House of Lords before Lords Bingham of Cornhill ; Mackay of Clashfern ; Steyn ; Hope of Craighead ; Rodger of Earlsferry 25th April 2002

LORD BINGHAM OF CORNHILL : My Lords,

1. Section 1(1) of the Civil Liability (Contribution) Act 1978 provides: *"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)."*

   This appeal turns on the interpretation of the six words I have emphasised and their application to the facts of this case. I am indebted to my noble and learned friend Lord Steyn for his account of the factual, contractual and legislative background to the case, which I adopt and need not repeat.

2. The law has for many centuries recognised the existence of situations in which, if B is called upon to discharge a legal obligation owed to A, fairness demands that B should be entitled to claim a contribution from other parties subject with him to that obligation. Thus a rule first developed to cover parties to a common maritime adventure was over time extended to cover co-sureties, co-trustees, co-contractors, partners, co-insurers, co-mortgagors, co-directors and co-owners (see Goff & Jones, ***The Law of Restitution***, 5th ed, (1998) pp 394, 399, 409, 413, 415, 421, 424, 425 and 427). The common link between all these situations was the obvious justice of requiring that a common liability should be shared between those liable.

3. The advent of the motor car however highlighted a situation in which B, if called upon to discharge a liability to A, could not seek any contribution from others also subject to the same liability to A. The old rule in ***Merryweather v Nixan*** (1799) 8 TR 186 forbade claims for contribution or indemnity between joint tortfeasors and a more recent decision in ***The Koursk*** [1924] P 140 showed that even where independent acts of negligence by different parties resulted in one injury and gave rise to a cause of action against each party there could be no contribution between them. The Law Revision Committee in its *Third Interim Report* (Cmd 4637) of July 1934 addressed this problem. In paragraph 7 of its report the committee said:

   "We think that the common law rule should be altered as speedily as possible.

   The simplest way of altering the law would seem to be to follow the lines of Section 37(3) of the Companies Act [1929], and to give a right of contribution in the case of wrongs as in cases of contract.

   If this were done, joint tortfeasors in the strict sense would be given a right of contribution inter se. We think, however, that such a right might with advantage also be conferred where the tort is not joint (ie, the same act committed by several persons) but where the same damage is caused to the Plaintiff by the separate wrongful acts of several persons. This is the position which frequently arises where the plaintiff sustains a single damage from the combined negligence of two motor car drivers, and recovers judgment against both . . .

   We think therefore that when two persons each contribute to the same damage suffered by a third the one who pays more than his share should be entitled to recover contribution from the other."

   The committee included the following among its recommendations:

   "(II) Any person who is adjudged to be liable to make any payment . . . in respect of an actionable wrong may recover contribution . . . from any other person who has been made liable in respect of the same wrong, or who, if sued separately, would have been so liable, unless . . .

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

   Effect was given to these recommendations in section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935 which provided: *"Where damage is suffered by any person as a result of a tort . . . any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have* been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise. . . ."

4. The Law Revision Committee's *Third Interim Report* and section 6(1)(c) were directed only to the liability, as between each other, of those who had committed tortious acts, whether jointly or concurrently. This limited field of application came in time to be recognised as a weakness, for section 6(1)(c) did not apply to wrongdoers other than tortfeasors and did not apply if only one of the wrongdoers was a tortfeasor. This was one of the weaknesses addressed by the Law Commission in its *Report on Contribution* (Law Com No 79) published in March 1977. A number of recommendations were made with the main aim of widening the jurisdiction given to the courts by the 1935 Act (paragraph 81) and specific recommendations were made:

   "(a) . . . that statutory rights of contribution should not be confined, as at present, to cases where damage is suffered as a result of a tort, but should cover cases where it is suffered as a result of tort, breach of contract, breach of trust or other breach of duty . . .

   (d) . . . that the statutory right to recover contribution should be available to any person liable in respect of the damage, not just persons liable in tort . . ."

   In the draft bill appended to its report the Law Commission proposed a subsection (in clause 3(1)) which differed from section 1(1) of the 1978 Act quoted at the outset of this opinion only in its reference to the time when the damage occurred, a reference which has been omitted in the subsection as enacted. The words which I have emphasised at the outset were included in the Law Commission draft. Section 1(1) of the 1978 Act is supplemented by section 6(1): *"A person is liable in respect of any damage for the purposes of this Act if the person*

who suffered it . . . 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)."

This differs more obviously, at least in wording, from the interpretation clause proposed by the Law Commission:

"(1) For the purposes of this Act -

(a) a person is liable in respect of any damage if he is subject to a duty enforceable by action to compensate for that damage, whether or not he has in fact been held to be so liable in any action actually brought against him; and

(b) it is immaterial whether he is liable in respect of a tort, breach of contract, breach of trust or on any other ground whatsoever which gives rise to a cause of action against him in respect of the damage in question."

5. It is plain beyond argument that one important object of the 1978 Act was to widen the classes of person between whom claims for contribution would lie and to enlarge the hitherto restricted category of causes of action capable of giving rise to such a claim. It is, however, as I understand, a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A. I find nothing in section 6(1)(c) of the 1935 Act or in section 1(1) of the 1978 Act, or in the reports which preceded those Acts, which in any way weakens that requirement. 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.

6. 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?

