CASE COMMENTS AND NOTES

CONTRIBUTION BETWEEN TORT-FEASORS

Twenty-four years have passed since the publication of Glanville Williams' classic text on "Joint Torts and Contributory Negligence",[1] in which the author analyzed, in a very detailed manner, the various problems which he saw in the law relating to joint torts and contributory negligence. Not only did Professor Williams isolate and analyse the problems, but he also presented a recommended statute, containing forty-four provisions, which modified and codified the law in this area.

It is unfortunate that no Canadian common law jurisdiction has yet taken advantage of Professor Williams' brilliant work, with the result, as this note will indicate, that we are still grappling with certain problems discussed by Professor Williams in his text.[2]

Three recent Canadian decisions, emanating from three different common law provinces, clearly demonstrate that at least one of the problems analysed by Professor Williams continues to cause difficulties in this complex area of tort law. These cases are *B.C. Hydro and Power Authority* v. *Kees van Western et al. and District of Kitimat et al. (Third Parties),*[3] *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd. et al.,*[4] and *County of Parkland No. 31* v. *Woodrow et al.*[5]

The specific question with which these three cases deal is this—in accordance with the appropriate legislation in each province, against which persons can a claim for contribution be made by a defendant who has been found liable in tort and who is obliged to compensate a plaintiff in full for his damages?

Before discussing these specific decisions, it would be useful to briefly review the common law of torts as it related to actions which involved more than one joint or several concurrent tort-feasor[6] and, more specifically, as it related to the problem of contribution between these tort-feasors.

At common law, if two tort-feasors either jointly or independently caused damage to a victim they would each be liable for the entire loss. The courts did not have the power to apportion the liability between them and would not enter into an inquiry as to the degrees of wrongdoing of each of the tort-feasors. This meant that the tort-feasor against whom a judgment was recovered was unable to collect any contribution towards the payment of this judgment from the other tort-feasors.

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[1] Williams, Joint Torts and Contributory Negligence, 1951.

[2] *The Civil Liability Act, 1961* of Eire adopted Williams' recommendations without change. The Alberta Institute of Law Research and Reform is in the process of preparing a working paper as a preliminary step to statutory recommendations.

[3] [1974] 3 W.W.R. 20 (B.C.S.C.).

[4] (1974) 46 D.L.R. (3d) 28 (Ont. H.C.).

[5] [1975] 1 W.W.R. 441 (S.C.C.).

[6] The expression "joint tort-feasors" refers to tort-feasors jointly liable, *e.g.*, those engaged in a concerted action who combine to injure the Plaintiff. The expression "several, concurrent tort-feasors" refers to those who independently act and cause the Plaintiff the same damage.

The basis for this principle was the maxim *ex turpi causa non oritur actio*. The courts were unwilling to give aid to a wrong-doer and to allow him to come into court and seek relief from the consequences of his proven wrong-doing. The first case which stated this point was *Merryweather* v. *Nixan*[7] where it was held that "if A recovers in tort against two defendants, and levies the whole damages on one, that one cannot recover a moiety against the other for his contribution".[8]

It was argued that this "no-contribution" rule had two beneficial effects; firstly, that it 'punished' wrong-doers by making them liable for the whole of a victim's damages and, secondly, that it acted as a deterrent to others who may have been contemplating wrong-doing.

More persuasive, however, were the numerous arguments which condemned this approach. Although Professor Williams lists several,[9] the main one seems to be that it was highly unfair to place the entire burden of a person's losses only on one of those wrong-doers who caused these losses and thereby to allow others, also at fault, to completely escape the consequences of their wrong-doing. It became open to argument, moreover, that this rule forbidding contribution between tort-feasors never was intended to apply to those liable for negligence but only to those who committed intentional torts.[10] It should be recalled that the case of *Merryweather* v. *Nixan*[11] dealt not with negligence but with the intentional tort of conversion.

All common law provinces of Canada have abolished the no contribution rule by apportionment legislation. The purpose of this legislation is to allow an injured party to recover his full damages from any one of two or more co-tort-feasors but to give to these tort-feasors a right to seek contribution towards the payment of this judgment from other tort-feasors not called upon by the Plaintiff to pay his damages. This involves a determination by the Court of the degree of fault of each tort-feasor so that an apportionment of the damages can be made.

