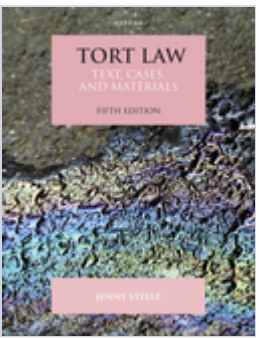

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

p. 505

8. Limitation and Contribution

Jenny Steele, Professor of Law, University of York

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter examines the principles of contribution and their effect on the remedies that can be obtained by a successful claimant, as well as the statutory rules of 'limitation' that govern the time-barring of claims. The liability of more than one party for 'the same damage' is discussed, together with the apportionment of responsibility for the damage. Relevant provisions found in the Civil Liability (Contribution) Act 1978 and the Limitation Act 1980 are also considered.

Keywords: contribution, remedies, limitation, claims, liability, damage, apportionment, responsibility

Central Issues

i) A claim may eventually become 'time-barred' if no proceedings are commenced. Statutory rules of 'limitation' govern the time-barring of claims, and are justified by reasons of both practicality and fairness. The current rules of limitation applying to tort are mainly to be found in the Limitation Act 1980.

ii) A liable party may seek a 'contribution' to damages from other parties who could be sued in respect of the same damage. In principle, contribution proceedings are not the business of the tort claimant and rules of contribution generally play no role in the claim itself. The rules of

contribution are set out in the Civil Liability (Contribution) Act 1978.

1 Limitation of Actions

1.1 What Are Limitation Rules and Why Do We Have Them?

'Limitation' is generally referred to as a 'defence' to an action. It is for the defendant to establish that the relevant period has expired and that the action is 'time-barred'. However, strictly speaking the claim itself is not extinguished by the expiry of the relevant period (with the exception of the action in conversion).[1] Instead, the *remedy* becomes unavailable.

Ronex Properties v John Laing [1983] QB 398

The defendants applied to have the claim against them struck out as disclosing no cause of action, because the applicable time period for bringing the action had expired. The Court of Appeal refused to strike out on this ground (although it would have considered striking out on different grounds, if evidence and argument had been presented).

p. 506

> **Donaldson LJ**
>
> Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action, merely because the defendant may have a defence under the Limitation Acts. … it is trite law that the English Limitation Acts bar the remedy and not the right; and, furthermore, that they do not even have this effect unless and until pleaded. …

Why have Limitation Rules?

The need for some rules of limitation is not seriously in doubt.[2] Rather, it is the complexity of the current rules, and the existence of potential anomalies in their application, which give rise to most criticism.

A. McGee and G. P. Scanlan, 'Judicial Attitudes to Limitation' (2005) 24 CJQ 460–80

> … despite the present unsatisfactory state of the law of limitation, the rationale behind a coherent and practical law of limitation is both clear and simple. Potential defendants should not have to live with the risk of legal action indefinitely if for any reason a potential claimant does not pursue his remedy, furthermore, old or stale claims are difficult to try when memories are clouded, and where evidence has probably been lost. Parties should be certain that, in conducting their business and professional affairs, or indeed their everyday activities, they are able to predict when they can regard a potential action in which they could be defendants as stale and expired. The expiration of stale claims is also in the interests of the state, since the state has a legitimate interest in the quality of the justice it achieves for its citizens.
>
> Prompt litigation increases the chances of a measured and just result. It also ensures that public money is not wasted in hearing claims which cannot be dealt with properly. The interests of claimants are also served by a rational law of limitation. The Committee on Limitation of Actions in Cases of Personal Injury in its Report recognized the value of limitation periods in prompting claimants to act swiftly in pursuit of their rights. The authors noted that: 'We apprehend that the law is designed to encourage plaintiffs [claimants] not to go to sleep on their rights, but to institute proceedings as soon as it is reasonably practicable for them to do so.'

1.2 The General Position Under the Limitation Act 1980

The present rules on limitation are largely set out in the Limitation Act 1980. The following section states the general approach in cases of tort. It is important to note that there are some large and very important
p. 507 exceptions to this general rule, explored below. Equally, some ↵ individual actions—such as actions in defamation, and actions under the Human Rights Act 1998 (HRA)—have their own statutory limitation periods.[3]

Limitation Act 1980

> **2 Time limit for actions founded on tort**
>
> An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Generally speaking, a cause of action in tort accrues when the relevant invasion of a protected right or interest (which may or may not be the result of wrongful conduct) has occurred. This is when the tort is actionable. It is not necessarily the date of the defendant's tortious act or omission. In the case of torts of damage (including negligence), the cause of action accrues when the relevant *damage* occurs. These torts are *actionable* when there is damage which is not 'insignificant' (*Cartledge v Jopling*, below). That is also when the limitation period starts to run.

As a result, in cases where there are potential claims in *both* tort *and* contract, the tort action is often more long-lived than the action in contract. An action in contract starts to run when the contract is breached, and expires six years later.[4] Time will not begin to run in respect of a claim in the tort of negligence until the damage is done. An important case where this led the claimants to choose to sue in tort—and where the House of Lords allowed them to make this choice—is *Henderson v Merrett* [1995] 2 AC 145 (Chapter 5, Section 2). Nevertheless, this will not always mean the date at which the claimant actually suffered financial loss. For example, in *Axa Insurance Ltd v Akther & Darby* [2009] EWCA Civ 1166, a claim in respect of failure to vet claims under a legal expenses insurance scheme was held to have accrued when insurance policies were issued: it was at this point that the claimants had incurred 'damage', since a proper valuation of the policies at that point would take into account the vetting failure. In *Holt v Holley and Steer Solicitors* [2020] EWCA Civ 851, a negligence claim against legal advisers in divorce proceedings, based on the undervaluation of assets, the loss accrued at the final hearing, not at the date the judgment was handed down. This was the time at which it was too late to correct the error.

In other respects also, identifying the time *when damage occurred* is not as straightforward as it might sound. We will consider two areas where the interpretation of section 2 and its statutory predecessors has led to recognized injustice, so that further legislation has been required. The first relates to personal injury generally; the second relates to other instances of negligence specifically.

1.3 Personal Injury Cases

Cartledge v Jopling [1963] 758

The applicable limitation periods were set out in section 2(1) of the Limitation Act 1939. That provision was
p. 508 expressed in similar terms to the present section 2 (above), but was subject to ↵ fewer exceptions and qualifications.[5] This case shows the pressing need for the reforms that are now encapsulated in sections 11, 14, and 33 of the Limitation Act 1980. Later we will see the problems of interpretation to which section 14, in particular, has led.

The plaintiffs were steel dressers working in a factory. Through exposure to dust, they contracted a lung disease, pneumoconiosis. This is a 'progressive' disease. The workmen commenced actions in negligence and breach of statutory duty, on 1 October 1956. It was established that there had been no breaches of duty after (at the latest) September 1950. Thus, the claim would be out of time unless the cause of action 'accrued' later than the breaches themselves.

Available evidence suggested the plaintiffs had suffered substantial injury without becoming aware of it. They argued that, as a matter of principle, their action could not become time-barred *before they had any relevant knowledge* of the injury suffered. The House of Lords felt compelled to reject their argument. As a matter of statutory interpretation, unless discovery of the injury was prevented by fraud or mistake within section 26 of the Limitation Act 1939, time would begin to run when the injury occurred, and not when the injured party was able to discover it. The House was under no illusions as to the injustice of this, and strongly supported the need for legislative reform.