At the striking-out stage the questions must be recast to reflect the rule that it is arguability and not liability which then falls for decision, but their essential thrust is the same. I do not think it matters greatly whether, in phrasing these questions, one speaks (as the 1978 Act does) of "*damage*" or of "*loss*" or "*harm"*, provided it is borne in mind that "*damage*" does not mean "*damages*" (as pointed out by Roch LJ in ***Birse Construction Ltd v Haiste Ltd*** [1996] 1WLR 675, at p 682) and that B's right to contribution by C depends on the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A. 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.

7. Approached in this way, the claim made by the Architect against the Contractor must in my opinion fail in principle. It so happens that the Employer and the Contractor have resolved their mutual claims and counterclaims in arbitration whereas the Employer seeks redress against the Architect in the High Court. 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.

8. For the reasons given by Lord Steyn, and also for these reasons, I conclude that Judge Hicks QC and the Court of Appeal made correct decisions and I would dismiss this appeal.

LORD MACKAY OF CLASHFERN : My Lords,

9. I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. I agree that this appeal should be dismissed for the reasons they have given.

LORD STEYN : My Lords,

10. In a tripartite relationship under a building contract between an employer, a contractor and an architect a question of the correct interpretation of section 1(1) of the Civil Liability (Contribution) Act 1978 arises. Subject to its other provisions section 1 provides: *"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)."*

The issue centres on the meaning of the words *"in respect of the same damage"* read in the context of the language and purpose of the 1978 Act. Having ascertained the meaning of the operative words of section 1 the

application of the statute requires a close examination of the nature of claims by the employer against the contractor and the architect respectively in order to decide whether they are "*in respect of the same damage*".

I. The History of the Contract.

11. By a contract incorporating the articles of agreement and other conditions of the JCT Standard Form of Building Contract 1980 Edition, Local Authorities with Quantities, with Amendment No. 1 of 1984, the Royal Brompton Hospital National Health Service Trust (the Employer) employed Taylor Woodrow Construction Ltd (the Contractor) as the main contractor in the development and construction of phase 1 of new hospital premises in Sydney Street, Chelsea (the works). Watkins Gray International (UK), and two named architects, acted as architects under the contract. Collectively, I will call them *"the Architect"*. This is a well-known standard form of contract, which is readily available to interested parties, and it is therefore unnecessary to set out its provisions verbatim: *Keating on Building Contracts, 7*th ed, (2001), p 591 et seq.

12. The contract between the Employer and the Contractor was not dated but it came into effect on about 2 March 1987 when the Contractor took possession of the site. The contract fixed the date for the completion of the works as 23 July 1989. Under clause 24 of the contract the Contractor had to pay or allow the Employer liquidated and ascertained damages at the rate of £47,000 per week if the Contractor failed to complete the works by the completion date. In the event practical completion was certified 43 weeks and 2 days later than the contractual completion date. The Contractor made numerous applications on a variety of grounds for extensions of time under clause 25 of the contract and for the payment of loss and expense for prolongation and disruption under clause 26 of the contract, for variations and other matters. The Architect granted extensions of time totalling 43 weeks, 2 days, ie up to the date on which practical completion was certified ie on 22 May 1990. The effect of this was to relieve the Contractor of its obligation to pay or allow liquidated and ascertained damages for any of the delay. The Contractor claimed for loss and expense amounting to some £22m. The Architect certified as due and the Employer paid some £5.2m of which about £2.3m related to prolongation and the balance to disruption.

II. The Proceedings.

13. The Contractor commenced arbitration proceedings, claiming a further £17.1m. The Employer disputed the claim and counter-claimed for a sum of some £6.6m. The Employer was able to make these claims notwithstanding the extensions of time granted by the Architect because by article 5.3 of the contract the arbitrator had power to open up, review and revise any certificate to determine all matters in dispute in the same manner as if no such certificate had been given. On 19 December 1995 the parties settled the arbitration on terms that the Employer paid to the Contractor some £6.2m and agreed to indemnify the Contractor against any claim for contribution made against the Contractor by, amongst others, the Architect.

14. On 21 January 1993 the Employer issued a writ against the Architect and others. Between 1993 and 1997 the action was by consent stayed. On 5 August 1997 the statement of claim was served. The Employer alleged that the Architect had been negligent. The relevant heads of claim are summarised in the agreed statement of facts and issues. Subject to minor alterations the relevant paragraphs read:

> *"(a) Section F of the re-amended statement of claim: Hydrotite: The Contractor had responsibility for drying out the floor slabs. By April 1989 it had become apparent that the slabs would not dry out for a very long time. On 18 May 1989 the Architect issued an instruction to lay a proprietary damp-proof membrane called Hydrotite so that the Contractor could proceed to lay the floor coverings before the concrete was dry. The Contractor made claims for loss and expense incurred by reason of the instruction to lay Hydrotite, for which the Contractor was paid £669,070 (for prolongation) and £189,062 (for disruption) before the arbitration and claimed further sums in the arbitration. The Architect granted extensions of time totalling 12 weeks (including 2 for Christmas) by reason of delay caused by the application of Hydrotite. The Employer counterclaimed in the arbitration to recover the sums paid for prolongation and damages in respect of the sums paid for disruption. The Employer claims that the Architect was negligent in failing to give adequate advice as to the options available to the Employer (and in particular in failing to advise of the option of holding the Contractor to its undoubted contractual responsibility for the drying out of the works) or as to the possible consequences of issuing an architect's instruction to lay Hydrotite in terms of claims for extension of time and loss and expense.*
>
> *(b) Section G of the re-amended statement of claim: Extensions of Time: The Contractor claimed loss and expense by reason of the events giving rise to the extensions of time, for which the Contractor was paid £2,319,169 before the arbitration and claimed further sums in the arbitration. The Employer counterclaimed to set aside the extensions of time and to recover the sums paid before the arbitration. The Employer also claimed liquidated damages for which, but for the extensions of time, the Contractor would have been liable. The total claim for liquidated damages was £2,021,000 at the contractual rate of £47,000 per week."*

