[HIGH COURT OF AUSTRALIA.]

BITUMEN AND OIL REFINERIES (AUSTRALIA) LIMITED . . . . . Defendant, } Appellant;

AND

COMMISSIONER FOR GOVERNMENT TRANSPORT . . . . . Plaintiff, } Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

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1954, Sydney, *Nov.* 12, 15;

1955, Melbourne, *March* 2.

Dixon C.J., McTiernan, Webb, Fullagar and Taylor JJ.

Tort—Joint tortfeasors—Contribution—Action—Liability—"Tort-feasor liable in respect of . . . damage"—"Liable"—Meaning—Law Reform (Miscellaneous Provisions) Act 1946-1951 (*No.* 33 *of* 1946—*No.* 59 *of* 1951), *s.* 5 (1) (*c*).

Section 5 (1) (*c*) of the *Law Reform (Miscellaneous Provisions) Act* 1946-1951 (N.S.W.) provides "Where any damage is suffered by any person as a result of a tort . . . (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise . . ."

Held (1) that the words "any tort-feasor liable in respect of that damage" in s. 5 (1) (c) refer to a tort-feasor whose liability has been ascertained; (2) that the word "liable" where it first occurs in s. 5 (1) (c) includes ascertainment by judgment.

George Wimpey & Co. Ltd. v. *British Overseas Airways Corporation* (1954) 3 W.L.R. 932, at pp. 934, 935, 940, 947, 948; *Littlewood* v. *George Wimpey & Co. Ltd. and British Overseas Airways Corporation* (1953) 2 Q.B. 501, at pp. 510, 511, 519, 523, discussed.

Decision of the Supreme Court of New South Wales (Full Court); *Commissioner for Government Transport* v. *Bitumen & Oil Refineries (Aust.) Ltd.* (1953) 54 S.R. (N.S.W.) 1; 71 W.N. 25, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales to recover contribution, either totally or partially, under the provisions of s. 5 of the *Law Reform (Miscellaneous Provisions) Act* 1946-1951 (N.S.W.) the Commissioner for Government Transport claimed from Bitumen & Oil Refineries (Australia) Ltd. the sum of £20,000.

The plaintiff, in its declarations, alleged that at all material times the plaintiff by its servants and agents had the care, control and management of a certain tramcar, and the defendant by its servants and agents had the care, control and management of a certain motor vehicle; that the defendant by its servants and agents so negligently, carelessly and unskilfully drove managed and controlled the said motor vehicle upon a public highway that the said tramcar came into collision with the motor vehicle whereby Leslie Charles Vickery, who was then lawfully riding as a passenger upon the tramcar, suffered damage; that the defendant if sued would have been liable in respect of such damage; that in proceedings instituted by him in the Supreme Court against the plaintiff Vickery recovered in respect of such damage a verdict and judgment in the amount of £14,711 18s. 6d.; that the plaintiff incurred expense in and about satisfying that judgment and the costs of and incidental thereto; and that the plaintiff claimed contribution from the defendant in accordance with the statutes in such case made and provided. The plaintiff claimed the sum of £20,000.

The defendant pleaded (1) that it was not guilty; (2) that Vickery did not suffer any damage as alleged; and (3) that if sued it would not have been liable for such damage as alleged.

An application made by the defendant for an order striking out of the declaration the allegations that Vickery instituted proceedings in the Supreme Court of New South Wales against the plaintiff and recovered a verdict and judgment for £14,711 18s. 6d. and that the plaintiff incurred expense in and about satisfying the said judgment and costs, on the ground that those allegations were so framed as to prejudice and embarrass the fair trial of the action, was dismissed by *McClemens* J.

The Full Court of the Supreme Court of New South Wales, by majority (*Street* C.J., *Herron* J., *Owen* J. dissenting), dismissed an appeal from that decision: *Commissioner for Government Transport* v. *Bitumen & Oil Refineries (Australia) Ltd.* (1).

The defendant, by leave, appealed to the High Court.

(1) (1953) 54 S.R. (N.S.W.) 1; 71 W.N. 25.

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The relevant statutory provisions are set out in the headnote, and in the judgment hereunder.

