

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

JAMES HARDIE & COY PTY LIMITED

APPELLANT

AND

SELTSAM PTY LIMITED

RESPONDENT

James Hardie & Coy Pty Limited v Seltsam Pty Limited (S64/1998)
[1998] HCA 78
21 December 1998

ORDER

1. *Appeal dismissed.*
2. *The respondent has liberty to file, within 7 days of the date of this Order, written submissions on the making of orders for costs of the appeal to this Court.*
3. *The appellant has liberty to file, within 7 days of the date of the filing of the submissions referred to in par 2 of this Order, written submissions in reply on the making of orders for costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

C G Gee QC with J A McIntyre and R A Pepper for the appellant (instructed by Diamond Peisah & Co)

D F Jackson QC with J J E Fernon for the respondent (instructed by Toomey Pegg & Drevikovsky)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

James Hardie & Coy Pty Limited v Seltsam Pty Limited

Tort – Contribution – Parties entitled to claim contribution – Parties against whom contribution can be claimed – Relevance of final judgment obtained by consent in favour of party against whom contribution claimed.

Tort – Contribution – Assessment – Relevance of liability of claimant tortfeasor to tort victim when determining liability between claimant tortfeasor and other tortfeasors.

Statutes – Construction – Purposive construction – History of legislation – Previous decisions on the statutory provision.

Words and phrases – "tort-feasor liable in respect of that damage" – "who is, or would if sued have been, liable in respect of the same damage".

Law Reform (Miscellaneous Provisions) Act 1946 (NSW), s 5.

- 1 GAUDRON AND GUMMOW JJ. This appeal raises an issue of construction of s 5 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) ("the Law Reform Act"). This provision, as the Court observed in its joint judgment in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*¹, was transcribed from the *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK) ("the UK Act"), the foundation of which had been in the recommendations of the *Third Interim Report* of the Law Revision Committee, presented in July 1934 ("the Report")².

The statute

- 2 Section 5(1) of the Law Reform Act applies "[w]here damage is suffered by any person as a result of a tort" and in those circumstances has two distinct operations. First, in par (a), it abolishes what had been a particular plea in bar. Secondly, in par (c), supplemented by s 5(2), a right and remedy of contribution is created where they did not exist at common law.

- 3 In the Report, par (I) of the Summary of Suggested Recommendations had recommended alteration of the rule in *Brinsmead v Harrison*³ whereby the principle that the tort was merged in the entry of judgment had the result that a plaintiff who had sued one joint tortfeasor to judgment and recovered nothing could not afterwards proceed against another person otherwise jointly liable in respect of the same wrong. The local legislative response is found in par (a) of s 5(1) of the Law Reform Act. This provides that where damage is suffered by any person as a result of a tort (whether a crime or not):

"judgment recovered against any tort-feasor 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 tort-feasor in respect of the same damage".

- 4 Paragraph (a) of s 5(1) is not in issue in the present appeal. However, it will be noted that it contains the phrase "would, if sued, have been liable" and operates upon an action brought against a second tortfeasor where judgment

1 (1955) 92 CLR 200 at 205, 211-212.

2 Cmd 4637.

3 (1871) LR 6 CP 584; (1872) LR 7 CP 547.

already has been recovered against the first tortfeasor. The first judgment will not bar recovery by the tort victim of judgment in the second action if, rather than a multiplicity of actions, the tortfeasors had been sued jointly and, if so sued, the second tortfeasor would have been liable as a joint tortfeasor in respect of the same damage.

- 5 This appeal turns largely upon the construction of the expression "who is, or would if sued have been, liable in respect of the same damage" as it appears in par (c) of s 5(1). Paragraph (c) applies where damage is suffered by any person as a result of a tort (whether a crime or not) and states:

"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, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought".

This provision operates not only between joint tortfeasors but also where the same damage is caused to the plaintiff by the separate wrongful acts of several parties. The equivalent United Kingdom legislation followed upon pars (II) and (III) of the Summary of Suggested Recommendations in the Report. These stated:

"(II) 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 recover contribution, whether the wrong be a crime or not, *from any other person who has been made liable in respect of the same wrong, or who, if sued separately, would have been so liable*, unless the person against whom contribution is sought proves that he is by law entitled to be indemnified in respect of his liability by the person seeking contribution. It shall be for the Judge to decide what the amount of the contribution is to be, or whether complete indemnity is to be given.

(III) Where two or more persons have committed independent wrongful acts which have been the cause of the same damage they shall have the same right to contribution among themselves but subject to the same exception as in the case of persons liable in respect of the same wrong." (emphasis added)

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6 In *Brambles Constructions Pty Ltd v Helmers*, Barwick CJ said⁴:

"The effect of s 5(1)(c), in my opinion, is that a tort-feasor who has come under an enforceable obligation to pay money for the damage caused by his tortious act may successfully recover contribution from another tort-feasor who has also come under an obligation to pay money in respect of the same damage and he may also recover contribution from any other tort-feasor who, not having been sued by the injured party, had he been sued, would have been found to have caused or contributed to the same damage by a tortious act."

Defective law reform

7 The legislation has become notorious for the conceptual and practical difficulties it engenders. It is an example of the need to keep measures of law reform under legislative review for defects and inadequacies exposed from time to time by the actual operation of such measures. Further, judicial decisions calculated to remove one anomaly by an apparent beneficent construction of the legislation have given rise to other anomalies. In some jurisdictions, including that where it originated, the legislation in question has been substantially amended or replaced⁵. Not so in New South Wales.

8 In its report which preceded the enactment in the United Kingdom of the 1978 Act⁶, The Law Commission identified, under the heading "Double jeopardy" (pars 60-67), four issues to which the UK Act gave rise. The first was an anomaly to which the interpretation given to the statute by the decisions in *George Wimpey & Co Ltd v British Overseas Airways Corporation*⁷ and *Harvey v R G O'Dell Ltd. Galway (Third Party)*⁸ gave rise. If P sued D2 and was met by a good plea that the action against D2 was time barred, D1's claim for contribution against D2

4 (1966) 114 CLR 213 at 219.

5 See, for example, in the United Kingdom the *Civil Liability (Contribution) Act* 1978 (UK) ("the 1978 Act") and in Victoria Pt IV (ss 23A-24AD) of the *Wrongs Act* 1958 (Vic).

6 United Kingdom, The Law Commission (No 79), *Law of Contract – Report on Contribution*, Report 181, 15 December 1976.

7 [1955] AC 169, accepted by this Court in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 211 because it was "highly convenient that [the legislation] should be given the meaning and application which it has received in England".

8 [1958] 2 QB 78, followed by this Court in *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213.

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would fail. However, if P sued D1 but not D2, D1 would have a good claim to contribution by D2 because at some time in the past P would have had a good action against D2.

9 The second problem arose where D2 succeeded in having the action by P dismissed for want of prosecution and D2 relied upon this dismissal when sued by D1. The risk of prejudice to D2 which had supported the dismissal of P's claim might be reintroduced if D1 now were allowed to pursue the contribution claim. Nevertheless, in *Hart v Hall & Pickles Ltd*⁹, the English Court of Appeal held that, in such circumstances, it remained open to D1 to pursue contribution from D2.

10 The third situation arose where D2 had defeated P's claim "on the merits". The effect of *George Wimpey & Co Ltd v British Overseas Airways Corporation* (which The Law Commission supported) was that D2 was not at risk of re-agitation of the merits by D1 on a contribution claim and that D2 was not obliged to defend itself twice. Finally, The Law Commission concluded that the rejection of P's claim in an arbitration between it and D2 should not bar the agitation of D2's liability by a court subsequently hearing an action by P against D1 and a claim by D1 for contribution by D2.

11 We mention these matters not to urge or criticise any of the stances taken by The Law Commission. Rather, they serve to emphasise the need for renovation of the New South Wales legislation, not by judicial grafting to it of tissue which it lacks, but upon detailed reconsideration by the legislature. Judicial interpretative techniques may come close to leaching the existing statutory text and structure of their content and, whilst answering that apparently hard case then before the court, unwittingly lay the ground for other hard cases.

12 The present statute represents an attempt to adjust the tripartite rights and interests of P, D1 and D2. Any regime of this nature is at greater risk of generating anomalies where all those liable to suit are not sued at the same time and in the one proceeding. Many of the difficulties discerned by The Law Commission in the operation of the UK Act arose where all the parties had not been joined in the one action. However, that was not the present case. All parties were joined in the one proceeding and it was the task of the court in question¹⁰ to control its procedure

9 [1969] 1 QB 405.

10 The forum of the litigation was the Dust Diseases Tribunal of New South Wales ("the Tribunal") which is established as a court of record by s 4 of the *Dust Diseases Tribunal Act* 1989 (NSW). Section 10 of that statute gave the Tribunal exclusive jurisdiction in the proceedings, with the same powers the Supreme Court of New South Wales otherwise would have had. Section 11(3) conferred what was
(Footnote continues on next page)

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"so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided"¹¹. It was the failure of the appellant effectively to utilise those procedures which precipitated the particular dispute now before this Court.

The present appeal

13 The issue of construction with which this appeal is concerned arises in circumstances where (a) a plaintiff sued three defendants, D1, D2 and D3, for damages for injuries and disabilities flowing from asbestos-related pleural disease; (b) D1 cross-claimed against D3 seeking indemnity or contribution from D3; (c) D3 cross-claimed for corresponding relief against D1 and D2; (d) the plaintiff and D1 and D2 reached a settlement and by consent judgment was entered for the plaintiff in the agreed amounts against D1 and D2; and (e) D3 and the plaintiff settled on terms adverse to the plaintiff and by consent judgment was entered in favour of D3.

14 The trial of the plaintiff's action came on for hearing on 8 November 1995 and steps (b) and (c), the filing of the cross-claims, occurred on the second day of the trial. On that second day, steps (d) and (e) then were taken. The orders touching D1 and D2 were made with the consent of those parties and the plaintiff. The order touching D3 was made with the knowledge of D1 and D2, as well as with the consent of the plaintiff.

15 That left on foot the cross-claim by D1 against D3 for contribution in respect of what was now the ascertained liability of D1 to the plaintiff. By application made on 21 May 1997, D3, which had the judgment in its favour against the plaintiff, sought to have struck out the cross-claim against it by D1. An order that the cross-claim be struck out was made on 27 June 1997. The New South Wales Court of Appeal (Mason P, Beazley and Stein JJA) dismissed an appeal by D1 against this order¹².

16 The judgment of the Court of Appeal was delivered by Mason P. The reasoning which led the President to hold that the cross-claim by the appellant (D1)

analogous to an accrued jurisdiction with respect to such claims as those for contribution.

11 *Supreme Court Act* 1970 (NSW), s 63.

12 *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1997) 15 NSWCCR 247.

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for contribution by the respondent (D3) had properly been struck out appears in the following passage¹³:

"The plaintiff and the respondent were the parties to the judgment which, albeit by consent, determined conclusively as between those parties that the respondent was not liable. This event alone put an end to the appellant's right of contribution simply because it had the effect of taking the respondent out of the class of persons against whom an order for contribution under the statute could be made."

His Honour added¹⁴:

"Unless and until the appellant can show that the respondent should have been found liable to the plaintiff then a vital step in its claim for contribution is missing. Since no attempt was made either below or here to challenge the judgment in the plaintiff's favour against the respondent, whether by appeal or otherwise, the fact that that judgment stands precludes the right of contribution.

In *Oceanic [Crest Shipping Co v Pilbara Harbour Services Pty Ltd]*¹⁵ Brennan J said with reference to the facts of that case:

'... So long as the judgment holding Pilbara not liable stands on the record, the shipping company is unable to assert that Pilbara is a tortfeasor who "is or would if sued have been liable" to Hamersley ...'.

- 17 The outcome supported by the Court of Appeal in the present litigation had not been inevitable. Not all steps open to the appellant to protect and advance its position had been taken. The appellant had been "directly interested in the question whether [the respondent was] a tortfeasor who [was] liable to the plaintiff"¹⁶ upon the claim in respect of which judgment by consent was entered in favour of the respondent on 9 November 1995. The Tribunal, as a court of record, had an overriding power to control its own proceedings and was not obliged to act upon the request by some of the parties before it that consent orders be entered¹⁷. The

13 (1997) 15 NSWCCR 247 at 251.

14 (1997) 15 NSWCCR 247 at 252-253.