> **Lord Reid, at 771–3**
>
> ... It is now too late for the courts to question or modify the rule that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided.
>
> But the present question depends on statute, the Limitation Act, 1939, and section 26 of that Act appears to me to make it impossible to reach the result which I have indicated. That section makes special provisions where fraud or mistake is involved: it provides that time shall not begin to run until the fraud has been or could with reasonable diligence have been discovered. Fraud here has been given a wide interpretation, but obviously it could not be extended to cover this case. The necessary implication from that section is that, where fraud or mistake is not involved, time begins to run whether or not the damage could be discovered. So the mischief in the present case can only be prevented by further legislation.

Legislation remedied the problem, initially through the Limitation Act 1963. The current position is to be found in sections 11, 14, and 33 of the Limitation Act 1980.

p. 509

11 Special time limit for actions in respect of personal injuries

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

[(1A) This section does not apply to any action brought for damages under section 3 of the Protection from Harassment Act 1997.]

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

(4) Except where subsection (5) below applies, the period applicable is three years from—

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured.

(5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from—

(a) the date of death; or

(b) the date of the personal representative's knowledge;

whichever is the later.

Compared with the general statement about civil claims in section 2, section 11 sets out a *shorter* time period of three years for most actions in personal injury. However, this is capable of running from a later date, namely *the date of knowledge of the injured party* (or, if that party has died, from the date of knowledge of their personal representative).

Clearly, the section relates only to claims in respect of personal injury. By section 38 of the Limitation Act 1980:

> 'personal injuries' includes any disease and any impairment of a person's physical or mental condition …

In terms of limitation periods therefore, there is no distinction between *physical* or *mental* injuries: see further *Adams v Bracknell* [2005] AC 76, below. But to what range of *torts* does section 11 apply? The statutory wording (set out above) refers to 'negligence, nuisance or breach of duty'. In Chapter 2, we noted the interpretation of this section in *Stubbings v Webb* [1993] AC 498, in which the House of Lords held that actions in *trespass to the person* involve no 'breach of duty', and therefore come outside the reach of section 11, even if they involve

p. 510 personal injury.[6] As we also noted, this has now been remedied by *A v Hoare* [2008] ↵ UKHL 6, in which the House of Lords departed from *Stubbings v Webb*. Trespass to the person which causes personal injury (including mental harm) will now be subject to the same limitation period as negligence causing personal injury. The limitation period begins not with the injury but with the 'date of knowledge'. As we will see, there is also the possibility of a further extension within the discretion of the court.

'What is the Date of Knowledge'?

> **14 Definition of date of knowledge for purposes of sections 11 and 12[7]**
>
> (1) ... In sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—
>
> that the injury in question was significant; and
>
> (a) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
>
> (b) the identity of the defendant; and
>
> (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;
>
> (d) and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.
>
> ...
>
> (2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
>
> (a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;
>
> but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

This section is of fundamental importance. Its interpretation, however, has created continuing difficulties, stemming from the need for limitation rules to reflect what a claimant knew or could be expected to have known about their injury and its causes, rather than being based simply on issues of factual causation of injury. Here we explore some key recent cases where courts have grappled with those difficulties.

p. 511 ↵ A first problem is posed by subsection (3), which refers to knowledge which the claimant 'might reasonably have been expected to acquire'. Clearly, this necessitates a judgment as to 'reasonableness'. But should reasonableness be assessed ***objectively*** (by reference to *the reasonable person*), or ***subjectively*** (taking into account characteristics of the particular claimant)? The answer given in the following case is that the test is *objective*; but that it reflects the circumstances in which the claimant is placed.

Adams v Bracknell Forest BC [2005] 1 AC 76

The claimant, an adult, argued that the defendant education authority had negligently failed to diagnose his dyslexia as a child, and that his untreated condition had led to psychological ill-effects. The House of Lords determined, following *Phelps v Hillingdon* [2005] 1 AC 76, that the claim was one for *personal injuries*, so that it came within the scope of sections 11, 14, and 33.

Under section 11, the claim would be time-barred unless the claimant could show that the 'date of knowledge' (defined, as we have said, by section 14) was substantially delayed. The claimant argued that he could not have been reasonably expected to realize that the problems he experienced in adulthood were related to his undiagnosed dyslexia. This was accepted. However, he further argued that he had no grounds for acting sooner in order to *seek expert advice* in respect of his problems, which would have revealed the connection. Eventually, he told his life story to an educational psychologist whom he met at a party, and she persuaded him to consult a solicitor. Resolution of the limitation question therefore turned on interpretation of section 14(3)(b) above, setting out the circumstances under which a claimant may reasonably be expected to seek expert advice.

Lord Hoffmann argued that the test for reasonableness in section 14(3) is generally 'objective'. He accepted that the test should reflect the likely characteristics *of a person who had suffered the injury in question*. But even allowing for this, Lord Hoffmann was not persuaded that a reasonable person suffering from undiagnosed dyslexia and its mental effects could fail, over many years, to disclose to his medical adviser the essential facts which would lead to relevant advice under section 14(3)(b) above. In effect, it might be said that there is an 'obligation of curiosity' upon the injured party.[8]

Lord Hoffmann, *Adams v Bracknell*

47 It is true that the plaintiff must be assumed to be a person who has suffered the injury in question and not some other person. But … I do not see how his particular character or intelligence can be relevant. In my opinion, section 14(3) requires one to assume that a person who is aware that he has suffered a personal injury, serious enough to be something about which he would go and see a solicitor if he knew he had a claim, will be sufficiently curious about the causes of the injury to seek whatever expert advice is appropriate.

Constructive knowledge in this case

48 The judge held that Mr Adams acted reasonably in making no inquiry into the reasons for his
p. 512 literacy problems. I do not think that he based this finding upon matters of character or intelligence which were peculiar to Mr Adams. If the judge had been relying upon his personal characteristics, he might have been hard put to explain why someone who was willing to confide in a lady he met at a dancing party was unable to confide in his doctor. But the judge appears to have thought that extreme reticence about his problems was the standard behaviour which ought to be expected from anyone suffering from untreated dyslexia and that the conversation with Ms Harding was an aberration.

49 In principle, I think that the judge was right in applying the standard of reasonable behaviour to a person assumed to be suffering from untreated dyslexia. If the injury itself would reasonably inhibit him from seeking advice, then that is a factor which must be taken into account. My difficulty is with the basis for the finding that such a person could not reasonably be expected to reveal the source of his difficulties to his medical adviser. In the absence of some special inhibiting factor, I should have thought that Mr Adams could reasonably have been expected to seek expert advice years ago. The congeries of symptoms which he described to Dr Gardner, which he said had been making his life miserable for years, which he knew to be rooted in his inability to read and write and about which he had sought medical advice, would have made it almost irrational not to disclose what he felt to be the root cause. If he had done so, he would no doubt have been referred to someone with expertise in dyslexia and would have discovered that it was something which might have been treated earlier.

