

**LEGALWISE
PERSONAL INJURY CONFERENCE**

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**CONTRIBUTION AND INDEMNITY
IN PERSONAL INJURY CASES**

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Introduction

Categories of case

- 1 My paper covers rules that apply to multi-party personal injury litigation. They control whether a negligent party will carry or share the burden of liability for injury where the injury was caused by the negligence of more than one party.
- 2 Relevant categories of case that may have multiple defendants include:
 - 2.1 Car crashes – driver, other driver, other road user, or road authority;
 - 2.2 Dangers at a construction site or finished building – architect, engineer, builder, local authority, strata company, owner or occupier;
 - 2.3 Medical treatment – private or hospital medical practitioner, employed or contract nurse, other hospital staff, or labour hire company;
 - 2.4 Mine sites – mine owner, mine operator, mining contractor, employer, or other contractor on site;
 - 2.5 Asbestos disease – mine owner, product manufacturer, product supplier, occupier, or employer;
 - 2.6 Shopping centre falls – employer, cleaning contractor or occupier.

Solidary liability

- 3 In a personal injury claim each defendant is liable to pay the full amount of the plaintiff's damages even though that another party may have been negligent. This is called solidary liability and is to be contrasted with proportionate liability where each tortfeasor is liable only for its share of the loss. Proportionate liability arises under the *Civil Liability Act 2002* (WA) and under national company and consumer laws. It does not apply to personal injury claims.
- 4 One judgment for the same amount is awarded against several tortfeasors liable for the same damage. Judgments are not entered for different apportioned amounts: *Speirs v Caledonian Collieries Ltd* [1957] SR(NSW) 483 affirmed (1957) 97 CLR 202. As against each tortfeasor the plaintiff is entitled to recover his damages in full subject to any reduction for contributory negligence which is an amount common to all tortfeasors: *Fitzgerald v Lane* [1989] AC 328. Where defendants cause different damage each will be responsible only for the damage it has caused: *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323.
- 5 The plaintiff may choose to sue one defendant or a number of defendants in one action or in succession.

Relevance to settlements

- 6 A decision on how to resolve a claim will be influenced by the rules that determine whether the chosen method extinguishes or preserves rights. Settlement with one defendant tortfeasor will not always preclude the plaintiff from commencing a second action against another party. A settlement with the plaintiff might not protect that defendant against claims for contribution from another defendant tortfeasor in a later action.

Sources of Law

7 For our purposes the most relevant sources of rules are:

7.1 Statute – the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA);

7.2 Common law – the law of contract.

8 The Act was amended in 2003 to make section 7 subject to Part 1F of the *Civil Liability Act 2002*, which concerns proportionate liability. Part 1F does not apply to personal injury claims. It came into force on 1 December 2004. It applies to an “apportionable claim” which is one for economic loss or damage to property: s5AL(1).

9 Problems of apportionment between defendants might also arise where the foundation of a claim for damages for personal injury against at least one defendant is under a contract (for example, sale of goods) or statute (for example, the *Australian Consumer Law*). *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* will not be the source of any relevant rule for apportioning liability between tortfeasors. Whether a right of contribution is available is unclear. It might arise in equity: cf *Burke v LFOT Pty Ltd* [2002] HCA 17; (2002) 209 CLR 282, 292; *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd* [2009] WASCA 31 [247]; (2009) 226 FLR 306; *Amaca Pty Ltd v CSR Ltd* [2015] VSC 582 (partnership).

Joint or several concurrent tortfeasors

10 The common law consequences of a judgment against, or settlement of a claim with, a joint tortfeasor differed from those applicable to a several concurrent tortfeasor.

11 Parties are “joint” tortfeasors where a tort is committed by one person on behalf of, or in concert with another. Examples of joint torts are typically placed in three classes. They are agency, vicarious liability, and common or concerted action. Joint tortfeasors include the employee whose negligence causes loss and the employer who is vicariously liable for that negligence, the agent whose performance of his duties constitutes a tort and the

principal, and those who participate in common in the commission of a tort: *The Koursk* [1924] P 140, 155, 159-60. There must be responsibility for the same action. The law imputes the commission of the one wrongful act to two or more persons at once: *Myer Stores Ltd v Soo* [1991] 2 VR 597, 630 per McDonald J.

- 12 In contrast several concurrent tortfeasors are those whose acts are independent and unrelated but are connected only by their contribution to the damage that they cause in common: Williams *Joint Torts*, 1; Fleming *Law of Torts* (8th Ed), 255. For example, motorists whose independent negligent acts of driving contribute to the one collision are concurrent, but not joint, tortfeasors. The principal contractor on site and the employer whose separate acts of negligence contribute to a worker's injury are several concurrent tortfeasors.
- 13 The distinction between these kinds of tortfeasors remains relevant when deciding on mode of resolution of a claim brought by a plaintiff.

