IN THE COUNTY COURT AT
CENTRAL LONDON

Neutral Citation: [2025] EWCC 10
Case No: G00ED909

Thomas More Building
Royal Courts of Justice
Strand
London, WC2A 2LL

Date: 21st March 2025

Before :

HIS HONOUR JUDGE HOLMES

- -

Between :

MR DAVID DOROUDVASH **Claimant**

-and-

ZURICH INSURANCE PLC **Defendant**

-and-

THE COMMISSIONER OF THE POLICE FOR THE METROPOLIS **Respondent**

- -

Mr Adam Dawson (instructed by **Pattinson & Brewer**) for the **Claimant**
Mr Jamie Clarke (instructed by **Keoghs LLP**) for the **Defendant**
Mr David Callow (instructed by **Weightmans LLP**) for the **Respondent**

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Hearing date: 27th January 2025
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JUDGMENT

His Honour Judge Holmes:

1. Police Constables Sehmi and Doroudvash were responding to a 999 call on the morning of 6th August 2017. P.C. Sehmi was driving, P.C. Doroudvash was the front seat passenger. P.C. Sehmi was driving along the Uxbridge Road in W13 at a speed of 87mph. The speed limit was 30mph. He had slowed by the time they were approaching the junction with Dane Road. Mr Adam Tarnowski was emerging from Dane Road. As he did so, his vehicle, and that being driven by P.C. Sehmi came into contact. P.C. Doroudvash and Mr Tarnowski were both injured (I assume that P.C. Sehmi was as well, but there is no evidence in these proceedings as to that).

2. P.C. Sehmi was subsequently convicted of causing serious injury by dangerous driving and was sentenced to a suspended sentence of imprisonment by the Crown Court. Mr Tarnowski commenced proceedings in the High Court against P.C. Sehmi and the Commissioner of the Police for the Metropolis ("the Commissioner"). The Commissioner admitted liability under s.88 of the Police Act 1996. She invited Mr Tarnowski to discontinue the proceedings against P.C. Sehmi. No argument of contributory negligence was raised. The case settled before trial.

3. Meanwhile, P.C. Doroudvash sent a claims notification form ("CNF") to Mr Tarnowski's insurers, Zurich Insurance plc. P.C. Doroudvash was exercising his rights under the European Communities (Rights against Insurers) Regulations 2002 ("the 2002 Regulations"). The CNF was sent to Zurich on 1st May 2018. On 23rd May 2018, Zurich admitted liability in full for the accident. P.C. Doroudvash issued a Part 8 Claim Form on 10th June 2020. There were then agreed stays to allow for the collation of medical evidence. By the time that medical evidence was gathered it was clear that P.C. Doroudvash was alleging damages in excess of £200,000. The parties therefore agreed that the matter should proceed under Part 7, and a Particulars of Claim and a schedule of loss were served. The Defence purported to withdraw the admission of liability.

4. The Defendant made an application to resile from the admission on 22nd September 2023. That application was heard by District Judge Griffiths on 18th June 2024. The learned District Judge gave permission for Zurich to withdraw its admission of liability. The District Judge also gave permission to P.C. Doroudvash to make an application to join the Commissioner as a second defendant. Prior to that hearing, Zurich had already made an application, dated 13th June 2024, to seek a contribution or an indemnity from the Commissioner.

It is those applications which I have heard and which must be addressed in this judgment.

ZURICH'S APPLICATION

5. Zurich's application is to make an additional claim for a contribution or indemnity against the Commissioner. Mr Clarke's attractive submissions point to the reality of the situation that the Commissioner has, in other proceedings, already accepted full responsibility for the accident. He points to proportionality, to the undesirability of different conclusions being reached by different courts – this court on the one hand, the Crown Court and the High Court (albeit by consent) on the other. Mr Clarke's skeleton argument did not anticipate the arguments advanced on behalf of the Commissioner by Mr Callow. Criticism can be made of the Commissioner for his failure to provide any indication as to what his position would be until around 2pm on Thursday, 23rd January 2025; a matter of days before the hearing before me the following Monday.

