WRONGS (TORT-FEASORS) ACT 1949.

By the Honourable MR. JUSTICE O'BRYAN of the Supreme Court of Victoria.

With the coming into operation of the *Wrongs (Tort-Feasors) Act* 1949 two well-embedded principles of the Common Law have disappeared.

The doctrine that judgment against one of two joint tort-feasors barred any proceedings against the other and the doctrine of no contribution between joint tort-feasors have been generally disapproved and on many occasions have been adversely criticised by jurists. The purpose of the *Wrongs Act* of 1949 is to remove these doctrines from the Common Law and at the same time to provide adequate safeguards for the principles which originally were thought to justify the doctrines themselves and which have from time to time been advanced in their defence.

The Victorian Statute was passed on the recommendation of a Committee of Law Reform set up by the Chief Justice, Sir Edmund Herring, shortly after his appointment to that office. That Committee had before it recent English legislation and the Third Interim Report of the Lord Chancellor's Law Revision Committee presented to the English Parliament in July 1934.

The Chief Justice's Committee took the view that, generally speaking, the English Statute should be copied *verbatim* unless some special advantage was to be gained by change. If the English Act were copied the double benefit of uniformity of law and of a common basis for judicial interpretation would be had.

Suggested changes were carefully considered and such as were adopted survived a very critical survey.

The Act came into operation on the 1st January 1950, the day fixed by the Governor-in-Council by proclamation published in the *Government Gazette* of the 19th October 1949.

Its operative provisions are comprised in one section. Paragraphs (*a*) and (*b*) of section 2 (1) are designed to get rid of the doctrine which was the basis of *Brinsmead v. Harrison*,[1] where it was decided that a plaintiff who sued one joint tort-feasor to judgment could not afterwards proceed against another person who was originally jointly liable in respect of the same tort; the cause of action was merged in the judgment even though their original liability was both joint and several. This rule could well work an injustice. A plaintiff who had recovered judgment against one tort-feasor might fail to recover any or complete satisfaction. He was precluded, however, from bringing another action against one whom he might have sued originally. The justification for such a rule was the avoidance of multiplicity of actions and of the possible confusion arising from different damages being awarded against the various tort-feasors in respect of the same tort. The rule only applied when the tort-feasors were jointly or jointly and severally liable in respect of the one tort.

1. (1871) L.R. 6 C.P. 584; (1872) 7 C.P. 547.

> " Persons are said to be joint tort-feasors when their respective shares in the commission of the tort are done in furtherance of a common design."[2]

When, however, a person suffers one injury from the independent acts of several tort-feasors the liability is not joint but several and judgment recovered against one is no bar to a separate action against the others.[3] This is the case of the most common action in tort in our Courts to-day, *viz.*, the action for injuries caused by the negligent driving of motor vehicles.

The *Wrongs (Tort-feasors) Act* provides that when damage is suffered by any person as the result of a tort, judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage.

If the Statute had stopped there certain injustices or inconveniences might have followed. Paragraph (*b*) is designed to avoid these :

(i) To discourage multiplicity of actions it is provided that if more than one action is brought in respect of the same damage the plaintiff even if successful, is not entitled to costs in any action after that in which judgment is first given unless the Court is of opinion that there were reasonable grounds for bringing the actions separately. In this and other parts of the Act where the expression ' judgment first given ' is used, that expression means when the judgment is reversed on appeal, the judgment so given which is not so reversed ; and in a case where that judgment is varied on appeal, that judgment as so varied.

(ii) The plaintiff is not entitled to recover under separate judgments in respect of the same damage more than the amount of damages awarded by the judgment first given. This meets the possible evil of a plaintiff recovering double damages—or of a plaintiff, being dissatisfied with the amount of his first judgment, seeking to recover more by a separate action against another defendant.

Both the above rules are applicable to actions under Lord Campbell's Act. These provisions relating to merger of tort in judgment are the same in Victoria as in England.