Sir *Garfield Barwick* Q.C. (with him *J. G. Smyth*), for the appellant. The appellant adopts the views expressed by *Owen* J. in the court below. The statute creates a new cause of action. It is a cause of action independent of the injured party's cause or causes of action. The plaintiff in the trial of such cause of action must establish according to the general law (including evidentiary provisions) that it (the plaintiff) satisfies the description of the person to whom the cause of action is given and that the defendant satisfies the statutory description of the person against whom the cause of action is created. The time at which such descriptions must be satisfied is the date of the commencement of the proceedings. This involves the plaintiff in proof (a) that he is responsible in law for the damage sustained by some person; (b) that the defendant is, or has been, also responsible for the same damage; and (c) that the judgment recovered, *inter alios*, is irrelevant except after verdict to set the maximum limit of any indemnity. The plaintiff does not say that the fact of the judgment is indispensable to the description of the tortfeasor who may sue. He claims that the cause of action given by s. 5 (1) (c) of the *Law Reform* (*Miscellaneous Provisions*) *Act* 1946-1951 does not accrue until the tortfeasor's liability crystallizes. Therefore, he says, as the crystallizing of the liability may be proved by production of the judgment he cannot rightly plead the judgment. The judgment is not pleaded as a condition precedent to action. It is rather pleaded as an ingredient of the cause of action. The appropriate condition precedent is the assertion of the fact that the tortfeasor has become liable. There is not any warrant for pleading the evidence by which that fact is to be established. In the case of a settlement it is not the amount of the settlement by which the defendant tortfeasor is bound but the reasonableness as it appears to the tribunal hearing the case between the tortfeasors. Generally, a construction should be adopted which does not bind a person by a judgment to which he was not a party. If a tortfeasor wants the other tortfeasor bound he can resort to the third-party procedure. He has the remedy in his own hands. The plaintiff need not have paid, nor is he bound to pay any contribution. "Contribution" to a judgment, mentioned in sub-s. (2) of s. 5 means the amount of money; a contribution to the liability for the injury. "Damage" means the detriment which the injured party has suffered. It is important to note that the word used is "damage" and not "damages". "Liability" is not a money

sum. Each clause is required to fix a sum which is ratably payable. "Indemnity" is used in the last paragraph in the sense that the court could say that the defendant is wholly responsible for the damage and it, the court, ordered him to make complete indemnity for that damage. "Complete indemnity" is not measured by the amount of damage. It is not contribution to a verdict given but contribution to damage suffered. [Counsel referred to *Littlewood* v. *George Wimpey & Co. Ltd. and British Overseas Airways Corporation* (1); *Nickels* v. *Parks* (2); *In re Kitchin*; *Ex parte Young* (3); *Hordern-Richmond Ltd.* v. *Duncan* (4) and Dr. *Glanville Williams* on *Joint Torts and Contributory Negligence*, pp. 183, 184.]

J. K. Manning Q.C. (with him *H. W. May* and *C. A. Cahill*), for the respondent. Regard must be had to the issue now before the Court and to the nature of the cause of action. The only issue for determination is whether the allegation in the respondent's declaration that he has suffered judgment is calculated to prejudice or embarrass the fair trial of the action. The proceeding is not by way of demurrer. It is thus necessary to consider what is the cause of action which the respondent has against the appellant. It arises only by reason of the express terms of the statute. The respondent submits (i) that a cause of action accrues under the section to one tortfeasor to another tortfeasor only when the liability of the former has been ascertained. The ascertainment of such liability is an essential ingredient of the cause of action; and (ii) that the liability of such tortfeasor is certainly ascertained when he is sued to judgment and may possibly be ascertained in other ways, for example if he makes payment in settlement or agrees to make payment in settlement. In such an action where the plaintiff has been sued to judgment by the injured party the allegation and the fact that judgment was recovered against him is a material and essential allegation. It cannot either prejudice or embarrass the fair trial of the action. The fact that the cause of action only arises when the liability has been ascertained is probably the only matter upon which there is unanimity of opinion in court decisions (*Hordern-Richmond Ltd.* v. *Duncan* (5); *Littlewood* v. *George Wimpey & Co. Ltd. and British Overseas Airways Corporation* (6); *Nickels* v. *Parks* (7)). There was not any cause of action against the plaintiff until judgment was given against him (*Cockatoo Docks &*

(1) (1953) 2 Q.B. 501, at pp. 509, 510, 514-517, 523; 1 W.L.R. 426, at p. 436; 1 All E.R. 583, at p. 590.
(2) (1948) 49 S.R. (N.S.W.) 124, at p. 129; 65 W.N. 273.
(3) (1881) 17 Ch. D. 668.
(4) (1947) 1 K.B. 545.
(5) (1947) 1 K.B., at p. 552.
(6) (1953) 2 Q.B. 501, at pp. 511, 519, 526.
(7) (1948) 49 S.R. (N.S.W.) 124; 65 W.N. 273.

