

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

**THE LAW RELATING TO
CONTRIBUTION BETWEEN WRONGDOERS**

(TOPIC 5)

Membership of the Law Reform Commission of Hong Kong as at the date of this report is :

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Attorney General

Hon Sir Denys Roberts, KBE
Chief Justice

Hon G.P. Nazareth, OBE, QC
Law Draftsman

Robert Allcock, Esq.
Senior Lecturer, School of Law, University of Hong Kong

Hon Mrs Selina Chow, JP
Member of Legislative Council Company Director

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Terms of reference

WHEREAS :

On 15 January 1980, His Excellency the Governor of Hong Kong Sir Murray MacLehose, GBE, KCMG, KCVO in Council directed the establishment of the Law Reform Commission of Hong Kong and appointed it to report on such of the laws of Hong Kong as might be referred to it for consideration by the Attorney General or the Chief Justice;

On 5 October 1981 the Honourable Attorney General and the Honourable Chief Justice referred to this Commission for consideration a topic in the following terms : -

"Civil Liability - Contribution between wrongdoers

Should the law relating to contribution between wrongdoers, particularly section 19 of the Law Amendment and Reform (Consolidation) Ordinance Cap. 23, be changed and, if so, in what way?"

At its Seventh Meeting on 13 November 1981 the Commission appointed sub-committee to research consider and advise on this topic;

At its Twenty-first Meeting on 19 August 1983 the Commission received and considered the report of the sub-committee;

We have made in our report recommendations which will meet the problems described therein.

Dated this 9th day of September 1983.

NOW THEREFORE DO WE THE UNDERSIGNED MEMBERS OF THE LAW REFORM COMMISSION OF HONG KONG PRESENT OUR REPORT ON CONTRIBUTION BETWEEN WRONGDOERS :



Hon Michael Thomas, QC
(Attorney General)



Hon Sir Denys Roberts, KBE
(Chief Justice)



Hon G P Nazareth, OBE, QC
(Law Draftsman)



Robert Allcock, Esq.



Hon Mrs Selina Chow, JP



Hon Mr Justice Fuad
(Justice of Appeal)



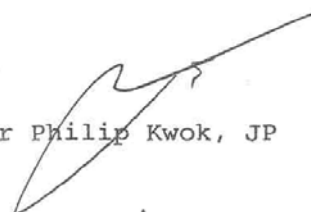
Hon HU Fa-kuang, JP



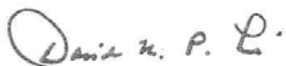
Dr The Hon Henrietta Ip



Dr Ambrose King



Dr Philip Kwok, JP



David Li, Esq., JP



Hon T.S. Lo, CBE, JP



Brian McElney, Esq., JP



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Professor Peter Willoughby, JP

Dated this 25th day of January 1984.

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

THE LAW RELATING TO CONTRIBUTION BETWEEN WRONGDOERS

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Chapter I

Introduction

1.1 The law relating to contribution between wrongdoers has had a long and interesting life in the common law legal system. The question of contribution or the sharing of damages between wrongdoers arises when one person suffers damage out of the action of more than one other person in a set of circumstances which are so related that both wrongdoers have contributed to the infliction of the damage.

1.2 While the history of the law is set out in detail in Chapter 3 it seems appropriate to note its course in recent times to understand why the Commission received this reference.

1.3 At common law a distinction was drawn between different types of legal action and different classes of wrongdoers. It was difficult if not impossible to sue more than one person for the same damage. In 1936, following the English Law Reform (Married Women and Tortfeasors) Act 1935, Hong Kong enacted section 19 of the Law Amendment and Reform (Consolidation) Ordinance (Chapter 23 of the Laws of Hong Kong). A copy of section 19 is contained in Annexure 1. This improved the injured person's rights against persons who had collectively injured him by action which gave rise to a claim in the law of tort. However the passage of time found section 19 to be wanting in certain areas. Once again these are detailed later.

1.4 As our 1936 Amendment was based on English law we noted that the English once again took the step of passing the Civil Liability (Contribution) Act 1978. A copy of the Act is at Annexure 2. This Act broke down more of the barriers imposed by the common law.

1.5 On 5 October 1981, the Law Reform Commission appointed a sub-committee to consider the following question :

"Should the law relating to contribution between wrongdoers, particularly section 19 of the Law Amendment and Reform (Consolidation) Ordinance Cap. 23, be changed and, if so, in what way?"

The membership of the sub-committee is set out in Annexure 3.

Chapter II

Summary of work

2.1 The sub-committee held eleven formal meetings, and several informal discussions. The Commission considered the report of the sub-committee at its 21st Meeting on 19 August 1983 and subsequently produced this report.

2.2 The law of contribution in Hong Kong is based on English Law. The law of contribution in England has recently been reformed by the Civil Liability (Contribution) Act 1978, which followed a study by the Law Commission. The 1978 Act is therefore at the centre of our deliberations. Noting that the Act differed in several details from the Law Commission's draft Bill, enquiries were made in London asking about those differences and also inquiring about any reaction to the legislation which may have reached the Commission. The reply was detailed and helpful.

2.3 Further investigation was carried out as to whether there had been any cases or commentaries on the 1978 Act. The result was that judicial references had been few and oblique and that the legal writing had been sparse. What was uncovered, however, has been useful in pinpointing difficulties with the Act, so enabling consideration being given to whether Hong Kong might improve on it. The articles and judicial references are listed in Annexure 4. In addition, we had the benefit of the Law Commission's Report which led to the 1978 changes.

2.4 We also looked to other Commonwealth and common law jurisdictions to see whether any ideas or guidance might be forthcoming from them. With few exceptions, it was found that their legislation, like that of Hong Kong, follows the Law Reform (Married Women and Tortfeasors) Act 1935. The exceptions were Ireland, Ontario and Tasmania. The Irish approach is fundamentally different from the cautious extension contained in the 1978 Act. The contribution provisions are only part of a wider scheme. We have concluded that it is too far-reaching for us to consider this wider scheme, since it would take us beyond our terms of reference. The approach in Ontario and Tasmania is less radical and aspects of the Tasmanian system are referred to later in this report.

2.5 Enquiries were made of the law reform bodies in various Commonwealth jurisdictions whether they had been asked to report on contribution and whether there was a chance of changes being instituted in their jurisdictions.

2.6 Although information was obtained from England and other Commonwealth jurisdictions we did not assume that Hong Kong should automatically follow overseas developments. Throughout our study we consider whether in the particular circumstances of Hong Kong a different course should be followed.

2.7 The sub-committee decided that since contribution is rather a technical legal topic, of interest mainly to lawyers and those in the professional and business world, it would not ask for submissions at an early stage but would issue a preliminary report for comment. The preliminary report was issued in March 1983 and sent to a total of 78 organisations and individuals. There were 31 replies and these were taken into account when it prepared its final report. A list of those who were invited to make submissions is set out in Annexure 5.

Chapter III

The background to the present law

The common law relating to joint tortfeasors

3.1 Section 19 of the Law Amendment and Reform (Consolidation) Ordinance ("LARCO") owes its origin to the common law rules about joint tortfeasors. A person who commits a tort such as negligence or defamation is a joint tortfeasor if he commits the wrong against the plaintiff in company with someone else and the same evidence would support an action by the plaintiff against either of them. A good example from the reports is Brooke v Bool [1928] 2 KB 578 where the first defendant was a landlord who smelt gas in the plaintiff's shop. He went to investigate with the second defendant, his lodger. Both the landlord and the lodger used naked lights to look for leaks and an explosion occurred, causing great damage to the plaintiff's shop. The two were held to be jointly liable, that is, each was answerable not only for his own negligence but for that of the other as well. So it made no difference that it was probably the lodger's match which set off the explosion; the landlord was the person whom the plaintiff had chosen to sue and, since he was a joint tortfeasor, he had to pay for the whole of the damage. If the plaintiff had preferred to sue the lodger, then the lodger would have had to pay.

3.2 This does not mean that because there are two wrongdoers whose tortious acts coincide they are always jointly liable. Their acts may be independent of one another. So, for instance, if two cars collide through the negligence of both drivers and a pedestrian is injured by the accident, the drivers will not be joint tortfeasors. Their negligent acts may lead to the same damage, but their acts are quite separate. The plaintiff pedestrian will have to sue the driver whose carelessness caused the pedestrian's injury - or more likely, since it will probably be impossible to say which of the two is to blame, he will have to sue both - because the one is not answerable for damage caused by the other. They are, as lawyers put it, severally liable but not jointly liable. What distinguishes the landlord and his lodger from the two drivers is that the first two entered on what might be called their enterprise (searching for leaks) with a concerted design and with a common end in view. The damage caused as a result of their acts is the same. In the case of the drivers, their acts and aims are separate from one another. Their acts of negligence happen to coincide and happen to lead to the same damage, so we can call them concurrent tortfeasors. But they are not joint tortfeasors.

3.3 The distinction between joint tortfeasors and several concurrent tortfeasors used to be very important. The common law took the somewhat doctrinaire view that where there were joint tortfeasors there was only one wrongful act and therefore only one legal action could be brought, and one

judgment delivered, in respect of it. So while the plaintiff had the choice of which joint tortfeasor to sue, once he had sued one, he could not sue the other. Similarly if he made a compromise and released one of the potential defendants from liability he also released the other because the whole cause of action was ended.

3.4 This approach could of course give rise to difficulties in practice. It could be unjust on the plaintiff. Suppose the plaintiff in Brooke v Bool had sued the landlord successfully (as he did) but the landlord proved to be unable to pay the damages. The plaintiff could not then sue the lodger, even if the lodger were wealthy. The cause of action had disappeared when judgment was obtained against the landlord. Yet our pedestrian, in the same predicament having sued the first driver and found that he was insolvent, could turn round and sue the second driver (provided he could show that the second driver had also caused his injuries) because the drivers were independent tortfeasors and separately liable.

The reformed law

3.5 To avoid such unfairness, in 1936 the provision which is now s 19 of LARCO was enacted in Hong Kong. Like so many reforms, it reflected a change which had already been made in the law of England - in this case, by s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935.

Judgment no bar

3.6 The first paragraph of s 19(1) states that 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. In other words, it abolished the restriction which the common law placed on a plaintiff who sued a joint tortfeasor successfully but did not receive the damages ordered by the court. After 1936 there was nothing to prevent him suing the other joint tortfeasor.