The Architect issued Part 20 proceedings to recover a contribution from the Contractor under the 1978 Act. In respect of section F (Hydrotite) the Architect alleged in the third party notice:

"[The Employer] alleges that [the Architect], inter alia, was negligent in that the Architect should have known that [the Contractor] was not therefore entitled to an Architect's instruction to lay a moisture resistant membrane . . . and [the Employer] seeks to recover damages from [the Architect].

If [the Employer] is right in its allegations made against [the Architect], which is denied, and in its allegations against [the Contractor], then it was entitled . . . to recover £858,132 paid to [the Contractor] in respect of and consequential upon the instruction; the recovery of liquidated damages in the sum of £564,000 and/or any other sums allegedly paid to [the Contractor] in consequence of the instruction, extensions of time and/or prolongation.

In the premises [the Contractor] is and/or was liable to [the Employer] in respect of the same damage, the subject matter of this part of the action against [the Architect] and thus liable to contribute to the extent of an indemnity for such loss as [the Architect] may be held liable to [the Employer] pursuant to the provisions of the Civil Liability (Contribution) Act 1978."

In respect of section G (extensions of time) the Architect alleged in the third party notice:

"If, which is denied, [the Architect] was negligent as alleged by [the Employer] in granting extensions of time to [the Contractor] to which [the Contractor] was not entitled and liable to [the Employer] for the liquidated damages and/or loss and expense paid to [the Contractor] as alleged in the amended statement of claim, then [the Contractor] is and/or was also liable to [the Employer] in respect of the same damage the subject matter of this part of the action against [the Architect] and thus liable to contribute to the extent of any indemnity for such loss as [the Architect] may be held liable to [the Employer] pursuant to the provisions of the Civil Liability (Contribution) Act 1978."

The Contractor applied to strike out the Part 20 claim. Given the indemnity given by the Employer to the Contractor in the settlement of the arbitration, the Contractor was represented by the same solicitors and counsel as the Employer.

III. The Decisions of Judge Hicks QC and the Court of Appeal.

15. Sitting in the Technology and Construction Court, Judge Hicks QC held that in respect of sections F and G, as described above, the Contractor was not liable in respect of the same damage as the Architect. He therefore struck out the third party notice of the Architect against the Contractor: ***Royal Brompton Hospital National Health Trust v Hammond*** [1999] BLR 385. The Architect appealed to the Court of Appeal. By agreement the argument concentrated on the Architect's claim for a contribution in respect of the section G (extensions of time). It was assumed that if the Architect failed in the arguments on section G he must necessarily also to fail in his arguments on section F (Hydrotite). Dismissing the appeal Stuart-Smith LJ held that the Contractor's breach consisted in the failure to deliver the building on time whereas the damage caused by the Architect occurred at the time of the certification of extensions and was the impairment of the ability of the Employer to obtain financial recompense in full from the Contractor; and, accordingly, it was not a claim in respect of "*the same damage*": ***Royal Brompton Hospital National Health Service Trust v Hammond*** [2000] Lloyd's Rep PN 643. Buxton LJ agreed. With some hesitation Ward LJ also agreed.

16. Since the Court of Appeal decision a trial has taken place of the Employer's claims against the Architect in respect of section G (extensions of time). The Architect was held to have been negligent in granting five weeks for laying Hydrotite on 24 November 1989. The issues on quantum still await decision. The trial in respect of section F (Hydrotite) has not yet taken place.

IV. The Issues.

17. On appeal to the House counsel for the Architect broadened his case by making submissions both on section F (Hydrotite) and section G (extensions of time). Both aspects arise for decision in the context of a striking-out application: the focus is therefore on the arguability of claims. The agreed statement of facts and issues formulates the issues as follows:

"In the [case] of Hydrotite (section F): On the assumptions

(i) that the relevant facts and matters alleged in the third party statement of claim were established at trial against [the Contractor] and

(ii) that the relevant facts and matters alleged in the re-amended statement of claim were established at trial against [the Architect].

*Would [the Contractor] be liable to [the Employer] **'in respect of the same damage'** as that in respect of which [the Architect] would be liable for the purposes of section 1(1) of the Civil Liability (Contribution) Act 1978?*

In the case of the second extension of time in relation to Hydrotite (ie the extension in respect of which [the Architect] has been found to have been in breach of duty: section G):

*On the assumption that the relevant facts and matters alleged in the third party statement of claim were established at trial against [the Contractor], would [the Contractor] be liable to [the Employer] **'in respect of the same damage'** as that in respect of which [the Architect] has been found to be liable for the purposes of section 1(1) of the Civil Liability (Contribution) Act 1978?"*

It will be convenient first to consider the position under section G (extensions of time) which was the subject-matter to which the judgments in the Court of Appeal were directed.