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Engineering Co. Pty. Ltd. v. *Dalgety & Co. Ltd.* (1)). In construing the section attention should first be directed to the nature of the recovery which the plaintiff is entitled to make. His entitlement is to obtain " contribution ". The contribution may amount to complete " indemnity ". The words " contribution " and " indemnity " can only relate to an ascertained sum of money. Thus it is preferable to disregard the consideration which has been given to the meaning of the word " liable ". The words " liable in respect of that damage " mean, in the context in which they appear, " liable for a sum ascertained to be that damage ". The only real alternative is that the words mean " liable to pay damages ". This can be stated alternatively by saying that the tortfeasor's right of action only arises when he encounters a liability which is fixed upon him. The argument advanced on behalf of the appellant that an order can be made requiring the second tortfeasor to make complete indemnity, cannot be accepted. The only action which is cognizable is an action to recover a sum of money. The fact that the first tortfeasor has suffered judgment is one which may be proved in the action. Although possibly not relevant as between the two tortfeasors on the question of liability it is clearly admissible for two reasons, namely (i) to establish the fact that the liability has been ascertained and the cause of action has thus arisen, and (ii) to fix the sum which, prima facie, is the damage which the first tortfeasor has suffered. Although Dr. *Glanville Williams* on *Joint Torts and Contributory Negligence*, p. 183, (n) 24, appears to favour the view advanced on behalf of the appellant, he agrees that the judgment is admissible for the second purpose mentioned. Moreover, Dr. *Glanville Williams*, in the April 1954 issue of the *Cambridge Law Journal*, at pp. 50-52, accepts without adverse comment the view that the cause of action only arises when the liability of the first tortfeasor is ascertained. The appellant concedes that the judgment must fix the " upper limit " which the first tortfeasor can recover. He also concedes that there must be some event as a result of which the cause of action crystallizes. If that be so, then that event must give rise to the cause of action. It cannot be suspended. The examples of causes of action which cannot be exercised which were mentioned during argument are merely examples of cases where a defendant may plead in abatement. If the appellant's contention is correct the action between the two tortfeasors could be maintained even though the first tort-feasor was not sued by the injured party. Similarly, it could be maintained notwithstanding that the first tortfeasor had succeeded in

(1) (1939) 39 S.R. (N.S.W.) 295 ; 56 W.N. 146.

the action brought against him by the injured party. Accordingly, the entry of judgment against the first tortfeasor is an event which ascertains his liability and thus gives rise to the cause of action itself. It is proper in these circumstances that it should be pleaded. Alternatively, the meaning of the word " liable " in s. 5 (1) (c) is " held liable " for the reasons appearing in the judgment of *Morris* L.J. in *Littlewood* v. *George Wimpey & Co. Ltd. and British Overseas Airways Corporation* (1) and the judgment of *Herron* J. in the court below (2).

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

March 2.

THE COURT delivered the following written judgment :—

This appeal is the product of the uncertainties of the statutory provision for contribution between tortfeasors which was transcribed in the *Law Reform* (*Miscellaneous Provisions*) *Act* 1946 (N.S.W.) from s. 6 of the *Law Reform* (*Married Women and Tortfeasors*) *Act* 1935 of the United Kingdom.

