**The Bread & Butter of Contribution**

**Background**

1. ‘Contribution’, in the legal sense of the word, simply means the divvying up of a plaintiff’s damages between two, or among multiple, liable parties.
2. At common law, the rule was that a liable party could not seek contribution from another; the liable party should have known it was doing the wrong thing and had to face up to the consequences. The rule dates back to *Merryweather v Nixan* (1799) 8 TR 186[[1]](#footnote-1). Over time, the courts watered down that rule. For instance, if an employee was following instructions and found liable, that employee could seek indemnity from the employer[[2]](#footnote-2).
3. Where the common law left unfair gaps, equity stepped in[[3]](#footnote-3). Equitable contribution still applies, for example in cases of double insurance, although Justice Kitto of the High Court held that this is a contribution recognised by the common law too[[4]](#footnote-4).
4. Given the piecemeal state of the law, then, the Victorian Parliament enacted Part IV of the *Wrongs Act 1958 (Vic)*.[[5]](#footnote-5)
5. Part IV is an important regime for at least two reasons:
   1. first, as a rule, a defendant is jointly and severally liable for the whole of a plaintiff’s loss, even if its liability might otherwise be only, say, 5%[[6]](#footnote-6). If the plaintiff seeks out its damages award from one defendant, that defendant needs a mechanism of recovering contribution from another liable party; and
   2. secondly, the defendant may seek contribution from a party who would be liable to the plaintiff, but the plaintiff has chosen, for whatever reason, not to sue it. It is a rare case where the Court would force a plaintiff to sue a further defendant[[7]](#footnote-7).
6. Strictly speaking, a claim for contribution is only enlivened when a defendant has a liability to the plaintiff (i.e. held liable/paid damages to the plaintiff). It cannot be a hypothetical or conditional liability.[[8]](#footnote-8)
7. In practice, of course, a defendant usually seeks contribution before it has a liability to the plaintiff. The contribution claim or claims then run alongside the plaintiff’s, technically as separate proceedings.
8. Speaking generally, the Court will determine contribution at the same time as the plaintiff’s claim or immediately after the plaintiff’s claim, avoiding unnecessary use of the Court’s time or wasted resources.

**When is contribution available?**

1. Section 23B of the *Wrongs Act* provides that a “*liable party*” may seek contribution from another if that second party is “*liable in respect of the same damage*”.
2. This wording asks two questions:
   1. who is a “*liable party*”?; and
   2. what does the phrase “*same damage*” mean?

**“Liable party”: settling with a plaintiff and pursuing contribution later**

1. The phrase “*liable party*” does not mean that the Court must find the party liable to a plaintiff (or claimant) before it has a right of contribution against another, although obviously that would satisfy the test. This would result in needless litigation.
2. Sub-sections 23B(4) and (5) *of the Wrongs Act* provide that, as long as the defendant settles with the plaintiff (or claimant) “*in good faith*” and, assuming on the plaintiff’s facts the defendant would have been liable, the defendant is permitted to pursue the third party for contribution.
3. If, however, the defendant settles for an “*excessive*” sum, the Court will disregard that sum when it determines contribution[[9]](#footnote-9).
4. In this way, it is important that a defendant, when settling with a plaintiff before resolving contribution, ensures that:
   1. the plaintiff has an arguable case against the defendant - on the plaintiff’s case against it; and
   2. the defendant settles the plaintiff’s claim for a sum ‘within the range’.
5. In practice, if two defendants or a defendant and a third party cannot resolve contribution, but agree the plaintiff’s claim should resolve, they will often agree that the defendant settle with the plaintiff and agree the quantum of the settlement is reasonable, narrowing the ongoing dispute to contribution/whether the third party is liable. This is sound practice.
6. On occasion, a party will settle a claimant’s case before that claimant issues proceedings and without first seeking or agreeing contribution[[10]](#footnote-10).
7. Such an approach may be fraught with danger. For example, how would the party who settled with the claimant establish it was liable to the plaintiff on the plaintiff’s case that has not been pleaded? And further, how does it establish what it paid to the plaintiff was ‘within the range’?
8. It therefore seems preferable that the plaintiff’s claim be settled when proceedings are on foot, not before, and preferably adopting the approach noted in paragraph 14 above.

