Preliminary Paper No 19

APPORTIONMENT OF CIVIL LIABILITY

A discussion paper

The Law Commission welcomes your comments on this paper and seeks your response to the questions raised.

These should be forwarded to:
The Director, Law Commission, P O Box 2590, Wellington
by Friday, 3 July 1992

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Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its aim is to help achieve coherent and accessible laws that reflect the heritage and aspirations of New Zealand society.

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Introduction

BACKGROUND

1 This paper addresses the rules of civil (that is, non-criminal) liability where the acts or omissions of two or more persons give rise to loss or damage. They may all be defendants or they may include a plaintiff who is partly responsible for his or her own loss. The present rules are to be found both in the general law - various propositions laid down by court decisions - and in several statutes which have modified some of the earlier judge-made rules. The rules decide whether the plaintiff's responsibility (if any) reduces the damages recoverable, and how the damages should be divided between responsible defendants.

2 The topics addressed in this paper necessarily touch on some difficult and fundamental questions, including the nature of fault and responsibility and the objectives of our system of civil liability. Some current concerns are also involved, notably the expansion of the liability of local authorities, and of professional advisers to persons other than those with whom they have contracted and the impact of that expansion on the cost and availability of insurance against liability.

3 The Law Commission has selected this area as one deserving of attention for several reasons. One is that the former Contracts and Commercial Law Reform Committee (the CCLRC) had published a working paper entitled *Contribution in Civil Cases* in June 1983, but had not had time to complete a final report before being disbanded. It was part way through the drafting of a Bill based on its working paper at that time. The committee's work had been prompted in part by significant statutory reform in England and Wales by the enactment of the Civil Liability (Contribution) Act 1978. Further, in our own work leading to our reports on statutes of limitation (see NZLC R6 *Limitation Defences in Civil Proceedings*, 1988) and on company law (see NZLC R9 *Company Law: Reform and Restatement*, 1989; NZLC R16 *Company Law Reform: Transition and Revision,* 1990), our consultative activity revealed considerable concern about some of the present rules concerning multiple liability disputes.

4 The publication of this paper has been preceded by extensive research, including a review of overseas legislation, case law, law reform proposals and academic writing, and a significant degree of preliminary consultation with groups and individuals having a particular interest in questions of civil liability. We have been greatly assisted by all those with whom we have discussed these issues, and are most appreciative of the efforts of some of them to extract otherwise

inaccessible factual material.

5 We have also had the help of a small advisory group comprising Mr Justice Henry of the High Court and Professor Brian Coote of the Auckland University Law Faculty (both of whom were members of the CCLRC), and Ms Joanne Morris, formerly of the Victoria University of Wellington Law Faculty and author of *Apportionment of Civil Liability* (Legal Research Foundation, Publication No 28, 1987).

6 The purposes of this paper include the following:

- to provide a reasonably concise introduction and background to the subject matter of the Law Commission's inquiry;
- to indicate areas where changes to the present rules might be made and the possible directions for change;
- to indicate the Law Commission's current views on particular matters; and
- to encourage responses from interested persons and organisations.

7 The paper outlines the historical development and present state of the relevant law (Chapter I); discusses problems created by that law (Chapter II); considers reforms made or suggested in New Zealand and elsewhere (Chapter III); discusses the wider context in which our proposals are being put forward (Chapter IV); sets out the Law Commission's provisional proposals for reform in New Zealand (Chapter V); discusses some difficult points of detail (Chapter VI); and presents a draft Civil Liability and Contribution Act with a commentary.

8 The priority which the Law Commission has had to give to other urgent projects meant the publication of this paper has been delayed longer than would have been preferred. But that has allowed us to monitor the many useful developments in other jurisdictions. Because of this, and because the CCLRC developed work in this area to the stage of drafting, we have decided that the best course at present is to concentrate on the extension of rights of contribution amongst defendants and of the right of defendants to have claims by plaintiffs reduced so as to reflect their contributing fault. Reform in these matters would, in our view, remove anomalies in the law. We will, however, continue to monitor related developments in relation to the liability of particular defendants and will consider the need for further reforms to deal with particular situations (such as the liability of professional advisers and local authorities).

9 We hope that this paper will generate submissions not only on matters covered by the draft Act, but on the wider issues that remain to be addressed. The objective is to remove the obvious anomalies, and clarify the expression and content of the present law. That will both provide a more satisfactory regime for those affected, and ensure that any necessary subsequent changes can take place from a clear and principled base.

CONCEPTS IN CIVIL LIABILITY

10 Before turning to the substance of the paper, we explain briefly the concepts and terminology associated traditionally with civil liability and identify the various situations which involve multiple parties and are the subject of the Law Commission's review.

11 Civil liability exists where one person (the *plaintiff*) has suffered loss and is legally entitled to (that is, a court will give a judgment ordering) a remedy against another (the *defendant*). (In this context, *person* includes such non-human entities as companies and public bodies.) In most situations the remedy available is a payment of money (*damages*) by way of compensation for the loss suffered. This paper is concerned exclusively with remedies in the form of an action for damages and not with others such as injunctions which direct a defendant to do or (more commonly) refrain from doing certain things.

12 For a plaintiff to be legally entitled to a remedy against a defendant, our system of law requires that the plaintiff establish that the circumstances complained of fall within the scope of a recognised *cause of action*. The most common cause of action in civil claims in New Zealand is that of *breach of contract*: if the defendant has entered into a valid contract with the plaintiff and then acts in breach of the terms of that contract, the plaintiff is legally entitled to damages for any loss suffered as a result of that breach. Damages may be based on the defendant's failure to provide the plaintiff with the benefit contracted for or may reimburse the plaintiff for wasted expenditure incurred in relation to the contract.

13 In New Zealand the next most common cause of action is in *tort*. Tort law operates independently of any contract to protect against unlawful interference with one's person or property. The most frequently encountered tort is *negligence*: the breach of a duty to take reasonable care for the interests of another person where it was foreseeable that such breach would cause loss to that other person. *Defamation*, the breach of a duty not to damage another's good reputation, is another tort. So is *battery*: a breach of another's right not to be subjected to physical force. A person who commits a tort is known as a *tortfeasor*.

14 Other causes of action outside both contract and tort include *breaches of trust* or *fiduciary obligations* (eg, misuse by directors of company assets) or breaches of other *equitable* obligations (eg, misuse of confidential information), and of *statutory provisions* (eg, infringement of registered patents or trade marks).

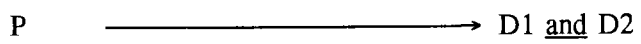
15 Using the abbreviations "P" for plaintiff and "D" for defendant, and an arrow to indicate a cause of action against the defendant, a simple case of liability may be represented in a diagram as follows:

P —— (tort/breach of contract)——→ D

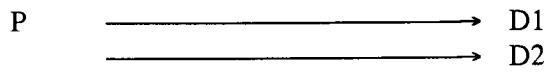
16 This paper is concerned with more complex disputes, in particular where there are multiple defendants (D1, D2, etc), but where the dispute relates to a single loss suffered by a plaintiff. It is not concerned with situations where

different causes of action or different defendants are involved in different kinds of loss. In diagrammatic form, the paper is especially concerned with variations on three situations:

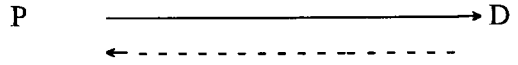
(a) Joint concurrent liability



(b) Several concurrent liability



(c) Plaintiff's partial responsibility for a loss suffered



17 *Joint concurrent liability* describes a situation where P can claim on the same cause of action (arising from the same facts) against both D1 and D2. This might occur where D1 and D2 as partners contract with P and one of the partners breaches the contract. In the field of tort there is joint concurrent liability where:

(a) D1 is the principal or employer of (and *vicariously liable* for) D2, the agent or employee;

(b) D1 and D2 are subject to a joint duty (for example, as partners undertaking some activity); or

(c) there is combined activity between D1 and D2 to a common end (an early but famous example being where P was set upon by D1, D2 and D3, with D1 committing battery, D2 wrongful imprisonment, and D3 theft of a silver button. All were held liable for the entire damage: *Smithson* v *Garth* (1691) 3 Lev 324; 83 ER 711).

In contract the test for joint liability depends upon the existence of a common liability for a common obligation, eg, where D1 and D2 are co-contractors or co-guarantors.

18 *Several concurrent liability* describes a situation where P has, in respect of a single loss, one claim against D1 and (whether by reason of a separate cause of action or of different facts) an *independent* claim against D2. An example of this would be a multi-vehicle collision where D1 (negligent in driving too fast) collides with D2 (negligent in being on the wrong side of the road) who in turn collides with P.

19 This paper is concerned with the rules of liability which are applicable or should apply as between D1 and D2: how they share (or contribute to) P's claim. Rights as between D1 and D2 are referred to in terms of *contribution* where D2 must reimburse D1 for part only of the damages paid by D1 to P, and *indemnity* where D2 must reimburse D1 for the whole of the damages paid to P. In our

discussion of contribution D1 is usually the contribution claimant and D2 the party against whom it is claimed (contribution defendant). D1 and D2 are both wrongdoers whose acts have caused loss or damage to P. They are called *concurrent wrongdoers* (a global term which refers to both joint concurrent wrongdoers and several concurrent wrongdoers) and their liability is *in solidum*: that is, each is responsible to P for P's entire loss, subject to the limit that P can never recover more than the total loss suffered. Although we generally refer to D1, D2 and D3 (see para 20) in the singular, those terms should be taken to include the plural; for example there will very often be more than one contribution defendant.

20 The sharing of liability as between D1 and D2 may be complicated by particular circumstances, including the following:

- D1 has the benefit of a contractual (or statutory) limit to any liability to P.
- D2 has a statutory defence (eg, limitation or infancy) to any claim by P.
- D1 has compromised the claim with P in any of several forms including a consent judgment, an acceptance of money paid into court, or a settlement agreement (*compromise* is used throughout the paper to include any payment which is made other than as a result of a judgment on the merits).
- Another defendant (D3) has become insolvent or disappeared (and a separate question arises about the impact of that as between D1 and D2).
- D1 may be liable for exemplary or punitive damages, while D2 is liable for ordinary (compensatory) damages only.

21 The paper is also concerned with the situation where P's own acts or omissions have contributed to the loss suffered for which P seeks damages from one or more defendants. P is partly at fault. What effect should this have on P's claim? Should it make any difference that P is more at fault than D? Or that D2 has disappeared?

I

History of Contribution and Contributory Negligence

THE POSITION OF DEFENDANTS

22 We begin our consideration of the general law by looking at the rules which applied where two or more defendants acted in such a way as to cause a single loss to P. They would then share liability to P. But the common law found difficulty in apportioning blame: it regarded a shared liability as an indivisible obligation. Those who shared the obligation were all fully responsible for the entire loss.

Procedural rules

23 At paras 17-18 we recorded the difference between joint concurrent liability and several concurrent liability. At common law that distinction had important consequences (many but not all of which have already been reformed by legislation). For example, the rule in ***Brinsmead*** v ***Harrison*** (1871) LR 7 CP 547: judgment against one *joint* defendant entirely discharged the other(s), even if the plaintiff was unable successfully to execute the judgment obtained against the first joint defendant. The plaintiff might thus be left without a remedy. This rule, and an analogous one that a formal discharge of one joint wrongdoer (but not an agreement not to sue) discharged the rest, were based on the concept that since there was a joint liability there was only *one* cause of action. If that cause of action were extinguished in some way, it simply ceased to exist. Where the tortfeasors were joint concurrent tortfeasors only a single judgment, which could not be severed, could be given and it could be executed in full against any of the defendants named in it. The rule releasing joint wrongdoers where there is a judgment against one has long since been abrogated (see s 17 of the *Law Reform Act 1936* which superseded s 94 of the *Judicature Act 1908* as a result of certain English reforms (see para 47) and applies in respect of all civil proceedings whether a crime or not). The rule still exists, however, in relation to a compromise.

24 A different rule was applied to *several* concurrent tortfeasors: in that case there were as many causes of action as there were defendants. Consequently, although joint concurrent tortfeasors could be joined in a single action, several concurrent tortfeasors could not. They had to be sued separately in turn until the plaintiff had recovered the damages sought. Naturally judgment against one did

not release the others. (Rule 74 of the High Court Rules and rule 138 of the District Court Rules now enable the joinder in one proceeding of defendants against whom the plaintiff claims either jointly or severally.)

25 In both situations, however, the concurrent wrongdoers were said to be liable *in solidum*: each of the wrongdoers was responsible for the *whole* of the damage. The plaintiff could therefore enforce judgment against whichever defendant the plaintiff chose. In practical terms one defendant might be made to pay the entire award while another escaped scot-free. This rule has not been abolished and remains a fundamental of the law of civil liability. For the purposes of the present review it will be necessary to decide whether or to what extent concurrent wrongdoers should continue to be liable *in solidum*, or whether the rule should be changed in favour of separate or *several* liability so that each concurrent wrongdoer should bear only the proportion of the plaintiff's loss which the court allocates to that wrongdoer.

Tortfeasors: the no-contribution rule

26 The rules allowing a plaintiff to pick and choose between defendants had serious consequences where the wrongdoers were tortfeasors (ie, persons whose liability arose from committing a tort).[1] A tortfeasor who had paid the entire judgment debt was not able to bring a claim against other tortfeasors to make them pay their fair share of the damages: that is, to contribute. A tortfeasor was thus forced to bear the whole of the loss caused partly by him or herself, and partly by someone else, even if that other person had also been sued to judgment by P.

27 The rule that there is no contribution between joint tortfeasors is found in the judgment in *Merryweather* v *Nixan* (1799) 8 TR 186; 101 ER 1337. It appears that M and N had together done an injury to a reversionary interest belonging to S. S had sued and obtained his entire judgment of £840 from M who then brought an action against N to recover a "moiety". On appeal, the Chief Justice of the Court of King's Bench, Kenyon CJ, upheld the trial judge's decision that M did not have a good claim. According to the report:

> There could be no doubt but that the non-suit was proper: that he had never before heard of such an action being brought, where the former recovery was a tort: that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit [contract]: and that this decision would not affect cases of indemnity.

This rule was to be trenchantly criticised until its legislative reform in the 1930s. It was, however, a perhaps inevitable conclusion in a legal system not yet sufficiently sophisticated to provide for the division of a seemingly indivisible liability.

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1 The situation was rather different in respect of joint wrongdoers whose liability was for a breach of a contract or other civil obligation, see paras 30-34.

28 The rule was also justified by reference to the maxim *ex turpi causa non oritur actio*: that an action does not arise from a wrongful cause. A contribution action was seen as an attempt to recover part of a penalty which had been imposed for a wrongful act. The maxim reflects the view that D1 should not be able to escape responsibility for a wrongful action by passing the consequences on to D2 (even if the latter were more to blame for the loss to P).

29 The rule in *Merryweather* v *Nixan* could produce very unjust results. Even so, it was never judicially overturned although some limited exceptions to it were found. None of these exceptions (at least in the common law courts) allowed for the *apportionment* of damages between the wrongdoers, but in some circumstances a defendant who had paid a damages award was held able to recover an "indemnity" (ie, recompense for the *whole* of the amount paid). These were cases where the moral fault was regarded as being exclusively or preponderantly on one side, or where one party had acted innocently at the request of the other. (Williams, 81)

For example, consider situations where D1 did not know that an unlawful act was being committed, where the act was not manifestly tortious, or where D1 acted in honest ignorance of the facts which made an act unlawful. Injustice would result if D1, rather than a guiltier D2, was made to assume the burden of compensating P. Instead, D1 could claim indemnity from D2.

Wrongdoers other than tortfeasors

30 The rule in *Merryweather v Nixan*, denying a right of contribution, applied only to *concurrent tortfeasors*. Where the liability of the wrongdoers was *joint* and non-tortious, as in claims against co-contractors, joint trustees, tenants, directors, sureties or insurers, D1, who had settled a judgment debt was entitled to claim contribution from D2 and the rest of the co-obligors. This was not a contractual remedy but was based on principles of equity and unjust enrichment. The right to contribution arose most often in respect of debts: *Deering* v *The Earl of Winchelsea* (1787) 2 Bos & Pul 270; 126 ER 1276; *sub nom Dering* v *Earl of Winchelsea* 1 Cox Eq 312; 29 ER 1184, the leading authority, was concerned with obligations between sureties. The right to contribution depended on "a common obligation and a common burthen" and that was far more likely to be present in respect of obligations in debt than when P sought recovery of damages.

31 It seems that it was unimportant whether the common burden of debt arose from the same or different instruments or whether one obligor knew of the obligation of the other. So long as the obligation was in respect of the same liability, the fact that the co-obligors were quite unknown to each other would not bar a contribution claim by the one who had paid the debt.

32 Contribution under this rule was usually in equal shares, which reflected equitable considerations as well as the inability of the law at that time to come to terms with apportionment in unequal shares. One exception to that practice applied to the liability of partners: liability corresponded to the partnership agreement as to the division of profits between members, whether equal or not. (That rule has been partly codified by s 12 of the Partnership Act 1908.)

33 The law of joint obligations, like the law of joint torts, recognised that one of the obligors might be primarily responsible for the plaintiff's loss. In such a case the others remained jointly liable to the plaintiff, but if the plaintiff recovered against one of them, that obligor might be able to claim a full indemnity from the primary defendant.

34 Finally, it should be emphasised that there could be no contribution unless there was a common obligation. If the plaintiff's loss had resulted from a breach of contract by the first defendant and a breach of trust by the second defendant, or of breaches of separate unconnected contracts, there was no common obligation and so there could be no contribution. This remains the case today in New Zealand.

Admiralty

35 The rule in *Merryweather* v *Nixan* did not apply in Admiralty which was a separate jurisdiction of the court dating back to 1391. Apportionment of damages between concurrent wrongdoers was permitted in the Admiralty jurisdiction.[2] For example, in *The Englishman and The Australia* [1894] P 239 the plaintiff's vessel was damaged as a result of the combined negligence of the operators of a tug and of the vessel which it was towing. The court held that the damages should be apportioned equally between the two operators. (See also *The Milan* (1861) Lush 388; 167 ER 167; *The Bernina (2)* (1887) 12 P D 58, 76, 95; and *The Cairnbahn* [1914] P 25.)

36 The last of these decisions was reached under the Maritime Conventions Act 1911,[3] based on the *International Convention for the Unification of Certain Rules Respecting Assistance and Salvage at Sea* (Brussels, 23rd September 1910; TS4 (1913); Cmnd 6677), which clarified and extended the Admiralty rules to provide expressly for apportionment of damages proportionate to fault (an early attempt by the Scottish Admiralty division to introduce proportionate rather than equal liability had been unsuccessful: see *Hay* v *Le Neve* (1824) 2 Sh Sc App 395). The convention was acceded to by New Zealand on 19 May 1913 and was given effect in the *Shipping and Seamen Act 1952*. The *Marine Pollution Act 1974* which gives effect to the *International Convention on Civil Liability for Oil Pollution Damage* (Brussels, 29 November 1969) includes the same principle. The facts of *The Cairnbahn* were that P's ship had been damaged as a result of the negligence of D1 and D2 who were equally at fault. P recovered the entire loss

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2 Admiralty was originally a separate court concerned with shipping matters, its separate jurisdiction arising from a statute of Richard II, the Admiralty Jurisdiction Act 1391. This Act has been superseded most recently by s 20 of the *Supreme Court Act 1981* (UK) and the *County Courts Act 1984* (UK). Admiralty is a jurisdiction of the High Court in New Zealand by virtue of the Admiralty Act 1973.

3 Prior to 1911 s 25(9) of the *Judicature Act 1873* had provided:

> In any case in proceedings for damages arising out of a collision between two ships, if both ships shall have been found to be in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail.

from D1. D1 then sued D2 for contribution. It was held (based on s 1 of the Act, which dealt with recovery of contribution for losses caused by the negligence of two or more parties) that D1 was entitled to recover from D2 half the sum paid to P; the damages paid to P were held to be a loss arising from the fault of both.

THE POSITION OF THE PLAINTIFF AT FAULT

37 The other kind of shared liability which is considered in this paper is where the loss suffered by P results partly from P's own conduct: what has traditionally been called P's "contributory negligence". The question is, where P has suffered a loss partly as a result of P's own misconduct, carelessness or stupidity, whether that conduct should operate to reduce the damages payable by a defendant who, being also partly to blame for the loss, is legally responsible for it.

38 This is a question which needs to be considered quite separately in relation to tort and other causes of action. Historically, it was only where the cause of action lay in tort that contributory negligence was an issue. Where the claim against a defendant arose, for example, out of the breach of a contract, P's own conduct was not considered to be relevant: the contractual obligation was absolute and P was entitled to rely on its being fulfilled. Thus the discussion in paras 39-45 applies only to the rules in tort, particularly negligence. We will consider whether P's conduct should continue to be irrelevant in the face of a breach of contract or other civil obligation in the following chapters.

39 Turning then to the law of tort, the common law rule was that contributory negligence on P's part would deny P any recovery for damages at all, see *Butterfield* v *Forrester* (1809) 11 East 60; 103 ER 926. In that case, D was repairing his house and for this purpose had placed a pole across the road. P left a nearby public house at dusk, and, failing to see the pole, rode into it and was badly injured. D claimed that if P had been riding more slowly he would have been able to avoid the obstruction. The jury found that a person riding with ordinary care could have seen and avoided the pole and that P was not riding with such care. The verdict for D was upheld by the Chief Justice of the Court of King's Bench, Lord Ellenborough CJ. He said:

> A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. ... one person being in fault will not dispense with another's using ordinary care for himself. (60; 962)

40 This rule was a harsh one since the slightest negligence on P's part denied any recovery at all. In, it seems, an attempt to avoid some of the worst unfairness the courts developed an exception known as the *last opportunity* rule which is generally explained in terms of causation. Its effect was not to apportion loss between the parties but to shift the entire loss to the defendant.

41 The rule is found in *Davies* v *Mann* (1842) 10 M & W 546; 152 ER 588: the "donkey" case. D's wagon and horses which were being driven at "a smartish

pace" killed P's donkey which had been left hobbled at the side of the road. Curiously, D did not allege negligence by P in leaving the donkey unattended. But, in any case, the court said that even if P had been careless in tethering the donkey:

> [I]t would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, although the animal may have been improperly there. (548; 589)

42 The last opportunity rule depended on decisions as to which of P or D acted last, or more precisely, whose negligence operated later. It was particularly difficult to apply when there was continuing negligence by the parties, or when their actions were nearly or actually contemporaneous, say in the case of a collision between two cars both travelling at high speed.

43 The doctrine of last opportunity was later extended to include *constructive* last opportunity. In that case liability would fall on the party who *would* have had the last opportunity to prevent the loss if it had not been for that person's prior negligent act. It is illustrated by a decision of the Judicial Committee of the Privy Council in an appeal from Canada, *British Columbia Electric Railway Co Ltd* v *Loach* [1916] 1 AC 719. P had been injured as a result of being on the railway track in the path of a train belonging to D, a railway company. The train was unable to stop because its brakes were defective. It was said that the railway company could and ought to have avoided the consequences of P's negligence and that it would have been able to do so if it had not been negligent and sent out the train with defective brakes. Since D had had the constructive last opportunity of avoiding the accident it was solely liable. The common law was forced to adopt such a doctrine (which produced very fine distinctions) because it had chosen not to apportion responsibility between the parties and adjust the damages accordingly.