V. The Operation of the Contract.

18. It is necessary at the outset to describe in uncontroversial fashion how this standard form JCT contract operates. Drawing on a helpful summary in the Contractor's printed case, the position is as follows. The Contractor is obliged to proceed regularly and diligently with the works and to complete them by the completion date: clause 23.1. If he fails to do so, he is liable to pay or allow to the Employer a sum by way of liquidated and ascertained damages calculated at the agreed rate: clause 24. Those damages are either deducted from sums otherwise payable to the Contractor or the Employer may recover them "*as a debt*": clause 24.2.1.

19. If the works are delayed, or are likely to be delayed, beyond the completion date by a relevant event as defined by clause 25.4, the Contractor is entitled to an extension of time; if, on the Contractor's application, the Architect is satisfied that there has been a relevant event and that the completion of the works is likely to be delayed thereby beyond the completion date, he must give an extension of time by fixing such a later date as

the completion date which he considers fair and reasonable: clause 25.3. Thus the effect of giving an extension of time is twofold. First, the Employer no longer has the right to take possession of the works on the original date for completion, but only on the later date fixed by the Architect. Secondly, the Contractor becomes relieved from any liability to pay liquidated damages in respect of the delay between the two dates. In addition, where the regular progress of the works is materially affected by one or more of the matters listed in clause 26.2 and the Contractor has thereby incurred loss and/or expense for which he would not be reimbursed under any other provision of the contract, the Contractor is entitled to have such loss and expense ascertained (by the Architect or quantity surveyor) and paid to him.

20. Each of the matters listed in clause 26.2. is also a relevant event under clause 25. Thus if an extension of time is given for one or more of those events, this will entitle the Contractor to recover any loss and expense under clause 26. In practice, when the Architect gives an extension of time because of a relevant event that entitles the Contractor to loss and expense, he will also ascertain (or instruct the quantity surveyor to ascertain) the amount of that loss and expense. The loss and expense so ascertained then becomes added to the contract sum: clauses 26.5 and 30.6.2.13. At the conclusion of the contract (before the expiry of the defects liability period) the Architect must issue a final certificate stating (1) the sum of the amounts already due by way of interim certificates and (2) the contract sum as adjusted in accordance with the contractual provisions. The balance representing the difference between these two sums becomes (subject to any further deductions authorised by the contract) a debt payable by the Employer to the Contractor, or vice versa, as the case may be: clause 30.8. The liability of either the Employer or the Contractor is to pay the balance.

21. The arbitration clause in the main contract gives the arbitrator power to *"open up, review and revise any certificate, opinion, decision . . . and to determine all matters in dispute . . . as if no such certificate, opinion, decision . . . had been given"* (article 5.3). If either the Employer or the Contractor is dissatisfied with the extension of time given by the Architect then, not later than 15 days after the issue of the final certificate, he may commence an arbitration against the other and seek an award setting aside the extension of time. If the Employer is successful in any arbitration, the final certificate (if already issued) will be subject to the terms of the award or any settlement so that any balance stated in it to be due by one party to the other will be adjusted accordingly. If, for example, the balance was nil, and the arbitrator sets aside the extension of time, then the balance will be adjusted so that a sum representing the amount of liquidated damages referable to the extension of time, and the associated loss and expense overpaid, will become due to the Employer as a debt: clauses 30.8 and 30.9. In any event, the liability of the Contractor will be the contractual liability to pay whatever balance is due, after all relevant matters have been taken into account.

VI. A Description of the Claims.

22. 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. It is conceivable that an Architect could negligently cause or contribute to the delay in completion of works, eg by condoning inadequate progress of the work or by failing to chivvy the Contractor. In such a case the Contractor and the Architect could be liable for the same damage. There are, however, no such allegations in the present case.

23. 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. The Employer's case is that the Architect wrongly evaluated the Contractor's claim for an extension of time. It is alleged that by negligently giving an extension of time 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. The Employer lost the right under the contract to claim or deduct liquidated damages for the delayed delivery of the building. The Contractor committed no wrong by retaining the money until the extension of time had been set aside in an arbitration. The detrimental effect on the Employer's contractual position took place when the extension of time was negligently given. In such a case the Employer must go to arbitration in order to restore his position. He has the burden of proof in the arbitration and has to face the uncertain prospect of succeeding in what may perhaps be a complex arbitration. The Employer's bargaining position against the Contractor is weakened. A reasonable settlement with the Contractor may reflect this changed position: a case with a 100% prospect of success may become, for example, a case with only a 70% prospect of success.

VII. Civil Liability (Contribution) Act 1978.

24. The long title of the 1978 Act states that its purpose is *"to make new provision for contribution between persons who are jointly or severally, or both jointly and severally, liable for the same damage and in certain other similar cases where two or more persons have paid or may be required to pay compensation for the same damage; and to amend the law relating to proceedings against persons jointly liable for the same debt or jointly or severally, or both jointly and severally, liable for the same damage".*

25. Section 1 creates the 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 present purposes it is unnecessary to set out the remaining provisions of section 1. It is, however, necessary to read section 1(1) with the interpretation provision in section 6(1). It provides:

"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)."

The court's power of assessing contributions is contained in section 2. So far as it is material it provides:

"(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."