The right to contribution

- 14 At common law a tortfeasor did not have a right to claim contribution from another tortfeasor. A right to claim contribution was conferred in 1947 by the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*. Section 7(1)(c) of that Act provides that where damage is suffered by any person as a result of a tort any tortfeasor liable in respect of the damage may recover contribution from any other tortfeasor who is or would if sued have been liable in respect of the same damage whether as a joint tortfeasor or otherwise.
- 15 This right is limited by any right of indemnity. Section 7(1)(c) provides that no person is entitled to recover contribution from any person entitled to be indemnified in respect of the liability for which contribution is sought.
- 16 The amount of contribution recoverable is such as may be found by the court to be just and equitable and the court has 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: s7(2).

17 Three conditions must be satisfied to found a claim for contribution:

17.1 The person claiming contribution is liable as a tortfeasor in respect of the damage;

17.2 The person against whom the claim is made is a tortfeasor who is also liable, or if sued, would have been liable in respect of the same damage;

17.3 The person claiming contribution is not liable to indemnify the person against whom the claim is made.

18 If those conditions are satisfied the second tortfeasor is liable to pay as contribution an amount that is just and equitable.

19 The conditions may also determine whether, after a resolution of a claim by the plaintiff against a tortfeasor, a right of contribution has been preserved.

“*is liable*”

20 Section 7(1)(c) creates a statutory cause of action that confers a right on a tortfeasor to recover contribution once that tortfeasor has been ascertained to be “liable in respect of that damage”. The word “liable” includes ascertained by judgment: *Bitumen & Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200. It may also include ascertainment of liability by arbitral award or agreement: *Ibid* 212; *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651; *Anderson v Haskins and the Nominal Defendant* (SCt SA, unreported, 3 March 1989, O’Loughlin J).

21 Contribution may not be recovered from a party that was sued by the plaintiff and found not to be liable: *Wimpey v BOAC* [1955] AC 169; *Hood v Commonwealth of Australia* [1968] VR 619; *Kelly v Newcastle Protective Coating Pty Ltd* [1973] 2 NSWLR 45. This is so even in a case where a judgment dismissing a claim was given by consent: *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53.

“*would if sued have been liable*”

22 Contribution may only be recovered from a tortfeasor who is or would if sued have been liable in respect of the same damage. Each of the tortfeasors must be liable to the plaintiff. Alternatively the first tortfeasor must be liable and the second would have been liable if sued.

23 Section 7(1)(c) should be read as if the words “at any time” were present after the words “if sued”: *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213; *Moore v Western Australian Government Railways Commission & Commonwealth of Australia* (1990) 3 WAR 409. Contribution may be claimed even though the operation of a limitation statute may prevent the plaintiff prosecuting the claim against the second tortfeasor. There is a limitation period of two years from the date of the judgment, arbitral award or settlement agreement: *Limitation Act 2005* ss 17 and 58. Contrast *State Government Insurance Commission v Teal* (1990) 2 WAR 105, 114 which was decided under the (now repealed) *Limitation Act 1937*.

24 A liability of a tortfeasor may be established by judgment, arbitral award or agreement. A party seeking contribution after a settlement must be prepared to show that if the claim had been fought out that party would have been held responsible to pay in whole or in part for the damage: *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651, 656-657.

Other consequences of judgment or settlement

25 Not every judgment that is unfavourable to the plaintiff will prevent a claim for contribution:

25.1 A right to claim will not be lost where the plaintiff’s action has been dismissed for want of prosecution and the second tortfeasor has not been “sued to judgment”: *Hart v Hall and Pickles Ltd* [1969] 1 QB 405, 411;

25.2 The grant of leave to a plaintiff to discontinue an action against one defendant does not prevent another defendant from pursuing a claim that has been made for

contribution: *Harper v Gray & Walker* [1985] 1 WLR 1196; *Scarff v Turner* (SCT WA, reported, 23 February 1993, Owen J); *Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd* [2004] WASCA 196 (2004) 28 WAR 540.