The existence of an 'obligation of curiosity' giving rise to general rules was doubted by the Court of Appeal in *Whiston v London SHA* [2010] EWCA Civ 195, Dyson LJ suggesting that the remarks in para [47] quoted above did not form part of the *ratio* of *Adams*; nor were they fully reflected in the language of section 14(3). The court should simply consider 'what is reasonably to have been expected of the claimant in all the circumstances of the case' ([59]). A claimant is not fixed in all cases—as the defendant had argued—with knowledge of 'such facts as he would have ascertained if he had made appropriate inquiries'. In *Whiston* itself, the claimant had suffered a deterioration of a condition which he had suffered all his life, rather than a sudden event; and this

affected the time at which a reasonable person in his position would have sought advice. In *Johnson v Ministry of Defence* [2012] EWCA Civ 1505, a case concerning the gradual onset of deafness, Smith LJ thought that Lord Hoffmann's remarks about 'curiosity' were not intended to be insensitive to circumstances:

Smith LJ, *Johnson v Ministry of Defence*

> [24] … It seems to me that what Lord Hoffmann must have meant was that there would be an assumption that a person who had suffered a significant injury would be sufficiently curious to seek advice unless there were reasons why a reasonable person in his position would not have done. …
>
> [25] … there are good policy reasons for this objective and more demanding standard. If a claimant is entitled to bring an action *as of right*, many years, possibly decades, after the relevant events, there may be real unfairness to defendants. So the *right* to bring a long delayed action must be circumscribed. …

p. 513 ↵ In *Adams v Bracknell*, the primary limitation period having passed, this left the question of discretion under section 33. The existence of this discretion was one of the factors justifying a 'tightening up' in the determination of the 'primary' limitation period, as defined in sections 11 and 14. Before we turn to section 33 in its own right, however, we should consider further important developments in the interpretation of section 14.

Sexual Assault Cases

In *KR v Bryn Alyn* [2003] 1 QB 1441 the Court of Appeal adopted a broadly subjective approach to section 14(2) of the Limitation Act 1980, which defines 'serious damage'.[9] Given the wording of the subsection, the court thought that it had to decide whether it would reasonably have occurred to the claimant, given his life history, to bring a civil action for damages within three years of his majority. Each case had to be considered individually taking account of all the circumstances. This approach has been disapproved by the House of Lords in *A v Hoare*. While section 14(3) might involve some subjective as well as objective elements (what should C reasonably have done?), section 14(2) is an entirely objective provision. It was concerned with the objective seriousness of the injury suffered.

A v Hoare [2008] UKHL 6; [2008] 1 AC 844

We have seen, in Chapter 2, that *A v Hoare* released the law of trespass in personal injury cases from the inflexible limitation period imposed upon it by the House of Lords in *Stubbings v Webb* [1993] AC 498. It ensured that claimants who alleged that they are the victims of abuse no longer have to frame their claims in negligence to avoid the limitation problem. The importance of this was encapsulated by Baroness Hale:

Baroness Hale, *A v Hoare*

54 My Lords, until the 1970s many people were reluctant to believe that child sexual abuse took place at all. Now we know only too well that it does. But it remains hard to protect children from it. This is because the perpetrators are so often people in authority over the victims, sometimes people whom the victims love and trust. These perpetrators have many ways, some subtle and some not so subtle, of making their victims keep quiet about what they have suffered. The abuse itself is the reason why so many victims do not come forward until years after the event. This presents a challenge to a legal system which resists stale claims. Six years, let alone three, from reaching the age of majority is not long enough, especially since the age of majority was reduced from 21 to 18.

55 Fortunately, by the time the problem was recognised, some flexibility had been introduced in personal injury cases, albeit to meet the rather different problem of the insidious and unremarked onset of industrial disease. Then along came *Stubbings v Webb* [1993] AC 498, holding that this flexibility did not apply to cases of deliberate assault. For the reasons given by my noble and learned friend, Lord Hoffmann, I agree that *Stubbings* was wrongly decided and have nothing to add on that point.

p. 514 ↵ However, when it came to the details of the relevant limitation periods, the House took a restrictive approach to the meaning of section 14(2) Limitation Act 1980. Our next extract focuses on the section 14 issues; later we will turn to the more generous interpretation of the discretion conferred by section 33.

Lord Hoffmann, *A v Hoare*

39 The difference between section 14(2) and 14(3) emerges very clearly if one considers the relevance in each case of the claimant's injury. Because section 14(3) turns on what the claimant ought reasonably to have done, one must take into account the injury which the claimant has suffered. You do not assume that a person who has been blinded could reasonably have acquired knowledge by seeing things. In section 14(2), on the other hand, the test is external to the claimant and involves no inquiry into what he ought reasonably to have done. It is applied to what the claimant knew or was deemed to have known but the standard itself is impersonal. The effect of the claimant's injuries upon what he could reasonably have been expected to do is therefore irrelevant.

AB v Ministry of Defence [2012] UKSC 9

The claims in *AB v Ministry of Defence* related to injuries alleged to have been caused by nuclear testing in the 1950s. At first instance, Foskett J held that the claims were not statute-barred: not until a scientific study published in 2007 would evidence be available to make it reasonable to link their illnesses with the testing. And yet, the majority of claimants had already initiated their claims by 2004, well ahead of this date. The Court of Appeal reversed the judge's decision in relation to limitation; and there was a further appeal to the

Supreme Court. Here, a bare majority of Justices decided that the claims were indeed outside the limitation period. Since they also thought the actions to be without chance of success, they did not exercise their discretion to disapply the period under section 33.

The particular difficulty in *AB v Ministry of Defence* was that (in the view of the Justices) there was—even at the time of the Supreme Court's decision—no convincing evidence that the various medical conditions suffered by the claimants were in fact caused by breach of duty on the part of the defendants. Could it be that the limitation period had not yet begun to run, even though actions had long since been commenced? At the same time, many of the claimants had for several years sincerely believed that the nuclear tests were the cause of their injuries. Could such a *belief* be sufficient reason for the time period to begin to run? The statutory language, extracted earlier in this section, relates to *knowledge*, which might well be thought to imply the existence of a fact. This was the view taken by Lord Phillips, in the minority. 'Belief'—or even 'reasonable belief'[10]—is not what the statute requires. Lord Phillips proposed that the only appropriate basis for striking out would be, not limitation, but the lack of prospect of success. This had not been pleaded by the defendants.[11] The interpretation adopted by the minority does, on one view, have the awkward implication that a claim based on insufficient evidence can never become time-barred.

p. 515 ↵ The majority reached the opposite conclusion: the claim was indeed time-barred. Their decision was influenced by an understandable preference that a claim they considered to be hopeless should not be allowed to proceed. But unfortunately, some of the majority judgments appear to interpret a provision referring to 'knowledge' as satisfied where a claimant has formed a strong 'belief'. It is also uncommonly difficult in this case to pinpoint a core argument to unite the views of the majority judges. Lord Wilson appeared to require a particularly high 'degree of confidence' for a 'belief' to amount to 'knowledge' (para [12]). This seems to fly in the face of the objectivism set out in *Adams v Bracknell* and later cases: time begins to run when the reasonable person would have become aware of the defined issues (*Adams*); yet here, a sincere and strong belief which the reasonable person would not have formed can also start the clock ticking. Lord Walker's approach is no easier to pin down:

> **Lord Walker**
>
> 50 *Adams* marks a very important shift towards a more objective approach to the claimant's state of knowledge. This goes a long way to blunt or blur the clear distinction, in ordinary discourse, between knowledge and belief. As Simon Brown LJ said in *O'Driscoll v Dudley Health Authority* [1998] Lloyd's Rep Med 210, 221, 'knowledge and belief inevitably shade into one another'. Lord Donaldson MR's well known statement that 'reasonable belief will normally suffice' is reinforced, but weight must be given to the belief being 'reasonable'—or, as Lord Wilson JSC suggests, 'reasoned'.