Sanctions against successive actions

3.7 Had the reform left things there, however, it would have opened the way for a plaintiff to sue joint tortfeasors in separate or successive proceedings, perhaps in the hope that he would receive compensation from each of them for the same damage, or perhaps simply in order to cause nuisance or annoyance to the defendants. So, to discourage such multiplicity of litigation and wasting of the courts' time, it was provided in the second paragraph of s 19(1) that where the plaintiff brings more than one action in respect of the same damage, the sums recoverable in those actions shall not in the aggregate exceed the award made to the plaintiff in the first action. This is known as "the damages sanction". It effectively eliminates successive

speculative actions by the gold-digging plaintiff while preserving the rights of the legitimate plaintiff whose first award has not been paid and is now seeking compensation from another joint tortfeasor.

3.8 This is supplemented by "the costs sanction" in the same paragraph. The plaintiff is not entitled to the costs of the second or subsequent action unless the court thinks there were reasonable grounds for bringing it.

Contribution

3.9 The third paragraph in s 19, complements the first two by extending a defendant's right to contribution from another potential defendant. Whereas the first two paragraphs extend the number of defendants a plaintiff can sue, paragraph (c) assumes that a plaintiff has chosen a defendant (and successfully sued him), but that defendant is seeking to share the burden of compensation with another person whom the defendant considers is also responsible for the damage.

3.10 The need for paragraph (c), like the need for the earlier paragraphs, arises from the old common law. At common law, one tortfeasor who paid the whole of the damage could not recover any part of the sum from any other potential tortfeasor (whether a joint tortfeasor with the defendant or a tortfeasor whose separate tort had been committed concurrently), unless the other had specifically agreed to contribute to the damages. This was laid down in the old case of Merryweather v Nixan (1799) 8 TR 186. There was no apparent reason for such a harsh rule, but it had become hallowed by time.

3.11 Paragraph (c) of s 19(1), came to the rescue by providing that any tortfeasor may recover contribution from any other tortfeasor who is, or would if sued have been liable in respect of the same damage. So since 1936, where a plaintiff has a choice of defendants in a tort action and opts to sue one (we shall call him D1) but not the other (D2), D1 can recover from D2 a contribution to the damages which he has had to pay to the plaintiff. In fact D1 does not have to wait for the court to hold him liable: the Supreme Court's procedure very sensibly enables D1 to have D2 added as a party to the proceedings between the plaintiff and himself. This enables the judge to consider all the issues raised by the plaintiff's claim for damages and D1's claim for contribution at the same hearing.

3.12 Once a defendant's liability to contribute has been established, the court has a wide discretion as to the amount it can order him to pay. "The amount of the contribution recoverable" says s 19(2) "shall be such as may be found by the court to be just and equitable having regard to that person's responsibility for the damage." The judge can even exempt a defendant from paying contribution or, at the other extreme, order him to indemnify the other defendant - in other words, in effect to pay all the damages. It may seem rather illogical to say that someone is jointly liable for damage and then order

him to pay all, or none, of that damage. Nevertheless, the court has such a power and it is not uncommon for one defendant to pay all the damage where the injury is really all his fault. This might happen, for instance, where an employee is injured at work through the negligence of some outside contractor engaged by his employer. The employee might well choose to sue his employer, saying that he hired an incompetent contractor, and the employee might well succeed. The employer could then claim contribution from the contractor and, if the employer was in no way to blame for the accident, the contractor would end up footing the bill for the entire award.

What is wrong with s 19?

3.13 Now that we know what s 19 does, it may seem strange that we were ever asked to consider whether it should be changed. It is an explicable and sensible piece of law reform, doing away with the arcane consequences of an archaic legal distinction. Why should anyone say that is wrong?

3.14 The objection is not that s 19 is bad: rather, that it does not go far enough. It deals only with tortfeasors. In other words, s 19 suits very well when both the defendants are liable, or potentially liable, in tort, but it is no good when the action against one or both happens to be classified as some other type of civil wrong. There are several other types of civil wrong. The two most common are breach of contract (where two people have an agreement making promises under which they incur mutual obligations and one of them breaks the agreement) and breach of trust (where, generally speaking, two people reach an agreement under which one of them is entrusted with property for the benefit of some third person and fails to live up to the trust).

3.15 The deficiency in the law is perhaps most easily understood by means of examples. Suppose that a consumer buys an electrical appliance from a shop. The appliance explodes the first time the consumer switches it on in his home. The consumer may sue the shop for breach of contract, claiming compensation for property damage and any personal injury he suffers. The law implies into such consumer sales a term that the goods shall be fit for their purpose and of merchantable quality, which the appliance obviously is not. The shop cannot prevent such terms being part of the contract and the liability for breaking them is strict: it is no answer for the shop to say that it was not its fault but the fault of the manufacturer. Of course, the consumer might accept that the shop, though liable in law, was not really to blame and instead sue the manufacturer. But he is unlikely to do so because he has no contract with the manufacturer and therefore he does not have the benefit of implied terms: any liability will be in tort, for negligence. The consumer will have the difficult task of proving that the manufacturer was negligent. So instead he sues the shop and obtains damages. The shop cannot demand that the manufacturer pays a contribution to those damages. Section 19(1)(c) does not apply because the shop is liable in contract, not tort. The paragraph says any tortfeasor may recover contribution from any other

tortfeasor who is or would be liable in respect of the same damage. But the shop is not a tortfeasor. To obtain compensation, the shop will have to start a separate action for breach of contract against its supplier and the supplier in turn will have to start an action against its own supplier and so on up the chain of distribution until the manufacturer is reached.

3.16 A similar obstacle may face a defendant in a dispute over a building contract. This is in fact the context in which the limitations of s 19 are most usually discussed and are likely to have the most extensive (and expensive) consequences. Suppose a developer engages an architect to draw up building plans and supervise the construction work. The developer separately employs a builder to carry out the work under the architect's supervision. The builder carries out the work badly and the architect fails to see that it is defective. The developer later has to spend a lot of money putting the defects right. He sues, let us say, the architect for breach of contract. The architect will have to pay the whole of the damages. There will be no right of contribution under s 19 by which the architect can force the builder to shoulder some of the burden because the architect is not a tortfeasor. Neither, for that matter, is the builder, so if the developer sued him instead, he would not be able to claim contribution from the architect.

3.17 The trouble with s 19 therefore is that it talks only in terms of tortfeasors. The reason why it is so limited is apparently that the 1935 Act which, as we have seen, s 19 follows, emanated from a report by the (now defunct) Law Revision Committee which was concerned only with contribution between tortfeasors and the abolishing of the common law rule preventing a plaintiff from suing more than one joint tortfeasor. Contribution between wrongdoers who were not tortfeasors (or one of whom was not a tortfeasor) was outside the committee's terms of reference. So a gap was left in the legislation - and that gap remains in Hong Kong.

3.18 For these reasons, we are of the view that the existing law relating to contribution is in need of reform.

3.19 In deciding how to reform the law of contribution it was natural for us to consider the position in England. In 1978, following a report of the Law Commission, the Civil Liability (Contribution) Act was passed. This Act in effect extends the contribution provisions of the earlier legislation to all wrongdoers. As a result, the problems of the defective appliance and the negligent building work no longer arise in England. In addition the Act brought in many minor alterations dealing with rather technical aspects of the law of contribution. Inevitably the 1978 Act has been at the centre of our deliberations, for it is quite sensible to interpret our terms of reference as in effect asking: should Hong Kong enact the same statute as that which England now has?

3.20 We now propose to look in detail at the reforms effected in England, and to consider whether they should be followed in Hong Kong. Throughout this discussion we will, for convenience, refer to the plaintiff as P;

the defendant claiming the contribution as D1; and the person from whom contribution is claimed as D2.

Chapter IV

Should the bar to proceedings be removed?

Release by judgment

4.1 One of the main objectives of the 1978 Act was to remove the bar which prevents plaintiffs from suing persons other than tortfeasors who are jointly liable with a defendant. This was achieved by extending the equivalent of our s 19(1)(a) so that it applies not just to any tortfeasor but also to "any person liable in respect of any debt or damage." The new provision is in section 3 of the 1978 Act, which reads :

"Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage."

We have underlined the words which have been changed or added by the 1978 Act. The wording is precisely that recommended by the Law Commission in clause 1 of their draft Bill published in their 1977 Report on Contribution (Law Com. No. 79).

4.2 There has never been any doubt in our minds that this main objective of the 1978 Act is desirable. There is no cogent reason why paragraph (a) of s 19(1) should be limited to tortfeasors. It merely follows the 1935 Act in England, and that Act was so limited only because the terms of reference of the committee recommending the changes did not extend to considering wrongdoers other than tortfeasors. The 1978 reform is therefore welcome.

4.3 Section 3 of the 1978 Act also clarifies a point on which judicial doubt had been raised (by Lord Denning MR in Bryanston Finance v De Vries [1975] QB 703, 722) as to whether paragraph 19(1)(a) applied to a single action against two or more persons as well as to successive actions. The words make it plain that the new provision does apply to a single action.

4.4 Section 3 therefore extends the plaintiff's options. It has been pointed out in some of the commentaries on the legislation, however, that it exposes a second defendant to a risk. The section permits P, having sued D1 successfully, to bring an action also against D2, even though D1 may find himself paying out contribution by virtue of the extension of paragraph (c) and then being held liable to P in respect of the same damage. In order to safeguard D2 in this situation there was a proposal in Parliament that

payment of contribution by D2 should bar P's claim. This was later withdrawn and the matter was referred to the Supreme Court Rules Committee to see if the procedural rules could be amended so that a person seeking enforcement of an award made in contribution proceedings could not do so without leave of the court. These rules are now in Order 16 rule 7(2) and (3) of the 1982 edition of the Rules of the Supreme Court. We therefore recommend that section 3 of the 1978 Act should be introduced in Hong Kong, subject to an amendment to the Rules of the Supreme Court along the lines of those in England.

Release by accord and satisfaction

4.5 If our recommendation is implemented, the doctrine of release by judgment will be abolished in Hong Kong. There is a similarly ancient doctrine, that of discharge of an obligation by release under seal or by accord and satisfaction. Where a plaintiff settles with one of two or more defendants he may discharge that defendant either by release or by a covenant not to sue. The distinction between these two concepts is crucial since if the settlement is by covenant not to sue, it does not prevent the plaintiff from proceeding against the other defendants. If it is by release, then the other defendants are released as well, once the settlement is satisfied. It is rather like the old, harsh law that judgment against one joint tortfeasor released the other joint tortfeasor(s) from liability, except that release by judgment operated even where the judgment had not been satisfied.