44 Like the rule forbidding contribution between concurrent tortfeasors, the bar against recovery for contributory negligence was clearly productive of great unfairness. The principles and the criticism were clearly set out by Lindley LJ in *The Bernina* (2) (1887) 12 PD 58:

> The cases which give rise to actions for negligence are primarily reducible to three classes as follows:- 1. A without fault of his own is injured by the negligence of B, then B is liable to A. 2. A by his own fault is injured by B without fault on his part, then B is not liable to A. 3. A is injured by B by the fault of more or less of both combined, then the following further distinctions have to be made:- (a) if, notwithstanding B's negligence, A with reasonable care could have avoided the injury, he cannot sue B: *Butterfield* v *Forrester*; *Bridge* v *Grand Junction Rly Co.*; *Dowell* v *General Steam Navigation Co*; (b) if, notwithstanding A's negligence, B with reasonable care could have avoided injuring A, A can sue B: *Tuff* v *Warman*; *Radley* v *L & NW Railway Company*; *Davies* v *Mann*; (c) if there has been as much want of reasonable care on A's part as on B's, or, in other words, if the proximate cause of the injury is the

> want of reasonable care on both sides, A cannot sue B. *In such a case A cannot with truth say that he has been injured by B's negligence, he can only with truth say that he has been injured by his own carelessness and B's negligence, and the two combined give no action at common law.* This follows from the two sets of decisions already referred. *But why in such a case the damages should not be apportioned, I do not profess to understand.* (89, emphasis added)

45 But by 1922, Viscount Birkenhead, LC, was saying that:

> Upon the whole I think the question of contributory negligence must be dealt with somewhat broadly and upon commonsense principles as a jury would probably deal with it. (*The Volute* [1922] 1 AC 129, 144)

However, *The Volute* was an Admiralty case and, as we have seen, that jurisdiction was rather more pragmatic than the common law courts. General statutory provision for apportionment of loss which had been caused by the combined negligence of P and D was not to be made for almost another 25 years.

REFORM OF THE COMMON LAW

46 By the early twentieth century the common law rules were generally considered to be profoundly unsatisfactory. The "inveterate predilection of the common law mind for assigning occurrences to a single response or cause" (Fleming, 243) was being replaced by a recognition that responsibility for so-called indivisible losses should be apportioned when that would promote the ends of justice; and the decisions in the Admiralty jurisdiction had demonstrated that this was practicable.

The Law Reform Act 1936

47 In 1934 a Law Revision Committee chaired by Lord Hanworth MR was set up to consider the reform of a number of questions of law including the doctrine of no contribution between tortfeasors. The committee reported on this question in 1934 (see *Third Interim Report*, Cmd 4637), recommending that the common law rules be altered as speedily as possible. The committee's recommendations were given statutory effect in England in s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935. That legislation was promptly copied in New Zealand in s 17 of the Law Reform Act 1936. The section (with a minor amendment in 1950 to subs (1)(c)) reads as follows:

> **17 Proceedings against, and contribution between, joint and several tortfeasors** - (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) -
>
> (a) Judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of

the same damage;

(b) If more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent, or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of the opinion that there was reasonable ground for bringing the action;

(c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued [in time] have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section 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; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

(3) For the purposes of this section -

(a) The expressions "parent" and "child" have the same meanings as they have for the purposes of [the Deaths by Accidents Compensation Act 1952]:

(b) The reference in this section to "the judgment first given" shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given, which is not so reversed, and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

(4) Nothing in this section shall -

(a) Affect any criminal proceedings against any person in respect of any wrongful act; or

(b) Render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed.

(5) Section 94 of the Judicature Act 1908 shall not hereafter apply with respect to any action or other proceeding to which this Part of this Act applies.

48 The main change effected by the legislation is that if D1 and D2 are concurrent tortfeasors, D1 (who is liable to P) may bring an action against D2 for contribution. If D2 is, or would if sued in time by P have been, liable to P for the same damage, D1 may recover from D2 the contribution which the court finds to be "just and equitable". So contribution in unequal shares is clearly contemplated. If D2 is liable to indemnify D1, D1 may be entitled to recover 100% of the damages as contribution. However, if D1 is liable to indemnify D2, D1 will not be able to recover any contribution from D2. The section also makes some procedural changes to the rules about damages where loss is caused by more than one defendant.

49 The reform was confined entirely to the law of tort. The section does not allow contribution unless both or all the defendants are tortfeasors. If, say, the liability of D1 is in contract and the liability of D2 is in tort, the section does not apply. Nor does it apply if P's loss has been caused by the breach of separate contracts by each defendant.

The Contributory Negligence Act 1947

50 Legislation reforming the law about the plaintiff's contributory negligence also arose from the recommendations of a Law Revision Committee, this one chaired by Lord Wright. It was asked to consider modification of the doctrine of contributory negligence, particularly in light of s 1 of the Maritime Conventions Act 1911 (see para 36) and s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935. It reported in June 1939 (see *Eighth Report*, Cmd 6032) concluding that, as the law stood at that time, the essential question "must ultimately be, who caused the accident - the defendant, the plaintiff or both?" Disregarding the complexities of the common law by expressing the question in this way, the committee was able to assert that the same principles applied in Admiralty and common law and that the difference between the two was one of degree and not kind. The committee recommended that the apportionment provisions of Admiralty law should be extended to all tort cases.

51 The Law Reform (Contributory Negligence) Act 1945 implemented in England the recommendations of the Law Revision Committee. In New Zealand, the Contributory Negligence Act was passed in 1947. The primary provision is s 3(1) (corresponding to s 1 of the UK legislation) which provides as follows:

3 Apportionment of liability in case of contributory negligence - (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that

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

52 "Fault" is defined in s 2:

"Fault" means negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

This definition has been the subject of much discussion in an attempt to isolate its exact meaning. It is clear from s 3(1) that "fault" describes behaviour of *both* the plaintiff and the defendant and it follows that the definition must somehow cover both. It has been suggested that the *whole* definition refers to both P and D (see the *Vesta* case, para 63) but it seems that a better view is that the first limb of the definition refers to the fault of D and the second limb to the fault of P; it is irrelevant whether P's conduct would give rise to a liability in tort. The court is concerned only with the question of whether P's fault is of a kind which at common law would have given rise to the defence of contributory negligence (*Rowe* v *Turner Hopkins & Partners* [1980] 2 NZLR 550, 555 (HC)). This reflects the view of the committee that the need was not to change the law about what constituted contributory negligence but the *effect* of that law on the rights of the parties. Under this Act courts can reduce damages for fault rather than entirely barring P's recovery. But, again, the reform was of the law of tort only.

53 We have, thus far, sketched the rules of the general law and the modifications made by statute. In the next chapter we begin a consideration of some problems which have not been dealt with by legislation.

II

Some Problems in the Present Law

54 The statutory changes in New Zealand to the rules of shared liability, while an improvement on the inflexibility of the common law, leave unsolved several major difficulties. The primary remaining problem is that mechanisms of apportionment and contribution (both between defendants and in respect of the plaintiff's responsibility for a loss) are still inadequate. A secondary problem is encountered when one or more of the parties is insolvent, unable to be found or otherwise "judgment proof". The Law Commission is of the view that both these matters require resolution. Although we do not propose in this paper anything more than a relatively minor adjustment in respect of the second matter we are conscious that our modest proposal, if adopted, will be far from being the last word on the subject. There is a wider context for reform in this area which we will touch on in Chapter IV. But it may be helpful if we first describe in more detail some of the problems and some reform initiatives which have already been made.

APPORTIONMENT OF PLAINTIFF FAULT

55 In Chapter I we traced the development of the law governing fault of the plaintiff. To recapitulate, although proof of plaintiff fault was originally a complete bar to any recovery in a negligence action, the Contributory Negligence Act 1947 now provides for reduction of the plaintiff's damages in some circumstances where the plaintiff is partly responsible for the loss or damage. It is argued, on a perhaps narrow reading, that the Act can be invoked to apportion damages only in cases where contributory negligence would have been a defence to a claim at common law. Others suggest that the provisions of the 1947 Act apply wherever negligence is an essential ingredient of the plaintiff's cause of action. See *Fletcher* v *National Mutual Life Nominees Ltd* [1990] 1 NZLR 97, 107.

56 Whatever the true reading of the Contributory Negligence Act 1947, it seems to the Law Commission that two questions must be raised in a discussion of reduction of damages for plaintiff fault. The first relates to the sort of conduct on the part of the plaintiff that should operate to allow a reduction: how high a standard must the plaintiff attain in taking care for himself or herself? The second question relates to the behaviour of the defendant, or, more precisely, to the nature of the defendant's obligations to the plaintiff. Are there circumstances where one person's obligations to another are such that the latter is not expected to take any active step to look after his or her own interests, but instead is entitled to rely entirely on the first party's behaving in a certain manner? The answer to

the second question will inform decisions in respect of the first. The two are very closely connected: the conduct to be expected of the plaintiff in a particular case will differ, depending at least in part on the plaintiff's reasonable expectations of the defendant. We now mention some situations by way of example. They demonstrate that the current rules in relation to the effect of plaintiff fault are more dependant on categorisation of the cause of action than any coherent policy based on notions of causation or fairness.

Intentional torts/strict liability torts

57 The 1947 Act clearly allows for reduction of plaintiff damages where the plaintiff's action is in negligence. However, many torts do not depend on negligence on the defendant's part but are committed intentionally. Can, and should, the plaintiff's damages be reduced for the plaintiff's own fault in relation to an intentional tort? Should the fact that the defendant's conduct *was* intentional be sufficient to exclude fault on the part of the plaintiff; or to put the question another way, is the plaintiff also to be expected to take some care in the face of a deliberate act by the defendant?

58 In New Zealand it is not certain whether contributory negligence may be a defence to an intentional tort. In *Hoebergen* v *Koppens* [1974] 2 NZLR 597 Moller J considered the defence against a claim of intentional assault. Distinguishing the English case of *Lane* v *Holloway* [1968] 1 QB 379, the Supreme Court found that although the defendant had intended to assault the plaintiff, the plaintiff had been partly to blame for what had happened: he could easily have walked away from the situation and had provoked and insulted the defendant. The Court applied the Act to reduce the damages by 15%. However, a contrary view was taken in *Dellabarca* v *Northern Storemen and Packers Union* [1989] 2 NZLR 737, 755-757 where Smellie J concluded that contributory negligence could not be raised as a defence to an intentional tort since it would not have been so available before the passing of the Contributory Negligence Act 1947. The decision was thus based on legislative interpretation rather than policy.

59 Similar issues are raised by torts of strict liability, eg, in a case concerning the rule in *Rylands* v *Fletcher* (1868) LR 3 HL 330 (the rule imposes liability for damage caused by the escape of dangerous things), or in relation to some strict duties which are created by statute. In such a case, the defendant's intentions or reasonable care are irrelevant and, once it is shown that the defendant's act caused loss or damage, imposition of liability is automatic. But some commentators, such as Fleming (318), suggest that in such cases policy should favour reduction of the plaintiff's damages where the plaintiff is contributorily negligent in failing to discover or avoid the damage.

Claims for equitable damages

60 In New Zealand the effect of a plaintiff's carelessness on an equitable claim was clarified by the decision of the Court of Appeal in *Day* v *Mead* [1987] 2 NZLR 443. Mead (a solicitor) had persuaded his client Day to invest in a company in which Mead had an interest. The company failed and Day sued Mead

to recover the money invested. The Court found that there had been a breach of fiduciary duty by Mead and that Day was entitled to equitable damages. However, the Court also found that Day had contributed to his own loss by making a second investment after becoming aware of the true state of the enterprise. To take account of this, damages in relation to the second investment were reduced by 25%.

61 The Court considered equitable principles of conscience and fairness, and reasoned by analogy from the provisions of the 1947 Act in concluding that damages should be reduced. In this context, then, a power to apportion damages, consistent with that existing in tort, was held to apply in relation to an equitable cause of action. Effectively, a general principle was extended to a new situation.

62 It would seem likely, however, that where equitable damages are to be thus reduced because of the plaintiff's carelessness, the very high standard of behaviour which a fiduciary is required to exhibit may require a clearer case of plaintiff fault to be made out by the fiduciary before the court will allow the reduction. It seems right, in terms of the questions posed in para 57, that the nature of the defendant's obligation *should* so influence the standard expected of the plaintiff.

Contract

63 The remaining difficulties in respect of the effect of the plaintiff's fault lie mainly in the area of contract. As has been mentioned, the difficulties in New Zealand are exacerbated by the lingering doubts over *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 CA (para 72). In England, where an adviser is liable both in tort and contract and a plaintiff claims for negligent breach of contract, the damages may be reduced if the plaintiff has been at fault: see the decision of the Court of Appeal in *Forsikringsaktieselskapet Vesta* v *Butcher* [1989] AC 852. (This issue was not discussed in the further appeal to the House of Lords, [1989] AC 890.)

64 Hobhouse J at first instance ([1986] 2 All ER 488) identified three categories of contractual duty:

> (1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.
> (2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
> (3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract. (508)

Vesta itself was classified as a class (3) case and apportionment of damages for contributory negligence was accordingly available. This approach was upheld in the Court of Appeal which placed great weight on the analysis of the nearly identical New Zealand legislation by Prichard J at first instance in *Rowe* v *Turner Hopkins & Partners* [1980] 2 NZLR 550. It seems from the judgments that the

English court would not have been willing to countenance reduction of damages because of plaintiff fault in either of cases (1) or (2).

65 The question has not been fully considered by a New Zealand court. Members of the Court of Appeal made some observations on the matter in *Rowe* v *Turner Hopkins & Partners* [1982] 1 NZLR 178, but did not have to decide the point because of certain concessions by counsel and because the Court had concluded that the defendant was not negligent. But the judgment of Cooke and Roper JJ contains the observation that

> it would not be right to do more in this particular case than to refer to the view that [the Contributory Negligence Act] can apply wherever negligence is an essential ingredient of the plaintiff's cause of action, whatever the source of the duty. In disposing of this appeal on the facts only, we should not be taken necessarily to assent to the narrower view of the Act reached in the judgment under appeal. (181)

66 Although that "narrower view" is the one adopted by the English Court of Appeal in *Vesta* it would be strange, given the decision in *Day* v *Mead* (para 60) that plaintiff fault may be pleaded to reduce damages in an equitable action, if such a defence were not available (on appropriate facts) where the case rested on a contractual duty, which will often be less stringent.

67 It will be seen that the problems in New Zealand arise in part from the *McLaren Maycroft* prohibition on concurrent liability in tort and contract (see paras 72-77). But even if *McLaren Maycroft* is to be confined entirely to its own facts, the Law Commission inclines to the view that it would be unsatisfactory merely to apply the provisions of the Contributory Negligence Act 1947 to claims in contract. The Act was not drafted to accommodate such an application. Any attempts to make it do so are likely to give rise to strained interpretations and consequent anomalies, particularly in relation to class (1) or class (2) (see para 64) claims in contract. The Law Commission thinks a more principled approach should be sought.

THE RIGHT TO CONTRIBUTION

68 A familiar shared liability problem in New Zealand can be illustrated as follows:

> P wishes to build a house and engages an architect to draw up plans and supervise the project, and a builder to carry out the construction. Periodic inspections are made by the local authority (in the exercise of its statutory role) during the building process. Some years later, P notices cracks in the exterior walls and, on consulting an engineer, discovers that these are due to foundations which are inadequate because they do not make allowance for the filled site on which the house is built. P will need to strengthen the foundations to prevent the damage getting worse, and seeks to recover the cost of carrying out that work from whomever was to blame.

In this situation it is entirely possible that the "blame" for the building failure rests to some extent with all the defendants. If the builder was careless, that should have been noticed by the architect who was paid to supervise construction, or, in the last resort, by the local authority when fulfilling its statutory obligation to carry out inspections of the work in progress. In that case, P would have a claim against each of the builder and the architect under their separate contracts with P, and a further claim against the local authority in tort.

69 If P sues the local authority in tort for negligence, and a court finds that the authority bears partial responsibility for the loss, P can recover the entire loss from the local authority. Similarly, P can recover the entire loss from either the builder or the architect, if they are found to be in breach of their respective contracts of engagement. Proof of partial responsibility against any one of the potential defendants would be sufficient to give P a complete remedy (assuming that the defendant is able to pay a judgment).

70 If, in the example above, P chooses to sue only one of the potential defendants or sues more than one but enforces judgment against one only, under the present law that defendant is unable to force the others to pay their share of the loss. The chosen defendant cannot join the others as third and subsequent parties to the action under r 75 of the High Court Rules:[4] as we have already seen, a right to contribution arises only under the terms of the Law Reform Act 1936 (in respect of joint tortfeasors) or at common law in respect of co-obligors. In the present example, the local authority is liable in tort, but the other two parties are liable under their separate contracts. There are no joint tortfeasors and no co-obligors. Therefore there is no right of contribution or indemnity as required to invoke r 75. Similarly, D1 will be unable to bring a subsequent separate action for contribution. The entire loss falls upon the defendant whom P elects to sue (or, if P sues more than one, the one against whom P executes the judgment). That seems plainly unfair.

71 Occurrences of this kind are reasonably common in disputes over houses in New Zealand. Reported examples include *Bowen* v *Paramount Builders* [1977] 1 NZLR 394, *Mt Albert Borough Council* v *Johnson* [1979] 2 NZLR 234 and *Morton* v *Douglas Homes Ltd* [1984] 2 NZLR 548. Local authorities understandably claim that, as they are bodies which continue to exist and are perceived to be well insured, they will tend to be sued first in this type of action. They are, to use the North American expression, a "deep pocket". (Other

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4 Rule 75 of the High Court Rules provides:

75 Third and subsequent parties - (1) Where in any proceeding a defendant claims against any person not already a party to the proceeding (hereinafter referred to as the third party)-

(a) That the defendant is entitled to contribution or indemnity;

... then the defendant may, within 14 days after the expiration of the time for filing his statement of defence or thereafter with the leave of the Court, issue a notice to that effect ...

See the helpful commentary in *McGechan on Procedure*, paras 75.01-75.04.

See also rule 138 of the District Court Rules.

professional advisers are likely to be similarly viewed; again they are usually insured and often practice in firms which remain stable over time. The position of company auditors is notorious in this respect.)

72 The problem of the narrow drafting of s 17 of the Law Reform Act 1936, confined as it is to tortfeasors, is aggravated in New Zealand by judicial decision that a person engaged under a contract (for example, a builder, an engineer or an accountant) is liable to the other contracting party only in contract and cannot be sued by that other contracting party in tort, even where the breach of contract is a breach of a duty of care to that other party. The authority for this proposition is the decision of the Court of Appeal in *McLaren Maycroft & Co* v *Fletcher Development Co Ltd* [1973] 2 NZLR 100.

73 The case arose from the sale by Fletchers (a developer) of some land to Mr and Mrs Hudson. McLaren Maycroft (consulting engineers) were engaged by Fletchers to prepare the site by excavating and filling it for development. Mr and Mrs Hudson built on the site a house which later cracked due to subsidence. The Hudsons sued Fletchers, who joined McLaren Maycroft as third party. Fletchers and McLaren Maycroft were held liable by the High Court, McLaren Maycroft to contribute 75% of the damages. There was an appeal on the question of contribution only.

74 In the Court of Appeal Richmond J (giving the leading judgment) stated that any liability of McLaren Maycroft to Fletchers (as a professional adviser) was in contract only. No question of contribution or indemnity could arise at common law or under the 1936 Act. However, it seems that the question whether McLaren Maycroft owed a separate duty of care to the Hudsons was not argued. Richmond J noted that if such an argument had been made

> a very difficult question would arise whether at law or in equity Fletchers (being liable to the Hudsons for breach of contract) would have any right of indemnity or contribution from McLaren Maycroft (being liable to the Hudsons for the same damage in tort). (117)

75 Despite the fact that not all the issues were raised in the case, the decision in the *McLaren Maycroft* case has generally been taken as authority that professional advisers can be liable only in contract (see the observations in *Rowe* v *Turner Hopkins & Partners* [1982] 1 NZLR 178, 181 and 182, which seem to limit *McLaren Maycroft* to professional relationships only). However, since 1973 other common law jurisdictions have taken rather a different stance on professional liability. The English courts have held (overruling *Bagot* v *Stevens Scanlan & Sons* [1966] 1 QB 197 which the Court of Appeal relied on in *McLaren Maycroft*) that professional advisers may be concurrently liable in tort and contract, and that a plaintiff may bring an action under either head: *Midland Bank Trust Co Ltd* v *Hett, Stubbs & Kemp* [1979] Ch 384; *Ross* v *Caunters* [1980] Ch 2970; see also *Caparo Industries plc* v *Dickman* [1990] 2 AC 605, 619. Comments by members of our own Court of Appeal have suggested that the *McLaren Maycroft* decision requires reconsideration (see eg, *Rowe* v *Turner Hopkins & Partners* (above); and *Day* v *Mead* [1987] 2 NZLR 443, 450 where Cooke P referred to overseas developments and "doubt[ed] very much whether the New Zealand courts should swim against such a strong tide").

76 It may be that the swimmer has already turned about. In the recent decision of *Rowlands* v *Collow* [1992] 1 NZLR 178 which was a claim against an engineer, Thomas J in the High Court took the view that *McLaren Maycroft* should no longer be followed. He reviewed English and Canadian authorities and academic writing, noted the traditional common law rigidity in classifications and the modern deformalising of distinctions between types of action, discussed the *McLaren Maycroft* decision and other observations by the Court of Appeal, remarked on basic considerations of fairness and justice, and concluded:

> Pending reconsideration by the Court of Appeal, therefore, I consider that *McLaren Maycroft* is to be read as having been decided on its own facts. In other words, although it may be difficult to see why the Court reached the decision which it did, the Court decided as a matter of fact that the parties in that case necessarily intended the contract to define their entire relationship to the exclusion of tort. Otherwise concurrent liability in contract and tort may arise in cases where the defendant has rendered professional services provided that there is nothing in the contract which precludes the application of the common law or the common law duty of care. (102,016)

77 In view of the statements already made by members of the Court of Appeal, and of developments overseas, it seems likely that the conclusion in *Rowlands* v *Collow* on this point would be upheld. Until the matter is reconsidered by the Court of Appeal, however, there is an undesirable residual uncertainty.

UNCOLLECTIBLE CONTRIBUTION

78 So far in this chapter we have discussed problems of a legal nature: gaps or anomalies in the existing legal rules. Examination of shared liability also requires consideration of practical problems.

79 Recovery of contribution - indeed, recovery of damages at all - depends on the availability and solvency of the defendant or defendants against whom judgment is given. In the simplest terms, it is of no use to a plaintiff or a contribution claimant (having proved a loss caused by a defendant) to have a judgment ready for execution if the relevant defendant has no funds to meet it. Some (uninsured) defendants - often those most responsible for the loss, like the negligent builder and the irresponsible company director - are insolvent or simply disappear. The question is then: how should the insolvency or unavailability of one defendant impact on other defendants (each of whom is jointly and severally liable) and on the plaintiff? Who should bear the burden of the uncollectible contribution?

80 Even if all defendants are solvent and available, some particular defences may be available to a claim against them. In this context we refer not to factual defences, but to legal defences based on such matters as

- an exemption or limitation on damages in a defendant's contract with the plaintiff,

- a like exemption or limitation in a statute which controls the relationship (see eg, Carriage of Goods Act 1979 or Innkeepers Act 1962), or

- expiry of a limitation period under the Limitation Act 1950 or in a contract.

In these situations it might immediately be said that the plaintiff should be barred from or restricted in recovery, either on the basis that the plaintiff has agreed on the limitation (if it arises under a contract) or that good public policy reasons have led to the inclusion of a limitation in a statute, as in the general regime of the Limitation Act 1950. But if these limits apply to D2, and P has already recovered *in full* from D1, there is an issue about the extent to which D1's *contribution* claim might be similarly barred or limited lest it remove D2's rights, as it were, by the back door. Any new apportionment regime must take account of these matters and provide, where necessary, an appropriate balance between the rights of all parties.