Unfortunately the present apportionment legislation in all Canadian common law provinces is unsatisfactory and does not adequately resolve the two main questions which must be resolved by any contribution scheme:

(1) Which persons are entitled to claim contribution?
(2) Against whom may they claim?

As indicated above, the three cases which form the subject of this note attempt to deal with the second question. After discussing this question, we will briefly look at the first.

Due to the fact that the three cases to be examined here emanate from Ontario, British Columbia and Alberta, it is important to note the appropriate sections of the contribution legislation on which these decisions were based.

In Alberta, contribution between tort-feasors is provided for in two Statutes. *The Tort-Feasors Act,* R.S.A. 1970, c. 365, s. 4(1)(c) states:

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

[7] (1799) 8 T.R. 186, 101 E.R. 1337.

[8] *Id.*

[9] *Supra*, n. 1 at 94

[10] *Id.* at 83.

[11] *Supra*, n. 7.

damage, whether as a joint tort-feasor or otherwise, but no person is entitled to be indemnified by him in respect of the liability regarding which the contribution is sought.

The Contributory Negligence Act, R.S.A. 1970, c. 65, s. 3(2) states:

Except as provided in sections 4 and 5, where two or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of any contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been found at fault.

In British Columbia, contribution between tort-feasors is provided for in *The Contributory Negligence Act,* R.S.B.C. 1960, c. 74, s. 5:

Where damage or loss has been caused by the fault of two or more persons, the Court shall determine the degree in which each person was at fault, and except as provided in sections 6 and 7 where two or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of any contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

In Ontario, contribution between tort-feasors is provided for in the *Negligence Act,* R.S.O. 1970, c. 296. Section 2(1) of this Act is worded similarly to s. 5 of the British Columbia Act and s. 3 provides for the following:

A tort-feasor may recover contribution or indemnity from any other tort-feasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing action against such other tort-feasor, in which event the tort-feasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

It is seen that these sections state that a person who has suffered damage may obtain a "joint and several" judgment against those persons "who are found at fault", and that these latter persons are liable to make contribution to each other, and/or that contribution may be recovered "from any other tort-feasor who is or would, if sued, have been found liable in respect of the same damage." Therefore it would appear that in Alberta there are two descriptions of those persons against whom a claim for contribution can be made—those *found at fault* or those *tort-feasors who are or would if sued have been found liable;* in British Columbia, those persons *found at fault* are those against whom a claim for contribution can be made; in Ontario those liable for contribution are described by the same expressions used in the Alberta legislation. What do these expressions mean? How have the Courts interpreted them?

In the *British Columbia Hydro* case,[12] the Supreme Court of British Columbia was faced with the following factual situation.

P., the Plaintiff (B.C. Hydro) instituted proceedings against D1 (Kees) and D2 (Konst Construction) for allegedly causing damage to underground lines belonging to P in the operation of earth moving machinery. D1 and D2 were attempting to Third Party the District of Kitimat for contribution or indemnity under the Contributory Negligence Act,[13] on the ground of the alleged negligence of the employees of the Third Party in contributing to the damage of P.

The Third Party claimed that the application should be dismissed on

[12] *Supra,* n. 3.

[13] R.S.B.C. 1960, c. 74.

the ground that the claim of the two Defendants for contribution was statute-barred. It was relieved of its liability to the Plaintiff in the principal action because a six month limitation period established by The Municipal Act, R.S.B.C. 1960, c. 255 had expired and the Third Party notice was issued more than a year after the incident complained of had occurred, which was past a one year limitation period established for contribution proceedings by the above Act.

The Court would eventually have to consider two questions. Firstly, at what point in time does the limitation period for the bringing of an action for contribution commence, and secondly, can a claim for contribution be successful even though at the time that it is brought the person against whom it is brought has not been found liable to the Plaintiff and cannot be found liable because of a limitation period.

The Supreme Court of British Columbia held that the limitation period for the bringing of an action for contribution only begins to run from the date of the judgement holding the claimant liable to the Plaintiff in the principal action. This therefore could mean that contribution proceedings could be brought against the District of Kitimat, in the case at bar, several years after the incident which formed the basis of the original complaint had occurred.