- 26 Where the plaintiff settles with one tortfeasor and subsequently with another tortfeasor, the second tortfeasor is entitled to claim contribution from the first even though the effect of the claim may be to override the first settlement by requiring the first tortfeasor to pay a total sum exceeding the amount agreed to be paid in the original settlement: Williams *Joint Torts*, p151. According to Williams a settlement was “virtually final” only if the plaintiff agreed to indemnify the settling wrongdoer against claims for contribution. He was of the view that under the law as it stood under the English Act no wrongdoer should be advised to settle unless the settlement contained that clause: p155.
- 27 These views, which should be understood as applying to several concurrent tortfeasors rather than joint tortfeasors, conform with the decided cases. Where the plaintiff settles with a defendant and discontinues the claim another tortfeasor may sue that defendant to recover contribution: *Harper v Gray & Walker* [1985] 1 WLR 1196. A tortfeasor that is sued does not cease to be a “tortfeasor who is or would if sued have been liable” merely because the tortfeasor and the plaintiff enter into a deed of compromise: *Ramyel Pty Ltd v Hassell & Partners Pty Ltd* (SCT NSW, unreported, 1 September 1989, Giles J).
- 28 The common law consequences of a judgment against, or settlement of a claim with, a joint tortfeasor differed from those applicable to a several concurrent tortfeasor. Concerning judgment, the following differences were identified by Asprey JA in *Castellan v Electric Power Transmission Pty Ltd (No.2)* [1968] 1 NSWLR 286 at 301-2:
- 28.1 At common law each of two several concurrent tortfeasors had to be sued by the plaintiff in separate actions;
- 28.2 At common law judgment against one joint tortfeasor was a bar to a further action by the plaintiff against another joint tortfeasor liable in respect of the same damage;

28.3 On the other hand, judgment against one several concurrent tortfeasor did not prevent the plaintiff obtaining judgment against another several concurrent tortfeasor liable in respect of the same damage;

28.4 But if the judgment against the first concurrent tortfeasor was satisfied, even by a stranger to the wrongdoing, there was a bar against any second or subsequent action against any other concurrent tortfeasor's liability in respect of the same damage.

29 The *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* altered the common law position. Section 7 has abolished the common law principle that a person who suffers damage by a joint tort has only one cause of action which merges in the first judgment recovered in respect of it: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 459-460. Section 7(1)(a) provides that judgment against a tortfeasor is not a bar to subsequent action against another person who would, if sued, have been liable as a joint tortfeasor for the same damage.

30 Section 7(1)(b) imposes a disincentive against bringing more than one action against a joint or several concurrent tortfeasor. It provides that if more than one action is brought against tortfeasors liable for the same damage (whether as joint tortfeasors or not) the sums recoverable under the judgments given in those actions are not in the aggregate to exceed the amount of damages awarded by the judgment first given and in any of the subsequent actions the plaintiff is not entitled to costs unless the court is of the opinion that there was a reasonable grounds for bringing the action.

31 A consent judgment in the first action for payment to the plaintiff will not preclude a second action against a several concurrent tortfeasor. Where the consent judgment for payment merely reflects a settlement agreement and does not result from a judicial determination the amount recoverable in a second action is not limited by the amount of the first judgment: *Newcrest Mining Ltd v Thornton* [2012] HCA 60; (2012) 248 CLR 555.

- 32 A consent judgment dismissing a claim will preclude one tortfeasor claiming contribution from another: *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53.
- 33 Sections 7(1)(a) and (b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* do not affect the common law position regarding settlement of a claim against a joint tortfeasor that falls short of entry of judgment – that accord and satisfaction of a claim in tort by one joint tortfeasor discharges the other: *Thurman v Wilde* (1840) 11 Ad&E 453, 113 ER 487; *Reynolds v Maclean* (1907) 9 WALR 89; *Cutler v McPhail* [1962] 2 QB 292, 296.
- 34 Glanville Williams in *Joint Torts* (p46) defines an accord as an agreement by a simple contract to give up a right of action and satisfaction as the payment of damages by judgment or agreement or satisfaction of the accord (p45). In *McDermott v Black* (1940) 63 CLR 161, 183-184 Dixon J defined accord and satisfaction as follows:
- “The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. It may be a promise or it may be the act or thing promised. Whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired”.
- 35 A compromise agreement may operate otherwise than by way of accord and satisfaction if it contains an express reservation of the right to sue another joint tortfeasor or is clearly an agreement not to sue the tortfeasor with whom the contract is made: *Duck v Mayeu* [1892] 2 QB 511; *Cutler v McPhail* [1962] 2 QB 292, 296.
- 36 A plaintiff is not entitled to recover by judgments against tortfeasors more than the amount of its loss. Payment by one tortfeasor under a judgment or settlement discharges *pro tanto* the liability of other tortfeasors and satisfaction of a judgment obtained against any one tortfeasor after trial exhausts the plaintiff's rights: *Castellan v Electric Power Transmission (No.2)* [1968] 1 NSWLR 286; *D'Angola v Rio Pioneer Gravel Co Pty Ltd* (1979) 1 NSWLR 492, 499 see also *Ramyel Pty Ltd v Hassell & Partners Pty Ltd* (SCT NSW, unreported, 1 September 1989, Giles J).