6. The Commissioner's position is that there is no proper contribution claim which can be brought against him. A claim brought under regulation 3(2) of the 2002 Regulations is not the "same damage" for the purposes of s.6(1) of the Civil Liability (Contribution) Act 1978 ("the 1978 Act"). Hence it is not possible for Zurich to bring a claim for contribution against the Commissioner, although it is accepted that had P.C. Doroudvash sued Mr Tarnowski direct, rather than Zurich, then Mr Tarnowski would be entitled in principle to bring such an additional claim.

7. The relevant statutory provisions are these. Section 1(1) of the 1978 Act reads as follows:

> "(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)."

8. Section 6 is the interpretation section and subsection (1) reads as follows:

> "(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."

9. Regulation 3 of the 2002 Regulations reads as follows:

> "(1) Paragraph (2) of this regulation applies where an entitled party has a cause of action against an insured person in tort or (as the case may be) delict, and that cause of action arises out of an accident. (2) Where this paragraph applies, the entitled party may, without prejudice to his right to issue proceedings against the insured person, issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle, and that insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person."

10. The only other relevant statutory provision is s.88 of the Police Act 1996. Subsection (1) reads as follows:

> "(1) The chief officer of police for a police area shall be liable in respect of any unlawful conduct of constables under his direction and control in the performance or purported performance of their functions in like manner as a master is liable in respect of any unlawful conduct of his servants in the course of their employment, and accordingly shall, in the case of a tort, be treated for all purposes as a joint tortfeasor."

11. The argument develops in this way. The House of Lords in *Royal Brompton Hospital National Health Service Trust v. Hammond (and others)* [2002] UKHL 14, [2002] 1 W.L.R. 1397 was dealing with a building dispute. The dispute between the contractor and the employer was settled, but the claim by the employer against the architect in negligence arising out of the issuing of extension certificates and for delay, loss and expense arising from allegedly negligent advice proceeded before the High Court. The architect brought a claim against the contractor under the 1978 Act. The contractor sought to have that claim struck out on the basis that the damage claimed in the proceedings were not the "same damage".

12. Lord Bingham sets out in his speech the history of joint liability. At paragraph 5 his Lordship emphasises that "the constant theme of the law of contribution … rests upon the fact that they … are subject to a common liability". He continues, "Indeed both sections, by using the words "in respect of the same damage", emphasise the need for one loss to be apportioned among those liable."

13. In the following paragraph, Lord Bingham says this, "When any claim for contribution falls to be decided the following questions in my opinion arise. (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it?"

14. Citing the case of *Birse Construction Ltd v. Haiste Ltd* [1996] 1 W.L.R. 675, and the judgment of Roch, L.J., Lord Bingham says that it must be borne in mind that "damage" does not mean "damages". He says, "This seems to me to accord with the underlying equity of the situation: it is obviously fair that C contributes to B a fair share of what both B and C owe in law to A, but obviously unfair that C should contribute to B any share of what B may owe in law to A but C does not."

15. In paragraph 7, Lord Bingham says this,

> "But for purposes of contribution the parties' rights must be the same as if the employer had sued both the contractor and the architect in the High Court and they had exchanged contribution notices. The question would then be whether the employer was advancing a claim for damage, loss or harm for which both the contractor and the architect were liable, in which case (if the claim were established) the court would have to apportion the common liability between the two parties responsible, or whether the employer was advancing separate claims for damage, loss or harm for which the contractor and the architect were independently liable, in which case (if the claims were established) the court would have to assess the sum for which each party was liable but could not apportion a single liability between the two. It would seem to me clear that any liability the employer might prove against the contractor and the architect would be independent and not common. The employer's claim against the contractor would be based on the contractor's delay in performing the contract and the disruption caused by the delay, and the employer's damage would be the increased cost it incurred, the sums it overpaid and the liquidated damages to which it was entitled. Its claim against the architect, based on negligent advice and certification, would not lead to the same damage because it could not be suggested that the architect's negligence had led to any delay in performing the contract."