Adams v Bracknell and its emphasis on an objective test is being used here to support a quite contrary argument, based on a very strong form of subjectivism: believe something enough, and time will begin to run. Lord Brown for his part proposed a significant general principle, namely that 'it is a legal impossibility for a claimant to lack knowledge of attributability for the purpose of s 14(1) at a time after the date of issue of his claim'.

A possible explanation for the 'legal impossibility' referred to may be found in the judgment of Lord Mance. He proposed that the statutory language simply *assumes* that the facts pleaded by the claimant do exist for the purposes of the limitation enquiry. In order to succeed, the defendant needed to show that there had been 'knowledge' (actual or constructive) *of those presumed facts* to the required standard. Adopting this approach, the difference between 'belief' and 'knowledge' would simply cease to be pertinent; and the logical difficulties are avoided. In the present case, assuming the facts asserted by the claimants to be correct, they plainly had sufficient 'knowledge' of them.

> **Lord Mance, *AB v Ministry of Defence***
>
> 86 As matters stand, the claimants clearly have no case on causation. But that is no answer in my opinion to their limitation problems. They have chosen to bring proceedings on the basis of certain facts. Whether the facts by reference to which their case falls to be assessed for limitation purposes are those pleaded (a straightforward allegation of causation) or those later asserted (an increase in the risk of injury being caused or, now, an admission that the
> p. 516 claimants cannot presently establish causation, coupled with a submission that the proceedings should continue in the hope that causation will in future prove possible to establish), the limitation question is not whether those facts give rise to a good claim in law. It is when the claimants first had knowledge of those facts. This they did, in each of the nine cases before the court, more than three years prior to the issue of the proceedings (or, in the case of Mr Ogden, more than three years prior to his death).

Section 33: Discretion to Exclude the Time Limit

As already explained, section 11 and section 14 set out the 'primary' limitation period in respect of personal injuries and death. One justification for a fairly tightly defined approach to this primary limitation period is the existence of a discretion to set aside that period, in section 33.

33 Discretionary exclusion of time limit for actions in respect of personal injuries or death

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 11 [or 11A] or 12 of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, [by section 11A] or (as the case may be) by section 12;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

p. 517 ↵ In *A* v *Hoare*, the House of Lords underlined that section 33 provides an unfettered discretion which should not, as some cases had previously suggested, be taken to be weighted against the claimant. The result was that the House of Lords broadened the potential application of discretion in favour of claimants, while tightening the approach to the primary limitation period, which would give claimants a *right* to proceed irrespective of the merits of the issue.

> **Lord Hoffmann, *A v Hoare***
>
> 49 That brings me, finally, to the approach of the judge and the Court of Appeal to the exercise of the discretion. In *Bryn Alyn* [2003] QB 1441, para 76, the Court of Appeal said that the judge in that case had gone wrong in giving undue weight to his conclusion that 'the claimants' reasons for delay were a product of the alleged abuse … and that, accordingly, it would be unjust to deprive them of a remedy'. These matters, said the Court of Appeal, were more appropriately considered under section 14. I am of precisely the opposite opinion, and if your Lordships share my view, the approach to the discretion will have to change. In *Horton v Sadler* [2007] 1 AC 307 the House rejected a submission that section 33 should be confined to a 'residual class of cases', as was anticipated by the 20th Report of the Law Reform Committee (Cmnd 5630) (1974), at para 56. It reaffirmed the decision of the Court of Appeal in *Firman v Ellis* [1978] QB 886, holding that the discretion is unfettered. The judge is expressly enjoined by subsection (3)(a) to have regard to the reasons for delay and in my opinion this requires him to give due weight to evidence, such as there was in this case, that the claimant was for practical purposes disabled from commencing proceedings by the psychological injuries which he had suffered.

These comments should be read in the light of the new acceptance in *A v Hoare* that trespass to the person falls within the same limitation rules as negligence. As the House of Lords pointed out, the issues arising in a negligence claim brought against an organization, on the basis that there had been systemic negligence in respect of the abuse of children in its care, are typically diverse and complex. Many documents and witness statements would be needed if such an allegation were to be properly investigated. If instead the action was one for trespass to the person, the investigation could be expected to be much narrower and more straightforward, raising fewer questions and requiring fewer witnesses. All this is relevant to the exercise of the section 33 discretion. Equally, issues about the particular claimant, which were irrelevant to section 14(2), are relevant to section 33. Some cautionary notes were sounded by Lord Brown, who underlined that the change in emphasis from section 14(2) to section 33 did not mean that section 33 would be used to replicate the extension of the limitation period 'as of right' as had been the effect of the previous interpretation of section 14(2). There was no disagreement with this view. Equally, issues about the particular claimant, which are irrelevant now to section 14(2), are relevant to section 33.

The effect of *A v Hoare* was to release a spate of trespass actions in respect of historic abuse. A number of appeals in such cases were heard together by the Court of Appeal, which sought to clarify the implications of *A v Hoare*.

B v Nugent Care Society [2009] EWCA Civ 827

The Court of Appeal confirmed that the impact of *A v Hoare* was to ensure that the date of knowledge in cases
p. 518 of sexual abuse (and perhaps in numerous other cases) 'is now much ↵ earlier than it was previously thought to be'. This was due to the new 'objective' interpretation of section 14(2) as set out above. The court also stressed that in releasing the trespass action from the inflexible limitation period imposed by *A v Hoare*, the difficulties in persuading a court to exercise its discretion and permit an action to be brought outside the period should not be overstated. In the majority of the cases considered, the claims were allowed to proceed.

Even so, it is possible for a court to decide not to exercise its discretion under s.33, despite a lack of any blameworthy delay on the part of the claimant. An example is *FXF v Ampleforth Abbey Trustees* [2020] EWHC 791 (QB), an abuse case in which a delay of 32 years was readily explicable by the effects of the abuse itself. This delay made a fair trial impossible, so that the limitation period was not disapplied. The approach of the courts was gathered together into a series of propositions by the Court of Appeal in *Chief Constable of Greater Manchester v Carroll* [2017] EWCA Civ 1992, at [42]. The discretion is a broad and unfettered one, and though the onus is on the claimant to show that the discretion should be exercised, it is not a necessarily a heavy burden. The essence of the test is 'a balance of prejudice'. In *Carroll* itself, the defendant was unsuccessful in challenging the judge's exercise of discretion in favour of the claimant, a police officer who had developed an addiction as a consequence of undercover police work.

1.4 Other Cases in Negligence

As we have seen, the effects of *Cartledge* were removed for most cases of personal injury by the Limitation Act 1963 and subsequent legislation. But the *Cartledge* approach was still applicable outside the realms of personal injury.