The Court did not expressly consider the second question as to whether the claim for contribution proceedings would be successful, or whether the District of Kitimat could then argue that since it was not and could not be held liable to the injured party because of the expiration of the limitation period against it, that it was not a party who could be made to contribute to the damages. It would seem illogical, however, if the Court were to express the opinion that contribution proceedings may be commenced after the original judgment and for a one year period, but then to deny the claim for contribution because at the time of bringing the claim the person against whom it was claimed was no longer liable to the original Plaintiff. It therefore may be assumed that the Court would not consider the expiration of the limitation period in the principal action as a defense in the action for contribution. This would effectively mean that although a party was relieved of its liability to the Plaintiff, it could still be liable for part of the Plaintiff's damages via third party contribution proceedings.

In the case of *Dominion Chain* v. *Eastern Construction,*[14] the Ontario High Court was faced with the same type of problem.

The Plaintiff, Dominion Chain Company, was suing E, the prime contractor, and G, the supervising engineer, among others, for the faulty construction of a factory built for Dominion Chain. Both defendants were found to be factually negligent and the degrees of fault were assessed at 75% for E and 25% for G. Contractually, however, E's liability was limited to defects appearing within one year from the date of substantial completion of the work. It was found that none of the defects complained of appeared within this one year requisite period and therefore E was relieved of all liability to the Plaintiff. Was it, however, a tort-feasor against whom a claim for contribution could be made according to the relevant Ontario legislation? The Court held that a claim for contribution could not be made against E, under s. 3 of The Negligence Act,[15]

[14] *Supra,* n. 4.

[15] R.S.O. 1970, c. 296.

because according to that section the person against whom a claim for contribution can be made must be a "tort-feasor who is, or would if sued have been, liable in respect of the damage", and in the case at bar, E was not such a person. It was in fact a person who was sued and was held not liable in respect of the Plaintiff's damages. The Court did find, however, that E was a person against whom a claim for contribution could be made under s.2(1) of The Negligence Act[16] since this section "plainly provides that tort-feasors are liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault".[17] The Court held that E was a person who was found to be at fault and that it was therefore liable to make contribution, which in this case amounted to 75% of the assessed damages.

It is interesting to note that the Court did not find the two sections inconsistent and was able to find that a party could be liable to contribute on the basis of one but not on the other. Moreover, the fact that Section 2(1) of The Negligence Act,[18] on which the liability for contribution was based, expressly states that those persons who are found at fault and who are jointly and severally liable to the victim are those who may seek contribution from one another did not force the Court to an opposite decision. Clearly the parties in this case were not parties who were jointly and severally liable to the victim since one of them was relieved of all liability to the Plaintiff. The Court held, however, that section 2(1) contained two, independent propositions—firstly that parties are jointly and severally liable, and secondly, that there is to be contribution between persons who are found at fault. Evidently being "found at fault" was not considered as equivalent to being "liable".

It is submitted that this decision was an erroneous interpretation of the legislation but more seriously that it worked an injustice on the Defendant E. He was deprived of a contractual right which relieved him of liability to the Plaintiff by being obliged to contribute to the Plaintiff's damages via contribution proceedings.

In the case of *County of Parkland No. 31* v. *Stetar et al,*[19] the Supreme Court of Canada was faced with a problem under the Alberta legislation.

In this case there was an automobile collision at the intersection of two rural roads. Two cars were involved, each car containing several passengers. All parties were injured and one party was killed.

At trial, the owner and driver of car one, S, was found solely to blame for the collision. Although all injured parties had alleged that the County of Parkland was also at fault as regards this accident, specifically for failing to maintain properly a warning sign at the intersection, it was held not liable. Two of the parties were non-suited in this action against the County for failure to give the appropriate notice in writing to it as required by The Municipal Government Act, R.S.A. 1970, c. 246, and the other injured parties failed as against the County because of the finding of the trial court that it was not liable under the relevant section of the Act which discussed its duties to maintain roads.

On appeal, the decision holding S solely to blame and relieving the

[16] *Supra,* n. 15.
[17] *Supra,* n. 14.
[18] *Supra,* n. 15.
[19] *Supra,* n. 5.

County of any liability was reversed. S was found to be 75% at fault and the County was found to be 25% at fault. The parties, excepting those non-suited at trial for failure to give notice, were given judgment for their damages against S for 75% and against the County for 25%. The parties non-suited at trial were only given a judgment against S and only for 75% of their damages.