“just and equitable”

- 37 The amount of contribution is what the court decides is just and equitable.
- 38 In determining this question the court is entitled to consider whether the tortfeasor claiming contribution 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, so that the excess is due to his fault and not to that of the tortfeasor resisting the claim: *Bitumen & Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200, 212-213.
- 39 A consent judgment might be excessive if it did not reflect the plaintiff’s contributory negligence: *Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd* [2004] WASCA 196; (2004) 28 WAR 540 [65].
- 40 In determining what is just and equitable the court must make a comparison of the relative blameworthiness and the relevant causal potency of the negligence and conduct of each party: *Podrebersek v Australian Iron and Steel Pty Limited* (1985) 59 ALJR 492; *Wynbergen v Hoyts Corporation Pty Limited* (1977) 72 ALJR 65; *Vinidex v Thiess* [2000] NSWCA 67 [29]; *Parlin Pty Ltd v ChoiceOne Pty Ltd* [2012] WASCA 19 [31]-[32].
- 41 In proceedings for contribution the court has power to exempt any person from liability to make contribution and as between two tortfeasors contribution by one may amount to 100% and hence equate with an indemnity: *Law Reform (Contributory Negligence and Tortfeasors’ Contribution) Act 1947* (WA) s.7(2); *Fairfield Municipal Council v McGrath* [1984] 2 NSWLR 247 (overturned as to the effect of the *Employee’s Liability (Indemnification of Employer) Act 1982* (NSW) by *McGrath v Fairfield Municipal Council* (1985) 156 CLR 672, 678-679); see also eg *Fennell v Supervision & Engineering Services Holdings Pty Ltd* (1988) 47 SASR 6.

42 A tortfeasor who claims contribution after settling with the plaintiff is not necessarily required to call witnesses to prove the reasonableness of the settlement. In *Saccardo Constructions Pty Ltd v Gammon* (1994) 63 SASR 333 King CJ (with whom Millhouse J agreed) derived from the authorities the following propositions of law applicable where a defendant seeks to recover contribution towards its liability on a consent judgment to which the third party did not consent:

42.1 The test as to whether the defendant can recover the full amount of a consent judgment is the reasonableness of the settlement;

42.2 There is no presumption of law that the settlement was reasonable and the onus is on the defendant seeking contribution to prove the reasonableness of the settlement in the proceedings against the third party;

42.3 The fact of the settlement is some evidence of its reasonableness and the defendant is not in all circumstances required to call witnesses to establish that the amount paid was reasonable;

42.4 The circumstances in which the settlement was arrived at and any proper inferences therefrom may be evidence of the reasonableness of the settlement.

See also *Dowthwaite Holdings Pty Ltd v Saliba* [2006] WASCA 72.

Asbestos cases

43 Asbestos cases present particular problems. Causation is important. A victim of mesothelioma may have been exposed to cancer causing asbestos over different periods of time and at different locations. An important question that affects liability for and assessment of the extent of contribution between tortfeasors is which exposures contributed causally to the development of the disease and to what extent.

44 In *Amaca Pty Ltd (under NSW administered winding up) v Booth* (2011) 246 CLR 36; [2011] HCA 53 the High Court held that it was open to the primary judge on the evidence

in that case, to accept the cumulative effect theory, that all asbestos exposure contributes causally to the ultimate development of mesothelioma.

45 In *Powney v Kerange District Health* [2014] VSCA 221 [108] the judge summarised the factors that were relied on by the plaintiff in *Booth* to make out his case that mesothelioma was due to exposure to brake linings containing asbestos:

45.1 He had contracted mesothelioma;

45.2 The only known cause of the disease is exposure to asbestos;

45.3 The expert evidence, accepted by the trial judge, was that:

45.3.1 Exposure to asbestos contributes to the disease; and

45.3.2 The prospective risk of contracting the disease increases with a significant exposure;

45.3.3 Booth had two periods of significant exposure; and

45.3.4 It was more probable than not that each period of exposure made a material contribution to bodily processes which progressed to the development of the disease.

46 *Amaca Pty Ltd v CSR Ltd* [2015] VSC 582 is a recent case in which CSR Ltd successfully claimed contribution from two other suppliers of asbestos products.

Payment as a pre-condition to the entitlement to contribution

47 The *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* is silent on whether a tortfeasor liable for damage is required to pay any sum before any payment can be recovered as contribution from another tortfeasor. Glanville Williams (*Joint Torts*, p148) was of the view that it is clear that a condition precedent to the right to receive contribution is some payment by the claimant to the injured party. The question then arises whether the tortfeasor claiming contribution is required to pay more than its just proportion so that it can recover only the amount of any excess paid or whether it is entitled to contribution upon mere payment of any sum to the plaintiff. Williams (p150)

regarded the latter as the better rule in tort where a plaintiff's claim is initially unliquidated, and where owing to the difficulties of proof that are frequently encountered in tort it may not be pursued to the end.