4.6 The Senate of the Inns of Court and the Bar, in its submissions to the Law Commission, felt that this technical and unmeritorious distinction between a release and a covenant not to sue should be abolished. It has been abolished in Eire and Tasmania. Lord Denning has suggested that the rule regarding release is obsolete (Bryanston Finance v de Vries [1975] QB 703 at 723). But the Law Commission refused to grasp the nettle. They felt that it would raise issues going beyond contribution.

4.7 The question is whether we should be bolder. We think that the fundamental objection which practising lawyers have to the distinction between a release and a covenant not to sue is that, as Lord Denning has said, it is a trap into which it is easy for the unwary to fall. A plaintiff may find that by settling with one defendant he has unwittingly released all the other potential defendants. In our view, the law should not set such traps. Nevertheless there are good reasons for retaining the distinction between a settlement which only discharges one defendant, and a settlement which releases all potential defendants. A way to retain that distinction, but eliminate the trap, is found in the Tasmanian Tortfeasors and Contributory Negligence Act of 1954. This deals only with tortfeasors, but it could equally be adapted to other types of wrongdoers. Section 3(3) states that -

"a release of, or accord with, one joint tortfeasor granted or made by a person by whom the damage is suffered does not

discharge another joint tortfeasor unless the release so provides."

4.8 This does seem to us to be a satisfactory approach because then it is open to the parties (ie. P and D1) to agree whether or not it should be open to P to pursue his claim against D2. Although it will probably take some time for the impact of the legislation which we are proposing to reach the legal profession it does mean that D1 when reaching the settlement can incorporate into that settlement a statement that the release discharges all other defendants in the action. It is quite normal in a settlement between a plaintiff and one defendant for there to be an undertaking by the plaintiff that he shall not pursue his claims against the other defendants in that action or in any other actions. All that the Tasmanian legislation does is to require such a clause to be present before the other defendants are discharged.

4.9 We therefore recommend that any reform of the law should include an express provision to the effect that a release of, or accord with, one joint wrongdoer does not discharge another wrongdoer unless the release or accord so provides.

Finality of settlements

4.10 Where P settles with D2 in such a way that D1's liability is not discharged, P may subsequently recover damages from D1. If D1 then claims contribution from D2, how should the law treat this claim? There are at least three possible approaches.

4.11 The first possible approach is to protect D2 from any contribution claim by D1. This by itself would be unfair on D1 where D2's settlement was on the low side.

4.12 The second approach is to reduce P's rights against D1 along the lines of section 3(3) of the Tasmanian Act, so that D1 is only liable to P for, at the most, his own share of the liability. D1 does not then need any right of contribution against D2. Section 3(3) provides that a release of, or accord with, one joint tortfeasor (D2) will reduce the claim of the person by whom damage is suffered (P) -

"(c) in the amount of the consideration paid for the release or accord;

(d) in any amount or proportion by which the release or accord provides that the total claim of that person shall be reduced; or

(e) to the extent that the joint tortfeasor to or with whom the release or accord is granted or made would have been liable to make contribution to another joint tortfeasor if

that person's total claim had been paid by the other joint tortfeasor,

whichever is the greatest."

4.13 An example of the effect of this section may be given. Let us suppose that D1 and D2 are both liable for the same damage to P. D2 settles with P for \$20,000 and obtains a covenant not to sue from P. P then sues D1. The court decides that P suffered \$100,000 damages. P cannot, however, recover the whole of this amount from D1. His damages will be reduced by at least \$20,000 (the amount of the consideration paid for the settlement). The court must also consider the extent to which D2 would have been liable to contribute, had D1 paid the damages in full. If, for example, D1 and D2 were regarded as equally responsible for the damage, D2 would have had to contribute \$50,000. P's damages would then be reduced by that sum, it being greater than the amount actually paid.

4.14 In the preliminary report of the sub-committee, they doubted whether the second approach was workable. It was feared that in the proceedings between P and D1 the court would not be in any position to determine the responsibility of D2. Several commentators disagreed with this view and pointed out that D2 could be subpoenaed either by P, who would be anxious to minimise D2's contribution, or by D1, who would try to maximise it. It was also argued that even without any evidence from D2 there will usually be sufficient evidence to assess D1's actual degree of blame.

4.15 The main argument in favour of the second approach is that it would protect D2 from any further liability after he has settled with P, without prejudicing D1. There would thus be a greater incentive for D2 alone to settle with P than at present. Under the present law, and the third approach, D2 is still exposed to the risk of further litigation by D1 after a settlement with P and so has little incentive to settle.

4.16 A further argument against the second approach was, however raised by one commentator. This argument is based on two fundamental principles :

- (a) joint wrongdoers are liable to a plaintiff for his whole loss, and
- (b) how the plaintiff's bill is met is a matter for contribution between the wrongdoers themselves.

Two things may be said to follow from this, namely -

- (i) a joint wrongdoer is necessarily exposed to two separate claims from a plaintiff under (a) and the other wrongdoer under (b). A two party settlement of one or other therefore has no claim to finality beyond its own limits;

- (ii) the second approach materially affects principle (a). The joint wrongdoer is not liable for the plaintiff's loss but only for his share of it. Moreover this new approach does not apply generally but only where there is some prior release of or accord with one wrongdoer.

4.17 This argument against the second approach denies that D2 should be protected from contribution proceedings at the expense of P. It also denies that settlements between P and D2 will be encouraged under the second approach, since P will be unwilling to settle with D2 alone if D2 is impoverished or uninsured and cannot meet his full share of the loss. One comment received by us suggested that the second approach -

"..... is calculated to inhibit settlements and virtually force a plaintiff to take both tortfeasors to Court at the same time. He could be in serious trouble if he cannot find or reach both together. It is calculated to encourage dubious musical chairs tactics from defendants. The apparently innocent or impoverished one will be advanced first; and then armed with a favourable settlement a rather different view of the facts will follow it is calculated to put the Court in an impossible position and lead to dangerous speculation."

4.18 We considered these arguments in some detail and corresponded with those who disagreed with our preliminary view. Our final view is that, as a matter of principle, the second approach should not be adopted. Our view is that, for the reasons set out above, the third approach should be adopted even though this may mean that a settlement between P and D2 is not final. We recommend that where P settles with D2 in such a way that D1's liability is not discharged, it should still be open to D1 subsequently to claim contribution from D2.

Chapter V

Who should be entitled to claim contribution?

Extension of the right to contribution

5.1 Under the present law in Hong Kong, the right to contribution is vested in "any tortfeasor liable in respect of [the] damage" (s 19(1)(c)). As has already been pointed out, this provision is unnecessarily limited.

5.2 The second main objective of the 1978 Act was therefore to widen the scope of contribution beyond tortfeasors to all persons liable in respect of the same damage. This is given effect to by sections 1(1) and 6(1) of the Act -

s 1(1) *".... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)."*

s 6(1) *"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)."*

5.3 We are in complete agreement with this extension of the right to contribution. The present restriction of the right to contribution to tortfeasors cannot be justified on any policy grounds, and is merely an accident of legal history. Furthermore we see this reform as the most important of our recommendations.

The time for ascertaining liability

5.4 It is possible that a person who wishes to claim contribution (D1) may have originally been liable to another person (P), but has ceased to be liable. For example, he may have settled the proceedings brought by P. Since it must be the policy of the law to encourage settlements, D1 should still be entitled to claim contribution from any other person who is also liable to P (ie D2). Section 1(2) of the 1978 Act now makes it clear that this is the position -

"A person shall be entitled to recover contribution ... notwithstanding that he ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which contribution is sought."

5.5 This approach is in line with that recommended by the Law Commission. Although the actual wording differs from that recommended, the final version is, if anything, clearer than the original one. Commentators have found no fault with this provision and we therefore propose that a similar subsection should be introduced in Hong Kong.

5.6 It should perhaps be mentioned that under section 6 of the Limitation ordinance (cap. 347) any claim to contribution must be brought within two years of the claimant being held liable or agreeing to pay a sum in discharge of his liability. It is not proposed to alter this period of limitation, although section 6 would need to be reworded if the law relating to contribution is reformed.

Bona fide compromise

5.7 Under the present law a tortfeasor can claim contribution if he is "liable" in respect of the damage. It has nevertheless been held (in Stott v West Yorkshire Road Car Co [1971] 2 QB 652) that he need not have been held liable by a court. A defendant may therefore make a bona fide compromise of a claim against him and then claim contribution from another person who is also liable for the same damage. However, that contribution claim will fail unless the claimant can establish that he was in fact liable to the party with whom he settled. This requirement means that a defendant has to prove his own liability, which is not only the opposite of the normal position, but may be very difficult in practice.

5.8 The Law Commission therefore recommended that a person who makes a bona fide settlement or compromise of any claim should be entitled to claim contribution even if he was not actually liable to the injured party. This recommendation was given effect to by section 1(4) of the 1978 Act, although the wording of this provision departs from that in the Law Commission Bill.

s 1(4) *"A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that*

the factual basis of the claim against him could be established."

This subsection raises several points for consideration.

5.9 The basic idea is that a defendant who has compromised a claim should still be able to recover contribution. This seems laudable in that it encourages settlement, long accepted as the correct policy for the law to follow in civil litigation. The danger is that the subsection may inadvertently encourage collusive settlements. We have therefore considered whether there is a need for greater safeguards, particularly when one bears in mind the perhaps more robust attitude of businessmen in Hong Kong and the fact that the market here is dominated by several large enterprises. We have in mind the situation in which one large business has a claim against two others. One of the defendants might be tempted to placate the major customer, perhaps settling on generous terms, and then turn to the second defendant for contribution.

5.10 Our aim is to encourage settlements, but at the same time to prevent a second defendant from being prejudiced by a settlement at an excessive figure. We considered the possibility of only allowing settlements reached after legal advice to be the basis of a contribution claim. We have rejected this, however, since it is possible that a bone fide and reasonable settlement might be reached in ignorance of such a requirement. Another possibility would be to provide expressly that a party who settles and then claims contribution must satisfy the court that the amount of the settlement was reasonable. This is done in the Irish legislation (s 22(1)), in Tasmania (s 3(1)(d) Tortfeasors and Contributory Negligence Act 1954) and in the Negligence Act, 1970, of Ontario (s3). Section 22(1) of the Irish Civil Liability Act 1961 reads as follows :-

"Where the claimant has settled with the injured person the claimant may recover contribution in the same way as if he had suffered judgment for damages, if he satisfies the court that the amount of the settlement was reasonable; and, if the court finds that the amount of the settlement was excessive, it may fix the amount at which the claim should have been settled."