The appeal comes by leave from an order of the Full Court of the Supreme Court dismissing an appeal from a judge's order made at chambers by which a defendant's summons to strike out portion of a declaration was dismissed. In the action the plaintiff sues under the statute for contribution by the defendant to damages recovered from the plaintiff in an action against it brought by a third party. It appears from the allegations in the declaration that a motor vehicle under the care, control and management of the defendant's servants or agents came into collision with a tram car of the plaintiff upon which one Vickery was a passenger. Vickery, who was injured in the collision, instituted proceedings in the Supreme Court against the now plaintiff in which he recovered £14,711 18s. 6d. damages in respect of his injuries. Although, of course, the fact does not appear from the record, the award of damages was subsequently attacked by the now plaintiff on the ground of the discovery of fresh evidence, but not on the ground that the award was in itself excessive. The question whether because of the fresh evidence the verdict should be set aside as to damages reached this Court : *Commissioner for Government Tram & Omnibus Services* v. *Vickery* (3). The report of the proceeding may suggest why the present plaintiff framed its declaration in this action in the form of which the defendant complains but

(1) (1953) 2 Q.B., at p. 526.
(2) (1953) 54 S.R. (N.S.W.), at p. 15 ; 71 W.N., at p. 28.
(3) (1952) 85 C.L.R. 635.

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otherwise the plaintiff's unsuccessful attempt to disturb the verdict against it is irrelevant to the question now before us. The declaration alleges that the defendant by its servants and agents negligently drove, managed and controlled the motor vehicle so that it came into collision with the tram car whereby Vickery was injured and that " the defendant if sued would have been liable in respect of such damage ". These last words are taken from the statute but when the declaration goes on to the allegation intended to bring the plaintiff within the statutory description "any tort-feasor liable in respect of that damage " (*scil.* damage suffered by any person as a result of a tort) it deserts the words of the provision and states the facts upon which the pleader relies in order to satisfy the description. The allegation is in the following form :—Whereupon the said Vickery instituted proceedings in the Supreme Court against the above-named plaintiff claiming to recover in respect of the said damage and as a result of such proceedings the said Vickery recovered a verdict and judgment against the above-named plaintiff in the amount etc.

The question is whether this allegation alleges what will satisfy the condition expressed in the words " any tort-feasor liable in respect of that damage ". The words occur in s. 5 (1) (c) of the Act, the material part of which is as follows :—" (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)

> (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise . . . "

Does the verdict and judgment establish the liability of the now plaintiff ? It is a question which depends upon the meaning of the words, not upon the general law. Does the word " liable " in that phrase mean or include " liable by judgment ", " adjudged liable " or " held liable " ? It cannot depend upon the general law, for under the general law a judgment pronounced between Vickery and the now plaintiff would work no estoppel against the now defendant who was a stranger to the proceedings.

In the Supreme Court the question was answered in favour of the present plaintiff (*Owen* J. dissenting) (1) and the decision in chambers of *McClemens* J. was affirmed. When the argument of this appeal before us took place the appeal to the House of Lords from the decision of the Court of Appeal in *Littlewood* v. *George Wimpey & Co. Ltd. and British Overseas Airways Corporation* (2) had been

(1) (1953) 54 S.R. (N.S.W.) 1 ; 71 W.N. 25. (2) (1953) 2 Q.B. 501.

argued but their Lordships' judgment had not been delivered. Now, however, we have the advantage of the decision of the House of Lords in that case which is reported under the title *George Wimpey & Co. Ltd.* v. *British Overseas Airways Corporation* (1).

The question which the House decided involved the meaning of the word " liable ", not, unfortunately, where it occurs first in the paragraph, viz. in the phrase " any tortfeasor liable in respect of that damage ", but where it occurs second, viz. in the phrase " any other tortfeasor who is, or would if sued have been, liable in respect of the same damages ". Their Lordships all appear to have accepted the view that the word there meant liable in judgment. Viscount *Simonds* said—" No other meaning can reasonably be attributed to it in the context ' would if sued have been ', for these words make a suit the condition of liability " (2). Lord *Tucker* said—" I understand that all your Lordships agree with the trial judge and the majority of the Court of Appeal that the word ' liable ', where it appears for the second time in par. (c) of sub-s. (1) must, owing to the presence of the words ' would if sued have been,' mean ' held liable.' I agree, and accordingly pass to consider the construction of the subsection on this basis " (3). But as to the construction of the sub-section on that basis their Lordships were unable to agree. It is small wonder, considering the economy of expression practised in the provision and the apparent failure to advert to any of the many practical problems involved in applying a general principle of contribution between persons liable jointly or severally for the same loss or damage. Viscount *Simonds* and Lord *Tucker* decided the case upon the ground that the words " contribution from any tort-feasor who is, or would, if sued, have been, liable ", contemplated two cases, namely contribution " from one who in an actual suit by the injured man has been held liable by judgment ", and " from one who if sued would in that hypothetical suit have been held liable " : the words could not include " one who has been actually sued by the injured man and held not liable ". As the respondent, the B.O.A.C., had been sued by the injured man and held not liable on the ground that recovery was barred by lapse of time under the *Limitation Act* 1939 s. 21, within which the B.O.A.C. fell as a public authority, the view of Viscount *Simonds* and Lord *Tucker* was enough to determine the case. Lord *Reid* arrived at the same result upon another ground, namely that in the phrase quoted the words " if sued " mean if sued at some