81 Uncollectible contribution (particularly that related to insolvency or absence of a defendant) thus raises problems in the context of shared liability. It is obvious that if a plaintiff has a claim against a single defendant and that defendant is insolvent, the plaintiff's loss must lie where it falls. But in the case of a shared liability where there are two or more defendants the plaintiff may choose whichever defendant or defendants the plaintiff pleases, first to sue and secondly against whom to enforce judgment. As long as one defendant is solvent, P can recover the entire judgment from that defendant. A primary purpose of the law of civil liability is to provide full compensation for the plaintiff, although this is by no means its only purpose, and strong arguments can be put forward to support other objectives and raise questions about the balance to be drawn (see further Chapter IV). If compensation is indeed primary, it would not be consistent with that objective to make an injured person bear the loss caused by inability to execute a judgment against one defendant: that is, to reduce P's claim against D1 to reflect the uncollectibility of a judgment against D2. On the other hand, D1 may have played a lesser part than D2 (or even than P, if P is at fault) in the infliction of damage upon P, yet may be left bearing the whole claim and without an effective right of contribution.

82 Even if our liability rules were reformed so that a defendant had reliable contribution rights against all solvent fellow defendants, the outstanding problem which arises when one or more of the co-defendants is insolvent or missing would remain. If P has judgment for 100% of his or her loss against D1 and D2 (both solvent) and D3 (insolvent), and D1 pays P in full, what proportion of that payment should be recoverable by D1 from D2?

83 The point has already been strongly made to the Law Commission in the consultation it has carried out so far that professionals and other persons or bodies who can be seen, or suspected, to have deep pockets feel a strong sense of injustice at these practical consequences of the current law. The comment has

been made on a number of occasions that such persons have no objection to paying for the results of their own mistakes. But they are aggrieved when they find themselves also paying for the mistakes of others.

THE COST OF INSURANCE

84 Quite fundamental questions exist about who should pay for the cost of accidents in our society. Where an accident results in personal injury, New Zealand now has the benefit of the no-fault Accident Compensation Scheme. But compensation for many other accidents continues to depend on proof of wrongdoing by a defendant and the pursuit of a damages award. In still other cases, compensation for loss will depend on whether the injured person holds first party insurance. In this context of shared liability, insurance is important because it directly determines whether compensation will be available to a person suffering a loss. Insurance also impacts on the way in which claims are dealt with and affects the behaviour of those involved.

85 There was for some years in New Zealand a reasonably widely expressed view that concurrent liability served a useful social function by ensuring that an injured party received compensation from another party who was able, through insurance, to spread the loss much more effectively than the injured could have done by taking out first party cover, or any other defendant would have achieved. See, for example, the comments of Richardson J to this effect in the context of a claim of professional negligence brought against a solicitor in *Gartside* v *Sheffield Young & Ellis* [1983] NZLR 37:

> In so far as an action in negligence may be viewed in social terms as a loss allocation mechanism there is much force in the argument that the costs of carelessness on the part of the solicitor causing foreseeable loss to innocent third parties should in such a case be borne by the professionals concerned for whom it is a business risk against which they can protect themselves by professional negligence insurance and so spread the risk, rather than be borne by the hapless third party. (51)

86 As a matter of public policy, the concept of such loss-spreading seems admirable *if* it does indeed work in practice as the theory suggests it should. Recently, however, it has been suggested that the prospect of more and larger claims, and uncertainty as to the bounds of such claims, are having a harmful effect on the cost and availability of insurance, particularly professional indemnity insurance. Insurance premiums reflect predictions about liability: about the likely number and amount of claims. If there is great uncertainty about these factors, premiums will probably rise. Nothing like the "insurance crisis" which has had such wide-ranging and serious effects in the United States has occurred in New Zealand. Indeed, there is some uncertainty about the exact causes and extent of the American problems. But we are not immune from that crisis - even if its causes are unclear. On a pessimistic view, the international nature of insurance today (consider say the insurance arrangements of large accounting firms) may mean that even if there were greater certainty about the extent of the legal liability of professionals in this country, the price of insurance in New Zealand might not

be much reduced. That is one view. However, we note that many professionals and local authorities arrange their insurance through mutual societies which are more localised and less affected by international trends. We would expect premiums charged by the mutual societies to quickly reflect changes in legal rules in this country.

87 Another factor which must be borne in mind is that the increased costs of insurance will be passed back to the consumers. This is a fundamental of the loss-spreading concept. Where the insured is a manufacturer that will result in (slightly) higher prices for goods. This is often acceptable: the cost of the increase is balanced by the benefit of ready compensation in the case of injury. But in some contexts it may not be. Where the insured is, say, a local authority, higher insurance charges will mean either higher rates or fewer services within the community. A balance needs to be maintained.

88 Another factor connected with insurance which may be mentioned at this point is the likelihood that an insurer will promote the early settlement of claims to avoid the very substantial expense that would be incurred in fighting a claim in the courts. We understand that the number of claims against professionals which are resolved through litigation is very small. An overwhelming percentage either "go away" because there is no real basis for liability, or are settled long before a substantive court hearing takes place. This is understandable: costs arise not only in terms of any eventual judgment, but also in defending a claim. The total may be very substantial, amounting to many thousands of dollars. As well as the obvious cost of legal fees, there are the extensive hidden costs in preparing for litigation. Even if the defendant is successful and no liability is established, it is unlikely that an award of costs by the court will sufficiently compensate the defendant for the expenses incurred.

89 A further very unfortunate effect of higher insurance costs relates to the manner in which tasks which may give rise to liability are carried out. Lower levels of cover and higher deductibles (or excess clauses) mean that in the event of liability even an insured defendant is faced with increasing costs at both ends of the claim. Indeed, the smaller the claim, the less useful the insurance cover. Potential defendants are aware that a successful claim could result in their bankruptcy and the knowledge may cause such persons to go to great - perhaps unnecessary - lengths to avoid claims. It is suggested to the Law Commission that this has many unfortunate effects including defensive practice, avoidance of innovation, double checking at increased cost to the consumer, the divestment of assets by professionals, and an avoidance of some professions by those entering the job market. There is little readily available empirical evidence of the *extent* of the problems, but there seems no doubt that they do exist.

ADDRESSING THESE MATTERS

90 The Law Commission does not, in this paper, attempt to suggest solutions to all the issues outlined above. Instead the remainder of the discussion focuses on the following issues of shared liability:

- whether concurrent defendants should be liable jointly and severally,

or just severally ("proportionate liability");

- whether there should be an extension of rights of contribution between defendants;

- how the problem of the uncollectible contribution might be addressed; and

- whether there should be an extension of the concept of apportioning damages to reflect the plaintiff's fault.

91 We recognise that these topics by no means cover the entire range of issues in this area. The expansion of the bases of civil liability in recent years, in particular the extension of liability to the situations contemplated in the decisions of the House of Lords in the cases of *Anns* v *Merton London Borough Council* [1978] AC 728 and *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465; the more recent retreat by the English courts evidenced in *Murphy* v *Brentwood District Council* [1991] 1 AC 398 and *Caparo Industries plc* v *Dickman* [1990] 2 AC 605; the lack of certainty about the manner in which the New Zealand Court of Appeal will react to these developments (although see now *South Pacific Manufacturing Co Ltd* v *New Zealand Security Consultants and Investigations Ltd* (unreported, Court of Appeal 14/90, 29 November 1991); increasingly high expectations of professionals and other potential defendants; and the increasingly large amounts involved in civil claims, all present areas of difficulty. The proposed solutions have been many. They include the suggestion that the level of damages for particular persons or organisations (especially professional advisers and local authorities) should be "capped", review of the basis of the duty of care of some parties, and the retreat from the *Anns* and *Hedley Byrne* conceptions of liability and responsibility such as occurred in *Murphy*. The Law Commission is not, in this preliminary paper, attempting to deal with all of these difficult and complex issues, but, by raising them for comment, expects that its discussion and consultation process will help clarify future approaches to their resolution.

III

Initiatives for Reform

92 In this chapter we discuss the broad directions of recent reform or reform proposals relating to shared liability in New Zealand and other jurisdictions. We omit at this stage any discussion of the troublesome matters of relative detail concerning the treatment of such matters as compromises, prior judgments, contractual or statutory exemptions or limitations and time limitations, which are dealt with in Chapter VI. (We also omit discussion of a number of relevant reports which discuss wider issues - a list can be found in Appendix B.)

IN SOLIDUM LIABILITY

93 In Chapter I we pointed out that concurrent wrongdoers have *in solidum* (joint and several) liability and we have mentioned the need to decide whether the liability of concurrent wrongdoers should continue to be *in solidum* (each being liable for 100% of P's loss) or several (P's claim against each being limited to the proportion of the injury allocated by the court to that defendant). In Chapter V we will discuss the merits of each approach in a New Zealand context, for the moment noting only that a change to the present joint and several liability would represent a very significant departure from the fundamental concern of the common law that a plaintiff should be able to recover the full amount of his or her loss, any possible unfairness to defendants being subordinate to this principle.

94 So far as we are aware, with the single exception of the Canadian province of British Columbia, all of the Commonwealth jurisdictions deriving their legal systems from England have always had the joint and several liability rule. It was retained in England when the Civil Liability (Contribution) Act 1978 (England and Wales) was enacted, and in the Australian State of Victoria in the Wrongs (Contribution) Act 1985 (amending the Wrongs Act 1958). There is a detailed discussion of the subject in Chapter 3 of the *Report on Contribution Among Wrongdoers and Contributory Negligence* of the Ontario Law Reform Commission (1988), concluding with the recommendation that there should be no change in the law respecting the *in solidum* liability of concurrent wrongdoers to a plaintiff, even where the plaintiff is contributorily negligent. The Uniform Contributory Fault Act (adopted as a Uniform Act by the Uniform Law Conference of Canada in 1984, see *Proceedings of the 66th Annual Meeting* (1984), 32, Appendix F) also adopts the rule. The subject has recently been considered by the New South Wales Law Reform Commission: see *Report on Contribution Among Wrongdoers: Interim Report on Solidary Liability* (LRC 65, 1990). It too came to the conclusion that a general movement away from solidary liability could not be justified and recommended that the existing general rule of *in solidum* liability

justified and recommended that the existing general rule of *in solidum* liability should be maintained, noting that the recommendation was consistent with those made by other Commonwealth law reform agencies which had considered the matter in recent years (see *Report*, para 46). In New Zealand, the tentative position of the CCLRC was the same (*Working Paper on Contribution in Civil Cases* (1983), paras 2.7 and 2.8).

95 In British Columbia it was generally assumed that the Negligence Act RSBC 1979 c 298 had not disturbed the joint and several liability rule until the courts of that province held that, on a true construction of the Act, this was not so. Only where the plaintiff was blameless did the rule continue to operate. If the plaintiff were at fault, several liability prevailed. Evidently this interpretation (in *Leischner* v *West Kootenay Power & Light Co Ltd* (1986) 24 DLR (4th) 641) came as a surprise. In 1986 the Law Reform Commission of British Columbia in its *Report on Shared Liability* (LRC 88) recommended restoration of *in solidum* liability in cases where the plaintiff was contributorily negligent.

96 However, in the United States a different view has recently prevailed, although it is fair to say that the impulse for it seems to have been largely due to the ever increasing level of damages awards made by juries in personal injury cases and the effect of these on the insurance market. (For one account of the problem, and some suggestions about its causes, see George L Priest "The Current Insurance Crisis and Modern Tort Law" (1987) 96 *Yale Law Journal* 1521.) Cases which have given rise to particular alarm are those where a "deep pocket" defendant such as a local authority has, by virtue of joint and several liability, been left to bear a damages judgment of some millions of dollars for the plaintiff's personal injury where that defendant's contribution to the accident was relatively small. Some fascinating, though by New Zealand standards bizarre, outcomes of litigation are given as examples by L Pressler and K V Schieffer in "Joint and Several Liability: A Case for Reform" (1988) 64 *Denver University Law Review* 651, 654-655. They instance *Stills* v *City of Los Angeles* (San Fernando Superior Court, March 14, 1985) in which the City was responsible for virtually the entire damages award of $2.16 million because it failed to trim hedges on private property "causing" a vehicle whose driver was high on drugs to collide at an intersection equipped with stop signs. The plaintiff argued that the City should have installed signs to warn of the upcoming stop signs. The negligent driver had no money and three other co-defendants settled for their insurance policy limits, a total of $200,000, leaving the City to pay the balance. Another instance is *Anderson* v *City of Signal Hill* (Los Angeles County Superior Court, October 15, 1984) where the City was held to be liable because its traffic lanes were too narrow "causing" a collision between negligent drivers. The verdict was for $1.5 million against the City and two negligent drivers but the drivers' policy limits totalled $115,000 leaving the City responsible for the balance.

97 The authors point out (656-659) that in 1976 *in solidum* liability was universally applied in every State. But by the time of writing (1987) at least 33 States had either abolished or substantially limited *in solidum* liability either by legislation or by judicial decision. In 1986 alone, 15 State legislatures enacted tort liability reform laws. Ten more had done so by the time of writing in 1987.

98 However, as the Ontario Law Reform Commission points out (*Report*, para

94 above, 44), most American States that have enacted or propose reform measures provide for *modification*, rather than outright abolition, of the doctrine of joint and several liability. The reform measures are of four general kinds:

- Abolition of joint and several liability in respect only of non-economic losses, ie, damages for pain and suffering. This is clearly not relevant to New Zealand conditions.

- Abolition or modification of the doctrine with respect to particular "deep pockets", such as local authorities or certain professionals.

- Retention of joint and several liability with respect to an innocent plaintiff but abolition where the plaintiff's fault exceeds a specific degree - for example, 50% - or is greater than the fault of each defendant.

- Abolition of the doctrine in respect of defendants whose degree of fault is small, for example, less than 25%.

We are unaware of any legislative or law reform proposals outside the United States along the lines of any of these reforms. We describe reforms of the third and fourth kinds in the list above at paras 127-128.

CONTRIBUTION

Extension of contribution rights

99 The next question is related to the extension of the right of contribution amongst concurrent wrongdoers. At present claims can only be made between tortfeasors under s 17 of the Law Reform Act 1936, and between co-obligors at common law. If there is to be an extension of the right of contribution, should it be limited to particular causes of action? Or should the new right apply to all types of civil obligations?

100 The approach in England is that the reform should embrace proceedings for all kinds of damage. Section 6(1) of the Civil Liability (Contribution) Act 1978 (England and Wales) provides:

> A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).

101 Similarly, the recommendation of the Scottish Law Commission (*Report on Civil Liability - Contribution*, Scot Law Com No 115 (1988))[5] was that statutory

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5 The 1978 Act does not apply in Scotland.

rights of relief (contribution) should be available in all cases where loss was suffered as a result of a delict (tort), breach of contract, breach of trust or breach of any other obligation giving rise to a liability in damages.

102 And the CCLRC (*Working Paper*, see para 94 above) was of the same view:

> As amongst defendants, the first question to be answered is whether the right of contribution should continue to be restricted, as it now is, to tortfeasors, and if not whether there should be any restriction regarding the relationship situations to which the right should apply. It seems to us that in principle there should be no restriction. The right to contribution should be extended to all situations, whether they arise from a statutory, tortious, contractual, trustee, fiduciary, or other relationship. This is in accord with the general intent of the United Kingdom Act, and also with the Victorian and South Australian recommended approaches. (para 3.1)

The Victorian recommendation has since been enacted (Wrongs (Contribution) Act 1985).

103 The Ontario Law Reform Commission followed the same line (*Report*, para 94 above, 65), specifically indicating that it should not matter whether the tort or breach was intentional or not, but excluding the torts of conversion, detinue and injury to a reversionary interest because these matters were under consideration in its project on remedies for interference with goods. It does not seem to this Law Commission that there is any need to deal with these torts separately in the present context, although reform of the law relating to conversion and detinue could usefully be undertaken in New Zealand.

104 The proposals in paras 100-103 above, by referring to "damages", exclude the application of a right to contribution in the case of shared liability for a *debt*. The Ontario Commission (*Report*, para 94 above) put it thus:

> While it is difficult to justify in principle an assertion that there is some fundamental distinction between apportioning, as between themselves, the liability of wrongdoers and debtors, two practical considerations support this limitation. First, there appears to be no significant dissatisfaction with the present law respecting the existing rights to contribution among those who owe debts to one another. Although cases on guarantees appear quite regularly in the law reports, the contentious issues do not seem to relate to questions of contribution or indemnification. Secondly, the omission of contribution among concurrent debtors avoids overburdening proposals for law reform in an area which already contains a fair share of complexity. (74)

The effect of contractual provisions

105 Where this matter has been considered by other law reform bodies there

seems to be unanimity that a statutory right of contribution should be subject to any contract between the parties to the contribution action which excludes or limits that right and that any new Act should not override an express or implied contractual or other right to indemnity which one defendant may have in relation to another. The Ontario Law Reform Commission (*Report*, para 94 above, 81-82) has also suggested that a defendant with a right to claim contribution from another defendant should be entitled, by subrogation, to take over and exercise any rights of the plaintiff of a proprietary nature against the party from whom contribution is claimed. They had in mind a situation in which D2 has given P some form of security for the performance of D2's obligations. If D1 pays the entire amount of P's claim against D1 and D2, then, they say, D1 should have the benefit of that security up to the amount of the sum that it may be found appropriate for D2 to contribute. To that extent D1 would be treated in the same way as a guarantor of the liability of D2 to P.

Method of apportionment

106 There is also unanimity concerning the basic rule for determining the proportion which D2 should contribute to D1. As is presently the case under s 17(2) of the Law Reform Act 1936 relating to the liability of joint tortfeasors, D2 should contribute such amount as the court finds to be "just and equitable having regard to the extent of that person's responsibility for the damage". Section 2 of the Civil Liability (Contribution) Act 1978 (England and Wales) uses in this respect exactly the same language as s 17(2). The Ontario Law Reform Commission recommends (in cl 9 of its draft Act) that "[t]he amount of contribution recoverable by one concurrent wrongdoer from another is the amount that is found by the court to be just and equitable having regard to the degree of responsibility of each concurrent wrongdoer for the damage of the injured person".

107 The CCLRC suggested a provision along the following lines:

> The amount of contribution recoverable under this Act shall be such as shall be found by the Court to be just and equitable having regard to the extent of that person's liability for the damage in question, the amount of his potential liability, and to the respective rights and obligations of the parties both as between themselves and in respect of P. (para 3.6)

The committee emphasised the need to give the court a wide discretion but at the same time to draw the attention of the court to the particular considerations which should influence its decision.

108 For good measure, the Ontario Law Reform Commission recommended that the statute should expressly authorise the court to "include any degree of responsibility, including responsibility for none or all of the damage" (cl 9(2) of the draft Bill). Section 2(2) of the Civil Liability (Contribution) Act 1978 (England and Wales) empowers the Court to "exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity". The Scottish Law Commission

(*Report*, para 101 above, paras 3.68-3.69) made a similar recommendation (Recommendation 8(f)).

109 The Ontario Law Reform Commission also recommended in cl 9(3) of its draft Bill that if the degree of responsibility of a concurrent wrongdoer cannot be determined in relation to another concurrent wrongdoer "they shall be deemed to be equally responsible". We imagine that this is exactly what a court would be likely to do in the absence of any express statement in the statute, if it had difficulty in determining the responsibility of the defendants.

Apportionment where wrongdoer not before court

110 A matter concerning apportionment between wrongdoers which is discussed in the Ontario report but not mentioned in any of the other reforms or proposals for reform is the manner in which the court should make the apportionment if there is a wrongdoer who is not a party to the contribution proceedings. Clause 12 of the Ontario Commission's draft Bill directs the court to disregard the existence of concurrent wrongdoers who are not parties to the proceeding. The entire amount paid by D1 to P is apportioned between the defendants who are parties to the proceedings as if there were no other concurrent wrongdoer. This is, of course, consistent with the notion that any uncollectible apportioned sum should be reapportioned between the other defendants who are before the court. The Ontario Commission points out (*Report*, para 94 above, 187) that such a rule concerning a wrongdoer who is not before the court provides considerable incentive for those who are before the court to join that person as an additional party in the contribution proceedings, and that to attempt to apportion the fault of an absent party may well be both unjust and inconvenient.

Crown to be bound

111 There is general accord that the Crown should be bound by the provisions of legislation relating to contribution and apportionment of liability in civil cases. This accords with the conclusion reached by this Law Commission in its work on the interpretation of legislation that laws should generally apply to the Crown in the same way as to private persons (see NZLC R17, *A New Interpretation Act: To Avoid Prolixity and Tautology*, 1990, para 128).

ALLOCATION OF UNCOLLECTIBLE JUDGMENT

112 In Ontario (*Report*, para 94 above, 48) it was recommended that where there are more than two concurrent wrongdoers and one wrongdoer is insolvent or otherwise unavailable to satisfy a share of liability, the outstanding share should be divided among the remaining wrongdoers in proportion to their respective degrees of fault. (This would not discharge the liability to contribute of the defaulting concurrent wrongdoer.) This is consistent with s 2(d) of the Uniform Comparative Fault Act (12 ULA 40) approved by the National Conference of Commissioners on Uniform State Laws in the United States in 1977. The Ontario Commission thought an adjustment of this nature would be equitable: otherwise

a defendant who pays the plaintiff's entire damages shoulders the burden which would otherwise have been borne by an insolvent co-defendant, without having the ability to spread it proportionately on to another solvent co-defendant. The Law Reform Commission of British Columbia (*Report*, para 95 above, 22) recommends that where the court is satisfied that there is no reasonable possibility of collecting from a party, that party's share should be apportioned between all other parties (including the plaintiff) according to their relative degrees of fault. The reports and legislation in the other Commonwealth jurisdictions do not deal with this question, nor was it mentioned by CCLRC.

PLAINTIFF'S CONTRIBUTORY FAULT

Extension to civil wrongs other than tort

113 So far as we know, none of the Commonwealth jurisdictions has yet enacted legislation extending the law relating to apportionment where the plaintiff is partially at fault, and thereby has partially caused his or her injury, beyond claims based in tort. As we discussed in Chapter I, in New Zealand the relevant legislation is the Contributory Negligence Act 1947 modelled on the English Law Reform (Contributory Negligence) Act 1945. The Civil Liability (Contribution) Act 1978 (England and Wales) does not extend the law on contributory negligence in the same way as it does the law of contribution. The 1945 Act remains in force in England.

114 However, a Working Paper recently published by the Law Commission of England and Wales (Working Paper No 114 *Contributory Negligence as a Defence in Contract* (1989)) suggests extending the concept of comparative fault to all breaches of contract but requiring the court, in determining whether the plaintiff has been at fault, to take into account the nature and extent of the defendant's contractual undertaking, including the extent to which it was reasonable for the plaintiff to rely on the defendant and the relative expertise of the parties.

115 The Scottish Law Commission (*Report on Civil Liability - Contribution*, para 101 above, para 4.15) recommended that where the defender's liability for breach of a *contractual* duty of care is the same as the liability in delict (tort) for negligence, the plea of contributory negligence should be available as a defence, whether the action is framed in delict or in contract (Recommendation 20). But the plea of contributory negligence would only be available in a case of breach of a contractual duty of care and would not be available where the defender's breach of a contractual obligation did not depend on the defender having been negligent. Nor would the plea of contributory negligence be available in answer to any action founded on liability in delict for intentional wrongdoing or on liability for an intentional breach of a contractual duty of care (*Report*, paras 4.16-4.26).

116 In New Zealand, the CCLRC preferred a wider reform; one not restricted to contractual claims based on a breach of duty of care. The committee thought (*Working Paper*, see para 94 above) that there

> would not seem to be any particular difficulty in allowing apportionment of indivisible loss in those cases where it has resulted

> from breaches of obligations owed by each party to the other, whatever the actual source of the obligation. (25)

The law should not allow a party to obtain recovery from another for harm that person has brought upon himself or herself. Hence the so-called "duty" to mitigate, the requirement of causation, the doctrine of estoppel by negligence and the rule that a party who has brought about the failure of a condition is to be denied the benefit of that failure. "The underlying principle is one of disqualification" (26). The committee points out that although a potential tort victim must take care for his or her own safety even before the wrongful act occurs, by contrast, under present law the potential victim of a breach of contract is not thought of as having to mitigate loss, at least until the victim ought reasonably to have known of the breach and certainly not before the breach has occurred.