A similar provision was considered in the House of Commons but not accepted. The Chief Justice's Law Reform Committee of Victoria nevertheless recommended its adoption. That provision reads as follows -

"On assessing any contribution under sub-section (1) above the Court shall disregard any part of the payment in respect of which the contribution is sought which appears to the Court to be excessive."

5.11 In our view, such a provision is unnecessary. There is already authority to the effect that a person can only make a claim on the basis of a

settlement figure if the amount paid was reasonable (see Biggin & Co Ltd v Permanite Ltd [1951] 2 KB 314, Nash & Dymock Ltd v Chaw Chi-keung [1965] HKLR 1089). Moreover the claimant is required to lead evidence so that the court can come to a conclusion whether or not the sum paid was reasonable. Were we to adopt an express provision similar to those set out above it is possible that a claimant would be required to prove the measure of damages strictly, which would involve a very complicated and expensive enquiry. This in turn might discourage settlements, which would be undesirable.

5.12 The possibility of collusive settlements occurring was not overlooked by the English Law Commission (see Law Com No. 79, paras 52-57). Their view was that it was sufficient to provide that contribution should be recoverable only by a person who has made a bona fide compromise of a claim. It should also be remembered that in tort cases the real defendants are usually insurers who would have no interest in collusion. In any event the claimant (D1) can only recover contribution from the defendant (D2) if he establishes that D2 was liable to P. Finally, as has already been stated, the settlement must have been bona fide and the amount paid reasonable. We conclude that the English provision should be adequate to deal with the problem of collusive agreements.

5.13 A second point on s 1(4) is that it is limited to situations where the settlement is in the form of payment. While this is appropriate to settlements of tort claims, in contract the settlement may involve the defendant performing some service, such as repairs, for the plaintiff. Such a defendant could still claim contribution under subsection (1), though he would have to prove his liability for the damage. But, in settling, his liability would have ceased and, although s 1(2) says a person is entitled to recover compensation notwithstanding that he has ceased to be liable, he will run up against the proviso that he must show he was liable immediately before he agreed to make the payment. The solution, we feel, is to include a definition of 'payment' in the interpretation section of any Hong Kong legislation which will make it clear that payments in kind or by way of service are included, provided their value can be quantified.

5.14 The third and last aspect of s 1(4) which calls for consideration is the wording at the end. There is a proviso to the effect that the claimant must have been "liable assuming that the factual basis of the claim against him could be established." This was inserted at the Committee stage of the Bill. We were told by the Law Commission that it was meant to emphasise the bona fide element of the settlement and to exclude settlements abroad. Thus if D1 settles with P in a situation where D1 was clearly not liable to P, even if P could establish the facts relied upon, D1 could not claim contribution from D2. Similarly if D1 settles with P in a situation where D1 would be liable to P under a foreign legal system but would not be liable if sued in Hong Kong, D1 again could not claim contribution from D2. We agree with the policy behind this provision.

5.15 There is, however, one other effect of the proviso to section 1(4). In some disputes there is uncertainty as to the state of the law. D1 may settle with P in order to discharge a possible liability and then claim contribution from D2. If the court then decides as a matter of law that D1 would not have been liable to P, even if the alleged facts were true, then D1 is precluded from obtaining contribution from D2. As a result it may be argued that the proviso to section 1(4) will discourage settlements in situations where the law is unclear.

5.16 We have considered whether the law in Hong Kong should go further than that in England so that D1 could claim contribution even though he would not have been liable on the basis of the alleged facts. The difficulty with such an approach would be that it might encourage collusive settlements. The English provision is already an improvement on the present law, under which D1 must prove not only that the law was against him, but also that the facts were as alleged. Section 1(4) therefore encourages settlements but stops short of making D1's liability completely irrelevant. In the end we have concluded that it is a satisfactory solution and should be adopted in Hong Kong.

Limitation period for actions for contribution

5.17 We will be recommending below that D1 should be entitled to claim contribution from D2 notwithstanding the fact that P's remedy against D2 has become time-barred. A related question is the period within which D1 must bring his own claim for contribution against D2. The present law is that the action must be commenced within two years from the date when D1 was held liable to, or settled with P. As a result, D2 may actually be sued by D1 many years after P's remedy against D2 has become statute barred. For example, if P suffers personal injuries as a result of the joint negligence of D1 and D2, P has three years in which to issue his writ. He may bring proceedings against D1 shortly before that period expires, and obtain judgment against him in, say, a further two years' time. D1 then has a further two years in which to bring his claim for contribution against D2. A total of nearly seven years may therefore have elapsed after the injury to P before any claim is made against D2.

5.18 This theoretical problem was discussed by the Law Commission in its Working Paper and the comments received were passed on to a separate body, the Law Reform Committee, which was at the time considering limitation periods. That Committee made its final report in 1977 (Cmnd 6923) and referred to the evidence collected by the Law Commission in the following terms (para 3.34) -

"With one or two exceptions it confirms the view which we ourselves have formed that, despite the theoretical possibility of a long period from the original cause of action, [the present law] causes few problems in practice and that there is no compelling

case for abandoning it in favour of the more complex solutions adumbrated by the Law Commission. It is rarely necessary to invoke [the limitation provision] because well-advised plaintiffs in practice sue all likely defendants, and if one only is sued, he is quick to suggest that others are really to blame."

The law in England has not therefore been changed.

5.19 There seems no doubt that a claim for contribution might, in theory, be made against D2 many years after the events which gave rise to his liability. The responses to the sub-committee's preliminary report did not, however, indicate that this is a problem which has arisen in Hong Kong. We therefore do not consider that this is a problem which is sufficiently real for it to be specifically dealt with. We consider that the present limitation period for actions for contribution is satisfactory.

Chapter VI

From whom should contribution be recoverable?

6.1 Under the present law, contribution may be recovered from "any other tortfeasor who is, or would if sued have been, liable in respect of the same damage" (s 19(1)(c)). It has already been explained that the 1978 Act has widened the right to contribution by making it available not only from tortfeasors but from any person liable for the same damage.

The time for ascertaining liability

6.2 Another difficulty has arisen from the present statutory provision. The phrase "who would if sued have been liable" is rather unclear, since the time of the hypothetical action is not stated. It is possible that a claim is presently time barred but would have been successful if proceedings had been brought earlier. Which date is the relevant one? The words have been interpreted to mean if sued "at the time most favourable to the plaintiff" (Geo. Wimpey & Co Ltd v BOAC [1955] AC 169, 190) or "at any time" (Harvey v R.G. O'Dell Ltd [1958] 2 QB 78, 109). The Law Commission approved of this interpretation, and suggested that a new provision should specify that contribution should be recoverable from any person who was liable to the injured party at the time when the damage occurred. We agree with this approval. The 1978 Act provides in section 1(3) 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."

6.3 If, therefore, D2 has ceased to be liable to P because of a settlement between them, this does not prevent D1 from subsequently claiming contribution from D2. Where D2 has ceased to be liable to P because of the expiry of a period of limitation the position is more complicated. Section 1(3) allows D1 to recover contribution from D2 unless D2 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 was based. At first sight, it might be thought that D1 cannot recover contribution from D2 if P's claim against D2 is statute-barred. Such a result would be the opposite of that intended by the Law Commission and by ourselves. In fact this is not the case, since most periods of limitation do not extinguish the right of the plaintiff, but only bar the remedy. For example, let us suppose that P is injured by the

combined negligence of D1 and D2 on January 1, 1980. On December 1, 1982, P recovers judgment against D1. P's cause of action against D2 become statute-barred on the last day of 1982, but D1 can still recover contribution from D2 after that date provided he starts proceedings within two years of the judgment against him. (Any claim of contribution has a limitation period of two years.) This result is thought to be satisfactory. Only in exceptional cases will D2 be able to defeat D1's claim by showing that P's right against D2 has been extinguished by a period of limitation or prescription. This will be the case where P's right was to recover land from D2 or to sue D2 for the conversion or wrongful detention of goods. In those cases, the expiration of the period of limitation has the effect of extinguishing P's title to the land or goods, and D1 could not subsequently recover any contribution from D2.

6.4 Thus explained, subsection 1(3) gives effect to our proposal, but we feel that the subsection could have made the meaning clearer. We conclude that the principle incorporated in the subsection should be adopted in Hong Kong but that consideration be given to the possibility of redrafting the provision to make its meaning clearer.

Double jeopardy

6.5 Section 19(1)(c) of Cap 23 allows contribution to be recovered only from a person who would if sued have been liable in respect of the damage. This has been interpreted to mean that contribution is not available from someone who has already been sued unsuccessfully by the injured party. This is just what occurred in Wimpey v BOAC [1953] 2 QB 501 where the parties had both been defendants in a suit by an employee of BOAC. The employee had won damages from Wimpey, but not from BOAC because the period of limitation had expired. Wimpey claimed contribution from BOAC and failed because BOAC had already been sued and held not liable. The statute's wording does not allow one defendant to open up the case against another defendant again.

6.6 The Law Commission was of the view that a distinction should be drawn between the situation where P has sued D2 and lost on the merits, and that where P sued D2 and failed on a 'technicality,' such as a time bar. In the former case, it was recommended that D1 should not be allowed to reopen the question of D2's liability to P, but in the latter case he could. Their draft clause read as follows -

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

the fact that the action was brought after the expiration of any period of limitation applicable thereto)."

6.7 We agree with this approach to the problem. The provision which appears in the 1978 Act is, however, rather different. Section 1(5) states that -

"A judgment given in any action brought ... by ... the person who suffered the damage in question against any person from whom contribution is sought ... shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought."

This means that if P sues D2 and obtains judgment, D1 cannot re-open any issue determined in favour of D2 when he (D1) claims contribution from D2. Since D1 cannot re-open 'any issue', he will not be able to challenge a finding that D2 was not liable to P because of some technicality, such as that P's claim was time-barred. Again this provision seems to have the opposite effect to that which we intend. D1 should be able to recover contribution from D2 even if P's claim against D2 has been held to be time-barred. But when read in conjunction with subsection 1(3), the effect of subsection 1(5) is more restricted than it first appears. The result of subsection 1(3) is that (in most cases) D2 will be liable to make contribution to D1 notwithstanding that he has ceased to be liable since the time when the damage occurred. Therefore a decision in proceedings between P and D2 to the effect that D2 is not liable because the proceedings were brought too late will not prevent D1 from establishing D2's liability under subsection 1(3). D1 cannot re-open the decision that D2 was not liable to P because of a time bar, but he may still establish that D2 is liable to D1 'notwithstanding that [D2] has ceased to be liable.' D1 will only be precluded from claiming contribution from D2 by a decision in an action between P and D2 to the effect that D2 had never been liable or had ceased to be liable because P's right had been extinguished by virtue of the expiry of a period of limitation or prescription.

