able to obtain a lift from a Mr Cliff, the driver of a bus which operated between the resort and airport. Mr Cliff transported the two men to Birrahl Park, where there was access to Yaroomba Beach.

The two swimmers accessed the beach and went into the surf, even though it was unpatrolled at the time. They swam for approximately 30 to 40 minutes before realising they had been taken a considerable distance out to sea, approximately 80 metres. Unfortunately, Mr Enright was unable to make his way to shore. Despite efforts by his colleague to gain assistance from local surfers and others in the vicinity, Mr Enright could not be rescued and drowned.

A number of parties connected with the resort were included as defendants in the action. Mr Cliff was also a defendant. The allegations against these defendants were essentially of failing to warn Mr Enright of the risks associated with Yaroomba Beach.

The local council was also included as a defendant primarily because of an alleged failure to provide adequate or appropriate signage warning of the risks at Yaroomba Beach.

In dismissing the plaintiff's claim, Moynihan J identified a number of relevant factors, including Mr Enright's experience in water activities such as diving and swimming; his determination on the day in question to swim in the surf despite the chauffer's warning; his absence of enquiry of resort staff or use of the resort's facility; and his lack of fitness combined with his overnight travel and immediate attendance at the conference without rest.

Another important consideration in Moynihan J's judgment was the obviousness of the risks associated with swimming in the surf, particularly by way of rips, undercurrents and the like. The obviousness of these risks diminished the need, or at least the effectiveness, of warnings. Moynihan J stated:

'A sign which said, for example, "Surfing Dangerous, It is Dangerous to Get Out of Your Depth" is simply a statement of what already ought to have been obvious to Enright.'[1]

Moynihan J held that the plaintiff had failed to establish a breach of duty by any defendant causing Enright's death. Accordingly, it is apparent that the plaintiff's case failed both in respect of breach of duty and causation.

ENDNOTE:

1 At para 91.

TRACEY CARVER, QLD

Causation, apportionment of liability, and the interplay between contract and tort:

Kim & Anor v Cole & Ors [2002] QCA 176, Supreme Court of Queensland, Court of Appeal, 24 May 2002

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Whilst as a general rule, 'a contract between A and B does not exhaust or otherwise affect A's liability to C,'[1] the existence of a contract may operate to shape liability in tort not only as between the contract's parties, but also as against outsiders. An adaptation of this principle was recently applied in *Kim & Anor v Cole & Ors*, where the Queensland Court of Appeal[2] was called upon to determine the statutory apportionment of liability between two concurrent tortfeasors, in circumstances where one of the defendants was also liable to the other in contract.

THE FACTS

The plaintiff's (Kim's) building was destroyed by an explosion originating

from premises leased by the first defendant (Cole), who was operating a pizzeria. Prior to the explosion, Cole, having experienced trouble with her gas oven, employed the second defendant (Hurst) to inspect it. Hurst traced the problem to a 'miniset valve',[3] and advised Cole that a replacement would be available in one week.

Cole found this unacceptable, as it meant that she would be out of business until the oven was repaired. Therefore, her fiancé (Umstad) asked whether some other valve might be fitted in the meantime so that the oven could be used. Hurst produced another valve type, which he explained was, unlike the miniset valve, not 'failsafe', in that it had to be operated manually. Having ensured that Umstad was proficient in operation of the manual valve, Hurst fitted it to the oven. When the new miniset valve arrived, Hurst offered to fit it. However, as Cole had a social engagement, the valve was not fitted on that day. That night, Cole left the manual valve open, causing a build up of gas which ignited.

AT TRIAL

Kim sustained $160,000 in damage as a result of the defendants' negligence. The trial judge, acting pursuant to sections 6(c) and 7 of the *Law Reform Act* 1995 (Qld), apportioned Cole's and Hurst's contributions to their joint liability for that damage at 85 per cent and 15 per cent respectively.[4]

Cole also suffered $25,000 damage to her property as a result of the explosion, and claimed this amount from Hurst in contract. However, in denying liability, the trail judge held that given Hurst's mere 15 per cent responsibility in tort for the explosion, it would be incorrect to characterise his actions as the 'effective cause' of Cole's loss in contract.[5]

It was against the apportionment of liability in tort, and the failure of the trial judge to allow her to recover anything from Hurst in contract, that Cole appealed on the basis that the result under sections 6(c) and 7[6] (in particular) would have been different if Hurst's liability to Cole for contribution were considered as arising from contract rather than tort.[7]

ON APPEAL

As regards Hurst's liability to contribute to Cole's liability (as defendant) in tort, the Court of Appeal considered that under sections 6(c) and 7 of the *Law Reform Act* 1995 (Qld), once it was established that there were two joint tortfeasors liable for the same damage, it was not necessary that Hurst's liability to contribute or indemnify should arise from a causal liability in tort for the damage sustained. Instead, it may be a liability that has its origin in contract, statute, or some other way recognised by law:[8]