117 The CCLRC thought that "fault" should be defined as negligence, breach of statutory duty, breach of contract or any other breach of a civil duty owed by one person to another. In the case of a plaintiff, "fault" would include an unjustified failure to take adequate care of the plaintiff's own interest.

118 It suggested that a failure by a plaintiff to take adequate care for the plaintiff's own interests should be "unjustified" if it were not excused

- by the terms of a contract or other agreement between the plaintiff and the defendant, or
- by the rules of the common law or of equity, or
- by the provisions of any enactment.

This seems to be very much the approach subsequently taken by the Law Commission of England and Wales in their proposal to extend the right to apportionment to claims in contract.

119 The CCLRC also thought that care taken by a claimant for his or her own interests should not be found to be inadequate by reason only and to the extent that it constituted a failure to take precautions against

- the breach by the defendant of an obligation owed to the plaintiff under the terms of the contract, or
- the deliberate default of a defendant

before the plaintiff knew or ought to be taken to know that, as the case may be, the breach or the deliberate fault had occurred.

120 The Ontario Law Reform Commission considered those views but concluded that such an approach might be too restrictive, for it would exclude apportionment of fault in a case where, eg, loss was caused by the defendant's negligent professional opinion based on misleading or incomplete information given by the plaintiff. The Ontario Commission thought that there was no strong

reason to exclude apportionment in such cases unless an agreement between plaintiff and defendant allocated the entire risk to the defendant. It therefore said that apportionment should not be excluded where the plaintiff had relied on the defendant's contractual assurance of performance (see *Report*, para 94 above, 247). Where the plaintiff's reliance on the defendant's assurance of performance was reasonable there would be no basis for finding that the plaintiff had contributed to the loss. This, again, seems to be the position taken in the English Working Paper.

121 The CCLRC approach would not require a reduction in the plaintiff's damages on the ground of his or her failure to take care against a *deliberate* fault of the defendant before the plaintiff knew or ought to be taken to know that the deliberate fault had occurred. However, the Ontario Commission observes (*Report*, para 94 above, 248) that often an intentional breach of contract causes unintentional harm and that, as in the case of tort, there seems to be no strong reason to exclude intentional breaches of contract from the scope of the apportionment legislation. Intentional torts have been held in New Zealand not to be excluded from the application of the Contributory Negligence Act 1947 (see para 58).

122 The Ontario report would apply the reform of contributory fault to all civil wrongs including breaches of trust or of fiduciary duty, though, as in contribution, it suggested deferral of the application of the reform to the torts of conversion, detinue and injury to reversionary interests because these were under study elsewhere.

Method of apportionment

123 The CCLRC took as its starting point s 3 of the Contributory Negligence Act 1947 and favoured grafting the reforms on to that section. Accordingly, as is provided in s 3(1), the damages recoverable where the plaintiff had been partly at fault would be "reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". But this would not operate to defeat any defence arising under a contract.

124 The Ontario report recommends that where a person is injured by the wrongful act of one or more persons and the fault of the injured person is found to have contributed to the damage, the court should determine the degrees of fault of the person or persons and of the injured person that contributed to the damage, and should apportion the damages in proportion to the degrees of fault that are so found (*Report*, para 94 above, 264). But apportionment for loss should be subject to any agreement, express or implied.

125 Recently the House of Lords in *Fitzgerald* v *Lane* [1989] 1 AC 328 considered the way in which contributory fault should be assessed and applied in tort where there were two or more defendants. It was held that apportionment of liability between the plaintiff and the defendants had to be kept separate from apportionment of contribution between the defendants; that assessment of the plaintiff's share in the responsibility for the damage he had sustained did not involve the determination of the extent of the individual culpability of each of the

defendants. Therefore the plaintiff's share in the responsibility was to be fixed as against all defendants and the reduced amount claimable by the plaintiff was only then to be apportioned between the defendants.

126 The Ontario report, which was published in the same year as *Fitzgerald* v *Lane* was decided and appears to have been written before that decision, took a different view. It recommended that where contributory negligence is available as a defence for one defendant but not another, then the other should not have the benefit of a rule like *Fitzgerald* v *Lane:* a person whose liability to the plaintiff is less than that of another wrongdoer because of a defence of contributory fault available to that person only, should not, the Ontario Commission said, be required to pay by way of contribution a sum that exceeds the amount of the liability of that defendant to the plaintiff. This issue is not discussed in the subsequent working paper from the Commission in England and Wales.

Modified contributory fault

127 We have deliberately left until the end of this survey of initiatives for reform of the law relating to plaintiff's contributory fault any mention of modified forms of contributory fault regimes. What we have in New Zealand in tort law is pure contributory fault: plaintiffs who have contributed to their own losses are never totally barred from recovery against wrongdoers as they were prior to the 1947 Act. In all instances the plaintiff will succeed in obtaining an award of damages - but on a reduced basis. This is the type of contributory fault scheme found in the Commonwealth jurisdictions and in many parts of the United States.

128 However, for the sake of completeness, we ought also to mention certain modified regimes which are in force in some states of the United States and which endeavour to achieve a compromise between the old law (as laid down in *Butterfield* v *Forrester*, see para 39 above) and pure contributory fault (as under the *Contributory Negligence Act 1947* in New Zealand) by continuing to deprive a plaintiff of damages where the plaintiff's fault is grave. The modified schemes have their own unsatisfactory elements, as is shown in the following quotation from the Prefatory Note to the Uniform Comparative Fault Act prepared by the National Conference of Commissioners on Uniform State Laws in 1977 (see para 112 above):

> Many states, however, have adopted a modified type, which takes one of two forms, providing that a plaintiff who is at fault can recover diminished damages but that he cannot recover if his negligence either (1) "is equal to," or (2) "is greater than," that of the defendant.
>
> The modified type has several serious logical and practical disadvantages:
>
> 1. If both parties have been injured, the modified type forces one party to bear all of his own loss, together with the greater part of the other party's loss, in addition. This result is therefore worse than that of the common law contributory

negligence rule. A slight alleviation under the not-greater-than form, which allows recovery when the parties are each 50% at fault, forces a cognizant jury always to find for 50% negligence if it wants to reach a fair result.

2. If there are several defendants at fault, the modified type produces a confused jumble. The plaintiff's fault may be less than that of some defendants and greater than that of others. If defendants having to pay seek contribution from those not under obligation to the plaintiff, the answer is uncertain; and when counterclaims arise, no solution seems available. The problem is avoided in some modified-type states by providing that the plaintiff's negligence bars recovery only if it is greater than the combined negligence of all the defendants. Although this is a helpful provision, it is essentially adopting the pure form in this situation.

3. If the plaintiff's fault is greater than that of the defendant, he cannot recover under the modified type. Yet, if, as a result of this, the statute leaves him under the common law, including its exceptions (such as last clear chance, or ordinary contributory negligence in an action based on strict liability) he can nevertheless recover full damages, if he comes within an exception. The anomaly therefore arises that he may be better off if his negligence is found to be greater than that of the defendant and he thus recovers full damages, than if his negligence is found to be less than that of the defendant and his damages are diminished.

4. A difference of a single point in the percentage of fault allocated to the claimant may determine whether he can recover anything at all - not just how much. It is quite unrealistic to expect a jury to reach a decision this precise and then require the whole issue of liability to depend upon it. An arbitrary decision of this nature is very conducive to appeals and the development of highly technical distinctions by the appellate court.

The single disadvantage urged against the pure type is that it fails to prevent the bringing of "nuisance suits". Yet the cure of the modified form is distinctly an overcure, and therefore worse than the disease. How many more times is the plaintiff's negligence likely to be from 51% to 90% of the total than it is to be 90 to 100% of the total? And when it approximates 100% - the true nuisance claim - the trial court may be expected to control the matter.

The innate fairness of the pure type contrasts with the nondiscriminating rough justice of the modified type, which casts out many justified claims in order to be sure to eliminate a few unjustified ones, and impels the decision for the pure form. It is significant that when the courts, as distinct from the legislatures

have adopted a form of comparative fault, the great majority of them have selected the pure type, and that England, Ireland, the Canadian provinces and Australian states have all adopted the pure form. (41-42)

IV

The Context for Reform

129 Having considered, in the previous chapters, the problems with the present New Zealand law governing shared liability and approaches to reform which have been adopted in other relevant jurisdictions, we should now briefly outline the context in which any reforms will occur.

130 As noted earlier, the Law Commission inclines to the view that the first step in the reform exercise is rationalisation of shared liability rules and the enactment of a principled system for apportioning and sharing loss in civil claims. That first step is deliberately a limited one. The Law Commission is very aware of the wider issues. The discussion which follows touches on a number of matters which fall outside the scope of the present review; options which involve closer consideration of the nature of remedies for civil wrongs. In doing this, we wish to indicate how future reform of these matters might proceed. We also recognise that even limited reform cannot seriously be suggested without taking account of these factors. We would be happy to receive comment on these questions as well as on the matters contemplated in the draft Civil Liability and Contribution Act which is annexed to this paper.

OBJECTIVES IN REFORM OF SHARED LIABILITY

131 Civil law generally, and tort law in particular, are perceived as fulfilling a number of competing objectives. Much academic writing has been devoted to the attempt to define and weigh these. Suggested motives and principles are various and include compensation, punishment, deterrence, prevention of unjust enrichment, allocation of moral blame, distribution of losses and minimisation of risks. Philosophical and economic vantage points suggest new insights.

132 Depending on the particular context, other factors impact on the nature and basis of the duties: consider the public interest role played by the auditors of public companies and by local authorities fulfilling their statutory obligation to inspect dwellings in the course of construction, or the theory of the sanctity of promises which has influenced the development of contract law.

133 Furthermore, in formulating any legal rule there is a delicate balancing exercise between, on the one hand, promoting fairness so that the right result may be reached in as many cases as possible and, on the other, ensuring that the new regime is sufficiently certain and specific that the rules are clear and people may predict the consequences of actions governed by those rules. Unfairness may sometimes be created by wide discretions as well as by narrow or inflexible rules. Reform of the law relating to shared liability may in some respects involve a

choice between the objectives of fairness and efficiency. For example, it may seem fairer that a wrongdoer should be made responsible for a proportionate share only of the plaintiff's loss. But, quite apart from whether that may sometimes be unfair to the plaintiff, it is arguably inefficient in that it may require assessment of the share of liability of a wrongdoer who is not (yet) before the court and re-assessment of that apportionment at a later time (see para 170).

134 Accepting that these objectives of fairness and efficiency must be met and balanced so far as possible, we now mention three further factors which are, or may be thought to be, relevant.

Compensation

135 The goal of compensation of the plaintiff has traditionally been viewed as fundamental, particularly in the tort process. It is captured in the maxim *restitutio in integrum*: civil damages are designed to make the plaintiff "whole", whether by restoring P to the position enjoyed before D's civil wrong was committed, or by compensating P for the loss suffered. We return to this theme of paramountcy of the compensation principle many times in the course of the paper. Imposition of *in solidum* liability, where the plaintiff can recover in full from any defendant (and any loss caused by the inability of other defendants to compensate that defendant is borne by the defendant rather than the plaintiff) reflects the compensation goal.

136 However, although compensating losses is a very important goal, it has become clear in recent years that the common law process is inefficient in its attempts at attaining this objective; the transaction and administration costs involved in litigation are far greater than those involved in, for example, a no fault compensation scheme. (Compare, for example, the figures cited by the Pearson Commission in England, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, Cmnd 7054 (1978) paras 83, 121 with those in the Accident Compensation Corporation's most recent *Annual Report* (1991), 12, 15; the former estimated operating costs of the tort system to be about 45% of the combined value of those costs and compensation payments, whereas the Accident Compensation Corporation's operating costs made up 6% of expenditure for the financial year in question.) In part, this may be because of the nature of the process (the adversarial system); in part it is because of the nature of plaintiffs' claims, based as they are on the proof of fault. In any case, it is a matter to be taken into account in formulating decisions about rules of civil liability: the primacy of rules (such as a joint and several liability rule) to promote full compensation may seem less compelling if the matter is dealt with, at least in some contexts, by other means.

137 What is being claimed by way of compensation? Damages, particularly in personal injury actions, and almost always, it seems, in the United States, include a component for non-economic losses, for example, for "pain and suffering". Such damages are no more than an approximation in dollar terms of the loss they seek to compensate - sometimes very approximate indeed. Fortunately in New Zealand, since the advent of the accident compensation scheme which provides no-fault compensation for personal injuries, apart from some specific types of claims (eg, defamation, damages for unjustified dismissal), claims for civil damages are

generally linked to quantifiable economic losses. In this respect the context for reform in New Zealand differs from that in almost every other English speaking country.

Deterrence

138 Increasingly prominent in the writing on the goals promoted by civil law is its deterrence or incentive function. The law - civil and criminal - reflects the current beliefs of society about the manner in which people should behave. Particular rules or, more importantly, the sanctions attached to breach of the rules, are designed to encourage people to prefer some courses of action over others. For example, rules about the speed at which people may drive vehicles and fines for breach of speed limits encourage people to drive at a speed which society considers safe (or safer); to put the matter another way, they deter people from driving at speeds which are considered unsafe.

139 The imposition of liability and penalties (in the form of damages) for breaches of statutory, contractual, tortious or equitable duties may be thought to encourage behaviour which society considers proper, and deter that which it considers harmful.

140 The effect of these rules on the conduct of individuals is difficult to measure. One of the functions of the growing "law and economics" literature is the attempt to quantify the effect of existing rules and to predict the results of imposing new ones. This is not new: the common law has traditionally taken these factors into account in formulating and applying legal rules - although the analysis has been less systematic.

141 It is hypothesised that setting rules and penalties at the "correct" level creates incentives to prevent accidents or events which are not beneficial to *society in general*. This assumes some accidents or events which may cause loss to a particular person should be allowed, since it would be more expensive to prevent them than to compensate the injured person. Setting the rules correctly allows a balance to be reached between preventing accidents which are too expensive and allowing accidents which it is cheaper for society to allow to happen. The good of all, it is said, is thus maximised.

142 In this analysis compensation is a subsidiary goal. The fact that civil damages are paid to the plaintiff (rather than, say, the state) is incidental: the important thing is that breach of the obligation incurs a *cost*.

143 Deterrence theory depends on sometimes unsubstantiated assumptions about the manner in which people behave. It is difficult to believe that people quantify the costs and benefits of a proposed course of action in the precise and careful manner suggested by economic analysis, although they may do so in a more general way. We therefore doubt that deterrence theory will play a significant role in the formulation of rules for the sharing of liabilities.

Loss spreading

144 The loss spreading function of civil liability is closely related to both the goals which have just been mentioned. The concept of loss spreading is consistent with both or either compensation and deterrence. It fits a compensation analysis, because its purpose is to ensure that losses are met by those best able to afford them. And, because the losses are distributed to those members of society with the resources to meet them and pass them on, it also satisfies economic and philosophical requirements for the arrangement of affairs in the interests of the public good.

145 Making legal rules on the basis of encouraging loss sharing is, however, not an easy exercise. It seems likely that decisions which have been made about civil liabilities in the past to encourage the promotion of loss spreading have been based on inadequate information. The extension of liability rules (such as the extension of tort liability to third parties) and any uncertainty about the extent of the legal liability of some defendants, may radically affect the availability and cost of insurance.

146 The Law Commission is given to understand that some potential defendants traditionally seen as good "loss spreaders" (such as local authorities and professionals) now have increasing difficulty in obtaining sufficient insurance to fulfil this role. Even if such insurance is available, it may be too expensive to remain worthwhile. In that event, after a defendant's own resources are exhausted the loss must lie where it falls.

TORT AND CONTRACT

147 Some of the discussion in the preceding paragraphs may seem to apply more readily to the area of tort liability than to that of contract. However, it may be said that there is presently a move away from traditional classifications of duties as arising in tort, contract or equity, and towards a general civil law of obligations. See eg, Fridman "The Interaction of Tort and Contract" (1977) 93 *LQR* 422; and the decision of the Court of Appeal in *Day* v *Mead* [1987] 2 NZLR 443. Divisions and distinctions are decreasing. Gilmore writes of the "death" of contract. Other commentators may not go so far, but certainly suggest a move away from rigid rules to a contract law based perhaps on "reasonable expectations", which does not seem very far at all from tort: see eg, Mason and Gageler "The Contract" in Finn (ed) *Essays on Contract* (Law Book Co, Sydney 1987, 1, 32). The law of restitution has emerged and provides a rapidly growing new cause of action.

148 Under this view, contract law may be seen as a useful device, in those cases where the parties have the opportunity to consider consequences before various contingent events take place, to limit obligations which might otherwise exist under the general law or to create new ones. By making a contract, people in a relationship can set out what they wish to happen in certain circumstances and make it plain that the general rules are to be displaced or limited. This seems eminently sensible and accords with notions of freedom of contract and freedom for people to arrange their affairs.

149 If some contracts are to be approached this way, the approach does need to be more consistent, and the limits (once set) accepted more readily. To take a concrete example, consultation we have undertaken with members of the engineering profession (among others) suggests they would like the law of civil liability to adequately reflect the difference between a brief appraisal of a project for a small fee or none at all, and a full and comprehensive consideration of relevant plans and specifications, which is more time consuming and consequently more expensive. Again, if a person buying a dwelling wishes to pay a smaller fee for a less thorough inspection and take the chance that structural defects in the building might not be identified, it seems entirely reasonable that that person should be able to do so. But the corollary is that the inspector's duties (and potential liability) should be less onerous. Problems may arise when this kind of agreement, or one even more casual, is taken by a court to imply rather greater duties than any of the parties had originally contemplated, the attitude of the client having changed when something went wrong. Liability may then be imposed which is much greater than that originally intended by the parties.

150 On the other hand, the person damaged by an inadequate brief appraisal may be a later purchaser, unconnected with the contractual bargain which reduced the scope of the engineer's obligation to the first purchaser of the dwelling, but relying on the advice communicated through that earlier purchaser.

151 It must be said that there is a public interest in ensuring that safe dwellings are built. Minimum standards are necessary, eg, to protect later purchasers, even if the immediate parties to the building contract or that between the builder/developer and the first purchaser are content with less.

152 But within the parameters of minimum safety, there should presumably be some freedom for people to make choices about the way in which they spend their money and about the risks which they feel prepared to accept. Various techniques could be adopted. Under our proposal, the "limited commission" discussed in para 149 could be viewed as a factor to be taken into account in considering the conduct of the plaintiff and damages reduced on that basis, even if the defendant is to remain partly liable. Some writers (notably Professor Richard Epstein of the University of Chicago, who presented a provocative seminar organised by the Law Commission in 1990) are of the opinion that, in these cases, duties in tort should be entirely replaced by obligations in contract. In this way, it is said, the reasonable expectations of the parties are not incorrectly adjudicated by the courts, often with the benefit of hindsight. Certainly such a view does not provide for a situation where the parties are strangers, and Epstein admits tort liability here; different remedies are required in that context. The contractarian argument is also somewhat unhelpful where the parties have failed to provide for a particular event. But like the economics and law arguments, Epstein's thesis is certainly provocative and suggests reassessment of some of the traditional approaches.

FULFILLING THE OBJECTIVES

153 Even accepting one or all of the philosophical bases for civil law which we have outlined above, we would re-emphasise that in practical terms it may be that some of those objectives simply cannot be fulfilled. We have already referred to the need for the availability of adequate insurance cover so as to allow the compensation objective to be met. Contraction in the insurance market is as likely to result from uncertainty about the extent of liability as from a real increase in the potential liability of those who form the "risk pool" in the particular insurance market.

154 Another limit on the availability of insurance may be generated by the amount of potential liability. For example, a successful action for negligent misrepresentation may give rise to an award of damages measured in the hundreds of thousands if not millions of dollars if the plaintiff's loss arises from an investment or some similar decision made on the basis of the representation. Amount also relates to the number of claims: many small claims may build to a substantial total over time.

OTHER SOLUTIONS

155 The difficulty in fulfilling objectives suggests that improving the legal rules is not enough. The Law Commission recognises that the situations considered in this paper may require radical solutions to encourage the prevention of losses; or at least the efficient deterrence of unnecessary loss and the compensation of that which is unavoidable. One approach, dispensing with mere adjustment of civil rules, is evident in the number of enactments which provide regulatory regimes designed to prevent losses by making criminal that activity which is likely to give rise to loss (see eg, Explosives Act 1957, Factories and Commercial Premises Act 1981), although several of these enactments are to be repealed by the *Health and Safety in Employment Bill* if enacted. In our report on the Accident Compensation Scheme (NZLC R3 *The Accident Compensation Scheme*) we favoured the philosophy of promoting individual responsibility - the responsibility of individuals to take care in respect of their actions and to bear an appropriate share of the cost of health care in respect of the injury to themselves or others. A similar philosophy would help fulfil the objectives.

156 Education of consumers is also helpful. So is clarification of duties: eg, it is not always clear for what purpose a professional is engaged. The auditing profession argues very strongly that its role in carrying out a company audit is to report that, in their opinion, the company accounts represent "a true and fair view" of the company's position, not to detect fraud (although that would be notified if discovered). It may be easy to hold an auditor negligent with the benefit of hindsight: it is often much easier after the event to say what a reasonable auditor should have done in the circumstances. The cost of an audit which would be needed to detect fraud in every case is likely to far exceed the price which a company would reasonably be prepared to pay for the audit. It would also be out of proportion to any benefit to society from such an audit. These sorts of considerations are said to apply generally to professionals: the members of the professions have a very clear perception of their duties, which tends to differ

significantly from that held by clients. It seems that a clearer understanding and definition of the duties would be helpful, not least because a disgruntled client might be less likely to pursue legal remedies if there were such an understanding, and had been from the outset. In the particular context of accounting standards, this matter is to be addressed under the Financial Reporting Bill presently before Parliament.

157 One solution to deal with the problem of massive claims is to allow auditors and other professionals to limit their liability by means of a "cap". Most of the professional organisations which put forward statutory capping of damages as a viable option would link it to the provision of compulsory insurance to the level of the cap. At this stage of our project we have not considered this solution in any comprehensive way and therefore make no comment on it save to note that some members of the law and economics school do not appear to find it satisfactory (see, eg, Monroe and Wellington, *An Analysis of the Effects of Limiting Auditors' Liability: A Laboratory Investigation Using Experimental Markets*, paper presented at the Annual Conference of the Accounting Association of Australia and New Zealand, Perth (1990)).

158 Other solutions to the kinds of problems which we address in this paper may fall outside the traditional legal structure of a cause of action, proof of a wrong and the recovery of damages: the Accident Compensation Scheme provides a very good example in New Zealand. In the building context, defective premises legislation in the United Kingdom and a comprehensive scheme of insurance organised by the British building profession limit the need for litigation. A scheme similar to the English model, known as "Buildguard", was available in New Zealand until 24 January 1992 under the auspices of the Housing Corporation. Payment of a small fee guaranteed indemnification for defects arising from inadequate materials or workmanship for a six year period. The Corporation however, retained the right to insist that a claim be brought against the builder; it was not a no-fault scheme. It must be recognised that such insurance schemes will only operate to avoid the need for litigation, as well as ensuring compensation, if such rights of subrogation are excluded.

159 The Law Commission is of the view that solutions of this nature (if carefully designed) may be more effective in compensating losses than the litigation process. They will almost certainly be cheaper. However, we realise that in the meantime litigation will continue, given the immediate absence of viable alternatives. We repeat that it is therefore our aim in the present paper merely to suggest how the litigation process should be rationalised. We propose re-drawing some of the rules governing that process. Once that is done, the wider issues can then be reconsidered from a more principled base and other solutions implemented where they are necessary or helpful.