6.8 The end result seems to us to be satisfactory. The Law Commission draft clause 3(7) is, however, easier to follow. Their draft expressly states that D1 would not be bound by any judgment obtained by D1 which was not a determination of the merits of the claim but was based for example on the fact that the action was brought after the expiration of the period of limitation. However, we are reluctant to recommend the use of that draft for two reasons. In the first place, the phrase 'determination of the merits' is a vague concept and might lead to problems of interpretation. Secondly, the Law Commission clause formed part of a general scheme towards contribution, and that scheme was not followed in the Act.

6.9 We conclude that section 1(5) should be adopted in Hong Kong. We are hopeful that the obscurity of the section will be removed as a result of commentaries on the legislation.

Chapter VII

The place of liability

7.1 Under the existing law, contribution is available where more than one tortfeasor is liable in respect of the same damage. The statutory provision (s 19(1)(c) of LARCO) does not, however, specify the system of law under which such liability must arise. Section 1(6) of the 1978 Act now provides that -

"Reference ... to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales."

7.2 If the 1978 Act is followed in Hong Kong, the obvious amendment would be to replace references to "England and Wales" with "Hong Kong." The effect of the provision would then be that a person is only regarded as "liable" under the new law if his liability could be established in the courts of Hong Kong. It would, however, be immaterial whether that liability was, because of its proper law, governed by some foreign law. Where a claimant for contribution seeks the assistance of the law in Hong Kong it seems only right that the liabilities involved in the claim should be recognised by the courts in Hong Kong. We therefore suggest that section 1(6) be adopted in Hong Kong, subject to the substitution of "Hong Kong" for "England and Wales."

Chapter VIII

The amount recoverable

8.1 The amount recoverable by way of contribution under the present law is governed by section 19(2) of LARCO -

"... 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."

The Law Commission approved of this flexible approach, and accordingly this provision has been effectively re-enacted in section 2(1) and (2) of the 1978 Act.

Limited liability

8.2 Subsections (1) and (2) of section 2 are, however, subject to a new subsection -

(3) *"Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person from whom the contribution is sought was or would have been subject to -*

(a) *any limit imposed by or under any enactment or by any agreement made before the damage occurred;*

(b) *any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976; or*

(c) *any corresponding limit or reduction under the law of a country outside England and Wales;*

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a

greater amount of those damages as so limited or reduced."

8.3 In other words, where D2 has limited liability under statute or a clause in his contract with P, he shall not be required to pay more than that limited liability in contribution proceedings brought by D1. Similarly, if he would have been able, had he been sued by P, to claim a reduction on the ground of P's contributory negligence, or under the law of another country, he will not be ordered to pay more to D1 than he would have had to pay to P.

8.4 An example given by the Law Commission illustrates how this would work:

"P buys a car from D1 which has a latent defect in its electrical system. As he is driving it one night the headlights suddenly go out and he runs into an obstruction in the highway that D2 has negligently left unlit. P sues D1 and D2. There is a clause in the contract between P and D1 that sets a ceiling of \$400 on any claim that P may make for breach of contract."

It is further assumed that the damage caused amounts to \$1,000 and that D1 and D2 were equally to blame for the accident. Applying section 2(3) of the 1978 Act, the loss of \$1,000 must be divided equally between D1 and D2, subject to the limit on the amount of D1's overall liability set by the clause in the contract. The result would be that D1 would bear \$400 and D2 \$600.

8.5 There are at least two other ways of dealing with the situation where D1's liability is limited or reduced. Applied to the hypothetical facts given in the preceding paragraph, they are -

- (i) D1 pays P \$400; D2 pays \$500 and the balance of \$100 cannot be recovered from either.

The objection to this is that P loses his right to recover his loss in full, and this unduly benefits D2.

- (ii) Contribution is limited to the amount by which the two claims overlap (\$400), and D2 pays the balance. Thus D1 would pay \$200 and D2 \$800.

We think this unduly favours D1, who has caused \$1,000 worth of damage and yet is only liable to \$200.

8.6 The solution adopted in the 1978 Act was supported by those who responded to the Law Commission's working paper and appeals to us as the most satisfactory approach. We recommend that it be followed in Hong Kong.

Contributory negligence

8.7 There is one aspect of s. 2(3) which we think requires further consideration. The problem arises when P contributes to the damage he has suffered, but one of the defendants (because he is sued for breach of contract) cannot rely on contributory negligence as a defence. The example of this given by the Law Commission is:

"P buys a car from D1 which has a latent defect in its electrical system. As he is driving home one night, he runs into an obstruction in the highway that D2 has negligently left unlit. P was driving negligently and, vis-a-vis D2 is 40% to blame for his injuries. P suffers \$1,000 of damage."

Now, if P were to sue D2, he would recover \$600. But if he were to sue D1 for breach of the implied condition under the contract of sale he would, if successful, recover \$1,000: D1 could not set up P's contributory negligence as a partial defence because the contributory negligence provisions in LARCO (s.21) are framed in terms of fault:

"Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person ... the damages recoverable ... shall be reduced to such an extent that the court thinks just and equitable .. "

P has suffered damage partly as a result of his own fault, and partly as result of D2's fault - but it is not so clear that he has suffered partly as a result of D1's fault, at least not in the legal sense. Fault is defined as "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort". D1's liability is not based on fault, that is, negligence, with regard to the car's electrical system. His liability is based on strict liability for selling an unmerchantable car which is unfit for its purpose: he is liable notwithstanding that he has not been negligent. Ironically, therefore, it seems he cannot set up P's negligence to reduce his damages.

8.8 This is undoubtedly a defect in the law of contributory negligence, but the Law Commission fought shy of tackling it, saying that the ramifications would be too far-reaching. They were scolded for this by the Senate of the Inns of Court and the Bar in their submissions on the working paper which preceded the report. The Senate felt it was impractical to treat contribution and contributory negligence separately:

"Both principles are concerned with the apportionment of loss or liability and in practice both frequently fall to be considered in the same action. The apportionment of liability for a plaintiff's loss, whether as between him and the defendant or defendants, on the one hand, or as between two or more defendants, on the other hand, appears to us to be no more than two facets of the same basic problem."

We have considerable sympathy for this view, but are somewhat daunted by the consequences of following it. A reform of the whole law of contributory negligence is hardly a simple task and is anyway strictly outside our terms of reference insofar as any reform would not touch on the law of contribution.

8.9 It should be added that there may be circumstances in which a contractor like D1 can rely on contributory negligence as a partial defence. Since s 21 (1) of LARCO speaks only of fault and not of tortious liability alone it is open to the courts to interpret it as applying to breaches of contractual duties of care, that is, duties not to act negligently. This at least is the view of Professor Glanville Williams in his book Joint Torts and Contributory Negligence. He is supported by dicta in some English decisions, the most recent of which is De Meza v Apple [1974] 1 Lloyd's Rep 508, though the point was left open on appeal, [1975] 1 Lloyd's Rep 498. Dugdale and Stanton, in their recent book Professional Negligence, conclude that the balance of English authority favours the application of the apportionment provisions to breaches of contractual duties of care, but that on balance the Commonwealth authorities do not. The authors themselves suggest that the provisions should be applicable because the courts feel that as far as possible contract and tort rules should produce the same result when applied to the same facts. We sympathise with this view and hope that any Hong Kong court would choose the English preference, perhaps on the basis of taking the "fair, large and liberal" interpretation of the statutory words urged by section 19 of the Interpretation and General Clauses Ordinance.

8.10 Professor Treitel, however, in his treatise on the Law of Contract, has reservations about the applicability of contributory negligence to contract claims. He points out that 'negligence' in the definition of fault in s. 21 could be interpreted as meaning negligence in its tortious sense, and so a breach of contractual duty of care would not come within the contributory negligence defence unless it also happened to amount to the tort of negligence. This view receives support in several Australian decisions and so we cannot confidently say that contributory negligence is a defence to a claim in contract. Many such breaches would in fact also be tortious for instance between professional men and their clients, carrier and passenger, employer and employee, bailor and bailee and occupier and visitor. Indeed, the tort of negligence is expanding at such a furious rate that the problem may be more apparent than real. Even in rare circumstances such as those envisaged in the Law Commission's example, we are inclined to think that the court's ingenuity may be equal to the challenge. If P were to sue D1 and obtain the full \$1,000 (because D1's liability is strict), D1 could look to D2 for contribution under the new provisions and the court could apportion liability between them, subject to the restriction of D2's liability to \$600. As between D1 and D2 the result does not seem to us so harsh, even though P is not penalized for his carelessness. The result, of course, would be even fairer if P sued D2 first because then his contributory negligence would be reflected in the damages and D1 would end up paying part of a smaller sum.

8.11 In short, we suspect that if we were to follow the Law Commission and refuse to open up the entire topic of contributory negligence, the consequences would not be calamitous. We are reluctant to rush in where they have feared to tread, and we decline to do so.

Contribution and indemnity

8.12 Under the present Hong Kong legislation, no person is entitled to recover contribution from a person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought (LARCO, s 19(1) (c)). This principle was applied in a local case which went on appeal to the Privy Council (Stanley Yeung Kai Yung v The Hong Kong and Shanghai Banking Corp [1980] HKLR 195). In that case the bank had registered a transfer of shares on the basis of forged transfers. The bank was therefore liable to the true owner of the shares and had to restore his name to the register and compensate him for his loss. In turn, the bank sued the appellants who had presented the forged transfers to it for registration and it was held that the appellants, by requesting the transfer, had impliedly agreed to indemnify the bank if such transfer rendered the bank liable to a third party. The bank therefore recovered the whole of its loss from the appellants. The Privy Council held that even if the bank and the appellants were joint tortfeasors as against the true owner of the shares, the appellants could not claim contribution from the bank since section 19(1)(c) of LARCO precluded this.