Pirelli General Cable Works v Oscar Faber & Partners [1983] 2 AC 1

A factory chimney was constructed in 1969 and the defendants provided advice as to the appropriate lining for it. The lining turned out to be unsuitable. Evidence suggested that the chimney cracked no later than 1970. The cracks were not discovered, however, until 1977. This was outside the general limitation period of six years from the 'damage' (if the damage was, indeed, the cracking in the chimney). The plaintiff could not, with reasonable diligence, have discovered the defect, but the House of Lords held that the general six-year limitation period must be applied. Parliament had chosen, in 1963, to alter the effect of *Cartledge v Jopling* but had done so only for a range of **personal injury** cases; by implication, there was no intention to alter the effect of *Cartledge* where other types of damage were concerned.

By the Latent Damage Act 1986, two new sections (14A and 14B) were inserted into the Limitation Act 1980 in order to reverse the effect of *Pirelli*. Section 14A provided a 'date of knowledge' alternative to the usual starting date for **claims in negligence** which did not come within section 11. This section is identical to section 14 in the way that it defines 'knowledge'. However, claims to which these sections apply are subject to a long-stop of **15 years** from the date of breach (section 14B).

Nowadays, these sections are unlikely to be needed for a case like *Pirelli*. The claim in *Pirelli* was regarded as a claim for 'damage' to the factory chimney, in the form of cracking. Such a claim was actionable on the
p. 519 authority of *Anns v Merton* [1978] AC 728. As we saw ↵ in Chapter 5, *Anns v Merton* has been overruled by *Murphy v Brentwood* [1991] 1 AC 398, and the House of Lords has defined the relevant loss as *pure economic loss flowing from the acquisition of a defective product*. It is not to be seen as 'damage to property' at all. In *Murphy* itself, a claim for this sort of economic loss was held to be not actionable.

Therefore, the sort of claim for which sections 14A and 14B were principally designed may not now be actionable. Sections 14A and 14B are not, however, without application, because they are not limited to cases of 'latent damage'. They extend to any claim in negligence, other than a claim for personal injuries, where the

claimant's date of knowledge is (reasonably) delayed. For example, they have been applied in cases of professional negligence, where a claimant has been slow to take advice about whether they have an action, despite their loss being apparent to them: for example, see *Jacobs v Sesame* [2014] EWCA Civ 1410; *Gosden v Halliwell Landau* [2020] EWCA Civ 42.

2 Contribution Between Liable Parties

If more than one party is potentially liable for 'the same damage', then the claimant need not bring actions against each such party but may choose to proceed against any one, and recover in full. 'Contribution proceedings' may then be pursued by the liable party, in order to recover a portion of the damages payable.

'Contribution' between liable parties is clearly not in any sense a 'defence' to an action by the claimant since it is generally irrelevant to the tort claim. It is therefore an entirely separate issue from the defence of 'contributory negligence' (which we discussed in Chapter 7). It requires *apportionment* of damages on the basis of relative responsibility; while contributory negligence requires a reduction in damages to reflect fault (in a broad sense) on both sides. The distinction is exemplified by the decision of the House of Lords in *Fitzgerald v Lane* [1989] AC 328. A pedestrian was struck by two cars while crossing a road. The collisions were separate. Both drivers were at fault; but so too was the pedestrian. The House of Lords concluded that the correct approach was not to determine the relative responsibility of all three parties, and divide the damage accordingly. Rather, the pedestrian claimant's own responsibility for the harm suffered should be determined first, and this established the relevant amount of the deduction from damages. The defendants' liability was then shared in order to achieve a 'just and equitable result' between them.

In a case of indivisible damage, the principle is that the claimant may recover in full against any wrongdoer who has 'caused' that damage. The liable party may then seek contribution. It is not for the *claimant* to seek out every person contributing to the harm.[12] That being so, the risk that any particular liable party will turn out to be insolvent (and/or uninsured) remains with liable parties (and with their insurers), rather than with claimants. This is the principle of **joint and several liability.**

p. 520

2.1 The Starting Point: When a Liable Party May Seek Contribution

Civil Liability (Contribution) Act 1978

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

For the application of this statute, neither party needs to be liable *in tort*. For example, one or both parties might be liable in contract, for breach of a statutory duty to which the provisions of the statute extend, or for breach of trust. Certainly, if both *are* liable in tort, they need not be liable in the *same* tort, nor for the same amount. The important thing is that they should both be liable 'for the same damage'.

The above provision applies not only where there is judgment against the defendant, but also where the defendant has *settled* a claim:

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

As a result of this section, a party seeking contribution after settling a claim need not 'prove' the case against him or herself, but needs to show that the claim was settled in good faith, for a sound reason of law.

2.2 'The Same Damage'

Section 1(1) of the Civil Liability (Contribution) Act 1978 specifies that a liable party can seek contribution from anyone who is liable 'in respect of the same damage'. Contribution proceedings are *not* available where different parties are liable in respect of *different* damage. We need to remind ourselves of the basic principles governing recovery of damages from joint, concurrent, and consecutive tortfeasors, in order to identify clearly when tortfeasors will be considered to have contributed to 'the same damage'. The first step in understanding the contribution legislation therefore requires a grasp of some essential principles of causation.

One type of case to which the contribution legislation applies is the case of **joint liability**. Here, there is only
p. 521 one wrongful act, although several parties may be responsible for it. One ↵ form of joint liability is 'vicarious liability' (explored in Chapter 10). Where an employee commits a tort in the course of employment, the employer is held to be 'vicariously liable' in respect of that tort. There is no need to show any breach of duty or other wrongful conduct on the part of the employer at all. Here, there is only one tort (the employee's), but two parties are potentially liable in respect of it. Another example of joint liability is the case where two (or more) parties set out **with a common design** and act to cause harm. It is the collective action in concert which leads to damage; and thus both parties commit the *same* wrong, between them. The claimant can choose to proceed against either wrongdoer. The party found liable may seek contribution from the other. In *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10; [2015] AC 1229, the Supreme Court ruled that a UK charity was not a joint tortfeasor, because its acts in furtherance of a common design (an attack on a bluefin tuna farm) were 'de minimis'. The charity had clearly appreciated that a conservation society which it supported would commit tortious acts as part of its campaign, particularly in the light of the society's statement that it would destroy

illegal nets; thus, if the charity's role had been more than de minimis, even if relatively trivial, its liability as an 'accessory' would have been in full; and it would have been forced to seek contribution against the principal tortfeasor.

> **Lord Neuberger, *Fish & Fish v Sea Shepherd***
>
> 57 ... the assistance provided by the defendant must be substantial, in the sense of not being de minimis or trivial. However, the defendant should not escape liability simply because his assistance was (i) relatively minor in terms of its contribution to, or influence over, the tortious act when compared with the actions of the primary tortfeasor, or (ii) indirect so far as any consequential damage to the claimant is concerned. Nor does a claimant need to establish that the tort would not have been committed, or even that it would not have been committed in the precise way that it was, without the assistance of the defendant. I agree with Lord Sumption JSC that, once the assistance is shown to be more than trivial, the proper way of reflecting the defendant's relatively unimportant contribution to the tort is through the court's power to apportion liability, and then order contribution, as between the defendant and the primary tortfeasor.

Section 1(1) is explicitly not confined to 'joint liability'. It applies in *any* case where two or more wrongdoers contribute to the same damage, even if they do so through separate actions amounting to separate torts (or other wrongs). If two or more separate wrongs are committed by parties acting without any 'common design', each party will be liable in full (and the contribution legislation will apply) if *and only if* each wrong contributes to damage which is considered to be **indivisible**. This is referred to as a case of **concurrent torts** (or wrongs).