15 (1986) 160 CLR 626 at 670.

16 *Walter H Wright Pty Ltd v Commonwealth of Australia* [1958] VR 318 at 321.

17 See *R D Werner & Co Inc v Bailey Aluminium Products Pty Ltd* (1988) 18 FCR 389 at 392-393.

appellant had the right to be heard before the Tribunal entered the consent judgment in favour of the respondent against the plaintiff in the plaintiff's action¹⁸.

- 18 The matter was taken by counsel for the appellant no further than as appears from his statement to the Tribunal:

"I do not want to be seen to be consenting to any judgment in favour of the [respondent]. In my submission, in any event even if I could be heard, it would not be relevant in any sense to impede my claim for contribution."

- 19 The appellant might have sought deferral of the entry of judgment in favour of the respondent until determination of the issue of liability of the appellant to the plaintiff for the purposes of the appellant's contribution claim against the respondent. In the process of negotiation between the parties, various options might have been available. A release agreed between the plaintiff and one tortfeasor would not necessarily have released the others¹⁹. Further, the respondent concedes that, if the plaintiff had released the respondent without a judgment, then the appellant could have maintained its action for contribution.

- 20 Against any decision by the Tribunal to enter consent judgment as sought by the respondent and the plaintiff but against the wishes of the appellant, the appellant would have had standing to appeal²⁰. By that means, the appellant would have kept in play the question whether it was entitled to recover contribution from the respondent. This would have been achieved without falling foul of the procedural difficulties which divided the New South Wales Full Court in *Castellan*

18 Even if the appellant had not had sufficient status on the motion by the plaintiff and the respondent brought for entry of consent judgment in the plaintiff's action, it should have been joined as a respondent to that motion. See *Re Trade Practices Commission v Milreis Pty Ltd* (1978) 18 ALR 17 at 22-23; *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 155. See also *Hay v Carter* [1935] Ch 397 at 407-408, 409-410; *News Limited v Australian Rugby Football League Limited* (1996) 64 FCR 410 at 523-525.

19 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

20 As happened in similar circumstances in the litigation which reached this Court as *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 158; see, for the intermediate appeal, *Thomson Publications (Aust) Pty Ltd v Trade Practices Commission* (1979) 27 ALR 551.

*v Electric Power Transmission Pty Ltd*²¹ and were discussed by Brennan J in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*²².

- 21 However, s 5(1)(c) of the Law Reform Act calls for application in the situation which in fact came to pass. In our view, the judgment of Mason P was correct. To explain why that is so, it is convenient first to return to examine further some general considerations going to the construction of s 5(1).

The statutory action for contribution

- 22 Section 5(1), and the difficulties in construction to which it has given rise, are the product of the method of drafting identified by Dixon J in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*²³. His Honour remarked²⁴ that the legislation there in question²⁵:

"must be taken to perform a double function, namely to deal with substantive liabilities or substantive legal relations and to give jurisdiction with reference to them. It is not unusual to find that statutes impose liabilities, create obligations or otherwise affect substantive rights, although they are expressed only to give jurisdiction or authority, whether of a judicial or administrative nature. Indeed, in his *Legislative Methods and Forms*²⁶, Sir Courtenay Ilbert²⁷ appears expressly to advert to this trick of drafting, for the purpose of condemning it, when he says: 'The enactment should be so expressed as to give the right, not the remedy, to say that a person may do a particular thing, not that he may bring a particular action or obtain from the court a particular order.'"

21 (1967) 69 SR (NSW) 159.

22 (1986) 160 CLR 626 at 670-671.

23 (1945) 70 CLR 141.

24 (1945) 70 CLR 141 at 165-166.

25 Section 58E of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth).

26 at 249. [The work was published in 1901.]

27 Sometime Clerk to the House of Commons and Parliamentary Counsel to the Treasury.

23 Paragraph (c) of s 5(1) is to be read with s 5(2). This states:

"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."

24 These provisions create both a right and a remedy where, under English common law, none had existed. Paragraph (c) provides the descriptions of those for whom and against whom there is conferred the statutory entitlement to recover contribution. It attempts to comply with Sir Courtenay Ilbert's injunction to those drafting statutes that it be "made clear on whom the rights are conferred and the duties are imposed"²⁸. Thus, par (c) is concerned with the identification of parties by certain criteria, not the measure of liability to contribution. The content of the entitlement and the mechanism for its enforcement are found in s 5(2). The distinction has not always been fully appreciated. The appellant urges on this Court the proposition that the justice and equity referred to in s 5(2) impose upon the respondent the obligation from which it wrongly seeks immunity. However, that seeks to turn the statute on its head. Entitlement in respect of the new remedy is conferred only between certain parties and they must answer the criteria specified in s 5(1)(c).

25 The first step is to identify those upon whom the new statutory right is conferred and the time from which that conferral is operative. This is answered by the construction placed by authority upon the opening words of par (c) of s 5(1). The reference to the right of a tortfeasor who is "liable in respect of ... damage" to recover contribution is, as Windeyer J put it, "to a person whose liability as a tort-feasor has been ascertained, ordinarily by judgment, perhaps in some cases in some other way"²⁹. The scheme of the legislation is that, as his Honour said, a "person thus found liable may seek relief from having to bear the whole burden"³⁰.

26 In *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*³¹, the Court said in its joint judgment that it was unnecessary 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

28 Ilbert, *Legislative Methods and Forms*, (1901) at 248.

29 *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213 at 221.

30 (1966) 114 CLR 213 at 221.

31 (1955) 92 CLR 200 at 212.

amounting to accord and satisfaction or of an agreement amounting to accord executory followed by satisfaction". Their Honours' doubts as to the exclusion of other methods of ascertainment of the liability of the party now claiming contribution have been diminished by the later course of authority which admits of the sufficiency of at least some of those methods³².

- 27 Their Honours in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* continued³³:

"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 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."

This passage reflects the distinction drawn earlier in these reasons between the operations of s 5(1)(c) and s 5(2).

- 28 Whilst the liability ascertained as between the plaintiff and the claimant tortfeasor is a condition precedent to the assertion by that tortfeasor of its statutory right to recover contribution, the amount of that liability so ascertained is not determinative of the amount recoverable on that statutory action from other tortfeasors. Further, the connection between the liability of the claimant tortfeasor to the tort victim and the standing of the claimant to bring the statutory action for contribution does not carry the consequence that the statutory action is subjected to the same limitation or other procedural regime imposed upon an action by the tort victim against the claimant tortfeasor³⁴.

- 29 However, *George Wimpey & Co Ltd v British Overseas Airways Corporation* established that the outcome of any action between the plaintiff and the claimant tortfeasor is determinative of satisfaction by the claimant tortfeasor of the

32 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 616-617.

33 (1955) 92 CLR 200 at 212-213.

34 *Nickels v Parks* (1948) 49 SR (NSW) 124. See also *Slade & Kempton (Jewellery) Ltd v N Kayman Ltd* [1969] 1 WLR 1285 at 1289-1290; [1969] 3 All ER 786 at 790-791.

condition precedent to a claim by it under the statute. This result under the Law Reform Act may be contrasted to that obtaining under the legislation in issue in *Scala v Mammolitti*³⁵. In that case, the plaintiff's action, given by s 4(1) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), for nervous and mental shock caused by a negligent act of the defendant which injured the husband of the plaintiff was not defeated by the existence of a judgment against the husband in his action for damages against the tortfeasor.

- 30 The condition precedent may not have been satisfied at the time when the claim for contribution was instituted. That step of claiming contribution may be taken in anticipation of resolution of the main action. However, in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*, this Court set out with apparent approval a passage from the judgment of Denning LJ in *Littlewood v George Wimpey & Co Ltd and BOAC*³⁶, which included the following³⁷:

"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."

- 31 The claimant tortfeasor who satisfies the condition precedent may recover contribution from those other tortfeasors who bear responsibility in respect of the same damage in a fashion which answers a description in the balance of par (c). The defendant tortfeasor must be one (i) "who is ... liable in respect of the same damage" or (ii) "would if sued have been, liable in respect of the same damage". Only those who satisfy (i) or (ii) are amenable to a claim for contribution under the statute. Further, those who have been sued to judgment, whatever its outcome, do not fall within (ii). That is the effect of settled authority in this Court.

- 32 In *Brambles Constructions Pty Ltd v Helmers*³⁸, Barwick CJ identified the House of Lords in *George Wimpey & Co Ltd v British Overseas Airways Corporation*³⁹ as having:

35 (1965) 114 CLR 153.

36 [1953] 2 QB 501 at 519.

37 (1955) 92 CLR 200 at 210.

38 (1966) 114 CLR 213 at 218.

39 [1955] AC 169.

"decided that a tort-feasor who had been sued by the injured party and had successfully defended the action, no matter on what ground, could not be required to pay any contribution to any other tort-feasor who suffered judgment at the hands of the injured party in respect of the same damage. He was neither a tort-feasor liable to pay damages nor a tort-feasor who had not been sued."

The submissions

- 33 The respondent's case is that its situation falls within the last sentence of the above quotation. It is a tortfeasor who was sued but recovered a final judgment in its favour whereby the action against it was dismissed. The result is said to be that thereafter, in the action for a contribution brought against it by the appellant, it was not open to the appellant to satisfy the criterion for the amenability of the respondent to the statutory claim by re-agitating the issue of the respondent's liability to the injured party.
- 34 It should be accepted that the relationship between the two limbs in par (c) is that identified by Barwick CJ in *Brambles Constructions Pty Ltd v Helmers*⁴⁰. The persons against whom there is an entitlement to recover contribution are (i) those who have come under an obligation to pay money in respect of the same damage and (ii) those who, not having been sued by the injured party, would, had they been sued, have been found to have caused or contributed to the same damage by a tortious act.
- 35 The first limb of s 5(1)(c) identifies those who, like the respondent, have been sued by the injured party but fixes only upon those who have been made liable. The second limb identifies those who would, if sued at any time, have been liable, not those who were sued but obtained the entry of judgment in their favour, whether by consent or otherwise. There is no third category which identifies a person from whom contribution may be recovered by reference to the circumstance that this person has been sued and has been held not liable⁴¹. Unless the first or second limb is satisfied, there is, in the terms of s 5(1)(c) itself, no person "entitled to recover contribution under this section".
- 36 In some circumstances, this may produce what appear to be unsatisfactory outcomes. However, as indicated earlier in these reasons, this legislation has long been notorious as "a piece of law reform which seems itself to call somewhat

40 (1966) 114 CLR 213 at 218-219.

41 *Hood v Commonwealth of Australia* [1968] VR 619 at 622-624; *Hart v Hall & Pickles Ltd* [1969] 1 QB 405 at 410; *County of Parkland No 31 v Stetar* [1975] 2 SCR 884 at 897; *Quinn v Llesna Rubber Co Pty Ltd* [1989] VR 347 at 350.

urgently for reform"⁴². Be that as it may, in the present case, as indicated earlier in these reasons, it was open to the appellant to take steps to avoid it being shut out from the decision to enter judgment in favour of the respondent and against the plaintiff.

- 37 It is necessary to say something further with respect to the second limb. In *Brambles Constructions Pty Ltd v Helmers*⁴³, Windeyer J identified par (c) of s 5(1) as containing "the statutory description of the persons against whom such a claim [for contribution] can be made" and of the second limb said⁴⁴:

"I see no reason for limiting the denotation of the description by assuming that the words 'if sued' refer to some particular point of time. It is enough that there was a time, before the liability of the defendant tort-feasor was actually ascertained, at which the plaintiff (the victim of the tort) could have successfully brought an action against some other person (the third party), either independently of or jointly with the defendant."

- 38 In *Hart v Hall & Pickles Ltd*⁴⁵, the English Court of Appeal held that, where the action by the victim of the tort against the defendant in the contribution proceeding has been dismissed for want of prosecution, that person answers the description of one who "would if sued have been, liable in respect of the same damage". This was because the phrase "if sued" was rendered inapplicable only if the tortfeasor in question had been sued to judgment and the dismissal for want of prosecution was but an interlocutory order.

Conclusions

- 39 The appellant sought to bring the respondent within the second limb by submitting that the respondent had not been sued to judgment in the sense required to deny the respondent the character of a person not yet sued. Thereby the appellant would open the way to demonstrate in the contribution proceeding that, as between it and the respondent, the respondent was liable in respect of the same damage and that it should have the remedy specified in s 5(2).