VIII. The meaning of "the same damage".

26. Counsel for the Architect reminded the House that the 1978 Act is a reforming measure. He argued that it ought to be given a broad and purposive interpretation so as to achieve the legislative intent. He said that the wide power of the court under section 2(1) and (2) to impose a "just and equitable" solution reinforces the appropriateness of such an approach. He cited dicta in two Court of Appeal decisions in favour of this approach. In ***Friends' Provident Life Office v Hillier Parker May & Rowden (a firm)*** [1997] QB 85 Auld LJ, with the agreement of the other members of the court, observed in respect of sections 1(1) and 6(1), at pp 102-103: *"The contribution is as to **'compensation'** recoverable against a person in respect of **'any damage suffered by another' 'whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise'**. It is difficult to imagine a broader formulation of an entitlement to contribution. It clearly spans a variety of causes of action, forms of damage in the sense of loss of some sort, and remedies, the last of which are gathered together under the umbrella of **'compensation'**. The Act was clearly intended to be given a wide interpretation."*

This passage was cited with approval in ***Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services Ltd*** [2001] EWCA Civ 1785 by Keene LJ, who, having set out the passage from the judgment of Auld LJ, went on to say, at para 19: *"It is necessary, therefore, not to be over-influenced by the possibility of formulating the measure of damages or even the damage, for which one party is liable to the claimant, in different words from that which may be employed to define or describe that for which another party is liable. Since the cause of action against each of them may differ, a different formulation of the damage for which they are liable may be possible".*

This observation was made with the agreement of the other members of the court. It will be necessary to return to these two decisions. At this stage I concentrate on the proposition that the 1978 Act ought to be given a broad interpretation. In large measure this statement is correct. This view can in particular be accepted to the extent that the 1978 Act extended the reach of the contribution principle to a wider range of cases *"whatever the legal basis of . . . liability, whether tort, breach of contract, breach of trust or otherwise"* (section 6(1)) and in the light of the comprehensive powers of the court under section 2(1) and (2).

27. But this purposive and enlarged view of the reach of the statute does not assist on the central issue of construction before the House. The critical words are "*liable in respect of the same damage*." Section 1(1) refers to "*damage*" and not to "*damages*": see ***Birse Construction Ltd v Haiste* Ltd** [1996] 1 WLR 675, 682 per Roch LJ. It was common ground that the closest synonym of damage is harm. The focus is, however, on the composite expression *"the same damage"*. As my noble and learned friend Lord Bingham of Cornhill has convincingly shown by an historical examination the notion of a common liability, and of sharing that common liability, lies at the root of the principle of contribution: see also Current Law Statutes Annotated (1978), ***"Background to the Act"*** at p 47. The legislative technique of limiting the contribution principle under the 1978 Act to the same damage was a considered policy decision. The context does not therefore justify an expansive interpretation of the words "the same damage" so as to mean substantially or materially similar damage. Such solutions could have been adopted but considerations of unfairness to parties who did not in truth cause or contribute to the same damage would have militated against them. Moreover, the adoption of such solutions would have led to uncertainty in the application of the law. That is the context of section 1(1) and the phrase "the same damage". 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.

28. In ***Howkins & Harrison v Tyler (a firm)*** [2001] Lloyd's Rep PN 1, at p 4, para 17 of his judgment, Sir Richard Scott V-C (now Lord Scott of Foscote) suggested a test to be applied to determine the statutory criterion of *"the same damage"*. With the agreement of Aldous and Sedley LJJ he observed: *"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 un-reduced, will also have an obligation under section 1(1) to contribute to the payment made by the paying party."*

If this test is regarded as a necessary threshold question for the purpose of identifying whether a claim for contribution is capable of being a claim to which the 1978 Act could apply, questions of contribution might become unnecessarily complex: see on this point ***Eastgate Group Ltd v Lindsey Morden Group Inc*** [2002] 1 WLR 642, 652, per Longmore LJ. It is best regarded as a practical test to be used in considering the very statutory question whether two claims under consideration are for "*the same damage*". Its usefulness may, however, vary depending on the circumstances of individual cases. Ultimately, the safest course is to apply the statutory test.

29. Before the judge and in the Court of Appeal counsel for the Contractor deployed in support of his argument that the two claims were different a hypothetical case not covered by direct English precedent: see the judge's observations at [1999] LR 385, 390, para 29; and Stuart-Smith LJ's observations at [2000] Lloyd's Rep PN 643, 647, para 20. Since then a report of a Canadian decision on the point has become available. It is the decision of the Alberta Court of Appeal in ***Wallace v Litwiniuk*** (2001) 92 Alta LR (3rd) 249. In that case the plaintiff sustained injuries in a motor vehicle collision. She wanted to sue the driver of the other vehicle. Her lawyers allowed the claim to become time barred. She sued her lawyers. They issued a third party notice against the driver of the other car. Section 3(1) of the Canadian Tort - Feasors Act 1980 provides:

"When damage is suffered by any person as a result of a tort, whether a crime or not,

(a) . . .

(b) . . .

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise, but no person is entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability regarding which the contribution is sought." (Emphasis added)

The court held, at p 257, paras 32-34:

"The compensation which she [the plaintiff] presently seeks from the respondents [the lawyers] is not damages for her physical injuries, but damages for what she would have obtained had the original claim been brought. In both cases, she sought damages, but that is not to say she sought the same damage. The damage is different. . . .

The pleadings in [the plaintiff's] statement of claim against [the lawyers] only superficially look as though she is claiming the same damages she would have claimed against the [the negligent driver]. This seeming similarity results from the usual method for calculating damages in a professional negligence claim where a lawyer failed to bring litigation which might otherwise have been pursued. Damages for the professional negligence are calculated by reference to the damages which would have been obtained in the original claim: Dugdale and Stanton, Professional Negligence (London: Butterworths, 1989) at pp 363-364.