'Indivisible Damage'

In cases where the wrong is not 'joint' (which is to say, where there are separate contributing wrongs), we therefore need to consider the meaning of 'indivisible damage'. The leading statement on this subject is to be found in the judgment of Devlin LJ in *Dingle v Associated Newspapers* [1961] 2 QB 162, at 188–9. This was a case
p. 522 in defamation. A libel was published ↵ by several different newspapers and the question was whether one of those newspapers was liable in full for the effect of the libel. The following statement of 'elementary principles' applicable to cases of *personal injury* was set out by Devlin LJ in order to assist consideration of the best approach in a case of damage to *reputation*.

Devlin LJ, *Dingle v Associated Newspapers and Others*
[1961] 2 QB 162 at 188–9

> … Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law. If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of earnings, it is usually possible to say how many days' detention is attributable to the damage done by each collision and divide the loss of earnings accordingly.
>
> These are elementary principles and readily recognisable as such in the law of damage for physical injury … [Emphasis added]

Devlin LJ went on to conclude that the same principle must apply in a case of libel, where the injury to reputation is indivisible.

> The same principle must apply to general damage for loss of reputation. If a man reads four newspapers at breakfast and reads substantially the same libel in each, liability does not depend on which paper he opens first. Perhaps one newspaper influences him more than another, but unless he can say he disregarded one altogether, then each is a substantial cause of the damage done to the plaintiff in his eyes. …

Returning to Devlin LJ's general statement in respect of personal injury, we should note the following points:

p. 523

1. The principle that each tortfeasor is potentially liable for the full damage depends, as Devlin LJ expressed it, on showing that each tortfeasor has caused the harm in question ('a tortfeasor whose act has been a proximate cause of the injury …'). This means that each tort must satisfy the tests for causation that we set out in Chapter 3 and further explored (noting relevant complexities) in Chapter 4.
2. If the various torts of different tortfeasors lead to more than one *injury*—or, to put it another way, if the harm is treated as *divisible*—each tortfeasor is liable *only* for the injury that is caused by his or her tort. There is then no scope for contribution proceedings between tortfeasors, because the other parties will

not be held to have caused 'the same damage'. The liability of each tortfeasor does not extend to damage to which others have also contributed. The risk of insolvency and the burden of proving each tort lie upon the claimant.

3. In the case where four men in turn hit the claimant and he suffers a single consequential injury (for example, in the form of psychiatric harm leading to loss of earnings), then the damage will be treated as indivisible and any of the four may be liable for the whole damage. It is important to notice that it is not the physical harm that, in the example given by Devlin LJ, is said to be indivisible, but the psychiatric consequences of the four incidents. If there are four separate physical injuries, then clearly the damage is divisible. Each assailant will be liable only for the part of the damage that he or she causes; there is no scope for *contribution*. The following case shows that what appears to be a single injury may also be judged to be 'divisible'. A disease or injury which is *made worse by* each tort may be treated as divisible; each tortfeasor is liable only for the *additional harm* that they cause.

Thompson v Smiths Shiprepairers [1984] QB 405

The plaintiffs suffered hearing impairment through exposure to excessive noise in shiprepair and shipbuilding yards. Mustill J awarded damages which reflected not the full impairment of hearing suffered, but only the part of that impairment of hearing which could be said to flow from a *breach of duty*.

The plaintiffs' hearing loss in these cases had been progressive. Mustill J held that at the beginning of the process of impairment, there was no breach of duty because it was not generally recognized that the levels of noise were harmful. Only later, when the possibility of harm was recognized, was the exposure in breach of duty. Although the end result—hearing loss to a particular level—appeared to be a single *injury*, it was not 'indivisible'.

Mustill J relied upon expert evidence in order to calculate the *amount* of impairment likely to have been caused during the period of breach, in order to determine the appropriate level of compensation. The damages only compensated for a part of the loss suffered, reflecting the fact that at the time of breach, the claimant's hearing was already impaired.

Mustill J

> This condition is not the direct product of a group of acts, not necessarily simultaneous, but all converging to bring about one occurrence of damage. Rather, it is the culmination of a progression, the individual stages of which were each brought about by the separate acts of the persons sued, or (as the case may be) the separate non-faulty and faulty acts of the only defendant. In my judgment,
> p. 524 the principle stated by Devlin L.J. does not apply to this kind of ↵ case. Moreover, even if it could be regarded as apposite where the successive deteriorations and their respective causes cannot on the evidence be distinguished, it does not in my opinion demand the conclusion that where the court knows that the initial stage of the damage was caused by A (and not B) and that the latter stage was caused by B (and not A), it is obliged in law to proceed (contrary to the true facts) on the assumption that the faults of each had caused the whole damage. So also in the case where it is known that when the faulty acts of the employer began, the plaintiffs' hearing had already suffered damage.

Rahman v Arearose [2001] QB 351

The plaintiff was assaulted at work while employed by the first defendants, and sustained damage to his eye. He then underwent an operation at the second defendant's hospital. This operation was negligently performed, and led to the loss of the eye. Apart from this physical impairment, the plaintiff suffered a number of consequential psychological difficulties, attributed by experts variously to the initial assault, and to the loss of the eye. Here we consider the *psychological* harm.

The Court of Appeal concluded that this case differed from Devlin LJ's example of four separate assaults causing one sort of psychological harm. Here, the psychological impairment took several different forms (post-traumatic stress disorder; phobia; personality change; depressive disorder of psychotic intensity), and these various forms *could* be attributed, according to the experts, to one or other of the torts committed—even if this could be done only with some lack of certainty. Hence, this was *not* a case of joint or concurrent torts contributing to 'the same damage'.

> **Laws LJ**
>
> 23 … on the evidence the respective torts committed by the defendants were the causes of distinct aspects of the claimant's overall psychiatric condition, and it is positively established that neither caused the whole of it. So much is demonstrated by the document which sets out the conclusions of the three experts. It is true that this agreed evidence does not purport to distribute causative responsibility for the various aspects of the claimant's psychopathology between the defendants with any such degree of precision as would allow for an exact quantification by the trial court; no doubt any attempt to do so would be highly artificial. But the lack of it cannot drive the case into the regime of the 1978 Act to which, in principle, it does not belong. This view of the matter is by no means displaced by consideration of the oral testimony of the doctors, to which Mr Livesey invited our attention. The fact-finding court's duty is to arrive at a just conclusion on the evidence as to the respective damage caused by each defendant, even if it can only do it on a broad-brush basis which then has to be translated into percentages.