42 *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 211.

43 (1966) 114 CLR 213 at 222.

44 (1966) 114 CLR 213 at 221.

45 [1969] 1 QB 405. See also *Canberra Formwork Pty Ltd v Civil & Civic Ltd* (1982) 41 ACTR 1 at 17 (non-prosecution); *Re Securitibank Ltd* [1986] 2 NZLR 280 at 283 (leave to discontinue).

40 However, in the present litigation, the order dismissing the plaintiff's action against the respondent was a final order which brought that action to an end. It would be a distortion of the text and structure of par (c) of s 5(1) to hold in those circumstances that the respondent thereafter answered the description of one yet to be sued. The plaintiff's cause of action against the respondent merged in the judgment, thereby destroying its independent existence.

41 The status of the Tribunal as a court of record was such that the circumstance that the judgment in favour of the respondent was entered by consent renders it no less effective to absolve the respondent from liability to the plaintiff⁴⁶. It was for the appellant to have taken the necessary steps to oppose that entry of judgment and to have put itself in the procedural position whereby it was competent to appeal against that entry. In the meantime, whilst that judgment remained on the record of the Tribunal, the respondent did not answer either of the statutory descriptions necessary to confer entitlement upon the appellant to proceed against it for contribution.

42 With respect to the first limb, the respondent had not been adjudged liable to the plaintiff. Rather, it had succeeded in establishing the opposite. With respect to the second limb, the presence of the judgment in the respondent's favour denied it the character of a party still awaiting a final determination of a suit in respect of the damage sustained by the plaintiff.

43 The appellant sought to weaken the determinative character of the consent judgment by reference to the decision of the House of Lords in *Munster v Cox*⁴⁷. The House of Lords dismissed an appeal against an order of the Court of Appeal setting aside an order of the Divisional Court for the trial of an issue whether one Cox was liable to have execution against him upon a judgment in an action against a partnership. Cox asserted he had dissolved the partnership before the issue of the writ. There was an issue as to the authority of one partner to bind an absent partner by consenting to judgment in an action against the partnership for damages for libel. The judgment itself was not impugned. The question was whether Cox was liable to have execution issued against him upon the judgment. The decision provides no support for the appellant.

44 The appeal should be dismissed. Costs should be dealt with as proposed by Callinan J in his reasons for judgment.

46 *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508.

47 (1885) 10 App Cas 680.

Brennan CJ
Gaudron J
McHugh J
Gummow J
Kirby J
Hayne J
Callinan J

15.

- 45 McHUGH J. I agree with the judgment of Kirby J. There is nothing that I can usefully add to his Honour's reasons.

46 KIRBY J. In *Bakker v Joppich*⁴⁸, Wells J apologised for the "gallons of ink" which had been spilt over the meaning of the legislation enacted to provide for contribution between joint tortfeasors. More than 40 years ago, this Court described the legislation, transcribed from a statute of the United Kingdom⁴⁹, as "a piece of law reform which seems itself to call somewhat urgently for reform."⁵⁰ The source of the problem, and of the diversity of judicial opinion, was said to be "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."⁵¹ In *Brambles Constructions Pty Ltd v Helmers*⁵², Barwick CJ declared that the statutory provision "cries out for some legislative intervention in order to make it quite plain whether or not defences particular to the tort-feasor in an action by the injured party are to be available to him in an action by another tort-feasor for contribution." In some jurisdictions in which the original statute was copied reforms have been adopted. However, none is relevant to these proceedings taken in New South Wales where s 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) (the Act) has remained substantially unaltered⁵³.

47 This appeal requires us to re-visit the words appearing in s 5(1)(c) of the Act and to consider once again the meaning of the phrase "who is, or would if sued have been, liable in respect of the same damage". The problem arises on this occasion from the fact that the plaintiff, who sued the tortfeasors now claiming and resisting contribution, settled separately with each – with the appellant (the claimant tortfeasor) for a large sum of money and with the respondent (the target tortfeasor) for a judgment in its favour but with no order as to costs. The issue is whether that judgment conclusively determines that the target tortfeasor is not liable to pay contribution to the claimant tortfeasor and this although the

48 (1980) 25 SASR 468 at 472.

49 *Law Reform (Married Women and Tortfeasors) Act 1935* (UK) (25 & 26 Geo 5, c 30). The Act has been followed in Australia, Canada, New Zealand and elsewhere. By s 8(2), the Act did not extend to apply in Scotland or in Northern Ireland.

50 *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 211.

51 (1955) 92 CLR 200 at 207.

52 (1966) 114 CLR 213 at 219-220.

53 cf *Wrongs Act 1958* (Vic), s 23B; *Wrongs Act 1936* (SA), s 25; *Tortfeasors and Contributory Negligence Act 1954* (Tas), s 3; *Law Reform Act 1936* (NZ), s 17(c).

claimant tortfeasor was not a party to the judgment and specifically stated that it did not consent to a judgment in such terms.

The facts

48 Mr John Gannon (the plaintiff) brought proceedings in the Dust Diseases Tribunal of New South Wales (the Tribunal)⁵⁴. He claimed damages in respect of pleural diseases alleged by him to have arisen from his inhalation of asbestos dust and fibre at work. He named three defendants, viz James Hardie & Coy Pty Limited (the appellant), the Electricity Commission of New South Wales (Elcom) and Seltsam Pty Limited (the respondent). Against the appellant and the respondent, the plaintiff pleaded that they had manufactured and supplied products containing asbestos used by him in the course of his employment. The plaintiff sued the three defendants as concurrent tortfeasors. His claim was complicated by the fact that he had worked for Elcom from 1970 to 1991. However between 1953 and 1973 he had worked in the building industry, including for a time for his family, when arrangements for the supply of asbestos products were different. It was the plaintiff's case that the sole supplier of the asbestos products during his employment with Elcom was the appellant, whereas, before that, such products had been supplied by both the appellant and respondent. Despite these distinctions, the three defendants were sued in the one action as concurrent tortfeasors alleged to be responsible for the same injury and damage⁵⁵. No point arises in this appeal from that complication. Argument has proceeded on the basis that, when sued, the defendants were concurrent tortfeasors.

Proceedings in the Tribunal

49 The hearing of the plaintiff's claims commenced in the Tribunal before Judge Johns on 8 November 1995. On the second day of the hearing, both the appellant and respondent filed cross-claims seeking indemnity or contribution in the event that it is "found to be liable to the Plaintiff". Such claims were made pursuant to the provisions of the Act. The trial judge had his attention drawn to their terms.

50 Later on the second day of the hearing, the appellant and Elcom reached agreement with the plaintiff to settle the claims against them. Terms of settlement were handed to Judge Johns providing for judgment in favour of the plaintiff against the appellant in the sum of \$340,000 and against Elcom in the sum of \$120,000, each party being liable to pay his or its own costs. Provision was also made for interest and to the effect that the terms of settlement were not to be

54 Established by the *Dust Diseases Tribunal Act* 1989 (NSW), s 4. The Tribunal has exclusive jurisdiction to hear and determine such proceedings: s 10.

55 This point was noted by the New South Wales Court of Appeal. See *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1997) 15 NSWCCR 247 at 248.

disclosed "other than in proceedings for contribution". No mention was made in the terms of settlement of the plaintiff's claim against the respondent or of the cross-claims for contribution, although the latter were still on foot and their continuance was clearly envisaged by the term providing for limited disclosure of the settlement.

51 Shortly after this settlement was reached, the plaintiff also concluded a separate agreement with the respondent in respect of his claim against it. In the result, a document titled "Order for Judgment" was handed to Judge Johns. It read:

"1. That the First Defendant [appellant] pay to the Plaintiff the sum of \$340,000 - Each party to pay his or its own costs.

2. That the Second Defendant [Elcom] pay to the Plaintiff the sum of \$120,000 - Each party to pay his or its own costs.

3. Verdict and Judgment for the Third Defendant [respondent] against the Plaintiff. No order as to costs.

This Judgment takes effect on the 9th day of November 1995."

52 Before Judge Johns signed the Order for Judgment, and affixed to it the seal of the Tribunal, counsel appearing for the appellant stated that the appellant did not consent to any judgment in favour of the respondent. He stated that it was an order in respect of which he had "no standing". But he asserted that no action by the plaintiff and the respondent "such as consenting to judgment in favour of the [respondent]" could "in any way impair the statutory right which the [appellant] has to seek contribution from the [respondent]". Judge Johns indicated his opinion that the judgment would not have any such effect⁵⁶. He stated that he would hear the cross-claims on a later date. It was common ground that, pursuant to order 1 of the foregoing orders, the appellant satisfied its liability to the plaintiff by paying him the specified sum. It was not contested that, within the authorities, the appellant was a "tort-feasor liable in respect of that damage"⁵⁷.

53 Before the hearing of the cross-claims could be had, a motion on behalf of the respondent was filed in the Tribunal seeking an order that the cross-claim of the appellant against the respondent be struck out, dismissed or stayed. That motion was heard in the Tribunal by another member, Judge Maguire. On 27 June 1997, his Honour upheld the respondent's claim for peremptory relief. He concluded that, because the respondent had been sued, its liability to contribute to

56 Transcript of Evidence, Dust Diseases Tribunal of New South Wales, 9 November 1995 at 107.

57 Act, s 5(1)(c). See *Brambles* (1966) 114 CLR 213.

the plaintiff's judgment against the appellant was to be determined under the first limb of s 5(1)(c) ("is ... liable") and not the second ("would if sued have been, liable"). The entry of judgment in favour of the respondent was fatal to the contention that liability existed, and no less so because the judgment was entered by consent of the parties to it. In so concluding, Judge Maguire upheld the respondent's submission that the point in issue was determined in its favour by the decision of the majority of the New South Wales Court of Appeal in *Castellan v Electric Power Transmission Pty Ltd*⁵⁸. He ordered that the appellant's cross-claim for contribution be struck out. From that order, the appellant appealed, by leave, to the New South Wales Court of Appeal.

Decision of the Court of Appeal

- 54 The Court of Appeal dismissed the appeal⁵⁹. Mason P, who delivered the reasons of the Court, relied on the decision of the House of Lords in *George Wimpey & Co Ltd v British Overseas Airways Corporation*⁶⁰ to support the proposition that⁶¹:

"Entry of the judgment in favour of the respondent against the plaintiff means that the respondent has been held not liable for the plaintiff's injury. This is a final judgment which is unchallenged and, as such, is fatal to the claim for contribution."

- 55 Mason P concluded that so much had been decided in *Castellan*. He rejected the application for leave to challenge the holding in *Castellan*, so far as it was authority for the proposition upon which his decision rested⁶². He also rejected the argument that, because the appellant was not a party to the consent judgment, such judgment did not conclusively determine, as between the appellant and the respondent, whether the respondent was "liable" to it. He said⁶³:

"At the end of the day the appellant's submission stands as an assertion that a consent judgment declaring non-liability is relevantly distinguishable

58 (1967) 69 SR (NSW) 159 at 187-188 per Asprey JA, 189 per Holmes JA (concurring), 174-175 per Walsh JA (dissenting on this point).

59 *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1997) 15 NSWCCR 247 (Mason P, Beazley and Stein JJA).

60 [1955] AC 169.

61 (1997) 15 NSWCCR 247 at 250.

62 (1997) 15 NSWCCR 247 at 250, 252.

63 (1997) 15 NSWCCR 247 at 251.

from such a judgment entered by a judge at trial. ... In my view reliance upon this principle is misplaced in a situation such as the present. The plaintiff and the respondent were the parties to the judgment which, albeit by consent, determined conclusively as between those parties that the respondent was not liable. This event alone put an end to the appellant's right of contribution simply because it had the effect of taking the respondent out of the class of persons against whom an order for contribution under the statute could be made."

- 56 Whilst noting reservations expressed in this Court concerning the correctness of the majority decision in the House of Lords in *Wimpey*⁶⁴, Mason P's reasons for rejecting the application to re-open *Castellan* were as follows⁶⁵:

"Unless and until the appellant can show that the respondent should have been found liable to the plaintiff then a vital step in its claim for contribution is missing. Since no attempt was made either below or here to challenge the judgment in the plaintiff's favour against the respondent, whether by appeal or otherwise, the fact that that judgment stands precludes the right of contribution."

