. & T. H.C.) (wrongful arrest and false imprisonment), In *Cherneskey v. Armadale Publishers Ltd.*, *supra*, footnote 143, the lower court decided that a claim for contribution could be maintained in a libel case. It relied on a provision of the Saskatchewan statute based upon the tortfeasors acts, now Contributory Negligence Act, R.S.S. 1978, c. C-31, s. 10. The Court of

Yet it may be contended that courts retain the power to deny contribution to them on the basis that awarding contribution would not be "just and equitable" or consistent with public policy.¹⁴⁹

Under the tortfeasors acts, "the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage. . . ."¹⁵⁰ The court may exempt any person from liability to contribute or direct that contribution amount to a complete indemnity.¹⁵¹ If two or more persons are liable for the same or similar intentional torts, it seems much more "just and equitable" to have the burden of liability borne by all of them in appropriate proportions, than to have the burden borne solely or disproportionately by one.¹⁵² Perhaps a court should not permit an intentional tortfeasor to obtain contribution from a negligent tortfeasor, but the latter does bear some "responsibility" for the damage and usually should bear some shall proportion of the burden of liability.¹⁵³ Similarly, under the negligence acts, persons who are "at fault" to an equal "degree"¹⁵⁴ should contribute equally, even if they have committed intentional torts, and a negligent tortfeasor. Each bears a "degree" of "fault" relative to the other, although in most cases the intentional tortfeasor's degree can be expected to be much higher than the negligent tortfeasor's.¹⁵⁵ In all probability, it would be no more difficult to assign degrees of fault or responsibility to persons liable for different types of fault-based tort than to persons liable for different types of negligence.

Arguably, for reasons of public policy and under the maxim *ex turpi causa non oritur actio*, the remedy of contribution should be denied to

Appeal disagreed, believing that the insertion of this provision did not enlarge beyond negligence the category of torts to which the Saskatchewan act applied. See Cheifetz, *op. cit.*, footnote 1, pp. 146-147.

¹⁴⁹ See Fleming, *op. cit.*, footnote 40, p. 237; S. Stoljar, *Law of Quasi-Contract* (1964), p. 158; Williams, *op. cit.*, footnote 1, pp. 87-95; cf. McKerron, *op. cit.*, footnote 40, p. 309 (South African law). But see Walker, *op. cit.*, footnote 25, p. 119, n. 17.

¹⁵⁰ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(2), repealed 1978, c. 47, s. 9(2).

¹⁵¹ *Ibid.*

¹⁵² See Williams, *op. cit.*, footnote 1, pp. 89-91; E.J. Cohn, *Responsibility of Joint Wrongdoers in Continental Laws* (1935), 51 *Law Q. Rev.* 468, at pp. 494-495.

¹⁵³ Weir, *op. cit.*, footnote 40, pp. 64-65.

¹⁵⁴ Uniform Contributory Negligence Act, *supra*, footnote 12, s. 2(2)

¹⁵⁵ See Cheifetz, *op. cit.*, footnote 1, p. 33. In *Anderson v. Stevens*, *supra*, footnote 144, at pp. 742-743 (D.L.R.), 557-558 (W.W.R.) the court apportioned fault 4% to one negligent party, 6% to another negligent party, and 90% to parties liable for fraud. The court observed that the legislation would not be just or sensible if it was confined to parties liable in negligence and therefore prevented negligent parties from requiring intentional tortfeasors to contribute, *ibid.*, at pp. 741-742 (D.L.R.), 557 (W.W.R.).

intentional tortfeasors and tortfeasors whose conduct was criminal. Public policy, it is said, demands that intentional or criminal wrongdoing be punished and deterred by leaving the wrongdoer to shoulder the burden of liability unassisted by contribution; contribution would compensate the wrongdoer for the consequences of his misconduct and perhaps encourage such misconduct; it is inappropriate and wasteful for courts to entertain the claims of such wrongdoers; no injustice is done by denying them redress for the consequences of their deliberate wrongs.¹⁵⁶

These arguments are not persuasive.¹⁵⁷ Permitting contribution does not offend public policy by rewarding or encouraging misconduct. Even with contribution, the tortfeasor will be in a worse position than if he had never committed the tort.¹⁵⁸ He must still bear a portion of the damages paid to the victim. Most tortfeasors would be ignorant of a rule denying contribution and, therefore, not deterred by it. The desire to deter and punish wrongs is no answer to a claim for contribution in respect of compensatory damages. Deterrence and punishment are not principal functions of liability for compensatory damages. The appropriate "punishment" is the proportion of the victim's damages corresponding to the individual tortfeasor's fault or responsibility; contribution avoids only excessive "punishment". If contribution is denied, the tortfeasor who bears less than an appropriate share of the victim's damages avoids "punishment" and its deterrent effects. A tortfeasor might escape sanctions either because the victim can more readily recover damages from another party or because the victim chooses to protect the first tortfeasor.¹⁵⁹ The party who pays the damages, without a right of contribution, may be less blameworthy than the tortfeasor freed of liability.

Some torts classified as intentional, such as conversion, libel and even battery, are frequently committed without conscious wrongdoing or intent to cause harm. In these circumstances, such a drastic sanction as denial of contribution is especially unwarranted.¹⁶⁰ Modern criminal law

¹⁵⁶ See *Wick and Pulteneytown Steam Shipping Co. Ltd. v. Palmer* (1893), 20 Sc. S.C.(4th series) 275, at pp. 286-287 (Lord Young), aff'd [1894] A.C. 318 (H.L.); University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, p. 39; Williams, *op. cit.*, footnote 1, pp. 87-88, 94-95; G.D.G. Hall, Book Review (Williams, Joint Torts and Contributory Negligence) (1952), 15 Mod. L. Rev. 258, at p. 259.

¹⁵⁷ See *Lewis v. Sayers* (1970), 13 D.L.R. (3d) 543, at pp. 549-550, [1970] 3 O.R. 591, at pp. 597-598 (Ont. Dist. Ct.) (rejecting *ex turpi causa* argument raised against person who allowed opposing party to drive while intoxicated).

¹⁵⁸ If a tortfeasor has received a benefit from commission of the tort, that benefit can be considered in assessing his "fair share" of the damages. He may be denied contribution or required to contribute to the extent of the benefit received. See Williams, *op. cit.*, footnote 1, p. 160.

¹⁵⁹ Cheifetz, *op. cit.*, footnote 1, p. 33.

¹⁶⁰ See University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, pp. 39-40; Williams, *op. cit.*, footnote 1, pp. 89-95.

condemns much conduct that is not intentionally injurious. If contribution is denied when torts are also crimes, contribution will be unavailable to persons liable for breaches of statutory duties which are also criminal offences, such as those imposed by Factory Acts, and negligent tortfeasors guilty of such crimes as dangerous driving.¹⁶¹ It may be impracticable to distinguish between "intentional" crimes and others for purposes of contribution. When torts are also crimes, the suitable penalty is that provided by the criminal law. Whether or not a tort is a crime, punishment and deterrence may be effected in appropriate cases by liability for exemplary damages. The monetary penalty created by denying contribution should not be added, nor should a tortfeasor receive the monetary benefit of insulation from contribution.¹⁶²

The maxim *ex turpi causa non oritur actio* does not warrant refusal to entertain contribution claims by intentional tortfeasors, even those whose conduct was criminal. Strictly speaking, the right to contribution does not arise directly from the tortfeasor's wrongful conduct or from his relationship with the co-tortfeasor. It arises from his discharge of liability to the victim—proper conduct required by law. The tortfeasor who seeks contribution is not, in terms of the maxim, founding a claim on his wrongdoing.¹⁶³ A contribution claim is not analogous to a claim for damages from a co-participant in crime, which may be denied on the ground that it offends public policy or that the defendant owed no duty to the plaintiff.¹⁶⁴ The only duty asserted by a request for contribution is the monetary obligation created by the contribution legislation. There is no resemblance between a claim to an equitable allocation of a common liability and a claim to the equitable division of the profits of crime, such as the highwayman's petition for his share of the loot.¹⁶⁵ For a tortfeasor—even a deliberate wrongdoer—to bear a disproportionately heavy burden, at the victim's choice, is an injustice which should be avoided.

The parenthetical phrase "whether a crime or not" in the tortfeasors acts indicates an intention to override any objection to contribution in cases of torts involving criminal conduct.¹⁶⁶ Recent proposals for revision

¹⁶¹ Law Revision Committee, *op. cit.*, footnote 139, para. 10; J.W. Salmond. *Law of Torts* (17th ed., 1977), pp. 448-449.

¹⁶² Law Revision Committee, *ibid.*; University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, pp. 39-40.

¹⁶³ See *Palmer v. Wick and Pulteneytown Steam Shipping Co. Ltd.*, *supra*, footnote 156, at pp. 322-323 (A.C.), (Lord Herschell L.C.).

¹⁶⁴ *Ashton v. Turner*, [1981] Q.B. 137, [1980] 3 All E.R. 870 (Q.B.D.); *Smith v. Jenkins* (1970), 119 C.L.R. 397 (Aust. H.C.).

¹⁶⁵ *Everet v. Williams* (Ex. 1725), described in Note, *The Highwayman's Case* (1893), 9 Law Q. Rev. 197.