On appeal, the Supreme Court affirmed the decision holding both S and the County liable in the degrees of 75% and 25% respectively. It reversed the holding of the Appeal Court which granted the injured parties judgment against the Defendants only for their respective share and gave the injured parties a joint and several judgment against those found liable. This meant that those non-suited as against the County would recover 100% of their damages from S. This is in accordance with s.3(2) of the Contributory Negligence Act[20] and is clearly correct.

It is having said this that the question of contribution must then be resolved. Was the County a party against whom a claim for contribution could be made by S, so that it would be liable for 25% of the damages assessed against S in favour of those who had previously been non-suited as against the County?

The Supreme Court of Canada held that it was not. It examined the wording of s. 4(1)(c) of The Tort-Feasors Act,[21] and concluded that the County was not a tort-feasor "who is, or would if sued have been liable". In fact it was a party who was sued and held not liable due to the failure of the injured parties to give it adequate notice. It examined the wording of s. 3(2) of The Contributory Negligence Act,[22] which uses the words "where two or more persons are found at fault" and concluded that this section was superseded by The Tort-Feasors Act.[23] It therefore concluded that S was fully accountable for the damages and was not able to recover any contribution from the County.

This decision is contrary to the decisions in the two cases discussed above. Whereas the Ontario High Court found that s.2(1) of the Ontario Negligence Act[24] was consistent with s. 3 of the Ontario Negligence Act,[25] and that a person could be claimed against under one, even though he was not liable under the other, the Supreme Court of Canada held that s.4(1)(c) of the Alberta Tort-Feasors Act[26] prevailed over s.3(2) of the Alberta Contributory Negligence Act[27] and that if a person was not a party against whom a claim for contribution could be made under the former, he could not be claimed against by virtue of the latter. It is true that the sections in the Ontario Act do not correspond with the sections in the Alberta Act exactly but it is submitted that the intentions of the provisions are the same, although the wording may differ, and that the difference in wording cannot satisfactorily explain the conflicting decisions. The explanation for the differing decisions is that the Ontario High Court decided to adopt one solution to resolve the conflict with which it was faced, namely, whether it should deprive the first Defendant

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[20] R.S.A. 1970, c. 65.
[21] R.S.A. 1970, c. 365.
[22] *Supra*, n. 20.
[23] *Supra*, n. 21.
[24] *Supra*, n. 15.
[25] *Supra*, n. 15.
[26] *Supra*, n. 21.
[27] *Supra*, n. 20.

of his right to contribution or deprive the second Defendant of his right to avoid contributing to the victim's damages, and the Supreme Court of Canada decided to adopt the opposite solution.

It is respectfully submitted that either solution is inequitable to one of the parties, although on the wording of the present legislation the solution adopted by the Supreme Court of Canada seems more logical.

The dilemma which the above Courts were facing arises due to the fact that, although the legislation provides for contribution between *tort-feasors* or *persons found at fault,* the Courts have realized that it is inequitable to remove a right of contribution from one Defendant because the Plaintiff in the action has failed to serve adequate notice upon the second Defendant, has failed to institute proceedings against him in the required limitation period or has in some other way relieved him of his liability. They have therefore attempted to circumvent the plain meaning of the legislation in certain instances, but in so doing they have substituted one injustice for another. They have forced a Defendant who was relieved of his liability to the injured party because of a legitimate defence to contribute to the injured party's losses via third party contribution proceedings.

The fact that this conflict still exists and is being litigated is particularly annoying because the problem presented by it has been recognized for at least thirty years but yet there have been no legislative changes to deal with it. The Supreme Court of Alberta in the case of *Aleman* v. *Blair and Canadian Sugar Factories Ltd.*,[28] when facing the dilemma presented by the legislation, called the situation "rather grotesque".

What alternatives are there to the present legislation?

Arthur Larson, in an article entitled "A Problem in Contribution: The Tortfeasor With An Individual Defense Against The Injured Party",[29] suggested that instead of penalizing one Defendant or the other because of a procedural error committed by the Plaintiff, the law should consider penalizing the Plaintiff. It could accomplish this by drafting a provision which would reduce the injured Plaintiff's recovery by the percentage share of the tort-feasor who was relieved of his liability to the Plaintiff, thereby allowing the Plaintiff to recover only the liable tort-feasor's share from the latter. Let us note that this is what the Court of Appeal did in effect in the *County of Parkland*[30] case, which decision was reversed by the Supreme Court. Professor Larson's specific proposal is as follows:[31]

> Where the injured Plaintiff is unable to sue one of the joint tortfeasors because of an individual defense based on a covenant not to sue or other individual release, assumption of risk, or statute of limitations or notice of injury statute, the amount recovered by the injured Plaintiff shall be diminished by an amount equal to the percentage of fault attributed to the tortfeasor with the individual defense; and there shall be no right of contribution by or against the tortfeasor holding the individual defense.