48 The view expressed by Williams that mere payment should give rise to an entitlement to contribution differs from the rule that governs contribution among joint debtors. In contract where a liability is joint a right of contribution is available between debtors but it is a condition precedent to the right that the plaintiff should have been liable to pay the whole debt and should have paid more than his share of it: *Legal & General Assurance Society Ltd v Drake Assurance Co Ltd* [1992] 1 QB 887; *Davies v Humphreys* (1840) 6 M&W 153 168-169; *Stirling v Burdett* [1911] 2 Ch 418; *Chitty on Contracts (General Principles)*, para 17-014.

49 It appears that when the *Law Reform (Contributory Negligence & Tortfeasors' Contribution) Act 1947* was enacted the legislative intention was that contribution would be payable to a tortfeasor that had paid more than its just proportion of the damages. The Act derives from the *English Law Reform (Married Women and Tortfeasors) Act 1935*; 25 & 26 Geo.5, c.30. The English Act was enacted following recommendations contained in the Third Interim Report (1934) of the Law Revision Committee.

50 The problem with the common law and the solution proposed by the Committee were discussed by Murphy J in *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 343 332-333 as follows:

“The problem in the common law and the solution proposed are clear from the recommendations of the Committee. The problem was expressed as follows:

“3. When two or more persons jointly commit a wrongful act, the person injured can recover the full amount of his damage from any one of them. If he does so, the wrongdoer who has paid the whole damage has to bear the whole loss and the other wrongdoers escape liability by reason of the rule of the common law that there can be no contribution between any joint tort-feasors.

The rule is different in cases of breach of contract, for where one of several persons, jointly, or jointly and severally, liable under a contract is called upon

to perform the contract in full or to discharge more than his proper share, he has, as a general rule, a right to call upon persons jointly, or jointly and severally liable with himself to contribute to the liability which he has incurred (*Halsbury's Laws of England*, Vol VII at p375”.

The solution was expressed as follows:

“7. We think that the common law rule should be altered as speedily as possible.

The simplest way of altering the law would seem to be follow the lines of s.37(3) of the *Companies Act* and to give a right of contribution in the case of wrongs as in the case of contract.

If this were done, joint tort-feasors in the strict sense would be given a right of contribution *inter se*. We think, however, that such a right might with advantage also be conferred where the tort is not joint (ie. the same act committed by several persons) but where the same damage is caused by the plaintiff by the separate wrongful acts of several persons. This is the position that frequently arises where the plaintiff sustains a single damage from the combined negligence of two motor car drivers, and recovers judgment against both.

...

We think therefore that when two persons each contribute to the same damage suffered by a third, the one who pays more than his share should be entitled to recover contribution from the other”.” (my emphasis)

51 The remedy provided by the Act was intended by the Law Revision Committee to mirror the remedy that applied in the case of joint debtors.

52 When similar legislation was enacted in Western Australia it appears to have been intended to afford a remedy to a tortfeasor that had paid more than its fair share of the damages. The second reading speech for the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Bill* was delivered by the Attorney General the Hon. R McDonald in the Legislative Assembly of the Parliament of Western Australia on 25 September 1947: Western Australia: Parliament, Legislative Council, *Parliamentary Debates*, 25 September 1947, pp.949-951. After describing the Bill as dealing with two distinct but allied matters – namely, the questions of contributory negligence and contribution between tortfeasors the Hon Attorney General said of the second part of the Bill (p.951):

“The other part will deal with people who jointly cause an injury to a third person and will enable the injured person to recover fully from the wrongdoers and for any wrongdoer who has paid more than his share to recover a contribution from any others who may have been responsible with him in the commission of the wrong” (my emphasis)

53 Section 19 of the *Interpretation Act* provides that in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material for a number of purposes including to determine the meaning of the provision when the provision is ambiguous or obscure. Without limiting the generality of material that may be referred to, material that may be considered includes the speech made to a House of Parliament by a Minister on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House: s19(2)(f).

54 The material I have referred to may be admissible as an aid to construction of s7 of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* on the ground that “the provision is ambiguous or obscure”. The amount of recoverable contribution is “such as shall be found by the court to be just and equitable”: s7(2). The necessary ambiguity may be found in this provision of the Act.

