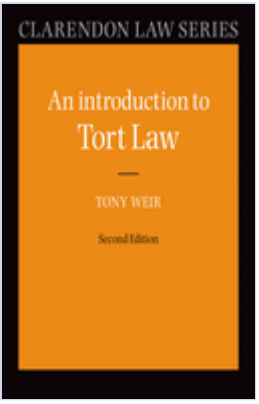

An Introduction to Tort Law (2nd edn)
Tony Weir

7. Contribution Between Tortfeasors

Tony Weir, Fellow of Trinity College, Cambridge

https://doi.org/10.1093/he/9780199290376.003.0007
Published in print: 07 September 2006
Published online: June 2015

Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter considers cases involving several torts and severable persons who are liable. It describes 'joint and several liability', where several different torts may be contributing to the same harm and several persons are liable for what they have independently done, since in principle, everyone whose tortious conduct has contributed to the occurrence of harm is liable to be sued for the full amount of that harm, provided it is indivisible and not too remote. The chapter also discusses how a tortfeasor who is sued and wishes to claim contribution should bring any other supposed tortfeasor into the victim's suit. Likewise, the victim should sue every plausible tortfeasor, because if he brings a second action in respect of the same damage he risks being penalised in costs, and if he loses against one defendant and succeeds against another, he will get all his costs paid by the latter.

Keywords: tort law, vicarious liability, employers, employees, tortfeasors

The previous chapter featured the victim who could sue not only the tortfeasor but also, under certain conditions, his employer as well. Employee and employer in such circumstances, like conspirators, are called 'joint tortfeasors': there is only one tort but two persons liable. But there may be several different torts contributing to the same harm and several persons liable for what they have independently done, since in principle, as we have seen, everyone whose tortious conduct has contributed to the occurrence of harm is liable to be sued for the full amount of that harm, provided it is indivisible and not too remote. This 'joint and

several liability', as it is unattractively called, is rational, because if two people by independent torts kill a third, each of them has killed the victim, and it is also fair, in that the victim will be paid in full even if one of the tortfeasors is insolvent, untraceable, or in gaol. Even the Law Commission has decided that no major reform of this rule is required; the attack on it is coming, as we have seen, from judges seeking to reduce its incidence by claiming to divide the indivisible (as if physical damage were just money) and thereby introduce proportionate liability.

Once again, as with vicarious liability, we have a triangular situation, with a victim (V) and two tortfeasors (T1 and T2). It is clear law that if V suffers damage to which both T1 and T2 have tortiously contributed and obtains full compensation from Ti, whether by judgment or agreement, V can no longer sue T2, since his harm has already been made good. It used to be the law that Ti, whose payment to V had released T2 from liability, could nevertheless not claim anything towards that payment from T2: after all, T1 was himself a tortfeasor, his claim would be for purely economic loss, and in the old days the defence of contributory negligence would bar a careless victim's claim even where the harm was physical. The common law solution seemed unfair to the Law Reform Committee, so in 1935 T1 was given a statutory claim against T2 for 'contribution'.[1] This is not a claim for damages in tort (Ti's harm is purely economic and T1 and T2 may be total strangers), but rather a claim in restitution for debt, to prevent T2 being unjustifiably enriched at Ti's expense by being released from his liability to V. T2 is liable to contribute to T1 only if he could have been sued by V for the 'same damage' as Ti, but he remains liable to pay contribution even though V's claim against him has lapsed, whether because V's claim against him has become barred by lapse of time or by V's receipt from T1 of payment in full. The amount of the claim is what is 'just and equitable having regard to the extent of... responsibility for the damage'.