8.13 The 1978 Act contains a provision similar to section 19(1)(c). Section 7(3) provides (inter alia) that -

*"... nothing in this Act shall affect -
(a) any express or implied contractual or other right to indemnity ..."*

It would seem, therefore, that the case referred to in the preceding paragraph would be decided in the same way under the 1978 Act.

8.14 We have considered whether the court should have the power to award contribution notwithstanding the existence of a right to an indemnity. The decision of the Privy Council referred to in the previous paragraph might be thought by some to be harsh on the appellants since they could not have claimed contribution from the bank even if the appellants and the bank were jointly liable for the loss to the plaintiff. However, it is dangerous to conclude from one hard case that all rights of indemnity should be interfered with. Many important commercial transactions involve indemnity agreements and if such agreements could be reopened on the basis of a claim for contribution much uncertainty and litigation would be created. The law relating to forged share transfers may be in need of reform but we believe it should not be achieved by extending the right of contribution. We therefore recommend that paragraph (a) of section 7(3) should be adopted in Hong Kong.

Chapter IX

Discouragement of successive actions

9.1 It will be recalled that paragraph (b) of s.19(1) contains two deterrents to the "gold-digging" plaintiff, the "damages sanction" and the "costs sanction" (see paragraphs 3.7-8 above) . If our view is approved and release by judgment is abolished in actions other than tort, should these two sanctions be extended to cover all plaintiffs? The Law Commission's view was that the costs sanction should, but the damages sanction should not. Furthermore the Commission recommended that the damages sanction should be abolished in relation to joint tortfeasors. They felt that the costs sanction is less complicated than the damages sanction and easier to justify because it gives the court a discretion: the plaintiff will receive his costs if the court thinks there was a reasonable ground for bringing the subsequent action. Sometimes it is impracticable to sue defendants in the same proceedings because, for example, some potential defendants may be hard to trace, and it would therefore be unfair automatically to penalise the plaintiff in costs. Also the damages sanction can work unfairly, especially if one defendant is liable in contract and the other in tort. The plaintiff may have to sue the contractor first and the contract may contain a limitation of liability clause. If the plaintiff then sues the other defendant in tort, that defendant would receive the benefit of the limitation for no better reason that he was sued second, rather than first. Besides, the damages sanction was introduced partly because of the risk of inconsistent jury awards in the days when juries were widely used in civil actions. As in England, juries are hardly ever used in civil cases in Hong Kong, so this justification has gone.

9.2 We recommend that any Hong Kong legislation should follow the 1978 Act and abolish the damages sanction, leaving the costs sanction (extended to all civil matters) to provide the stimulus towards consolidated actions. The costs sanction is preserved by section 4 of the 1978 Act.

Chapter X

The law in other jurisdictions

10.1 In the course of deliberations, we considered the situation in several other jurisdictions. These fell roughly into 3 categories as follows: -

- (a) no legislative intervention;
- (b) legislation propounding the principles of the 1935 English Act; and
- (c) other legislative intervention.

No Legislative Intervention

10.2 Our research showed that Antigua (up to 1977), the Bahamas (1978) and Trinidad and Tobago (1980) had no legislation comparable to either the Law Reform (Married Women and Tortfeasors) Act 1935 or to the Civil Liability (Contribution) Act 1978.

Legislation applying the principles of section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935

10.3 We have been able to ascertain that the countries listed in annexure 6 have followed the 1935 English legislation and in particular have applied the principles set out in section 6.

Australia

10.4 Australia, being a federation of states has approached the question on a jurisdiction by jurisdiction basis. In all of the jurisdictions legislation containing the principles of the 1935 English Act has been enacted.

10.5 As pointed out above, the Tasmanian Parliament struck a different balance in its Tortfeasors and Contributory Negligence Act 1954 to safeguard against collusion on settlement of claims. We are aware of recommendations by the Victorian Chief Justices Law Reform Committee made in 1979 to amend the Victorian Act to adopt some of the 1978 English Act provisions but have been unable to ascertain whether any legislative action has been taken yet.

Other Legislative Intervention

Canada

10.6 Canada like Australia has a multiplicity of jurisdictions. The Uniformity Commissioners in 1924 suggested legislation to overcome the harsh common law rules. Alberta, British Columbia, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island and Saskatchewan have followed the amended uniform act with differing adaptations. Manitoba has its own Act which combines the English Act and other provisions for apportioning fault for contributory negligence. Alberta, New Brunswick and Nova Scotia include provisions similar to section 6 of the 1935 English Act.

10.7 The Uniformity Commissioners have considered the question of contribution at their 61st annual meeting (August 1979, Saskatoon, Saskatchewan), 62nd annual meeting (August 1980, Charlottetown, P.E.I.), and at the 63rd annual meeting (August 1981, Whitehorse, Yukon). These deliberations were of assistance to us.

Ontario

10.8 The Negligence Act 1960, section 2(1) provides that where damages are caused or contributed to by the fault or neglect of two or more persons the court shall determine the degree to which each is liable. These persons are then jointly and severally liable to the injured party to the full extent of the damages but between themselves only liable to the degree so found by the court.

10.9 Sections 2(2) and (3) provide modifications to the general rule in section 2(1) as it applies to motor vehicle accidents and actions involving married persons.

10.10 The right to recover between tortfeasors is set out in section 3. Provision is made for adjustment between tortfeasors of the amount of a settlement by one tortfeasor where the settlement amount is found to be excessive.

10.11 Apportionment for contributory negligence by a plaintiff is covered by section 4. Section 5 deems contribution to be 50/50 where it is impractical otherwise to determine the matter. Joinder of parties is provided under section 6. In trials by jury contribution percentages are questions of fact for the jury (section 7). The costs sanction is retained as a discretion of the court under section 8.

10.12 Section 9 deals with time limitations as a bar to joining or suing for contribution.

England

10.13 The Civil Liability (Contribution) Act 1978, which is examined in detail throughout this report, extends the right to claim contribution by a person liable in damages from any other person liable in respect of the same damages (section 2).

10.14 Section 3 of the Act provides that judgment against one jointly liable wrongdoer does not act as a bar to an action or continuance of an action against a jointly liable person.

10.15 The "costs sanction", well known to the law as a means to lessen the bringing of successive actions against various defendants for the same damage, is maintained by section 4. The plaintiff cannot recover any costs in subsequent actions without first satisfying the court that it was reasonable to bring the subsequent action.

10.16 The Act applies to England, Wales and with slight modification to Northern Ireland. The Act does not apply generally to Scotland.

The Republic of Eire

10.17 The Civil Liability Act 1961 covers survival of causes of action on death, concurrent fault and fatal injuries. The rest of the Act amends the Workmen's Compensation and Air Navigation and Transport Acts as well as abolishing and modifying certain common law rules.

10.18 Part III of the Civil Liability Act 1961, contains comprehensive provisions on the liability of concurrent wrongdoers and contribution between these wrongdoers.

10.19 There are a total of 37 sections. These cover concurrent and vicarious liability, the extent of liability, joinder of defendants, the nature of judgments against concurrent wrongdoers, judgment by default, discharge and estoppel by satisfaction, release and accord, limitation of actions and contribution.

10.20 The scheme is much wider than our terms of reference and while the approach has been of interest and note has been taken of relevant parts, we do not consider it appropriate for us bearing in mind our terms of reference.

Chapter XI

Summary of recommendations

11.1 We set out below a summary of our recommendations.

The general question

11.2 Our terms of reference ask us whether the law relating to contribution between wrongdoers, particularly section 19 of LARCO, should be changed. Our view (see paragraphs 3.13-18) is that it should.

The English model

11.3 We are in general in support of the approach of the English Civil Liability (Contribution) Act 1978. We are of the view that any reform of the law in Hong Kong should be along the lines of that Act.

Areas where the 1978 Act should be followed

11.4 These are the areas where we recommend that the 1978 Act should be followed -

- (a) The rule that a judgment obtained against one defendant releases others who are liable for the same damage should be abolished (paragraphs 4.1 - 4).
- (b) There should be no change in the rule that where a settlement is made with one joint wrongdoer in such a way that the liability of another joint wrongdoer is not discharged a claim for contribution may subsequently be brought against the settling wrongdoer (paragraphs 4.10 - 18).
- (c) The right to contribution should be available wherever two or more persons are liable in respect of the same damage, no matter what the legal basis of that liability is (paragraphs 5.1 - 3).
- (d) A person should be entitled to claim contribution even though he has ceased to be liable to the injured party (paragraphs 5.4 - 6)

- (e) The present limitation period for actions for contribution should be retained (paragraphs 5.17 - 19).
- (f) A person claiming contribution should not be able to reopen any issue determined in proceedings brought by the injured party in favour of the person from whom contribution is claimed (paragraphs 6.5 - 9).
- (g) A person whose liability is limited or reduced should not be required to pay any greater sum by way of contribution (paragraphs 8.2 - 6).
- (h) No attempt should be made in this study to reform the law of contributory negligence (paragraphs 8.7 - 11).
- (i) A reform of the law should not effect any express or implied right to indemnity (paragraphs 8.12 - 14).
- (j) The "damages sanction" should be abolished but the "costs sanction" retained (paragraphs 9.1 - 2).

Areas where we propose to depart from the English approach

- 11.5 (a) It should be provided that a release of, or accord with, one wrongdoer should not discharge another person who is also liable for the same damage unless the release or accord so provides (paragraphs 4.5 - 9)
- (b) A person who makes a bona fide settlement or compromise of a claim should be entitled to claim contribution regardless of whether he was actually liable. However, subsection 1(4) of the 1978 Act should be extended so as to apply where the consideration for the settlement is a payment in kind or services of a quantifiable value (paragraph 5.13).
- (c) A person should normally be liable to make contribution even though he has ceased to be liable to the injured party. However, consideration should be given to a redrafting of subsection 1(3) of the 1978 Act to make its effect clear (paragraphs 6.2 - 4).
- (d) The right to contribution should only arise where persons are liable for the same damage under the law of Hong Kong (paragraphs 7.1 - 2).

Supplementary matters

- 11.6 The following consequential amendments are recommended-

- (a) The Rules of the Supreme Court should be amended to include Order 16 rule 7 (2) and (3) of the English Rules (paragraph 4.4).
- (b) Section 6 of the Limitation Ordinance should be reworded to reflect any change in the law relating to contribution (paragraph 5.6).
- (c) Section 6(2) of the Crown Proceedings Ordinance (Cap. 300) should be reworded to reflect any change in the law relating to contribution.