16. Lord Steyn in his speech emphasised the nature of the damage in that case. In paragraph 22 he said this,

> "The characterisation of the employer's claim against the contractor is straightforward. It is for the late delivery of the building. This is not a claim which the employer has made against the architect. Moreover, notionally it is not damage for which the architect could be liable merely by reason of a negligent grant of an extension of time."

17. In the following paragraph he continues,

> "The essence of the case against the architect is the allegation that his breach of duty changed the employer's contractual position detrimentally as against the contractor… It is alleged that by negligently giving an extension of in respect of an unmeritorious claim by the contractor, the architect presented the contractor with a defence to a previously straightforward claim by the employer for breach of contract in respect of delay."

18. In paragraph 27, Lord Steyn agrees with the observations of Lord Bingham in relation to the construction of the words, "the same damage". At the end of that paragraph, Lord Steyn says, "It must be interpreted and applied on a correct evaluation and comparison of claims alleged to qualify for contribution under section 1(1). No glosses, extensive or restrictive, are warranted. The natural and ordinary meaning of "the *same* damage" is controlling." (emphasis original).

19. There is also an interesting reference made by Lord Steyn to the decision of Sir Richard Scott V-C in *Howkins & Harrison v. Tyler* [2001] Lloyd's Rep. PN 1, 4 at paragraph 17 where the Vice-Chancellor said this:

> "Suppose that A and B are the two parties who are said each to be liable to C in respect of 'the same damage' that has been suffered by C. So C must have a right of action of some sort against A and a right of action of some sort against B. There are two questions that should then be asked. If A pays C a sum of money in satisfaction, or on account, of A's liability to C, will that sum operate to reduce or extinguish, depending upon the amount, B's liability to C? Secondly, if B pays C a sum of money in satisfaction or on account of B's liability to C, would that operate to reduce or extinguish A's liability to C? It seems to me that unless both of those questions can be given an affirmative answer, the case is not one to which the 1978 Act can be applied. If the payment by A or B to C does not pro tanto relieve the other of his obligations to C, there cannot, it seems to me, possibly be a case for contending that the non-paying party, whose liability to C remains unreduced, will also have an obligation under section 1(1) to contribute to the payment made by the paying party."

20. Lord Steyn does say that if this was to be regarded as a threshold test that it might lead to the law being unnecessarily complex, but he describes it as a "practical test to be used in considering the … statutory test".

21. Reference was made to the decision in *Bovis Construction Ltd v. Commercial Union Assurance plc* [2001] 1 Lloyd's Rep. 416, which was approved by Lord

Steyn in the *Brompton* case. Given the decision of the House of Lords in *Brompton,* it does not take the matter any further forward.

22. I was also referred to the decision of Mr John Bowers Q.C., sitting as a Deputy High Court Judge, in *Jubilee Motor Policies Syndicate 1231 at Lloyds v. Volvo Truck & Bus (Southern) Ltd.* [2010] EWHC 3641 (QB). This is of some interest because it is a claim for personal injuries arising from a road traffic collision. It is, however, a case brought under the indemnity provided by an insurer under s.151 of the Road Traffic Act 1988 rather than under the 2002 Regulations. The Deputy Judge found that damage caused by the tortfeasor and the requirement to provide a statutory indemnity were not the same damage for the purposes of the 1978 Act. He emphasised that the insurer's liability was only ever contingent on various matters, the effect of the "Road Traffic Act 1988 does not render Jubilee liable for Mr. Hawkes's personal injuries as such, but rather required Jubilee to satisfy a judgment, albeit one based on Mr. Hawkes's underlying injuries, and Mr. Bell or Fortress' liability to them. That liability could only be an economic loss as opposed to physical damage." (see paragraph 44). He continues in paragraph 47, "Jubilee, the claimant, never did cause Mr. Hawkes to sustain personal injuries; Jubilee was never directly nor vicariously liable for his personal injuries; Jubilee was not in fact a wrongdoer as far as Mr. Hawkes was concerned. Accordingly, the claimant was never liable to Mr. Hawkes for physical damage, namely his personal injuries for the purposes of the 1978 Act."