(1) (1954) 3 W.L.R. 932.
(2) (1954) 3 W.L.R., at p. 935.
(3) (1954) 3 W.L.R., at p. 948.

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particular date or during some particular period and that the date contemplated was either the time when the former tort-feasor claimed contribution or when he was sued by the wronged party (1). In either case recovery against the B.O.A.C. by the appellant was time barred. On this ground Lord *Reid* concurred in upholding the decision of the majority of the Court of Appeal (*Singleton* L.J. and *Morris* L.J., *Denning* L.J. dissenting), but his Lordship did not agree that a person sued as a tortfeasor unsuccessfully was necessarily outside the provision. As to Lord *Reid's* view, Viscount *Simonds* said, at the end of his opinion in which he stated his reasons for dismissing the appeal: " I do not find it necessary to discuss a question of great difficulty, viz., at what date is the hypothetical suit, in which 'the other tortfeasor . . . would, if sued, have been liable,' to be presumed to have been commenced, and I will say no more than that, having read and considered the opinion of my noble friend, Lord *Reid*, I should upon this part of the case accept his conclusion though I find myself reluctantly differing from him upon the first and vital question " (2). Lord *Porter* and Lord *Keith* dissented. It was no necessary part of the decision of any of their Lordships to assign a meaning to the word " liable " where it first occurs in par. (c) of sub-s. (1), viz. in the phrase " any tort-feasor liable in respect of the damage may recover contribution ". But Viscount *Simonds* said—" If the word 'liable' where secondly used in par. (c) bears the meaning which I have ascribed to it, I should be reluctant to give it any other meaning where it is first used in the same paragraph, nor do I think it unreasonable that the right of contribution between tortfeasors should be limited to the case where he who seeks contribution has himself been sued to judgment. In the view which I take it is immaterial whether the word, where first used, has the same meaning or another: if it were necessary for me to decide it, I should say it had the same meaning " (3).

The view which his Lordship thus expressed covers the present case. In the Court of Appeal *Singleton* L.J. expressed the same view—" It appears to me ", his Lordship said, " that the draftsman of the subsection had in mind a suit in which there were one or more defendants, and it was sought to provide that after judgment in the action contribution could be ordered as between the defendants, and, further, that a tortfeasor who had not been sued in the action, but who was brought in as third party, might be

(1) (1954) 3 W.L.R., at p. 947.
(2) (1954) 3 W.L.R., at p. 936.
(3) (1954) 3 W.L.R., at p. 935.

ordered to make contribution if he would have been liable in respect of the same damage if he had been sued. In that way the natural meaning of the word 'liable' in the first line of the subsection is 'held liable', and the words 'who is . . . liable' two lines later would have the same meaning. I am prepared to assume that the meaning of 'liable' ought not to be limited to 'held liable,' and that if a tortfeasor paid a claim he might have a right to contribution" (1). The last sentence probably means "assume contrary to the opinion just expressed". But it may involve an actual readiness on the part of his Lordship to extend the application of the word "liable" so as to include with judgment accord followed by satisfaction. This was the position taken by *Morris* L.J., who said:—"I do not think that the word 'liable' in the first line of s. 6 (1) (*c*) need be limited to tortfeasors who have been held liable, though this matter is not now directly in issue. In the context at the beginning of (*c*) the word may include one who has properly admitted liability to the person who has suffered damage. He may then recover contribution from another tortfeasor who either (a) has been held liable in respect of the same damage; or (b) who has not been sued but who, if he had been sued, would have been held liable" (2).