- 57 His Honour went on to acknowledge that the result was open to criticism as unfair and as presenting practical difficulties which could impede the early settlement of claims between plaintiffs and defendants where the latter had outstanding claims for contribution as between each other. But he concluded that any reform of the statute was for the legislature, not the Court. The result was that the appellant's appeal was dismissed.

- 58 Special leave to appeal to this Court was sought by the appellant. It was resisted on the grounds that the legislation was notoriously obscure, had been the subject of amendment in several jurisdictions, had (following *Castellan*) long been understood to have the effect determined by the Court of Appeal and was, in any case, the subject of contemporary examination by the New South Wales Law Reform Commission⁶⁶. Whilst counsel for the respondent candidly conceded that, working on a fresh page, the construction urged for the appellant might have been adopted (a concession continued before this Court) he submitted that the weight and flow of authority on the statutory phrase supported the opinion of the Court of Appeal. This Court was urged to leave it to Parliament, if it saw fit, to correct any injustices to a claimant tortfeasor in circumstances such as the present. This

64 For example by Barwick CJ in *Brambles* (1966) 114 CLR 213 at 219.

65 (1997) 15 NSWCCR 247 at 252-253.

66 New South Wales, Law Reform Commission, *Contribution Between Persons Liable for the Same Damage* (Discussion Paper 38), (1997) (hereafter NSWLRC DP 38).

argument derived additional force because legislation had been circulated in New South Wales which included a clause addressed to the effect of a settlement with one, or some only, of the defendants who were alleged to be joint tortfeasors in proceedings before the Tribunal⁶⁷.

- 59 Doubtless, the foregoing were strong reasons why special leave to appeal to this Court might have been refused⁶⁸. However, once leave is granted, it is the duty of this Court, unless it is persuaded to revoke special leave, to determine the point in issue on its legal merits. It may be open to the Court, finding a puzzling ambiguity in legislation which reveals a gap in the drafter's perception of a problem (such as has arisen⁶⁹) to leave repair to Parliament. However, today, a more constructive (or "purposive") approach will ordinarily be adopted to the task of statutory construction. The Court will seek to give effect to the legislative purpose as it discerns it unless the statutory language, or lack of language, stands in the way and forbids that course.

History of the statutory provision

- 60 In order to ascertain the purpose of legislation, it is invariably useful to define the mischief which occasioned its enactment. In the case of s 5(1) of the Act, the purpose is not difficult to find. At common law, subject to certain exceptions not presently material, there was no contribution between either joint⁷⁰ or concurrent⁷¹ tortfeasors. The origins, and even the applicability, of the common law rules were obscure, and sometimes contested. The best explanation that could be offered for them was that they were grounded in "the rule that wrong-doers cannot have redress or contribution against each other ... where the person seeking redress must

67 Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Bill 1998 (NSW) (Draft). See Sched 1 par [5] inserting s 12C in the *Dust Diseases Tribunal Act* 1989 (NSW).

68 The transcript shows that special leave was granted by majority. See *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*, Transcript of Special Leave Proceedings, High Court of Australia, 19 May 1998 at 13.

69 cf *Bitumen and Oil Refineries* (1955) 92 CLR 200 at 207.

70 *Genders v Government Insurance Office of NSW* (1959) 102 CLR 363 at 376-377 referring to *Merryweather v Nixan* (1799) 8 TR 186 [101 ER 1337]; cf *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 585-586.

71 *Horwell v London Omnibus Co* (1877) LR 2 Ex D 365 at 377, 379; *The Koursk* [1924] P 140 at 158.

be presumed to have known that he was doing an unlawful act"⁷². Whatever the explanation and history of the rule, by 1894 it was accepted as a settled principle of English law deriving its principal authority from the decision in *Merryweather v Nixan*⁷³. The rule had its critics. Lord Kenyon's judgment in *Merryweather* was castigated in the House of Lords in *Palmer v Wick and Pulteneytown Steam Shipping Co* as "somewhat meagre" such that it did "not appear to ... be founded on any principle of justice or equity, or even of public policy"⁷⁴. On that footing, the Law Lords in 1894 declined to extend the rule to Scotland. However, they concluded, with obvious reluctance, that *Merryweather* "has been so long and so universally acknowledged as part of the English law that even if one's own judgment did not concur with its principle it would be now too late to question its applicability to all cases in England"⁷⁵.

61 Various statutory exceptions were enacted in England to govern such matters as the apportionment of liability for misrepresentations in company prospectuses⁷⁶ and in collisions between certain ships⁷⁷. But the general rule of immunity to contribution between co-tortfeasors prevailed. It was observed in most parts of the British Empire, although not, apparently, in India and, as a result of *Palmer's* case, not in Scotland.

62 Lord Herschell's criticism of the rule in *Palmer* attracted no immediate legislative attention. In *Austin Friars Steamship Company Limited v Spillers & Bakers Limited*⁷⁸, Pickford LJ described the rule against contribution between joint

72 *Adamson v Jarvis* (1827) 4 Bing 66 at 73 per Best CJ [130 ER 693 at 696] cited by Lord Herschell LC in *Palmer v Wick and Pulteneytown Steam Shipping Co* [1894] AC 318 at 324.

73 (1799) 8 TR 186 [101 ER 1337].

74 [1894] AC 318 at 324.

75 [1894] AC 318 at 333.

76 *Directors Liability Act* 1890 (UK), ss 3, 4, 5 [later *Companies (Consolidation) Act* 1908 (UK), s 84(4) and *Companies Act* 1929 (UK), s 37(3)]. See Great Britain, Law Revision Committee, *Third Interim Report*, (1934) (Cmd 4637) at par 6 (hereafter "the Report").

77 *Maritime Conventions Act* 1911 (UK), s 3; cf Report at par 8; NSWLRC DP 38 at 7.

78 [1915] 3 KB 586 at 592.

tortfeasors as an artificial doctrine, one not to be extended. Judges affronted by the injustice of the rule became inventive at finding exceptions⁷⁹.

63 In 1934, the English Law Revision Committee delivered its *Third Interim Report* (the Report) responding to terms of reference addressed to a number of doctrines of the common law considered to be anomalous. The first was that which forbade contribution between tortfeasors liable for the same damage⁸⁰. At the time that earlier consideration was given to the legislation which followed this Report, it was generally regarded as impermissible for courts to go behind the statutory language and to look to a report which gave birth to it. This impediment was expressly acknowledged by this Court in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*⁸¹. It was there said that "[t]he 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". Even then, however, this Court glanced at the Report and to derive conclusions as to the purpose of the legislative reform from the terms of the Committee's recommendations⁸². This action may explain why, from the start, whilst attempting to maintain so far as possible a uniform interpretation of legislation enacted in many jurisdictions of the common law, this Court adopted a construction of the Act at once more realistic and attentive to its fundamental purposes. This is so when compared with the construction sometimes adopted in England by reference only to the language of the statute viewed in isolation and without regard to the Report out of which it arose.

64 By developments of common law⁸³ and statute law⁸⁴, the courts of this country are now released from the former "rigid rules" governing the ascertainment

79 See eg *Moxham v Grant* [1900] 1 QB 88 at 93 and *Burrows v Rhodes* [1899] 1 QB 816 at 828. In the latter it was held that the rule was inapplicable where the act was done in honest ignorance of the facts which constituted the unlawfulness. The plaintiff in that case was induced to take part in the Jameson Raid by a representation that the service in question was to be lawful employment.

80 Report at par 1.

81 (1955) 92 CLR 200 at 212 by reference to *Assam Railways and Trading Co v Commissioners of Inland Revenue* [1935] AC 445 at 457-459.

82 (1955) 92 CLR 200 at 212.

83 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321; *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Saraswati v The Queen* (1991) 172 CLR 1 at 21-23.

84 *Acts Interpretation Act* 1901 (Cth), s 15AA; *Interpretation Act* 1987 (NSW), s 33; *Interpretation of Legislation Act* 1984 (Vic), s 35(a); *Acts Interpretation Act* 1954 (Footnote continues on next page)

of the meaning of legislation such as the Act. When the Report of the Law Revision Committee is examined it makes it abundantly clear that its object was "as speedily as possible"⁸⁵ to alter the common law rules so that "when two persons each contribute to the same damage suffered by a third the one who pays more than his share should be entitled to recover contribution from the other"⁸⁶. The apportionment of liability is left to the court to be made fairly following, with any necessary modifications, the practice which had developed in admiralty cases as to apportionment of contribution⁸⁷. Those cases had not been subject to the common law rule. In suitable cases, the Committee proposed, the judge could award "a complete indemnity"⁸⁸. The Committee considered various suggestions for exceptions to the general recommendation. However, it confined exceptions to a minimum. Its attention to matters of substance, rather than form, caused it to conclude that it was desirable "to alter the rule that the tort is merged in the judgment even though there is no satisfaction"⁸⁹. Such a rule could be unfair to a plaintiff. It should be altered, provided that the plaintiff should not be entitled to obtain by execution, in the aggregate, more than the amount awarded in the first judgment⁹⁰.

- 65 The ultimate recommendation of the Committee which gave rise to the statutory words in question reads, relevantly⁹¹:

"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 recover contribution ... from any other person who has been made liable in respect of the same wrong, or who, if sued separately, would have been so liable, unless the person against whom contribution is sought proves that he is by law entitled to be indemnified in respect of his liability by the

(Q), s 14A; *Acts Interpretation Act* 1915 (SA), s 22; *Interpretation Act* 1984 (WA), s 18; *Acts Interpretation Act* 1931 (Tas), s 8A; *Interpretation Act* 1967 (ACT), s 11A.

85 Report at par 7.

86 Report at par 7.

87 Report at par 8.

88 Report at par 8.

89 Report at par 11 citing *Brinsmead v Harrison* (1871) LR 6 CP 584; (1872) LR 7 CP 547.

90 Report at par 11.

91 Report at par (II) (Summary of Suggested Recommendations).

person seeking contribution. It shall be for the Judge to decide what the amount of the contribution is to be, or whether complete indemnity is to be given."

- 66 It was this recommendation which was carried into the *Law Reform (Married Women and Tortfeasors) Act 1935* (UK)⁹². The provisions of s 6(1) of that Act were copied verbatim in s 5(1) of the New South Wales Act. They read, relevantly:

"Where 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".

- 67 It did not take long for these words to give rise to difficulties. The most immediate problem was presented by the omission from the Act of an express provision to specify the time at which the "hypothetical suit"⁹³, ie the "hypothetical action envisaged by the statute"⁹⁴, was presumed to be brought. Did it mean "if sued when the tortfeasor claiming contribution was sued"; or "when the claim for contribution was made"⁹⁵; or when the plaintiff's cause of action arose⁹⁶; or "at any time"⁹⁷. Some of the differences of view about the purpose of the statute were later reflected in the opinions expressed in the New South Wales Court of Appeal in *Castellan* where Walsh JA wrote a strongly reasoned dissent⁹⁸.

- 68 In Australia, the issue of the presumed time of the hypothetical suit (and thus the operation of the statute of limitations) was settled, in respect of the Act, by the decision of this Court in *Brambles*⁹⁹. It was there held that the words in par (c) should be read without the importation of any temporal element, as if, after the words "if sued" there were added the words "at any time". In New Zealand, Parliament had earlier embraced this construction and put it beyond doubt by

92 s 6(1)(c).

93 *Wimpey* [1955] AC 169 at 178 per Viscount Simonds.

94 *Wimpey* [1955] AC 169 at 194 per Lord Keith of Avonholm.

95 *Wimpey* [1955] AC 169 at 189-190 per Lord Reid.

96 *Wimpey* [1955] AC 169 at 183 per Lord Porter, 194 per Lord Keith of Avonholm.

97 As this Court held in *Brambles* (1966) 114 CLR 213 at 220 per Barwick CJ.

98 (1967) 69 SR (NSW) 159 at 163.

99 (1966) 114 CLR 213.

adding the words "in time" to the common language of par (c)¹⁰⁰. Without an equivalent legislative elaboration, this Court came to a like conclusion in order to give effect to what it took to be the purpose of the Act and to avoid a construction which would frustrate the achievement of that purpose.