23. The final case I was taken to was a decision of Master Brightwell in *Riedweg v. HCC International Insurance plc* [2024] EWHC 2805 (Ch). That was a case which involved the interaction between the 1978 Act and the Third Parties (Rights Against Insurers) Act 2010 ("the 2010 Act"). I am told the judgment is subject to appeal, but in any event it is dealing with a different statutory regime, the 2010 Act as opposed to the 2002 Regulations, and cannot add to the decision of the House of Lords in the *Royal Brompton Hospital* case on the construction of the 1978 Act.

24. Mr Callow says that the damage is different: one is a claim as against an insurer, limited under the 2002 Regulations to the extent of its own liability to the insured person, the other is a direct cause of action against a tortfeasor (albeit through s.88 of the Police Act 1996) . If he is right, then the application must fail.

25. Mr Clarke begins by pointing to the practical effects of the Commissioner's position. If the Commissioner is right then whether an insurer has the ability to bring a claim for a contribution will depend on whether it is acting on behalf of its insured or whether it has been sued direct under the 2002 Regulations. To use

his phrase, the insurers would be "hamstrung". It will have the effect of insurers having to seek to add their own insured as a second defendant so that they can use their subrogated rights to seek a contribution through the insured. This will blunt the effect of the 2002 Regulations and will unnecessarily complicate these types of cases. He also says that if the Commissioner succeeds in his application, the effect in this case will likely be an application by Zurich to add Mr Tarnowski such that he can bring the contribution claim.

26. In any event, Mr Clarke says that the Commissioner's position is misconceived. The words, "directly liable" in Regulation 3(2) have the effect that the insurer becomes the tortfeasor, or it is as if the insurer were the tortfeasor. He says that the limitation in the Regulation which limits the insurers liability, "to the extent that he is liable to the insured person", does not change that position.

DISCUSSION

27. The law on the meaning of s.1(1) of the 1978 Act is clear and is to be taken from the *Royal Brompton* case. The condition precedent for its application is that it must be the same damage. To take what Lord Bingham says in paragraph 6 of that case, "it is obviously fair that C contributes to B a fair share of what both B and C owe in law to A." Here the Commissioner (C) and Zurich (B) both owe the same sum to P.C. Doroudvash (A). It seems to me that the same is true of Sir Richard Scott's extended questions in *Howkins & Harrison*. If, for example, Zurich were to pay P.C. Doroudvash's claim for care and assistance in full, P.C. Doroudvash could not then seek that sum from the Commissioner.

28. The damage claimed against Zurich in this case is precisely the damage that P.C. Doroudvash would have sought had he sued Mr Tarnowski direct. The formulation of the claim is identical, save for the identification of Zurich's liability under the 2002 Regulations. Thereafter the case is pleaded in negligence with a requirement to establish a duty of care, breach of duty, causation and damage. The schedule of loss is formulated exactly as it would have been had the claim been against Mr Tarnowski himself. Had P.C. Doroudvash sued both Zurich and the Commissioner in this claim originally, the loss pleaded would have been identical. It is difficult to see a clearer case of where the damage is the same.

29. That the right which gives rise to the remedy is different – one under s.88 of the Police Act 1996 and the other under the 2002 Regulations – is not the point. To do away with such differences was the purpose behind the 1978 Act and seems to me to accord with s.6(1) of the 1978 Act. This is not a situation where the claim is for delay in performance of a contract as opposed to the increased costs

incurred due to negligent certification of the works as it was in *Royal Brompton.* The same is true of *Birse Construction* where one party was liable for the loss suffered by the water authority in not having a properly working reservoir at the time that they expected, whereas the loss sustained by the other party was in having to construct a second reservoir as a result of their compromise with the water authority.