**Does “same damage” mean same cause of action?**

1. As noted, section 23B requires that the second party from whom contribution is sought be liable “*…in respect of the same damage*”. The phrase “*same damage*” is not confined to damage for the same cause of action, but goes to the “*loss*” the plaintiff suffered[[11]](#footnote-11).
2. In other words, provided both defendants could be, or were held to be, liable to the plaintiff (or claimant) for the plaintiff’s loss, either defendant may seek contribution against the other (or a defendant against a third party).
3. For example, the defendant may be liable to the plaintiff in contract for supplying faulty goods. The third party was not privy to that contract, but may be liable to the plaintiff for breach of statutory duties under the *Australian Consumer law* as a manufacturer of the faulty goods. The plaintiff may consider that it has a watertight claim against the supplier, choosing not to sue the manufacturer. It matters not. Both may be liable to the plaintiff, paving the way for the defendant to seek contribution by joining the manufacturer as a third party.
4. The supplier may also have a separate claim against the manufacturer under a contract between them that the manufacturer indemnify the supplier for any loss arising from its faulty goods. In its third party claim against the manufacturer, the supplier would seek a complete indemnity from the manufacturer to any liability it has to the plaintiff and then seek contribution as an alternative.
5. It is worth adding that, if the defendant seeks both a contractual indemnity and alternatively contribution, those claims must be brought at the same time.
6. In *Port of Melbourne Authority v Anshun* Pty Ltd[[12]](#footnote-12), the Authority and Anshun served contribution notices on each other during the plaintiff’s case. The Authority was held to contribute 90% to the plaintiff’s claim, Anshun 10%. In later proceedings, the Authority sought to rely on a contractual indemnity to recover all of the damages paid to the plaintiff. The High Court said that the Authority was obliged to raise its claim for the contractual indemnity against Anshun at the same time as its contribution claim under the *Wrongs Act* and was, therefore, estopped from bringing this second claim; hence the name ‘*Anshun estoppel*’.

**How does a defendant seek contribution?**

1. Although it is the *Wrongs Act* that enlivens an entitlement to seek contribution, it is Order 11 of the *Rules of Court* that provides the *procedure* for seeking contribution.
2. The procedure is straightforward against a co-defendant. The defendant must file and serve a Notice Seeking Contribution on the co-defendant using Form 11B. That Form must give sufficient notice to the co-defendant of the claim. Typically, that means that the co-defendant says it seeks contribution to any award for damages against it from the plaintiff.
3. If, however, the claim for contribution goes beyond the plaintiff’s pleadings, for example, it relies on additional facts to argue the other party’s contribution, the defendant must give sufficient notice to the co-defendant of its claim.
4. In practice, ‘sufficient notice’ in such a case means the defendant issues a Statement of Claim against the co-defendant pleading out its claim. The co-defendant will then issue a defence so the issues between the parties are before the Court.
5. If the defendant seeks contribution from a non-party, assuming proceedings are on foot and putting to one side informal negotiations, the defendant must issue a Third Party Notice and Statement of Claim on a Third Party (Form 11A).
6. It should be noted also that, under the *Rules of the Court*, the defendant cannot join the third party until the defendant files and serves its defence. It is best for a defendant to join a third party within 30 days after it files and serves its defence because the defendant needs neither the consent of the plaintiff nor leave of the court. Otherwise one or other is necessary.
7. If the claimant’s claim against the defendant resolves before the claimant has issued proceedings, the party seeking contribution against another would issue a Writ and Statement of Claim in the usual way.

**Limitation periods**

1. One of lawyers’ many bugbears is, of course, limitation periods. This is particularly, perhaps *frighteningly*, relevant to contribution claims.
2. Unlike many of the provisions in the *Limitations of Actions Act*, the *Wrongs Act* does not permit extensions of time to bring third party proceedings.
3. A defendant can seek contribution from another party at any time:
   1. within the time the plaintiff could have brought the claim against the third party; or
   2. within 12 months after the plaintiff brought the claim against the defendant,

whichever period comes later.

1. By way of an example, in a ‘slip and trip’ claim, the plaintiff was injured on 1 June 2012. He had three years to bring a claim against any negligent party (1 June 2015). He brought his claim against the defendant occupier on 25 May 2015. In this case, the defendant has until 18 May 2016 to join the landlord as a third party to the claim (or, if already a party, to file and serve its contribution notice against the landlord).
2. If the Plaintiff did not know the occupier was a separate entity to the landlord until a few years after the incident, it is debatable whether sections 27K and 27L *Limitation of Actions Act*[[13]](#footnote-13)would extend time, thus extending time for a defendant to join a third party. To my knowledge, such an argument has not been tested. It would be advisable, however, to issue any contribution proceedings within the 12 month timeframe to avoid resorting to ‘creative’ arguments.
3. The *Wrongs Act* also provides for a third party to join a fourth party and so on[[14]](#footnote-14). The Court has accepted that a third party may seek contribution from a fourth party within the same time the defendant could have joined that third party, or within a further six month period from the date the defendant issued proceedings on it, whatever is the latter[[15]](#footnote-15).