¹⁶⁶ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c), repealed 1978, c. 47, s. 9(2). See *Williams, op. cit.*, footnote 1, pp.

of Canadian statutes specifically provide for contribution in cases of intentional torts and torts which are crimes, as does the Irish statute now in force.¹⁶⁷ It cannot have been accepted that permitting contribution would be inimical to the public welfare. If violation of criminal law is not to prevent contribution then, *a fortiori*, violation of non-criminal statutes should not prevent contribution. Contribution certainly ought to extend to tort liability for breach of statutory duty.¹⁶⁸ It is submitted that contribution ought to be applicable to the entire field of tort liability, irrespective of whether the tort was committed intentionally and irrespective of whether its commission violated criminal or other public law.

At the other end of the spectrum are persons liable on a theory of strict liability, such as the rule in *Rylands v. Fletcher*.¹⁶⁹ Their role in the contribution system is unclear, especially under the Canadian negligence acts.¹⁷⁰ Contribution can be extended to strictly liable parties by judicial interpretation, but if this is not done, legislative extension would be desirable. The negligence acts provide for contribution among "persons . . . found at fault".¹⁷¹ Strict liability is conventionally considered liability without "fault".¹⁷² but "fault" may describe a basis of tort liability which implies no blame, only the creation of a danger which warrants the imposition of liability. This is a desirable construction of "fault" in the negligence acts, for it opens the door to contribution in cases of strict liability, but there is a second problem to be met. Parties are "liable to make contribution to and indemnify each other in the degree in which

91-93; Note, Rights and Liabilities of Joint Tortfeasors (1934), 178 L.T. 321; Law Revision Committee, *op. cit.*, footnote 139, para. 10.

¹⁶⁷ Canada: University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, Draft Contributory Negligence and Contribution Act, ss. 1, 10. (1979); Uniform Law Conference of Canada, *op. cit.*, (1979), footnote 53, Draft Contributory Negligence and Contribution Act, ss. 1, 11. Later drafts of the latter statute omit the reference to criminal wrongs. Uniform Law Conference of Canada, Uniform Contributory Fault Act, s. 1 (1981 draft); Uniform Law Conference of Canada, Uniform Contributory Fault Act, s. 1 (1983 draft). Prince Edward Island's recent revised Contributory Negligence Act provides: "This Act applies notwithstanding that any act causing or contributing to the damage is also a crime"; Contributory Negligence Act, Stat. P.E.I., 1978, c. 3, s. 15(2); Ireland: Civil Liability Act, 1961, No. 41, ss. 2(1), 11(1), 21(1).

¹⁶⁸ See Williams, *op. cit.*, footnote 1, pp. 94, 160-162. For application of the tortfeasors and Canadian negligence acts to breach of statutory duty, see footnotes 174, 186, *infra*.

¹⁶⁹ (1868), L.R. 3 H.L. 330, *aff'g* (1866), L.R. 1 Ex. 265 (Ex. Ch.).

¹⁷⁰ See Cheifetz, *op. cit.*, footnote 1, pp. 30-36.

¹⁷¹ Uniform Contributory Negligence Act, *supra*, footnote 12, s. 2(2).

¹⁷² See *Acker v. Kerr*, *supra*, footnote 143 (no contributory negligence apportionment in action for cattle trespass); *Bell Canada v. Cope (Sarnia Ltd.)*, *supra*, footnote 144 (fault equated with substandard conduct). But see *McNeill v. Frankenfield*, *supra*, footnote 142 (contributory negligence apportionment in action for keeping dangerous animal *scienter*).

they are respectively found to have been at fault".¹⁷³ How is that to be done when liability is "strict"?

It appears that, for purposes of the negligence acts, the "degree" in which the parties are "at fault" depends upon the extent to which each party departed from a standard of proper conduct—proper conduct being lawful¹⁷⁴ conduct reasonable in the circumstances. The parties' departures from this standard are compared and the relative degrees of fault expressed in terms of percentages, with the total amount of fault being 100%.¹⁷⁵ In most cases of true strict liability, the tortfeasor's conduct has been lawful and reasonable; there has been no departure from the standard of proper conduct. If this means that the strictly liable tortfeasor's degree of fault is nil, he cannot be required to contribute to negligent tortfeasors, he is entitled to indemnity from negligent tortfeasors,¹⁷⁶ and he must bear the same portion of liability as other strictly liable tortfeasors.¹⁷⁷ This is not necessarily the most equitable apportionment of liability. These results would not be inevitable if degrees of fault were assessed on the basis not only of culpability, but also of the gravity of the risks created by each party and the causal connection between each party's conduct and the victim's injury, i.e. the relative importance and immediacy of each party's conduct in causing the injury.¹⁷⁸

The provisions for contribution in the tortfeasors acts do extend to strictly liable tortfeasors, as they are "liable in respect of" "damage . . . suffered . . . as a result of a tort".¹⁷⁹ "Fault" is not mentioned. The

¹⁷³ Uniform Contributory Negligence Act, *supra*, footnote 12, s. 2(2).

¹⁷⁴ When the basis of liability is a party's violation of a statute, the party is "at fault" and subject to contribution: Cheifetz, *op. cit.*, footnote 1, p. 35. See *Menow v. Honsberger* (1969), 7 D.L.R. (3d) 494, at pp. 504-505, [1970] 1 O.R. 54, at pp. 64-65 (Ont. H.C.), *aff'd* (1970), 14 D.L.R. (3d) 545, [1971] 1 O.R. 129 (Ont. C.A.), *aff'd sub. nom. Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, (1973), 38 D.L.R. (3d) 105 (contributory negligence apportionment between parties in violation of statute).

¹⁷⁵ *Clyke v. Blenkhorn* (1958), 13 D.L.R. (2d) 293, at pp. 302-305, *sub. nom. Blenkhorn v. Correia* (1958), 41 M.P.R. 1, at pp. 15-19 (N.S.F.C.) (MacDonald J., with whom MacQuarrie J. agreed); *Anderson v. Stevens*, *supra*, footnote 144, at pp. 742-743 (D.L.R.), 557-558 (W.W.R.); Cheifetz, *op. cit.*, footnote 1, pp. 99-105; Klar, *op. cit.*, footnote 131, pp. 156-157; cf. McKerron, *op. cit.*, footnote 40, pp. 301-304, 310 (South African Law); McMahon & Binchy, *op. cit.*, footnote 25, pp. 93, 221-222 (Irish Law).

¹⁷⁶ See *O'Sullivan v. Dwyer*, [1971] I.R. 275, at pp. 282-288 (S.C.) (apportionment between negligent plaintiff and defendant who breached statutory or other strict duty, if without fault); Weir, *op. cit.*, footnote 40, at pp. 73-74.

¹⁷⁷ When it is not possible to establish different degrees of fault, liability is apportioned equally: Uniform Contributory Negligence Act, *supra*, footnote 12, s. 1(1).

¹⁷⁸ See *The Miraflores and The Abadesa*, [1967] 1 A.C. 827, at pp. 845-848, [1967] 1 All E.R. 672, at p. 678-679 (H.L.); *Clyke v. Blenkhorn*, *supra*, footnote 175 at pp. 294-299 (D.L.R.), 4-10 (M.P.R.) (Currie J.); cf. P.Q.R. Boberg, Contributory Negligence and the Apportionment Act (1959), 76 S.A.L.J. 253, at pp. 256-259.

¹⁷⁹ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c), repealed 1978, c. 47, s. 9(2).

amount of contribution recovered from any person "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage".¹⁸⁰ "Responsibility" has been interpreted to mean "culpability", i.e. fault. Under this interpretation, the amount of contribution depends upon the relative extent to which each party departed from a standard of proper conduct; causation is not an element in assessing degrees of responsibility.¹⁸¹ A logical consequence is that the strictly liable tortfeasor, who has not departed from a standard of proper conduct, will not be required to contribute to negligent tortfeasors and will be entitled to indemnity from negligent tortfeasors.¹⁸² It may be required that strictly liable parties contribute equally *inter se*.

This may not be desirable in some cases, especially cases in which the tortfeasor's conduct, though reasonable, created a substantial risk of harm. Such tortfeasors ought to bear a portion of the loss flowing from the risk they created. That can be accomplished under a broader interpretation of "responsibility"—one which takes into account the danger created by a party's conduct and the nature of the causal connection between that conduct and the victim's injury.¹⁸³ This is not to say that "degrees of causation" are to be assessed in isolation from culpability¹⁸⁴ or that culpability is not the most important element in assessing a "just and equitable" contribution, but it does assert that "responsibility" is not synonymous with fault". There must, of course, be some causal connection between a party's conduct and the loss suffered by the victim. Otherwise, the party would not be liable. But it is possible to go beyond this

¹⁸⁰ *Ibid.*

¹⁸¹ Cheifetz, *op. cit.*, footnote 1, pp. 99-102; Williams, *op. cit.*, footnote 1, pp. 156-158; S. Chapman, Apportionment of Liability Between Tortfeasors (1948), 64 Law. Q. Rev. 26; Cohn, *loc. cit.*, footnote 152, p. 497; J.P. Lawton, Vicarious Liability of Hospital Authorities (1947), 10 Mod. L. Rev. 425, at pp. 427-429. See *Unsworth v. Commissioner for Railways*, *supra*, footnote 96, at pp. 91-92 (Taylor J.) ("responsibility" refers to "degree of blame worthiness for the injuries"); *Gaudi Kidu v. Port Moresby Freezing Co. Ltd.*, [1967-68] P. & N.G.L.R. 466, at p. 480 (S.C.) (apportionment by comparison of culpability, i.e. degree of departure from standard of reasonable man).