第十一章 建議摘要

11.1 茲將本委員會的建議撮要臚列如下：

一般性問題

11.2 本委員會職權所須解答的一項問題，就是本港有關過失責任人之間彼此分擔責任的法例，尤其是法律修訂及改革（綜合）條例第十九條，應否修改？本委員會的意見（見第 3.13 至 3.18 段）認為有關法例應予修訂。

作為本港法例藍本的英國法例

11.3 一般來說，本委員會贊同英國一九七八年民事責任（分擔）法的處理方法，並認為香港法例的任何改革，應依循該法例的基本條文規定進行。

應依照英國一九七八年民事責任（分擔）法修改的各方面

11.4 本委員會建議，在下開各方面，香港的法例應依照英國一九七八年民事責任（分擔）法修改：

- (a) 法庭裁定一名被告敗訴後即免除其他須對同一損害負責人士的責任，這條法則應予撤銷。（第 4.1 至 4.4 段）
- (b) 如一名共同過失責任人與原告達成和解協議，而另一名共同過失責任人的責任並未因此得以解除者，後者可於事後要求該達成協議的共同過失責任人分擔責任。這條法則應維持不變。（第 4.10 至 4.18 段）
- (c) 凡兩人或兩人以上須對同一損害負責任，這些人即應有彼此分擔責任的權利，而不論該項責任涉及的是那一門類法律。（第 5.1 至 5.3 段）
- (d) 縱使某人對受害者應負的責任已不存在，仍應有權要求有關人士分擔責任。（第 5.4 至 5.6 段）
- (e) 要求分擔責任訴訟的現行起訴期限應予保留。（第 5.17 至 5.19 段）

- (f) 如受害者曾起訴某人而該人被判得直，則要求該人分擔責任的一方，不得將案中裁定的任何事實重新提出。（第 6.5 至 6.9 段）
- (g) 凡某人須負責任的程度已有限制或減少，則該人不應因被要求分擔責任而致繳付較已限制或減少的責任更大數目的分擔額。（第 8.2 至 8.6 段）
- (h) 這項研究，不應試圖改革有關受害者本身過失的法律。（第 8.7 至 8.11 段）
- (i) 法律的改革，不應對明言或暗示的代償權利有所影響。（第 8.12 至 8.14 段）
- (k) 「賠償金方面的制裁」應予撤銷，惟「堂費方面的制裁」則應予以保留。（第 9.1 至 9.2 段）

本委員會建議不必依循英國法例修改的各方面

- 11.5 (a) 新條文應規定，凡免除一名過失責任人的責任或與該人達成協議，除非有特別聲明，否則不能解除須對同一損害負責的另一人士的責任。（第 4.5 至 4.9 段）
- (b) 凡對一項索償作出真實和解或妥協的人士，均應享有要求他人分擔責任的權利，而不論其本人是否確應負責。不過，英國一九七八年民事責任（分擔）法第一條第(4)款之範圍則應擴大，以適用於達成和解的報酬是以實物或以可確定價值之服務來支付的情況。（第 5.13 段）
- (c) 縱使某人對受害者應負的責任已不存在，通常該人仍須分擔其他過失責任人的賠償責任。不過，當局應考慮將英國一九七八年民事責任（分擔）法第一條第(3)款重行擬訂，使其作用清楚明確。（第 6.2 至 6.4 段）
- (d) 只有根據香港法律有兩人或兩人以上須對同一損害負責時始有彼此分擔責任的權利。（第 7.1 至 7.2 段）

補充事項

11.6 本委員會建議進行下開相應修訂：

- (a) 高等法院規則應予修訂，以包括英國高等法院規則法令第 16 號規則第 7(2)及(3)條在內（第 4.4 段）

- (b) 起訴期限條例第六條的字句應予重寫，以反映分擔責任法例方面的任何改變（第 5.6 段）
- (c) 政府訴訟條例（香港法例第三〇〇章）第六條第(2)款的字句應予重寫，以反映分擔責任法例方面的任何改變。

LAW AMENDMENT AND REFORM (CONSOLIDATION) ORDINANCE
(Cap 23; LHK 1979 ed)

Proceedings against and contribution between joint and several tortfeasors. 1935 c.30, s.6

S 19 (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 dependants, 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 opinion that there was reasonable ground for bringing the action; (Amended, 27 of 1970, s 5)
- (c) any tortfeasor liable in respect of that 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, 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) In this section -

- (a) "dependants" has the same meaning as in the Fatal Accidents Ordinance; and
 - (b) the reference 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 enacted.

(11 of 1936, s 2, incorporated)

CIVIL LIABILITY (CONTRIBUTION) ACT 1978

Proceedings for contribution

Entitlement to contribution

1. (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

(2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

(3) A person shall be liable to make contribution by virtue of subsection (1) above 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.

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

(5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

Assessment of Contribution

2. (1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above 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 in question.

(2) Subject to subsection (3) below, the court will have power in any such proceedings 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) Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to -

- (a) any limit imposed by or under any enactment or by any agreement made before the damage occurred;
- (b) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976; or
- (c) any corresponding limit or reduction under the law of a country outside England and Wales;

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.

Proceedings for the same debt or damage

Proceedings against persons jointly liable for the same debt or damage

3. Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage.

Successive actions against persons liable (jointly or otherwise) for the same damage

4. If more than one action is brought in respect of any damage by

or on behalf of the person by whom it was suffered against persons liable in respect of the damage (whether jointly or otherwise) the plaintiff shall not be entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of the opinion that there was reasonable ground for bringing the action.

Supplement

Application to the Crown

5. Without prejudice to section 4(1) of the Crown Proceedings Act 1947 (indemnity and contribution), this Act shall bind the Crown, but nothing in this Act shall be construed as in any way affecting Her Majesty in Her private capacity (including in right of Her Duchy of Lancaster) or the Duchy of Cornwall.

Interpretation

6. (1) 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).

(2) References in this Act to an action brought by or on behalf of the person who suffered any damage include references to an action brought for the benefit of his estate or dependants.

(3) In this Act "dependants" has the same meaning as in the Fatal Accidents Act 1976.

(4) In this Act, except in section 1(5) above, "action" means an action brought in England and Wales.

Savings

7. (1) Nothing in this Act shall affect any case where the debt in question became due or (as the case may be) the damage in question occurred before the date on which it comes into force.

(2) A person shall not be entitled to recover contribution or liable to make contribution in accordance with section 1 above by reference to any liability based on breach of any obligation assumed by him before the date on which this Act comes into force.

(3) The right to recover contribution in accordance with section 1 above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances; but nothing in this Act shall affect

- (a) any express or implied contractual or other right to indemnity; or
- (b) any express contractual provision regulating or excluding contribution;

which would be enforceable apart from this Act (or render enforceable any agreement for indemnity or contribution which would not be enforceable apart from this Act).

Application to Northern Ireland

8. In the application of this Act to Northern Ireland -
- (a) the reference in section 2(3)(b) to section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976 shall be construed as a reference to section 2 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948 or Article 7 of the Fatal Accidents (Northern Ireland) Order 1977;
 - (b) the reference in section 5 to section 4(1) of the Crown Proceedings Act 1947 shall be construed as a reference to section 4(1) of that Act as it applies in Northern Ireland;
 - (c) the reference in section 6(3) to the Fatal Accidents Act 1976 shall be construed as a reference to the Fatal Accidents (Northern Ireland) Order 1977;
 - (d) references to England and Wales shall be construed as references to Northern Ireland; and
 - (e) any reference to an enactment shall be construed as including a reference to an enactment of the Parliament of Northern Ireland and a Measure of the Northern Ireland Assembly.

Consequential amendments and repeals

9. (1) The enactment specified in Schedule 1 to this Act shall have effect subject to the amendments set out in that Schedule, being amendments consequential on the preceding provisions of this Act.

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

Short title, commencement, and extent

10. (1) This Act may be cited as the Civil Liability (Contribution) Act 1978.

(2) This Act shall come into force on 1st January next following the date on which it is passed.

(3) This Act, with the exception of paragraph 1 of Schedule 1 thereto, does not extend to Scotland.

Sub-committee on the law relating to contribution

(Original Chairman)	Mr. Edmund Y.S. Cheung*	Solicitor
(Second Chairman)	Mr. Robert Allcock**	School of Law, University of Hong Kong
	Mr. Malcolm Merry	School of Law, University of Hong Kong
	Mr. William Lane	Barrister-at-law
(Secretary)	Mr. Jonathan Daw	Attorney General's Chambers
(Secretary)	Mr. Eric Au	Attorney General's Chambers
	Mr. John McPhail	Attorney General's Chambers

* Commission member, retired from sub-committee on May 20, 1982.

** Commission member, appointed Chairman of sub-committee on October 1, 1982.

1. **Writing on the Civil Liability (Contribution) Act 1978:**

- (a) Commentaries
Halsbury, (4th ed) Vol 48, p 357
Current Law Statutes, (1978), Vol 2, (annotations by D.M. Morgan)
- (b) Articles
(1979) 42 Modern Law Review 182 (A.M. Dugdale)
(1978) 128 New Law Journal 1042 (D.M. Morgan)
(1979) 129 New Law Journal 509 (Tom Hervey)
(1978) 122 Solicitors' Journal 799 (Alec Samuels)
- (c) Textbooks
Winfield and Jolowicz on Tort (1979), pp 584-88
Hepple and Matthews, Cases and Materials on the Law of Tort (1981), pp 673-76
Salmond and Heuston on the Law of Tort (1981), pp 419-23
Gatley, Libel and Slander (8th ed, 1981) paras 1138, 1139, 1182, 1183, 1446 and 1447
Clerk and Lindsell, Torts (15th ed, 1982), paras 2-54, 2-57 to 2-64 and 9-63
A.M. Dugdale and K.M. Stanton, Profesional Negligence (1982) Chapter 34
Treitel, Law of Contract (1979) pp 728-30

2. **Other Writing on Contribution**

- (a) Law Reform Reports
England : Law Commission (England) (Law Com. No. 79, 1977)
Victoria : Chief Justice's Law Reform Committee (1979)
South Australia : Law Reform Committee Report.
- (b) Overseas Legislation
Ireland : Civil Liability Act 1961
Tasmania : Tortfeasors and Contributory Negligence Act 1954
Ontario : The Negligence Act 1960
England : Civil Liability (Contribution) Act 1978
- (c) Textbooks
Glanville Williams, Joint Obligations (1949) p 87
Glanville Williams, Joint Torts and Contributory Negligence (1951) p 148