The rest of the Act has to do with the Common Law rule that there is no contribution between tort-feasors. This rule was first formulated in the judgment of Lord Kenyon in *Merryweather v. Nixon*[4]. It was never a popular rule, but the conservatism of our legislators kept it extant for a century and a half. If there is no right to contribution between joint tort-feasors, *a fortiori* there is no right to contribution between independent tort-feasors whose wrongful acts have produced the one injury. The prevalent action for damages for injuries received in motor accidents brought to the front the injustices which this rule can produce and has led to its ultimate abolition. A successful plaintiff against two or more defendants could, by virtue of this rule, gain more than his just compensation; indeed an unscrupulous claimant without recovery of judgment could play off one possible defendant against the

2. *The Koursk*, [1924] P. 140, at 156, *per* Scrutton J.
3. *The Koursk*, [1924] P. 140.
4. (1799) 8 T.R. 186.

other, each knowing that, however guilty of negligence, he could not be made to contribute to any judgment obtained against the other.

The new Act provides for contribution between tort-feasors when damage is suffered by any person as a result of a tort. It is not limited to joint torts, but applies to the case of independent torts producing the same damage. Any tort-feasor who is liable in respect of such damage may recover from any other tort-feasor who is, or would if sued, be liable in respect of the same damage. In certain cases at Common Law one joint tort-feasor was entitled to an indemnity against the other, *e.g.* an innocent principal made liable for the fraud of his agent under the doctrine of *respondeat superior*. Such right of indemnity has not been affected by the Statute. He is still entitled to his indemnity and his co-tort-feasor is excepted from the statutory right to contribution.

Consideration was given to the question whether an exception to the right of indemnity ought to be made in the case where the tort is also a crime. Although it might be thought that public policy called for such an exception, it was decided that uncertainties would be introduced into the law if such an exception were made (such as *e.g.* libel which is only under certain conditions a crime and under other conditions is not, and whereas slander never is a crime, *cf.* also negligent driving which may in certain circumstances be a crime but otherwise is not). The Statute is quite explicit. Contribution can be recovered whether the tort which causes the damage is or is not a crime.

So far the Victorian Statute is the same as the English in its provisions for contribution between joint tort-feasors. Paragraph (*d*) of section 2 (1) is, however, not in the English Act.* This paragraph was introduced into our Act to meet the doctrine that a husband and wife cannot, generally speaking, sue his or her spouse in tort, a doctrine that has been removed from English Law by the *Married Woman's and Tort-feasors Act* 1935. The common case which Paragraph (*d*) is designed to meet is that in which a plaintiff has been injured by the independent negligence of his or her wife or husband, as the case may be, and that of a third party. It is the common running-down case where the driver of one vehicle is the spouse of the injured party (*e.g.* a passenger in a vehicle driven by husband or wife). It may be that the damages were caused in a much greater degree by the negligence of the spouse than of the third party. Yet, without paragraph (*d*) the third party would have no right of contribution from the more negligent spouse because the right of contribution under paragraph (*c*) is only available if the other tort-feasor is or would, if sued, have been liable to the plaintiff.

Paragraph (*d*) provides :

> " (*d*) where (apart from the operation of this paragraph) any tort-feasor liable in respect of that damage is unable to recover contribution under this section from any other person because such other person is the husband or wife of the person by whom the damage was suffered, such tort-feasor may recover contribution from such other person under this section to the same extent as he could have recovered contribution thereunder if the person by whom the damage was suffered were not the wife or husband of such other person."