¹⁸² Williams, *op. cit.*, footnote 1, p. 160. The tortfeasors acts explicitly provide that the court has power to exempt any person from liability to contribute and direct that a contribution amount to a complete indemnity; Law Reform (Married Women and Tortfeasors) Act. 1935, 25 & 26 Geo. 5, c. 30, s. 6(2), repealed 1978, c. 47, s. 9(2).

¹⁸³ See Fleming, *op. cit.*, footnote 40, pp. 245-248; H. Street, Law of Torts (7th ed., 1983), pp. 478-479; University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, pp. 77-78 (recommending language drawn from tortfeasors acts, in preference to language of Canadian negligence acts, so that both culpability and causation would be considered); T. Hervey, "Responsibility" Under the Civil Liability (Contribution) Act 1978 (1979), 129 New. L.J. 509; J.A. Redmond, Fault and Apportionment Acts (1957), 31 Aust. L.J. 520. Fleming would also consider the relative abilities of the tortfeasors to bear and distribute the loss.

¹⁸⁴ This approach is criticized in Chapman, *loc. cit.*, footnote 181; Klar, *op. cit.*, footnote 131, at pp. 156-157; Lawton, *loc. cit.*, footnote 181, at pp. 427-429.

and make a judgment about the relative importance or directness of each party's conduct in causing the loss. Today, the prevailing view is that contribution under the tortfeasors acts is assessed on the basis of both culpability and causation, and it is unlikely that in practice either element will be ignored.¹⁸⁵ Courts can, therefore, require a strictly liable party to contribute to a loss concurrently caused by a negligent party¹⁸⁶ and apportion liability between strictly liable tortfeasors in unequal proportions.¹⁸⁷

Vicarious liability, like strict liability, usually involves no "fault" on the part of the person liable. A vicariously liable party is a "tort-feasor liable in respect of" "damage . . . suffered as a result of a tort".¹⁸⁸ The tortfeasors acts thus provide for contribution by and against persons vicariously liable in tort.¹⁸⁹ The position of vicariously liable tortfeasors under

¹⁸⁵ *Randolph v. Tuck*, [1962] 1 Q.B. 175, at p. 185, [1961] 1 All E.R. 814, at p. 818 (Q.B.D.); *Smith v. McIntyre*, [1958] Tas. S.R. 36, at pp. 42-51 (F.C.); *McFarlane v. Neshausen*, [1952] N.Z.L.R. 292, at p. 295 (S.C.); R. Goff & G. Jones, *op. cit.*, footnote 75, p. 234; Walker, *op. cit.*, footnote 25, p. 422; Winfield & Jolowicz, *op. cit.*, footnote 73, p. 585.

¹⁸⁶ P.F.P. Higgins, *Elements of Torts in Australia* (1970), p. 572. This has occurred in cases of liability for breach of statutory duty. *Knapp v. Railway Executive*, *supra*, footnote 35; *Dolley v. Cammell Laird & Co. Ltd.*, [1951] 1 Lloyd's Rep. 271, at pp. 281-282 (K.B.D.). But see *Whitby v. Burt, Boulton and Hayward Ltd.*, [1947] K.B. 918, at pp. 929-930, [1947] 2 All E.R. 324, at p. 325 (K.B.D.) (negligent party required to bear all of damages); cf. *Davie v. New Merton Board Mills Ltd.*, [1957] 2 All E.R. 384 (Q.B.D.) rev'd [1958] 1 Q.B. 210, [1958] 1 All E.R. 67 (C.A.), aff'd [1959] A.C. 604, [1959] 1 All E.R. 346 (H.C.) (employer liable because it provided defective tool negligently manufactured by manufacturer; latter required to bear all of damages); Williams, *op. cit.*, footnote 1, pp. 160-162, would draw a distinction between negligent and non-negligent breach for this purpose. But see *Hervey*, *loc. cit.*, footnote 183 (treating breach of statutory duty generally as form of fault, distinguishable from such "innocent" liabilities as breach of contract).

¹⁸⁷ *Rippon v. Port of London Authority*, [1940] 1 K.B. 858, at pp. 866-867, [1940] 1 All E.R. 637, at pp. 648-649 (K.B.D.) (breach of statutory duty); *Clarke v. E.R. Wright & Son*, [1957] 1 W.L.R. 1191, [1957] 3 All E.R. 486 (C.A.) (breach of statutory duty); *Clearlite Holdings Ltd. v. Auckland City Corp.*, [1976] 2 N.Z.L.R. 729, at p. 744 (S.C.) (private nuisance; one party required to bear all of damages).

¹⁸⁸ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c) repealed 1978, c. 47, s. 9(2).

¹⁸⁹ *Ryan v. Files*, [1938] 3 All E.R. 517, at pp. 523-526 (K.B.D.) (employer); *Romford Ice and Cold Storage Co. Ltd. v. Lister*, [1956] 2 Q.B. 180, [1955] 3 All E.R. 460 (C.A.), aff'd [1957] A.C. 555, [1957] 1 All E.R. 125 (H.L.) (employer); *Soblusky v. Egan* (1960), 103 C.L.R. 215, at pp. 232-235 (Aust. H.C.) (owner of car, deemed principal of driver by statute, and bailee in possession of car); *Genders v. Government Insurance Office of New South Wales* (1959), 102 C.L.R. 363, at p. 382 (Aust. H.C.) (employer); *Necula v. Ducharme* (1963), 38 D.L.R. (2d) 736, at pp. 742-744 (Alta. T.D.) (employer); *Everett's Blinds Ltd. v. Thomas Ballinger Ltd.*, [1965] N.Z.L.R. 266, at p. 271 (S.C.) (owner of car, deemed principal of driver by statute, and employer of driver); P. Atiyah, *Vicarious Liability in the Law of Torts* (1967), pp. 430-432. The statutory liability to contribute is personal, not vicarious, even though the tort liability to the victim is vicarious; Tony Weir, Book Review (Cheifetz, *Apportionment of Fault in Tort*) (1982), 14 *Ottawa L. Rev.* 234, at p. 235.

the Canadian negligence acts is less certain.¹⁹⁰ Authority can be found for the proposition that contribution provisions of these acts are inapplicable because vicariously liable tortfeasors become liable without any personal fault.¹⁹¹ It seems, however, to be routine to involve vicariously liable parties in contribution.¹⁹² This can be rationalized with the text of the negligence acts on the argument that liability is based on fault¹⁹³—that of the person for whose tort vicarious liability is incurred—although that may not suffice when it is the only fault in the case. The principal justification of vicarious liability lies in its function of securing compensation for the injured victim, but there is no reason why it should not apply for purposes of contribution. Recent proposals for revision of Canadian statutes provide for contribution in cases of vicarious liability, including cases in which the sole cause of injury is the conduct for which vicarious liability is imposed.¹⁹⁴ Under these proposals, as well as the tortfeasors acts, a vicariously liable party might claim contribution from (or be subject to a contribution claim by) tortfeasors for whose conduct he is vicariously liable, other persons vicariously liable for the same conduct, tortfeasors for whose conduct he is not vicariously liable, and persons vicariously liable for the conduct of those tortfeasors.

The vicariously liable party properly bears the degree of "fault" or "responsibility" of the person for whose tort vicarious liability is incurred.¹⁹⁵ The vicariously liable party is "identified" with his employer, agent, car driver, etc., for purposes of contribution proceedings involving a third party. The court should first assess amounts of contribution without regard to vicarious liability and then make the identification. Suppose that the victim is injured by the combined negligence of T1 and T2, for whom T3 is vicariously responsible. The court should first apportion fault or

¹⁹⁰ See Cheifetz, *op. cit.*, footnote 1, pp. 15-16, 20, 60-61; Klar, *op. cit.*, footnote 131, p. 154.

¹⁹¹ *Pickin v. Hesk*, [1954] 4 D.L.R. 90, at pp. 99-100, [1954] O.R. 713, at pp. 725-726 (Ont. C.A.); *Hillburn v. Lynn* (1955), 2 D.L.R. (2d) 671, *sub. nom.*, *Hilburn v. Lynn* 17 W.W.R. 15 (Alta. T.D.).

¹⁹² See, e.g., *White v. Proctor*, [1937] 3 D.L.R. 599, [1937] O.R. 647 (Ont. C.A.); *Arnold v. Teno*, [1978] 2 D.C.R. 287, (1978), 83 D.L.R. (3d) 609.

¹⁹³ See *Flamant v. Knelson* (1971), 21 D.L.R. (3d) 357, [1971] 4 W.W.R. 454 (B.C.S.C.).

¹⁹⁴ University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, Draft Contributory Negligence and Contribution Act, ss. 1(a), 10 (1979); Uniform Law Conference of Canada, Uniform Contributory Fault Act, ss. 1(a), 7 (1983 draft).