Organisations and Individuals invited to make submissions

(those who responded are marked *)

The Hong Kong Bar Association

* The Law Society of Hong Kong

The Magistrates' Association

The Chinese General Chamber of Commerce

Hong Kong General Chamber of Commerce

Department of Business Management Studies, Hong Kong Polytechnic

* Hong Kong Institute of Architects

* Hong Kong Institution of Engineers

Royal Institution of Chartered Surveyors, H.K. Branch

* Law Commission, England and Wales

* Registrar, Supreme Court

* The School of Law, Hong Kong University

Chief Justice

Sir Alan Huggins

* Hon Mr Justice McMullin

* Hon Mr Justice Leonard

* Hon Mr Justice Li

* Hon Mr Justice Cons

Hon Mr Justice Yang

Hon Mr Justice Silke

Hon Mr Justice Baker

Hon Mr Justice Power

- * Hon Mr Justice Liu
- Hon Mr Justice Mayo
- Hon Mr Justice Rhind
- Hon Mr Justice Mantell
- * Hon Mr Justice Jackson-Lipkin
- Hon Mr Justice Kempster
- * Hon Mr Justice Hunter
- * Hon Mr Justice Jones
- Hon Mr Justice O'Conner
- H.H. Judge Downey
- Mr. Henry Litton, Q.C.
- Mr. Denis K.L. Chang, Q.C.
- * Mr. Arjan H. Sakhrani, Q.C.
- Mr. Kemal Bokhary, Q.C.
- Mr. Anthony R. Dicks
- Mr. Robert C. Tang
- Mr. Andrew K.N. Li
- Mr. Ronny F.H. Wong
- Mr. Raymond Faulkner
- * Mr. William Stone
- Mr. Anthony F. Neoh
- Miss Maria Yuen
- * Miss Audrey Eu
- Mr. Robert Ribeiro

- * Mr. Benjamin Yu
- * Mr. William Waung
- * Mr. E.L. Mumford
- * Mr. Patrick Fung
- * Mr. W.K. Thomson
- Lovell, White & King
- Baker & McKenzie
- * Edmund Cheung & Co.
- Clyde & Co.
- Coward Chance
- Deacons
- Denton, Hall & Burgin
- Fairbairn & Kwok
- Ho & Co., Gallant Y T
- Johnson, Stokes & Master
- Linklaters & Paines
- * Norton, Rose, Botterell & Roche
- Russell & Co., Charles
- Sinclair Roche
- Wilkinson & Grist
- * Woo, Kwan, Lee & Lo
- McKenna & Co.
- Masons & Marriott
- Attorney General
- Solicitor General

- * Law Draftsman
Crown Solicitor
- * Mr. N.T. Kaplan, Q.C.
- * Mr. J. Daw
Mr. P.T. Nunn
- * Mr. G.M. Wheatley
- * Mr. T.H. Solomon
Mr. P. Graham
Miss J.N. Lewis

The sub-committee also wishes to acknowledge the assistance of Mr. Francis L. Rodrigues, a student at the School of Law, University of Hong Kong, in connection with its study of contributory negligence.

**Jurisdictions with legislation based on
section 6 of the Law Reform
(Married Women and Tortfeasors) Act 1935**

<u>Country</u>	<u>Edition of laws</u>	<u>Name of Enactment</u>
Barbados	Cap. 204, 1978 ed.	Joint Tortfeasors Act
Bermuda	1972 ed.	Law Reform (Liability in Tort) Act 1951
Fiji	1975 ed.	Law Reform (Contributory Negligence and Tortfeasors) Ordinance 1955
Gibraltar	Cap. 32, 1978 ed.	Contract and Tort Ordinance
Guyana	Cap. 6:02, 1975 ed.	Law Reform (Miscellaneous Provisions) Ordinance
Jamaica	Cap. 214, 1965 ed.	Law Reform (Tortfeasors) Law
Kenya	Caps 23 and 26, 1970 ed.	Law Reform Act Law of Contribution Act
Malaysia	1978 ed.	Civil Law Act 1956
Malawi	Cap. 5:01, 1976 ed.	Statute (Miscellaneous Provisions) Law
New Zealand	1980 ed.	Law Reform Act 1936
Nigeria	1965 ed.	Civil Liability (Miscellaneous Provisions) Act 1961 Torts Law 1959 Torts Law 1962 Civil Liability (Survival of Actions, Tortfeasors and Contributory Negligence) Law 1957

Singapore	1979 ed.	Civil Law Act
Uganda	1971 ed.	Law Reform (Miscellaneous Provisions) Act 1953
Zambia	Cap. 74, 1977 ed.	Law Reform (Miscellaneous Provisions) Act

A BILL
To

Make new provision for contribution between persons who are jointly and severally, or both jointly and severally, liable for the same damage or debt and in certain other similar cases where two or more persons have paid or may be required to pay compensation for the same debt or damage; and to amend the law relating to proceedings against persons jointly liable for the same debt or jointly or severally, or both jointly and severally liable for the same damage or debt.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

Short title and commencement 1 This Ordinance may be cited as the Civil Liability (Contribution) Ordinance 1984 and shall come into operation on [date about 3 months after enactment to be inserted].

Interpretation
1978 c. 47, s.6
(Cap. 22) 2. (1) In this Ordinance –
"dependants" has the same meaning as in the Fatal Accidents Ordinance;
"action" means an action brought in Hong Kong

(2) Reference in this Ordinance to an action brought by or on behalf of the person who suffered any damage include reference to an action brought for the benefit of his estate or dependants.

(3) A person is liable in respect of any damage for the purposes of this Ordinance 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).

Entitlement to contribution
1978 c. 47 s. 1 3. (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

(2) A person shall be entitled to recover contribution by virtue of subsection (1) notwithstanding that he has ceased to be liable in respect of the damage

in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

(3) A person shall be liable to make contribution by virtue of subsection (1) 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 (and did not merely bar a remedy) on which the claim against him in respect of the damage was based.

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

(5) A judgment given in any action brought by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

- (6) In this section –
- (a) reference to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a place outside Hong Kong;
 - (b) "payment" includes payment in kind or by way of services or other arrangement whatsoever if such payment in kind or services or arrangement has a monetary value reasonably capable of being determined.

Assessment of contribution
1978 c. 47, s. 2

4. (1) Subject to subsection (3), in any proceedings for contribution under section 3 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 in question.

(2) Subject to subsection (3), the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered complete indemnity.

(3) Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to

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(Cap. 23)

- (a) any limit imposed by or under any law or by any agreement made before the damage occurred;
- (b) any reduction by virtue of section 21 of the Law Amendment and Reform (Consolidation) Ordinance; or
- (c) any corresponding limit or reduction under the law of a place outside Hong Kong.

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 3 be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.

Proceedings against persons jointly liable for the same debt or damage
1978 c. 47, s.3

5. Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage.

Successive actions against persons liable (jointly or otherwise) for the same damage
1978 c. 47 s.4

6. If more than one action is brought in respect of any damage by or on behalf of the person by whom it was suffered against persons liable in respect of the damage (whether jointly or otherwise) plaintiff shall not be entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of

the opinion that there was reasonable ground for bringing the action.

Effect of joint liability of release or accord 7. A release of, or accord with, a person liable in respect of any debt or damage, granted or made by a person to whom the debt is due or by whom the damage is suffered, does not discharge another person who is jointly liable in respect of the debt or damage unless the release or accord so provides.

Application to the Crown (Cap. 300) 1978 c. 47, s. 5 8. Without prejudice to section 6(1) of the Crown Proceedings Ordinance (indemnity and contribution), this Ordinance shall bind the Crown, but nothing in this Ordinance shall be construed as in any way affecting Her Majesty in Her private capacity (including in right of Her Duchy of Lancaster) or the Duchy of Cornwall.

Savings 1978 c. 47, s. 7 9. (1) Nothing in this ordinance shall affect any case where the debt in question became due or (as the case may be) the damage in question occurred before the date on which it comes into force.

(2) A person shall not be entitled to recover contribution or liable to make contribution in accordance with section 3 by reference to any liability based on breach of any obligation assumed by him before the date of commencement of this Ordinance.

(3) The right to recover contribution in accordance with section 3 supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Ordinance in corresponding circumstances; but nothing in this Ordinance shall affect –

- (a) any express or implied contractual or other right to indemnity; or
- (b) any express contractual provision regulating or excluding contribution,

which would be enforceable apart from this ordinance (or render enforceable any agreement for indemnity or contribution which would not be enforceable apart from this ordinance).

10. (1) Order 16 rule 7 of the Rules of the Supreme Court is amended by deleting paragraph (2) and substituting the following –

"(2) where judgment is given for the payment of any contribution or indemnity to a person who is under a liability to make a payment in respect of the same debt or damage, execution shall not issue on the judgment without the leave of the Court until that liability has been discharged.

(3) For the purpose of paragraph (2) "liability" includes liability under a judgment in the same or other proceedings and liability under an agreement (of 1984) to which section 3(4) of the Civil Liability (Contribution) Ordinance 1984 applies."

(Cap. 23)

(2) (a) Section 19 of the Law Amendment and Reform (Consolidation) Ordinance is repealed.

(b) Section 21 of the Law Amendment and Reform (Consolidation) Ordinance is amended -

(i) in subsection (3) by deleting "Section 19 (which relates to proceedings against, and contribution between, joint and several tortfeasors)," and substituting the following -

"The Civil Liability (Contribution) Ordinance 1984; and"

(ii) in subsection (5) by deleting "or contributions".

(Cap. 300)

(3) Section 6 of the Crown Proceedings Ordinance is amended by deleting subsection (2).

(Cap. 347)

(4) Section 6 of the Limitation Ordinance is repealed and replaced by the following -

"Time 6. (1) Where under section 3 of the limit for Civil Liability (Contribution) Ordinance 1984 claiming any person becomes entitled to a right to contribution recover contribution in respect of any (of 1984) damage from any other person, no action to recover contribution by virtue of that right shall (subject to sections 22 and 26) be brought after the end of the period of 2 years from the date on which that right accrued.

(2) For the purposes of this section

the date on which a right to recover contribution in respect of any damage accrues to any person (in this subsection referred to as "the relevant date") shall be ascertained as follows, that is to say -

- (a) if the person in question is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall be the date on which the judgment is given, or the date of the award, as the case may be;
- (b) if, in any case not falling within paragraph (a), the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made;

and for the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question."