160 Thus, we do not at this time favour immediate adoption of other solutions, such as capping damages, which have been suggested or adopted overseas. In particular, we have noted the introduction into the New South Wales Parliament in 1990 of the Occupational Liability Bill which would introduce a scheme limiting professional liability in conjunction with compulsory insurance. We will be most interested in its progress.

V

Proposals for Reform

161 We now turn back to the issues which were identified at para 90, namely:

- whether concurrent defendants should be liable jointly and severally, or just severally ("proportionate liability");
- whether there should be an extension of rights of contribution between defendants;
- how the problem of the uncollectible contribution might be addressed; and
- whether there should be an extension of the concept of apportioning damages to reflect the plaintiff's fault.

SEVERAL LIABILITY

162 Proponents of a change away from the present rule of joint and several (where each defendant is entirely responsible for the plaintiff's loss) to several liability - division of the presently indivisible responsibility of each defendant for the whole of the plaintiff's loss - have some strong arguments in their favour. One of the most attractive is that joint and several liability may place a wrongdoer whose proportionate share of the blame for the loss caused to the plaintiff is relatively minor at risk of having to bear a very much greater share, even perhaps the whole, of that liability. Under a system of several liability each defendant would bear only his or her own proportion (as apportioned by the court) of the plaintiff's damages. While the loss suffered by the plaintiff may be indivisible in the sense that it is not possible to *isolate* each defendant's share of liability, it seems indefensible to point to that as an argument against several liability. The practical divisibility of such losses is acknowledged in contribution and in reduction of damages for contributory fault. It seems that the courts generally have little trouble in undertaking the necessary apportionments (and if they did, difficulty in calculation is not an excuse for denying proper adjustment of rights). Once divisibility is thus acknowledged, it is arguable that there is no good reason not to take the next step, and make the defendant responsible only for the divided

share. The plaintiff then bears the loss arising from an insolvent or unavailable defendant in multiple party claims, as the plaintiff must presently do if a sole defendant is unavailable.

163 One immediately attractive consequence is that under several liability there would be no need for complicated rules concerning the apportionment of liability between defendants. The problems of how to deal with compromises between the plaintiff and one of the defendants, with a judgment against one defendant, with contractual limitations enjoyed by one defendant, with the running and expiry of the limitation period against one defendant: all these problems could be avoided. The law relating to contribution in civil cases would be greatly simplified because the plaintiff would be responsible for seeking out defendants.

164 *In solidum* liability may have been all very well in the days when a plaintiff had to have been completely blameless in order to recover any damages at all from the defendants; when the plaintiff's own contribution to the injury in respect of which the claim is brought disqualified the plaintiff from any recovery. But now, it is argued, a plaintiff whose contribution to the injury is greater than that of any defendant (or even of all defendants) may recover, though the damages will be proportionately reduced so as to reflect the plaintiff's own fault. This change in the law relating to contributory fault opens the door (at least in theory) to a situation in which a plaintiff who is able to recover 100% of the reduced damages may do so against a defendant whose proportionate contribution to the injury was less than that of the plaintiff. Take, eg, a situation in which P (40% at fault) claims against D1 and D2 who, between them, are equally at fault (ie, 30% each). P can recover 60% of the damages which would otherwise be awarded and, under the *in solidum* rule, can recover that 60% from either D1 or D2. If D1 is insolvent, D2, responsible only to the extent of 30%, may be called upon to pay 60% to a plaintiff who is 40% to blame for the injury. That, say the critics, is manifestly unfair.

165 It is also argued that *in solidum* liability may increase the cost of insurance because an insurer of a prospective defendant has to take into account the possibility that the defendant will become involved in an incident where there is more than one wrongdoer but may be unable to recover contribution from any other wrongdoer. However, the Law Commission sees this as a relatively weak argument. It seems from the North American materials, and particularly the work of Professor Priest referred to earlier (para 96) and others, that no one has yet succeeded in demonstrating that the cost of insurance is significantly increased because of the existence of joint and several liability nor that insurance costs have decreased in United States jurisdictions where the rule has been abolished. There is, though, a perception that the real cause of the insurance crisis is the magnitude of damages awards by juries in personal injury actions, particularly the element of damages for non-economic loss (such as exemplary damages or damages for pain and suffering). This is not an issue in New Zealand, and as we have just said, there is some doubt whether the American reforms have had any effect on insurance markets.

166 The personal injury question is, however, an important factor distinguishing the New Zealand context for reform from that in other jurisdictions. Personal injury claims overseas very often involve multiple parties. However, it may be

argued in *favour* of several liability that New Zealand has abolished such an action. We understand that, in this country, multiple party claims are most frequent in claims against professional advisers, and for defective buildings. In such cases the loss suffered tends to be purely economic rather than being economic loss arising from physical injury (although some building cases will involve physical damage to the building). This impacts on the validity of the principle of full compensation: that objective is certainly very important where damages relate to the costs of medical care for, and lost earnings of, injured and disabled persons. Compensation may seem less urgent, however, where the loss arises from, say, the fact that the plaintiff's shares in a company are worth less than originally suggested; it is arguable that such a loss is merely a business risk which should not necessarily give rise to a right to full compensation whatever the consequences for the other parties involved. At least, in such cases, there is not the emotional background created by a dead or disabled plaintiff, whose family have no means of support.

167 Nevertheless, although we recognise the force of some of the arguments in favour of the abolition of *in solidum* liability, the Law Commission is not at this stage of its deliberations convinced that there should be any change in New Zealand. In part this view is influenced by the reluctance of legislators or reformers elsewhere in the Commonwealth to institute or recommend such a reform. We have already noted that only in British Columbia has a principle of several liability been adopted or recommended and that there the change was evidently made so subtly that it was at first not perceived as having occurred. Now that the change has been appreciated, it is proposed to reverse the position. And, as has just been mentioned in connection with insurance, the context for reform in New Zealand is vastly different from the experience of the State jurisdictions in the United States.

168 Those considerations alone would not be decisive. The factor which weighs with us most heavily at present is the effect on plaintiffs which abrogation of the rule would have. We stress a number of times in this paper the commitment of the common law to the objective of fully compensating a plaintiff for all loss which has been suffered. Joint and several liability is one means of achieving this: any risk of an absent or insolvent defendant must be borne by a co-defendant (if there is one). If there is only one defendant and he or she is insolvent the plaintiff fails to recover. But if there are two defendants, the plaintiff can recover from either and, if D2 is insolvent, D1, not the plaintiff, bears that burden. Although it recognises the contrary arguments, the Law Commission has yet to be persuaded to recommend any departure from this position.

169 We also take into account the differing nature of the acts or omissions of the plaintiff compared with those of the defendants in claims where the plaintiff is partially at fault. The defendants have, by their acts or omissions, injured the plaintiff. Each has failed to take reasonable care for the interests of someone *else*. But the plaintiff's fault will often consist of no more than a failure to look after his or her *own* interests. The plaintiff has not necessarily caused injury to anyone else. It is appropriate that the plaintiff's damages be *reduced* to reflect the plaintiff's fault, but we do not think that the risk of uncollectibility of the balance should fall on the plaintiff (at least not in its entirety; we return to the subject of uncollectibility later in this chapter).

170 Several liability also presents practical difficulties. The court will not be able to apportion the defendants' liability unless it knows how many people are liable to the plaintiff. And even if this information is available it is, we think, undesirable to make an apportionment against a person who is not before the court (even if no order is made against that person). The decision might later require review in light of evidence produced by that person when eventually sued. Consequently the plaintiff will usually have to sue all possible defendants even if the claim will be difficult to prove against some. Unless this is done, those actually sued will blame the others in an endeavour to reduce their (several) share of liability. Such problems do not arise to the same extent under a system of *in solidum* liability, for the plaintiff is not concerned with any apportionment between defendants. Where one defendant seeks apportionment it is done only amongst those who are before the court. It must be said, however, that these matters could probably be addressed to a large extent by rules of procedure. Furthermore, we understand that in practice plaintiffs already tend to employ a "shotgun" approach and sue all possible defendants. We do not think, however, that such an approach should be *required* - as it would effectively be under a several liability rule.

171 The Law Commission recognises the theoretical possibility of a recovery situation of the kind outlined in para 164, where the plaintiff recovers from a defendant even though the plaintiff's contribution to the injury is greater than that of the particular defendant. However, this situation will arise in a very small number of cases only and we do not believe that such an important change as reversal of the *in solidum* liability rule should be made in the law simply to accommodate these. We propose a different (partial) solution (see para 180). We note that in the United States modifications to the contributory negligence rule, as we have known it in New Zealand in tort since 1947, have thrown up as many anomalies as those that they were designed to avoid (see para 128).

172 The Law Commission is, therefore, provisionally of the view that the *in solidum* liability rule should remain unchanged. The draft Act attached to this discussion paper accordingly contains a draft s 6 in the following terms:

> **Concurrent wrongdoers are jointly and severally liable for the whole of the damages payable to a wronged person in respect of a loss.**

Concurrent wrongdoer, wrongdoer, and **wronged person** are defined in the draft Act:

> **concurrent wrongdoer** means each of two or more wrongdoers whose acts or omissions give rise, wholly or partly, to the same loss, and includes a person who is vicariously liable for any act or omission of a wrongdoer;
>
> **wrongdoer** means a person whose acts or omissions give rise, wholly or partly, to a loss;
>
> **wronged person** means a person who suffers a loss.

173 We recognise that such a provision would also make a slight change to the

law relating to true joint wrongdoers who fall within the ambit of the draft Act, since it would permit damages to be apportioned in unequal shares; it will be remembered that, at present, one consequence of a joint obligation is division of the liability in equal shares (see para 32). Historically, there were also, in tort at least, procedural differences arising from the characterisation of wrongdoers as joint or joint and several (see para 23).

174 However, we do not believe the change will have much practical effect in either context. Most joint liabilities will be outside the scope of the draft Act since they relate to matters of debt. As for those to which the draft Act does apply, we think that although the court will have the *power* to apportion damages unequally, equal division will continue to be appropriate in most cases simply because of the nature of a joint obligation. As for the procedural differences, there is no good reason for them; indeed they have generally been removed already. We propose to carry over the removal, and this is achieved by making all wrongdoers jointly and severally liable with the incidents attaching to that. The removal would now extend to compromises. It could also, of course, be managed by laying down specific rules (which is the approach taken by s 94 of the Judicature Act 1908 and s 17(1)(c) of the Law Reform Act in relation to the judgment bar rule).

EXTENSION OF CONTRIBUTION RIGHTS BETWEEN DEFENDANTS

175 We propose the extension of the right to contribution amongst defendants whatever the basis of civil liability, as has already been enacted in England and Wales (Civil Liability (Contribution) Act 1978) and as recommended in New Zealand by the CCLRC. This does not include liability arising from failure to pay a debt. The annexed draft Act (draft s 4) accordingly states:

> **This Act applies to loss or damage**
>
> **(a) which arises wholly or partly from an act or omission of a person, whether intentional or not, including an act or omission that is**
>
> **(i) a tort, or**
>
> **(ii) a breach of a statutory duty, or**
>
> **(iii) a breach of contract, or**
>
> **(iv) a breach of trust or other fiduciary duty**
>
> **whether or not the act or omission is also a crime, and**
>
> **(b) for which that person has a civil liability to pay damages,**
>
> **but does not apply to loss or damage arising wholly or partly from a failure to pay a debt or from the fault of two or more ships within the meaning of Part XIV of the Shipping and Seamen Act 1952.**

176 Under our proposals (draft s 7) in any such situation:

> **(1) Loss suffered by a wronged person is attributable**
>
> > **(a) as between a wronged person who has failed to act with due regard for that person's own interest and a wrongdoer, or concurrent wrongdoers taken as a group, and**
> >
> > **(b) as among concurrent wrongdoers,**
> >
> > **in accordance with subsection (2).**
>
> **(2) Loss suffered by a wronged person is attributable in the proportions that are just and equitable, having regard to**
>
> > **(a) the nature, quality and causative effect of**
> >
> > > **(i) the wronged person's failure (if any) to act with due regard for that person's own interest, and**
> > >
> > > **(ii) the acts and omissions of the wrongdoer or of each concurrent wrongdoer, and**
> >
> > **(b) the rights and obligations of the wronged person and the wrongdoer or each concurrent wrongdoer in relation to one another.**
>
> **(3) For the purposes of this section, a wronged person who does or fails to do anything in justified reliance on a contract, a rule of law or an enactment does not fail to act with due regard for that person's own interest.**

But it would be provided that responsibility for exemplary damages should not be apportioned and would rest only with the defendant against whom they are awarded: see draft s 10(3)(b)(ii).

177 We do not envisage that the legislation would need to provide other guidelines for the manner of apportionment between defendants. In considering how to apportion damages between defendants whose civil wrongs were of differing natures, the courts should be left with considerable discretion so that their apportionments can reflect their views on the relative blameworthiness of the conduct of each defendant in the circumstances of each case.

178 It will be observed that we suggest specifically the availability of apportionment in cases of intentional, as well as accidental, injury. We accept the point made in the Ontario report that apportionment should be permissible even where the defendant had acted deliberately. That quality of the defendant's act may sometimes justify the court in declining to allow the claimant to have

contribution but, in other circumstances, it may be clear that the defendant did not intend all of the consequences of the deliberate behaviour and some degree of apportionment may well be appropriate. We think that a defendant's conduct would need to be particularly outrageous for all rights of contribution to be disallowed (in the absence of facts giving rise to an indemnity): one of the conceptual difficulties with this area of law is that it does require division of seemingly indivisible things. A court may be required to allocate responsibility between one defendant who *meant* to cause the entire damage, and another who actually caused part of it through negligent behaviour. We do not think, in general, that the negligent actor should escape scot-free from the consequences of his or her behaviour, merely because of the presence of another whose conduct may have been more disgraceful.

179 Our proposal follows s 17 of the Law Reform Act 1936 in stating that contribution is available regardless of whether the act or omission in question happens also to be a crime as well as a civil wrong.

ALLOCATION OF UNCOLLECTIBLE SHARES

180 We have provisionally rejected abrogation of *in solidum* liability but, in so doing, have recognised the hardship which may be caused by the rule to a defendant who finds that a co-defendant is missing, insolvent or otherwise "judgment proof". Of course, the position of many defendants will be improved by our proposal for extension of contribution rights whatever the nature of the defendant's liability. For example, a defendant whose liability arises from breach of contract will now be able to claim contribution from a tortfeasor. Under the present law no such contribution is possible, making the absence or insolvency of the tortfeasor (in the present example) irrelevant. In liberalising the law of contribution we bring into greater focus the criticism which can be made of *in solidum* liability. Nevertheless, we have provisionally rejected calls for change in that rule.

181 Is there, however, a mechanism which will reduce the impact on D1 where D2's fair share of the damages is uncollectible? How should the uncollectible share be allocated?

182 A starting point may be to examine a situation in which it is clear from the beginning of the litigation that one of the defendants or potential defendants is insolvent. The court should, we think, apportion liability only between those who are parties before it, disregarding any potential defendant who has not been sued by the plaintiff or joined as a third party.

183 If the insolvent wrongdoer is before the court and the insolvency is apparent before the court rules on contribution or within a reasonable time after judgment, the insolvency ought to be taken into account. The insolvent wrongdoer might be ignored in a claim if there is no prospect of any recovery from that source.

184 However, where a dividend in the insolvency is a possibility, we think that the court should enter judgment against each defendant. The plaintiff can then

enforce judgment against one or more, so as to be fully compensated. We propose that if D1 finds (or suspects) that contribution is unavailable from D3, whether because of insolvency, absence or other reasons, D1 should be entitled to return to the court within a reasonable time (we suggest one year) and apply for reallocation of the uncollectible contribution among the remaining parties. To take a simple example: D1 and D2 are each 30% responsible for the loss and D3 40% responsible. If D1 finds that D3 is unavailable, D1 may apply for reallocation of the 40%. Since D1 and D2 are, between themselves, equally responsible, the outstanding share will be equally divided between them, 20% to each. D1 should be able to make such an application at any time after making or becoming obliged to make a payment to P, although any order for reallocation will not be enforceable until the payment is *actually* made.

185 P, if partly responsible for his or her own loss, should be taken to be a party for this purpose. So, if P is 30% at fault and the balance of the responsibility has been divided amongst the defendants as to 30% for D1 and 40% for D2, P would, in the absence of insolvency, be able to recover 70% from either D1 or D2, and the chosen defendant would seek contribution with the result that all parties bore an appropriate share of the loss as set out above. Under present law (in tort) P would be able to recover the full 70% from D1 and the insolvency of D2 would effectively deprive D1 of any available right of contribution. What we now propose is that P and D1 should proportionately between them share the burden of the insolvency. As P and D1 are each 30% responsible D1 would become responsible for payment of 50% (30% + 20% (half of D2's share)) of P's damages and P would be left to bear the remaining 50% (30% + 20% (half of D2's share)).

186 Section 16 of the annexed draft Act accordingly provides:

> **(1) If**
>
> > **(a) contribution is recoverable from a concurrent wrongdoer under this Act, and**
> >
> > **(b) a court has attributed a proportion of a loss to that concurrent wrongdoer, and**
> >
> > **(c) the proportionate amount of contribution payable by that concurrent wrongdoer is uncollectible,**
>
> **any other concurrent wrongdoer to whom all or part of that contribution is payable may apply to the court for apportionment of the uncollectible contribution.**
>
> **(2) Contribution is uncollectible for the purposes of this section if it cannot be collected because the concurrent wrongdoer by whom it is payable is insolvent, absent from New Zealand or cannot be found.**
>
> **(3) If the court is satisfied that contribution payable by a concurrent wrongdoer is uncollectible, it may make an order**

apportioning the uncollectible contribution among the other concurrent wrongdoers (including the applicant) and any wronged person who has failed to act with due regard for that person's own interest, so that each is liable to pay or to forego a share of the uncollectible contribution that is proportionate to the loss attributable to each.

(4) An application under this section may be made in a proceeding brought by a wronged person for the recovery of damages or in a proceeding brought by a concurrent wrongdoer for the recovery of contribution or in a separate proceeding, but must be brought within one year after the attribution of a proportion of the loss to the concurrent wrongdoer whose contribution is uncollectible.

(5) Apportionment of uncollectible contribution under this section does not discharge the concurrent wrongdoer whose contribution is uncollectible from liability to pay contribution.

It must be admitted that this suggestion, which is made in the Ontario report (see para 94 above), is not consistent with our stance on retention of the *in solidum* rule. It is, in fact, a half-way house between joint and several liability and several liability: a compromise. We think it appropriate in the context. Our draft makes the power of the court to carry out a reallocation discretionary.

187 It has been suggested to us that this proposal for an uncollectible contribution may give rise to inconvenience,with proceedings being brought for perhaps very small sums. We think, though, that a defendant is unlikely to bring such proceedings unless the amount is reasonably substantial, and we think that the court's discretion could be exercised to exclude vexatious and unjustified claims.

REDUCTION IN PLAINTIFF'S DAMAGES TO REFLECT FAULT

Nature of plaintiff's fault

188 Just as we have proposed the extension of the right of contribution amongst defendants regardless of the nature of their respective wrongdoing, we also propose the extension of the concept presently known as "contributory negligence" beyond the field of tort, following, in general terms, the path of wider reform favoured by the CCLRC (*Working Paper*, para 94 above, para 8.6). We favour integrating the plaintiff into the scheme of contribution so that the plaintiff will, in effect, contribute his or her share of the damages (the entire amount being reduced proportionately to the plaintiff's contribution) in the same way as they are now reduced in tort under the Contributory Negligence Act 1947 or in an equitable claim such as breach of fiduciary duty: *Day* v *Mead* [1987] 2 NZLR 443. We see it as anomalous that the legislature and the courts take into account the plaintiff's contributory fault in relation to some causes of action but not others, most importantly actions for breach of contract. That is an unnecessary anomaly.

189 It might be different if the concept of contributory fault were incompatible with the law of contract so that the proposed extension would bring with it major change to the law of contract and, perhaps, distortions. However, having carefully considered the matter and taken particular account of the Working Paper of the Law Commission of England and Wales (see para 114 above), we do not think such distortions will result.

190 The extension will, we think, be beneficial. To begin with, it is anomalous that where a duty of care arises under a contract, the rules should be different depending on whether the plaintiff pleads a claim in tort or contract. That is an avoidable source of confusion and unfairness. We recognise that some contractual doctrines such as causation and mitigation may be said to fulfil similar roles to contributory negligence. However, apart from mitigation, which may reduce damages, those doctrines are "all or nothing" rules. Damages are either awarded in full or denied entirely. We have already discussed how unsatisfactory this is where both plaintiff and defendant are somewhat to blame, in our consideration of the early rules in tort. Indivisibility will often be no more satisfactory in contract. And mitigation, although it allows apportionment, operates only in respect of acts *after* breach. Estoppels, and the rule that a party who brings about the failure of a condition may not take advantage of the failure, may operate *ex ante*, but, if established, will defeat the plaintiff's claim entirely. We think it preferable that courts be able to apportion loss in these sorts of cases. The question will be one of the reasonableness of the plaintiff's behaviour and will, as we have said, depend upon the nature of the contract and of the obligations undertaken by the defendant. Like the Law Commission of England and Wales we do not see this as fundamentally inconsistent with the existing law of contract nor as giving rise to any upheaval in that area of law, so long as what is reasonable behaviour on the plaintiff's part is considered in light of the terms of the contract.

191 We therefore propose that the plaintiff's contributing fault should be available to reduce damages in contract, as well as in other forms of claim. The question whether the plaintiff's action or inaction has been contributory to the loss and the exact apportionment of that responsibility will be matters for the court to decide on the facts of the case. Detailed rules about the matters which a court should take into account would not, we think, be very helpful. They would be difficult to draft and it would be unlikely that every contingency would be covered. It seems more appropriate for the courts to have a general discretion to apportion damages where that is appropriate on the facts of the case, leaving the courts to make decisions as they see best.

192 Thus, s 7 of the draft Act provides in part that:

> **loss suffered by a wronged person is attributable ... as between a wronged person who has failed to act with due regard for that person's own interest and a wrongdoer, or concurrent wrongdoers taken as a group**
>
> and
>
> **... a wronged person who does or fails to do anything in justified**

reliance on a contract, a rule of law or an enactment does not fail to act with due regard for that person's own interest.

And the court is also directed, when making an apportionment, to take into account the rights and obligations of the parties between themselves: see draft Act s 7(2)(b).

193 We think it obvious that, where the terms of the contract are such that the plaintiff is entitled to rely entirely on the defendant's performance, there can be no question of reducing the plaintiff's damages for any failure to monitor the performance of the defendant or anticipate default. The plaintiff should be able to rely on the defendant to perform as specified. This would apply to, say, a matter which is the subject of an express absolute warranty. And of course the parties are always free to write the contract in terms which impose strict liability on the defendant and thus preclude reduction of damages for plaintiff fault. In those cases, it could not be said that the plaintiff behaved unreasonably, even if certain conduct might have prevented or minimised the loss.

194 Similarly, in the case of anticipatory breach, where the plaintiff is in the position of choosing which remedy to pursue. In the generality of cases, choice of one remedy, which turns out to have worse consequences or causes a greater loss than another would have, should not be a matter which reduces the damages to which a plaintiff is entitled. This is analogous to the principle that the plaintiff is entitled to recover costs incurred in attempted mitigation of loss, even though the attempt actually increases the loss. The court will not expect the plaintiff to be omniscient, merely to behave reasonably. If it is considered that our proposals might give rise to difficulty, we would be helped by illustrations of particular fact situations. Our analysis has not yet produced any.