Though the underlying idea of the statutory scheme is fair enough, its practical operation is far from unproblematical. The simple case is where V is a passenger in a car negligently driven by her husband T2 and is injured in a collision with an oncoming car being driven equally negligently by Ti. V will probably want to sue the stranger T1 rather than assert that her husband was negligent, but T1 's insurer will certainly bring in T2 in order to recover contribution from T2's insurer, and the question whether T2 was negligent, the very question V wanted to avoid, will muddy the waters of her claim against Ti, although it will not diminish her damages. Perhaps there is nothing much wrong with that, given that both drivers are bound to be insured against liability. But consider the case where Ti, solely to blame for a collision in which V, a child, was badly injured, was allowed to claim contribution from V's mother, a passenger, as well as V's aunt, the driver, on the ground that the child was inadequately secured by a seat-belt.[2]

To pursue the matter, take the case that a little girl is able to run into the street and be run over by a careless motorist only because her mother carelessly let go of her hand. The child would never sue the mother, who is most unlikely to be insured against liability, but the motorist's insurer will have no compunction in claiming contribution from her and thereby diminishing the family funds—a result so unsatisfactory that in order to avoid it the New York Court of Appeals has been led to hold that a mother owes her child no duty to look after it![3] Or take another case, a depress-ingly frequent one. A motorist emerges from a side-road without proper care and collides with a motorcyclist driving quite properly on the main road. Of course the motorist will be liable, but his insurer will, by way of subrogation, try to claim contribution in his name from the highway authority on the ground that it also was to blame for the accident, whether because the sightlines were poor[4] or the road was not properly maintained or the signage was defective or whatever else they can dream up. It is

surely quite wrong for the liability-insurer to be allowed to put part of the loss, which it has itself agreed to bear, on to the public, and put the local authority to the trouble and expense of defending a claim which the victim would never have brought.

Yet another case occurred in days gone by when the purchaser of a badly built house could sue the local authority for failing to prevent its erection.[5] At that time the negligent architect was also liable to the purchaser for the same damage so the statute gave him a contribution claim against the local authority. When it came to deciding on the amount of this claim, the court granted the architect 25%, saying coyly that perhaps the policeman should bear less responsibility than the thief he failed to catch![6] A statute which lets the thief sue the policeman for not catching him is not without regrettable effects. A further effect of the Act as presently drafted is that T1 who has bona fide settled with the victim remains liable to contribute to T2, even if the latter denied liability right up to judgment. And our system professes to encourage settlements!

A tortfeasor who is sued and wishes to claim contribution would be well advised to bring any other supposed tortfeasor into the victim's suit. Likewise, the victim should sue every plausible tortfeasor, because if he brings a second action in respect of the same damage he risks being penalised in costs, and if he loses against one defendant and succeeds against another, he will get all his costs paid by the latter. Indeed, if T1 and T2 both negligently cause an accident in which T1 's passenger and he himself are injured, and T1 wishes to claim contribution from T2 towards the damages he has paid to his passenger, T1 *must* join his own claim for damages (subject to his contributory negligence) to his claim for contribution, for if he does not, he may be barred from claiming for his own injuries. This is the astonishing result of a decision of the Court of Appeal, holding that the driver's claim for personal injury damages against the local authority was barred because the claim had not been joined to his insurer's claim for contribution (yes, it was another case where a motorist's insurer was trying to get its snout into the public trough; but why expect a liability insurer to care twopence for the insured's personal injury claim anyway?), the Court actually saying of the rule it was applying 'it is a salutary rule... important for insurance companies'.[7] This decision was not formally denounced, as it should have been, when the House of Lords reviewed the doctrine of 'abuse of pro-cess'.[8] So bringing a contribution claim (or having one brought by your insurer) may lose you your claim for damages. Nice work, Parliament! Well done, the courts!