69 Although the limitation question was thus solved by the courts in different ways in England and Australia, further problems continued to arise. In *Hart v Hall & Pickles Ltd*¹⁰¹, the problem arose out of the dismissal of the plaintiff's claim against a second defendant for want of prosecution. The plaintiff, a worker, had been injured in the course of his employment at the first defendant's factory. He was helping to unload objects from a lorry brought onto the premises by contractors. Initially, the plaintiff issued his writ only against the first defendant, his employer. In its defence, the first defendant joined the contractors as third parties claiming indemnity or contribution from them under the statute. This propelled the plaintiff into adding the third party as a second defendant. However, those proceedings were dismissed for want of prosecution by the plaintiff. At the trial, the third party claimed, on a preliminary point of law, that it was entitled to be dismissed from the entire action on the ground that it could not be "liable" for contribution under the Act, the plaintiff's proceedings against it having been dismissed. The trial judge rejected the argument. The Court of Appeal affirmed his decision. Lord Denning MR, with whose reasons Davies and Winn LJ agreed (adding reasons of their own), catalogued the ambit of the statutory words thus¹⁰²:

"Those words ... cover two situations: (1) where a tortfeasor has been sued and has been held liable; and (2) where a tortfeasor has not been sued, but, if he had been sued, he would have been held liable. The words do not cover a third situation: (3) where a person who is alleged to be a tortfeasor has been sued and has been held not liable. If he has been held not liable *on the merits of the case*, clearly he cannot be sued for contribution. If he has been saved from liability by reason of the Statute of Limitations, again he cannot be sued for contribution: see *George Wimpey & Co Ltd v BOAC*¹⁰³. But here we have a fourth situation: (4) where a person (who is alleged to be a tortfeasor) has been sued but the action has been dismissed against him for want of prosecution. Does this relieve him of any liability to make contribution?" (emphasis added)

100 See *Law Reform Act 1936* (NZ), s 17(c) words inserted by s 35(2) of the *Limitation Act 1950* (NZ); cf *Re Securitibank Ltd* [1986] 2 NZLR 280 at 288.

101 [1969] 1 QB 405.

102 [1969] 1 QB 405 at 410-411.

103 [1955] AC 169.

70 The parallels between *Hart* and the present case, although not exact, are striking. Here too the person alleged to be a co-tortfeasor has been sued. Here too that action has been dismissed. The only difference is that here the action was dismissed not for want of prosecution by the plaintiff but by reason of a consent judgment between the plaintiff and the target tortfeasor to which the claimant tortfeasor, held liable, was not a party. In common with the present case and the situation in *Hart* there has been no holding of liability "on the merits of the case", a requirement thought necessary to secure the immunity in Lord Denning's third situation. In dealing with the problem in *Hart*, Lord Denning concluded that dismissal of the plaintiff's proceedings for want of prosecution was not fatal to the exercise by the claimant tortfeasor of its statutory right to indemnity¹⁰⁴:

"It seems to me that, in order that a person should be exempted from contribution, he must have been 'sued to judgment' and found to be not liable. Those words 'sued to judgment' were used by Parker J in *Littlewood v George Wimpey & Co Ltd and BOAC (Third Party)*¹⁰⁵ and were adopted by Morris LJ in the same case¹⁰⁶. When an action has been dismissed for want of prosecution, the defendant has not been 'sued to judgment' at all. *There has been no finding on the merits*. There has been no judgment that the defendant is not liable. It is only an interlocutory order – a matter of procedure – which does not affect substantive rights. It is not a final decision. It does not give rise to an estoppel by res judicata. The plaintiff can start another action for the same cause, so long as he does so within the period allowed by the Statute of Limitations ... Seeing that it is only a procedural matter, I hold that the defendant is not exempted by reason of the action being dismissed for want of prosecution. He is still liable to make contribution if he is a person who 'would, if sued, have been liable, in respect of the same damage.'" (emphasis added)

71 Both the appellant and the respondent sought to derive support from *Hart's* case. The appellant laid emphasis upon the repeated references to the need for an action "to judgment" and a "finding on the merits" to warrant extinguishing the claimant tortfeasor's statutory right to contribution. The appellant also used the case to illustrate its argument that the statutory language was not narrowly confined. It had to be given meaning in a variety of circumstances. It invoked a true hypothetical suit, the outcome of which determined whether there would be recovery or not. On the other hand, the respondent argued that it had indeed been "sued to judgment" and that the judgment against it was not interlocutory but affected substantive rights as between it and the plaintiff so as to foreclose the

104 [1969] 1 QB 405 at 411.

105 [1953] 1 WLR 426 at 439; [1953] 1 All ER 583 at 592.

106 [1953] 2 QB 501 at 522-523.

preconditions necessary to the appellant's statutory claim for contribution. The Court below preferred the latter approach. But should we?

Approach: the purposive construction of legislation

- 72 As Windeyer J remarked in *Brambles*, referring to the speeches in the House of Lords in *Wimpey*, an analysis of previous authority "does not yield any definite single principle capable of being applied in this case"¹⁰⁷. Accordingly, we should take his Honour's instruction and "go to the words of the Act". In doing so, it is important to emphasise yet again what is involved in the function of a court when it gives meaning to statutory provisions such as those of s 5(1)(c) of the Act. Common law courts have long accepted as relevant to the task of statutory construction ascertainment of the "mischief" to which the statute is addressed¹⁰⁸. However, for a time, until "an increasing willingness to give a purposive construction to the Act" replaced the "unhappy legacy" of a narrow approach to the judicial interpretive function, judges not only deprived themselves of materials useful to the task of interpretation. Sometimes they addressed such problems with a "narrowly semantic approach"¹⁰⁹. In England, one of the foremost disciples of the "semantic" approach was Lord Simonds. In *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd*¹¹⁰ he said, addressing a provision of an Act which he described as "clearly a remedial section":

"It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed."

- 73 Amongst the judges who have led the courts of the common law away from this approach, the influence of Lord Diplock may be acknowledged. In *Jones v*

¹⁰⁷ (1966) 114 CLR 213 at 221.

¹⁰⁸ The rule in *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638]; *Miller v The Commonwealth* (1904) 1 CLR 668 at 674; *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 439.

¹⁰⁹ *Fothergill v Monarch Airlines* [1981] AC 251 at 280 per Lord Diplock.

¹¹⁰ [1946] 1 All ER 637 at 641. See also his Lordship's speech in *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 at 190-191. For a similar opinion, see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-162 per Higgins J; cf *Mills v Meeking* (1990) 169 CLR 214 at 235; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-305, 336.

*Wrotham Park Estates*¹¹¹ he made it clear that, if the application of the literal or grammatical meaning would lead to a result which would defeat the clear purpose of a statute, the court, construing the legislation, may read words into the text so long as three conditions were fulfilled. First, that the mischief with which the Act was dealing was clear. Secondly, that the court was satisfied that, by inadvertence, Parliament had overlooked an eventuality which must be dealt with if the purpose of the Act was to be achieved. Thirdly, the court must be able to state with certainty what words Parliament, if its attention had been drawn to the defect, would have used to overcome the omission. Lord Diplock's approach to statutory construction now prevails, not only in England¹¹² but also in Australia¹¹³ and throughout the common law world. Today, unless driven to the result by unyielding words, no judicial satisfaction is to be derived from concluding that the manifest target of legislation has been missed¹¹⁴.

74 This Court should therefore approach the problem before it with a constructive attitude to achieving the purpose of the statute, which is clear enough on its face and rendered unmistakable when access is had to its history. There should be no going back to the former approach to statutory interpretation, especially because this Act has a clear remedial purpose and because, in respect of it, this Court has already expressed its preference for the construction which gives effect to, and does not defeat, the remedy provided by Parliament¹¹⁵. To make that remedy effective (and to prevent the defeat of the recovery of equitable contribution from a joint tortfeasor who can be shown to be "liable in respect of the same damage") all that is needed is the addition, after the words "if sued", of the words "to judgment on the merits". Clearly, that was the legislature's objective. In my respectful view, it is no more "a distortion of the text and structure of par (c)

111 [1980] AC 74 at 105.

112 *Fothergill v Monarch Airlines* [1981] AC 251 at 275, 280, 281, 291.

113 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA. See also *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 109-110.

114 Diplock, "The Courts as Legislators", in Harvey (ed), *The Lawyer and Justice*, (1978) 263 at 274; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424 per McHugh JA. It is perhaps worthy of mention that the leading speech for the majority in the House of Lords in *Wimpey* was given by Viscount Simonds. Counsel for the unsuccessful appellant in that case, the tortfeasor claiming contribution, was Mr Kenneth Diplock QC.

115 *Brambles* (1966) 114 CLR 213.

of s 5(1)"¹¹⁶ than was the decision of the Court in *Brambles* to imply into the text the words "at any time". Any other meaning would result in the precise injustice which the Act was introduced to overcome. That cannot have been Parliament's purpose.

- 75 If it was possible for this Court to imply the words "at any time" in 1966 when it decided *Brambles*, it would be remarkable if, today, it were to hold back from implying the words suggested in this case. Since 1966, the courts have permitted themselves access to a broader range of materials than were then available. One such source, namely the Report, is clearly pertinent. As well, since 1966, the purposive approach to statutory construction has replaced the sterile semantic view which previously prevailed. Whereas in 1954, in *Wimpey*, the majority approached the task of interpretation in a way which involved "least alteration of the existing law"¹¹⁷, that is not now, and should not be, the approach of this Court to the construction of a provision such as that in question.

The meaning of the legislative words

- 76 When, therefore, I take Windeyer J's advice and turn to the words of the Act, read to achieve their reformatory object, their meaning is clear. Section 5(1) attaches where "damage is suffered by any person as a result of a tort". In the present case, it was common ground that the plaintiff had suffered damage as a result of a tort and therefore the application of the sub-section was, to that extent, engaged.
- 77 The abolition of the former bar to action which, at common law, would have arisen by the plaintiff's recovery of judgment against one tortfeasor (such as the appellant) is then removed by s 5(1)(a). The object of the sub-section, as a piece of remedial law designed to overcome the anomalous common law rule, is made clear by par (a). What follows in the sub-section should be construed, so far as possible, to uphold that object and not to frustrate its achievement.
- 78 The terms of par (c) begin with a phrase which states a second precondition. It is necessary that the claimant for contribution should be a "tort-feasor liable in respect of that damage". By the authority of this Court, that phrase refers to a tortfeasor whose liability has been ascertained, including ascertained by judgment¹¹⁸. In the present case, the appellant qualified for that description. Although the judgment entered against it was by consent, it was for a substantial

116 *James Hardie & Coy Pty Limited v Seltsam Pty Limited* [1998] HCA 78 at 40 per Gaudron and Gummow JJ.

117 [1955] AC 169 at 191 per Lord Reid.

118 *Bitumen and Oil Refineries* (1955) 92 CLR 200 at 212.

sum, arrived at in the course of the settlement of part-heard proceedings with the parties at arm's length. No point was raised to suggest that the appellant was not a "tort-feasor liable in respect of that damage". Accordingly, the second precondition is also met.

79 There is then the statutory entitlement to the recovery of contribution from "any other tort-feasor". A clue as to the nature of the contribution envisaged is given by s 5(2) of the Act. That is the provision which fixes the "amount of the contribution recoverable" to 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". This is a broad mandate, as this Court has emphasised¹¹⁹. Whilst these words provide the formula for the determination of the amount of recovery they also throw light upon the object of the statutory contribution provided for. It is the just and equitable sharing of responsibility for the damage to the plaintiff in accordance with the terms of the Act, just as the Law Revision Committee's Report envisaged.

80 This brings me to the crucial words: "who is, or would if sued have been, liable in respect of the same damage". Although a theoretical argument might arise that the first limb of this phrase ("who is ... liable") addresses a notional liability in law yet to be ascertained, the juxtaposition in par (c) of the first limb with the second suggests, as has been repeatedly held¹²⁰, that it is dealing with the case where the respondent tortfeasor has been sued and has been held liable, perhaps in separate, earlier or other proceedings¹²¹. In the present case, although the respondent was sued in the same proceedings, the disposal of the plaintiff's claim against it by a consent judgment in favour of the respondent removes the application of the first limb. In the face of that judgment, it cannot be said that the "other tort-feasor ... is ... liable in respect of the same damage". So far as the record of the judgment between the plaintiff and the respondent is concerned, it lends no support to the existence of the liability necessary for the recovery of contribution under that limb. If such liability is to be established, it must arise under the second limb as properly understood. This takes the Court into the inquiry about the alternative, hypothetical, liability of the respondent. Would it, if sued, have been liable in respect of the same damage?