¹⁹⁵ If parties are vicariously liable for a single tortious act, they will probably contribute in equal proportions as between themselves. This would occur, for example, when A, while acting as B's servant or agent, negligently drives a vehicle owned by C; see *Soblusky v. Egan*, *supra*, footnote 189, at pp. 232-235; *Everett's Blinds Ltd. v. Thomas Ballinger Ltd.*, *supra*, footnote 189, at p. 268. Atiyah, *op. cit.*, footnote 189, p. 432, suggests apportionment "on the basis of the respective interests of the joint principals". This might be applied when the principals are shareholders or partners.

responsibility between T1 and T2—for example, 40% to T1 and 60% to T2. Identifying T3 with T2, T3 shares T2's 60% responsibility. In consequence, T1 can require T3, as well as T2, to contribute up to 60% of the victim's damages (if paid by T1). T3 cannot require T1 to contribute more than 40%. If the example is changed to add personal fault on the part of T3, apportionment of responsibility should again commence by considering personal fault only—say 35% to T1, 45% to T2 and 20% to T3. Adding T3's vicarious responsibility (45%) to his 20% personal responsibility, T3 would be treated as having 65% responsibility for the victim's injuries. T1 could require T3 to contribute up to 65% of the damages and T3 could require T1 to contribute no more than 35%.¹⁹⁶

This "identification" does not apply in proceedings between the person who committed the tort and the person vicariously responsible for it. In the first example given above, in which T3's responsibility is vicarious only, T3 would be deemed 0% responsible in a claim between T3 and T2. It follows that T3 is entitled to contribution from T2 for 40% of the damages recoverable by the victim. In effect, T3 can be indemnified by T2 for the "share" of the victim's injury attributed to T3 on account of T2's tort.¹⁹⁷ In the second example, T3 would be deemed 20% responsible and be able to recover contribution of 45% from T2, while being deemed 65% responsible in a contribution claim by or against T1. In the typical case in which the only tortfeasor is an employee or agent, his principal could recover from him 100% contribution—i.e. full indemnity.¹⁹⁸ Although liable to the victim for the same injury, the em-

¹⁹⁶ Atiyah, *ibid.*; Cheifetz, *op. cit.*, footnote 1, pp. 60-61; Williams, *op. cit.*, footnote 1, pp. 166-167, 430-431, see *Sleeman v. Foothills School Division No. 38*, [1946] 1 W.W.R. 145, at pp. 160-161 (Alta. S.C.), and the judgments given in each court in *Teno v. Arnold* (1974), 55 D.L.R. (3d) 57, (1974), 7 O.R. (2d) 276 (Ont. H.C.), rev'd (1976), 67 D.L.R. (3d) 9, (1976), 11 O.R. (2d) 585 (Ont. C.A.), rev'd, [1978] 2 S.C.R. 287, (1978), 83 D.L.R. (3d) 609. If T3 claims damages from T1 and T2's negligence (60% in the first example; 45% in the second) is imputed to T3, T1's liability to T3 is reduced by that proportion of the damages. In the second example, T1's liability is further reduced by the proportion of T3's personal responsibility (20%). As T1 will pay no more of the damages than the portion corresponding to his own responsibility (40% in the first example; 35% in the second), T1 will have no contribution claim against T2. As there is no imputation of negligence if T3 claims damages from T2, T2 will be liable for T3's damages reduced only by T3's personal fault (0% in the first example; 20% in the second example) and have a contribution claim against T1 to the extent of T1's responsibility for T3's loss. *Pennell v. O'Callaghan*, [1954] V.L.R. 320 (S.C.); *Doyle v. Pick*, [1965] W.A.R. 95 (S.C.); Williams, *op. cit.*, p. 446.

¹⁹⁷ Atiyah, *ibid.*, pp. 430-431; Williams, *ibid.*, pp. 166-167.

¹⁹⁸ *Ryan v. Fildes*, *supra*, footnote 189, at pp. 523-526; *Lister v. Romford Ice and Cold Storage Co. Ltd.*, *supra*, footnote 189, at pp. 579-580 (A.C.) 135 (All E.R.) (Viscount Simonds), pp. 584-585 (A.C.), 138 (All E.R.) (Lord Morton); *Ewacha v. Breen Motors Ltd.* (1955), 63 Man. R. 302-308 (Man. Q.B.); *Necula v. Ducharme*, *supra*, footnote 189, at pp. 742-744; *Richardson v. O'Neill*, [1959] N.Z.L.R. 540 (S.C.). New South Wales and South Australia, reacting negatively to the decision of the House of

ployee or agent could not recover contribution from the principal incurred liability on another basis, either personal fault or vicarious liability on another basis, either personal fault or vicarious liability for the conduct of another employee or agent.¹⁹⁹ There is also a common law claim to indemnity in such circumstances.²⁰⁰ If sustained, it would exclude an opposing claim to contribution. A tortfeasor who owes a party indemnity cannot obtain contribution from that party.²⁰¹

These results are, perhaps, more appealing in the case of a motor vehicle owner liable by statute for a driver's negligence than in the case of an employer vicariously liable for an employee's negligence. In almost all cases, the employer is better able to bear and distribute the cost than the employee. But if the employee's tort is negligence in driving a vehicle, should the employer's contribution remedy be less complete than the remedy of the owner of the vehicle? Vicarious liability exists to protect the victim, not the tortfeasor, from the tortfeasor's impecuniosity. As between the tortfeasor and the vicariously liable party, the sole fault and sole responsibility for causing damage rests with the tortfeasor. There is no basis for apportionment of responsibility. Consequently, it is appropriate that the vicariously liable party be able to obtain what amounts to indemnity from the tortfeasor and that the latter have no remedy under the

Lords in the *Lister* case, have barred indemnity claims against employees by their vicariously liable employers. An exception is made for torts consisting of "serious and wilful misconduct" by employees; Employee's Liability (Indemnification of Employer) Act, 1982, No. 3 (N.S.W.); Wrongs Act, 1936, No. 2267, s. 27c (S.A.). The Northern Territory Law Review Committee has recommended that the Territory prevent recovery from employees of damages paid by employers: Northern Territory Law Review Committee, Report No. 4, Abolition of the Rule in *Lister v. Romford Ice & Cold Storage Co. Ltd.* (1980). In Britain, an inter-departmental committee established shortly after the *Lister* decision recommended against legislation; Ministry of Labour and National Service, Inter-Departmental Committee Report, *Lister v. The Romford Ice and Cold Storage Co. Limited* (1959).

¹⁹⁹ See *Jones v. Manchester Corp.*, [1952] 2 Q.B. 852, [1952] 2 All E.R. 125 (C.A.) (responsibility apportioned 20% to negligent employee; 80% to employer and other staff members).

²⁰⁰ Rights to indemnity are outside the scope of this article. For textual treatments, see Clerk & Lindsell, *op. cit.*, footnote 20, paras. 2-57, 2-63, 2-64; Fleming, *op. cit.*, footnote 40, pp. 238-239; Higgins, *op. cit.*, footnote 186, pp. 573-575, 603-604; Williams, *op. cit.*, footnote 1, pp. 80-83. The Western Australian tortfeasors act grants a right of indemnity to several categories of tortfeasors, including a person "responsible on grounds of vicarious liability . . . where the act was done without his connivance, knowledge or express authority": Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act, 1947, No. 23, s. 7(1)(c) (W.A.).

²⁰¹ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c) repealed 1978, c. 47, s. 9(2); Contributory Negligence Act, Stat. P.E.I., 1978, c. 3, s. 8; *Everett's Blinds Ltd. v. Thomas Ballinger Ltd.*, *supra*, footnote 189, at p. 271. Uniform Contributory Negligence Act, s. 2(2) (1978) (Can.), provides that the parties are "liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault."

contribution statutes unless the vicariously liable party himself or his other employees or agents contributed to the damage for which the victim claimed compensation.²⁰²

An analogy may be drawn between vicariously liable parties and representatives of deceased tortfeasors' estates, as both are liable to victims for torts they did not commit personally. Accordingly, reference may be made at this point to the special problem of contribution claims by or against tortfeasors' estates. If survival legislation provides that an action for which the deceased would have been liable may be maintained against his estate, no one would defend an absolute bar of contribution claims by or against the estate in respect of that liability. The question is whether amendment of survival or contribution legislation is necessary to achieve this. If the estate was liable to the victim for the deceased tort, it would seem that the tortfeasors and Canadian negligence acts apply much as they do to vicariously liable tortfeasors. If so, there can be contribution between the estate and a tortfeasor also liable to the victim.²⁰³

It may, however, be contended that the basis of the contribution claim is the deceased's liability for contribution, which arguably lies with the deceased under the rule *actio personalis moritur cum persona* unless a statute explicitly provides for survival of contribution actions (as distinct from actions for damages). If a cause of action for contribution does not arise until the claimant's liability to the victim is established, a tortfeasor may have died before the cause of action arose, so that there was no action at the date of death which could survive to his estate.²⁰⁴ Numerous survival statutes provide for maintenance of actions when damage occurs after the death of the person responsible for it.²⁰⁵ Despite their obvious purpose to make the situation the same as if the tortfeasor were alive when the cause of action arose, such provisions may not have the effect of preserving contribution claims.²⁰⁶ On the other hand, there is support in

²⁰² See Walker, *op. cit.*, footnote 25, pp. 151-153, 422-423; Williams, *op. cit.*, footnote 1, pp. 162-167.