The distinct nature of the original claim and the professional negligence claim is recognised by the need to estimate the value of the original claim, and then discount for the costs of pursuing the original litigation, and allow for any chance that the original claim might not have succeeded."

Counsel for the Architect rightly conceded that this is a correct analysis which in a similar situation an English court would be bound to follow. He asserted that the present case is different, apparently on the basis that there is greater proximity between the two claims. This is, however, not a material distinction. The analogy of the *Wallace* case militates strongly against the claims in the present case being for *"the same damage"*. A further analogy was put forward by counsel for the Contractor. He postulated a sale of the shares in a company. An accountant had negligently valued the shares at £7.5m. The vendor warranted that the shares were worth the price of £10m. In truth the shares were worth only £5m. The vendor was liable for damages in the sum of £5m. Counsel for the Contractor said that the accountant could only be liable to the extent of the common liability ie £2.5m. Counsel for the Architect accepted that this analysis is correct. Again, the Architect is in difficulties because the example demonstrates the unavailability of a right of contribution to the extent that there is no common liability. It points in the present case to the conclusion that the Architect is not liable for "the same damage" as the Contractor.

30. Counsel for the Architect urged the House to eschew an overly analytical approach to the nature of the claims. He said that in the application of the statute a flexible and broad view should be adopted. But loyalty to the statutory criterion of "the same damage" demands legal analysis of claims. Moreover, counsel for the Architect rightly did not contest the legal characterisation of the claims set out in paragraphs 13 and 14 above in respect of section G (extensions of time). In my view the conclusion is inescapable that the claims are not for the same damage.

IX. Conclusions on section G (extensions of time).

31. In agreement with the Court of Appeal I would hold that the criterion that the two claims must be for *"the same damage"* is not satisfied in respect of section G (extensions of time).

X. Section F (Hydrotite).

32. As between the Employer and the Architect it has been held that the Contractor was contractually responsible for drying out the floor slabs. However, the Architect issued an instruction to lay Hydrotite. The effect of the instruction was to transfer the cost of the solution to the problem from the Contractor to the Employer. The pleaded case of the Employer against the Architect is that the Employer authorised the issue of the instruction on the negligent advice of the Architect. The damage or harm for which the Architect is liable is the change in the Employer's contractual position vis-a-vis the Contractor. This claim is fundamentally different from the Employer's claim

against the Contractor in respect of the delay in completion of the building. On a correct analysis of the claims the Architect's argument does not satisfy the criterion that the claims must be for *"the same damage"*.

XI. Earlier Decisions.

33. It is necessary to refer to dicta in four earlier decisions. In ***Friends' Provident Life Office v Hillier Parker May & Rowden*** [1997] QB 85 to which I have already referred Auld LJ observed at p 102G-H: *"In my judgment, despite the distinction between a claim for restitution and one for damages, each may be a claim for compensation for damage under sections 1(1) and 6(1) of the Act of 1978. The difference between asking for a particular sum of money back or for an equivalent sum of money for the damage suffered because of the withholding of it is immaterial in this statutory context, which is concerned with 'compensation' for 'damage'."*

Goff & Jones, The Law of Restitution, 5th ed (1998), p 396, commented on this dictum: "*To conclude that a restitutionary claim is one for 'damage suffered' cannot be justified in principle; nor is it, in our view, consistent with the natural meaning of the statutory language. A claim for restitution cannot be said to be a claim to recover compensation within the meaning of section 1(1).*"

I am in respectful agreement with this criticism of the ***Friends' Provident*** case. To this extent it cannot be accepted as a correct statement of the law. Secondly, it is necessary to refer again to ***Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services Ltd*** [2001] EWCA Civ 1785. Relying on the observations in ***Friends' Provident*** the Court of Appeal held that the claim by an employer against a contractor for negligent site investigation services and a claim by the employer against insurance brokers for failure to insure against the contingency are claims for *"the same damage"*, entitling the insurance brokers to claim a contribution against the contractor. The fact is, however, that the insurance brokers had no responsibility for the remedial work. In my view the extensive interpretation of section 1(1) adopted by the Court of Appeal led to a conclusion not warranted by the language of the statute. If my conclusions in respect of the claims under consideration in the present case are correct it follows that the ***Hurstwood*** case was wrongly decided.

34. In two first instance decisions a difference of opinion on section 1(1) arose. In ***Bovis Construction Ltd v Commercial Union Assurance Co plc*** [2001] 1 Lloyd's Rep 416 the question arose whether a claim against a builder for defective work was "*the same damage*" under section 1(1) as an insurance company's liability under a policy of insurance. David Steel J held, at p 420, para 28: *"Bovis was liable for the flood damage to Friendly House: CU was liable under a policy of insurance. It is a misconception to describe those as liabilities 'in respect of the same damage'. The damage inflicted by the builder was a defective building susceptible to flooding damage and consequential loss of rent. CU has not inflicted that damage: the only damage it could inflict would have been a refusal to pay on the policy (which in any event excluded consequential loss), thereby imposing financial loss. This is not the same damage: see* ***Royal Brompton Hospital National Health Trust v Hammond*** *[2000] Lloyd's Rep PN 643."*

In a careful and detailed judgment in ***Bovis Lend Lease Ltd (formerly Bovis Construction Ltd) v Saillard Fuller & Partners*** (2001) 77 ConLR 134, 181-182, paras 128-130 Judge Anthony Thornton QC took a contrary view. It will be obvious that on this point I prefer the view of David Steel J. It is unnecessary, however, to examine the discussion by Judge Thornton QC of other matters.