The nub of this proposal is essentially to 'identify' the Plaintiff with the tort-feasor having the defense in the Plaintiff's action against the tort-feasor without the defense. This converts a joint and several liability into a several liability for the share of the damages attributed to the Defendant who is held liable. This is what the apportionment legislation

[28] (1963 44 W.W.R. 530 at 534.

[29] (1940) 4 Wis. Law Rev. 467.

[30] *Supra*, n. 5.

[31] *Supra*, n. 29 at 502.

of the three jurisdictions do now in two cases. Where a spouse is injured by the fault of his/her spouse and another party, the injured spouse is identified with the negligent spouse in the injured spouse's action against the second tort-feasor. This is due to the archaic principle of inter-spousal tort immunity still part of the law of every Common Law jurisdiction except Manitoba, although its abolition seems imminent in other jurisdictions. The second case of identification is made when a gratuitous passenger is injured due to the negligence of his host driver and a second tort-feasor. If gross negligence cannot be established as against the host driver, the gratuitous passenger is identified with him in the gratuitous passenger's action against the second tort-feasor. It can be added here in passing that this gratuitous passenger rule is another one which is ripe for abolition. The technique of identification is therefore familiar to our apportionment legislation.

It is assumed that this proposal would work in the following way. Where the Plaintiff institutes proceedings against one tort-feasor at a time in which he could not be successful in proceedings against a second tort-feasor due to his failure to give adequate notice, to institute proceedings within the required limitation period, or because he has otherwise relieved him of his liability, he shall be identified with this tort-feasor in his action against the first tort-feasor. Where, on the other hand, the Plaintiff has instituted proceedings against the first tort-feasor at a time in which the second tort-feasor could be held liable, this identification would not operate and the normal rule of joint and several liability would.

Assuming that the Plaintiff has instituted his action against both tort-feasors without omitting any procedural requirement which would be fatal to his action, the claim for contribution between these two tort-feasors should be settled in this action. It is arguable that a claim for contribution need not be made until there is a judgment in the principal action. This is what was said in the *B.C. Hydro*[32] case, *supra,* and appears to be the present law in certain jurisdictions. It is preferable to have all the claims settled in one action, however, and I would endorse the principle established in the Ontario case of *Cohen* v. *S.McCord & Co.*[33] that it must be made, if it is to be made at all, in the principal action. Assuming that the Plaintiff has instituted his action against the first tort-feasor only, at a time in which the second tort-feasor could if sued have been found liable, it is submitted that the first tort-feasor must in this action Third Party the second for contribution. The claim for contribution should not fail even if made outside the original limitation period if the principal action was instituted in due time, or the other procedural requirements were met, as long as it is made in the principal action.

If this scheme were in effect in the above decisions their resolution would be as follows. In the *B.C. Hydro*[34] case the Third Party would not be liable to contribute to the damages awarded to the Plaintiff because at the time that the Plaintiff had instituted his action against the claimants for contribution, the liability of the Third Party to the Plaintiff was extinguished. The claimants however would only be liable to the Plaintiff for their respective share of the damages.

[32] *Supra,* n. 3.

[33] [1944] 4 D.L.R. 753 (Ont. C.A.).

[34] *Supra,* n. 3.

In the *County of Parkland*[35] case, the injured parties, by failing to give the County adequate notice would be able to recover from the liable Defendants their share of the damages only. The solution in the *Dominion Chain*[36] case is more difficult, even under the suggested scheme. The reason for the failure of the Plaintiff to succeed against E was a contractual clause which made E liable only for certain types of defects. Should the Plaintiff be identified with E due to this? I would argue, not without some hesitation, that it should. The contract was between the Plaintiff and E and the Plaintiff should suffer rather than the second tort-feasor.