²⁰³ *Genders v. Government Insurance Office of New South Wales*, *supra*, footnote 189, at pp. 381-382.

²⁰⁴ See *Harvey v. R.G. O'Dell Ltd.*, [1958] 2 Q.B. 78, at p. 108, [1958] 1 All E.R. 657, at p. 669 (Q.B.D.); *Ronex Properties Ltd. v. John Laing Construction Co. Ltd.*, [1983] Q.B. 398, at pp. 406-407, [1982] 3 All E.R. 961, at pp. 996-967 (C.A.) (Donaldson L.J.); *Genders v. Government Insurance Office of New South Wales*, *ibid.*, at pp. 380-381.

²⁰⁵ E.g., Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41, s. 1(4); Uniform Law Conference of Canada, Consolidation of Uniform Acts (1978), Uniform Survival of Actions Act, s. 4.

²⁰⁶ When damage occurs after the death of the person responsible for it, a cause of action against him is deemed to have existed before he died. This permits a cause of action for that damage to be maintained against that person's estate. It may not, however, authorize maintenance of an action for contribution against the estate. Contribution is a claim based not on damage but on tortfeasor incurring and discharging liability. Some

both the cases and the literature for the view that a claim to contribution is statutory (or quasi-contractual), not a tort claim, and therefore not within the *actio personalis moritur cum persona* rule.²⁰⁷ It is likely that a court will find some basis upon which to uphold a timely contribution action by or against the representative of a tortfeasor's estate,²⁰⁸ so a statutory amendment to specifically provide for such actions appears unnecessary.

IV. Non-Tort Liabilities

The tortfeasors acts provide for recovery of contribution by one "tort-feasor" against another "tort-feasor" "[w]here damage is suffered by any person as a result of a tort".²⁰⁹ If the contribution claimant and the contribution defendant are liable for the same damage, there is no right to contribution under the tortfeasors acts unless both parties are liable in tort. Liability for damage on another basis, such as breach of contract, breach of trust or legislative provision, will not suffice.²¹⁰ Even when there is a cause of action in tort, the party liable may be outside the tortfeasors acts because the victim has chosen to assert a different form of

courts have applied survival legislation to sustain contribution claims; *Harvey v. R.G. O'Dell Ltd.*, *supra*, footnote 204, at p. 108 (Q.B.), 669 (All E.R.); *Genders v. Government Insurance Office of New South Wales* (1958), 76 W.N. (N.S.W.) 381 (F.C.), *aff'd*, (1959), 102 C.L.R. 362. But this has been disapproved by higher authority: *Ronex Properties Ltd. v. John Laing Construction Co. Ltd.*, *supra*, footnote 204, at p. 407 (Donaldson L.J.); *Genders v. Government Insurance Office of New South Wales* (1959), 102 C.L.R. 363, at pp. 380-381. See Negligence Act, R.S.B.C. 1979, c. 298, s. 7(1) (action or third party proceedings that could have been maintained under act against deceased may be maintained against his personal representative, where person would have been liable for damages or costs had he continued to live).

²⁰⁷ *Ronex Properties Ltd. v. John Laing Construction Co. Ltd.*, *ibid.*; Williams, *op. cit.*, footnote 1, p. 95; E.5; Tollefson, Contributory Negligence and the Fatal Accidents Act—Liability of the Deceased's Estate (1962), 40 Can. Bar Rev. 120, at p. 129.

²⁰⁸ This was the conclusion in each case cited in footnotes 203-206, *supra*, and *Lean v. Alston*, [1947] 1 K.B. 467, [1947] 1 All E.R. 261 (C.A.).

²⁰⁹ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c) repealed 1978, c. 47, s. 9(2).

²¹⁰ *McConnell v. Lynch Robinson*, [1957] N.I. 70 (C.A.); *Brown v. Sevrup Fisheries Pty. Ltd.*, [1970] Tas. S.R. 1 (F.C.); *Kay v. McGay Ltd.* (1979), 101 D.L.R. (3d) 286, [1979] 5 W.W.R. 279 (Man. Q.B.); *J.W. Harris & Son Ltd. v. Demolition & Roding Contractors (N.Z. Ltd.)*, [1979] 2 N.Z.L.R. 166, at p. 180 (S.C.) (all cases involving liability in contract); Fleming, *op. cit.*, footnote 40, p. 234; South Australian Law Reform Committee, *op. cit.*, footnote 71, pp. 10-11; Williams, *op. cit.*, footnote 1, pp. 126-129; see Law Commission, *op. cit.*, footnote 90, paras. 8-10, 19-23. In *Matheson v. Salah* (1962), 33 D.L.R. (2d) 146 (N.S.S.C.), an action for breach of contract, the court ordered trial on the question of the third parties' liability to defendants for contribution or indemnity under the provisions of the tortfeasors act. The third party claim was based on allegations of innocent or fraudulent misrepresentations (characterized by the court as breach of trust) and negligence. It appears that the basis for sustaining the third party proceedings was common law principles of indemnity, not statutory contribution. No reason was given for the application of the tortfeasors act.

liability.²¹¹ Contribution provisions in the Canadian negligence acts do not mention "tort".²¹² They establish contributions among "persons . . . found at fault" "[w]here damage or loss has been caused by . . . fault".²¹³ If breach of trust, breach of contract and violation of statute were treated as "fault", a right to contribution could be claimed under the negligence acts.²¹⁴ A more limited interpretation would find "fault" for this purpose when the breach of trust, breach of contract or violation of statute was negligent or wilful.²¹⁵ The conventional interpretation is that the negligence acts are addressed only to tort liability and provide for apportionment of fault (among the parties liable or between those parties and the victim) only where liability is in tort.²¹⁶ The question remains unsettled,²¹⁷

²¹¹ Compare *Brown v. Sevrup Fisheries Pty. Ltd.*, *ibid.*, (no contribution when victim obtained judgment for breach of contract); *Employers Corporate Investments Pty. Ltd. v. Cameron* (1977), 3 A.C.L.R. 120, at pp. 123-125 (N.S.W.S.C.) (tentatively sustained cross-claim for contribution by party sued in contract but also liable in tort); *Macpherson & Kelley v. Kevin J. Prunty & Associates*, [1983] V.R. 573 (F.C.) (contribution available when parties sued for both breach of contract and negligence); *Nova Scotia Home for Colored Children v. Aza Avramovitch Associates Ltd.* (1983), 58 N.S.R. (2d) 267, at pp. 275-278 (N.S.T.D.) (sustained claim to indemnity under tortfeasors act by party liable for breach of contract; party had also been sued in negligence and contract was breached by negligent performance of professional services). It seems that contribution is available when the victim has settled a claim not labelled as "contract" or "tort".

²¹² However, the marginal note of the Uniform Contributory Negligence Act, *supra*, footnote 12, s. 2(1), is "Liability of joint tortfeasors". Also, the Ontario and Saskatchewan statutes have provisions on settlements and limitation periods which mention "tort" and "tort feisor"; Negligence Act, R.S.O. 1980, c. 315, ss. 3, 9; Contributory Negligence Act, R.S.S. 1978, c. C-31, ss. 10-11. These do not apply to non-tort liabilities, and their inclusion in the negligence acts supports the view that the negligence acts as a whole apply only to tortfeasors: *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, *supra*, footnote 39, at pp. 1354 (S.C.R.), 349 (D.L.R.).

²¹³ Uniform Contributory Negligence Act, *supra*, footnote 12; Ontario provides for contribution by "persons . . . found at fault or negligent" where damage or loss has been caused by fault or negligence: Negligence Act, R.S.O. 1980, c. 315, s. 2. In the immediately following text a reference to "fault" should in the case of Ontario be read as encompassing "negligence".

²¹⁴ See S.M. Waddams, *Products Liability* (2nd ed., 1980), pp. 88, 208 (arguably, "fault" includes "default" and therefor breach of warranty).

²¹⁵ See *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia* (1974), 51 D.L.R. (3d) 380, at pp. 414-415, [1975] 2 W.W.R. 97, at p. 133 (B.C.S.C.), *rev'd* (1975), 64 D.L.R. (3d) 78, *sub. nom. Groves-Raffin Construction Ltd. v. Canadian Imperial Bank of Commerce*, [1976] 2 W.L.R. 673 (B.C.C.A.) (liable for breach of contract; negligent); *Willis v. FMC Machinery & Chemicals Ltd.* (1976), 68 D.L.R. (3d) 127, at p. 160 (P.E.I.S.C.) (liable for breach of warranty; if had been negligent); *Graham v. The Queen* (1978), 90 D.L.R. (3d) 223; *sub. nom. R. v. Graham*, [1978] 6 W.W.R. 48 (Sask. Q.B.) (statutory liability for damage caused by default, interpreted to mean negligence).