* Hence the decision in Drinkwater v. Kimber
1951 2 All ER 713
1952 1 All ER 701

The amount of contribution recoverable from a co-tort-feasor is such as may be found " to be just and reasonable having regard to the extent of that person's responsibility for damage." This seems to point to causation and not to the extent of culpability as the criterion of the amount of contribution recoverable : see *Smith v. Bray*,[5] It is contemplated that the tribunal which shall determine the amount of contribution shall be the same as that which determines the question of liability to and the amount of damages payable to the plaintiff, *i.e.* in many cases a jury. The third party procedure in the Supreme and County Courts would be available to determine the question of contribution and the amount thereof. Subsection (2) expressly provides that contribution may amount to a complete indemnity or nothing may be awarded if responsibility for the damage is considered to be attributable (substantially) to one tort-feasor only. The framers of the original Victorian Statute at first made it compulsory for a defendant claiming contribution from another tort-feasor to proceed by third party notice, unless exempted by the Court or a Judge. This provision was, however, dropped from the Bill. The Victorian subsection (2) differs from the corresponding English sub-section in a minor respect. Whereas the English sub-section provides for the Court to determine the amount of contribution which is " just and equitable having regard to that person's responsibility for the damage ", the words of our Act are that this function shall be performed " by the Jury, or by the Court if the trial is without a Jury." The report of the Lord Chancellor's Committee suggests that that Committee contemplated that this assessment should be made by the trial Judge. The Victorian Statute, which is to be " read and construed as one with the *Wrongs Act* 1928", would probably have been so read if the expression " by the Jury or by the Court if the trial is without a Jury " had not been substituted for the words " by the Court." (See *Wrongs Act* section 16.)

Sub-section (3) has been added in Victoria. It provides :

> " (3) No execution for the recovery of contribution under this section shall issue without the leave of the Court or a judge. Upon application for such leave the court or judge may direct that payment to the original plaintiff shall be sufficient satisfaction of the order for contribution."

The necessity for such a provision was felt to be this— a defendant might recover judgment for contribution before he had satisfied the plaintiff's judgment against him. If impecunious and unscrupulous he might put the contribution so recovered into his own pocket without satisfying the plaintiff's claim. This section enables the Court to retain control of the matter and to ensure that contribution finds its way either to the plaintiff, or is a true indemnity (whole or partial) for what the defendant has already paid to the injured plaintiff. The idea behind this sub-section is borrowed from the equitable rules governing recovery under judgment for contribution or indemnity between co-sureties.

Sub-section (4) is also new. It was introduced originally to meet the decision in *Merlihan v. A. C. Pope Ltd.*,[6] although such decision was

5. (1939) 56 T.L.R. 200.
6. [1946] K.B. 166.

doubted in *Hordern Richmond Ltd. v. Duncan,*[7] and in *Nickels v. Parks*[8]. Sub-section (4) however serves two useful purposes: (1) It fixes a limitation upon the time within which proceedings for contribution may be commenced, *viz.*, within twelve months after the writ in the original action was served on the party recovering contribution.* It should thus encourage the use of third party procedure which normally would appear to be appropriate for the enforcement of this new right. (2) It provides for the case in which one of the tort-feasors is a public authority in respect of which a notice before action or a special period of limitation is prescribed by its own Statute. In such a case, notwithstanding such statutory pre-requisites, proceedings for contribution may be commenced (although no such notice has been given or such special period of limitation has expired) within the period of twelve months after the writ in the original action was served on the party seeking to recover contribution.

Sub-section (5) contains several general provisions:

(1) The Act does not apply to any tort committed before the commencement of the Act (1st January 1950).

(2) It does not affect any criminal proceedings against any person in respect of any wrongful act.

(3) It does not render enforceable any agreement for indemnity which could not have been enforceable if the Act had not been passed. A contract for indemnity in respect of an act which was manifestly tortious is void at Common Law as being contrary to public policy. A plain illustration of such a contract is an agreement by A to indemnify B whom he had hired to assault a third person. The rule went beyond criminal acts. In *Smith* v. *Clinton,*[9] an agreement by an author to indemnify the printer and publisher of a newspaper against liability for libel contained in the paper was held to be contrary to public policy and void. The staff of the printer and publisher knew of the libel which they printed and published.

The Act simply does not save such a contract. There would appear to be no reason, however, why two persons whose tortious acts have produced the one damage should not agree upon the proportions in which each shall share responsibility to the injured party.

Finally the Act does not affect the operation of sections 64-66 of the *Supreme Court Act* 1928. These sections relate to Maritime Law and loss suffered by fault of vessels at sea and the division of such loss between vessels which are both at fault.

See Corps. Act Sec. 92(4)
Cwlth Navign Act Secs 259-61.

* as to Public authorities with fancy periods of limitation

7. [1947] K.B. 545.
8. [1949] S.R. (N.S.W.) 124.
9. (1908) 99 L.T. 840.

See Littlewood v Geo. Wimpey & Co Ltd
1953 3 W.L.R. 553.