The area of application of the Act was greatly increased in 1978 when contribution claims were allowed not just between tortfeasors but between all persons liable for the same damage suffered by the victim, whether their liability arose from tort, breach of contract, breach of trust(!), or whatever. Although this extension was rendered less momentous by subsequent decisions which effectively held that every negligent breach of contract was also a tort, even though it caused only economic harm, it led to an eccentric result in the following case. D1 negligently certified to P that P owed money to D2, and P duly paid D2. P thereupon became entitled to claim that money back, as paid under a mistake, but brought a suit for damages against D1, who negligently caused that mistake. D1 sought to bring in D2 in order to claim contribution from him. The trial judge correctly held that no such claim lay, but the Court of Appeal under Auld LJ reversed.[9] This is absurd: a claim lies only between persons liable in respect of the same damage, and here D2 was not liable in respect of damage at all, any more than a person liable to pay the price for goods sold and delivered is liable in respect of damage to the seller. The correct solution is that if P has recovered the money from D2, his damages claim against D1 is reduced to that extent, because his loss is thereby reduced; and if P has not yet recovered from

D2, the question will be whether his claim against D1 is to be reduced under the rule that a claimant must seek to mitigate his loss by all reasonable means, for example by suing another person whose payment would reduce the damage. It should be noted that in a suit by P against D2 for his money back, it could not possibly be relevant that P had a damages claim against D1.

To grant a tortfeasor who had paid the victim a claim against another tortfeasor who was released by that payment no doubt seemed a good idea at the time, but it is clear that the enactment has had baleful effects. It permits a party who should bear the loss through his liability insurance to throw this loss or part of it onto a person, public or private, who would never have been sued by the primary victim. The notion that the primary victim will have been actuated by caprice or malice in deciding which tortfeasor to sue is quite unrealistic: victims have legal advice and will sue the party whose liability is most easily established and who is most likely to be able to pay, and that should be the end of the matter. Indeed, it *is* the end of the matter so far as tort law is concerned, but the dog of tort has a tail of restitution and the tail is now distortingly wagging the dog. The fact that T1 can bring T2 into the lawsuit initiated against him by V not only complicates the lawsuit contrary to V's interests but also greatly delays the process of settlement.

An extreme example of dog-wagging occurred in the Court of Appeal recently. A young man who had been beaten up by thugs at work was taken to hospital and lost an eye during treatment there; he became a total nervous wreck in consequence, and sued both the employer who had failed to protect him and the surgeon whose carelessness had blinded him. In this fairly straightforward tort case the *very first* question the Court of Appeal asked was whether the Contribution Act applied, and because, as they held (erroneously) it did not, they gave separate judgments against the defendants, each for their part, rather than a single judgment against both for the harm for which both were responsible.[10] It hardly needs to be said that the application of the Act is a consequence, not a determinant, of tort liability. In this case, as it happened, both defendants were solvent, but even so this solution operated against the interests of the victim, for whom the law of tort exists; had one of the defendants been unable to pay (as the thugs doubtless were) the injustice would have been manifest.

It is worth considering the effect of the two doctrines based on 'equitable' considerations, namely subrogation and contribution. Both of them interfere with the proper operation of the law of tort. Thus the person who causes damage to insured property has to pay the insurer although the insurer has suffered only a financial loss and can claim only through the insured, a party already satisfied.[11] The claimant in contribution is also a party whose loss is purely financial and who could certainly not bring a tort claim for that loss. The outcome is that the only people who can claim for financial loss caused to them by a stranger are the insurer, who has promised to pay for that loss, and the tortfeasor, who has himself caused it. The peculiarities are compounded when one notes that not only is the property-insurer subrogated to the insured victim's claim in tort but that the liability-insurer is subrogated to the insured tortfeasor's claim in contribution!

Notes

1 Now Civil Liability (Contribution) Act 1978.

2 *Jones v Wilkins* [2001] TLR 89.

3 *Holodook v Spencer* 324 NE 2d 338 (NY 1974).

4 *Stovin v Wise* [1996] 3 All ER 801.

5 *Anns v Merton LBC* [1977] 2 All ER 492.

6 *Eames London Estates v North Herts DC* (1980) 18 BLR 50.

7 *Talbot v Berkshire CC* [1993] 4 All ER 9 at 15.

8 *Johnson v Gore Wood & Co* [2001] 2 All ER 48L

9 *Friends Provident Life Office v Hillier Parker* [1995] 4 All ER 260.

10 *Rahman v Arearose* [2001] QB 351.

11 *Simpson v Thompson* (1887) 3 App Cas 279.