This is a very different case from *Thompson* because different 'aspects' of the psychiatric harm were identified by the experts as continuing to affect the plaintiff. Examining the plaintiff in *Rahman*, medical experts identified a number of different continuing harms. In *Thompson*, the plaintiff was suffering from one harm, impaired hearing. But different levels ↵ of impairment were attributed, in the main action and without the need for contribution proceedings, to different periods. In either of these ways, it may be concluded that the different tortfeasors have not contributed to 'the same damage'.

p. 525

Whether the expert reports *should* have been accepted in *Rahman* is a different matter:

Tony Weir, 'The Maddening Effect of Consecutive Torts' [2001] CLJ 237, at 238

> That left the … question of what damage each was liable for. Here the Court accepted an absurd report confected jointly by the experts for the three parties, who tentatively divided up the victim's present condition in terms of the two causes. They should not have been asked to do this, and their answer should have been ignored, for there is no scientific basis for any such attribution of causality; the claimant is not half-mad because of what the first defendant did and half-mad because of what the second defendant did, he is as mad as he is because of what both of them did. His mania is aetiologically indiscerptible, as when grief and shock combine to wreck the life of a parent who witnesses the death of her children. Suppose that the claimant was so maddened that he committed suicide: would his death be divided up by those responsible for triggering the injuries?

The approach in *Rahman v Arearose* was considered doubtful in *Dickins v O2 Plc* [2008] EWCA Civ 1144, the court ruling that psychiatric damage with a number of sources was to be seen as an indivisible injury. *Rahman* was, however, followed, and the decision in *Dickins* doubted, in *BAE Systems v Konczak* [2017] EWCA Civ 1188: an attempt should be made to identify a part of the defendant's suffering that was due to the wrong, though with the proviso that this will not always be possible.

'Damage' not 'Damages'

In *Royal Brompton NHS Trust v Hammond* [2002] 1 WLR 1397, Lord Bingham emphasized that 'the same damage' in section 1(1) (see Section 2.1 of the present chapter) does not mean 'the same *damages*'. 'Damage' is equivalent to 'loss' or 'harm', not to amount payable. That being so, it is not necessary that the two (or more) liable parties would, if successfully sued, be liable for identical amounts. For example, one party may have acted in such a way that he or she is susceptible to a claim for aggravated or punitive damages, while the other is not. Or, the parties may be liable on the basis of different causes of action, in which different rules on the extent of recoverable damage apply. These differences may be relevant to the apportionment stage; but they will not affect the prior question of whether the parties are potentially liable in respect of the same damage.

On the other hand, the different nature of the two liable parties' wrongs may make a significant difference to the sum that is treated as 'the same damage' to be apportioned. In *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm), the first defendant was liable in deceit (for a major mortgage fraud), while the second defendants were liable only in negligence (for failing, as the first defendants' solicitors, to spot the fraud). As explained in Chapter 2, damages in deceit are calculated differently from damages in negligence. Some damage which would be considered too remote in a negligence claim is awarded
p. 526 in deceit; and contributory negligence is not an available defence in an ↵ action for deceit. That being so, it was concluded in this case that the 'same damage' which had to be apportioned in the contribution proceedings would be the 'overlapping' liability of the two defendants. This may appear at first to be hard to tally with the statement of Lord Bingham above, but the purpose of the remoteness or attribution rules is precisely to identify what damage is to be treated as occasioned by any particular tort. If different damage has been done by the different torts, then the 'same damage' can indeed only be the overlapping amount. As we

will see, the proportion that a fraudulent party is liable to pay is likely to be far higher than the amount payable by a merely negligent tortfeasor. In this instance the first defendants were liable for 80 per cent of the 'overlapping' damage; they were also liable in full for the parts of the damage not attributable to negligence.

2.3 Apportionment

Civil Liability (Contribution) Act 1978

> **2 Assessment of contribution**
>
> 2.—(1) … in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.
>
> (2) … the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

Section 7(3) of the Act expressly preserves contractual indemnities and exclusions of contribution, and section 2(3)(a) effectively gives priority to contractual and statutory allocations of responsibility. Subject to these caveats, the guiding principle is that apportionment between liable parties should be on the basis of what is 'just and equitable', having regard to 'responsibility for the damage'.

We saw in Chapter 7 that very similar language is used in the Law Reform (Contributory Negligence) Act 1945, which sets out the approach to be taken where damages fall to be reduced for contributory negligence. However, there are significant differences in the way that these two provisions operate. In particular, it is well established that the idea of 'responsibility for damage' incorporates issues of causation, and of relative culpability. However, in respect of contribution under the 1978 Act, 'responsibility' (incorporating causation and culpability) is only a matter to which courts must 'have regard'. *The guiding aim is not to reflect relative responsibility, but to achieve a 'just and equitable' distribution.*

The Role of Culpability

Culpability may be a particularly significant consideration where one party has acted with wrongful and perhaps criminal intent, while the other has merely been careless or even acted with no degree of culpability at all. Clearly, these may be circumstances in which the court might lean towards a conclusion that the more
p. 527 'culpable' party should take a greater share ↵ of liability, or indemnify the innocent liable party in full. A similar result—liability being allocated 100 per cent to one of two parties—was reached in *Dawson v Bell* [2016] EWCA Civ 96. The claimant in the contribution proceedings had misappropriated funds from a company in which he and the defendant were directors and shareholders. Even assuming that the defendant knew of this

and in breach of her duty to the company, did nothing, it would not be 'just and equitable' to order the defendant to make a contribution given the extent of her responsibility, and given that the funds were misappropriated for the claimant's exclusive benefit.

Special considerations apply, however, where one of the defendants is liable 'vicariously' for the torts of another (typically an employee, or a partner under section 10 of the Partnership Act 1890).[13] In these circumstances, the employer is liable independently of any fault on his or her own part; and the employer does not need to have done anything to 'cause' the harm. Should the 'responsibility' of a vicariously liable employer be judged at zero whenever the other potentially liable parties are wrongdoers in their own right? The House of Lords has decided that this is *not* the right approach. In *Dubai Aluminium v Salaam* [2003] 2 AC 366, the 'responsibility' of a vicariously liable party was judged not in terms of their own innocence, but in terms of the tort of the tortfeasor (a wrongdoing partner). The employer 'stands in the shoes' of the party for whose torts they are liable; and if that party was fraudulent, the vicariously liable party takes a share of the liability accordingly.

Factors not Causative of the Damage

The House of Lords in *Dubai Aluminium* accepted a reason, unrelated to causative responsibility, for ordering the other fraudulent parties to indemnify the innocent partners completely. This reason was not based on 'responsibility' (to which, according to section 2(1), the court must 'have regard'). It was based on the fact that S and T still held undisgorged profits of their wrongdoing, whereas the co-partners did not. This factor justified a total indemnity, despite being irrelevant to 'responsibility' for the damage. The guiding aim is to distribute liability in a manner that is 'just and equitable'; 'responsibility' (incorporating both culpability and causation) is one factor to which the court must 'have regard', but is not the *only* factor.

Lord Nicholls, *Dubai Aluminium v Salaam*

Contribution and proceeds of wrongdoing

50 The other major factor which weighed with the judge when deciding to direct that the Amhurst firm should be entitled to an indemnity was that Mr Salaam and Mr Al Tajir had still not disgorged their full receipts from the fraud. The judge considered it would not be just and equitable to require one party to contribute in a way which would leave another party in possession of his spoils: see [1999] 1 Lloyd's Rep 415, 475.

51 Mr Salaam and Mr Al Tajir submitted that this approach is impermissible. Under section 2(1) p. 528 of the Contribution Act the court is required to assess the amount of contribution recoverable from a person which is just and equitable 'having regard to the extent of that person's responsibility for the damage'. 'Responsibility' includes both blameworthiness and causative potency. However elastically interpreted, 'responsibility' does not embrace receipts.