81 The respondent submitted that these words were not engaged by the facts of this case. It had been sued. The second limb was therefore inapplicable, being confined by its terms to a case where the respondent to the claim for contribution

119 *Bitumen and Oil Refineries* (1955) 92 CLR 200 at 212-213.

120 See *Wimpey* [1955] AC 169 at 179.

121 *Littlewood v George Wimpey & Co Ltd and BOAC* [1953] 2 QB 501 at 510 per Singleton LJ.

had *not* been sued but would *if* sued have been held liable. In this way the respondent claimed immunity from the obligation to contribute as justice and equity might otherwise require. Its immunity would, on its argument, prevail even if a tortfeasor in the position of the appellant could show that, in a hypothetical action pursued to judgment on the merits prior to the entry of the consent judgment between the plaintiff and the respondent, the respondent would have been held liable in respect of the same damage. On the respondent's argument the fact that, in such circumstances, it might be just and equitable having regard to the respondent's responsibility for the damage to the plaintiff that it should substantially contribute to, or even wholly indemnify the appellant from its liability, would be no answer. The case would simply slip through a gap in the legislation which had not provided for recovery of contribution in such a circumstance. The pre-existing common law rule would prevail. The apparent object of the reform would fail. The Court, like Lord Simonds, would hold back from inserting words or phrases "which might succeed where the draftsman failed"¹²².

82 Such a result would be as surprising as it would be unjust. This makes it incumbent on anyone construing the legislation to be very sure that no alternative construction is available which would achieve the apparent object of the reform and avoid the injustice – these being the presumed purposes of Parliament in enacting the provisions. There is an alternative construction. It is the one harmonious with the approach adopted by this Court in *Brambles*. It is to read the second limb of par (c) in a way which recognises that it posits a hypothetical action: one designed to ascertain whether at any time there was liability of the respondent against whom contribution was claimed to the plaintiff, not whether at the particular time the claim was actually made, a limitation statute or other impediment had intervened to act as a bar to recovery. This approach to the meaning of the second limb of par (c) requires the implication of words which give content to the hypothetical action which is postulated.

83 The added words are few in number, clear of purpose and require no more than that the hypothetical action which the Act contemplates is brought to judgment by a determination on the merits, which includes on the legal merits, of the case which the plaintiff would have had against the targeted tortfeasor had the plaintiff sued that tortfeasor to judgment. This alternative construction is consistent with this Court's holding in *Brambles*. It is also compatible with the approach adopted in *Hart*¹²³ where the plaintiff's action against the targeted tortfeasor was dismissed for want of prosecution. It is consistent with the authorities which have emphasised that the statutory right of contribution is

¹²² *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641 per Lord Simonds.

¹²³ [1969] 1 QB 405.

substantive and exists independently of acts or omissions on the part of the plaintiff or the tortfeasor from whom contribution is sought after the occurrence of the tort¹²⁴. It also stands more comfortably with decisions under legislation providing analogous rights to recover contribution¹²⁵ where it has been held, rightly in my view, that a consent judgment in favour of a defendant tortfeasor is no bar to an employer's claim for its statutory indemnity¹²⁶.

- 84 The words "would if sued have been" in par (c) therefore envisage a completed action where the target tortfeasor has been sued to judgment and the action has been fully dealt with on its merits. Lord Denning suggested this construction of the paragraph in *Hart*¹²⁷. Windeyer J implied as much in *Brambles* when he said¹²⁸:

"The description, a tort-feasor who if sued would have been liable, denotes any person who would have been held liable in tort had he been sued in a competent court, by proper process, at a proper time and on evidence properly presented - that is anyone whose liability as a tort-feasor could have been ascertained in an action."

- 85 Clearly, in the context, the ascertainment of liability means ascertainment on its merits, not ascertainment by private arrangement between only some of the parties by which, unilaterally, they deprive others of rights which, for good purpose, Parliament has conferred on them by reforming legislation.

The contrary arguments are unpersuasive

- 86 As against this construction, the respondent deployed a number of arguments. First, it said that the construction amounted to a departure from a settled interpretation which, by its "antiquity", had derived authority to which this Court should adhere. But this is not so. The precise point before the Court has never previously arisen. In so far as the majority speeches in *Wimpey* were relied upon, this Court has already recognised the absence in them of a single principle¹²⁹.

124 See eg *Nickels v Parks* (1948) 49 SR (NSW) 124 at 129 per Jordan CJ.

125 For example *Workers' Compensation Act* 1926 (NSW), s 64(b).

126 *Government Insurance Office of NSW v C E McDonald (NSW) Pty Ltd* (1991) 25 NSWLR 492 applying *Tooth & Co Ltd v Tillyer* (1956) 95 CLR 605 at 611-612; cf *Watson v Newcastle Corporation* (1962) 106 CLR 426 at 441.

127 [1969] 1 QB 405 at 411.

128 (1966) 114 CLR 213 at 221.

129 *Brambles* (1966) 114 CLR 213 at 221.

Certainly, the speeches of the minority in *Wimpey* are consistent with the approach which I favour. *Castellan*, upon which the respondent placed much emphasis, is like *Wimpey* distinguishable from the present case. In those cases, unlike here, the targeted tortfeasor was sued and a final judgment on the merits (including the legal merits) was entered in its favour. Such was not this case. Since these early decisions were written (and they scarcely qualify for the description of "antiquity") a broader range of materials has become available to the courts for the interpretation of the legislation. And a more constructive approach is now taken to the judicial task.

- 87 It is clearly contrary to principle to place a plaintiff and a tortfeasor, against whom contribution has been, or may be, sought in a position where they can, between themselves, deprive another tortfeasor of its statutory right to contribution¹³⁰. As Lord Denning observed in *Nana Ofori Atta II v Nana Abu Bonsra II*¹³¹:

"The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence."

- 88 One of the chief defects of the common law was that it subjected co-tortfeasors to the power of the plaintiff to determine the incidence of loss distribution between the tortfeasors "at his own whim, allowing him to throw the whole loss, if so minded, on one of them and completely exempt the other"¹³². Having regard to the trouble taken to amend the common law, it seems scarcely likely that Parliament would have willingly continued such a privilege. It is even more unlikely that it would have extended the power to one of the co-tortfeasors, acting without the concurrence of the others, to confer immunity on itself and to deprive those others of a valuable statutory right to contribution. It would require the clearest possible statutory language to uphold such a construction of the Act. No warrant for it can be found in par (c). On the contrary, the objects and purpose of the legislation speak strongly against such a construction.

- 89 In any case, the correctness of the decisions in *Wimpey* and *Castellan* have been repeatedly questioned in the intervening years. The outcome of *Brambles* represents a rejection of the narrow view of the legislation which the majority in

130 See *Wimpey* [1955] AC 169 at 196 per Lord Keith of Avonholm (diss).

131 [1958] AC 95 at 101. Lord Denning allowed two exceptions but neither applies here. The appellant was not a privy to the judgment in favour of the respondent; nor was the appellant precluded from challenging the judgment, as it did from the start.

132 Fleming, *The Law of Torts*, 9th ed (1998) at 293.

Wimpey favoured. Similarly, the dissenting opinion of Walsh JA in *Castellan*¹³³ attracted the favourable notice of members of this Court in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*¹³⁴. The result is that there is no consistent line of authority about the meaning of par (c) which constrains this Court to an interpretation which would so manifestly defeat the legislative purpose.

- 90 Secondly, the respondent submitted that a consent judgment, such as that entered between it and the plaintiff, was a final judgment¹³⁵. So long as it stood on the record, the judgment between the plaintiff and the respondent barred recovery under either limb of par (c). It conclusively established that, when sued, the respondent is *not* liable in respect of the same damage. But it equally answered the question posed by the hypothetical action, for the respondent had been sued and thus the hypothesis was disposed of by actuality. In this regard, the respondent cited the dictum of Brennan J in *Oceanic* where his Honour said, with reference to the facts of that case¹³⁶:

"So long as the judgment holding Pilbara not liable stands on the record, the shipping company is unable to assert that Pilbara is a tortfeasor who 'is, or would if sued have been, liable' to Hamersley".

- 91 There are many answers to these arguments which appear to have influenced the decision of the Court of Appeal. First, in *Oceanic*, Brennan J was concerned with a case where, as in other decisions in this series, a judgment had been obtained in favour of the target tortfeasor on the merits (including the legal merits) of the case. That is not the situation here. There are strong reasons of legal principle and policy for upholding, including in the context of s 5(1)(c) of the Act, the conclusive effect of such a judicial determination on the merits. But a consent judgment does not have for all purposes exactly the same consequences as a judgment reached on the merits in a contested action. In *Spencer Bower, Turner and Handley on The*

133 Walsh JA in *Castellan* (1967) 69 SR (NSW) 159 at 176 said: "The mere fact that [D2] would have had a good defence against the plaintiff, once the judgment against [D1] had been satisfied, would not bar the claim for contribution of [D1] against [D2]. In the separate action now being assumed, it would be sufficient for [D1] to show that, if sued at any time ... [D2] would have been liable to the plaintiff." Holmes JA at 188 said that he would have agreed with Walsh JA but for what he took to be required by the precedent of *Wimpey*.

134 (1986) 160 CLR 626 at 671 per Brennan J, 679-680 per Deane J concurring.

135 *Giles v Wooldridge* (1883) 17 SALR 38 at 40-41; *The Bellcairn* (1885) 10 PD 161 at 165-166; *Scott v Meehan* (1899) 1 WALR 179 at 180.

136 (1986) 160 CLR 626 at 670.

*Doctrine of Res Judicata*¹³⁷, the authors state, correctly in my view, that "[n]o consent judgment or order has any operation against any third person or against any party not shown to have consented".

92 In the present case, far from having consented to the judgment in a way which would make it right and just that it be bound, the appellant signified that it did not consent. The judge who entered the judgment indicated, clearly enough, his agreement with the appellant's understanding of the effect of what he was doing. A consent judgment is indeed a true judgment between the parties. It speaks to the world of the agreement to which the parties give effect in the form of a judgment. But without the consent of others or the operation of some other law, it cannot have the consequence of depriving others of rights expressly conferred upon them by statute. In this case, it cannot deprive the appellant of its right to secure contribution if it can prove that the respondent is a "tort-feasor ... liable in respect of the same damage". Clearly, the respondent could not have obtained a contractual release from the plaintiff which would have had the effect of providing it with an immunity from a liability to contribute under the Act. Nor will such immunity attach because the release is given effect in the form of a consent judgment.

93 Thirdly, the respondent submitted that it was open to the appellant to protest against the entry of judgment between the plaintiff and the respondent and to persuade Judge Johns, or on appeal the Court of Appeal, that such judgment should not have been entered because it would adversely affect the appellant's right to recover indemnity or contribution under the Act. In short, it was argued that the appellant has mistaken the law, and must now pay the consequences. I am doubtful that the appellant would have had any ultimate right to resist the entry of a consent judgment between the plaintiff and the respondent disposing of their separate dispute. In particular, it seems doubtful whether the appellant would have a right (fraud or like grounds apart) to seek relief by way of the setting aside of a consent judgment between other parties concerning their dispute. But even if such rights existed, they are scarcely an answer to the proper construction of the Act or the outcome of this appeal. The rights of the appellant to recover contribution derive from the Act. They may not be made dependent on the exercise by a court of discretions or decisions which depend upon whether a judge will, or will not, enter judgment or an appellate court will, or will not, grant leave to appeal or accept as an objector to a judgment a stranger to the proceedings in which judgment is given. Moreover, the strength of the respondent's objection must be measured against the possibility that the action between the plaintiff and the targeted tortfeasor was not brought (as here) in the consolidated proceedings but in separate proceedings, perhaps much later and possibly of which the tortfeasor claiming contribution was completely unaware. If, in such a case, a consent judgment between the plaintiff and the targeted tortfeasor could not deprive the tortfeasor claiming contribution

137 3rd ed (1996) at par 41.

of its statutory rights, the same must be true where, as in this case, the proceedings were brought together.

94 Judge Johns was correct in his understanding of the effect of what he was doing. It was not his purpose, by entering the consent judgment between the plaintiff and the respondent, to conclude the proper determination of the cross-claims. That is why he stood them over for later hearing. Had any other purpose been intended, it would have been incumbent on the Tribunal to delay the entry of judgment until the cross-claims were concluded or, at least, to postpone the entry of judgment until all those affected by it had an opportunity to be heard. None of these problems arises if the effect of the judgment is as Judge Johns assumed and as the appellant asserted. In my opinion, their assumption and assertions were correct. The judgment, being a consent judgment, had no operation against the appellant or against any party not shown to have consented to its terms. In particular, it had no operation to deprive the appellant of rights to contribution which it otherwise enjoyed pursuant to s 5(1)(c) of the Act.