There is one strong objection to the suggested proposal which must be countered. It contravenes the fundamental principle that if a person is injured by the torts of two or more others he may choose to proceed against any one of them and recover the full amount from him. It is arguable that the right of contribution should be restrictively applied, and that it should not be the Plaintiff's concern to make sure that he follows all procedural requirements to sue all possible tort-feasors, as long as he can find one who is liable. The strength of this objection becomes visible upon examination of the *County of Parkland*[37] case. The injured parties suffered losses due to the negligence of a driver of a vehicle. They did not give notice to the County in the required time because they may not have been aware of its complicity in the accident nor were they particularly concerned about it. They did know that a particular driver was at least partly if not totally at fault and sued him in the required time. It is arguably unjust to deprive them of their full damages.

This objection is worrisome, especially as it applies to the above case. It can be suggested, however, that the injustice which would result if the scheme were applied to the above case would result not from the scheme but from the requirement which places an onus on an injured party to serve notice upon a possible Defendant in a short period of time. The injustice can be done away with by waiving the notice requirement where it could not reasonably be followed. It can be argued that it is no more unjust to deprive injured persons of their right to full compensation in multi-party accidents due to procedural omissions than it is to deprive injured persons of their entire right to compensation in single party accidents due to procedural omissions. One must also keep in mind that if the scheme is not accepted we accept other inequities and that in the absence of another more equitable alternative we must weigh the alternatives we have.

Even if this scheme is not acceptable, it seems, in the light of the above decisions, advisable to redraft the apportionment provisions to clearly express which of the conflicting solutions is the one preferred by the legislatures.

Let us now briefly look at the first question asked at the beginning of this paper: Which persons are entitled to claim contribution?

The Alberta Tort-Feasors Act[38] states that "any tort-feasor liable in respect of that damage" may claim contribution. The Ontario Negligence Act[39] goes further than this and gives a right of contribution to a tort-

[35] *Supra*, n. 5.
[36] *Supra*, n. 4.
[37] *Supra*, n. 5.
[38] *Supra*, n. 21.
[39] *Supra*, n. 15.

feasor who was not found liable but has settled with the injured party. It seems from a proper reading of the Alberta enactment that settling with a victim is not sufficient to allow this party to seek contribution since the Act does not qualify the claimant for contribution with the words "or would if sued have been liable" as it does so qualify the tort-feasor against whom a claim for contribution can be brought. Notwithstanding this, the Alberta case of *Tarnava et al.* v. *Larson et ux.*[40] did hold that under the Alberta apportionment legislation a claimant does not have to have first been found liable in respect of the damage by an action brought by the victim in order to claim contribution but could claim once having settled. This certainly seems wise and must be assumed to be the case despite the poor wording of the statute.

If a party has settled and has instituted a claim for contribution, is it open to the person against whom the claim is made to defend this action on the basis that the settling party was not a party who would have been held liable if sued? In other words, are "tort-feasors" who may claim contribution only persons who would have been liable if sued?

In jurisdictions with enactments similar to the legislation in Alberta the Courts have held that it is clearly open to the person against whom a claim for contribution is brought to defend this action by establishing that the claimant should not have settled as he was not a person who was liable to the victim.[41] In one case under the Ontario legislation, namely *Marschler* v. *G. Masser's Garage,*[42] the Ontario High Court held that this defence was not open. The court held, however, that this was so because of the special wording of the Ontario legislation but that under the Alberta wording it would not be the case.

Although the problem is not likely to arise very frequently, it would be suggested that any new legislation with regards to contribution between tort-feasors should make it clear that persons who settle before judgment should be able to claim contribution and that it should not be open to the person against whom the claim is brought to defend the claim on the basis that the claimant was not a tort-feasor who would have been held liable if sued. He should be restricted to defences relevant to his own liability, to his degree of fault, and to the quantum of damages.[43]

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[40] (1956-57) 20 W.W.R. 538 (Alta. D.C.).

[41] *See* for example *Stott* v. *West Yorkshire Road Car Co. Ltd.* [1971] 2 Q.B. 651 (C.A.).

[42] (1956) 2 D.L.R. (2d) 484 (Ont. H.C.).

[43] Other problems beyond the scope of this note which must be considered are (1) what limitation period should be given in cases where settlement has been made in order to claim contribution and (2) how should settlements entered into by one tort-feasor effect the liability of the other and the claim for contribution. *See* Williams for valuable discussion of these and other problems.

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