30. The situation in *Bovis Construction* is closer to the facts of this case, but still in my judgment distinguishable. Bovis was responsible for the flood damage to Friendly House as a result of the construction works it had undertaken. Commercial Union was liable under a policy of insurance. The difference here is that by virtue of the 2002 Regulations, Zurich steps into the shoes of the tortfeasor and defends the claim in precisely the same way in which Mr Tarnowski would have done, save that it would have an additional defence if it could avoid the policy, or there were some upper limit on the level of cover.

31. The position in *Jubilee Motor* was different again, although getting closer to the facts here. That was a claim for an indemnity under s.151 of the Road Traffic Act 1988. The essence of the decision is that the 1988 Act does not render the insurer liable for the claimant's personal injuries, rather it requires the insurers to satisfy a judgment, "that liability could only be an economic loss as opposed to physical damage." (see paragraph 44).

32. I confess to finding the facts somewhat difficult to divine from the judgment. It would appear that there was an accident between vehicles being driven by Mr Hawkes and Mr Bell. Mr Bell was working for a company called Fortress. Fortress were insured by Jubilee. Mr Bell was driving a vehicle which was maintained by Volvo. After the proceedings brought by Mr Hawkes against Mr Bell, Fortress and Jubilee (as s.151 insurer) were settled, Jubilee then sought a contribution from Volvo.

33. If those are the facts of *Jubilee Motor* then the position is materially different from the present case, even assuming that the case is correctly decided. The s.151 insurer is required to satisfy a judgment obtained against the insured. The insurer may or may not have been a defendant in the action, but either way the failure to satisfy a judgment is materially different from an insurer who is directly liable to the person who has suffered the damage, as is the position under the 2002 Regulations.

34. It was submitted that if Parliament had intended to impose vicarious liability on the insurer, it could have made that clear. I do not find the comparison between the 2010 Act, the Police Act 1996, and the 2002 Regulations to be particularly

illuminating. There is no doubt that the draftsmen have used different mechanism to achieve the same or similar results. The question is not whether the statutory provision have been written in different terms, it is what the statutory provision under consideration says and means.

35. In my judgment the insurer in the 2002 Regulations is directly liable to the claimant for the damage caused by the insured driver. The limitation on liability – "to the extent that he is liable to the insured person" – does not, in my judgment, change the position. There is no difference in the actual damage that the court is considering, rather it is entitlement to bring the action against a particular person for that damage which is changed by the 2002 Regulations.

36. There is a clear policy reason to support that construction. The whole purpose of the 2002 Regulations was to simplify personal injury litigation arising out of road traffic collisions. Such claims are almost always defended by the road traffic insurer. It is also not uncommon for more than two vehicles to be involved in collisions. In those cases issues of contribution will arise. If it is right that contributions can only be brought by the insured as opposed to the insurer, then the 2002 Regulations could not be used in such situations. That would add an unfortunate additional complexity to these types of cases, increasing costs and using up more court time. That would be most unfortunate.

37. Zurich's application is allowed.

MR DOROUDVASH'S APPLICATION

38. Mr Doroudvash seeks by his application to add the Commissioner as a second defendant. The Civil Procedure Rules draw a distinction between applications to add or substitute a party before and after limitation has expired. The test in CPR r.19.2(2), which applies before limitation expires, is one of desirability. The test after the expiry of limitation is in r.19.6 and is generally one of necessity. The relevant parts of that rule are as follows:

> "(2) The court may add or substitute a party only if–
>
> (a) the relevant limitation period was current when the proceedings were started; and
>
> (b) the addition or substitution is necessary.
>
> (3) The addition or substitution of a party is necessary only if the court is satisfied that–
>
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

(b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or

(c) the original party has died or had a bankruptcy order made against them and their interest or liability has passed to the new party.