In the Court of Appeal a defence was raised by B.O.A.C. to the claim by George Wimpey & Co. Ltd. against that corporation for contribution which was not argued in the House of Lords. It was that the right of Goerge Wimpey & Co. Ltd. to claim contribution from B.O.A.C. arose more than one year before it was made and was therefore barred by s. 21 of the *Limitation Act* 1939 which applied to B.O.A.C. as a public authority. This defence failed because it was held that the B.O.A.C.'s right to, or "cause of action for", contribution did not arise until their liability to the injured man Littlewood was at least ascertained, and that was less than twelve months before. In the House of Lords Viscount *Simonds* said upon this subject—"I am content to assume that the right to contribution arose at any rate not earlier than the date when the existence and amount of Wimpeys' liability to Littlewood was ascertained by judgment" (3). *Denning* L.J., who in other respects dissented, said:—"One more question, however, arises. Although Wimpeys have a right to contribution from British Overseas Airways Corporation, is their remedy for it barred by the one-year limitation contained in s. 21 of the *Limitation Act*, 1939? This depends on

(1) (1953) 2 Q.B., at p. 510.
(2) (1953) 2 Q.B., at p. 523.
(3) (1954) 3 W.L.R., at p. 934.

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when the cause of action for contribution arises. If it arises at the date of the accident (as *Birkett* J. held in *Merlihan* v. *A. C. Pope Ltd.* (1)) then the remedy would be barred; but I do not think that that is correct. It seems to me clear that a tortfeasor cannot recover contribution until his liability is ascertained. If he had not been sued and has paid nothing and admitted nothing, he can have no cause of action for contribution, for the simple reason that he may never be called on to pay at all. The damaged plaintiff may go against the other tortfeasor only. Once the liability of the first tortfeasor has, however, been ascertained by judgment against him or by admission, then he has a cause of action for contribution against the second tortfeasor. He can obtain a declaration of his right to contribution and a prospective order under which, whenever the first tortfeasor has paid any sum more than his share, he can get it back from the second tortfeasor. A close analogy is the right of one surety to contribution from a co-surety. His right at law did not accrue until he had paid more than his share, *Davies* v. *Humphreys* (2); but his right in equity (which now prevails) arose when his liability was ascertained and the Statute of Limitations then began to run. (*Wolmershausen* v. *Gullick* (3); *Robinson* v. *Harkin* (4)). In cases where a writ is issued against the first tortfeasor and he serves a third-party notice against the second tortfeasor, the notice is convenient machinery, but it does not mean that he has then a cause of action. His cause of action only arises when judgment is given against him ascertaining his liability" (5). *Parker* J., from whom the appeal came, had adopted the view expressed by *Cassels* J. in *Hordern-Richmond Ltd.* v. *Duncan* (6) that time started to run in favour of a third party against whom contribution was claimed only when the defendant claiming it had been made liable for the damages. "The cause of action", said *Cassels* J., "which entitles a defendant to bring a third party before the court is the liability of the third party to make contribution or to pay an indemnity. The cause of action has not arisen until the liability of the defendant has been ascertained" (7). (His Lordship did not follow on this point the decision of *Birkett* J. in *Merlihan* v. *A. C. Pope Ltd.* (1)).

In the Court of Appeal in the case of *George Wimpey & Co. Ltd.* (8) *Singleton* L.J. accepted the view of *Cassels* J. and *Parker* J. His

(1) (1946) K.B. 166.
(2) (1846) 6 M. & W. 153, at pp. 168-169 [151 E.R. 361, at pp. 367, 368].
(3) (1893) 2 Ch. 514.
(4) (1896) 2 Ch. 415.
(5) (1953) 2 Q.B., at p. 519.
(6) (1947) K.B., at p. 552.
(7) (1953) 1 W.L.R., at p. 438.
(8) (1954) 3 W.L.R. 932.

Lordship said, speaking of the first tortfeasor—" It may be that his cause of action accrues when the writ in the action is served on him—but that was not argued—and I am content to adopt the view of *Parker* J. that the cause of action arises when the defendant is held liable . . . " (1).