95 Finally, the respondent made much of the fact that the legislation had been in operation for many years, had been amended in several other jurisdictions, was the subject of specific law reform recommendations in New South Wales¹³⁸ and in other jurisdictions, in one of which it had been expressly suggested that words should be inserted to clarify the fact that the hypothetical suit contemplated by the second limb of par (c) involved a hearing on the merits¹³⁹. Although these were doubtless valid arguments for contesting a grant of special leave, they must not deflect this Court, once the appeal is before it, from its duty to construe the legislation and to state its meaning. In *Brambles*, this Court did not withhold the construction it favoured because the matter could be, and in other jurisdictions had been, attended to by legislative amendment. Nor should we here. It is open to question whether the Draft Bill which was shown to the Court and which would incorporate certain provisions in relation to settlements before the Tribunal would, if enacted, affect a case such as the present¹⁴⁰. However that may be, in its applications outside the Tribunal it would leave the Act still governed by the Court of Appeal's decision. Moreover, in so far as equivalent legislation still operates in other jurisdictions of Australia¹⁴¹, the general problem would remain. The appellant before this Court would be left without redress by a prospective

138 NSWLRC DP 38.

139 Ontario, Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence*, (1988) at 272-273.

140 The Draft Bill expressly reserves the operation of s 5(1)(a) of the Act. See Sched 1 par [5] inserting s 12C(2) in the *Dust Diseases Tribunal Act 1989* (NSW).

141 See *Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT), s 11(4); cf *Canberra Formwork v Civil & Civic* (1982) 41 ACTR 1.

amendment of the legislation. The Court was also informed that a number of cases before the Tribunal, in a situation akin to that in this case, await this decision.

- 96 Clearly, the ruling of the Court of Appeal represents a significant inhibition upon the early settlement of litigation in the Tribunal as the law presently stands. Although the Court was told that, in this case, the plaintiff was not gravely ill, it was not contested that in many cases coming before the Tribunal (and inherent in the nature of its jurisdiction) the plaintiffs concerned will be desperately ill and often dying. In such circumstances, a requirement, in effect, that the consent of all defendants be had before settlement of claims against particular defendants is achieved would represent a most serious practical inhibition on the disposal of those parts of such claims as can be settled. Such settlements put the plaintiff in funds at the earliest possible time. They leave it to the defendants to fight out their respective claims for contribution as the Tribunal's hearing priorities permit. Not only is this the sensible operation of the contribution legislation, as it may be assumed was Parliament's purpose. It is also, in my view, the operation which the language of the Act requires.

Orders

- 97 The appeal should be allowed. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In lieu thereof, it should be ordered that the appeal to that Court from the orders of Judge Maguire in the Dust Diseases Tribunal of New South Wales be allowed; the orders of his Honour should be set aside; in place thereof, the motion which was determined by his Honour should be dismissed. The respondent should pay the appellant's costs in this Court, in the Court of Appeal and in the Tribunal.

- 98 CALLINAN J. This appeal is concerned with the liability of concurrent tortfeasors to one another in circumstances in which one tortfeasor has obtained judgment in its favour by consent of the plaintiff. The question is whether a tortfeasor who has sought indemnity or contribution from another tortfeasor who has had a judgment entered in its favour against the plaintiff, is, as a result of that judgment, precluded from obtaining indemnity or contribution. The answer to the question depends upon the proper construction of s 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

The proceedings

- 99 The plaintiff, Mr Gannon, suffered a serious illness by reason of prolonged exposure at work to asbestos dust and fibre. The circumstances of his exposure to the dust and fibre were such that he apparently had an arguable case in negligence against three defendants, James Hardie & Coy Pty Limited ("the appellant"), Seltsam Pty Limited ("the respondent") and Elcom.

- 100 The plaintiff commenced proceedings in the Dust Diseases Tribunal of New South Wales which has exclusive jurisdiction to hear and to determine proceedings of this kind¹⁴².

- 101 The matter came on for hearing in the Tribunal before Judge Johns who had jurisdiction to determine not only the plaintiff's claim but also cross-claims which had been filed by each defendant seeking indemnity or contribution from the other in the event that one or other of such defendants might be found to be liable to the plaintiff.

- 102 After the plaintiff had given evidence, an agreement to settle his claim was made between him and the appellant and Elcom.

- 103 Pursuant to the terms of settlement, the plaintiff was to have a judgment in his favour against the appellant in the sum of \$340,000, and against Elcom in the sum of \$120,000. The terms included a conventional term that the details of the settlement were not to be disclosed, but there was an exception made in respect of "proceedings for contribution". Otherwise, there was no reference to the plaintiff's claim against the respondent or to the cross-claims. The Tribunal was provided with a copy of the terms of settlement.

- 104 Apparently, contemporaneously with the negotiations leading to the resolution of the plaintiff's claims against the appellant and Elcom, the plaintiff was engaged in separate discussions with the respondent. These discussions

142 *Dust Diseases Tribunal Act 1989* (NSW) ss 4, 10.

resulted in an agreement that the respondent should have judgment against the plaintiff.

105 His Honour was then invited to make orders as follows which he did:

- "1. That the First Defendant [the appellant] pay to the Plaintiff the sum of \$340,000 – Each party to pay his or its own costs.
2. That the Second Defendant [Elcom] pay to the Plaintiff the sum of \$120,000 – Each party to pay his or its own costs.
3. Verdict and Judgment for the Third Defendant [the respondent] against the Plaintiff. No order as to costs.

This judgment takes effect on the 9th day of November 1995."

106 When his Honour was invited to make the orders, counsel for the appellant stated that the appellant did not consent to judgment in favour of the respondent, explaining, at the same time, that any order in that regard was one in respect of which he had no standing but which could not impair the statutory right which the appellant had to seek contribution from the respondent. His Honour then said that he would hear the cross-claims at a later date.

107 The appellant satisfied the judgment entered against it in favour of the plaintiff. On 21 May 1997 the respondent sought to have the appellant's cross-claim struck out. That application was granted by another member of the Tribunal, Judge Maguire on 27 June 1997. It is against that order that the appellant appealed to the Court of Appeal of New South Wales.

108 Before the Court of Appeal the respondent submitted that the appellant's appeal should be dismissed on two bases: that the judgment in its favour against the plaintiff precluded or defeated the claim for contribution; and that the satisfaction of the judgment in the plaintiff's favour against the appellant discharged the liability of the respondent as a concurrent tortfeasor.

109 In a judgment delivered *ex tempore* on 26 September 1997, the Court dismissed the appeal¹⁴³.

110 Mason P (with whom Beazley and Stein JJA agreed) accepted both of the respondent's submissions. First, they held that entry of the judgment in favour of the respondent against the plaintiff was fatal to any cross-claim by the appellant for some or all of the plaintiff's damages. Their Honours relied upon

143 *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1997) 15 NSWCCR 247.

*George Wimpey & Co Ltd v British Overseas Airways Corporation*¹⁴⁴ and the following passage in *Castellan v Electric Power Transmission Pty Ltd*¹⁴⁵:

"Contribution cannot be successfully claimed by one tortfeasor against another alleged tortfeasor who, having been sued by the injured party, has been found in that action not to be liable to the injured party no matter on what ground".

- 111 The appellant had contended that *Castellan* was wrongly decided, or that, in any event, any principle for which it might stand as authority does not extend to circumstances in which judgment was obtained by consent and without a hearing on the merits. In support of this proposition, counsel for the appellant sought to derive from the following passage in the judgment of Windeyer J in *Brambles Constructions Pty Ltd v Helmers*¹⁴⁶, a proposition that if a case could have been made out against another tortfeasor, no matter what happened in proceedings between the plaintiff and that tortfeasor, a liability to contribute or provide indemnity would always remain available to another tortfeasor liable to satisfy the plaintiff's claim:

"A person from whom contribution can be claimed is, as I read the Act, anyone who would had he been sued have been held liable for the same damage. The description, a tort-feasor who if sued would have been liable, denotes any person who would have been held liable in tort had he been sued in a competent court, by proper process, at a proper time and on evidence properly presented – that is anyone whose liability as a tort-feasor could have been ascertained in an action."

- 112 The Court of Appeal was of the opinion that there was no relevant distinction between a judgment by consent in favour of a tortfeasor and a judgment entered by a judge after a trial, as appears from the following passage from the reasons of Mason P¹⁴⁷:

"At the end of the day, the appellant's submission stands as an assertion that a consent judgment declaring non-liability is relevantly distinguishable from such a judgment entered by a judgment at trial ... [but it] put an end to the appellant's right of contribution simply because it had the effect of taking

144 [1955] AC 169.

145 (1967) 69 SR(NSW) 159 at 188 per Asprey JA.

146 (1966) 114 CLR 213 at 221.

147 (1997) 15 NSWCCR 247 at 251.

the respondent out of the class of persons against whom an order for contribution under the statute could be made".

- 113 Their Honours were also of the view that the satisfaction by the appellant in full of the judgment in favour of the plaintiff, precluded the Court from dealing further with the cross-claims.

The appeal to this Court

- 114 In this Court the appellant renewed the arguments that it had presented in the Court of Appeal, adding that the obscurity of the language of the section admitted of an interpretation in favour of the appellant, and that such an interpretation was to be preferred on policy and remedial grounds.

- 115 Section 5(1) of the Act is open to a criticism of want of clarity. It relevantly states:

"(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, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought".

- 116 The purpose of the legislation was remedial, to redress the injustice of the common law which generally made no provision for contribution between concurrent¹⁴⁸ or joint tortfeasors¹⁴⁹. I need not repeat the history of the application and criticism of the common law rules which are summarised in the reasons for judgment of Kirby J, and which led to the passage of the *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK). Section 5(1) of the New South Wales legislation which I have set out above is relevantly in the same terms as s 6(1) of the United Kingdom Act of 1935.

148 *The Koursk* [1924] P 140 at 158.

149 *Genders v Government Insurance Office of NSW* (1959) 102 CLR 363 at 376-377 referring to *Merryweather v Nixan* (1799) 8 TR 186 [101 ER 1337].

117 In its submissions to this Court, the appellant pointed to a passage from the judgment of Barwick CJ in *Brambles*¹⁵⁰:

"In my opinion, there is no need to import into s 5(1)(c) any temporal element in this connexion. The effect of s 5(1)(c), in my opinion, is that a tort-feasor who has come under an enforceable obligation to pay money for the damage caused by his tortious act may successfully recover contribution from another tort-feasor who has also come under an obligation to pay money in respect of the same damage and he may also recover contribution from any other tort-feasor who, not having been sued by the injured party, had he been sued, would have been found to have caused or contributed to the same damage by a tortious act. It seems to me that there is no need whatever to specify any point of time as at which the expression 'if sued' should be applied. It can be read 'if sued at any time' which, of course, does not import any temporal element into the section. It was so held by Donovan J in *Morgan v Ashmore, Benson, Pease & Co Ltd*¹⁵¹ and by McNair J in *Harvey v R G O'Dell Ltd; Galway (Third Party)*¹⁵² and with their views I respectfully agree.

This conclusion does not depend upon reading the word 'liable' where firstly occurring in the paragraph of the subsection as exclusively denoting liability by judgment, nor does it depend upon adopting a view one way or the other as to whether the word 'liable' where secondly occurring, means 'liable by judgment'. No doubt the use of the words 'if sued' does tend towards the view that 'liable' where secondly occurring means liable by judgment. That view commended itself to members of the House of Lords in *George Wimpey & Co Ltd v British Overseas Airways Corporation*¹⁵³ but I find no need to resolve that question myself at this time and notwithstanding the observations of their Lordships, with all due respect, the question so far as I am concerned remains an open one."

118 Reference was also made to the passage in the judgment of Windeyer J in *Brambles*¹⁵⁴ which I have already quoted.

119 The appellant argued that the view of Walsh JA, who dissented in *Castellan* was to be preferred to the opinion of the majority and that this Court should adopt

150 (1966) 114 CLR 213 at 219.

151 [1953] 1 WLR 418; [1953] 1 All ER 328.