Method of apportionment

195 At para 125 we mentioned the decision of the House of Lords in *Fitzgerald* v *Lane* [1989] 1 AC 328 in which it was held that apportionment of liability between the plaintiff and defendants had to be kept separate from apportionment of contribution between the defendants; that assessment of the plaintiff's share in the responsibility for the damage sustained did not involve the determination of the extent of the individual culpability of each of the defendants. Therefore the plaintiff's share in the responsibility is fixed as against all defendants and the reduced amount claimable by the plaintiff is only then to be apportioned between the defendants. We mentioned that the Ontario Commission took a different view, suggesting that only a defendant directly affected by a plaintiff's contributory fault should be entitled to the benefit of it. We are inclined at this stage to recommend adherence to the rule in *Fitzgerald* v *Lane* which has the great advantage of simplicity and which was decided as a matter of policy by the House of Lords after full argument. We therefore think that the procedure should remain that the plaintiff's contributory fault should be assessed in percentage terms as against all defendants together and that the residual damages as reduced should then be the subject of apportionment in contribution between the defendants. Accordingly s 10(3) of the annexed draft Act is in part in the following terms:

In a proceeding where the reduction of damages is sought or there is a claim for the recovery of contribution, or both,

(a) the court must

(i) first, ascertain the loss suffered by the wronged person;

(ii) second, ascertain, in relation to the wrongdoer or concurrent wrongdoers taken as a group, the proportion of the loss (if any) attributable to the failure of the wronged person to act with due regard to that person's own interest;

(iii) third, where there are concurrent wrongdoers, ascertain, as among them, the proportion of the loss attributable to each. ...

METHOD OF REFORM

196 We have in this chapter advocated wide extensions of the doctrine of contributory fault and the right of contribution so that both would apply whatever the cause of action against each defendant. We have also made some suggestions about the way in which the problem of the uncollectible contribution could be adjusted in a situation in which the plaintiff is partially at fault. If the submissions which we are now calling for indicate general approval of these proposals it would be our intention to prepare a report to the Minister of Justice accompanied by a draft Act.

197 Because the subject matter has already been considered by the CCLRC, which also called for submissions, we wish to advance the matter as much as possible at this stage, but without making any final commitment to particular recommendations. We have concluded that the best way to achieve this advancement is the publication of a draft Act which we hope will assist readers of this paper to focus on our provisional proposals. Accordingly a draft Civil Liability and Contribution Act with a commentary is annexed. It would replace s 86 of the *Judicature Act 1908*, s 17 of the Law Reform Act 1936, s 8(2) of the *Crown Proceedings Act 1950*, s 6 of the *Occupiers Liability Act 1962* and the *Contributory Negligence Act 1947*, which would be repealed.

198 There are some difficult subsidiary issues on which we have postponed discussion until this point in the paper. They take up a good deal of space in some of the reports and working papers of other Commonwealth law reform bodies but they are, in relative terms, matters of detail. We deal with them in the next chapter.

VI

Some Particular Issues

199 In this chapter we consider some subsidiary matters which will require attention if the proposals in Chapter V are adopted. They concern:

- the treatment to be given to compromises with the plaintiff by one or more defendants; and to judgments in favour of the plaintiff against one or more defendants;
- the effect of statutory and contractual limitations (including time bars) and immunities enjoyed by one defendant but not another;
- the questions whether the plaintiff should be required to sue all defendants together; and whether claims for contribution must be made only in the proceedings brought by the plaintiff (ie, by third party application or cross-claim).

Compromises

200 If D1 compromises (see para 20) the claim of the plaintiff and pays or agrees to pay a sum to P in full and final settlement of P's claim against D1, how should that payment be treated if D1 seeks contribution from D2 to the sum so paid? Should it be open to D2 to resist the contribution claim on the basis that D1 was never liable to P or should D1's liability to P be assumed where there was no collusion between P and D1 and the compromise was otherwise made in a bona fide manner?

201 The present law in relation to concurrent tortfeasors is that D2 may raise as a defence the fact that D1 was not a tortfeasor. Section 17(1)(c) of the Law Reform Act 1936 provides that a tortfeasor "liable" in respect of the damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage. It has been determined in *Baylis* v *Waugh* [1962] NZLR 44 that a person claiming contribution must prove that he or she was a tortfeasor and was liable to the plaintiff at the time the payment was made. It is not necessary that D1 show the existence of a judgment by P against D1: "liable" does not mean "held liable". A defendant can admit liability, pay damages and then enforce a right of contribution. But it is still open to D2 to

argue that D1 need not have paid because D1 was not liable at all to P. The court is then required to rule upon whether D1 was responsible at law for the damage and, only if it finds D1 to be responsible, and also D2 to be so, can the court award D1 contribution. In coming to this conclusion in *Baylis* McGregor J adopted the obiter views of Denning and Morris LJJ (as they then were) in the English Court of Appeal in *Littlewood* v *George Wimpey & Co Ltd and BOAC* [1953] 2 QB 501. When the case went to the House of Lords, Viscount Simonds (also obiter) took the contrary view, but the English Court of Appeal has subsequently confirmed the views of Denning and Morris LJJ: see *Stott* v *West Yorkshire Road Car Co Ltd* [1971] 2 QB 651. A claim for contribution might thus be complicated by arguments as to D1's liability.

202 The Law Commission thinks the law on this point should be changed and that it should not be open to D2 to prove that a bona fide compromise made by D1 was unnecessary because D1 was not actually under any liability to P. It should be enough for D1 in the contribution proceedings to show his or her genuine belief at the time of the payment that P might have a valid claim against D1 and that, consequently, D1 did not make the payment to P for extra-legal reasons, say because D1 believed that P had a good moral claim or because it was to D1's commercial advantage to accommodate P or that the payment was made for reasons relating to family matters between P and D1.

203 The Law Commission takes this view because it believes that the law should not be formulated in a way which discourages settlement of claims and thus prolongs litigation. A rule which allowed a compromise to be re-opened on the basis that D1 was never liable to P would, in cases of doubt, certainly deter D1 from risking a payment in respect of which he or she might be unable to recover contribution. The Law Commission also believes that it should not matter whether the compromise is made with or without an admission of liability to P; nor should it matter whether D1 is formally released from liability by P or merely has the benefit of an agreement by P not to pursue any further a claim against D1. The question to be answered should be simply whether D1 has paid P a sum in or towards P's claim against D1 in the genuine belief that P might, if the matter went to court, obtain a judgment for *some* amount against D1 in respect of the loss or damage suffered by P. If this is shown, it should not even be necessary to show that P had actually commenced proceedings against D1.

204 It has been suggested to us that D1's right to contribution should rest on an even broader basis: that D1 should be able to bring a contribution claim in any case where D1 has made a compromise payment (relating to P's loss) to P, so long as the payment confers a benefit on D2. If D2 is liable, *any* payment by D1 will confer such a benefit, because it reduces the amount which P could recover from D2: P cannot receive compensation for more than the value of the loss suffered. There is merit in this proposal. However, we are concerned that such a rule might be open to abuse. It is conceivable that, without the safeguard that the compromise must be bona fide, the way would be open for collusion between P and D1. We prefer at this stage to retain the requirement of bona fides.

205 But it is also necessary to consider whether there might be prejudice if D2 were unable to challenge the *amount* of the payment. This raises the question of the amount of benefit received by D2 as a result of D1's payment pursuant to the

compromise. We next consider that question.

206 D2 obviously should not be liable to make any contribution unless he or she is liable as a concurrent wrongdoer to P or would, if sued in time, have so been. It follows that we think that while D2 should not be able to challenge D1's acceptance of liability, D2 should be able to challenge the amount of the payment as it relates to D2's liability to P. D2's contribution should be calculated in relation to, and should not exceed, D2's original liability to P. If D1 is liable to P in a greater amount than the liability of D2 to P (eg, where the awards of damages differ because of the differing nature of P's claims against each defendant or because the foreseeability test produces different results by reason of different knowledge of each defendant), then the contribution should be apportioned on the basis of the lower sum. That is the maximum benefit which D2 could receive by reason of D1's payment. On the other hand, if D2's liability is higher than that of D1, there seems to be no good reason why the contribution which D2 must make to D1 should be limited by the amount of D1's true liability. If D1 makes a poor settlement with P and pays P more than P could have recovered by means of a judgment against D1, D2 is harmed only if D1 pays more than their common liability to P. A bona fide but mistaken acceptance of liability does not prejudice D2, who is after all a wrongdoer, and a misjudgment about the amount of their common liability will do so only to the extent that the amount paid exceeds D2's liability to P. However, if the true responsibility of D2 exceeds the liability of D1, a payment by D1 of an amount up to the responsibility of D2 would not seem to prejudice D2: D2 is benefited to that extent. The Law Commission therefore suggests that the control should simply be that D1 may not claim contribution for a payment greater than the responsibility of D2 to P, the amount of D1's true responsibility to P being for this purpose disregarded.

207 The Law Commission accordingly proposes that D1 must show that:

- the compromise made by D1 with P was made bona fide; and
- D2 is (or was) responsible to P for an amount equal to or exceeding the amount claimed by D1 by way of contribution.

If these matters are proved the court should proceed to apportion the responsibility for the loss or damage suffered by P between the defendants and allow to D1 a contribution from D2 equal to the amount by which D1's payment is greater than D1's apportioned share of that payment, subject always to the limit that the contribution should not exceed the apportioned amount of D2's liability to P. (In cases where there are more than two defendants, this limit also properly prevents D1 (who has made a payment corresponding to the whole of P's loss) recovering a payment which represents in part D3's share of liability. D1 must proceed separately against D3)

208 The draft Act would give effect to this proposal in ss 9 and 15:

> **9 (1) A concurrent wrongdoer who in good faith has paid, or has agreed or is obliged by a judgment to pay to a wronged person an amount which, as a proportion of the whole of the damages payable to the wronged person,**

exceeds the proportion of the loss attributable to that concurrent wrongdoer is entitled to recover contribution from any one or more other concurrent wrongdoers.

(2) The amount of contribution recoverable by a concurrent wrongdoer is the amount by which the amount paid, agreed or obliged to be paid by that concurrent wrongdoer to the wronged person by way of damages exceeds an amount proportionate to the loss attributable to that concurrent wrongdoer.

(3) A concurrent wrongdoer from whom contribution is recoverable is not liable to pay, by way of contribution, an amount greater than

(a) the amount for which that concurrent wrongdoer is liable to the wronged person by way of damages, or

(b) an amount that is proportionate to the loss attributable to that concurrent wrongdoer,

whichever is the smaller.

15 (1) A defence to which this section applies that is available in respect of a claim for damages by a wronged person against a concurrent wrongdoer is similarly available to that concurrent wrongdoer in respect of a claim for contribution from that concurrent wrongdoer.

(2) This section applies to a complete or partial defence under

(a) an agreement made between the concurrent wrongdoer and the wronged person before the loss occurred; or

(b) an enactment other than a limitation provision in the *Limitation Act 1950* or other enactment.

209 The CCLRC in its Working Paper (see para 94 above, 16-17) suggested that it should be necessary for D1 to show that the compromise was reasonable, as well as bona fide, on the part of D1. But the committee seems to have been concerned only that, where the liability of D1 and D2 differs in amount, the compromise may not reflect the potential liability, or risk of it, that D2 was under. As an instance of that different liability they pointed to the fact that the rules as to remoteness of damage may give different results because what is reasonable for D1 to foresee may be unreasonable for D2 to foresee. Accordingly they suggested that the elements that D1 should have to prove to recover

contribution from D2 ought to be:

(a) that D1's compromise with P was reasonable having regard to all factors which influenced the settlement;

(b) that D2 is liable to P for an amount equal to or exceeding the amount claimed by D1 by way of contribution.

210 For its part the Law Commission sees no need for any requirement that D1's payment should be reasonable in amount. Provided it is made bona fide, D2 can be protected by the second ingredient, namely that D1 may not claim an amount exceeding D2's actual responsibility to P (if D2 had been sued in time).

211 The foregoing discussion concerns a situation in which D1 has settled P's claim in its entirety and so D2 is discharged from further liability to P: in doing so D1 has paid more than a fair share. But D1 may settle at a figure which is less than P's entire claim against the defendants but still more than D1's fair share. The Law Commission believes that in such a case the same rules should apply as for full compromise, with D1 having to prove only that the decision to settle was bona fide and that the amount of contribution claimed did not exceed D2's true responsibility.

212 This situation might arise because D1 has over-estimated the proportion of the entire claim for which D1 is liable. The payment may, when made, seem to be a fair share but for some reason P does not pursue D2 and so the eventual result is one of unfairness as between the defendants.

213 Or, after D1 has settled with P, there may be a further compromise between P and D2 at a level which, when the respective faults of the defendants are compared, means that D1 has paid too much and D2 too little. In the same way as D2 is able to challenge the amount of D1's payment where both are under the same liability to P, D1 should be able to contend against D2 that D2's payment was too low and did not reflect D2's true liability to P. The true liability - rather than the compromised liability - would be the limit in respect of which D1 could claim contribution. And, of course, credit would have to be given to D2 for the amount which D2 paid in respect of the compromise.

214 Where there are successive proceedings between this cast of characters (and especially so if there are more than two defendants and the proceedings are kept separate) there may need to be a series of adjustments between the defendants (absent uncollectibility) but the eventual result will be governed by the extent to which each has paid more than his or her fair share of the amount for which all (or more than one) of them were concurrently liable to P. It will be seen from this description that we disagree with the view of the CCLRC (*Working Paper*, para 94 above, 17) where it said that a bona fide reasonable compromise between P and D2 (concluded before D1 brought a claim for contribution) should bar D1's contribution claim.

215 Sections 12 and 13 of the draft Act therefore provide:

> **12 In making any order for the payment by any concurrent wrongdoer of an amount by way of contribution, the court must take account of any payment already made by that wrongdoer, by way of damages or by way of contribution.**
>
> **13 A compromise made by a concurrent wrongdoer with a wronged person is not a defence to a claim for contribution made against that concurrent wrongdoer and does not affect the attribution of a proportion of a loss to that concurrent wrongdoer for the purposes of such a claim.**

216 It has been suggested that where there is a part payment the settlor (D1) should be segregated, ie, unable to claim contribution, but, equally, immune from a claim for contribution by D2. However, the problem with this rule is that it introduces elements of several liability and provides no adjustment for any unfairness deriving from the respective levels of the settlements.

217 If a defendant who settles on a partial basis is barred from claiming contribution simply because he or she has not discharged the entire obligation to the plaintiff, such a settlor, in order to preserve a right of contribution, will be forced to settle at a figure which is obviously high enough to leave nothing further claimable by the plaintiff. This will discourage compromises and, in some instances, lead to unnecessarily high payments (which in turn may lead to disputes about the excess).

218 The problem which would be caused by segregation is not entirely overcome even by a provision that P's claim against D2 is to be reduced by the amount of a *fair* compromise between P and D1, rather than by the amount actually settled between those parties.

219 On the other hand, if D1 is to be left unsegregated after a compromise with P, he or she may be discouraged from reaching such a compromise except on the basis of an indemnity by P to D1 against any contribution claim made by D2 (if P should choose to pursue D2). We take this into account but believe that the ends of justice will be better served, and the scheme of any legislation more consistent, if there is no segregation of a defendant who has made a compromise payment. Nor do we think that P should be inhibited in claiming against D2 by reason of the amount of the payment made by D1 unless, of course, that payment fully compensates P for all the loss which P has suffered. It may be that P settles with D1 at a figure which is, in reality, too low. But that may be because of difficulties of proof against D1 or because the injury which P has suffered as a result of the activities of the defendants has placed P in a parlous financial situation and forced P to accept whatever sum can be easily obtained from one of the defendants, thus funding the claim against the other defendant. Any injustice to that other defendant should, we think, be remedied by his or her right of contribution from the defendant who reached a compromise.

Judgments

220 Our concern in this part of the chapter is with judgments. Arbitral awards are included in that term under the general law. We exclude, however, consent judgments or payments into court which have been accepted since these are essentially in the nature of compromises without a determination of liability by the court. Our concern is now with judgments given "on the merits": which phrase which should be taken to exclude a judgment based on a statute bar or a dismissal for want of prosecution.

221 Moreover, the question in issue can be narrowed even further, for if all the parties to the litigation are before the court in the one action, either with P suing D1 and D2 as co-defendants or with P suing D1 who joins D2 as the third party claiming contribution or indemnity, a judgment given in that action ought to be (and is) binding on all parties even when the judgment directly affects fewer than them all. If P obtains in that action a judgment against D1 it will be after a hearing in which D2 has a right to participate in the fullest sense.

222 The issue raised in this part of the chapter relates to the effect of a judgment determining (on the merits) a claim by P against D1 where D2 is not a party to the action and, indeed, may not even be aware that it has occurred. However, D1 may later (in a claim for contribution or indemnity against D2) seek to rely on a determination in relation to liability under that judgment. What evidential or binding force should it have?

223 It should be noted that the judgment (or arbitral award) may have been handed down in a foreign jurisdiction. D1 will not, of course, be seeking to enforce the judgment (enforcement by P against D1 in the New Zealand courts is a quite separate matter) but merely to rely upon it as evidence of the existence and amount of liability for the purpose of seeking to recover from D2 all or part of the payment which D1 has made to P in terms of the judgment. There may be questions whether D1 had an adequate opportunity to, and did, undertake a defence and present evidence and legal argument.

224 The present law as between tortfeasors under s 17 of the Law Reform Act 1936 is that D2 must accept in the claim for contribution the judgment which P has obtained against D1 both as to liability and as to amount. The position is summarised in the judgment of the High Court of Australia in *Bitumen and Oil Refineries (Australia) Ltd* v *Commissioner for Government Transport* (1955) 92 CLR 200, 212-213:

> A decision that the liability imposed by the previous judgment is a liability which par (c) of sub-s. (1) contemplated does not necessarily mean that the tribunal which discharges the responsibility of fixing the amount of contribution under sub-s. (2) of s [17] cannot consider whether owing to the fault of the now plaintiff it stands at an excessive figure. No doubt the Court under sub-s. (2) must accept the assessment as conclusive as to the existence and the amount of the liability of the plaintiff claiming contribution. The Court,

> however, is required to find what is just and equitable as an amount of contribution having regard to the extent of the responsibility for the damage of the tortfeasor against whom the claim is made. There does not seem to be any valid reason why that tortfeasor may not say to the tortfeasor making the claim, if he has improvidently agreed to pay too large an amount or by unreasonable or negligent conduct in litigation has incurred or submitted to an excessive verdict, that the excess is due to his fault and not to that of the tortfeasor resisting the claim. It would be a matter for the Court to consider under the heading of "just and equitable".

225 It should be borne in mind that D2 can also dispute the existence of any liability of D2 to P and the amount of that liability. The issue is only whether the rule preventing D2 from relitigating D1's liability (and its amount) which is set out in *Bitumen Oil* should continue to exist.

226 If there has been fraud or collusion between P and D1, D2 should certainly be able to have the matter re-examined but if the judgment has been given against D1 in good faith (to use the same expression as we used in connection with compromises) there is no prejudice to D2 in allowing D1 to rely upon the judgment, provided that D2 is not prevented from challenging the existence of any liability of D2 to P and is able to restrict D1's right of contribution to such amount (if any) as D2 is independently liable for to P. In the same way as a "soft" compromise by D1 benefits D2 to the extent that D2 was independently liable to P, a judgment which is for a sum which D1 would have been able to reduce but for "unreasonable or negligent conduct in litigation" (to use the words of the High Court of Australia) will not prejudice D2 if the contribution claim must be based on the *lower* of that judgment and D2's liability to P, and cannot exceed the apportioned amount of D2's liability to P. So, in the same way that P would have had to prove the liability of D2 and the amount of that liability if P had directly sued D2, D1 should be required to prove those matters in the claim against D2. (See s 9(1) and (3) of the draft Act: para 208 above.)

227 In some situations the contribution claim may follow judgments given in separate actions against both defendants, possibly for different sums. In that circumstance, in the absence of fraud or collusion, the Law Commission believes that each judgment should be binding but that, again, the claim for contribution should be limited to the amount for which the defendant in the contribution action has been found liable to P and any payment made by that defendant to P must be brought into account. Therefore if P has obtained judgments of $100 against D1 and $50 against D2, and if D1 satisfies the judgment for $100 and shows in the contribution claim that liability should be apportioned equally, D1 should be entitled to claim from D2 only a 50% share of the amount, still unpaid, for which D2 was found liable, namely $25. The amount of P's judgment against D1 is not challenged. The protection for D2 against D1's unreasonable or negligent conduct in the litigation with P is the imposing on D1 of a like obligation to accept the determination of damages in the action between P and D2.

228 In the same way, if P has already sued D2 and lost that action on the merits, D2 being found not to have caused injury or loss to P, then D1 should be barred from claiming any contribution from D2: D2 has been found by judgment

on the merits not to be a concurrent wrongdoer.

229 In the draft Act, s 11 provides:

> **In a proceeding for contribution brought by a concurrent wrongdoer, a judgment on the merits in a prior proceeding brought by the wronged person against any other concurrent wrongdoer is conclusive evidence, in the absence of fraud or collusion, of the liability of that other concurrent wrongdoer to the wronged person and of the amount by way of damages for which that other concurrent wrongdoer is liable to the wronged person.**

The exception for fraud or collusion is intended to enable a challenge to a judgment which was not obtained in good faith.

230 This provision can be compared with s 1(5) of the Civil Liability (Contribution) Act 1978 (England and Wales) providing for a judgment in an action brought in the United Kingdom against D1 to be "conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom contribution is sought".

Contractual or statutory bar or limitation

231 The opening up of rights of contribution between defendants against whom there is alleged a variety of civil wrongs brings with it a complication where one of the defendants (D2) is sued in respect of a matter relating to a contract which contains an exemption from or limitation on the liability of that party in respect of the civil wrong asserted by the plaintiff. P may be thereby unable, or limited in his or her ability, to claim from D2. P has, however, another target (D1) who is without the protection of the exclusionary or limitation clause. If P obtains judgment against D1, can D1 claim contribution from D2 and thereby deprive D2 of the protection of the clause?

232 The Law Commission would be reluctant to extend the law of contribution to allow claims between all civil wrongdoers if to do so involved subverting the law of contract and the protections which it can currently give to a contracting party. Many contracts are, quite properly, entered upon only on the basis that there is to be no (or limited) liability should breaches of a particular kind occur. The existence of that protection may be reflected in the consideration to be received by the protected party. If freeing up the law of contribution removes the protection, the price payable by someone who wants goods or services usually provided on a protected basis may be very significantly increased. It may in some cases mean that the goods or services are no longer available. We emphasise that we refer here only to limits which are negotiated *before* the injury occurs. As we maintained in the discussion of compromises (para 214), we do not propose that a defendant should be able to take advantage, in contribution proceedings, of an agreement negotiated with the plaintiff subsequent to the loss.

233 It may at first sight seem unfair if D1 loses, or is restricted in, a right to contribution because of an arrangement made between P and D2 before the loss or injury occurred. D1 may have known nothing of the arrangement. But D1 is a wrongdoer and is independently liable to P for a civil wrong done to P. To give D1 the benefit of a contractual exemption or limitation unbargained for by D1 is to present D1 with a windfall at the expense of D2. Moreover, since D2 had no (or limited) liability to P, any payment made by D1 to P is of no (or limited) benefit to D2.

234 Another approach would be to provide that P should lose or be limited in his or her right to recovery against D1 where P has negotiated an agreement that limits D2's liability, thus visiting the loss on P (where it would rest in any case, absent D2's existence) rather than D1. P might be said, in a such a case, to have anticipated less than full recovery. However we think this suggestion should also be rejected. It is counter to the fundamental objective of compensating a plaintiff for the entire loss which has been suffered. It is unlikely that P will have anticipated the occurrence of damage from a civil wrong by D1 in calculating whether, and upon what terms, to enter into the contract with D2. If the loss in this situation were to fall on plaintiffs they might have great difficulty in working out the economics of their contracts, for they could not readily foresee the acts or omissions of persons who were not parties to their contracts. And they would be unable to extract from non-parties any payments or other benefits by way of inducement to take the risk, as is possible in a contractual situation when the consideration payable by the party who agrees to the exemption or limitation clause can be adjusted to reflect the likelihood of unclaimable loss.