**How is contribution determined and by whom?**

1. The *Wrongs Act* provides that a judge or jury may determine contribution.
2. The Court is required to consider what is ‘just’ and ‘equitable’ having regard to the Plaintiff’s loss.
3. The Court is permitted to find contribution on a scale of 0 to 100% (i.e. up to what would amount to a complete indemnity against one party).
4. It seems a determination of 100% contribution to one party where two defendants were otherwise liable to the plaintiff would be reserved for the rarest of case. Cute arguments could be made that an otherwise liable defendant should not have to contribute to the plaintiff’s claim. Let us say, for instance, that the owner of a small business is also a so-called ‘employee-director’. He sues his own company as well as a negligent third party. He is found to have contributed to his own negligence through failing to take care for his own safety. For that same failure, his ‘employer’ is found liable for not instructing his employee to take care. It is an artificial legal distinction between he is the employer. The third party is also found liable. Why should the plaintiff have his damages reduced for contributory negligence and effectively have to contribute to his claim through his employer, putting insurance coverage to one side? Should that liable fall wholly on the third party because that is what is just and equitable in those unique circumstances?[[16]](#footnote-16)
5. What is ‘just’ and ‘equitable’ when divvying up contribution should be the subject of its own paper. However, it is probably best summed up by considering the Civil Juries Charge Book, which offers:

“*You would need to consider, in deciding to what extent it was just and equitable that one defendant should recover contribution from the other, the extent to which each defendant, in your judgment, fell short of taking that care for the plaintiff which it should have taken in all the circumstances. In considering that matter, it would be appropriate to take into account whether, in your view, one defendant had greater control over the situation than the other.*

*You would also need to consider, in deciding that matter, the importance of the conduct of each defendant in causing the accident and the plaintiff’s injuries…*”

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9 June 2016

1. <http://www.worldlii.org/int/cases/EngR/1799/669.pdf>. [↑](#footnote-ref-1)
2. See the discussion of exceptions in *Belan v Casey* [2003] NSWSC 159. [↑](#footnote-ref-2)
3. *Ibid*. [↑](#footnote-ref-3)
4. See for example *Albion Insurance Co Ltd v Government Insurance Office* *(NSW)* [1969] HCA 55. [↑](#footnote-ref-4)
5. The cause of action under the *Wrongs Act* is a statutory one. The Court noted in *Van Win Pty Ltd v Eleventh Mirontron Pty Ltd* [1986] VR 49 that this is “*a cause of action for contribution conferred by statute and not founded in tort* [or other causes of action]”. This does not mean that there are no rights to contribution in equity in cases that do not fall within Part IV of the *Wrongs Act*. See, for example, *Edingbay Pty Ltd v Aroni Colman; National Australia Bank Ltd; Horwath (Vic) Pty Ltd* [1999] VSC 216 from paragraph 19. [↑](#footnote-ref-5)
6. Proportionate liability provisions are not dealt with in this paper, but see Part IVAA for its application. [↑](#footnote-ref-6)
7. Although strictly speaking a defendant can make such an application under Order 9 of the *Rules of Court* for the joinder of another defendant as a ‘necessary’ party to the case. [↑](#footnote-ref-7)
8. *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7 at 54; 216 CLR 109. [↑](#footnote-ref-8)
9. Section 24(2) of the *Wrongs Act*. [↑](#footnote-ref-9)
10. See for example Tadgell J’s obiter in *State Electricity Commission of Victoria and Others v Fooks and Others* [1994] VicRp 18; [1994] 1 VR 259:

    “*Plainly enough an action need not have been brought by the injured party in respect of damage to him before any person liable in respect of it may recover contribution in respect of his liability. Liability may be admitted or established otherwise than by action at the suit of the injured party: s 24(2B)**recognises as much.*” [↑](#footnote-ref-10)
11. *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7 per Gleeson CJ, Gummow and Hayne JJ at 32 and 39; 216 CLR 109:

    “[at 32]*…the claimant may recover contribution from any other person ("the potential contributor") who is also liable to the injured plaintiff in respect of the same damage. The relevant inquiry is not confined to whether the damage for which each is liable can be said to be the same; both claimant and potential contributor must be liable to the injured plaintiff…*[at 39] *So it may be in a given case that the liability of one party is founded in contract and the other is in tort.*” [↑](#footnote-ref-11)
12. [1981] HCA 45; (1981) 147 CLR 589. [↑](#footnote-ref-12)
13. Providing an extension to the plaintiff based on the date of discoverability. [↑](#footnote-ref-13)
14. Section 24(4)(b) of the *Wrongs Act.* [↑](#footnote-ref-14)
15. *State Electricity Commission of Victoria and Others v Fooks and Others* [1994] VicRp 18; [1994] 1 VR 259 (“…*each contributor could bring contribution proceedings within the same time period as the defendant, and if that time period had expired, within a further six months period after each contributor was served with contribution proceedings*”). [↑](#footnote-ref-15)
16. See for example *Andar Transport Pty Ltd v Brambles Ltd* [2004] HCA 28; 217 CLR 424 from paragraph 59. [↑](#footnote-ref-16)