152 [1958] 2 QB 78.

153 [1955] AC 169.

154 (1966) 114 CLR 213 at 221.

his Honour's reasoning here because it had already secured the approval of Brennan J (with whom Deane J agreed) in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*¹⁵⁵.

120 In *Castellan*, Walsh JA had said¹⁵⁶:

"But in the present case the situation is different. BHP is not in the position of a person who has been sued and has been held by a final verdict and judgment to be not liable. The whole point of the appeal is to say that the decision that BHP was not liable was wrong in law and that, if the trial had proceeded according to law, BHP would have fallen into the class of a person who has been sued *and held liable* (assuming, of course, that the jury had found a verdict for the plaintiff against BHP)."

121 In *Oceanic Crest Shipping*, Brennan J expressed his approval of the opinion of Walsh JA in *Castellan* in these words¹⁵⁷:

"In *Castellan v Electric Power Transmission*¹⁵⁸, a majority of the Court of Appeal held that no new trial could be ordered on the application of one tortfeasor to decide the liability of another alleged tortfeasor to the plaintiff when the first tortfeasor had satisfied the plaintiff's judgment against him and the plaintiff's claim against the other alleged tortfeasor had been dismissed by consent of those parties. The judgment for the alleged tortfeasor standing as a final judgment, he was immune from an order for contribution to the tortfeasor who had satisfied the plaintiff's judgment. Walsh JA dissented. In a passage with which I respectfully agree, his Honour said¹⁵⁹:

'In order that the rights of all parties should be properly determined in accordance with law, I am of opinion that this Court has the power and the duty to set aside any part of the result of the trial, if it was reached through error of law, and if it is such that, whilst it stands, it impedes the proper resolution of the rights of all parties. It was the automatic consequence of the entry of verdicts for BHP in the plaintiff's action that, in the claims of EPT for contribution against BHP, there must be verdicts for BHP. If this was erroneous and if, so long as it stands, the said claims of EPT can never be duly determined according to law, it is

155 (1986) 160 CLR 626.

156 (1967) 69 SR(NSW) 159 at 177.

157 (1986) 160 CLR 626 at 671.

158 (1967) 69 SR(NSW) 159.

159 (1967) 69 SR(NSW) 159 at 173.

proper for this Court to review the correctness of the entry of the verdicts for BHP in the plaintiff's action."

122 The appellant was unable to refer the Court to any case in which a tortfeasor sued to judgment was held entitled to recover contribution or indemnity from another alleged tortfeasor in the same action, the claim against whom has been dismissed by a final judgment. *Hart v Hall & Pickles Ltd*¹⁶⁰ was not such a case. There, the plaintiffs' action against the "target" joint tortfeasor was dismissed for want of prosecution¹⁶¹ and accordingly there was not a final judgment in the sense in which that term is generally used and understood.

123 Lord Denning MR, although he said that there had been no judgment on the merits, added that the joint tortfeasor had "not been 'sued to judgment'"¹⁶². His Lordship also referred to the interlocutory and non-substantive nature of a dismissal for want of prosecution which does not bar a further action based on the same facts.

124 It is necessary to return to the language of the provision to be construed, s 5(1)(c). In *George Wimpey*, Viscount Simonds¹⁶³ and Lord Tucker¹⁶⁴ held that the UK legislation there identified two categories of joint tortfeasors from whom another tortfeasor might recover contribution: one who has been sued in respect of, and is liable for that damage; and one who would, if sued, have been liable for that damage.

125 Contrary to the submission of the appellant, the respondent here does not in my opinion fall into the latter category. The use of the words "if sued" leads to the conclusion that those who fall within that category must be tortfeasors who have not in fact been sued by the plaintiff.

126 Nor can the respondent fall into the former category for it is not liable for the damage, that is, the damage to the plaintiff to which the sub-section makes reference. Indeed it is the final judgment in this case that establishes that the respondent is not liable for the damage suffered by the plaintiff.

160 [1969] 1 QB 405.

161 See also *Canberra Formwork Pty Ltd v Civil & Civic Ltd* (1982) 41 ACTR 1.

162 [1969] 1 QB 405 at 411.

163 [1955] AC 169 at 179.

164 [1955] AC 169 at 191.

127 The final judgment, which is a judgment of a Court of Record¹⁶⁵, is no less a judgment of that kind because it was a judgment entered by consent¹⁶⁶.

128 It is not only in *Castellan* that the reasoning in the House of Lords in *George Wimpey* has been followed or applied. In *Hood v The Commonwealth*¹⁶⁷ the Full Court of the Supreme Court of Victoria construed the Victorian analogue in the *Wrongs Act* 1958 (Vic) at that time, s 24(1)(c) (since repealed) in the same way as the House of Lords in *George Wimpey*, in holding that one defendant had no right to contribution from another defendant in circumstances in which the latter was found to be not liable to the plaintiff for damages for personal injuries suffered in an accident, even though in other proceedings arising out of the same event brought by a different plaintiff, the plaintiff was successful against both defendants.

129 The New South Wales provision which the Court has to construe has remained unchanged since its enactment. There was no legislative intervention after the decision in *Castellan*. In other jurisdictions there have been changes. In the United Kingdom, s 1 of the *Civil Liability (Contribution) Act* 1978 replaced s 6 of the Act of 1935 which the House of Lords interpreted in *George Wimpey*. One effect of that replacement was explained by Balcombe LJ in *Nottingham Health Authority v Nottingham City Council*¹⁶⁸ that although a limitation Act might bar the remedy it did not extinguish the right of a tortfeasor to recover contribution from another tortfeasor able to avail himself or herself of the benefit of a limitations defence in proceedings by a plaintiff. In Victoria, s 24(1) of the *Wrongs Act* 1958 was replaced by s 23B of the *Wrongs Act* 1985 following a report by the Chief Justice's Law Reform Committee in 1979. In moving the legislative change the responsible Minister stated that the intention of the amendment was to provide that a result in favour of one person who was sued might only defeat a claim for contribution by another if there was a finding after trial on the merits¹⁶⁹:

" ... it provides that neither party is entitled to challenge a finding of non-liability made in favour of the other in an action brought by the plaintiff - provided that the finding was made after a trial 'on the merits', that

165 *Dust Diseases Tribunal Act* 1989 (NSW) s 4(2).

166 *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508. See also *Giles v Wooldridge* (1883) 17 SALR 38 at 40-41; *The Bellcairn* (1885) 10 PD 161 at 165-166; *Scott v Meehan* (1899) 1 WALR 179 at 180; *Hart v Hall & Pickles Ltd* [1969] 1 QB 405 at 411, 412.

167 [1968] VR 619.

168 [1988] 1 WLR 903.

169 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 September 1985 at 223.

is, the finding of non-liability was not due to such factors as dismissal for want of prosecution, on the grounds that judgment was obtained collusively or that the time period for bringing the action had expired ...".

130 In South Australia, the phrase "or would have been sued" has been replaced with the phrase "or would at any time have been"¹⁷⁰ and in Tasmania with the phrase "or would, if sued by the person by whom the damage was suffered at the time when the cause of action arose, have been"¹⁷¹. Similarly, in New Zealand, the relevant legislation, the *Law Reform Act* 1936, was amended¹⁷² after *George Wimpey* to include the words "in time" after the words "or would if sued".

131 The appellant urged before this Court that the result on the application of *Castellan* was an unfair one in that it enabled a tortfeasor to escape liability to a joint tortfeasor because the former has been able, effectively in secret, to conclude an arrangement with the plaintiff having the effect of shutting out the latter from pursuing its claim against the former. It does not seem to me that such disadvantage, if any, as a tortfeasor may suffer in a situation of the kind which existed here, stems from an erroneous construction of the legislation: rather, it is a consequence of the inability or unwillingness of the appellant to impose upon the plaintiff in its negotiations with him, an obligation requiring the plaintiff to abstain from any step which might prejudice the appellant, such as acceding to judgment in favour of the other tortfeasor.

132 To allow the issue of contribution or indemnity between the appellant and the respondent to be revisited now could do some injustice to the respondent. It is impossible for this Court, indeed any court, to know what factors motivated the parties to act as they did in the making of the separate settlements that they made with the plaintiff. It may be that had the plaintiff been unwilling to consent to judgment against him by the respondent, the latter might have asked the Tribunal to refrain from giving the judgment that was given against the other two defendants. The respondent might have held the view that the damages agreed upon were excessive and themselves should have been litigated to finality in the Tribunal before the judge at that time if there was any risk that the respondent might have to make a contribution to them. Considerations of cost may have also entered into the decision by the parties to act in the way in which they did. It might well be quite unfair to the respondent to be confronted now with the possibility of a liability which it no doubt believed it had escaped by a judgment in its favour in proceedings in which until judgment, the cross-claims were live. All of the parties

170 *Wrongs Act* 1936 (SA) s 25(1)(c).

171 *Tortfeasors and Contributory Negligence Act* 1954 (Tas) s 3(1)(c).

172 By the *Limitation Act* 1950 (NZ) s 35(2).

there and then were content to have their settlements translated into final judgments, no doubt for good reason on the part of each of them.

133 All of the parties were before the court and subject to the jurisdiction of the court in proceedings in which all of the respective claims were fully articulated in the pleadings between them. It is desirable in the public interest that in those circumstances all issues between all of the parties be concluded, if possible, without the need for a further hearing¹⁷³, a need which will only arise if the appellant has been unable, or has not wished, to impose a term of settlement upon the plaintiff of the kind which I have mentioned. It is not as if here the appellant made an application to his Honour Judge Johns to abstain from entering judgment in favour of the respondent. Had the appellant done so, and the Judge refused to abstain from entering judgment then the appellant might have been entitled to appeal against that refusal. All that the appellant did was simply to assert that the judgment entered by consent could have no prejudicial effect upon it with respect to the contribution proceedings.

134 What occurred here brought the respondent outside either of the classes of litigants contemplated by s 5(1)(c) of the Act. There are only two classes. The respondent is in neither of them.

135 The conclusion that I have reached accords with authority that has now been taken as settled for many years with respect to the form of the New South Wales Act, and with the general understanding of the effect of the Act among insurers and the profession. In those circumstances the Court might well be cautious about finding some different meaning in the legislation, or, in effect creating a third category of litigants liable to contribute for which the legislation makes no provision. The reservation of Barwick CJ as to the correctness of the reasoning of their Lordships in the majority in *George Wimpey* was no more than that, a reservation. And what was said by Brennan J and concurred in by Deane J in *Oceanic Crest Shipping* has not been adopted by any other member of this Court since his Honour made the observations that he did. Indeed, in *Oceanic Crest Shipping*, Brennan J had earlier said¹⁷⁴:

173 cf the statutory mandate contained in s 63 of the *Supreme Court Act* 1970 (NSW):

"The Court shall grant, either absolutely or on terms, all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

174 (1986) 160 CLR 626 at 670.

"So long as the judgment holding Pilbara not liable stands on the record, the shipping company is unable to assert that Pilbara is a tortfeasor who 'is or would if sued have been liable' to Hamersley¹⁷⁵".

136 It follows that the appellant's attempt to apply to this case the categorical statement in *Spencer Bower, Turner and Handley: The Doctrine of Res Judicata*¹⁷⁶ that "[no] consent judgment or order has any operation against any third person or against any party not shown to have consented" should be rejected.

137 There is only one other matter to which I should refer and that is the proposition of the majority in *Castellan* that was accepted as correct and applicable by the Court of Appeal here, that the fact of satisfaction of the judgment of itself operates to discharge another defendant from all liability to the plaintiff¹⁷⁷. I base my decision upon the fact and record of the final judgment in favour of the respondent and need not consider the correctness or otherwise of the other proposition that was accepted by the Court of Appeal.

138 It follows that I would dismiss the appeal. The parties asked that they be given an opportunity in writing to make submissions as to costs and I would direct that the respondent, being the successful party, make its submissions within seven days from today and that the appellant make such submissions as it wishes to make within seven days thereafter.

¹⁷⁵ *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169; *W H Wright Pty Ltd v Commonwealth* [1958] VR 318 at 321; *Castellan v Electric Power Transmission Pty Ltd* (1967) 69 SR(NSW) 159 at 177, 188, 189.

¹⁷⁶ 3rd ed (1996), § 41.

¹⁷⁷ (1967) 69 SR(NSW) 159 at 187-188 per Asprey JA.