235 We think that the same principles should apply in relation to statutory limits. Again they are in force prior to the injury. Also if a statutory limit is imposed, it will be for a good reason resulting, say, from a policy decision that D2 should not be exposed to excessive liability, or in fulfilment of an obligation under an international treaty (as in the *Shipping and Seamen Act 1952*).

236 For these reasons we have provided in draft s 15 that:

> **(1) A defence to which this section applies that is available in respect of a claim for damages by a wronged person against a concurrent wrongdoer is similarly available to that concurrent wrongdoer in respect of a claim for contribution from that concurrent wrongdoer.**
>
> **(2) This section applies to a complete or partial defence under**
>
> > **(a) an agreement made between the concurrent wrongdoer and the wronged person before the loss occurred; or**
> >
> > **(b) an enactment other than a limitation provision in the *Limitation Act 1950* or another enactment.**

237 Section 2(3) of the Civil Liability (Contribution) Act 1978 (England and Wales) likewise limits a contribution claim by reference to any limit imposed by or under any enactment or by any agreement made before the damage occurs.

The CCLRC endorsed this approach (*Working Paper*, see para 94 above, para 6.2).

238 It is also necessary to consider the exact manner in which a contractual or statutory limitation should affect the apportionment in a contribution action. There is extensive discussion of the various possible means of calculation in the report of the Ontario Law Commission (*Report*, see para 94 above, 129-135). Having considered the possibilities we are of the same view as the Ontario Commission, namely that in the first instance the cap on liability should be ignored, the sum paid by D1 to P being apportioned between D1 and (protected) D2. D2 should then contribute his or her proportion of that sum, with liability to contribute a monetary amount being limited to the sum for which D2 is liable to P in terms of the contract or under the statute. For example, assume D2's liability to P is limited by a contract between them to $500. If D1 has paid P $2 000 (a figure which is not challenged by D2) and the court finds that D1 and D2 are each 50% responsible for the injury to P, D2 will have to pay only $500 leaving D1 to bear the residue of $1 500. On the other hand, if the judgment paid by D1 was for $600, D1 and D2 share it as to $300 each: the contractual limit has no effect in such a case. The same approach is recommended in the Scottish Report (see para 115 above, paras 3.63-3.67, 3.70, and cls 3(1) and (2) of their draft Act).

239 We have not, however, spelled out this solution in the draft Civil Liability and Contribution Act other than by stating in draft s 14 that D2 has, as against D1, the benefit of any defence which is available to D2 against P, and in draft s 9(3) that D2 may not be ordered to pay a contribution exceeding his or her liability to P. We have left it for the court to apply a solution which it considers just and equitable where there is a cap on D2's liability.

Limitation defences

240 In this portion of the chapter we consider whether the existence of a limitation defence in favour of one defendant (D2) against the plaintiff should also bar another defendant (D1) who has paid or agreed to pay damages to the plaintiff, from claiming contribution from D2.

241 The Law Commission reported on *Limitation Defences in Civil Proceedings* in October 1988 (NZLC R6). No general decision has been taken on the implementation of that report (although see the Building Act 1991 s 91). Therefore at present under the Limitation Act 1950 there is a six year limitation period for actions founded on simple contract or on tort and for breach of trust, with a 12 year period applicable to actions upon a deed (s 4). There is provision for postponement of a limitation period in the case of fraud or mistake or where the plaintiff is suffering under a disability (ss 24, 28). Although the basic period of six years is of the same length in contract and in tort, the right of action will not necessarily accrue at the same time so that the six year period may be calculated from different dates. On any view, in the case of tort the right of action accrues when damage occurs (*Pirelli General Cable Works Ltd* v *Oscar Faber & Partners* [1983] 2 AC 1) or perhaps when it was or could with reasonable diligence have been discovered (*City of Kamloops* v *Nielson* (1984) 10

DLR (4th) 641): the point has been left open by the New Zealand Court of Appeal (*Askin* v *Knox* [1989] 1 NZLR 248). In contrast a cause of action for breach of contract arises at the date of the breach (*White* v *Taupo Totara Timber Co Ltd* [1960] NZLR 547).

242 The Law Commission's recommendation was that there should be a standard limitation period of three years running from the date of the act or omission on which the claim was based (cl 4 of the draft Limitation Defences Act) but that time should be extended for three years after the latest date on which the claimant gained knowledge of the occurrence of the act or omission on which the claim was based or the identity of the person to whom the act or omission was wholly or partly attributable or of the harm suffered by the claimant as a result of the act or omission (cl 6 of the draft Act). The intention of this recommendation was to put an end to the prejudice currently being suffered by plaintiffs in cases of latent damage as exemplified in *Pirelli*. The Law Commission has had no reason to doubt the soundness of the recommendation but notes that, unless it is implemented or some other means is found to overcome the consequences of distinctions in the periods over which time runs for the various kinds of rights of action, the proposal canvassed in this paper for contribution claims between defendants charged with differing civil wrongs will create more situations in which the differences in time periods will be of importance.

243 In its report on limitation defences the Law Commission also proposed a long stop defence of 15 years after the date of the act or omission, which would operate to prevent indefinite extension of the time period when the plaintiff did not have knowledge of one of the crucial elements of the cause of action or there was disability. Therefore, even if the Law Commission's recommendations on limitation are adopted, there will be a small number of cases in which time may be running against one defendant but not against another so that the limitation dates for each differ.

244 The question is therefore whether D1 should be able to claim contribution against D2 notwithstanding that P's claim against D2 is statute barred. Such a contribution claim is possible as between tortfeasors by virtue of s 17(1)(c) of the Law Reform Act 1936. The provision was amended in 1950 to confirm the legislative intent and now reads:

> (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued [in time] have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise ...

245 It had been determined under the equivalent English provision that the description "a tortfeasor who is or would have been liable" denoted any person who would have been held liable in tort had he been sued in a competent court, by proper process, at a proper time and on evidence properly presented. It was enough that there was a time when P could successfully have brought an action against D2 either independently or jointly with the defendant (*Harvey* v *R O'Dell Ltd* [1958] 2 QB 78). Later the High Court of Australia came to the same conclusion (*Brambles Constructions Pty Ltd* v *Helmers* (1966) 114 CLR 213). So it is enough that D2 was *once* liable to P.

246 The Civil Liability (Contribution) Act 1978 (UK) confirms this position by providing that

> A person shall be liable to make contribution ... notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based (s 1(3)).

247 It can be argued that s 17(1)(c) deprives D2 of protection against a stale claim which is allowed to enter, as it were, by the back door. In order to combat the claim for contribution by D1 it may be necessary for D2 to rely upon the same witnesses who would have been called in defence of P's stale claim. Moreover, as D2 now has a defence against P, it cannot be said that the payment by D1 confers any benefit on D2.

248 Nevertheless, the Law Commission thinks that it is unreasonable that D1 should lose his or her contribution claim by reason of delay on the part of P. D1 will presumably be unable to influence P's behaviour vis à vis D2. It is conceivable that in some circumstances P's delay may be influenced by the thought that D1 will be unable to pass any portion of the damages claim on to D2 if P's claim against D2 is allowed to become statute barred. Whether this is so or not, it seems to us that D1 should not be disadvantaged by a situation arising after the injury was caused and over which D1 has no control.

249 It would, of course, be possible to throw any disadvantage caused by P's delay back on to P by providing that in such circumstances P's claim against D1 should abate by an amount equivalent to the contribution which D2 would, in the view of the court, have been obliged to make if actions had been brought against both defendants in due time and the court had settled contributions as between the defendants. However, such a solution seems contrary to the general policy of giving priority to the ability of the victim of a civil wrong to obtain recompense. Furthermore, it would detract from the ability of P to choose not to sue a particular defendant and would, in effect, oblige P to commence proceedings against D2 even if that were contrary to the wishes of P. The case against D2 might have difficulties absent in the case against D1. It may be legitimate for P to proceed against D1 alone, leaving it for D1 to face the difficulties in making the claim for contribution against D2. For these reasons the Law Commission suggests that the policy behind s 17(1)(c) of the Law Reform Act 1936 is correct, that P's claim against D1 should not be reduced where P's claim against D2 has become statute barred but that D1's right of contribution against D2 should continue to be available notwithstanding the existence of that defence of D2 against P. For this reason s 14(1) of the draft Act attached to this paper provides that:

> **A defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement, that is available to a concurrent wrongdoer in respect of a claim for damages against that concurrent wrongdoer is not a defence in**

respect of a claim for contribution against that concurrent wrongdoer.

250 Draft s 11 deals with judgments, which are normally to be conclusive if given "on the merits". That phrase is intended to indicate (inter alia) that a judgment between P and D2 declaring merely that P's claim is statute barred is not conclusive where D1 seeks contribution from D2.

251 So far we have considered only limitation defences arising by virtue of statute. Occasionally, parties to a contract insert in it a term that any claim arising out of the contract must be brought, if at all, within a specified period after any breach of the contract (ie, after the cause of action arises). In other words, they agree to a contractual limitation period. We have already in this paper considered contractual caps on liability. We concluded that a contractual cap should not be defeated by the indirect means of contribution and that D2 (with the benefit of that cap in a contract negotiated before the injury to the plaintiff) should not be required to contribute to the damages paid by D1 beyond the amount to which D2 was liable in terms of the contract (para 232). Like the contractual cap, the contractual limitation which we are here contemplating is one put in place before D2 committed the civil wrong against P. But, while the point is not free from difficulty, we see a distinction between a cap and a limitation defence and believe that, as should be the case with a statutory limitation, D1's right of contribution should not be barred. In the case of a cap there is no change to D1's situation by reason of any behaviour of P after P has suffered loss. The cap existed at the moment of loss: D1 has to take his concurrent wrongdoer as he finds her. But in the case of the limitation, D1 is prejudiced by P's behaviour (delay) after the event and it is, we think, wrong to inflict that upon D1. We have already concluded that D1's claim should not be reduced where a statutory time bar arises. For the same reasons we do not favour a reduction where the time bar is contractual. Therefore the draft s 14 extends to "a defence under the Limitation Act 1950, or a similar defence under ... an agreement".

252 We would make one exception: if a claim becomes statute barred against all defendants but is resurrected against one of them by an acknowledgement or one of the defendants later makes a payment to P in respect of P's claim, the defendant who makes the acknowledgement or the payment should not be able to claim contribution from any other defendant. We say this because in these circumstances not only is there no benefit conferred upon the other defendants but the liability or the payment has arisen entirely from the voluntary act of the would-be contribution claimant. That party has not been prejudiced by any omission by the plaintiff. The decision to make the acknowledgement or payment was the voluntary act of that person alone and he or she should not be able to look to anyone else for a contribution. This question is dealt with in s 14(2) of our draft Act.

253 We look now to the question of the limitation period applicable to the contribution claim. D1's right to claim contribution against D2 does not arise until D1 has paid or agreed to pay damages to P. That is the moment when D1 confers a benefit on D2. D1's claim against D2 is a quite separate thing from P's claim against D1. Therefore it has a separate limitation period as is recognised by s 14 of the Limitation Act 1950:

> For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.

254 It has accordingly been held that time does not run under this section until D1's own liability to P is fixed by judgment, compromise or admission (*Wrightcel (NZ) Ltd* v *Felvin* [1975] 1 NZLR 50). The Law Commission's recommendation on this question was that the "date of the act or omission" on which a claim for contribution or indemnity was based should be the date on which the sum of money in respect of the claim was made was quantified by decision of the court or arbitrator or by agreement (NZLC R6, para 241 above, cl 20(3) of the draft Limitation Defences Act). If this recommendation were implemented it would reduce the period for the contribution claim to three years. Then the basic limitation period for the plaintiff's claim would be three years (subject to extension as discussed above) and the contribution period would be a separate one of three years. At present the basic period and the contribution period are each six years which, in theory, can mean that even without elements of fraud, concealment or disability, a claim for contribution can be made after a plaintiff has waited until the last day of her six year period and there have then been the usual delays of the litigation process before judgment is given and then D1 has waited until the last day of her six year period. In practice this is not likely to happen but the fact that it is theoretically possible demonstrates the need for truncation of the time periods. In the United Kingdom the Limitation Act 1980 s 10 reduces the contribution period to two years. The report of the Ontario Law Reform Commission (at 233), also recommends a two year period. However, in view of the relatively short basic period which we have already recommended, we confirm our view that the period for the contribution claim should be three years.

Rules to avoid multiple proceedings

255 It goes almost without saying that one of the prime objectives of law reform is to eliminate the need for litigation. Where it cannot be entirely eliminated, the dimensions of the litigation should, as much as possible, be limited. One way in which the latter objective can be obtained is by requiring all matters pertaining to the same set of facts to be litigated in one set of proceedings. So where P has a claim against more than one defendant it can be argued that P should be entitled to bring only one set of proceedings, claiming against all defendants (or those whom P chooses to sue), and should not be able to sue them successively in separate proceedings.

256 However, the Law Commission does not recommend any such rule which, though undoubtedly tidy, might be unfair to a plaintiff and could run counter to the principle that a plaintiff should receive full compensation for injury caused by wrongdoers. We have already (at para 249) pointed out that in some circumstances it may be perfectly reasonable for a plaintiff to pick and choose between wrongdoers and to claim, in the first instance, against fewer than them all. A claim against one wrongdoer may be fraught with particular difficulty

which it is reasonable for the plaintiff to avoid by first pursuing another wrongdoer. Sometimes the plaintiff may not, at first, appreciate that a cause of action lies against a certain party or may be unable to find that party or may not realise that that party is "worth powder and shot". The plaintiff may later change that view. We do not think that there should be any rule barring a plaintiff, who has already sued someone else to judgment, from afterwards commencing an action in respect of the same facts against a different defendant.

257 In claims in tort there is no bar against separate proceedings by a plaintiff: indeed, the right of the plaintiff to proceed successively by way of claims in tort against separate defendants arising out of the same matter is specifically recognised. Section 17(1)(a) of the Law Reform Act 1936 provides that judgment recovered against any tortfeasor liable in respect of damage suffered by the plaintiff is not to be a bar to an action against any other person liable as a joint tortfeasor. However, the section, which is copied from English legislation of 1935, does provide in subs (1)(b) for two sanctions against multiple proceedings by plaintiffs. If more than one action is brought in respect of the damage:

> the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of the opinion that there was reasonable ground for bringing the action.

258 Section 17 thus contains both a *sanction in damages*, namely that the plaintiff is not to receive more than the amount obtained in the first action to go to judgment, and a *sanction in costs*, namely that in the subsequent proceedings the plaintiff is not to have costs unless the court thinks that there were reasonable grounds for proceeding in that manner.

259 In the days when the Law Reform Act was passed in 1936, most civil actions were tried before a jury. The legislature seems to have feared that, if there was more than one jury trial arising out of the same set of facts, it was quite likely that there would be inconsistent awards of damages. There also seems to have been a concern that plaintiffs would endeavour to achieve the best possible result by deliberately bringing separate actions, hoping that one jury at least would make a high award and knowing that the defendant against whom that award was made, being jointly and severally liable, would have to pay the entire sum. In this way a small award by another jury could effectively be circumvented.

260 We do not have available to us any statistical information, or even anecdotal evidence, concerning the effectiveness of the sanction in damages. We are not even aware of instances in which it operated, although their absence may indicate the effective working of the section. However that may be, the situation which gave rise to the perceived need for the sanction in damages has gone: civil jury trials are now a rarity except in defamation proceedings.

261 Furthermore, the Law Commission believes that the sanction in damages could work unfairly. As we have indicated, there may be good reason for the plaintiff initially electing to sue only one of the defendants. But an unexpected

difficulty in making out the case against that defendant or a contractual limitation on the amount of damages which can be awarded against that defendant, may lead to a limited amount of damages being awarded in the first case. A rigid rule limiting damages in the second action to the same amount may therefore sometimes work unfairly. Where judgments in the actions are given by judges sitting alone, it is more than likely that the second judge will carefully consider the damages awarded by the first judge and that the control provided by that consideration will be both fairer and sufficient. Indeed, the Law Commission does not think that it is necessary even to provide by statute that the second judge must consider the amount awarded by the first judge.

262 The Civil Liability (Contribution) Act 1978 (UK) does not contain a sanction in damages equivalent to that in our s 17(1)(b). The Law Commission (UK), upon whose report (*Law of Contract: Report on Contribution*, Law Com No 79, 1977) the Act was based, thought that it was unjust that the amount awarded against the first defendant sued should operate as a limit on the sum recoverable from other defendants. It also thought, and we agree, that a sanction by way of costs would be sufficient to deter multiplicity of proceedings. The CCLRC Working Paper expressed the same view (see *Working Paper*, para 94 above, paras 7.1-7.2).

263 As to the sanction in costs: while we agree that the courts should use the awarding or withholding of costs as a means of regulating the behaviour of parties to litigation, we think that this control is a matter which can be left to the good sense of the court and that there is really no need for a specific provision denying costs where the court is of the opinion that there was no reasonable ground for bringing the subsequent proceedings. We therefore see no need for an equivalent to section 4 of the Civil Liability (Contribution) Act 1978.

264 But what of the position between defendants? Should there be a rule requiring a defendant who wishes to seek contribution from a concurrent wrongdoer to do so by way of third party notice or, if the other wrongdoer is already a defendant in the plaintiff's action, by cross claim in the same action? If the right to contribution is broadened in the manner suggested in Chapter V so as to embrace all kinds of civil wrongs, there would appear to be no need for change to rules 75 and 154-168 of the High Court Rules, which will then satisfactorily allow for a defendant to issue a third party notice to any party against whom a claim for contribution is made on the basis that the defendant and that party are concurrent wrongdoers. Under Rule 163 a defendant is able to claim against another defendant in circumstances where (had that other defendant not been a defendant) the claimant would have been entitled to issue and serve a third party notice on that other defendant. But if this is to be done at all, it must be done before the proceeding has been set down for trial.

265 The English Report and the CCLRC Working Paper are silent on the question whether a defendant wishing to claim contribution ought to be required to do so, if at all, in the same proceedings in which that defendant is sued by the plaintiff. No such requirement appears in s 17 of the Law Reform Act 1936. Indeed, it would be inconsistent with s 14 of the Limitation Act 1950 under which time does not begin to run for the purposes of a claim for contribution or indemnity until "everything has happened which would have to be proved to

enable judgment to be obtained for a sum of money in respect of the claim". As the obtaining of a judgment against the claimant or a compromise with the plaintiff is a necessary ingredient, it is more than clear that a claim for contribution can be made after judgment in favour of the plaintiff, at a point when it is too late for a third party notice or a claim between defendants to be made in the plaintiff's proceedings.

266 But in Ontario it is different. The Ontario Negligence Act 1980 and its predecessors have been interpreted as providing that a party who has been sued to judgment by a plaintiff may claim contribution only within that action (see *Cohen* v *S McCord & Co* [1944] 4 DLR 753). It is to be noted that the rule applies only where the plaintiff has obtained an award of damages by judgment.

267 It has been found necessary to create at least one exception to the rule - where it is legally impossible for the primary rights and duties of the injured person and the defendants to be determined in the same proceedings - and it is not difficult to think of circumstances in which a rule along the lines of the Ontario rule could be very unfair. For example, D1 may not have learned of the existence of P's rights against D2 until it was too late to join D2 in P's proceedings, or D1 may have been unable to find D2 or may have thought D2 was insolvent and therefore not worth suing.

268 The Law Commission is not convinced that the Ontario rule, or a variant of it, should be enacted in New Zealand. While it is true that the rule might discourage unnecessary multiple litigation, it can also be discouraged by the manner in which the courts determine awards of costs. We think that it can be left to the good sense of the judges to impose a costs sanction where D1 neglected a reasonable opportunity to have the question of contribution determined in the main action.

Appendix A

CIVIL LIABILITY AND CONTRIBUTION ACT 199-

CONTENTS

[D R A F T]

CIVIL LIABILITY AND CONTRIBUTION ACT 199-

Assented to on [ ]

Comes into force on [ ]

The Parliament of New Zealand enacts the *Civil Liability and Contribution Act 199-*.

1 Purposes

The purposes of this Act are

(a) to provide that concurrent wrongdoers are jointly and severally liable for the damages payable in respect of a loss;

(b) to revise and extend the rights of wrongdoers to have their liability to pay damages reduced because the wronged person has failed to act with due regard for that person's own interest;

(c) to revise and extend the rights of concurrent wrongdoers to contribution among themselves; and

(d) to provide for the apportionment of uncollectible contribution.

2 Commencement

This Act comes into force on 1 January 199-.

COMMENTARY

Section 1

In its drafting and format the draft Act reflects the ideas which the Law Commission has been developing for some time as part of its response to its task of helping to make the law more understandable and accessible. For example, we have replaced the long title to the Act by a short title and a purpose clause.

Section 1 sets out the purposes of the Act by reference to the specific areas of law with which it deals.

Paragraph (a) refers to the purpose of providing for the joint and several liability of concurrent wrongdoers (defined in s 3) who have caused loss or damage of a kind to which the Act applies (provided for in s 4). The joint and several rule is in s 6.

Paragraph (b) refers to the purpose of enabling wrongdoers to have their liability to pay damages reduced when a plaintiff (wronged person) has failed to act with due regard for that person's own interests. Section 7(1)(a) and (2) provide for the attribution of loss in those circumstances as between a wronged person on the one hand and a single wrongdoer or more than one wrongdoer (as a group), on the other hand, in just and equitable proportions.

Paragraph (c) refers to the purpose of enabling concurrent wrongdoers to have their contribution to the plaintiff's damages adjusted amongst themselves. The substantive provisions are s 7(1)(b) and (2) and s 9.

Paragraph (d) refers to the final purpose, which is the apportionment of amounts of contribution which cannot be collected because of the absence or insolvency of a defendant. This is dealt with in s 16.

Section 2

The day on which the Act comes into force (as opposed to becoming law, see further NZLC R17 *A New Interpretation Act* (1990) para 264) should be a reasonable time after it becomes law. That will give litigants and their advisers sufficient time to become familiar with its provisions.

DRAFT ACT

3 Definitions

In this Act

compromise includes a consent judgment, a payment into court which has been accepted, and a settlement reached whether or not a proceeding has been brought:

concurrent wrongdoer means each of two or more wrongdoers whose acts or omissions give rise, wholly or partly, to the same loss, and includes a person who is vicariously liable for any act or omission of a wrongdoer:

judgment includes an award made by an arbitrator and an approved settlement or order that is final and binding under section 23 of the *Disputes Tribunals Act 1988*:

loss means loss or damage to which this Act applies under section 4:

payment includes the conferment of any benefit having a monetary value that is reasonably capable of being ascertained:

wrongdoer means a person whose acts or omissions give rise, wholly or partly, to a loss:

wronged person means a person who suffers a loss.

COMMENTARY

Section 3

Compromise

A distinction is drawn in the Act between **compromises**, which are consensual and do not involve determinations of liability by the courts, and **judgments** given "on the merits". See respectively ss 13 and 11. A consent judgment is treated as a compromise.

Concurrent Wrongdoer

The concepts of joint concurrent liability and several concurrent liability are discussed in paras 17 and 18 of the paper. Wrongdoers who, acting together or independently, have caused to the plaintiff loss or damage of a kind to which the Act applies are defined as **concurrent wrongdoers**. Included in the term are persons such as employers or principals liable vicariously for the acts or omissions of their employees or agents. The Act does not disturb rights to contribution or indemnity which may exist as between such persons independently of the Act: s 17(1).

Loss

A loss must, independantly of the Act, give rise to a liability to pay damages recoverable by civil action and includes loss or damage arising from a tort or breach of a contract, statute, trust or fiduciary duty: see s 4.

Payment

The ordinary meaning of **payment** is extended to include all benefits that can be translated into monetary values. These will most commonly be orders for specific performance of a contract and restitution orders.