55 The view that contribution is only recoverable by a tortfeasor that has paid more than its just proportion finds some support in the following passage from the judgment of Denning LJ in *Littlewood v George Wimpey & Co Ltd and British Overseas Airways Corporation* [1953] 1 QB 501, 519:

“It seems to me clear that a tortfeasor cannot recover contribution until his liability is ascertained. If he had been sued and has paid nothing and admitted nothing, he can have no cause of action for contribution, for the simple reason that he may never be called on to pay at all. The damaged plaintiff may go against the other tortfeasor only. Once the liability of the first tortfeasor has, however, been ascertained by judgment against him or by admission, then he has a cause of action for contribution against the second tortfeasor. He can obtain a declaration of his right to contribution and a prospective order under which, whenever the first tortfeasor has paid any sum more than his share, he can get it back from the second tortfeasor. A close analogy is the right of one surety to contribution from a co-surety. His right at law did not accrue until he had paid more than his share, *Davies v Humphreys* (1946) 6 M&W 153 168-

169; but his right in equity (which now prevails) arose when his liability was ascertained and the Statute of Limitations then began to run (*Wolmershausen v Gullick* (1893) 2 Ch 514 *Robinson v Harkin* (1986) 2 Ch 415).

Indemnity and Insurance Clauses

Agreement to indemnify = no contribution

56 One tortfeasor cannot recover contribution from another tortfeasor if the first has agreed to indemnify the second. By s7(1)(c) of the *Law Reform (Contributory Negligence and Tortfeasor's Contribution) Act* no person is entitled to recover contribution from any person entitled to be indemnified in respect of the liability for which contribution is sought.

57 A related question is whether a tortfeasor who agreed to obtain relevant insurance for the benefit of another tortfeasor can recover contribution from the other tortfeasor.

58 The common source of a right of indemnity is in a contract. Indemnity provisions are common in construction, mining, and service contracts.

Meaning of indemnity term

59 Many of the disputes between apparent tortfeasors arise from differences about the scope, and hence the meaning, of a particular indemnity provision. Often lawyers look for cases that appear comparable to the case under consideration. Lawyers should be cautious with that approach. The focus should be on the language used in the particular contract and the application of principles of construction of contracts.

60 The principles governing construction of indemnity clauses are:

60.1 The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background,

- the context [and] the market in which the parties are operating”: *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Limited & Ors* [2014] HCA 7 251 CLR 640 (at 656 [35]) French CJ, Hayne, Crennan and Kiefel JJ;
- 60.2 Where, however, the written contract is a contract of guarantee or indemnity, a doubt as to the construction of a provision in the contract must be resolved in favour of the guarantor or indemnifier. The doubt may arise not only from the uncertain meaning of a particular provision, but also from its apparent breadth of possible application: *Westina Corporation Pty Ltd v BGC Contracting Pty Ltd* [2009] WASCA 213, (2009) 41 WAR 263, 277 [49];
- 60.3 It is unnecessary to review decisions on Australian intermediate courts of appeal, which turned on their own facts. The principles to be applied are to be found in the decisions of the High Court in *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 and *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269; *Westina* 277 [50]; *Westina Corporation* 277 [50];
- 60.4 A number of cases suggest a predisposition to construe an indemnity clause as not applying to a loss caused by the negligence of the indemnified party. However an indemnity clause may be applicable in a case where the indemnified party was negligent if the court is satisfied the parties intended that the provision should apply to liabilities as between the parties which arise from the indemnified party’s own default. In each case, whether a contractual provision should be so characterised will depend on the proper construction of the provision: *Westina Corporation* 280 [67].

Apparently comparable cases

- 61 Each case is decided on its own facts and contract wording. Hence my exhortation to focus on the particular contract rather than searching for case comparators.

62 Seemingly similar cases have resulted in different outcomes on the application of an indemnity clause. I offer some illustrations:

62.1 In *Erect-Safe Scaffolding (Aust) Pty Ltd v Sutton* [2008] NSWCA 114 an agreement by a subcontractor to indemnify the contractor “against all damage, expense ... loss ... or liability of any nature suffered or incurred by [the contractor] ... arising out of the performance of the Subcontract Works” (my emphasis) was held not to apply to liability that arose from the contractor’s negligence;

62.2 In contrast in *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* [2000] WASCA 408 (2000) 23 WAR 291 a liability arose from the negligence of the principal, Hamersley Iron. A contract provided that the contractor, Speno, “shall be solely liable for, and shall be deemed to indemnify and hold harmless [Hamersley Iron] against any and all liabilities, losses, damages ... of every name or nature whatsoever arising whether ... at common law or in respect of personal injury ... any and all persons employed by it in the execution of the Work/Services ... resulting either directly or as a consequence of the performance of the Work/Services under the Contract” (my emphasis). The Court held that the principal was entitled to be indemnified for its liability in negligence;

62.3 In *BGC Contracting Pty Ltd v Webber* [2005] WASCA 112 a negligent principal was entitled to indemnity under a term that “the Contractor shall be solely liable for and indemnify and keep indemnified the Principal ... against all ... liabilities ... of whatsoever nature whether arising under any statute or at common law arising out of injury to ... any person whomsoever arising out of in the course of caused by the execution of the Works under the Contract” (my emphasis);

62.4 In *Westina Corporation* a clause that required the contractor to “bear the risk of loss in the hiring of the Plant and ... indemnify and hold [the principal] harmless against any ... loss ... arising from the hiring of the Plant” (my emphasis) was held not to

apply to loss caused by negligent operation by the principal or its employee of other plant.