²¹⁶ *Allcock Laight & Westwood v. Patten*, [1967] 1 O.R. 18, at pp. 19-20 (Ont. C.A.); *DOMinion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 68 D.L.R. (3d) 385, at p. 390, (1976), 12 O.R. (2d) 201, at p. 206 (Ont. C.A.), *aff'd sub. nom. Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, *supra*, footnote 39; University

but it appears that amendment of the negligence acts, as well as the tortfeasors acts, is required in order to provide for contribution among persons liable on a basis other than tort or between these persons and a person liable in tort for the same damage.²¹⁸

Glanville Williams criticized the restriction of contribution to persons liable in tort and advocated that there be contribution (proportionate to each party's responsibility for the damage) in cases of breach of contract and breach of trust, including cases of "mixed" wrongs, i.e. damage caused by a combination of tort and breach of contract, tort and breach of trust, or breach of contract and breach of trust. He drafted legislation to establish contribution in these cases, and it has been adopted by Ireland.²¹⁹ In 1977, the Law Commission recommended that contribution extend to cases in which there is liability for damage "on any . . . ground whatsoever".²²⁰ The next year, Parliament enacted for England and Northern Ireland a new contribution statute which provides for contribution "whatever the legal basis of . . . liability, whether tort, breach of contract, breach of trust or otherwise".²²¹ The South Australian Law Reform Committee has recommended that contribution claims be permitted when a party is liable for breach of contract or for an "innominate

of Alberta Institute of Law Research and Reform, Working Paper, Contributory Negligence and Concurrent Tortfeasors (1975), p. 21; Weinrib, *loc. cit.*, footnote 66, at p. 339; cf. *O.K. Bazaars (1929) Ltd. v. Stern & Ekermans*, [1976] (2) S.A. 521, at pp. 530-531 (C.) (South African law).

²¹⁷ See discussions in Cheifetz, *op. cit.*, footnote 1, pp. 24-29; University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 216, pp. 17-22; University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, pp. 42-51; Cheifetz, *loc. cit.*, footnote 43, at pp. 146-147; Klar, *op. cit.*, footnote 31, pp. 151-154.

²¹⁸ There are non-statutory rights to contribution among contractors, sureties, trustees and others liable on a common obligation, but contribution is in equal amounts and the required common obligation does not exist when liability is for breach of separate contracts or other separate obligations; J. Chitty, *Contracts* (25th ed., 1983), paras. 1213-1214, 2025-2034, 4455-4462; G.H.L. Fridman & J.G. McLeod, *Restitution* (1982), pp. 365-367; Goff & Jones, *op. cit.*, footnote 75, pp. 211-230; Law Commission, *op. cit.*, footnote 90, paras. 3-9, 19-23; G.L. Williams, *Joint Obligations* (1949), pp. 163-176. But see Williams, *ibid.*, p. 173 (contribution among several promisors); Williams, *op. cit.*, footnote 1, p. 127, n. 2 (power of court to decree unequal contribution); Weinrib, *loc. cit.*, footnote 66.

²¹⁹ Williams, *op. cit.*, footnote 1, pp. 126-129, 497, Draft Concurrent Fault Act, ss. 1, 11, 39; Civil Liability Act, 1961, No. 41, ss. 2(1), 11, 21, (Ir.). The act provides for contribution among "wrongdoers" and defines "wrong" as "a tort, breach of contract or breach of trust".

²²⁰ Law Commission, *op. cit.*, footnote 92, Draft Civil Liability (Contribution) Act, s. 5(1)(b) (1977); see paras. 33, 58, 81(a), (d) of the report. The Law Commission proposed no change in the law applicable to persons liable for the same debt (as distinct from persons liable for the same damage); para. 29. In Victoria, The Chief Justice's Law Reform Committee adopted the Law Commission's recommendation: Victoria Chief Justice's Law Reform Committee, Report, Contribution (1979), para. 5.

²²¹ Civil Liability (Contribution) Act, 1978, c. 47, s. 6(1) (Eng. & N.I.).

cause of action'' created by statute.²²² In Canada it has been proposed that there should be contribution when damage is caused by breach of contract or of statutory duty.²²³ When such recommendations are adopted, ''contribution among tortfeasors'' becomes ''contribution among wrongdoers''.

The argument for extending contribution to non-tort wrongdoers is essentially the same as the argument for establishing contribution among tortfeasors. If two parties are liable for the same damage and the victim decides to recover damages from only one party, it is unjust to leave that party to bear all of the cost and allow the other party to escape payment; the burden of liability should be equitably divided among all parties liable. This argument is equally applicable to tort and non-tort liability for damage.²²⁴ Furthermore, without applying contribution to non-tort wrongs, a tortfeasor has no recourse to (or liability for) contribution when the other party's liability for damage is not in tort. Illustrative cases suggest the desirability of extending contribution to wrongs other than torts.

- (1) Victim is injured by a defective product sold to him by W1 and negligently manufactured by W2. W1's liability is in contract (breach of warranty); W2's liability is in tort.²²⁵
- (2) W1, a doctor or hospital, uses defective equipment negligently manufactured by W2 when treating Victim, a patient of W1. If injured, Victim's cause of action against W1 may be for breach of contract even if based upon failure to exercise care in selecting or testing the equipment.²²⁶
- (3) Victim buys a defective product from W1. Victim is injured by a combination of the defect and W2's negligence, as when the defect defeats a safety feature which would have protected Victim from the consequences of W2's negligence. W1's liability

²²² South Australian Law Reform Committee, *op. cit.*, footnote 71, pp. 10-12.

²²³ Uniform Law Conference of Canada, Uniform Contributory Fault Act, ss. 1, 7 (1983 draft). University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, pp. 40-52, recommended contribution for breach of contract and tentatively concluded in favour of contribution in cases of breach of trust. See also Uniform Law Conference of Canada, *op. cit.*, (1979) footnote 53, pp. 110-112 (breach of contract).

²²⁴ University of Alberta Institute of Law Research and Reform, *ibid.*, pp. 34-36, 40-41; Uniform Law Conference of Canada, *ibid.*, pp. 110-111.

²²⁵ See *Willis v. FMC Machinery & Chemicals Ltd.* *supra*, footnote 215; Waddams, *op. cit.*, footnote 214, pp. 207-210; Williams, *op. cit.*, footnote 1, p. 128; Griffiths, *op. cit.*, footnote 145, p. 249 (hospital administers to patient food or drug which is negligently manufactured or labelled). Cf. *Dowsett Engineering Construction Ltd. vs. Sloan*, [1955-56] Ir. Jur. Rep. 31 (N.I.Q.B.) (house built by W1 for victim with bricks negligently manufactured by W2). The seller (W1) might claim a right to be indemnified by the manufacturer: Chitty, *op. cit.*, footnote 218, paras. 4370-4373; Williams, *ibid.*, p. 128; Griffiths, *ibid.*, pp. 249, 250.

²²⁶ See O'Donnell, *loc. cit.*, footnote 43, at pp. 18-19.

for Victim's injuries is in contract (breach of warranty); W2's liability is in tort.²²⁷

- (4) W1 supplies a defective product to Victim. Victim's property sustains damage when the product is used by W2 in a manner which breaches W2's contract with Victim or when the product is used in conjunction with a defective product supplied by W2. The liabilities of W1 and W2 are for breaches of their separate contracts with Victim.²²⁸
- (5) In breach of his contractual obligations to Victim, W1 fails to prevent W2 from breaching W2's contract with Victim or to prevent loss caused by W2's breach, as when W1 is engaged to supervise or inspect W2's work. W1 and W2 are liable for breaches of their separate contracts.²²⁹
- (6) W1, in breach of his contract, fails to protect Victim from harm tortiously caused by W2,²³⁰ Alternatively W2 has a duty in tort to protect Victim from loss for which W1 is liable under his contract.²³¹
- (7) Victim enters a contract with W1. W2 induces W1 to breach the contract, causing Victim to sustain damages. W1's liability is in contract; W2's liability is in tort.²³²
- (8) Victim engages W1 and separately, W2 to provide professional services or advice—perhaps legal services or financial advice. Victim sustains a single loss as a result of breaches of contract by W1 and W2.²³³ Alternatively, Victim engages W1 to provide

²²⁷ Law Commission, *op. cit.*, footnote 90, para 22 (defect in car's electrical system causes headlights to fail; car runs into obstruction negligently left unlit on highway).

²²⁸ See *Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd.* (1974), 51 D.L.R. (3d) 702, [1974] 6 W.W.R. 724 (B.C.C.A.).

²²⁹ See *McConnell v. Lynch-Robinson*, *supra*, footnote 210; *Dabous v. Zuliani* (1974), 52 D.L.R. (3d) 664, (1974), 6 O.R. (2d) 344 (Ont. H.C.), *rev'd*, *supra*, footnote 93; *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1974), 46 D.L.R. (3d) 28, 3 O.R. (2d) 481 (Ont. H.C.), *rev'd* (1976), 68 D.L.R. (3d) 385, 12 O.R. (2d) 201, *aff'd sub. nom. Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, *supra*, footnote 39; *Karori Properties Ltd. v. Jelichich Austin Smith and Davies*, [1969] N.Z.L.R. 698 (S.C.); *O.K. Bazaars (1929) Ltd. v. Stern & Ekermans*, *supra*, footnote 216.