XII. Disposal.

35. For these reasons, as well as the reasons given by Lord Bingham of Cornhill, I would hold that the Architect's claims were rightly struck out and I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD : My Lords,

36. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. I agree with them and for the reasons which they have given I too would dismiss the appeal. I should like however to add a few observations of my own on the meaning and effect of sections 1(1) and 6(1) of the Civil Liability (Contribution) Act 1978.

37. The purpose of the Act, as its long title indicates, was to make new provision for contribution between persons who are jointly or severally, or both jointly and severally, liable for the same damage, and in certain other similar cases where two or more persons have paid or may be required to pay compensation for the same damage. The word "contribution" is used where the cost of making good damage which has to be compensated is distributed equitably among a number of persons who are responsible in one way or another for causing the damage. The starting point for the exercise is the assumption that two or more persons have contributed, albeit in different ways, to the same wrong. The Act is concerned only with liability for damage, so the rules which apply to contribution between two or more persons who are liable for the same debts are not affected by it.

38. As my noble and learned friend Lord Bingham of Cornhill has explained, the common law did not favour the remedy of relief between joint tortfeasors: ***Merryweather v Nixan*** (1799) 8 TR 186. The principle upon which the decision in that case was based appears to have been that a wrongdoer could not seek redress from another where he is presumed to have known that what he was doing was wrong: ***Adamson v Jarvis*** (1827) 4 Bing 66; ***Weld-Blundell v Stephens*** [1920] AC 956, 976 per Lord Dunedin. It is plain from the comments on it in ***Palmer v Wick and Pulteneytown Steam Shipping Co Ltd*** [1894] AC 318 by Lord Herschell LC, at p 324, Lord Watson, at p 333 and Lord Halsbury, at p 333 that the rule was not one which they regarded with much favour. That was a case where damages had been claimed by the widow of a man who was killed by the fall of part of the tackle when the cargo of a vessel was being discharged at Grangemouth. Both the shipowner and the stevedore had been found liable to the widow in damages and expenses. It was held that the shipowner was entitled to recover

half of the damages and expenses from the stevedore, as the rule that there was no contribution between wrongdoers did not apply in Scotland. But, as Lord Herschell said, at p 324, it was too late for the decision in the ***Merryweather*** case to be questioned in England. It was not until the rule was removed by section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 that it became possible in this jurisdiction for the liability in damages to be distributed between joint or concurrent tortfeasors. Section 6(2) of that Act went one step further, as it enabled the liability to be apportioned equitably between them and not just equally. This reform was extended to Scotland by section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

39. The 1978 Act extended these reforms still further so as to provide for relief by way of contribution between wrongdoers whatever the basis of their liability. The major innovation introduced by the Act is to be found in section 6(1), which provides: *"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)."*

40. This further reform was designed to close the gap in the law which had been identified by the Law Commission in its report of March 1977, *Law of Contract, Report on Contribution* (Law Com No 79). It affected all wrongdoers other than tortfeasors: see paras 5 -7. The Law Commission could see no policy reason for leaving this gap unfilled: para 33. The problem which it had in mind was illustrated in the Report by two simple examples. The first example was taken from ***McConnell v Lynch-Robinson*** [1957] NI 70. It assumes that an architect was employed to draw plans for and supervise the building of a new house, and that a builder was employed under a separate contract to undertake the work. The builder in breach of his contract failed to install the damp proof course properly, and the architect in breach of his contract failed to notice this error. The building owner sued the architect, who failed in his attempt to have the builder joined as a third party as the claim lay not in tort but in contract. Although the architect and the builder had both caused the same damage, there was no right to contribution as they were not liable in contract to the same demand: ***Deering v Earl of Winchelsea*** (1787) 2 Bos & Pul 270. The second example assumes that the house falls down due to the architect's breach of contract, and that this was due also to the fault of the local authority whose inspector negligently approved the work for the house. In this case the architect would have been disabled from obtaining a contribution from the local authority under section 6 of the 1935 Act, as his liability was for breach of contract while the liability of the local authority was as a tortfeasor. It was in order to close this gap that the Law Commission recommended in para 58 that *"wrongdoers other than tortfeasors"* should be brought within the ambit of contribution.

41. This is the background against which section 1(1) of the 1978 Act should be understood. This subsection provides: *"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)."*

    The words *"any other person"* must be read together with section 6(1). So the right to contribution applies whatever the legal basis of that other person's liability. The words "*whether jointly with him or otherwise*" extend the wording of section 6(1)(c) of the 1935 Act to all such persons. That subsection provided that any tortfeasor was entitled to recover a contribution from any other tortfeasor liable in respect of the same damage "*whether as a joint tortfeasor or otherwise*". Section 2 of the 1978 Act provides that in any proceedings for contribution under section 1 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."

42. Paragraph 1 of Schedule 1 to the 1978 Act is the only provision in that Act which extends to Scotland. It provides: *"For section 5(b) of the Law Reform (Contributory Negligence) Act 1945 (application to Scotland) there shall be substituted -*

    "(b) section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (contribution among joint wrongdoers) shall apply in any case where two or more persons are liable, or would if they had all been sued be liable, by virtue of section 1(1) of this Act in respect of the damage suffered by any person."