Now whether the question when the " cause of action for " or the right to claim contribution arises in the first tortfeasor is put directly on the construction of the word " liable " or upon the more general consideration that only an ascertained liability is regarded as the basis of contribution, it seems to follow that ascertainment by judgment is at least one, and indeed the chief, example of what is required to satisfy the condition expressed by the words " any tort-feasor liable in respect of that damage ". In his dissenting opinion in *Wimpey's Case* (2) Lord *Porter* states the effect of the view which *Parker* J. and the Court of Appeal had taken as to the time when the cause of action arose, noting that the same view had been adopted by *Cassels* J. in *Hordern-Richmond Ltd.* v. *Duncan* (3) and by *Donovan* J. in *Morgan* v. *Ashmore, Benson, Pease & Co. Ltd.* (4). Lord *Porter* described it thus—" Substantially their view was that Wimpeys were under no liability until judgment was given against them, that their cause of action arose then and not until then . . . " (2).

It is, of course, true that Wimpeys' liability had been ascertained only by judgment, and that the judgment had been satisfied. The observation of Viscount *Simonds* already quoted (5), namely that he was content to assume that the right to contribution arose at any rate not earlier than the date when the existence and amount of Wimpeys' liability to Littlewood was ascertained by judgment, may be significant. For it appears advisedly to leave open the question whether discharge by payment might be a necessary element. It does not suggest that until judgment or other ascertainment the liability could be treated as giving an enforceable right to contribution.

The provision under consideration has been transcribed from the English statute in a number of jurisdictions and it is highly convenient that it should be given the meaning and application which it has received in England. It represents a piece of law reform which seems itself to call somewhat urgently for reform. At all events it has not yielded any clear answer to those who have sought in its terms solutions of the not inconsiderable number of problems

(1) (1953) 2 Q.B., at p. 511.
(2) (1954) 3 W.L.R., at p. 940.
(3) (1947) K.B. 545.
(4) (1953) 1 W.L.R. 418; (1953) 1 All E.R. 328.
(5) (1954) 3 W.L.R., at p. 934.

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that arise from its operation. The rigid rules of English law governing interpretation make the Report of the Committee which led to the adoption of the statute inadmissible as a guide to its meaning (*Assam Railways & Trading Co. Ltd.* v. *Commissioners of Inland Revenue* (1)). But perhaps the fact that the second of the Committee's recommendations, which is the foundation of the provision now in question, confined the then proposed right to contribution to " any person who is adjudged to be liable to make any payment or who suffers execution under a judgment recovered against him in respect of an actionable wrong " may be taken into account in considering whether there is any compelling reason of justice or convenience for our refusing to give effect to the conclusion expressed in the passages quoted above from English authorities without embarking on some new exploration of our own. The statement of Viscount *Simonds* as to the meaning of " liable " where the word first occurs in par. (c) of sub-s. (1) forms no necessary part of his Lordship's *ratio decidendi* but it has the highest persuasive authority. It is, however, unnecessary for us to say definitively that the ascertainment of the liability must be by judgment to the exclusion, for example, of arbitral award or of agreement itself amounting to accord and satisfaction or of an agreement amounting to accord executory followed by satisfaction. But the meaning of " liable " where it first occurs should be held at least to include ascertainment by judgment. So construed the provision is satisfied by the facts pleaded or at all events substantially so. It is necessary to add the qualification implied by the word " substantially " because there is a slip in the pleading of a technical character. The declaration does not say expressly that the cause of action in the proceedings instituted by Vickery were for negligence or other tort. It may be desirable to allow the plaintiff to amend the declaration to make it clear that the recovery pleaded was for tort. It is logically consistent with the declaration that it might have arisen otherwise, as for example from a contract of indemnity or insurance. A decision that the liability imposed by the previous judgment is a liability which par. (c) of sub-s. (1) contemplated does not necessarily mean that the tribunal which discharges the responsibility of fixing the amount of contribution under sub-s. (2) of s. 5 cannot consider whether owing to the fault of the now plaintiff it stands at an excessive figure. No doubt the Court under sub-s. (2) must accept the assessment as conclusive as to the existence and the amount of the liability of the plaintiff claiming contribution. The

(1) (1935) A.C. 445, at pp. 457-459.

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

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Alfred J. Morgan & Son.*
Solicitor for the respondent, *R. W. Scotter.*

J. B.