²³⁰ See *Brown v. Sevrup Fisheries Pty. Ltd.*, *supra*, footnote 210; *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia*, *supra*, footnote 215.

²³¹ See *McLaren Maycroft & Co. v. Fletcher Development Co. Ltd.*, [1973] 2 N.Z.L.R. 100 (C.A.); *J.W. Harris & Son Ltd. v. Demolition & Roading Contractors (N.Z.) Ltd.*, *supra*, footnote 210.

²³² Williams, *op. cit.*, footnote 1, p. 128. W1 might be considered a tortfeasor on the theory that he was a co-conspirator of W2.

²³³ See *Macpherson & Kelley v. Kevin J. Prunty & Associates*, *supra*, footnote 211; *O'Donnell, loc. cit.*, footnote 43, at p. 19.

professional services or advice. W1 seeks the assistance of W2, who knows that W1 and (through W1) Victim will rely upon W2's services or advice. W2 is negligent, causing loss to Victim. W1 may be liable to Victim for breach of contract; W2's liability is in tort.²³⁴

- (9) Victim is induced to enter a transaction by innocent misrepresentations separately made by W1 and W2. Victim suffers loss as a result of the transaction. A statute renders W1 and W2 liable for the loss. This may not be a tort liability.²³⁵ Alternatively, W2's misrepresentations are fraudulent or negligent and W2 is liable to Victim in tort, while W1 is liable under the statute.

Even when damage is caused by the negligence of two parties, contribution may be denied when one of the parties is in breach of contract. It may be decided that the victim has no tort action against the party, only an action for breach of contract.²³⁶

Breaches of separate contracts, damage caused by a combination of tort and breach of contract, and "negligent breach of contract" may all be found in cases arising from defects in building construction. Typical construction projects involve land surveyors, architects, construction contractors, sub-contractors and suppliers of building materials. Many of these will have entered a contract with the party for whom the building is constructed. Architects may be responsible for supervision or inspection of construction work as well as for building design. Government officials may also undertake inspection of the premises. If the building's location, design or construction is improper, two or more parties may be held responsible.²³⁷ If two or more parties are liable to the building owner for structural damage or repair costs, contribution ought to be available irrespective of whether liability is in contract or tort, whether negligent breach of contract gives rise to concurrent liability in tort, and whether negligence in the performance of a contract can be equated with tortious negligence for purposes of contribution. If contribution extends to all parties liable, courts will avoid the inexact and profitless task of classifying wrongs as torts or breaches of contract, and there will be no possibility

²³⁴ See *Smith v. McInnis*, [1978] 2 S.C.R. 1357, (1978), 91 D.L.R. (3d) 190; *Henuset Bros. Ltd. v. PanCanadian Petroleum Ltd.* (1977), 82 D.L.R. (3d) 345, [1977] 5 W.W.R. 681 (Alta. T.D.); *Nova Scotia Home for Colored Children v. Aza Avramovitch Associates Ltd.*, *supra*, footnote 211.

²³⁵ South Australian Law Reform Committee, *op. cit.*, footnote 71, p. 10.

²³⁶ Authority is divided. See cases cited in footnotes 211, 215, 216, *supra*.

²³⁷ See cases cited in footnotes 229, 231, *supra*; *Dowsett Engineering Construction Ltd. v. Sloan*, *supra*, footnote 225; cases and examples discussed in Law Commission, *op. cit.*, footnote 90, paras. 8-9, 22-23 and University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 216, pp. 18-21. See also J. Holyoak & D.K. Allen, *Civil Liability for Defective Premises* (1982), pp. 260-267.

that the victim can prevent contribution by framing his action in contract rather than tort.²³⁸

The argument against extending contribution to non-tort wrongdoers is essentially pragmatic.²³⁹ Contribution would inject complexity and uncertainty into circumstances in which certainty (or at least predictability) is desirable; it would be difficult to administer; courts would be required to construct a mode of apportionment of contribution shares for each combination of legal wrongs; much attention would be devoted to matters found in relatively few tort cases. The pragmatic argument is addressed primarily to liability for breach of contract. Contracts involve planned transactions, in which it is often necessary for the parties to predict their exposure to liability; the existence of contribution would complicate the negotiation and performance of contracts; the parties' expectations may not be fulfilled should an action for breach of contract be instituted; devices used to limit liability for damages—waivers of liability, monetary ceilings and time limitations—might not be effective to limit liability for contribution and would frequently present courts with problems difficult of satisfactory solution; issues irrelevant to liability for breach of contract, such as degree of relative "fault" or "responsibility", would loom large in litigation of contribution claims, consuming much time and expense. It might also be noted that in cases of mixed wrongs—damage caused by a combination of one wrongdoer's tort and another wrongdoer's breach of contract—it could be particularly difficult to apportion contribution shares due to the varying nature of the wrongs²⁴⁰ or remedies for them. (Breach of contract may give rise to equitable relief not granted for a tort; damages for breach of contract may differ from tort damages because of varying principles of "remoteness"—legal causation—or the absence of a contributory negligence defence to breach of contract;²⁴¹

²³⁸ See University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, pp. 41-49; Waddams, *op. cit.*, footnote 214, pp. 208-209. The possibility of the victim preventing contribution by framing his action in contract arises if contribution is confined to tort liability; see cases cited in footnote 244*infra*; *O.K. Bazaars (1929) Ltd. v. Stern & Ekermans*, *supra*, footnote 216; Cheifetz, *op. cit.*, footnote 1, pp. 26-29; D. Cheifetz, *The Application of Apportionment Legislation to Concurrent Contractual Liability* (1979), 2 *Adv. Q.* 117.

²³⁹ See Law Commission, *op. cit.*, footnote 90, paras. 46-54; Uniform Law Conference of Canada, *op. cit.*, footnote 53, p. 110. Compare University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 216, p. 22 (tentative conclusion against contribution in contract cases), with University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, pp. 49-51 (recommendation that contribution be extended to breaches of contract), and discussion in Weinrib, *loc. cit.*, footnote 66, pp. 345-349.

²⁴⁰ J.W. Salmond & R.F.V. Heuston *Law of Torts* (18th ed., 1981), p. 422; Hervey, *loc. cit.*, footnote 183, at p. 511.

²⁴¹ See *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 69 D.L.R. (3d) 385 at p. 390, (1976), 12 O.R. (2d) 201, at p. 206 (C.A.), *aff'd sub. nom.*, *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*; *supra*, footnote 39; D.R. Percy,

compensation for loss may be in the form of forfeiture payments or other benefits rather than liability for damages.²⁴²) The troublesome problem of different limitation periods would also frequently arise when the victims' causes of action are different.²⁴³

There may be some areas of liability where there is little need for a statutory right of contribution and the drawbacks outweigh the benefits. One might not recommend that contribution for contractual liability extend to liability for debt.²⁴⁴ Debtors already have a right to contribution for equal shares of a common debt.²⁴⁵ If courts could apportion payment of debts in unequal amounts (when the contract does not so provide), there would be an undesirable amount of uncertainty in financial affairs and, perhaps, a great increase in litigation concerning debts.²⁴⁶ There are relatively few cases in which a person who is not a co-debtor or guarantor is liable for a sum owed by a debtor. (As an example, there might be liability if there is tortious interference with the contract to pay the debt.) In order to withhold contribution for debt, a line between "debt" and "damages" must be drawn.

Contractual liability to insure a person against loss should not give rise to a claim for contribution from the person who caused the loss. The insurer's remedies should be confined to subrogation and recoupment from the insured. The obligation to compensate a person insured against loss may be classified as "debt" rather than "damage". A more fundamental reason to deny contribution is that the insurer and wrongdoer are not under a "common liability" to the victim even if the measure of their liabilities is the same. Only the wrongdoer is liable for the damage itself.²⁴⁷ If it is accepted that an insurer will not be able to obtain contribution,

Contribution Claims and Contract Principles (1982), 64 Unif. Law Conf. Can. Proc. 124; D.R. Percy, *The Impact of the Contribution Proposals of the Uniform Law Conference on the Common Law of Contract* (1982), 64 Unif. Law Conf. Can. Proc. 148. But see O'Donnell, *loc. cit.*, footnote 43, at p. 17.

²⁴² See Dugdale, *loc. cit.*, footnote 106, at p. 183.

²⁴³ For an illustration, see D. Cheifetz, *A Final Look at Dominion Chain* (1979), 27 Chitty's L.J. 50, discussing *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, *supra*, footnote 39.

²⁴⁴ See Law Commission, *op. cit.*, footnote 92, paras. 28-29. Following the Law Commission's recommendation, Civil Liability (Contribution) Act, 1978, c. 47 (Eng. & N.I.), provides for contribution only when there is liability "in respect of any damage", whereas judgment recovered against a person "liable in respect of any debt or damage" is not a bar to another action against a person jointly liable for the same "debt or damage". See also Uniform Law Conference of Canada, Uniform Contributory Fault Act, ss. 1, 7 (1983 draft) (contribution applicable to breach of contract "giving rise to a right of action for damages").

²⁴⁵ *Supra*, footnote 218.

²⁴⁶ Law Commission, *op. cit.*, footnote 92, para. 29.