52 I cannot accept this submission. It is based on a misconception of the essential nature of contribution proceedings. The object of contribution proceedings under the Contribution Act is to ensure that each party responsible for the damage makes an appropriate contribution to the cost of compensating the plaintiff, regardless of where that cost has fallen in the first instance. The burden of liability is being redistributed. But, of necessity, the extent to which it is just and equitable to redistribute this financial burden cannot be decided without seeing where the burden already lies. The court needs to have regard to the known or likely financial consequences of orders already made and to the likely financial consequences of any contribution order the court may make. For example, if one of three defendants equally responsible is insolvent, the court will have regard to this fact when directing contribution between the two solvent defendants. The court will do so, even though insolvency has nothing to do with responsibility. ...

53 In the present case a just and equitable distribution of the financial burden requires the court to take into account the net contributions each party made to the cost of compensating Dubai Aluminium. Regard should be had to the amounts payable by each party under the compromises and to the amounts of Dubai Aluminium's money each still has in hand. As Mr Sumption submitted, a contribution order will not properly reflect the parties' relative responsibilities if, for instance, two parties are equally responsible and are ordered to contribute equally, but the proceeds have all ended up in the hands of one of them so that he is left with a large undisgorged balance whereas the other is out of pocket.

In *Re-source America v Platt Site Services* [2004] EWCA Civ 665, even the manner in which a defendant runs its defence—and any unreasonable attempt to deny responsibility or evade detection—was regarded as a relevant factor in determining contribution. This is not the same as the position in contributory negligence, where it is settled that only fault that *contributes to* the harm is relevant.

In *West London Pipeline v Total UK Ltd* [2008] EWHC 1296 (Comm), the claimants argued that insurance cover on the part of another potential party to the litigation should be a relevant factor for contribution proceedings. This, however, was rejected.

Ability to pay, therefore, appears to be an irrelevant factor, and it is exceptional for noncausative factors to play a part. Generally speaking, they should be related to the conduct which creates that party's tortious liability.

2.4 Time Limit for Contribution Claims

Contribution proceedings attract their own limitation period, set by section 10 of the Limitation Act 1980 at two years, running from the time at which the right to seek contribution arose. This will typically be the date of a judgment or settlement.

p. 529

3 Conclusions

i The rules of limitation and contribution discussed in this chapter exist for reasons of fairness and practicality, and have a significant impact on civil litigation, including litigation in tort. Principles of limitation have been adjusted over the years to reflect the difficulties claimants may have in realizing that their potential claim exists; but these adjustments continue to be balanced against the need to ensure that claims are brought as expeditiously as reasonably possible and so that courts and defendants are protected against open-ended potential litigation. In personal injury claims in particular, the court's discretion to permit claims outside the statutory limitation period is of continued significance.

ii Rules of contribution are of great significance in a system in which liability is joint and several. A tortfeasor whose blameworthy behaviour or contribution to causation is relatively trivial can be held liable in full, and must seek contribution against the principal tortfeasor. The principles of apportionment set out in section 2(1) of the Contribution Act 1978 bear some resemblance to the principles guiding apportionment in contributory negligence, but in important respects the two regimes are very different. In contribution proceedings, it is possible that a court will find it just and equitable to order either 0 per cent contribution or 100 per cent contribution, which are not available options in contributory negligence; and factors other than those relating to the causation of damage are considered relevant. The overriding goal is not to determine relative responsibility, as in contributory negligence, but to achieve a 'just and equitable' distribution.

Further Reading

Limitation of Actions

Davies, P. J., 'Limitations on the Law of Limitation' (1982) 98 LQR 249.

James, R., 'The Law Commission Report on the Limitation of Actions' (2003) 22 CJQ 41.

Law Commission, *Limitation of Actions* (LCCP 151, HMSO, 1998).

Law Commission, *Limitation of Actions* (Report No 270, HC 23, HMSO, 2001).

McGee, A., *Limitation of Actions*, 6th edn (London: Sweet & Maxwell, 2010).

McGee, A., and Scanlan, G. P., 'Constructive Knowledge Within the Limitation Act' (2003) 22 CJQ 248–64.

Mosher, J., 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44 UTLJ 169.

Patten, K., 'Limitation Periods in Personal Injury Claims—Justice Obstructed' (2006) 25 CJQ 349.

p. 530

Contribution Between Liable Parties

Davies, P.S., 'Accessory Liability in Tort' (2016) 132 LQR 15.

Dugdale, T., 'Civil Liability (Contribution) Act 1978' (1979) 42 MLR 182.

McCaul, C., 'Holtby and the End Game' (2006) JPIL 6–11.

Mitchell, C., *The Law of Contribution and Reimbursement* (Oxford: Oxford University Press, 2003).

Stace, V., 'The Law of Contribution – An Equitable Doctrine or Part of the Law of Unjust Enrichment' (2017) 48 Victoria U Wellington L Rev 471

Stace, V., 'Civil Liability Contribution – The New Zealand Supreme Court Tackles the "Same Damage" Issue' (2017) 133 LQR 20–25.

Tettenborn, A., 'Contribution between Wrongdoers' (2005) 155 NLJ 1722.

Notes

1 By Limitation Act 1980, s 3, *title to goods is extinguished* if a claim in conversion is not brought within the relevant limitation period. A striking example is *Commissioner of Police for the Metropolis v Meekey* [2021] EWHC 34 (Admin): the expiry of the limitation period for a claim in conversion also meant that the (now former) owner of a firearm no longer had the right to its return from the police (who had confiscated it) through s.1(a) of the Police (Property) Act 1897.

[2] Exceptionally, Keith Patten argues against such rules in cases of personal injury in 'Limitation Periods in Personal Injury Claims—Justice Obstructed' (2006) CJQ 349–66. P. J. Davies, 'Limitations on the Law of Limitation' (1982) 98 LQR 249, argues that all fixed periods should be abolished, to be replaced by an entirely discretionary system.

[3] Defamation Act 1996, s 5, and HRA, s 7(5), specify periods of one year; in each case, there is a statutory discretion to override the time limit.

[4] Limitation Act 1980, s 5.

[5] There were exceptions for cases of disability (e.g. where the plaintiff was a minor), fraud, and mistake.

[6] Trespass to the person does not *necessarily* involve personal injury, since trespass is actionable per se.

[7] Section 12 relates to claims under the Fatal Accidents Act 1976. These are claims for bereavement and loss of dependency by the dependents of a deceased victim of tort: see further Chapter 8.

[8] Patten (2006) CJQ 349.

[9] Section 14(2) is extracted above. In order to avoid the problem in *Stubbings v Webb*, which was then still binding on the court, this case was treated as raising a claim in negligence.

[10] In this context, any such belief could only be reasonable in the sense that it is not unreasonable. It cannot be that the reasonable person would *objectively* believe there to be a link, since the court at the same time plainly thought there was no evidence to support such a conclusion. Part of the confusion in this case may stem from different senses of what is 'reasonable'.

[11] Lord Brown would have preferred to strike out on this ground nonetheless.

[12] As we saw in, Chapter 6 *Barker v Corus* [2006] UKHL 20 created an important exception to this principle.

[13] The nature of the liability under this section is debatable. For discussion see C. Mitchell, 'Partners in Wrongdoing' (2003) 119 LQR 364.