Wrongdoer/Wronged Person

In the case of counter-claims by a **wrongdoer**, the wrongdoer may also be a **wronged person**. Take for example a multi-vehicle collision, where one driver driving too fast collides with another who has encroached on to the wrong side of the road, in turn colliding with the plaintiff. The speeding driver is a wrongdoer with respect to the plaintiff, and a wronged person in relation to the driver on the wrong side of the road.

4 Application of this Act

This Act applies to loss or damage

(a) which arises wholly or partly from an act or omission of a person, whether intentional or not, including an act or omission that is

(i) a tort, or

(ii) a breach of a statutory duty, or

(iii) a breach of contract, or

(iv) a breach of trust or other fiduciary duty,

whether or not the act or omission is also a crime, and

(b) for which that person has a civil liability to pay damages,

but does not apply to loss or damage arising wholly or partly from a failure to pay a debt or from the fault of two or more ships within the meaning of Part XIV of the Shipping and Seamen Act 1952.

COMMENTARY

Section 4

The Act is to apply whether or not the act or omission causing the loss was deliberate on the part of the wrongdoer. For the present position in New Zealand in relation to tort law only see paras 57 to 59 of the paper. The fact that the defendant's act was deliberate may sometimes lead the court in its discretion to determine that no contribution shall be ordered in favour of that person. But it would not be an absolute bar. The consequences of the deliberate act may not have been intended. The negligent behaviour of a co-defendant may have played a more significant part in the plaintiff's loss. See paras 178 and 179 of the paper.

The Act is concerned with civil liability and it applies whether or not the loss occasioned arises as a result of the commission of a crime provided that recovery of the loss is sought within the context of specific civil proceedings. For example, driving offences may give rise to both criminal and civil liabilities.

The Act is not to apply to loss or damage arising wholly or partly from a failure to pay a debt. There appears to be no significant dissatisfaction with the present law relating to existing rights to contribution amongst persons who owe debts to one another. Goff and Jones on Restitution provides a good analysis of the current law in respect of liabilities in debt (see third ed, 272-289).

The omission of the fault of ships under the *Shipping and Seamen Act 1952* reflects the inclusion in that Act of separate (but parallel) rules for liability under the *International Convention for the Unification of Certain Rules of Law Respecting Collisions* (Brussels, 23 September 1910). The Maritime Transport Division of the Ministry of Transport has just issued a discussion paper, *Review of the Shipping and Seamen Act 1952* (January 1992). It proposes that New Zealand shipping law should continue to incorporate the principal elements of the 1910 Convention and also of the *International Convention on Certain Rules concerning Civil Jurisdiction in matters of Collision 1952* (this latter convention has not yet been ratified by New Zealand). (Compare ss 31 and 32 of the *Marine Pollution Act 1974* which impose joint liability on shipowners for pollution damage but do not in themselves provide for contribution between those owners.)

5 Act binds the Crown

This Act binds the Crown.

6 Liability of concurrent wrongdoers

Concurrent wrongdoers are jointly and severally liable for the whole of the damages payable to a wronged person in respect of a loss.

COMMENTARY

Section 5

The application of the provisions of the Act to claims by or against the Crown accords with general principle: the Crown should generally be bound by the same laws as its subjects unless there are very good reasons for a different position (see generally NZLC R17 *A New Interpretation Act*, chapter IV). It also accords with current practice. Section 8 of the *Crown Proceedings Act 1950* provides that the law relating to contribution and indemnity should apply to the Crown as if it were "a private person of full age and capacity" (subs (1)). Subsection (2) further provides that Part V of the *Law Reform Act 1936* binds the Crown. The *Contributory Negligence Act 1947* itself binds the Crown; see s 7 as inserted by the *Statutes Amendment Act 1948*.

The general statement in s 8(1) of the *Crown Proceedings Act 1950* remains useful, because it applies the whole law relating to contribution and indemnity to the Crown. Section 5 is not sufficient to replace that, since this Act applies only to actions for damages and does not affect the general law as it relates to debts, for example. However, s 8(2) of the *Crown Proceedings Act 1950* should be repealed because the *Law Reform Act 1936* is itself to be repealed: s 20.

Section 6

The rule that the liability of defendants is *joint and several* is retained. In effect this carries over s 17 of the *Law Reform Act 1936* and s 86 of the *Judicature Act 1952*, but extends those schemes, for example, to damages payable under compromises between wrongdoers and wronged persons: see para 23. The section will not affect joint and several obligations which arise outside the context of the Act, as in the case of contractual provisions stipulating that liability will be joint and several. See further paras 162-174 which discuss the arguments for and against retention of joint and several liability.

7 Attribution of loss

(1) Loss suffered by a wronged person is attributable

(a) as between a wronged person who has failed to act with due regard for that person's own interest and a wrongdoer, or concurrent wrongdoers taken as a group, and

(b) as among concurrent wrongdoers,

in accordance with subsection (2).

(2) Loss suffered by a wronged person is attributable in the proportions that are just and equitable, having regard to

(a) the nature, quality and causative effect of

(i) the wronged person's failure (if any) to act with due regard for that person's own interest, and

(ii) the acts and omissions of the wrongdoer or of each concurrent wrongdoer, and

(b) the rights and obligations of the wronged person and the wrongdoer or each concurrent wrongdoer in relation to one another.

(3) For the purposes of this section, a wronged person who does or fails to do anything in justified reliance on a contract, a rule of law or an enactment does not fail to act with due regard for that person's own interest.

COMMENTARY

Section 7

This section provides for the attribution of actionable loss suffered by a wronged person. It applies where there is either or both of the following circumstances:

- the wronged person is in part responsible for his or her own loss because of failure to act with due regard for his or her own interest;

- there are concurrent wrongdoers: see definition in s 3.

It requires the loss to be divided by being attributed between these persons in proportions thought by the court to be just and equitable. Because of the almost infinite variety of circumstances in which loss will fall to be attributed the court is left with a complete discretion but it must have regard to the nature, quality and causative effect of the acts or omissions of the wronged person and the wrongdoer(s).

The court must also have regard to the rights and obligations of each of these persons to the other(s).

The procedure to be followed by the court is to be found in s 10.

The substantive provision requiring reduction of a wronged person's damages where part of the loss is attributable to that person is in s 8. Under the existing law (*Law Reform Act 1936*, s 1 and *Contributory Negligence Act 1947*) apportionment of liability for the purposes of contribution and reduction of damages is possible only in tort actions, but this Act will require it in all civil claims (see s 4). Because these include claims in contract, it is necessary to take account not only of rules of law or enactments which govern the relationship between the parties but also of provisions of a contract on which a wronged person may have relied, where that reliance has caused or increased the loss. Subsection (3) states that where the wronged person did or failed to do anything in "justified reliance" on a contract, rule of law or enactment, there has been no failure by the wronged person to act with due regard for that person's own interests.

The question of what reliance is "justified" will, in a matter relating to a contract, depend upon the interpretation of the nature of the promise made by the contract breaker: whether, eg, a warranty could in terms of the contract be relied upon absolutely, or whether it was unreasonable in the circumstances for the wronged person to fail to take steps to mitigate a loss which was foreseeable. The Act would therefore extend the concept of mitigation to a pre-breach situation; at present it applies only when an actual (as opposed to an anticipatory) breach has occurred. See paras 193 and 194 of the paper.

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8 Reduced damages where part of loss attributable to wronged person

Where part of a loss suffered by a wronged person is attributable to a wronged person and part to a wrongdoer or concurrent wrongdoers,

(a) the wronged person is not precluded from recovering damages in respect of the loss from the wrongdoer or concurrent wrongdoers, but

(b) the damages payable to the wronged person by the wrongdoer or concurrent wrongdoers are reduced by the proportion of the loss attributable to the wronged person.

9 Contribution among concurrent wrongdoers

(1) A concurrent wrongdoer who in good faith has paid, or has agreed or is obliged by a judgment to pay to a wronged person an amount which, as a proportion of the whole of the damages payable to the wronged person, exceeds the proportion of the loss attributable to that concurrent wrongdoer is entitled to recover contribution from any one or more other concurrent wrongdoers.

(2) The amount of contribution recoverable by a concurrent wrongdoer is the amount by which the amount paid, agreed or obliged to be paid by that concurrent wrongdoer to the wronged person by way of damages exceeds an amount proportionate to the loss attributable to that concurrent wrongdoer.

(3) A concurrent wrongdoer from whom contribution is recoverable is not liable to pay, by way of contribution, an amount greater than

(a) the amount for which that concurrent wrongdoer is liable to the wronged person by way of damages, or

(b) an amount that is proportionate to the loss attributable to that concurrent wrongdoer,

whichever is the smaller.

COMMENTARY

Section 8

This section confirms that where part of the loss suffered by a wronged person is attributable (under s 7) to the wronged person and part to the wrongdoer(s), that fact will not preclude recovery of damages: para (a). But recovery is to be on a reduced basis (depending on the proportion of loss attributed to the wronged person): para (b). It thus extends to all areas of civil liability the rules now found for tort law in the *Contributory Negligence Act 1947* and in claims in equity. See paras 188-194.

Section 9

Subsection (1) provides a wrongdoer with a general right to contribution when that wrongdoer has paid, or has agreed to, or is obliged to pay damages to a wronged person in excess of the proportion of the loss attributable to that wrongdoer (ie, that part of the loss attributed to that wrongdoer). The loss in question may be the full loss suffered by the wronged person or a reduced amount taking into account the wronged person's proportion: see s 8. Contribution can be claimed once the court has ordered the wrongdoer to pay damages to the wronged person or a compromise has been agreed upon. But in the case of a compromise the agreement must have been reached in good faith. If so, the amount which the contribution claimant has agreed to pay is not open to challenge. The contribution defendant is protected against an excessive claim by subs (3). See paras 200-219 of the paper.

Subsection (2) provides the formula for calculating the amount of contribution a wrongdoer is entitled to by virtue of subs (1): it is the amount by which the payment to the wronged person exceeds an amount proportionate to that person's share of the loss. For example, if D1 has paid half of total damages of $1000 (ie, a payment of $500) but only one quarter of the loss is attributable to that wrongdoer, he or she will in principle be entitled to contribution of $250 from other concurrent wrongdoers.

Subsection (3) imposes limits on the amount of contribution a wrongdoer can recover under subs (2). Paragraph (a) clarifies the rule that the amount of contribution which a wrongdoer (D1) can claim from another wrongdoer (D2) cannot exceed D2's liability to the wronged person (P) (in a situation in which, for example, D2 has a partial defence to P's claim that is not available to D1). To pursue the hypothetical case above, in a situation where D2's total liability to P is $200, D1 can claim contribution of only $200 from D2, not $250.

Paragraph (b) sets a second limit. No concurrent wrongdoer may be required to contribute a greater share of the damages than an amount proportionate to that wrongdoer's share of the loss. So, in the example given, D2's maximum contribution is $200, ie one fifth of the total damages. But if the proportion of the loss attributable to D2 is only one tenth, then D2 will be liable to D1 for a maximum contribution of $100, being one tenth of the total damages payable to P.

DRAFT ACT

10 Legal proceedings

(1) A wrongdoer or concurrent wrongdoers may seek reduction of damages under section 8 in a proceeding brought by a wronged person for the recovery of damages.

(2) A claim for contribution by a concurrent wrongdoer against another concurrent wrongdoer under section 9 may be made in a proceeding brought by a wronged person for the recovery of damages or in a proceeding brought by a concurrent wrongdoer for the recovery of contribution.

(3) In a proceeding where the reduction of damages is sought or there is a claim for the recovery of contribution, or both,

(a) the court must

(i) first, ascertain the loss suffered by the wronged person;

(ii) second, ascertain, in relation to the wrongdoer or concurrent wrongdoers taken as a group, the proportion of the loss (if any) attributable to the failure of the wronged person to act with due regard to that person's own interest;

(iii) third, where there are concurrent wrongdoers, ascertain, as among them, the proportion of the loss attributable to each;

(b) the court must not

(i) attribute any proportion of a loss to a person who is not a party to the proceeding;

(ii) apportion as between the wronged person and the wrongdoer or concurrent wrongdoers, or as among concurrent wrongdoers, any entitlement to or liability for an amount awarded to the wronged person as exemplary damages.

COMMENTARY

Section 10

Subsection (1) permits defendant(s) to seek reduction of damages in the plaintiff's action. This will be possible in all kinds of civil actions (s 4) where s 8 applies, ie where part of the plaintiff's loss is attributable to that person's failure to act with due regard for his or her own interests: see also s 7.

Subsection (2) gives a defendant who wishes to claim contribution against another wrongdoer the right to do so either in the plaintiff's action - by cross-claim or third party notice - or in separate contribution proceedings. See paras 264-268 of the paper and Rules 75 and 154-168 of the High Court Rules.

The procedure to be adopted by the court is to be found in subs (3)(a). Subparagraph (ii) will apply only when there is loss attributable to the plaintiff and subpara (iii) only when there are concurrent wrongdoers.

The procedure for the recovery of damages or contribution (or both) follows that set down by the House of Lords in *Fitzgerald v Lane* [1989] 1 AC 328, where it was held that the assessment of the plaintiff's share in the responsibility for damage did not involve the determination of the individual culpability of the defendants. Accordingly, the plaintiff's share of the responsibility is to be fixed as against all defendants together and only then is the reduced amount claimable by the plaintiff to be apportioned between the defendants. See paras 123-126.

When the proceedings are a claim for contribution the parties are bound, in relation to the loss suffered by the wronged person, by any judgment on the merits in a prior proceeding against the contribution defendant: see s 11. In this context see also s 9(3) which controls the amount for which such a defendant can be made liable.

Subsection 3(b) recognises that it is unjust and inconvenient to apportion loss against a person who is not a party to the proceedings. Any such finding cannot bind a non-party and would require reassessment if that person were later sued.

Similarly, it is unjust to apportion exemplary damages. Exemplary damages are directly related to the culpability and the nature of the behaviour of a particular wrongdoer.

11 Effect of prior judgment

In a proceeding for contribution brought by a concurrent wrongdoer, a judgment on the merits in a prior proceeding brought by the wronged person against any other concurrent wrongdoer is conclusive evidence, in the absence of fraud or collusion, of the liability of that other concurrent wrongdoer to the wronged person and of the amount by way of damages for which that other concurrent wrongdoer is liable to the wronged person.

12 Payments already made to be taken into account

In making any order for the payment by any concurrent wrongdoer of an amount by way of contribution, the court must take account of any payment already made by that wrongdoer, by way of damages or by way of contribution.

COMMENTARY

Section 11

This section applies when there has been a judgment in an action by P against D2 and there has also been a judgment or compromise between P and D1. If D1 then seeks contribution from D2, the judgment between P and D2 is to be conclusive evidence of D2's liability (and the extent of that liability) to P. If the judgment was in favour of D2 it will be conclusive evidence that D2 was not a wrongdoer. The phrase "on the merits" excludes a judgment based on a statute bar or by consent or a dismissal for want of prosecution.

As to the effect on a contribution claim of a prior judgment by P against D1: see s 9(1) and (3). D1's ability to recover contribution in respect of an amount D1 has been obliged to pay in damages to P is limited by the amount which D2 is liable to pay to P. So, where there are two wrongdoers, the amount to be apportioned between them is the lower of D2's liability to P or the amount of the judgment in favour of P suffered by D1.

Section 12

Payments already made will not have an effect on the attribution of loss between a wronged person and wrongdoer(s) under s 7. Such payments will, however, affect the amounts of contribution payable between wrongdoers. Section 9 requires that concurrent wrongdoers should not pay more than the share of the loss attributed to them. Section 12 accordingly provides that payments already made under a judgment or compromise as contribution are to be taken into account in a claim for contribution. The initial payment and the contribution payment ordered should equal the sum of the loss attributed to that defendant.

13 Compromises

A compromise made by a concurrent wrongdoer with a wronged person is not a defence to a claim for contribution made against that concurrent wrongdoer and does not affect the attribution of a proportion of a loss to that concurrent wrongdoer for the purposes of such a claim.

14 Limitation in contribution proceedings

(1) A defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement, that is available to a concurrent wrongdoer in respect of a claim for damages against that concurrent wrongdoer is not a defence in respect of a claim for contribution against that concurrent wrongdoer.

(2) Notwithstanding subsection (1), if

(a) a defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement, is available to all concurrent wrongdoers in respect of a claim for damages made by a wronged person against them or any of them, and

(b) that defence ceases to be available to one or more of those wrongdoers because of an acknowledgment of liability or a payment in favour of the wronged person,

that defence is available in respect of a claim for contribution from any other concurrent wrongdoer to whom the defence would have been available in respect of a claim for damages.

(3) This section does not affect the availability to a concurrent wrongdoer of any defence under the *Limitation Act 1950*, or a similar defence under another enactment, in equity or under an agreement in respect of a claim for contribution in its own right.

COMMENTARY

Section 13

This section is concerned with a situation in which a wrongdoer (D1) has suffered a judgment or made a compromise with a wronged person (P) and is pursuing a contribution claim against another concurrent wrongdoer (D2) who has already compromised a claim by P. It prevents D2 from excusing himself or herself from liability to contribute to D1's damages payment on the ground that D2 has already settled with P. Nevertheless the payment made to P by D2 must be taken into account: s 12.

As to the effect of D1's compromise with P see s 9(1) and (3). D1's claim will be limited in accordance with s 9(3).

Section 14

Subsection (1) ensures that a limitation defence of any kind (ie, a bar against bringing proceedings because of a time limitation) available to D2 against P does not prevent D1 from claiming contribution against D2. It preserves and extends to all kinds of civil claims the rule now applying to contribution claims between tortfeasors under s 17(1)(c) of the *Law Reform Act 1936*. See paras 240-251 of the paper.

Subsection (2), however, allows such a defence to D2 where P's claim has become stale against both of them but D1 has voluntarily revived it by acknowledging liability or making a payment to P. See para 252 of the paper.

Subsection (3) relates to the limitation period applicable to the contribution claim itself (see s 14 *Limitation Act 1950* and paras 253 and 254 of the paper) and indicates that the section does not affect it.

15 Other defences in contribution proceedings

(1) A defence to which this section applies that is available in respect of a claim for damages by a wronged person against a concurrent wrongdoer is similarly available to that concurrent wrongdoer in respect of a claim for contribution from that concurrent wrongdoer.

(2) This section applies to a complete or partial defence under

(a) an agreement made between the concurrent wrongdoer and the wronged person before the loss occurred, or

(b) an enactment other than a limitation provision in the *Limitation Act 1950* or another enactment.

COMMENTARY

Section 15

This section applies to all other (ie, non-limitation) defences available to D2 in a claim by P. These include defences available under a contract between D2 and P or under an enactment (eg, a limit on the amount of D2's liability to P). Such defences will have been available to D2 when the act or omission occurred which gave rise to P's right to claim against D1. Section 15 preserves them for D2 in any proceedings for contribution brought by D1. See paras 231- 235 of the paper.

The rationale for treating such defences differently from limitation defences (s 14) is that the former do not involve any change in D1's situation by reason of P's behaviour (ie, delay by P after the loss has been suffered).

16 Apportionment of uncollectible contribution

(1) If

(a) contribution is recoverable from a concurrent wrongdoer under this Act, and

(b) a court has attributed a proportion of a loss to that concurrent wrongdoer, and

(c) the proportionate amount of contribution payable by that concurrent wrongdoer is uncollectible,

any other concurrent wrongdoer to whom all or part of that contribution is payable may apply to the court for apportionment of the uncollectible contribution.

(2) Contribution is uncollectible for the purposes of this section if it cannot be collected because the concurrent wrongdoer by whom it is payable is insolvent, absent from New Zealand or cannot be found.

(3) If the court is satisfied that contribution payable by a concurrent wrongdoer is uncollectible, it may make an order apportioning the uncollectible contribution among the other concurrent wrongdoers (including the applicant) and any wronged person who has failed to act with due regard for that person's own interest, so that each is liable to pay or to forego a share of the uncollectible contribution that is proportionate to the loss attributable to each.

(4) An application under this section may be made in a proceeding brought by a wronged person for the recovery of damages or in a proceeding brought by a concurrent wrongdoer for the recovery of contribution or in a separate proceeding, but must be brought within one year after the attribution of a proportion of the loss to the concurrent wrongdoer whose contribution is uncollectible.

(5) Apportionment of uncollectible contribution under this section does not discharge the concurrent wrongdoer whose contribution is uncollectible from liability to pay contribution.

COMMENTARY

Section 16

This section represents an attempt to reduce the harsh consequences for concurrent wrongdoers if one of their number cannot be found or is insolvent and therefore unable to meet the share of the plaintiff's judgment which has been attributed to that wrongdoer. It enables the court, if it thinks fit, to re-allocate the damages provided an application is made within one year after the original attribution of the loss amongst the parties. See paras 180-187 of the paper.

Where the wronged person is in part responsible for his or her own loss (damages having been reduced accordingly) and an application for re-apportionment is made, the court may require the wronged person to accept a further reduction in damages, being a proportion of the uncollectible amount equivalent to the share of loss originally attributed to the wronged person.

A re-apportionment under this section does not release the absent or insolvent wrongdoer from liability - lest a change of circumstance subsequently renders that person available or solvent.

17 Contractual or indemnity rights not affected

(1) This Act does not affect any right to contribution or indemnity that arises otherwise than under this Act.

(2) This Act does not make any agreement for contribution or indemnity enforceable that would not have been enforceable if this Act had not been enacted.

18 Powers of the court

In a proceeding to recover damages or contribution or to apportion uncollectible contribution, the court may

(a) order that contribution should be paid directly to a wronged person, or into court pending a further order, or

(b) order that payment of contribution should be postponed pending a further order, or

(c) make any other order that it considers necessary or desirable to give effect to this Act.

19 Transitional

This Act does not apply to any loss arising wholly or partly from any act or omission that occurred before the commencement of this Act.

COMMENTARY

Section 17

A wrongdoer may have by contract or statute (other than this Act) or under equitable principles a right to have another concurrent wrongdoer contribute to damages payable to a wronged person or even a right to a complete indemnity. Subsection (1) ensures that any such existing right remains undisturbed by the Act. On the other hand, subs (2) confirms that an otherwise unenforceable agreement for contribution or indemnity is not made enforceable by the Act.

Section 18

The court is given wide powers to facilitate the purposes of the Act. Paragraphs (a) and (b) deal particularly with the need for interim orders where the position of all the parties may not have been finally established. This will be especially relevant to the possibility of a re-apportionment of damages under s 16.

Section 19

The Act applies to contracts, trusts and other legal relationships existing before it comes into force but only insofar as a civil liability arises after commencement. So a contribution claim in respect of a breach of a pre-Act contract occurring after the Act is in force will be dealt with under the rules in the Act.

20 Repeals

The following enactments are repealed:

(a) section 86 of the *Judicature Act 1908*;

(b) section 17 of the *Law Reform Act 1936*;

(c) the *Contributory Negligence Act 1947*;

(d) section 8(2) of the *Crown Proceedings Act 1950*;

(e) section 6 of the *Occupiers Liability Act 1962*.

21 Consequential amendments

The enactments listed in the schedule are consequentially amended as indicated.

[NB This list may not yet be complete. The Law Commission would be assisted by reference to further consequential amendments which may be required.]

DRAFT ACT

SCHEDULE
CONSEQUENTIAL AMENDMENTS TO OTHER ENACTMENTS

1 Carriage by Air Act 1967

Section 12 of the *Carriage by Air Act 1967* is amended by omitting the words "*Contributory Negligence Act 1947*" and substituting the words "*Civil Liability and Contribution Act 199-*".

2 Occupiers Liability Act 1962

Section 4(8) of the *Occupiers Liability Act 1962* is amended by omitting the words "*Contributory Negligence Act 1947*" and substituting the words "*Civil Liability and Contribution Act 199-*".

3 Hovercraft Act 1971

Section 6(3) of the *Hovercraft Act 1971* is amended by omitting the words "*Contributory Negligence Act 1947*" and substituting the words "*Civil Liability and Contribution Act 199-*".

Appendix B

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