'An approach to apportionment that, as a matter of law, ascribes primacy to causal potency does not accord with the provisions of s.7 ... All relevant circumstances are to be taken into consideration when adjudicating upon a claim for contribution.'[9]

Therefore, the court recognised that sections 6(c) and 7 clearly contemplated taking into account parties' express or implied contractual arrangements, which in an appropriate case may result in one of two tortfeasors contributing a larger share to damage for which both are liable.[10]

Although the installation by Hurst of the manual valve breached an implied term of Hurst's contract with Cole, namely, to use reasonable care in advising on the oven's rectification,[11] the court held that as Hurst's conduct was a result of:

- Cole's claim that she could not afford to close her business;
- Cole's inability to facilitate the installation of the replacement valve; and
- Umstad's demonstrated ability to operate the manual valve,

the 85 per cent:15 per cent assessment of apportionment should not be revised.[12] The fact that Cole's claim to contribution was founded on a contract that was illegal[13] did not affect this result.[14]

However, in relation to Hurst's liability to Cole in contract, in was held, by a majority,[15] that whilst Hurst's breach of ▶

contract was not the sole or dominant cause of Cole's damage, it causally contributed to the loss, and thus Hurst was liable for damages for the agreed $25,000 sum.[16] Neither, sections 6(c) or 10[17] applied to the contractual claim.[18] PL

ENDNOTES:

1 Fleming J.G., (1998) *The Law of Torts*, 9th ed., LBC, Sydney, 1998, p. 206; *Donoghue v Stevenson* [1932] AC 562.
2 McMurdo P, McPherson JA and Helman J.
3 A device which controls the flow of gas to an oven.
4 At [15] and [20].
5 At [16] and [20].
6 *Law Reform Act* 1995 (Qld).
7 At [15-16] and [20].
8 At [18].
9 At [26].
10 At [27-28].
11 At [28-30].
12 At [2] and [34-35].
13 In that the contract to install a manual value was an agreement to do an act constituting an offence under the *Gas Act* 1965 (Qld) and *Gas Regulation* 1989 (Qld)
14 At [43].
15 McMurdo P and McPherson JA.
16 At [3-4], [5], [21-22] and [35].
17 *Law Reform Act* 1995 (Qld).
18 At [8], [32-33] and [35].

MICHAL HORVATH, QLD

Is it GBS or SNG?

Smit v Brisbane South Regional Health Authority [2002] QSC 312 (9 October 2002)

If you thought you ever had a bad day in court, spare a thought for Mr Smit who took on the Brisbane South Regional Authority (the body that ran public hospitals in Queensland at the relevant time).

His plight began in August 1992.

On 5 August, at night, the plaintiff had a shower and found lumps in his neck and groin. He went to the Redland Hospital, but they took too long so he left. He went to see his general practitioner later that night.

Over the next eight days, he went to his general practitioner repeatedly and attended at three hospitals.

Finally, on 12 August, a provisional diagnosis of Guillain-Barre Syndrome (GBS) was made. The diagnosis was not 'confirmed' until 13 August. The plaintiff was then given plasma exchange on 14, 16 and 19 August.

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Just to keep up with the medical lingo, GBS is a disease that attacks the nervous system. To make things confusing, there is a condition known as acute sensory neuropathy (SNG) which also attacks the nervous system. The two conditions share some of the same symptoms.

The plaintiff called an immunologist who said the plaintiff had a form of GBA. The condition is a medical emergency and requires plasma exchange within six to eight hours. According to that expert, the plaintiff had a 70 per cent chance of the treatment working had it been done in time.

The defendant called two neurologists and an employee of one of the hospitals who saw the plaintiff. These doctors said that the plaintiff suffered from SNG. The judge agreed.

Worse still, the judge, Muir J, said that even if the plaintiff had GBA, the plaintiff did not prove that plasma transfers should have been given earlier and did not prove they would have made a difference. According to the accepted evidence of the defendant's experts, plasma is not given until a patient cannot walk. One has to wonder why it is given at all or whether a doctor can ever be negligent in missing this condition.

Anyway, putting aside the nature of the condition and the supposed lack of causation, the court ruled that the doctors at the hospital had not even been negligent. As junior members of staff they did all that could be expected of them (and their level of experience) in assessing the condition and further, that they were not obliged to refer the patient to a specialist.

Incidentally, the claim was initially against several doctors, the hospitals and the medical centre. All but the hospitals were released from the claim before trial. Quantum was agreed at $900,000. But that is all academic now.

You have to wonder what it takes to win a medical negligence trial these days. Maybe it is just an isolated case where the evidence came out the defendant's way. You decide. PL