²⁴⁷ See *Sterling Trust Corp. v. Firemen's Fund Insurance Co. of Canada* (1982), 36 O.R. (2d) 27 (S.C. Master).

what of the person, not an insurance company, who agrees to compensate another for damage caused by a third person, such as a contractor who agrees to be responsible for damage caused by a sub-contractor? It is submitted that here, too, there ought to be no right of contribution from the person who caused the damage, even when caused tortiously. There is not a common liability,²⁴⁸ and the person responsible for the damage ought not to be subject to contribution because of an arrangement to which he was not a party. In the example given, the contractor should be able to obtain reimbursement from the sub-contractors only if this is provided in the sub-contract. In short, a person whose breach of a contractual obligation is a cause of damage ought to be able to obtain contribution from another person who caused the damage, but a person who undertakes a contractual obligation to pay for damage caused by another ought not to be awarded contribution from that other person.

One might also consider that contribution should not extend to liability for breach of trust. Parties in breach of a common obligation have an existing right to contribution in equal shares.²⁴⁹ There may be few cases in which a trustee and a non-trustee are liable for the same damage. However, in the case of co-trustees, responsibility for breach of trust may be so unequal that liability should be borne in unequal shares, and in general there seems to be no satisfactory distinction between damage caused by breach of trust and damage caused by other civil wrongs. It therefor appears desirable to apply contribution to liability for damage caused by breach of trust.²⁵⁰

Contribution should be available in all cases of common liability for damages, whatever the basis of liability.²⁵¹ The pragmatic argument against contribution for non-tort wrongs is serious but fails to justify differential treatment of tort and non-tort liability. Contribution would complicate the negotiation and performance of contracts, but it also complicates the performance of tort obligations and especially the negotiation of settlements. Liability for breach of contract is frequently limited by waivers, monetary ceilings and time limitations, but so is tort liability. Torts can vary in the damages recoverable and the availability of non-damage remedies. There is such a variety of torts that apportionment of fault or responsibility between two tortfeasors can be no less uncertain than apportionment between a tortfeasor and a different type of wrongdoer. The problems

²⁴⁸ See *National Coal Board v. Knight Brothers*, [1972] S.L.T. Notes 24 (O.H.); cf. *Allcock Lught & Westwood Ltd. v. Patten*, *supra*, footnote 216 (claimant liable for breach of warranty that goods were insured).

²⁴⁹ *Supra*, footnote 218.

²⁵⁰ See University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, p. 52; Williams, *op. cit.*, footnote 1, pp. 126-127.

²⁵¹ This is the formula recommended by the Law Commission and adopted by Parliament in the 1978 contribution act. See footnotes 220, 221, *supra*, and accompanying text.

posed by extension of contribution to non-tort wrongs have already been experienced in some cases of contribution among tortfeasors and satisfactory solutions have been found—satisfactory, that is, to the extent that there is no serious movement for abolition of contribution among tortfeasors. That these problems would arise more frequently in cases of other wrongs does not justify withholding the remedy of contribution. Solutions drawn from experience with torts can be applied to other wrongs, and the apportionment formula of the tortfeasors acts is sufficiently flexible to permit appropriate adaptations to be made.²⁵²

Conclusion

The issues canvassed in this article fall into two divisions. The first is concerned with persons who have committed (or would be vicariously responsible for) a tort or other wrong, but are not liable for all or any of the damage caused thereby. The second is concerned with persons who are liable in a tort other than negligence or a non-tort cause of action. These are by no means all of the issues bearing upon the question of "who is liable to whom for contribution?" But they are an appropriate starting-place in undertaking the examination and reform of contribution law.

This article has advanced the view that no one ought to be required to contribute unless he is liable to the victim for the same damage or portion of damage as the contribution claimant and that when there is this common liability, contribution ought to be available without exclusion of parties liable for certain torts or non-tort causes of action. A prior judgment for the contribution defendant in an action brought by the victim should not prevent contribution unless it was given on the ground that the defendant did not incur liability or that liability was not proved. It is also submitted that when common liability would exist but for a relationship or agreement between the victim and one of the parties, there be no contribution but that the remaining party or parties' liability to the victim be reduced in order that the burden of liability cast upon him or them not

²⁵² "[T]he amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage": Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(2), repealed 1978, c. 47, s. 9(2). This formula was recommended by the Law Commission and adopted by Parliament when contribution was extended to non-tort liability for damages; Law Commission, *op. cit.*, footnote 92, Draft Civil Liability (Contribution) Act, s. 3(4); Civil Liability (Contribution) Act, 1978, c. 47, s. 2(1) Eng. & N.I.). It is also found in Canadian draft legislation which extends contribution to cases of breach of contract; University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, Draft Contributory Negligence and Contribution Act, s. 11(1); Uniform Law Conference of Canada, *op. cit.*, footnote 53, Draft Contributory Negligence and Contribution Act, s. 12(1). See also Williams, *op. cit.*, footnote 1, Draft Concurrent Fault Act, s. 11(2); Civil Liability Act, 1961, No. 41, s. 21(2) (Ir.) ("just and equitable having regard to the degree of that contributor's fault").

be greater than if contribution had been available. There are, though, numerous sub-issues which should be addressed individually. A conclusion on one sub-issue usually does not dictate a conclusion on an analogous or related matter.

Reform of contribution law does not, of course, begin with a blank slate. It proceeds from a study of contribution under existing legislation: negligence acts in most provinces and territories of Canada, tortfeasors acts in parts of Canada and most other nations, of the Commonwealth, and the distinctive Irish and South African acts which provide valuable points of reference in considering the operations of and possible amendments to contribution statutes in other countries.²⁵³ Despite the difficulties presented by "tort-feasor who is, or would if sued have been, liable"²⁵⁴ and other features of phraseology, the tortfeasors acts appear to be more successful in their operation and to provide a better foundation for future legislation than the negligence acts.²⁵⁵

One reason for this is the relative clarity of the tortfeasors acts. It is reasonably clear that contribution applies only to parties under an enforceable liability to the victim and extends to all forms of tort liability but not to non-tort liabilities. That cannot be said with assurance of the negligence acts. The tortfeasors acts can be extended to non-tort wrongs and modified in needed respects without changing their basic structure or burdening them with a series of amendments enacted in response to judicial decisions.²⁵⁶ A second reason is the negligence acts' linkage of provisions on contribution to provisions on contributory negligence. Whether there should be contribution by or against a person liable for damage is a completely different question from whether liability for damage ought to be reduced, barred or unaffected by the negligence of the injured person. It ought to receive a different answer.²⁵⁷ The structure of the negligence acts and the role of the term "fault" suggest it must receive the same answer, with the result that contribution is inapplicable to types of liability in which contributory negligence is not a defence and the plaintiff's

²⁵³ One may also refer to the contribution law of the United States. Most states have adopted contribution by statute or judicial decision and there is now a large body of American literature on the subject. The contribution laws and literature of the United States and other common law jurisdictions are collected in P.B. Kutner, *Bibliography: Contribution Among Tortfeasors* (1983), 3 Rev. Lit. 297, (1984), 33 Def. L.J. 219.

²⁵⁴ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6(1)(c) repealed 1978, c. 47, s. 9(2).

²⁵⁵ For a contrary view, see Uniform Law Conference of Canada, *op. cit.*, footnote 127, pp. 68-69.

²⁵⁶ The unhappy history of the Wrongs Act, 1936, No. 2267, ss. 25-26a (S.A.), is instructive. A further series of amendments was proposed by South Australian Law Reform Committee, *op. cit.*, footnote 71.

²⁵⁷ See Weir, *loc. cit.*, footnote 189.

damages are not subject to reduction for contributory fault. There is nothing wrong with including contributory fault and contribution provisions in the same statute; they need not be in entirely different statutes, as in England.²⁵⁸ Coordination between the two forms of apportionment is very desirable. But the provisions should be separate, and the range of torts and other wrongs included should be different—wider for contribution than for contributory fault.²⁵⁹

The process of reform of contribution law has begun in earnest with the enactment of the 1978 English act,²⁶⁰ replacing the 1935 tortfeasors act²⁶¹—the model for statutes through the Commonwealth—and the proposal of a new contributory fault act to replace the Canadian negligence acts.²⁶² The subject will, no doubt, receive additional attention from law reform bodies and legislatures. Contribution is a simple concept but a complicated business—primarily because it involves three causes of action: the victim's claim against the contribution claimant, the victim's claim against the contribution defendant, and the contribution claim itself. If contribution legislation is reformed, it is likely to become more complicated than in the past. This seems a necessary price to pay if liability issues and other significant matters are to be addressed and well provided for in the legislation, rather than governed by established case law or left open for future judicial resolution.

²⁵⁸ Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28; Civil Liability (Contribution) Act, 1978, c. 47 (Eng. & N.I.).

²⁵⁹ See statutes cited in footnote 262, *infra*.

²⁶⁰ Civil Liability (Contribution) Act, 1978, c. 47 (Eng. & N.I.).

²⁶¹ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 6, repealed 1978, c. 47, s. 9(2).

²⁶² Uniform Law Conference of Canada, Uniform Contributory Fault Act (1983 draft). See also University of Alberta Institute of Law Research and Reform, *op. cit.*, footnote 64, Contributory Negligence and Contribution Act (1979).