Effect of insurance clause on meaning of indemnity clause

63 It has been suggested that where a contract contains both an indemnity clause and an insurance clause the latter may be intended to require insurance that supports the indemnity, and that, in the absence of express words, the obligation under the insurance clause does not require the maintenance of insurance against loss occasioned by the negligence of the party that had the benefit of the indemnity: eg. *Steele v Twin Rigging Pty Ltd* (1992) 114 FLR 92; *Erectsafe Scaffolding (Australia) Pty Ltd v Sutton* [2008] NSWCA 114 [165]-[167]. In my view the extent of the insurance required will be determined by the language used in the insurance clause having regard to the principles of construction enunciated by the High Court in *Andar Transport*.

Agreement to obtain insurance ≈ agreement indemnify

64 A contractual obligation to obtain insurance effectively equates with an obligation to indemnify. Breach gives rise to a right to claim damages being the amount of the insurance fund that would have been available if the clause had been complied with: see *Thiess Contractors Pty Ltd v Norcon Pty Ltd* [2001] WASCA 364, (2001) 11 ANZ Ins Case 61-509.

65 A clause in a contract that requires one party to obtain insurance for the benefit of the other contracting party is a means by which the first party indirectly provides indemnity to the other: see *Cervellone v Besselink Bros* (1984) 55 ACTR 1.

66 Further, a defendant may set off against a plaintiff's claim for damages for loss caused by negligence the amount of an insurance fund that should have been available if the plaintiff had complied with a contractual obligation to obtain insurance for the benefit of the defendant: *Hacai Pty Ltd v Rigil Kent Pty Ltd* (S Ct of WA, 19 December 1995, unreported, library number 960450; BC960384).

67 It seems to follow that if one tortfeasor has agreed to obtain relevant liability insurance for another party the first tortfeasor should not be entitled to claim contribution from that party in the event that both negligently contribute to an injury.

Workers compensation

68 Section 301 of the *Workers' Compensation and Injury Management Act* provides that "Except as provided by this Act, its provisions apply notwithstanding any contract to the contrary". In *Delron Cleaning Pty Ltd v Public Transport Authority* [2008] WASCA 68 the Court of Appeal held that the provisions of the Act are paramount and override any inconsistent contractual arrangements between a common law employer and a deemed employer.

69 This clearly applies to protect statutory rights to recover workers' compensation. There are statutory rights of recovery, or indemnity for, the amount of workers' compensation paid, under ss92, 93 and 175 of the *Workers' Compensation and Injury Management Act 1981*, that will override contractual arrangements. Section 93K precludes recovery of contribution from an employer where (1) the Director has not registered an election by the worker to retain the right to seek damages (based on a whole person impairment of at least 15%) or (2) damages have been awarded against the employer for a degree of disability that is less than 25%.

Summary

70 Contribution and indemnity rules apply to negligence cases that have multiple defendants.

71 A plaintiff is entitled to recover from each tortfeasor a judgment for the full amount of its loss.

72 Principles of proportionate liability do not apply.

73 A plaintiff is not entitled to recover by judgments against tortfeasors more than the amount of its loss.

- 74 Payment by one tortfeasor under a judgment or settlement discharges *pro tanto* the liability of other tortfeasors and satisfaction of a judgment obtained against any one tortfeasor after trial exhausts the plaintiff's rights.
- 75 The principal sources of the rules are the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) and the common law of contract.
- 76 There is a distinction between tortfeasors whose liability is joint and those whose liability is joint and several (several concurrent tortfeasors). The distinction may be relevant in the event of a settlement.
- 77 The conditions that must be satisfied for a right of contribution to arise focus on the liability in negligence of each tortfeasor.
- 78 Payment to the plaintiff would also appear to be a precondition of a right to recover contribution from another tortfeasor.
- 79 Asbestos disease cases, and cases where workers' compensation has been paid, may present particular problems.
- 80 Preservation of rights as between plaintiff and defendant, or as between tortfeasors, may vary according to the manner by which the claim is resolved, including the terms of the settlement agreement, whether there is a judgment, and whether judgment is by consent or the outcome of a trial:
- 80.1 Where the defendants are several concurrent tortfeasors one settlement with all defendants is not essential. Settlement with one defendant will not extinguish the plaintiff's rights against others. The plaintiff may enter into settlement arrangements with one or more defendants, with or without a judgment;
- 80.2 Absent a judgment of dismissal, settlement with a several concurrent tortfeasor will not prevent that defendant from claiming contribution from other tortfeasors. Nor will it prevent others from claiming contribution from the first if later proceedings are taken by the plaintiff;