43. The effect of paragraph 1 of Schedule 1 is not easy to grasp at first sight, as section 1(1) of the 1945 Act deals with the apportionment of liability between the claimant and the wrongdoer in a case of contributory negligence. But I think that the reference in paragraph 1 of Schedule 1 to the 1978 Act to section 1(1) of the 1945 Act must be read together with section 1(3) of that Act, which provides: *"Section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 (which relates to proceedings against, and contribution between, joint and several tortfeasors) shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of subsection (1) of this section in respect of the damage suffered by any person."*

    Section 1(3) of the 1945 Act was repealed by section 9(2) of and Schedule 2 to the 1978 Act. But section 10(3) of the 1978 Act provides that that Act, with the exception of paragraph 1 of Schedule 1 thereto, does not apply to Scotland. I understand this to mean that the repeal of section 1(3) of the 1945 Act does not extend to Scotland.

44. The effect of these provisions would appear to be that section 3 of the 1940 Act, which enables the liability between wrongdoers in Scotland to be apportioned equitably between them, now applies in any case where two or more persons are jointly or severally or both jointly and severally liable for the same damage, whatever the basis in law of the wrongdoers' liability. It had already been held that the doctrine of joint and several liability applies in cases of breach of contract as well as in delict: ***Grunwald v Hughes***, 1965 SLT 209. As Lord Justice-

Clerk Grant put it, at p 211, the test is the same whether the action is based on delict or on contract. It is whether the two persons have contributed, albeit in different ways, to cause a single wrong.

45. In ***Friends' Provident Life Office v Hillier Parker May & Rowden*** [1997] QB 85, 102H-103B Auld LJ referred to the words "*any damage suffered by another*" and "*whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise*". He said that it was difficult to imagine a broader formulation of an entitlement to contribution and that the 1978 Act was clearly intended to be given a wide interpretation. Keene LJ followed those observations in ***Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services Ltd*** 21 November 2001, para 19, when he said that it is necessary not to be over-influenced by the possibility of formulating the damage for which one party is liable in different language from that which is employed to define or describe that for which another party is liable. It is clear that the purpose of the 1978 Act was to extend the law to enable a contribution to be recovered in situations where it was not previously available. In that respect the wording in section 6(1) is undoubtedly very wide. But I think that it is a misconception to regard the Act as a whole as being open to the widest possible interpretation.

46. I do not detect either in the Law Commission's Report or in the wording of the Act itself an intention to depart from the assumption which has always been made in contribution cases that this relief is available only where two or more persons have contributed, albeit in different ways, to the same harm or damage - that is, where a single harm has resulted from what they have done. Where this occurs it may be said (loosely, as their liability is not common in the strict sense, as in the case of co-trustees or co-owners) that they share a common liability to pay compensation for having inflicted the same harm. Prior to ***Palmer v Wick and Pulteneytown Steam Shipping Co Ltd*** [1894] AC 318 it was not settled whether the statement that there shall be no contribution between wrongdoers was part of the law of Scotland: see ***National Coal Board v Thomson*** 1959 SC 353, 368 per Lord Patrick. But Lord Watson said in ***Palmer,*** at p 327, that it had been recognised in Scots law that a right of relief inter se was competent to all persons concerned in and responsible for the civil consequences of the same delict. This was said to be because payment and reparation by one wrongdoer liberates the rest and he ought in equity to have relief against the others proportionately, since by his money the others are freed from their obligation: Bankton, *Institute of the Laws of Scotland* (1751-1753), I.10, 4. The words *"liable in respect of the same damage*", which first appeared in section 6(1)(c) of the 1935 Act and were repeated in section 1(1) of the 1978 Act, confirm that the concept of a common liability remains the basis of the entitlement to contribution in English law.

47. The effect of those words is that the entitlement to contribution applies only where the person from whom the contribution is sought is liable for the same harm or damage, whatever the legal basis of his liability. But the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. The facts must be examined more closely in order to determine whether or not the damage is the same. As Lord Fraser pointed out in ***Turnbull v Frame*** 1966 SLT 24, 25, each utterance of a slander may be said to lead to a common result in the sense that they each cause damage to a man's reputation. It may be difficult to identify the particular damage caused by each utterance. But that does not mean that they are not separate wrongs, each of which causes its own damage. That is equally true of separate physical assaults by different persons at different but closely consecutive times. Unless they were acting in combination, each would be liable only for the damage caused by his own attack. Those examples may be contrasted with ***Arneil v Paterson*** [1931] AC 560, where two dogs which were the property of different owners, acting together, attacked a flock of black-faced ewes and killed some of them. It was held that each of the owners was liable jointly and severally for the whole of the damage done to the flock, as the whole of the damage was the result of the action of the two dogs acting together.

48. In the present case, for the reasons explained by my noble and learned friend Lord Steyn, the Contractor and the Architect did not cause the same damage. The basis for a finding that this was so is entirely absent. The harm done by the Contractor's breach of contract was the product of delay in the completion of the contract. The harm done by the Architect's breach of contract was due to the certificates which the Architect granted to the prejudice of the rights of the Employer under the contract. I agree that the harm, or the damage, which was done in each case was different. The conclusion must be that the prerequisite for entitlement to contribution under section 1 (1) of the 1978 Act is not satisfied.

LORD RODGER OF EARLSFERRY : My Lords,

49. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. I agree with them and, for the reasons that they give, I too would dismiss the appeal.