(4) In addition, in a claim for personal injuries the court may add or substitute a party where it directs that –

(a) (i) section 11 (special time limit for claims for personal injuries); or

(ii) section 12 (special time limit for claims under fatal accidents legislation),

of the Limitation Act 1980 shall not apply to the claim by or against the new party; or

(b) the issue of whether those sections apply shall be determined at trial."

39. In his application, Mr Doroudvash makes reference to r.17.4(2), that, however, is not the appropriate provision by which to determine the addition of a new party. The point was not pursued in oral submissions.

40. Returning to r.19.6, Mr Dawson says that his client made the election to sue Zurich. He obtained an admission of liability from Zurich. He held that admission of liability for a long period of time – a period which spanned the expiry of limitation. It was only after the liability was withdrawn that the application became necessary. Mr Dawson says that his client is now faced with the spectre of being an innocent passenger, who has now lost his admission of liability, and might fail at trial against Zurich. He would then receive no compensation despite the Commissioner having, in other proceedings, admitted liability for the accident.

41. If Mr Doroudvash was able to bring himself within r.19.2(2) he would have little difficulty in overcoming the desirability test. But that is not necessarily the test to be applied here.

42. Mr Doroudvash's position at the hearing was that the addition of the Commissioner was necessary and that the court could, therefore, add the Commissioner under r.19.6(2). Sub-rule (3) sets out the basis upon which a court can be satisfied as to necessity. Neither paragraphs (a) or (c) apply here. That leaves Mr Doroudvash needing to demonstrate that the claim cannot properly be carried on against the original party unless the new party is added as a defendant.

That is clearly not the position here. Mr Doroudvash still maintains that he has a good claim against Zurich. That is a claim which can continue whether or not the Commissioner is a party. It may succeed, it may not; but that does not mean that it is necessary to add the Commissioner. It is quite clear from the authorities set out in the commentary to r.19.6 in the *White Book 2024* at paragraph 19.6.5, that Mr Doroudvash's position is not one of necessity.

43. Having come to that conclusion, and having considered r.19.6(4), it seemed surprising that Mr Doroudvash had not sought to focus his argument on that rule. I invited additional written submissions from counsel for Mr Doroudvash and the Commissioner on the application of r.19.6(4), specifically whether an application to disapply the primary limitation period under s.33 of the Limitation Act 1980 ("the 1980 Act") was a necessary step before the court could consider r.19.6(4), and if so whether the test was one of necessity or desirability – a question posed by Stuart-Smith, L.J. in *Pawley v. Whitecross Dental Care Ltd* [2021] EWCA Civ. 1827, [2022] 1 W.L.R. 2577, but not answered. I am grateful to both counsel for their detailed further submissions.

44. To understand the structure of r.19.6, it is necessary to acknowledge the distinction between what a court is doing under r.19.6(2) and r.19.6(4). Under r.19.6(2) the court is disapplying the provisions of the Limitation Act 1980 which would otherwise provide a defence to the claim. The need to do this was anticipated by Parliament in s.35 of the 1980 Act. The test of necessity, which is the threshold in r.19.6(2), is provided for in s.35(5) of the 1980 Act. The rule is therefore simply giving effect to a statutory power.

45. Parliament, however, set a different threshold for personal injury and fatal accident claims. The primary limitation period in ss.11 and 12 of the 1980 Act, was supplement by a power to disapply those periods if it is equitable to do so. That power is contained in s.33 of the 1980 Act. It is the power in s.33 which no doubt caused the rule committee to draft r.19.6(4) as it did.

46. In my judgment it is telling that neither s.33 nor r.19.6(4) use the term "necessary". The difference in approach reflects not only the statutory test, but also the reality. A claimant in a case to which s.33 of the 1980 Act does not apply, can only use r.19.6(2) to seek to pursue his claim against a different party. If he brought a freestanding claim, it would almost inevitably be defeated by a limitation defence. The position of a claimant who can use s.33 is that he can bring a freestanding claim, a limitation defence may be deployed, but if it is, he can invite the court to disapply the limitation period under s.33. There is, therefore, another route.