- 80.3 It is possible for a several concurrent tortfeasor to pay more than the amount of an agreed settlement. Accordingly, in order to protect the first defendant (several concurrent tortfeasor) a settlement without judgment should include an agreement by the plaintiff to indemnify the defendant against future claims for contribution or indemnity;
- 80.4 A judgment of dismissal in favour of a defendant will prevent other tortfeasors from claiming contribution from the first defendant in the future;
- 80.5 Where an action is dismissed for want of prosecution or is discontinued the plaintiff can sue other tortfeasors and one tortfeasor can claim contribution from another tortfeasor;
- 80.6 Where the defendant is liable with other defendants as a joint tortfeasor, if the settlement is by agreement without a judgment it will extinguish the cause of action against all other joint tortfeasors;
- 80.7 In the case of settlement with a joint tortfeasor by agreement without a judgment, in order to preserve the plaintiff's claims against the other joint tortfeasors:
- 80.7.1 The agreement should be not to sue the first defendant and contain an express reservation of the right to sue other joint tortfeasors, or
- 80.7.2 There should be judgment for payment of money;
- 80.8 A settlement with one defendant by judgment for payment to the plaintiff will not prevent that defendant from claiming contribution from other joint or concurrent tortfeasors;
- 80.9 Nor will it prevent other tortfeasors, if subsequently sued, from claiming contribution from the first defendant;
- 80.10 Whether tortfeasors are joint or are several concurrent a judgment for payment of money after a trial will limit the maximum amount that the plaintiff can recover;

- 80.11 A limit will not apply if the judgment gives effect to a settlement by agreement.
- 81 I have included a table that sets out the different consequences according to mode of resolution.
- 82 The extent of contribution is what is “just and equitable”.
- 83 The assessment task requires consideration of the relative blameworthiness and relevant causal potency of the negligence and conduct of each party, whether a settlement amount is excessive, and whether there is any right of indemnity.
- 84 An agreement to obtain insurance might equate with an agreement to indemnify for the purposes of determining what is “just and equitable” contribution.
- 85 A tortfeasor who claims contribution after settling with the plaintiff is not necessarily required to call witnesses to prove the reasonableness of the settlement.
- 86 Usually a right of indemnity, precluding a right of contribution, will arise from an indemnity clause in a contract.
- 87 The lawyer’s focus should be on the meaning of the indemnity clause and its application to the facts of the case rather than searching for comparable cases.

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TYPE OF TORTFEASOR		
MODE OF RESOLUTION	Joint tortfeasor	Several concurrent
Settlement without judgment	Extinguishes all claims unless the agreement is not to sue and preserves right to sue other tortfeasors.	Does not extinguish all claims. Plaintiff can sue other tortfeasors. Each tortfeasor can claim contribution. A tortfeasor might end up paying more than the amount of the settlement.
Settlement with judgment for payment	Plaintiff can sue other tortfeasors. First judgment does not limit amount of later judgment. Tortfeasor can claim contribution from another tortfeasor.	Plaintiff can sue other tortfeasors. First judgment does not limit amount of later judgment. Tortfeasor can claim contribution from another tortfeasor.
Judgment after trial	Plaintiff can sue other tortfeasors. Tortfeasor can claim contribution from another tortfeasor. In second and later actions judgment is limited to the amount of the first judgment.	Plaintiff can sue other tortfeasors. Tortfeasor can claim contribution from another tortfeasor. In second and later actions judgment is limited to the amount of the first judgment.
Judgment of dismissal for want of prosecution	Plaintiff can sue other tortfeasors. Tortfeasor can claim contribution from another tortfeasor.	Plaintiff can sue other tortfeasors. Tortfeasor can claim contribution from another tortfeasor.
Discontinuance of action	Plaintiff can sue other tortfeasors. Tortfeasor can claim contribution from another tortfeasor.	Plaintiff can sue other tortfeasors. Tortfeasor can claim contribution from another tortfeasor.
Settlement with judgment of dismissal	Plaintiff can sue other tortfeasors. Other tortfeasor cannot claim contribution from the first defendant.	Plaintiff can sue other tortfeasors. Other tortfeasor cannot claim contribution from the first defendant.