47. Mr Callow for the Commissioner argues that despite this, an applicant can only succeed in an application under r.19.6(4) where he can show that it is necessary to add the new party. The only case which deals with these provisions is *Pawley v. Whitecross Dental Care Ltd* [2021] EWCA Civ. 1827, [2022] 1 W.L.R. 2577. The issue identified is whether, if s.33 applies, or might apply, the test should be one of necessity as opposed to desirability. At paragraph 48, Stuart-Smith, L.J. expresses it in this way:

> "There is logic in the suggestion that (a) in a case where section 11 is disapplied by the court there is no further limitation issue and therefore the test should be that adding the party is "desirable" but that (b) in a case where limitation is left to trial the test should be that it is "necessary" to join the party. On the other hand, it could be said that leaving limitation over to trial means that the limitation defence is not established and that therefore to require necessity is too high a threshold. The problem is that the rule neither says nor indicates how this conundrum should be resolved."

48. In my judgment the correct approach is to consider desirability rather than the necessity of adding a party when considering an application under r.19.6(4). As already observed the rule does not set a necessity test, and that is not surprising where the rule is not seeking to implement s.35 of the 1980 Act. To imply a high threshold for such an application into r.19.6(4) is not necessary or desirable.

49. Rule 19.6(4) simply gives the court a discretion as to whether to add. The court must exercise that power judicially. The test of desirability, echoing the approach in non-limitation cases in r.19.2(2), may be the sensible approach. However, in my judgment what is required is a consideration of the circumstances of the application, and as Stuart-Smith, L.J. says in para. 49 of *Pawley*, that would bring into play all the circumstances and the application of the overriding objective. If the court decides under r.19.6(4)(a) that the primary limitation period should not apply, it is difficult to see on what basis a court may still refuse permission to add the additional party. Where the court is not in a position to consider the merits of a s.33 application at this stage, then the court should go on to consider whether a new party should be added to allow the limitation issue to be litigated. If it would fail, that would be a powerful reason for not adding a new party. The strength or otherwise of the potential s.33 application could, and perhaps should, be one of the factors taken into account in determining the desirability of allowing the addition.

50. The approach I have set out seems to me to reflect the reality of the situation. A necessity threshold would result in many applications failing. The effect would be that Claimants would simply bring a fresh set of proceedings against the prospective defendant. If a limitation defence was advanced, the claimant could then make an application under s.33 of the 1980 Act. All that would have been achieved was duplication in proceedings together with the inevitable cost and waste of court time.

51. I cannot see anything in the rule which precludes such an approach, and that appears to be the view of Stuart-Smith, L.J. in *Pawley*. It is by far the better practical solution. The court could, after the pleadings have been exchanged, determine that limitation should be tried as a preliminary issue, or, perhaps as here where there will be a trial in any event of the claim against Zurich and the contribution claim between Zurich and the Commissioner, that any s.33 application could be dealt with far more conveniently at trial.

52. The final issue is whether to consider an application under r.19.6(4) it is necessary for there to be an application before the court seeking reliance on s.33 of the 1980 Act. I can see nothing in the rule which requires that. Mr Doroudvash has included in his application r.19.6(4). He has therefore included the possibility of the court using the power in sub-rule(4). There is nothing in the sub-rule which requires an application under s.33. If such an application were included in the application, then the court might well have decided the limitation issue and simply disapplied the limitation period and deprived the defendant of that defence.

53. In my judgment the court has the power on the application before it to make an order under r.19.6(4)(b). In my judgment it is desirable to exercise the power in this case. The prospect of a s.33 application succeeding is far from fanciful against the factual background in this case. If the s.33 application did not succeed, there would be a prospect of the Commissioner, who has admitted liability for this accident in other proceedings, escaping liability because of an early admission of liability by Zurich. It is in my judgment desirable for the Commissioner to be added as a second defendant.

54. For these reasons, Mr Doroudvash's application succeeds. The question of limitation is to be left for trial if the Commissioner chooses to plead a limitation defence.